

# Law Clerks: A Jurisprudential Lens

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## INTRODUCTION

2019 was the putative hundredth anniversary of the formal institution of Supreme Court law clerks.<sup>1</sup> It is understandable at this milestone to focus on biography, history, and warm personal reminiscences. As a former clerk to Justice William J. Brennan Jr., memories of my time with him remain sharply etched and deeply meaningful.<sup>2</sup>

My concern in this Essay is more abstract, however. My aim is to use the simple fact that law clerks (not just Supreme Court law clerks) often draft opinions as a lens through which to reflect on several jurisprudential issues, including the institutional structures of each of the three branches of our government, the nature of the judicial function, and the interpretation of judicial and other legal texts. Along the way, I also propose some tentative conclusions about the legitimacy and hermeneutical relevance of the law clerk's role. But I am ultimately more interested in exploring the terrain than in offering definitive prescriptions.

Part I of this Essay sets the stage. It makes several observations: Many law clerks play a significant role in drafting judicial opinions. That work is something of an “open secret,” widely recognized but not often discussed.

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<sup>1</sup> The Symposium to which this Essay is a contribution was organized in response to the National Constitution Center's gala “celebration of the 100<sup>th</sup> anniversary of the federal statute creating clerkships at the Supreme Court.” Press Release, National Constitution Center, National Constitution Center Quarterly Events Calendar, October–December 2019, (Sept. 30, 2019), <https://constitutioncenter.org/press-room/press-releases/national-constitution-center-quarterly-events-calendar-october-december-2019> [<https://perma.cc/8KUC-UN63>]; see also ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 34 (2006). I say “putative hundredth anniversary” because—as with many publicized milestones—dating the institution to one definite moment obscures as much as it reveals. Supreme Court Justices have had clerks, under various titles, since the latter part of the nineteenth century. See *id.* at 21–34. And some of those young lawyers apparently did work resembling that of later law clerks. See Todd C. Peppers, *Birth of an Institution: Horace Gray and the Lost Law Clerks*, 32 J. SUP. CT. HIST. 229, 229–31 (2007).

<sup>2</sup> See, e.g., SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 488 (2010); Perry Dane, *A Fountain of Renewal*, in *THE COMMON MAN AS UNCOMMON MAN: REMEMBERING JUSTICE WILLIAM J. BRENNAN, JR.* 71 (E. Joshua Rosenkranz & Thomas M. Jorde eds., 2006); Perry Dane, *A Judge Who Was Honest With the Law and Himself*, PHILA. INQUIRER, Aug. 3, 1997, at E7; Perry Dane, Remarks, Memorial Proceedings before the New Jersey Supreme Court for the Honorable William J. Brennan, Jr. (Nov. 18, 1997), in 158 NEW JERSEY REPORTS XXXIX–XLIII (1999).

And observers who have focused on the role that law clerks play have often been critical or at least anxious about it. This Essay then asks a couple of questions that only become obvious on reflection: Why is the role played by law clerks so relatively obscure, and why should there be any angst about it? Part II digs more deeply into these questions by comparing the role of law clerks to that of the myriads of employees of the executive and legislative branches whose work might seem at least roughly analogous. Part III tries to uncover the normative and jurisprudential stakes revealed by those comparisons. The goal is not to decide whether law clerks drafting opinions is a good or bad practice, but to reveal some of the considerations that might be relevant to whether it is good or bad. Part IV is hermeneutic: Putting aside questions of right and wrong, should the fact that law clerks often draft opinions change how the legal culture reads, interprets, or deploys those opinions? Part V ties together the various strands of the Essay and offers a concluding thought about the complex duality of impersonal authority and personal responsibility in the work and work product of American judges.

## I. “THE FAMILIAR MADE STRANGE”<sup>3</sup>

### A. *The Practice*

American law clerks often draft opinions for their judges.<sup>4</sup> To what extent they do so and under what terms varies.<sup>5</sup> In some chambers, clerks draft all or most opinions. In other chambers, their role is only to research, give advice, brainstorm, and then perhaps to polish their judges’ work or fill in footnotes. When law clerks do draft full opinions, some judges edit their work intensely, while other do so minimally if at all. In some chambers, the process of drafting opinions is intensely iterative and interactive, making it

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<sup>3</sup> THE FAMILIAR MADE STRANGE: AMERICAN ICONS AND ARTIFACTS AFTER THE TRANSNATIONAL TURN (Brooke L. Blower & Mark Philip Bradley eds., 2015).

<sup>4</sup> For a fascinating comparative account of the role of the equivalent of law clerks in the Supreme Court of Japan, see David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009). Interestingly, Japanese law clerks are not recent law school graduates but distinguished mid-career judges in their own right. *Id.* at 1579. They serve for several years, are assigned to the court as a whole rather than to individual Justices, are hierarchically organized, and often deliberate collectively before presenting their views to the Justices. *Id.* at 1579–80. “The net result is that [they] are more influential, more confident, and more independent from the justices than their American or Canadian counterparts.” *Id.* at 1581.

<sup>5</sup> See Paul J. Wahlbeck et al., *Ghostwriters on the Court?: A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL. RES. 166, 166–68 (2002); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1383–84 (1995).

difficult to draw a sharp line between the role of the clerk and that of the judge.

The extent to which law clerks have drafted opinions has changed over time. It also often changes over the span of any single judge's career or even over the course of a law clerk's time with the judge. But the simple point is still that American law clerks often draft opinions for their judges.

### B. *Obscure*

Yet American legal culture is remarkably diffident about the role that law clerks play in drafting opinions.<sup>6</sup> In my experience, former clerks rarely say that they drafted opinions, or at least they do not say so in public or casual settings outside the circle of the initiated.<sup>7</sup> They are more likely to use euphemisms, such as that they “worked on” cases.<sup>8</sup> Judges certainly do not routinely acknowledge the role that their clerks played in drafting opinions.<sup>9</sup> There are a few cases in which judges explicitly thank or recognize clerks by name for drafting their opinions.<sup>10</sup> But it turns out that almost all those

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<sup>6</sup> See Parker B. Potter, Jr., *Judges Gone Wild*, 37 OHIO N.U. L. REV. 327, 328 (2011) (“As a general rule, law clerks are the least visible actors in the judicial system. In court, we are typically seen but not heard, and on paper we are even less apparent, lurking as ghostly presences behind the orders and opinions signed by our judges.”). For one of the few sustained scholarly examinations of law clerks and the work they do, see Symposium, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1 (2014). For an especially useful overview, see Chad Oldfather and Todd C. Peppers, *Introduction: Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1 (2014).

<sup>7</sup> There have been notable and much-criticized exceptions. See, e.g., EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (Penguin Books, 2005). I notice, reading an early draft I found on my computer of my contribution to a volume of remembrances dedicated to my former boss, Justice Brennan, that I was willing to write that the Justice “gave his clerks tremendous latitude and responsibility. We usually drafted his opinions, and he made few changes. But, in ways large and small, with humor and gentleness, he also made clear that he was in charge.” Perry Dane, *Recollections of Justice Brennan* (April 5, 2000) (unpublished manuscript) (on file with author). Those words, however, along with other descriptions of our work in chambers, did not make it to the final shorter version of the piece that was eventually published in Dane, *Fountain of Renewal*, *supra* note 2. And I have never again even considered being so forthcoming during the intervening years. Of course, in quoting that passage from an unpublished manuscript in this current Essay, I have come full circle. But to my mind, both the passage of time and the very subject of this Essay ameliorate the breach.

<sup>8</sup> Cf. EVIATAR ZERUBAVEL, *THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL IN EVERYDAY LIFE* 28 (2008) (discussing the use of euphemisms to “invoke taboo subjects yet at the same time avoid mentioning them.”).

<sup>9</sup> For a thorough discussion of some of the few examples, see Potter, *supra* note 6, at 345–54.

<sup>10</sup> See Potter, *supra* note 6, at 345–54.

acknowledgments were the work of one judge: Milton Shadur, a former United States District Judge for the Northern District of Illinois.<sup>11</sup> And even Judge Shadur only acknowledged his clerks' help in a tiny fraction of the approximately 11,000 opinions that he released in the course of a 37-year career on the bench.<sup>12</sup> And, more important, he was careful to insist that “[e]very draft opinion submitted by a law clerk is reviewed and reworked sentence by sentence (indeed, word by word) by this Court, and as part of that process this Court also reads every one of the authorities that is cited in each of its opinions.”<sup>13</sup> In any event, this is the proverbial exception that proves the rule.<sup>14</sup>

That law clerks often draft opinions is not a secret. Far from it. But the details of the practice are at least obscured by law clerks' own “strict code of *omertà*.”<sup>15</sup> And that, if nothing else, at least qualifies it to be somewhere in the outer vicinity of being an “open secret.”<sup>16</sup> “Open secrets” are a distinct

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<sup>11</sup> See *id.* at 358–64. A typical acknowledgment read: “Without in any way depreciating the work of counsel for either side in this litigation, this Court owes a substantial debt to its extremely able law clerk Dennis Devine, Esq. for having identified and addressed, in an excellent proposed draft opinion, many of the arcane mysteries of federal habeas law that have been dealt with here.” United States *ex rel.* Centanni v. Washington, 951 F. Supp. 1355, 1369 n. 16 (N.D. Ill., 1997) (Shadur, J.). For other similar statements, see, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Barchman, 916 F. Supp. 845, 857–58 n.21 (N.D. Ill. 1996) (Shadur, J.); Davis v. Coopers Lybrand, 787 F. Supp. 787, 809 (N.D. Ill. 1992) (Shadur, J.); Alber v. Illinois Dep’t of Mental Health & Developmental Disabilities, 786 F. Supp. 1340, 1384 (N.D. Ill. 1992) (Shadur, J.); Donohoe v. Consol. Operating & Prod. Corp., 736 F. Supp. 845, 846 n.2 (N.D. Ill, 1990). I was able to find one other opinion, though I am sure there are more, in which a judge explicitly thanked a law clerk for assistance in drafting. See Lapointe v. Sigma Tau Pharm., Inc., 2013 MDBT 7, at \*1 n.1 (Md. Cir. Ct.).

