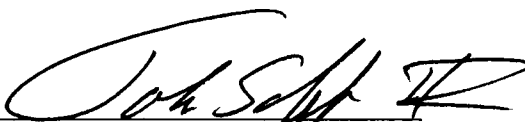
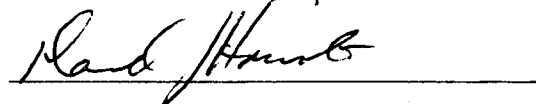


To the Graduate Council:

I am submitting a dissertation written by Douglas Clouatre entitled "Changing the Court's Ideological Direction: The Burger and Rehnquist Courts." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy with a major in Political Science.

  
John Scheb II, Major Professor

We have read this dissertation  
and recommend its acceptance:



Accepted for the Council:

  
Associate Vice Chancellor and  
Dean of the Graduate School

**Changing the Court's Ideological Direction  
The Burger and Rehnquist Courts**

A Dissertation presented for the  
Doctor of Philosophy Degree  
The University of Tennessee, Knoxville

Doug Clouatre  
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## **Abstract**

Throughout the political history of the United States, the executive branch has attempted to change the ideological focus of the Supreme Court. This work examines the historical record of presidential Court packing and how some chief executives were successful in achieving their aims while others were not. Using the recent examples of the Burger and Rehnquist Courts, the paper examines the four elements of success and their effect on the Court's ideological direction. The results show that the appointment system, judicial leadership, judicial activism and congressional and executive support for the Court aid in presidential success at changing its ideological direction.

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## Introduction

Richard Nixon and Ronald Reagan entered the White House expressing philosophical differences with Supreme Court decisions. In 1968 Nixon campaigned for law and order and criticized Warren Court decisions expanding the rights of the accused. He promised to appoint "strict constructionist" justices who would reconsider those decisions. Ronald Reagan entered office calling for change in the Court's rulings on school prayer and abortion. He also promised to appoint judicial restraintists who would reconsider the law in those areas. Both presidents had the opportunity to appoint justices. Nixon and his successor, Gerald Ford, chose a majority of the justices on the Burger Court. Reagan and his successor, George Bush, chose a majority of the Rehnquist Court.

While both Courts had a majority of Republican appointees, their performance have been characterized in different ways. The Nixon and Ford appointees were unable to guide the Court away from its liberal activism. The Burger era saw enactment of sweeping decisions that extended liberal precedent.<sup>1</sup> The failure of the Nixon and Ford appointees to initiate a rightward shift on the Court has been documented by several observers (Blasi, 1983; Funston, 1977; Hodder-Williams, 1979; Howard, 1979; Schwartz, 1987; White, 1988; Schwartz, 1990, 1993; Woodward and Armstrong, 1979).

The Rehnquist Court has achieved greater success than its predecessor. The Reagan and Bush justices have adopted a more conservative posture and rewrote precedent to reflect their policy preferences. During the first decade of the Rehnquist Court (1986-1996), the justices rewrote Free Exercise law and have

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<sup>1</sup>These cases included *Roe v. Wade* 410 U.S. 113 (1973), *Frontiero v. Richardson* 411 U.S. 677 (1973) *University of California v. Bakke* 438 U.S. 265 (1978), and *Fullilove v. Klutznick* 448 U.S. 448 (1981).

reexamined Establishment Clause<sup>2</sup> law, adopted a different approach to affirmative action policies<sup>3</sup> and resuscitated the Tenth Amendment and Commerce Clause as restrictions on government.

One explanation for these disparate results can be found in the phenomenon of presidential Court packing. Limited research has been done to explain presidential success in changing the Court's ideological direction through the appointment of justices who agree with the president. Instead, most analysis has focused on the specifics of constitutional law and how the newly appointed justices differed from their predecessors. *My research will examine the phenomenon of Court packing, first defining it, then using historical examples to generalize about successes and failures. It will then test those generalizations by comparing the Burger and Rehnquist Courts using case analysis, voting patterns and other quantitative data.*

Before making generalizations about presidential attempts to alter the Court's jurisprudence, a definition of Court packing must be constructed. Court scholars have used historical examples to develop their own views on how presidents have tried to change the Court's ideological direction. Scigliano defined Court packing as "the appointment of justices to the Supreme Court so as to influence Court decisions" and presented the example of President Grant's appointment of Justices Bradley and Strong to overturn the first Legal Tender Case (1971, 51). Laurence Tribe (1985) saw Court packing as inevitable since a president would seek to appoint justices sharing his ideological beliefs. In support of Franklin Roosevelt's 1937 Court reorganization plan, the Dean of the

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<sup>2</sup>*Employment Division v. Smith* 494 U.S. 872 (1990), *University of Virginia v. Rosenberger* 115 S. Ct. 2510 (1995)

<sup>3</sup>*Richmond v. Croson* 488 U.S. 469 (1989), *Adarand v. Peña* 115 S. Ct. 2097 (1995).

Northwestern Law School argued that Court packing was legitimate since it involved appointing justices whose policy preferences matched that of the president (Green, 1937). Court packing was also defined as a replacement of justices with outdated constitutional views and replacing them with justices who had more modern views (Green, 1937). According to Henry Abraham, a president engages in Court packing in order to choose justices who "share[d] his own philosophy of government and politics, at least to the extent of giving them a sympathetic hearing" (1993, 73). In deciding upon a nominee, a president might choose "someone who generally agreed with [him] on what role government should play in American life, what role the individual in society should have" (Clayton, 51, 1964). Herman Schwartz defined court packing as a president's "effort to change basic constitutional principles and rulings" (1988, 43).

Using these descriptions of Court packing a partial definition can be formed. *A president is engaged in Court packing when he nominates justices who agree with his policy preferences and ideological beliefs.* This definition is incomplete since many presidents seek out justices with those characteristics. Every president engages in at least a diluted form of Court packing when making a Court appointment. A president uses that appointment to extend his legacy beyond his administration and have an effect on Court rulings. But Court packing used to change the Court's ideological direction suggests a more systematic approach by the president. A president who nominates justices to enunciate his values on the Court implies that those views are not part of the Court's agenda. Disagreement over that agenda would create conflict between the executive and judicial branches. The president and congressional supporters would engage in anti-court rhetoric, attacking the institution, its members and decisions.

Any change would require the president to appoint a majority of justices who would agree with him on the Court's agenda. With Court vacancies occurring on average every twenty two months, few presidents can appoint a majority (Ulmer, 1981). Therefore more than one president may be involved in Court packing. Court packing would sometimes involve a president or presidents with the same political agenda who would appoint a majority of the Court.

Another part of any Court packing definition involves a president's political agenda. Presidents with an agenda altering the constitutional relationship between government and the individual would require the support of the Supreme Court to achieve success.

These three elements round out the definition of Court packing. *Court packing occurs when a president or presidents, who experience conflict with the Court over their political agenda, appoint a majority of the justices and seek out nominees who agree with the presidents' political ideology and agenda.*

Examining the history of the Supreme Court through the lens of presidential court packing, it is possible to identify five periods when a president or presidents attempted to change the Court's jurisprudence and its interpretation of the constitution.

### *The Jefferson Court*

The well known conflict between Thomas Jefferson and John Marshall serves as the first example of presidential court packing. Their conflict dated back to the election of 1800 and the attempt by the lame duck John Adams to create a judiciary that would be controlled by Federalist judges. This included the new chief justice, John Marshall. Jefferson and his congressional allies reacted by

launching an attack on the judiciary, canceling the Court's 1802 term and refusing to allow the newly appointed judges to assume their positions on the bench (Schwartz, 1995; White, 1984). This last strategy led to the decision in *Marbury v. Madison*<sup>4</sup> as Marshall claimed broad powers of judicial review for the court over state and federal legislation. In response, Congress attacked the Court with the impeachment and Senate trial of Justice Samuel Chase. Though unsuccessful in their attempt to remove Chase, members of Congress had clearly expressed their antipathy toward the Federalist dominated Court.

The power of judicial review was anathema to the president and his political partisans. This was true because the Jeffersonian agenda emphasized localized control of politics and a party based government that allowed the president to dominate government at the national level (Malone, 1970; Burns, 1965). John Marshall, though, followed more nationalistic instincts. His political agenda included extending federal power over the states using the Commerce and Necessary and Proper Clause (Hobson, 1996). To advance his agenda, Marshall enhanced the judicial power, claiming equal status to the other branches.

Jefferson and his supporters attempted to change the Court's composition and put Marshall into a minority position. Jefferson had three opportunities to change the Court. Jefferson sought nominees who shared his belief in localized control of government and a restrained judiciary that would allow the political branches to fulfill their duty to the people (Abraham, 1993; White, 1984a). Jefferson's three appointees were followed by two more from his immediate successor James Madison. Madison also extolled the virtues of localism and representative government. These five appointments comprised a majority of the

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<sup>4</sup>5 U.S. 137 (1803)

Court. Thus the two presidents' Court appointments fit the criteria for court packing. A conflict between the judicial and presidential agendas, the conflict breaking into political action and a majority of the Court being appointed by presidents seeking to change the direction of the Court's agenda. It was another twelve years after Madison's retirement that a pair of presidents sought to again challenge John Marshall and the judiciary.

### *Jackson's Court*

Andrew Jackson entered the White House with the promise to return power to the people. Specifically he criticized the centralization of power by the Bank of the United States (BUS) and the commerce power of the federal government (Pessen, 1969). He proposed removing economic constraints on the typical American and promoting a manifest destiny for the country. Jackson saw the presidency as autonomous from the other branches, able to propose and implement an agenda that had been approved by all of the voters (Schlesinger, 1945). This separate agenda allowed the president to disregard the orders of the other branches including the judiciary. This was reflected in his message accompanying the veto of the rechartering of the BUS and his refusal to implement the Court's decision in *Worcester v. Georgia*<sup>5</sup>. While the Court had ruled the BUS was a constitutional power of the Congress, Jackson expressed disagreement with the decision when issuing his veto message on the bank's rechartering. In *Worcester*, he disagreed with the Court that the state of Georgia would have to respect treaties with the Indians and could not confiscate their property. Jackson

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<sup>5</sup>31 U.S. 315 (1835)

refused to enforce the decision, suggesting that since the Court had issued the decision it should also enforce it (Pessen, 1969).

Jackson had the opportunity to break Marshall's hold on the Court with four total appointments including a new chief justice. His vice president and successor, Martin Van Buren, had three opportunities to fill the now nine member court providing for a total of six new Jacksonian justices appointed between 1829 and 1841 (Abraham, 1993). Jackson further extended philosophical control over the Court using the Judiciary Act of 1837 which redrew the circuit boundaries for the justices. The new boundaries created five circuits encompassing southern slave states. With geographical demands placed on court appointments this ensured that a majority of the justices would be drawn from the South. Since much of the Jacksonian philosophy was accepted in the South the result of the new circuit boundaries would be the choice of justices from a region supporting his political views.

The Jackson and Van Buren Administrations exemplified presidential court packing. They did so by attempting to change the Court's nationalistic agenda of the Supreme Court and replace it with one that returned power to the states. This agenda would dominate the Court until the next systematic attempt to change the direction of its jurisprudence undertaken during the Lincoln Administration.

### *Lincoln's Court*

Elected on a platform denouncing the Court's decision in *Dred Scott v. Sandford*<sup>6</sup> Abraham Lincoln was expected to appoint justices who would hold a

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<sup>6</sup>60 U.S. 393 (1857)

broader view of the national government's powers (Silver, 1956). The Dred Scott decision represented a strict view of states' rights with the Court ruling that the federal government could not restrict slavery in either the states or even in the new federal territories (Fehrenbacher, 1978). This had produced a firestorm of debate and criticism of the Court that resulted in congressional attacks upon the justices and a failed nomination in 1861 (Abraham, 1992).

Faced with a civil war early in his term, Lincoln extended presidential commander in chief powers by calling up soldiers, issuing paper money to finance the war and suspending habeas corpus protections (Silver, 1956). It was the latter action that brought him potentially into conflict with the Court and the chief justice. In the Merryman case Chief Justice Taney, acting in his role as circuit judge, declared that the presidential order to suspend Habeas Corpus and subsequent imprisonment of Merryman was unconstitutional. The administration ignored the decision and continued to imprison those rebelling against the national government.

Lincoln also called for changes in the court's circuits, redrawing the boundaries so as to equalize the population in each. He hinted at an increase in the size of the Court and considered different candidates for the three vacancies he inherited upon entering the presidency (Swisher, 1974). The congressional drumbeat against the Court continued with Senator Hale proposing that the Court be abolished and a new Court with new justices be created (Silver, 1956). Though this proposal died a quick death, other proposals making dramatic changes in the Court did pass Congress. Included among these was a redrawing of the circuit boundaries with the Midwest and Northern states getting greater representation and an increase in the size of the Court to ten. As Lincoln's term progressed, the pressure on the justices to retire increased with the proposal that

justices serving more than twenty five years could retire with full salary. At that time three of the justices had served almost thirty years. While the proposal did not pass Congress, it sent a clear message that the justices were not held in high esteem by Republican legislators (Silver, 1956).

Overall, Lincoln made five appointments to the Court including the chief justice and with the reduction in the Court's size to nine in 1866, the five appointees comprised a majority till 1873 when Chief Justice Chase died. With these five appointees and the clear conflict between the Taney Court and Republicans in the executive and legislative branches, Lincoln's Court choices fulfilled the requirements for presidential Court packing. Those appointees' effect would be felt until the next attempt at Court packing during the turn of the century.

### *The Roosevelt and Taft Courts*

Both Theodore Roosevelt and William Howard Taft face a with a political agenda different from their own. The two chief executives supported a politically progressive agenda that included government regulation of the private sector. The Court was using economic due process to strike down legislation with the argument it exceeded the powers of government or violated an individual's economic rights (Ely, 1995). In emphasizing economic rights, the Court had struck down the federal income tax, several state economic regulations and severely hindered the enforcement of the Sherman Antitrust Act.

The two presidents expressed their disdain for the Court's doctrine and for the justices. Roosevelt frequently complained about the unwillingness of the Court to allow federal economic regulation. Taft talked about "the old fools"

serving on the Court and expressed his desire to replace them with younger, less conservative justices (Baker, 1994). Progressive politicians were more direct. They proposed legislation to curb the Court, offered to limit its appellate jurisdiction and weaken the judiciary's power to issue injunctions, set age and term limits on the justices and even to provide for direct election of federal judges (Nagel, 1969).

This pressure on the Court was accompanied by several vacancies that allowed the two presidents to replace seven of the nine justices including the chief justice. In total, Roosevelt had three appointments while Taft filled six vacancies, an ample opportunity for the two to fill the court with justices who reflected their progressive views. The conflict between the Court's and the presidents' political agendas and the opportunity afforded the presidents to change the membership exemplified presidential Court packing. It was not until the 1930's that a conflict between the two branches would lead to another attempt to change the court's ideological direction.

### *Franklin Roosevelt's Court*

Twenty years after Taft left the White House, Franklin Roosevelt was confronted with a recalcitrant Court that he filled with his partisans in order to advance his political agenda. Roosevelt's agenda included a dramatic increase in the size and scope of the federal government. During his first term Congress passed laws that created a federal minimum wage, restricted farm production, developed social welfare programs and protected unions (Davis, 1986). The

Court promptly struck down several of the measures including the National Recovery Act<sup>7</sup> and the Agricultural Adjustment Act<sup>8</sup>. The president's response was both rhetorical, denouncing the Court for having a "horse and buggy definition of commerce," and legislative, proposing an increase in the size of the Court from nine to fifteen (Leuchtenberg, 90, 1995). While his Court packing plan did not make it through Congress, another piece of legislation providing full pensions to justices who had served twenty years began to crack the anti-Roosevelt bloc (Leuchtenberg, 1995). Between 1937 and 1943, Roosevelt had nine total appointments, replacing seven justices including the Chief Justice. This wholesale remaking of the Court in Roosevelt's political image shifted its agenda and served as an example of Court packing.

Each of the five historical examples of Court packing present a range of issues faced by presidents and the Court and different methods of resolving conflicts. The next step is a more systematic analysis that develops and tests the criteria for when presidents are successful or failures at changing the Court's agenda.

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<sup>7</sup>*Schechter Poultry v. U.S.* 295 U.S. 495 (1935)

<sup>8</sup>*U.S. v. Butler* 297 U.S. 1 (1936)

## **Chapter Two**

### **Success at Court Packing**

A president engages in Court packing to advance his own political agenda by changing the Court's jurisprudence. Determining whether that objective was attained requires analyzing whether the new Court's decisions differed from its predecessors and whether it carved out a different approach to constitutional law.

The initial step involves identifying those precedents that drew the most criticism from the president seeking to change the Court's ideology. These precedents will represent the salient issues raised by the president in attacking the Court. Then the new Court's rulings in the salient issue areas will be examined. A success will exist where precedents have been significantly reinterpreted or overruled. Success would also be reflected in a shift in the Court's agenda toward those issues highlighted by the president. The differentiation between the old Court and the newly appointed Court would reflect the desires of the president who made certain legal issues part of his attack on the Court. Such a differentiation occurred when John Adams' administration was replaced in 1801.

#### *The Jefferson and Madison Court*

Thomas Jefferson's political agenda included changes in the power structure of American government. The Jeffersonian model included a party oriented government with party loyalty tying together the executive and legislative branches (Malone, 1974; Burns, 1965). Jefferson also wanted a more constrained

reading of the national constitution in relation to federal power. A constrained national government would mean more powerful local and state governments.

Jefferson was confronted with a Supreme Court under John Marshall whose Federalist political philosophy emphasized national power over the states and used the federal judiciary as a powerful force in government. Marshall followed this philosophy in his decision in *Marbury v. Madison* (1803) where he claimed the power of judicial review for the federal courts, a power allowing judges to strike down state and federal legislation if it contravened the Constitution. Such a broad claim of power was not recognized by Jefferson as legitimate and served as a catalyst for two presidents to seek change in the Court's ideological direction. The Jefferson and Madison Administrations appointed five of the seven members of the Court starting in 1805. The Court was composed of a majority of those appointees between 1811-1826. The appointees were expected to change the Court's decisions on the implied powers of Congress, the power of the federal judiciary and states rights. The new justices, though, were unable to guide the Court away from the nationalism expressed by Chief Justice Marshall.

In the area of congressional power and its limits, the Marshall Court came down on the side of implied powers. In *McCulloch v. Maryland*<sup>9</sup> (1819), Marshall's opinion for the Court noted that the congressional powers found in Article One were plenary with the Necessary and Proper Clause giving Congress implicit powers to carry out its plenary authority (White, 1988a). Marshall established that congressional legislation must have legitimate ends, be within the scope of the Constitution and use means within the Constitution's letter and spirit

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<sup>9</sup>17 U.S. 316 (1819)

(White, 548, 1988a). In *McCulloch*, Marshall broadened congressional power while carving out for the judiciary the power to decide which laws abided by the letter and spirit of the constitution.

Another major case involving congressional powers, *Gibbons v. Ogden*<sup>10</sup>, interpreted the meaning of the commerce clause. Congress had the sole power to regulate commerce while the states were prohibited from regulating it even if Congress had not acted (White, 1988a). This dormant commerce clause restricted the states and served as a centripetal force with commerce regulations becoming more uniform.

The Court also expanded federal judicial power over state government in two decisions, *Martin v. Hunter's Lessee*<sup>11</sup> and *Cohens v. Virginia*<sup>12</sup>. In *Cohens*, a Virginia law prohibited sale of unauthorized lottery tickets. The Cohens sold tickets for the District of Columbia lottery in the state and were convicted of violating the law. The Cohens argued the law was unconstitutional because it conflicted with federal law. On appeal to the Supreme Court, Virginia argued that the Court did not have jurisdiction in the case since the Virginia State Supreme Court had ruled on it and the federal constitution gave the state courts finality in their decisions. The Court's decision dismissed Virginia's argument and noted that when Congress legislated in a particular area, the federal courts also had jurisdiction to rule in those areas (White, 1988a).

In *Martin*, the state argued the federal courts could not review the final judgment of state courts. Justice Story wrote the Court's opinion noting that the federal judiciary had broad powers under the Constitution that gave federal judges

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<sup>10</sup>22 U.S. 1 (1824)

<sup>11</sup>14 U.S. 304 (1816)

<sup>12</sup>19 U.S. 264 (1821)

jurisdiction over questions of state power (Hobson, 1996). The decisions in *Martin and Cohen* broadened federal judicial control over the state courts (White, 1988a).

Marshall further restricted state power using the Contract Clause. It prohibited state legislatures from impairing the obligation of private contracts. Two decisions, *Fletcher v. Peck*<sup>13</sup> and *Dartmouth College v. Woodward*<sup>14</sup>, reflected the Marshall Court's strict interpretation of the clause. In *Fletcher*, the Georgia state legislature tried to reacquire property sold at very low prices to speculators who had bribed previous legislators. The land had been sold by the speculators to innocent third parties but the state argued that since the original contract was the result of illegal activities it should be abrogated. The Supreme Court disagreed, citing the contract clause and noting that it prohibited impairment of any contract by the state. The Court expanded the meaning of contract to include public contracts and used the clause to restrict the legislative power of states.

In *Dartmouth College*, the state of New Hampshire revoked the royal charter granted the College, removing the trustee governing system established under the charter and placing the college under the oversight powers of the state. The college argued that the charter was a contract and that the rights created under the contract allowed the college to govern itself under the trustee system. Thus the abrogation of the governing system violated the Contract Clause. The Court agreed. The Chief Justice wrote that the trustee system was a vested right created by the contract and could not be impaired by state legislation.

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<sup>13</sup>10 U.S. 87 (1810)

<sup>14</sup>17 U.S. 518 (1819)

The fact that Chief Justice Marshall guided the Court into these decisions was not unexpected because his nationalist tendencies were well known. The acquiescence of the Jefferson and Madison appointees, though, reflected the failure of those two presidents to choose justices who could change the Court's agenda. The lack of dissenting voices in the Marshall Court reflected another failing of the two presidents. With the chief justice able to compose the opinions and prevent dissenting voices from being heard, no consistent opposition bloc could form around a dissenter. The high level of unanimity continued until the first appointments by Andrew Jackson, whose appointees challenged Marshall and his nationalism.

The inability of the Jefferson and Madison appointees to wrest philosophical control from Marshall doomed the two presidents' efforts to change the Court's jurisprudence. Marshall was able to expand congressional powers to include those implied in the Constitution, broaden the federal judiciary's reach over state courts and place restrictions on the legislative powers of the states. This nationalistic agenda was almost the opposite of the Jeffersonian ideal, a view that would not be expressed by the Court until the next chief justice, Roger Taney, took his seat.

### *The Taney Court*

Andrew Jackson campaigned for the presidency on the issues of removing national barriers to economic growth, returning power to the states and on a strong executive with a political agenda separate from the other branches (Pessen, 1969). Martin Van Buren, Jackson's successor, agreed with these views. Together they made six Court appointments with their appointees composing a

majority of the Court from 1837 to 1853. The new Taney Court departed from the nationalism of its predecessor, emphasizing states' rights and a more restrained judiciary. It also made changes in the definition of interstate commerce by allowing more state regulation at the expense of the dormant Commerce Clause.

Three cases during Taney's first term exhibited the change in the Court's jurisprudence created by the Jacksonian appointees. In *New York v. Miln*<sup>15</sup>, *Charles River Bridge v. Warren*<sup>16</sup> and *Briscoe v. Bank of Kentucky*<sup>17</sup>, the justices issued decisions that tended to increase the power of the states and weaken the ability of the national government to regulate both commerce and the issuing of money. In *Miln*, the Taney Court issued its first decision delineating the state and federal commerce powers. The Court upheld a state law regulating ships that carried immigrants into New York. According to the Court's opinion, the regulation was intended to protect the state's citizens from the problems of immigration, a problem that fell within what was defined as the state's police power (Swisher, 1974). In *Miln*, the Court expanded on the definition of state police power as first identified in *Willson v. Blackbird Creek Marsh*<sup>18</sup>

In *Charles River Bridge*, the Taney Court began to undo the restrictions placed on the states under the Contract Clause. The Court ruled that the monopoly given the *Charles River Bridge* by the state did not grant those rights in perpetuity and the granting of a right to build a competing bridge did not impair the obligation of a contract. (Pessen, 1969; Schwartz, 1993). This narrower interpretation of the Contract Clause departed from the Marshallian reading. It

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<sup>15</sup>11 Pet. 102 (1837)

<sup>16</sup>36 U.S. 420 (1837)

<sup>17</sup>11 Pet. 257 (1837)

<sup>18</sup>27 U.S. 245 (1829)

advanced the Jacksonian agenda of preventing monopoly power from impeding economic growth and westward expansion (Pessen, 1969).

The *Briscoe* case created another avenue of economic expansion for the states. In this decision, the Court upheld a Kentucky law that allowed a state owned bank to issue legal tender even though Article I Section Ten prohibited anything other than gold and silver money (Schwartz, 1993). The Court used convoluted reasoning that the constitution only prohibited states from issuing such money and that a bank rather than the state was distributing legal tender. The Court's decision freed state banks from artificial financial constraints and reflected the Jacksonian's distrust of concentrated economic power.

Several of the Jackson and Van Buren appointees vigorously opposed the growing strength of corporations and their efforts to get their cases heard in federal rather than state courts. Justices Daniel and Catron dissented from any suggestion that any corporation chartered in two or more states qualified under Article III diversity of citizenship to have its cases heard in federal court (Nolan, 1964). Justice McKinley, a Van Buren appointee, argued in his capacity as circuit judge that corporations chartered in one state could not conduct business in another state (Schwartz, 1993). Though the full Court in the case of *Bank of Augusta v. Earle*<sup>19</sup> overruled McKinley's ruling and gave corporations wider latitude in conducting business in multiple states. It also allowed states to regulate corporate activity within their boundaries.

While such issues as the distribution of legal tender by states have receded as important elements in the Court's agenda, the Taney Court made three decisions in other areas between 1837 and 1853 that still guide the Court. In the *License*

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<sup>19</sup>13 Pet. 519 (1839)

Cases<sup>20</sup>, Taney broadly defined the police power to include the government's ability to protect the health, safety and welfare of its citizens, a case and definition that was termed one of the most long lasting of the Court's decisions (Swisher, 1974). In *Luther v. Borden*<sup>21</sup>, the Court placed a self imposed restraint on its power of judicial review, again in opposition to Marshall's broad claim of that power. In *Borden*, the Court was asked to consider the rightful government of the state of Rhode Island, whether its current government was Republican in nature and whether its actions were defensible in Court. Chief Justice Taney's opinion noted that the determination was a political question instead of a legal one and was best decided by Congress. The political question doctrine has remained an important element of the Court's jurisprudence and been used occasionally by the justices to avoid certain issues<sup>22</sup>.

Finally, in *Cooley v. Board of Wardens*<sup>23</sup>, the Court issued a clearer definition of interstate commerce and distinguished it from intrastate commerce. Justice Curtis' opinion in *Cooley* noted that national commerce affected national interests and should be left to the federal government. Local commerce affected local interests and could be regulated by states even if it had an incidental affect on interstate commerce (Swisher, 1974). Curtis restricted the dormant commerce clause created by Marshall, suggesting that when the national government was silent on certain commerce issues that the states had the power to regulate that commerce (Schwartz, 1993). The *Cooley* decision removed some of the strictures on state commerce regulation that had been created by Marshall in

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<sup>20</sup>5 How. 504 (1947)

<sup>21</sup>48 U.S. 1 (1849)

<sup>22</sup>See for example *Colegrove v. Green* 328 U.S. 549 (1946) and *Nixon v. U.S.* (1993).

<sup>23</sup>53 U.S. 299 (1851)

Gibbons and reflected the Jacksonian desire to distribute economic power to the states.

The last important difference between the Taney Court and its predecessor involved the shattering of unanimity among the justices. During Taney's tenure, the justices expressed their opinions in separate concurrences and dissents at a much higher rate than had existed during the Marshall Court (Dolan, 1964). Early in Taney's term, the Court was divided among Jacksonian jurists and Marshall holdovers led by Justice Story. By the late 1840's the Jackson and Van Buren judges were in control and the Court splintered. During the era, such states rights hardliners as Justices Daniel and Catron wrote separate opinions that fragmented the Court (Dolan, 1964; Frank 1964). With the many different written opinions, the division on the Court became more visible and allowed justices with different viewpoints to express them in an attempt to influence the Court.

While the Taney Court did not succeed at or even attempt a wholesale rejection of all Marshall decisions, it did halt the nationalistic tendencies of the Court. It also established a state rights oriented agenda favored by Jackson and Van Buren. It removed some of the barriers on state regulation of commerce. The Court gave constitutional recognition to state police power while limiting judicial power in deciding political questions. All of these were goals of the two presidents who appointed the majority of the Taney Court. The Court's success eventually provoked another president opposed to Jackson's agenda to attempt to change the Court's jurisprudence.

### *The Lincoln Success*

With the Civil War as his primary domestic problem, Abraham Lincoln

sought out justices who would support the expansion of presidential and national power necessary to fight the war. The litmus tests for his Court appointees included support for an aggressive federal war policy (Silver, 1956), support for the emancipation of slaves in the South and support for the Legal Tender Act (Schwartz, 1993). His three early appointees provided the votes to uphold the presidential order to blockade the South and seize shipping during the early days of the war. In the *Prize Cases*<sup>24</sup>, a five member majority agreed that the president could act to quell a rebellion even without congressional approval (Swisher, 1974). This support for a broad reading of the commander in chief power all but ensured that Lincoln's policies during the war would not be seriously challenged by the justices. In fact, the justices avoided ruling on war related issues until the Confederacy surrendered (Silver, 1956).

The post civil war effort, though, brought several disputes before the Court challenging presidential and congressional power both in fighting and reconstructing the South. Under Chief Justice Chase, Lincoln's choice to replace Taney, the Court maneuvered around an aroused Congress while carrying out its duties to interpret and review the reconstruction acts and war powers. The disputes between Congress and the president over reconstruction dated back to Lincoln's desire to create a "soft" peace. Lincoln's appointees on the Court tended to support the reconciliation policies, yet their rulings also reflected the president's ambivalence about a powerful judiciary overriding congressional actions, a distrust built upon the disastrous effects of the *Dred Scott* decision. In 1866, the Chase court was faced with a challenge to the use of military courts in the North to try those accused of treasonous activities. In *Ex Parte Milligan*<sup>25</sup>, the justices ruled

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<sup>24</sup>67 U.S. 635 (1863)

<sup>25</sup>71 U.S. 2 (1866)

that trials must occur in civil courts where they are functioning (Kutler, 1968).

This ruling revealed that the firm support given the administration's activities during the war would not continue after the cessation of hostilities.

The Court also struck down two congressional acts reflecting the harsher reconstruction favored in Congress. In *Cummings v. Missouri*<sup>26</sup> and *Ex Parte Garland*<sup>27</sup>, the court struck down test oaths that were required before an individual could assume state offices or practice before the Supreme Court (Kutler, 1968). While both were minor pieces of legislation, their overturning reflected the willingness of the justices to use judicial review against more punitive reconstruction measures.

Yet the Court did retreat from a direct confrontation with Congress over the broader issues of Reconstruction, likely still fearful of the type of reaction that had followed Dred Scott. In *Ex Parte McCordle*<sup>28</sup>, the Court backed away from directly ruling on the constitutionality of congressional reconstruction of the South. Instead it upheld congressional action removing such issues from the Court's appellate jurisdiction.

The Chase Court also considered the constitutionality of the Legal Tender Acts. The first case, *Hepburn v. Griswold*<sup>29</sup>, found a bare four to three majority in opposition to the law with the three supporters being the three early Lincoln appointees. A year later the Court reconsidered and with a full complement of justices upheld the law five to four<sup>30</sup>. This gave the national government the broader economic powers favored by the Lincoln Administration.

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<sup>26</sup>71 U.S. 277 (1866)

<sup>27</sup>71 U.S. 333 (1866)

<sup>28</sup>74 U.S. 596 (1868)

<sup>29</sup>8 Wall. 603 (1870)

<sup>30</sup>The Legal Tender Cases 12 Wall. 457 (1871)

The last major case decided by the Chase Court involved the first interpretation of the Fourteenth Amendment. In the *Slaughterhouse Cases*<sup>31</sup>, a Louisiana law giving a monopoly to a certain slaughterhouse was challenged on due process and equal protection grounds. The butchers who lost their jobs argued that they had been denied their liberty rights to work at their profession and were treated unequally by the state law. In a five to four decision, the justices refused to give the clause such a broad reading. They preferred instead to interpret the Amendment to involve only the rights of freed slaves. The decision exhibited the justices' unwillingness to accept a constitutional doctrine that would involve the Court in striking down legislative acts on substantive due process grounds. (Fairman, 1939). It also temporarily prevented southerners from using the Fourteenth Amendment to challenge the acts of reconstruction era state legislatures. Lincoln's appointees were able to move the Court's jurisprudence away from that of its predecessor, thus achieving his Court packing goals. Yet that success had consequences for future presidents.

### *Roosevelt and Taft Court Packing*

Justice Miller's narrow reading of the Fourteenth Amendment in the *Slaughterhouse* cases was later replaced by a majority of justices willing to use the amendment to strike down state economic legislation. In tandem with the broad reading of the Fourteenth Amendment came a restricted reading of Congress' commerce power. This was used by the justices to strike down or severely limit the federal government's regulatory power. The Supreme Court under Chief

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<sup>31</sup>83 U.S. 36 (1873)

Justice Fuller struck down the federal income tax in *Pollock v. Farmers Loan and Trust Co*<sup>32</sup>, created a liberty of contract doctrine in *Allgeyer v. Louisiana*<sup>33</sup> and gave a restricted reading of the Sherman Antitrust Act in *United States v. E.C. Knight*<sup>34</sup>. The Court's rulings were challenged by Congress and the president, particularly Theodore Roosevelt, whose political agenda included an expanded federal regulatory state and powerful chief executive. A key element in Roosevelt's agenda was a more restraintist Court with justices willing to allow state and federal governments to experiment in economic regulations.

With his appointment of Justice Holmes in 1902 Roosevelt put a strong advocate of judicial restraint on the Court. Yet Holmes' arguments had a limited effect on justices who had become accustomed to utilizing their judicial review powers to strike down legislation that ran contrary to their political preferences. The Court's decision in *Lochner v. New York*<sup>35</sup> reflected its continued adherence to economic due process. The decision used the liberty of contract doctrine to strike down a maximum working hours law. Even with three appointments to the Court, Roosevelt had only a minor effect on its rulings. It was not until William Howard Taft's six appointments, including the Chief Justice, that the Court made a limited move away from its constricted view of economic regulations. While the two presidents' appointees comprised a majority of the Court until 1921, they were unable to guide the Court away from the doctrines of its predecessor.

During Roosevelt's two terms, the Court did pull back from its more stringent property rights rulings and established a more flexible doctrine allowing economic regulations of inherently harmful products. Yet during those two terms

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<sup>32</sup>157 U.S. 429 (1895)

<sup>33</sup>165 U.S. 578 (1897)

<sup>34</sup>156 U.S. 1 (1895)

<sup>35</sup>198 U.S. 45 (1905)

the Court did not appear to have any overarching philosophy when considering those laws as one or two swing justices determined whether a particular regulation involved an inherently dangerous product (Ely, 1995). The Court upheld some regulatory laws and taxes intended to regulate harmful products in such cases as *Champion v. Ames*<sup>36</sup> and *McCray v. United States*<sup>37</sup>. It also struck down other regulations using liberty of contract arguments in such cases as *Lochner*.

Roosevelt's support for the labor movement was also ignored by the Court. The justices struck heavily at the right to join a union and the right of members to strike. Two cases in particular exhibited the inability of the Roosevelt appointees to change the Court's relationship with unions. In *Loewe v. Lawler*<sup>38</sup>, the Court noted that union activity represented a restraint of trade under the Sherman Antitrust Act and upheld prosecutions of unions (Ely, 1995). In *Adair v. United States*<sup>39</sup>, a majority of the justices struck down a federal law that prohibited antiunion "yellow dog" contracts, explaining that by prohibiting such contracts government was violating the individual's right to contract his services (Baker, 1991). The Roosevelt appointees had a limited effect on the Court's decisions and even less of an effect on the doctrines used to test the constitutionality of state and federal economic legislation.

With the replacement of Fuller by Edward White and the filling of five other vacancies by President Taft, the Court initially appeared to move in a progressive direction. It upheld economic regulations in such decisions as

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<sup>36</sup>188 U.S. 321 (1903)

<sup>37</sup>195 U.S. 27 (1904)

<sup>38</sup>208 U.S. 274 (1908)

<sup>39</sup>208 U.S. 161 (1908)

*Hippolite Egg Co. v. United States*<sup>40</sup> and the *Pipeline Cases*<sup>41</sup>. In two cases, *Standard Oil v. United States*<sup>42</sup> and *United States v. American Tobacco Co.*<sup>43</sup>, the Court let stand the antitrust prosecutions of the two companies. Yet again the Court did not introduce or follow any new doctrine that would allow the federal government to initiate broad based economic regulations as desired by the two administrations. Instead each movement toward allowing greater flexibility in such regulations was usually followed by a step backward. In *Standard Oil*, Chief Justice White reinterpreted the Sherman Antitrust Act so as to allow for only prosecutions of unreasonable restraints of trade (Baker, 1991). With this reinterpretation, the Court severely weakened the ability of the federal government to prosecute monopolies, as reflected in a significant decline in those prosecutions over the next decade (Bickel and Schmidt, 1984; Highsaw, 1981). The Court also continued to rule against labor unions, striking down a state law that also prohibited "yellow dog" contracts in *Coppage v. Kansas*<sup>44</sup>. In *Hammer v. Dagenhart*<sup>45</sup> the Court led by Chief Justice White used his view of dual federalism to strike down a federal law prohibiting the sale of products made by child labor. The Court used the Tenth Amendment to argue that such products did not in themselves pose any inherent harm and could only be regulated by the states (Highsaw, 1981).

The justices nominated by Roosevelt and Taft were unable to guide the Court away from its narrow reading of the commerce clause and the Fourteenth

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<sup>40</sup>220 U.S. 45 (1911)

<sup>41</sup>234 U.S. 548 (1914)

<sup>42</sup>221 U.S. 1 (1911)

<sup>43</sup>221 U.S. 106 (1911)

<sup>44</sup>236 U.S. 1 (1915)

<sup>45</sup>247 U.S. 251 (1918)

Amendment that prevented the national government and state governments from creating a large regulatory state. The Court continued to examine regulatory laws and the justices saw as the main role the protection of economic rights and private property from government intrusion. It would not be until 1937 that the Court's agenda would move away from economic issues.

### *The Roosevelt Court*

Facing an economic crisis, Franklin Roosevelt created a federal regulatory apparatus that far exceeded previous presidents' attempts to use the federal commerce power to control the private sector. His political agenda immediately ran into resistance from the Supreme Court. A majority of the justices followed the doctrines of liberty of contract and restricted federal commerce power. The clash of philosophies was stark and represented by the type of Court nominees sought by the president. In his nine court appointments Roosevelt sought justices who would allow the federal government an almost unlimited hand in economic affairs while using their power of judicial review to restrain government control over individual and social rights. Roosevelt's desire to utilize the federal government to create economic security was exhibited by the New Deal and his economic bill of rights that making the federal government the guarantor of economic well being (Davis, 1986).

His appointees immediately began the task of discarding the old doctrines and creating new ones in such decisions as *United States v. Darby*<sup>46</sup>. In *Darby*, the Court swept away the doctrine of dual federalism with the argument that the

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<sup>46</sup>312 U.S. 100 (1941)

Tenth Amendment did not restrict the federal government. Darby overturned the decision in *Hammer v. Dagenhart* (1918) that had used the Tenth Amendment and dual federalism to restrict federal commerce power. The Court also expanded congressional commerce power. In *Wickard v. Filburn*<sup>47</sup>, a federal law setting limits on farm production was challenged. A farmer was prosecuted for growing excess wheat for his own consumption. He argued his action involved intrastate commerce which could not be regulated under Congress' commerce power. The Court disagreed noting that if every farmer produced excess food for their own consumption it would have a substantial effect on interstate commerce and could be regulated by Congress (Schwartz, 1993). The decisions in Darby and Wickard freed the federal government from most constitutional constraints on its use of the commerce power. With these two decisions, the Court adopted a policy of consistently upholding New Deal type social and regulatory policies.

