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## Leading the Court: Studies in Influence as Chief Justice

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\* © 2011, Joel K. Goldstein. All rights reserved. Vincent C. Immel Professor of Law, Saint Louis University School of Law. I am grateful to other participants at the Constitution Law Discussion Forum at the University of Louisville Louis D. Brandeis School of Law on December 15–16, 2010 for helpful comments on an earlier draft of this Article , to the sponsors of that event, and to Russell Weaver and Mark Killenbeck for the invitation to participate. Stacy Osmond and Margaret McDermott, Esq. provided research assistance. I alone am responsible for the views and shortcomings of this Article.

John G. Roberts, Jr. has now served more than five years as the seventeenth Chief Justice of the United States. He has held that position longer than Harlan Fiske Stone did and for nearly twice as many days as John F. Kennedy was President.

Although Roberts' judicial opinions, and those of the Court, offer jurisprudence to analyze, it is too early to reach definitive judgments regarding Roberts' influence as Chief Justice or his success in that position. Roberts holds an office that, unique among high governmental positions, resists confident real-time assessment.

The office of Chief Justice is cloaked in ambiguity and mystery. Most of what the Chief does publicly either resembles the work of the Associate Justices (i.e., opinion writing), involves administration of the federal judiciary, or seems ceremonial. The Chief's administrative work may contribute importantly to the functioning of the judiciary,<sup>1</sup> yet these labors do not provide

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<sup>1</sup> For instance, William Howard Taft was instrumental in securing passage of the Judges Act of 1925, which made most of the Court's docket discretionary. Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II* 238–239 (5th ed., Rowan & Littlefield 2008) (describing Warren Burger's administrative achievements); Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969–1986*, 10–11 (U. S.C. Press 2000) (also describing the administrative achievements of Warren Burger); Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 141–145 (Random House 2003) (discussing the initial skepticism that greeted Burger's administrative reforms); Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* 184–185, 187–192 (U. S.C. Press 1986) (discussing the administrative reforms of Chief Justice Burger); see generally Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More Than Just the Highest Ranking Judge*, 1 Const. Commentary 57 (1994) (discussing the

the usual measure for assessing his contributions. Instead, history typically evaluates Chief Justices based largely on their perceived impact on the Court's institutional standing and on its decisions and opinions, particularly those regarding constitutional interpretation. Yet measuring that influence is difficult.

The formal powers of the Chief Justice regarding the Court's work are few—presiding at conference and assigning opinions when in the majority—and the linkage between a Chief's action and historic effect is often inscrutable. Most of that activity which may significantly and distinctively affect the Court's work occurs behind closed doors, obscured from the view of all but a few observers. Those who witness it, primarily the other Justices, generally maintain a discrete silence, at least while the Chief presides, other than tossing occasional public praise his way.

The necessary customs of a small, collegial judicial institution may mandate these characteristics of invisible interactions and contemporary confidentiality but those habits postpone informed judgment by denying outside observers critical information. Though these attributes characterize the Supreme Court generally, the Roberts Court presents some additional impediments to assessment. It has experienced a high degree of turnover with four new members, including the Chief, in five years.<sup>2</sup> That amount of transition in personnel imposes new challenges for many members, including the Chief. New members must become acclimated to

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nonjudicial responsibilities of Chief Justice); *Steamer*, *supra* n. 1, at 16 (arguing that Taft's term saw the Chief Justice become the head of the judiciary rather than simply the presiding officer of the Court.

<sup>2</sup> S. Ct. of the U.S., *Members of the Supreme Court of the United States*,

<http://www.supremecourt.gov/about/members.aspx> (accessed Jan. 26, 2011).

the Court's work, practices, and personalities; continuing Justices must familiarize themselves with colleagues who have different attitudes, experiences, and styles than their predecessors. The new members include a new Chief Justice who many had previously experienced as an advocate or lower court judge. The retirements of Justices Sandra Day O'Connor, David Souter, and John Paul Stevens necessarily impacted the group dynamic by removing some powerful personalities from the institutional mix. Turnover also puts some members in new roles. Anthony Kennedy now is senior to all but the Chief Justice and Antonin Scalia. Stevens' retirement means that Kennedy gets to assign the opinion when he joins the four "liberal" Justices. These changes mark the Court as an institution currently in flux. Some time is needed before the Justices adjust to a changed context and before the component parts arrange themselves in discernible and predictable patterns.

Moreover, Roberts' youth when appointed—he was fifty—raises the prospect that these first five years may be but a fragment of a tenure which could rival in length John Marshall's thirty-four year run. Even if Roberts does not match that record, life tenure and the actuarial tables would predict that his service will substantially exceed the seventeen-year average of his three most recent predecessors.<sup>3</sup> Thus, Roberts may still be in the early moments of his tenure, a possibility that carries two significant consequences which, taken together, present a historical dilemma. The likely longevity of his term may allow him to exert a relatively unique impact on the Court and on American law. Nonetheless, much information regarding his leadership may remain hidden for some time, until his colleagues are willing to speak frankly and until his papers and those of other Justices are made available for scholars to assess. The history of his

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<sup>3</sup> *Id.*

Chief Justiceship is being made, yet the history of his leadership will not be heard,<sup>4</sup> at least for a while.

Even though circumstances will defer informed assessments of Roberts' impact, the patterns of the recent past may provide some useful analytical tools to help anticipate the likelihood that Roberts will exert influence as Chief Justice and the ways he might do so. Although the Chief Justice has “scant inherent powers”<sup>5</sup> and some suggest his office carries “no more authority than other members of the [C]ourt,”<sup>6</sup> anecdotal evidence suggests that a Chief can make a substantial difference, in discrete cases and in the overall operation of the Court.<sup>7</sup> Historically, informed governmental observers have cared deeply who becomes Chief Justice, and their behavior provides some evidence that the office is consequential.<sup>8</sup>

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<sup>4</sup> *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 705 (2007) (Roberts himself wrote “but when it comes to using race to assign children to schools, history will be heard.”)

<sup>5</sup> Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 192 (Simon & Schuster 1964).

<sup>6</sup> Bernard Schwartz, *A History of the Supreme Court* 246 (Oxford U. Press 1993). *See also* Felix Frankfurter, *Chief Justices I Have Known*, 39 Va. L. Rev. 883, 901 (1953) (Stating that “[a]side from the power to assign the writing of opinions . . . a Chief Justice has no authority that any other member of the Court has[ no]t” and that the Court, was really “an institution in which every man is his own sovereign. The Chief Justice is *primus inter pares*.”)

<sup>7</sup> Frankfurter, *supra* n. 6, at 899–902.

<sup>8</sup> When Chief Justice Fuller died on July 4, 1910, several members of the Court wanted to succeed him and significant lobbying occurred before President Taft nominated Justice Edward White. Abraham, *supra* n. 1, at 133–134. When White died on May 19, 1921, Taft became Chief

Some consensus suggests that during the last century there have been at least two great Chiefs— Charles Evans Hughes and Earl Warren<sup>9</sup>—although some would add a third, William Justice. *Id.* at 135. This was after making clear that he would not accept appointment as an Associate Justice and after having previously declined such appointments. Mason, *supra* n. 5, at 17. When Chief Justice Harlan Fiske Stone died on April 22, 1946, some Justices reportedly sent word to President Truman that they would resign if Justice Robert Jackson became Chief Justice. When Truman instead nominated Fred Vinson, Jackson sent an unprecedented cable to two Congressional committee chairs blasting Justice Hugo Black who he suspected of undermining his prospects for elevation. Edwin M. Yoder, Jr., *Black v. Jackson: A Study in Judicial Enmity*, in *The Unmaking of a Whig* 3, 42–49 (Geo. U. Press 1990). Presidents care, too. Taft stewed over the appointment in 1910, as did Franklin D. Roosevelt in 1941, and Truman in 1946. Lyndon B. Johnson so wanted to elevate his friend, Justice Abe Fortas, that he ignored warning signs that such an appointment would receive a hostile reception. And senators place great stock in who occupies the center chair. Republicans and Southern Democrats invested considerable energies in successfully filibustering Fortas’s promotion even though it would not change the Court’s composition. When Ronald Reagan nominated Justice William Rehnquist to be Chief Justice, Senate Democrats focused on contesting his nomination but essentially ignored that of Judge Antonin Scalia who Reagan had nominated for Rehnquist’s seat even though Rehnquist’s elevation would not change the composition of the Court, whereas Scalia’s confirmation would.

<sup>9</sup> See Steamer, *supra* n. 1, at 36 (identifying Hughes and Warren, along with John Marshall, as great Chief Justices); Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 *Yale L.J.* 405, 405–406 (1975) (describing Marshall and Hughes’ leadership as “outstanding” and stating that Warren should be included in that “special category”).



Howard Taft.<sup>10</sup> At least three others—Harlan Fiske Stone, Fred Vinson, and Warren Burger—are regarded as pretty unsuccessful measured by their leadership of the Court’s decisionmaking efforts.<sup>11</sup>

The modest, some might say meager, formal powers of a Chief Justice may allow, but certainly do not guarantee, judicial leadership.<sup>12</sup> Whether a Chief leads, and leads well, depends on his capacity to exploit the opportunities the powers provide. This ability turns on his possession of intangible qualities, which are unevenly distributed among those who occupy the center chair. Between his two stints on the Court (at a time when he presumably thought his chance to be Chief Justice had passed), Hughes wrote that the Chief’s “actual influence will depend upon the strength of his character and the demonstration of his ability in the intimate

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<sup>10</sup> Abraham, *supra* n. 1, at 5–7, 158, 203; *see id.* at 147 (arguing that Taft was not a great Chief Justice despite his administrative and technical leadership); Mason, *supra* n. 5, at 304 (observing that Taft was not commonly regarded as a great Chief Justice).

<sup>11</sup> Maltz, *supra* n. 1, at 11 (arguing that Burger was not a distinguished Chief Justice based on his role in jurisprudential leadership); Alpheus T. Mason, *The Chief Justice of the United States: Primus Inter Pares*, 17 J. Pub. L. 20 (1968) (stating that Stone “suffered from administrative ineptitude”); *see generally* Abraham, *supra* n. 1, at 183–184, 191, 238–240 (discussing Stone’s “less [than] satisfactory” role as Chief Justice, Vinson’s “lack of leadership,” and Burger’s “marginally successful attempts” to shift the judicial position).

<sup>12</sup> David J. Danelski, *The Influence of the Chief Justice in the Decisional Process*, in Walter F. Murphy et al., *Courts, Judges, & Politics* 675, 676 (6th ed., McGraw-Hill 2006) (stating that the office of Chief Justice “does not guarantee leadership”).

relations of the judges.”<sup>13</sup> Professor David Danelski essentially echoed this conclusion in an important article a half century ago; he concluded that a Chief Justice’s “actual influence depends upon his esteem, ability, and personality and how he performs his various roles.”<sup>14</sup>

This Hughes-Danelski assessment seems clearly correct. Yet the experiences of Chief Justices during the last century suggest two refinements. First, there is no one model of background or conduct that predicts greatness as a Chief Justice. The traits that seem to correlate well with success as Chief Justice are intangible qualities of leadership, not any characteristics that lend themselves to easy measurement. Second, the influence of a Chief Justice inevitably depends on contextual factors as well as on personal attributes. Whether a Chief Justice can lead, and how, depends on the opportunities history provides, and those vary from Chief to Chief and often during any one incumbency.