<sup>12</sup> See Tony Briscoe, *Milton Shadur, Federal Judge Who Oversaw Key Cases Involving Chicago Schools, Cook County Jail, Dies*, CHI. TRIBUNE (Jan. 16, 2018, 5:45 PM) <https://www.chicagotribune.com/news/obituaries/ct-met-milton-shadur-obituary-20180116-story.html> [<https://perma.cc/Z9DJ-RPPB>].

<sup>13</sup> *Alber*, 786 F. Supp. at 1384–85. Judge Shadur’s aim in qualifying his expressions of thanks often had as much to do with confirming his own ultimate responsibility for any remaining missteps as with emphasizing his own supervisory role as a matter of principle. See, e.g., *Washington*, 951 F. Supp. at 1369 n.16 (N.D. Ill., 1997) (Shadur, J.) (“As in this Court’s prior expressions of thanks to others of its outstanding clerks, however, it must be made clear that this tribute should not backfire if a different view on the merits of these actions were ultimately to prevail—this Court’s invariable word-by-word editing and revision of all of its clerks’ draft opinions assure that if any errors exist here, they remain the sole responsibility of this Court and not that of its able clerk.”).

<sup>14</sup> Here, as elsewhere, I use this phrase in both its senses: The exception confirms the rule. But, more faithful to the original meaning of the phrase, it also *tests* the rule.

<sup>15</sup> Stuart Taylor Jr. & Benjamin Wittes, *Of Clerks and Perks*, ATLANTIC MONTHLY, July/Aug. 2006, at 50.

<sup>16</sup> For a broad exploration of open secrets and other forms of collective silence, see generally ZERUBAVEL, *supra* note 8.

phenomenon.<sup>17</sup> They are conspiracies of silence or at least conspiracies of reticence.<sup>18</sup> “In marked contrast to ordinary secrets, the value of which is a direct function of their exclusivity . . . open secrets actually become more tightly guarded as more, rather than fewer, people are ‘in the know.’”<sup>19</sup>

### C. *Controversial*

Now, to be honest about it, the role of law clerks in drafting opinions has become more “open” and less of a “secret” in recent years. But even putting to one side how forthrightly the legal culture admits the role of clerks in drafting opinions, the practice is certainly controversial. Justice Louis Brandeis, on being “asked why he thought that people respected the Court,” purportedly replied, in a time when this might have been said with some modicum of truth, “[b]ecause we do our own work.”<sup>20</sup> And that still seems to be the articulated ideal in the legal culture, even if it is an unrealized one. More to the point, many commentators express considerable angst about the power that law clerks might exert through drafting opinions and otherwise.<sup>21</sup> For example, one book-length history of law clerks at the United States Supreme Court describes the role of law clerks in drafting opinions as “problematic.”<sup>22</sup> The authors argue that even if Justices decide their own votes and edit their clerks’ drafts, the “system poses a real danger if justices delegate too much authority to clerks with little, if any, direction and oversight. It also raises the important question of clerk influence on the law

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<sup>17</sup> The “open secret” that clerks often draft opinions is mostly benign. I do not mean to compare it, except in the most formal sense, to pernicious open secrets, such as those that might surround various forms of abuse. Cf. Insiya Hussain & Subra Tangirala, *Why Open Secrets Exist in Organizations*, HARV. BUS. REV. (Jan. 14, 2019), <https://hbr.org/2019/01/why-open-secrets-exist-in-organizations> [<https://perma.cc/9JCC-UV53>] (discussing social scientific studies that help explain “why problems—such as harassment and abusive supervision—can remain unaddressed for so long without anyone taking action.”).

<sup>18</sup> Cf. ZERUBAVEL, *supra* note 8, at 54–55.

<sup>19</sup> *Id.*

<sup>20</sup> William H. Rehnquist, Chief Justice, United States Supreme Court, Lecture at the Faculty of Law of the University of Guanajuato, Mexico, (Sept. 27, 2001), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_09-27-01.html](https://www.supremecourt.gov/publicinfo/speeches/sp_09-27-01.html) [<https://perma.cc/C539-5AHN>].

<sup>21</sup> See, e.g., WARD & WEIDEN, *supra* note 1, at 16–19; TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 209 (2006); Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 304–06 (2008); Taylor & Wittes, *supra* note 15; Philip Kurland, *Making and Remaking the Law of the Land*, N.Y. TIMES (Sept. 20, 1987), <https://www.nytimes.com/1987/09/20/books/making-and-remaking-the-law-of-the-land.html> [<https://perma.cc/9AKD-7WJY>].

<sup>22</sup> WARD & WEIDEN, *supra* note 1, at 246 (2006).

as they make structural, stylistic, and even substantive choices as they write.”<sup>23</sup> Another major history of Supreme Court law clerks is more sanguine, but is still concerned that, even if Justices make their own decisions as to how to vote, they might vest “their law clerks with substantial authority to decide how to reach the preferred outcome. A litigant can be declared a winner based on narrow jurisdictional grounds or through a complex doctrinal test, and in many instances it is the law clerk who selects the jurisprudential path.”<sup>24</sup> One article that tried to subject the practice to a more systematic normative analysis cautioned that “[u]sing law clerks to draft opinions is not unethical, but the judge’s voice and reasoning must resonate through the opinion. The law clerk should not be the arbiter and the judge merely the overseer.”<sup>25</sup>

Other criticisms have been less reserved. Two distinguished attorneys have referred to the amount of opinion-drafting left to clerks as “shocking” and unacceptable.<sup>26</sup> “No justice worth his or her salt should need a bunch of kids who have never (or barely) practiced law to draft opinions for him or her.”<sup>27</sup> Not content with mere griping, they went so far as to propose major institutional changes to reduce or even eliminate the role of law clerks in drafting opinions.<sup>28</sup> A leading constitutional scholar of a previous generation suggested that Justice Brandeis—he who boasted that Justices “do [their] own work”<sup>29</sup>—would be “aghast” at the role currently played by law clerks.<sup>30</sup>

The role of law clerks in courts other than the Supreme Court has prompted a distinct set of arguments. The high workload of federal courts of appeals, for example, might mean that increased delegation of opinion-drafting to law clerks is simply unavoidable.<sup>31</sup> Nevertheless, some commentators have suggested that precisely because that workload has led

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<sup>23</sup> *Id.*

<sup>24</sup> PEPPERS, *supra* note 21, at 209.

<sup>25</sup> Lebovits et al., *supra* note 21, at 304.

<sup>26</sup> Taylor & Wittes, *supra* note 15.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* (suggesting that each Justice should be allotted only one clerk and that clerks should be “[cut] . . . out of the writing” of opinions).

<sup>29</sup> Rehnquist, *supra* note 20 (quoting Louis Brandies, Associate Justice, Supreme Court of the United States).

<sup>30</sup> Kurland, *supra* note 21. A related but separate set of arguments surround the question whether, apart from their role in drafting opinions, law clerks unduly influence the views of the judges and Justices who employ them. For one important empirical study, see Adam Bonica et al., *Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court*, 35 J.L. ECON. & ORG. 1 (2019).

<sup>31</sup> *See* Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 944–45 (1995).

courts of appeals to publish large numbers of shorter, non-precedential, opinions, the role of law clerks raises even more serious issues. One federal appellate judge has argued that:

Any nuances in language [in nonprecedential opinions], any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.<sup>32</sup>

Moreover, even among the many observers who accept that many judges will inevitably rely on their law clerks to draft opinions, there is still that tendency, noted earlier, to esteem judges who do not or who at least limit the practice.<sup>33</sup> For example, the late John Paul Stevens is said to stand out for generally writing his own first drafts, at least much of the time.<sup>34</sup> Similarly, foreign judges who do not have the benefit of American-style law clerks are sometimes described as “doing their own work.” Not long ago, I was at a dinner with a senior English judge who took it as a point of pride that she and her colleagues “do their own work.”

#### D. *The Puzzle*

My aim in this Essay is not principally to engage in the debate over whether opinion-drafting by clerks is proper or improper, good or bad. Rather, I want to reflect on why the role of clerks in drafting opinion should be cloudy and controversial in the first place. Everything I have said so far

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<sup>32</sup> Letter from Judge Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit, to Honorable Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules 7 (Jan. 16, 2004), <http://www.nonpublication.com/kozinskiletter.pdf> [<https://perma.cc/6NGN-WSRQ>]. I leave to the reader the repeated credible accusations that Judge Kozinski (who has since retired in the midst of scandal) sexually harassed and otherwise created a hostile work environment for many of his clerks. See Dara E. Purvis, *When Judges Prey on Clerks*, N.Y. TIMES, Dec. 12, 2017, <https://www.nytimes.com/2017/12/12/opinion/law-schools-alex-kozinski.html> [<https://perma.cc/7ZGM-3LKZ>].

