

DOCTRINAL AND STRATEGIC INFLUENCES OF THE CHIEF JUSTICE

THE DECISIONAL SIGNIFICANCE OF THE CHIEF JUSTICE

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The office of the Chief Justice of the United States has received considerable renown but has been the subject of relatively little research. It is common to refer to the Chief as *primus inter pares*, but little attention has been paid to the relative significance of the *primus* as opposed to the *pares*. The office of the Chief Justice has been considered “second in national authority and prestige only to the president,”¹ and is said to have “sweeping, if usually unstated, powers and significance.”² Yet the Chief Justice has relatively little actual authority over the Associate Justices who serve contemporaneously, and the “fact that a chief justice must work his will with eight independent souls not chosen by him is a formidable barrier to his success.”³ Justice Frankfurter described the Supreme Court as an “institution in which every man is his own sovereign.”⁴ More colorfully, then-Associate Justice Rehnquist referred to Associate Justices as being “as independent as hogs on ice.”⁵ Thus, the actual influence of the Chief

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¹ ROBERT J. STEAMER, *CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT*, at xii (1986).

² Tony Mauro, *More Than One Justice Among Nine*, *LEGAL TIMES*, Sept. 12, 2005, at 10.

³ STEAMER, *supra* note 1, at 294; *see also* LAWRENCE BAUM, *THE SUPREME COURT 164-65* (7th ed. 2001) (describing the “significant limits on the chief’s capacity to influence the Court”).

⁴ FELIX FRANKFURTER, *Chief Justices I Have Known*, in *FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION* 471, 491 (Philip B. Kurland ed., 1970).

⁵ William H. Rehnquist, *Chief Justices I Never Knew*, 3 *HASTINGS CONST. L.Q.* 637, 637 (1976).

Justice on the Court may be disputed and may vary over time depending on the particular composition of the bench and the personality and inclinations of the individual Chief Justice.

The recent sad death of Chief Justice William Rehnquist has prompted tributes to his influence on the Court as Chief Justice. Mark Tushnet, the prominent liberal constitutional law professor, declared that Chief Justice Rehnquist and Chief Justice Earl Warren were the twentieth century's two great Chief Justices, as "[b]oth presided over courts that changed the law in a very dramatic way."⁶ Professor A.E. Dick Howard suggested that "[w]e will look back on the Rehnquist court as one of the smoothest in the court's history."⁷ Linda Greenhouse of the *New York Times* declared that Justice Rehnquist's tenure as Chief was "one of the most consequential," during which he "managed to translate many of his long-held views into binding national precedent."⁸ According to the *Washington Post*, judicial restraint will be the Rehnquist Court's legacy, and Chief Justice Rehnquist's personal "considerable achievement" was his "effectiveness as chief."⁹ Taking a slightly different perspective, however, Greenhouse suggested that the Rehnquist Court's legacy was the growth of the Supreme Court's own power.¹⁰ Some disagreed with claims about Justice Rehnquist's influence, suggesting that "during some of the most heated battles, rather than an influential chief rallying the court, Rehnquist was the court's missing man, seeming to watch from the sidelines."¹¹ Thus, the impact of our most recent Chief Justice appears still open to question.

A considerable amount of historical evidence, including that drawn from judicial biographies, has provided critical information about the role and responsibilities of the Chief Justice, as well as about the influence of individual Chiefs over time. Like all anecdotal evi-

⁶ Charles Lane, *The Rehnquist Legacy: 33 Years Turning Back the Court*, WASH. POST, Sept. 5, 2005, at A8.

⁷ Charles Lane & Fred Barbash, *Two Vacancies Give Bush a Chance to Solidify Court's Right*, WASH. POST, Sept. 5, 2005, at A9.

⁸ Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A16.

⁹ Editorial, *The Rehnquist Era*, WASH. POST, Sept. 5, 2005, at A30.

¹⁰ See Greenhouse, *supra* note 8, at A16 ("In the zero-sum game of the tripartite separation of powers, the Supreme Court's own power grew correspondingly as the [Rehnquist Court] justices circumscribed the power of Congress.")

¹¹ Cliff Sloan, Editorial, *A Limited Legacy*, WASH. POST, Sept. 5, 2005, at A31. Sloan pointed to affirmative action, the Establishment Clause, abortion, and defendants' rights as areas where Rehnquist failed to influence the Court, but conceded that some influence could be found in federalism questions. *Id.*

dence, however, its reliability is uncertain. Such evidence can mislead by failing to uncover systematic trends or by relying on selective and unrepresentative stories. More rigorous quantitative empirical research on the role of the Chief Justice has been relatively sparse, although what does exist has provided some important insights.

This Article provides some additional empirical evidence on the effects of the Chief on the Court's deliberations, as well as the effects of elevation to the position on the Chief himself. We investigate whether decision-making trends on the Supreme Court shifted when Justice Rehnquist replaced Chief Justice Warren Burger. In particular, we consider changes in ideological trends in Court outcomes, cohesion among the Justices, and the Court's docket. In addition, we evaluate the extent to which Justice Rehnquist altered his own behavior following his elevation to Chief Justice in 1986.

I. THE POWER OF THE CHIEF JUSTICE: EXISTING EVIDENCE

Some existing research addresses the role and influence of the Chief Justice. Various analyses have considered the sources of the Chief's institutional powers and the potential influence these powers enable the Chief to exercise over his fellow Justices.¹² These analyses typically look to anecdotal examples in support of their claims; this research is addressed in Part A. While relatively little rigorous quantitative research has addressed the role of the Chief Justice, Part B reviews the research that does exist.

A. Institutional Powers

The Chief Justice may cast only one vote of nine in individual cases, the same as the other members of the Court. Nevertheless, the Chief does enjoy certain institutional powers that might be used to steer the Court in a particular direction. The Chief Justice serves as the Court's titular leader, as well as its actual leader in important respects. For example, she presides over conference deliberations and, when in the majority, assigns the opinion. The Chief Justice is also given several administrative powers that other Justices do not possess, and these might be implemented in a fashion that would give the

¹² One fine review of this research is found in Sue Davis, *The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 135 (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter SUPREME COURT DECISION-MAKING].

Chief some influence over the Court as a whole. This Part examines some of those influences and how they might create some power to affect case outcomes.

First, the Chief presides over oral argument and the subsequent conference at which the Justices vote on case outcomes. This enables her to speak first and provides her with the option to vote last on contested cases.¹³ The authority to speak first conveys an agenda-setting power that may be quite important because it enables the Chief to “direct discussion and frame alternatives.”¹⁴ Indeed, Chief Justice Rehnquist regarded the ability to speak first and structure the legal arguments as a key “advantage” of his position.¹⁵ He also stressed that “what the conference shapes up like is pretty much what the chief justice makes it.”¹⁶ Jefferson Powell suggested that Chief Justice Rehnquist took advantage of this authority and “shifted the center of the discussion.”¹⁷

Occasionally, the Chief Justice may be able to take advantage of the Condorcet paradox to manipulate the outcome.¹⁸ This paradox, amplified in Arrow’s famous Theorem, involves nontransitive preferences.¹⁹ A majority may prefer option *A* to *B*, option *B* to *C*, but option *C* to *A*. In this case, the resolution of the decision is entirely dependent on the order in which the dichotomous options are considered, thus providing the agenda-setter with considerable power over outcomes. The probability that such a set of manipulable preferences exists in a given case is not high,²⁰ however, and even the low probability is eliminated when preferences are “single-peaked,” such

¹³ WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 82 (1964). The voting order has changed over time at the Court. DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 204-05 (6th ed. 2003). The Chief Justice may pass, though, to avoid early commitment or change his vote after other votes are cast.

¹⁴ BAUM, *supra* note 3, at 165.

¹⁵ Rehnquist, *supra* note 5, at 647.

¹⁶ O’BRIEN, *supra* note 13, at 200 (quoting Chief Justice Rehnquist).

¹⁷ Richard W. Garnett, *Right On*, *LEGAL AFF.*, Mar.-Apr. 2005, at 34 (quoting Jefferson Powell, Professor, Duke Law School).

¹⁸ See MURPHY, *supra* note 13, at 85-87 (describing “[t]he voting paradox [that] might take place in a decision-making body where more than two alternatives . . . [are] available to the group.”).

¹⁹ DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 48-51 (1991).

²⁰ See KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 52-53 (1997) (noting that over ninety percent of preference configurations are not so manipulable, when a group of three persons chooses among three alternatives).

as when they are ideologically driven.²¹ Yet the Chief may also be able to take advantage of characteristics of the Court beyond the existence of any intransitive preferences. By controlling the conference, for example, the Chief may be able to pick the most strategic time to call a vote, such as when a swing vote appears to be leaning in the desired direction. Furthermore, like any chairperson, the Chief can exercise some control over the content of the discussion at the conference. Some Chiefs have used this control to their advantage: Chief Justice Hughes, for example, was known for dominating conference deliberations.²²

Policymakers' ability to manipulate outcomes through agenda-setting or issue-structuring is known as heresthetics, a word William Riker coined and defined as the ability of a "prospective loser to rearrange politics to his or her advantage."²³ Riker wrote extensively on such strategic actions, illustrated by historical examples of strategies used by politicians to influence policy outcomes.²⁴ A Chief Justice may similarly use this power by "constructing choice situations in order to manipulate outcomes—most notably, by adding alternatives, controlling the agenda, and voting in a sophisticated fashion."²⁵ One study indicates that the nature of the sequential voting at conference enables strategic behavior to influence outcomes and that the Chief Justice has engaged in such behavior to a statistically significant degree.²⁶ The Chief may also have other tools at her disposal to shape the Court's decision making. For example, in *Brown v. Board of Education*,²⁷ Chief Justice Warren strategically used his authority to separate the merits from the remedy in order to secure a unanimous opinion.²⁸

²¹ FARBER & FRICKEY, *supra* note 19, at 48.

²² See MURPHY, *supra* note 13, at 87 (describing how Chief Justice Hughes dominated conferences "armed both with heavily marked volumes of the U.S. Reports and a photographic memory").

²³ William H. Riker, *Heresthetic and Rhetoric in the Spatial Model*, in *ADVANCES IN THE SPATIAL THEORY OF VOTING* 46, 50 (James M. Enelow & Melvin J. Hinich eds., 1990).

²⁴ For more on Riker's heresthetic theories, see WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 *AM. POL. SCI. REV.* 1 (1984).

²⁵ Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the U.S. Supreme Court*, 14 *J. THEORETICAL POL.* 93, 93-94 (2002).

²⁶ See Kirk Randazzo et al., *Strategic and Sequential Voting During the Burger Court* (2002) (Research Paper, Annual Meeting of the Midwest Political Science Association, on file with the University of Pennsylvania Law Review).

²⁷ 347 U.S. 483 (1954).

²⁸ BERNARD SCHWARTZ, *SUPER CHIEF* 90-91 (1983).

The Chief's functional heresthetic authority at conference may be limited, however, at least in modern times. If all the Justices have made up their minds about the case prior to the conference deliberations, they may not be subject to much strategic manipulation. In contemporary conferences at the Court, there is little "give and take" among the Justices, and minds appear to be already made up.²⁹ Justice Scalia once declared that the conference was less an interchange than it was a statement of the independent views of each individual Justice.³⁰ Empirical studies of voting fluidity on the Court have not specifically addressed the effect of the conference but have found relatively little change in the votes of the Justices at various stages of the decision-making process. Segal and Spaeth find that strong fluidity—where Justices switch their votes over the course of the decision-making process—rarely occurs, and "when it does it disproportionately happens because most of the justices switch their votes to avoid a decision on the merits of the controversy."³¹

Moreover, evidence supporting a strong association between the individual Justices' ideologies and their voting behavior calls into question the extent to which votes may be influenced at conference or otherwise. Where the Justices' votes are essentially predetermined by their ideological and policy preferences, little room exists for other factors—including the potential influence of the Chief Justice—to shape their decisions. Political scientists frequently maintain that the ideological character of the Justices' individual voting behavior remains largely stable over time,³² although some quantitative evidence suggests that several Justices' preferences have shifted during their tenure on the Court.³³ One study in particular found that while most Justices' preferences remained unaltered over a long periods of time (Justice Brennan, for example, remained consistently liberal and Justice Powell remained consistently conservative), for a few Justices a dramatic change was observable. Justice Black's voting record became steadily more liberal for years until he exhibited a sudden shift to the right at the end of his tenure on the Court, while Justice Douglas be-

²⁹ O'BRIEN, *supra* note 13, at 258.

