Statutory Interpretation and Decision Theory

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Judging under Uncertainty:
An Institutional Theory of Legal Interpretation,

In a series of articles published over the last decade, Adrian Vermeule has established himself as one of the smartest and most interesting theorists of statutory interpretation in the American legal academy. His new book uses the insights of those articles to advance a striking thesis: judges interpreting federal statutes (and, for that matter, the Constitution itself) should do much less work than most of them currently do. In Vermeule's words, "judges should sharply limit their interpretive ambitions, in part by limiting themselves to a small set of interpretive sources and a restricted range of relatively wooden decision-rules" (p 4).

As this formulation suggests, Vermeule revels in the counterintuitive. On occasion, indeed, readers may well wonder whether he is more interested in persuading them or in provoking them. But the book has all the virtues of the articles that form its backbone. Its analysis is dispassionate and incisive. Its sources are wide-ranging, reflecting the remarkable breadth of Vermeule's intellectual interests and attainments. And its exposition—especially as compared to other academic writing—is downright beautiful. While some of Vermeule's prescriptions are unlikely to win adherents, confronting his logic will help readers better understand the premises of their own preferred approaches.

I. A GUIDE TO VERMEULE'S ARGUMENT

Vermeule himself describes the book as "advanc[ing] two distinct theses" about legal interpretation (p 1). First, and less controversially, he argues that one cannot sensibly advocate a particular interpretive

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approach without paying close attention to the capacities of the decisionmakers who will be applying it. Even if Approach A would unquestionably produce better results than Approach B if both were applied perfectly, one cannot automatically conclude that real-world decisionmakers should therefore use Approach A; an interpretive theory that would be wonderful in the hands of omniscent and omnicompe\ntent interpreters might be dreadful in the hands of interpreters who lack the information or cognitive ability that proper application of the theory requires. To determine whether particular decisionmakers should adopt a particular interpretive method, one must therefore consider what the method asks them to do and how good they are likely to be at doing it. One must also consider how, if at all, their use of the method might affect the future behavior of other relevant actors. In Vermeule’s words, “legal theory cannot reach any operational conclusions about how judges, legislators, or administrative agencies should interpret texts unless it takes account, empirically, of the capacities of interpreters and of the systemic effects of interpretive approaches” (pp 1–2).

According to Vermeule, prior scholarship has been insufficiently attentive to this point (pp 13–59). To be sure, scholars have long recognized the relevance of institutional capacities to interpretive theory. But Vermeule argues that the theorists who have paid attention to this issue have failed to analyze it properly. Rather than providing “an institutional account that is realistic about the capacities of all relevant actors,” they either have contented themselves with stylized pictures of the different branches of government or have “compare[d] a worst-case picture of one institution to a best-case picture of another” (pp 17–18).

The second aspect of Vermeule’s project, and the core of the book, is to try to do better. Given our current governmental institutions and the current state of our knowledge about their capacities, Vermeule aims to develop an institution-specific approach to interpretation. In particular, Vermeule asks two main questions: how should interpreters within the federal judiciary go about interpreting federal statutes, and to what extent should interpreters in federal administrative agencies be free to use different techniques? Ultimately, he advo-

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2 At various places in the book, and especially in the final chapter, Vermeule also discusses how judges should interpret the federal Constitution. But the bulk of the book is about statutory interpretation, and so is this Review.
icates a dramatic shift in interpretive authority from courts to agencies. When no agency is in the picture, Vermeule urges judges to eschew the quest for interpretive perfection in favor of keeping decision costs low (pp 192–96). The result is a truly original interpretive theory—one that, for better or for worse, does not reflect how any federal judge currently acts.

Part I of this Review summarizes the gist of Vermeule's argument. Parts II and III explain why I am not entirely persuaded.

A. "The Stalemate of Empirical Intuitions"

Suppose that you have just been appointed to the federal bench, and you are trying to identify the interpretive techniques that you should use to interpret federal statutes. In your judgment, neither the federal Constitution nor any other source of federal law answers the methodological questions that you confront (pp 31–33). Your new colleagues, moreover, disagree with each other to a sufficient extent that you cannot simply defer to an existing consensus (p 132). You must engage in what Vermeule calls "interpretive choice"—the selection, conscious or not, of a particular methodology from among an array of possible alternatives (pp 66–67).

Your first step, one might think, will be to identify some metric against which to judge the likely results of different methodologies. That task might seem daunting: so-called textualists are said to have very different views about the high-level goals of statutory interpretation than so-called intentionalists or purposivists (pp 82, 202–05). But while Vermeule does not question the true extent of this disagreement, he treats it as being largely irrelevant to how judges should behave. In his view, we do not have enough information about the real-world consequences of different interpretive techniques for the existing disagreements about high-level goals to matter much in practice (pp 2–3, 63, 289).

For the sake of simplicity, then, let us stipulate that you have a fairly typical view of what statutory interpretation is all about. Although the concept of legislative intent is complicated, you do not think it meaningless, and you care about some version of "intended meaning".

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4 See Nelson, 91 Va L Rev at 371 (cited in note 3) ("[T]he fact that the notion of 'intended meaning' requires some aggregation of competing views does not mean that it is entirely inco-
meaning”; you want the directives that interpreters enforce to correlate in some way with the directives that members of the enacting legislature understood themselves to be establishing, and you would consider it a serious problem if your chosen interpretive methodology impeded effective communication between the courts and conscientious members of Congress. But you would also consider it a serious problem if your chosen methodology impeded effective communication between Congress and the public at large (or, more realistically, the lawyers who advise people in the private sector about their legal obligations); you recognize that statutes are not secret messages from Congress to the courts, and you think it important for their meaning to be accessible both to the electorate and to the people whom the law regulates. You also want to keep the costs of the interpretive process within reasonable bounds for all concerned; interpretive techniques that would delay your processing of other cases or substantially increase the expense of litigation are not necessarily desirable, even if they might marginally improve the accuracy of the results that you reach in individual cases. Finally, you care about public policy. While you respect the limits of your institutional role and recognize that Congress has policymaking priority in our system, you believe that interpreting Congress’s statutes often entails some subsidiary policy choices, and you want those choices to promote rather than detract from overall social welfare.

In theory, you can use this set of goals to structure your thinking about the more particularized questions of interpretive practice that currently divide the federal judiciary. To determine your stance on the use of legislative history, for instance, you might ask whether supplementing statutory text with committee reports and other documents generated during the legislative process will help you better understand the directives that members of Congress collectively intended to establish, whether any incremental benefit along these lines will justify the cost of the necessary research, and whether your reliance upon such research will make the law’s operational meaning less accessible to the public at large. Unfortunately, different interpreters have dramatically different intuitions about the facts that bear on these issues. Justice Scalia asserts that it is very rare for members of Congress to

herent, or that every possible method of aggregation is just as sensible as every other possible method of aggregation.”). See also Lawrence M. Solan, Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation, 93 Georgetown L J 427, 437-49 (2005) (discussing both philosophical theories of collective intent and psychological research about the attribution of intent to groups).
have formed a true collective intention, of a sort that they mean to be authoritative, on matters that the statutory text leaves unclear; Justice Stevens suggests that such collective understandings are more common. Justice Scalia adds that judges who are insulated from the legislative process will not be very good at using legislative history to reconstruct whatever collective understandings did in fact exist; Justice Stevens has more faith in the typical judge's capacity to assess the legislative history and to sort reliable statements from unreliable ones. Justice Scalia suggests that legislative history encourages judges to find ambiguity where none really exists, and thereby magnifies the range of policies that judges can attribute to the statute; Justice Stevens believes that the use of legislative history tends to constrain the discretion that judges confronting statutory texts would otherwise indulge.

These and other disputes about the use of legislative history are empirical, in the sense that they relate to facts and that an omniscient observer would know which side has the better argument. But Vermeule plausibly suggests that the current state of our empirical knowledge does not permit us to resolve them with any confidence. What is more, there is little prospect of designing and executing empirical studies that will change this situation (p 162). We are left with what Vermeule calls "the stalemate of empirical intuitions" (p 153): Justice Scalia acts upon his intuitions about the facts, Justice Stevens acts upon his competing intuitions, and neither can prove the other wrong.

According to Vermeule, the same stalemate characterizes a host of controversies about interpretive methodology (pp 162–63). Take,
for instance, debates about the importance of relatively rule-like canons of construction, such as the presumption against reading federal statutes to abrogate the states' sovereign immunity. When a judge is trying to determine whether a facially ambiguous federal statute exposes states to suits by individuals, what weight should he put on this generic presumption, and what sort of statute-specific clues about the enacting Congress's understandings should be capable of trumping it? Someone trying to answer this question might want to know how often Congress collectively intends to abrogate the states' immunity without making this intention clear on the face of its statutes, what kinds of clues (if any) Congress tends to leave when it forms such a collective intent, how accurately the judge can identify and process those clues, how an additional judge's invocation of the presumption against abrogation might affect Congress's behavior in the future, and how the costs of erroneously finding abrogation where it was not intended compare to the costs of erroneously denying abrogation where it was intended. But the real-life judges who must decide cases cannot answer these questions with any confidence. All they have are their intuitions, and those intuitions differ from judge to judge.

B. Borrowing Tools from Decision Theory

Vermeule's main ambition, and the distinctive contribution of his book, is to use the tools of decision theory to break stalemates of this sort. In particular, Vermeule seeks to cope with the problem of "uncertainty"—the fact that judges do not have (and cannot acquire) much of the information on which a rational decisionmaker would want to base his choice of interpretive methodology. As Vermeule notes, the problem of "uncertainty" (which involves gaps in the information available to a decisionmaker) is distinct from the problem of "bounded rationality" (which involves limitations on the decisionmaker's ability to process the information that he does have). Early on in his discussion, Vermeule suggests that one can safely lump these problems together when discussing interpretive choice (pp 154–55). Because they play somewhat different roles in his analysis, however, I will try to keep them separate. For Vermeule, the problem of bounded rationality is one of the many concerns that bear on the selection of an interpretive methodology; other things being equal, an interpretive methodology should not ask judges to perform tasks that they will be bad at performing (pp 2–3). It follows that in an ideal world, someone choosing an interpretive methodology for a particular judge would be well informed about the types of processing errors to which the judge is prone. Unfortunately, we do not have very good empirical information on this subject, either about individual federal judges or about the tendencies of judges in general. The extent to which federal judges can reliably process legislative history, for instance, is one of the subjects on which Vermeule detects a "stalemate of empirical intuitions" (p 190). Thus, some of the "uncertainty" with which interpretive choice must cope relates to the problem of "bounded rationality." Still, these two problems lie on different planes.
To lay the groundwork for his analysis, Vermeule gives readers a quick primer. In the jargon of decision theory, someone who acts under conditions of "risk" has all of the information needed to calculate the expected cost or benefit of his decisions; he knows not only all of the possible outcomes that might result from each of the options that he is considering, but also the probability of each outcome and its payoff (p 171). Someone who must act under conditions of "uncertainty" is not so fortunate; he knows the possible outcomes and their payoffs, but not the relevant probabilities (p 171). Under what Vermeule sometimes calls "severe uncertainty," indeed, he does not have any reliable sense of the probabilities at all (p 173).

As Vermeule explains, decision theorists have analyzed various techniques for coping with severe uncertainty. Vermeule does not purport to formulate a general theory about which techniques are best, but he does select a few that, in his view, have useful applications in the context of interpretive choice. Two techniques in particular seem to do most of the work in his subsequent analysis. The first, the "principle of insufficient reason," tells decisionmakers who can identify all the possible consequences of each option under consideration, but who have no reliable idea of the relevant probabilities, to assume that all of the unknown probabilities are equal and then to proceed as they would in a situation of mere risk (pp 173–75). The second, the "maximin criterion," tells decisionmakers who cannot use the principle of insufficient reason (perhaps because they do not know how to partition the relevant outcomes) to try to avoid disaster by "choos[ing] the option whose worst possible outcome is better than the worst possible outcomes of the alternatives" (pp 175–76).

For these techniques to make sense, of course, decisionmakers must genuinely face severe uncertainty. But Vermeule posits that many of the questions that are important to interpretive choice—including but not necessarily limited to questions on which judges’ empirical intuitions are currently deadlocked—satisfy this condition.

Vermeule begins with the question of legislative history. Even if all judges agreed that statutory interpreters should pursue the intended meaning of statutory language, different judges would have different intuitions about whether their use of legislative history would advance or retard this high-level goal. Judge Smith might believe that legislative history frequently contains valuable information and that consulting it will edify her more often than it misleads her; Judge Jones might believe the opposite. According to Vermeule, however, neither judge should have any confidence in her intuitions on this topic. If both judges were thinking clearly, each would recognize
that her subjective assessment of the relevant probabilities is simply not meaningful, because no one has the data necessary to reach an informed conclusion. In Vermeule’s opinion, there is “severe uncertainty” about whether judges will do better by consulting legislative history or by ignoring it (pp 189–90).

That premise will strike some scholars as implausible. People who want judges to consult legislative history often quote Chief Justice Marshall’s rationale for considering a statute’s title when trying to resolve ambiguity in the statute’s operative provisions: “Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived.”9 According to people who take this statement literally, judges can be expected to make better decisions when they take account of more information, and so a strategy of flatly ignoring the available legislative history is more likely to reduce judges’ accuracy rates than to improve them. As Vermeule notes, however, that conclusion rests on some unprovable assumptions. In the real world, where decisionmakers are not perfect and information is not complete, it is at least possible that decisionmakers can increase their accuracy rates by disregarding some categories of information altogether—particularly when the decisionmakers would not be very good at processing that sort of information or when the information that would be available to them is likely to be skewed in ways that they cannot detect. Notwithstanding the contrary intuitions of many scholars, Vermeule sees no reason to assume that judges who try to read the tea leaves of legislative history will tend to reach more accurate results than judges who do not.

Of course, Vermeule also sees no reason to make the opposite assumption. But given what he considers “severe uncertainty” on this point, Vermeule nonetheless contends that decision theory should lead judges to adopt a categorical rule against consulting legislative history. If judges currently can have no reliable idea whether the use of legislative history moves their results closer to or further from the high-level goals that statutory interpretation should serve, then the principle of insufficient reason tells judges to assume that both possibilities are equally likely (p 192). Yet while the other costs and benefits of using legislative history are uncertain, its effect on “the direct costs of litigation and decision” is not; legislative history can be “voluminous,” and there is fairly widespread agreement that it is “expensive to research” (p 193). Vermeule concludes that a rational judge

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9 United States v Fisher, 6 US (2 Cranch) 358, 386 (1805).
should therefore refrain from considering legislative history: given the current gaps in our empirical knowledge, judicial use of legislative history cannot be expected to improve the decisional process (because the possibility of benefits is effectively counterbalanced by the possibility of harms), but it can be expected to increase the costs of the process itself (p 193).

Vermeule reaches similar conclusions about many of the canons of construction that courts sometimes invoke (pp 198–202). To be sure, when generalist judges must resolve interpretive questions without guidance from specialists in administrative agencies, Vermeule does not object to their using default rules to handle certain issues that statutory language often raises but does not resolve. For instance, when a statute “contains a list that can either be read as exhaustive or illustrative,” or when it is unclear “whether the statute applies to American firms outside the United States or only domestically” (p 200), interpreters need to resolve the matter one way or the other. Although judges might try to handle such questions on a statute-by-statute basis, Vermeule thinks it sensible—and perhaps even inevitable—for them to establish some default rules instead. But he encourages judges not to spend much time trying to figure out which way to set the defaults, and to spend no time at all trying to fine-tune them in individual cases. His argument follows the same structure as his analysis of legislative history: efforts along these lines will increase “decision costs” without achieving any predictable benefits (p 201).

Vermeule is much less tolerant of canons whose use does not strike him as inevitable. In particular, he encourages judges to abandon various “dice-loading rules,” such as the canon that ambiguities in federal statutes should be resolved in favor of Native Americans (p 199), the similar principle favoring veterans (p 200), and perhaps even the rule of lenity (p 202). In Vermeule’s view, having more canons rather than fewer marginally increases the costs of litigation and decision (p 198); the decisional apparatus becomes more complicated, conflicts among the canons become more likely, and people have to figure out the precise contours of each of the specialized rules in question. To the extent that particular canons have obvious distributive effects, moreover, they are likely to generate “persistent disagreement over the[ir] content,” and the resulting variations will both increase decision costs and reduce whatever benefit might otherwise flow from establishing rules of con-

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10 I borrow this term from Justice Scalia. See Scalia, A Matter of Interpretation at 28 (cited in note 5).
struction (p 199). According to Vermeule, experience bears out this point; judicial application of the rule of lenity, for instance, has been “notoriously sporadic and unpredictable” (p 135).”

For similar reasons, Vermeule urges scholars to stop promoting so-called “democracy-forcing rules”—canons that courts allegedly can use to make members of Congress deliberate more carefully about matters that judges deem especially sensitive (pp 132–33, 198). As Vermeule notes, the presumption against retroactivity, the canon of avoidance, and a variety of other rules of thumb are often defended in these terms (p 133). Indeed, Cass Sunstein has encouraged courts to adopt a host of additional canons designed to “promote better law-making” and “serve the purposes of deliberative government.”

But Vermeule suggests two reasons for skepticism about such proposals. First, even if all judges used the same interpretive methods, Congress’s responsiveness to those methods is itself an empirical question on which people have little reliable information (pp 133–34, 199). Second, and more interestingly, even if we could safely assume that Congress would respond in salutary ways if a large group of judges consistently enforced a particular set of canons, this assumption is largely irrelevant to the calculus that an individual judge should use when selecting interpretive methods (pp 121–23). Unless the judge sits on the Supreme Court, whatever canons he personally adopts are extremely unlikely to affect how Congress legislates; any realistic mechanism for that effect requires some critical mass of judges, and no individual federal judge can force his colleagues to coordinate on a particular methodology. In Vermeule’s view, indeed, even the Supreme Court cannot realistically secure coordination on particular democracy-forcing rules, because those rules tend to have political valences that work to defeat the necessary consensus. Vermeule concludes that canons designed “to provoke desirable legislative responses” are unlikely to work; they will generate extra decision costs but no predictable benefits (p 198).


13 According to Vermeule, different justices are likely to have sufficiently different views to prevent the Court as a whole from acting with a single mind (p 131), and any temporary coalition might fall apart before the Court encountered statutes enacted in response to it (p 128). To make matters worse, most questions of statutory interpretation never make it up to the Supreme Court, and the extent to which certiorari review generates uniformity among lower courts is another empirical question on which we have insufficient data (p 130).
Vermeule is also skeptical of canons designed to reflect Congress's existing patterns of behavior and to encourage judges to answer interpretive questions in light of those patterns. Such canons rest on the premise that when a statutory provision could be interpreted in either of two ways, one of which is consistent with Congress's established patterns and the other of which is not, Congress is more likely to have intended the former meaning than the latter. Vermeule contends, however, that the "informational value" of these canons is relatively low; because the canons are "generic," they cannot "speak directly to the particulars of the interpretive problem at hand," and they therefore cannot offer great insight into what members of the enacting Congress were really thinking (pp 199-200). Although Vermeule concedes that "the costs of using the canons are plausibly small," he argues that the benefits are small too, and that "the benefits are far more conjectural than the costs" (p 200).

Vermeule also discourages judges from trying to shed light on the meaning of one statute by considering other, related statutes—a standard technique for textualists and purposivists alike, but one that Vermeule believes "often fails cost-benefit analysis" (pp 202-03). Having to identify and consider these "comparison texts" unquestionably takes time. The time that judges and law clerks spend "searching out and comparing usage across the whole Code or within a database" leaves them with less time for "considering directly relevant texts in other cases" (p 204); the time that lawyers spend in similar pursuits translates into higher fees for their clients. The marginal costs of consulting these "collateral sources" can therefore be significant (pp 203-04). In Vermeule's opinion, however, the marginal benefits tend to be low: "The most important common feature of other statutes is that they are not the statute before the Court, and any information they supply will be at best collateral or low-value" (p 205). Indeed, to the extent that judges misinterpret the comparison texts that they consider, the practice of considering such texts may actually be counterproductive, and Vermeule sees "no particular reason to think that the illuminating effect of holistic textualism will predominate over its error-producing effect" (pp 204-05). Given the certain costs and the uncertain benefits of paying attention to related statutes, Vermeule advises judges to consider only the statute that they are trying to interpret.