<sup>33</sup> See BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 53 (1996). A reminiscence written almost sixty years after the fact of a clerk’s experience during the Court’s 1926 term went out of its way to insist that “[w]hile the clerk was responsible for extensive research, he was never asked to draft an opinion as such. His main role was to participate in the painstaking process of revision.” Milton Handler, *The 1926 Term: My Clerkship With Mr. Justice Stone*, in YEARBOOK 1985: SUPREME COURT HISTORICAL SOCIETY 6 (1985).

<sup>34</sup> See Sam Erman, *Justice John Paul Stevens’s Fiercely Modest Judicial Method*, THE HILL (July 18, 2019 11:30 AM), <https://thehill.com/opinion/judiciary/453663-justice-john-paul-stevenss-fiercely-modest-judicial-method> [<https://perma.cc/3ZLH-Z7XD>].

might seem obvious or even commonplace. But I want to ask *why* it is commonplace. Why do we take all this for granted? My goal here is to strip away our assumptions. I want, in the sociological lingo, to make the familiar strange in part to develop a more educated sense of why it should be so familiar.

## II. “SHALL BE VESTED”

In pursuing this exercise of making the familiar strange, it might be useful to compare law clerks in the judicial branch to subordinates and staff of various sorts in the two other branches of government: the executive and the legislative. Commentators who are cautious about clerks drafting opinions, and judges themselves in conversations with their own clerks, often point out that it is the judges, not their clerks, who are appointed by the President, confirmed by the Senate, and assigned their powers and duties by Article III of the Constitution.<sup>35</sup> Indeed, Article III of the Constitution begins by declaring that “[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>36</sup> Article II begins with the parallel declaration that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>37</sup> And Article I begins with the words “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>38</sup> Therefore, it is worth delving a bit into our expectations about how the President and Congress—in whom constitutional authority is also “vested”<sup>39</sup>—actually operate.

### A. *The President*

Presidents do not “do their own work.” Not even close. The Executive Branch employs approximately four million persons, not including postal workers.<sup>40</sup> Of these four million employees, approximately 1,600 require

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<sup>35</sup> See, e.g., Randall Kennedy, *Fanfare for an Uncommon Man*, TIME, Feb. 8, 1993, at 33 (recounting that Justice Thurgood Marshall would remind his law clerks that he was “the one who was nominated by President Lyndon B. Johnson and confirmed by the Senate of the United States . . . not you.”).

<sup>36</sup> U.S. CONST. art. III, § 1.

<sup>37</sup> U.S. CONST. art. II, § 1.

<sup>38</sup> U.S. CONST. art. I, § 1.

<sup>39</sup> U.S. CONST. art. II, § 1; *Id.* art I, § 1.

<sup>40</sup> *Our Government: The Executive Branch*, WHITE HOUSE <https://www.whitehouse.gov/about-the-white-house/the-executive-branch/> [<https://perma.cc/ND9H-MGBB>].



Senate confirmation,<sup>41</sup> but the rest do not. Many government workers admittedly perform clerical or ministerial tasks. But many others do important, consequential, substantive work that Presidents could not do themselves and which Presidents mostly do not, and could not even, know about. To be sure, Article II does contemplate the existence of “executive Departments” and “Heads of Departments,”<sup>42</sup> which already concedes that the Executive Branch is not a one-person operation. But even those heads of departments do not, and could not, know most of what happens in their name in the agencies that they lead.

Nor is the issue here merely the practical impossibility of the President or even the President’s Senate-confirmed officers taking full personal charge of the substantive executive functions performed by their subordinates. More important for my purposes is the normative dimension of our theory of the executive branch.<sup>43</sup> Some executive branch agencies enjoy functional independence from the President, who cannot remove their heads without cause. The relative autonomy of other executive functions, including criminal investigations and prosecutions, rests on powerful traditions of independence that Presidents ignore at their political and possibly legal peril. To be sure, advocates of the “unitary executive” theory consider full-fledged independent agencies to be unconstitutional<sup>44</sup> and might be at least skeptical of forms of autonomy enshrined by tradition rather than statute.<sup>45</sup> But even they treat the President’s role in these contexts as a backstop, an ultimate supervisory authority and responsibility, not a matter of day-to-day control.<sup>46</sup>

The fact remains that, under any theory, much of what the executive branch does requires specialized skills and experience across a vast array of

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<sup>41</sup> See John Bowden, *Office That Vets Trump Appointees Faces Staff Shortage, Inexperience: Report*, THE HILL (Mar. 30, 2018 12:27 PM), <https://thehill.com/homenews/administration/381008-office-that-vets-trump-appointees-faces-staff-shortage-inexperience> [<https://perma.cc/9JV6-XYMH>].

<sup>42</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>43</sup> With a few notable, but I hope forgivable, lapses, I resist the temptation to say much here about the norm-shattering behavior and attitudes of the current President, Donald Trump.

<sup>44</sup> See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 293–94* (2008) (discussing findings of the Committee on Administrative Management under Franklin D. Roosevelt that independent agencies were unconstitutionally taking on duties for which the President was responsible); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 82–86 (1995).

<sup>45</sup> For a compelling contrary view, however, see Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, 70 ALA. L. REV. 1, 69–70 (2018).

<sup>46</sup> Cf. Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1600 (1997).

fields—including law, policy analysis,<sup>47</sup> management, diplomacy and foreign affairs, physical science, climate science, engineering, medicine, social science, aeronautics and astronautics, agriculture, economics, finance, military tactics and discipline, spycraft, and much more. All Presidents—and, for that matter, all heads of executive agencies—must rely on others to do what they not only could not, but should not even want to do themselves. Just as important, executive government requires both the functional specialization and the push and pull of officials and agencies to function properly.

There have always been complaints about “faceless bureaucrats” and their modern incarnation in “the deep state.” But those complaints are outweighed by recognition of the indispensable role that all those executive branch workers play in running a well-ordered government.

Perhaps though, to sharpen the comparison, we should zoom in, ignoring the mass of “executive departments,” and just focus on the approximately 4,000 employees in the immediate Executive Office of the President<sup>48</sup> who do not operate within the “departments” of government and are not, as a rule, subject to Senate confirmation.<sup>49</sup> But it turns out that, even in zooming in, the same basic conclusions recur. Indeed, putting partisan politics aside, one of the clearest signs of the sense of chaos enveloping the current presidential administration is that the President frequently does not allow the ordinary operations of the Executive Office to function effectively. Instead, he proceeds on his own without the benefit of thorough and systematically organized advice, analysis, and consultation.

We might also then zoom in even further to the most immediate staff of the President who have roles at least crudely comparable to that of law clerks. The closest analogue might be presidential speechwriters. In this context, there is at least some resemblance to the debate over law clerks. The practice of presidential speechwriting goes back to the presidency of George Washington, whose farewell address Alexander Hamilton famously drafted, though that fact stayed a secret for some time and was not full resolved for

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<sup>47</sup> I refer here not only to consideration of “policy” in a colloquial sense, which should be at the core of any qualified President’s own skill set, but to the more systematic discipline of public policy analysis, which “uses multiple methods of inquiry and argument to produce and transform policy-relevant information that may be utilized in political settings to resolve policy problems.” WILLIAM N. DUNN, *PUBLIC POLICY ANALYSIS* 35 (1981); *see generally* HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS, AND METHODS xix (Frank Fischer et al. eds., 2007).

<sup>48</sup> *See* BARBARA A. BARDES ET AL., *AMERICAN GOVERNMENT AND POLITICS TODAY: ESSENTIALS* 2017-2018 EDITION 351 (Cengage Learning 2016).

<sup>49</sup> *Cf.* Bowden, *supra* note 41.

about fifty years.<sup>50</sup> Until the mid-twentieth century, there was some debate about the propriety of presidential speechwriting.<sup>51</sup> By now, though, the practice is generally uncontroversial<sup>52</sup> and entirely open, unlike the work of judicial law clerks. Historians have written definitive accounts of presidential speechwriting,<sup>53</sup> and speechwriters themselves routinely write memoirs of their time in the White House<sup>54</sup> and shared detailed explanations of how they plied their craft.<sup>55</sup> The White House organization chart includes the official title of Speechwriter.<sup>56</sup>

This entire discussion might well reduce to one simple observation. As noted, Justice Louis Brandeis famously boasted that “we do our own work.”<sup>57</sup> That statement might, in today’s context, no longer be exactly true. But many observers would nevertheless understand it to be a noble aspiration or even an innocent fiction. By contrast, when President Donald Trump in 2017 asserted, “I’m the only one that matters,”<sup>58</sup> many observers would take

<sup>50</sup> See Jeffrey J. Malanson, “If I Had It in His Hand-Writing I Would Burn It”: *Federalists and the Authorship Controversy over George Washington’s Farewell Address, 1808–1859*, 34 J. EARLY REPUBLIC 219 (2014).

<sup>51</sup> See, e.g., Ernest G. Borman, *Ethics of Ghostwritten Speeches*, 47 Q.J. SPEECH 262, 262, 267 (1961) (arguing that ghostwritten speeches diminish presidential credibility and can be generally unethical if deceptive).