³⁰ Davis, *supra* note 12, at 145.

³¹ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 287 (2002).

³² See, e.g., Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905, 911 n.2 (1988).

³³ See, e.g., Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801, 810 (1998) (noting the shift in Justice Blackmun's liberalism and Justice Reed's conservatism over time).

gan as a moderate liberal and later became the most liberal of the Justices. Similarly, Justice Blackmun's voting became progressively more liberal the longer he served on the Court.³⁴ The study did not suggest, however, that these shifts were linked in any way to the influence of the Chief Justice.

The Chief may also potentially influence the Court's policymaking at the case selection stage. The Chief Justice controls the conferences in which the Justices determine which cases to accept on writ of certiorari.³⁵ This authority may produce a greater impact than the Chief's presiding authority over the conference in which the Justices vote on the merits. Given the vast number of cert petitions, individual Justices are less able to attend carefully to individual cases, so they may be more willing to defer to the Chief's leadership. Moreover, the Chief Justice creates the "discuss list" that generally determines the petitions that the Court considers fully,³⁶ although other Justices may add cases to this list if they choose.³⁷ According to one scholar, Chief Justice Rehnquist used this authority to "push[] into the mainstream once idiosyncratic views of state sovereignty and limited federal power."³⁸ This ability to shape the Court's docket certainly could have contributed to what some scholars have claimed to be his success in "shaping the law in selected areas that are central to his agenda."³⁹

Another matter decided at the certiorari stage is the simple number of cases that the Court will accept for hearing on the merits. The Chief Justice is said to "disproportionately influence policy over . . .

³⁴ *Id.* at 811 fig.3.

³⁵ See O'BRIEN, *supra* note 13, at 198-207 (discussing this process under Chief Justice Rehnquist and how he changed the procedures from previous Courts).

³⁶ BAUM, *supra* note 3, at 107.

³⁷ See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 (1983) (describing the Chief Justice's practice of circulating "a list of cases that he deems worthy of discussion [to which] each of the other members of the Court may add cases"). In practice, though, the Chief Justice is predominant in determining the cases discussed. See Gregory A. Caldeira et al., *Sophisticated Judicial Behavior: Agenda-Setting Via the Discuss List 11*, 39-40 tbl.1 (Aug. 1997) (unpublished manuscript, on file with the University of Pennsylvania Law Review) (showing that in the 1990 Term Chief Justice Rehnquist placed more cases on the discuss list—fifty-eight percent—than all the other Justices combined). Historically, the Chief's control was even greater; Chief Justice Warren placed ninety-five percent of the cases on the discuss list. *Id.* at 10.

³⁸ Garnett, *supra* note 17, at 34; see also Lane, *supra* note 6, at A9 (quoting Dean John C. Jeffries of the University of Virginia Law School as stating, "You can't identify anyone who's had more to do with the revival of federalism than Bill Rehnquist").

³⁹ See Davis, *supra* note 12, at 142-43 (citing the law of habeas corpus as well as federalism decisions as examples of Rehnquist's successful law-shaping).

the size of the docket.”⁴⁰ The number of cases decided by the Court has fluctuated considerably over the years, and the Rehnquist Court is known for its paucity of decisions.⁴¹ Indeed, in recent years, the Court has decided only about half as many cases as it once did, a reduction made more remarkable by the dramatic increase in circuit court cases during this same time period.⁴² The cause of this “incredibly shrinking docket” has been debated by commentators.⁴³ Sue Davis suggests it may be attributed to Chief Justice Rehnquist’s concern for Court “efficiency” and his “strategy to reduce the role of the Court and to let conservative decisions of Reagan-Bush-packed lower federal courts stand.”⁴⁴ The latter explanations are probably not complete, however, because by affirming the conservative decisions of lower courts, the Supreme Court could amplify their power while reducing its own role through limiting language, thereby accomplishing the same goal through a completely different method—accepting more cert petitions. Thus, the shrunken docket remains something of a mystery.

Yet even at the certiorari level, the influence of the Chief Justice may be limited by circumstances and Associate Justice preferences.⁴⁵ Just as in decision making, the Chief has only a single vote of nine on the decision whether to grant or deny certiorari. It is now well-established that the certiorari decision is an ideological and strategic one, in which individual Justices calculate the likely consequences of

⁴⁰ Mauro, *supra* note 2, at 10.

⁴¹ See, e.g., Davis, *supra* note 12, at 146 (“[D]uring the 1995 term the Court decided only seventy-five cases, less than half of the 175 decided in the 1984 term and the lowest number since the 1953 term.”); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 430 (noting that as Chief Justice, Rehnquist has been more willing to reject cases for review with holdings with which he disagrees but which have little precedential value).

⁴² See JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 222 fig.9.2 (2005) (displaying graphically the increase in cases filed in circuit court, which exceeded twenty-five percent between 1992 and 2003).

⁴³ See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 750-93 (2001) (discussing various theories explaining the reduced docket and analyzing them using data on conference votes); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 557-59 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998)) (suggesting reasons for the reduced docket).

⁴⁴ Davis, *supra* note 12, at 146. Rehnquist clearly “moved to trim the Court’s docket.” Mauro, *supra* note 2, at 11.

⁴⁵ See Davis, *supra* note 12, at 147 (noting that “the complex interaction between the outcome and jurisprudential modes among his eight colleagues is likely to diminish his ability to secure the three necessary votes to grant certiorari”).

the Court taking up a case.⁴⁶ While the Chief has some informational power over this decision, she has no specific powers to control the agenda that would enable her to control certiorari decisions in the face of a willful opposition.

The most commonly considered and apparently influential power of the Chief Justice is the authority to assign opinion writing when in the majority. Although the Chief Justice votes first—the Court votes in order of seniority—he may strategically pass in order to ensure membership in the majority if desired.⁴⁷ The Chief Justice may assign opinion writing to the individual Justice best able to hold together a fragile coalition, to an ideologically amenable colleague, or to himself. This power has been called the position’s “single most influential function,”⁴⁸ a conclusion based on a belief that “opinion authors have a disproportionate influence on the content of an opinion.”⁴⁹ Moreover, the Chief’s assignment power may provide other forms of leverage over the other Justices. In theory, the Chief Justice may also use her position to punish or reward Justices for whatever reason she chooses.⁵⁰ Nevertheless, strategic assignments do not always produce perfect outcomes from the standpoint of the Chief and may even blowback and disadvantage her interests.⁵¹

Even independent of specific structural leadership powers, the very title of “Chief Justice” may provide an amorphous source of lead-

⁴⁶ See SEGAL ET AL., *supra* note 42, at 285-89 (describing this strategic calculus and presenting empirical information on how individual Justices have employed it); see also Davis, *supra* note 12, at 147 (observing that the decision involves strategic considerations “including whether the case is a good vehicle or whether there is likely to be a better case for pulling a swing justice and for achieving one’s long-range goals”).

⁴⁷ See Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC’Y REV. 349, 357 (2005) (discussing how requiring a minimum four-member coalition to grant certiorari increases uncertainty and renders the Chief Justice more prone to delay his vote).

⁴⁸ O’BRIEN, *supra* note 13, at 269.

⁴⁹ Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-making*, in SUPREME COURT DECISION-MAKING, *supra* note 12, at 43, 53.

⁵⁰ When Justice Souter was asked why he joined Chief Justice Rehnquist in singing carols at the annual Christmas party of the Court, he explained, “I have to. Otherwise I get all the tax cases.” Tony Mauro, *Courtside, The Highs and Lows of the 1992 Court*, LEGAL TIMES, Dec. 28, 1992, at 12, 14. While he was presumably joking, he “touched on an important reality.” BAUM, *supra* note 3, at 166. Justice Blackmun reported that a Justice in Chief Justice Burger’s “doghouse” would be assigned a “crud” opinion “that nobody wants to write.” *Id.*

⁵¹ See Cross, *supra* note 43, at 517-19 (discussing the complexity of opinion assignment and backlash by other Justices against Chief Justice Burger’s obvious strategic ploys to control assignments).

ership authority. Walter Murphy suggests that “there is an expectation that a titular leader will exert both task and social leadership,” so that a “Chief Justice generally has an initial psychological advantage over any Associate Justice in a struggle for influence within the Court.”⁵² Chief Justices have employed a wide array of different leadership styles throughout history.⁵³ For example, Chief Justice Hughes reportedly ran the conference like a drill sergeant, while Chief Justice Stone ran conferences loosely, allowing lengthy debates among the Justices.⁵⁴ Chief Justice Warren’s success has been attributed to his collegial leadership qualities,⁵⁵ in comparison to Chief Justice Burger, who reportedly had “limited impact” due to his lack of effective leadership skills.⁵⁶ A seminal study has analyzed this leadership role for several past Chief Justices.⁵⁷

Thus, while the unique attributes of being the Chief Justice might seem to convey some special power, the extent of that power is unclear and may vary from Chief to Chief. As Chief Justice Chase declared:

[The Chief] is but one of eight judges, each of whom has the same powers as himself. His judgment has no more weight, and his vote no more importance, than those of his brethren. He presides, and a good deal of extra labor is thrown upon him. That’s all.⁵⁸

Chief Justice Stone suggested that the Chief may be disadvantaged, compared to the other Justices, as the one who “has to do the things that the janitor will not do.”⁵⁹ Chief Justices apparently do not feel empowered to direct the Court.

The Chief Justice has also increasingly been assigned administrative duties for the federal judiciary, in an amount that is “almost over-

⁵² MURPHY, *supra* note 13, at 83.

⁵³ See generally STEAMER, *supra* note 1 (breaking down the leadership styles of all the Chief Justices).

⁵⁴ *Id.* at 27-28.

⁵⁵ BAUM, *supra* note 3, at 166-67.

⁵⁶ *Id.* at 167.

⁵⁷ David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR 506 (Sheldon Goldman & Austin Sarat eds., 1978) (comparing the relative implementation of the leadership role in taking cases, hearing oral argument, conferencing, and creating unanimity of Chief Justices Taft, Hughes, and Stone).

⁵⁸ Alpheus Thomas Mason, *The Chief Justice of the United States: Primus Inter Pares*, 17 J. PUB. L. 20, 22 (1968).

⁵⁹ ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 281 (1956).

whelming.”⁶⁰ Some of these powers are obviously significant, such as the ability to select the judges who in turn select a special prosecutor to investigate administration figures.⁶¹ One significant administrative power is probably the Chief’s role in lobbying for the federal judiciary’s budget and other matters of concern (such as caseload limitations). It is unlikely, however, that much connection exists between these administrative duties and case outcomes. Indeed, the increasing “burden of administrative duties” may even hamper the Chief Justice’s ability to influence decision making.⁶²

One study has drawn a connection between the Chief Justice’s budgetary and lobbying responsibilities and the Court’s decisions, implicitly affirming the Chief Justice’s influence over case outcomes.⁶³ Eugenia Toma hypothesizes that Congress uses its appropriation authority to signal its approval or disapproval of the ideological pattern of Supreme Court opinions, and that the Chief Justice takes these signals and correspondingly modifies the pattern of opinions in order to better conform to congressional preferences and thereby increase the judicial budget. Her study of budgets and decisions between 1946 and 1988 found that the larger the distance between Court ideology and congressional ideology, the smaller the budget increase. Then, for several Chief Justices during the period, the Court responded by producing decisions more in line with congressional preferences.⁶⁴ In contrast, subsequent and more detailed research has suggested that there is little relationship between congressional preferences and Supreme Court decisions.⁶⁵

Regardless of this budgetary connection, the Chief Justice’s administrative authority can affect the conditions of service on the Supreme Court. Chief Justice Burger modernized and expanded the administration of the Court and redecorated its facilities.⁶⁶ Chief Jus-

⁶⁰ STEAMER, *supra* note 1, at 14. Chief Justice Warren described his schedule as “backbreaking,” with his mornings filled by administrative responsibilities. *Id.* at 17.

⁶¹ See *infra* notes 77-80 and accompanying text (discussing Chief Justice Rehnquist’s role in the investigation and impeachment of President Clinton).

⁶² BAUM, *supra* note 3, at 165.

⁶³ See Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT’L REV. L. & ECON. 433, 434 (1996) (“The [Supreme Court and Congress] enter into a contract of budgetary favors in exchange for politically influenced output.”).