As the Roosevelt appointees reduced in the Court's economic rights agenda, they began to utilize their judicial review power to protect individual liberties and civil rights. The process began with *Palko v. Connecticut*<sup>48</sup> as the Court established the procedure for placing state governments under the constraints of the Bill of Rights. Palko's ordered liberty test selectively incorporated rights through the Fourteenth Amendment's Due Process clause and applied them to state actions. With the *Palko* doctrine in hand, the Roosevelt appointees voted to incorporate the free exercise and Establishment clauses in *Cantwell v. Connecticut*<sup>49</sup> and *Everson v. Board of Education*<sup>50</sup>. While the process of incorporation became more rapid in the 1960's, the opinions written by

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<sup>47</sup>317 U.S. 111 (1942)

<sup>48</sup>302 U.S. 319 (1937)

<sup>49</sup>310 U.S. 296 (1940)

<sup>50</sup>310 U.S. 1 (1947)

Justice Black in such cases as *Adamson v. California*<sup>51</sup> calling for the entire Bill of Rights to be incorporated, laid the groundwork for later decisions. The major arguments facing the Roosevelt Court focused on the pace of incorporation and which rights represented ordered liberty. This was a dramatic change from the previous decades when the justices had debated the merits of direct and indirect effects on commerce and the liberty of contract.

Finally, the Roosevelt appointees began to apply the Fourteenth Amendment's Equal Protection Clause and redefined the concept of state action. The new approach to the Clause began with the *Carolene Products* case<sup>52</sup> and the footnote inserted by Justice Stone. The footnote recognized the existence of discrete and insular minorities and that any legislation directed against them would be examined by the Court using the strictest scrutiny (Schwartz, 1993). Later the Court in *Korematsu v. United States*<sup>53</sup> defined race as one of the classifications that would be closely scrutinized. The Court also expanded the definition of state action which was necessary before the Court could apply the Fourteenth Amendment. In *Smith v. Allwright*<sup>54</sup> and *Shelley v. Kraemer*<sup>55</sup>, the Court expanded the definition of state action to strike down racially discriminatory laws.

Equal protection was utilized to overrule another doctrine dating back to the Fuller Court. In *Plessy v. Ferguson*<sup>56</sup>, the justices had upheld racial segregation of public accommodations under the Separate but Equal doctrine. The justices began dismantling the doctrine beginning with the educational process. In

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<sup>51</sup>332 U.S. 46 (1947)

<sup>52</sup>*Carolene Products v. U.S.* 304 U.S. 144 (1938)

<sup>53</sup>323 U.S. 214 (1944)

<sup>54</sup>321 U.S. 649 (1944)

<sup>55</sup>334 U.S. 1 (1948)

<sup>56</sup>167 U.S. 537 (1896)

a series of cases, *Missouri Ex Rel Gaines v. Canada*<sup>57</sup>, *McLaurin v. Oklahoma*<sup>58</sup> and *Sweat v. Painter*<sup>59</sup>, the Court weakened the doctrine, finding inequality and ordering integration. The attack on Plessy reached its climax in *Brown v. Board of Education*<sup>60</sup> with the Court overruling the doctrine. *Brown* was the last major decision made by the Court composed of a majority of Roosevelt appointees. Yet the legal philosophy supported by that majority continued to drive the Court's agenda for the next two decades.

The sudden change wrought by the Roosevelt appointees made his Court packing a success. Not only was the president able to move the Court away from its focus on economic rights, he was able to appoint justices who developed a new agenda that reflected his political philosophy long after his death.

The history of presidential attempts to alter the Court's jurisprudence has seen both success and failure. Thomas Jefferson and James Madison were unable to alter the direction of the Marshall Court. Theodore Roosevelt and William Howard Taft could not move the justices away from their economic liberties philosophy. Presidents Jackson and Van Buren, Lincoln and Franklin Roosevelt were able to alter the Court's ideology. Explaining such disparate results requires determining what elements contributed to the success of some and the failure of others.

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<sup>57</sup>305 U.S. 367 (1938)

<sup>58</sup>339 U.S. 637 (1950)

<sup>59</sup>339 U.S. 629 (1950)

<sup>60</sup>347 U.S. 483 (1954)

### *Conditions for Success*

Five specific conditions can be gleaned from the historical examples as having contributed to the success or failure of presidential Court packing. The first condition involves the president having his first choice for a Court vacancy confirmed by the Senate. Linked to this is the president choosing his nominees on the basis of ideology rather than using the nomination to achieve political gains. A second condition of success is a president choosing a justice who can serve as a leader, exhibits task or personal leadership skills and uses them to build a consistent coalition among his colleagues. The third condition includes justices who are willing to use the power of judicial review to rewrite judicial precedent and strike down laws that ran counter to their policy preferences. With the more activist role played by the Supreme Court this century, it is necessary for the justices to accept an activist role in order to control the judiciary's agenda. During the Warren Court, the federal judiciary began to undertake an expanding role in governing. Such decisions as *Brown v. Board of Education II*<sup>61</sup> gave lower courts greater power to run schools and prisons. The more activist lower courts have passed their policy making onto the Supreme Court.

The fourth and fifth conditions involved presidential and congressional support for the Court. Presidents must enforce Court rulings and in doing so can provide political cover for the justices. If the president willingly accedes to a Court ruling and enforces it, the justices are more willing to use judicial review in support of their political views. The executive branch also argues its philosophy before the Court. This would be done by the solicitor general and attorney

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<sup>61</sup>394 U.S. 294 (1955)

general. Congress is another contributor to Court packing success. It can use its legislative powers to override or reinterpret a Court ruling or even amend the constitution. Congress can also actively support the Court in extending or expanding upon its rulings with legislation. The elements of success are more apparent in those presidential administrations that were effective in changing the Court's ideological direction. One element, an appointment system that allowed a president to use ideology in choosing justices, will be examined first.

### *The Confirmation Process and Success*

The first example of Court packing during the Jefferson and Madison Administrations exhibited how a president's attempt to change the Court could be harmed by confirmation failures. While Jefferson was successful in his Court nominations, James Madison's second nomination ran into trouble. His first two nominees refused the seat, causing him to choose a nominee who would accept the nomination and limit the political damage to the president. He settled upon Joseph Story, who became a strong nationalist force on the Court (Abraham, 1993).

The other failed attempt at Court packing, that initiated by Theodore Roosevelt and William Howard Taft, showed the importance of ideology in choosing justices who would change the Court's agenda. William Howard Taft made six Court appointments during his term of office. While he supported a politically progressive agenda for the Courts, he did not consistently use that agenda as a litmus test in choosing nominees. Three of his appointments were Southern Democrats, a political maneuver intended to bolster Republican electoral prospects in the region and to gain Democratic support in the Senate after the

large Republican losses in the 1910 midterm election (McHargue, 1961). In his choice for chief justice, Taft used age rather than ideology as the main determinant for his decision. The president wanted the position for himself. When faced with two choices for the position, Edward White and Charles Evans Hughes, Taft chose the older White who Taft hoped would not outlive him (Bickel and Schmidt, 1984). With such considerations driving Taft's Court selections, it not surprising that his nominees did not always reflect his progressive views.

The three groups of presidents who were successful in packing the Court, had little difficulty in having their nominees confirmed by the Senate. Each also utilized litmus tests in choosing their nominees. Andrew Jackson chose administration loyalists. Lincoln also chose loyalists who were strongly antislavery while Franklin Roosevelt's choices came mainly from the higher echelons of his administration. His familiarity with their views and political positions ensured he was selecting justices who would support his political philosophy.

### *Appointing a Leader to the Court*

Presidents engaged in Court packing were also successful when choosing justices who could lead their colleagues and build coalitions inside the Court. Leadership on the Court has been divided into two elements, task and social. Task leadership refers to the ability of a justice to guide the Court in its legal work, understanding the elements of the law and precedent while social leadership is the ability of a justice to maintain a collegial atmosphere among the justices (Danelski, 1961). Such leadership is frequently exhibited by the Chief Justice or the senior associate justice based on their power to assign opinions and their speaking early

during conferences. Yet both types of leadership do not have to be invested in one individual. During the Taft Court, the Chief Justice exhibited social leadership, maintaining collegiality among the fractious justices while ceding task leadership to Justice Van Devanter (Danelski, 1964). The same could be found during the Warren Court with the Chief Justice exhibiting social leadership and Justice Black task leadership (Schwartz and Leshner, 1983).

During the Marshall Court even with a majority of Jefferson and Madison appointees the Chief Justice exhibited both types of leadership. He wrote most of the majority opinions for the Court (Morgan, 1971) and maintained a level of unanimity among the justices so as to make the Court speak as a single institution (Hobson, 1996). The most senior associate among the Jefferson appointees, William Johnson, found it difficult to challenge Marshall by writing dissents or building coalitions (Morgan, 1971).

During the Taney Court, the Chief Justice was a more effective social than task leader, able to maintain a close relationship among the justices with widely disparate beliefs. Two justices, Catron and Daniel, wrote ideologically strong opinions, and kept the court on the states' rights path. Another effect of Jackson's appointments during the last years of the Marshall Court was his appointees' ability to shatter the unanimity of the Court (Morgan, 1971). Jackson's two early appointees, Justice Maclean and Baldwin were idiosyncratic in their habits and legal views. Neither showed the willingness to shade their views in order to maintain a united Court, the former because of his political aspirations, the latter possibly because of mental illness (Swisher, 1974). It was during these last years of the Marshall era that the Chief Justice did not appear to be in

complete control of the Court. Marshall was forced to dissent in some cases and faced more dissents to his own majority opinions (Hobson, 1996).

Lincoln appointed justices who served as both task and social leaders. Justices Miller and Field provided both the intellectual firepower for their competing views and coalition building efforts. During the Chase Court, Miller held sway, writing the majority opinion in the Slaughterhouse Cases and leading the Court bloc supporting a more restrained judiciary. Field frequently dissented during this period, arguing for a broad reading of constitutional provisions such as the due process clause (Swisher, 1963). Both justices reflected the change in the Court's agenda, to one focused on federal and state power to regulate the growing industrial sector.

Neither Theodore Roosevelt nor William Howard Taft were successful in choosing strong task or social leaders as justices. While Oliver Wendell Holmes provided intellectual support for upholding economic regulation, he served as a junior justice throughout most of Roosevelt's term, providing mostly his vote rather than his reasoning in many early decisions. The senior associate during the last decade of the Fuller Court was Justice Harlan, who tended to smash rather than build coalitions with his desk pounding dissents (Baker, 1991). Taft's choice for chief justice, Edward White, was unable to guide the Court with the number of five to four decisions reaching their highest level during his ten year service as chief (Bickel and Schmidt, 1984). The senior associate during this time, Justice McKenna, could not provide intellectual leadership since his own position on complex legal matters tended to drift (Baker, 1991).

Franklin Roosevelt was able to appoint a task leader for the Court but was unable to select a justice to serve as social leader. Justice Black's intellectually consistent opinions provided task leadership, presenting his constitutional views in

both concurring and dissenting opinions and aggressively stating his beliefs in conference. While Black's opinions were able to attract justices who shared his views, he was less able to build coalitions. His most strongly held views were not adopted by the Court until the appointment of a bonafide social leader, Earl Warren.

In each of the historical examples, the more successful Court packings included justices who could provide leadership in guiding the justices toward a new agenda. Without such leadership in support of the president's stated political objectives, the justices will be unable to move the Court in the desired direction. Thus leadership abilities are an important element in choosing nominees for the Court.

### *Judicial Activism and Court appointees*

Another element of success is the appointment of justices willing to actively use their powers of judicial review. In order for a president to change the Court's political philosophy and agenda, it is necessary to overrule precedent and create new precedent. Both Jackson and Van Buren appointed activists including Justices Catron, Barbour, McKinley and Daniel. Each supported a view of the relationship between the national and state governments that reinterpreted Marshall Court precedents touching on the Commerce Clause, Contract Clause, corporate law and state power. Each of the four justices used their circuit court duties to write their strong views into the law and were willing to argue in the full Court for the most extreme position on issues (Frank, 1964; Swisher, 1974).

Lincoln's appointees also rejected its predecessors' rulings in arguing for a more nationalistic jurisprudence. The justices supported broad presidential war

powers, national commerce power and rejected the states' rights tendencies of the Taney Court. Justice Field was the most virulent in rejecting broad use of the police power. Field saw the Fourteenth Amendment as the tool the federal courts could use to keep state governments under control in the area of economic regulation (Swisher, 1963). Franklin Roosevelt's appointees were also activists, willing to overturn precedent and strike down government legislation. By the mid 1940's most of the economic rights doctrines used by the Court during the previous half century had been overruled. New constitutional doctrines intended to incorporate rights and protect groups with strict scrutiny becoming the major philosophy guiding the Court's agenda (Pacelle, 1991).

Neither the Jefferson - Madison appointees nor the Roosevelt - Taft appointees expressed a willingness to pursue an activist philosophy in pursuit of their political goals. The two best known appointees among these, William Johnson and Oliver Wendell Holmes, were unable to present an activist agenda to the Court. Justice Johnson silently acquiesced in the *McCulloch* decision. In *Gibbons* he fired off a concurring opinion that argued for a more nationalist commerce policy than that favored by Marshall. He was also unable to present an alternative to the decisions expanding federal power over state judicial and legislative decisions.

Justice Holmes spent his judicial career arguing for a more passive role for the Court. This judicial restraintist posture could not challenge the dominant doctrines of liberty of contract and dual federalism. Holmes was asking justices accustomed to using judicial review to further their political aims to forgo that power. Much as it has failed in trying to limit presidential and congressional power, such an argument could not restrain the activism practiced by the Court.

An important part of Court packing is a judicial activism that rewrites precedent and uses judicial review to overturn legislation. Yet achieving a more complete success requires support from the other branches of government.

### *The Legislative and Executive Branches*

With both branches of the federal government having the power to check the judiciary, their participation in implementing or extending the Court's rulings is critical. The president is involved in the implementation of Court decisions. In implementing a decision, the president can choose to provide political cover for the justices in openly supporting a ruling or can attack the Court by arguing against aggressive implementation (Scigliano, 1971). A president can also aid the Court by using the resources of the Justice Department to argue his agenda before the Court. Such actions have been institutionalized in the office of Solicitor General. It is there that the government's position on constitutional issues is developed and refined. Referred to as the "Tenth Justice" because of the importance placed on his arguments and position on issues by the Court, the solicitor general has considerable resources and a highly trained staff of lawyers to write briefs and argue cases before the Court (Caplan, 1987; Clayton, 1992). The attorney general also oversees the solicitor general's office, discussing issues and frequently making the ultimate decision on whether the government will become involved in a case and on whose side (Clayton, 1992; Kmiec, 1992).

A vigorous attorney general can use his position to decide the administration's position on legal issues. During the Lincoln Administration, Attorney General Bates carefully watched which cases would be appealed to the Court. Bates warned against appealing war related rulings that went against the

administration. He feared that the Court might rule against the government and create legal precedent that could harm the war effort (Silver, 1956). Bates intervention, preventing the administration from presenting issues on which they would lose, allowed Lincoln to run the war effort with limited interference from the Court.

Theodore Roosevelt utilized his attorney general Philander Knox to prosecute monopolies and argue the administration position on the Sherman Antitrust Act before the Court (Baker, 1991). Yet the Justice Department focused almost its entire effort on antitrust policy and in convincing the justices to expand their interpretation of the law. It did not propose overturning the decision in *E.C. Knight* that created the distinction between manufacturing and commerce but instead argued for an expanded definition of commerce (Fiss, 1991). This incremental approach did allow the administration to win individual cases but it eventually lost the antitrust war when the Court interpreted the act as prohibiting only unreasonable restraints of trade (Highsaw, 1981).

The Taft Justice Department also focused on antitrust policy at the cost of not presenting a progressive agenda to the Court. The administration's failure to challenge the doctrines of liberty of contract and dual federalism could be attributed to those in charge of arguing cases before the Court including James McReynolds. A future Court justice as a government lawyer prosecuting monopolies he expressed a fervent belief in antitrust policy. Yet this antipathy toward monopolies hid a conservative distrust in all other types of federal regulatory activities and support for liberty of contract and dual federalism. (Bickel and Schmidt, 1984). With such men arguing cases before the Court and presenting the administration's views to the justices, it is not surprising that the Taft

Administration could not successfully challenge the dominant legal doctrines of the era.

Franklin Roosevelt's Justice Department and Solicitor General's office worked closely with the president in arguing for changes in the Court's doctrine. Roosevelt took an interest in the Court's work and appointed trusted officials to both offices. The fact that both his attorney generals and solicitor generals were eventually appointed to the Court was an expression of his belief that those holding the office shared his political philosophy.

Congress also has a role to play in a presidential packing of the Court. The Senate has the power to block any Court nomination and both houses can override a Court decision using either legislation or constitutional amendment. Yet Congress can also aid Court packing through legislation by extending a ruling through statutes. For example during the Taney Court, Congress acted on Court rulings that granted it power over fugitive slaves. In *Prigg v. Pennsylvania*<sup>62</sup>, the Court had ruled that the federal government had the sole power to make laws on fugitive slaves (Swisher, 1974). A few years later, Congress passed a stricter fugitive slave law as part of the Compromise of 1850. This law became deeply involved in the workings of state officials and courts, reducing the state police power over slavery. The congressional act was an logical extension of the Court's ruling in *Prigg* that gave Congress sole power over this issue.

During the Roosevelt and Taft Administrations, Congress took the justices' cue that they would uphold regulatory legislation that prohibited certain products or activities based on their inherent harm. Thus Congress passed the Pure Food and Drug Act and the Mann Act, outlawing the interstate transport of prostitutes.

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<sup>62</sup>16 Peters 539 (1842)

The justices found both laws constitutional. Yet a prohibition against the sale of goods produced by child labor was struck down as going beyond that interpretation. In this case, the Court set a different standard of interpretation of the Commerce Clause, unwilling to allow Congress to extend its rulings any further.

Franklin Roosevelt's administration built upon many of the rulings made by its appointees. The Roosevelt Court expanded the federal government's commerce power, allowing Congress greater latitude for passing economic regulation particularly during the war. Both the executive and legislative branch made good use of the powers given them under the Court's flexible reading of the Commerce Clause.

Congress and the president can affect Court packing. Congress can aid and hinder the ability of the Court to change its agenda. The president has the resources to advance his political philosophy. Even with these joint powers, it is the president who provides the initial leadership in attempting to change the Court. Congressional power is limited to reacting to the Court's decisions and the president's appointment choices. Congress has little power to advance its own agenda and can only act to extend or halt what has already occurred.

### *Conclusion*

Examining the historical examples of Court packing, the elements of success have been identified. The four elements include an appointment system that allows presidents to choose nominees based on ideology. Such a system usually includes a pliant Senate controlled by the president's party. An opposition controlled Senate usually forces a president to replace ideology with confirmability

as the central thrust in the selection of a nominee.

Selecting a justice with leadership abilities also aids in the success of Court packing. In order to alter the Court's ideological direction requires the votes of five justices. Building a coalition among five strong willed, life tenured judges requires the efforts of an intellectual leader who can present arguments for changes in the Court's jurisprudence. An effective Court leader also has social skills that allow him to smooth over differences among his colleagues and prevent professional differences from becoming personalized. The chief justice can use his social skills to build consensus within the Court and limit the appearance of internal dissension in its decisions.

Any president seeking to change Court precedent must also choose justice with an activist temperament. The appointees must be willing to replace their predecessor's decisions with new doctrine and use that doctrine to enforce their agenda against the other branches of government. Without activists on the Court, the justices are forced to use precedent with which they disagree and attempt to reinterpret it in order to reach the desired results.

Finally, success at Court packing must involve the active support of the other branches of government. Congress and the president have the power to undermine Court decisions. Only with the active support of the two branches can the justices ensure that their agenda will be implemented.

The elements of successful Court packing obtained through historical examples will now be tested using two modern Courts. Four Republican presidents sought to move the Court away from the liberal precedents of the 1960's. The development of the Burger and Rehnquist Courts will provide valuable insight into how a president can successfully alter the Court's jurisprudence and whether the elements of success are apparent in the two Courts.

## **Chapter Three**

### **The Burger and Rehnquist Courts**

Franklin Roosevelt's successful Court packing produced a liberal majority of justices. The Warren Court expanded on the Roosevelt Court's rulings. After Warren's retirement four Republican presidents, Nixon, Ford, Reagan and Bush, attempted to undo his efforts. The four presidents appointed a total of ten justices including two chief justices, forming a majority on the subsequent Burger and Rehnquist Courts. Even though both Courts had a majority of Republican presidents' appointees, the two have been characterized in different ways.

Scholarly examination of the Burger Court has produced the consensus opinion that neither Richard Nixon nor Gerald Ford were able to create a consistently conservative majority. Scholars examined Burger Court opinions dealing with First, Fourth, Sixth and Fourteenth Amendment jurisprudence and concluded that the Burger Court was unsuccessful in its stated goal of rewriting the law in those areas (Funston, 1977; Blasi, 1983; Schwartz, 1987; White, 1988b; Schwartz, 1990, 1993).

The reasons given for this perceived failure are diverse. Blasi argued the Court was marked by rootless activism, with moderates controlling the Court's agenda and deciding cases according to their facts and relevant precedents (1983). Its lack of success has also been attributed to the changing issues it faced (Smith and Beuger, 1993). The Burger Court appointees were chosen based on their views on criminal procedure questions and willingness to weaken Warren Court precedents in those areas. Their views on abortion and affirmative action were not known making it difficult for Nixon to predict their votes on such issues.

Richard Funston explained that the Burger Court was overshadowed by the

more dynamic and activist Warren Court (1977). The innovations and judicial policies produced by the Warren Court made it likely that any successor Court would pale in comparison. Building upon this thesis, Edward White characterized the Burger Court as transitional (1988b). Composed of a mix of Warren Court holdovers and Nixon-Ford appointees, it had no ideological majority to guide it and was marked by a pragmatic accommodation among a group of moderate justices (White, 1988). The change in the Court's membership during the Burger era marked the transition from the egalitarian liberalism of the Warren Court to the conservative majoritarianism of the Rehnquist Court.

The inadequate leadership of Chief Justice Burger is another explanation given for the Court's failures. Burger's attention to administrative duties may have contributed to his poor performance in the Court's weekly conferences (Steamer, 1986). His presentations have been described as rambling and ineffective in building support for his views within the Court (Schwartz, 1990, 1993; Jeffries, 1994). Journalistic accounts of the Court cast doubt on Burger's ability to smooth over conflicts among the justices with the Chief Justice being portrayed as pompous and overbearing (Woodward and Armstrong, 1979; Savage, 1992). One legal scholar went so far as to describe Burger as an "epicure" and as more concerned with the pageantry and formalities of the Court than its legal work (Schwartz, 1993). With Burger being a source rather than an ameliorator of conflict in the Court, he would be an unlikely leader of a constitutional revolution.

The tenure of Chief Justice Burger was seen as being less than successful. The Rehnquist Court is portrayed as more successful in rewriting constitutional law. The Rehnquist Court has rewritten constitutional doctrine in several areas including the Free Exercise clause, affirmative action, school desegregation, and the takings clause. The justices have also reduced the federal courts' habeas

corpus power (Thomas and Sussman, 1995). Chief Justice Rehnquist is portrayed as the opposite of his predecessor, an affable jurist with a strong intellect and an ability to lead the Court (Savage, 1992; Schwartz, 1993; Simon, 1995). The late 1980's and 1990's have also been characterized as a period of accelerating conservatism with Rehnquist as its leader (Baum, 1995). While there were setbacks in the conservative drive to rewrite constitutional doctrine<sup>63</sup>, the Rehnquist Court has begun to implement the agenda enunciated by Richard Nixon in 1968. To conduct a more systematic analysis of the Courts requires identifying the salient issues for the administrations and the major Warren Court precedents targeted by them.

### *The Burger Court*

In his 1968 presidential campaign, Richard Nixon's pointed criticism of the Warren Court focused on two areas of constitutional law, the rights of criminal defendants and Court imposed restrictions on the policies of state governments. Nixon also campaigned against the strong integration policies judicially enforced against southern school districts. In the campaign, he placed both issues within the slogan of "Law and Order" and a "Southern Strategy" (Ambrose, 1991; Evans and Novak, 1972). Two supreme court decisions, *Mapp v. Ohio*<sup>64</sup> and *Miranda v. Arizona*<sup>65</sup>, with their restrictions on police, came under the severest criticism

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<sup>63</sup>During the 1991 term, conservative justices were unable to gather the votes to overrule *Roe v. Wade* and abortion rights in *Planned Parenthood v. Casey* and suffered a defeat in attempting to rewrite Establishment Clause jurisprudence in *Lee v. Weisman*.

<sup>64</sup>367 U.S. 643 (1961)

<sup>65</sup>384 U.S. 436 (1966)

(Abraham, 1993; Simon 1973). Nixon announced that he would appoint "strict constructionists" to the Court, justices who would be less likely to read their own political views into the Constitution. Implicit within this promise was that *Mapp* and *Miranda* would be treated more skeptically by his appointees. He continued the criticism during his first presidential term, giving speeches enunciating his opposition to Court rulings on crime. In an October, 1970 speech he promised to "speak out for America" on the issue of crime and in favor of both tougher penalties on criminals and less attention to technicalities in court rulings (Windt, 152, 1987). In an October 1971 speech where he announced the nominations of Lewis Powell and William Rehnquist for the Court, Nixon promised that his nominees would change the Court's rulings which had "weakened the peace forces against the criminal forces in our society," (Nixon, 1971).

In addition to criminal rights decisions, Nixon spoke out against the stringent requirements for the desegregation of public schools. In several speeches in the South, he campaigned for the freedom of choice plans, a diluted form of integration supported by many southern school boards. He warned against immediate integration of schools and expressed a preference for a slower, more evolutionary approach (Evans and Novak, 1972). His comments put him in direct conflict with the Supreme Court decision in *Green v. Kent County*<sup>66</sup> where the justices explicitly rejected such an approach to school desegregation. Nixon's comments suggested the difficulties associated with school integration would receive a more sympathetic hearing from his Court appointees.

Nixon's arguments for limiting federal control of school integration and federal judicial involvement in state criminal cases all involved support for greater

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<sup>66</sup>391 U.S. 430 (1968)

state and local rights vis-a-vis the federal government. He expressed those sentiments in a speech unveiling his new federalism proposals in January, 1971. Nixon proposed returning power to state and local governments and limiting federal influence (Windt, 1987). Richard Nixon identified salient issues as criminal rights, school integration and federalism. He would seek out nominees who would agree with him on those issues.

Nixon's campaign against the Warren Court was seen as more than just political rhetoric by its main target, Chief Justice Earl Warren. In the Spring of 1968 with Nixon leading in opinion polls, Warren announced his resignation, allowing Lyndon Johnson to appoint his successor (Ambrose, 1991). It was clear to most Court observers that Warren preferred a Johnson appointee to be his successor rather than allowing Nixon to fill the chief justice position. Warren wanted a politically liberal successor who would continue his views on the Court, an unlikely occurrence if Nixon appointed the new Chief Justice.

After the Senate rejected Justice Fortas for chief justice, Nixon had the opportunity to fill the empty chief justice slot. Nixon had another opportunity with the resignation of Fortas after he was found to have taken bribes. During the 1971 term, two more vacancies opened up, allowing him to choose four of the nine justices on the Court. To complete the majority, his successor, Gerald Ford filled the slot opened up by the retirement of Justice Douglas.

The first appointed president, Ford had served as the Republican House Leader before replacing Vice President Agnew. As the minority leader, he verbally attacked the Warren Court and its rulings. In 1971, he led an impeachment drive against Justice Douglas, accusing the justice of corruption in his off the bench activities (Cannon, 1994). He also attacked the justice's liberal decisions and his activities on behalf of left wing political groups (Cannon, 1994). After Douglas

left the Court, Ford was faced with appointing his replacement, searching for someone who was not a supporter of the justice's strident liberalism. In his memoirs he expressed dissatisfaction with the criminal rights decisions of the previous Court and his desire to change them (Ford, 1979). On other issues, Ford has been described as more politically conservative than even his predecessor, favoring greater state power and local control. While Ford may not have held the same political views about the Court as Richard Nixon and had not been elected on the Nixon ticket in 1968 or 1972, his actions as congressional leader showed he was in sympathy with Nixon's goals. He disagreed with the liberalism of the Warren Court and some of its holdover justices. Faced with the resignation of the most virulent liberal justice on the Court, Ford wanted to appoint a replacement who would at least reject liberal activism and weaken Warren Court precedents.

With five appointees from Republican presidents, the Burger Court was expected to issue decisions that consistently reflected the political philosophies of those presidents. Yet such consistency was lacking. While the Court was less supportive of the rights of criminal defendants and favored more local control of school integration efforts, it did not overrule any major Warren Court precedents or move the Court away from the liberal activism of its predecessor. Between 1969 and 1981, the Court issued several important decisions that created new rights and expanded upon the liberal activism of the Warren Court.

One such decision was *Lemon v. Kurtzman*<sup>67</sup>. *Lemon* established a rigid set of constraints on the ability of government to accommodate religion and was used in future cases to create a separation of church and state<sup>68</sup>. The decision in

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<sup>67</sup>403 U.S. 602 (1971)

<sup>68</sup>In the companion case of *Tilton v. Richardson* 408 U.S. 672 (1971), the Court upheld government aid to religious colleges using the *Lemon* test.

*Roe v. Wade* (1973), extended the right to privacy created by the Warren Court in *Griswold v. Connecticut*<sup>69</sup> and established a new right to abortion. The Court also spoke in a liberal voice when ruling on the constitutionality of affirmative action programs. In *University of California v. Bakke* (1978) the Court ruled that race could be included as part of a college admissions program, thus refusing to treat affirmative action in the same category as other racial classifications. The Court went even further in 1980, explicitly upholding federal affirmative action policies in *Fullilove v. Klutznick*. Even in criminal rights opinions, the justices extended the Warren Court's liberal agenda. In *Furman v. Georgia*<sup>70</sup>, the justices ruled that the death penalty as administered violated the Eighth Amendment and struck down all state capital punishment laws. These liberal opinions were not balanced out by more conservative decisions.

The Court issued only two major opinions moving the law in the direction desired by the appointing presidents. In *Miller v. California*<sup>71</sup>, the justices rewrote obscenity law, allowing local communities to develop standards for determining whether speech is obscene within some broad guidelines created by the Court. In *Milliken v. Bradley* (1974), a five member majority weakened the ability of district court judges to enforce integration orders in northern school districts. The Court differentiated between de jure and de facto segregation and ruled district courts were not to enforce integration against the latter. Because segregation in the North was based on residential patterns, the decision halted most court ordered busing there.

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<sup>69</sup>381 U.S. 479 (1965)

<sup>70</sup>408 U.S. 238 (1972)

<sup>71</sup>413 U.S. 14 (1973)

The mixed record of the Burger Court prevents it from being labeled as a Court packing success. The strict constructionist justices who were to implement the Nixon agenda continued the Warren Court agenda. They extended many of the individual rights created by the Warren Court, striking down the death penalty, striking down abortion laws and upholding affirmative action policies. It was the failings of the Burger Court that prompted the next two Republican administrations to undertake another Court packing effort.

### *The Rehnquist Court*

In Ronald Reagan's 1980 presidential campaign, he set out a clear agenda for his supreme court appointees. Reagan reiterated his opposition to the Court's social agenda, specifically referring to the school prayer cases of the Warren Court and the Burger decision in *Roe v. Wade* (1973). In a 1982 speech he laid out his position on abortion in stark terms stating that "abortion is a great moral evil, an assault on the sacredness of human life," (Windt 324, 1987). Reagan also campaigned on the theme of federalism, a constitutional idea that had been declared dead in the 1940's, though briefly resurrected by the Court in *National League of Cities v. Usery*<sup>72</sup>. In his inaugural address, the president noted his support for federalism and "demanded recognition of the distinction of powers granted to the federal government and those reserved to the states or the people," (Windt, 301, 1987). He also reminded his listeners that the states created the national government and had powers predating that government (Windt, 1987). Finally Reagan criticized the continued use of both the exclusionary rule and the

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<sup>72</sup>426 U.S. 833 (1976)

*Miranda* decision to exclude evidence and overturn criminal convictions (Cannon, 1991).

Reagan's successor, George Bush, also subscribed to his views. Bush supported overturning of *Roe* and the Court's religion decisions (Mervin, 1996). He also stated his support for other elements of the Reagan agenda including opposition to affirmative action (Hill and Williams, 1994). While Bush's vehemence for social issues was less apparent than Reagan's - he was less likely to mount a public campaign for a constitutional amendment outlawing abortion - he was supportive of the Reagan administration's desire to remold the federal judiciary in a more conservative direction. He allowed his judicial selection process to be run by the more conservative members of his administration. With the two administrations in general agreement on the direction they wanted to move the Court, the salient issues on which they would focus included criminal rights issues and federalism along with greater church-state accommodation and opposition to abortion.

To advance his political agenda, Reagan made three appointments and promoted Justice Rehnquist to be chief justice while George Bush appointed two justices. The five new justices, in tandem with Chief Justice Rehnquist, composed a comfortable majority moving the Court in a decidedly conservative direction.

Unlike the Nixon and Ford appointees, the Republican appointees of the Rehnquist Court did not issue any major decision creating new liberal precedent. The Court, though, issued several decisions that either overruled or severely limited the reach of previous liberal decisions. In *Establishment and Free Exercise*

Clause cases, the Court acted to rewrite liberal precedent, explicitly overturning the Warren Court decision in *Sherbert v. Verner*<sup>73</sup> and weakening the Burger Court decision in *Lemon v. Kurtzman* (1971).

In its major Free Exercise decision, *Employment Division v. Smith* (1990), the Court overturned the strict scrutiny standard that had been used to decide those case for twenty five years. Justice Scalia's opinion replaced strict scrutiny with a neutrality standard. Under the standard the Court would uphold any generally applicable criminal law that incidentally affected religious practices. The *Smith* decision made free exercise claims more difficult to win in Court.

The Rehnquist Court's Establishment Clause cases witnessed a weakening of the *Lemon* standard that enforced a strict separation of church and state. In a series of cases, the Court replaced *Lemon* with another neutrality standard requiring government to treat religious groups in an equal manner with other groups. The decisions allowed religious activists to challenge government actions on the basis of discrimination against religious speech.

The Reagan and Bush appointees also changed how the Court decided affirmative action cases. In *Richmond v. Croson* (1989) and *Adarand v. Peña* (1995) the justices applied strict scrutiny to state and federal affirmative action policies. In using the standard, government was required to show a compelling interest for such policies and that the policies were narrowly tailored to meet that interest. That high standard and heavy burden meant most affirmative action policies would be struck down.

A further attack on the *Mapp* and *Miranda* decisions was initiated by the Rehnquist Court, using the standard developed by its predecessor. The Rehnquist

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<sup>73</sup>374 U.S. 398 (1963)

Court continued the policy of deferring to state legislation that weakened the rule. The Court upheld searches even though they were conducted under state laws that were later found to be unconstitutional. The justices ruled that police had acted in good faith and thus used that exception to the exclusionary rule to uphold searches<sup>74</sup>. The Reagan and Bush appointees took a large step in allowing coerced confessions into a criminal trial. In *Fulminante v. Arizona*<sup>75</sup>, the justices agreed that such confessions could be considered as a harmless error though it threw out Fulminante's confession. The ruling allowed prosecutors to use in trial those confessions obtained in violation of *Miranda*. If the confession was found to be illegal, the defendant's conviction would not be automatically overturned. Instead if sufficient evidence was used in the trial to convict notwithstanding the confession, the conviction would be upheld.

The Reagan and Bush appointees also revived two doctrines that had been rejected since the Roosevelt Court. Both the Tenth Amendment and the Commerce Clause had been used in the first three decades of the twentieth century to restrict the powers of the federal government in economic and social legislation. Those restrictions had been ignored by the modern Court which had given Congress cart blanche when regulating the economy. The Rehnquist Court appeared willing to use the Commerce Clause as a restriction on government power and the Tenth Amendment as a barrier between state and federal power.

In *U.S. v. Lopez* (1995), the Court struck down a federal ban on guns at secondary schools. The five to four decision stated that the federal government did not have the power to pass such legislation. It dismissed the argument that

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<sup>74</sup>*Illinois v. Krull* 480 U.S. 340 (1987), *Anderson v. Creighton* 483 U.S. 635 (1987), *Griffin v. Wisconsin* 483 U.S. 868 (1987), *California v. Greenwood* 486 U.S. 35 (1988).

<sup>75</sup>499 U.S. 279 (1992)

guns at school was substantially related to economic activity and was covered under Congress' power to regulate interstate commerce. For the first time in almost sixty years five justices found that an action taken by the federal government fell outside its enumerated powers. The Court continued the trend two terms later. In *Printz v. U.S.* (1997), the Court ruled the federal requirement that local police conduct background checks for gun purchases went beyond congressional power. The federal government could not force local officials to enforce federal laws. The ruling struck down part of the Brady gun control law and provided for protection against federal involvement in state affairs.

The court also revived the Tenth Amendment in *New York v. U.S.*<sup>76</sup>. In New York, the Court ruled that Congress could not legislatively force states to create waste depositories within their boundaries. Such a requirement violated the Tenth Amendment and its repository of rights stored in state governments. Instead of a mandate, Congress could provide financial incentives for the states to take actions and the state governments could choose to take advantage of those incentives or ignore them.

The Court also hastened the pace of returning control of school districts to state and local governments. The Reagan and Bush appointees began rolling back the remedial powers granted to federal district courts in their efforts to enforce integration orders. In *Dowell v. Board of Education*<sup>77</sup>, the Court ruled that once integration had been achieved in a district, the federal court could not reopen the case and remedy instances of de facto segregation caused by shifts in residential patterns. The decision in *Dowell* prevented never ending control of school districts by federal courts in order to achieve the shifting goal of integrated schools.

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<sup>76</sup>505 U.S. 104 (1991)

<sup>77</sup>498 U.S. 237 (1991)

In *Missouri v. Jenkins*<sup>78</sup>, the Court again asserted local control over school financing and budgeting, overturning a federal judge's order mandating salary increases for teachers. The Court further restricted the judge's remedial powers by preventing him from using student test scores to determine the success of integration efforts. The *Jenkins* decision set further limits on remedial powers.

Finally in two of its most politically controversial opinions, the Rehnquist Court stepped back from the absolutist position that the justices had taken in the original *Roe* decision. In *Webster v. Reproductive Services* (1989) and *Planned Parenthood v. Casey* (1992), the Court replaced the three trimester standard created in *Roe* with an undue burden test. The new test would allow government to restrict abortion if it did not cause an undue burden on the rights created in *Roe*. In both *Webster* and *Casey*, the Court upheld state restrictions on abortion that included a twenty four hour waiting period, parental consent requirements for minors and a prohibition against state financed hospitals from performing abortions.

*Webster* and *Casey* revealed that there was a majority on the Court that would uphold meaningful abortion restrictions. Yet *Casey* and *Webster* did not fulfill the goal of the Reagan and Bush Administrations to overturn *Roe* completely and eliminate the abortion right. The abortion decisions represented the greatest failure of the Rehnquist Court to create a new conservative direction in constitutional interpretation.

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<sup>78</sup>495 U.S. 33 (1990)

## *Conclusions*

The overall efforts of the Rehnquist Court in placing a conservative gloss on constitutional interpretation have been more successful than its predecessor. In areas targeted by the Reagan and Bush Administrations for change, the conservative majority has produced meaningful results. Affirmative action has been severely weakened as a government policy while the religious speech doctrine has been used to open public forums to religious groups. The Court has also recognized some limits to congressional commerce power. While the abortion decisions did not arrive at the stated goal of overruling *Roe*, both *Webster* and *Casey* eliminated its absolutist three trimester standard and allowed abortion restrictions at any stage of pregnancy.

The Burger Court was less effective in fulfilling the agenda proposed by Richard Nixon. The appointees were able to modify the criminal rights decisions of the Warren Court but such important precedents as *Mapp* and *Miranda* remained. The Court also did little in the area of federalism, overruling *Usery* that used the Tenth Amendment to restrict national power over state government functions. The Burger Court also frequently rejected the desegregation policies offered by the Nixon Administration. The justices upheld busing to achieve school integration which was opposed by the president. The limited success of the Nixon and Ford appointees prevent the presidents' efforts at altering the Court as being characterized a success.

The different results reached during the Burger and Rehnquist Courts can be attributed to the elements of success derived from historical examples of presidents altering the Court's jurisprudence. The Burger Court resembled the attempts by the Jefferson and Madison Administrations and Roosevelt and Taft

Administrations to alter the Court's ideology. The lack of leadership skills among appointees, the absences of a strong activist and difficulties in the appointment system are apparent in all three periods.