Part I of this Article will outline the thesis of Danelski’s 1960 article and apply it to the seven Chief Justices from Taft to Rehnquist. Relying on these sketches, Part II will discuss the impact of context on the Chief’s influence. Part III will suggest that tangible qualities and particular practices do not correlate well with success as Chief Justice. Part IV will apply some of these generalizations to Roberts before Part V offers conclusions.

## I. The Influence of the Chief Justice in the Decisional Process

### A. The Danelski Formulation

Fifty years ago, David J. Danelski published a short study of the Chief Justice’s influence in the Court’s decisionmaking process based on his review of Court papers during the Taft,

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<sup>13</sup> Charles Evans Hughes, *The Supreme Court of the United States* 57 (Garden City Publ. Co. 1928).

<sup>14</sup> Danelski, *supra* n. 12, at 676.

Hughes, and Stone chief justiceships. He identified task and social leadership as two distinct activities that contributed to the success and cohesion of the Court.<sup>15</sup> The former role focused on the Court's work to reach a decision whereas the latter emphasized the need of the members of the institution to remain sufficiently cohesive, socially, to accomplish its work. The Chief's success in performing those roles is not assured but is contingent on his or her mix of skills as perceived by his or her colleagues, "his [or her] esteem, ability, and personality and how he [or she] performs his [or her] roles."<sup>16</sup>

Danelski suggested that the Chief Justice, as the presiding officer at the conference, was in a favorable but not inevitable position to exert "both task and social leadership."<sup>17</sup> The Chief Justice typically presented the cases to the conference, which Danelski regarded as "an important task function."<sup>18</sup> Although Danelski did not spell out the advantages associated with case presentation, presumably that function allows the Chief to frame the issues, a prerogative that may effectively steer discussion in a particular direction. Moreover, the right to be the first to state a position affords the Chief the opportunity to suggest a resolution before anyone else has verbally committed. Thus, presumably, the order of speaking at conference gives the Chief persuading advantages over those who only get to weigh in after others have already stated their views. Minds can and do change but most are more persuadable before, not after, they have shared a conclusion. Finally, the assignment power that the Chief exercises when in the majority confers substantial opportunity to shape the doctrine that will emerge from the decision.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Danelski pointed out that presiding at conference also positioned the Chief to exercise critical social functions. He was in position “to invite suggestions and opinions, seek compromises, and cut off debate which appears to be getting out of hand.”<sup>19</sup> His ability to engage his colleagues yet manage their interaction could contribute to the Court’s cohesion, or lack thereof.

Danelski also explored the importance of the opinion assigning role, which falls to the Chief when he is part of the majority. That function presented four instrumental challenges: producing a valuable precedent, winning public acceptance for a decision, preserving a majority when the Court was divided, and massing the Court.

Finally, Danelski concluded that unifying the Court was among the Chief’s “most important roles.”<sup>20</sup> Quite clearly, the Chief’s skill as a task and social leader and in assigning opinions would contribute to his success in this role. So, too, would the extent to which he emphasized unanimity as a judicial norm.

## B. Successful Chief Justices

### 1. Charles Evans Hughes

Hughes’ great success as Chief Justice related in part to his ability to merge the roles of task and social leader. Danelski proclaimed Hughes “the most esteemed member of his Court” in large part due to his commanding performance at conference.<sup>21</sup> Hughes’ work won the respect of his colleagues. “Few men have been so fitted by talent and disposition to carry the heavy burden

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

<sup>20</sup> *Id.* at 681.

<sup>21</sup> *Id.* at 677.

which unavoidably rests on the Chief Justice,” wrote Stone.<sup>22</sup> “He was master of the business,” said Frankfurter,<sup>23</sup> who likened Hughes presiding to Toscanini conducting.<sup>24</sup>

The Chief Justice’s case-stating prerogative probably contributed to Hughes’ influence even more than it enhanced that of his predecessors or successors. By all accounts, Hughes was an outstanding lawyer with a keen analytical mind and a formidable memory. He labored over case files until he had mastered them. At conference, he stated cases succinctly yet comprehensively, precisely, and impartially.<sup>25</sup> The case having been presented, he concluded by

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<sup>22</sup> Harlan F. Stone, *The Chief Justice*, 27 ABA. J. 407 (July 1941).

<sup>23</sup> Frankfurter, *supra* n. 6, at 901.

<sup>24</sup> *Id.* See also Felix Frankfurter, “*The Administrative Side*” of Chief Justice Hughes, 63 Harv. L. Rev. 1, 3 (1949)(“He knew that the manner of conducting the business of the Court affects the matter....In Court and in conference, he struck the pitch, as it were, for the orchestra.”).

<sup>25</sup> Merlo J. Pusey, *Charles Evans Hughes* 664–665, 673 (Macmillan Co. 1951); Owen J. Roberts, *Charles Evans Hughes: The Administrative Master* in Alan F. Westin, *An Autobiography of the Supreme Court* 205, 208 (Greenwood Press 1963); Stone, *supra* n. 22, at 407 (referring to Hughes’ “extraordinary power of accurate and luminous statement”); *Transcriptions of Conversations Between Justice William O. Douglas and Professor Walter F. Murphy*, *Cassette No. 1: December 20, 1961*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas1.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas1.html) (accessed Jan. 24, 2011) (“Hughes covered all those in a very, very efficient way. One of the reasons that he did that was, first, he had tremendous capacity, an unusual capacity to get things done very fast.”); Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63Harv. L. Rev. 5, 14-15, 17 (1949) (discussing Hughes’s skill in stating cases and his elaborate preparation for conference).

offering his preferred resolution, and his statements of proposed dispositions often commanded assent.<sup>26</sup> After listening to discussion, Hughes then summarized the Court's position and reacted to the comments of the other Justices.<sup>27</sup>

In addition to Hughes' task leadership, Danelski regarded him as the social leader of the Court who acted to ensure its cohesion.<sup>28</sup> Hughes was not a backslapping extrovert but maintained warm relations with his brethren, some of whom he had known for years before becoming Chief Justice.<sup>29</sup> Hughes was sensitive to the personalities and psychic needs of his

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<sup>26</sup> Roberts, *supra* n. 25, at 208.

<sup>27</sup> Pusey, *supra* n. 25, at 675; Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 Harv. L. Rev. 4, 40 (1967).

<sup>28</sup> Danelski, *supra* n. 12, at 677.

<sup>29</sup> Hughes had served with Justices Holmes, Van Devanter, and McReynolds during his first stint on the Court. Charles Evans Hughes, *The Autobiographical Notes of Charles Evans Hughes* 298 (David J. Danelski & Joseph S. Tulchin eds., Harv. U. Press 1973). Hughes maintained warm relations with them, even with the incorrigible McReynolds, who reportedly deferred to him. Pusey, *supra* n. 25, at 667–668, 670–671. Hughes was particularly friendly with Van Devanter from their prior service. William G. Ross, *The Chief Justiceship of Charles Evans Hughes, 1930–1941*, at 1919 (U. S.C. Press 2007). Hughes and Brandeis had overlapped for only a few days in June 1916, but they had known each other as practicing lawyers and had a warm relationship. Hughes, *supra* n. 29, at 171, 298. Hughes and Cardozo were old friends long before Hoover nominated Cardozo to succeed Holmes. *Id.* at 299–300; Pusey, *supra* n. 25, at 682. Hughes had served in Herbert Hoover's Cabinet with Harlan Fiske Stone. Hughes, *supra* n. 29,

colleagues, and he presided with tact. Hughes treated his colleagues in a courteous manner and did not let jurisprudential disagreements affect his interactions with them.<sup>30</sup>

Hughes' command in conference was no doubt enhanced by his behavior towards the other Justices outside of it. When Justice Van Devanter fell behind in his opinions, Hughes would sometimes reclaim some assigned cases, but always with the comment that Van Devanter had been overburdened.<sup>31</sup> The anti-Semitic McReynolds avoided social encounters with Louis Brandeis, so Hughes divided his colleagues between two annual dinners he hosted.<sup>32</sup> Hughes developed and maintained a close rapport with Owen Roberts,<sup>33</sup> and when Roberts was hospitalized for three weeks, Hughes visited him every weekday.<sup>34</sup> Knowing that Cardozo would immediately begin working on an opinion on Saturday night if he received an assignment after the conference, Hughes withheld Cardozo's allotment until Sunday or Monday to protect his health.<sup>35</sup> So Cardozo would not feel singled out, Hughes also deferred sending assignments to Van Devanter, Cardozo's neighbor.<sup>36</sup> He handled the delicate mission of suggesting to Holmes that it was time for the ninety-year-old to retire with such tact that Holmes immediately took the

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at 298. Brandeis and McReynolds, representing opposite wings of the Court, both endorsed Hughes's nomination. Ross, *supra* n. 29, at 19–20.

<sup>30</sup> Ross, *supra* n. 29, at 28, 219.

<sup>31</sup> Pusey, *supra* n. 25, at 667–668.

<sup>32</sup> *Id.* at 670.

<sup>33</sup> Hughes, *supra* n. 29, at 298.

<sup>34</sup> Pusey, *supra* n. 25, at 669.

<sup>35</sup> William O. Douglas, *Mr. Justice Cardozo*, 58 Mich. L. Rev. 549, 549 (1960).

<sup>36</sup> Pusey, *supra* n. 25, at 678.

hint free of ill feeling.<sup>37</sup> Hugo Black had voted against Hughes' nomination as Chief Justice and had advocated the court-packing plan; yet, Hughes treated him with such courtesy and respect that Black became an admirer.<sup>38</sup> Hughes never lobbied other Justices outside of the conference room although he was open to discussing a case if approached.<sup>39</sup>

Hughes facilitated the Court's work and generally won points with his colleagues by his efficient administration. He conducted Court business in a manner that was respectful of his colleagues' calendars. Conferences began on schedule, and Hughes enforced the time allotted to oral advocates (it was said, perhaps apocryphally, that he once cut an advocate off in the middle of the word "if") and was not afraid to end oral argument when no longer needed. Hughes typically circulated a list of cases he deemed unworthy of certiorari.<sup>40</sup> Although it was understood that any of the cases would be discussed at the request of a single Justice, such requests came about once every other year of Hughes' Chief Justiceship.<sup>41</sup>

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<sup>37</sup> *Id.* at 681–682.

<sup>38</sup> *Id.* at 773.

<sup>39</sup> Hughes, *supra* n. 29, at 301; Pusey, *supra* n. 25, at 676–677; Roberts, *supra* n. 25, at 209–210 (stating that Hughes never discussed merits of cases with other Justices between argument and conference).

<sup>40</sup> Pusey, *supra* n. 25, at 672.