<sup>52</sup> See Deborah Brandt, “Who’s the President?”: *Ghostwriting and Shifting Values in Literacy*, 69 COLLEGE ENG. 549, 549–50 (2007) (noting that it is common knowledge that presidents rely on speechwriters).

<sup>53</sup> See generally ROBERT SCHLESINGER, *WHITE HOUSE GHOSTS: PRESIDENTS AND THEIR SPEECHWRITERS* (2008).

<sup>54</sup> See, e.g., DAVID FRUM, *THE RIGHT MAN: AN INSIDE ACCOUNT OF THE BUSH WHITE HOUSE* (2005); DAVID LITT, *THANKS, OBAMA: MY HOPEY, CHANGEY WHITE HOUSE YEARS* (2017).

<sup>55</sup> See, e.g., Matt Kohut, *In His Own Words*, HARV. KENNEDY SCH. MAG., Autumn 2013, at 20–23 (discussing Cody Keenan’s time in the White House and his reflections on the craft of presidential speechwriting); Adam Frankel, *What Was It Like to Be Edited by Barack Obama?*, LITERARY HUB (Nov. 11, 2019), <https://lithub.com/what-was-it-like-to-be-edited-by-barack-obama/> [<https://perma.cc/PE6A-PBGM>].

<sup>56</sup> See EXECUTIVE OFFICE OF THE PRESIDENT, *ANNUAL REPORT TO CONGRESS ON WHITE HOUSE OFFICE PERSONNEL* (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/06/July-1-2019-Report-FINAL.pdf> [<https://perma.cc/NU5B-Q43P>]. Even President Trump does not write his own more formal speeches, though he does presumably compose many of his own tweets.

<sup>57</sup> Rehnquist, *supra* note 20 (quoting Louis Brandies, Associate Justice, Supreme Court of the United States).

<sup>58</sup> Bill Chappell, *‘I’m The Only One That Matters,’ Trump Says of the State Dept. Job Vacancies*, NPR (Nov. 3, 2017, 8:09 AM) (quoting Interview by Laura Ingraham with Donald J. Trump, President of the United States (Nov. 2, 2017)), <https://www.npr.org/sections/thetwo-way/2017/11/03/561797675/im-the-only-one-that-matters-trump-says-of-state-dept-job-vacancies> [<https://perma.cc/Z83R-CYPG>]. The President was speaking specifically about foreign policy, but he has said much the same thing

that to be not only an obvious falsity but a narcissistic and dangerous pretension. A part of us thinks that judges could or should do their own work, but no part of us thinks that Presidents could or should.

*B. The Congress*

The houses of Congress and individual members employ thousands of aides and other staff. The existence of a significant congressional bureaucracy is relatively more recent than that of the executive bureaucracy. Many foreign legislatures still function with very thin staffing. Congress not only relies on its staff, but it is entirely open about it. This was dramatically apparent during the recent House hearings considering the impeachment of President Trump, during which staff attorneys questioned witnesses and even testified themselves about their conclusions.<sup>59</sup>

It might be useful, though, to zoom in on the most obvious point of comparison between Congress and the courts: Both the courts and Congress are charged with producing formal documents. Judges issue opinions and judgments, and legislators produce laws. Yet modern legislators, including foreign legislators, do not typically draft the statutes and resolutions that they enact. Legislative drafting is a specialized craft delegated to the staff of individual members and committees and then to technically minded institutions, such as the Office of Legislative Counsel. This is not a secret. It is not even an open secret.<sup>60</sup> It is simply how the legislative process works.

Scholars have in recent years emphasized the role of staff, legislative counsel, and even outsiders such as lobbyists in drafting both statutory language and the formal expressions of intent that typically accompany

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in other realms too. *See, e.g.*, Jennifer Jacobs et al., *Trump Declares He Has 'Total' Authority to Reopen After Virus*, BLOOMBERG (Apr. 13, 2020, 9:15 PM), <https://www.bloomberg.com/news/articles/2020-04-13/trump-declares-he-has-power-to-open-up-states-not-governors> [<https://perma.cc/9NJ5-547P>] (discussing President Trump's assertion that he has "the ultimate authority" to order states to reopen their economies in the effort to combat COVID-19).

<sup>59</sup> *See* Brian Naylor, *Who Are the Staff Attorneys Questioning Impeachment Witnesses?*, NPR (Nov. 13, 2019, 12:09 PM), <https://www.npr.org/2019/11/13/778818003/who-are-the-staff-attorneys-questioning-impeachment-witnesses> [<https://perma.cc/ABQ9-2DSP>]; John Wagner et al., *Lawyer for Democrats Calls Trump 'A Clear and Present Danger' as He Argues Case for Removal*, WASH. POST (Dec. 9, 2019, 10:07 PM), [https://www.washingtonpost.com/politics/impeachment-hearings-live-updates/2019/12/09/108f038c-1a70-11ea-87f7-f2e91143c60d\\_story.html](https://www.washingtonpost.com/politics/impeachment-hearings-live-updates/2019/12/09/108f038c-1a70-11ea-87f7-f2e91143c60d_story.html) [<https://perma.cc/D5UX-D4ZY>].

<sup>60</sup> *See Our Services*, LEGIS. COUNS., <https://legcounsel.house.gov/about/our-services> [<https://perma.cc/3AGT-UY24>].

legislation.<sup>61</sup> The point of some of these studies has been to suggest that much of our understanding of legislative history as an aid to statutory interpretation is built on untenable formalism if it ignores the actual way that laws get drafted, redrafted, and officially characterized.<sup>62</sup> But few, if any, observers dispute the value or legitimacy, as such, of professional counsel and other staffers drafting legislative texts.<sup>63</sup> Indeed, I would wager that with respect to this vital and central task of legislative process, no reasonable observer would argue that members of Congress should do their own work.

### III. AUTHORS AND AUTHORITY

#### A. *The Presidents and the Executive Branch*

How do we make sense of the distinct puzzle of law clerks? With respect to the comparison between the judicial and executive branches, there might be a straightforward explanation: When the Constitution declares that “[t]he executive Power shall be vested in a President of the United States of America,”<sup>64</sup> the word “President” is really being used as a metonym or synecdoche for the entire organization of the executive functions of government or, more accurately, for that entire organization with the flesh-and-blood President at its head.<sup>65</sup> Even supporters of the “unitary executive” theory would not necessarily dispute this description. Their disagreement with the rest of us has less to do with the meaning of the word “President” at the beginning of Article II than with the (partly consequential and partly symbolic) balance of authority between the literal President and all the other agencies of executive governance.<sup>66</sup>

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<sup>61</sup> See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 585–89 (2002); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 83–92, 103, 118 (2015).

<sup>62</sup> See, e.g., Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 178–81 (2017) (arguing that statutory interpretation based on formal rules of textualist and objective evaluation is rarely practiced in full, and that any legitimate method of statutory interpretation still “depends . . . on understanding how Congress works”).

<sup>63</sup> See, e.g., Nourse & Schacter, *supra* note 61, at 577–78.

<sup>64</sup> U.S. CONST. art. II, § 1.

<sup>65</sup> See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1245–46 & n.330 (2019).

<sup>66</sup> See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010) (“The theory of the unitary executive focuses upon the extent to which Article II, Section 1, Clause 1 . . . protects the President’s authority to appoint, direct, and remove officers within the executive branch.”).

The use of the personal title of the head of state as a metonym or synecdoche to describe the executive function of government is an ancient and still common practice.<sup>67</sup> The Declaration of Independence, after all, complains about the abuses of King George III even though the monarch—while exercising genuine influence and not yet a figurehead constitutional monarch in the modern sense—did not in any “sense . . . decide and dictate policy.”<sup>68</sup> An extreme example in constitutional drafting appears in the Constitution of Australia. The Australian Constitution declares that “[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.”<sup>69</sup> Yet neither the Queen nor the Governor-General actually exercises any but residual functional executive power.<sup>70</sup>

Notably, the word “President” elsewhere in the United States Constitution usually refers to the literal President, much as the term “Governor-General” in the Australian Constitution often refers to the literal Governor-General. But these sorts of inconsistent usages should not detain us for long; they are in line with ancient and commonly employed conventions going back at least to the medieval conception of the “King’s Two Bodies.”<sup>71</sup>

### B. *Congress and Its Laws*

Accounting for the difference between Congressional staffers and judicial law clerks is more difficult. Members of Congress and Article III

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<sup>67</sup> See Mortenson, *supra* note 65, at 1245–46.

<sup>68</sup> P.D.G. Thomas, *George III and the American Revolution*, 70 HIST. 16, 17 (1985).

<sup>69</sup> *Australian Constitution*, s 61. The Queen is also, technically speaking, a constituent of Parliament along with the House of Representatives and the Senate. *Id.* s 1.

<sup>70</sup> See Gabrielle Appleby, *Unwritten Rules*, in OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION 209, 215, 221–223 (Cheryl Saunders & Adrienne Stone eds., 2018). State constitutions in the United States are illuminating in this respect. Many provide for independently elected executive officials other than the Governor, such as an Attorney General or even a Commissioner of Agriculture. See, e.g., ALA. CONST. art. V, § 114. Some of those constitutions accommodate that division of labor by, for example, vesting only the “chief executive power” in the Governor. Va. Const. art. V, § 1. Other state constitutions blithely claim to vest “the executive power” in the Governor even though they clearly are not vesting all such executive power in the Governor alone. MD. CONST. art. II, § 1, art. V, § 1 (vesting “the executive power” in the Governor but providing for the election of an Attorney-General). This last category strikes me as less a metonym than just a symbolic affirmation of the Governor’s unique role in state governance.