The Rehnquist Court more closely resembles the effective alteration of the Court during the Jackson, Lincoln and Franklin Roosevelt Administrations. The leadership skills of the chief justice, the presence of justices with an activist philosophy and the aggressive support of the executive branch all contributed to the effectiveness of the Court during the four periods. While the Reagan and Bush appointees have yet to fully implement the agenda of the appointing presidents, they have laid the groundwork for future decisions that would accomplish that goal.

In the next four chapters, the Nixon, Ford, Reagan and Bush Administrations and their Court appointees will be analyzed using the elements of success discussed in chapter two. The overall appointment process, the ability to choose justices who can exert leadership on the Court, selecting jurists who have an activist philosophy and using the executive and legislative branches in supporting the Court will comprise the points of analysis.

Each chapter will look at the elements on an individual level utilizing a mixture of case and statistical analysis to show how the Burger and Rehnquist Courts differed. Also it will be shown how the policies of the four Republican administrations differed and how that affected the results reached by their appointees.

## **Chapter Four**

### **The Appointment System and Ideology**

A president seeking to change the Court's ideological direction must use his judicial appointment power as effectively as possible. The president should develop applicable criteria in order to determine who he will nominate to carry out his policies on the Court. This chapter will examine the entire appointment system including presidential selection of a nominee and Senate confirmation of the nominee. The selection process used for each of the ten justices appointed during the period being studied will be categorized according to the stringency of that process.

The presidential selection process is limited only by the qualifications or attributes sought by the appointing president. Even without formal qualifications for a justice, presidents choose their nominees with care and the knowledge that once a justice assumes the bench the executive's power over them ends. A president seeking to create an ideological majority on the Court uses specific criteria to choose Court nominees and ensure that a judge will vote as desired in future cases (Kahn, 1995).

The most obvious criterion is that a judicial nominee share the president's ideological predilections. The nominee's view on salient issues would be the most closely examined. The president would also seek to project the votes of justices in the future. This would require a stringent process of discovering a nominee's political philosophy.

While a president can use a selection process to choose a nominee with certain ideological beliefs, it does not guarantee that the nominee will reach the

Court. Within the appointment system there is also the confirmation process requiring a majority of the Senate to approve any Court nominee. This process produces its own criteria in confirming a nominee, one that may run counter to the desires of the appointing president and instead conform to the wishes of the party controlling the Senate. With the possibility of a difficult confirmation, a president may seek out a nominee who will be more acceptable to the Senate rather than a nominee who will fulfill his ideological goals. Also the Senate can reject a nomination as a signal to the president as to the type of nominee they would accept.

The connection between the appointment system used to choose a nominee and that nominee's subsequent performance on the Court will also be studied using support and interagreement scores. Each justices' votes on salient issues will be tabulated and given a numerical score to show how supportive the justice was of the president's position on a salient issue. A second measure to be used is the interagreement scores of the justices. The standard deviations of those scores will be analyzed to determine the degree of moderation in a justice's voting behavior.

Using these two measures, the presidential selection process and the Senate's confirmation process can serve as a partial explanation of the success and failure at Court packing.

### *Methodology*

Scholarly discussions of the appointment process rely primarily on description of the process for individual judges. They examine the role played by several actors in the process including the president, senators, interest groups and the nominee (Massaro, 1990; Abraham, 1993; Schwartz, 1989; Smith, 1994).

These studies provide insight into the workings of the nomination process and prescriptions of how a president can ensure a successful nomination (Massaro, 1990; O'Brien, 1989). The studies though provide less information on how the entire process can affect the attitudes and behavior of justices once they reach the Court.

The choices made by the president as part of the selection and confirmation processes have also been ignored. This chapter will combine the two processes under the heading of the Court appointment system. It will show how the presidential selection process and the demands of the confirmation process can affect the type of Court nominee and his subsequent voting behavior. The effect of the appointment system is particularly magnified in those instances when a president is seeking to change the Court's ideological direction. Any significant deviation from the use of ideology in the choosing of a nominee can lead to presidential failure in altering the Court's jurisprudence.

Three measures will be utilized to identify the type of appointment system and the effect that system had on presidential court packing. First, justices will be categorized according to the selection and confirmation process. Then the effect of the appointment system on the justices' performance on the Court will be examined using support and interagreement scores for each term.

To determine the effect of the appointment system, each of the Court appointments made during the four administrations, Nixon, Ford, Reagan and Bush, will be examined. Each of the justices will be categorized according to the type of presidential selection process and Senate confirmation process used in their appointment. Placement within the two categories will be determined by the systematic nature of the selection process and the ease of the confirmation process.

The selection process utilized by presidents will be divided into two categories, a stringent process and a lax process. The two categories will be determined using three criteria, those involved in the process, the attention paid to ideology and the nominee's writings, and the existence of criteria besides ideology in choosing a nominee. A stringent selection process would use two of the three criteria in choosing an ideological candidate. For example, those involved in the selection would share the president's values and seek to change the Court's direction. The nominees writings would be scrutinized for their ideological purity by those involved in the selection. Finally ideology would be the primary focus of those selecting the nominee.

A lax process would have the nomination being delegated to those in the White House who were less desirous of change in the Court's ideological direction. There would be a stronger focus on regional or other political values rather than ideology in choosing the nominee. A lax process would be less likely to produce a candidate who would move the Court in the direction favored by the president.

The demands of the confirmation process can also affect the type of justice chosen and his behavior on the Court. The confirmation process will be divided into two categories, stringent and lax. Placement within the categories will be determined using three criteria, the partisan makeup of the Senate, the year in the president's term that the nomination occurred and whether previous nominees for the same vacancy had been rejected by the Senate. Partisan control of the Senate has been determined to be one of the main factors in the success of a president's Court nominee. (Massaro, 1990; Segal, 1987; Palmer, 1983; Scigliano, 1971; Friedman, 1983). Segal (1987) found a correlation between defeated nominees and partisan control of the Senate. Most defeated Court nominees were

considered by a Senate under control of the opposition party. Also presidents who have nominations early in their term are also more successful than nominations that occur later in the second term (Segal, 1987; Abraham, 1993).

The third criteria, rejection of previous nominees, can have a profound effect on the president's nominees. Senate rejection of nominees is seen as a political negative for the president, exhibiting his weakness in Congress. The political damage caused by rejected nominees can be transmitted to substantive legislative issues as the president loses political support for his political agenda on Capitol hill (Scigliano, 1971; Abraham, 1993). By making the political price high through repeated rejections of nominees, the Senate can force a president to jettison ideology as a primary concern and replace it with confirmability of a nominee. Even the threat of rejection by the Senate can change the political calculus for a president. Knowing that the Senate is likely to reject a candidate, the president would seek out a compromise nominee who would not reflect the ideological preferences of the president on salient issues. The existence of two of the above criteria in the appointment of a justice means the confirmation process will be labeled stringent. A stringent confirmation process is expected to produce more moderate justices.

With each justice categorized according to the appointment system, their behavior on the Court will be analyzed. Because the ideology of the justice tends to be the primary focus of presidents seeking to alter the Court's direction, two measures of ideology will be used. Once calculated, the measures will be used to compare the appointment system with the expectations generated by that system.

Support for the president will be measured using the support scores on salient issues. For each of the salient issues in a term, justices supporting the president's position will be assigned a positive one. A justice opposing the

president's position will be assigned a negative one. The scores will be tabulated for each justice during that term and divided by the cases in which they participated. Each justice's support score will range from positive one, meaning perfect support for the president's position on salient issues, to negative one, meaning no support for the president in such cases. Justices whose selection was stringent and confirmation was lax would be expected to have positive support scores. Those justices with the opposite appointment system would be expected to register low support scores.

Support scores, though, provide only a limited picture of the justices' behavior and relationships with their colleagues. A broader measure is needed to show whether justices are likely to follow the ideology of their colleagues and join their opinions. Interagreement scores provide such a measure. The scores reflect the number of times one justice votes with another justice. The more times a justice agrees with another the higher the interagreement score for the two.

To measure the ideological proximity of justices during the two Courts, the rate of interagreement for the justices will be calculated for each of the terms. Comparison of those scores will identify the justices who agree at a higher rate and whether the Republican appointees are more likely to vote together. In addition to the raw interagreement scores, the standard deviations of those scores will be analyzed to determine links between the justices. Because the standard deviation of the interagreement scores will reflect the spread of those scores, they will provide insight into how ideological the justices were. A justice with strong ideological tendencies is likely to join the opinions of a colleague whose views most closely approximated his. The same justice is likely to agree at a much lower rate with those justices whose views are not close to his own. The justice's overall

interagreement scores would reflect this, producing a large spread in the values between justices sharing his view and those opposing them. That spread would be reflected in larger standard deviations in the scores.

Standard deviations have been utilized in previous studies to determine the influence exerted among the justices (Altfeld and Spaeth, 1984; Spaeth and Altfeld, 1985). Influence relationships between justices were determined using the rate at which justices joined the opinions of colleagues. Those who joined at a rate that was two standard deviations above the mean were said to have been influenced by a colleague.

For this study, the standard deviation of interagreement scores will be used in an aggregate. Instead of looking at the interagreement between individual justices, the scores for each justice will be compared across the entire Court for the 1969-1995 terms. This will determine whether a justice is more likely to vote with all his colleagues at an approximately equal rate regardless of ideology.

The average of all the justices' standard deviations will then be calculated. It is expected that moderate justices will have small standard deviations in their interagreement scores, usually below the average of the standard deviations for the entire Court. Ideological justices would have high standard deviations in their interagreement scores because of the disparity of those scores. Their standard deviations would exceed the average standard deviation of the other justices, showing that the justice was less likely to vote with colleagues who expressed a different ideology. For example, Justice Scalia has exhibited strong ideological convictions in his opinions and votes. He is likely to vote with those justices sharing his views and less likely to vote with justices who do not share those views. His interagreement scores would show that disparity with large standard deviations. Justices Brennan and Marshall expressed a strong liberal ideology and

agreed in most cases. Therefore their interagreement with each other would be high while their agreement with their colleagues would be lower. The disparity in interagreement scores would also be exhibited in large standard deviations.

The ideological moderation exhibited by each of the eleven appointees will be compared using scale scores and the standard deviations of their interagreement scores. The two measures will test the effect of the appointment systems on the moderation of Court appointees. Justices categorized as undergoing lax selection and stringent confirmation should exhibit greater moderation than appointees undergoing a stringent selection and lax confirmation process. The first task, though, requires the categorization of appointees according to the criteria established for each process.

### *The Appointment System and Categories of Nominees*

Using descriptive analysis of the selection and confirmation processes for each of the eleven appointees, each justice will be categorized according to the process they faced. The first appointee to be examined is Richard Nixon's choice to fill the vacancy for chief justice. Warren Burger was chosen in 1969 to replace the retired Earl Warren. Nixon, who had attacked the Warren Court during the 1968 presidential campaign, established criteria for choosing nominees who could change the Court's ideological direction. He sought a nominee who would reverse the criminal rights decisions of the Warren Court with particular attention being paid to the *Mapp* and *Miranda* decisions (Nixon, 1978). His speeches against the stringent integration decisions of the Warren Court would suggest his justices would be less strict in their implementation of school desegregation. Finally Nixon's desire to increase the power of state governments would also be on the

new chief justice's agenda as one of the salient issues he had identified.

To find a nominee, Nixon utilized both the Justice Department and the White House staff to collect information on potential nominees. The candidates tended to be judges whose writings and off the bench speeches supported the law and order and federalism policies of the Nixon Administration. One candidate, Warren Burger, had served as a judge on the D.C. appeals court. During his tenure, he had written strong dissents in liberal criminal rights decisions and written speeches and articles criticizing the Warren Court. In a 1967 speech, he stated that the Warren Court had went too far in its criminal rights decisions, drew Nixon's attention to him (Simon, 1973; Woodward and Armstrong, 1979). Both Nixon's staff members, including H.R. Haldeman, and his attorney general, John Mitchell, sought out appointees who would reflect the president's philosophy. Nixon was also personally involved, talking with several candidates, including Justice Stewart and Burger. Finally, the selection process used ideology as its primary focus, ignoring the promises Nixon made to appoint a southerner to the Court or any political considerations such as repaying a political debt. While the Nixon selection process used to choose Burger was not as stringent as that established in the Reagan Administration, it did focus on the issues necessary to choose a nominee who would reflect the president's ideology.

The confirmation process faced by Burger was lax. The Burger nomination occurred in the early months of the Nixon presidency, when his political honeymoon with Congress was in full swing. During this period Congress is generally more supportive of the new chief executive. This support transfers to confirming presidential Court appointees. The Burger nomination also followed a bitter battle over Lyndon Johnson's attempt to promote Justice Fortas to the chief justiceship. The defeat of Fortas was predicated upon Richard Nixon becoming

president and appointing a nominee who would be more conservative than Fortas. Thus the Senate in 1968 had signaled it would support a conservative appointee such as Burger. The only negative for Burger was the Democratic control of the Senate. This opposition control of the chamber, though, was partly ameliorated by the strong support given the nominee by southern Democrats who welcomed a more conservative chief justice. The willingness of southern Democrats to cross party lines in favor of a Republican appointee was exhibited by the strong support of the chairman of the Judiciary Committee. Senator Eastland of Mississippi had fought against the Fortas nomination but gave wholehearted support for Burger. Thus the confirmation process can be properly categorized as lax.

The Burger nomination underwent a fairly stringent selection process and a lax confirmation process. His support and interagreement scores would be expected to reflect the president's beliefs since the White House chose him on ideological grounds and the Senate accepted that White House decision.

The selection and confirmation of Harry Blackmun was the opposite of the process used for appointing Burger. Blackmun was Nixon's third choice to fill the vacancy to replace Justice Fortas. Nixon had made this appointment the test of his southern strategy. He had promised the region that he would appoint a southerner to the Court, making regionalism a criterion equaling ideology. He selected Clement Haynsworth, a southern Republican, but the nomination was rejected. The Senate's defeat of Haynsworth infuriated Nixon, who promptly nominated another southerner, Harrold Carswell, as a direct challenge to the confirmation power of the Senate. Carswell was defeated after a bitter fight and Nixon surrendered in his efforts to appoint a southerner. Suddenly regional and ideological concerns became secondary as the White House attempted to limit the

political damage caused by the back to back rejections. Confirmability in the Senate became the overriding criteria. The president sought to limit the political damage caused by the failed nominations as he headed into midterm elections.

The relegating of ideological concerns was not the only sign that the selection process was to be more lax. Nixon turned over the Blackmun decision to White House staff as he focused on international issues. The staff was less concerned with changing the Court's ideological direction and preferred getting the nomination off the political agenda (Frank, 1991). Their choice for the position, Harry Blackmun, seemed to share the president's views on criminal rights. Yet his opinions were not carefully scrutinized for his overall philosophy. Instead Blackmun was seen as a midwest moderate who would likely survive confirmation and limit political damage to the president ("The Changing Social Vision", 1983; Wasby, 1988).

Blackmun faced a strict confirmation process. The Democratically controlled Senate had rejected two nominees with the Republican Senate leader and minority whip voting against Haynsworth (Massaro, 1991). Neither the Democratic majority nor Republican leaders seemed willing to confirm another conservative to the Court. Also as the 1970 midterm elections approached it was more likely the nomination would receive greater Senate scrutiny. With a stringent confirmation process facing any nominee, the Nixon White House's main goal became choosing a nominee who would pass easily through the recalcitrant Senate. Such a lax selection and stringent confirmation process would produce a more moderate justice whose support and interagreement scores would be lower than the Chief's.

The retirements of Justices Black and Harlan in 1971 gave Nixon two more vacancies to fill. With the 1972 presidential campaign approaching and Nixon

serving the last year of his term, his Court nominees faced a difficult task. Rejections of nominees are more frequent during the last year of a president's term as the possibility of a new president taking office causing increased partisanship in the Senate. With confirmation difficulties lying ahead, the Administration bungled its initial attempts to fill the two vacancies. The White House abdicated its selection decision by placing the names of two nominees before a review committee of the American Bar Association (ABA). The ABA had assumed the role of giving Court nominees ratings. By 1971, though, the committee included many pro-Warren Court partisans who disagreed with Nixon's attempt to change the Court. By waiting for the ABA to approve his two nominees, Nixon delegated the presidential appointment power to a group that did not share his views about the Court. The ABA promptly gave the nominees a rating of unqualified. The vote infuriated Nixon, who refused to send any future nominees to the ABA for approval.

Nixon then reinstituted the stringent selection process used to choose Chief Justice Burger. The two appointees chosen under this system appeared to agree with the president on the salient issues before the Court. Lewis Powell had been part of the group of southerners considered during the Haynsworth and Carswell nominations. Powell's criticism of the Warren Court's criminal rights decisions and desegregation efforts made him compatible with Nixon (Lamb and Halpern, 1990). He made clear he would support the trimming back or overruling of many of those decisions (Powell, 1968, 1969).

In choosing the replacement for Justice Harlan, Nixon adopted Franklin Roosevelt's strategy of choosing a nominee who had worked for the White House. William Rehnquist had provided a strong conservative voice within the Justice Department, arguing for stronger police measures against demonstrators and a

greater role for the states (Boles, 1987; Lamb and Halpern, 1990). He also had a record within the Supreme Court, acting as Justice Jackson's clerk during the 1952 term and writing memos on many issues that would come before the Court (Boles, 1987; Davis, 1990).

In both the Rehnquist and Powell selections, the White House paid particular attention to the nominees' ideological convictions on salient issues. With the nominations occurring at the beginning of a presidential election year, the Senate might be expected to make it a stringent process. Rehnquist took the brunt of the questioning but his difficulties were assuaged by the strong support of southern Democrats. The confirmation process, for all the sound and fury of some senators, was lax with neither nomination in danger of being rejected (Boles, 1987; Jefferies, 1994). Thus both justices would be expected to display less moderation in their scale scores and larger standard deviations in their interagreement scores.

The final nominee for the Nixon and Ford Administrations was the choice to fill the vacancy created by Justice Douglas' resignation. The White House selection process, though, seemed concerned with limiting the political damage that might be created by nominating a judge with a conservative ideology. Ford turned over the selection of a justice to his attorney general, Edward Levi, who made plain his desire to find a confirmable nominee. The main criteria for Douglas' replacement was integrity and the selection was the least ideological of the ten Republican nominees (O'Brien, 1989). With Levi in control of the selection process, it was certain that a nominee's ideology would not be the primary factor in the choice. In accordance with Ford's wishes, the attorney general sought out a justice who was more conservative than the departing Douglas yet did not exhibit

the same fervor as some of the other Nixon appointees in their desire to overturn Warren Court precedents.

Two other factors affected Levi's selection of Justice Stevens. The attorney general had personal knowledge of Stevens who had taught at the law school where Levi had served as dean (Lamb and Halpern, 1990). Stevens was also a safe, confirmable nominee who would increase Ford's political standing in Congress by preventing a bruising confirmation battle that might further weaken his status as the only unelected president (O'Brien, 1989). To accomplish this he selected a nominee with no ideological baggage and little interest in joining the other Nixon appointed justices in conducting a judicial revolution. The lax selection process suggested that Stevens would be a moderate on the Court.

The confirmation process for Stevens promised to be stringent. In the 1974 midterm elections, Democrats had increased their Senate majority and were emboldened to challenge a Republican president's Court nominees. Ford's status as an appointed president who had promised not to run for reelection when appointed vice president made him a lame duck (Cannon, 1994). Thus the Senate would historically be more likely to reject his nominee. The lax selection and stringent confirmation process made the choice of a moderate justice more likely.

The Nixon and Ford Administration appointees were divided into two groups. Justices Burger, Powell and Rehnquist underwent a stringent selection and a lax confirmation process and were expected to be more ideological in their decisions. Justices Blackmun and Stevens underwent a different process and were expected to exhibit more moderate tendencies. These five justices made up a majority of the Burger Court and contributed to its lack of a clear ideological direction. This would begin to change as the Nixon and Ford appointees were joined by the first Reagan appointee.

### *The Reagan and Bush Appointees*

President Reagan faced a court vacancy in 1981. With the retirement of Justice Stewart, Reagan had the opportunity to fulfill two campaign pledges, change the Court's ideological direction and appoint the first female justice. Even though early in his term, the administration had developed a systematic approach to choosing judicial nominees used during Reagan's second term as California governor (Cannon, 1991). The selection process had a single objective, choosing judges whose philosophy reflected the president's conservative beliefs.

The White House Office of Legal Policy (OLP) was headed by Edwin Meese, a close Reagan friend, and was used to examine a nominee's legal opinions and off the bench activities. Staffed by conservative lawyers, the OLP was dedicated to removing the Court's liberal tendencies through the appointment of strongly conservative justices (Kmiec, 1995). With Stewart's resignation, Meese and his lawyers were given the task of filling the vacancy. While ideology was an important factor in the choice, the first goal was finding a female nominee who would fulfill Reagan's pledge to appoint a woman to the Court (Cohadas, 1981). O'Connor's name came to their notice based on her career as an Arizona state legislator, her strong law and order opinions as a state judge and the recommendation of her law school colleague, William Rehnquist (Schwartz, 1988; Lamb and Halpern, 1990; Savage, 1992). O'Connor consistently expressed disdain for the procedural rules created by the federal judiciary in protecting criminal rights. As a state judge, she had chafed under the restraints of those federal judges, arguing that their interference only harmed the dispensation of justice. Her views on federalism and crime made her an attractive candidate while her comments on social issues such as abortion and religious freedom made

her a likely supporter of the Reagan agenda on such issues. Also because he was the most conservative justice on the Court, Rehnquist's support of O'Connor would attract the attention of the conservatives in the OLP.

Therefore, the selection process used to choose Justice O'Connor was stringent in looking not only for a female candidate, but the most conservative one they could find. While the search was limited by the pledge to appoint a female justice, the federal courts included many female judges who were qualified for the Court. The administration ignored them in search of a judge who best reflected their ideology. The fact that O'Connor was an unknown state judge at the time of her selection reflects how systematic the search had been. The promise to appoint a female justice limited the candidates who were considered by the White House with such staunch conservatives as Robert Bork being passed over. Yet the administration was able to appoint a justice who would be a consistent vote in support of the president's agenda in many cases.

The stringent selection process was followed by a lax confirmation process. The nomination of O'Connor occurred early in Reagan's term, during his honeymoon with Congress. Also Republicans had just taken control of the Senate for the first time in thirty years. Many senators had ridden in on Reagan's coattails and were unlikely to vote against his first Supreme Court nominee. O'Connor's status as the first female justice eased the process as no Senator wanted to be seen opposing such an historic event. There was little doubt that Reagan's nominee would be confirmed. It would be expected that O'Connor would not exhibit moderation in her support or interagreement scores.

It was not until the middle of his second term that President Reagan was able to fill another vacancy on the Court. The retirement of Chief Justice Burger prompted the president to nominate William Rehnquist for the chief's position and

Antonin Scalia to take Rehnquist's position as associate justice. The White House process in these selections looked carefully at the two nominee's opinions on salient issues. Rehnquist's status as the most conservative justice on the Court made him an easy choice to lead the new Reagan Court while Scalia's reputation on the D.C. Court of Appeals and as an academic made him a certain conservative vote (Smith, 1994). The two justices were well known by Attorney General Edwin Meese who recommended the nominations to the president. Both justices were chosen because of their conservative ideology and agreement with Reagan's own beliefs.

The nominees faced a Republican Senate which supported the Administration. The double nomination tended to diffuse the opposition as Rehnquist took the most abuse from opposition senators and the more conservative Scalia sailed virtually untouched through the process. The fairly lax confirmation process in combination with the ideology driven selection process suggests that Rehnquist and Scalia would not exhibit moderate tendencies on the Court.

Anthony Kennedy's nomination a year later was submitted under different circumstances. Two previous nominees to fill Justice Powell's empty position had failed. The White House process that had chosen Rehnquist and Scalia the year before was abandoned by the new chief of staff, Howard Baker. Baker, a moderate Republican, had arrived at the White House to improve the Administration's political power in Congress (Cannon, 1991). To do that, he wanted a quick confirmation process so that the White House could move onto substantive issues. Accomplishing that required a more moderate nominee than either Robert Bork or Douglas Ginsburg. His choice, Anthony Kennedy, was an appeals court judge with a moderate conservative record (Schwartz, 1995).

Kennedy was seen by Baker as confirmable and earned him the nod. The Kennedy nomination, unlike the previous three by the Reagan Administration, was handled by a moderate, Baker, who focused on a compromise candidate acceptable to the Democratic Senate. Confirmability rather than ideology was the focus of the selection of Kennedy, exemplifying a lax selection process.

The political reality in the Senate was also different. Democrats had taken control after the 1986 midterm elections and were organized to oppose Reagan's Court nominees. The Democratic majority signaled through the rejection of Robert Bork that it would confirm only a moderate appointee. The combination of a lax selection and stringent confirmation process marked by rejection of previous nominees produced the likelihood of a moderate appointee reflected in his support scores and interagreement scores.

George Bush's two Court nominees, David Souter and Clarence Thomas, faced different types of confirmation and selection processes. The replacement of Justice Brennan in 1990 was seen by the Bush White House as a choice that would create significant opposition within the Democratically controlled Senate. Replacing the Court's most vocal liberal with a vocal conservative could raise the ire of liberal senators and interest groups. This fear of a confirmation fight was expressed by Chief of Staff John Sununu as he attempted to convince conservative interest groups of the wisdom of choosing Souter rather than the more conservative Judge Edith Jones. Sununu explained that Souter had been picked over Jones since he was less likely to garner strong opposition on the abortion issue ("Inside Baseball, 1990). Once Souter was confirmed and a conservative majority more firmly entrenched on the Court, Jones would meet less opposition when she was appointed to fill the next Court vacancy ("Inside Baseball, 1990).

Sununu did not mention that Souter's legal writings did not reveal any specific views on the salient issues supported by the president. His views on most subjects were so unknown that he was dubbed the "stealth candidate" since he was able to slip under the ideological radar of the Democratic Senate (Biskupic, 1991). The selection of Souter could be termed lax because of his unknown views and the fact that several other candidates, including federal judges with outspoken views on salient issues, were rejected as being too controversial. Thus political considerations appeared to override ideological considerations in Souter's selection.

The Senate had maintained its Democratic majority after the 1988 elections, making confirmation more difficult. With the presidential honeymoon with Congress over and midterm elections drawing near, the nomination was likely to be challenged. Souter's strategy of not revealing his views on any legal issues, though, eased his confirmation as opposition could not form against his nonanswers.

Justice Marshall's resignation in 1991 gave Bush a second Court vacancy to fill. His selection of Clarence Thomas was based on two criteria, finding a black nominee to fill the vacancy created by the resignation of the only black justice, and finding a conservative (O'Connor, 1992; Smith, 1994). Thomas' conservative credentials were well known in the Reagan Administration, where he had served as head of the EEOC and had expressed conservative views on such issues as affirmative action and religious rights. It has been argued that his position within the Administration had been part of grooming process as Marshall approached retirement (Smith, 1994). In choosing Thomas, the Bush Administration accepted the political reality that replacing Marshall with a white conservative judge would produce strong criticism while coalescing opposition to the nominee (Biskupic,

1991). Sununu's earlier promise to place Edith Jones on the top of the list for the next nomination was forgotten. Race became the dominant factor in filling the vacancy.

Yet the administration did not completely forgo ideology. Obviously there were more experienced black judges in the federal judiciary. Those more experienced judges were passed up to appoint the most conservative black judge that the Administration could find. Thomas' views on salient issues were well known by the administration with his strongest supporters being the most conservative members of the White House staff. Thomas could be accurately described as a true believer within the Reagan Administration, a nominee who would act to fulfill the president's vision of where he wanted to move the Court.

Thomas' success in the confirmation process seemed even more likely than Souter. The main constituency of Senate Democrats, civil rights groups, was split in its support of Thomas. It made voting against Thomas more difficult. If Thomas was defeated in the Senate, it was unlikely that another black nominee would be forthcoming from the Administration. Thus the Senate would be blamed for removing the black seat from the Court. The combination of a black conservative nominee put Senate Democrats in a quandary and produced a lax confirmation process. This made it easier for the Bush White House to choose a more ideological nominee, which they did. While the confirmation process quickly descended into a circus atmosphere, it had no effect on the original decision. In fact Thomas' race was probably the deciding factor in both the attacks against him and his eventual success. It is expected that the justice would be less moderate than his colleagues in both his support scores and interagreement scores.

As shown in Table One, four of the ten successful nominees by the Republican Administrations, Justices Blackmun, Stevens, Kennedy and Souter,

were expected to be more moderate than their fellow appointees. With the justices being categorized according to the selection and confirmation processes, their support scores and interagreement scores will be examined for signs of moderation.

### *Support Scores and the Burger and Rehnquist Courts*

Trends in the support scores for the Nixon-Ford appointees illuminate how the appointment system affected their performance. Tables Two through Four show that both Chief Justice Burger and Justice Rehnquist were the strongest supporter of Nixon's agenda among the Republican appointees. Both consistently voted in favor of the administration's positions on salient issues including crime, desegregation and federalism. The selection of ideological candidates by the administration was successful with the Burger and Rehnquist Court nominations.

Justice Stevens also behaved as predicted. After exhibiting support for conservative positions on salient issues during his first two terms (1975-76), his support dropped dramatically and he became a consistent opponent of those positions. Instead of joining Chief Justice Burger and Justice Rehnquist, Stevens moved in the opposite direction, toward the two remaining Court liberals, Justice Brennan and Marshall. Stevens opposition to Republican administration's views are best displayed in his opposition to the Reagan Administration's views on religious freedoms. Through the last years of the Burger Court (1981-1986), Stevens supported the Reagan Administration's views only once in religious freedom cases (Sickels, 1988)

Justices Blackmun and Powell, though, did not perform entirely according to expectations. It was predicted that Blackmun would exhibit moderate

tendencies in his support scores. Powell was expected not to be as moderate. The two justices showed almost identical support for salient issues from the 1971 through 1977 terms with Blackmun averaging a .53 score through the seven year period and Powell averaging .41 during the same period. Therefore both were strong supporters of the Republican presidents' views on salient issues with Blackmun appearing to be more supportive than Powell.

Beginning with the 1978 term, though, both justices support scores declined. During the remaining eight years of the Burger Court, Blackmun had a positive scale score in only four years with his average score during the period hovering around zero. It was during this period that Blackmun behaved according to expectations.

Powell's support scores also dipped during the period with his average falling by half. The justice became a weak supporter of the agenda of the president who appointed him. While Powell had more moderate support scores than the Chief Justice or Justice Rehnquist, his scores were not as low as the other two Nixon/Ford appointees, Justices Blackmun and Stevens. His moderate scores, though greater than predicted by his appointment system categorization, did not prevent him from being a fairly consistent supporter of the Nixon view on salient issues.

Tables Five and Six show the support scores for the Rehnquist Court. The Burger Court holdovers maintained their tendencies including the two justices who were moderates during the era. Justices Blackmun and Stevens moved further away from the Reagan and Bush Administrations' positions on salient issues. This was not surprising since Reagan and Bush vehemently opposed the Court's abortion decisions which Blackmun authored and Stevens supported. Through the 1995 term, the pair had consistently negative support scores and they

represented the most consistent liberal - moderate votes on the Court. They were eventually joined by Justice Souter, who had been expected to display moderation in his voting.

The most consistent support of the Reagan and Bush positions on salient issues were Chief Justice Rehnquist and Justices Scalia and Thomas. Both Scalia and Thomas had either the highest scores or were tied for the highest scores. Justices O'Connor and Kennedy's scores followed a pattern of strong support during the early terms of the Rehnquist Court then weakening support from the 1991 through 1993 terms. Beginning with the 1994 term, the two justices had an increasing level of support on salient issues. The support scores exhibited little difference between the two justices, a contradiction of the expectation that Kennedy would be more moderate than O'Connor.

Justice Souter's scores made him the least supportive among the Reagan and Bush appointees. After an initial perfect score for salient issues during his first term, 1990, Souter posted consistently negative scores through the 1996 term. Only in the 1992 term did he show positive support for the Bush Administration's positions on salient issues. His scores placed him in agreement more with the Clinton appointees than the Reagan and Bush appointees.

Throughout the Rehnquist Court, Justice Stevens continued his movement away from the views of the Republican Administration that appointed him. His highest scale score during the ten years of the Court was a zero. His consistently negative scores placed him firmly within the opposition bloc.

The support scores for the justices during the Burger and Rehnquist Court generally support the view that selection and confirmation systems can have an effect on a justice's behavior. Three of the justices whose selection and

confirmation suggested they would be moderate in their voting displayed such tendencies in their scores. Only Justice Kennedy appeared to be less moderate than expected.

A stringent selection and lax confirmation system were found to produce justices whose ideology conformed closely with the appointing president. Six of the seven justices who underwent such an appointment system proved to be consistent supporters of the appointing president's position on salient issues. Only Justice O'Connor appeared to stray and only during a three term period of the Rehnquist Court.

The support score results can be bolstered using the interagreement scores for the justices during the Rehnquist and Burger Courts. It is expected that those justices who exhibited strong support scores will also have high standard deviations in their interagreement scores.

### *Intergreement Scores and the Burger Court*

Intergreement scores reveal the voting patterns among justices. The standard deviations of those scores will reflect whether justices were willing to join all of their colleagues or just certain members who were closest to them ideologically.

The Burger era witnessed a bloc of moderate justices who thwarted the designs of Presidents Nixon and Ford. There was also a bloc of three Nixon appointees who were expected to rule consistently in favor of the president's views. Chief Justice Burger and Justices Rehnquist and Powell were expected to have high standard deviations in their interagreement scores. Tables Seven through Nine show that the trio of justices had standard deviations ranking

consistently above the Court's mean. Justice Rehnquist had the highest scores, underscoring his reputation as the member least likely to vote with the opposition bloc.

While Justice Powell's scores dipped below the average in five terms, his scores were not the lowest among the justices. During the 1976 and 1981 terms, Powell's standard deviation score was only fourth lowest among the justices. His score was the third lowest during the 1977, 1980 and 1984 terms.

Chief Justice Burger's scores sometimes placed him in the moderate position among the three justices. During the 1982 term Burger had the lowest standard deviations while in other terms Burger standard deviation scores were close to Powell's. Yet Justice Powell was the one justice of the trio who was most willing to join justices who had a different ideology. Those tendencies were limited as his standard deviations never fell to the level of the other two Nixon-Ford appointees.

Four justices, two Warren Court holdovers and two Nixon-Ford appointees, had standard deviation scores that were consistently below the Court's average. Justices Stewart and White, who had served in the Warren Court, had frequently dissented in the landmark liberal cases of that era. They were expected to hold the key votes for any decision to overrule precedent. The two justices status as swing justices was displayed in there interagreement scores from the 1969-1977 Court terms. Their low standard deviations scores made them the likeliest justices to join either the liberal or conservative side in a case. Neither showed an inclination during that time for expressing a consistent liberal or conservative philosophy, as shown in their contradictory votes to strike down the death penalty in *Furman v. Georgia* (1972) and to uphold the death penalty in *Gregg v. Georgia* (1975). After the 1977 term, though, the two justices'

standard deviation scores began to balloon as they became more conservative in their votes. This made it more likely that Justices Burger, Powell and Rehnquist could pick up a fourth vote from either Stewart or White in a salient case.

The result of this movement of the two justices should have been more conservative rulings by the Court. Instead during the 1970's, Court conservatives were unable to mold a consistent majority. This can be partly attributed to the unwillingness of two Nixon-Ford nominees to join them. Justices Blackmun and Stevens were expected to display more moderate interagreement scores based on the selection and confirmation processes used to choose them. Early in his tenure, Blackmun's standard deviations did not exhibit any inclination to move back and forth from bloc to bloc. Starting with the 1977 term, though, his standard deviations dipped, a sign he was less tied to a particular group of justices.

Justice Stevens had also experienced a lax selection and potentially difficult confirmation process, suggesting he would be a Court moderate. As the standard deviation scores for Stewart and White rose, Justice Stevens' declined. Throughout the entire Burger Court, Stevens' standard deviations remained among the lowest for the justices. His scores were the lowest in four of nine years and second lowest in three of the remaining five. The low standard deviations revealed that Stevens' interagreement scores did not differ much among the justices as he joined liberals and conservatives at a consistent rate. Rarely did his interagreement scores rise above seventy percent or fall below fifty five percent. This can be compared to Justice Brennan joining Justice Marshall in eighty percent of his decisions while voting with Justice Rehnquist approximately forty percent of the time. Justices Blackmun and Stevens low standard deviations for interagreement scores exhibited their tendency to move from one ideological bloc to another. That movement would become less important during the Rehnquist Court.

### *Interagreement Scores and the Rehnquist Court*

The Reagan and Bush appointees also experienced a mixture of lax and strict selection and confirmation processes. The likeliest of the five appointees to exhibit moderation in his standard deviation scores was Justice Kennedy. As the third choice to fill Justice Powell's seat his selection would have been less rigorous in determining his ideology. The scores for the Rehnquist Court can be found in Tables Ten and Eleven.

Justice O'Connor tended to be a consistent vote for those justices most supportive of the presidents' positions on salient issues. Her higher standard deviations showed she did not move from bloc to bloc in her voting decisions. During her first three terms, her standard deviation was above the Court mean. Her scores exceeded Justice Powell's and in 1983 they exceeded the chief justice's score. During the Rehnquist Court, her standard deviations remained high, even exceeding Rehnquist, whose support for the appointing president's values was unquestioned. This unexpected finding can be explained by Rehnquist's consistent support for the government's position even when that contradicted the result desired by the Republican presidents. O'Connor was less of a statist oriented justice. She was willing to overrule government in some instances, producing disagreements with Rehnquist over policy. The sizable gap between her support for liberal justices, including William Brennan and Thurgood Marshall, and her support for conservatives such as Rehnquist and Justice Scalia, is apparent in her standard deviations and raw interagreement scores.

She voted with Brennan and Marshall approximately fifty percent of the cases during the Rehnquist Court while agreeing with Rehnquist and Scalia in over seventy percent of the cases, with her scores approaching eighty percent in three

terms. O'Connor did show a decrease in her standard deviations starting with the 1991 term. But her scores still exceeded that of other justices and her raw interagreement scores with Scalia and Rehnquist did not fall precipitously.

Chief Justice Rehnquist and Justice Scalia also had high standard deviations in their interagreement scores. Both justices voted with each other in over seventy percent of salient cases for most of the terms and agreed with other like minded justices, including O'Connor, Kennedy and Thomas at a high rate. This was combined with a low rate of interagreement with the other justices to exhibit the strong ideological tendencies in their voting behavior.

Justice Kennedy has exhibited moderate tendencies and a willingness to vote with both liberal and conservative justices. During his first term, Kennedy's standard deviation scores equaled the Court's average, placing him in the moderate category. Much like Justice O'Connor, Kennedy displayed increasingly moderate voting during the 1991 term and afterward. He was the most moderate among the Reagan appointees and during the 1993 and 1994 terms his standard deviation scores were the lowest among all of the justices. This made him the likeliest justice to vote with his colleagues who were not supportive of the Republican presidents' positions on salient issues. Kennedy has been the least consistent member of the new majority that emerged on the Rehnquist Court and has earned the reputation as a swing vote. He has been on the winning side of most five to four votes during his tenure, with his vote determining which bloc of justices wins (Schwartz, 1995; Smith, 1995; Smollna, 1996).

Among the Reagan appointees, Justices O'Connor and Kennedy are clearly the most moderate. Between the two, Kennedy appears to be the most likely to vote against his conservative colleagues, while O'Connor's standard deviations

reveal less moderate interagreement scores. Both justices still reflect the conservative philosophy of President Reagan but seem less ardent in their beliefs and more likely to agree with other justices.

The appointment process during the Bush Administration was as stringent as its predecessor. The prediction that both Court appointees would not be moderate in their voting achieved mixed results. Except for his first term, 1990, Souter's standard deviation score was below the mean in three of four years and in the 1992 term it was the lowest among all the justices. The 1992 score indicates that he did not consistently vote with one group of justices over another. His standard deviation scores reflects the opinion of Court observers that Souter has moved away from his conservative colleagues and has become a more predictable member of the moderate-liberal bloc on the Court (McGinnis, 1995).

Justice Thomas has moved in the opposite direction of Souter. His standard deviation scores are well above the mean, frequently the highest among his colleagues. His high rate of interagreement with the Chief Justice and Justice Scalia compares unfavorably with low scores with Justice Stevens and Blackmun. His standard deviation scores reflect that Thomas has become the most predictable member of the conservative majority and least likely to vote with the moderate wing of the Court. Thus Thomas fulfilled the expectations of George Bush.