<sup>41</sup> *Id.* Hughes's efficient approach did not meet with universal acclaim. Stone thought Hughes ran conference like a "drill sergeant." Ross, *supra* n. 29, at 221. This left inadequate time for collective rumination of matters before the Court. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 101–103 (Oxford U. Press 1998). Stone tried to fill this gap by sometimes holding Friday afternoon rump sessions, which a few Justices



Hughes put a good deal of thought into case assignments, which he considered his “most delicate task.”<sup>42</sup> Although Hughes claimed that he tried to distribute important cases equally,<sup>43</sup> he was not averse to keeping a disproportionate number for himself (twenty-eight percent), a smaller percentage than Taft retained (thirty-four percent) but far more than did Stone (eleven percent).<sup>44</sup> He kept some important opinions for himself but also shouldered his share of the pedestrian cases.<sup>45</sup> He often assigned controversial cases to the Justice close to the Court’s center to minimize division.<sup>46</sup> He tended to assign each Justice a range of cases<sup>47</sup> while considering the “special fitness of a Justice for writing in the particular case.”<sup>48</sup>

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attended. Ross, *supra* n. 29, at 222; Melvin Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953*, at 31 (U. S.C. Press 1997).

<sup>42</sup> Hughes, *supra* n. 29, at 302; *see also* Frankfurter, *supra* n. 6, at 904 (“No Chief Justice, I believe, equaled Chief Justice Hughes in the skill and the wisdom and the disinterestedness with which he made his assignments.”)

<sup>43</sup> Hughes, *supra* n. 29, at 302.

<sup>44</sup> David M. O’Brien, *Storm Center: The Supreme Court in American Politics 260–261* (W.W. Norton 2005). To some extent, these numbers may reflect the Chief picking up the slack for ill or less productive colleagues, as was true of Taft, for instance. *See* Ross, *supra* n. 29, at 230 (listing significant cases Hughes assigned himself).

<sup>45</sup> Roberts, *supra* n. 25, at 209.

<sup>46</sup> Freund, *supra* n. 27, at 40.

<sup>47</sup> Pusey, *supra* n. 25, at 678; Ross, *supra* n. 29, at 229.

<sup>48</sup> Hughes, *supra* n. 29, at 302.

Finally, Hughes worked to achieve a consensus as broad as the Court's composition allowed. In part, he led by example. He rarely wrote dissenting opinions, and his institutional commitment often caused him to acquiesce silently in a disposition rather than publish his disagreement.<sup>49</sup>

Hughes quite clearly commanded the admiration of the Brethren, many of whom effusively praised his leadership. Frankfurter said that Hughes "radiated authority, not through any other quality than the intrinsic moral power that was his."<sup>50</sup> Douglas regarded Hughes as "a great man."<sup>51</sup> So, too, did those who observed Hughes in action. Robert Jackson wrote of Hughes' "impressive personality" and said he "imparted strength to the Court during our time by his character."<sup>52</sup> Paul Freund, who encountered Hughes as a law clerk to Brandeis, as an attorney before the Court, and as a scholar, compared Hughes to John Marshall as a Chief Justice.<sup>53</sup>

## 2. Earl Warren

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<sup>49</sup> Freund, *supra* n. 27, at 37–38 (reporting that Hughes wrote only seventeen dissents and six concurrences out of more than two hundred and fifty opinions).

<sup>50</sup> Frankfurter, *supra* n. 6, at 901.

<sup>51</sup> *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 7a: January 18, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas7a.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas7a.html) (accessed Jan. 26, 2011).

<sup>52</sup> Robert H. Jackson, *The Judicial Career of Chief Justice Charles Evans Hughes*, in *The Supreme Court and Its Justices* 142–143 (Jesse H. Chopper ed., 2d ed., ABA 2001).

<sup>53</sup> Freund, *supra* n. 27, at 43.

Warren lacked Hughes' technical skill as lawyer yet apparently presided with welcome authority.<sup>54</sup> His popularity among his colleagues disposed them in his favor, and he apparently provided able case summaries that highlighted the basic issues for decision followed with a clear statement of his position, except in an occasional technical matter where he indicated he would join any majority for lack of his own preference.<sup>55</sup> Warren reportedly presided in a fair and efficient manner and resisted the urge to argue with his colleagues, a practice that had undermined Stone's authority.<sup>56</sup> Warren's colleagues regarded him as persuasive in conference and a hard worker.<sup>57</sup> He drew on the skill of others to enhance his own performance. Warren and Black often discussed pending cases before and after conferences.<sup>58</sup> After Brennan joined the

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<sup>54</sup> Michael Belknap, *The Supreme Court under Earl Warren, 1953–1969*, at 22–23 (U. S.C. Press 2005) (quoting Stewart that Warren was “ideal” in presiding over the conference).

<sup>55</sup> Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* 143–144 (N.Y.U. Press 1983).

<sup>56</sup> See William J. Brennan, Jr., *Chief Justice Warren*, 88 Harv. L. Rev. 1, 1–2 (1974) (praising Warren's skills presiding over conference); Schwartz, *supra* n. 55, at 144 (stating that Stone felt Warren always had to get in the last word).

<sup>57</sup> Interview by T. H. Baker with Thurgood Marshall, Assoc. J., U.S. S. Ct. (July 10, 1969) (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/MarshallT/marshall.pdf>) [hereinafter *Marshall Interview*].

<sup>58</sup> Jim Newton, *Justice for All: Earl Warren and the Nation He Made* 348 (Penguin Group 2006).

Court, Warren regularly strategized with him, meeting every Thursday before conference in Brennan's chambers.<sup>59</sup>

Warren reportedly provided simple, but effective, statements of cases that focused discussion on the underlying moral values at issue. Warren's eloquent statement at the December 12, 1953 conference on *Brown v. Board of Education*<sup>60</sup> was noteworthy in this respect.<sup>61</sup> Although Warren said he favored "pooling all of the humble wisdom of the Court[,]" he proceeded to state that "separate but equal" rested on the "basic premise that the Negro race is inferior," a conclusion Warren rejected as inconsistent with the three Civil War Amendments.<sup>62</sup> Warren's comments, when coupled with the prior term's discussion of the case, signaled that a clear majority existed to overturn *Plessy* and placed the constitutional issue in a moral frame that virtually compelled the ultimate decision.<sup>63</sup> Moreover, Warren astutely invited the conference to discuss, but not to vote on, the case to make it easier for those with misgivings about overturning

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<sup>59</sup> Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* 106, 183, 250–252 (Houghton Mifflin Harcourt 2010); Jeffrey T. Leeds, *A Life on the Court*, N.Y. Times 6 (Oct. 5, 1986).

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

<sup>61</sup> *Notes of Conference of December 12, 1953*, in *The Supreme Court in Conference: 1940–1985*, at 654 (Del Dickson ed., Oxford U. Press 2001) [hereinafter *The Supreme Court in Conference*].

<sup>62</sup> *Id.*

<sup>63</sup> See e.g. G. Edward White, *Earl Warren: A Public Life* 165 (Oxford U. Press 1982) (arguing that Warren's statement used moral shame to attract support).

*Plessy* to change their minds later.<sup>64</sup> Although Warren was not solely responsible for achieving the unanimous result in *Brown*, he surely played an important role.<sup>65</sup>

*Brown* was by no means the only instance when Warren's opening identified a broad principle that the Court adopted. In *Miranda v. Arizona*,<sup>66</sup> Warren's conference statement articulated the basic ideals and specific requirements that later found their way into his opinion and commanded the essential assent of five others.<sup>67</sup> In *Loving v. Virginia*,<sup>68</sup> he declared that the Equal Protection Clause was designed to eliminate racial discrimination, but that miscegenation statutes "maintain white supremacy."<sup>69</sup> Bernard Schwartz found from his review of conference notes that Warren was usually able to lead the Court in the direction he chose.<sup>70</sup>

Warren also excelled as a social leader, and his popularity with his colleagues presumably enhanced his influence. He had immense interpersonal skills. The simple acts of a

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<sup>64</sup> *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 13: December 17, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas13.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas13.html) (accessed Jan. 26, 2011).

<sup>65</sup> Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 *Geo. L.J.* 1, 1 (1979).

<sup>66</sup> 384 U.S. 436 (1966).

<sup>67</sup> *The Supreme Court in Conference*, *supra* n. 61, at 515–518.

<sup>68</sup> 388 U.S. 1 (1967).

<sup>69</sup> *The Supreme Court in Conference*, *supra* n. 61, at 695.

<sup>70</sup> Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* 12 (Addison-Wesley 1990); *see also* Belknap, *supra* n. 54, at 22 (stating that Warren could usually steer conference discussion).

master politician paid important dividends. When Warren first arrived at the Court, he went directly to Black’s chambers and introduced himself to Black’s office staff and law clerks—a gesture Black appreciated.<sup>71</sup> He asked Black for a reading list to help with opinion writing, and after Black suggested Aristotle’s *Rhetoric*, Warren immediately began to read it.<sup>72</sup> He invited Black, as senior Justice, to continue to preside at conference initially. Warren greeted Potter Stewart and his wife at the train station at 6:30 a.m. when they first arrived in Washington, D.C.<sup>73</sup> Warren routinely met other Justices, even those most junior, in their chambers rather than summoning them to his, persisting in the practice even when they protested that protocol demanded that they visit him.<sup>74</sup> This show of humility—institutional and personal—helped endear Warren to his associates. Warren personally hand-delivered his draft of the opinion in *Brown* to each of his colleagues, even taking it to Jackson in the hospital,<sup>75</sup> a gesture that signaled deference of a new Chief Justice for a senior colleague and afforded an opportunity for conversation, in addition to addressing the underlying confidentiality concerns associated with transporting the opinion outside of the Court. Warren won favor with other actions too, like lobbying Congress (unsuccessfully) to provide cars and drivers for the Justices<sup>76</sup> or resisting

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<sup>71</sup> Newton, *supra* n. 58, at 277.

<sup>72</sup> *Id.* at 277–278.

<sup>73</sup> Belknap, *supra* n. 54, at 21; Schwartz, *supra* n. 55, at 321.

<sup>74</sup> See generally Leeds, *supra* n. 59 (citing Warren’s practice of meeting Brennan in his chambers as a reflection of Warren’s view that he was “Chief among equals”); *Marshall Interview*, *supra* n. 57.

<sup>75</sup> Hutchinson, *supra* n. 65, at 42.

<sup>76</sup> Earl Warren, *The Memoirs of Earl Warren* 347–348 (Doubleday & Co. 1977).

efforts to increase the differential between his salary and that of the associate Justices from five-hundred dollars to twenty-five hundred dollars.<sup>77</sup>

Warren also cultivated his colleagues socially—an enterprise that must have come naturally for someone Brennan recalled as being “marvelous with people.”<sup>78</sup> Warren and his family spent holidays with the Blacks; he hunted<sup>79</sup> and walked<sup>80</sup> with Clark; and he attended sporting events and otherwise regularly socialized with Brennan.<sup>81</sup> He persuaded all of his colleagues (except Black and Frankfurter) to join him at the Army-Navy football game most years; the Justices traveled to the game by rail during which time they socialized with one another and their families over breakfast and dinner.<sup>82</sup>

Save for Frankfurter and sometimes Douglas, Warren’s colleagues spoke of him effusively.<sup>83</sup> Brennan regarded him as “the Super-Chief.”<sup>84</sup> Stewart called Warren “an instinctive

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<sup>77</sup> Brennan, *supra* n. 56, at 3.

<sup>78</sup> Leeds, *supra* n. 59.

<sup>79</sup> Newton, *supra* n. 58, at 348.

<sup>80</sup> Schwartz, *supra* n. 55, at 443.

<sup>81</sup> Stern & Wermiel, *supra* n. 59, at 105; Leeds, *supra* n. 59.