<sup>71</sup> See ERNST KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* 7 (1957) (explaining the medieval concept of the King having a “Body natural, and a Body politic” (quoting Edmund Plowden, *The Commentaries or Reports of Edmund Plowden* 212a (London, S. Brooke 1816))).

judges are both constituted holders of specific, formal, government authority. Those roles might have a certain metonymic quality, but not in nearly the same intense sense as the President's. I do, though, tentatively want to suggest two more focused explanations for the difference.

The first explanation goes to the question of expertise. I wrote earlier that nobody expects Presidents to be experts in the entire range of disciplines necessary to the exercise of executive decisionmaking.<sup>72</sup> We might say the same of members of Congress, which is one reason they have large staffs. More to the point, the role played by members of Congress does not require them to be lawyers, have legal training, or have any skill in the arcane techniques of legislative drafting.

By contrast, one distinct and vital dimension of the relationship between judges and their law clerks is that they are two of a kind, which is to say that they are both lawyers engaged in lawyerly work. Judges might be older and more experienced; law clerks might be more flexible and attentive to detail. But these are differences of degree. At heart, judges and their law clerks are specialists of the same sort, collaborating in a single enterprise. Thus, although it is self-evident why members of Congress (as much as the President) would, and could, legitimately turn to professional staff with specialized skill sets, it is less clear—as a normative matter—why judges would turn to their clerks to take the dominant role in drafting opinions.

The second, related explanation goes to the very nature of the legislative and judicial functions. The argument would go something like this: In our common conception, legislatures exercise political will and courts exercise legal reason. The legislator's task in legislating is to decide how to exercise political will, looking to considerations of prudence, political philosophy, and the sentiments of constituents. The legislative text effectuates that exercise of will. But the judge's task is to engage in judicial reasoning, and the judicial opinion *is* that reason. There is something uncomfortable in the possibility that law clerks are reasoning for their judges. Moreover, judges are legal *reasoners*, engaged in a process of both individual and collective deliberation that extends throughout their judicial careers. If many clerks are drafting many opinions over many years for the same judge, that single reasoning mind at work, as part of a collective body engaged in a long course of reasoning, shatters like a broken window into many tiny shards.

This cannot be the last word, however. The distinction between legislative will and judicial reason, as I have just drawn it, is overbroad and

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<sup>72</sup> See discussion *supra* Section II.A.

inadequate.<sup>73</sup> It overlooks the role that legislatures play in searching for law and not merely dictating it.<sup>74</sup> It ignores the extent to which legislative will is bound up with the precise words delivered by effective—which is to say well-reasoned—legislative drafting. It elides the complex, contingent, historical relationships between legislation and adjudication.<sup>75</sup> It downplays the necessarily creative dimension of adjudication. Finally, it ignores the extent to which judicial opinions might be justifications, reconstructions, or rhetorical amplifications of judicial reasoning as much as direct unmediated exercises of that reasoning.

To sum up, what we think of the practice of law clerks drafting opinions probably depends on two variables. The first variable is empirical. As noted, “drafting opinions” is a very general term. It covers a wide range of practices and precise divisions of labor between judges and their clerks. The second variable is theoretical: Where do we think judicial reasoning inheres? At one extreme, one might argue that only the result really matters and that judicial opinions are mere ornaments. That does not seem credible. At the other extreme, one might think that opinions *are* judicial reasoning, including every argument, byway, and turn of phrase. That might not be entirely right either. But the best view, whatever it is, is somewhere between those poles.

At the intersection of these two variables is a third set of questions that goes to the pattern of judicial careers beyond the individual case: Might even judges who leave most of the work of drafting to their clerks still be able to maintain substantial control over the larger path of their life of reason? Can a succession of clerks collectively channel the through-line of their judge’s distinct contribution to the work of the court?<sup>76</sup>

As I emphasized at the start, my goal here is not to argue a specific, definitive, normative position on law clerks drafting opinions, but only to explain some of the legal culture’s diffidence and angst about the practice.<sup>77</sup>

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<sup>73</sup> See William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 546–52 (1988) (discussing the origins and limitations of the distinction between legislative will and judicial reason).

<sup>74</sup> See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

<sup>75</sup> I leave aside here Congress’s quasi-judicial role in contexts such as impeachment.

<sup>76</sup> Several studies have used rigorous quantitative methods to try to measure whether changes from one batch of Supreme Court law clerks to the next affects the degree of internal consistency in the Justices’ writing styles. See, e.g., Keith Carlson et al., *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U. L. REV. 1461, 1498–1502, 1509 (2016) (highlighting several studies on the clerks’ effects on Supreme Court opinions and independently finding evidence that clerks contribute to “less inter-year individual writing consistency for the Justices”).

<sup>77</sup> See discussion *supra* pp. 101, Section I.B.



The distinctions I have just suggested should at least have enough purchase to do that.

C. *Clerks and Ghostwriters*

I have contended that, in terms of the conceptual difficulties they raise, the work of law clerks does not analogize well to that of staffers and other employees in the executive and legislative branches. But in light of the arguments I have just made, a better frame of reference might be ghostwriters outside of government.

The world of ghostwriting, of course, is both diverse and normatively tangled, but that is part of what makes it an interesting comparator. Corporate speechwriting and the like are much like political speechwriting and might not need to detain us long. Celebrity memoirs are more complicated. In general, the ghostwriting of such life stories is accepted and not especially hidden. Nevertheless, it is at least potentially fraught.<sup>78</sup>

Literary ghostwriting is another part of the complex mix. Some examples—as when persons famous for other reasons put their names on novels drafted by more obscure professional authors—are as mundane as celebrity memoirs, if not more so. Other cases, though, raise deep questions, which I will explore further below.

Finally, scholarly ghostwriting is both interesting and instructive for our purposes. It happens. It is almost certainly wrong. And scholars themselves have articulated specific sound reasons for concluding that it is unethical and pernicious. One author, for example, has suggested that law professors’

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<sup>78</sup> As Joe Queenan relates:

A perfect example of the shadow looming over the ghostwriting-industrial complex is Tim Russert’s memoir, “Big Russ and Me.” This is the heartwarming 2004 best seller in which the distinguished newsman pays tribute to his wonderful father, a man of great character, grace and common decency who taught Russert all the important things in life—like how to hire Lee Iacocca’s ghost to write a book about how graceful and decent your dad is, but not to put the ghostwriter’s name right there on the cover, because that might make it seem less heartwarming. When I read Russert’s book, I found his easygoing, straight-talking style entirely irresistible—and not just because the dust jacket said that his style was easygoing, straight-talking and irresistible. But then, when I got to the very end of the book and found out that Bill Novak was Russert’s “full partner in writing this book,” I recalled that Novak was also the author of Iacocca’s easygoing, straight-talking, heartwarmingly irresistible book. Not to mention the easygoing memoirs of Nancy Reagan. And the Mayflower Madam. This got me to wondering whether the irresistibly heartwarming sentiments expressed in the book were Russert’s, Novak’s or perhaps some heartwarmingly straight-talking sentiments left over from Iacocca’s even more irresistible book.

Joe Queenan, *Ghosts in the Machine*, N.Y. TIMES, (Mar. 20, 2005), <https://www.nytimes.com/2005/03/20/books/review/ghosts-in-the-machine.html> [<https://perma.cc/JNG3-KQRY>].

appropriation of their research assistants' prose, even if consensual, is akin to plagiarism. Its many harms are said to include “[d]elegation of thinking,” “deception of the reader,” “[e]rosion of the integrity of the professor,” “modeling deceptive behavior” to the research assistant, and “erod[ing] the ethical sensibility of the [legal] profession as a whole.”<sup>79</sup> Less close to home, ghostwriting is apparently especially prevalent in medical and scientific scholarship.<sup>80</sup> One might have naively supposed that the role of ghostwriting in those contexts is harmless, since the crux of a scientific paper is the experimental result and not the prose. Yet serious observers have argued that the practice is potentially dangerous, especially with respect to medical research, and, in any event, “violates the integrity and ethical principles of scientific research.”<sup>81</sup>

The question for us, then, is whether judicial opinions are more akin to political and corporate speeches on the one hand, or to scholarly articles on the other. Neither analogy seems entirely apt, though the claim that ghostwritten scholarship unduly delegates thinking and also models deceptive behavior cuts close to the bone. Still, both analogies are instructive.

I conclude, then, much as I ended the last subsection. Relating normative questions about the practice of clerks drafting opinions to ongoing debates about the ethics of ghostwriting outside of government does not resolve anything definitively. But it does help illuminate what is at stake.

In the end, our legal culture is uncertain about the propriety of law clerks drafting opinions because it has never resolved, and might never resolve, a deeper and more complex constellation of puzzles about judicial reasoning, the role of judges within the institutional apparatus of the judiciary, and the place that judicial opinions play in the landscape of the law. Our vague discomfort and conspiracies of reticence merely sublimate more profound anxieties and uncertainties about the enterprise in which we are engaged.

#### IV. THE BLACK BOX

##### A. *The Irrelevance of “Judicial History”*

So far so good, or not. There is a further question, though. Should any of these analogies to government staffers or ghostwriting make a difference

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<sup>79</sup> Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467, 478–79 (2001).