The Reagan and Bush appointees have exhibited in their interagreement scores how a weak selection and strict confirmation process can affect future performance. The lower standard deviations for Justices Kennedy and Souter can be partially explained by how ideology was removed as a central factor in their selection.

### *Conclusion*

The judicial appointment system, consisting of a presidential selection and Senate confirmation process, can affect a president's attempt to change the ideological direction of the Court. In order to choose a nominee with the proper ideology, a president must institute a rigorous selection process to determine each judicial candidate's philosophy. Presidential success is also dependent upon a Senate confirmation process that is not hostile to the president's goals for the Court.

Using the two processes, it was possible to categorize the eleven successful appointees and predict their ideological behavior on the Court. Six justices, Burger, Powell, Rehnquist, O'Connor, Scalia and Thomas were predicted to be consistent conservative votes based on the selection and confirmation processes used to choose them. Though some were more consistent in their support of salient issues than others, their support scores and the standard deviations of their interagreement scores reflected a different voting pattern than the other appointees.

Support scores focused on how often a justice voted with the president's stated position on salient issues. Justices appointed under a more stringent selection and lax confirmation system should have higher support scores than justices appointed under a different appointment system. That system would also be expected to affect the justices interagreement. The standard deviations for those scores were used to show the strength of ideology in a justice's voting. Larger standard deviations represented the spread in a justice's interagreement scores and whether that justice joined a small group of his colleagues at a more frequent rate. Lower standard deviations would suggest moderation in voting,

with ideology playing a smaller role which of his colleagues a justice joined.

Four justices who underwent a lax selection and stringent confirmation processes were expected to exhibit more ideologically moderate behavior. Justices Blackmun, Stevens, Kennedy and Souter all exhibited moderate voting patterns in their support scores and standard deviations. Each of the four were less likely to vote for the Administration's position on salient issues and were more willing to join more liberal justices than were the other appointees.

The findings in this chapter supported the contention that appointment system affects a justice's performance on the Court. In order for presidents to change the Court's ideological direction, it is necessary that they use a stringent selection process focusing on a nominee's ideology and views on salient issues. This is easier to achieve if the nominee faces an easy confirmation process, one usually conducted by a Senate controlled by the president's party. Partisan control of that chamber is critical in allowing a president to focus on ideology in selecting nominees. A pliant Senate, one that shares the goal of the president in changing the Court's ideological direction, will grant the president greater leeway in choosing nominees based on ideology.

While the appointment systems used by the four Republican Administrations did explain some of the differing results of the Burger and Rehnquist Court, it did not fully explain why the latter was more successful than the former. Another step in explaining that will be achieved in examining the leadership styles and abilities of the chief justice and senior associates on the two courts.

## **Chapter Five**

### **Leadership and the Chief Justice**

A president seeking to change the Court's ideological direction must look beyond ideology to achieve success. An individual justice's political beliefs can guide his vote but producing change requires the vote of a majority of justices. Molding a consistent bloc requires a leader, someone able to mold differing viewpoints into a majority. This chapter will examine leadership on the Burger and Rehnquist Courts and how it contributed to the success and failures of court packing.

Leadership will be studied according to its task and social components. Both chief justices will be compared using anecdotal evidence of how they led the Court. The same will be done for the senior associates during the period. The leadership skills exhibited in both positions should affect the success of changing the Court's ideological direction. In addition to anecdotal evidence, a more systematic analysis will be used to test leadership skills. The chief justice and the senior associate have the power to assign opinions in a Court case. This power provides the best avenue for exerting leadership as the author of the majority opinion must be able to draw in sufficient votes while also adhering to the president's views on salient issues. Effective use of assignment power would allow a leader to guide the Court.

An effective chief justice would follow two strategies in opinion assignment. The chief would assign a high proportion of salient opinions to himself. This would ensure his point of view was reflected in the opinion. When

not self assigning, the chief would choose a justice who was ideologically closer to him. Both strategies would advance the ideological changes sought by the appointing president.

### *Leadership, the Chief Justice and the Senior Associates*

One focus in judicial behavior research examines leadership and the influence exercised by the justices. These studies have focused heavily on the chief justice's ability to guide the Court and maintain relations among his colleagues. The chief justice position is seen as important because of his opinion assignment power. The chief justice has the power, when he is in the majority, to assign the Court's opinion to any member of that majority. The chief justice can assign important opinions as a reward to justices who consistently votes with him. The opinion can also be assigned to a wavering justice or one who best reflects the beliefs of the other members of the majority in order to maintain a coalition.

In addition to opinion assignment, the chief can exercise leadership in the weekly conferences where the justices discuss and decide cases. The chief has the responsibility of starting the discussion, outlining the case and voting first. With this he can direct the discussion of the case toward certain issues. How conference discussion reflects the views of the chief justice and determines the direction of the discussion is best reflected in the differing approaches of Chief Justices Warren and Burger in criminal rights cases. When discussing cases involving the rights of criminal defendants, Warren focused the conference on the defendant himself, his social and economic background and the police techniques used in the arrest (Schwartz, 1996). Warren's emphasis mirrored his own preference for stricter constraints on police and prosecutors. By creating the image of a defendant under

attack by an abusive system, Warren was able to draw his colleagues toward rectifying perceived abuses.

Warren Burger used a different approach in describing the issues raised by criminal rights cases. Burger focused on the crime itself, a description of its grisly details and the victim's suffering (Schwartz, 1996). Burger's approach reflected his own belief that criminals should not be released on the basis of technicalities. He directed the conference to the fact that a crime had been committed and that the guilty person should be punished. Both chief justices emphasized case facts to help his own arguments and direct his colleagues toward a particular decision.

The chief also has leadership power based on his position. The chief represents the judiciary in addition to the Supreme Court. His voice carries the force of the leader of the entire judicial branch. While the chief has only limited and indirect power over his colleagues, his formal position may have an effect on them. Some justices may feel more deferential toward the chief on important issues and go along with the chief's views so as not to weaken the prestige of the office or the Court.

While the focus on leadership in the Court has been on the chief justice, other justices have the power to lead their colleagues. The senior associate justice's position is filled by the associate justice with the longest tenure on the Court. The senior associate can assign the Court's opinion when not part of a majority that includes the chief justice. The justice speaks second in conference and can provide a different interpretation of the important issues. Because of the senior associate's extended Court tenure - most attain the position after at least fifteen years on the Court - that justice's name can become synonymous with the institution. The justice can even attain equal stature to the chief. For example, Justice Black had been senior associate for over twenty years when Warren Burger

arrived at the Court. Black's experience and leadership abilities had made him a powerful presence during the Warren Court and his voice and opinions had become synonymous with the Court. Black was the de facto leader, his acquiescence in any important decision being critical to Burger's success as chief.

The abilities of the senior associate can also determine whether the chief is a successful leader. If the senior associate is able to present opposition to the chief's political views and build coalitions around alternatives, then the senior associate may prevent the chief from guiding the Court. Some Court observers have attributed Chief Justice Burger's leadership weaknesses to Justice Brennan, who served as senior associate during the last decade of Burger's tenure (Savage, 1993; Schwartz, 1988, 1990). Brennan opposed Burger in many constitutional cases and was frequently able to build a coalition of justices around his own liberal view of the Constitution.

The leadership success and failures of chief justices were first examined in a systematic manner by David Danelski. Borrowing from psychological studies of small group leadership, Danelski utilized two leadership types, task and social, to explain how justices can lead the Court. Task leadership involves the conducting of Court business, deciding issues in cases, assigning and writing opinions and ensuring that justices complete their duties in a timely fashion (Danelski, 1964). Task leadership has also been expanded to include intellectual leadership or the ability to guide the Court's jurisprudence in the direction desired by the leader (O'Brien, 1989). Social leadership reflects the chief's ability to maintain collegiality on the Court by preventing legal disputes from becoming personal (Danelski, 1964). Anecdotal evidence has been utilized to characterize certain chief justices according to their task and social leadership abilities. Not surprisingly, chief justices who exerted task and social leadership skills were

identified as successes. These included John Marshall and Charles Evans Hughes. Those who provided neither task nor social leadership, Harlan Stone and Fred Vinson, were identified as failures. Yet both types of leadership were not seen as necessary for a chief to guide the Court. Some chiefs exhibited strong social leadership skills including William Howard Taft and Earl Warren while having weaker task leadership abilities. Taft's delegated task leader was Justice Van Devanter, who directed the technical legal discussion during conferences. Warren allowed Justice Black to be task leader, even allowing him to run conferences early in Warren's tenure.

Danelski relied upon anecdotal evidence from justices and law clerks to determine the abilities of the chiefs. The same type of evidence can be used to determine the type of leadership skills displayed by the two chief justices. The first to be examined is the social leadership exerted by Warren Burger and William Rehnquist.

### *Social Leadership and Warren Burger*

It is in social leadership, maintaining close relations among his colleagues, that Chief Justice Burger and Rehnquist differed the most. During his seventeen year tenure, Warren Burger earned the reputation of generating animus in his colleagues and members of the Court staff. In several works examining those relationships, Burger was portrayed as unprepared, unable to lead, petty and at times intellectually dishonest (Jeffries, 1994; Lusky, 1991; Savage, 1993; Schwartz, 1990, 1993, 1995; Steamer, 1986; Woodward and Armstrong, 1979). Two elements of Burger's personality have been seen as the cause for the enmity he generated among his colleagues. Burger's overbearing attitude and attempt to

bully the others to accept his view only caused them to resist his leadership efforts and dismiss him as little more than a political hack. Also Burger's obsession with formality and attention to his more titular duties as chief justice caused some justices to suspect that the chief enjoyed his title more than the legal duties associated with it.

Court personnel were also familiar with Burger's security obsession, his outbursts against justices during conference and open disdain for the opinions of the liberal holdovers from the Warren Court (Jeffries, 1994; Woodward and Armstrong, 1979). The chief justice's public attacks on Warren Court precedents and his promise to overturn them did not make him a favorite among those justices who had written or supported those opinions. Burger's ideology put him in direct conflict with such senior justices as Hugo Black, William Douglas and William Brennan. His aggressive style made it inevitable that these legal disagreements would become personal in tone and make social leadership difficult for the chief.

Burger's enjoyment of the administrative side of his job also limited his social leadership. The chief justice not only presides over the Supreme Court but also over the entire federal judiciary, representing it at conferences and making proposals for improvements. One of those improvements took much of Burger's time and political capital as he proposed the creation of an intermediate court of appeals to limit the number of cases that the Supreme Court would have to hear (Burger, 1983). His proposal caused debate including criticism from within the Court emanating from its liberal wing (Brennan, 1973, 1982) which further strained the relationship between them and the chief justice. His dedication to the administrative side of his job also affected Burger's performance of his other duties. Frequently he was unprepared for conference and unable to direct the discussion so as to prevent acrimony from breaking out.

In addition to stressing better administration for the entire federal judiciary, Burger made efficiency within the Supreme Court another of his goals. His emphasis on giving justices greater resources weakened the social bonds among them and weakened the ability of the chief justice to lead the Court. Burger introduced such bureaucratic methods as division of labor, formality and dependence on technology to the Court. He created such labor saving devices as the cert pool that divided up the reading of cert petitions among the other chambers and reduced the workload for the law clerks (Jeffries, 1994). Thus those clerks could spend more time researching and writing opinions for the justices, making each chamber more independent. The introduction of computers and copiers into the Court also increased productivity in the number of opinions that each chamber could produce per term (Schwartz, 1990).

The increased productivity and efficiency has had the side effect of reducing the amount of time justices spent in personal negotiation over the details contained in an opinion. In previous Courts ranging from the Marshall Court up to the Warren Court, justices would hold informal conferences among themselves to work out difficulties in opinions and coordinate their positions on upcoming votes (Schwartz and Leshner, 1983; White, 1988b). Beginning with the Burger Court, such personal contact became less frequent as the justices communicated mostly on paper. This lessened the influence of each individual justice but particularly the chief justice. Previous chiefs had controlled many of the resources, dispensing it to allies and using that control to lobby for the votes of wavering justices. The chief today has little control over resources and communicates mostly with written memos. It is doubtful that Earl Warren would have been able to build a unanimous Court behind *Brown v. Board of Education* (1954) if he had

communicated with his colleagues by paper rather than personally. His efforts also would have been stymied if each justice had the resources available to write and research opinions that challenged his *Brown* opinion.

### *Social Leadership and William Rehnquist*

The Court reforms may have contributed further to Burger's weak leadership skills, making it more difficult for the chief justice to smooth over hurt feelings and prevent legal disputes from becoming personal grudges. Yet even with these structural barriers to leadership, his successor, William Rehnquist has earned the reputation of being an effective social leader who can charm both conservative and liberal justices. Where Burger was portrayed as pompous and stuffy, going out of his way to insult his colleagues and Court personnel, Rehnquist is seen as informal, easy going, polite and respectful to his colleagues and law clerks (Savage, 1992).

While Rehnquist had been blamed for not controlling some of the verbal excesses that have appeared in some of the opinions of his colleagues (Smith, 1994), overall he has been credited with reducing some of the bitterness that had been openly displayed during the conferences and the reading of opinions that occurred during Burger's tenure (Savage, 1992; Schwartz, 1996). Rehnquist is credited for running a tightly controlled conference, one that allows each justice to state his opinions without interruption and prevents the raucous debate that marked his predecessor's conferences. He has also limited justices to reading aloud only one of their separate opinions per term. This constraint limits the

opportunities for public splits or expression of bitterness that can harm personal relationships.

The chief's affability has won over even his staunchest ideological critics with Justice Brennan describing Rehnquist as an "excellent chief justice." (Irons, 1994). His personal friendliness with each justice was apparent even before he became chief. Early in his tenure, he struck up a personal relationship with Justice Douglas, whose reputation for irascibility was second to none, even spending vacation time at the senior justice's home (Jeffries, 1994). With his sense of humor and down to earth attitude that prevents legal disputes from becoming personal, Rehnquist is seen as an effective social leader on the Court.

With their social leadership skills differing in their effectiveness, it is not surprising that ability of the two chief justices to perform task leadership also diverged. The task leadership of Warren Burger and William Rehnquist will be examined next.

### *Task Leadership and Warren Burger*

Warren Burger's preoccupation with the administrative side of his position was blamed for his inadequate task leadership and created the perception he was unprepared for the Court's weekly conferences. It is at these conferences where the chief has the best opportunity to provide task leadership. Without a firm knowledge of the cases Burger was unable to lead the Court. Conferences during his tenure lasted several hours, frequently without the justices arriving at a definitive conclusion.

Burger's performance in conference was also placed in a less charitable light by some of his colleagues. Some justices perceived his poor performance in

Machiavellian terms. His indecisiveness was seen as part of a plan to assign the majority opinion even when his own views placed him in the minority. At times Burger would not cast his vote until after his colleagues had voted. His failure to vote during his turn caused some liberal justices to suspect he joined the majority to prevent those justices from writing a more liberal opinion. With the power to assign the opinion, the chief could choose the justices with the more moderate views for writing a liberal decision. Burger was accused of such devious motives in assigning the *Roe v. Wade* decision to Justice Blackmun, who he believed would write a more moderate opinion than would Justice Douglas or Brennan (Jeffries, 1994; Woodward and Armstrong, 1979).

Whether Burger's indecision was the result of poor preparation or part of some complex plan to control the opinion assignment, the result of his indecisiveness was a weakening of his task leadership abilities. Speaking first, he had the opportunity to guide the discussion toward the issues he wanted to emphasize. His disjointed presentations, though, tended to degenerate into rote speeches about his own political beliefs and issues that were irrelevant to the case (Jeffries, 1994).

In addition to his performances at the weekly conferences, Burger also stumbled in writing opinions. The chief has been portrayed as struggling to form coalitions for his opinions and convince justices that his approach to a case was correct. Several examples exist including *Swann v. Charlotte Mecklenberg*<sup>79</sup>, the Nixon Tapes Case<sup>80</sup>, *Bakke* and *Milliken v. Bradley* (1974). In each Burger had difficulty maintaining a majority, even when the justices were unanimous in

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<sup>79</sup>402 U.S. 1 (1971)

<sup>80</sup>*United States v. Nixon* 418 U.S. 683 (1974)

conference. Bernard Schwartz (1996) described how Burger allowed his colleagues to lead the Court in *Buckley v. Valeo*<sup>81</sup>. *Buckley* involved a challenge to the 1974 Campaign Finance Act. The Court upheld parts of the law, striking down others. Strong leadership was required from the chief to synthesize those disparate views. Instead, Burger ceded control of the opinion to the other justices, placing responsibility for the authorship of elements of the opinion to different justices who were responsible for building support for their section (Schwartz, 1996). The result in *Buckley* was an amalgamation of opinions, each using different reasoning and philosophy to defend or attack sections of the law. The opinion reflected no general philosophy but rather the narrow opinions of the nine authors behind *Buckley*. Burger's inability to lead in such a case reflected his poor leadership skills. With his poor performances at conferences and the struggles with opinion writing, Burger exhibited limited task leadership over the Court.

### *Task Leadership and William Rehnquist*

William Rehnquist's task leadership abilities can also be compared favorably to his predecessor's. Rehnquist's affability contributed to his success but so did his reputation as a knowledgeable justice who was able to state his views clearly and consistently. During his tenure on the Burger Court, Rehnquist's conservatively oriented analysis countered the liberal philosophy offered by the Warren Court holdovers. He also showed effectiveness in attracting the votes of such moderates as Byron White and Potter Stewart.

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<sup>81</sup>424 U.S. 1 (1976)

As chief justice, Rehnquist changed the method of running conferences, maintaining strict control over the discussion and providing crisp and concise summaries of the cases to be discussed. Unlike his predecessor, Rehnquist is well prepared and his votes in cases subscribe to his conservative philosophy. There is no doubt about Rehnquist's views and no suspicion that he is manipulating the opinion assignment process. Along with his own presentations, the chief justice ensures that each of the other justices are allowed to state their views without interruption. This has sped up the process of deciding cases and weekly conferences rarely run past their time.

His coalition building and strong opinions also reflect his task abilities. The appellation of "a Rehnquist Court" conjures up the image of a strongly conservative Court led by the chief and issuing opinions consistent with his philosophy. The same could not be said for "a Burger Court," which seemed like little more than an amalgamation of judges who could only agree to disagree and was marked by inconsistent statements of philosophy.

The differences in how the two chief justices controlled the direction of the Court's decisions is most apparent in the type of opinions authored by the two men in major cases. While Burger authored several landmark decisions that reached liberal results, the major decisions handed down by Rehnquist, *Webster v. Reproductive Services* (1989), *Cruzan v. Missouri*<sup>82</sup>, *Board of Education v. Dowell* (1990) and *U.S. v. Lopez* (1995) all reached conservative conclusions and frequently overturned more liberal precedent. Any Court scholar would be shocked to see a Rehnquist opinion upholding affirmative action or providing for busing to integrate public schools, two landmark decisions authored by Burger.

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<sup>82</sup>497 U.S. 261 (1989)

The chief justice also exhibited a willingness to lead from dissent, holding to his views even when a majority of the Court disagreed. In such cases as *Texas v. Johnson*<sup>83</sup>, upholding flag burning as protected speech, and *Metro Broadcasting v. FCC*<sup>84</sup>, Rehnquist strongly argued his point of view from dissent rather than writing a watered down majority opinion that would not reflect his views. In fact during his ten year tenure, Rehnquist did not write a major nonunanimous opinion advancing a liberal precedent.

Rehnquist also displayed the ability to craft opinions that gathered in wavering members of the Court, such as Justices O'Connor and Kennedy, without undermining his conservative message. Such crafting becomes apparent when a Rehnquist opinion is attacked by Justice Scalia or Thomas as not being conservative enough. The chief justice appears to realize that the two justices to his political right will join his opinions on most occasions and that it is more important to protect the votes of the two moderate members of his bloc. It is this willingness to compromise around the edges that has made Rehnquist a successful task leader.

Anecdotal evidence has identified the major differences in the leadership abilities of Chief Justice Burger and Rehnquist. The former is portrayed as unable to lead the other justices toward his conservative philosophy while the latter is seen as being remarkably successful at guiding the justices. The next step requires testing whether these perceptions match what has occurred in the salient cases in which the two men participated. The success of the two chief justices in leading the Court will also be demonstrated using the opinion assignment power they wield.

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<sup>83</sup>491 U.S. 397 (1989)

<sup>84</sup>497 U.S. 547 (1990)

### *Methodology*

Written opinions provide insight into the task leadership provided by the chief and senior associate. Successful task leaders can either write or assign opinions reflecting their legal views. The same type of leadership could be exhibited by the senior associate in opposition to the chief.

Opinion assignments in cases involving salient cases will be analyzed first. A chief would be expected to assign salient cases to justices whose views closely approximated his own. In order for the chief justice to alter the Court's jurisprudence, he would use the opinion assignment power to assign salient cases to his fellow appointees or himself. This strategy would ensure that the chief's views were reflected in the Court's opinion.

A chief justice hoping to maintain credibility with his colleagues would likely use his opinion assignment power in an inclusive manner. Justices expect to be assigned opinions at an approximately equal rate. The assignment rate of chief justices have been studied by Court scholars. They discovered that equality in opinion assignment was the standard during the Warren, Burger and Rehnquist Courts (Brenner and Spaeth, 1988; Rohde, 1972; Segal and Spaeth, 1993; Slotnick, 1978, 1979).

Two measures were used to arrive at those conclusions and will be used in this paper. The first was the opinion assignment ratio (OAR), which determined the rate at which a chief justice assigned opinions to his colleagues. The OAR was calculated using the number of times the chief assigned an opinion to a justice divided by the number of times the justice agreed with the chief. The percentages for each justice will be compared with his colleagues during a term and used to

give a rough estimate of the equality in opinion assignment.

The term by term analysis provides raw data for determining equality, but a more systematic analysis is needed to determine the level of equality during the chief's tenure. This will be achieved using the Coefficient of Relative Deviation (CRV). The CRV is calculated using the mean assignment percentage and dividing it into the standard deviation of assignments for a particular period (Segal and Spaeth, 1993; Slotnick, 1978, 1979). The higher the standard deviation in the opinion assignment ratio, the larger the spread in that ratio among the justices. A high standard deviation would be reflected in a high CRV score and reflect inequality in how the chief justice assigned opinions to his colleagues. A lower standard deviation would create a lower CRV and be interpreted to mean that the chief had assigned opinions at a more equal rate. The CRV scores for the Warren, Burger and Rehnquist Courts reflected the chiefs' attempt to assign on an equal basis with the three Courts scoring .12, .11 and .11 respectively.

Yet such an equitable arrangement would seem to run counter to the desire to change the ideological direction of the Court. Chief justices appointed to perform that task would be expected to favor ideology over fairness when assigning salient opinions. The chief would choose justices whose views approximated his own, ensuring that those views were written into the law. In this case, an effective chief would have high CRV scores when assigning salient cases. To test that effectiveness, the Burger and Rehnquist Courts will be broken into different periods, each reflecting a different dynamic associated with the number of Republican appointees on the Court and the opportunities for the chiefs to use their opinion assignment power to lead the Court.

Between the 1969 and 1974 Court terms, the Nixon appointees made up a minority on the Court and tried to move the Court in a more conservative direction

using the votes of such Warren Court holdovers as Justice Stewart and White. This would require the chief to assign to the most moderate member of the majority or himself in an attempt to maintain a coalition. That strategy would be expected to change as Justice Douglas retired during the 1975 term. Between the 1975 and 1980 terms, the Nixon and Ford appointees composed a majority of the Court. This increased the likelihood that the Court would move in a conservative direction while weakening the importance of such moderates as Justices Stewart and White. The chief would have to be less concerned with assigning salient opinions to those two justices in order to maintain their vote.

The 1981-1985 terms saw the appointment of Justice O'Connor, who brought another solidly conservative vote to the majority. O'Connor's presence added intellectual firepower to the Court, strengthening the conservative bloc and presenting another opinion assignment option to the chief justice. With a larger bloc of supporters, the chief would be able to spread opinion assignment around and should have been more effective in using his power to maintain majorities on the court.

The fourth period, the 1986-1992 terms, began with the resignation of Chief Justice Burger and witnessed a growing conservative bloc begin to dominate the new Rehnquist Court. The chief could depend upon consistent majorities, making opinion assignment a less important because there was a comfortable majority of conservatives on the Court. The conservative bloc's growth halted in the 1993 term with the retirement of Justice White. Between the 1993 and 1996 terms, the Court broke into two blocs, a consistent five member conservative and four member liberal/moderate bloc. This close division made opinion assignment by the chief a much more important power to use in controlling a majority.

In addition to assigning and writing majority opinions, a chief justice can also lead through the use of a dissent, forcefully expounding his views and placing the power of his office behind those views. A chief cannot exert task leadership by writing or joining in decisions that contradict or violate his beliefs. Writing or joining such an opinion would only weaken the chief's ability to lead the Court in the future.

Task leadership abilities will be measured using opinions on salient issues during the Burger and Rehnquist Courts. It is expected that the two chief justices during this period will press their conservative views before the Court and will be opposed by the more liberal senior associate justices. They include Justices Black, Douglas and Brennan, all of whom would want to maintain or extend Warren Court precedents. Both Rehnquist and Burger would attempt to change the Court's rulings on issues of criminal rights, school integration, religious freedom, federalism and property rights. They would author or assign opinions reflecting those views and attempt to maintain winning coalitions to support them. It is expected that Rehnquist would exhibit stronger task leadership skills than his predecessor, successfully leading the Court in a more conservative direction. Rehnquist would also be less likely to join or write opinions reflecting politically liberal values, preferring instead to lead from a dissenting opinion. Chief Justice Burger would be expected to show less effective use of his leadership position.

### *Opinion Assignments and the Burger Court*

Table Twelve includes the percentages for each of the justices' OAR's and the CRV for the three periods of the Burger Court. Each of the percentages reflect some biases in opinion assignment behavior favoring the chief's ideological

compatriots. Also the CRV scores exhibited inequality in opinion assignments. The CRV for the three periods of the Burger Court were at least three times higher for salient issues than the overall CRV's. Throughout the entire Burger Court, the CRV for opinion assignments averaged .12 (Segal and Spaeth, 1993). During the first period, the CRV averaged .46. During the second period it was .31 while for final period it was .38. As expected, the scores reflected Burger's discrimination in assignments of salient opinions. His bias tended to be in favor of his fellow Nixon appointees and the most conservative Warren Court holdover, Justice White.

During the first period, two thirds of Burger's opinion assignments on salient issues went to justices most supportive of the president's position on those issues. Four justices, Burger, White, Powell and Rehnquist received the lion share of salient opinions. Burger self assigned nineteen percent of the cases, having the fourth highest OAR and writing the most opinions. Rehnquist was assigned twenty two percent, Powell twenty percent and White nineteen percent. The justice with the highest OAR, though, was William Brennan, a leading opponent of Nixon's agenda. He was assigned twenty three percent of salient opinions when in agreement with Burger. The unexpectedly high percentage was the result of the small number of opinions, 26, in which he and Burger were in agreement. This compared with Burger agreeing with White in 65 of 67 opinions and Powell in 49 of 53 opinions. Brennan's OAR revealed that Burger was less discriminating in his opinion assignment than was expected. Yet the first period saw Burger's most effective use of opinion assignment. It had the highest CRV score and the highest percentage of self assignment for salient decisions.

Burger also used his assignment power to maintain the support of the marginal vote in a majority. Justice White authored five of twelve five to four opinions during the period while Burger self assigned the remainder. By assigning

to White, who represented the marginal vote, Burger hoped to maintain his support. The 1969-1974 terms have been recognized as the period that the Warren Court decisions disliked by Nixon were under the greatest threat of being overruled. This could be partly attributed to Burger's bias in opinion assignment.

That bias declined appreciably during the 1975-1980 terms. The appointment of Justice Stevens in 1975 gave the Court five Nixon-Ford appointees and presented an opportunity for a definitive rightward shift in its decisions. This shift would be aided by an opinion assignment strategy favoring the Republican appointees. The data for the second period of the Burger Court present a different picture.

The first difference between the two period is the percentage of cases assigned to the four most conservative justices, Burger, White, Powell and Rehnquist. Their opinion output declined from two thirds to one half of the opinions assigned by the chief during the 1975-1980 terms. Burger's self assignment rate declined by a third to twelve percent, a score that was fifth among the justices and falling below both Justice Marshall, a leading Court liberal, and Justice Blackmun.

Justice Rehnquist had the highest OAR for salient opinions, writing eighteen percent of the opinions when he agreed with Burger. Justice White, though, saw his OAR decline by a third to twelve percent and Powell's OAR declined by half to ten percent. Both justices scores fell below the percentages of the three moderate/liberals, Justices Stewart, Marshall and Blackmun. White and Powell also wrote a smaller number of opinions than Blackmun and Stewart, two justices whose views did not closely approximate that of the chief justice.

In addition to the OAR and raw scores, the CRV showed that the level of equality in opinion assignment increased as the CRV fell by one third to .31.

Justices who approved of the Nixon and Ford views on salient issues were assigned a smaller percentage of opinions as Burger distributed more opinions to his moderate and liberal colleagues.

The changes in the OAR during the second period of the Burger Court was also apparent in his assignment of five to four opinions. He self assigned only one and gave the same number to Justice White. During the first period, the two had written all of the five to four opinions on salient issues. As with assignment of his other opinions, Burger followed a more egalitarian approach assigning three such opinions to Justice Rehnquist and two apiece to Justices Powell and Blackmun.

The last period of the Burger Court, the 1981-1985 terms, began with Justice O'Connor's appointment and the strengthening of the bloc of justices seeking to change the Court's ideological direction. Such strength was reflected in a return to a strong bias in opinion assignments to the Nixon and Reagan appointees who favored those changes. Chief Justice Burger and Justices White, Rehnquist and O'Connor authored fifty nine percent of the Court's opinions, an almost twenty percent increase from the previous period. Burger increased his self assignment rate to twenty percent, writing nineteen total opinions. Rehnquist had the second highest percentage, eighteen, and second highest number of opinions authored, thirteen. Burger also focused on salient issues, with twenty four percent of his written opinions dealing with such issues while only thirteen percent of the Court's cases involved salient issues. The CRV score for the period, though, only rose to .38. Again Burger showed stronger egalitarian impulses than would be expected from a chief justice who sought to change the Court's rulings on salient issues.

Reflecting his change of strategy in assigning opinions, Chief Justice Burger became more active in writing five to four decisions. He self assigned half

of those opinions, six total. Justice Powell, whose support scores placed him in the position as marginal justice during the period was assigned only one. Instead of following the rule of assigning to the marginal justice, Burger gave three opinions to Justice Rehnquist and two to Justice O'Connor, his most consistent supporters.

During his tenure, Chief Justice Burger displayed a bias in his opinion assignments in salient cases. He favored colleagues who agreed with his views, assigning them a larger percentage of cases, particularly during his first five terms and last five terms. His limited bias would be overshadowed by the more deliberate strategy of his successor.

### *Opinion Assignments and the Rehnquist Court*

The first period of the Rehnquist Court, 1986-1992 terms witnessed a growing conservative majority as the Reagan and Bush Administrations made five appointments. With more votes, Rehnquist's opinion assignments would be expected to slanted toward those appointees. Table Twelve shows that the chief justice followed such a strategy.

Four justices, Rehnquist, White, O'Connor and Scalia authored seventy percent of the Court's salient decisions. This exceeded the percentages for all three periods of the Burger Court. Rehnquist was particularly active, self assigning thirty two percent of salient opinions. He also focused his opinion writing on salient issues, with twenty six percent of his opinions dealing with those issues though they made up only thirteen percent of the Court's decisions.

Rehnquist also assigned opinions to three Reagan appointees, Justices O'Connor, Scalia and Kennedy, at a higher rate. Scalia received sixteen percent of

opinions where he agreed with the chief justice while Kennedy was assigned fifteen percent and O'Connor fourteen percent. The CRV score also reflected the chief's bias. The .63 value exceeded that of the three periods of his predecessor. It was five times the CRV value of .12 for the Rehnquist Court on all opinions during the 1986-1991 terms (Segal and Spaeth, 1993).

During the 1993-1995 terms, the chief justice continued his opinion assignment bias in favor of his fellow Reagan and Bush appointees. Once again, he self assigned the largest percentage of salient opinions. He also followed the strategy of assigning a large percentage of opinions to a marginal vote. Justice O'Connor received the second highest percentage of salient opinions during the period. The OAR's showed the close division of the Court during the period, with the four strongest supporters of the chief justice receiving the overwhelming number of opinions. Four justices, Blackmun, Souter, Stevens and Breyer received no opinion assignments on salient issues. Rehnquist's strong bias in favor of the Reagan and Bush appointees was exhibited in the CRV of .92, the highest among the periods analyzed. During these three terms, Rehnquist wielded his opinion assignment power on salient decisions to ensure that views agreeable to him were expressed.

William Rehnquist's bias in favor of his fellow Reagan and Bush appointees reflected his attempt to lead the Court through opinion assignments. He was also more supportive in his own opinions of the views of the Republican presidents who were trying to shift the Court's ideology. The success of his tenure as chief justice can be partly attributed to his opinion assignment strategy.

### *Support for the Appointing President by the Chief Justice*

In addition to the assignment of opinions to his colleagues and maintenance of a majority coalition, a chief justice exhibits task leadership through the enunciation of a consistent philosophy. A chief justice whose opinions move from one end of the political spectrum to another may find it difficult to guide the Court. Consistency of views will be measured using the number of majority opinions written by the chief reflecting the views of the appointing president.

During his tenure, Warren Burger authored thirty decisions on salient issues that supported the position of the Nixon, Ford and Reagan Administrations. Over half of them, sixteen, came during the last period of his tenure. Burger also authored fifteen opinions that could be identified as opposing the views of the Republican administrations that wanted to change the Court's direction. Twelve of the fifteen came during the first two periods of his tenure (1969-1980). These results point to the effect that Justice O'Connor's appointment had on the Burger Court. While the Court did not overrule or rewrite as much precedent as during the Rehnquist Court, it did move decidedly in the direction favored by President Reagan.

The two to one ratio of opinions favoring the administration's position on salient issues made Burger a consistent vote for those positions but not a powerful voice in favor of changing the Court's direction. The chief justice was willing to bend his views in order to be part of the majority. In desegregation cases, Burger displayed no central philosophy, certainly not one that reflected the views of the Nixon Administration. He joined an early decision in *Alexander v. School Board*<sup>85</sup>

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<sup>85</sup>396 U.S. 19 (1969)

calling for immediate desegregation and contradicting administration policy. His decision in *Swann v. Charlotte-Mecklenburg* (1971) upheld the use of busing to achieve integration. Burger also concurred in *Keyes v. School Board*<sup>86</sup> which required northern schools to prove their actions were not predicated on deliberate discrimination.

Burger's joining of *Keyes* was unusual because he authored the opinion in *Milliken v. Bradley* (1974) making it more difficult for parents to show that northern school districts had discriminated. A member of the majority in two contradictory cases, Burger was unable to provide a consistent voice in desegregation cases and lead the Court.

Burger was more effective in expressing consistent views in criminal rights cases. While joining some pro criminal rights decisions<sup>87</sup>, Burger effectively argued his ideas for changing the *Mapp* and *Miranda* rulings in his concurring and dissenting opinions. One area of reform which he argued for was in limiting the number of federal Habeas Corpus appeals that state defendants could receive. In two cases<sup>88</sup>, Burger argued for tightening of habeas standards, a view that attracted a majority vote in *Stone v. Powell*<sup>89</sup>.

One of Burger's most vociferous dissents later became a policy adopted by the Court. In *Brewer v. Williams*<sup>90</sup>, the Court ruled a confession obtained after the defendant asked for counsel was not admissible. In his dissent, Burger assailed the majority's reasoning, arguing that the confession was not coerced and the

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<sup>86</sup>413 U.S. 189 (1974)

<sup>87</sup>*Michigan v. Tyler* 436 U.S. 499; *Mincey v. Arizona* 437 U.S. 385; *Arkansas v. Sanders* 442 U.S. 753; *Reid v. Georgia* 448 U.S. 438; *Carter v. Kentucky* 450 U.S. 288; *Steagald v. U.S.* 452 U.S. 204; *Welsh v. Wise* 466 U.S. 470.

<sup>88</sup>*Schneekloth v. Bustamonte* 411 U.S. 218 and *Capp v. Murphy* 411 U.S. 291.

<sup>89</sup>428 U.S. 465 (1976)

<sup>90</sup>430 U.S. 387 (1977)

evidence obtained from it should be used in the trial. Seven years later, in *Nix v. Williams*<sup>91</sup>, the chief justice wrote the opinion upholding the use of the evidence in the trial under a new inevitable discovery standard. Burger reasoned that since the body was going to be discovered even without the confession it should be used in evidence. The five to four decision further weakened the *Miranda* ruling on confessions and advanced the chief justice's agenda in the area.

While Burger struggled to enunciate a clear philosophy on salient issues, his successor proved more successful at doing so. Chief Rehnquist during the 1986-1996 terms authored eighteen opinions on salient issues, all stating the views of the Reagan and Bush Administrations. This was six times more than the three he authored that were in opposition to those views. During his ten terms as chief justice, there was little doubt how Rehnquist would vote on salient issues. He expanded the definition of Takings, revived the Commerce Clause and Tenth Amendment as restrictions on congressional powers and consistently voted to overrule *Roe v. Wade* (1973). Rehnquist's consistency aided him in achieving the results that eluded his predecessor. In addition to an unwavering statement of his views, Rehnquist also faced limited opposition from senior associates. Part of his success and Burger's failures could be attributed to the abilities of the senior associate who served with them.

### *Senior Associates and the Burger Court*

Task and social leadership on the part of senior associates during the Burger Court show how an effective leader can stymie the leadership efforts of a

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<sup>91</sup>467 U.S. 431 (1984)

chief justice. During Warren Burger's tenure, he served with three senior associates, Justices Black, Douglas and Brennan. Court observers agree that Brennan displayed the greatest leadership skills among the three and had the greatest effect on the Court (Schwartz, 1990; O'Brien, 1991)

Justice Black had been senior associate since 1945 and with Burger's appointment entered the twilight of his judicial career. He also began to reconsider his judicial legacy as reflected in Warren Court opinions. Ulmer (1979) demonstrates how Black's support for civil liberties began to decline during the late sixties and early seventies. Black voted to significantly undermine the exclusionary rule in *Coolidge v. New Hampshire*<sup>92</sup>. He also joined the opinion in *Harris v. New York*<sup>93</sup> that weakened Miranda. He also wrote the opinion in *Palmer v. Thompson*<sup>94</sup> interpreting the Equal Protection Clause to allow municipal officials to close public facilities when ordered to integrate them.

Black's shift would have had a profound effect on wavering justices. His credentials as a crusading liberal were unmatched. Thus his arguments for cutting back on liberal precedent would appear less politically motivated and would likely draw the support of moderates such as Potter Stewart and Byron White. It was during Black's stint as senior associate in the Burger Court that the Chief Justice appeared poised to initiate the judicial revolution that had been promised upon his nomination. Yet even with Black's vote, Burger was unable to overrule many Warren precedents. The senior associate leadership abilities had been depleted by age, his performance in conference slipping and his personal relations with the other justices becoming more strained (Schwartz and Leshner, 1983). After

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<sup>92</sup>403 U.S. 443 (1971)

<sup>93</sup>401 U.S. 222 (1970)

<sup>94</sup>403 U.S. 217 (1971)

Black's death in 1971, many of the decisions targeted by Chief Justice Burger remained the law. And instead of a senior associate who was becoming more conservative, Burger was faced with Justice Douglas, who had an unswerving commitment to a liberal philosophy. Between the 1971 and 1974 terms, with Douglas as senior associate, the Court's movement to the political right stalled.

During those three years, the justices issued a series of opinions that alternated between political conservatism and liberalism. The decision in *Roe v. Wade* (1973) was followed by *Miller v. California* (1973) which allowed local juries to define obscenity within their community. The Furman decision striking down the death penalty was followed by a series of decisions that limited the reach of the exclusionary rule and the Miranda decision<sup>95</sup>. The shifting in political philosophy could be attributed to a lack of effective leadership on the part of the chief justice and senior associate.