<sup>82</sup> Newton, *supra* n. 58, at 350; Stern & Wermiel, *supra* n. 59, at 104–105.

<sup>83</sup> *The Douglas Letters* 124–125 (Melvin I. Urofsky ed., Adler & Adler 1987) (criticizing Warren in letters in spring, 1961); *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 11: June 9, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas11.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas11.html) (accessed Jan. 26, 2011).

<sup>84</sup> Brennan, *supra* n. 56, at 5.

leader whom you respected and for whom you had an affection.”<sup>85</sup> Clark thought Warren would be viewed as the equal to, or greater than, John Marshall;<sup>86</sup> Douglas ranked him with Marshall and Hughes.<sup>87</sup> Marshall described Warren as “one of the greatest people who ever lived” and thought history would rank him “probably the greatest Chief Justice who ever lived.”<sup>88</sup> Goldberg exaggerated only slightly in judging Warren as “beloved by all his brethren.”<sup>89</sup> Fortas said that Warren “provided an essence, an attitude, which set the tone and quality of the Court’s work.”<sup>90</sup>

Warren distributed assignments fairly, making an effort to give all members some opportunity to write important cases.<sup>91</sup> As with other Chief Justices, he wrote many of the historic decisions, such as *Brown, Bolling v. Sharpe*,<sup>92</sup> *Reynolds v. Sims*,<sup>93</sup> *Miranda v. Arizona*,

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<sup>85</sup> Belknap, *supra* n. 54, at 22.

<sup>86</sup> Interview by Joe B. Frantz with Tom Clark, Assoc. J., U.S. S. Ct. (Oct. 7, 1969) (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Clark-T/Clark-T.PDF>) .

<sup>87</sup> William O. Douglas, in *Earl Warren—A Tribute*, 58 Cal. L. Rev. 3, 4 (1970).

<sup>88</sup> *Marshall Interview*, *supra* n. 57.

<sup>89</sup> Arthur J. Goldberg, in *Earl Warren—A Tribute*, *supra* n. 87, at 6.

<sup>90</sup> Fortas, *supra* n. 9, at 411.

<sup>91</sup> Schwartz, *supra* n. 55, at 30; Interview by Joe B. Frantz with Earl Warren, (Sept. 21, 1971) (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Warren-E/Warren-e.pdf>).

<sup>92</sup> 347 U.S. 497 (1954).

<sup>93</sup> 377 U.S. 533 (1964).



*Loving*, and *Powell v. McCormack*.<sup>94</sup> Yet he also bore more than his share of those less coveted.<sup>95</sup> He often relied on Brennan to write delicate opinions or to preserve a narrow majority, as in *Cooper v. Aaron*<sup>96</sup> or *Baker v. Carr*.<sup>97</sup> Yet strategic concerns probably dictated the assignments to Clark in *Abington v. Schempp*,<sup>98</sup> *Heart of Atlanta v. United States*,<sup>99</sup> and *Mapp v. Ohio*,<sup>100</sup> and to Stewart in *Katz v. United States*<sup>101</sup>—cases where a more conservative author might help keep the majority intact and gain greater public acceptance.

## 2. William Howard Taft

The Taft tenure demonstrated that a Chief Justice can, under certain circumstances, be highly successful without providing both task and social leadership. Taft, according to Danelski, acted as the Court's social leader while his appointee, friend, and ally, Van Devanter, emerged as the task leader of the conference.<sup>102</sup> Taft's good nature apparently paid dividends in easing tensions on the Court, and he quickly achieved cordial relations with Brandeis,<sup>103</sup> with whom he

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<sup>94</sup> 395 U.S. 486 (1969). Brennan did much of the drafting although the decision was issued as an opinion of all nine Justices. Stern and Wemiel, *supra* note 59, at 145-152.

<sup>95</sup> Schwartz, *supra* n. 55, at 460–461.

<sup>96</sup> 358 U.S. 1 (1958).

<sup>97</sup> *See id.* at 418–419 (discussing strategic considerations in assignment to Brennan).

<sup>98</sup> 347 U.S. 203 (1963).

<sup>99</sup> 379 U.S. 241 (1964).

<sup>100</sup> 367 U.S. 643 (1961).

<sup>101</sup> 389 U.S. 347 (1967).

<sup>102</sup> Danelski, *supra* n. 12, at 677.

<sup>103</sup> Alpheus Thomas Mason, *Brandeis: A Free Man's Life* 537–539 (Viking Press 1946).

had previously endured high-stakes, public, and acrimonious clashes.<sup>104</sup> The rapprochement reflected their reciprocal efforts, but Taft certainly did his part, by going out of his way to be solicitous about Brandeis' health and feelings and accommodating Brandeis' views and suggestions when he could. Taft's outreach was consistent with his "very genial"<sup>105</sup> personality, but it also reflected his desire to have the Court work collegially as a team.<sup>106</sup> Taft valued unanimity highly and accordingly tried to foster a climate conducive to compromise.<sup>107</sup> The Taft Court demonstrated a high degree of cohesion, handing down unanimous decisions eighty-four percent of the time. Taft set an example in this respect, writing only about two dissents a year.<sup>108</sup>

Taft won favor with his colleagues generally by generous and sensitive gestures towards them, ranging from Christmas cards, rides, and gift salmons, to arranging for the funeral of Mrs.

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<sup>104</sup> Brandeis had humiliated Taft during the investigation of Secretary of Interior Ballinger in 1910 by demonstrating that Taft had lied in his statements about his own inquiry into matters in dispute. Six years later, Taft signed a letter along with former ABA presidents opposing Brandeis's nomination to the Court on the grounds that he was unfit to serve. *See generally* Mason, *supra* n. 5, at 199–200 (describing how the two men began to mend relations after this event).

<sup>105</sup> Frankfurter, *supra* n. 6, at 898 (describing Taft as having "great warmth" and "a great deal of comraderie about him").

<sup>106</sup> *See generally* Mason, *supra* n. 5, at 193–206 (describing ways in which Taft promoted teamwork and unanimity).

<sup>107</sup> *The Supreme Court in Conference*, *supra* n. 61, at 74–75.

<sup>108</sup> O'Connor, *supra* n. 1, at 116–117.

Holmes at Arlington.<sup>109</sup> Taft’s conduct in assigning opinions also no doubt endeared him to his colleagues. He wrote more than his share of the Court’s opinions, in part because he assigned himself cases in areas like patent law, which others preferred to avoid, and he took on extra work when a colleague was ill or fell behind.<sup>110</sup> Brandeis credited Taft with “admirable” personal qualities, with smoothing out problems, and with conducting a harmonious conference.<sup>111</sup>

Although Taft lacked the legal skills that Hughes was to display, Van Devanter helped fill that void. Van Devanter’s writer’s block limited his output of opinions,<sup>112</sup> but his knowledge of procedure, the Court’s precedents, and his ability at legal analysis were highly valued by his colleagues.<sup>113</sup> He often strategized with Taft before conference and reviewed memoranda before

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<sup>109</sup> Mason, *supra* n. 5, at 205; *see also* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 S. Ct. Rev. 299, 336 (quoting Brandeis as praising Taft’s generosity to other Justices).

<sup>110</sup> Mason, *supra* n. 5, at 205–206, 231–232 (reporting that Taft wrote one-sixth of the Court’s opinions and averaged ten opinions per year—more than his colleagues for most years); Urofsky, *supra* n. 109, at 321 (crediting Taft with assigning cases fairly).

<sup>111</sup> Urofsky, *supra* n. 109, at 313, 322, 333.

<sup>112</sup> Abraham, *supra* note 1, at 136; Mason, *supra* note 5, at 209 (describing VanDevanter as “opinion-shy” and a “perfectionist”); Pusey, *supra* note 25, at 667-668 (referring to Van Devanter’s “pen paralysis” as “almost an affliction”).

<sup>113</sup> .David Burner, *Willis Van Devanter*, in *The Justices of the United States Supreme Court 1789-1978: Their Lives and Major Opinions* 1945, 1948, 1952-1953 (Leon Friedman and Fred L. Israel eds., Chelsea House, 1980).

the Chief circulated them to the other chambers.<sup>114</sup> Brandeis claimed that Van Devanter ran the Court due to his knowledge of federal law and his willingness to be helpful to his colleagues.<sup>115</sup>

### C. Unsuccessful Chief Justices

By contrast, the Chief Justiceships of Stone, Vinson, and Burger have not been regarded as successful in terms of leading the Court. The Court fell victim to internecine strife during the Chief Justiceships of Stone and Vinson, whom Herbert Johnson suggests “share the unenviable distinction of being perhaps the least collegial and most internally vindictive periods of the Court’s history.”<sup>116</sup>

#### 1. Harlan Fiske Stone

Although Stone came highly recommended as Chief Justice,<sup>117</sup> he proved miscast in the center seat. Stone conducted conference quite differently than Hughes, in part due to his reaction to Hughes’ style of leadership, in part because he valued unanimity less and dissents more, and in part due to his own temperament. Stone’s praise of Hughes for not seeking “unanimity at the cost of the sacrifice . . . of strongly held convictions” and for recognizing the historic role of

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<sup>114</sup> Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, in *The Supreme Court and Its Justices* 319 (Jesse H. Choper ed., 2d ed., ABA 2001); Mason, *supra* n. 5, at 222; Alpheus Thomas Mason, *William Howard Taft: President by Chance, Chief Justice by Choice*, in *The Supreme Court and Its Justices*, *supra* n. 114, at 139–140;

<sup>115</sup> Urofsky, *supra* n. 109, at 310.

<sup>116</sup> Herbert A. Johnson, *Editor’s Preface*, in Urofsky, *supra* n.41, at ix.

<sup>117</sup> Alpheus Thomas Mason, *Harlan Fisk Stone: Pillar of the Law* 565–570 (The Viking Press 1956) (reporting praise of Stone from Hughes, Brandeis, and Frankfurter among others).

dissents,<sup>118</sup> probably described Stone's values more accurately than Hughes' performance. Stone was more the academic than the man of action—a jurist whose contributions came more from his pen than his command.

Stone often came to conference without having reached a resolution of the matters for decision. His statements of cases lacked the authority of Hughes' renditions and accordingly others embellished on them and competed for de facto leadership of the Court. Rather than presiding, he tended to join the debates.<sup>119</sup> Believing Hughes' efficiency sacrificed full exploration of the issues, Stone allowed discussion to continue interminably.<sup>120</sup> Stone exacerbated matters by debating with others who differed with his views,<sup>121</sup> thereby sacrificing any ability to police the discussions. Whatever the benefits of longer deliberations, they had negative byproducts.<sup>122</sup> Disposing of the Court's work became a more arduous enterprise as

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<sup>118</sup> Stone, *supra* n. 22, at 408.

<sup>119</sup> Danelski, *supra* n. 12, at 678; Mason, *supra* n. 117, at 790–792 (describing conferences under Stone); *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 2: December 20, 1961*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas2.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas2.html) (accessed Feb. 9, 2011) (describing Stone's practice of debating points made by each Justice who spoke).

<sup>120</sup> Frankfurter, *supra* n. 6, at 902–903.

<sup>121</sup> Joseph P. Lash, *From the Diaries of Felix Frankfurter* 152 (W.W. Norton & Co. 1975); *Transcripts*, *supra* n. 119 (describing Stone's practice of debating points made by each Justice who spoke).