⁶⁴ *Id.* at 441-43.

⁶⁵ See Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 35 (1997) (concluding that evidence that the Supreme Court responds to congressional preferences is “far from convincing”).

⁶⁶ STEAMER, *supra* note 1, at 177-78.

tice Warren unsuccessfully sought appropriations for cars and drivers for the Justices and these efforts were “appreciated” by his brethren.⁶⁷ While we don’t know if the Chief Justice receives any decisional “pay-back” for her administrative efforts, such an effect is plausible.

Whether or not the Chief Justice’s lobbying and administrative budgetary role affects specific Court decisions, it may still have a broader policy impact. The Chief serves as chairman of the Judicial Conference of the United States and makes its committee assignments. The Judicial Conference is composed of circuit court and district court judges who choose issues of interest to the judiciary to bring before Congress. Chief Justice Rehnquist strategically used this authority to obtain Judicial Conference recommendations tightening habeas corpus relief.⁶⁸ Such action can provoke legislation that has an indirect effect on judicial decisions and an even more direct effect on the Court’s docket.

Federal statutes also assign to the Chief Justice other potentially significant appointment powers.⁶⁹ Most prominent among these powers is the ability to appoint judges to specialized courts, including the Foreign Intelligence Surveillance Court,⁷⁰ the Alien Terrorist Removal Court,⁷¹ and the Judicial Panel on Multidistrict Litigation.⁷² The potential exists for the Chief to use this appointment power strategically to achieve political ends.⁷³ Moreover, these powers have expanded over time,⁷⁴ and Chief Justices Burger and Rehnquist have appointed scores of judges to special tribunals.⁷⁵

Chief Justices have other extrajudicial sources of authority as well. Occasionally, the constitutional power of the Chief Justice to preside

⁶⁷ *Id.* at 19.

⁶⁸ David C. Nixon, *Policy-Making by Different Means: The Chief Justice’s Attempts to Shape Policy Through the Judicial Conference of the United States*, 15 RATIONALITY & SOC’Y 345, 356-57 (2003).

⁶⁹ For an excellent discussion and critique of these powers, see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004).

⁷⁰ See 50 U.S.C. § 1803(a)-(d) (Supp. 2002) (giving the Chief Justice power to appoint eleven judges, and setting the tenures of those judges).

⁷¹ See 8 U.S.C. § 1532(a) (2000) (stipulating the Chief Justice’s appointment powers to establish a removal court).

⁷² See 28 U.S.C. § 1407(d) (2000) (giving the Chief Justice power to designate seven circuit court and district court judges to sit on the panel).

⁷³ Ruger, *supra* note 69, at 390.

⁷⁴ See *id.* at 351 (describing the “gradual accretion of the Chief’s appointment authority”).

⁷⁵ See *id.* at 390 (observing that Burger and Rehnquist appointed over 125 judges to these panels).

over impeachment proceedings⁷⁶ may become substantial, as when Chief Justice Rehnquist presided over the impeachment trial of President Clinton.⁷⁷ Until recently, the Ethics in Government Act empowered the Chief Justice to assign judges to a special division of the D.C. Circuit created for the purpose of appointing independent counsels to investigate the executive.⁷⁸ The latter power became quite significant when the judges of the special division removed Robert Fiske, the original counsel investigating Whitewater during the Clinton Administration, and replaced him with Kenneth Starr.⁷⁹ This action was politically controversial and may have tainted the subsequent impeachment proceedings against President Clinton.⁸⁰ All of these powers could conceivably translate into some additional influence over decisions, but the connection seems relatively remote.

In addition to formal legal powers, both judicial and extrajudicial, Chief Justices have assumed responsibility for Court cohesion. Past Chiefs' successes in this regard may be measured in part by their ability to produce unanimous or near-unanimous decisions, since such decisions seem more authoritative and yield more respect for a ruling.⁸¹ Chief Justice Taft wrote that he was "expected to promote teamwork by the Court, so as to give weight and solidarity to its opinions."⁸² The ability to produce unanimous decisions in controversial cases,

⁷⁶ U.S. CONST. art. I, § 3, cl. 6.

⁷⁷ For a brief discussion of this role, see Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 101 n.478 (1999).

⁷⁸ 28 U.S.C. § 49(d) (2000).

⁷⁹ See Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel: Ex-Solicitor General Starr To Take Over Probe*, WASH. POST, Aug. 6, 1994, at A1 (discussing the controversy surrounding this decision). For a review of the occurrence and its fallout, see John Q. Barrett, *Special Division Agonistes*, 5 WIDENER L. SYMP. J. 17, 33-38 (2000).

⁸⁰ See Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745, 750 (2000) (describing the Starr appointment as "suspect from the outset" for Clinton supporters). Critics charged that the special division was partisan. See, e.g., Abbe D. Lowell, *Starr Flap Shows Need for Reform*, NAT'L L.J., May 13, 1996, at A19 (noting that the choice of Republicans by both Attorney General Reno and the Special Court was "based on the assumption that an attorney from the party not in office will not overlook any wrongdoing"). For a brief history of the appointment controversy, see John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years*, 51 ADMIN. L. REV. 631, 646-47 (1999).

⁸¹ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 106 (1998) (discussing an important school desegregation ruling and the Justices' understanding that "a unanimous opinion in such a major case would have a greater chance of remaining undisturbed by external political actors than a divided opinion").

⁸² MURPHY, *supra* note 13, at 83.

such as *Brown*⁸³ and *United States v. Nixon*⁸⁴, are often regarded as vital, since the “decisions would have lost much of their authority had there been dissenting opinions around which the opposition might have rallied.”⁸⁵ Chief Justice Hughes attempted “to secure as great a degree of unanimity as was possible without compromising the integrity of the majority opinion.”⁸⁶ Indeed, each additional vote for the majority opinion, even short of unanimity, appears to have some functional power.⁸⁷ Chief Justices have differed in the importance they place on this virtue, however, and Chief Justice Stone may even have considered cohesiveness a negative.⁸⁸ In general, however, “chief justices display a special level of institutional concern” for producing larger majority opinions.⁸⁹

This responsibility may not be welcomed by the Chief, however, since it requires the Chief Justice to “spend much precious time and energy in cajoling his colleagues” or to “join the majority even when in disagreement with it.”⁹⁰ In this sense, the position of Chief Justice may produce “golden shackles” that limit the Chief’s individual freedom. In particular, the Chief’s responsibility to promote Court cohesion may constitute a special burden if it reduces the ideological power of the Chief Justice. The Chief may have to compromise her preferences in order to build a greater majority or control the assignment of the opinion. According to one commentator, for example,

⁸³ 347 U.S. 483 (1954).

⁸⁴ 418 U.S. 683 (1974).

⁸⁵ STEAMER, *supra* note 1, at 25; see also RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 694-99 (1975) (discussing Chief Justice Warren’s efforts to achieve unanimity and avoid even concurring opinions in *Brown*); Charles M. Lamb & Lisa K. Parshall, *United States v. Nixon Revisited: A Case Study in Supreme Court Decision-Making*, 58 U. PITT. L. REV. 71, 107-08 (1996) (suggesting that the Court’s desire to make *Nixon* unanimous was intended to give the President no excuse for noncompliance).

⁸⁶ Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 19 (1949).

⁸⁷ See Cross, *supra* note 43, at 555-56 (noting that this may explain why 5-4 opinions are exceptional, as most winning coalitions contain more than the necessary five Justices).

⁸⁸ See *infra* notes 102-05 and accompanying text (examining Chief Justice Stone’s leadership of the Court).

⁸⁹ SEGAL ET AL., *supra* note 42, at 336.

⁹⁰ STEAMER, *supra* note 1, at 25.

Justice Rehnquist became more “muted and focused” upon ascending to the position of Chief Justice.⁹¹

The influence of the Chief Justice on case outcomes is thus unclear in the sense that she enjoys no unique institutional powers sufficient to enable him to drive the Court in a particular ideological direction, at least in individual cases. On the other hand, at the margins, her authority—via docket composition and majority opinion assignment—may be sufficient to shift the Court’s decisions in a particular direction over time, assuming she has sufficient allies on the Court who support her agenda. In that sense, her influence is clearly contingent and conditional, rather than direct.

B. *Empirical Research on the Influence of the Chief Justice*

While only limited empirical research on the influence of the Chief Justice on the Court’s decision making exists, some analyses have begun to emerge. Opinion assignment has been most studied because it is the most direct and readily observable power of the Chief Justice. The conclusions drawn from these studies are mixed, but the best research shows that “in some cases the Chief’s assignments appear to be designed to further his policy objectives, while in other cases assignments reflect concerns about the smooth operation of the Court.”⁹² The ability to assign opinions is constrained by the need to balance opinion writing among the Justices and by external considerations as well.⁹³

In addition, it is unclear that opinion assignment necessarily controls the content of the opinion. The writer must accommodate the other Justices in the majority. One empirical study suggests that the

⁹¹ Lane, *supra* note 6, at A9 (quoting Professor Dennis Hutchinson); *see also* Mauro, *supra* note 2, at 10 (quoting Professor Ruger as saying that Rehnquist “moderated when he became chief justice”).

⁹² FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 35 (2000). An earlier study reached similar findings. Chief Justice assignments of civil liberty opinions during the Warren Court suggested that opinions were assigned to ideologically compatible Justices, though this effect was limited somewhat by concern for external reaction. David W. Rohde, *Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 MIDWEST J. POL. SCI. 652, 677-78 (1972). However, this pattern did not exist for economic cases before the Warren Court. Gregory James Rathjen, *Policy Goals, Strategic Choice, and Majority Opinion Assignments in the U.S. Supreme Court: A Replication*, 18 AM. J. POL. SCI. 713, 719 (1974).

⁹³ Sometimes the identity of an opinion author may render the decision more acceptable. For example, Chief Justice Hughes would assign decisions striking down New Deal statutes to more liberal Justices, such as Justice Brandeis. David J. Danelski, *Conflict and Its Resolution in the Supreme Court*, 11 J. CONFLICT RESOL. 71, 78 (1967).

substantive content is controlled by the median member of the majority coalition, regardless of who drafts the opinion.⁹⁴ If so, the opinion assignment authority provides relatively little power to the Chief. Arguably, the existing research has focused unduly on the opinion assignment power, at the expense of other sources of influence of the Chief Justice.⁹⁵

Some quantitative evidence demonstrates the influence of the Chief Justice during the certiorari process as well. As noted above, the Chief has predominant influence over the discuss list of cases to be considered by the Court.⁹⁶ Moreover, certiorari is more likely to be granted in those cases selected by the Chief. In the 1990 Term, 37.6% of the cases chosen by the Chief Justice were selected for certiorari, while the highest rate for any other Justice was 20%.⁹⁷ Indeed, 78.6% of the cases heard that Term came from Chief Justice Rehnquist's selections.⁹⁸ Strategically used, this authority could give the Chief considerable agenda-setting power.

Other empirical evidence might permit an inference of the Chief Justice's influence on Court cohesion. Paul Edelman and Suzanna Sherry have examined the size of majority coalitions in several natural courts.⁹⁹ Their data revealed that Rehnquist Court majorities were more successful in winning over the final Justice to gain a unanimous opinion than were Burger or Warren Court majorities.¹⁰⁰ This is not strong evidence of a Chief Justice effect, however, because of numerous other differences among those Courts.¹⁰¹

⁹⁴ See Chad Westerland, *Who Owns the Majority Opinion? An Examination of Policy Making on the U.S. Supreme Court 29-30* (Aug. 29, 2003) (unpublished manuscript, on file with the University of Pennsylvania Law Review) (finding that the probability of Justices writing separate opinions was predicted by their ideological distance from the median member of the majority, *not* by their ideological distance from the opinion author).

⁹⁵ See Davis, *supra* note 12, at 140 (observing that it was "unfortunate" that so much research focuses on opinion assignment, thereby presenting an "incomplete" picture of the Chief's leadership).

⁹⁶ See *supra* notes 35-39 and accompanying text (explaining the importance of the discuss list in the certiorari process).

⁹⁷ Caldeira et al., *supra* note 37, at 23.

⁹⁸ *Id.* at 24.

⁹⁹ Paul H. Edelman & Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, 78 N.C. L. REV. 1225 (2000).

¹⁰⁰ *Id.* at 1241-42.