<sup>80</sup> See Anna Wilde Matthews, *At Medical Journals, Writers Paid by Industry Play Big Role*, WALL STREET J. (Dec. 13, 2005), <https://www.wsj.com/articles/SB113443606745420770> [<https://perma.cc/LUU3-AWPN>].

<sup>81</sup> Xavier Bosch, *Exorcising Ghostwriting*, 12 EMBO REP. 489, 491 (2011).

beyond some possible normative harrumphing or theoretical puzzlement? More specifically, should they affect how we read or evaluate judicial opinions themselves?

As noted earlier, some commentators have argued that the fact that congressional staff and legislative counsel, not legislators, draft legislative language and shape the official record might influence how we read statutes, especially with respect to the use of legislative history and intent. But as Professor Adrian Vermeule pointed out in an important article some years ago, one of the powerful conventions regulating the reading and interpretation of judicial opinions is that we do not look to the underlying subjective intent of the judges who wrote those opinions.<sup>82</sup> Nor, in reading and interpreting judicial opinions do we consult “judicial history,” including the internal deliberations within chambers or among judges or Justices.<sup>83</sup> Put another way, judicial opinions are black boxes; we do not peek inside.

Vermeule offers a set of distinct but cumulative arguments for why this convention makes sense even, I should add, in an age otherwise besotted by various forms of intentionalism and originalism. For my purposes here, I do not want to rehearse those arguments, but simply to note the convergence of accepted practice and normative justification that Vermeule identifies.

Vermeule’s basic insight also highlights another piece of the puzzle here. I noted at the start of this Essay that the legal culture is diffident about recognizing that law clerks often draft opinions.<sup>84</sup> But that diffidence is only one part of the broader and more profound diffidence, unparalleled in the other branches of government, that surrounds the inner workings of the judicial process. Conversations, deliberations, and written exchanges in and among chambers are closely held, and they rarely leak. Historians do gain access to these records, but only as individual judges and Justices see fit, and only years later. Occasionally, journalists obtain enough sources to write tell-all books about a discrete period in a court’s history.<sup>85</sup> And, every so often, reporters become privy to some specific dramatic event in the deliberative process.<sup>86</sup> But these are sporadic outbursts of information, not the sort of

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<sup>82</sup> See Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1312–13 (1999).

<sup>83</sup> *Id.*

<sup>84</sup> See discussion *supra* Section I.B.

<sup>85</sup> See, e.g., JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008) (discussing the work and ideological tilt of the Court throughout the late 20<sup>th</sup> Century); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979) (detailing the Supreme Court’s work from 1969 to 1975).

<sup>86</sup> See, e.g., JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 233–40 (2019) (reporting the Supreme Court’s internal deliberations regarding the constitutional challenge to the Affordable Care Act, including Chief Justice Roberts’ change of mind to uphold the Act’s individual mandate).

reliable record out of which later judges could hope to fashion a judicial history for purposes of interpreting judicial opinions. It would be a mistake, though, to think that this thinness of an institutional record is the sole *reason* that judges and others do not look to judicial history in interpreting judicial opinions. I doubt that there is any simple cause and effect here. To the contrary, if judges thought that they *should* interpret judicial opinions with the aid of judicial history, they might be more likely to produce it promptly and transparently. And that would likely profoundly change both the private and the public dimensions of the dynamic between judges and law clerks.

*B. Names and Narratives*

If judicial opinions are black boxes, that strongly suggests that our readings of specific opinions should not concern itself with whether law clerks drafted, or in some other way contributed to, those opinions. How we interpret statutes might depend in part on how much weight we put on the fact that much of the material recorded in legislative histories is not the work product of legislators themselves. But that debate does not arise when we interpret opinions because, as Vermeule points out, we do not consult judicial history in the first place.<sup>87</sup>

That should not be the end of the matter, though. Putting aside specific opinions, should our interpretive and legal practice more generally bear in mind the role that law clerks can play in the judicial process? And might that, in turn, suggest normative implications for the role of law clerks?

Consider that there is one specific but vital respect in which judicial opinions are not mere black boxes: With the exception of occasional *per curiam* and jointly-signed opinions,<sup>88</sup> judicial opinions in our legal culture are not anonymous—they have names attached to them. They *could* be anonymous; witness those occasional and even sometimes important *per*

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<sup>87</sup> See Vermeule, *supra* note 82, at 1312–13.

<sup>88</sup> See generally Laura Krugman Ray, *Circumstance and Strategy: Jointly Authored Supreme Court Opinions*, 12 NEV. L.J. 727 (2012). The most notable joint opinion in United States Supreme Court history was *Cooper v. Aaron*, 358 U.S. 1 (1958), which all nine Justices signed as a token of their unanimous assertion of authority in the face of Southern resistance to desegregation. See EARL WARREN, *THE MEMOIRS OF EARL WARREN* 298 (1977) (explaining the decision to have all nine Justices sign the opinion); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 73–86 (1979); Ray, *supra*, at 744–45. For a brief discussion of the continuing debate over the wisdom of that strategy, see Perry Dane, *Jurisdiction, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 25 n.61 (1994). Notably, Justice Frankfurter released a concurring opinion, which provoked significant bewilderment and resentment from his colleagues. See Hutchinson, *supra*, at 82–85. It might also be worth noting that, as Hutchinson and others have described after examining the archival records, the successive drafts of the opinion were primarily the responsibility of Justice Brennan. *Id.* at 79–83.

*curiam* and joint opinions. But they are not anonymous. And that is clearly relevant to our interpretive and legal practice even though at least majority opinions in a deep and important sense also speak for the court.<sup>89</sup> We think of individual judges and Justices as having careers in which they develop and sometimes evolve jurisprudential stances on a variety of issues. We routinely speak of the jurisprudence of this Justice or that judge.<sup>90</sup> We also imagine that courts sitting collectively—most notably the United States Supreme Court—are engaged in a continuing drama whose cast changes only incrementally. That drama plays out an ongoing deliberative process featuring jurisprudential debates and doctrinal turns that can take years or even decades to work themselves out.

All this is not merely of academic interest. It has specific implications for the techniques and strategies by which courts and commentators read the body of judicial opinions. With respect to individual Justices and judges, our interpretive practice assumes that that opinions produced in different cases at various times might illuminate each other's meaning. Consider, to cite just one small example, the crucial debate in *Burwell v. Hobby Lobby Stores, Inc.*<sup>91</sup> in 2014 regarding whether for-profit corporations could claim protection under the federal Religious Freedom Restoration Act ("RFRA").<sup>92</sup> Justice Ginsburg's dissent sought to draw a sharp line between for-profit corporations, which it argued did not qualify for religious exemptions under either the Free Exercise Clause or RFRA, and religious and other nonprofit corporations, which did.<sup>93</sup> The dissent, among other things, cited Justice Brennan's concurring opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>94</sup> which posited, in a different legal context, that "[t]he risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation."<sup>95</sup> The majority opinion in *Hobby Lobby* retorted that Justice Ginsburg's reading of Justice Brennan's

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<sup>89</sup> See Dane, *supra* note 88, at 24 n.61 (1994) (discussing "the American practice, instituted by John Marshall, of producing, if possible, 'Opinions of the Court,' in which one judge or justice speaks for a majority").

<sup>90</sup> See, e.g., Steven G. Calabresi, *The Jurisprudence of Justice Alito*, 87 G.W. L. REV. 507 (2019); William W. Fisher III, *The Jurisprudence of Justice Marshall*, 6 HARV. BLACKLETTER J. 131 (1989).

<sup>91</sup> 573 U.S. 682 (2014).

<sup>92</sup> *Id.* at 688–90.

<sup>93</sup> 573 U.S. at 751–57.

<sup>94</sup> 483 U.S. 327, 340 (1987) (Brennan, J., concurring); see *Hobby Lobby*, 573 U.S. at 752.

<sup>95</sup> *Amos*, 483 U.S. at 344 (Brennan, J., concurring).

concurrence in *Amos* did not accurately reflect Justice Brennan's view of the rights of for-profit corporations because, after all, Justice Brennan had recognized such rights in his dissenting opinion in a yet earlier case, *Gallagher v. Crown Kosher Supermarket*.<sup>96</sup> These sorts of intertextual gymnastics, encompassing cases 26 years apart from each other, require a strong assumption that the same reasoning mind was at work in both cases.

Attaching names to opinions is also important to our reading of larger-scale doctrinal and jurisprudential evolutions. Consider, for example, the process by which most of the rights guaranteed in the Bill of Rights, which federal courts originally only enforced against the federal government, were "incorporated" by way of the Fourteenth Amendment so that they became enforceable against the States.<sup>97</sup> The present shape of the doctrine makes its best sense against the background of a grand narrative spanning several distinct, if overlapping, chapters and several generations of strong judicial personalities. That narrative, or at least the past century's part of it,<sup>98</sup> began with cases in the 1920's and 1930's incorporating certain rights mostly modeled on the First Amendment because the Court deemed them "fundamental."<sup>99</sup> The second chapter centered on the epic debate between Justices Harlan and Frankfurter on the one hand and Justice Black on the other. Justices Harlan and Frankfurter, continuing in the tradition established most prominently by Justice Cardozo,<sup>100</sup> argued that only those parts of the Bill of Rights that were necessary in any free society and reflected a fundamental conception of "ordered liberty" should be enforceable against the States, and even then not necessarily on the same terms as they were

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<sup>96</sup> 366 U.S. 617, 642 (1961) (Brennan & Stewart, JJ., dissenting); see *Hobby Lobby*, 573 U.S. at 709 n.21.