Vermeule does not stop there. He would have judges limit themselves to "the directly dispositive clauses or provisions at hand" and not seek guidance even from other provisions in the same statute (p 204). Vermeule defends this startling idea on his usual grounds. In his view, the benefits of having judges consider the statute as a whole
are quite uncertain; while Vermeule trusts interpreters within specialist agencies to draw fairly accurate conclusions about how different provisions of a statute fit together, he does not think that generalist judges can use this technique so well. The more sources judges consider, though, the greater their decision costs.

In the end, Vermeule uses sophisticated-sounding tools to reach a crude-sounding conclusion: judges should interpret each statutory provision according to “its surface or apparent meaning” and not much else (p 183). When judges can identify such a meaning, they should never attempt to enrich their understanding by drawing upon collateral sources; on cost-benefit grounds, judges should abandon the use of “legislative history, many of the canons of construction, and holistic textual comparison” (p 183). Indeed, judges should not use these tools even when they confront questions that a statute’s surface meaning does not answer, but that nonetheless lie within the statute’s domain. As we shall see, Vermeule’s principal suggestion for such cases is that judges should defer to the interpretation of administrative agencies. But if there is no agency in the picture, courts still should not engage in “complex interpretation” (pp 214–15). Instead of trying to maximize their accuracy rates (subject to the side constraint that the interpretive process should not be wildly expensive), courts should strive to minimize decision costs (subject to the side constraint that the interpretive process should not be wildly inaccurate).

C. Administrative Agencies and Institutional Choice

Although Vermeule encourages federal judges to simplify their interpretive techniques dramatically, he does not give the same advice to interpreters in federal administrative agencies. In keeping with his belief that decisionmakers in different institutions tend to have different capacities, he tentatively suggests that agencies can productively use many of the very techniques that he urges judges to abandon.

In Vermeule’s view, for instance, “[s]pecialist agencies . . . are far better positioned to comprehend the complex legislative histories of their particular statutes than are generalist judges” (p 215). For one thing, they have the luxury of being able to delve more deeply into the available materials; while judges cannot possibly read all the committee reports and floor debates associated with each statute they encounter, agency interpreters confront a smaller set of statutes and can become quite familiar with the relevant records. In addition, they may have a better feel for the legislative process and a better grasp of any relevant technical issues (p 209).
Interpreters in administrative agencies may also be better positioned than judges to use other statutory provisions to shed light on the one being interpreted (p 205). Being immersed in the relevant area of law already, they may be quite efficient at identifying provisions that are in pari materia, and their understanding of how those provisions fit together may be more reliable than the typical nonspecialist's. To the extent that administrative interpreters can conduct intertextual comparisons more cheaply and accurately than judges can, cost-benefit analysis might lead them to retain this tool even if judges should discard it.

Just as agency interpreters may be better positioned than judges to engage in these forms of complex interpretation, so too they may be better positioned to fill whatever gaps their interpretive methods identify. When choosing among different constructions, agency decisionmakers are likely to know more than generalist judges about the probable consequences of each. As compared to the life-tenured federal judiciary, agencies are also "systematically more responsive and accountable" to the political process (p 210). Thus, both technocratic and democratic ideals arguably favor giving agencies rather than courts primary responsibility for the policy judgments that the resolution of ambiguities sometimes requires.

For these and other reasons, there is one judicial canon that Vermeule very much likes (and wants to expand considerably): the presumption that when Congress commits the administration of a statutory provision to a particular federal agency, Congress is implicitly authorizing the agency to interpret the provision's language in a way that binds later courts. As the Supreme Court formulated this canon in Chevron U.S.A., Inc v Natural Resources Defense Council, Inc,\textsuperscript{14} reviewing courts must accept the agency's reading on any matter as to which (1) the statutory provision is "silent or ambiguous" and (2) the agency has supplied a "permissible" construction.\textsuperscript{15} Not only does Vermeule embrace this canon wholeheartedly, but he encourages judges to take an extraordinarily lenient view of both conditions. In his view, a provision qualifies as "silent or ambiguous" as long as it contains some gap or ambiguity on its surface; even if the judiciary's traditional tools of construction would completely eliminate the ambiguity, Vermeule believes that judges should not use those tools to constrain the agency's interpretive freedom (pp 206, 215). Indeed,

\textsuperscript{14} 467 US 837 (1984).
\textsuperscript{15} Id at 842–43.
Vermeule suggests that judges should give agencies considerable leeway to adopt an entirely different interpretive methodology than the judges themselves would use (pp 212–14). Vermeule also seems to believe that the second step of the *Chevron* framework should have very little bite: rather than having courts determine whether the agency's interpretation is “permissible” by second-guessing the agency's reasoning process, Vermeule would let the agency supply any answer that does not contradict “clear and specific language[] in the provision immediately at issue” (pp 224, 229).

In addition to boosting the power of *Chevron* deference, Vermeule would also expand its scope. Under current doctrine, federal statutes are presumed to give an agency *Chevron*-style interpretive authority only with respect to provisions that the agency is in charge of administering, and agencies are not thought to “administer” provisions that are enforced only in court. Vermeule seems inclined to relax or eliminate that limitation. Similarly, Vermeule sharply criticizes the Supreme Court's recent decision in *United States v Mead Corp*, which declined to accord *Chevron* deference to interpretations reflected in the Customs Service's tariff classifications. Rather than asking on a statute-by-statute basis whether Congress intends particular agencies to be able to exercise *Chevron*-style interpretive authority through mechanisms other than formal adjudication or notice-and-comment rulemaking, Vermeule favors a less nuanced default rule: absent contrary directions from Congress, courts should apply *Chevron* deference without regard to the procedures that the relevant agency used to develop its interpretations or the form in which it chose to express them (pp 215–23).

**II. JUDGING WITHOUT AGENCIES**

Vermeule suggests that under his expanded version of *Chevron* deference, it will be relatively rare for federal judges to confront questions of statutory interpretation on which no agency's views deserve deference (p 201). This suggestion, however, is surely exaggerated. Many important federal statutes create no significant role for agency

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19 Id at 234.
interpreters. Others address so many different agencies that courts cannot sensibly defer to any single agency's position; for instance, even Vermeule concedes that courts must interpret the Administrative Procedure Act on their own (p 217). Before considering the proper allocation of interpretive authority between courts and agencies, I will therefore raise a few questions about the approach that Vermeule would have judges take when no agency is in the picture.

A. How Far Does Our "Severe Uncertainty" Really Extend?

Vermeule's argument for jettisoning many of the traditional tools of statutory construction rests on the premise that we face "severe uncertainty" about the practical consequences of a judge's use of those tools; for all we know, the tools are just as likely to worsen the judge's results as to improve them. In support of this claim, Vermeule points to the "stalemate of empirical intuitions" between today's textualists and today's purposivists. But that stalemate probably does not reach as far as Vermeule's thesis requires.

It may well be true that the current state of human knowledge does not permit us to make an informed choice between textualism and purposivism; even if we could agree upon the high-level goals that we want the judiciary's methods of statutory interpretation to serve, we might still face severe uncertainty about whether the typical judge would better promote those goals by gravitating toward textualism or by gravitating toward purposivism. As Vermeule suggests, moreover, we might sensibly react to this uncertainty by favoring the approach that will be cheaper to implement; if textualism entails fewer decision costs than purposivism, that would be a reason to prefer textualism over purposivism. But one cannot automatically use this logic to support an even cheaper third alternative, which uses a more restricted interpretive palette than either textualism or purposivism, unless the

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20 See, for example, the Federal Arbitration Act, 9 USC § 1 et seq (2000); the Bankruptcy Code, 11 USC § 101 et seq (2000); most of the Copyright Act, 17 USC § 101 et seq (2000); and the Judicial Code, 28 USC § 1 et seq (2000).

uncertainty to which one is reacting reaches this alternative as well. Vermeule's approach probably does not satisfy that condition.

To make this criticism more concrete, suppose one shares the commonly held view that judges should try to identify some version of the “intended meaning” of statutory language. As Vermeule notes, different theorists disagree about whether textualist or purposivist methods will bring judges closer to this high-level goal. The same stalemate of empirical intuitions might extend to the choice between purposivism and Vermeule’s proposed alternative. But it does not extend to the choice between textualism and Vermeule’s proposal. To the contrary, nearly everyone engaged in the current debate is likely to share the intuition that judges who use standard textualist methods will come closer to the intended meaning of statutory language than judges who use Vermeule’s approach. Textualists themselves will require little persuasion on this point. As for purposivists, they are likely to regard Vermeule’s emphasis on “surface meaning” as being even cruder and more error-prone than the textualist methods that they criticize.

Even if I am right about people’s likely intuitions, of course, this consensus would not threaten Vermeule’s argument if we could dismiss it as unfounded. But notwithstanding all the gaps in our empirical knowledge, I doubt that there really is “severe uncertainty” about whether judges will grasp the intended meaning of a statute better if they read the statute as a whole than if they focus exclusively on the one provision most immediately at hand. Likewise, I see little reason to think that there is severe uncertainty about whether canons that are designed to reflect Congress’s established patterns of behavior will be better guides to the intended meaning of statutory language than canons whose content is picked at random. Although the contrarian possibilities that Vermeule raises on these points may be conceivable, they seem distinctly improbable—and Vermeule himself has no objection to basing interpretive choices upon what the available information genuinely identifies as the probabilities. It seems probable, then, that judges will do a better job of capturing the intended meaning of statutory language if they use standard forms of textualism than if they adopt Vermeule’s even more minimalist alternative.

As Vermeule puts it in a different context, to refuse to act upon any such assessments “is to cross the indistinct but real boundary between laudable agnosticism and debilitating skepticism” (p. 215).

To avoid misunderstanding, I should make clear the limits of what I have just said. The argument that I have just advanced does not purport to establish that all judges should be textualists; I have said nothing about the choice between textualism and purposivism. But the argument does suggest that judges who care about identifying the intended meaning of statutory
B. To What Extent Do the Claimed Benefits of Vermeule’s Approach Require Coordination?

Even though Vermeule’s approach can be expected to yield less accurate results than more familiar methods of interpretation, it might still be attractive if it reduced “decision costs” enough. But I am skeptical that individual judges could generate any significant savings by adopting Vermeule’s approach. Meaningful reduction of decision costs would require precisely the sort of coordinated action that Vermeule does not think the judiciary can attain.

Vermeule himself anticipates this objection and rejects it; he argues that individual judges can use his strategy to reduce decision costs regardless of what other judges do (p 226). That is true up to a point—individual judges who use Vermeule’s strategy might indeed spend somewhat less time than other judges on the questions of statutory interpretation they confront. To be sure, the time that they free up in this way cannot necessarily be used to process more cases. (Under the methods that most federal courts currently use to assign cases to judges, individual judges usually cannot get more cases to decide than their colleagues.) But judges who use Vermeule’s approach may have more time either to play golf or to analyze the nonstatutory issues in their cases.

Still, these time savings are likely to be fairly small. Even judges who are willing to consider legislative history or related provisions in other statutes do not usually conduct unguided searches for this information; they read briefs submitted by the parties and they follow the citations that the parties have provided. From the judge’s perspective, then, it need not take a great deal of time to consider arguments based on legislative history or statutes in pari materia.

Of course, those arguments are not costless to produce; while judges can piggyback on the efforts of the parties’ lawyers, the lawyers themselves cannot. But even if lawyers were trying to present judges only with arguments about “the statutory . . . provisions directly applicable in the case at hand” (p 204), they would have to read all of the statutes that might contain such provisions. In the course of trying to identify the “provisions immediately at hand” (p 184), they would inevitably come across at least some of the sources that distinguish standard forms of textualism from Vermeule’s approach (such as other

language should not be Vermeulians. Even if the stalemate of empirical intuitions afflicts both the choice between textualism and purposivism and the choice between purposivism and Vermeule’s approach, the transitive property does not apply: everyone’s empirical intuitions are likely to favor standard forms of textualism over Vermeule’s approach.
provisions in the same statute and statutes in pari materia). The marginal cost of calling those sources to the judges' attention seems fairly low. Thus, Vermeule's approach may not be substantially cheaper for the legal system to implement than standard forms of textualism.

Vermeule's approach might seem to promise greater savings when compared to approaches that emphasize the use of legislative history. After all, if lawyers believe that arguments about legislative history might help them win their case, and if winning the case is sufficiently valuable to their clients, they are likely to do some costly research that they would not choose to do if all judges used Vermeule's approach. If Vermeule is correct that research of this sort does not predictably improve the accuracy of the legal system's results, moreover, then the resulting legal fees—while worthwhile from the clients' perspective—may well represent a loss for society as a whole.

Importantly, however, an individual federal judge's decision to embrace Vermeule's approach would not necessarily avoid this loss in any given case. Individual circuit judges, in particular, are in a terrible position to save the parties any substantial research costs. Not only will the parties already have done much of the necessary research at the district court level, but the parties typically must submit their appellate briefs before they know which circuit judges will sit on their panel. Even if one of the judges on the panel has embraced Vermeule's approach, moreover, the parties will be trying to win the votes of the other judges too. For that very reason, indeed, an individual circuit judge's decision to adopt Vermeule's novel approach might marginally increase the litigation costs that society incurs, because some parties would find it advantageous to address both the application of more traditional interpretive methods and the application of Vermeule's approach.

At least when no administrative agency is in the picture, then, Vermeule's proposed approach does not seem very attractive. An individual judge who embraces Vermeule's emphasis on the "surface ... meaning" of "the statutory text directly at hand" (p 183) seems likely to

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25 Individual district judges might be in a somewhat better position than individual circuit judges to cause the parties to economize on research costs. But the coordination problem will still have at least some effect. Even if the district judge who is assigned to a case makes clear that she will ignore all arguments based on legislative history and other collateral sources, the parties' lawyers might research such sources anyway, both to determine their prospects on appeal and to preserve arguments that a panel of circuit judges might find persuasive.
reach less accurate results (on any plausible version of accuracy) than a judge who uses standard forms of textualism. If Vermeule is correct about the judiciary's low capacity for coordination, moreover, this loss of accuracy seems unlikely to be offset by a substantial reduction in decision costs—especially when one compares Vermeule's approach to textualism, and perhaps even when one compares it to purposivism.

III. DOES CHEVRON CONQUER ALL?

Even if Vermeule is wrong to steer judges away from all forms of "complex interpretation" when no agency is in the picture, the real focus of his book is the interpretive techniques that judges should apply to statutory provisions that a specialist agency has already construed. In particular, Vermeule is interested in the relationship between Chevron deference and what the Chevron Court called the "traditional tools of statutory construction"—in other words, the tools traditionally used by courts to determine statutory meaning. When a statutory provision seems ambiguous on its face, but an established canon of construction would resolve the ambiguity, how should reviewing courts decide whether the relevant agency can ignore the canon? What if the agency's construction does not offend any established canons, but conflicts with the available legislative history or the apparent purpose behind related statutory provisions? When reviewing courts apply the Chevron framework, which interpretive tools should they use to narrow the range of meanings from among which the agency can choose, and which interpretive tools should they permit agencies to discard?

Although these questions are central to the practical operation of Chevron deference, which in turn has become one of the cornerstones of federal administrative law, the Supreme Court has given them almost no sustained attention. Even the United States Court of Appeals for the D.C. Circuit, whose administrative-law opinions in the two decades after Chevron have often been more sophisticated than those of the Supreme Court, has shed relatively little light on the interaction between Chevron deference and other interpretive principles. The relationship between Chevron deference and the canons, for instance, remains "one of the most uncertain aspects of the Chevron doctrine."

26 *Chevron*, 467 US at 843 n 9.
With a few notable exceptions, moreover, legal scholars have spent little time trying to dispel the uncertainty. Vermeule therefore deserves great credit for focusing attention on these important questions.

The answer that he proposes, however, is too extreme to be very plausible. According to Vermeule, "courts should defer to agencies whenever the statutory text at issue, viewed on its face and without recourse to the traditional tools, contains a surface-level gap or ambiguity" (p 211). Even if the ambiguity would vanish if interpreters simply read other provisions of the same statute or applied some widely recognized canon that reflects Congress’s established patterns, Vermeule does not want reviewing courts to use such techniques to restrict the relevant agency’s interpretive freedom. Vermeule draws no distinctions among the “traditional tools of statutory construction,” and he believes that Chevron deference should trump them all.

As Vermeule is well aware, of course, even to identify the “surface-level” meaning of a statutory provision requires attention to some set of linguistic conventions (pp 43–44, 188), such as the conventions about vocabulary and grammar that were widely considered part of American English at the time the provision was enacted. When Vermeule urges judges to deemphasize the traditional tools of statutory construction, he is not talking about the “fundamental canon” that interpreters should usually give statutory language its “common meaning”—the meaning that it would have in what the Supreme Court calls “ordinary English.” By and large, the tools that he wants to deemphasize are the ones that apply specifically to the interpretation of statutes (rather than English prose in general).

For people whose view of the high-level goals of statutory interpretation pays some attention to congressional intent, those tools fall into two broad categories. Some of the traditional tools of statutory interpretation v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem, 37 Conn L Rev 495, 543–56 (2004) (noting the similar split about whether the canon of construing federal statutes in favor of Indian tribes trumps Chevron deference); Brian G. Slocum, The Immigration Rule of Lenity and Chevron Deference, 17 Georgetown Immig L J 515, 543–59 (2003) (concluding more generally that “courts have not attempted to formulate a jurisprudence that would resolve the conflict between substantive canons and Chevron deference”).


construction, such as so-called descriptive canons, are designed to minimize gaps between the directives that judges understand statutes to establish and the directives that members of the enacting Congress understood themselves to be enacting; they are aimed at identifying the intended meaning of statutory language. Others, such as so-called normative canons, are designed to guide judges when the available information about intended meaning has run out—when the judges’ primary interpretive tools have succeeded only in identifying a range of possible meanings, none of which seems significantly more likely than the others to reflect what members of the enacting legislature probably had in mind.31

At least before Vermeule’s book, courts and commentators alike assumed that most of the interpretive techniques in the first category should trump *Chevron* deference, in the sense that judges can properly use them to narrow the range of interpretations from which the relevant administrative agency can choose.32 Although Vermeule’s contrary suggestion requires us to take a fresh look at this issue, Part III.A concludes that the conventional wisdom should survive his arguments. Part III.B then considers whether any of the interpretive techniques in the second category should also be capable of trumping *Chevron* deference. Part III.C discusses Vermeule’s broader ideas about the relationship between *Chevron* deference and an agency’s choice of interpretive method.