¹⁰¹ *Id.* at 1245 (noting, for example, that "over the course of four decades, the Supreme Court changes in many ways" and that "[t]he personalities of the individual Justices and their interactions with one another are different for each Court").

On the other hand, there is compelling evidence that the Chief Justice has affected the norm of separate opinion writing. For the first 150 years of U.S. history, Supreme Court opinions were characterized by consensus, with relatively few concurring and dissenting opinions. "In the early 1940s, however, the conventions of the Court radically changed," and the number of dissenting and concurring opinions "surged to unprecedented levels."¹⁰² An empirical study of this change found that it could not be attributed to changes in jurisdiction or caseload or the Court's ideological composition.¹⁰³ Instead, the change seemed to be due to the leadership style and ability of Chief Justice Stone.¹⁰⁴

A subsequent empirical analysis of the data similarly concluded that the rise in separate opinions was due to the leadership of the Chief Justice or lack thereof.¹⁰⁵ Data on such independent opinions shows considerable variation over time, with statistically significant differences mainly in the Hughes and Stone Courts.¹⁰⁶ While the authors of these studies have successfully ruled out other logical explanations for the increase of independent opinions, they could not exclude the possibility that the change was due simply to the broader tenor of the legal times and to the growth of legal realism, both of which were coincident with the increased number of separate opinions.¹⁰⁷ Nevertheless, the results suggest a Chief Justice effect.

This historical analysis suggests that the Chief Justice has some ability to define the Court's culture and norms, which may dramatically influence the Court's functioning. That culture may be one of collegiality in which Justices are more likely to join majority opinions, even if they have some disagreement with their language or even results. At this point, however, it is unclear that a Chief Justice has the power to reverse the frequency of dissents and concurrences. Once the Pandora's Box was opened by Chief Justice Stone, the Chief's ability to influence independent decision making by Associate Justices may have become quite limited.

¹⁰² Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 362 (1988).

¹⁰³ *Id.* at 364-78.

¹⁰⁴ *Id.* at 378-80.

¹⁰⁵ Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 J. POL. 1158, 1165-66 (1992). Haynie found that the increase in concurring opinions largely occurred under Justice Hughes, while dissents rose under Justice Stone. *Id.* at 1164.

¹⁰⁶ *Id.* at 1163-65.

¹⁰⁷ Davis, *supra* note 12, at 144.

In terms of decisional influence, therefore, the effect of the Chief Justice might appear in several ways. The Chief might exert a gravitational pull on decisions of the full Court or on those of particular Associate Justices. The Chief might more successfully mold larger majorities in support of an opinion. The Chief could have influence over the nature of cases accepted on certiorari or simply the number of cases accepted. These influences have seen limited investigation, however, and this article strives to supplement this investigation with additional empirical evidence, focusing on the potential effect of Chief Justice Rehnquist.

II. THE 2004 TERM

We begin with an analysis of a unique natural experiment that arose during the 2004 Term, in which Chief Justice Rehnquist fell ill with thyroid cancer and stopped presiding over the Court for four months.¹⁰⁸ During this time, Justice Stevens took over as Acting Chief Justice. Justice Rehnquist neither attended oral argument nor, presumably, the conference vote on the cases immediately following oral argument, over which Justice Stevens presided.¹⁰⁹ Justice Rehnquist did not participate in decisions for the first month of his absence but cast votes on cases in the succeeding months.¹¹⁰ This episode offers a natural, if brief, experiment on the influence of the Chief Justice, both because the number of cases in both sets is roughly equal, and because Justice Rehnquist and Justice Stevens are considered ideological opposites.

Relatively little press discussion focused on the effect of Justice Rehnquist's absence, save for a suggestion that it might have delayed the writing of opinions.¹¹¹ Others suggested there might be a greater

¹⁰⁸ See Tony Mauro, *Illness Keeps Rehnquist From the Bench*, LEGAL TIMES, Nov. 8, 2004, at 10. The Chief Justice underwent significant surgery for thyroid cancer in late October, which was followed by radiation and chemotherapy treatments. *Id.* The Chief Justice temporarily left the Court in November 2004 and resumed his duties in March 2005.

¹⁰⁹ See Linda Greenhouse, *While Rehnquist Is Treated, Life at the Court Proceeds, but With Sadness and Uncertainty*, N.Y. TIMES, Nov. 7, 2004, at A25 (describing how Justice Stevens, as the senior Associate Justice, presided "over courtroom sessions and the justices' private conferences").

¹¹⁰ The Chief Justice initially sought to return to work after just the first month but was medically unable to do so. Linda Greenhouse & Katharine Q. Seelye, *Rehnquist Fails to Return, and Speculation Increases*, N.Y. TIMES, Nov. 2, 2004, at A1.

¹¹¹ See Tony Mauro, *Waiting Game Continues on Sentencing*, LEGAL TIMES, Dec. 20, 2004, at 10.

impact. At an ABA convention, Kenneth Starr and other panelists suggested that the ascendancy of Justice Stevens to Acting Chief Justice caused the Court to issue more liberal opinions, a thesis discussed at the *Volokh Conspiracy* blog.¹¹² The suggestion was based only on anecdotal evidence, however. This Part examines whether the switch from Chief Justice Rehnquist to Acting Chief Justice Stevens actually appeared to make a difference.

We examined all cases decided with full opinions during the Supreme Court's 2004 Term, including the closely divided decision in *Medellin v. Dretke*, which dismissed the petitioner's writ of certiorari as improvidently granted.¹¹³ Justice Stevens presided over forty cases in this set; Chief Justice Rehnquist presided over thirty.

We first analyze the Chief's success at promoting court cohesion. One might expect that Chief Justice Rehnquist might have more success at marshalling a unified Court than would Justice Stevens. Justice Rehnquist had years to cultivate the relationships and leadership skills to build coalitions, while Justice Stevens was unexpectedly thrust into the role of Acting Chief Justice. Table 1 reports the percentage of unanimous opinions and the percentage of decisions that turned on a single vote during the respective tenures of Chief Justice Rehnquist and Acting Chief Justice Stevens during the 2004 Term.

Table 1: Court Cohesion Under Two Leaders, 2004 Term

Cohesion	Rehnquist Chief	Stevens Acting Chief
Unanimous	.43	.40
One-Vote Majority	.20	.30

N=70.

Chief Justice Rehnquist did slightly better on these cohesiveness measures than did Justice Stevens, as hypothesized. The magnitude of the difference was not great, however, so no confident conclusions can be reached about the change in Chief Justice on Court cohesion.

Although the foregoing analysis is not dispositive, other hypotheses about the 2004 Term centered on the ideological direction of the Court's decisions. Some suggested that upon becoming Acting Chief Justice, Justice Stevens effectively took control and drove the Court in

¹¹² Posting of Todd Zywicki to The Volokh Conspiracy, <http://volokh.com/posts/1123540096.shtml> (Aug. 8, 2005, 6:28 EST).

¹¹³ 125 S. Ct. 2088, 2089 (2005).

a liberal direction. There is little doubt that Justices Stevens and Rehnquist differed ideologically and commonly found themselves opposed in close cases. To test for the effect of the Chief Justice on outcomes, therefore, we simply compare the number of cases in which Justices Rehnquist and Stevens dissented from the majority during each of their tenures as Chief Justice.¹¹⁴ If the Chief Justice were indeed influential in determining outcomes, through agenda setting or other measures, one would expect that the Justice would be in dissent less often while serving as Chief Justice. Table 2 reports the results as the percentage of cases in which each of the Justices dissented, by the cases in which they served as Chief Justice.

Table 2: Dissent Behavior by Two Leaders, 2004 Term

Behavior	Rehnquist Chief	Stevens Acting Chief
Rehnquist Dissent	.100	.275
Stevens Dissent	.300	.250

The results definitely conform to the hypothesis about the influence of the Chief Justice. Justice Rehnquist's dissents rose dramatically during the period when Justice Stevens was Acting Chief. Moreover, these numbers likely understate the effect because they incorporate some cases in which Justice Rehnquist did not participate (and therefore could not dissent), including at least one case in which a dissent by Justice Rehnquist seems likely to have occurred.¹¹⁵ The effect on Justice Stevens's dissents was not so dramatic but was also in the expected direction.

The test of the 2004 Term is intriguing but far from conclusive. The sample size is small and too many relevant explanatory variables are thus beyond realistic control. The findings could be attributed, for example, to the different set of cases on the docket during the times that Justices Rehnquist and Stevens served as Chief. Nevertheless, this natural experiment does provide some suggestive evidence

¹¹⁴ According to our coding conventions, the Justice was considered a dissenter if he dissented from any part of the majority opinion.

¹¹⁵ Most of the cases in which Justice Rehnquist did not participate were fairly uncontroversial, but *Small v. United States*, 125 S. Ct. 1752 (2005), was a criminal case decided on a 5-3 vote, with Justices Thomas, Scalia, and Kennedy as dissenters. Had Justice Rehnquist participated in and dissented from this ruling, his dissent percentage under Acting Chief Justice Stevens would rise to 30%, or three times the rate at which he dissented while serving as Chief.

about the authority of the Chief Justice by indicating that the presiding Chief Justice may have considerable influence on outcomes. In the following Part, we test this theory on a much larger set of data provided by the Spaeth U.S. Supreme Court Judicial Database.¹¹⁶

III. BROADER EMPIRICAL ANALYSIS OF THE CHIEF JUSTICE'S INFLUENCE

The Supreme Court Database includes variables reflecting the ideological direction of Justices' votes, the nature and number of the cases taken by the Court, the decision of the full Court and votes of individual Justices, and many other items of interest. This Part embarks on some preliminary empirical analysis regarding the influence of the Chief Justice. To do so, we focus on the transition from Justice Rehnquist's service as Associate Justice (1972-1985 Terms) to his service as Chief (1986-2004 Terms), exploring the effect of the transition on Supreme Court decisions as well as on Justice Rehnquist's behavior individually. In this sense, we seek to evaluate the notion that "[o]ne indicator of the power of a chief justice is how much things can change at the Court when a new chief takes office."¹¹⁷

Comparing transitions as a measure of the Chief Justice's power and authority, as we do here, has theoretical and practical limitations, however. Suppose that a powerful and effective conservative Chief Justice was replaced by a new powerful and effective conservative Chief Justice. The measure of the transition effect in such a case would be null, but this would not disprove the influence of the Chief Justice. It would only show that the succeeding Chief Justice was comparable to the predecessor. If the transition did mark a change in the Court's decisional outcomes, however, it would provide more persuasive evidence of the Chief's influence. Moreover, studying the elevation of Chief Justice Rehnquist might be expected to produce such an effect if it has the potential to exist. The Court under Chief Justice Burger was rife with confusion and contentiousness. In contrast, Chief Justice Rehnquist was a more able administrator, who was able

¹¹⁶ The United States Supreme Court Judicial Database is a multi-user database that provides detailed data, including ideological direction, on Supreme Court decisions since the start of the Warren Court. Harold J. Spaeth, The S. Sidney Ulmer Project: U.S. Supreme Court Judicial Databases, <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> (last visited Mar. 8, 2006).

¹¹⁷ Mauro, *supra* note 2, at 10.

to create a more collegial decision-making environment.¹¹⁸ Although Justice Rehnquist is regarded as more conservative than Justice Burger, the liberals on the Court generously praised his new leadership regime.¹¹⁹ Thus, if the Chief Justice's leadership matters, one might expect it to appear in a study of this transition. Justice Rehnquist's relatively lengthy service as both an Associate Justice and then as Chief Justice facilitates this comparison.

Such transition testing is a very rough measure, of course. Justice Rehnquist was elevated to Chief Justice at the same time that Justice Scalia joined the Court. Consequently, any change with the transition might be due to Justice Scalia's influence, or the interactive combination of Justices Scalia and Rehnquist, rather than to the Chief Justice effect alone.¹²⁰ In addition, the transition period itself is not precise. The new Chief's "leadership style" will "take[] time to develop" and "some period of adjustment is inherent in the chief's development of strategies necessary to 'marshall' the Court *and* for the Court to effectively respond to his leadership style."¹²¹ If so, the effects of a Chief on Court decisions would appear only after a lag period. Finally, since we look at trends over time, a number of additional variables could confound the analysis. For example, we evaluate Justice Rehnquist's propensity to concur over the two periods. His decreased inclination to concur as Chief Justice, as we observe it in the data, could be the result of his enhanced interest in cohesion on the Court, or it could be due to the Court's shift to the right—obviating the need for Justice Rehnquist, a conservative, to present an alternative perspective.