Douglas was unable to play a positive role as the Court's liberal leader. Described as independent minded, irascible, intolerant of the failings of others and unwilling to compromise on his views, Douglas was anything but a leader (Jeffries, 1994; Woodward, 1979; Simon, 1980). He was unconcerned with building coalitions around his opinions, preferring instead to play a lone hand. One justice noted that Douglas did not like when others joined his opinions because it prevented him from firing off a dissent against them (Jeffries, 1994). His social leadership skills were lacking, having no close relationships with the other justices, even disliking his ideological allies such as Justice Marshall. His task leadership was also lacking. Even though he expressed a strongly liberal philosophy, many of his opinions were devoid of much legal reasoning. For example, his concurring

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<sup>95</sup>Including *Schneckloth v. Bustamonte* 412 U.S. 218 (1973); *Michigan v. Tucker* 417 U.S. 453 (1974) and *U.S. v. Calandra* 414 U.S. 338 (1974)

opinion in *Roe v. Wade* spoke of the "Individual freedom from bodily restraint or compulsion" and "the right to walk, stroll and loaf."<sup>96</sup> Such statements lacked the technical explanation that was part of most Court opinions and rarely drew the support of his colleagues. Though his obstinate individualism may have made Douglas a heroic figure to some, it did not make him an effective leader. The moniker of "Antijudge" given him by one Court observer fit well (White, 1988b).

Douglas' 1975 retirement placed William Brennan in the senior associate's chair. For the next fifteen years, Brennan battled against the Court's growing conservatism and achieved remarkable success. Between 1976 and 1981, the Court drifted away from the conservative course originally set by Warren Burger. During this period, Brennan became Burger's equal and at times appeared to be leading the Court.

During his tenure, he worked to build a liberal bloc on the Court but with only one dependable vote, that of Justice Marshall, he was forced to appeal to the Nixon and Ford appointees. During the late seventies, he was successful in adding Justice Blackmun to his coalition in most social issues. During the 1980's, Justice Stevens drifted toward the liberal bloc, frequently concurring with their opinions. By the last years of Burger's tenure, there was a fairly consistent four member bloc supporting a more liberal interpretation of the Constitution.

His success as senior associate can be attributed to sharpened task and social leadership skills honed during the Warren Court. During the 1960's, Brennan was the coalition builder among the liberal majority, working closely with the Chief Justice to attract the votes of moderates such as Tom Clark and Potter

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<sup>96</sup>410 U.S. 347 (1973)

Stewart (Schwartz and Leshner, 1983). During this time he gained the reputation as a justice willing to lobby his colleagues in their offices and even trading votes with the other justices (Lusky, 1991; Savage, 1992). Brennan was also effective in conference, stating his views in a clear and consistent manner. His writing ability was also recognized as aiding him in his task leadership duties. Using sweeping statements about liberty and freedom, Brennan was able to attract the votes of justices who appeared carried away by the emotive impact of his opinions (Irons, 1994; Savage, 1992).

Brennan's hold on the liberal bloc weakened during the Rehnquist Court, mainly because of old age and infirmities. With his retirement in 1990, he was replaced as senior associate by Byron White, who had become a dependable vote for the chief justice during the 1980's. White did not actively oppose the chief justice during the 1990-1992 terms. Even if he had, his social leadership skills were hindered by a gruff manner and unwillingness to discuss cases or compromise his views to accommodate his colleagues. White had no specific political philosophy to guide him along a consistent path and his resistance was limited to a few cases. In the *Fulminante* decision White led the opposition to declaring that a coerced confession introduced into a trial could be considered as a harmless error that would not overturn a conviction. In *Jacobson v. U.S.*<sup>97</sup>, he limited the ability of federal officials to run sting operations by mail. Yet these cases were more anomalies than a pattern as White joined the conservative bloc in most cases involving social issues including abortion and religious rights.

White retired after the 1992 term and Justice Blackmun assumed the role of senior associate. Blackmun is best known for his opinion in *Roe v. Wade*

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<sup>97</sup>112 S. Ct. 1535 (1992)

(1973) and his sudden conversion to a politically liberal position on many social issues. During his twenty years on the Court he had earned the reputation as indecisive and a slow writer. During his one year as senior associate, Blackmun behaved predictably, suddenly declaring his opposition to the death penalty and having little effect on the Court's direction.

Blackmun's departure after the 1993 term placed Justice Stevens in the position of senior associate. During his seventeen years on the Court, Stevens had acquired the reputation as a maverick, an unpredictable vote and a justice tied to no particular ideology (Sickels, 1988). He had produced the most concurring and dissenting opinions during his tenure than any of his colleagues, a sign that he was unwilling to compromise his views in order to build coalitions. During the 1993-1996 terms, when Stevens was senior associate, the chief justice led the Court in rewriting the law in affirmative action, the Establishment Clause and the Tenth Amendment. He received only token resistance from Stevens.

The multitude of senior associate justices during the Rehnquist Court has prevented an effective opposition leader from emerging. It has also strengthened the chief justice and made him a more effective leader. This is demonstrated in the differing success at opinion assignments by the senior associates.

### *Opinion Assignment and Senior Associates*

The opinion assignment strategies of senior associates can determine their effectiveness in challenging the chief justice. A successful senior associate can also weaken the leadership abilities of the chief.

During his two years as senior associate on the Burger Court, Black opposed Burger in only four of twenty one salient cases. He dissented with the

chief justice on four occasions. By agreeing with Burger in eighty one percent of salient cases, Black abdicated the position of opposition to the next senior associate, Justice Douglas. During the 1969 and 1970 terms, Douglas wrote five dissenting opinions and assigned four majority opinions, the same as Black. Control over opinion assignment was divided between two senior associates who had differing visions of the direction the Court should take. Because of this split, the 1969 and 1970 terms represented the best opportunity for the chief to begin a wholesale revision of constitutional law (Blasi, 1983).

With Black's retirement, Justice Douglas formally assumed the position as senior associate. During this thirty years on the Court he had played the role as a maverick, disdaining a leadership role or trying to convince his colleagues to join his opinions. Such handicaps were on display during his three full terms as senior associate where he was able to form only two majorities in salient cases. He had better success at drawing in the votes of Justices Brennan, Marshall and Stewart, who formed ten of thirteen four member dissenting blocs during the period. It is not surprising that Douglas was more effective in leading dissenting blocs since much of his legal reputation had been built on his dissenting opinions. Douglas' stated unwillingness to compromise on his views made it more difficult for him to acquire the support of such moderates as Justice Blackmun and White.

The weakness of the two senior associates who served during the 1969-1974 terms was reflected in the Chief Justice's leadership success during the period. As described above, Burger was more discriminating in his opinion assignment policies during the five terms and appeared ready to overturn both Mapp and Miranda, the goals set out by the president who appointed him.

The second period of the Burger Court witnessed a stagnation in the chief's attempts to change the direction of the Court. Douglas' resignation placed Justice

Brennan in the role of senior associate. With the departure of a solid liberal vote, Brennan was in a weaker position than his two predecessors. He had only the dependable vote of Justice Marshall while facing five Nixon-Ford appointees. Yet even with these barriers, Brennan was able to prevent a wholesale rewriting of constitutional law. During the six terms, he was senior justice in fourteen salient cases and led a four dissenter bloc in nine more. The number of opinion assignments was double the amount of his two immediate predecessors.

In addition to the raw numbers of majority opinions assigned, Brennan achieved success at an individual level. He was able to draw the consistent support of Justice Blackmun in such salient cases as school desegregation and federalism. He also attracted the vote of the new appointee, Justice Stevens, at a more frequent rate. Brennan's ability to form a new liberal/moderate coalition was exhibited in the fact that he and Justice Marshall, the two most consistent liberals, dissented alone as a pair on only two occasions during the six terms. Blackmun and Stevens increasing support for Brennan's opinions saw the formation of modern version of the "Four Horseman" during the last period of the Burger Court.

Brennan's success at creating majorities was also on display in cases not involving salient issues. During the 1975-1980 terms, he was the driving force behind decisions expanding on Warren Court precedents in free speech, women's rights and race relations. In *Elrod v. Burns*<sup>98</sup>, Brennan wrote that the First Amendment prevented patronage firings in some government positions. In *Craig v. Boren*<sup>99</sup>, he oversaw the creation of an intermediate level of scrutiny for legislation that discriminated on the basis of gender. In the *Bakke* and *Fullilove*

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<sup>98</sup>427 U.S. 347 (1976)

<sup>99</sup>429 U.S. 190 (1976)

decisions, Brennan provided the impetus for upholding government affirmative action policies. In *Steelworkers v. Weber*<sup>100</sup>, he wrote the opinion that interpreted the 1964 Civil Rights Act to allow racially discriminatory policies in hiring. It was these last two sets of opinions that galvanized many political conservatives and led to the Reagan Administration's attempt to rework the Court's precedents.

During the final period of the Burger Court, the 1981-1985 terms, Brennan saw the number of moderates decline by one as Justice Stewart retired while Justice O'Connor's appointment strengthened the conservatives. Yet during the five terms, Brennan assigned fourteen majority opinions, the same number as the previous period, and led a bloc of four dissenters in another fourteen opinions. Even with the strengthened conservative bloc, Brennan was able to control the opinion assignment in sixteen percent of salient cases. In another sixteen percent he cobbled together a four member bloc to oppose the majority. In one third of the salient cases, Brennan was a major player, either controlling or limiting the reach of an opinion.

In two salient areas, religious freedom and federalism, Brennan proved particularly effective. Brennan was in the majority in six Establishment Clause decisions, assigning two of them while forming four member dissenting blocs in two others. Brennan's use of the Lemon test to strike down church-state accommodation led to Chief Justice Burger's tentative steps away from the test as a recognition that the standards he created were leading to disagreeable results.

Brennan was particularly successful in the area of federalism. In the *Usery* decision, a five member majority opened up the door to state governments so they could challenge federal legislation on Tenth Amendment grounds. Brennan moved

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<sup>100</sup>443 U.S. 193 (1979)

to slam that door. During the 1981-1985 terms, he led a five member coalition that systematically rejected the Tenth Amendment claims of state governments<sup>101</sup>. Brennan built his majority by drawing the vote of Justice Blackmun, who had been part of the *Usery* majority. In two of the cases, Brennan assigned Blackmun the opinion including the *Garcia* opinion overruling *Usery*. Brennan closed a conservatively oriented policy space opened by the Burger Court.

The senior associate's success during the last two periods of the Burger Court can be attributed to Brennan's task and social leadership abilities. He used his written opinions to attract moderate votes while his personal friendliness made him one of the best liked members of the Court. By using the power of the senior associate's position, Brennan was able to stymie Burger in the areas of religious rights and federalism while expanding liberal precedent in other areas.

#### Senior Associates during the Rehnquist Court

The Burger Court represented the zenith of Brennan's influence as senior associate. His power to build majority coalitions weakened during the Rehnquist Court. Only in affirmative action cases was Brennan able to slow the chief justice's agenda<sup>102</sup>. Seven of his nine opinion assignments came during the first year of the Court as Brennan found his leadership match in Rehnquist. The chief justice's willingness to use his opinion assignment power to shape the Court's decisions on salient issues were discussed above. His abilities compared favorably with Brennan's faltering efforts as his tenure came to an end.

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<sup>101</sup>*FERC v. Mississippi* (1981), *EEOC v. Wyoming* (1981), *Garcia v. San Antonio* (1985)

<sup>102</sup>*U.S. v. Paradise* (1987); *Metro Broadcasting v. FCC* (1990)

With Brennan's retirement in 1990, the mantle of senior associate came to Justice White, who served in the position during the 1990-1992 terms. White's tenure ended the senior associate's role as main opponent to the chief justice. During the latter years of the Burger Court and the early years of the Rehnquist Court, White had become a dependable supporter of the chief justice on such issues as abortion, affirmative action and religious rights. He assigned only six cases on salient issues during his tenure as senior associate. Most of his disagreements with the chief justice centered on criminal issues and federalism, but for the most part White provided little opposition leadership to the chief.

White's retirement in 1993 placed a more liberal justice in the senior associate's position. Justice Blackmun had become a dependable member of the bloc led by Justice Brennan. He had earned the reputation as a justice who had difficulty making up his mind. These are not characteristics of a good leader and during his one year as senior associate assigned the opinion in only one salient case<sup>103</sup>.

The last three years of the Rehnquist Court, 1994-1996 terms saw a dramatic shift in a direction desired by both Presidents Reagan and Bush. During this period the Court rewrote federal affirmative action policy, created a new standard for protecting religious freedom, and struck down racial gerrymandering. A majority of the justice revived both the Commerce Clause and Tenth Amendment as restrictions on Congressional power.

Justice Stevens served as senior associate during this period. As the head of the opposition he had to discard his reputation as a maverick and attempt to build coalitions around a liberal/moderate position. He was more successful at

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<sup>103</sup>*Kiryas Joel v. Grumet* (1994)

forming four member dissenting blocs than winning coalitions. During his three years as senior associate, he was able to build coalitions in only three salient cases<sup>104</sup>. Each of the three cases involved issues of federalism and perceived abuses of that power. Stevens was effective in moving the opinion in each case away from the issue of federalism, attracting the votes of Justice O'Connor in *BMW* and *Romer* and attracting Justice Kennedy's votes in all three. Yet even with these victories, Stevens was able only to issue fiery dissents from many of the Rehnquist opinions that turned the Court's jurisprudence in a decidedly conservative direction.

Once again Chief Justice Rehnquist's leadership skills allowed him to guide the Court in the direction in which he wanted it to move. He controlled the opinion assignment in most salient cases with the senior associates having only a limited effect in a small number of decisions. The last period of the Rehnquist Court showed the importance of leadership skills and how a chief justice could dominate a Court using his powers.

The senior associates played significant roles in the success of both Warren Burger and William Rehnquist as chief justice. While both chief justices served with a majority of justices who shared their ideology, their efforts to direct their colleagues had mixed results. Burger appeared more effective early in his tenure. He was more active in his own opinion writing and assigned salient opinions to justices with whom he shared views. Later in his tenure as chief justice, Burger was unable to overcome the opposition of Justice Brennan, the most effective senior associate during his tenure. Brennan was able to attract moderate justices to slow the conservative tide while expanding liberal precedents.

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<sup>104</sup>*Arkansas Term Limits v. Thornton* (1995); *BMW v. Gore* (1996); and *Romer v. Evans* (1996)

During the Rehnquist Court, the chief dealt with weakened senior associates and had a larger conservative majority. After the 1986 term, the senior associate was able to mount only token resistance to Rehnquist's efforts and form a majority coalition in less than ten percent of the cases. It was during this time that the greatest shift in the Court's jurisprudence occurred as old precedents were replaced. The leadership abilities of the chief justice and the lack of leadership provided by the senior associate was partly the cause.

### *Conclusions on Leadership*

The leadership abilities of the chief justice and the senior associate can have a profound impact on whether a president can alter the Court's jurisprudence. Chief Justice Burger's leadership skills were lacking in their task and social components. He was unable to prevent professional disagreement from becoming personal. His task leadership suffered from his enjoyment of the perks of office and lack of preparation for conference. Burger's power over opinion assignment reflected his weaknesses. He maintained a level of equality in assigning salient cases, hindering his efforts to alter the Court's ideological direction. He assigned salient opinions to liberal and conservative justices at an approximately equal rate and did not use his assignment power to lead the Court. Burger also did not self assign at a rate that would allow him to place his own imprint on the Court's decisions. Part of Burger's failure to change the Court's ideological direction as desired by Richard Nixon can be attributed by the chief's limited leadership skills.

William Rehnquist's successful leadership also explains his Court's greater success at meeting the goals of the Reagan Administration. Rehnquist's social skills allowed him to maintain friendly relations with all of his colleagues and

separate professional and personal disagreements. He provided task leadership by forcefully arguing his point of view in conference. In using his opinion assignment power for salient cases, Rehnquist was willing to discriminate in favor of his fellow Reagan and Bush appointees who were in close agreement with him. He also self assigned a high percentage of cases, presenting the opportunity for him to guide opinions in the direction he desired. The first decade of the Rehnquist Court has seen a decided shift to the right as desired by the two appointing presidents.

The comparison of the two chief's leadership skill was also affected by the senior associates serving with them. Warren Burger's greatest success came during the early years of his tenure when a weakened senior associate provided limited opposition to his views. Burger's effectiveness declined with the accession of Justice Brennan as senior associate. Brennan was able to maintain a coalition of justices in opposition to Burger's philosophy. This prevented the chief from rewriting the law as he wished.

William Rehnquist has faced four different senior associates during his ten years as chief. The turnover in the position has weakened it as a center of opposition to the chief. In addition, the justices occupying the senior associate's chair were at the end of their careers and exhibited little willingness to expend energy to oppose Rehnquist. This prevented a consistent opposition bloc from forming during his tenure.

The leadership skills of Warren Burger and William Rehnquist have contributed to the relative success and failure of the two Courts. The methods used to test leadership effectiveness have revealed the sometimes stark differences between the two. The next major difference is the activist bent of the appointees of the four administrations. The willingness of justices to engage in an activist agenda also contributed to the Court's success at changing its ideological direction.

## **Chapter Six**

### **Judicial Activism and a New Conservative Agenda**

The previous two chapters focused on ideology and leadership as essential parts of any attempt to alter the Court's ideological direction. Yet a strong ideological majority under effective leadership cannot be successful if it is following the agenda set by its predecessor. Another of the elements of presidential success in altering the Supreme Court's jurisprudence is the appointment of justices with an activist philosophy. Presidents must choose nominees who are willing to overturn established precedent and replace it with alternatives that reflect their own policy preferences. Those appointees must be less concerned with stability in the law and stare decisis when considering precedent with which they disagree.

Judicial activist justices are a necessary component for altering the Court's ideological direction because of the importance of precedent. Presidents in conflict with the Court want to change its legal decisions in addition to the legal standards under which those decisions are made. Presidents in conflict with the Court want to change its legal decisions in addition to the legal standards under which those decisions are made. Those standards are contained within legal precedents which must be changed in order for the president's political agenda to be advanced by the Court. To understand the effect of judicial activism on efforts to alter the Court's ideological direction, it is necessary to define the term and means for identifying it. Upon identification of activism, an analysis of the Burger and Rehnquist Courts will be conducted, searching for the elements of activism and whether the presence of activists on the Court affected its rulings.

Because activism is a difficult concept to identify and measure, several tools will be utilized in the chapter. Activism will be analyzed using the amount of new agenda space for favored groups created by the new justices, their willingness to overrule precedent that advanced the political agenda opposing their own, the participation of interest groups in amicus briefs, the creation of new standards for deciding salient issues and effect of activist opinions on the overall rulings of the court in salient areas. The first task, though, is constructing a workable definition of activism in order to measure its existence and strength.

### *Activism and Role Perceptions*

Judicial activism refers to the perceptions judges have about the courts' role in government. Activist justices believe that the Courts were created to check the majority will as represented by the legislative and executive branches. Activists fear that majorities will abuse their power, taking away the rights of the minority in order to achieve certain policy preferences. Since the executive and legislative branches are directly accountable to those majorities they are vulnerable to being swept away in the passions of the moment. Contrarily, life tenured judges have no such accountability and can ignore the majority in seeking to protect certain overriding principles. These principles are either mentioned in the constitution, such as free speech and due process, or suggested within its framework, such as privacy. Judicial activists are willing to use judicial review to overturn the acts of the majority in order to protect minority rights.

Judicial restraintists perceive a more limited role for judges within government. They believe the Constitution created a democratic government accountable to the people. The constitutional framework placed an implicit trust in

the voters and elected representatives to stay within the confines of the powers ceded to government. With a representative republic as the goal of the constitution, restraintist judges believe that unelected, unaccountable public officials should not play a large role in determining government policy. They fear rule by the few and believe in using judicial review only when government has clearly violated an explicit constitutional provision. Otherwise, the courts should defer to the elected legislature and executive and depend upon the people to remove officials who have abused their power.

Role perceptions also act in concert with a judge's political beliefs when deciding a case (Gibson, 1978; Scheb et. al., 1991). Therefore judges who strongly support criminal rights and have an activist temperament will be more likely to overturn a conviction than a restraintist oriented judge sharing the same beliefs.

Delineating between judicial activists and restraintists can be a delicate task. One such effort was carried out by Bradley Canon who divided activism into six dimensions. They include majoritarianism, interpretive stability, interpretive fidelity, substance-process dichotomy, specificity of policy and availability of an alternative policymaker. Those six can be further divided into two categories, activism directed toward constitutional interpretation and doctrine and activism directed against legislative and executive actions. The first category, which includes interpretive stability and fidelity, refers to the willingness of judges to ignore precedent that contradicts their beliefs and create new doctrine to reflect those beliefs (Canon, 1982). Activist justices are less likely to follow precedent, producing instability in constitutional interpretation. Activists show less fidelity to

the constitutional text and reading their political beliefs into vague constitutional commands.

The second category, which includes the four remaining dimensions, refers to the willingness of judges to overturn the acts of the other branches. In such cases judges overrule executive and legislative actions (Canon, 1982). The judges then require the same branches to implement judicial made policy.

Both categories of activism are critical in achieving any change in the Court's ideological direction. Justices who are unwilling to overrule precedent and create new doctrines that follow their policy preferences will be less successful in changing the direction of the Court's rulings. With old precedent in place and being implemented, the Court's decisions will reflect the policy preferences of the justices who created that precedent. Overruling the precedent removes those policy preferences.

The new appointees should seek to overrule the liberal precedents of the Warren Court and replace them with more conservative oriented rulings. If the Court simply trimmed around the edges of precedent, its decisions would reflect the policy set by the Warren Court and resulting in constitutional drift.

It was this condition that affected the Burger Court. It has been described as being engaged in rootless activism (Blasi, 1983). The justices serving during this period were activist in that they were willing to replace government officials' judgment with their own. Yet their antimajoritarian instincts were not guided by any political philosophy. Instead most precedent dated from the Warren Court and ran counter to the conservative tendencies of some of the new appointees. The justices were faced with implementing liberal decisions they did not like but could not overrule. They attempted to trim around the edges by reaching conservative results using liberal precedent. The result was inconsistency in the Court's rulings

in such areas as desegregation, criminal rights, and religious rights. This rootless activism partly explains why the Nixon and Ford appointees failed to change the Court's jurisprudence on salient issues.

The Burger Court's failure in creating new precedent and doctrine prevented it from performing in the other activism category, striking down legislation contrary to their political beliefs. In addition, the Nixon and Ford appointees could not create new policy space for conservative issues in the Court's agenda. Policy space for the Supreme Court refers to the cases heard by the justices involving a particular issue or policy of interest to them (Pacelle, 1991). Frequently, justices choose cases based on disputes between appeals courts, lower court decisions that fly in the face of Court precedent or cases that present a new and important issue that the Court has not heard (Abraham, 1993; Segal and Spaeth, 1993). Justices also have broad discretion in hearing cases involving issues conforming to their own political beliefs. Liberal justices want to hear cases involving criminal rights while conservatives favor religious and property rights cases. In order to hear these cases, four justices must agree to grant a writ of certiorari. Yet the creation of new policy space requires five votes. Only a majority of justices can create new policy areas that can be used by the Court to advance a particular political agenda.

For example, in the 1976 decision in *National League of Cities v. Usery*<sup>105</sup>, the Court majority signaled that it would hear state challenges to federal law based on the Tenth Amendment. The *Usery* decision saw the Court create new policy space for Tenth Amendment challenges. If a majority had rejected the

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<sup>105</sup>426 U.S. 833 (1976)

Tenth Amendment argument in *Usery*, then states would have been told that no new policy space had been opened. The result of the majority's action was a flood of state challenges to federal law using the Tenth Amendment.

If the Burger and Rehnquist Courts were to achieve the goal of creating a conservative jurisprudence, it was necessary that new policy space be opened. In order to change the Court's agenda, the justices would write new precedent, such as that in *Usery*, signaling a change in their approach to constitutional interpretation. The Court would also actively use judicial review to strike down legislation, such as they did in *Usery*. This would signal to litigants that the justices would look favorably on constitutional claims against similar laws. An additional element of activism involves generating outside group support for the justices' agenda. Silverstein and Ginsberg (1987) noted that interest group participation since the Warren Court has allowed the judiciary to separate itself from presidential influence. Because presidents have the power to appoint members of the judiciary the executive branch has had the most influence with judges (Scigliano, 1971). That influence, though, has been on the wane as the Court opened itself up during the 1960's to more special interest law suits. Politically liberal groups such as the ACLU, NAACP and environmentalists have been effective in using the Court to enact their social and political agenda. Their lobbying efforts focused on sponsoring and arguing cases before the Court or filing amicus briefs on behalf of a litigant (O'Connor and Epstein, 1982). These groups focused on issues ranging from racial discrimination to free speech and the separation of church and state (Epstein, 1985).

These groups received beneficial rulings from the Court and in return aggressively fought to prevent a change in the Court's membership that would weaken their ideological hold on its decisions. During the 1960's, the groups were

not active in opposing a nomination since the nominees supported their goals. But during the four Republican administrations beginning in the 1970's, the groups vigorously fought several nominations that would have moved the Court in a decidedly conservative direction. The Haynsworth, Bork and Thomas nominations exhibited the power of the groups. Their opposition to the nominees caused Haynsworth and Bork to be rejected by the Senate and likely slowed the ability of the Republican presidents to remake the Court according to their own beliefs<sup>106</sup>. In order for the Republican appointees to change the Court's ideological direction, they would have to draw the support of conservatively oriented groups by making rulings benefiting those groups. By favoring certain issues and groups, the justices would create political support for their jurisprudence outside the Court. The justices would implement this strategy by hearing a greater percentage of appeals by favored groups. By agreeing to hear certain cases, the justices would be signaling their support for certain groups. Those groups in turn would file a larger percentage of amicus briefs in favor of their position.

With these elements of activism in mind, it becomes possible to determine the level of activism in the two Courts. Since activism within the Court and among the justices cannot be directly measured, several statistics will be generated to determine whether the Burger and Rehnquist Court's contained activists who wanted to change the Court's jurisprudence.

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<sup>106</sup>The more insidious strategy of these groups during the Thomas nomination focused not only on defeating him but destroying his reputation and name to weaken his voice on the Court. Considering his activism in opinion writing it appears not to have succeeded.

## *Methodology*

Activism will be measured using both case analysis and quantitative techniques. The type of method used will be dependent upon the information being analyzed. The overrulings of precedent, the creation of new policy space on the Court's agenda, the use of standing to aid favored groups and the opinions of activist justices and their effect on Court decisions will be examined using case analysis. The rate of cert granting for favored litigants and the amicus participation by interest groups will be studied using quantitative techniques. The initial examination of activism, though, will consist of categorization of the Burger and Rehnquist Court's in terms of the level of activism exhibited by each. The analysis will consist of looking at the decisions issued by each Court on salient issue and noting whether the justices exhibited activist characteristics as defined by Canon's categories. For example, if justices rewrite precedent and use that precedent to replace elected officials' judgment with their own, they would be engaged in judicial activism. The focus will be on the Burger and Rehnquist Court's rulings on salient issues.

The decisions will also be rated as politically conservative or liberals. This categorization will be determined according to the type of rights being expanded and whether the decision corresponded with the beliefs of the appointing president. Since the four administrations being studied were headed by conservative Republican presidents, Court decisions corresponding to the Administrations' beliefs will be categorized as conservative.

Upon determining the level of overall activism, the elements of activism found in each Court will be analyzed. They include the overruling of precedent and the expansion of policy space. In order for justices to alter the Court's

ideological direction, they must change the precedents that govern how salient issues are decided. Overruling Warren Court decisions and replacing them with decisions more favorable to the new appointees would allow the justices to change the Court's direction. Measuring precedent change requires examining the major precedents in salient issues - *Mapp* and *Miranda* for example - and determining how the Burger and Rehnquist Courts had changed the interpretation of the original decision or even overruled it. A decision can be specifically overruled or interpreted to mean the opposite of the intention of the justices who authored it. This requires case analysis of the reasoning and the results of salient decisions during the two Court periods.

Standing requirements would also be used by the justices to open the door for more appeals by favored groups or limit the number of appeals by disfavored groups. Cases involving issues of standing and salient cases where standing is an issue will provide insight into whether the Republican appointees gave favored litigants greater access to the Court. It is expected that the justices will waive standing requirements for litigants whose arguments are favored by the justices. The same requirements would be used to prevent disfavored groups from gaining access.

Along with loosening standing, the justices would attempt to open policy space for favored litigants involved in salient issue cases. The Republican appointees would rule in favor of certain rights favored by the appointing president. The justices would proceed to create new doctrines and standards allowing favored litigants to challenge government policy. Salient cases will be analyzed for examples of new standards being created and whether subsequent cases were used to expand that policy space.

Finally, cases analysis will be used to determine how justices with activist

philosophies altered the Court's decisions. Specifically the willingness of the Republican appointees to make policy statements in majority and special opinions will be examined. The arguments in those special opinions will be noted and future cases analyzed for whether those special opinions had an effect on the Court's decision.

Quantitative measures will be used to determine the rate of participation for favored litigants and groups. Litigants can have their cases heard by the Court only if four justices agree to grant a writ of cert. Justices favoring a certain group would likely hear appeals of lower court rulings that went against the group. For example, in religious rights cases, the appellants would be expected to favor church state accommodation. The Court would hear fewer appeals of lower court decisions favoring church state accommodation. The greater the percentage of appellants representing a favored group, the more activist the Court.

A second measure of group support and inclusion in the Court's agenda will be the number of amicus briefs filed by those groups. The briefs are used to support a litigant and argue for the justices to take a certain position in the case. Groups favoring stronger law enforcement, more states rights and protection of religious rights would be expected to be more active in the amicus filings. During the Rehnquist Court, those opposing abortion and affirmative action would be more likely to write amicus briefs. If the justices are able to create policy space and use their new agenda to benefit certain groups, then the number of amicus filings by those groups in salient cases would increase.

Before cases analysis and quantitative techniques can be used to examine individual justices's opinions and Court decisions on salient issues, it is necessary to analyze the general tenor of the Burger and Rehnquist Courts in relation to their role philosophy. In order for the Nixon and Ford Administrations to have been

successful in changing the Court's philosophy the Burger Court had to act in an activist manner, rewriting the law in their conservative mold. The Reagan and Bush Administration's efforts also hinged on the Rehnquist Court's ability to produce conservative precedent.

### *The Burger Court and an Activist Conservative Agenda*

The Nixon and Ford appointees achieved limited success in replacing the Warren Court's liberal agenda. The conservative issues of federalism, religious rights, property rights and a restrained federal power were not advanced by the Nixon and Ford appointees. Instead, the Burger era saw the expansion of a liberal agenda. The Court agreed to forced busing of school children, the creation of an abortion right, the upholding of affirmative action policies, the temporary abolition of the death penalty and a new commitment to equal rights for women.

The Burger Court's one area of success in creating new policy space occurred in *National League of Cities v. Usery* (1976). In *Usery*, a five member majority struck down a federal requirement that state employees be included under federal minimum wage guidelines. Justice Rehnquist's opinion stated that such a requirement invaded the proper province of the states and violated the Tenth Amendment. The decision explicitly overruled a similar case, *Wirtz v. Maryland*<sup>107</sup>, and brought into question many federal regulations of state government activities. Rehnquist suggested in his opinion that other laws might also invade the powers of states reserved under the Tenth Amendment.

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<sup>107</sup>392 U.S. 183 (1968)

*Usery* was recognized as a conservative victory, advancing the conservative goal of decentralizing government power to the states. It also represented a shift in thinking. For the first time in over forty years the Court utilized the Tenth Amendment to strike down a federal law. Suddenly it appeared that a conservative majority would be using the amendment to study the effect of other federal legislation on state governments. This produced a flurry of challenges to federal economic and environmental regulations of state activities. While the states took advantage of the new policy space, the Burger Court did not use the opportunity to advance its policy preferences. Instead when faced with state challenges of federal law, the Court consistently upheld the legislation.

Four decisions between 1980-1982 reflected the direction the Court took after *Usery*. In *Hodel v. Virginia Surface Mining Association*<sup>108</sup>, the Court agreed that the federal environmental regulation requiring strip mined areas be returned to their formal condition was within federal power and did not invade state power. In *Transportation Union v. Long Island Railroad*<sup>109</sup>, the Court upheld a federal law regulating railroad operations, stating that the law did not impinge on the abilities of states to operate their own railroads. In *FERC v. Mississippi*<sup>110</sup>, the Court upheld federal power regulations even though they prevented some state regulations of such companies. Again a majority of the justices noted that such regulation did not fall under the Tenth Amendment powers of the states. Finally in *EEOC v. Wyoming*<sup>111</sup>, the Court upheld the extension of federal age discrimination laws to state governments. The EEOC decision was

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<sup>108</sup>452 U.S. 264 (1980)

<sup>109</sup>455 U.S. 678 (1981)

<sup>110</sup>456 U.S. 742 (1981)

<sup>111</sup>460 U.S. 226 (1982)

surprising since the *Usery* decision had struck down a similar regulation of wages paid to state employees.

The conservative justices' missed opportunity provided them by the *Usery* decision becomes more apparent when noting the appellants in the cases. In each of the four, the federal government was appealing an adverse decision from the lower courts. This meant that federal appeals courts had applied *Usery* to strike down federal laws under a broader interpretation of the Tenth Amendment. These lower court decisions received little support from the Court. Finally, a new majority of the justices ended the charade of Tenth Amendment protections promised in *Usery*. In *Garcia v. San Antonio*<sup>112</sup>, the Court upheld the extension of federal minimum wage laws to municipal employees and specifically overruling *Usery*. The initial was seen the beginning of an activist conservative thrust against federal regulatory laws but was relegated to the status of an anomaly. Never again during the Burger Court was there a majority of justices who were willing to strike down a federal law on Tenth Amendment grounds.

The conservative failure on the issue of federalism was matched by several successes of liberal justices to open policy space for their policy preferences. One such case involved abortion and opening of new policy space in *Roe v. Wade* (1973). In *Roe*, the justices placed the judiciary in the forefront of the political fight over abortion as the Court scrutinized abortion laws for any violation of the new right. The three trimester standard in *Roe* forbade state restrictions on abortion during the first six months of pregnancy. In his opinion Justice Blackmun declared that all current abortion laws violated those standards and were unconstitutional.

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<sup>112</sup>469 U.S. 528 (1984)

The result of *Roe* was a flurry of lawsuits challenging attempts by state legislatures to get around the absolutist standard and the Court engaging in a new activism to strike down each attempt<sup>113</sup>. Abortion rights became a major policy space for the Burger Court, signaling to other litigants that privacy right claims would be upheld by a majority of justices. The justices even considered a law prohibiting the use of public funds for abortions, *Harris v. McRae*<sup>114</sup>, and barely upheld it over bitter dissents.

While the decision in *Roe* attracted the most attention and created political controversy, the Burger Court established another policy space to advance the liberal view of equality of the sexes. The Court was aggressive in using equal protection claims to strike down state and federal laws that treated the genders unequally. In the seminal decision of *Frontiero v. Richardson*<sup>115</sup>, a majority struck down such a government regulation. A plurality of the justices took the additional step of announcing that gender was a protected class under the Fourteenth Amendment. The ruling would have placed gender specific laws under strict scrutiny and led to many of the laws being overturned. Even without this total victory, the issue of equality for women assumed a major policy space for the Court, as gender specific laws were challenged<sup>116</sup>.

The Nixon and Ford appointees were just as unsuccessful in cases involving the Establishment Clause. The Warren Court had issued decisions

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<sup>113</sup>The cases include *Planned Parenthood v. Danforth* 428 U.S. 929 (1976), *Maher v. Roe* 432 U.S. 464 (1977), *Williams v. Zbaraz* 448 U.S. 358 (1980), *Akron v. Akron Reproductive Services* 462 U.S. 416 (1983), *Planned Parenthood v. Ashcroft* 462 U.S. 476 (1983).

<sup>114</sup>448 U.S. 297 (1980)

<sup>115</sup>411 U.S. 677 (1973)

<sup>116</sup>*Craig v. Boren* 429 U.S. 190 (1976), *Orr v. Orr* 440 U.S. 268 (1979), *Michael M v. Superior Court* 450 U.S. 464 (1981), *Rostker v. Goldberg* 453 U.S. 57 (1981), *Mississippi v. Hogan* 458 U.S. 718 (1982)

enforcing a strict separation of church and state<sup>117</sup>. The Burger Court was expected to follow the conservative belief in church-state accommodation. Yet in its landmark decision setting a standard for Establishment Clause cases, *Lemon v. Kurtzman* (1971), the Court imposed three stringent requirements on government. Under the aptly named Lemon test, government had to show its legislation had a secular purpose, that its primary effect was not to advance religion and that it did not contribute to the excessive entanglement of government and religion<sup>118</sup>. The test in the original case was used to strike down a Rhode Island law allowing public school teachers to teach at parochial schools while being paid by the public schools. But the damage caused by Lemon to conservative hopes of a more accommodationist Supreme Court came later. The three part test was used to strike down most government benefits to religion during the seventies and early eighties<sup>119</sup>. It was not until the mid 1980's that the Court ignored Lemon and upheld the display of Christmas creches on public property and prayers by state legislatures.

Yet even with these minor victories, the Burger Court's foray into creating an accommodationist approach to church state relations failed abysmally. Instead of furthering a conservative political agenda, the strictures of the Lemon test produced liberal opinions enforcing a strict separation of church and state. Chief Justice Burger's authorship of the Lemon test likely dismayed those who supported

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<sup>117</sup>*Engel v. Vitale* 370 U.S. 421 (1962); *Abington v. Schempp* 374 U.S. 203 (1963); *Epperson v. Arkansas* 393 U.S. 97 (1968)

<sup>118</sup> 403 U.S. 602 at 612-13

<sup>119</sup>*Committee for Public Education v. Nyquist* 413 U.S. 756 (1973), *Meek v. Pettenger* (Catholic Tape Recorder Case) 421 U.S. 329 (1975), *Wolman v. Walter* 433 U.S. 229 (1977), *Stone v. Graham* 449 U.S. 39 (1980), *Larson v. Valente* 456 U.S. 228 (1982) *Larkin v. Grendel's Den* 459 U.S. 116 (1982), *Estate of Thornton v. Calder* 472 U.S. 703 (1985), *Grand Rapids School District v. Ball* 473 U.S. 373 (1985), *Aguilar v. Felton* 473 U.S. 402 (1985)

him as conservative alternative to Earl Warren. It also exhibited the futility of the Nixon and Ford appointees' attempts to carve conservative policy niches into the Court's agenda. Instead they produced new liberal policy spaces that advanced the precedents they were appointed to overturn.

### *Judicial Activism and the Rehnquist Court*

Throughout the Burger era, the Nixon and Ford appointees exhibited an inability or unwillingness to write precedent reflecting their president's conservative philosophy. Its successor, the Rehnquist Court, proved more capable in advancing a conservative agenda. Both Presidents Reagan and Bush expressed the desire to overrule both Warren and Burger Court precedents on the Establishment and Free Exercise Clauses, abortion, affirmative action and federalism. Their appointees immediately began asserting their views on these issues, overruling precedent and signaling that a conservative agenda would be advanced by the Court. One area where the Rehnquist Court differed from its predecessor was church-state accommodation.

The Lemon test was used during the Burger Court to strike down accommodationist policies toward religion. The Reagan and Bush appointees utilized a new religious speech doctrine to challenge the separationist view of the Establishment Clause. The new doctrine first appeared in *Widmar v. Vincent*<sup>120</sup>. In *Widmar*, the Court struck down a University of Missouri rule prohibiting the use of school facilities by student religious groups even though such facilities were open to other nonreligious groups. In his opinion Justice Powell utilized the First

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<sup>120</sup>454 U.S. 263 (1982)

Amendment's free speech clause to determine that the group had been discriminated against on the basis of the content of their speech. Powell suggested that the Establishment Clause did not prohibit government from dispensing benefits in an equal manner to both religious and nonreligious groups. He went further in declaring that by treating them unequally government would be violating their religious speech rights.

*Widmar* was important for two reasons. First it ignored the strict requirements under the Lemon test that would have likely prohibited the university from allowing religious groups to use public property for services. Powell's creation of the religious speech doctrine signaled religious groups that they could challenge government actions and receive a favorable hearing from the justices. *Widmar* opened up a conservative policy space in the Court's agenda. But as with the Burger Court's decision in *Usery*, there was no follow up by the justices. During the remainder of the Burger era, the doctrine was never again used to strike down government restrictions on religious speech.

The doctrine remained dormant in the Court until Congress passed the Equal Access to Schools Act. The law required all schools receiving federal funding to grant access to religious groups if the same facilities were open to nonreligious groups. The law was challenged in *Board of Education v. Mergens*<sup>121</sup>. In her majority opinion, Justice O'Connor recognized that the law was protecting the religious speech rights of high school students by requiring equal access to school facilities that were open to nonreligious groups and agreed it did not violate the Establishment Clause.