32 See Sunstein, 90 Colum L Rev at 2105, 2109–10 (cited in note 28) (concluding that “*Chevron* is plainly overcome by principles that help to ascertain congressional instructions”). See also Bradley, 86 Va L Rev at 675 (cited in note 27) ("[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of *Chevron.*") Mendelson, 102 Mich L Rev at 745 (cited in note 28) (“Despite *Chevron*, for example, courts generally have applied rules of syntax in preference to agency interpretations."). For recent applications of text-based canons to restrict agencies’ interpretive freedom, see *National Credit Union Administration v First National Bank & Trust Co*, 522 US 479, 501–02 (1998) (presumption of consistent usage); *United States v Cooper*, 396 F3d 308, 312–13 (3d Cir 2005) (presumption against superfluity); *California Independent System Operator Corp v FERC*, 372 F3d 395, 400 (DC Cir 2004) (*noscitur a sociis*); *City of Tacoma, Washington v FERC*, 331 F3d 106, 115 (DC Cir 2003) (construction of statutes in pari materia). For similar applications of descriptive canons designed to reflect Congress’s established patterns of behavior, see *INS v St Cyr*, 533 US 289, 320 n 45 (2001) (presumption against retroactivity); *ABA v FTC*, 430 F3d 457, 472 (DC Cir 2005) (presumption that Congress does not intend to regulate areas that it has traditionally left to the states); *California State Board of Optometry v FTC*, 910 F2d 976, 980–82 (DC Cir 1990) (presumption that Congress does not intend to regulate the states as sovereigns).
A. *Chevron* and Interpretive Tools Designed to Identify a Statute's Intended Meaning

The standard defense of *Chevron* deference starts from the premise that statutes do not have determinate meanings on each and every legal issue within their domain, and asks whether the legal system will work better if primary responsibility for filling gaps and resolving ambiguities lies with judges or with decisionmakers in a specialist agency. As compared to generalist judges, agency decisionmakers are likely to have more experience in the relevant field, better information about problems that need solving, and a better sense for the practical consequences of various possible rules. Agency decisionmakers also are subject to more effective presidential control than life-tenured judges, and they interact more regularly with the relevant congressional committees and staffs; assuming that it is desirable for interpreters to pay some attention to current political preferences when resolving ambiguities in statutory language, many agency decisionmakers are probably better positioned than the typical federal

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33 Of course, to the extent that Congress has already confronted and resolved this policy question, interpreters would not have to address it for themselves. The rule articulated in *Chevron* is commonly described in just these terms, as a presumption about how Congress intends to allocate interpretive authority between courts and agencies. But scholars agree that this presumption is largely fictional. At least before *Chevron* was in place, there was no more reason to believe that Congress typically understood its statutes to delegate interpretive authority to administrative agencies than that Congress typically understood its statutes to leave all such authority in judges' hands. With respect to most enactments, indeed, members of Congress probably formed no understanding on this issue at all. The *Chevron* canon therefore cannot plausibly be defended as an estimation of some preexisting legislative intent. See David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 S Ct Rev 201, 212–25.

It does not follow that judges who care about the effectuation of congressional intent should reject *Chevron* deference. Even if Congress has not spoken to this issue, judges reviewing the administration of federal statutes need to figure out how much to defer to the relevant agency's interpreters. In the absence of contrary direction from Congress, judges could make the necessary decisions on a statute-by-statute or provision-by-provision basis, without any guiding presumption. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J 511, 516–17 (asserting that this is precisely what the Supreme Court did before *Chevron*). In the face of consistent congressional silence or ambiguity about the allocation of interpretive authority, however, members of the Supreme Court could sensibly conclude that a broader presumption would generate more predictable decisions without frustrating any genuine legislative intent. Id. In setting the presumption's content, moreover, they could legitimately rely upon their own normative judgments about the circumstances in which agencies are likely to do a better job than judges at resolving ambiguities in statutory language. As discussed more fully in Part III.B, canons that formalize such normative judgments are a common response to issues that the judiciary must confront when applying federal statutes, but on which Congress has provided little or no guidance.
judge to do so.  To be sure, specialist agencies might be more prone than generalist judges to harmful forms of tunnel vision (or, on some accounts, to capture by regulated industries). On balance, though, both their greater expertise and their greater responsiveness to the political branches arguably give them a sounder basis than courts for many types of discretionary judgments.

Notably, this standard defense of *Chevron* does not claim that agencies will systematically be better than courts at discerning a statute's intended meaning. It focuses, instead, on the resolution of matters that the enacting Congress left obscure—gaps and ambiguities as to which the statute has no single discernible intended meaning. The argument that agencies have more expertise in their specialized fields does spill over to affect a few of the techniques that judges sometimes use to glean intended meaning: courts should give considerable deference to a specialist agency's understanding of terms of art, and courts also should hesitate to conclude that an interpretation endorsed by the relevant agency is likely to produce such absurd results that Congress must have meant something else. By and large, though, *Chevron* deference is less about the determination of a statute's intended meaning than about the exercise of discretionary judgment within the zone in which courts deem that meaning unclear. That is why, on the standard account, courts are free to use descriptive canons (and other traditional techniques for discerning intended meaning) at Step One of the *Chevron* process.

In criticizing this aspect of current practice, Vermeule argues that agencies are better positioned than courts not only to make discretionary judgments in their fields of specialty but also to identify the judgments that Congress has already made. As he notes, “[a]gencies will often possess far better information about the legislative process that produced the statute, about the specialized policy context surrounding the statute’s enactment, and about the resulting legislative

34 See Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum L Rev 2027, 2126–59 (2002) (defending *Chevron* on this basis). See also Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 Geo Wash L Rev 821, 824 (1990) (tracing *Chevron* to “the sound premise that agencies enjoy a comparative institutional advantage as a matter of legitimacy in resolving ambiguities in legislation they are charged with administering” because “Congress and the President have a great deal more continuing influence over those agencies than over the judiciary”).

35 See Peter S. Heinecke, Comment, *Chevron and the Canon Favoring Indians*, 60 U Chi L Rev 1015, 1023 (1993) (“One of the motivating factors behind *Chevron* deference is that agencies have greater expertise; they presumably know better than courts what constitutes an ‘absurd’ result.”).
deal" (p 209). Largely because of their superior information about what members of the enacting Congress had in mind, Vermeule suggests that agencies need not resort to the tools of construction that courts have developed for their own use, such as generic canons or inferences drawn from related statutes in the same field. If reviewing courts nonetheless use those tools to invalidate an agency's interpretation, the courts might well be driving the legal system's results away from the statute's true intended meaning; according to Vermeule, there is great uncertainty about "[whether] judicial resort to the traditional interpretive tools produces better accounts of original legislative intentions ... than does judicial deference to agencies" (p 210).

But while no one can know whether judges tend to help or hurt when they engage in complex forms of interpretation over and above the interpretive work that agencies have already done, this practice plainly does add to the legal system's "decision costs" (p 210). Vermeule concludes that reviewing courts therefore should not invalidate agency interpretations for failure to conform to the traditional tools of construction. As long as the agency's interpretation does not conflict with the surface meaning of the particular provision at hand, reviewing courts should simply accept it "without consideration of legislative history, holistic textual comparison to collateral provisions, or other tools" (pp 227-28).

The critical premise of this argument—that agencies are likely to have better information than courts about the intended meaning of particular statutes—may well be correct. For one thing, lawyers from the relevant agency often work with Congress on regulatory legislation, and those lawyers might well emerge from the legislative process with a good feel for the compromises that members of Congress understood themselves to be striking. But if one accepts standard

\[36\] In addition to claiming that this proposal will reduce the legal system's overall "decision costs," Vermeule suggests an additional reason to discourage judges from using the traditional tools of statutory construction in this context: "Where canons of various sorts, legislative history with its high volume and internal heterogeneity, and indeed the whole enacted code are all in the judicial kit-bag waiting to be used, agencies and other actors will find it difficult to predict what the eventual fate of an agency interpretation will be" (p 210). If one accepts Vermeule's own arguments, however, this point should not really persuade any individual judge to embrace Vermeule's proposal. Even if it is possible for a single judge to make an incremental contribution to the predictability of the legal system (as Vermeule asserts but does not explain (p 226)), this incremental contribution cannot be expected to produce any positive effects in the real world. For the reasons laid out by Vermeule himself, neither agencies nor other actors are likely to alter their behavior in any discernible way simply because an additional federal judge has embraced Vermeule's proposed approach.

views of the high-level goals of statutory interpretation, one will not actually want interpreters to rely upon this sort of inside information; on the standard account, the search for the intended meaning of statutory language is tempered by the desire for interpreters to rely only upon information available to the public at large.\textsuperscript{38} Perhaps for that reason, the Supreme Court has specifically refused to base \textit{Chevron} deference on the premise that an agency's role during the enactment of a statute gives the agency special insight into the statute's intended meaning.\textsuperscript{39}

Admittedly, specialist agencies may also be better than courts at processing the information about intended meaning that is publicly available. To the extent that related statutory provisions shed light on the provision being interpreted, for example, agency lawyers may be better positioned than generalist judges to draw the right inferences.\textsuperscript{40} But even if judges would have lower accuracy rates than agency lawyers if both were forced to interpret statutes entirely on their own, it does not follow that judges should embrace Vermeule's proposal. After all, judges applying \textit{Chevron} deference are not proceeding on their own; they have the benefit of the views of a specialist agency, and they will give substantial deference to those views even if they also take account of the traditional tools of statutory construction. For purposes of assessing Vermeule's proposal, the key question is whether it would be desirable for judges to give \textit{even more} deference to agency interpretations and to cut the traditional tools of statutory construction out of the process entirely.

Although no one can possibly develop empirical data on this question, my own strong intuition is that the legal system as a whole will do a worse job of capturing the intended meaning of statutory language if judges adopt Vermeule's proposal than if judges allow the traditional tools of statutory construction to temper their deference to agencies. Unless an agency is impermissibly relying upon inside inform-

\textsuperscript{38} That is one reason why judges interpreting federal statutes do not consider testimony from legislators who participated in the enactment process. See Nelson, 91 Va L Rev at 359 (cited in note 3).

\textsuperscript{39} See \textit{Smiley v Citibank (SD)}, 517 US 735, 740-41 (1996). See also Michael Herz, \textit{Defence Running Riot: Separating Interpretation and Lawmaking under Chevron}, 6 Admin L J Am U 187, 194 (1992) (agreeing that "[a]lthough this justification for deference has a lengthy pedigree, it is not the theory that underlies \textit{Chevron}").

\textsuperscript{40} I leave aside judges who are themselves specialists in the field of law that the agency administers. As Judge Posner has suggested, there is little reason to think that decisionmakers within the Securities and Exchange Commission have a better sense of how the federal securities laws are supposed to interact than Chief Judge Easterbrook of the Seventh Circuit, or that lawyers within the Patent and Trademark Office have a better understanding of intellectual property law than Judge Leval of the Second Circuit. See Posner, 101 Mich L Rev at 964 (cited in note 1).
The techniques that the agency uses to determine a statute's intended meaning are likely to resemble the traditional tools used by courts themselves. Under current versions of Chevron deference, moreover, judges will not reject the agency's interpretation simply because the agency has used those tools better than the judges could have done on their own; if the agency uses its expertise to figure out the relationship between the provision at hand and other statutory provisions, the mere fact that reviewing courts might not have understood that relationship without the agency's guidance will not cause them to throw out the agency's interpretation. For that matter, judges who care about the traditional tools of statutory construction will not necessarily reject an agency's interpretation simply because the agency has decided not to apply one of those tools in a particular case, if the agency has provided a sensible explanation for that decision. Instead, judges applying the current version of Chevron deference are likely to reject an agency's interpretation only when the agency has been unable to explain its position in a way that makes sense to them. Assuming that federal judges are reasonably skilled lawyers even though they are generalists, I strongly suspect that they will have higher accuracy rates than agency lawyers in this set of cases—that is, the set of cases in which judges who have reviewed the agency's position, and who have assessed it in light of both the traditional tools of statutory construction and the explanations offered by the agency itself, have concluded that the agency's interpretation goes beyond the zone of discretion permitted by Chevron.

Even though this claim rests on "empirical intuitions" and conventional wisdom rather than hard data, and even though its accuracy is therefore uncertain, I am not persuaded that the uncertainty is severe enough to warrant invoking the principle of insufficient reason. Perhaps Vermeule is correct that judges should not reject agency interpretations on the basis of some commonly used tools, such as legislative history; people's empirical intuitions may genuinely be stalemated about whether judicial use of legislative history in this context is likely to help or hurt. But there is no similar stalemate about whether courts reviewing an agency's interpretation of a statute should be willing to consider other provisions in the same statute or sensible descriptive canons—especially when the relevant agency has no apparent reason for neglecting these tools. Here, the very originality of Vermeule's thesis is a strike against his conclusion: no one other than Vermeule seems to believe that when federal judges use these tools to conclude that an agency's interpretation goes beyond the zone of discretion conferred by Congress, the possibility that the tools will
Statutory Interpretation and Decision Theory

affirmatively lead the judges into error completely counterbalances the possibility of any benefits. Unless that condition is satisfied, however, the traditional tools have a positive expected value in the hands of reviewing courts—which would defeat Vermeule's argument.

To the extent that one wants the legal system to enforce the intended meaning of statutory language (on matters as to which such meaning exists), there is another reason to be wary of Vermeule's proposal. If a critical mass of judges were to embrace Vermeule's approach, agency decisionmakers would face less risk of reversal, and they might be expected to react by expanding the set of interpretations that they consider adopting. As a result, even if agency decisions currently reflect the intended meaning of statutory language better than court decisions can, widespread relaxation of the constraints on agency interpretations might change this calculus. In an odd way, then, Vermeule's analysis has a self-defeating character: the more judges Vermeule persuades, the more his approach risks producing systemic effects that would undercut his arguments.

B. Which Normative Canons Should *Chevron* Deference Trump?

Even if reviewing courts should not permit administrative agencies to thumb their noses at descriptive canons and other traditional techniques for determining the intended meaning of statutory language, normative canons might well be different. Indeed, scholars sometimes suggest that unless *Chevron* deference trumps at least some such canons, it does not really exist at all, because reviewing courts would use the canons to eliminate all of the ambiguities that *Chevron* might otherwise permit administrative agencies to resolve. This argument is overstated; the set of recognized canons is not nearly comprehensive enough to resolve all potential ambiguities in statutory language, and in any event reviewing courts could require an agency to take account of particular canons while simultaneously giving considerable deference to the agency's judgments about the proper appli-

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41 See Cass R. Sunstein, *Chevron Step Zero*, 92 Va L Rev 187, 189 n 3 (2006) ("[A]gencies and their lawyers are likely to adjust their own practices to deference doctrines . . . and take legal risks that they would not assume if courts were less likely to defer.").

42 See, for example, Mendelson, 102 Mich L Rev at 746 (cited in note 28) ("[I]ncorporating substantive canons into Step One implies the survival of the *Chevron* doctrine. *Chevron* does not actually survive this approach, however, because when it is taken, the substantive canon will always dictate the result."). Vermeule gestures in the same direction, saying that when a court "draw[s] upon the traditional tools to decide whether there is a gap for the agency to fill," it "in effect reads agency deference out of the picture by narrowing agencies' gap-filling power to the residual area in which judicial tools run out" (p 206).
cation of those canons. Still, if one accepts the underlying rationale of Chevron deference, there are good reasons for reviewing courts to let agencies entirely disregard at least some of the normative canons that judges would apply in the agencies’ absence.

In order to approach this issue, we must first understand exactly why courts might apply normative canons when no agency is in the picture. Even if a court cares deeply about trying to identify and enforce the intended meaning of statutory language, the interpretive tools that the court uses for this purpose will not resolve every single question that the statute authorizes interpreters to answer; the court will inevitably confront issues that come within the statute’s domain but that Congress has not authoritatively answered in an intelligible way. Courts could try to handle all such gaps and ambiguities in statutory language on an entirely ad hoc basis, so that the answers they supply for one statute have no bearing on the answers they supply for any other statute. With respect to certain issues, however, courts interested in a more rule-like approach have articulated broader canons or presumptions that they proceed to apply across a range of different statutes. These rules are classified as “normative” canons because their content typically reflects some normative judgments, such as the relevant court’s own sense of what makes for good policy, or the values that the court imputes to our Constitution or to other aspects of our legal traditions, or the importance that the court places on promoting the overall coherence of American law.

At least for theorists who emphasize the search for a statute’s intended meaning, purely normative canons rank below descriptive canons in the interpretive hierarchy. According to the common account, normative canons guide the choices that interpreters must make when they confront a set of possible interpretations, none of which seems substantially more likely than the others to reflect what members of Congress understood themselves to be enacting. To de-

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43 See, for example, NLRB v Catholic Bishop of Chicago, 440 US 490, 501 (1979) (describing the canon of constitutional avoidance as “the Court’s prudential policy”).

44 See, for example, Bell v United States, 349 US 81, 83 (1955) (applying the rule of lenity and stating that “[i]t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment”). See also William N. Eskridge, Jr., and Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand L Rev 593, 598 (1992) (“A good many of the substantive canons of statutory construction are directly inspired by the Constitution.”).

45 See, for example, FDA v Brown & Williamson Tobacco Corp, 529 US 120, 143-44 (2000) (resolving ambiguities in language that Congress enacted in 1938 in such a way as to maximize its consistency with statutes that Congress enacted much more recently).
termine whether that condition is satisfied, interpreters should use their tools for determining intended meaning (including any relevant descriptive canons) before they resort to normative canons. Indeed, the fact that courts commonly use descriptive canons to help set the parameters for *Chevron* deference is simply an application of this principle; on the conventional account, the basis for *Chevron* deference is itself a normative canon.

The relationship between *Chevron* deference and other normative canons is thus a subset of a broader question: within the space in which normative canons matter, how should courts proceed when two normative canons point in opposite directions? For instance, what should courts do when a statute lends itself to two possible interpretations, one of which would raise a substantial constitutional question and the other of which would run contrary to international law? Should the normative portion of the canon of avoidance trump the normative portion of the *Charming Betsy* canon, or vice versa?

Instead of establishing any firm pecking order among normative canons, current doctrine encourages courts to approach such conflicts

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46 See Nelson, 91 Va L Rev at 393–98 (cited in note 3) (discussing the role of normative canons in an interpretive philosophy that emphasizes fidelity to intended meaning). See also id at 395 n 143 (discussing hybrid canons such as the presumption against retroactivity, which has both a descriptive component and a normative component).

47 As noted above, *Chevron* deference is not conventionally seen as a tool for courts to identify the intended meaning of statutory language; rather, it is a tool for the legal system as a whole to fill gaps and resolve ambiguities left by the enacting Congress. This tool, moreover, was not dictated by Congress itself, but instead was developed by the Supreme Court in response to Congress's persistent failure to address questions of interpretive authority. See note 33. The general presumption announced in *Chevron*—that when Congress entrusts the administration of a statutory provision to a federal agency, Congress should usually be understood to be letting the agency take the lead in resolving any indeterminacies in the provision—is thus a paradigmatic normative canon.

In the years since the Supreme Court articulated this presumption, of course, *Chevron* deference has become a prominent part of federal administrative law, and one can plausibly assume that members of Congress now know about it and draft bills in light of it. The version of *Chevron* deference that they can be presumed to know, however, is limited to matters on which Congress's intended meaning is unclear. As a result, even if there is a sense in which the presumption articulated in *Chevron* is now a descriptive canon (because members of Congress factor it into their own understanding of the bills that they consider), it still should not trump other descriptive canons.

48 See *Catholic Bishop*, 440 US at 501 (expressing a preference for interpretations that do not "give rise to serious constitutional questions").

49 See *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804) (endorsing the view that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"). For discussion of the history and development of this canon, see generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Georgetown L J 479 (1998).
on a statute-by-statute basis and to tailor their resolutions to particular circumstances.\textsuperscript{50} I am certainly sympathetic to the idea that courts should try to develop a more rule-like approach, so that the relationship among different canons will be stable across a range of different statutes. In a peculiar way, however, the very firm rule that Vermeule proposes for the relationship between \textit{Chevron} deference and other normative canons would actually undercut this goal. If, as Vermeule proposes, reviewing courts systematically allowed \textit{Chevron} deference to trump any and all normative canons that the courts might otherwise apply, then each federal agency would be free to decide for itself whether to apply those canons with respect to any particular statutory provision that the agency administers. As a result, the normative canons would lose some of their own rule-like features; from the perspective of the legal system as a whole, they would apply to some statutes and not others, and the distinction would depend on the discretionary determinations of individual agencies.