¹¹⁸ See *supra* notes 6-10 and accompanying text (referring to some of the multiple commentators who have remarked on the relative influence of Justice Rehnquist on the Court).

¹¹⁹ Justice Stevens expressed "sincere appreciation for the exemplary way in which . . . [Chief Justice Rehnquist] performed the special responsibilities of [his] high office, with particular emphasis on the efficiency, good humor and absolute impartiality that [he] . . . consistently displayed when presiding at our conferences." Greenhouse, *supra* note 8, at A16. The transitional effect is described in O'BRIEN, *supra* note 13, at 203-04; see also BAUM, *supra* note 3, at 166-68 (discussing Chief Justice Rehnquist's ability to be a more effective leader of the Court than was Chief Justice Burger). Indeed, some have considered Justice Rehnquist a "dominant" Chief, though others have suggested that his Court was truly controlled by its "swing justices." Garnett, *supra* note 17, at 34.

¹²⁰ Prior research has shown different voting patterns on civil liberties cases in different Courts (for example, the Warren Court, the Burger Court, and the Rehnquist Court), but has attributed this to the ideological composition of different Courts, rather than a Chief Justice effect. See Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 3, 10-21 (1992).

¹²¹ Haynie, *supra* note 105, at 1161-62 (citation omitted).

Nevertheless, analysis of trends is suggestive and can serve as the basis for future empirical research that may tease out these underlying relationships. In this Part, therefore, we present a preliminary empirical analysis on the effects of the Chief Justice on Supreme Court decisions, focusing on Chief Justice Rehnquist. We begin with an analysis of Justice voting and case outcomes. While Chief Justice Rehnquist's leadership does not appear to dramatically affect ideological outcomes overall, this Part examines whether Justice Rehnquist successfully achieved other objectives. We examine his effect on the neutral goals of Court cohesion and on the cases taken for the Court's docket. Finally, we examine the Rehnquist Court's record on "judicial activism," for which the Court has commonly been criticized. The evidence suggests that Chief Justice Rehnquist may indeed have had some impact on the Court's decisionmaking, although future multivariate analysis would provide additional evidence of such an effect.

A. Chief Justice Effects on Case Votes and Cohesion

This Part presents data on the effect of Justice Rehnquist's elevation to Chief Justice on case outcomes. Justice Rehnquist is certainly a conservative, so one might expect him to try to drive judicial decisions in a conservative direction. Keith Whittington's summary of Justice Rehnquist's service conceded that while he did not fully realize this jurisprudential goal in case outcomes overall, Justice Rehnquist did lead "a revitalized strand of judicial conservatism."¹²² For Whittington, it "seems clear that the chief justice has directed the Court toward a different destination."¹²³ If so, his service might be expected to have produced an increased percentage of conservative decisions, or, conversely, a decreased percentage of liberal outcomes over the period. This effect can be measured by evaluating the directional outcome for cases by Term. Figure 1 presents the percentage of liberal decisions in criminal procedure and civil liberties cases from 1972 to 2004.¹²⁴

¹²² Keith E. Whittington, *William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 8, 8 (Earl M. Maltz ed., 2003).

¹²³ *Id.* at 27.

¹²⁴ For this and all other analyses, we used case citation as the unit of analysis and omitted cases decided with memorandum opinions or decrees. The coding conventions used to identify the ideological direction of the case outcomes are available at HAROLD J. SPAETH, S. SIDNEY ULMER PROJECT FOR RESEARCH IN LAW AND JUDICIAL PROJECTS, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE: 1953-2003 TERMS: DOCUMENTATION (2005), http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf.

Figure 1: Percent Liberal Outcomes in Criminal Procedure and Civil Liberties Decisions

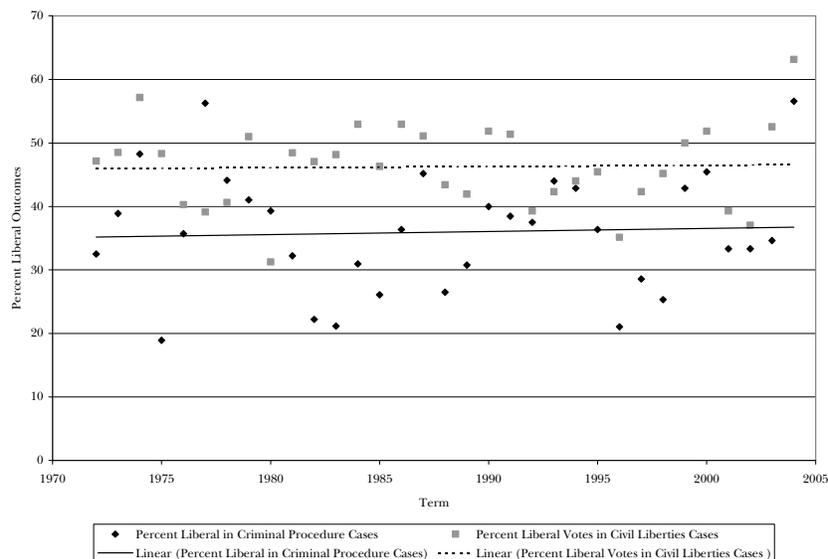


Figure 1 displays little trend toward more conservative decisions by the Supreme Court over the period, either in criminal procedure or civil liberties cases. Indeed, given the fact that Justice Scalia joined the Court in 1986 and was soon joined by Justice Thomas, it may be surprising that the Court did not shift even further in a conservative direction over the time period covered in the figure. When considering these findings, there is no reason to believe that Justice Rehnquist's tenure as Chief drove the Court to produce more conservative case outcomes. The Rehnquist Court certainly has not broadly rolled back the liberal precedents of the Warren Court, and the period has been called "The Revolution that Wasn't."¹²⁵

The data on case outcomes may simply be too unrefined to identify an ideological effect. They show nothing about the content of the opinions issued by the Court or the content of the cases taken on certiorari. In some major issue areas, the Court clearly has become more

Note that Justice Rehnquist joined the Court in 1972 and became Chief Justice in 1986.

¹²⁵ M. Elizabeth Magill, *The Revolution that Wasn't*, 99 NW. U. L. REV. 47 (2004).

conservative. For example, the Rehnquist Court has plainly limited the availability of habeas corpus.¹²⁶ The shift from the governing rule for abortion restrictions in *Roe v. Wade*¹²⁷ to the governing rule in *Casey*¹²⁸ clearly reflects a movement away from reproductive rights,¹²⁹ though it fell far short of the reversal of *Roe* that conservatives sought. Such examples, however, cannot illustrate any distinct effect of Chief Justice Rehnquist. Nor do these quantitative results provide any information on the nonideological components of decisions, such as Court cohesion. The remainder of this Article embarks on an investigation of whether the transition from Chief Justice Burger to Chief Justice Rehnquist is associated with changes in other measures of Supreme Court decisionmaking.

We begin with an analysis of Court cohesion. One conventional view of Court dynamics is purely ideological, as evidenced by the analyses of Justice voting. But at least theoretically, the Chief is likely to be concerned with other institutional considerations that are non-ideological in nature. One such consideration is the extent to which the Justices render decisions that are unmarred by dissenting or concurring opinions. Such cohesive decisionmaking can influence the power of opinions rendered by the Court, shape lower courts' implementation of those opinions, and affect the Court's legitimacy in the public eye.¹³⁰ Some commentators have suggested that Chief Justice Rehnquist was a failure at building Court consensus. Thus, arguably the "norm of individual opinions may have grown even stronger under Chief Justice Rehnquist."¹³¹ Others have even described the Rehnquist Court as fragmented.¹³²

¹²⁶ See Davis, *supra* note 12, at 143 (describing Rehnquist's "victory in reducing habeas corpus").

¹²⁷ 410 U.S. 113 (1973).

¹²⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹²⁹ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 124 (1999) (reporting that *Casey* "made it substantially easier for the states to adopt regulations restricting the availability of abortion").

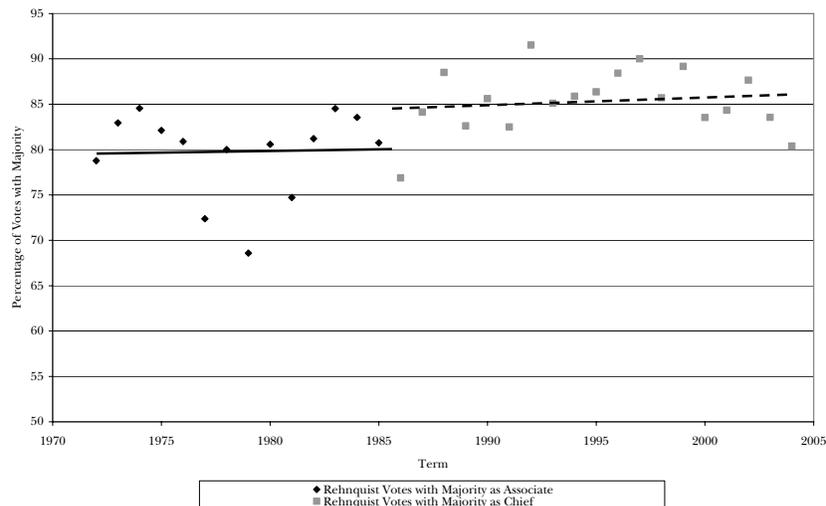
¹³⁰ Majority opinions with the support of more Justices tend to have greater power as precedents and may benefit the Court in other ways as well. See, e.g., Cross, *supra* note 51, at 554-57 (discussing the potential value of larger majorities in their potential to give "compelling force" to the result); see also *supra* notes 81-89 and accompanying text. Unanimous opinions may be especially important to the influence of Supreme Court opinions; see also MURPHY, *supra* note 13, at 66 (declaring that "[t]he greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases").

¹³¹ Davis, *supra* note 12, at 144.

¹³² Cornell Clayton, *Law, Politics, and the Rehnquist Court: Structural Influences on Supreme Court Decision Making*, in *THE SUPREME COURT IN AMERICAN POLITICS* 151, 161-

Our analysis considers both the behavior of Chief Justice Rehnquist himself and of the Court under his leadership. The following figures reflect trends in the Court's decisions as well as those of Chief Justice Rehnquist, before and after his elevation to Chief. These trends display both the immediate effect of the Rehnquist Court and its gradual effect over time. We begin by studying Justice Rehnquist's individual voting behavior and whether becoming Chief Justice affected his willingness to write separately. Figure 2 presents the frequency with which Justice Rehnquist voted with the majority, with separate data points and trend lines for his time as an Associate and as Chief Justice.

Figure 2: Rehnquist Votes with Majority



162 (Howard Gillman & Cornell Clayton eds., 1999); see also Timothy Sandefur, *The Rehnquist Legacy*, LIBERTY, Nov. 2005, at 25, available at http://libertyunbound.com/archive/2005_11/sandefur-rehnquist.html (characterizing the Rehnquist Court as “fractured” and discussing Chief Justice Rehnquist’s inability to achieve consensus).

These results show a distinct change in Justice Rehnquist's behavior following his elevation to Chief Justice. Although no apparent trend existed in his interest in filing or joining an independent opinion before he was elevated, thereafter it appears that he became more inclined to join the majority opinion. Before becoming Chief, Justice Rehnquist voted in the majority around eighty percent of the time. As Chief, he voted with the majority over eighty-five percent of the time. In some years, as an Associate Justice, he felt free to refuse to join the majority over twenty-five percent of the time. As a Chief, his highest rate of refusing to join the majority was seventeen percent. Chief Justice Rehnquist's disinclination to express himself in an independent opinion is particularly apparent when one examines his rate of concurring opinions over the period.¹³³

It is therefore possible that institutional features of the chief justiceship had an effect on Justice Rehnquist's independent voting behavior. While he continued to dissent on occasion, the rate of such action dropped. At the margin, it appears that he was more willing to sacrifice his ability to express his own distinctive views in exchange for a larger majority. This is suggestive of the "golden shackles" argument that being Chief limits a Justice's freedom.¹³⁴ There is, however, an alternative explanation. When in the majority at conference, the Chief can designate the opinion writer, a potentially strategic and empowering effect. Chief Justice Rehnquist may have joined more majorities in order to possess this assignment power and thereby influence the content of the resulting opinion. Information on conference voting could help distinguish these explanations, but we lack that data. It is also possible that when the Court's membership changed with the addition of Justices Scalia and Thomas, Justice Rehnquist more often found himself in a conservative majority. This, too, would explain a reduction in his propensity to dissent.