<sup>122</sup> See Mason, *supra* n. 117, at 793–794 (describing some of the consequences of long deliberations under Stone's Chief Justiceship).

additional sessions were required to complete deliberation. Rather than being Saturday's work, conferences often continued on Monday, Tuesday, and Wednesday.<sup>123</sup> Moreover, disagreements between strong-willed members of the Black and Frankfurter wings of the Court often dominated the discussions and perhaps exacerbated some of the divisions between the Justices.<sup>124</sup> Stone apparently made derogatory comments about Black, which later became known to Black, thereby tempering his regard for the Chief Justice.<sup>125</sup>

## 2. Fred Vinson

Vinson lacked the legal skill of Hughes or Stone. He was a sociable person and a number of his colleagues liked him personally.<sup>126</sup> That did not translate into professional respect, however, from colleagues who viewed him as lazy and lackluster.<sup>127</sup> Frankfurter's famous comment at Vinson's funeral in September, 1953 ("This is the first indication I have ever had that there is a God.")<sup>128</sup> may have revealed more about Frankfurter than about Vinson, yet it

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<sup>123</sup> William O. Douglas, *Chief Justice Stone*, 46 Colum. L. Rev. 693, 695 (1946).

<sup>124</sup> Lash, *supra* n. 121, at 207, 228; Mason, *supra* n. 117, at 793–795; O'Brien, *supra* n. 44, at 197–198; Urofsky, *supra* n.41, at 39–40.

<sup>125</sup> *Transcriptions No. 7a*, *supra* n. 51.

<sup>126</sup> Urofsky, *supra* n.41, at 149; Interview by Jerry Hess with Tom Clark, Assoc. J., U.S. S. Ct. (Oct. 17, 1972) (transcript available at <http://www.trumanlibrary.org/oralhist/clarktc.htm>) (recalling Vinson as popular with other Justices).

<sup>127</sup> Urofsky, *supra* n. 41, at 149, 151.

<sup>128</sup> Abraham, *supra* n. 1, at 191; *see also Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No.17: June 5, 1963*,

reflected a perception that Vinson was more obstacle than answer in the Court's effort to find a consensus solution in the then pending school-segregation cases. Even Henry Abraham's effort to present an even-handed judgment concludes that "overall . . . Vinson demonstrated an astonishing lack of leadership: the role of [C]hief [J]ustice was simply beyond his ken."<sup>129</sup> Vinson at times upset colleagues by acting in the more autocratic manner of a congressional committee chair or cabinet official in circumstances when such hierarchical authority did not reside in the Chief Justice.<sup>130</sup> Vinson, though not otherwise a successful Chief Justice, distributed majority opinions evenly and indeed kept few "plums" for himself.<sup>131</sup> The Court rarely acted unanimously and dissents proliferated.

### 3. Warren E. Burger

Burger forfeited his roles of task and social leader by occasional inept and obtuse conduct. Like Stone and Vinson, he failed to impose structure on the conference, to his colleagues' regret.<sup>132</sup> His statements of the case were reportedly unimpressive and often

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[http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas17.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas17.html)) (describing Vinson as lacking "the elements of greatness" of other Chief Justices).

<sup>129</sup> Abraham, *supra* n. 1, at 191.

<sup>130</sup> *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 10: June 9, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas10.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas10.html)) (discussing Vinson's act in calling a special session of the Court to review the stay of execution in *Rosenberg*).

<sup>131</sup> John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. Chi. L. Rev. 212–213, 241(1954).

<sup>132</sup> O'Brien, *supra* n. 44, at 200.

incomplete.<sup>133</sup> He imposed little discipline but allowed each Justice to interrupt others and speak as long as he or she wished.<sup>134</sup> As a consequence, senior Justices often spoke multiple times before junior Justices were able to make their initial contribution, and often little was left to be said by the time the end of the queue was reached.<sup>135</sup> Conferences frequently continued into the following day.<sup>136</sup> Burger sometimes did not record conference votes correctly. Whether this failing was strategic or reflected carelessness, it was not appreciated.<sup>137</sup> Burger did not distinguish himself as a jurist or command the respect of his colleagues.<sup>138</sup> Other Justices rewrote a number of opinions in significant cases he assigned himself.<sup>139</sup> Unlike Hughes, he was not a

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<sup>133</sup> David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* 52 (John Wiley & Sons, Inc. 1992).

<sup>134</sup> O'Brien, *supra* n. 44, at 199.

<sup>135</sup> *Id.*; Savage, *supra* n. 133, at 52 (describing Burger's unimpressive conference performance); Stern & Wermiel, *supra* n. 59, at 356 (describing Burger's case discussions as rambling).

<sup>136</sup> Interview by Harold Hongju Koh with Harry Blackmun, Assoc. J., S. Ct. U.S. (Nov. 1, 1995) (transcript available at <http://lcweb2.loc.gov/diglib/blackmun-public/page.html?page=366&size=640&SERIESID=D09&FOLDERID=D0901>) [hereinafter *Blackmun Interview*].

<sup>137</sup> O'Brien, *supra* n. 44, at 200, 202.

<sup>138</sup> See generally Bob Woodward & Scott Armstrong, *The Brethren* 257, 272, 284, 315 (Simon & Schuster 1979) (describing how Chief Justice Burger, at times, frustrated his colleagues with his leadership style).

<sup>139</sup> Stern & Wermiel, *supra* n. 59, at 357–358 (describing rewrites of Burger opinions in *Alexander v. Holmes Co. Bd. of Educ.*, 396 U.S. 19 (1975), and *Swann v. Charlotte-Mecklenburg*



proficient technical lawyer, and unlike Warren, he did not identify compelling ideals to furnish a foundation for constitutional jurisprudence. Burger often joined but rarely formed majorities in important cases.<sup>140</sup>

Burger compounded his failings as a task leader with social shortcomings.<sup>141</sup> He upset some members of the Court by moving a desk into the Court's conference room and appropriating it as his reception room.<sup>142</sup> Some colleagues resented his perceived practice of deferring initial comment and then strategically voting with the winning side so he, rather than Douglas or Brennan, would assign the Court's opinion.<sup>143</sup> His officious manner alienated Blackmun, his childhood friend.<sup>144</sup> The disparaging portrait of Burger in *The Brethren*,

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*Bd. of Educ.*, 402 U.S. 1 (1971)); Woodward & Armstrong, *supra* n. 138, at 315–346 (describing rewrites of *United States v. Nixon*, 418 U.S. 683 (1975)).

<sup>140</sup> Maltz, *supra* n. 1, at 11–12.

<sup>141</sup> See Joan Biskupic, *Sandra Day O'Connor* 106 (HarperCollins 2005) (“The truth was that Burger’s personal style inspired rivalries.”); Maltz, *supra* n. 1, at 12 (arguing that Burger’s “personal characteristics” exacerbated divisions on the Court); see e.g. Woodward & Armstrong, *supra* n. 138, at 269, 359–360 (describing instances that illustrate Burger’s sometimes difficult leadership style).

<sup>142</sup> Stern & Wermiel, *supra* n. 59, at 327–328.

<sup>143</sup> Biskupic, *supra* n. 141, at 106; Stern & Wermiel, *supra* n. 59, at 356; Woodward & Armstrong, *supra* n. 138, at 100, 170–172, 258, 417–419.

<sup>144</sup> Linda Greenhouse, *Becoming Justice Blackmun* 154–160, 185–188 (Times Books 2005); Tinsley E. Yarbrough, *Harry A. Blackmun: The Outsider Justice* 275, 287–288 (Oxford U. Press 2008).

apparently came in part from interviews with at least five of his colleagues, including many whom were ideologically closest to him.<sup>145</sup>

#### D. William H. Rehnquist

Just five years after the end of an almost nineteen-year tenure, it is too early to assess fully the Rehnquist Chief Justiceship. Five of the eleven who served with him as associate Justices remain on the Court,<sup>146</sup> important papers remain closed, and the fate of some strands of Rehnquist Court jurisprudence still hangs in the balance. Yet a few words are appropriate, not only because of the length of his service (the longest since Melville Fuller died a century ago), but because Chief Justice Roberts served as his law clerk when Rehnquist was an associate Justice.<sup>147</sup>

Rehnquist surely had his impact, yet it is unclear that as Chief Justice he led the Court in crafting sustainable doctrine of the significance of that associated with Hughes and Warren. Moreover, the disposition of the major crisis on his watch—*Bush v. Gore*<sup>148</sup>—remains controversial and the extent of his leadership remains hidden. Accordingly, Henry Abraham's

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<sup>145</sup> David J. Garrow, *The Supreme Court and The Brethren*, 18 Const. Commentary 303, 304–305 (2001) (identifying Stewart, Powell, Blackmun, and probably White and Rehnquist as those interviewed); *see also* Leeds, *supra* n. 59 (reporting Brennan's criticisms of Burger).

<sup>146</sup> S. Ct. of the U.S., *About the Supreme Court, Members of the Supreme Court of the United States*, <http://www.supremecourt.gov/about/members.aspx> (accessed Jan. 25, 2011).

<sup>147</sup> S. Ct. of the U.S., *About the Supreme Court, Biographies of Current Justices of the Supreme Court*, <http://www.supremecourt.gov/about/biographies.aspx> (accessed Jan. 25, 2011).

<sup>148</sup> 531 U.S. 98 (2000).

conclusion that Rehnquist was “a great [C]hief [J]ustice,”<sup>149</sup> seems generous and premature. Of the seven Justices who served with him just prior to, and who issued statements upon, his death, only Justice O’Connor used the word “great” in assessing his service.<sup>150</sup>

Nonetheless, Rehnquist appears to have successfully led the conference and left a mark as Chief Justice. If Rehnquist’s final group of colleagues generally did not label him “great,” the others all did use the words “fair” or “fairness” to describe him.<sup>151</sup> Although Justice O’Connor said she liked Chief Justice Burger, she described Rehnquist as a “terrific” and “wonderful Chief Justice.”<sup>152</sup> Rehnquist presided in a “humble fashion,” “put on no airs at all,” and “held no grudges”<sup>153</sup>—assessments that were not often used in connection with Burger and accordingly draw a contrast. She credited Rehnquist with preserving harmonious personal relations among Justices with divergent jurisprudential approaches.<sup>154</sup> Kennedy described Rehnquist as someone

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<sup>149</sup> Abraham, *supra* n. 1, at 277.

<sup>150</sup> S. Ct. of the U.S., *Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist*, [http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr\\_09-04-05b.html](http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-04-05b.html) (accessed Jan. 23, 2011).

<sup>151</sup> *Id.*; see also Sandra Day O’Connor, in *In Memoriam: William H. Rehnquist*, 119 Harv. L. Rev. 3, 4 (2005) (describing Rehnquist as “fair”); Linda Greenhouse, *Court in Transition: William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. Times A16 (Sept. 5, 2005) (reporting on earlier tribute praising Rehnquist’s impartiality in presiding).

<sup>152</sup> Sandra Day O’Connor, *Response*, 58 Stan. L. Rev. 1673, 1674 (2006).