Depending upon what a particular normative canon is designed to achieve, that result might be perfectly acceptable. For instance, there are good reasons for \textit{Chevron} deference to trump normative canons that appellate courts have articulated simply for the purpose of promoting uniformity in the lower courts' interpretations of statutes. Drawing upon the work of Peter Strauss,\textsuperscript{51} Vermeule plausibly suggests that \textit{Chevron} deference not only is a good substitute for such canons, but might actually be better than such canons at fostering national uniformity in the interpretation of federal law. If the central board that sits atop the hierarchy of the typical federal administrative agency interprets a statute in a particular way, and if judges scattered throughout the country give considerable deference to its conclusions, then the statute will have a more "genuinely national" meaning than it would if the relatively decentralized federal judiciary engaged in more independent interpretation (p 208).\textsuperscript{52}

\textsuperscript{50} See, for example, Chickasaw Nation v United States, 534 US 84, 95 (2001) (refusing to conclude that "the pro-Indian canon" always trumps "the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed" and explaining that the Court's precedents "are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength").

\textsuperscript{51} See Peter L. Strauss, \textit{One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action}, 87 Colum L Rev 1093, 1121 (1987) (arguing that in light of practical limits on the Supreme Court's ability "directly to enforce uniformity upon the courts of appeals," the \textit{Chevron} doctrine "enhances the probability of uniform national administration of the laws").

\textsuperscript{52} Vermeule himself takes this argument much farther, implicitly treating it as one reason for \textit{Chevron} deference to trump all of the canons that courts might otherwise use to limit agen-
Assuming that one accepts *Chevron*’s own rationale, *Chevron* deference should also trump normative canons that reflect the Supreme Court’s assessment of policy questions specific to the field in which a particular administrative agency specializes. The logic of *Chevron*, after all, suggests that agencies are better suited than courts to take the lead in making such assessments with respect to the statutory provisions that they administer.

Many normative canons, however, rest on broader policy judgments that go well beyond any single agency’s particular specialty. To the extent that generalist courts are less prone to tunnel vision than specialist agencies, courts may actually be better positioned to make those judgments than the typical agency. Figuring out whether *Chevron* deference should trump normative canons of this sort therefore requires one to decide what to do when the “expertise” and “political accountability” rationales for *Chevron* deference diverge—a question on which *Chevron* itself suggests no answer.

By the same token, it is possible for normative canons to be policy-based without resting entirely on policy judgments made by courts. Some normative canons, although developed and articulated by
judges, are designed to guide the resolution of ambiguities toward outcomes that reflect values gleaned from the federal Constitution or from our legal system as a whole. It is not clear that even *Chevron*'s "political accountability" rationale provides strong reason for reviewing courts to let administrative agencies dispense with these canons.

Of course, even if *Chevron*'s own internal logic does not itself compel reviewing courts to elevate *Chevron* deference over all other policy-based normative canons, other institutional considerations might provide independent reasons for courts to do so. I am not a great fan of normative canons, and I have no particular stake in where *Chevron* deference ranks among them. Developing a position on that issue, however, probably requires a more thoroughgoing institutional analysis than Vermeule provides. While it is possible to speak in general terms about the structure and institutional capabilities of the federal judiciary, federal administrative agencies are much more heterogeneous. Different agencies have very different internal structures and are subject to very different mechanisms for external oversight and control. These differences affect both how centralized their decisionmaking is and how much the president and Congress influence it. The kinds of decisions that Congress commits to particular agencies also vary widely, with the result that technical expertise matters more in some agencies than in others. Similarly, jobs in different agencies come with different levels of prestige, with the result that some agencies can attract better lawyers and higher-powered staffs than others.

Despite all this variability, scholars might still conclude that reviewing courts should take a one-size-fits-all approach to the relationship between *Chevron* deference and other normative canons; although the variability of agency structures surely increases the costs of such an approach, the benefits of having a universal rule might still exceed those costs. But Vermeule does not even sketch out how this analysis might proceed. Notwithstanding his repeated calls for "a resolutely institutional account" that pays attention to on-the-ground empirical realities (pp 12, 85), he contents himself with broad-gauged references to the advantages that "agencies" enjoy over "judges." As a result, he does not really fulfill his claim to establish that sophisticated institutional analysis, when applied to the current state of our knowledge about all of the entities at work in our legal system, counsels reviewing courts never to use any normative canon to reject any specialist agency's interpretation of a statute.
C.  *Chevron* and an Agency’s Choice of Interpretive Method

Although Vermeule insists that judges should never use “complex interpretation” to reject constructions that a specialist agency has embraced, he is not entirely clear about whether judges should ever use complex interpretation to *uphold* a specialist agency’s construction. Suppose, for instance, that the surface meaning of a particular statutory provision seems unambiguous, but the relevant agency has embraced a different reading on the strength of one of the traditional tools of statutory construction; the agency has invoked a canon that supports reading certain kinds of exceptions into seemingly unqualified statutory language, or it has detected some hidden ambiguity generated by the provision’s interaction with other provisions in the same statute, or it has concluded that a literal reading of the provision would produce such absurd results that a more flexible interpretation is warranted. Should reviewing courts reject all such arguments for deviating from the provision’s surface meaning, or can they take account of the traditional tools of construction to recognize the existence of an ambiguity that the relevant agency is empowered to resolve?

In a gesture at answering this question, Vermeule asserts that judges should not defer to agencies “where ambiguities are extrinsic rather than intrinsic” (p 228). But the illustration that he offers—that judges should not let agencies deviate from “the clear and specific text of the provision at hand” because of contrary statements in the legislative history (p 228)—is too easy to tell us much about his position. Even supporters of the use of legislative history do not usually argue that interpreters can properly invoke it to contradict clear and specific statutory text; they focus, instead, on “cases in which statutory language is unclear.” Thus, Vermeule’s illustration does not really ad-

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54 See, for example, *Young v United States*, 535 US 43, 49–51 (2002) (applying a longstanding “background principle” to read an equitable tolling exception into a federal statute of limitations); *National Private Truck Council, Inc v Oklahoma Tax Commission*, 515 US 582, 588 (1995) (inferring an exception to 42 USC § 1983 on the strength of “the background presumption that federal law generally will not interfere with administration of state taxes”); *United States v Mezzanotte*, 513 US 196, 203–04 (1995) (reading federal rules in light of the “background presumption that legal rights . . . are subject to waiver by voluntary agreement of the parties”); *Staples v United States*, 511 US 600, 605 (1994) (reading a mens rea requirement into seemingly broad statutory language); *Leuthner v Blue Cross and Blue Shield of Northeastern Pennsylvania*, 454 F3d 120, 125 (3d Cir 2006) (“As a matter of statutory interpretation . . . Congress is presumed to incorporate background prudential standing principles, unless the statute expressly negates them.”).

55 Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S Cal L Rev 845, 847 (1992). See also Molot, 106 Colum L Rev at 38 (cited in note 3) (observing that “virtually all interpreters today—both self-proclaimed textualists and purposivists—tend to exclude legislative history if the text, in context, otherwise is clear”). But see *Exxon Mobil Corp*
dress what judges should do when an agency’s deviation from the surface-level meaning of a particular provision rests on a respectable application of some recognized tool of statutory construction.

If other parts of his analysis are any guide, though, Vermeule would have judges defer to agency interpretations of this sort. The reason that Vermeule wants judges to focus on surface meaning when left to their own devices is that, as he understands the available empirical information, their use of more complex interpretive techniques would consume resources without producing any predictable benefits. Vermeule believes that the calculus is different for interpreters in specialist agencies; they can apply the same interpretive techniques more cheaply and accurately, and so their use of complex interpretation has some positive expected value. According to Vermeule, moreover, that value might well exist even when judges would say that a provision has a clear surface meaning; as compared to judges, “agencies are likely to be in a better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme,” and so “the case for formalistic interpretation by judges is stronger than the case for formalistic interpretation by agencies” (p 213). Thus, Vermeule suggests that reviewing judges should allow agencies not only to resolve ambiguities in the statutes that they administer, but also to select the interpretive approach that is used to identify those ambiguities (pp 213–14). More generally, Vermeule seems inclined to have judges defer to agencies whenever there is any “reasonable basis for interpretive dispute” (p 233)—even if the dispute arises because the agency has adopted a more complex method of interpretation than Vermeule advises judges to use in the agency’s absence.

The idea that reviewing courts should extend Chevron deference to an agency’s choice of interpretive method does not necessarily hinge on Vermeule’s other positions. Thus, even if one rejects Vermeule’s efforts to develop an alternative to standard forms of textualism and purposivism, one must still consider the possibility that reviewing courts should leave the choice between these standard interpretive methods up to individual agencies. Again, however, I am not entirely persuaded.

v Alapattah Services, Inc, 545 US 546, 125 S Ct 2611, 2628 (2005) (Stevens dissenting) (“Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity vel non of a statute as determinative of whether legislative history is consulted.”).
1. Should textualist judges defer to an agency’s choice of purposivism?

Imagine that a particular judge has decided (for the reasons suggested in Part II of this Review) that when no agency is in the picture, he will better advance the high-level goals of statutory interpretation if he adopts standard textualist methods than if he follows Vermeule’s cruder approach. The harder choice is between textualism and purposivism, but let us suppose that this particular judge makes that choice in favor of textualism too. He recognizes, of course, that statutes are mechanisms for members of Congress to achieve certain policy objectives, and he does not want the method of interpretation that he adopts to raise unwarranted obstacles to the accomplishment of the purposes that Congress as a whole collectively wanted to advance. But he also recognizes that even when Congress as a whole collectively embraces particular goals, it still faces important policy questions about the nature of the statutory directives that will best promote those goals. In particular, Congress must decide how rule-like to make those directives: should the relevant statute simply express the goals that Congress is trying to achieve and leave implementing authorities in charge of deciding what is most likely to advance those goals in each set of circumstances that arises, or should Congress hardwire some such decisions into the statute itself, so that implementing authorities will sometimes have to take actions that they themselves would not have identified as the best way of achieving Congress’s underlying purposes in the particular circumstances at hand? When attempting to identify any decisions that Congress has authoritatively made on this point, our hypothetical judge sees no reason to apply background principles of interpretation that make statutory language less rule-like than it seems on its face. In other words, our hypothetical judge identifies himself with textualism rather than with purposivism:

For discussion of these issues, and of the costs and benefits that members of Congress might consider as they decide how rule-like to make particular directives, see generally Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford 1991).

At least with respect to statutes that courts must implement on their own, he believes that he will best advance the high-level goals of statutory interpretation if he refrains from reading purpose-based embellishments into seemingly rule-like provisions.
A judge who accepts this tenet of textualism has no obvious reason to conclude that agency interpreters should be free to apply the background principles that he has rejected for his own use. To be sure, Congress may well cast statutory directives in less rule-like terms when it is committing their administration to a specialist agency than when the directives will be administered only by courts; members of Congress might plausibly conclude that certain agencies are better positioned than courts to decide what will advance Congress’s underlying purposes in particular sets of circumstances. If Congress takes account of agencies’ superior capabilities at the drafting stage, though, interpreters should not automatically invoke the same considerations again to make the formulation that Congress has chosen even less rule-like than it seems.

This point is sufficiently important that it is worth belaboring. Suppose that members of Congress agree on a particular objective and want to draft a statutory provision to promote that objective. In their opinion, generalist judges cannot be trusted to figure out what policies will advance Congress’s chosen objective in any given situation. If Congress were entrusting administration of the provision directly to the courts, Congress would therefore make the provision relatively rule-like; if one imagines a “ruleness” scale of zero to ten (with zero representing the paradigmatic “standard” and ten the paradigmatic “rule”), Congress might choose language that makes the provision a seven. But members of Congress instead plan to have a specialist agency administer the provision, and they have more confidence in the agency’s ability to exercise sound discretion about how best to achieve Congress’s underlying objectives in particular circumstances. They therefore draft the provision in such a way as to make it a five. For textualist judges, the fact that the agency is better able than courts to make direct application of Congress’s purposes is no reason to let the agency apply interpretive principles that effectively push the provision’s ruleness down to three; by hypothesis, Congress took the agency’s superior capabilities into account when it made the provision a five rather than a seven. For the very same reasons that textualist judges assume that Congress chooses the level of ruleness it wants when it legislates for the courts, textualist judges are likely to assume that Congress also chooses the level of ruleness it wants when it legislates for agencies.58

58 This analysis would lose force if agencies were better positioned than reviewing courts to determine the level of ruleness that Congress intended to adopt. But except to the extent that
Admittedly, there are some other respects in which textualist judges might think it perfectly fine for agencies to use interpretive techniques that are not associated with textualism. For instance, if an agency wants to consult publicly available legislative history to help it resolve some ambiguity in statutory language that it administers, textualist judges will generally let the agency do so; as long as the judges agree that the relevant provision is genuinely ambiguous, and as long as the agency’s interpretation stays within what the judges regard as the permissible bounds (which textualist judges might determine without regard to the legislative history), judges will not reject the agency’s interpretation simply because they would not themselves have paid attention to the legislative history. For reasons that I have discussed elsewhere, however, debates about the proper use of legislative history strike me as less central to the practical differences between textualism and purposivism than disagreements about whether to take a statute’s level of ruleness at face value. On that crucial topic, a judge who is committed to textualism for courts is unlikely to think that agencies should be free to be purposivists.

2. Should purposivist judges defer to an agency’s choice of textualism?

By the same token, a judge who is committed to purposivism might well see no reason to approve agency interpretations that can be defended only in textualist terms. To the extent that the differences between purposivism and textualism entail disagreements about the high-level goals of statutory interpretation, so that the type of “meaning” that purposivist judges seek differs from the type of “meaning” that textualist judges seek, neither set of judges is likely to think that agencies have access to inside information of the sort that interpreters should not consider, it is not apparent why that would be true. See Part III.A.

59 Indeed, a regime in which agencies consider legislative history while reviewing courts do not may be a good way of finessing disputes about whether the use of legislative history tends to restrict or to expand interpreters’ discretion. See note 7 and accompanying text. To the extent that legislative history is a useful restraint on interpreters’ discretion, it will have a salutary effect on agency decisions; to the extent that agencies try to use legislative history to create ambiguity where none exists, reviewing courts will rein them in. The legal system as a whole might thus get the best of both worlds.


61 On one account, for instance, the concept of “meaning” that is central to textualism focuses on the semantic import of the text that Congress enacted, while the concept of “meaning” that is central to purposivism is more receptive to inferences (drawn from the publicly available evidence) about exceptions or embellishments that members of the enacting Congress probably would have wanted to incorporate into the text if the relevant questions had occurred...
the relevant concept of "meaning" changes whenever Congress gets an agency involved. Of course, the most significant differences between purposivism and textualism may not reflect disagreements about the high-level goals of interpretation at all; purposivist judges may simply disagree with textualist judges about the pragmatic methods that will bring courts closest to achieving those goals. Given their stance in this debate, however, purposivist judges will resist the idea that textualism can be good for agencies even though it is not good for courts. After all, the pragmatic argument for embracing textualism over purposivism is driven by constraints on interpreters' information and capabilities. A judge who does not consider those constraints sufficient to justify textualism even for generalist courts is unlikely to think textualism appropriate for the more expert decisionmakers in specialist agencies.

3. Should the stalemate of empirical intuitions affect these questions?

The combined conclusion of the two previous parts—that textualist judges will see no reason to defer to an agency's choice of purposivism, while purposivist judges will see no reason to defer to an agency's choice of textualism—may itself seem to supply a powerful reason for such deference. As Vermeule notes, the judiciary as a whole is unlikely to coordinate upon either textualism or purposivism (pp 129–30); both camps are well represented, and the stalemate of empirical intuitions means that neither camp is likely to persuade the other. If the judiciary remains divided between textualists and purposivists, and if each camp tries to impose its preferred methodology on the same administrative agencies, reviewing courts risk engaging in a tug-of-war over those agencies' methods, producing considerable costs but no lasting benefits.

This problem may seem especially severe for agencies whose interpretations are equally likely to come before a variety of different courts, as opposed to agencies that face more concentrated review in a single federal court (such as the United States Court of Appeals for the D.C. Circuit). Not only does the D.C. Circuit have many fewer judges than the federal judiciary as a whole, but it follows the standard rule that individual panels set binding precedent for the circuit; thus, different panels are unlikely to give an agency mutually exclusive commands about how to interpret the very same provision. Yet even

agencies that can keep their eyes primarily on the D.C. Circuit must announce particular interpretations without knowing which judges will sit on the panels that review them. If textualist judges do not defer to agency purposivism and purposivist judges do not defer to agency textualism, the judges put agencies in an awkward position.

If Vermeule is correct about the judiciary's low capacity for coordination, however, individual judges cannot necessarily solve this problem. Even if they personally defer to each agency's decision about whether to embrace textualism or purposivism, their colleagues may well engage in the same old tug-of-war. Especially when multiple different courts all have jurisdiction over cases that implicate an agency's interpretation (which is when the tug-of-war problem is greatest), the decisions that any individual judge makes about whether to defer to the agency's methodological choices might have no discernible impact on how the judiciary as a whole interacts with the agency. The desire to produce good systemic effects might therefore be a weak reason for individual judges to tolerate methodological choices with which they disagree.62

If judges do not defer to individual agencies' decisions about whether to be textualists or purposivists, moreover, the current methodological divisions within the federal judiciary may actually produce some good systemic effects of their own. Vermeule is quite correct that as things currently stand, neither Congress nor administrative agencies can know whether the judges who confront their handiwork will be textualists or purposivists; an individual judge therefore should not embrace textualism because of the feedback effects that might ensue if all judges were textualists. What Congress and administrative agencies can know, however, is that some judges are textualists and others are purposivists. Knowledge of these very divisions can itself have useful feedback effects. Most notably, an administrative agency that confronts a divided federal judiciary, and that cannot know whether its interpretation of a particular statutory provision will be reviewed by textualist judges or by purposivist judges, might try to develop an interpretation that is acceptable to both camps.

62 The tug-of-war problem might conceivably give individual judges a reason to defer to each agency's varying methodological choices if the judiciary as a whole seemed more likely to coordinate on that approach than on either textualism or purposivism. But it is not clear why that would be true, and Vermeule does not suggest that it is. Instead, he maintains that the benefits of his approach are "strictly marginal or divisible" and do not assume any coordination among judges (p 226).
Because the differences between textualism and purposivism are not nearly so stark as the rhetoric of the two camps sometimes suggests, such overlaps will often be possible. To the extent that there is indeed "severe uncertainty" about whether textualism or purposivism is best, moreover, it seems affirmatively desirable for agencies to seek them out. Ironically, the system that gives agencies the greatest incentive to do so may be the system in which textualist judges and purposivist judges each insist that their chosen methodology is correct.

IV. CONCLUSION

When books begin as a series of law-review articles, their authors often have difficulty weaving them into a coherent theme. Not so Vermeule; he integrates his prior work smoothly and effectively. To be sure, a few seams do show: it is odd to find an extensive "case study" of a single Supreme Court decision (pp 86–117) in a book that promises to deemphasize "concrete cases and examples" (p 6), and sections of the book based on Vermeule's earlier articles do not always seem to take full account of his recent insights about the judiciary's low capacity for coordination in matters that have a political valence. But Vermeule has succeeded admirably in distilling eight years of articles into a sustained and cohesive argument.

Even readers (like me) who resist his broad conclusions, moreover, will profit from the more particularized insights that leap off his pages. The book is overflowing with important points; Vermeule's observation that what individual judges should do cannot always be determined by what one would like the judiciary as a whole to do, his reasons for skepticism about arguments premised on feedback effects, his distinction between situations of genuine uncertainty and situations in which decisionmakers can put more stock in their empirical intuitions, his recognition of the practical importance of the relationship between Chevron deference and the interpretive tools that courts use when no agency is in the picture, and a host of other insights are all significant contributions to the legal literature. Above all, his call for decisionmakers in every institution to have a decent humility, and to make honest appraisals of what they do and do not know, is advice that all should heed.