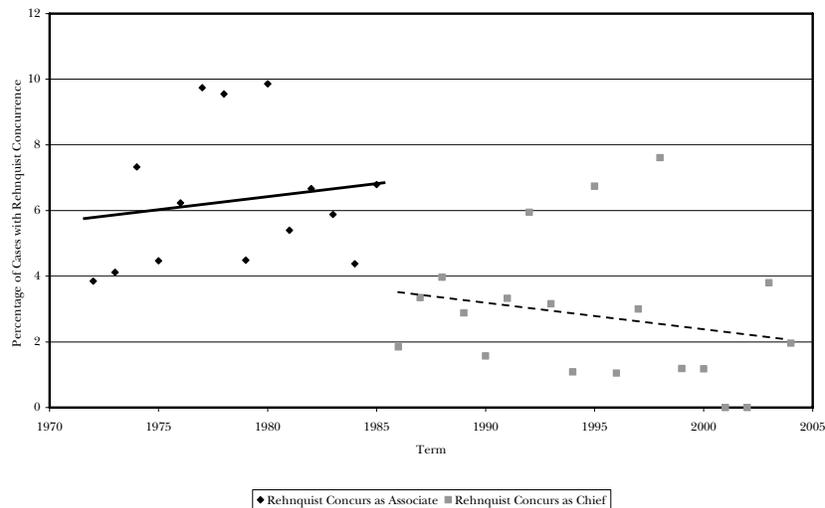
The next analysis considers whether becoming Chief Justice affected the probability that Justice Rehnquist would concur. If the Chief votes with the majority at conference, she may both assign the majority opinion and file a concurring opinion that expresses her views more precisely. Thus, she could control the opinion assignment and still fulfill her expressive interests in opinion writing by later filing a separate concurring opinion. Figure 4 presents the rates at which

¹³³ See *infra* figure 3.

¹³⁴ See *supra* notes 90-91 and accompanying text.

Justice Rehnquist filed concurring opinions over the years, with separate trend lines for his service as Associate Justice and as Chief Justice.

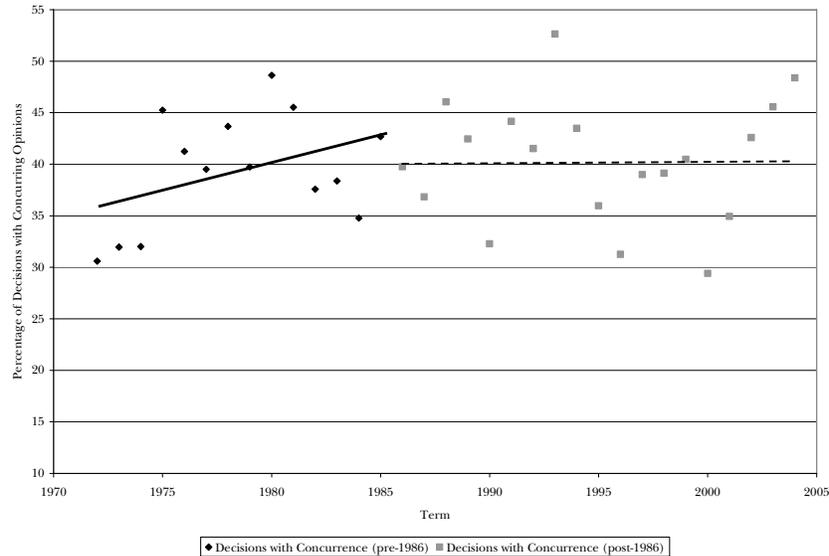
Figure 3: Rehnquist Concurs as Associate and Chief



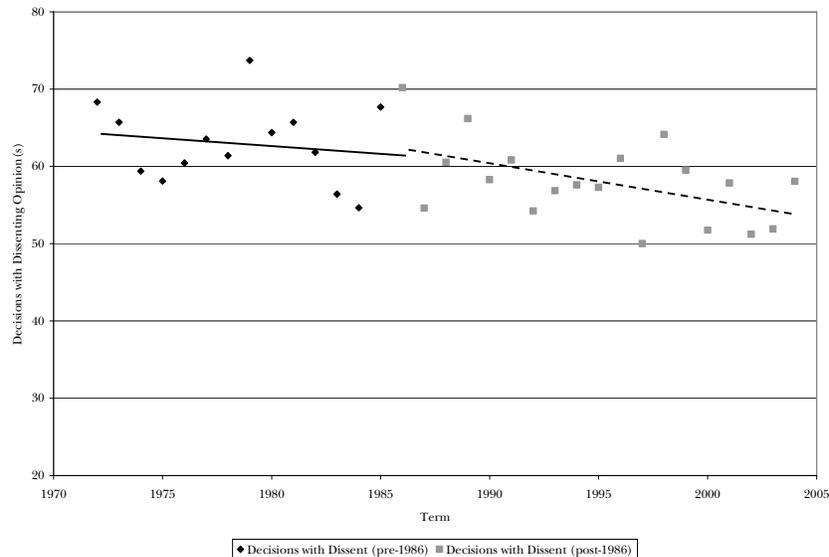
These results show that the probability of a Rehnquist concurrence declined after he became Chief Justice. This finding suggests some increased concern for Court cohesion on his part after becoming Chief Justice. Although Chief Justice Rehnquist continued to file concurring opinions, he did so four percent of the time or less in the vast majority of years. By contrast, as an Associate, he filed concurring opinions four percent of the time or more in every year but his first.

The above evidence on Justice Rehnquist's concurrences is not terribly dramatic. The absolute number of fewer concurrences is not great, averaging only one or two fewer concurrences per year following Justice Rehnquist's elevation to Chief. Moreover, this only contributes to cohesion in his own vote and illustrates only the "golden shackles" theory of being Chief Justice. Ideally, we think that a Chief Justice could use her power to induce greater consensus among the other members of the Court. This requires consideration of the behavior of the Court as a whole and whether it appeared to change following the transition from Chief Justice Burger to Chief Justice Rehnquist. Data on the frequency of overall concurrences are presented in Figure 4.

Figure 4: Decisions with Concurrence



The break in the trend lines here suggests that Chief Justice Rehnquist may have had some effect on Court cohesion generally. Concurrences were steadily increasing during the Burger Court but that trend was stalled in the time period of the Rehnquist Court. The break was not as dramatic as it was for Justice Rehnquist's individual behavior, which might be expected—he had to steadily learn his role as Chief Justice and how to influence other Justices to join a majority opinion. Once again, the effect is not a highly dramatic one, as the overall rate of concurrences declined only slightly. The possible influence of Chief Justice Rehnquist on dissent is considered in Figure 5. This figure displays the number of decisions with at least one dissent, the converse of a unanimous opinion.

Figure 5: Decisions with Dissent

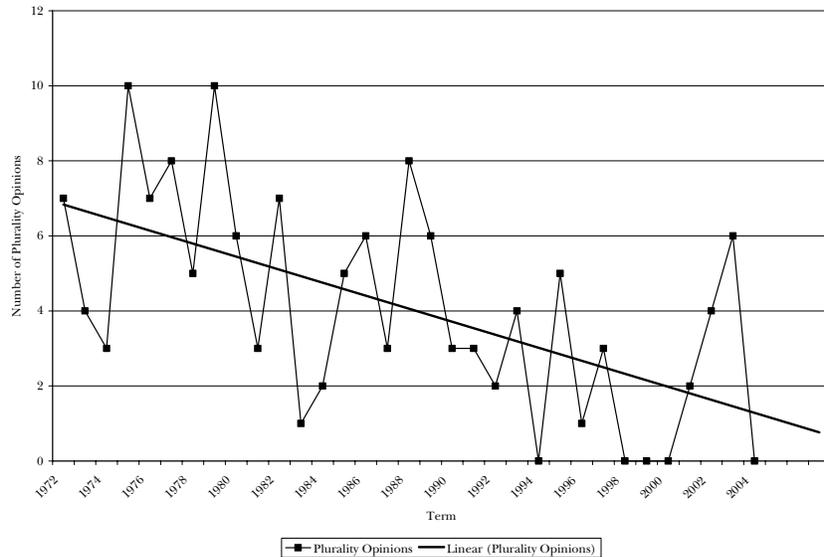
This figure suggests that dissents may have been on the decline even before Justice Rehnquist became Chief, and that trend clearly continued after he obtained the position.

The circumstances of Chief Justice Rehnquist's tenure do not provide a perfect natural experiment because other intervening factors that cannot be controlled may explain the differences in Court cohesion. Perhaps the most obvious and significant intervening factor, the addition of Justice Scalia, suggests that our data may understate the positive effect of Chief Justice Rehnquist on Court cohesion. Justice Scalia has the highest probability of any recent Justice of filing a special concurrence; he also files a significant number of dissents.¹³⁵ On the other hand, the Court may have become more cohesive over the period after the retirements of Justices Brennan and Marshall, who were far more liberal than any of the Justices who later joined the Court. Thus, a decrease in the range of ideological preferences associated with the individual Justices could also account for this apparent increase in Court cohesion. Indeed, to the extent that Justice Rehnquist moderated his own behavior after becoming Chief, it would have affected the mean of the Court as a whole.

¹³⁵ SEGAL ET AL., *supra* note 42, at 336 tbl.13.1.

One final important measure of cohesion is found in the number of plurality opinions. The presence of such an opinion reflects some level of failure by the Supreme Court. While such opinions resolve the case before the Court, the lack of a governing majority opinion leaves the law in a state of uncertainty. The plurality opinion’s “authority as a precedent, as a guide to the decisions of other courts, is severely compromised.”¹³⁶ Thus, it is in the Court’s interest to limit the number of plurality opinions. Figure 6 shows the trend in plurality opinions during Justice Rehnquist’s tenure on the Court.

Figure 6: Plurality Opinions, 1972-2004



Again we see a remarkable change in the number of plurality opinions over the period analyzed. This result could be attributed to Chief Justice Rehnquist’s marshalling of the Court, or it could be due to the decrease in the size of the Court’s docket over the same period.

These results show some pronounced differences in Justice Rehnquist’s behavior after becoming Chief and also some modest cohesion differences between the Burger and Rehnquist Courts. It is

¹³⁶ *Id.* at 335; see generally John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62 (explaining that plurality opinions “may compromise [the Court’s] professional and public acceptance,” carry “less precedential weight,” and “often fail[] to give definitive guidance as to the state of the law”).

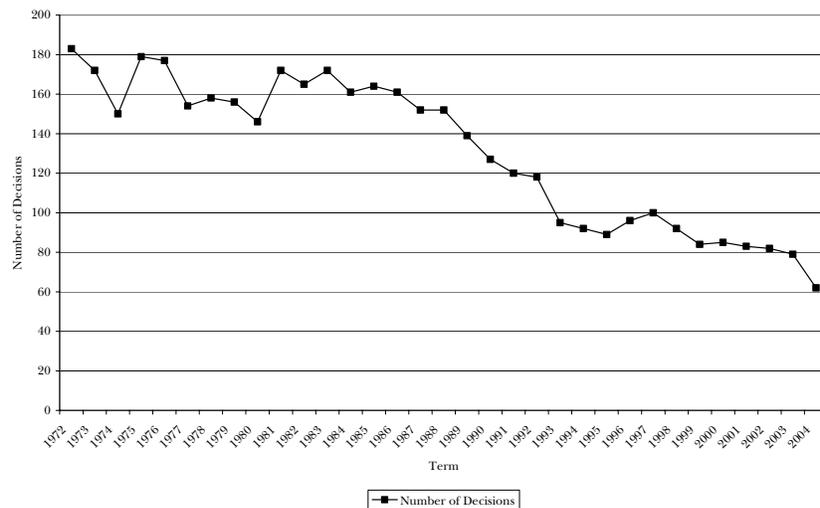
impossible to conclusively assign these differences to Justice Rehnquist's elevation to Chief, as Justice Scalia joined the Court at the same time. The results are suggestive, however, and they are generally consistent with scholarly opinion on the effect of Chief Justice Rehnquist. It appears that Chief Justice Rehnquist effectively discharged his managerial responsibility in achieving increased Court cohesion.