<sup>153</sup> *Id.*

<sup>154</sup> O’Connor, *supra* n. 1, at 5; see also Savage, *supra* n. 133, at 362–363 (discussing the positive impact of Rehnquist’s interpersonal skills).

who stated his positions forcefully, but respected the “deliberative process,” and who was “a brilliant, effective, and dedicated Chief Justice.”<sup>155</sup> Justices who often disagreed with Rehnquist on high-profile matters, such as Brennan, Marshall, Stevens, and Ginsburg, were among those who praised his performance as Chief Justice.<sup>156</sup> That consensus signaled a professional respect for Rehnquist’s role as a task and social leader in marked contrast with their appraisals of his predecessor.

Rehnquist did not see conference as an occasion to change minds, and accordingly, he conducted them efficiently without opportunity for extended discussion. Rehnquist also deployed opinion writing assignments to achieve strategic objectives. Although Rehnquist initially would seek to distribute them equally each term, he would minimize assignments during the second half of a term to a Justice who was slow to circulate a majority or dissenting opinion or to vote in a case in which opinions had circulated.<sup>157</sup> This practice, which was communicated to the other

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<sup>155</sup> Anthony M. Kennedy, *William Rehnquist and Sandra Day O’Connor: An Expression of Appreciation*, 58 *Stan. L. Rev.* 1663, 1664, 1667 (2006).

<sup>156</sup> Robert J. Giuffra, *A Tribute to Chief Justice William H. Rehnquist*, 58 *Stan. L. Rev.* 1675, 1676 (2006); *see also* O’Brein, *supra* n. 44, at 200–201 (stating that Brennan and Marshall praised Rehnquist as a “‘splendid’ [C]hief [J]ustice”); Savage, *supra* n. 133, at 14 (reporting praise of Rehnquist as Chief Justice from Brennan and Marshall); *Blackmun Interview*, *supra* n. 136 (discussing Rehnquist’s fair assignment of cases); Jeffrey Rosen, *Rehnquist the Great? The Atlantic* (Apr. 2005) (available at <http://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/3820/>) (describing how even liberals may come to view the conservative Chief Justice as successful).

<sup>157</sup> O’Brien, *supra* n. 44, at 200–201.

Justices, promoted efficiency in part by giving Justices incentive to complete their writing and to act so the Court could issue opinions expeditiously.

Just as Stone's appreciation of Hughes signaled some of his own values, it is possible that what Chief Justice Roberts wrote of his predecessor may provide clues regarding his performance. Roberts admired Rehnquist's intellectual curiosity, his lack of pretense, his direct manner, and his sense of whimsy, and Roberts described him as "a genuinely kind, thoughtful, and decent man."<sup>158</sup> Years before his Court experienced a presidential rebuke at the State of the Union,<sup>159</sup> Roberts spoke admiringly of Rehnquist's decision to skip one such occasion when it conflicted with his painting class.<sup>160</sup> Roberts called his former boss "a towering figure in American law" and, more pertinent to this piece, "one of a handful of great Chief Justices."<sup>161</sup>

## II. The Impact of Context

Success as Chief Justice, as in other leadership positions, depends on context as well as skill. Some background conditions remain relatively constant. For instance, the position of Chief Justice confers little hierarchical advantage. Unlike the President's Cabinet, the Court adheres to "one person, one vote," having done so long before the Court recognized that formula as a constitutional principle.<sup>162</sup> The Chief cannot remove other Justices and, except for the Taft

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<sup>158</sup> John G. Roberts, Jr., *In Memoriam: William H. Rehnquist*, 119 Harv. L. Rev. 1, 2 (2005).

<sup>159</sup> Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. Times A12 (Jan. 29, 2010).

<sup>160</sup> Roberts, *supra* n. 158, at 2.

<sup>161</sup> *Id.*

<sup>162</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (stating that "one person, one vote" is a concept that has existed since the Declaration of Independence).

anomaly of a Chief Justice who had, as President, appointed some of his colleagues, cannot expect loyalty from grateful associates who owe their positions to him.

Yet the context also presents variable elements that shape the historic possibilities of a Chief Justice. Chief Justices have presided under varying circumstances that presented different opportunities and constraints. Although history furnishes no mechanism to test counterfactuals, circumstance surely creates leadership opportunities and impacts outcomes and accordingly history's assessments. Important contextual factors include Court composition as well as the issues that the times present.

#### A. The Composition of the Court

The makeup of the Court affects the context in which a Chief Justice operates.

Composition may impact a Chief Justice's fortunes in at least three ways.

##### 1. Ideological Balance

Chief Justices need to operate differently depending on the ideological balance on the Court and where they fall on the relevant spectrum relative to their colleagues. Some successful Chiefs have been centrists in the context of their Court. Taft, for instance, occupied a center position along with Sanford and McKenna.<sup>163</sup> Hughes' influence too, was enhanced by his ideological position on the Court. He and Roberts occupied the middle of a Court that often<sup>164</sup> divided between Butler, McReynolds, Sutherland, and Van Devanter to the right and Holmes (or

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<sup>163</sup> Ross, *supra* n. 29, at 20.

<sup>164</sup> From 1930 to 1936, the Court was, however, unanimous eighty-five percent of the time.

Russell W. Galloway, Jr., *The Court That Challenged the New Deal (1930-1936)*, 24 Santa Clara L. Rev. 65, 98 (1984).

Cardozo), Brandeis, and Stone on the left.<sup>165</sup> When Hughes and Roberts reached the same resolution, and sometimes when they did not, Hughes was able to dictate the outcome of many cases.<sup>166</sup> Roberts was closest to Hughes personally and ideologically and that double proximity enhanced Hughes' clout.

A Chief who occupies the center position is in a strong position to lead. His vote can decide many cases, thereby expanding his bargaining strength. His colleagues have additional reason to curry his favor. Not only can he reward them through the assignment power, he also can help those with strong predilections see their preferred outcomes prevail and perhaps see their views shape doctrine.

Whereas Taft and Hughes gained influence from their position at or near the Court's center, Warren ultimately emerged as the leader of the Court's liberal wing. In that position, he operated at different times in at least three distinct contexts. During the early years of his Chief Justiceship, he sometimes found himself as part of a minority faction, often with Black and Douglas. Following the appointment of Brennan in 1956,<sup>167</sup> the so-called liberal wing grew to include four reliable Justices.<sup>168</sup> This development enhanced Warren's position, not only by bringing him within a single vote of a majority in many cases, but also by adding Brennan's strategic skills to his coalition.<sup>169</sup> This circumstance lent greater significance to Warren's

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<sup>165</sup> *Id.* at 89.

<sup>166</sup> *Id.*

<sup>167</sup> S. Ct. of the U.S., *supra* n. 146.

<sup>168</sup> These four Justices were Black, Douglas, Warren, and Brennan. Stern & Wermiel, *supra* n. 59, at 183.

<sup>169</sup> *Id.*

interpersonal skills, and he was often able to persuade Clark to join them.<sup>170</sup> Once Arthur Goldberg replaced Frankfurter in 1962, Warren was the leader of a generally reliable liberal majority, which allowed him to achieve results consistent with his philosophy.<sup>171</sup>

Like Warren, Rehnquist was the leader of an ideological faction, yet his Chief Justiceship reveals a fourth position that can provide leadership opportunity. After Justice Clarence Thomas joined the Court in 1992, Rehnquist found himself essentially in the center of a five-Justice conservative block consisting of himself and Justices O'Connor, Kennedy, Scalia, and Thomas. Although Rehnquist could not keep this group together on some issues of importance to him, like abortion or school prayer, he was able to achieve narrow majorities in a number of federalism cases.<sup>172</sup> Rehnquist often wrote the majority opinion in the first case in an area in order to produce an opinion that all five would join before distributing the pen to others.

And yet simply being part of the Court's majority has not always been a measure of success for a Chief Justice. In important cases, Vinson frequently was part of a majority consisting of himself, Reed, the three other Truman appointees (Burton, Clark, and Minton), and

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<sup>170</sup> Schwartz, *supra* n. 55, at 208.

<sup>171</sup> The Warren Court liberals consisted of Warren, Black, Douglas, Brennan, Goldberg or Fortas, and Marshall once he replaced Clark in 1967, although Black proved less reliable in later years. *See e.g.* Mark Tushnet, *The Warren Court in Historical and Political Perspective* 7–10 (U. Press of Va. 1993) (illustrating how the appointments of White and Goldberg made a difference in specific cases).

<sup>172</sup> *See generally* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L.J. 569, 575 (2003) (explaining that Rehnquist was able to fashion majorities in some federalism cases but not in those dealing with certain social issues).



often Jackson.<sup>173</sup> Nonetheless, Vinson is not generally credited with having constructed the coalition nor is the resulting jurisprudence as a whole remembered as historic.<sup>174</sup> Burger sided with the majority in many of the most significant cases during his tenure, yet was not viewed as their architect.

## 2. Complementary Allies

The success of a Chief Justice may depend, in part, on the presence of dependable allies who possess talents that complement and supplement his or her own. Taft, for instance, was not a great technical lawyer but was able to rely on Van Devanter to provide that form of professional leadership for the Court.<sup>175</sup> Warren benefited from the presence of Brennan, a master strategist who was able to persuade colleagues to adopt his position and to craft opinions in a manner that would attract five votes.<sup>176</sup>

It is not enough simply to have friends—Stanley Reed had managed Vinson’s congressional campaigns,<sup>177</sup> and Tom Clark was Vinson’s colleague in Truman’s Cabinet.<sup>178</sup>

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<sup>173</sup> Frank, *supra* n. 131, at 243.

<sup>174</sup> See generally *id.* at 242–244 (noting that it is not clear whether Vinson was a leader to his colleagues, and explaining that he was not as effective in the Chief Justice position as he had been in others).

<sup>175</sup> Frankfurter, *supra* n. 6, at 897 (quoting Taft, who described Van Devanter as his “lord chancellor”).

<sup>176</sup> David O. Stewart, *The Great Persuader*, 76 ABA J. 58, 58 (1990).

<sup>177</sup> Urofsky, *supra* n. 41, at 18.

<sup>178</sup> Abraham, *supra* note 1, at 190-192.

Vinson and Clark often voted together<sup>179</sup> yet their friendship did not enable Vinson to succeed as Chief Justice.<sup>180</sup> What adds particular value are allies who bring needed qualities to the table.

Moreover, a Chief Justice can only exploit the resources the Court's personnel provides if he or she fairly assesses his or her own limitations and needs, and forms alliances with those who can help him or her. Taft was willing to use Van Devanter or even Brandeis to provide the technical help his Court needed.<sup>181</sup> Warren certainly benefitted from Brennan's talents, yet it was to Warren's credit that he recognized areas in which he could use help and was willing to seek it from Brennan.<sup>182</sup> By contrast, Burger's apparently inflated self-assessment may have undermined his ability to lead.<sup>183</sup>

### 3. The Dispositions around the Table

The mix of personalities around the table also affects a Chief's ability to lead. The tasks of Stone and Vinson were surely complicated by the presence of Black, Frankfurter, Douglas, and Jackson on the Court. They were strong-willed individuals who approached many legal issues quite differently once the questions relating to federal legislative power and economic substantive due process were resolved in the late Hughes years. All were highly intelligent, energetic, and not averse to giving voice, written and oral, to their convictions. Their propensity to concur and dissent, sometimes at length, consumed time that might have been spent producing

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<sup>179</sup> Frank, *supra* n. 131, at 245 tbl. 4.