63 This chapter is based on Vermeule's important article Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 Stan L Rev 1833 (1998).
Clerks

Peter B. Rutledge†

Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court,

Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk,

Scholars studying the United States Supreme Court confront a difficult task. The proceedings and the operation of the institution are, in many respects, entirely confidential—and remain so long after a particular case has been decided or a particular justice has left the Court. Even after a justice has left, there is no guarantee that the justice’s private papers will be available for scholarly review (in case the justice destroys his papers or fails to make them available for public scrutiny). Consequently, Court scholars confront a basic dilemma. They can confine their study to publicly available sources, which may enable some profound hypotheses about the institution’s operations but always leave one with lingering doubts about the hypotheses’ validity. Alternatively, scholars can poke and prod nonpublic sources, most notably by attempting to interview the Court’s present and past personnel. This approach may provide a fuller look at the institution’s underbelly but may not yield generalizable conclusions, dependent as the method is on the willingness of the justices and Court personnel to speak.

Of course, scholars can surmount this dilemma by employing both methods, for they are not mutually exclusive. Then the challenge becomes a temporal one, requiring the scholar to spend years develop-

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ing protocols to test propositions and ferret out the inside information from the Court personnel. Once the scholar has generated a statistically significant data set, she must undertake the painstaking process of sorting that data to test the various hypotheses. Few scholars have the patience or, with the pressure to publish, the luxury of time to attempt this challenge.¹

If these challenges complicate study of the Court generally, they make study of its law clerks especially difficult. Until very recently, little was known about the clerks and their role, apart from the most basic data.² What do they do on a daily basis? How has their work evolved? How does their work influence—if at all—the Court’s operations? Answers are elusive because, as with the rest of the Court, so little of what clerks do is ever made public. Even publicly available information trickles out during disclosure of a particular justice’s papers rather than through the more systematic disclosure of the clerks’ work from a particular term or a particular generation. Further complicating systematic study, clerks are an incredibly innum group. Strong bonds of loyalty run from the clerk to the justice, making clerks extremely reluctant to discuss even the most ordinary details of their work in chambers.³ A recently instituted practice requires incoming clerks to sign an oath in which they broadly declare their intention not to disclose confidential information about their work at the Court.

¹ For a classic example of a scholarly work on the Court that successfully employs both methodologies, see H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 2-3 (Harvard 1991) (explaining that the Court is both a legal and political institution and consequently that its students should not lose sight of either approach). In addition to Perry, some of the best political science on the Court generally has come through the scholarship of Lee Epstein. See generally, for example, Lee Epstein and Jack Knight, The Choices Justices Make (CQ 1998) (modeling justices as rational policy seekers constrained by institutional structures); Lee Epstein, et al, The Supreme Court Compendium: Data, Decisions and Developments (CQ 1994) (containing data on many aspects of the Court’s functioning).

² For earlier efforts to develop a systematic understanding of the law clerk, see generally Paul R. Baier, The Law Clerks: Profile of an Institution, 26 Vand L Rev 1125 (1973) (sketching the history of the clerkship institution); Chester A. Newland, Personal Assistants to Supreme Court Justices: The Law Clerks, 40 Or L Rev 299 (1961) (examining changes in the ways justices have used law clerks).

³ See, for example, Ken Foskett, Judging Thomas: The Life and Times of Clarence Thomas 275–76 (Harper Collins 2004) (disclosing anecdotes that show a close bond between Justice Thomas and his clerks). Witness, for example, the reaction to the publication of Edward Lazarus’s Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court (Times 1998). See David J. Garrow, The Lowest Form of Animal Life? Supreme Court Clerks and Supreme Court History, 84 Cornell L Rev 855, 856 (1999) (gauging reactions to the publication of Closed Chambers).
Due to these limitations in the record, books about law clerks tend to come in one of two forms. Some are highly personalized biographical or autobiographical accounts of a clerk’s time at the Court, which tend to be rich in detail but ultimately anecdotal. Others are better described as somewhere between popular nonfiction and journalism, entertaining but ultimately lacking much scholarly value.

The two books under review, coincidentally released in the same year, attempt to fill this lacuna in the scholarship. As shorthand, I refer to the Ward and Weiden book as Apprentices and the Peppers book as Courtiers. Both apply the tools of the political scientist to the study of a particular institution at the Court. Both rely on many of the same primary sources in their historical account of the institution. While the books address the same general topic and apply some of the same methodological tools, they differ in terms of their organization, their focus, and their prescriptions. Both have been well received and have sparked a renewed interest in both the Court’s operation generally and the clerk’s role specifically. Their near-simultaneous publication provides an unusually good opportunity to assess the curious institution of the law clerk and to chart a direction for future research into the subject.

Before embarking on the review, it is important to address a critical and nonfrivolous question—who cares? Why does such an obscure institution as the Supreme Court law clerk, which Justice Douglas

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4 Quoting the Code of Conduct for Law Clerks of the Supreme Court of the United States, Canons 2, 3(C) (1989).
5 See, for example, J. Harvie Wilkinson, III, Serving Justice: A Supreme Court Clerk’s View (Charterhouse 1974) (recounting his clerkship with Justice Powell); Dennis J. Hutchinson and David J. Garrow, eds, The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR’s Washington (Chicago 2002) (recounting the personal experiences of a clerk for Justice James Clark McReynolds during the FDR “courtpacking” era); William H. Rehnquist, The Supreme Court 3-20 (Knopf 2002) (recounting Chief Justice Rehnquist’s time as a clerk for Justice Jackson).
6 See for example Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (Simon and Schuster 1979) (describing the first six years of the Burger Court); Lazarus, Closed Chambers (cited in note 3) (chronicling the author’s year as a Supreme Court clerk by relying on personal experience and confidential interviews).
7 By tools of the political scientist, I mean methods such as modeling, statistical sampling, empirical testing of propositions, and rational choice theory, among others. They also draw heavily on the theoretical literature in political science on matters such as the importance of institutions in explaining political outcomes.
8 See, for example, Stuart Taylor, Jr., and Benjamin Wittes, Of Clerks and Perks, Atlantic Monthly 50, 50 (July/Aug 2006) (arguing that the clerkship position should be eliminated); Richard A. Posner, The Courthouse Mice, New Republic 32, 32-35 (June 12, 2006) (reviewing Waard and Weiden’s Courtiers and Peppers’s Courtiers).
once allegedly described as the “lowest form of animal life,”9 deserve (two!) full-length book treatments and further commentary in one of the country’s premier law journals? The answer is not immediately obvious. Officially, clerks have absolutely no power. They do not vote on whether to grant petitions for certiorari. They do not vote on how to resolve merits cases. They do not issue or sign opinions. Unlike the justices whom they serve, they do not have life tenure but typically only work for a single term, at most two. So why bother?

To this challenging question, several answers are possible. An obvious one is that clerks serve as the justices’ information gatekeepers. At present, the Court receives nearly nine thousand certiorari petitions each year, over one thousand applications, and thousands of motions and other miscellaneous filings.10 Under these circumstances, no one person can read every single piece of paper filed at the Court. Consequently, the justices look to the clerks—individually and as an institution—to identify those pieces of paper most worthy of their attention. Additionally, at present, each term the Court resolves eighty to ninety cases on the merits on a wide array of questions, ranging from obscure questions of admiralty law to grand constitutional debates.11 For these cases, the clerks serve as the justices’ miners, probing all the possible sources of law to help the justice develop a position and, sometimes, articulate that position in an opinion. Here, it bears emphasis that the clerks are the only people with whom the justices can openly discuss the merits of the cases (apart from the other justices). A third answer, and one critical to both books’ theses, is the symbiotic relationship between a law clerk and the operation of the Supreme Court as an institution. As the Court has changed, clerks have changed with it. These changes in the clerks’ activities have wrought additional changes at the Court. For these and other reasons, a thor-

9 See Garrow, 84 Cornell L Rev at 855 n 1 (cited in note 3) (quoting Justice Douglas).
10 In terms of the applications, the Journal of the Supreme Court of the United States has references to specific applications but does not offer a cumulative statistic. However, one can estimate the number from reviewing the docket during the last few weeks of a term and the first few weeks of the new term (for example, the Supreme Court received approximately 1300 applications in October Term 2005). The number of motions is a hard statistic to compile accurately. For instance, the Court receives a couple of hundred miscellaneous motions, plus a few thousand motions to be admitted to the bar, as well as numerous motions in cases on the docket. For historic caseload trends at the Court, see Epstein, et al, Supreme Court Compendium at 70–80 (cited in note 1).
ough understanding of clerks is necessary both for the political scientist who studies the institution and for the lawyer who practices before it.

This review examines both books' contributions along several dimensions. It begins with the books' theoretical underpinnings, written in the "new institutionalism" school of political science. It then turns to methodology, where the books diverge sharply—Courtiers takes a more historical approach and Apprentices employs statistical sampling (based primarily on surveys of former clerks). After considering methodology, the review moves to law clerk recruitment and retention, trends that have undergone significant shifts in recent decades and, with respect to matters of diversity, have been the subject of recent controversy.12 The review then considers the role of clerks in reviewing certiorari petitions and the changing rules governing the operation of certiorari review. After analyzing certiorari, the review addresses the clerks' role in the disposition of cases on the Court's merits docket, identifying and analyzing some of the original contributions made by both books to a study of the Court. Finally, the review considers the books in the broader policy debate over the future of the Court and the role of clerks. Both books' failure to engage this debate is one of their few real disappointments. Nonetheless, the impressive array of historical and statistical material that they have amassed is bound to influence that debate in the future.

I. THEORY

While they write about a legal institution, the authors do not approach their projects from a lawyer's perspective (though Peppers attended law school and clerked for a federal judge). Instead, they view the Court and its clerks through a political scientist's lens. This perspective presents both opportunities and challenges for the authors.

The opportunities lie in the fact that the political scientist, as opposed to the lawyer, has more specialized training in the theories about the operation of political institutions and thus is better positioned to identify patterns and trends that a lawyer might miss.

Both authors analyze the relationship between the Court and its law clerks in terms of the "new institutionalism."13 According to this

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12 See Margaret Raymond, The Importance of Being Important, 84 Iowa L. Rev 147, 160–61 (1998) (noting that "the clamor to increase the gender and racial diversity of Supreme Court clerks continues").

13 For a prior effort to analyze the Court, though not its clerks, in this school, see generally the essays in Cornell W. Clayton and Howard Gillman, eds, Supreme Court Decision-Making: New Institutionalist Approaches (Chicago 1999).
theory, institutions are "rules of the game in a society or, more formally . . . the humanly devised constraints that shape interaction" (Peppers, p 11). These "rules" shape the way in which "players" in the "game" behave. If it stopped here, the account would be interesting but not especially profound. But the new institutionalism takes the analysis one important step further. It posits, as Peppers explains, that the players "can sometimes change the rules of the game to better achieve their goals. Hence institutions (the rules) affect the players, and the players re-shape and amend the rules" (Peppers, p 11) (emphasis added).

While both books begin from a common theoretical starting point, they diverge in their elaboration. Apprentices uses the new institutionalism to demonstrate both how specific changes in the Court's institutions have altered the duties of the clerk and how these alterations in the clerks' duties have had further influence on the institution. For example, growth in the certiorari docket led to several important changes, including authorization to hire more clerks, creation of the cert pool, and use of a "dead list" containing cases not discussed at conferences (Ward and Weiden, pp 147-48). These changes freed up clerks to participate in other tasks, most notably playing an increased role in the preparation for and disposition of cases on the Court's merits docket. Greater clerk participation in the merits cases (by a larger number of clerks) allowed the justices to produce more opinions, arguably spawning the proliferation of separate opinions in recent years and a decline in consensus among the justices. This represents a classic example of the new institutionalism—one set of institutions influences the roles of actors within those institutions, and through this shift those actors thereby exert further influence on the institution's behavior.

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15 For more on the cert pool, see Part IV.
16 The books do not represent the first example of linking these sorts of changes to behavior at the Court. Others have complained about how the increases in staff and Court personnel have undermined interaction at the Court and hurt its operation. See Joseph Vining, Comment, Justice, Bureaucracy, and Legal Method, 80 Mich L Rev 248, 251–52 (1981). The rise of the certiorari pool and increase in the number of clerks also correlates with a decline in the number of certiorari petitions that the Court annually grants. See Epstein, et al, Supreme Court Compendium at 66–70 (cited in note 1). On the correlation between the increase in the number of clerks and the decline in consensual norms at the Court, see Bradley J. Best, Law Clerks, Support Personnel, and the Decline of Consensual Norms on the Supreme Court of the United States, 1935–1995 at 123–42 (LFB Scholarly 2002). For a recent attempt to formalize this correlation, see David R. Stras, The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process 19–44 (Minnesota Legal Studies Research Paper No 06-61), online at http://ssrn.com/abstract=938566 (visited Jan 22, 2007).
Courtiers uses the theory to provide an explanatory typology by which to describe three historical eras in which clerks worked. The first, spanning approximately from the tenure of Chief Justice Waite until that of Chief Justice White (1874–1921) involved most justices using clerks as “stenographers.” During this era, most justices (except for Gray, Harlan, Holmes, and Brandeis) used their clerks as secretaries: typing opinions, delivering mail, and completing office work (Peppers, p 70). The second era, spanning from the time of Chief Justice Taft to that of Chief Justice Warren (1921–1969), involved most justices using law clerks as “legal assistants.” During this era, most justices (again with some exceptions) used their clerks to write memos on the certiorari petitions and to edit opinions that the justices themselves drafted (Peppers, p 143). Pointedly, most clerks did not write first drafts of the opinions during this era (Peppers, p 143). The third era, beginning with Chief Justice Burger and continuing to the present day, involves justices using their law clerks as “law firm associates” (Peppers, pp 145–205). During this current era, most justices participate in the cert pool, require bench memos from their clerks, and have their clerks write first drafts of opinions. This typology is the unique contribution made by Courtiers.

Whereas Apprentices offers a more sophisticated empirical account of institutional change at the Court, Courtiers offers a more theoretically nuanced account of why particular institutional changes (such as the cert pool) represented a rational response. Here, Courtiers relies on principal-agent theory. According to that theory, principals (here the justices) employ agents (here the law clerks) “in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal.” In doing so, however, the principal faces at least two challenges. First, asymmetric information may mean that the principal knows less about the agent than the agent knows about the principal (that is, a potential clerk is likely to know more about Justice Kennedy, from opinions, media reports, etc.,

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17 Justices Gray, Harlan, Holmes, and Brandeis, by contrast, were the first justices, according to Peppers’s historical research, to involve their clerks in legal research and the deliberations on the merits of the cases (Peppers, pp 43–44; 54–70). See also Leonard Baker, Brandeis and Frankfurter: A Dual Biography 131 (Harper 1984) (describing law clerks as stenographers).
18 Justice Frankfurter stood alone and generally did not involve his clerks in certiorari review, apparently reflecting his belief that personal review of the certiorari petitions was his most important job (Peppers, p 105).
19 Some justices (Clark, Frankfurter, Minton, Murphy, and Vinson) regularly used their clerks to draft opinions, and a few (Black, Jackson, and Reed) did so occasionally (Peppers, p 143).
than Justice Kennedy will know about the applicant, who has a far less extensive public record). This forces the principal to rely on decision cues to compensate for the asymmetry (in this context—"feeder schools" and, more recently, "feeder judges" discussed in Part III). Second, as the principal delegates more responsibility to the agent, risks of moral hazard for the agent increase. This forces the principal to implement monitoring and sanctioning mechanisms to ensure that the agent does not defect or shirk his duties but, instead, continues to promote the principal’s interest.

Viewed in this light, several institutional changes at the Court can be explained. For example, whereas the cert pool is often explained as a labor-saving tool by which clerks share the burden of reviewing petitions, Courtiers sees it instead as a monitoring mechanism whereby the justices, who have delegated to their clerks more responsibility for reviewing a rapidly rising number of certiorari petitions, rely on clerks from other chambers to review the poolwriter’s memo (Peppers, pp 210). This ensures, so goes the argument, that clerks who might “defect” (by, for example, injecting their own personal preferences into the analysis of a petition) are checked by clerks from other chambers who review the pool memo for bias.

Though the political scientist brings a more powerful set of tools to the study of the Court (as these books demonstrate), he also confronts a challenge. Unlike the lawyer, the political scientist is less likely to be sensitive to the exogenous factors that shape the institution. While both books offer a compelling account of how the clerkship institution fundamentally transformed during the Burger era (the convergence described in Apprentices; the law firm associate model described in Courtiers) (Ward and Weiden, p 147; Peppers, p 145), neither book adequately addresses a number of exogenous factors contributing to this change. For example, neither book describes the major changes in the Court’s exercise of its jurisdiction—from the tradition of writs of error or appeal (under which the Court’s exercise of jurisdiction was mandatory) to a greater preference for the writ of certiorari (under which the Court could exercise the discretion whether to decide a case). Nor do the books adequately examine

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doctrinal developments essential to their account—such as the demise of the *Lochner* era and the concomitant expansion of the federal administrative state, the incorporation doctrine and its effects on federal review of state criminal convictions, and an expansion of the habeas corpus remedy. Each of these doctrinal developments added to the Court’s workload and, thus, compelled institutional changes to accommodate these pressures.

A second challenge for the political scientist is to be sufficiently sensitive to legal nuances in the account. For example, both books fail to discuss adequately the importance of death penalty cases to the Court generally and law clerks specifically. Since the Supreme Court held in *Gregg v Georgia*\textsuperscript{22} that capital punishment could comport with the Constitution,\textsuperscript{23} capital cases have been a regular part of the Court’s docket. In October Term 2005, for example, the Court received fifty-six applications in capital cases, most of which were accompanied by certiorari petitions.\textsuperscript{24} While both books at least capture the certiorari filings in their general statistics on the Court’s growing certiorari caseload, the books fail to break out these cases and afford them distinct treatment.\textsuperscript{25} The Court has a full-time employee in the Clerk’s Office whose responsibility includes handling all filings in capital cases as they come in the door.\textsuperscript{26} Both books fail to offer any account of how the presence of this person in the institution shapes the treatment of capital cases at the Court.

Closer study might have buttressed both books’ use of the new institutionalism. Many capital cases, unlike most certiorari petitions, often must be acted upon under relatively taxing time conditions—with multiple filings on the night of a scheduled execution not un-

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\textsuperscript{22} 428 US 153 (1976).

\textsuperscript{23} See id at 187.

\textsuperscript{24} According to the Death Penalty Information Center’s Execution Database, online at http://www.deathpenaltyinfo.org/executions.php (visited Jan 22, 2007), there were sixty-two executions from October 2005 through October 2006. A review of the Court’s docket shows that six of those individuals did not appeal their sentence to the Court. See http://www.supremecourts.gov/docket/docket.html (visited Jan 22, 2007).

\textsuperscript{25} For example, Douglas Berman has shown how the certiorari pool influences the number of capital cases on the Court’s docket. See generally Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 Cato S Ct Rev 311.

\textsuperscript{26} See Stern, et al, *Supreme Court Practice* 25–28 (cited in note 21) (detailing the role of the Clerk’s Office).
usual. This increases pressure for clerks to rely on an information-sharing network to decide the disposition to recommend to their respective justices, a network that *Apprentices* identifies but fails to apply in this context (Ward and Weiden, pp 159–70). Likewise, *Courtiers* overlooks entirely how the Court’s treatment of the typical execution-night filing—a memo written by the Circuit Justice to the entire conference and reviewed by all the other chambers—exemplifies, much like the cert pool, what Peppers describes as a “monitoring” mechanism to prevent defections in the principal-agent relationship.

This Part has considered the theoretical tradition in which both books were written. Through application of the new institutionalism theory, both *Apprentices* and *Courtiers* offer a lens through which to view the Court, one that both books might have used more fully. The next Part compares the differing methodologies used by both books to fortify their arguments.

II. METHODOLOGY

While both books are written in the same basic theoretical tradition and rely on many of the same primary sources, they employ partly different methodologies to support their theses. Both books utilize the same basic corpus of historical material such as biographies, the justices’ internal correspondence, and essays by former clerks recounting their work at the Court. In both books the authors also directly obtained information from former clerks—by means of surveys, correspondence, and personal interviews.