B. Chief Justice Effects on Case Selection

As discussed above, the Chief Justice has some unique ability to influence the cases chosen for Court review, and one might expect more of an effect here than on case outcomes.

The first analysis considers simply the absolute number of cases taken by the Court.

Figure 7: Decisions with Written Opinion, 1972-2004

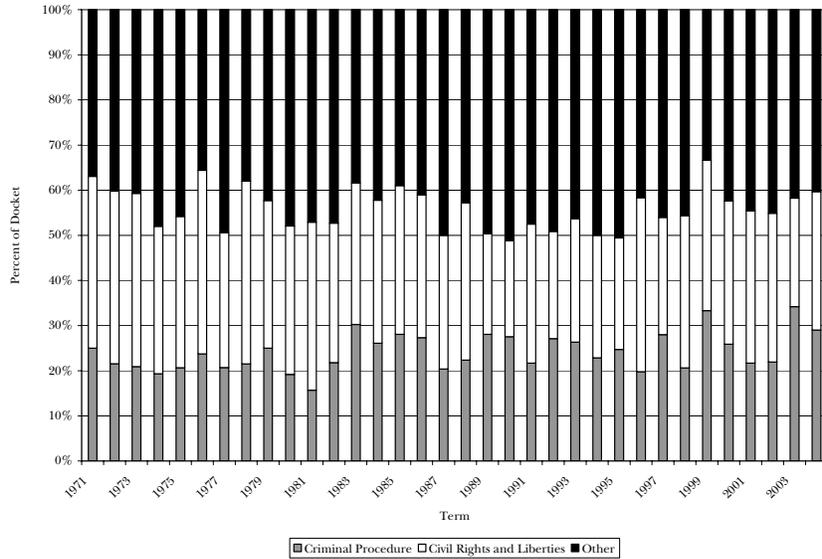


The results are striking. The Rehnquist Court was widely known for managing a significantly smaller docket than the Burger Court.

Another issue involves the types of cases on which the Court accepts certiorari; a Chief Justice can direct the course of the law simply through the types of cases the Court selects for review. Case types can be broken down in various ways; we begin the analysis by examining

broad case categories. We first graph the number of cases taken each year in two important areas—criminal procedure and civil rights and liberties. Figure 8 displays the percentage of the docket devoted to these issue areas for each of the years of Justice Rehnquist’s service on the Supreme Court.

Figure 8: Docket Composition, 1971-2004



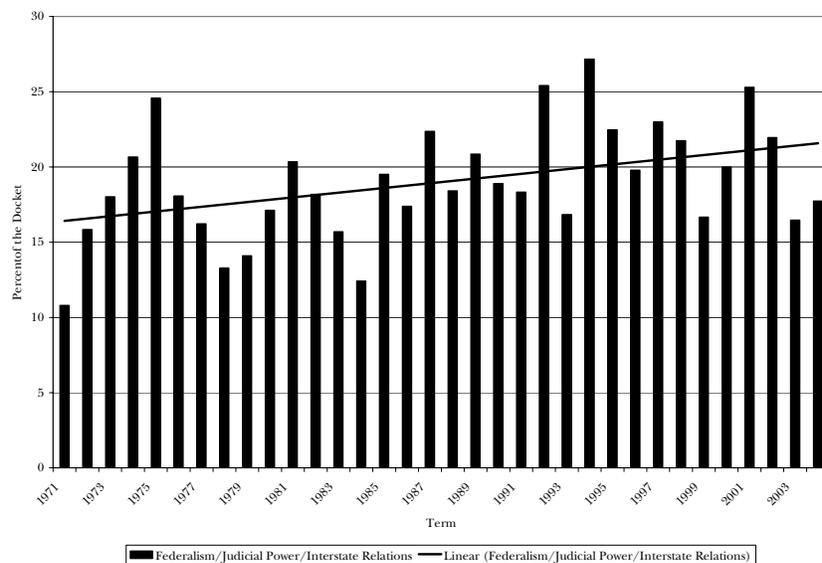
Here we see no significant change in the Court’s docket, at least with respect to these broad issue categories. There appears to be a slight increase in criminal procedure cases as a percentage of the docket, but, given the shrinking size of the docket, the Rehnquist Court took fewer criminal procedure cases in absolute numbers than did the Burger Court. The Court’s attention to these key legal issues has obviously varied over the years, but there is no clear and dramatic pattern of change in broad priorities during the tenure of Chief Justice Rehnquist.

In terms of more narrow issue areas, Chief Justice Rehnquist is associated with concern for federalism and the protection of states’ legal rights.¹³⁷ His success in this regard has been called the “Rehnquist

¹³⁷ See Davis, *supra* note 12, at 142 (observing that the “overarching theme of Rehnquist’s decision-making is state-centered federalism”).

Court's Velvet Revolution,"¹³⁸ with commentators noting that Chief Justice Rehnquist was "most successful in reinvigorating interest in federalism on the Court."¹³⁹ His tenure is also associated with a concern over the expansion of judicial power.¹⁴⁰ One might expect this preference to appear in the cases that his Court selected for certiorari. Figure 9 reports the percentage of the docket devoted to cases involving federalism, interstate relations, and judicial power during Justice Rehnquist's tenure on the Supreme Court.

**Figure 9: Docket Composition:
Federalism/Judicial Power/Interstate Relations**



¹³⁸ Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 496 (2001).

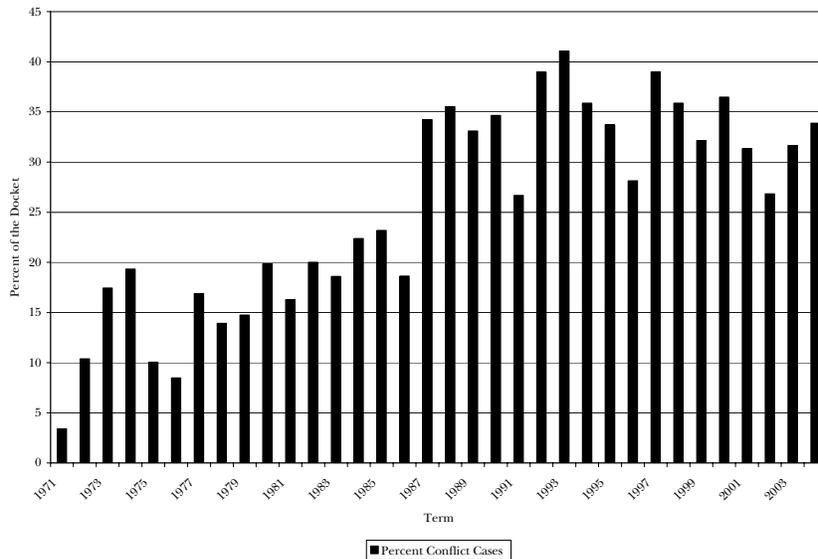
¹³⁹ Whittington, *supra* note 122, at 23.

¹⁴⁰ See, e.g., Kermit Roosevelt, *Wrong, but Not Too Right*, LEGAL AFF., Mar.-Apr. 2005, at 36 (noting that as Chief Justice, Justice Rehnquist appeared more concerned with expanding judicial power than producing conservative outcomes).

The results show an upward trend in the docket percentage of cases in these issue areas taken by the Supreme Court, though the trend appears to have begun before Justice Rehnquist became Chief Justice, and the magnitude of the change is not great. Moreover, because of the shrunken docket, the absolute number of federalism cases is fewer than for many years of the Burger Court. These pure quantitative measures do not capture the full story, however. The Rehnquist Court has seen the issuance of some of the potentially most significant federalism decisions, such as *United States v. Lopez*.¹⁴¹ The Court's pro-federalism decisions are not entirely consistent or far-reaching, however, and an analysis of the decisions has found their effects to be relatively pragmatic and minimalist.¹⁴²

Another important consideration in the makeup of the Supreme Court docket is the resolution of circuit court conflicts. To the extent that Chief Justice Rehnquist and his Court were more concerned with the Court's responsibility to resolve such conflicts, they may have chosen more intercircuit conflicts to resolve as a percentage of the overall docket. Figure 10 displays the percentage of docket cases that involved intercircuit conflicts.

Figure 10: Intercircuit Conflicts Cases as Percent of Overall Docket



¹⁴¹ 514 U.S. 549 (1995).

Once again, we see a striking change associated with the Rehnquist Court. The percentage of the docket devoted to conflicts cases nearly doubled over levels in the Burger Court. This change did not reflect a particular commitment to reducing circuit conflicts, however. The absolute number of conflicts resolved by the Rehnquist Court was fewer than in some years of the Burger Court. Instead, the higher percentages reflect the reduced docket of the Rehnquist Court years. In 1973, when less than twenty percent of the docket involved conflicts cases, the Court resolved thirty conflicts. By contrast, in 2003, when conflicts cases made up about a third of the docket, the Court resolved only twenty-five conflicts. The remarkable change in the percentage of the Court's docket taken up by conflicts cases is a result of the lesser number of nonconflicts cases accepted by the Rehnquist Court.

The results demonstrate that the Rehnquist Court remained reasonably attentive to the need to resolve circuit court conflicts, as have prior Courts, but showed much less interest in taking cases without circuit conflicts. This is a curious phenomenon, without an obvious explanation. One would think that the nonconflicts cases enable the Justices to choose the issues that interest them and on which they wish to make law. These discretionary choices would seem to be at the root of the Court's power, yet the Rehnquist Court limited them drastically. Such an action might reflect a commitment to reduce the Court's power in the U.S. governmental system, perhaps in response to attacks on judicial activism. The next Part considers the Rehnquist Court and such judicial activism.

C. Chief Justice Effects on Judicial Activism

One of the more common critiques of the recent Rehnquist Court is that it was an activist Court. Cass Sunstein declared that "[w]e are now in the midst of a remarkable period of right-wing judicial activism."¹⁴³ Similarly, Larry Kramer has contended that "conservative judicial activism is the order of the day,"¹⁴⁴ while others have called the Court's federalism doctrine "an astonishing display of judicial activism

¹⁴² See Clayton, *supra* note 132, at 171-75.

¹⁴³ Cass R. Sunstein, Op-Ed, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23.

¹⁴⁴ Larry D. Kramer, Op-Ed, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33. Professor Kramer has also referred to the "unparalleled activism" of the Rehnquist Court. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 960 (2004).

not seen since the 1930s.”¹⁴⁵ Yet in many ways, the concept of judicial activism has become more of an epithet than a thought. It often means nothing more than reference to “an action taken by a court of which the speaker disapproves.”¹⁴⁶ Conservatives declaimed the judicial activism of the Warren Court, which liberals embraced, only to find their ideological positions reversed as the Court became more conservative.

Even if activism is generally empty of meaning other than ideological disagreement, one can still measure certain elements commonly associated with such activism on their own terms. A commonly invoked measure of judicial activism is the Court’s willingness to invalidate statutes. While this is not a perfect or complete measure of activism,¹⁴⁷ it surely has a rough accuracy, because striking down legislation is a clear flexing of judicial power at the expense of another branch of government.¹⁴⁸ Richard Posner has suggested that he would like to see this metric for activism become “canonical,” because it involves courts “acting contrary to the will of the other branches of government.”¹⁴⁹ Ernest Young concedes that these are the “most dramatic instances” of judicial activism.¹⁵⁰ Most of the past decisions cited as “activist” involved the invalidation of a statute, whether it be an anti-

¹⁴⁵ Herman Schwartz, *Introduction to THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 13, 19 (Herman Schwartz ed., 2002). Jonathan Molot details the Rehnquist Court’s activism, reviewing the Court’s record in terms of countermajoritarian decisions and adherence to neutral principles. Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1806-25 (2004).

¹⁴⁶ Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276 (2002).

¹⁴⁷ See, e.g., Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1164-70 (2002) (addressing the concept of judicial activism and critiquing an excessive focus on statutory invalidation as the measure of activism). Young suggests consideration of other forms of judicial activism, including departing from text or history, departing from precedent, issuing maximalist rulings, exercising broad remedial powers, and deciding ideologically. *Id.* at 1144; see also Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1463-76 (2004) (reviewing different definitions of judicial activism, including statutory invalidations and definitions that ignore precedent, departures from interpretive methodology, and results-oriented judging).