<sup>180</sup> Urofsky, *supra* n. 41, at 18, 155.

<sup>181</sup> Steamer, *supra* n. 1, at 176.

<sup>182</sup> See Schwartz, *supra* n. 55, at 205–206 (discussing the relationship between Warren and Brennan).

<sup>183</sup> Maltz, *supra* n. 1, at 12.

majority opinions. Moreover, Frankfurter and Douglas were capable of real nastiness, which introduced an acrimonious tenor to Court deliberations.<sup>184</sup> The Court was increasingly divided, and often the opinions reflected the personal tensions.<sup>185</sup>

Of course, Black, Frankfurter, and Douglas also served under Hughes (and Warren) without being as disruptive, individually and collectively, as they were under Stone and Vinson. No doubt that reflected Hughes's (and Warren's) interpersonal skill. Hughes, after all, was able to manage a Court with McReynolds and Butler, neither of whom presented easy personalities. Yet Hughes also benefited from the fact that Black, Frankfurter, and Douglas served their first years on his Court at a time when they were still finding their way and had not divided ideologically or personally. Additionally, they may have showed someone of Hughes's rare stature a degree of deference they did not accord Stone, with whom they had served as a fellow Associate Justice.

Warren won the affection of his colleagues with the exception of Frankfurter, who clearly irritated him.<sup>186</sup> Although Jackson's death in 1954 cost the Court a gifted Justice,<sup>187</sup> Bernard Schwartz suggests that Jackson's death may have eased Warren's task, since Black and

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<sup>184</sup> Urofsky, *supra* n. 41, at 35–36.

<sup>185</sup> *Id.* at 39–40, 42–43, 137, 149.

<sup>186</sup> See Anthony Lewis, *Warren Says Frankfurter Degrades Court in Dissent*, N.Y. Times (Apr. 25, 1961) (reporting Warren's response in Court to Frankfurter's statement); see also Schwartz, *supra* n. 55, at 253–257, 261–264, 286 (providing examples of the animosity between Warren and Frankfurter).

<sup>187</sup> Abraham, *supra* note 1, at 205.

Jackson were personally antagonistic to one another.<sup>188</sup> Frankfurter, of course, remained to stir the pot, but he also alienated many of his colleagues by the condescending manner in which he approached them. A more politic adversary may have complicated Warren's leadership task during the first part of his service. And Frankfurter's retirement in 1962 made the Court more harmonious during the last half of Warren's service.

Warren also may have been fortunate that the Court he joined included a number of former politicians. Black, Burton, and Minton were former senators;<sup>189</sup> Jackson and Clark had been Attorney General.<sup>190</sup> They no doubt had a fair measure of professional respect for Warren. Moreover, these men were sensitive to political considerations and, in many respects, were receptive to Warren's approach to constitutional issues. Some who later joined the Court, like Brennan, Harlan, Stewart, White, and Fortas, were also pretty pragmatic people.

This discussion of Warren's colleagues suggests another generalization. A Chief Justice's influence also turns on how amenable his or her colleagues are to being persuaded. Warren served with a number of people who were more practical than ideological. They may have been susceptible to Warren's reason or charm in a way that a rival ideologue would not have been.

Taft and Hughes served among colleagues predisposed in their favor. Taft had appointed Van Devanter, with whom he served for sixteen years and played a considerable role in securing

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<sup>188</sup> Schwartz, *supra* n. 55, at 36.

<sup>189</sup> See Abraham, *supra* n. 1 at 167, 189, 195.

<sup>190</sup> *Id.* at 184, 192.

an associate justiceship for Pierce Butler.<sup>191</sup> Taft almost always served with five or six other conservative Justices and accordingly was in a position to lead the Court in a direction with which he sympathized.<sup>192</sup>

Although Hughes experienced a somewhat rocky confirmation battle in the Senate, he joined a Court that was glad to have him. Paul Freund pointed out that one attitude that Holmes and Brandeis shared with Van Devanter and McReynolds was their pleasure in Hughes' appointment,<sup>193</sup> a sentiment widely shared on the Hughes Court.

Other circumstances also gave Taft and Hughes some advantages in achieving a consensus that Vinson and Stone lacked. Brandeis may have been a great dissenter but he felt a strong institutional loyalty to the Court. As such, Brandeis looked for opportunities to work with Taft, and on a number of cases, their common efforts helped achieve Taft's ambition to mass the Court. Van Devanter had trouble writing,<sup>194</sup> McReynolds was lazy,<sup>195</sup> and Holmes was slipping

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<sup>191</sup> Taft also briefly overlapped with his appointee, Mahlon Pitney. S. Ct. of the U.S., *Members of the Supreme Court of the United States*, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (accessed Jan. 19, 2011).

<sup>192</sup> From 1923 until 1925, in addition to Taft, the Court included: Joseph McKenna, Van Devanter, McReynolds, George Sutherland, Butler, and Edward Sanford. *Id.* When McKenna retired in 1925, the more moderate Harlan Fiske Stone took his place. *Id.*

<sup>193</sup> Freund, *supra* n. 27, at 8.

<sup>194</sup> Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891, 1944 n. 267 (1994).

<sup>195</sup> .Mason, *supra* note 5, at 195, 215-217 (describing McReynolds's aversion to work among his deficiencies).

during Hughes' service,<sup>196</sup> all of which may have reduced their propensity to dissent.

Conversely, Stone and Vinson had Black, Frankfurter, Douglas, and Jackson in their primes, a collection that made unity more elusive.

#### B. What Arises on a Chief's Watch

What matters arise during the term of a Chief Justice will also affect his opportunity to lead in a manner that history recalls. Hughes led the Court through the crisis the Court faced when the constitutional jurisprudence of the first third of the twentieth century collided with the politics of the New Deal.<sup>197</sup> The Court was no doubt fortunate that Hughes was its leader when President Franklin Roosevelt proposed his "Court-packing plan,"<sup>198</sup> but that crisis also contributed to Hughes' place in history by furnishing a stage on which he could star. Hughes drafted a "masterful letter" to Senator Burton Wheeler that refuted Roosevelt's arguments in convincing fashion<sup>199</sup> and generally outmaneuvered Roosevelt.

Dwight Eisenhower did not put Warren on the Court to handle the assault on "separate but equal," but that work, from *Brown* in 1954 to *Loving* in 1967, essentially framed Warren's

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<sup>196</sup> Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 371-375 (Little Brown and Company 1989) (referring to Holmes's deterioration during his brief service on Hughes Court).

<sup>197</sup> See generally Cushman, *supra* note 41.

<sup>198</sup> See Steamer, *supra* n. 1, at 23 (explaining that Franklin Roosevelt planned to add six more Justices to the Supreme Court to make a total of fifteen Justices).

<sup>199</sup> *Id.*; Freund, *supra* n. 27, at 27-30 (citing the profound impact of Hughes' letter in defeating the Court-packing plan). See also McElwain, *supra* note 25, at 5 (discussing impact of Hughes's statesmanlike handling of Court-packing crisis on Hughes's historical standing).

service. Warren's leadership in that area was certainly not all history recalls of his tenure, which included major doctrinal shifts regarding criminal procedure,<sup>200</sup> reapportionment,<sup>201</sup> and privacy,<sup>202</sup> among other areas. But it, along with these other areas, formed a coherent record of judicial leadership that history has largely viewed in a positive manner.

That *Brown* arose at the beginning of Warren's tenure was fortuitous in terms of his professional standing. The unanimous opinion in *Brown* was rightfully seen as among Warren's great contributions. It established his credentials in a way that provided an early infusion of capital in his account, with history and with his colleagues.

The timing of *Brown* illustrates another important point. When matters arise may affect a Chief's legacy. Warren may have been fortunate that *Brown* arose at the very outset of his term

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<sup>200</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing rules to establish voluntary waiver of right against self-incrimination in custodial interrogations); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent defendant in criminal case had right to appointed counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence seized in violation of Fourth Amendment to Constitution should be inadmissible in state court prosecution).

<sup>201</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that state legislative districts in both houses of state legislature had to be roughly equal in population); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that Congressional districts must be roughly equal in population); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that legislative malapportionment presented a justiciable question).

<sup>202</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that constitutional right to privacy overruled state from prohibiting use of contraceptives by married couple).

when leaders of the Court's competing wings were vying for his favor and accordingly may have been more receptive to his leadership.

Yet the accidents of timing should not be overestimated in accounting for Hughes's and Warren's success. The appearance of great cases did not propel Stone<sup>203</sup> or Burger<sup>204</sup> to successful stints as Chief Justice. Yes, the reputations of Hughes and Warren benefitted from the circumstances they were dealt, yet their presence and leadership also shaped American history and the position of the Court.

### III Different Models

These sketches of recent Chief Justices caution against associating success in that position with tangible factors in any formulaic way. The differences among the very successful

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<sup>203</sup> Stone's first terms included the Court's path-blazing Commerce Clause decisions in *United States v. Darby*, 312 U.S. 100, 125–126 (1941) (holding that Congress had power to regulate labor conditions under the Commerce Clause for workers producing goods intended for interstate commerce) and *Wickard v. Filburn*, 317 U.S. 111, 133 (1942) (holding that Congress could use its power under the Commerce Clause to regulate intrastate productive activities intended simply for producers own consumption).

<sup>204</sup> Burger fumbled leadership opportunities in early cases dealing with school desegregation like *Alexander v. Holmes County Board of Education*, 396 U.S. 1218 (1969) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and with presidential power, like in *New York Times v. United States*, 403 U.S. 713 (1971), and *United States v. Nixon*, 418 U.S. 683 (1974), in part because his preferred disposition was at odds with that of the majority. See Stern and Wermiel, *supra* note 59, at 332-334, 355-358, 379-382.



Chief Justices far exceeded their similarities, and the qualities found in some successful Chief Justices also appeared in some who fared less well.

For instance, extraordinary legal skill and experience help, but do not guarantee success, as Chief Justice. Hughes was a great lawyer who had extensive experience at the upper echelons of his profession.<sup>205</sup> Yet the same might be said about Stone, who was Attorney General and a highly regarded Associate Justice. Warren, by contrast, had relatively modest experience as a lawyer.<sup>206</sup> Yet Hughes and Warren succeeded whereas Stone did not.

Hughes, Stone, and Rehnquist had served on the Court prior to being named its Chief. They were familiar with the Court and its operations. Their conduct as Chief Justice in part represented a reaction to that of the Chief Justice under whom each had served.<sup>207</sup> Conversely, Warren was a neophyte regarding the Court. But for Vinson's unexpected death, he was destined

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<sup>205</sup> See Ross, *supra* n. 29, at 10 (stating that Hughes' persuasive gifts were such that Cardozo, when on the New York Court of Appeals, would defer ruling for twenty-four hours on any case Hughes had argued to "resist Hughes' [ ] magnetism").

<sup>206</sup> Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 *Tulsa L.J.* 477, 481 (1997).