<sup>97</sup> The term "incorporation" does not appear in the earliest cases.

<sup>98</sup> For some of the earlier history, see Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102 (2009).

<sup>99</sup> See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming, without deciding, "that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) ("[T]he liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property."); *Powell v. Alabama*, 287 U.S. 45, 67–68 (1932) (holding that the right to counsel is safeguarded against state action, not because it is enumerated in the Bill of Rights, but because it is of such a "fundamental character" that its denial would be a violation of the guarantee of due process of law).

<sup>100</sup> See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that the only "particular amendments" in the Bill of Rights that are enforceable against the States are those that "have been found to be implicit in the concept of ordered liberty").

enforceable against the federal government.<sup>101</sup> Justice Black, to the contrary, argued for total incorporation, and for enforcing those incorporated rights against the States on the same terms as they were enforced against the federal government.<sup>102</sup> Black's absolutist view hovered over the conversation even as he usually contented himself with seeing incorporation proceed apace without always explicitly restating his conviction that it should be total.<sup>103</sup>

The third chapter suggested a resolution of sorts to the debate—a “new approach” that allowed for only selective incorporation, but equal application of whichever rights were incorporated.<sup>104</sup> The fourth, current chapter, articulated by a succeeding generation of Justices, has continued that

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<sup>101</sup> See, e.g., *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (“It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them.” (citations omitted)); *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (“[I]t is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather . . . those concepts which are considered to embrace those rights ‘which are . . . *fundamental*; which belong . . . to the citizens of all free governments[.]’ for ‘the purposes [of securing] which men enter into society.’” (alteration in original) (citation omitted) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Pa. 1823); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798))).

<sup>102</sup> See, e.g., *Adamson*, 332 U.S. at 71–72 (Black, J., dissenting) (“My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment’s first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.”); *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring).

<sup>103</sup> See Tinsley E. Yarbrough, *Justice Black, The Fourteenth Amendment, and Incorporation*, 30 U. MIAMI L. REV. 231, 254–59 (1976).

<sup>104</sup> *Duncan*, 391 U.S. at 149 n.14 (White, J.) (incorporating right to trial by jury in criminal cases) (noting that the Court’s practice was now to incorporate clauses contained in the Bill of Rights selectively but to enforce those incorporated rights against the States on the same terms as it enforced them against the federal government). The only exception to this practice—the consequence of an odd 4–1–4 split among the Justices, was the Court’s decision in *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), to allow non-unanimous jury verdicts in state trials. Only Justice Powell, however, endorsed that bottom-line result, and only because he believed the Sixth Amendment’s right to a jury trial required a unanimous verdict to support a conviction in federal court, even though he did not believe the Fourteenth Amendment required that standard of the states. See *Johnson v. Louisiana*, 406 U.S. at 371 (1972) (Powell, J., concurring) (explaining concurrence in the judgment in *Apodaca* and companion case). The Court’s recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), however, resolved that aberration. See *Ramos*, 140 S. Ct. at 1397 (holding that the Sixth and Fourteenth Amendments require a unanimous jury verdict to support a conviction in state court).

“new approach”<sup>105</sup> but also moved toward a rough cross-ideological convergence that treats incorporation as a default,<sup>106</sup> leaving only a couple of token rights out of the basket.<sup>107</sup> That current doctrine would be far less intelligible—and would surely have a different look and feel—if it were not for the culmination of a long line of opinions by named Justices engaged in a continuing collective debate and deliberation.

### C. *Oeuvres and Icons*

But what if it turned out that many different clerks over many years play a substantial role in drafting opinions for any given Justice? What if—to replay my earlier metaphor and imagine the most extreme possibility—the work of any Justice ends up shattering “like a broken window into many tiny shards”? Judicial opinions are black boxes. We do not peek inside. But should it matter that judicial opinions are black boxes that come with names attached to them?

It might be helpful here to consider the analogy of literary practice. Among interpreters of novels, poems, plays, and other works of literature, some look for meaning in the subjective intent of authors or in the social and historical background of the work of literature. But others—more relevant to our current exercise—treat works of literature as something like black boxes. Among these anti-intentionalists are formalist “New Critics” who champion close readings<sup>108</sup> and various anti-formalists who have announced some version of the “death of the author.”<sup>109</sup>

But what about the name attached to a work of literature? Michel Foucault, who was himself often associated with the “death of the author,” nevertheless argued that, if only in a conventional sense in certain

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<sup>105</sup> *Duncan*, 391 U.S. at 149 n.14.

<sup>106</sup> See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (Ginsburg, J.) (incorporating the Excessive Fines Clause of the Eighth Amendment); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (Alito, J.) (holding that the right to bear arms under the Second Amendment is incorporated against the states).

<sup>107</sup> These are the right to a grand jury in the Fifth Amendment and the right to a jury in civil cases in the Seventh Amendment. The Third Amendment’s guarantee against the quartering of soldiers in peacetime has almost never been litigated against either the federal or a state government, though one lower court decision on the subject did find the right to be incorporated. *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

<sup>108</sup> René Wellek, *The New Criticism: Pro and Contra*, 4 CRITICAL INQUIRY 611, 611 (1978); see, e.g., W. K. Wimsatt, Jr. & M. C. Beardsley, *The Intentional Fallacy*, 54 THE SEWANEE REV. 468, 468–69 (1946) (arguing that critical examination of a poem’s language is a superior means of interpretation than searching for an author’s intended meaning).

<sup>109</sup> See, e.g., Roland Barthes, *The Death of the Author*, in IMAGE, MUSIC, TEXT 142, 148 (Stephen Heath trans., 1977). The New Criticism and deconstruction took radically different approaches to the discovery of meaning in texts. I lump together here only for convenience.



conventionally-defined contexts, the name of the author defines and constrains the scope of the work being interpreted and limits its range of potential meanings:

These differences indicate that an author's name is not simply an element of speech . . . Its presence is functional in that it serves as a means of classification. A name can group together a number of texts and thus differentiate them from others. A name also establishes different forms of relationships among texts . . . [T]he fact that a number of texts were attached to a single name implies that relationships of homogeneity, filiation, reciprocal explanation, authentication, or of common utilization were established among them. Finally, the author's name characterizes a particular manner of existence of discourse. Discourse that possesses an author's name is not to be immediately consumed and forgotten; neither is it accorded the momentary attention given to ordinary, fleeting words. Rather, its status and its manner of reception are regulated by the culture in which it circulates.<sup>110</sup>

Recognizing the situatedness of an author's name leads, of course, to emphasizing the importance of understanding individual works of literature in the context of an author's entire oeuvre.<sup>111</sup> So, even if we do not find much to gain by trying to uncover the subjective intent allegedly behind a text, we can still connect texts to each other to form a larger meaningful body of work. Finally, locating both the author and that author's entire oeuvre helps create the narratives of continuity, discontinuity, and influence that help give meaning to our understanding of a literary tradition made up of many authors whose works are in some sort of conversation with each other.<sup>112</sup>

To sum up, even if we do not care in our interpretive practice what an author intended, we do find meaning in an author's name. Indeed, without trying to peek into the black box of private history and private intentions, we

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<sup>110</sup> Michel Foucault, *What Is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 113, 123 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon, trans., Cornell Univ. Press 1977).

<sup>111</sup> See Paisley Livingston, *From Work to Work*, 20 PHIL. & LITERATURE 436, 444–48 (1996). For an important discussion—which begins with more historicist but not strictly intentionalist sympathies—of the relevance of an author's body of writings taken in relation to each other, see generally Jerrold Levinson, *Work and Oeuvre*, in THE PLEASURES OF AESTHETICS: PHILOSOPHICAL ESSAYS 242 (1996).

<sup>112</sup> That “conversation” can itself be a cultural construction, of course. Pierre Bayard subversively posits “anticipatory plagiarism,” an imagined form of influence in which, for example, Sophocles is inspired by the insights of psychoanalysis and Shakespeare copies the form of the modern detective novel. Pierre Bayard, *Anticipatory Plagiarism*, 44 NEW LITERARY HIST. 231, 232 (Jeffrey Mehlman, trans., 2013).

routinely draw complex and crucial webs of understanding out of the simple crux of authorial identity.

But what if the name is a mistake? What if another author (or set of authors) are responsible for a body of work? These questions have arisen, for example, in the context of the stubborn claims that someone other than William Shakespeare wrote Shakespeare's plays. Leading candidates have included Francis Bacon, Christopher Marlowe, and Edward de Vere, the 17<sup>th</sup> Earl of Oxford. Most experts reject these theories,<sup>113</sup> though I raise them here in part as an homage to several Supreme Court Justices, including Justices John Paul Stevens<sup>114</sup> and Antonin Scalia who were—oddly enough—committed Oxfordians.<sup>115</sup>

The question for our purposes, though, is not who wrote Shakespeare's plays or poems, but how that might affect how we read those plays or poems. For historicist and intentionalist readers of Shakespeare, it would undoubtedly make an enormous difference to interpretation if the Earl of Oxford or some other ghostwriter were the actual author of the plays and poems published under Shakespeare's name. But what about more formalist readers?