Beyond this common ground, their methods diverge. *Courtiers* reads more like a history, aggregating the evidence in the available record and searching for patterns. With the exception of its treatment of law clerk recruitment, discussed further below, *Courtiers* makes little effort to “crunch the numbers” or engage in any type of sophisticated statistical analysis of the available data. By contrast, *Apprentices* adopts a much bolder approach. It is replete with time-series analyses on matters ranging from the mundane (such as the number of justices with whom applicants interviewed) to the controversial (such as a time-series analysis of the frequency with which clerks allegedly changed their justice’s mind on cases or issues). To buttress these arguments, the authors relied primarily on detailed surveys of clerks in which they probed, among other things, the clerks’ perception of their role. This difference in methodology affects the nature of the books’ conclusions. Whereas the conclusions in *Courtiers* are narrow but cautious, the conclusions in *Apprentices* are both more profound and more unstable.
Law clerk hiring criteria provide a good example where the more sophisticated methodology in *Apprentices* enables a more profound conclusion than in *Courtiers*. There is much speculation about the precise hiring criteria used by the different justices. Academic performance? “Feeder” judges? Law school recommendations? Ideological litmus tests? Both books tackle this problem but arrive at different conclusions that in turn are traceable to their different methods. *Courtiers* argues that law clerk selection has become *more* ideologically driven. In theoretical terms, Peppers explains this argument in terms of principal-agent theory: as justices have delegated a greater degree of responsibility to their clerks, ideological litmus tests provide one mechanism by which justices can decrease the likelihood that a clerk will defect by not behaving in a manner that advances the justice’s interest (Peppers, p 209). The problem with this argument is that Peppers does not add much to the supporting evidence. Apart from citing data contained in a 2001 political science article, Peppers relies primarily on anecdotal information contained in a handful of secondary sources such as biographies of justices or confirmation hearings of former clerks who were nominated to the federal bench (Peppers, pp 200–02). The problem is in the proof—while each of these anecdotal bits may be interesting, they do not amount to a very compelling set of evidence to prove a controversial proposition about the supposed increased importance of ideology in law clerk selection.

*Apprentices* arrives at a more sophisticated conclusion and, due to the evidence the authors marshal, demonstrates it in a more convincing fashion. Ward and Weiden argue that ideology is a factor—but not the dominant factor—in law clerk selection. Initially, they utilize a survey in which they asked former law clerks to rank-order seven criteria in terms of importance to their justice’s hiring selection (Ward and Weiden, p 276). Among the seven listed criteria, political ideol-

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27 See Corey Ditslear and Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J Politi 869, 869–83 (2001) (arguing that the justices have, since the 1990s, increasingly hired ideologically polarized clerks).

28 Citing Foskett, *Judging Thomas* at 279–80 (cited in note 3) and Andrew Peyton Thomas, *Clarence Thomas: A Biography* 465 (Encounter 2002). Peppers does gather some original data on the ideology of law clerks (Republican versus Democrat) (Peppers, pp 35–37). Those data merely demonstrate a slight uptick since the tenure of Chief Justice Burger in the number of law clerks who self-identify as Republican (a shift that could easily be offset by the large number of former clerks who did not answer the question). Regardless of the shift (or the defensibility of equating legal philosophy with political party affiliation), Peppers does not rely on these data about clerks’ ideology to support his argument about justices’ use of ideology in their hiring practices.

29 The seven criteria included: (1) prior clerkship experience, (2) law school academic performance, (3) quality of the law school, (4) similar political views as justice, (5) recommenda-
ogy ranked dead last, garnering only two votes for "most important" and three additional votes as "third most important" among 182 clerks (Ward and Weiden, p 69). This would suggest that Peppers's conclusion, rooted in anecdote, is utterly wrong. Ward and Weiden then take the analysis one step further. They combine existing data on the justices' ideology with their own survey results on law clerks' ideology and document a growing convergence over time between law clerks' ideologies and justices' ideologies (Ward and Weiden, p 105). This suggests that, clerks' own impressions notwithstanding, ideological convergence between clerk and justice has been fairly consistent at least since the tenure of Chief Justice Burger.

This is not to suggest that Ward and Weiden's analysis is airtight or flawless. For one thing, one can legitimately question whether their categories of "political ideology" (liberal versus conservative) are appropriate for measuring a law clerk's legal philosophy. Other categories such as "textualist," "originalist," "processualist," etc., may have been more appropriate measures of ideology in this context. For another thing, the mere coincidence of ideological convergence between justice and clerk does not necessarily prove that ideology itself caused the selection of a particular law clerk. It may be that lawyers who attend the same school or come from a similar background happen to have the same ideology, and that those commonalities (rather than the ideology itself) cause the convergence. Finally, the low response rate to the Weiden and Ward survey (28 percent) makes their conclusions vulnerable (p 10). Had they been able to obtain more complete survey results, the data might look very different. Regardless of its ultimate validity, Weiden and Ward's thesis on the recruitment issue is more persuasive than Peppers's due to their great amount of evidence and their use of it.

In other areas, Weiden and Ward's method makes Apprentices more likely than Courtiers to overstate its conclusions. This is particularly true where Weiden and Ward attempt a time-series analysis. Using this analysis, the authors argue that, among other things, clerks were more likely to change the views of their justices during the Rehnquist Court then during any of the tenures of the three preceding chief justices (Ward and Weiden, p 189). They base this argument on survey responses of former clerks who were asked to rate this factor. The problem with this approach, though, is that the authors are not entirely clear about how many clerks they surveyed in each era at the...
This difficulty in method, which is not entirely the authors’ fault, leaves one not fully confident in their conclusions.

This Part compared the methodology employed in the two books. While they both start from a common set of sources, *Apprentices* has amassed a more impressive array of original data and employed more sophisticated statistical analyses to support its more powerful conclusions. These data make some of the arguments in *Apprentices* more persuasive than in *Courtiers*. Due to the lower response rate and the use of time-series analysis, however, they also are more vulnerable. The next three Parts of this review consider specific applications of the authors’ methods—recruitment and retention, the certiorari pool, and merits cases.

**III. RECRUITMENT AND RETENTION**

Both books particularly shine in their discussion of recruitment and retention norms at the Supreme Court. With respect to recruitment, both books systematically lay out the historical trends. When they served as stenographers (in Peppers’s terms), the clerks came from several schools (mainly Harvard) and applied directly to the justices (Peppers, p 25). As their role evolved into something more akin to legal assistants (again Peppers’s term), the justices tended to hire clerks directly out of law school and looked to faculty members at certain law schools (centrally Harvard) for assistance with their hiring decisions, whether as “cues” for a justice’s decision or, in some cases, making the hiring decision for the justice (Peppers, pp 83–144). Finally, as they assumed their current role as “law firm associate,” starting with the tenure of Chief Justice Burger, certain lower court judges (“feeder judges”) played a more important role in the ultimate selection of the justices’ clerks (Peppers, p 33; Ward and Weiden, p 84).

While this story is a familiar one, both books take the analysis one step further and link the shifts in recruitment behavior to changes in the law clerk’s role. Prior to the tenure of Chief Justice Burger, less than 50 percent of clerks had prior clerking experience (Peppers, p 31; Ward and Weiden, p 77). Both books explain this in terms of the fact

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30 Moreover, relying on clerks’ self-assessment of matters such as their influence on justices’ decisionmaking process is precarious at best. Such self-assessments are fraught with biases, risks of inflated self-importance, and serious dissonance from the justices’ actual views. While Ward and Weiden explicitly acknowledge this risk, they do not control for it (Ward and Weiden, p 20). In most cases, the sitting justices were unwilling to speak with the authors.

31 See also Newland, 40 Or L Rev at 308 (cited in note 2).
that most justices during this era hired clerks as "legal assistants," researching points of law and reviewing certiorari petitions but not assisting with opinion drafting. With the possible exception of petition review, a clerkship with a federal appellate court did not provide the clerks any new skills that they would particularly need at the Court. Interestingly, the justice most likely to hire experienced clerks during this era was Justice Frankfurter who, according to the authors, was one of the few justices whose clerks drafted opinions during this time (Peppers, p 143). By contrast, during the tenure of Chief Justice Burger, and certainly by Chief Justice Rehnquist's tenure, clerks with lower court experience became the norm. Indeed, during the Rehnquist Court, virtually every clerk had some prior clerking experience (Peppers, p 31; Ward and Weiden, pp 77–78). In both books' views, this shift makes sense in light of the clerks' changing responsibilities. Beginning with Chief Justice Burger's tenure, the clerks played a greater role in opinion drafting. With this change in responsibility, lower federal court experience grew in importance: it provided an invaluable training ground for that type of work (Peppers, p 175; Ward and Weiden, p 78).

While both books document this interesting correlation between clerk responsibilities and recruitment trends, they overlook an important feature of the recruitment process: the incentives of the other institutions, such as law schools and feeder judges, that serve as cues in the justices' hiring decisions. If we assume, as Pepper does explicitly and Weiden and Ward do implicitly, that law clerks and justices are self-interested actors, then under this model law schools and feeder judges should behave similarly. Certain law schools and federal court judges will seek to dominate placements of Supreme Court clerks. With respect to schools, placing students at the Court brings several potential benefits, including marketing to prospective students, promoting alumni giving, and enhanced reputation among other schools and the professional community. Thus, it is hardly surprising to find schools engage in a concerted effort to persuade justices to hire their top students. While both books contain examples of schools displaying such behavior (Peppers, p 88; Ward and Weiden, pp 70–71), they fail to recognize that their own rational choice model can account for this behavior.

With respect to lower court judges, placing clerks at the Court reaps at least two benefits. First, it enhances the judge’s prestige. Logically, this enhanced prestige increases the likelihood that the best law students will apply to that judge for an appellate clerkship. Second, placing clerks at the Court may help some lower court judges in their efforts to join the Court as justices themselves one day. This is true both because the judge develops a reputation for producing first-rate work and because the judge’s clerks, after clerking for the Court, may go on to assume high-level positions in the government, during which they may promote their former boss’s candidacy. Here too, both books fail to analyze recruitment patterns in terms of the rational interest calculus of the lower court judges themselves.

In addition to their explanation of recruitment, both books also address issues of retention. In particular, both books explore trends in law clerk tenure (though Apprentices merely notes the trends, whereas Courtiers, as detailed below, seeks to explain them). One would expect that, as the clerks assumed greater responsibility and consequently in some sense held increasingly interesting jobs, they would have stayed around longer. Yet the data contained in both books convincingly demonstrate precisely the opposite result. During the era where they had relatively little responsibility, law clerks served justices for several years (Peppers, pp 49–70; Ward and Weiden, pp 30–34). As clerks assumed greater responsibility, such as reviewing certiorari petitions or assisting justices with their opinions, they typically served for two years, but not longer (Ward and Weiden, pp 36–45). As the clerks assumed yet more responsibility starting with the Burger Era (drafting opinions, etc.), they almost never stayed for more than a year (Ward and Weiden, pp 46–47) (one exception being when a justice retired, and his or her successor hired experienced clerks to facilitate the transition). Ironically then, as the job arguably became more interesting, clerks stayed for a shorter period of time.

Not only is the result ironic from the perspective of the clerks’ interests, it is at first glance also ironic from the perspective of the justices’ interests. In general, when a job requires relatively few skills, the learning curve is slight, and employees are easily replaced. By contrast, when a job entails heavy responsibility, the learning curve is steep, and it is in the employer’s interest to retain qualified employees once they are trained. Applied in this context, then, one would expect

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33 For a description of the learning curve faced by new clerks, see Perry, Deciding to Decide at 77–85 (cited in note 1).
the justices to be less concerned about retaining clerks during the "stenographer" era and more keen to retain them for longer tenures during the "law firm associate" era. Yet again, both books convincingly demonstrate that precisely the opposite pattern occurred.

What then explains the demise of the career law clerk and the ascendance of the single-term-clerk model? Several conventional explanations are possible. One is financial—that clerks earn far less as clerks than they could in the private sector; lured by the prospect of large signing bonuses, high salaries, and prestigious government jobs, the modern-day clerks rationally move into other, higher-paying jobs after a year. Another explanation is burnout—the modern-day clerkship is, by many accounts, an extremely demanding year, requiring clerks to work around the clock. After a year, they are prepared to move to another job promising either a superior quality of life or, at least, superior compensation for the demanding hours. Yet another explanation would be a social one—that we live in an increasingly transient society in which individuals change jobs more frequently. A final conventional explanation is topping out the learning curve. According to this explanation, clerks move on because, by the end of a year, they have learned all the key aspects of the job—how to draft a pool memo, a bench memo, and an opinion. While the legal issues may change from year to year, the skill set does not, so the clerk seeks other challenges. All of these explanations might be ones that one would expect from lawyers who focus primarily on the practical considerations.

While Apprentices does not really engage this debate, Courtiers does so, and its explanation exemplifies the scholarly benefits that come from applying the political scientist's tools to a legal institution. Courtiers explains the emergence of the single-term clerk in terms of principal-agent theory as a type of control mechanism for the justice. In other words, according to Peppers (who himself cites a former clerk cum judge for this point), keeping the clerks around for a single year represents a means by which the justices can "prevent[] law clerks from fully mastering the job and consolidating power" (Peppers, p 207).

This hypothesis certainly deserves further testing. While the evolution of tenure in the Supreme Court law clerk lends some credence to it, countervailing trends in the federal appellate courts arguably undercut it. As with the Supreme Court, federal appellate courts have

34 See, for example, Amy Joyce, Latham & Watkins Lands 6 Coveted Clerks, Wash Post D2 (Oct 30, 2006) (describing current signing bonus and salary information for clerks).
confronted an increasing workload in recent years. Under the logic of Peppers's thesis, this increased workload should require justices to delegate a greater share of responsibility, including opinion drafting, to their clerks. To minimize the risks of defection, federal appellate clerks should serve only one year. Yet several federal appellate judges have shifted in the opposite direction, opting for at least one and sometimes more permanent clerks. This issue presents an opportunity for further research to determine whether trends in the lower federal courts undercut Peppers's thesis or can be squared with it based on the differences in preferences between Supreme Court justices and federal appellate judges.

IV. THE CERTIORARI POOL

On the ground floor of the Supreme Court, beneath the great hall, a small video room plays a brief video about the Court. In the video, then-Justice O'Connor delivered a memorable line that "each petition receives the same individualized consideration." That statement, however noble, is at best irrelevant and at worst wrong; it masks a much more complex situation involving the certiorari pool where the clerks, as an institution, are most important.

In October Term 2005, the Supreme Court received approximately nine thousand petitions. If Justice O'Connor's statement were true, this means that if the justices never slept, never met, and never did anything else except review certiorari petitions around the clock, they could dedicate approximately one hour per certiorari petition. Factor in a healthy eight hours of sleep per night, and that raises the ratio to forty minute per petition, again assuming that they did nothing else. If we add in the justices' other basic time commitments (oral argument, weekly conferences during the term, and, say, four hours

35 See, for example, William L. Reynolds and William M. Richman, Studying Deck Chairs on the Titanic, 81 Cornell L Rev 1290, 1290 (1996) (explaining that appellate judges are increasingly delegating responsibilities to clerks in order "to cope with a rapidly growing caseload").

36 Some state and federal judges exclusively employ permanent (or "career") law clerks, and others employ a mixture of permanent and one-, two-, or four-year, law clerks. See Online System for Clerkship Review, online at http://oscar.dcd.uscourts.gov/ (visited Jan 22, 2007). See also Federal Law Clerk Information System, online at https://lawclerksao.uscourts.gov (visited Jan 22, 2007); Sally J. Kenney, Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court, 25 L & Soc Inquiry 185, 190 (2000) (noting that despite experiments in some federal and state courts, most appellate clerks serve two years at most).

37 The Court had 9608 certiorari petitions on its docket during the 2005 term. The Court received 8521 new petitions, and 1087 were carried over from the 2004 term. See Journal of the Supreme Court of the United States at II (Oct Term 2005) (cited in note 10).
per day on merits cases when the Court is sitting), that reduces the available time to less than a half hour per petition. In this time, the justice must theoretically read the petition, brief in opposition, reply brief, any amicus briefs, and appendix (including the lower court opinion), plus research the relevant case law and formulate a view on whether a petition is certworthy. Individualized consideration?

The dirty little "secret," as both books capably document, is that the justices inevitably must rely at least to some extent on their clerks to assist with review of the massive number of petitions for writs of certiorari, not to mention the stay applications and miscellaneous motions filed with the Court throughout the term.\footnote{For a more dated description of the process, see Doris Marie Provine, Case Selection in the United States Supreme Court 22–26 (Chicago 1980).} All justices except Justice Stevens currently participate in the cert pool, in which a clerk from one of the eight participating chambers drafts a memorandum to the entire Conference (Ward and Weiden, pp 125–26). The memorandum summarizes the facts of the case, the lower court's opinion, and the parties' arguments. It also analyzes the "certworthiness" of the issues presented by the case and makes a recommendation about how the Court should dispose of the petition. For pending cases, the recommendation is generally "grant," "deny," or "hold," though technically other recommendations are possible. While Justice Stevens does not participate in the pool, he does rely on his clerks to screen the petitions and identify those that, in their view, he might find certworthy (Peppers, p 196; Ward and Weiden, p 126).

On this topic, the analysis in Courtiers is deeper, grounded as it is in principal-agent theory.\footnote{For a prior effort to use principal-agent theory to explain the clerks' role in the justices' certiorari votes, see generally Jan Palmer and Saul Brenner, The Law Clerks' Recommendations and the Conference Vote On-the-Merits on the U.S. Supreme Court, 18 Just Sys J 185 (1995–1996).} While most accounts of the cert pool describe it largely in terms of being a labor-saving device (with the justices spreading responsibility for reviewing the petitions across more clerks),\footnote{For a discussion of the cert pool's operation, see generally Barbara Palmer, The “Bermuda Triangle?” The Cert Pool and Its Influence over the Supreme Court's Agenda, 18 Const Commen 105 (2001) (explaining the cert pool's organization and assessing its validity). For an account of the cert pool's creation in the biography of its likely architect, see John C. Jeffries, Justice Lewis F. Powell, Jr. and the Era of Judicial Balance 270–72 (McMillian 1994) (noting Justice Powell's inclination to add staff and make various other innovations—such as the cert pool—to increase efficiency in chambers).} Peppers sees the pool as a means by which the justices can monitor the clerks' behavior. Specifically, before the justices decide how to dispose of the petition, clerks in other chambers review the poolwriter's work (especially when a justice has placed the petition on
the discuss list). The scrutiny given by the other chambers, the account goes, reduces the risks that the author of the pool memo will defect; review by eight other chambers enhances the likelihood that someone will detect the defection. In other words, review of the pool memo by clerks in other chambers keeps the original author “honest.” It is, according to Peppers, just one of many means by which justices (as principals) control defection by the clerks (as agents).

Both books attempt to show how the creation of the pool has affected the relationship between the justice and the clerk, but sometimes the authors commit errors that are arguably attributable to their reliance on political science methodology and inattentiveness to legal detail. For example, Apprentices explains how pool memos are more likely to be encyclopedic, “attempting to incorporate every possible argument in an objective fashion” (Ward and Weiden, p 130). By contrast, in-chambers memos, which are prepared by a clerk for his or her individual justice, tend to be more terse and direct. In the authors’ view, this demonstrates that the cert pool actually increases the justices’ workload instead of reducing it. This is for two reasons. First, the justices may now have to read multipage, sometimes encyclopedic, memos, whereas in earlier generations (where the law clerks acted as “legal assistants”) the clerks often only wrote a single-page pool memo (also known as a “flimsy”). Second, the justices also may have to mark up memos prepared by clerks in other chambers.

Later on, Ward and Weiden cite another pool memo where the author (a Scalia clerk) recommended that the Court deny the petition, yet Justice Scalia subsequently voted to grant it (Ward and Weiden, p 191). This anecdote, in their view, indicates the limits on clerk influence over the certiorari decisions of their justices.