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<sup>121</sup>496 U.S. 226 (1990)

With the ruling in *Mergens*, the religious speech policy space was reinvigorated and the doctrine was used by religious groups to challenge local and state ordinances that discriminating against them. The first such case was *Lamb's Chapel v. Center Moriches School District*<sup>122</sup>. In *Lamb's Chapel*, the Court struck down a school district policy prohibiting churches from holding their religious services in the school facilities. The district allowed nonreligious groups to use the same facilities for their meetings. The Court used the Equal Access Act rather than the First Amendment, but agreed that Lamb's Chapel's religious speech rights had been violated by the school district's action. The decision extended the reasoning in *Mergens* to include nonschool groups and provided further impetus for those wanting to challenge government action using the religious speech doctrine.

The policy space created in *Widmar* and *Mergens* expanded during the 1994 term with *Review Board v. Pinette*<sup>123</sup> and *Rosenberger v. University of Virginia* (1995). In *Pinette*, the Ku Klux Klan appealed a state review board decision that prohibited the group from putting up a cross at the state capitol. The group argued its religious speech rights had been violated since other religious symbols had been allowed around the building. The Court agreed. Justice Scalia's plurality opinion specifically overruled the Lemon test and replaced it with a neutrality component to the religious speech doctrine. Scalia stated that government must treat religious groups equally with nonreligious groups. Scalia's new standard was joined by only three other justices and thus was not binding precedent. But his argument in *Pinette* had two powerful effects on religious rights. First, he extended the religious speech doctrine to a political group using a

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<sup>122</sup>113 S.Ct. 2141 (1992)

<sup>123</sup>115 S. Ct. 2240 (1995)

religious symbol. He also cast doubt on the Court's opinion on Christmas creches during the 1980's. Scalia's test would overrule the reasoning used in *Lynch v. Donnelly*<sup>124</sup> including Chief Burger's garbled assertion that Christmas had become a secular holiday, and in *Allegheny County v. ACLU*<sup>125</sup> where Justice Blackmun declared with a straight face that a Menorah was not religious symbol but that a creche was. Scalia's standard would likely lead to Christmas creches on public property being upheld since their exclusion in the face of nonreligious displays would represent unequal treatment of religious groups.

In the *Rosenberger* case, the Court struck down the University of Virginia's refusal to grant subsidies to a student religious group for its publication. Justice Kennedy's opinion noted that other student groups received the subsidies and the refusal to provide it to Rosenberger's group violated their religious speech rights. Where the Burger Court would have used the Lemon test to strike down any university subsidies for religious groups, the Rehnquist Court used its religious speech doctrine to require such subsidies to ensure equality of treatment.

The Court's Establishment Clause jurisprudence during the 1990's exemplifies the success of the Rehnquist Court in creating new policy space to further its agenda. The justices signaled to religious groups that their claims of discrimination by government would receive a favorable hearing.

The Rehnquist Court created another agenda space for a conservative political issue, the ending racial preferences for minority groups. In two decisions, *Richmond v. Croson* (1989) and *Adarand Construction v. Peña* (1995), the Court required that any government affirmative action must undergo strict scrutiny analysis. Such an analysis required that government show it had a compelling

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<sup>124</sup>465 U.S. 668 (1983)

<sup>125</sup>492 U.S. 573 (1989)

interest in enacting such policies and that the policy was narrowly tailored to meet that interest. Since most affirmative action programs are used to attack societal discrimination, it is unlikely that the Court will find any policy was narrowly tailored.

Affirmative action was not the only area where the Court shifted its focus away from protecting minority groups. During the 1990's, several states engaged in racial gerrymandering of congressional seats to advance the dubious goal of racial representation in Washington. The gerrymandered districts were challenged in Court as a violation of the voting rights of white voters. In *Miller v. Johnson*<sup>126</sup>, five justices agreed that racial gerrymandering violated the Fourteenth Amendment's equal protection clause. In the Court's opinion, the justices stated that race could not be the determining factor in the drawing of congressional boundaries. It dismissed the argument that such gerrymandering was used to protect the interests of minorities

In the three cases discussed above, the Rehnquist Court adopted an activist posture toward preferential policies aiding minorities. In the affirmative action cases the conservative majority focused in on the relevant precedent, *Fullilove v. Klutznick* (1980). They discarded the argument in *Fullilove* that racial preferences were constitutional if they benefited minorities. In *Adarand* they explicitly reversed *Fullilove* and applied the strict scrutiny standards to preference policies. In the racial gerrymandering case the justices also refused to apply the double standard of upholding preferences that benefited minorities. It is in this area that the Court acted to undo a liberal precedent dating back to the Roosevelt Court.

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<sup>126</sup>115 S. Ct. 2475 (1995)

In *Richmond* and *Adarand*, the Court not only overruled a Burger Court precedent but challenged the reasoning in *Carolene Products v. U.S.*<sup>127</sup>. In the *Carolene* decision, Justice Stone offered the view that government policies negatively affecting minorities would be examined closely by the Court. The justices would require government to have a compelling interest in enacting its policy and that the policy be tailored to meet that interest. Stone argued that "discrete and insular minorities" were particularly vulnerable to the vicissitudes of the majority and must have their rights protected by the judiciary. The *Carolene Products* footnote was used by future justices to strike down policies that injured minorities. In the *Bakke* and *Fullilove* decisions it was used to argue that policies hurting members of the majority were not covered by strict scrutiny. By 1995 the Rehnquist Court eliminated that double standard in racial cases.

The Reagan and Bush appointees were successful at rewriting the precedents in Establishment Clause cases and affirmative action policy then use their new standards to strike down government policy. Their rulings reflected the activist philosophy taken by the five member majority composed of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas. While disagreements did occur over the degree of change, the five represented a solid bloc in favor of rewriting constitutional law in the two areas. The same five opened policy space for protecting property rights.

During the latter part of the nineteenth and early decades of the twentieth centuries, the Court's agenda was dominated by economic rights cases as a conservative majority consistently striking down government regulation of economic processes. This approach ended after 1937 as the Court's emphasis on

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<sup>127</sup>304 U.S. 144 (1938)

economic rights was consigned to oblivion during the Roosevelt Court (Pacelle, 1991). Reviving property rights as a part of the Court's agenda would be one of the central goals of a conservative majority.

The Burger Court had no success in the property rights area, only weakly protesting against government taking of private property in such cases as *Penn Central v. New York*<sup>128</sup> and *Midkiff v. Hawaii Housing Authority*<sup>129</sup>. The beginning of the Rehnquist Court and specifically the arrival of Justice Scalia saw a dramatic change in how the Court perceived the protection of private property. In two decisions, *Nollan v. California Coastal Commission*<sup>130</sup> and *Lucas v. South Carolina Coastal Commission*<sup>131</sup>, Scalia convinced a majority of the justices to abandon Takings precedents in favor of a more stringent standard. Scalia followed an activist philosophy by overturning precedent, creating new standards and striking down government actions. With *Nollan* and *Lucas* he was also able to signal that the Court would include property rights litigation in its agenda. In the first case, *Nollan* owned beachfront property and was required by the coastal commission to grant it a right of way so that an access area could be built to the public beach. *Nollan* argued that such a requirement took his property without just compensation and a majority of the justices agreed. In his opinion Justice Scalia tightened the standard for showing that government was acting in a public purpose when regulating the use of private property. He required that a nexus exist between government action and the public purpose government was trying to fulfill<sup>132</sup>. This new test replaced the old standard that required only a

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<sup>128</sup>438 U.S. 104 (1978)

<sup>129</sup>467 U.S. 229 (1984)

<sup>130</sup>483 U.S. 825 (1987)

<sup>131</sup>505 U.S. 1003 (1992)

<sup>132</sup>483 U.S. 825 at 841- 42

connection between the two. The government requirement was not found to involve a nexus with the public purpose of providing public access to the beach.

Thus Scalia found that the commission had to compensate Nollan for any right of way. The nexus standard was further tightened in the *Lucas* decision. There, the South Carolina Coastal Commission changed the zoning on Lucas' property and eliminating most of its economic value. Lucas sued, arguing that the state had taken his property without just compensation, an argument that was found convincing by six justices. Again Justice Scalia wrote the opinion. He created a three part standard for determining whether government had to compensate a land owner when they regulate the use of his property. According to Scalia, government must compensate an owner for regulating any of the rights he had upon purchasing the property, that government had to prove it was regulating against a public nuisance in order to escape compensation and that only a total taking required compensation<sup>133</sup>. This made it easier for property owners to claim government should compensate them under the Takings Clause.

Scalia's opinions in *Nollan* and *Lucas* was initially seen as a revolution in property rights adjudication. Yet the Rehnquist Court narrowed the use of the standards when applying them to much of the regulatory state. They did not reignite the embers of substantive economic due process used earlier this century to strike down minimum wage and working conditions laws. Instead Scalia's opinions focused on environmental legislation (Lazarus, 1993; Sax, 1993). The Rehnquist Court opinions on property rights seemed to suggest two things. The first was that most of the regulatory state would be upheld as constitutional. But they promised to closely examine the most egregious environmental regulations

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<sup>133</sup>505 U.S. 1003 at 1014

and sometimes requiring compensation of property owners (Blumm, 1995; Sax, 1993). This message appeared to be received by many litigants who began challenging environmental regulation of private property, asking the courts for the government to compensate them for the financial losses they suffered (Huffman, 1995; Sullivan, 1995).

The decision in *Dolan v. Tigard*<sup>134</sup> reflects the renewed activism of the Rehnquist Court in restricting environmental regulation. In *Dolan*, the city of Tigard required that Dolan cede part of her property for drainage and traffic control needs before it would issue her a permit to expand her business. Dolan argued that such a cession was a Taking and required compensation. A five member majority agreed with Dolan. In his opinion, Chief Justice Rehnquist stated that there was no nexus between the required cession of land and what the city was attempting to accomplish, thus Dolan would have to be issued the permit.

Rehnquist's opinion was important not only in its use of the nexus standard but also in his choice of precedents. The chief justice used Justice Holmes' opinion in *Mahon v. Pennsylvania* (1923), striking down a state environmental regulation that prohibited coal mining beneath residential areas. Holmes had ruled that the state law was an unconstitutional taking of property and that Mahon had to be compensated. Rehnquist's revival of the reasoning in Mahon, a decision that had been ignored since the Roosevelt Court, suggested that recent Takings jurisprudence might be reconsidered by the Court. Such a reconsideration would represent a significant widening of the property rights policy space within the Court's agenda. It would also begin a more activist approach to Takings law, with the Court striking down government regulations at a more frequent rate.

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<sup>134</sup>114 S.Ct. 2309 (1994)

The Rehnquist Court has exhibited a more activist agenda than its predecessor. The Reagan and Bush appointees were willing to change precedent and replace Congress' policy views with their own. The differences in the two courts' approaches can also be found in their case selections.

### *Activism in Case Selection*

Case selection by the Supreme Court serves as one of its central policy making tools. Since 1925, the justices have been able to choose which cases they would decide. The decision to hear a case has been studied by Court observers who have arrived at different explanations for the justices' decision making. One such explanation, cue theory, suggests that continuous litigators such as the solicitor general of the United States are more successful in getting their petitions accepted by the Court (Tanenhaus et. al., 1963). Cue theory provides an insufficient explanation for the cert votes of justices who want to change the Court's ideological direction. Cue theory suggests that justices play a passive role by using cues to determine which cases to take. While a solicitor general working for an administration seeking to change the Court's ideology might aid the justices in accomplishing their agenda, an administration that favored the status quo would use the solicitor general's office to preserve precedent. During the Burger Court, the Carter Administration favored some of the Warren Court rulings attacked by Republican Administrations. The same could be said for the Clinton Administration, which favored many of the precedents under attack by the Rehnquist Court. Cue theory could not explain why the two Courts ignored the solicitor general when his cues ran counter to the justices' policy preferences. Schubert (1959) suggested that a justice's decision to grant cert is based on which

side lost in the lower appeals court. Justices' would be more likely to grant cert when their ideological position lost in the lower court. They would seek to change that decision in the Supreme Court. Contrarily, the justices would not grant cert in cases where their ideological position won in the lower court.

While ideology was an indicator of whether a lower court decision would be reviewed by the Court, it did not fully explain cert decisions. Provine (1980) suggested that a justice's role orientation would also affect decisions on whether to grant cert. She found that Justices Black and Douglas, who often voted to grant cert, also supported an activist judiciary (Provine, 1980). The pair of justices were willing to use the Court to effect changes in social policy, a strategy that required that the justices hear numerous cases. This led them to vote to grant cert in more cases than their colleagues.

Both Black and Douglas sought to change the Court's ideological direction, the same goal of some of the new appointees to the Burger and Rehnquist Courts. Thus the justices who were both ideological and activist in their approach would vote to grant cert more often than their colleagues. This would be reflected by the appellants for salient cases. Those appellants would be within favored groups, the government in criminal cases, school districts in desegregation cases and state governments in federalism cases during the Burger Court. These same groups in addition to religious groups in Establishment Clause cases, states in abortion cases and individuals challenging affirmative action policies would be favored during the Rehnquist Court.

### *Results*

By comparing which litigants were favored in cert grants, the direction of

the Court's activism can be identified. It has been argued that the Burger Court's activism was less focused on a particular ideology while the Rehnquist Court has favored specific groups. This disparity in their approaches to judicial activism should appear in the number and percentage of appellants who represent favored groups. Table Thirteen shows that in salient cases the number of appellants who were favored groups increased during the Rehnquist Court to seventy percent from the fifty five percent of the total during the Burger Court. These results show that the Rehnquist Court was more willing to grant appeals to favored groups who lost in the lower courts. This suggests that the Reagan and Bush appointees were more activist and ideological in their grants of cert, seeking to use the Court to correct decisions undermining their political agenda.

While granting cert provides an avenue for controlling the Court's agenda, it is necessary for the justices to use those cases to advance their preferences. One of the elements of judicial activism, interpretive stability, is reflected in the willingness of justices to overrule precedent that did not fit their ideological beliefs. Activist Courts would be less dedicated to interpretive stability particularly for precedents dealing with salient issues.

### *Overruling Precedent*

In order for justices to alter the Court's jurisprudence, they must overrule precedent that reflected their predecessors' ideology. The first systematic study of which cases were overruled by the Court was conducted by Spaeth and Brenner (1995). Included in their analysis of overrulings was the number and individual cases involving the Burger and Rehnquist Courts. Among all cases, they found that the Rehnquist Court was more willing to overrule prior decisions, averaging

over three per term between 1986 and 1991 while the Burger Court averaged only two and a half overrules per term between 1969 and 1985 (Spaeth and Brenner, 23, 1995).

Among salient cases Spaeth and Brenner found that the Burger Court had overruled five decisions, four dealing with the Fourth Amendment's exclusionary rule<sup>135</sup> and one, the *Garcia* decision, dealing with Federalism. According to Spaeth and Brenner, the Rehnquist Court was less active in overruling the salient decisions. They overruled only three, one involving the Fourth Amendment<sup>136</sup> and the *Casey* and *Webster* decisions involving previous abortion decisions.

The low level of overrulings in salient cases for the Rehnquist and Burger Courts can be partially attributed to the stringent definition of overrule followed by the two authors. They required that the Court explicitly state that it was overruling a decision and the decision it was overruling. Thus such cases as *Employment Division v. Smith* (1990), which created a new standard in Free exercise cases and overruled a series of decisions dating from *Sherbert v. Verner*<sup>137</sup> was not included. In *Smith*, the Court's opinion did not explicitly state that those precedents were no longer good law. Also the 1991 cutoff date excludes many of the overruling decisions handed down by the Rehnquist Court including *Lee v. Weisman* (1992) and *Rosenberger v. University of Virginia* (1995) in Establishment Clause cases and *Adarand v. Peña* (1995) in affirmative action cases. In addition to the number of overrules by each Court, the extent of the new precedent being written must be analyzed to determine the extent of the activism being practiced. Among salient cases, the Burger Court's overrulings

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<sup>135</sup>*U.S. v. Salvucci* 448 U.S. 83 (1980), *U.S. v. Ross* 456 U.S. 798 (1982), *Illinois v. Gates* 462 U.S. 213 (1983), *Michigan v. Long* 463 U.S. 1032 (1983).

<sup>136</sup>*California v. Acevedo* 114 S. Ct 619 (1991).

<sup>137</sup>374 U.S. 398 (1963)

tended to be narrowly drawn to involve specific issues within a single case. For example, in *U.S. v. Ross*<sup>138</sup>, the Court overruled its earlier decision in *Robbins v. California*<sup>139</sup>. The two decisions dealt with a particular area of the Fourth Amendment, car searches, and an element within car searches, closed containers. *Robbins* had prohibited police from searching closed containers after a traffic stop if they did not have a warrant. *Ross* overruled *Robbins* in stating that searches of closed containers could occur. The entire scope of car searches or the exclusionary rule was not part of the decision. Such a limited approach to overruling cases made it difficult for the Burger Court to change its agenda.

The Rehnquist Court tended to issue broader overrulings, sweeping away several precedents and changing legal doctrine built up over several terms. As discussed above, the Smith decision overruled *sub silentio* over two decades of free exercise decisions dating back to 1963. The Court's decisions in *Croson* and *Adarand* overruled over a decade of affirmative action decisions upholding government affirmative action programs. The decisions in *Lee* and *Rosenberger* also cast doubt on two decades of Establishment decisions and the use of the Lemon test to determine whether government had violated the Establishment Clause. Both the decisions in *Webster* and *Casey* limited the absolutist nature of *Roe v. Wade* (1973), overturning a doctrine that had precluded all but the most innocuous state restrictions on abortion. The Rehnquist Court has been more aggressive in using overrulings to change precedent and establish doctrines to ensure favorable rulings in future cases. The Reagan and Bush appointees thus exhibited stronger activist tendencies in the area of interpretive stability and fidelity.

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<sup>138</sup>456 U.S. 798 (1982)

<sup>139</sup>453 U.S. 420 (1981)

Overruling previous decisions can be use to both close policy space and limit the power of disfavored groups to appeal lower court decisions. An activist court, though, must also open new policy space, replacing old precedent with new cases and drawing in the support of different groups.

### *Policy Space and Redefining Issues*

Creating new policy space also requires changing the questions being considered in salient cases. The Roosevelt Court accomplished this in Commerce Clause cases. Prior to 1937, justices used a restrictive view of the Clause to strike down federal economic regulation. It was this approach that led to the clash between Roosevelt and the justices. When the Roosevelt appointees became a majority, the Commerce Clause became an avenue rather than obstacle for economic regulation. The questions considered under the Commerce Clause changed from whether the Clause prohibited federal action to whether state regulation had invaded or impeded the use of federal commerce power. It was the Commerce Clause and the Tenth Amendment that represented an opportunity for the new Republican appointees to change the Court's ideological direction. To do so they would have to change the questions being considered under those constitutional provisions, reviving the Commerce Clause jurisprudence predating 1937. Under this approach, challenges to federal law would be based on arguments that Congress exceeded its power under the Commerce Clause. Another argument would be that the Tenth Amendment reserved certain powers to the states and that the federal government had intruded upon those powers.

## *Results*

The Burger Court was unable to change the questions asked under the Commerce Clause and the Tenth Amendment. Between the 1969 and 1985 terms, the justices issued forty six opinions on state taxes or regulations under the Commerce Clause. Each of the forty six continued the previous tendency of challenging state actions based on the dormant Commerce Clause with the argument that the states had intruded upon federal power. These forty six cases easily overshadowed the nine cases where state governments challenged federal power under the Tenth Amendment. Seven of the decisions followed the *Usery* decision which appeared to make the Court more amenable to Tenth Amendment challenges to federal law. In each of the seven cases, a majority of the justices rejected the Tenth Amendment claim of the state government and upheld federal legislation as the proper exercise of the Commerce Power. The final case of the nine, *Garcia v. San Antonio* (1985), reversed the *Usery* decision and the Court reverted to the Roosevelt jurisprudence of an almost unlimited federal commerce power.

The *Garcia* decision included a prediction by Justice Rehnquist that the Tenth Amendment issue would be reconsidered by the Court and revived by a new majority. When Rehnquist was promoted to the Chief Justiceship, he joined with other Reagan and Bush appointees to fulfill his prophecy. The revision began in the 1991 term in *New York v. U.S.*<sup>140</sup> when Justice O'Connor invoked the Tenth Amendment to strike down a federal requirement that states build nuclear waste depositories. According to O'Connor building such depositories were part of the

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<sup>140</sup>505 U.S. 144 (1992)

reserved powers of the states under the Tenth Amendment. She agreed that the federal government could provide incentives to the states to perform such tasks but could not use coercion.

The Tenth Amendment became a more potent weapon to use against federal legislation during the 1994-1996 terms. In a series of cases, five Reagan and Bush appointees revived the restrictive nature of the Commerce Clause and used the reserved powers of the states to overturn federal requirements. In *U.S. v. Lopez* (1995) the justices ruled that a federal ban on guns at public schools was not within Congress' power to regulate interstate commerce. The justices extended this reasoning during the 1996 term as they struck down two federal laws on the argument that Congress had exceeded its power. In *Printz v. U.S.* (1997), the justices struck down part of the federal gun control law that required local sheriffs to conduct criminal background searches for gun purchases. The Court ruled that the Tenth Amendment prohibited the federal government from drafting local officials to enforce federal laws. In *City of Boerne v. Flores* (1997), the Court struck down the Religious Freedom Restoration Act, RIFRA, which interpreted the Fourteenth Amendment to provide certain protections of Free Exercise of religious rights. The justices noted that Congress did not have the power to enact legislation under the Fourteenth Amendment until a violation of that amendment had been found by the courts. Since the Court had not found such a violation, Congress did not have the power to pass RIFRA.

The Rehnquist Court has begun what has been described as a constitutional revolution. A five member majority, composed entirely of Reagan and Bush appointees, have revived a more restrictive view of the commerce power and an expanded Tenth Amendment (Fried, 1995; Calabresi, 1997). The Court is asking different questions and opening new policy space for challenging federal legislation

on the basis of pre-1937 jurisprudence. While it continues to hear cases involving the dormant commerce clause and the powers of the states to regulate commerce, this new jurisprudence is likely to increase the number of cases heard by the justices. It is also expected to draw the attention of interest groups whose views will be received more favorably by the justices.

### *Interest Groups and Judicial Activism*

During the 1970's, conservative interest groups adopted a judiciary centered strategy to advance their political views in government. Their efforts were a challenge to the dominance of liberal interest groups such as the NAACP, ACLU and labor unions in the judicial system (Abraham, 1993; Greenberg, 1977; Kluger, 1976). These groups had great success achieving in the Warren Court what they could not get from the legislative or executive branches.

The liberally oriented groups saw their influence decline during the Burger and Rehnquist Courts as the new Republican appointees implemented an agenda that conflicted with the groups' beliefs. To enact that agenda, though, the Court needed the support of conservative groups who favored federalism, limitations in criminal rights and an expansion of religious rights.

The groups utilize two methods of influencing judges, sponsoring cases or filing amicus briefs expousing their views. Amicus briefs are used by groups to influence judges. Amicus briefs are a relatively inexpensive method of lobbying courts when compared to the cost of filing actual cases. Also groups supporting the state in criminal rights cases cannot sponsor those cases, limiting them to filing amicus briefs in support of the government position.

The level of participation will be measured using the amicus briefs filed by groups or individuals in salient cases. Briefs will be categorized according to whether they support the views of the Republican Administrations that appointed members of the Burger and Rehnquist Courts. The effectiveness of the Rehnquist Court in opening policy space in these areas should be exhibited in higher amicus participation rates for administration supporters. Participation will include both the number of cases where briefs were filed and the total number of briefs filed in salient cases during a Court term.

In addition to overall group participation, the actions of specific groups based on certain issues will be analyzed. Groups supporting and opposing the Court's agenda will be examined. On the issue of criminal rights, the ACLU is the main opponent of government while the Americans for Effective Law Enforcement (AELE) filed briefs supporting stronger police powers (Epstein, 1985). In desegregation cases, the NAACP usually opposed the efforts of state governments and local school districts to slow integration efforts. The number of amicus briefs filed in such cases should reflect the weakening of the NAACP's influence on the justices.

The new federalism agenda begun under the Burger Court and continued by the Rehnquist Court was used by property rights advocates to fight government regulations. One such group, the Pacific Legal Foundation, was started by members of California Governor Ronald Reagan's staff members (Barnes, 1977). It spread into several umbrella groups which have challenged the federal government's control over private property. One such group, Mountain States Legal Foundation was part of the 1970's Sagebrush Rebellion led by James Watt (Epstein, 1985), who became the bete noire of the environmental movement during

the 1980's. These foundations would become more involved in litigation efforts as the Court created new policy space for them.

In church-state accommodation cases, three groups, the ACLU, the American Jewish Council (AJC) and Americans United for Separation of Church and State (AUSC) would oppose all efforts to weaken a stringent interpretation of the Establishment Clause (Pfeffer, 1980). Their main opponent, the Rutherford Institute, was one of the most active groups favoring religious rights.

### *Results*

The participation levels for groups in salient cases during the Rehnquist and Burger Courts varied according to their policy preferences. Supporters of the Republican Administrations' views on those issues filed amicus briefs in twenty seven percent of the cases during the Burger Court. They filed a total of 224 total briefs for an average of .74 briefs per case. Those opposing the administrations' viewpoint filed briefs in thirty one percent of the cases decided by the Burger Court for a total of 408 briefs. This average was double their opponents or 1.4 briefs per case.

In only four of the sixteen terms, 1972, 1977, 1982 and 1985 did administration supporters file more briefs than did its opponents. Thus groups opposing the administrations' views were much more active in filing briefs in salient cases, though conservative groups increased their filings of amicus briefs in salient cases.

The rise in the number of both liberal and conservative oriented briefs during the Burger Court has been attributed to the ideological meandering of the justices. With the Court not moving in a consistently conservative or liberal

direction, groups from both sides believed their views would be accepted by the Court and written into the law (Bradley and Gardner, 1985). Under the Warren Court, law enforcement groups knew that their views would be taken less seriously by the justices and were less likely to file amicus briefs during that period.

If the Warren Court preferred liberal groups and the Burger Court showed no particular preference, then the Rehnquist Court could be described as favoring more conservative groups. Between 1986 through 1995, the rate of participation evened out between the two sets of groups. In four of the ten terms, conservative groups filed amicus briefs in more cases than did more liberal groups. In two of the terms the rate of participation was equal and in the remaining four terms liberal groups participation exceeded their opponents.

Conservative groups greater participation allowed their views to be heard and used by the Court. The Court's opening of new policy space in federalism and property rights allowed greater participation by the Pacific Legal Foundation and its adjuncts while its innovative decisions in criminal issues presented the AELE with increased opportunities to change the law through its amicus briefs.

An analysis of specific groups who participated in filing amicus briefs show that conservative groups also became more active after the 1970's. The AELE filed briefs in twenty five criminal rights cases or approximately one third of all cases dealing with Mapp and Miranda during the Burger Court. Seventeen of those occurred during the 1980's when the Court was more active in rewriting the law involving the Exclusionary Rule and confessions. During the 1986-1992 terms of the Rehnquist Court, the AELE increased its involvement, filing in fourteen cases involving criminal rights or almost one half of the cases involving Mapp and Miranda during the period. The group's increased efforts could be partly attributed to the tougher approach on crime supported by the Reagan and

Bush appointees to the Court. Groups such as the AELE have limited resources and seek out cases where they can win when filing briefs (Epstein, 1985). Their renewed efforts during the Rehnquist Court suggests that the group's leaders believed that the justices were more amenable to their views on the criminal justice system.

The Pacific Legal Foundation and its regional counterparts also became more active during the Rehnquist Court. These foundations filed amicus briefs opposing affirmative action, supporting abortion laws and supporting religious rights. Their greatest efforts, though, concentrated on the property rights issue and the renewal of federalism after the *Usery* decision. After *Usery*, the Pacific Foundation filed briefs favoring states in federalism issues in six cases. They lost in each but expressed their views to the justices.

The increased rate of participation among conservative groups in comparison to liberal groups can be partly attributed to some of the rulings on legal standing handed down by the Court. An activist court would be expected to use standing requirements to limit the appeals of disfavored groups while expanding standing for favored groups. In doing so, the justices would be controlling the agenda and favoring those that gave the Court their political support.

### *Judicial Activism and Standing*

While the briefs filed by conservative groups increased percentage wise during the Burger and Rehnquist Court, their effectiveness before the justices was enhanced by rulings expanding standing. The effect of standing in increasing group participation before the Court was seen during the latter years of the Warren

Court. During that period, the justices opened new policy areas by giving groups and individual standing to challenge government actions in court. One of the cases *Baker v. Carr*<sup>141</sup> created a new policy space in state legislative redistricting. The Warren justices also expanded taxpayer suits in *Flast v. Cohen*<sup>142</sup> which allowed for citizens to challenge government action showing only a limited injury to them caused by that policy. The cases advanced the justices liberal policy agenda by expanding on the number of cases they could hear.

The Burger Court was effective in limiting the reach of those decisions by constructing procedural barriers for disfavored groups. This defensive style did to see an expansion of standing for favored groups or as an effort to expand policy space.

Chief Justice Burger's frustration at being unable to form a majority to overrule the Mapp and Miranda decisions caused him to change strategy in an effort to limit the reach of the Fourth Amendment. Since many Exclusionary Rule cases came from the state courts through habeas corpus appeals to the federal courts, limiting such appeals became the focus of the Burger Court's attempt to limit criminal rights. The first case where Burger was able to severely limit Fourth Amendment habeas appeals, *Stone v. Powell* (1976), saw the Court rule that such appeals could take place only if the state appeal system had prevented a careful consideration of the Fourth Amendment claim. This limited many exclusionary rule cases to the state court systems. The Court went further in *Wainwright v. Sykes*<sup>143</sup> limiting all habeas appeals to those issues raised by the defendant in the original trial. The limiting of habeas petitions continued throughout the Burger

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<sup>141</sup>369 U.S. 186 (1963)

<sup>142</sup>392 U.S. 83 (1968)

<sup>143</sup>433 U.S. 42 (1977)

Court and during the 1985 term the Court ruled in two cases *Murray v. Carrier*<sup>144</sup> and *Smith v. Murray*<sup>145</sup> that all federal habeas appeals must conform to state procedural rules on appeals. This included exclusionary rule cases, hampering federal judicial oversight of Fourth Amendment cases.

The success of the Chief Justice in limiting habeas appeals for exclusionary rule cases meant most cases would go through the state court system and then the U.S. Supreme Court where criminal rights were less favored. Obviously the efforts in Powell and Wainwright was in accordance with the agenda of the Nixon and Ford Administrations which favored reducing the reach of the *Mapp* decision. Yet the defensive strategy was a symptom of the Nixon and Ford appointees' inability to overrule those decisions.

The Burger Court also used standing requirements to restrict challenges to government policy that accommodated religion. In *Valley Forge College v. Americans United for Separation of Church and State*<sup>146</sup> the anti-accommodationist group, Americans United, filed suit arguing that the transfer of government property to the college violated the Establishment Clause. The Supreme Court dismissed the suit on the basis that the group lacked standing. Justice Rehnquist's opinion stated the group had suffered no actual injury and could not bring suit. Rehnquist recalled the standing requirements for taxpayers suits created under the Taft Court<sup>147</sup> which foreclosed the possibility of most taxpayers' suits. The decision not only raised standing requirements but also protected government when engaged in accommodationist policy toward the church.

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<sup>144</sup>477 U.S. 478 (1985)

<sup>145</sup>477 U.S. 527 (1985)

<sup>146</sup>454 U.S. 464 (1982)

<sup>147</sup>*Frothingham v. Mellon* 262 U.S. 447 (1923)

*Valley Forge* was one of the few instances where the Burger Court used standing in support of a favored group. Instead it expanded the standing definition for liberal oriented groups in such cases as *U.S. v. SCRAP*<sup>148</sup>. *SCRAP* allowed environmental groups to challenge federal action even without showing a specific injury to the group or its members.

Two cases exhibited the inability of the justices to expand standing for favored groups. In *DeFunis v. Odegaard*<sup>149</sup> (1974), the Court refused to consider a challenge to a university affirmative action admissions policy because the student making the challenge had been admitted to the university. The refusal to hear the case in 1974 revealed the division among the justices over the policy and inability of the Nixon appointees to open policy space at that time. It was expected that the Nixon appointees would welcome litigants seeking the overturning of affirmative action policies.

During the 1985 term, the Court in *Bender v. Williamsport School Board*<sup>150</sup> refused to grant standing to a school board member who was challenging the district's decision to allow religious groups to use school facilities for meetings. The five member majority ruled the board member was not injured by the school board decision and had no standing. The four member dissenting bloc, led by Chief Justice Burger, made clear its intention to hear the case and rule that the school district was forced by federal law to allow religious groups such access. *Bender* exemplified the Burger Court's ineffectiveness at opening new policy space by relaxing standing requirements.

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<sup>148</sup>412 U.S. 669 (1973)

<sup>149</sup>416 U.S. 312 (1974)

<sup>150</sup>475 U.S. 534 (1986)

Much of the Burger Court's success at implementing its agenda by changing standing requirements was achieved using a defensive strategy. Instead of expanding standing to allow favored groups greater access to the courts, the Burger Court restricted standing for disfavored groups such as those claiming violation of criminals' rights. Its opinions limiting habeas petitions only limited federal involvement in exclusionary rule cases. This mixed record compared unfavorably to the more activist opinions on standing requirements filed by the Rehnquist Court.

### *Standing and the Rehnquist Court*

From its beginning, the Rehnquist Court exhibited the predisposition toward activism in advancing its legal agenda. During its 1986 term, it moved to expand policy space for property rights, an integral part of an conservative legal agenda. In *First Evangelical Church v. L.A. County*<sup>151</sup>, the Court expanded the definition of takings to include temporary taking of property by government. As argued in the dissent, the decision promised to increase the number of takings claims to reach the judiciary and create new policy space for property rights. The Court moved further on the property rights front during the 1986 term. Its decision in *Nollan v. California Coastal Commission* (1987) further expanded when individuals could challenge government regulations under the takings clause.

The 1992 term saw standing expanded in for religious groups and those challenging affirmative action policies. In *Lamb's Chapel v. Center Moriches School District* (1993), the Court ruled that nonschool religious groups had

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<sup>151</sup>482 U.S. 304 (1987)

standing to challenge district policies prohibiting the groups' use of school facilities. The decision expanded the federal Equal Access Act to include nonschool groups. Religious rights groups, favored by the Reagan and Bush appointees, could take their cases to courts without having to meet stringent standing requirements.

In *Contractors v. Jacksonville*<sup>152</sup>, the Court agreed to allow building contractors bidding on government projects to challenge affirmative action setaside programs run by government. The contractors only had to show that they would bid on contracts and that their bidding would be affected by the setaside programs. The Jacksonville decision opened up the judiciary for more reverse discrimination suits including one, *Adarand v. Peña* (1995), which involved federal setaside programs for contracting. Adarand was used by the justices to place such programs under strict scrutiny and all but guaranteeing that they would be ruled unconstitutional.

The 1993 term saw the justices tackle the issue of racial gerrymandering of congressional districts. In *Shaw v. Reno*<sup>153</sup>, a five member majority agreed that white voters within the gerrymandered districts had standing to sue on equal protection grounds. Once again, a decision to allow a favored group to have standing led to a substantive decision advancing the Court's conservative agenda. In *Miller v. Johnson* (1995), the Justices agreed that a district gerrymandered on the basis of race violated the Fourteenth Amendment and must be redrawn. During the 1996 term, the Court further expanded the standing granted property rights groups. In *Bennet v. Spears*<sup>154</sup>, a unanimous Court agreed that individuals

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<sup>152</sup>113 S. Ct. 2297 (1993)

<sup>153</sup>509 U.S. 630 (1993)

<sup>154</sup>117 S. Ct. 1154 (1997)

whose property was affected by a government ruling under the Endangered Species Act could use that Act as a statutory ground for challenging the government regulation. The *Bennet* decision was a boon for property rights activists who sought to limit the reach of environmental regulation over private property.

In addition to limiting standing requirements for favored groups, it also used technical arguments to limit suits filed against those same groups. In *Bray v. Alexandria Clinic*<sup>155</sup>, the justices ruled that anti-abortion groups were not covered under the federal racketeering law (RICO) and thus pro-abortion groups could not use the federal statute to sue their opponents. This limited the reach of a federal statute and prevented its use against a favored group.

During the decade of the Rehnquist Court, the Reagan and Bush appointees used standing requirements both to expand the ability of favored groups to challenge government policies while also limiting the reach of courts to act against them. Their standing decisions were used to produce substantive rulings advancing the Court's agenda in the direction desired by the appointing presidents. Compared to the Burger Court, the Rehnquist Court was more effective in using standing to further an activist agenda and protect favored groups. The Court's success can be partly attributed to the efforts of individual justices who offered this agenda in their legal opinions.

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<sup>155</sup>113 S.Ct. 2462 (1993)

### *Activism and Activist Justices*

A Court's activist agenda can also be advanced in the ideas expressed in legal opinions written by justices interested in changing constitutional doctrine and Court precedent. A justice's views of constitutional fidelity and stability can be expressed in separate opinions. During the Rehnquist Court, the debate over the role of precedent occurred in two Eighth Amendment decisions, *South Carolina v. Gathers*<sup>156</sup> and *Payne v. Tennessee*<sup>157</sup>. Both cases involved the use of victim impact statements during the sentencing hearing for capital cases. In *Booth v. Maryland*<sup>158</sup>, a sharply divided Court ruled that such statements violated the Eighth Amendment's prohibition against cruel and unusual punishment. Victim impact statements were again challenged in *Gathers*, with a five member majority upholding Booth's prohibition against them. In *Gathers*, Justice White switched his vote from opposing *Booth* to supporting its holding. In a short concurrence he stated that he was willing to overrule *Booth* but that some of the dissenters would not agree.

One of the dissenters, Justice O'Connor argued that the case did not have to be overruled in order to uphold victim impact statements. This drew an immediate response from Justice Scalia in a separate dissent. Scalia quoted Justice Douglas, one of the most activist justices in the Warren Court, noting that the justices were to interpret the constitution rather than the gloss placed on that constitution by a previous justice. When a decision was considered as putting the wrong gloss on a constitutional provision, then it could be overruled<sup>159</sup>. Scalia

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<sup>156</sup>490 U.S. 805 (1989)

<sup>157</sup>111 S.Ct. 2597 (1991)

<sup>158</sup>482 U.S. 496 (1987)

<sup>159</sup>490 U.S. 805 at 825 (1989)

also stated his general philosophy about overturning precedent, noting that recent decisions were easier to overrule since they had yet to become a fixed part of the American jurisprudence.

Scalia's statement suggested he was willing to rewrite most recent constitutional rulings if he believed they represented an incorrect gloss. His quoting of Douglas and argument for rewriting recent precedent exhibits an activist philosophy toward constitutional and interpretive fidelity. In *Payne v. Tennessee* (1991), a six member majority agreed with Scalia that the Rehnquist Court had put an incorrect gloss on the Eighth Amendment. Views of precedent were expressed in separate opinions. Scalia explained his vote to overrule *Booth* as a decision to change an opinion that defied reason, noting that the Eighth Amendment was not applicable in such a case. Combined with his dissent in *Gathers*, Scalia saw his duty as a justice to correct decisions that he saw as incorrectly interpreting the Constitution. His separate opinions in the two cases reveal an activist temperament and philosophy.

Chief Justice Rehnquist expressed his own views on precedent. In his majority opinion, he noted that precedent was less important in individual rights cases than economic cases. This represented a switch in philosophy from post Roosevelt era Courts which had emphasized individual rights over economic rights. Rehnquist also noted that the *Booth* and *Gathers* decisions had been closely divided and that an overruling majority may have existed in the latter case. Rehnquist's stated willingness to reexamine individual rights decisions provided another activist vote for conservative justices who sought to remake the law.

Justice Thomas appeared to be a third vote for rewriting precedent. He has asserted an activist philosophy in separate opinions in federalism decisions (Crovitz, 1992; Mayer, 1996). Thomas voted with the majority in *U.S. v. Lopez*

(1995) and in a separate concurrence argued the Court should review its commerce jurisprudence dating back to the Roosevelt Court. Thomas suggested the broadening of the interstate commerce power by the Roosevelt Court was an incorrect reading of the Commerce Clause. He noted that a correct reading could be found in the Marshall Court decision in *Gibbons v. Ogden* (1824) and the Fuller Court decision in *U. S. v. E.C. Knight* (1895). His promise to sweep away decades of settled Commerce Clause law and reinitiate a dual federalism system made Thomas a dependable activist vote on the issue of federal power.