G.K. Chesterton famously quipped, in response to a similar challenge, that “[t]he sane man who is sane enough to see that Shakespeare wrote Shakespeare is the man who is sane enough not to worry whether he did or not.”<sup>116</sup> But that is not the only plausible answer.

At least one Oxfordian—an amateur scholar to be sure—has confronted this question head-on in a sophisticated way. Drawing on semiotic theory and its elaboration by Umberto Eco, Merilee Karr has argued that whenever we read a work of literature that has the name of an author attached to it, we necessarily look to an “icon” of the author as part of the task of interpretation.<sup>117</sup> That icon is a construct. It is not reducible to the flesh and blood person who wrote the work and it is certainly not reducible to the subjective intent of the author. But the icon is not entirely independent of the author either. For one thing—as already noted in my discussion of an

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<sup>113</sup> See, e.g., JAMES SHAPIRO, *CONTESTED WILL: WHO WROTE SHAKESPEARE?* 4–5 (2010).

<sup>114</sup> See Tyler Foggatt, *Justice Stevens's Dissenting Shakespeare Theory*, NEW YORKER, (July 29, 2019), <https://www.newyorker.com/magazine/2019/08/05/justice-stevens-dissenting-shakespeare-theory> [<https://perma.cc/R6QM-WCB7>]. Justice Stevens expressed some of his doubts in John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. Pa. L. Rev. 1373 (1992).

<sup>115</sup> See Foggatt, *supra* note 114 (“Justice Antonin Scalia was openly Oxfordian.”).

<sup>116</sup> G.K. Chesterton, *Our Notebook*, ILLUSTRATED LONDON NEWS, Feb. 23, 1907, at 284.

<sup>117</sup> Merilee Karr, *Semiotics and the Shakespeare Authorship Debate*, 36 SHAKESPEARE OXFORD NEWSL., No. 4, 2001, at 11.

author's oeuvre—"reader[s] use[] all the known works produced by an author to build up their own version of [the author's] icon."<sup>118</sup> And readers necessarily "paste[] onto the icon what they receive from the world outside the text."<sup>119</sup> Then, "[o]nce the reader has created an icon by reflection from the text, they use the icon to reflect back on and interpret the text."<sup>120</sup>

William Shakespeare, an actor and son of a glover, and Edward De Vere, the Earl of Oxford, were men with radically divergent backgrounds and biographies. Karr convincingly suggests that, even for a reader who is not out to reduce the meaning of a work to the author's circumstances or subjective intention, concluding that the Earl of Oxford was the author of Shakespeare's plays or poems would necessarily change how those plays and poems were understood.<sup>121</sup> *A fortiori*, our reading of Shakespeare's corpus would change even more profoundly if we became convinced that a different ghostwriter penned each of the plays and poems published under his name.

#### D. *The Icon on the Box*

Judicial opinions are black boxes. We do not peek inside. Whether an individual clerk drafted a specific opinion should be irrelevant to the legal

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see also Ismay Barwell, *Who's Telling This Story Anyway? Or, How to Tell the Gender of a Storyteller*, in *ART AND ITS MESSAGES: MEANING, MORALITY, AND SOCIETY* 89, 95 (Stephen Davies ed., 2001) ("In literary communication, what is of interest is not what the actual author did intend or 'have in mind' but what she *could have intended*, in the light of all the available evidence. The evidence is provided by . . . the structure and context of the text and anything relevant about the social conditions of its production.").

<sup>120</sup> Karr, *supra* note 117, at 11. My quick and sly treatment here does not claim to begin to scratch the surface of much more complex and contested discussions in literary theory and criticism. Suffice it to say that Karr's account finds at least an imperfect echo in the more common notion of an "implied author," who is also a construct distinct from the "real author" of a work. For a thorough discussion, including some important reservations about the effort to distinguish real and implied authors so cleanly, see Marie-Laure Ryan, *Meaning, Intent, and the Implied Author*, 45 *STYLE* 29 (2011); see also Clara Claiborne Park, *Talking Back to the Speaker*, in *LITERARY AWAKENINGS: PERSONAL ESSAYS FROM THE HUDSON REVIEW* 103 (Ronald Koury ed., 2017). For an intriguing use of ideas inspired by Foucault to shed light on some important questions in intellectual property law, see Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 *Notre Dame L. Rev.* 1377 (2005) (exploring the distinction between authors' identities and authors' names in the context of arguments about copyright law and its relation to trademark law).

<sup>121</sup> Karr, *supra* note 117, at 13–14. How much the meaning would change is, to be sure, a deep puzzle. A common touchstone for this sort of conversation has long been Jorge Luis Borges's famous short story about a fictional author who set out improbably to write a new version of *Don Quixote* that was, though not a mere transcription of the original, in fact identical to it. See Jorge Luis Borges, *Pierre Menard, Author of the Quixote*, in *LABYRINTHS: SELECTED STORIES & OTHER WRITINGS* 36, 39–40 (Donald A. Yates & James E. Irby eds., J. E. I. trans., New Directions Publ'g Corp. 2007); see also Karr, *supra* note 117, at 12.

meaning of that opinions.<sup>122</sup> But judicial opinions do come with names attached to them. Those names function as icons in the legal culture's practice of interpretation. Those names—those icons—lead us into certain practices of interpretation, some of which I discussed earlier.

Should the sheer fact that clerks often draft opinions change those practices by altering the meaning or significance of those icons, not for any individual judge or Justice or in any specific case, but in the deeper marrow of our interpretive practice?

I am not sure. For the reason I have already discussed, I doubt it. But that is the right question, which is as far as I need to go here.

## V. ALL TOGETHER NOW

I suggested at the start of this Essay that meditating on the fact that clerks often draft opinions can be a catalyst for considering “several jurisprudential issues, including the institutional structures of each of the three branches of our government, the nature of the judicial function, and the interpretation of judicial and other legal texts.”<sup>123</sup> But it turns out that these disparate themes connect.

I argued earlier that the President of the United States is in some respects a metonym for the executive branch.<sup>124</sup> Just now, I argued that the names of judges and Justices attached to opinions are icons that bear a complex relationship to their namesakes.<sup>125</sup> These two claims are different, but they reflect a common pattern. Each points in its distinct way to a certain formal and socially constructed dimension in our legal understanding. The “President” is, in at least some respects, a formal entity separate from the human being who holds the office. The “author” of an opinion is, in at least some respects, a formal entity apart from the human being who holds the office.

The larger point is that our collective understandings are not reducible to empirical facts. Nor, for that matter, are they reducible to normative judgments. They are also the products of our cultural imagination. That is the engine of meaning we always need to keep in mind. Indeed, this fundamental realization is deeply relevant, not only to executive

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<sup>122</sup> Cf. Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 W. & Mary L. Rev. 115, 136 (2014) (“The clerk is not the author even if she wrote every word of the opinion; no one wants to know what the clerk thought when she drafted this text. Authorship is not the act of drafting, but a social practice of accountability.”) (paragraph break omitted).

<sup>123</sup> Discussion *supra* p. 54.

<sup>124</sup> See *supra* text accompanying notes 64–66.

<sup>125</sup> See *supra* Section IV.D.

arrangements and judicial texts, but to the entire range of our interpretive practice as lawyers, including the interpretation of constitutions and other legal texts. But that is an argument for another day.

Let us end the discussion at hand with a more direct and ironic observation. The President of the United States is typically a strong, constantly visible personality. That was true even before the age of Trump. Yet much of the formal work product—the orders, rulemakings, adjudications, negotiations, and much more—generated by the Executive Branch have little to do with the person of the President. Members of Congress are also typically strong personalities who are constantly seeking attention. Yet their formal work product—not only laws, but also resolutions and reports and the like—are impersonal and abstract by design. Judges and Justices, with a few exceptions, are much less visible to the outside world. They work in secrecy. They do not hold press conferences to extol or defend their accomplishments. Yet, at least in our legal culture, their written work product is typically attached in the most formal and official way possible to the specific name of a specific author. This tradition of signed opinions was not inevitable; not all legal cultures organize themselves that way. But it is the conventional practice of our legal culture. Maybe that is one reason why the contributions of law clerks to that work product raises such deep and uncomfortable questions.<sup>126</sup>

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<sup>126</sup> One reader of an earlier draft of this Essay took it to “mesh[] with [an] argument for eliminating signed opinions.” Howard Wasserman, *More on Dane on law clerks*, PrawfsBlog (Feb. 10, 2020), <https://prawfsblawg.blogs.com/prawfsblawg/2020/02/more-on-dane-on-law-clerks.html> [<https://perma.cc/W4TB-R5EE>] (citing Suzannah Sherry, *Our Kardashian Court (and How to Fix It)* (Vanderbilt Law Research Paper, No. 19-30, 2019), <https://ssrn.com/abstract=3425998> [<https://perma.cc/LBL3-7AW2>]). For what it’s worth, I would not support such a change. The tradition of signed opinions might raise “deep and uncomfortable questions,” as I put it in the text. It might also have contributed more recently to the sort of celebrity culture among Supreme Court Justices that Professor Sherry rightly criticizes. See Sherry, *supra*, at 4–9. But it is, to my mind, worth those costs. Attaching names to judicial opinions—even if those names represent the “icons” of judges as much as the judges themselves, *see supra* text accompanying notes 117–120—allows our courts to speak with a healthy plurality of voices in the very process of their communication of authoritative institutional pronouncements.