Both anecdotes suffer from a common misconception that all the clerk’s work is geared toward advancing the interests of his or her individual justice. Sociological research tracing back to Weber illuminates how employees in a single job may operate in several different capacities. When their work requires them to serve the entire institution, they tend to behave in a more bureaucratic fashion, applying standardized criteria to a particular problem. By contrast, when they

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41 Though they do not participate in the certiorari pool, Justice Stevens’s clerks have access to the pool memos.

42 Other monitoring mechanisms include the Law Clerk Code of Conduct (which imposes a sanction for unauthorized disclosure) and the creation of the “lead clerk” in certain chambers (who has the responsibility for managing the other clerks) (Peppers, p 201).

43 Perry, Deciding to Decide at 51 (cited in note 1).
are working on behalf of a single individual, the employee can behave more flexibly, aligning his work style or product with the particular needs of his principal. That literature has applications in this context. When writing a pool memo, the clerk is effectively writing for the entire Court, not only for his or her particular justice. Different justices participating in the pool may have different preferences about which issues or arguments are especially compelling (or not). These preferences may not be immediately apparent to the clerk drafting the pool memo. This uncertainty forces the poolwriter to draft the memo taking into account all those justices' interests, not simply those of his or her boss. Thus, greater prolixity almost becomes unavoidable in the pool writing process.

It is also entirely coherent for a justice to vote contrary to the disposition recommended by his own clerk acting as a poolwriter (or, for that matter, for a clerk to recommend personally to his justice a different disposition than he recommended to the Conference). That divergence simply reflects the different capacities in which the clerk is operating. When evaluating the certworthiness of the petition for the entire Court (or at least the justices participating in the pool), the clerk is simply applying those standards set forth in Supreme Court Rule 10. When evaluating the certworthiness of the petition for his or


45 US S Ct Rule 10 is entitled "Considerations Governing Review on Certiorari." The rule in its entirety states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
her own justice, the clerk—as principal-agent theory would predict—should seek to promote the interests of his justice. Those interests may be different from the interests of the Court as an institution and, thus, may justify a different disposition of the petition.

There may, admittedly, be an argument here that the growing role of clerks in the certiorari review process influences how the Court as an institution applies Rule 10. Rule 10 articulates three basic grounds for granting certiorari—a conflict among certain lower courts, an important unresolved question, or an egregious error. The first ground involves minimal value judgment and can be applied rather mechanically. The latter two involve more subjective judgments about “importance” or “egregiousness.” To the extent clerks may be chary about engaging in subjective judgments—whether for reasons of blame avoidance, bureaucratic comfort, or otherwise—this might cause a disproportionate share of the Court’s docket to consist of cases implicating splits and only a few cases involving the other criteria under Rule 10.

In focusing on the extent to which clerks influence their justices’ decisions, the authors overlook an arguably more interesting feature of the certiorari pool—its effect on the clerk’s own recommendation. A stream of political science literature on the behavior of civil servants (who easily can be understood as agents in a principal-agent relationship) suggests that, assuming they are rational actors, they are prone to engage in behavior that minimizes the risk that they will be blamed for something and to reduce their responsibility for the behavior of the institution in which they work. This school of thought suggests that clerks’ recommendations in the cert pool will reflect these incentives. Specifically, the clerk should be expected to make recommendations that minimize the risk of an embarrassing result (or, more precisely, the risk that the clerk will be blamed for such a result).

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

See Stras, The Supreme Court’s Gatekeepers at 37-44 (cited in note 16) (documenting increased reliance on “objective measures” such as intercircuit conflicts to support grant recommendations); Shapiro, 63 Wash & Lee L Rev at 284-87 (cited in note 21) (describing the cert pool’s structure as contributing to an increase in the percentage of cases granted cert because of a circuit split).

See, for example, Alan K. Campbell, The Institution and its Problems, 42 Pub Admin Rev 305, 307 (1982) (detailing a tendency of civil servants to rely heavily on the trappings of job protection to the detriment of risk taking and innovation).

One embarrassing result might be that the Court has to dismiss a writ as improvidently granted. See generally Michael E. Solimine and Rafael Gely, The Supreme Court and the DIG: An Empirical and Institutional Analysis, 2005 Wis L Rev 1421. See also Shapiro, 63 Wash & Lee L Rev at 285 (cited in note 21):
These results might include: (1) the Court grants certiorari to resolve a question yet, upon closer examination, the case does not present an opportunity to resolve the question, (2) the Court grants certiorari and, upon closer examination, the case presents jurisdictional or other obstacles that preclude its resolution, (3) the Court grants certiorari, yet, upon closer examination, the question is not particularly important (say, an intervening law has rendered the question moot or the agency has rescinded the regulation in question).

To avoid these results, a self-interested clerk might do two things. First, she might recommend that the Court deny the petition. The Supreme Court has repeatedly made clear that its decision to deny certiorari has no precedential effect and should not be understood as an implicit approval of the decision below. With this doctrinal understanding, a clerk can safely recommend "deny," and, if that recommendation is erroneous, the worst consequence for the Court as an institution is that it must await another petition presenting precisely the same question. Even if the Court overrode that recommendation and granted the petition, the clerk suffers less embarrassment, for then the decision to invest resources lies with the Court, not the clerk; at most, the justices might in the future be more skeptical of future "deny" recommendations by this clerk in close cases.

It is worth noting that the avenue of denial was not always available to the clerk. In earlier decades, a greater portion of the docket consisted of writs of error and appeal, where the Court had to dispose of the case on the merits (even if it was dismissing the petition for want of a substantial federal question). In that state of affairs, an erroneous disposition (for example, summarily affirming a case as opposed to denying a certiorari petition) could sow great confusion. Litigants would then seize on the summary affirmance as an approval of the merits of the decision below, which could spawn substantial litiga-
tion over the meaning of the Supreme Court's cryptic action.\textsuperscript{52} The combined upshot of the certiorari docket and the behavior of the blame-avoiding clerk, therefore, would be a high number of recommendations to deny the petition, and clerks would rarely recommend that the Court grant the petition for fear of the institutional embarrassment to the Court (and personal embarrassment to the clerk) of an erroneous recommendation.

The second strategy available to the clerk is to recommend that the Court hold the petition. A "hold" means, at bottom, that the Court should not act on the petition until some future event. The lion's share of hold recommendations come when a petition is filed that presents the same question (or a similar question) as another case that the Court has already set for argument.\textsuperscript{53} A hold is an easy recommendation for the clerk. For one thing, it may defer action on the petition until after the clerk's departure. Even if it does not, it often will transfer responsibility for acting on the petition to someone else. When a petition is held for a case pending on the merits docket, the Clerk's Office will only release the petition for consideration after the Court decides the pending case. At this point, though, the petition is not returned to the clerk who originally wrote the pool memo. Instead, it is transferred to the chambers of the justice who authored the majority (or plurality) opinion. That chamber, rather than the poolwriter, must then draft a memo to the Conference recommending how to dispose of the petitions that have been held for the pending case. Thus, if the blame-avoidance theory is valid, one would expect to see a rise in the number of hold recommendations.

Unfortunately, neither book attempts to test these propositions, even though both hypotheses, if valid, would fit quite nicely into the "new institutionalism" school. To an extent, one cannot fault the authors, for the Court does not release pool memos as a matter of public

\textsuperscript{52} International civil litigation provides an example. In \textit{Hilton v Guyot}, 159 US 113, 163-65 (1895), the Supreme Court announced certain standards for the enforcement of foreign judgments. Following \textit{Hilton}, questions lingered over whether federal common law or state law determined those standards. Approximately twenty years later, the Supreme Court dismissed for want of a substantial federal question a state court case involving the enforcement of a foreign judgment. See \textit{Aetna Life Insurance Co v Tremblay}, 223 US 185, 190 (1912). Many inferred from this dismissal that the Court believed the enforcement of foreign judgments was primarily a matter of state law. Had \textit{Tremblay} come to the Court on a writ of certiorari—rather than on a mandatory writ—no one would have drawn the same inference from the Court's simple denial of the certiorari petition.

\textsuperscript{53} In far smaller numbers, hold recommendations are possible in other circumstances. For example, a clerk might recommend a hold so that the Court could await another petition presenting similar issues, enabling it to consider the two petitions simultaneously.
record (Ward and Weiden, p 247). Nonetheless, at least with respect to the question of holds, the data are available. Usually one to two weeks following the release of an opinion, the Court disposes of the petitions that had been held pending the opinion’s release. In some instances, it would be instantly evident which petitions had been held—they typically are ones “granted, vacated, and remanded in light of [the decision].” But this will not fully capture the universe of held petitions—sometimes the petitions are denied, either because the lower court’s opinion was correct based on the Court’s disposition of the case on the merits docket or because the Court’s disposition does not affect the premises underpinning the lower court’s opinion in the other case. Occasionally a petition that has been held may be granted, typically because it presents an independently certworthy issue that the Court’s opinion does not resolve. Despite the difficulties, all of the data are traceable through the public record and, depending on the results, could provide further evidence about the symbiotic effect of clerks and the certiorari pool on the operation of the Court as an institution. Further research is needed here.

A second set of interesting questions overlooked by the authors concerns the implications of the cert pool model for other activities at the Court. By the “cert pool model,” I mean the assignment of an initial filing to a particular chamber, followed by a memorandum to the Conference prepared by the chamber (and presumably reviewed by the other eight chambers before the Conference at which the matter is discussed). Neither book attempts to investigate the institutional interplay between the role of clerks and different activities of the Court. Capital cases provide a good example. In those cases, the Court often receives the filings days, and sometimes even hours, before the execution is scheduled to take place. The justices do not enjoy the luxury of considered reflection before they act on the application. Consequently, the need to rely on clerk recommendations is at its height, and the “checking” function performed by clerks in other chambers is dramatically limited by the urgency of the situation. Thus, applications in death penalty cases present a prime opportunity for the “clerk network” (Ward and Weiden, pp 159-70) to influence the information flow and the ultimate decision by the institution.54

54 For one anecdote illustrating the clerks’ influence in a death penalty case, see Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey 166-67 (Times Books 2005) (describing the path to the stay of the execution of Willie Darden, which involved a sixteen-page memorandum from a Blackmun clerk).
Capital cases also provide an interesting case study in the process of assigning certiorari petitions and other filings. Most death penalty appeals include both a certiorari petition and a stay application. Whereas certiorari petitions generally are allocated randomly across chambers, stay applications are not. By rule, stay applications are directed to the justice who is responsible for the particular circuit from which the case originates. Given the differences among justices' ideologies, this rule—in theory—could have a significant effect on how the application is handled. With respect to the clerks, if one accepts the authors' premises that certain factors (whether ideological convergence or relationship with feeder judges) influence each justice's clerk recruitment behavior, then clerks likewise could have a powerful effect on how a stay application is resolved. Neither book adequately explores these issues.

Nor do the books adequately account for why the justices are willing to pool the clerks in some matters but not others. In principle, the notion of pooling resources need not be limited to review of certiorari memos or applications. Theoretically, the could also pool their clerks for the preparation of bench memos, but they decline to do so. This may be attributable to the fact that justices have different preferences about how they like to prepare for cases (as Courtiers demonstrates, preferences run the gamut from justices who generally do not require the preparation of bench memos to those who require their clerks to prepare encyclopedic memos considering the case from every angle (Peppers, pp 190–200)). Yet, even here, the Court might utilize its resources more efficiently. For example, a single clerk might prepare a memo to the entire Court summarizing the facts, the decisions below, and the parties' and amici's primary arguments. Theoretically, this information should be the same across chambers and cases. To take the matter one step further, a bench memo to the Conference might also provide a synopsis of the existing doctrine on the subject.

Given the theoretical possibility of such collaboration, why then do the justices appear to draw the line at the merits docket in terms of formal interchambers collaboration? Perhaps it is because it would simply be too difficult to prepare a single memo adequately addressing each justice's preferences for facts and doctrinal emphasis (for

55 See US S Ct Rule 22.3. See also Stern, et al, Supreme Court Practice at 748–50 (cited in note 21) (discussing applications to individual justices); 28 USC § 42 (2000) (“The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court.”). An interesting question warranting further research is the decision about how “circuit justice” assignments are made.
example, some justices might want to know legislative history, while textualists might not care about it). If that is the explanation, both books fail to provide it (much less prove it), leaving the reader wondering why collaboration occurs in some areas and not others.

V. WORK ON THE MERITS DOCKET

Apart from their work in the cert pool, the law clerks' other primary role is to help the justices resolve cases on the Court's argument docket. *Courtiers* explains how the nature of this assistance has evolved over time. At the beginning of the twentieth century (during the "stenographer" era), clerks played a limited role (with a few exceptions, such as those who clerked for Justice Brandeis). Clerks informally discussed cases with the justices and citechecked their opinions (Ward and Weiden, pp 35–36). During the middle of the century (the "legal assistant" era), the average clerk's responsibilities on merits cases grew. Most clerks would edit their justice's first drafts of opinions, and a few would prepare bench memos or even draft an occasional opinion (Ward and Weiden, pp 36–45). Beginning with the Warren Court and certainly by the Burger Court (the "law firm associate" era), all clerks were editing their justice's opinions, and most were drafting bench memos and opinions, too (Ward and Weiden, p 45–48). To Court observers, this is familiar terrain, which *Courtiers* simply systematizes.

Both books plow new ground, however, and three observations on the role of clerks in the merits docket bear closer consideration here: (1) their discussion about how the growth in clerk responsibilities has affected the Court's output, (2) their discussion about how the evolution in the clerk's role has affected the Court's decisionmaking process, and (3) their suggestion that the clerk's role evolves over the course of a justice's tenure.

Both books offer a rather compelling account of how the growth in clerks' responsibilities has affected the Court's output. Prior research documented how, in recent decades, the number of separate opinions (that is, concurrences and dissents) produced by the Court had risen (Ward and Weiden, p 233). Both books explain how the new institutionalism can account for this phenomenon. The creation of the cert pool, the use of the dead list, and the growth in the number of clerks relieved individual clerks of the crushing burden of reviewing certiorari petitions. This freed up clerks to dedicate more time to as-

\[\text{\textsuperscript{56} See also Best, Law Clerks at 127 (cited in note 16) (providing a table showing the average number of opinions per case disposed of from 1935–1995).}\]
sisting their justices with the preparation of opinions. As clerks had more time to work on opinions, the justices could produce more of them. This arguably hampered the Court's ability to achieve a consensus in cases.\(^5\) Whereas justices previously might have had to join an opinion simply because they lacked the human resources to produce separate writings, now the reduction in their clerks' certiorari burdens enabled the justices to write more frequently.

While compelling, this conclusion is incomplete in two respects. One gap is that neither book accounts for why the justices chose to take fewer cases.\(^6\) The expanded use of the writ of certiorari certainly enabled this outcome but did not necessitate it. Even after a greater number of appeals shifted to the Court's certiorari docket, the Court could have continued to take 150–250 cases simply by granting more writs of certiorari.\(^7\) Had it done so, there might not have been the rise in separate opinions.\(^8\) While Court observers have articulated various theories to explain the decline in the number of merits cases, the books do not engage this debate. Their failure to acknowledge—much less explain—this contributing cause is a weakness in their account.

The other gap is that neither book adequately accounts for the behavior of Justice Stevens's chambers. As noted above, Justice Stevens does not participate in the cert pool. Under the logic of the books' arguments, one would expect, therefore, that his clerks would bear a greater responsibility for reviewing certiorari petitions relative to clerks in other chambers—an expectation that Peppers's research verifies (Peppers, p 196). These relatively greater demands, so the theory goes, should be expected to cut into the time available for clerks in the Stevens chambers to assist in the preparation of opinions. Accordingly, under the new institutionalism account, one would expect the Stevens chambers to produce fewer separate opinions than other chambers (Peppers, p 195).

Yet ironically, the data point in precisely the opposite direction. In recent years, Justice Stevens has been among the most productive,

\(^5\) See id at 13–14.
\(^6\) Both the decline in the number of cases on the Court's argument calendar and the difficulties in achieving consensus were explored during the recent confirmation hearings of Chief Justice Roberts. See Peter B. Rutledge, Looking Ahead: October Term 2006, 2006 Cato S Ct Rev 361, 362–63.
\(^7\) For a recent discussion of the contraction in the Court's docket, its causes, and its effects, see generally Shapiro, 63 Wash & Lee L Rev 271 (cited in note 21).
\(^8\) See Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 S Ct Rev 403, 432–38 (implying that the drop in number of cases disposed of led to the increase in separate opinions).
both in terms of the number of separate opinions and in terms of the number of pages authored. Neither book offers a clear account for this counterintuitive outcome, though they contain some findings (made in other contexts) that suggest a few explanations. Apprentices notes that Justice Stevens's clerks do not review all the petitions (Ward and Weiden, p 126). Among those that they do review, they may not review them in the same depth as pool clerks; generally, they do not prepare written memoranda (Ward and Weiden, p 126). A second explanation, suggested by Courtiers, is that Justice Stevens relieves his clerks of other responsibilities—not requiring bench memos and sometimes writing his own first drafts of opinions (Peppers, p 196). A third explanation, not adequately explored by either book, is that the Stevens clerks could essentially free ride on the cert pool. The Stevens clerks have access to the pool memos. Due to the lag between the pool memo deadline and the Conference, the Stevens clerks could use those memos as a type of cue to determine which petitions warrant closest scrutiny. Whether some combination of these explanations or others accounts for the productivity of the Stevens chambers, the books' accounts about the influence of clerks' responsibilities on institutional outcomes do not adequately explain this phenomenon.

Apart from their analysis of the clerk's impact on the Court's output, both books also posit that the change in clerk responsibilities has influenced the nature of the decisionmaking process. Here, Peppers's use of principal-agent theory is especially insightful. Several judges have attested to the occasional phenomenon where an opinion "just won't write." When this happens, the judge may reconsider his initial vote, thereby potentially changing the result in the case. The act of personally writing the opinion forces the judge to think through the implications of the decision in a very profound way.

Contrast that model of writing with one where the clerk is taking the primary responsibility for the first draft of the opinion. Peppers's principal-agent theory suggests that the clerk, unlike the judge, might be less willing to come to the conclusion that an opinion will not write. To do so would be to admit failure and, effectively, an inability to discharge the clerk's duties as agent committed to advancing the princi-

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61 See Christopher E. Smith, The Roles of Justice John Paul Stevens in Criminal Justice Cases, 39 Suffolk U L Rev 719, 725 n 54 (2006) (quoting a source claiming that Stevens "wrote a large number of concurring and dissenting opinions, authoring more of these than any of colleagues [sic] in each of the Court's last six terms").

pal's interest. Thus, the clerk will slog through the case, despite the potentially incorrect result or incoherent reasoning, rather than admit defeat to his boss. The effect of this is to give the justice greater confidence that an opinion can successfully be written in a hard case or, more controversially, to relieve the justice of the responsibility to write out his view in order to persuade himself of its correctness.

Whether this is an acceptable outcome depends, at bottom, on a normative question: what is the essence of the justice's role? Though neither book systematically explores the answer to that question, both offer anecdotes from different justices that provide two different answers. One, appearing in Apprentices, comes from Chief Justice Rehnquist:

[T]he clerks do the first draft of almost all cases to which I have been assigned to write the Court's opinion. When the caseload is heavy, [I] help by doing the first draft of a case myself. [This] practice . . . may undoubtedly . . . cause raised eyebrows. I think the practice is entirely proper: The Justice must retain for himself control not merely of the outcome of the case, but of the explanation of the outcome, and I do not believe this practice sacrifices either (Ward and Weiden, p 224) (emphasis added).\(^3\)

The other, appearing in Courtiers, concerns Justice Stevens:

Stevens always prepares the first draft of an opinion. When asked why he does not delegate this duty, Stevens initially replied that "I'm the one hired to do the job." When pressed to explain further, Stevens stated that the process of becoming educated about the factual and legal issues involved in a case does not end in oral argument—Stevens continues to learn about the case as he drafts his opinions, honing his interpretation of the applicable legal theories and even reevaluating his ultimate position on a case (Peppers, p 195) (emphasis added).\(^4\)

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\(^3\) Quoting Bernard Schwartz, Decision: How the Supreme Court Decides Cases 52 (Oxford 1996).