¹⁴⁸ See BAUM, *supra* note 3, at 194 (“Of the various forms of judicial activism, perhaps the most important is making decisions that conflict with policies of the other branches. This form of activism is often gauged by the Court’s use of judicial review, its power to overturn acts of other policy makers on the ground that they violate the Constitution.”).

¹⁴⁹ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 320 (1996).

¹⁵⁰ Young, *supra* note 147, at 1145.

abortion law in *Roe*¹⁵¹ or the Violence Against Women Act in *Morrison*¹⁵². In addition, this measure has the advantages of being ideologically neutral and readily quantifiable and has been used as a proxy in other research.¹⁵³

Critics of the Rehnquist Court have claimed that it has been all too ready to presume power for itself and strike down statutes. In their view, Chief Justice Rehnquist is an activist who is quick to overrule the judgments of legislatures. Standing opposite this stereotype, however, is Justice Rehnquist's own judicial philosophy, which is "mistrustful of judges substituting their judgments of contested constitutional rights for the judgments of popularly elected representatives."¹⁵⁴ By this philosophy, one might expect Chief Justice Rehnquist, and the Court that he led, to be loathe to strike down statutes. This is a controversy that may be readily tested.

As noted above, many have argued that the conservative Rehnquist Court was not true to its professed philosophy of judicial restraint, and some have supported this claim with modest empirical analyses. In a controversial editorial, Paul Gewirtz and Chad Golder examined the Justice's votes and found that on the Rehnquist Court, conservatives such as Justices Scalia and Thomas were most willing to strike down federal statutes.¹⁵⁵ Stuart Taylor observed that between 1994 and 2000, the Court invalidated twenty-three federal statutes, after it had invalidated only 128 in its entire prior history.¹⁵⁶

To amplify this research, we compare statutory invalidations in the Rehnquist Court with those in the Burger Court, beginning with an analysis of federal statutes. We used the Supreme Court database to identify all cases heard by the Burger and Rehnquist Courts during the 1971 to 2000 Terms in which the constitutionality of a statute was challenged on its face (as opposed to applied challenges), for all decision types except memorandum decisions and decrees.¹⁵⁷ The num-

¹⁵¹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵² *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁵³ See, e.g., Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 213-17 (2003) (using statutory invalidations as measure to test activism associated with different state court selection methods).

¹⁵⁴ Whittington, *supra* note 122, at 16.

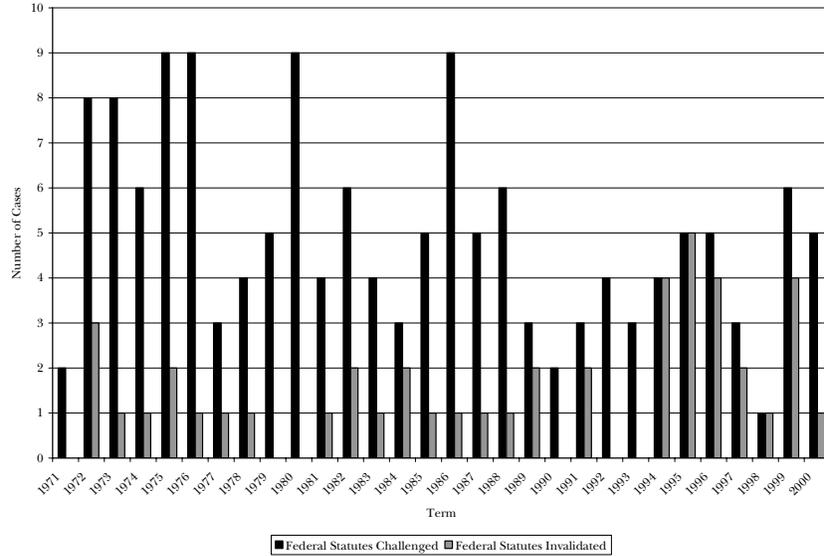
¹⁵⁵ Paul Gewirtz & Chad Golder, Op-Ed, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19.

¹⁵⁶ Stuart Taylor, Jr., *The Tipping Point*, NAT'L J., June 10, 2000, at 1810, 1816.

¹⁵⁷ To execute this, we first used the "uncon" variable in the Supreme Court Database to find cases in which a statute or ordinance was found unconstitutional. We then used the "authdec" variable in the database to identify all cases where there might have

bers are relatively small and are displayed in Figure 11 as a histogram showing the absolute number of facial challenges considered each year and the number of statutes invalidated as facially unconstitutional.

Figure 11: Judicial Activism: Invalidation of Federal Statutes



These results show some difference between the Burger and Rehnquist Courts. The Rehnquist Court was somewhat more likely to strike down federal statutes than its predecessor. The most remarkable change is the reduced number of challenges to statutes' constitutionality that the Court accepts. The Rehnquist Court takes certiorari on very few challenges, save for cases in which it strikes down the statute, in contrast to the Burger Court, which took many more challenges and issued fewer invalidations. While this is in part a function of the smaller docket of the Rehnquist Court as well as of changes in the Court's jurisdictional statute in 1988, the difference exceeds even the reduction in the docket. The Rehnquist Court seemed to be very reluctant to *uphold* the constitutionality of a statute. In three of these years (1993, 1994, and 1997), the Court upheld no federal statutes

been a constitutional challenge to the statute and then examined the opinion to determine whether this was in fact the case. Spaeth, *supra* note 116.

and in several other years (1988, 1990, 1995, and 1996) it upheld only one. Table 3 provides mean statistics on federal statutory constitutionality rulings during the periods when Justice Rehnquist was an Associate Justice on the Burger Court and when he was the Chief Justice.

Table 3: Mean Federal Laws Challenged and Invalidated Per Term

	Associate Justice Rehnquist	Chief Justice Rehnquist
Federal Laws Challenged	5.875	4.26
Federal Laws Invalidated	1.125	1.86

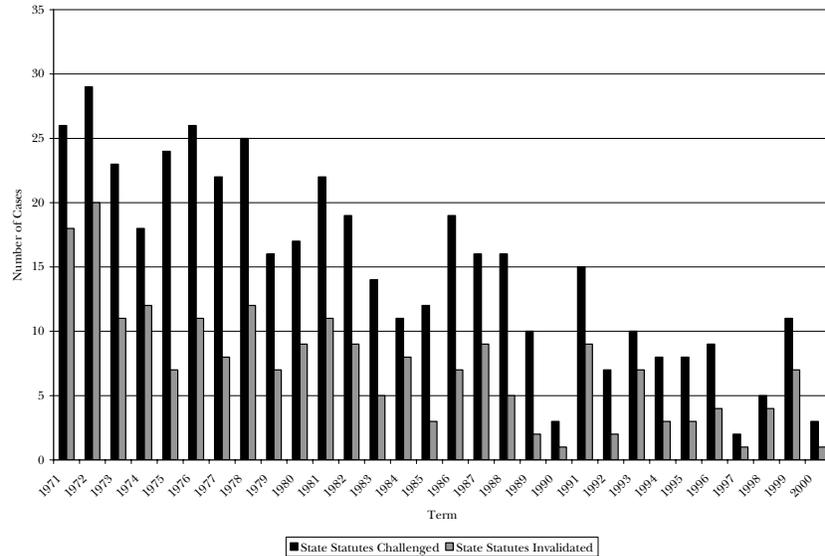
While the number of challenged statutes dropped significantly in the Rehnquist Court, the number of statutory invalidations increased distinctly. The increased absolute number of statutory invalidations shows a greater measure of judicial activism by the Court, especially when one considers the smaller docket of the Rehnquist Court. The reduced number of challenges is an interesting and somewhat curious finding that requires further exploration. While due in part to the smaller docket, it may also be that the Court sought to allow the circuit courts to consider questions of federal statute constitutionality and to strike down their decisions as it saw fit in some future opinion.¹⁵⁸

Much of the discussion of Rehnquist Court activism has considered only federal statutes. This can be misleading, as many of the Court's past decisions that are considered the most activist struck down state statutes. The critiques of Rehnquist Court activism have almost exclusively addressed its rulings on federal statutes, which arguably reveal an implicit and "strong ideological bias."¹⁵⁹ To consider the level of activism in striking down state laws, Figure 12 considers the number of constitutional challenges to and invalidations of state statutes while Rehnquist was a Justice.

¹⁵⁸ The docket size reduction is not independent of this effect. Indeed, the Court's reluctance to take cases in which it would uphold federal statutes could explain some of the docket reduction.

¹⁵⁹ Young, *supra* note 147, at 1146 n.20.

**Figure 12: Judicial Activism:
State Laws Challenged and Invalidated, 1972-2000**



This figure shows a steadily declining number of state statutes challenged and invalidated as facially unconstitutional. The decline is especially pronounced in the Rehnquist Court years. While Chief Justice Rehnquist's Court was clearly more activist with respect to striking down federal statutes, it was much less activist with respect to invalidation of state statutes. This provides clearer evidence of its commitment to federalism. Table 4 provides mean statistics on state statute constitutionality rulings during the periods when Justice Rehnquist was an Associate Justice in the Burger Court and when he was the Chief Justice.

Table 4: Mean State Laws Challenged and Invalidated Per Term

	Associate Justice Rehnquist	Chief Justice Rehnquist
State Laws Challenged	20.18	9.46
State Laws Invalidated	9.875	4.33

Here we see a remarkable decline in the number of constitutional challenges to state statutes and the number of invalidations of those

statutes, a reduction that exceeds the size of the overall docket reduction. The reduction in annual invalidations is significant and understates the effect of the change, because each of those decisions serves as a precedent to be followed by lower courts. The Rehnquist Court was much more deferential to state legislatures than were its predecessors. Statutory invalidation decisions may thus provide stronger evidence of the Court's states' rights orientation than do even the federalism decisions themselves.

After suggesting that Justice Rehnquist was committed to judicial restraint, Keith Whittington went on to observe that the Rehnquist Court has indeed sought to use the judicial power to limit the government, but "less by carving out particular preferred freedoms than by imposing new obstacles on the exercise of central government authority."¹⁶⁰ This suggestion is consistent with its pattern of striking down more federal statutes and fewer state statutes than the Burger Court. This is a different sort of activism that constrains federal government power, but not through the Bill of Rights. The Rehnquist Court was clearly less activist toward state legislation and more activist in striking down federal legislation.

Our measure of judicial activism is an imperfect one. Not all statutes are of equal societal significance, so strikes of statutes are not equivalent. However, the data suggest that the Rehnquist Court was more activist in striking down federal statutes, often on federalism grounds, and much less activist in striking down state statutes under the Bill of Rights. This change represents not so much greater or lesser activism on the whole, but a shift in the constitutional interest of the Court from the Amendments to the Articles and the structural makeup of the U.S. government, a shift in favor of state power. It seems fair to attribute much of this change to Justice Rehnquist's role as Chief, because these are the issues with which he is associated.

CONCLUSION

There is surely no universal association between the Chief Justice's unique sources of authority and the Chief's decisional power on the Court. Some have been more *primus* and others more *pares*. Yet the historical record may enable us to identify the potential power of the Chief Justice at the Court. Chief Justice Rehnquist himself declared that "the Chief Justice has placed in his hands some of the tools which

¹⁶⁰ Whittington, *supra* note 122, at 27.

will enable him to be primus among the pares but his stature will depend on how he uses them.”¹⁶¹ This Article provides some evidence of how Chief Justice Rehnquist used those tools.

Our results are necessarily tentative and preliminary, as they have not conclusively isolated a Chief Justice effect. However, they do provide insight into an understudied area of the law. The Chief Justice remains but one vote among nine, and Chief Justice Rehnquist had little effect driving the Court in an overall conservative direction or reversing the Warren Court’s liberal precedents. But our results suggest that Justice Rehnquist’s service as Chief Justice did have some effect on the Court’s product, both institutionally and in the content of its decisional output.

Much additional research should be conducted on this topic. We have analyzed the effect of Chief Justice Rehnquist, but there is a wealth of historical information that would permit comparable studies of prior transitions of the chief justiceship. Other than the change in individual opinion writing, attributed to Chief Justice Hughes, very little of this work has been done. It may well be that some *primi* have been much more effective than others, and some have been thoroughly ineffective. Such discoveries could considerably inform future judgments about who should be appointed and confirmed to the position.

¹⁶¹ William H. Rehnquist, Lecture, *Remarks of the Chief Justice: My Life in the Law Series*, 52 DUKE L.J. 787, 805 (2003).