The activism of the Rehnquist Court has also been exhibited by the other two Reagan appointees, both of whom have been at times labeled moderates on some issues. Justice O'Connor, with her experience as a state judge and legislator, has taken it upon herself to rewrite federal habeas corpus law. She has authored several opinions including *Coleman v. Thompson*<sup>160</sup> which set a new standard for determining when habeas petitions could be considered by the federal courts. The Coleman decision overruled the Warren Court decision in *Fay v. Noia*<sup>161</sup> which had opened the door to more habeas petitions by state prisoners.

Justice Kennedy has attempted to rewrite Establishment Clause doctrine in three different cases, *Allegheny v. ACLU* (1989), *Lee v. Weisman* (1995) and *Rosenberger v. University of Virginia* (1995). In each he ignored the Lemon test and tried a series of replacements. In *Allegheny* and *Lee* he created and used a coercion test to decide Establishment cases. By the time of *Rosenberger* he rejected his coercion test and appeared prepared to adopt Scalia's more open interpretation of the Establishment Clause.

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<sup>160</sup>111 S. Ct. 2546 (1991)

<sup>161</sup>372 U.S. 391 (1963)

But it has been Scalia's continuous and fierce statements of his beliefs that has moved the Court in a more activist direction as it reconsidered established precedent and revived once ignored approaches to the law. His effect on the Court was felt almost immediately during his first term in cases involving the Takings Clause. His main convert on the issue was the Chief Justice himself, whose belief in federalism had restricted his view of the Takings Clause. Prior to his becoming Chief Justice, William Rehnquist was identified as the most conservative justice on the Court, one who supported government in cases involving individual rights (Fiss and Krauthammer, 1982; Riggs and Proffitt, 1983; Shapiro, 1976). Rehnquist was a strong supporter of Federalism, favoring states rights over the federal government but also state governments over individuals (Davis, 1986, 1991). Rehnquist was even attacked by conservatives for being too supportive of government in cases where property rights and other conservative interests were under attack (Fiss and Krauthammer, 1982). In a 1976 law review article, Rehnquist noted he preferred to defer to legislators in most cases and that the judiciary was not the proper forum for solving social problems. Such statements, when backed up with a record of unyielding support for government, placed Rehnquist firmly within the restraintist mode of judging. In Takings cases during the Burger Court, Rehnquist joined several opinions limiting the property rights of individuals and even agreeing to overrule a Warren Court decision which protected some of those rights from government regulation.

The first such case, *New Orleans v. Dukes*<sup>162</sup>, represented a classic economic rights case as Dukes sued the city to prevent them from legislating her out of the pushcart business. Rehnquist joined the Court's opinion which stated

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<sup>162</sup>427 U.S. 297 (1976)

Dukes had no economic rights under the Equal Protection Clause and overruled the decision in *Maurey v. Dowd*<sup>163</sup>. In *Pruneyard v. Robbins*<sup>164</sup>, Rehnquist wrote the opinion which showed his support for federalism. He upheld the interpretation of the California constitution which allowed protesters to freely express their views in privately owned malls. Rehnquist rejected Pruneyard's contention that such an interpretation represented a taking of the mall's property without just compensation. Instead he stated that the state could restrict property rights without concern for Fifth Amendment protections. Finally, Rehnquist joined the opinion in *Hawaii Housing Authority v. Midkiff* (1984) which upheld a state scheme with divided large tracts of property when the owner died.

Two terms later Rehnquist was appointed Chief Justice. During his first term as chief he exhibited less support for local and state governments in property rights disputes. In three cases, Rehnquist argued for stricter standards that state or local governments had to meet in order to show they had not unconstitutionally taken property (Levitt, 1993).

In the first Takings case during the 1986 term, *Keystone v. DeBenedictis*<sup>165</sup>, Rehnquist dissented, arguing for a revival of the *Mahon* doctrine when considering regulatory takings by local governments. Both *Keystone* and the 1923 *Mahon* case dealt with restrictions on the extraction of mineral rights from beneath private property. In *Mahon*, Justice Holmes wrote that the law had went too far in its regulation and that the reduction in property values represented a taking of property. In *Keystone*, the Court upheld the regulation, arguing that the

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<sup>163</sup>354 U.S. 457 (1957)

<sup>164</sup>447 U.S. 74 (1980)

<sup>165</sup>480 U.S. 470 (1987)

public interest was stronger than any property interests. The chief justice's dissent argued for a narrowing of the public interest definition.

Though his view was not adopted by the majority in *Keystone*, Rehnquist was able to expand Takings in his decision in *First Evangelical*. The decision expanded the definition of Takings to include temporary seizure of property.

Justice Scalia's opinion in *Nollan v. California Coastal Commission* (1987) was joined by Rehnquist. The decision made it easier for an individual to claim government had taken property without compensation. Scalia's appointment to the Court that may have caused Rehnquist's sudden conversion in support of individual property rights. His change of heart is represented in that the chief justice voted with the individual in five Takings cases during the 1986 term. In comparison, during his first four terms on the Court, Rehnquist voted for individual rights against government on only eleven occasions (Shapiro, 1976).

Before he had been appointed to the Court, Scalia voiced the belief that a more property rights oriented jurisprudence was needed on the Court (Dorn and Manne, 1987). Willing to state his views among his colleagues, Scalia fashioned a traditionally conservative agenda for the Court, an activist approach protecting property interests. His decisions in *Nollan* and *Lucas* displayed his willingness to rewrite the Takings jurisprudence. The junior justice appears to have influenced the chief in adopting a more suspicious attitude toward state and local laws even as the two have clashed over their philosophies of judging (Rehnquist, 1987).

While Justice Scalia may have provided the impetus for the Court to take a more preferential stand toward property rights, Justice Thomas has drawn his colleagues toward redefining the relationship between the federal government and the states. Four of the five Reagan and Bush appointees have expressed support for a revival of the Tenth Amendment.

Yet using the argument of implied rights for states in order to strike down federal legislation requires a turn toward activism and away from majoritarian view of government. Both Chief Justice Rehnquist and Justice O'Connor have shown deference toward congressional prerogatives, refusing to embark on a wholesale striking down of federal legislation.

Since his arrival on the Court during the 1991 term, Justice Thomas has staked out a restrictive view of Federal Commerce power vis a vis the states while claiming broad state power under the Tenth Amendment. He expressed these views in his opinions in three cases, *Thornton v. Term Limits*<sup>166</sup>, *U.S. v. Lopez* (1995) and *Printz v. U.S.* (1997).

In each of the cases, Thomas expressed support for a dual federalism view of the separation of powers between the national and state governments. This interpretation strictly limits the powers of the national government in relation to the states as Congress cannot invade those powers traditionally reserved to the states by the amendment. Thomas' view would lead to the overturning of many federal regulatory schemes foisted upon state and local governments. It would also radically rework the Court's jurisprudence concerning issues of governmental power, requiring the overruling of Roosevelt era precedents<sup>167</sup>. Thomas proposed such a strategy in his *Lopez* concurrence, suggesting that the Court's post 1937 commerce clause jurisprudence had wrongly interpreted the relationship between the states and federal government and the power of Congress to regulate commerce.

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<sup>167</sup>This would include such groundbreaking decisions as *U.S. v. Darby* 312 U.S. 100 (1941) and *Wickard v. Filburn* 317 U.S. 111 (1942)

Thomas' views have not been consistently adopted by his colleagues - he wrote only for himself in *Lopez* - but his innovative arguments have led to the Court challenging the existing view of the Commerce Clause and Tenth Amendment. This has resulted in the Court's acceptance that there are some limits to the power of Congress and that some state powers are protected under the Tenth Amendment. Both Justice Thomas and Scalia have used their separate opinions to change the arguments before the Court and steer their colleagues toward a more restrictive view of the federal government's power.

### *Conclusion*

The analysis of judicial activism on the Burger and Rehnquist Courts has been achieved using several measures and different results. The Burger Court was less effective than its successor at overruling precedent, creating new policy space and precedent and attracting group support via amicus briefs on salient issues. It was effective in limiting legal standing for disfavored groups, such as convicted criminals appealing those convictions. Its decisions foreclosing the possibility of federal habeas appeals for most criminals limited the federal courts' ability to enforce the *Mapp* and *Miranda* decisions on state governments.

Yet the failure of the Nixon and Ford appointees to rewrite precedent and create policy space for salient issues limited their overall success at fulfilling the goals of the presidents who appointed them. The justices were forced to decide cases using Warren Court precedent, much of the reasoning which they opposed. To reach conservatively oriented decisions using liberal precedent, the justices were forced to twist the meaning of those precedents, producing tangled law and inconsistency in rulings. In criminal rights cases, the justices abided by the *Mapp* and *Miranda*

rulings while allowing evidence from warrantless searches and non Miranda confessions to be used in Court. This produced the changes in the interpretation of the exclusionary rule and the exceptions to both Mapp and Miranda. The rulings in such cases appeared to follow no general ideological trend and contributed to the perception that the Burger Court failed in its mission. The Rehnquist Court more effectively rewrote precedent, creating doctrine that ensured that future decisions would follow the ideology of the Reagan and Bush appointees. Their decisions tended to be more ideologically consistent with religious groups, state governments and prosecutors benefiting from the Court's decisions. The activism of the justices also contributed to the feeling that the Rehnquist Court was better able to fulfill the political goals of the appointing presidents.

The presence of judicial activists among a president's Court appointees fulfills one element of success at altering the Court's jurisprudence. The fourth and final element involves the support of the executive and legislative branches of the federal government for the Court's rulings.

## Chapter Seven

### Executive and Congressional support for the Supreme Court

The judiciary's limited power to enforce its decisions makes it dependent upon the executive and legislative branches for implementation. In order for justices to successfully change the Court's jurisprudence they must have the support of Congress and the president.

The executive branch is charged with the direct enforcement of judicial decisions, using cabinet level departments and federal law enforcement to ensure that the Court is obeyed. Stringent enforcement of rulings can legitimize them. It can also embolden the Court in future cases as the justices realized they have presidential support. Contrarily, weak enforcement can make controversial opinions appear less legitimate and force justices to make political compromises in their decisions in order to ensure executive support. Much of the early resistance to the decision in *Brown v. Board of Education* (1954) can be attributed to President Eisenhower's refusal to strongly enforce the decision.

Congressional power over Court rulings usually take the form of overruling decisions with legislation or Constitutional amendment. If Congress disagrees with a judicial interpretation of legislation, it can rewrite the law to meet the Court's concerns. Congress can also amend the Constitution. Five amendments have been added to the Constitution in order to overrule Court decisions<sup>168</sup>. Congress controls the judicial budget and is able to reduce or increase spending for Court resources. A refusal to provide additional spending for law clerks or other needs

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<sup>168</sup>The Eleventh, Thirteenth, Fourteenth, Seventeenth and Twenty Sixth Amendments were passed to overrule Supreme Court decisions.

of the Court would show congressional disapproval. The Senate's confirmation power can also be used to express displeasure with the Court. Refusal to confirm can send a message to the appointing president and the justices that Congress is unhappy with Court rulings.

The threat of congressional action and rhetorical attacks on the Court can lead to changes in its decisions. During the 1950's the Warren Court weakened the power of congressional probes of domestic communism. In *Watkins v. U.S.*<sup>169</sup>, the Court limited congressional investigations to those areas where the Constitution gave Congress the power to legislate. Congressional reaction was swift, with proposals being offered to change the Court's appellate jurisdiction over such cases (Pritchett, 1958). The furor produced a retreat by the justices in *Barenblatt v. U.S.*<sup>170</sup> where the Court gave committees broader discretion in conducting investigations and implied that the judiciary would remain outside the debate over the scope of congressional inquiries.

A second example involves the Burger decision in *Swann v. Charlotte Mecklenburg* (1971), which upheld forced busing to achieve integrated schools. Congress reacted by proposing to remove the busing issue from the Court's appellate jurisdiction and ordering the justices not to use busing as a remedy for segregated schools (Jeffries, 1994). The justices, observing their political support eroding, retreated in *Milliken v. Bradley* (1974). The decision foreclosed the possibility of forced busing between school districts in the North. The *Milliken* decision reduced the political pressure on the justices and made busing less of an issue.

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<sup>169</sup>354 U.S. 178 (1957)

<sup>170</sup>360 U.S. 109 (1959)

While an unhappy legislative or executive branch can block the implementation of judicial decisions, both branches also have the power to extend or expand on Court decisions. The president can stringently enforce judicial decisions, ensuring that the lower levels of government follow the Court's commands. During the battle over desegregating southern schools, the Johnson Administration threatened school districts with a cut off of federal funds if they did not integrate (Clayton, 1992). The administration also used the Justice Department to sue schools that refused to integrate.

The president can also use the moral suasion of his office in support of Court decisions. A strong presidential statement can make Court decisions appear more legitimate and provide political cover for the justices. During the 1960's Democratic presidents spoke out in favor of controversial Court decisions, diverting some of the political pressure away from the justices (Gates, 1992).

An important presidential resource for aiding the judiciary is the office of the solicitor general. The solicitor general argues the government's position on important cases before the Court. If the president is supportive of the Court, the solicitor general's support for a litigant can cue the justices which legal position the administration favors (Clayton, 1995). In cases where the government is not directly involved in the case, the solicitor general can file an *amicus curiae* brief supporting one of the litigants. The briefs explain which side is supported by government and how it would like the case decided. The briefs can also provide legal reasoning for the Court's decision. When the solicitor general supports a litigant, the power and prestige of the entire government is placed behind his position.

Congressional support of the Court involves two activities. Much like the president, members of Congress can provide political cover for its rulings, arguing

that the Court was correct and that the public should abide by the decision. Individual members can explain rulings to the public, trying to maintain public support for the Court. In addition to the power of moral suasion, Congress can use its more formal legislative power to extend a ruling. In *New York v. Ferber*<sup>171</sup>, the Court upheld a state ban on child pornography, ruling that such "speech" was not protected by the First Amendment. Congress proceeded to pass the 1984 Child Protection Act outlawing the interstate transport of such material and expanding the finding in *Ferber* (Cohados, 1984d). In *Osborne v. Ohio*<sup>172</sup>, the Court upheld the federal law. The *Ferber* decision, the subsequent federal legislation building upon it and that legislation being upheld by the Court in *Osborne* exemplifies how Congress can extend a Court ruling through legislation.

With several tools at their command, the executive and legislative branches play an important role in the success of justices attempting to alter the Court's jurisprudence. During the Burger and Rehnquist Courts, both branches were active in helping and hindering the justices.

### *Methodology*

Measuring the level of support in the executive branch and Congress for the Court will be accomplished using several variables. Legislative support for the Court will be measured according to legislation passed to either overturn or extend a ruling by the justices. Passed legislation will be counted rather than bills offered. The latter category is used by many members of Congress for political posturing to show their constituents they are working to overturn an unpopular Court ruling.

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<sup>171</sup>458 U.S. 747 (1982)

<sup>172</sup>495 U.S. 103 (1990)

Bills passed represent a serious attempt by legislators to challenge the Court or reflect congressional support for the justices. It is expected that legislative and executive support will be greater during the latter years of the Burger Court and most of the Rehnquist Court.

In the executive branch three areas will be examined, the formal powers of the president within the executive bureaucracy such as the executive order, the use of presidential influence on legislation that expands or restricts Court rulings and the utilization of the solicitor general's office to advance an agenda before the Court. This final item includes collecting data on the number of times the solicitor general files amicus briefs in critical issues, which side is taken in the brief and whether arguments found in the brief are used in the Court's opinion.

### *Legislative Support and the Burger Court*

Upon his appointment to the Court, Chief Justice Burger attempted to initiate a change in policy toward the issues of federalism, desegregation and criminal rights. Some of his efforts were not welcomed by Congress, which reacted against the Court's rulings. Congress' most dramatic action involved passage of a constitutional amendment to override the ruling in *Oregon v. Mitchell*<sup>173</sup>. In *Mitchell*, the Court ruled that the federal government did not have the power to order states to lower their voting age to eighteen for state elections. Congress acted quickly, passing the Twenty Sixth Amendment and forcing states to lower their voting age. The Burger Court's rather innocuous attempt to protect the traditional state power to run elections was swiftly overruled.

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<sup>173</sup>400 U.S. 112 (1970)

The Burger Court also came under attack for its liberal decisions. Congress reacted to the decision in *Roe v. Wade* (1973) and the broad assertion of an abortion right. In the mid 1970's, the Hyde Amendment became the primary vehicle for those opposing *Roe*. The amendment, attached to an appropriations bill, prohibited the use of federal funds to pay for abortions except under specific conditions. The amendment was challenged and upheld by the Court in *Harris v. McRae* (1978). The Hyde Amendment provided justices opposing *Roe* the opportunity to build precedent for government restrictions on abortion.

The Burger Court's greatest success at working with Congress came in its interpretation of the Omnibus Crime Control and Safe Streets Act. The Act was passed in 1968 before Burger's appointment to the Court but in anticipation that a more conservative supreme court that would give it a broad interpretation. It also challenged the Warren Court decisions in *Mapp*, *Miranda* and *Katz v. United States*<sup>174</sup> which placed electronic surveillance under the protections of the Fourth Amendment (Schmidhouser and Berg, 1972).

The most controversial sections were Title II and Title III which attempted to rewrite the exclusionary rule and overrule *Miranda* (Stephan, 1968; Title II, 1969). The two sections provided the new Nixon appointees the opportunity to weaken the *Mapp* and *Miranda* decisions by upholding Congressional statutes. It also told the Court the direction that Congress wanted the justices to move on criminal rights issues. Between 1969 and 1981, the Court heard eight cases<sup>175</sup> dealing specifically with the constitutionality or legislative scope of the Act. In

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<sup>174</sup>389 U.S. 347 (1967)

<sup>175</sup>*U.S. v. U.S. District Court* 407 U.S. 297 (1972), *Gelbard v. U.S.* 408 U.S. 41 (1972), *U.S. v. Kahn* 415 U.S. 143 (1973), *U. S. v. Giordano* 416 U.S. 505 (1973), *U.S. v. Chavez* 416 U.S. 562 (1973), *U.S. v. Donovan* 429 U.S. 413 (1976), *Scott v. U.S.* 436 U.S. 128 (1978), *Dalia v. U.S.* 441 U.S. 238 (1979)

five of them the Court upheld the act or broadened its scope. In three, the Court restricted the Act. In *U.S. v. U.S. District Court* (1972), a unanimous court stated that federal wiretaps could be ordered only under probable cause guidelines. The other two decisions where the Court limited the reach of the Act, *Gilbard v. U.S.* and *U.S. v. Giordano* (1973) restricted who could ask for federal wiretap warrants and when evidence from those wiretaps could be used in a trial.

Overall, though, the Court interpreted the Act according to the desire of the Congress. It placed greater law enforcement power in government and limited the exclusionary rule in federal cases. The Court also used the interpretations to chip away at the Warren Court's Fourth Amendment precedents.

Yet the 1969 through 1980 terms saw a Democratically controlled Congress preclude any substantial legislative support for the Nixon and Ford appointees. Three politically weak presidents also placed the agenda under the control of Congress. It was not until the beginning of the Reagan Administration that significant efforts would be mounted to extend Burger Court rulings favored by appointing presidents.

The Burger Court's inability to produce the promised revolution in the area of criminal rights, caused Congress to legislate changes in the judicially created exclusionary rule during the first Reagan term. Republican legislators offered several bills creating a federal good faith exception to the exclusionary rule. The bill would have allowed illegally obtained evidence to be used in trial if police acted in good faith. A mistake on the part of clerk or magistrate would not automatically invalidate the search under the Fourth Amendment. The legislation was introduced in 1981 through 1984, with the Reagan Administration strongly supporting its passage. While it passed the Republican Senate, the Democratic House refused to act on it until 1984. The heated debate and the Republican

criticism of the Court did produce some changes in Exclusionary rule cases. In *U.S. v. Leon*<sup>176</sup>, the Court acted to implement what Congress had been unable to do. In the five to four opinion, the Court upheld a search even though the warrant used for the search was found to be defective. The opinion in *Leon* stated that police had acted in good faith by obtaining the warrant and that excluding the evidence seized would not have the desired effect of prevent police abuse. Thus the evidence obtained against *Leon* could be used in his trial.

While it is not known that the action by congressional Republicans directly led to the Court's action, the about face after several years of refusing to enact good faith exception suggests that the legislative effort contributed to the change in policy. It may have also contributed to another retreat by the Court from one of its previous criminal rights decisions. In *Nix v. Williams* (1984), the Court considered a case that had been previously decided in the early case of *Brewer v. Williams* (1978). The Court considered whether William's confession after a supposedly illegal discussion by police could be used in Court. The former question had been decided in Williams' favor in the first case. In *Nix*, the Court ruled against Williams, arguing that the body and evidence collected from it would be inevitably discovered by police and thus could be used in Williams' trial. This decision further weakened the *Miranda* decision and removed some of the political pressure on the Court that had surrounded its criminal rights decisions.

The 1984 Crime Bill, no longer including the controversial good faith exception, passed both houses of Congress and was signed into law. Two provisions, one limiting the availability of bail for violent criminals and repeat offenders, the other creating a federal sentencing commission, were challenged on

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<sup>176</sup>468 U.S. 897 (1984)

constitutional grounds before the Court. Both cases gave the new Rehnquist Court the opportunity to continue its predecessor's hard line on criminal rights.

In *U.S. v. Salerno*<sup>177</sup>, the Court upheld the Bail Reform Act, allowing for preventive detention of those accused of crimes. In *U.S. v. Mistretta*<sup>178</sup>, the Court upheld the creation of the federal sentencing commission as a separate entity, allowing for a more efficient method of determining sentences for federal crimes. By upholding these sections of the 1984 law, the Court gave the federal government greater enforcement powers.

Congressional support for the Burger Court was at its peak during the Reagan Administration. With a Republican Senate, legislation supporting tougher law enforcement and expanding religious freedom aided the Court's agenda. With the return of Democratic control of the Senate, that support dwindled. It was not until after the 1994 elections that the Court would receive consistent legislative support.

### *Congressional Support for the Rehnquist Court*

While Congress appeared to be leading the Court in creating a good faith exception and inevitable discovery doctrine, in Establishment Clause jurisprudence, the Court led Congress in allowing for more church-state accommodation. The Court's decision in *Widmar v. Vincent* (1982) rejected a strict separation of church and state. In *Widmar*, the Court struck down a university prohibition of student religious groups using facilities to conduct religious services. The justices stated that the refusal violated the students' speech rights by discriminating against them

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<sup>177</sup>481 U.S. 739 (1987)

<sup>178</sup>488 U.S. 361 (1989)

based on the religious content of their speech. The university would have to allow religious groups to use its facilities as long as that same privilege was afforded nonreligious groups. The Court dismissed the argument that allowing the use of public facilities for religious reasons violated the Establishment Clause. Instead the Court focused on the free speech aspects of the university's refusal, creating a religious speech doctrine to be applied in future cases.

The *Widmar* decision laid dormant in the Court throughout the 1980's until Congress acted to expand *Widmar* beyond the university setting. During 1983 and 1984, while anti abortion and pro school prayer constitutional amendments were defeated in Congress, members sought to meet the demands of constituents asking for greater protection of religious freedoms. The result was the 1984 Equal Access to Schools Act building on the *Widmar* ruling (Cohados, 1984c). The Act required that all secondary schools receiving federal funding allow religious groups to use their facilities if the same privilege was afforded nonreligious groups (Hook, 1984). The Act passed Congress and was signed into law. It not only expanded the *Widmar* ruling, but also placed the federal government's imprimatur on the view that religious groups should not be discriminated against in the use of public facilities.

The Rehnquist Court made the most of the law and during the 1990's issued a series of rulings in support of the Equal Access Act. While the Equal Access Act represented the congressional high tide of support for the Republican social agenda during the Reagan Administration, there was a revival of support during the last two years of the Clinton Administration.

The advent of the first Republican Congress in forty years ushered in a period of greater legislative support for the Court. One of the first laws passed by the 104th Congress involved limiting federal control over state governments. The

Unfunded Mandates Act required Congress to hold hearings on any legislation that would cost the states in excess of one hundred million dollars (Hosansky, 1995). Though the Act's enforcement provisions were weak and would rarely halt congressional legislation, it did place Congress on the record in support of limitations on federal power over the states. In doing so, the legislative branch told the Court that it would be more sympathetic of rulings limiting federal power.

Congress has also moved on the issue of abortion passing a ban on most partial birth abortions. The ban would likely have been declared unconstitutional under the old *Roe v. Wade* (1973) framework which prohibited almost all government regulation of abortion. The Rehnquist Court decisions in *Webster* and *Casey* had created an undue burden test in abortion cases that allowed for government regulation at the state and federal level. Members of Congress voting for the bill did so with the knowledge that if it became law it was likely to be upheld by the current Court. That possibility was made moot by a presidential veto.

Republican lawmakers support for the Rehnquist Court was apparent in the are of Habeas Corpus reform. The Reagan and Bush appointees had been attempting to reduce the number and length of Habeas Corpus appeals filed by state prisoners. The justices hoped to improve the administration of justice and unclog the federal courts by preventing the filing of repetitious appeals that delayed the implementation of the death penalty.

The Court had taken the initiative through its rulings limiting Habeas Corpus<sup>179</sup>, but the judicially crafted solutions of the Rehnquist Court could only

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<sup>179</sup> *Teague v. Lane* 489 U.S. 288 (1989), *McCleskey v. Zant* 499 U.S. 467 (1991), *Sawyer v. Whitley* 505 U.S. 333 (1992), *Medina v. California* 505 U.S. 437 (1992), *Herrera v. Collins* 113 S.Ct. 853 (1993)

do so much against congressionally mandated appeals and resistance among those supporting criminal rights. With a Democratic Congress deeply concerned with the rights of criminals, the Rehnquist Court was in constant conflict with Congress over the issue. Habeas Corpus reform was included among the changes promised by Republicans in 1994 and passed in 1995. The Antiterrorism and Effective Death Penalty Act of 1995 codified the restrictions on Habeas Corpus petitions in federal courts, preventing the repetitious use of appeals to delay implementation of penalties.

The law was challenged in *Felker v. Turpin*<sup>180</sup>. In *Felker*, the Court upheld the restrictions on appeals for the lower federal courts but refused to interpret the law to place such restrictions on the Supreme Court itself. In his opinion, Chief Justice Rehnquist interpreted the law to mean that the justices had the power to hear such appeals notwithstanding the desire of Congress to limit them. Some commentators have argued that the *Felker* decision defeated the congressional attempt to limit appeals. But it appears unlikely that the chief justice, who had been the driving force behind such limits, would have overturned any part of the law that met his own requirements for limiting such appeals. Rehnquist used his opinion to reassert the Court's control over its docket, refusing to allow congressional interference in it while accepting the same restrictions on the lower courts, where the greatest abuse of Habeas Corpus had occurred.

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<sup>180</sup>116 S. Ct. 2333 (1996)

### *Conclusion*

The strongest congressional support for the Burger and Rehnquist Courts coincided with Republican majorities in the Senate between 1981-1987 and in both houses after 1994. That congressional support gave the Republican appointees the opportunity to expand on their rulings involving religious rights, criminal rights and federalism. The cooperative nature of the Republican Congress ensured that the Court would not be challenged legislatively when making controversial rulings that favored the approach of the Reagan and Bush appointees. This likely made the justices more confident in striking down federal affirmative action policies, racial gerrymandering and a federal school gun ban during the 1994 term and in striking down part of the Brady Bill and RIFRA during the 1996 term.

Congressional support for the period was less consistent than that offered by the four Republican administrations during the period. Their rhetorical and substantive support would be expected to aid the new appointees in meeting their goals.

### *The Nixon and Ford Justice Department and the Burger Court*

The first eight years of the Burger Court (1969-1976) saw a Republican controlled Justice Department arguing its views on salient issues before justices it recommended for appointment. The attorney general, as head of the Justice Department, also used his position as a forum to propose changes in the Court's jurisprudence.

The Nixon Administration's use of the Justice Department was limited by the abilities of the first term Attorney General, John Mitchell, and the disagreement

within the department itself over the direction of policy. Mitchell was a lawyer rather than a politician by trade and had no coherent political philosophy to enunciate. The entire Justice Department effort during Nixon's first term could be summed up Mitchell's words early in the administration "Don't listen to what we say, watch what we do." (Evans and Novak, 1972) This manipulative and cynical approach of the attorney general made consistency in policy difficult. Mitchell tended to talk toughly about law and order and school desegregation in the South but the actions of his department on both issues tended toward the tepid.

The attorney general criticized the criminal rights decisions of the Warren Court and the liberal activism of its justices including some that continued to serve on the Burger Court (Mitchell, 1971). He declared that social change should not be effected through the judicial process and that judges should not make social policy. He argued against the expression of raw political will in decisions and instead for carefully drawn judgments that tended to defer to elected officials. Yet these arguments tended to have a political tinge to them mostly because of Mitchell's calculating style. Much of the Justice Department's policies involving the Courts were made with an eye toward increasing Republican political support in the South. This was part of the Nixon Administration's much discussed Southern Strategy to attract those voters who had supported George Wallace in 1968 (Evans and Novak, 1972). His vague arguments for strict constructionist justices provided no analytical framework that would replace the jurisprudential approaches of the Court.

The main effect that the Nixon Justice Department had on the Court involved its attempts to have justices removed. Mitchell was personally involved in the investigation of bribery charges made against Justice Fortas and apparently worked out an agreement where charges would not be filed in return for his

resignation from the Court (Woodward and Armstrong, 1979; Massaro, 1991). Mitchell's involvement in Fortas' resignation placed him in an adversarial position to the Court. The Administration's political attacks on the Court continued with further investigations of justices. One particular target of the department, Justice Douglas, saw the results of the inquiries into his private life used in a congressional impeachment attempt (Cannon, 1994)..

The Nixon Administration's attacks on the Supreme Court soon became interpreted as an assault on the entire judiciary. With the Court as an institution under attack by another government branch, it was inevitable that the justices would feel beleaguered and see the executive branch as the enemy. Under such conditions, it was unlikely that the administration's legal arguments would receive an entirely impartial hearing from the justices. Instead the poorly instituted strategy of bullying the Court seemed to backfire, with the justices asserting the independence of the judiciary in such cases as *Nixon v. U.S.* (1974). Legal arguments that had been acceptable to the Court early during the Burger tenure suddenly became attached to the Nixon Justice Department and were discredited in the eyes of some of the more moderate justices (Woodward and Armstrong, 1979).

This harmed the administrations efforts to alter the Court's jurisprudence as exhibited in school integration cases. During the 1968 presidential campaign, Nixon sought a middle course for desegregation policy. Early in the Nixon Administration, the Justice Department signaled a change in policy by filing an amicus brief in a case arguing for a delay in implementing school desegregation. This reversed the Johnson Administration's policy of arguing against such delays. In the first Court case where such a brief was filed *Holmes v. Alexander* (1969), the Court unanimously rejected the call for delay. Even though defeated in Court,

the administration declared victory since it placed Nixon in agreement with southern voters. The administration also failed the following year to convince the Court to reject school busing in the Swann case.

These failures can also be attributed to the disagreements that raged within the administration itself. The Justice Department's civil rights division was divided over which approach to take. Its staff favored strict enforcement of congressional rules against schools that refused to integrate while its leaders, including the attorney general, promised southern politicians weaker enforcement (Layton, 1992). As the Justice Department countermanded the actions taken by the civil rights division, the disagreement within the Administration became visible. The purge of the division and the resignation of staff lawyers allowed for the appointment of staffers more in agreement with the administration's desegregation policies. Yet the discord within the Justice Department prevented it from speaking with one voice or presenting a clearly stated alternative to stringent desegregation policies.

The Nixon Administration used the Justice Department ineffectively to influence the Supreme Court and constitutional doctrine. The political machinations of the Attorney General, using policy as part of a reelection tool, made his arguments too overtly political to affect the Court. The inability to speak with a single voice also undermined the administration's policy on school desegregation.

Nixon's shortened second term did not produce an effective policy toward the Court. Instead the Watergate scandal engulfed the Justice Department, making changes on the Court seem a secondary concern. With Nixon's resignation, a new complement of Republican appointees began filling the department under the new Attorney General, Edward Levi. The Ford Administration followed in the

conservative stances of its predecessor with President Ford at times appearing more conservative than the man who appointed him. Yet Ford's attorney general did not agree with those same politically conservative notions. He entered the Justice Department without a declared goal of changing the Court's jurisprudence and did not rage against the Court as John Mitchell had.

Levi was a moderate Republican who stated that his main duty at Ford's Attorney General was to recover the public's and Congress' faith in the Justice Department (O'Brien, 1991). He also sought to lower the level of partisan criticism of the Court and the partisanship of the appointment process. With these goals in mind, Levi did not represent a likely candidate for using the Justice Department in an effort to guide the Court away from its Warren Court precedents. The discretion given him by Ford in running the Justice Department foreclosed the possibility that it would be an activist force in support of the president's views on crime, desegregation and federalism. This weak level of support would be reversed during the next two Republican administrations.

### *Executive Support during the Reagan and Bush Era*

The Reagan Justice Department was heavily involved in attempts to change the liberal precedents of the Warren and Burger Courts. Edwin Meese, the attorney general during Reagan's second term, launched a personal campaign against the liberal wing of the Court and its broad construction of constitutional rights. Meese argued for a more restrained approach to judging with the courts deferring to elected officials and respecting the boundaries between government

branches (Meese, 1986, 1987). The attorney general's speeches drew a reply from the leading liberal on the Court, Justice Brennan.

Brennan chastised Meese's view of judging and defended his own egalitarian decisions that created rights beyond those explicitly stated in the Constitution. He argued that the strict constructionist approach favored by Meese was impossible and would produce distorted results if used by the Supreme Court (Brennan, 1986).

While the Meese-Brennan debate did not produce any agreement on the best method of constitutional interpretation, it did raise the issue of whether the activism of the Warren and Burger Courts had produced satisfactory results. It also placed the Court's liberal wing on the defensive, as Justice Brennan had to fend off the attacks.

Meese was not the only high level Justice Department official who expounded a conservative philosophy for the judiciary. The head of the department's Civil Rights Division, William Bradford Reynolds, enunciated the Reagan Administration's view on civil rights policy. Reynolds made a series of speeches criticizing both civil rights organizations and the civil rights decisions of the Warren and Burger Courts. He directed his scorn on recent affirmative action opinions and their emphasis on group rights over individual rights (Reynolds, 1984). He also spoke out forcefully against the egalitarian approach to civil rights favored by Justice Brennan (Reynolds, 1987).

Reynolds was best known for advancing two policy objectives, a focus on reverse discrimination and the enforcement of a color blind civil rights policy. He focused his office's resources on protecting the rights of nonminorities denied jobs, promotions or government contracts on the basis of affirmative action. The Administration opposed the position of civil rights organizations and argued the

Court should strike down federal affirmative action policy.

Reynolds also adopted the words of Justice Harlan's dissent in *Plessy v. Ferguson* (1896) arguing that the Constitution was color blind. The Justice Department took this position in opposing racial preferences. Reynolds suggested that only by prohibiting all race based policies could the Court enact Harlan's vision. Reynolds arguments were recognized by the Court though a majority of justices never wrote it into law. Instead both Justices Scalia and Thomas pronounced their support for a color blind constitution in concurring opinions to affirmative action decisions<sup>181</sup>.

The effect of Meese's and Reynolds' speeches and declarations of policy was to place these conservatively oriented views within the mainstream of the debate. Their arguments also became accepted policy within the Court as justices began to focus on the original intent of the framers and the plain reading of constitutional text. In affirmative action policy, the Meese - Reynolds tandem had their political philosophy accepted by the Court, which rejected the policies less than twenty years after first declaring them constitutional.

Yet Meese did more than just talk about a new theory of judging, he initiated a judicial selection process that elevated judges who subscribed to his views. This process included the choosing of federal district and appellate court judges along with Supreme Court justices (Schwartz, 1987). Within the lower courts it established a cadre of conservatives who gained valuable judicial experience, advanced conservative doctrine and provided a "farm team" from which future presidents could choose justices. Three of the Reagan and Bush nominees, Justices Scalia, Kennedy and Thomas, came from the federal appeals

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<sup>181</sup>These include *Richmond v. Croson* (1989) and *Adarand v. Peña* (1995)

courts. Meese's efforts also ensured that future Republican presidents, searching for conservative nominees, would have several relatively young candidates to choose from.

The Justice Department's involvement in changing the Court's ideological makeup went beyond the appointment process and speeches made by the attorney general. It included using the office of solicitor general to express administration views before the Court and to cue its appointees to which position it supported. The two solicitor generals who served during the Reagan Administration, Rex Lee and Charles Fried, were active in filing amicus briefs in cases where the government was not a litigant. The number of filings rose dramatically from the totals of the previous administrations, representing a change in policy from the Nixon and Ford Administrations (Witt, 1986). The amicus briefs were used to present the administration policy on abortion, affirmative action, criminal rights and religious rights.

The Bush Justice Department was less able to enunciate a new agenda for the justices. Though the solicitor general, Kenneth Starr, continued to advance the agenda begun under Edwin Meese, the attorney general's office was less involved in trying to get the Court to change its jurisprudence (Clayton, 1995; Fried, 1991; Kmiec, 1992;) Both Richard Thornburgh and William Barr were less ideological than their Reagan era predecessor. They did not engage in debates with scholars and justices over the proper method of constitutional interpretation or the role of the judiciary.

While all four Republican Administrations had some involvement in trying to move the Court in a particular direction, their efforts were mainly turned to using the office of the Solicitor general to their advantage.

### *The Solicitor General and Amicus Briefs during the Burger Court*

The solicitor general's office can provide considerable support for litigants by filing amicus curiae briefs with the Court on their behalf. With the SG's office successful both at getting cases heard by the Court and getting favorable rulings, it is likely that their briefs on behalf of a litigant would have a positive impact (Segal, 1988; Segal and Reedy, 1988). That would include the justices using the SG's position to guide them in changing the Court's jurisprudence.

During the Nixon's first term, the solicitor general filed only twelve briefs in forty seven total salient cases. This twenty six percent participation rate ranked below the historical average for S.G.'s filing briefs on all cases (Segal, 1988). It was expected that the rate of brief filings for salient issues would be higher than the historical average.

During the 1974 and 1975 terms, when the Ford Administration controlled the Solicitor General's office, the SG filed fifty percent more briefs in salient cases, four filings in ten cases. The disparity between the two administrations can be partly attributed to turnover in the position of solicitor general. The Nixon Administration's SG, Erwin Griswold, was a holdover from the Johnson Administration and clearly not a strong supporter of the president's desire to alter the Court's ideological direction. Griswold also kept many of the staff lawyers dating back from the previous administration. These staffers were unlikely to write briefs that strongly argued the president's position on salient issues. In fact during Nixon's first term, his political appointees spent much of their time trying to convince more permanent staff to adopt the Nixonian position on certain issues (Evans and Novak, 1972). The refusal of the staff to bend to the president's

desires made the administration appear weak and vacillating. This affected the SG's office in the arguments it presented to the Court and the level of participation in cases as an *amicus curiae*.

With Griswold's resignation, Robert Bork was appointed the new SG. During most of his tenure, though, the turmoil in the Justice Department prevented any consistent political or legal vision from being enunciated from above. During the 1973 term, Bork filed seven briefs, exceeding the five filed by Griswold during his four terms. Three of the briefs dealt with desegregation and three with criminal issues. Unlike Griswold, who was unable to convince the Court to take a more restrictive view of the federal judiciary's power over desegregation, Bork was able to convince a majority of justices to scale back desegregation orders.

His first major success occurred in *Milliken v. Bradley* (1974). There his brief argued for a remedy in desegregation that matched the level of violation. His reasoning was adopted by the Court and used to prevent wholesale busing in northern school districts. Bork's reasoning represented the first restriction imposed by the Court on the ever expanding judicial powers to integrate schools. The SG was also successful in *Pasadena v. Spangler*<sup>182</sup>, which further limited federal judges' power over districts that had complied with desegregation orders. Bork's brief suggested that the Court uphold the school district's plan to integrate even if it did not achieve immediate results. This favored the Nixon Administration's slower approach to integration. The Court agreed, ruling in *Pasadena* that school districts were to be given greater latitude in making desegregation plans. Bork, though, did not have the full support of the Justice Department, which was involved in the Watergate scandal. This prevented him

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<sup>182</sup>427 U.S. 424 (1976)

from initiating a more aggressive use of amicus briefs (Segal, 1988). Such divisions would not be found within the Reagan Administration.