\(^4\) Interestingly, the justice for whom Stevens clerked, Wiley Rutledge, embraced a similar philosophy. See John M. Ferren, Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge 341 (North Carolina 2004) ("He was seen as a 'scholar' exploring every angle, remaining undecided until he worked the problem through in writing and could convince himself finally, by reading the analysis, what the best result was. . . . [If a 'hunch' controlled the tough decision, the written elaboration had to convince'."] (emphasis added). Justice Stevens was not the only clerk-turned-justice who emulated his former boss's management style. Justice White (a Vinson clerk) adopted Justice Vinson's approach to opinion drafting (Peppers, p 164) ("From the start, White's law clerks assisted in the opinion-writing process—as did White himself when clerking for Chief Justice Vinson."). Chief Justice Rehnquist (a Jackson clerk) adopted his juc-
The two passages illustrate very different conceptions of judging. Chief Justice Rehnquist believed that judging consisted primarily of decision and the articulation of the supporting reasoning—the act of writing was not essential. Justice Stevens draws the line differently, including within the essence of the act the articulation of the views in written form, implicitly disagreeing with Chief Justice Rehnquist's notion that this portion of the act is not especially essential to discharge of the judicial duty.

This review does not attempt to resolve the question which of these two approaches is preferable (arguably the Rehnquist model is more efficient, whereas the Stevens model preserves a larger role for the justice). Rather, it merely seeks to show that the choice of approach by a particular justice has implications both for the consequent role played by the clerks and, critically, for the content of the ultimate decision.

Finally, in addition to their analyses about the Court's output and decisionmaking process, both books suggest that, even with respect to a particular justice, the clerk's role is not static but can evolve over the course of the justice's tenure on the Court. Some justices, such as Chief Justice Vinson, fully involved their clerks in the opinion drafting process from the outset, "delegating" (in Ward and Weiden's terms) full responsibility for opinion drafting (Ward and Weiden, p 214). By contrast, other justices initially retain much of the opinion writing responsibility but then delegate it as circumstances change, such their health status. For example, Courtiers describes the evolution of the role played by Justice Harlan's clerks. During his first term on the Court, Justice Harlan drafted many of his own opinions, involving his clerks in opinion drafting only later in the term (Peppers, p 153). As his health, particularly his eyesight, worsened, Justice Harlan increasingly relied on his clerks to review cases prior to oral argument, read relevant precedent to him, and review his tough-to-decipher changes to his draft opinions (Peppers, p 154). Both Courtiers and Apprentices describe a similar evolution in Justice Black's chambers. Early in his

tice's approach to clerk recruitment (casting a broad net) and preparation for cases (generally no bench memos) (Peppers, pp 27, 125–29, 192–95). Neither book successfully obtained much information about Justice Breyer and, consequently, could not judge whether he followed the approach of his former boss, Justice Goldberg.

For one critique of a model under which judges depend on their staffs, see generally Wade H. McCree, Jr., Bureaucratic Justice: An Early Warning, 129 U Pa L Rev 777 (1981) (arguing that the quality of the judicial process depends on the quality of the individuals administering it).

See also Ferren, Salt of the Earth at 326 (cited in note 64) ("Vinson, like Murphy, relied on his clerks to write the opinions, subject only to occasional revisions at his request.").
tenure, Justice Black drafted many of his own opinions but, by the 1960s, had delegated an increasing share of the responsibility for writing first drafts to his clerks (Peppers, p 121; Ward and Weiden, p 212).

Whereas these anecdotes suggest that the justices increasingly rely on their clerks over time, other examples suggest the opposite trend. According to one former clerk of Justice Douglas:

As the years passed, argument with him on fundamental legal issues became more difficult. When a judge has been on a court long enough to cite himself and—as in Douglas' case—to see many of his dissents become majority opinions, the likelihood that a law clerk will persuade him to alter any of his basic views is remote.67

Such anecdotes suggest that the longer a justice has served on the Court, the more settled his or her views may be.

These examples hint at certain trends in the collaboration between justice and clerk (Ward and Weiden, pp 212–14). Under one model, the new justice (such as Chief Justice Vinson) arrives and instantly delegates substantial responsibility to the new clerk. Under a second model, the new justice (such as Justice Harlan) arrives, handles much of the work himself but, as his health declines, delegates an increasing share to the clerk.68 Under a third model, a new justice (such as Justice Douglas) arrives, cements his views on a variety of matters and then has less need to rely on clerks to complete his work.

While Apprentices articulates a typology for thinking about these different relationships between clerks and justices, Courtiers probes more deeply into the details of particular justices' relationships with their clerks and tracks them over time. Courtiers hints, but does not quite claim, that the evolution is attributable to the justice's age and


68 This model, if valid, would have implications for a current debate over the possibility of appointing additional justices when current ones reach a certain age. See Paul D. Carrington and Roger C. Cramton, The Supreme Court Renewal Act: A Return to Basic Principles, in Roger C. Cramton and Paul D. Carrington, eds, Reforming the Court: Term Limits for Supreme Court Justices 467, 469–70 (Carolina Academic 2006) (arguing for a departure from life tenure for federal judges because, among other reasons, judges' support staffs enable them to work into senility); James E. DiTullio and John B. Schochet, Note, Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms, 90 Va L Rev 1093, 1096–97 (2004) (suggesting the implementation of eighteen-year terms through constitutional amendment); Sanford Levinson, Contempt of Court: The Most Important "Contemporary Challenge to Judging," 49 Wash & Lee L Rev 339, 341 (1992) (proposing a single eighteen-year term).
health—younger justices have the energy to complete the tasks themselves, whereas older ones increasingly require the assistance of their clerks. While age and health may be two determinants, the anecdotes in Courtiers suggest another possible determinant for the clerk’s role: the justice’s professional experience and stage in his or her career. Thus, for example, justices with extensive experience in government or prior experience judging may already have well-formed views on many of the issues before the Court (Peppers, p 115). By contrast, new justices with less experience in the government or the federal judiciary may rely more heavily on their clerks’ input as to questions of law with which they are unfamiliar. For example, Courtiers gives the example of a memorandum from Justice Powell to the Chief Justice shortly after assuming office (Peppers, p 185). In it, Justice Powell requests the assistance of an additional clerk and bases this request partly on the fact that he needs their assistance on matters of criminal and constitutional law. The implication is that Justice Powell, despite a thirty-year distinguished career as a commercial lawyer, had little experience in these areas that formed an important part of the Court’s docket.

Having addressed many of the books’ arguments in terms of clerk recruitment and responsibilities, the review now turns to the policy debates over the future of the Court and, specifically, clerks—debates that the books inform but, with little exception, do not really engage.

VI. PRESCRIPTIONS

Despite their extensive research and analysis, both books dedicate remarkably little space to the question of what policy prescriptions flow from their analyses. This gap is curious: both books extensively review the history of some of the proposals for reforming the clerkship institution at the Court. In 1958, amid fears that a liberal cadre of clerks was effectively “running” the Court, Senator John Stennis of Mississippi took to the Senate floor and argued that the Senate should consider subjecting clerks to Senate confirmation (a proposal that went nowhere). In the 1970s, the government considered (but ultimately rejected) a National Court of Appeals. Such a court could have reduced the Supreme Court’s workload (and, consequently, the need for clerks at least at the Court) by relieving it of the

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69 85th Cong, 2d Sess, 104 Cong Rec S 8107-08 (May 6, 1958) (Sen Stennis) (suggesting an inquiry into the activities of Supreme Court clerks).
need to resolve splits among the lower courts." Quite recently, Stuart Taylor and Benjamin Wittes proposed eliminating law clerks (a proposal that Justice Douglas once suggested his colleagues try as an experiment for a year; like Senator Stennis's proposal, it went nowhere). 70

Both books contribute little to this ongoing debate. Peppers's book is bereft of any recommendations. Ward and Weiden make one "modest proposal": the Court should increase disclosure about its internal operations. One way of doing so would be to disclose pool memos after it denies certiorari (Ward and Weiden, p 247). 71 While their modest proposal is intriguing, the authors elsewhere confess that such incremental reforms would not result in comprehensive change at the Court. At one point, the authors lament that "[a]bsent any fundamental reform on the part of the justices, the only way the Court will be able to deal with continually rising dockets will be to do as they have done in the past: add more clerks and expand the cert pool" (Ward and Weiden, p 149).

If one accepts that the institution of clerks at the Court is in need of reform (and one walks away from both books not quite convinced that it is), then the options are not limited to a bifurcated choice between "modest proposals" and "fundamental reform." A menu of intermediate policy options is available. One obvious option would be to create a team of permanent clerks at the Court who do not turn over annually. These permanent clerks would perform some functions currently allocated to the term clerks (who used to be referred to as "elbow clerks"). One responsibility might be drafting pool memos. Another might be reviewing simple applications such as applications for extensions of time. Perhaps, more controversially, they might draft memoranda to the conference in applications to stay executions. Two

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70 See Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 16-19 (GPO 1975) ("The need for additional appellate capacity to maintain the national law is most starkly manifested by the existence of unresolved conflicts between different courts of appeals."). But see William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U Chi L Rev 473, 474 (1973) (arguing that the National Court of Appeals proposal is "fundamentally unnecessary and ill-advised").

71 Taylor and Wittes, Atlantic Monthly at 50 (cited in note 8) ("We have a modest proposal: let's fire [the justices'] clerks."). See also Dahlia Lithwick, Once is Enough, The American Lawyer on the Web (2006), online at http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Inside&id=1159434325368 (visited Jan 22, 2007) (arguing that clerks should be limited to one clerkship for one judge for one year); William O. Douglas, The Court Years, 1939-1975: The Autobiography of William O. Douglas 172 (Random House 1980) ("For one year, I pleaded, 'why don't we experiment with doing our own work? You all might like it for a change.").

72 At one point, they also suggest that the justices consider prohibiting "case swapping" by clerks but do not defend this proposal in any depth (Ward and Weiden, p 248).
features unify these functions: (1) in each case the clerk is serving the institution as opposed to a particular justice; and (2) they are all ones where the Court might benefit from the institutional expertise that comes with professional bureaucracies.\textsuperscript{7}

Another option would be to require counsel to certify, on penalty of sanction, that the petition satisfies the standards set forth in Rule 10, particularly that the petition does not merely seek error correction of the lower court’s decision. Many appellate courts require such a certification before counsel may file an en banc rehearing petition. The standards for such a petition, in some respects, resemble those of Rule 10.\textsuperscript{74}

While the permanent clerks would assume some of these duties, the justices would retain a reduced number of term clerks. Depending on the individual justice’s work habits, the term clerks’ tasks might include annotating the pool memos drafted by the permanent clerks, drafting bench memos in merits cases, and assisting the justice with the drafting of opinions. Two features unify these functions: (1) they all are designed to serve the particular justice, as opposed to the Court as an institution; and (2) they are ones where the benefits of professional bureaucracies are less salient (though certainly present).

Such a proposal flows naturally from some of the principles developed in \textit{Apprentices and Courtiers}. For one thing, it addresses some of the supposed recruitment issues identified in both books—justices could continue to recruit from “feeder judges” and “feeder schools” for their own clerks, but they would serve more limited functions at the Court. Additionally, it would reduce (though not eliminate) the risks of bias in the certiorari pool identified in both books. It would reduce the risk of bias because there could be no claim that a clerk in a particular chambers was shaping the pool memo to advance his or her own personal agenda.\textsuperscript{75} It might also affect the allocation of responsibilities within individual chambers. If a reduction in the number


\textsuperscript{74} See, for example, FRAP 35(b) (setting forth the procedure for petitioning for a rehearing en banc); Local Rules of the Court of Appeals for the Federal Circuit 35(b)(2) (requiring that a petition for a rehearing en banc state that the petitioner believes either that the panel decision was contrary to a Supreme Court decision or that the issue is exceptionally important). I am grateful to Barney Ford for this insight.

\textsuperscript{75} It might not eliminate the risk of bias entirely, though, because the cadre of permanent clerks might have their own agendas that they could perpetuate through their certiorari recommendations. The Court could counteract this risk of defection by having the term clerks annotate the permanent clerks’ memos to the Conference on certiorari petitions.
of “private clerks” accompanied the creation of a cadre of permanent clerks, the justices might play a greater role in opinion drafting. There might also be greater harmony in the Court’s opinions if a reduction in the number of clerks led to a reduction in the number of separate opinions, a result suggested by some political science research in this area.76

The infrastructure is already partly in place for such a reform. Both books basically overlook the fact that the Court already has a mature and well-functioning Clerk’s Office under the able administration of Major General William K. Suter, former head of the Army’s Judge Advocate General Corps.77 At present, the Clerk’s Office performs some initial review of the petitions when they are filed. It also employs several deputy clerks. In addition to the deputy clerks responsible for the death penalty docket discussed above, others are responsible for the paid petitions and the in forma pauperis petitions. Thus, the infrastructure at the Court is already fairly well developed to expand the operations of this office to support the above-described cadre of permanent clerks.

Moreover, the actions of other courts have created ample precedent for such reforms.78 Many of the lower federal courts of appeal have large clerks’ offices. Lawyers in these offices serve extended terms and perform a variety of substantive tasks not unlike those that permanent clerks could perform at the Supreme Court. These tasks include screening cases to determine which ones warrant the circuit court’s close attention. Not unlike a poolwriter, these clerks then draft recommended dispositions to a panel of appellate judges. The recommendation may be that the case should be put down for oral argument (where the case presents an unresolved question of circuit law). Alternatively, the recommendation may consist of an actual draft unpublished per curiam opinion resolving the case on the basis of existing circuit precedent.

Other courts suggest alternative models. The Court of Appeals for the Armed Forces (CAAF) provides a good example. CAAF is the highest appellate court in the military justice system and, like the Supreme Court, generally provides for discretionary review of most (but

76 See Best, Law Clerks at 123–41 (cited in note 16) (discussing the relationship between opinion production, the number of clerks, and the court personnel).
78 See, for example, Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?, 50 SC L Rev 235, 242 (1998).
not all) cases. A central legal staff, consisting of a mix of experienced and new attorneys, reviews the petitions and the underlying record in the case. The attorney on the central legal staff drafts a memorandum to the entire Court recommending whether to grant or deny the petition, or, alternatively, to dispose of it summarily. The Chief Deputy Clerk who oversees the legal staff reviews this recommendation and can require additional work by the staff attorney or forward the memorandum with his own recommendation. All of the judges on the Court then review the staff attorney’s and the Chief Deputy Clerk’s recommendation. The judges may perform this review themselves or delegate the task to their clerks. The judge’s own clerks consist of a mix of permanent clerks (with substantial experience) and term clerks (immediately or recently out of law school). The CAAF model suggests several innovations for the Supreme Court’s own management style. First, the CAAF model relies on a central staff, decoupled from an individual judge’s chambers, to review the petition. Second, the CAAF model relies on a mix of new attorneys who bring a fresh perspective and experienced attorneys (the Deputy Clerk) who bring the years of experience to analyzing a given legal problem. Third, the individual CAAF judges themselves rely on a mix of new attorneys and experienced attorneys in their own work, thereby also harnessing the benefits of both types of personnel.

To be sure, the proposal is not without problems. Most centrally, the proposal displaces, rather than solves, the principal-agent problem identified by Peppers. Risks of defection by permanent clerks would replace the risks of defection by term clerks. Additionally, the creation of a permanent class of clerks would arguably worsen the “capture” problem identified above in the discussion of retention and the rise of the single-year clerk. Furthermore, quality might suffer. As both books explain, one of the allures of a clerkship at the Court is the promise of downstream financial benefits or professional opportunities. The promise of deferred gratification enables the Court to recruit some highly qualified law school graduates who otherwise might immediately pursue more lucrative careers in the private sector. A permanent

79 Letter from the Clerk’s Office of the Court of Appeals of the Armed Forces to Peter Rutledge (on file with author). For discussions of other judicial management models, involving for example the use of central staff and permanent clerks, see John Bilyeu Oakley and Robert S. Thompson, Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts (California 1980); John Bilyeu Oakley and Robert S. Thompson, Law Clerks in Judges’ Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges, 67 Cal L Rev 1286, 1291–95 (1979) (describing the use of a “central staff” in combination with law students serving as “quasi-clerks”).
clerkship, focused on the more long-term institutional aspects of the job, might not have the same professional promise, consequently discouraging the most highly qualified applicants.

My point is not that this proposal is a cure-all. Rather, it is simply to demonstrate that both books' analyses naturally lead to a consideration of such prescriptions, yet neither does an adequate job of addressing them (or proposing an alternative solution). Despite this failing, both clearly provide policymakers with a rich source of data and analysis to guide the ongoing debate over the role of the clerk and the need for reform.

VII. CONCLUSION

Both Courtiers and Apprentices make a significant contribution to an understanding of the Court, for the political scientist and the lawyer alike. For the political scientist, the authors have amassed an impressive array of historical material and, through their surveys (particularly in Apprentices), supplied some original data. While the low response rates require one to treat the data cautiously, the authors' preliminary findings suggest some important new directions for research on the Court. Their treatment of the issues through new institutionalism and principal-agent theory (particularly in Courtiers) sheds important light on how changes at the Court, such as the creation of the cert pool and the dead list, have influenced both the recruitment of clerks and their responsibilities. The books demonstrate persuasively how those changes in the clerks' role subsequently and reciprocally influence the Court's operations.

For the lawyer, the books' primary value comes in how they shape the broader prescriptive debate over the proper role of law clerks at the Court. Both books do a reasonably good job of debunking the myth, propagated in books like The Brethren and Closed Chambers, that the Court is secretly run by some unaccountable "clerkocracy," sworn like members of some secret society never to reveal the power they wield (Ward and Weiden, pp 196–97). At the same time,

80 See generally Woodward and Armstrong, The Brethren (cited in note 6).
81 See generally Lazarus, Closed Chambers (cited in note 3).
82 At times, Ward and Weiden almost seem to resist these findings. At one point they allege that "[c]lerks do have influence at the Court and [ ] their influence is increasing" (Ward and Weiden, p 199). In the same paragraph, though, they also concede that "the data show that most of the time, clerks are not able to change their justices' minds about cases or issues" (emphasis added).

Admittedly, the authors have unearthed some documents, primarily consisting of correspondence between Justice Blackmun and his clerks, that paint a rather unflattering portrait of how some of those clerks treated the other justices quite disrespectfully (Ward and Weiden, pp 182–
they do fortify claims that clerks play a greater role in the institution's operations than at the beginning of the twentieth century. Perhaps this shift was likely in light of the Court's growing docket and unchanged number of justices over the last century. Yet, as the experiences in lower courts demonstrate, it was neither inevitable nor permanent. A variety of reforms, ranging from resuscitation of the National Court of Appeals debate to creation of a cadre of permanent clerks within the Office of the Clerk supply alternative models.

As a closing note, it is worth considering how the books also can inform the debate over the role of clerks at other courts. Like the Supreme Court, lower courts—both at the federal and state level—have confronted rising caseloads that have not necessarily been met by increases in the judicial ranks. These pressures have led to their own institutional reforms such as the above-described creation of large clerks' offices and the increasing frequency of unsigned per curiam dispositions of appeals without the opportunity for oral argument. The new institutionalism and principal-agent theories that inform Apprentices and Courtiers can inform these debates as well. One hopes to see future scholarship building on this commendable research and extending it to these other applications.

83). While the contents of those documents cannot be denied, they do not reflect the practices of the vast majority of clerks whom I know or the experiences of clerks from other eras with whom I have spoken in the course of preparing this review.