### *The Solicitor General during the Reagan and Bush Administrations*

The Reagan Administration was more effective in the use of briefs to alter the Court's rulings. During the 1981-1985 Court terms, the Reagan solicitor general filed 30 briefs in 78 cases where the U.S. was not a litigant. The thirty seven percent participation rate represented a forty percent increase over the levels attained by the previous two Republican administrations. The focus of the filings also changed during the administration. Fourteen of the thirty dealt with criminal rights, part of the administration's aggressive campaign to roll back *Mapp* and *Miranda*. The solicitor general also filed five briefs supporting state or local ordinances restricting abortion rights and four in support of religious rights. These briefs were used to change the Court's rulings in several areas.

One well known example of the Reagan solicitor general's having an effect on constitutional doctrine involved a brief filed by the government in *Akron v. Akron Center for Reproductive Health*<sup>183</sup>. In his amicus brief, solicitor general Lee called for the Court to replace the three trimester test created in *Roe v. Wade* (1973) with an undue burden test. According to Lee, the test would allow for more abortion regulation without overruling the right to abortion created in *Roe*. In *Akron*, a six member majority refused to accept the undue burden test or to uphold the abortion restrictions enacted by the city.

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<sup>183</sup>462 U.S. 416 (1983)

In dissent Justice O'Connor picked up on Lee's suggestion and argued for the undue burden test. She specifically mentioned the amicus brief filed by the Solicitor General. While O'Connor's Akron opinion did not attract a majority, it did put her on the record for an undue burden test, that would affect her future abortion opinions.

O'Connor's dissent became more important as it was turned into a concurrence in *Webster v. Reproductive Services* (1989). In his opinion, Chief Justice Rehnquist upheld a state ban on performing abortions in state funded hospitals, representing a major shift in Court policy toward abortion restrictions. Finally in *Planned Parenthood v. Casey* (1992), O'Connor wrote the Court's opinion that made the undue burden test the standard for future abortion related cases.

The Reagan solicitor generals were also effective in changing the Court's jurisprudence in Establishment Clause cases, Takings and affirmative action policies. In *Marsh v. Chambers* (1983), prayers in the Nebraska state legislature at the start of each day were challenged as a violation of the Establishment Clause. The Reagan Administration filed an amicus brief on behalf of the legislature. In the brief, the solicitor general noted that at the time of the ratification of the First Amendment, both states and Congress had legislative chaplains that said daily prayers<sup>184</sup>. This use of chaplains strongly suggested that the framers of the Establishment Clause did not intend for it to prohibit legislative prayers<sup>185</sup>.

This historical analysis was used in the Court's decisions upholding the prayers. The opinion eschewed the Lemon Test which, with its requirement that all laws have a secular purpose, would likely have led to the prayers being struck

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<sup>184</sup>U.S. Amicus Brief Pg 4

<sup>185</sup>U.S. Amicus Brief Pg 6

down. The solicitor general's argument not only drew five votes but also began the reexamination of the Lemon test and its replacement with other standards.

The U.S. amicus brief in the Nollan case made arguments that were adopted by the Court. The brief suggested that the Court, when deciding the meaning of Takings, should require that government regulation of private property be in proportion to the perceived health and safety concerns of the government<sup>186</sup>. It also stated that takings included a diminution of property in addition to a destruction of all economic viability, an extension of the definition<sup>187</sup>. These suggestions were included in the Court's opinion, which began a more aggressive approach by the justices on the regulation of private property.

The Reagan solicitor general also had an effect on affirmative action policy. In *Richmond v. Croson* (1989), the U.S. brief recounted the history of race based classification and the Court's use of strict scrutiny in deciding such cases. The brief asked the justices to extend that analysis to affirmative action policies. The Court responded and for the first time considered the constitutionality of an affirmative action program using strict scrutiny.

During the 1986 through 1991 terms, the Reagan and Bush Administrations continued to be active, filing thirty four briefs in seventy six cases or forty five percent of salient cases. This was a higher rate than achieved during the first Reagan term. The increased participation rate can be attributed to the aggressive litigation strategy undertaken by the two solicitor generals during that time, Charles Fried and Kenneth Starr. Fried drew scorn from liberal supporters of Warren and Burger Court precedent as he directly called for the overruling of the

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<sup>186</sup>U.S. Amicus Brief Pg 9

<sup>187</sup>U.S. Amicus Brief Pg 1

*Roe* decision and for the Court to strike down affirmative action policies as unconstitutional (Caplan, 1987).

Yet the largest portion of the briefs filed during this time dealt with criminal rights. Fourteen of the thirty briefs asked for restrictions on the rights of criminals while only six briefs dealt with abortion. Three briefs dealt with the Takings issue. Two of the briefs supported the property owner seeking just compensation from government. In both those cases, *Nollan* and *Lucas*, the justices ruled in favor of the individual. In both cases, the solicitor general was able to facilitate a return to a more property rights oriented jurisprudence. The decision to write briefs in support of property owners reflected the administration's dedication to protecting those rights against government intrusion. The brief was filed even though a decision favoring property rights would be costly to government.

One of the most interesting filings during this period occurred *Metro Broadcasting v. FCC* (1990). Metro sued the FCC to prevent the enforcement of affirmative action policies enacted and implemented during the Reagan Administration. The FCC, adhering to government policy, would expect the support of the solicitor general. Instead the government's brief was filed in support of Metro. It called for the Court to strike down affirmative action policies as unconstitutional. In its brief, the solicitor general followed the arguments it presented opposing state affirmative action policies in *Richmond v. Croson* (1989). Though they lost the *Metro* case, the administration had used the SG's office to advance policy goals and attempt to guide the Court in the direction favored by the president.

The statistics for the four administrations show that the Reagan and Bush terms saw a greater involvement on the part of the solicitor general in filing briefs

in salient cases. The forty percent of cases where the SG filed briefs exceeded the level achieved under the Nixon Administration. The different solicitor generals during the time can explain the different participation rates. Robert Bork and Charles Fried were dedicated to altering the Court's ideological direction and supporting certain principles rather than just effectively arguing the government's case. Bork's success was limited by the chaos in the Justice Department during his tenure. Without a steady hand in the attorney general's office, it became difficult to enact a consistent policy toward salient issues.

Charles Fried had ideological goals he wanted to achieve in the Court, goals that were also favored by Attorney General Meese. It was during the second Reagan term that a consistent social policy was enunciated by the solicitor general in its briefs. Fried asked the Court to overturn Roe, to prohibit affirmative action policies, to protect property and religious rights (Fried, 1991; Caplan, 1987). The agreement in philosophy and strategy between the solicitor general and attorney general produced results through arguments in briefs.

An administration seeking change in the Court's ideological direction has a powerful tool in the solicitor general's office for meeting its goal. The Reagan and Bush Administration were effective in using the SG to state their position before the Court and influence decisions through arguments in those briefs.

### *Presidential Implementation during the Burger and Rehnquist Courts*

In addition to the use of the Justice Department and the solicitor general's office, the president can support the Court and its decisions through the implementation and legislative process. Implementation includes the issuing of administrative rules, specifically executive orders, to ensure that the federal

government abides by Court rulings. Support or opposition to congressional legislation can be achieved through formal powers such as the presidential veto and more informal powers including rhetorical support and placing presidential prestige behind a proposed bill.

Much of the Nixon Administration's legislative and implementation activities attacked the justices' rulings. Nixon followed a strategy of supporting some congressional attempts to overrule or limit Court rulings while initiating a minimal implementation of those decisions with which he disagreed. The administration's opposition was particularly forceful following the decision in *Swann*, which allowed for large scale busing to achieve public school integration. Nixon supported legislation proposed in Congress to limit the Court's jurisdiction over such questions and its ability to use busing to achieve integration (Nixon, 1978). The president also allowed his Department of Health, Education and Welfare to perform the minimum activities mandated under the *Swann* ruling in integrating the schools. He stated in his memoirs that he adopted the strategy in the hope that the Court would see the error of its ways (Nixon, 1978). Considering that Nixon's chief justice authored the unanimous opinion, his own feelings about the judgment suggests he was unsuccessful in convincing the Court to adopt his policy.

Much of the posturing by the Nixon administration over the *Swann* decision followed his famous southern strategy intended to increase Republican political support in the region. Its effect on the Court's jurisprudence was limited, though, since Nixon's strategy was both defensive and political.

The Reagan Administration was more active in supporting the Burger and Rehnquist Courts within the legislative arena. During the congressional battles over the crime bills and the Equal Access Act, the administration was vocal in its

support and pressured individual members who were unsure about a measure (Cohadas, 1984a,b). Court decisions were also aggressively implemented. In affirmative action cases, the Justice Department attempted to enforce a race neutral policy following a decision in *Firefighters Union v. Stotts*<sup>188</sup>, which appeared to endorse remedying discrimination based on individual cases. The department immediately told state and local governments that it would have to rework its agreements to end discrimination to involve individual rather than groups rights (Fried, 1991). The Department made clear that the Reagan Administration favored overturning much of the affirmative action policy and would strongly implement any Court decision that abided by the administration's policy.

The administration also issued rules supporting the Court's reasoning on another salient issue, abortion. In 1988, the department of Health and Human Services issued rules forbidding doctors in federally funded clinics from referring patients to abortion clinics. The rule was upheld by the Court in *Rust v. Sullivan*<sup>189</sup>. While the *Rust* decision focused on speech rights, it provided the Reagan and Bush appointees another opportunity to create precedent for restricting abortion rights.

President Reagan also used his power of executive order to require the executive branch to implement Court decisions. Two such orders, issued in 1987 and 1988, expressed the president's views on two salient issues before the Court. In the Fall of 1987, Reagan issued Executive Order 12612<sup>190</sup> dealing with Federalism and the relations between state and federal government. The order

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<sup>188</sup>467 U.S. 561 (1987)

<sup>189</sup>500 U.S. 173 (1991)

<sup>190</sup>52 Federal Register 41685 (1987)

talked about the importance of dividing power between the states and national government and that the Tenth Amendment prohibited federal interference with certain inherent state rights. The order required federal agencies to consider the effect of any new rule on state power. Regulations that were too intrusive were to be withdrawn or rewritten to take into account state concerns.

The executive order took the form of an exhortation rather than a clear cut command as it included several loopholes in its enforcement. There were no clear reporting requirements that would allow the White House to determine whether the agencies were abiding by it. Although the order attempted to revive the pre-*Garcia* view enunciated by the Court, it did not have the backing of Congress or a majority of the Court. Its main effect was to state the obvious, that the Reagan Administration favored states' rights and the revival of the Tenth Amendment.

Executive Order 12630<sup>191</sup>, *Government Actions and Interference with Constitutionally Protected Property Rights*, provided more effective enforcement while building upon recent Rehnquist Court precedents. The order specifically mentioned that its contents were based on Court decisions protecting private property rights. In doing so, the executive order required executive agencies to determine whether any proposed rule or action affected private property or caused a temporary or permanent taking of that property<sup>192</sup>. This section built upon the Court's decision in *First Evangelical Church* which required compensation for even temporary takings (Folson, 1993). It also required agencies to make yearly reports on regulations that affected private property and the amount of compensation provided when a taking occurred<sup>193</sup>.

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<sup>191</sup>53 Federal Register 8859 (1988)

<sup>192</sup>53 Fed. Reg. 8859

<sup>193</sup>53 Fed. Reg. 8859 at 8861

The Takings executive order made a constitutional ruling by the Rehnquist Court part of the procedures for enacting bureaucratic regulations. It enforced a Court ruling using administrative procedures and placed the administration firmly behind the view that the taking of private property by government. It provided some political cover for the Court to make future Takings rulings since it would be federal agencies that would be affected if the definition of Takings was expanded. It also placed the executive branch within the forefront of protecting property rights.

The Bush Administration continued its predecessor's support for the Rehnquist Court, though its strategy was different. Bush did issue an executive order prohibiting abortions in overseas military bases but that represented one of its few positive actions. Instead the administration played a more defensive role, protecting the Court from the negative congressional reaction to its recent controversial decisions. Bush vetoed two Civil Rights Bills that would have overruled the Court's interpretation of the 1964 Civil Rights Act in *Wards Cove v. Atonio* (1989). He also actively opposed Congress attempt to pass legislation to overrule the Court's decision in *Employment Division v. Smith* (1989). The Religious Freedom Restoration Act did not become law until the Clinton Administration.

The Bush Administration's only foray into using executive orders to expand on Court rulings failed abysmally. A proposed executive order would have ended most affirmative action programs dealing with federal education funds, a logical extension of the Court's rulings in *Croson* (Hill and Williams, 1994). Once reports of the proposed orders became public and there was negative congressional reaction, Bush backtracked, refusing to issue the order and even disavowing its

contents. If issued, the order would have represented a dramatic shift in federal policy, one started by the Rehnquist Court in its rulings on the constitutionality of affirmative action policies.

Using their power to issue executive orders, two of the Republican presidents sought to implement Supreme Court rulings. Both Presidents Reagan and Bush were more active, issuing executive orders to expand on decisions on Takings and the regulation of abortion.

### *Conclusion*

The executive and legislative branches of the federal government have the power to aid or hinder a president's attempt to change the Supreme Court's jurisprudence. The executive's implementation powers, if used aggressively, can advance the Court's agenda within the federal bureaucracy. Also the executive can utilize the resources of the Justice Department and solicitor general to influence the justices and their decisions. Congressional support for the Court mainly takes the form of legislation that extends the justices' rulings. Federal laws can legitimize and be legitimized by a Court ruling.

Both the Burger and Rehnquist Courts worked with the executive and legislative branches in an effort to change constitutional interpretation. Executive support during the Burger Court was confined mainly to solicitor general Bork's tenure and during the Reagan Administration when the president pushed aggressively for legislation. The Reagan and Bush Administrations also used their resources, including executive orders, presidential vetoes and the Justice Department and solicitor general to aid its appointee's efforts.

Legislative support for the Burger Court was weaker. Two pieces of legislation, the 1968 Crime Control Act and the Hyde Amendment did aid the Nixon and Ford appointees in advancing their agenda. The Republican Senate of the 1980's also led Congress in extending Court rulings in the areas of criminal rights and religious rights. The Republican 104th Congress took the lead from the Rehnquist Court in passing Habeas Corpus reform, abortion restrictions and federalism legislation. The laws supported the Court's more aggressive approach toward federal legislation as the Reagan and Bush appointees struck down three politically popular laws within two years.

The presidential and congressional efforts to aid the Rehnquist Court contributed to its success. The weaker support afforded the Burger Court likely harmed its efforts to depart from liberal precedents.

## **Conclusions**

Throughout the history of the United States Supreme Court, presidents have sought to use their appointment and other powers to influence the Court's justices and alter its jurisprudence. Presidents ranging in beliefs from Jackson to Lincoln to Franklin Roosevelt and Ronald Reagan have sought to change the Court's ideological direction with mixed success. Presidents Jefferson, Theodore Roosevelt and Taft failed to move the Court's jurisprudence in the direction they desired. Contrarily, Jackson, Lincoln and the later Roosevelt achieved their aims for the judiciary.

The success of the latter presidents can be attributed to four factors. The first, a rigorous selection process focusing on nominees' ideological beliefs on salient issues and an easy confirmation process, ensured the president received the nominee he originally sought. Another factor was the choice of a justice who could lead the Court both intellectually and socially. This leadership was usually provided by the chief justice but could be effectively exercised by an associate justice. A third element involved choosing jurists who were activist in their temperament. This activism would be expressed in two way, through a willingness to overrule precedent and to use the power of judicial review in striking down legislation. Finally presidential success at changing the Court was linked to the support gained from the executive and legislative branches for its legal decisions. When the president and Congress worked to enforce rulings and did not attempt to overturn them with legislation, a Court could function more effectively in altering its own jurisprudence.

These historical trends continued during the Burger and Rehnquist Courts. Both were comprised of justices nominated by presidents who sought to alter the Court's jurisprudence. The Burger Court was perceived at having failed at achieving this alteration while the Rehnquist Court was more successful. The Nixon and Ford Administrations were unable to guide the Court in overruling the *Mapp* and *Miranda* criminal rights decisions, reviving federalism or limiting the power of federal courts in desegregation decisions. Instead during its first decade, the justices expanded liberal oriented precedents in school integration and abortion. It was only with the first Reagan appointee, Justice O'Connor did the Court appear poised to fulfill the desires expressed by the Republican presidents. Yet even this limited success was constrained to the area of criminal rights. Overall the Burger Court failed at the goals set out for it by Richard Nixon during his 1968 presidential campaign.

The ineffectiveness of the Burger Court can be attributed to the absence of three of four elements of success in Court packing. The appointment system used to choose justices Blackmun and Stevens produced two justices whose ideological commitments to the presidents' agenda were suspect. The two justices refused to provide consistent support to the other Nixon appointees in implementing an alteration in the Court's ideology.

Richard Nixon's selection of Warren Burger as chief justice hamstrung his promise to overturn Warren Court precedents. Warren Burger was unable to fulfill his role as task or social leader of the Court. His aggressive personality tended to anger his colleagues while his attention to administrative detail prevented him from guiding the Court with intellectual arguments.

The Burger Court appointees also lacked any consistent judicial activists who were willing to rewrite precedent and use it to advance the presidential

agenda. Through most of the Burger Court the Nixon appointees were able to only reinterpret such salient decisions as *Mapp* and *Miranda* that they were expected to overturn. The new interpretations gave police greater powers to conduct searches and acquire confessions but by the end of the Burger Court both decisions remained good law.

The Court's attempt to open new policy space in such salient areas as federalism in the *Usery* decision proved to be an anomaly with the decision being overruled less than a decade later. Instead of opening new policy space in areas favored by the Republican presidents, the Court created new rights and policy in such areas as abortion rights, women's rights and affirmative action. The limited results achieved by the Burger Court compares unfavorably to what its successor Court was able to achieve during its first decade

The Rehnquist Court was more successful in implementing the policy agenda of the Reagan and Bush Administrations. Both presidents sought not only to advance Nixon's stated agenda but also have the court overrule the decision in *Roe v. Wade* (1973), strike down affirmative action programs and enhance church-state accommodation. The Reagan and Bush appointees were able to fulfill each of the goals, even if on a limited basis. With a five member majority, the chief justice has rewritten the law on affirmative action, the religion clauses, revived federalism as a constraint on federal power and restricted criminal rights. Though the success has, by the end of the 1996 term, been incomplete, the Rehnquist Court has displayed an ability to create and implement the agenda favored by the two appointing presidents.

Reasons for the success of the Reagan and Bush appointees can be attributed to the existence of the four elements associated with historical success of a president changing the Court's jurisprudence. The two administrations

developed and maintained stringent selection processes that carefully chose most Court appointees according to their ideology. Through the use of a potential nominee's legal opinions and off the bench writings, the two administrations determined how nominees would rule on salient issues. An even more stringent procedure was used for lower court nominees, creating a group of judges whose future could take them to the Supreme Court under other Republican administrations.

The Reagan Administration also chose an effective leader for the Court by promoting William Rehnquist to be chief justice. Rehnquist provided the intellectual leadership, having confirmed his conservative credentials during his fifteen years as an associate justice, and also social leadership that limited personal animosity among his colleagues. Rehnquist used his opinion assignment power to control the direction of salient opinions. During his tenure, he has also been one of the most active opinion writers on salient issues.

Presidents' Reagan and Bush also appointed justices who followed an activist philosophy. While Justices Scalia and Thomas exhibited the greatest propensity for rewriting precedent and using judicial review to strike down legislation, the other appointees exhibit activist tendencies within discrete areas of the law. Justice O'Connor has authored several opinions that rewrote federal habeas corpus law while Justice Kennedy has tried his hand at reconstructing Establishment Clause jurisprudence. While the latter two justices have been less willing to join Scalia and Thomas, their support in certain salient issues such as affirmative action and criminal rights has contributed to the Rehnquist Court's success.

Finally, support of the executive and legislative branches was stronger during the last five years of the Burger Court and during the most of the Rehnquist

Court. Presidential support was strongest during the Reagan Administration - particularly during the first term - and the Bush Administration. Aggressive and ideologically committed solicitor generals used a panoply of briefs to influence the justices on salient issues. This compared favorably with the tepidness of Solicitor General Griswold who served during the Nixon Administration's first term. In addition to the solicitor general, the Reagan Justice Department and Attorney General Meese gave vocal support for certain principles that they wanted the justices to follow. The administration went further in implementing Court decisions, using executive orders to extend takings and abortion rulings.

Congressional support for the Court, limited to criminal and religious issues during the early 1980's saw a major expansion after 1994. The new Republican Congress moved quickly to expand on decisions involving abortion, habeas corpus reform and federalism. Congress gave the Court a freer rein in implementing the agenda favored by presidents Reagan and Bush.

The success of the Rehnquist Court can be directly attributed to the efforts of the Reagan and Bush Administrations to alter the Court's jurisprudence. The two presidents advanced their interests by including each of the elements of success in choosing their nominees and using the executive and legislative branches to provide political support for their justices' rulings. This continued the tradition of the Jackson, Lincoln and Franklin Roosevelt administrations. The lack of success of the Burger Court can be attributed to the exclusion of the crucial elements. Neither the Nixon nor the Ford Administrations were able to appoint a majority of justices who could alter the Court's jurisprudence.

The results achieved by the two Courts bolsters the relevance of the Court packing definition discussed in chapter one and the elements of success defined in chapter two. The Court packing definition identified two periods where presidents

sought to alter the Court's ideology while using judicial appointments to advance their political agenda. The presence and absence of the elements of success also corresponded to the periods of successful and less successful Court packing.

Yet the definition of Court packing used in this paper narrows the range of possibilities and limits which presidential administrations could be analyzed. Most presidents engage in some form of altering the Court's ideology when making judicial appointments. The requirements of the definition, a conflict between the executive and Court producing a systematic effort to appoint a majority of justices to advance the president's agenda and alter the Court, leave out several other administrations where president's sought to alter the Court's agenda. These include the Washington, John Adams, Grant, Truman and Eisenhower administrations.

In his nine appointments, Washington sought out strong Federalists. Adams appointment of John Marshall as chief justice was intended to advance his political agenda beyond his administration and during a time of Jeffersonian domination of government. Grant's choice of Justices Strong and Bradley led to the upholding of the Legal Tender Act, which the president supported. Truman's choices represented his attempt to move the Court away from the more radical liberalism supported by the Roosevelt appointees and to cool the disagreements among those justices. Eisenhower also sought out moderate to liberal Republicans who would represent his middle of the road agenda on the Court.

While each of these presidents had a clear agenda in mind when appointing justices, they did not fit within the definition of Court packing. Yet that does not make the analytical tools developed in this paper unusable. Each of the president's appointees could be analyzed with their performance being compared to the expectations of the president. Based on such a comparison, Adams' appointment

of Marshall would make him the most successful of the five. The elements of success could also be used to test whether the appointment system, the presence of leadership abilities, justices with an activist philosophy and the participation of the executive and legislative branches had an effect on the presidents' success. Thus the analysis used in this paper are applicable to instances when presidential administrations did not fit the narrow constraints of the Court packing definition.

Using historical examples and two modern era Courts this paper has attempted to define and explain how president's attempt to alter the Court's ideological direction and what leads to success. The analysis contained within should aid in future research on the relationship between the executive and judicial branches.

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Books

## **Appendix**

Table 1

*Court appointments over Four Administrations*

| Appointment System |                           |                              |  |
|--------------------|---------------------------|------------------------------|--|
| Justice            | Type of Selection Process | Type of Confirmation Process |  |
| Burger             | Stringent                 | Lax                          |  |
| Blackmun           | Lax                       | Stringent                    |  |
| Powell             | Stringent                 | Lax                          |  |
| Rehnquist<br>-1971 | Stringent                 | Lax                          |  |
| Stevens            | Lax                       | Stringent                    |  |
| O'Connor           | Stringent                 | Lax                          |  |
| Rehnquist<br>-1986 | Stringent                 | Lax                          |  |
| Scalia             | Stringent                 | Lax                          |  |
| Kennedy            | Lax                       | Stringent                    |  |
| Souter             | Lax                       | Stringent                    |  |
| Thomas             | Stringent                 | Lax                          |  |

Table 2

*Support Scores for the Burger Court*

| 1969-1974 Terms |       |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|-------|
|                 | 1969  | 1970  | 1971  | 1972  | 1973  | 1974  |
| Burger          | 0.27  | 0.64  | 0.43  | 0.4   | 0.74  | 0.45  |
| Blackmun        |       | 0.64  | 0.43  | 0.3   | 0.84  | -0.94 |
| Powell          |       |       | 0.29  | 0.4   | 0.58  | -0.64 |
| Rehnquist       |       |       | 0.29  | 0.6   | 0.84  | 0.27  |
| White           | -0.09 | 0.27  | 0.07  | 0.6   | 0.63  | 0.09  |
| Stewart         | -0.09 | 0.27  | -0.43 | 0.2   | 0.05  | -0.64 |
| Brennan         | -0.09 | -0.82 | -0.43 | -0.6  | -0.47 | 0.45  |
| Marshall        | -0.09 | -1    | -0.57 | -0.3  | -0.58 | 0.45  |
| Douglas         | -0.45 | -0.91 | -0.86 | -0.86 | -0.58 | 0.64  |
| Harlan          | -0.18 | -0.45 |       |       |       |       |
| Black           | -0.18 | 0.27  |       |       |       |       |

Table 3

*Support Scores for the Burger Court*

| 1975-1980 Terms |       |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|-------|
|                 | 1975  | 1976  | 1977  | 1978  | 1979  | 1980  |
| Burger          | 0.78  | 0.21  | 0.43  | 0.11  | 0.65  | 0.18  |
| Blackmun        | 0.94  | 0.29  | 0.29  | -0.22 | 0.41  | 0.18  |
| Powell          | 0.89  | 0.14  | 0.14  | -0.11 | 0.29  | 0.12  |
| Rehnquist       | 0.94  | 0.29  | 0.29  | 0.44  | 0.88  | 0.47  |
| White           | 0.33  | 0     | 0     | 0.44  | 0.29  | 0.06  |
| Stewart         | 0.56  | 0.14  | 0.14  | 0.44  | 0.29  | 0.06  |
| Brennan         | -0.67 | -0.43 | -0.36 | -1    | -0.53 | -0.29 |
| Marshall        | -0.67 | -0.43 | -0.57 | -1    | -0.53 | -0.29 |
| Stevens         | 0.67  | 0.21  | 0     | 0     | -0.18 | -0.41 |

Table 4

*Support Scores for the Burger Court*

| 1981-1985 Terms |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|
|                 | 1981  | 1982  | 1983  | 1984  | 1985  |
| Burger          | 0.29  | 0.45  | 0.46  | 0.41  | 0.53  |
| Blackmun        | -0.06 | 0.27  | 0.38  | -0.12 | -0.53 |
| Powell          | 0.41  | 0.32  | 0.31  | 0.06  | 0.06  |
| Rehnquist       | 0.53  | 0.73  | 0.77  | 0.53  | 0.65  |
| White           | -0.18 | 0.55  | 0.38  | 0.18  | 0.41  |
| O'Connor        | 0.65  | 0.73  | 0.85  | 0.29  | 0.18  |
| Brennan         | -0.29 | -0.27 | -0.85 | -0.88 | -0.65 |
| Marshall        | -0.29 | -0.45 | -0.82 | -0.76 | -0.65 |
| Stevens         | 0     | -0.36 | 0.23  | -0.65 | -0.29 |

Table 5

*Support Scores for the Rehnquist Court*

| 1986-1991 Terms |       |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|-------|
|                 | 1986  | 1987  | 1988  | 1989  | 1990  | 1991  |
| Rehnquist       | 0.86  | 0.57  | 0.6   | 0.89  | 1     | 0.78  |
| O'Connor        | 0.43  | 0.57  | 0.33  | 0.56  | 0.75  | -0.11 |
| Scalia          | 0.71  | 0.43  | 0.47  | 0.67  | 1     | 0.33  |
| Kennedy         |       | 0.6   | 0.6   | 0.67  | 0.75  | -0.11 |
| White           | 0.43  | 0.14  | 0.47  | 0.61  | 0.25  | 0.33  |
| Stevens         | -0.57 | 0     | -0.33 | 0     | -1    | -0.56 |
| Souter          |       |       |       |       | 1     | -0.11 |
| Thomas          |       |       |       |       |       | 0.33  |
| Blackmun        | -0.31 | 0     | -0.2  | 0.11  | -0.25 | -0.56 |
| Brennan         | -0.86 | -0.29 | -0.73 | -0.67 |       |       |
| Marshall        | -0.86 | -0.43 | -0.87 | -0.89 | -1    |       |
| Powell          | 0.57  |       |       |       |       |       |

Table 6

*Support Scores for the Rehnquist Court*

| 1992-1995 Terms |       |       |       |       |
|-----------------|-------|-------|-------|-------|
|                 | 1992  | 1993  | 1994  | 1995  |
| Rehnquist       | 0.78  | 0.43  | 1     | 1     |
| O'Connor        | 0.11  | 0.14  | 0.71  | 0.33  |
| Scalia          | 0.78  | 0.71  | 1     | 1     |
| Kennedy         | 0.56  | 0.14  | 0.71  | 0.33  |
| White           | 0.56  |       |       |       |
| Stevens         | -0.33 | -0.14 | -0.71 | -0.33 |
| Souter          | 0.33  | -0.43 | -0.14 | -0.33 |
| Thomas          | 0.78  | 0.71  | 1     | 1     |
| Ginsberg        |       | -0.43 | -0.43 | -0.11 |
| Breyer          |       |       | -0.14 | -0.33 |

Table 7

*Standard Deviations for Interagreement Scores*

| 1969-1974 Terms |      |       |       |       |       |       |
|-----------------|------|-------|-------|-------|-------|-------|
|                 | 1969 | 1970  | 1971  | 1972  | 1973  | 1974  |
| Burger          | 9.77 | 15.18 | 18.41 | 18.46 | 20.17 | 15.92 |
| Blackmun        |      | 15.55 | 15.96 | 15.64 | 16.24 | 12.61 |
| Powell          |      |       | 14.05 | 13.31 | 15.19 | 14.97 |
| Rehnquist       |      |       | 19.85 | 19.2  | 21.55 | 16.03 |
| White           | 8.27 | 9.59  | 7.97  | 12.85 | 9.14  | 10.87 |
| Stewart         | 7.09 | 9.7   | 7.57  | 5.58  | 11.62 | 9.67  |
| Brennan         | 11.6 | 12.63 | 12.74 | 15.16 | 16.75 | 16.4  |
| Marshall        | 9.45 | 10.71 | 13.42 | 11.79 | 14.61 | 10.49 |
| Douglas         | 10.3 | 11.58 | 13.42 | 12.12 | 14.16 | 17    |
| Harlan          | 7.28 | 7.91  |       |       |       |       |
| Black           | 4.22 | 13.42 |       |       |       |       |
| SD for Term     | 2.16 | 2.46  | 3.9   | 3.83  | 3.63  | 2.75  |
| Average         | 8.5  | 11.81 | 13.7  | 13.79 | 15.49 | 13.14 |

Table 8

*Standard Deviations for Interagreement Scores*

| 1975-1980 terms |       |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|-------|
|                 | 1975  | 1976  | 1977  | 1978  | 1979  | 1980  |
| Burger          | 16.27 | 15.03 | 9.89  | 13.82 | 12.82 | 12.41 |
| Blackmun        | 12.08 | 9.87  | 4.57  | 4.91  | 4.79  | 5.08  |
| Powell          | 15.08 | 8.73  | 4.32  | 11.96 | 11.3  | 9.73  |
| Rehnquist       | 16.14 | 15.51 | 12.33 | 15.83 | 15.61 | 15.11 |
| White           | 16.06 | 6.65  | 4.58  | 3.99  | 5.78  | 3.75  |
| Stewart         | 10.92 | 5.43  | 3.3   | 6.01  | 7.5   | 9.82  |
| Brennan         | 15.11 | 16.6  | 16.27 | 15.32 | 14.5  | 12.48 |
| Marshall        | 12.99 | 16.24 | 15.88 | 15.81 | 13.51 | 13.79 |
| Stevens         | 4.61  | 3.43  | 4.3   | 2.25  | 5     | 4.11  |
| SD for Term     | 3.92  | 4.5   | 5.1   | 5.15  | 4.8   | 4.17  |
| Average         | 12.59 | 10.09 | 7.87  | 9.55  | 10.09 | 9.59  |

Table 9

*Standard Deviations for Interagreement Scores*

| 1981-1985 Terms |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|
|                 | 1981  | 1982  | 1983  | 1984  | 1985  |
| Burger          | 13.9  | 13.06 | 14.86 | 14.45 | 19.36 |
| Blackmun        | 7.67  | 6.34  | 4.27  | 4.6   | 12.19 |
| Powell          | 16.23 | 13.97 | 12.76 | 8.43  | 14.57 |
| Rehnquist       | 16.53 | 17.76 | 17.37 | 15.36 | 20.71 |
| White           | 3.17  | 9.1   | 10.45 | 10.28 | 12.19 |
| O'Connor        | 12.24 | 14.63 | 15.35 | 12.14 | 13.3  |
| Brennan         | 16.24 | 11.6  | 13.04 | 15.17 | 19.36 |
| Marshall        | 17.54 | 16.67 | 14.07 | 15.38 | 17.8  |
| Stevens         | 4.08  | 5.88  | 7.2   | 2.89  | 6.91  |
| SD for Term     | 5.07  | 4.04  | 3.95  | 4.05  | 3.06  |
| Average         | 11.24 | 12.11 | 12.17 | 10.97 | 13.95 |

Table 10

*Standard Deviations for Interagreement Scores*

| 1986-1991 Terms |       |       |       |       |       |       |
|-----------------|-------|-------|-------|-------|-------|-------|
|                 | 1986  | 1987  | 1988  | 1989  | 1990  | 1991  |
| Blackmun        | 10.03 | 6.43  | 9.81  | 8.14  | 10.07 | 11.82 |
| O'Connor        | 12.15 | 10.47 | 15.94 | 17.62 | 12.41 | 3.82  |
| Rehnquist       | 20.54 | 9.68  | 17.79 | 19.36 | 14.4  | 11.78 |
| Scalia          | 16.53 | 11.23 | 13.32 | 17.65 | 12.49 | 16.59 |
| Stevens         | 8.26  | 3.77  | 5.11  | 7.88  | 11.39 | 11.8  |
| White           | 13.83 | 6.99  | 14.41 | 12.96 | 7.32  | 4.89  |
| Kennedy         |       | 9.09  | 16.43 | 17.81 | 13.46 | 6.79  |
| Brennan         | 19.18 | 11.42 | 14.68 | 19.11 |       |       |
| Marshall        | 20.04 | 12.69 | 16.01 | 19.25 | 12.87 |       |
| Souter          |       |       |       |       | 12.66 | 5.67  |
| Thomas          |       |       |       |       |       | 14.84 |
| Powell          | 11.68 |       |       |       |       |       |
| SD              | 4.29  | 2.69  | 3.73  | 4.48  | 1.98  | 4.34  |
| Average         | 14.69 | 9.09  | 13.72 | 15.64 | 11.9  | 9.78  |

Table 11

*Standard Deviations for Interagreement Scores*

| 1992-1995 terms |       |       |       |       |
|-----------------|-------|-------|-------|-------|
|                 | 1992  | 1993  | 1994  | 1995  |
| Blackmun        | 7.68  | 13.54 |       |       |
| O'Connor        | 6.03  | 7.12  | 7.02  | 7.28  |
| Rehnquist       | 12.16 | 8.68  | 10.17 | 26.17 |
| Scalia          | 13.64 | 12.03 | 12.89 | 26.17 |
| Stevens         | 8.2   | 13.67 | 11.49 | 26.69 |
| Kennedy         | 10.15 | 6.74  | 5.84  | 3.64  |
| Souter          | 5.48  | 10.86 | 8.8   | 26.52 |
| Thomas          | 14.01 | 14.8  | 14.31 | 25.76 |
| White           | 6.09  |       |       |       |
| Ginsberg        |       | 7.23  | 9.54  | 8.59  |
| Breyer          |       |       | 13.67 | 25.76 |
| SD              | 3.15  | 2.97  | 2.55  | 9.36  |
| Average         | 9.27  | 10.52 | 9.86  | 19.62 |

Table 12

*Chief Justice Burger's Opinion Assignments*

| 1969-1974 Terms |     | 1975-1980 Terms |     |
|-----------------|-----|-----------------|-----|
| Justice         | OAR | Justice         | OAR |
| Brennan         | 23  | Rehnquist       | 18  |
| Rehnquist       | 22  | Marshall        | 15  |
| Powell          | 19  | Blackmun        | 14  |
| Burger          | 17  | Stewart         | 13  |
| White           | 10  | Burger          | 12  |
| Blackmun        | 9   | White           | 12  |
| Douglas         | 8   | Brennan         | 10  |
| Stewart         | 3   | Powell          | 10  |
| Marshall        |     | Stevens         | 4   |
| SD = 6.75       |     | SD = 3.7        |     |
| Ave. = 14.56    |     | Ave. = 12       |     |
| CRV = .46       |     | CRV = .31       |     |
|                 |     |                 |     |
| 1981-1985 terms |     |                 |     |
| Justice         | OAR |                 |     |
| Burger          | 20  |                 |     |
| Rehnquist       | 18  |                 |     |
| White           | 16  |                 |     |
| Powell          | 15  |                 |     |
| O'Connor        | 12  |                 |     |
| Stevens         | 12  |                 |     |
| Marshall        | 11  |                 |     |
| Brennan         | 7   |                 |     |
| Blackmun        | 4   |                 |     |
|                 |     |                 |     |
| SD=4.83         |     |                 |     |
| Ave.=12.8       |     |                 |     |
| CRV=.38         |     |                 |     |

The Coefficient of Relative Deviation (CRV) measures the level of equality in opinion assignment. The lower the score, the more equal the assignment

Table 13

*Opinion Assignment during the Rehnquist Court*

| 1986-1992 Terms |     | 1993-1995 Terms |     |
|-----------------|-----|-----------------|-----|
| Justice         | OAR | Justice         | OAR |
| Rehnquist       | 32  | Rehnquist       | 26  |
| Scalia          | 16  | O'Connor        | 21  |
| Kennedy         | 15  | Scalia          | 19  |
| Powell          | 14  | Thomas          | 19  |
| O'Connor        | 14  | Kennedy         | 16  |
| Blackmun        | 12  | Ginsberg        | 7   |
| White           | 11  |                 |     |
| Souter          | 8   |                 |     |
| Thomas          | 8   |                 |     |
| Brennan         | 7   |                 |     |
| Marshall        | 3   |                 |     |
| Stevens         | 2   |                 |     |
| SD = 7.48       |     | SD = 9.89       |     |
| Avg. = 11.83    |     | Avg. = 10.8     |     |
| CRV = .63       |     | CRV = .92       |     |

The Coefficient of Relative Deviation (CRV) measures the level of equality in opinion assignment. The lower the number, the more equal the assignments

## Vita

Born on the same day, August 29, as John Locke, Doug Clouatre was destined to study politics. His mother recognized this and read him party platforms rather than fairy tales during his childhood. His lifelong affinity for the Republican party was exhibited during his infancy as he vomited on the 1968 Democratic party platform and screamed hysterically at the sight of Lyndon Johnson making a televised speech.

Upon graduating from high school he entered Bradley University in the Fall of 1986. After a prolonged legal battle and out of court settlement he received his Bachelors degree in May 1990. He graduated with a Masters degree from Southern Illinois University in December 1993 and after briefly considering a presidential run entered the doctoral program at the University of Tennessee.

It was there that his innovative technique of using family vacation slides to explain basic political concepts made him highly popular among his students. A series of bloody protests at the university administrative complex were attributed to his class being closed to any new students.

He was known among his fellow graduate students as Mr. Sunshine because of his continuously cheery nature and unwillingness to criticize others no matter how blatant their misdeeds. He was also known as a caring volunteer. Every Saturday afternoon over a three year period he visited the homes of elderly shut-ins and instructed them on the intricacies of state immunity under the Eleventh Amendment.

At a tearful sendoff ceremony, several professors from his department begged him not to leave. He received his doctorate in May, 1998.

He is currently teaching within the Georgia university system and writing a series of books about his graduate school experiences.