<sup>207</sup> Lash, *supra* n. 121, at 313–315 (explaining that Hughes believed White was frequently unprepared for the Conference and thus learned from White's mistakes); Ross, *supra* n. 29, at 220–221 (reporting that Hughes thought White failed to structure or limit conference discussion); Mason, *supra* note 117, at 787–792 (contrasting Stone's leadership style with that of Hughes); *cf.* Jeffrey Rosen, *Rehnquist the Great?* *Atlantic Monthly*, April 2005, <http://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/3820/> (accessed March 14, 2011) (discussing Burger and Rehnquist styles of leadership).

to become Solicitor General to prepare him for a later move to the Court.<sup>208</sup> When he arrived at the Court much earlier than expected, he needed to spend time understanding the basic roles of Court employees and observing a few conferences before he took the helm.

Nor does prior judicial experience correlate with success as Chief Justice. Seven of the eight Chief Justices since Taft had prior judicial experience. Hughes, Stone, and Rehnquist had served on the Court; Taft, Vinson, Burger, and John Roberts had been appellate court judges. Warren had not. The novice Warren succeeded as did some, but not all, of the seasoned jurists.

Hughes, Stone, and Rehnquist were gifted intellects. Warren was not,<sup>209</sup> although as Justice Stewart pointed out, to his credit he did not pretend to be one.<sup>210</sup>

Nor does prior relationship with others on the Court guarantee success as Chief Justice. Taft, Hughes, and Rehnquist came to the Court with strong relations with most of its members and these prior relationships no doubt aided them. The same advantage did not confer success on Stone or Vinson, each of whom was well-acquainted with most of their colleagues. And Warren's lack of a prior relationship with his colleagues<sup>211</sup> did not inhibit his success as their leader.

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<sup>208</sup> Schwartz, *supra* n. 55, at 3.

<sup>209</sup> See Philip B. Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 U. Mich. L. Rev. 353, 354 (1968) ("Unlike Stone and Charles Evans Hughes before him, Warren can hardly be regarded as the intellectual or forensic superior of any of his brethren.")

<sup>210</sup> Schwartz, *supra* n. 55, at 31.

<sup>211</sup> See Warren, *supra* n. 76, at 276 (reporting that he knew only Clark well, and Jackson and Douglas slightly).

Even running conference does not need to follow one method. Hughes and Rehnquist apparently operated most efficiently whereas Stone, Vinson, and Burger were less structured. Yet Warren apparently allowed substantial discussion without loss of control.<sup>212</sup>

Nor does success depend upon occupying a particular place in the ideological spectrum. Taft and Hughes were centrists on their Courts but Vinson probably was, too. Warren and Rehnquist successfully led factions at opposite wings of their Courts, but Stone also had been a somewhat ideological jurist, yet was unsuccessful as Chief Justice.

Finally, the secret of success does not reside in the manner of seeking to establish Court majorities. Hughes avoided discussions of cases outside of conference unless initiated by one of his colleagues. Warren, however, frequently engaged in one-on-one and small-group discussions to good effect. His “persuasive powers” helped entice Reed and perhaps others to make the majority opinion in *Brown* unanimous.<sup>213</sup> Yet whereas Warren’s efforts enhanced his leadership, Burger apparently more often offended his colleagues through these efforts.

Notwithstanding the absence of one precise mold from which the successful Chief Justices are cut, less tangible attributes do seem to be associated with successful Chief Justices. First, success requires that a Chief Justice discharge functions with professional skill. Taft, Hughes, Warren, and Rehnquist, in different ways, met this challenge. All worked hard, came to conference well-prepared, and distributed work strategically, yet fairly. Those who have been

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<sup>212</sup> *Id.* at 282–283.

<sup>213</sup> Tushnet, *supra* n. 171, at 4; *see also* Schwartz, *supra* n. 55, at 90, 94 (describing Warren’s sessions with Reed on *Brown*); Leeds, *supra* n. 59 (explaining, from Justice Brennan’s point of view, how Chief Justice Warren was effective at persuading other Justices to vote a particular way).

less successful were deficient in one or more of those respects. Stone was not a leader; Vinson was lazy; Burger was mediocre.

Second, interpersonal skills matter. Taft, Hughes, Warren, and Rehnquist were successful social leaders who conducted their relations with the other justices in a collegial fashion. Disagreement did not make them disagreeable. A Chief Justice's charm cannot eliminate all strife<sup>214</sup> but social skills can mitigate tension and promote collegiality. Stone and Burger were less skilled in dealing with others. They could not draw from personal capital with their associates, and the atmosphere surrounding their Courts deteriorated.

Third, those who were most successful understood both the limits and possibilities of their role as Chief Justice, taking account of the powers their position conferred and the context in which they operated. Taft, Hughes, and Warren understood pretty quickly that their power came from their ability to persuade, and they acted to maximize their ability to do so. A successful government bureaucrat like Vinson or law school dean like Stone may find that being Chief Justice does not confer the accustomed benefits a hierarchical structure affords other leaders.

Moreover, those who succeeded managed to pursue achievable goals through appropriate strategies. Warren could operate differently after Brennan joined the Court than before;<sup>215</sup> Goldberg's arrival changed the equation further.<sup>216</sup> Warren adapted to changing circumstances.

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<sup>214</sup> Frankfurter, *supra* n. 6, at 898–900 (discussing conflicts on the Court notwithstanding Taft's social talents).

<sup>215</sup> See Schwartz, *supra* n. 55, at 205–206 (discussing the close relationship between Warren and Brennan).

<sup>216</sup> See *id.* at 446 (explaining how Goldberg became one of Warren's strongest supporters).

Stone, by contrast, apparently failed to appreciate the peril to his position as Court leader of debating the points each colleague made.

Fourth, the successful Chief Justices demonstrated awareness about themselves and the context in which they functioned. Taft and Warren understood that they lacked some technical skills but borrowed them from Van Devanter and Brennan respectively. Conversely, Burger's pretentious behavior alienated some of his colleagues.<sup>217</sup>

Fifth, it helps if the Chief Justice really enjoys shouldering the extra burdens that position imposes. Clearly, Taft, Hughes, and Warren relished being Chief Justice, and that attitude probably contributed to their success. Stone's views were ambivalent at best. He once likened being Chief Justice to being a law school dean, a position he had also held, since both have "to do the things that the janitor will not do."<sup>218</sup> The administrative demands weighed on him, and he viewed them as a distraction from judging, the activity he most enjoyed.<sup>219</sup> Burger gravitated to his administrative and ceremonial roles regarding the judiciary and legal profession and contributed in these respects, but one wonders whether his preoccupation with those parts of the job came at the expense of judging and working with his colleagues.

The common ingredient of those who found success as Chief Justice was the ability to lead given the opportunities and confines of the position. Leadership, Robert Steamer observed, "is intrinsic."<sup>220</sup> It requires professional and interpersonal skill, energy, awareness—and something more.

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<sup>217</sup> Maltz, *supra* n. 1, at 12.

<sup>218</sup> Steamer, *supra* n. 1, at 18.

<sup>219</sup> Mason, *supra* n. 117, at 581, 606, 639–640, 787–788.

<sup>220</sup> Steamer, *supra* n. 1, at 31–32.

Hughes, Warren, and Taft all brought unique stature to the Court based on their imposing resumes. Hughes's experience included service as Governor of New York, Associate Justice, Republican presidential candidate in 1916, and Secretary of State.<sup>221</sup> Warren had been a highly successful Governor of California and Republican vice-presidential candidate;<sup>222</sup> Taft, an appellate court judge, Secretary of War, and President.<sup>223</sup>

Yet their stature rested on more than the credits on their resumes. Hughes, Paul Freund observed, exuded a "Jovian figure."<sup>224</sup> One suspects his presence inspired a difficult bunch. "Everybody was better because of Toscanini Hughes, the leader of the orchestra," Frankfurter wrote, "[o]ne man is able to bring things out of you that are there, if they're evoked, if they're sufficiently stimulated, sufficiently directed. Chief Justice Hughes had that very great quality."<sup>225</sup>

Hughes' professional reputation and public standing also enhanced the Court's stature. Jackson credited Hughes's presence as helping the Court weather the storm during the 1930s when it abandoned some recent and long-standing precedents.<sup>226</sup> Hughes was "a symbol of stability as well as of progress" whose presence "gave the country a sense of steadiness."<sup>227</sup>

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<sup>221</sup> See, e.g., Pusey, *supra* n. 25, at 181-190, 271-281, 315-359, 411-425.

<sup>222</sup> See, e.g., Schwartz, *supra* note 55, at 1.

<sup>223</sup> See, e.g., Mason, *supra* note 5, at 20-21, 24-33,

<sup>224</sup> Freund, *supra* n. 27, at 13.

<sup>225</sup> Frankfurter, *supra* n. 6, at 902.

<sup>226</sup> Robert H. Jackson, *The Judicial Career of Chief Justice Charles Evans Hughes*, 27 ABA J. 408, 408 (July 1941).

<sup>227</sup> *Id.* at 408-409.

Warren brought some of these same qualities. “The most important feature of Earl Warren’s [C]hief [J]usticeship,” legal historian Ted White wrote, “was his presence. . . . He was regarded as one of the great Chief Justices in American history because of the intangible but undeniable impact of his presence on the Court.”<sup>228</sup>

Ultimately, the greatest Chief Justices are measured not simply by their ability to lead, but by the direction and distance they took the Court and constitutional law. Hughes outmaneuvered Roosevelt on the court-packing plan and led the Court in doctrinal directions that accommodated the New Deal. Warren led the Court through doctrinal revolutions regarding civil rights, criminal procedure, and legislative apportionment. As John Hart Ely wrote of Warren, “[h]e was a leader because he was a man with a mission, and because the mission was good.”<sup>229</sup>

#### IV. Speculating on Chief Justice Roberts

Although it is premature to assess John Roberts’ influence as Chief Justice, the preceding discussion offers some measures to inform speculation on that score. Roberts certainly brings imposing assets to his position. He came to the Court after a highly successful career as a Supreme Court advocate;<sup>230</sup> he is perhaps the ablest lawyer to serve as Chief Justice since Hughes. He clearly is very bright and energetic, well-versed in the work of the Court, and

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<sup>228</sup> White, *supra* n. 63, at 161.

<sup>229</sup> John Hart Ely, *The Chief*, 88 Harv. L. Rev. 11, 11 (1974).

<sup>230</sup> See Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 Ohio St. L.J. 1149, 1228–1230 (2010) (describing Roberts’ success as Supreme Court advocate); Jeffrey Rosen, *Roberts’s Rules*, The Atlantic (Jan.–Feb. 2007) (available at <http://www.theatlantic.com/magazine/archive/2007/01/roberts-apos-s-rules/5559/>) (describing Roberts’ success as advocate).

curious about it. His professional record leaves no doubt regarding his abilities to read and master an appellate record and the relevant cases, to frame issues in a compelling manner, to distinguish cases, to anticipate consequences of doctrinal choices, and to respond to arguments. Roberts' formidable talent and success as an appellate advocate makes him well-suited to lead the Court in its tasks.

Roberts also gives every appearance of possessing strong interpersonal skills. He has a reputation for working well with people who have differing viewpoints.<sup>231</sup> As O'Connor wrote, "[f]ew have made the transition as seamlessly and effectively as Roberts. He knew our traditions well, as he had clerked in 1980 for then Associate Justice Rehnquist. His sense of humor and articulate nature and calm demeanor combine to make him a very effective Chief."<sup>232</sup> Roberts does not bring the stature of a Taft, Hughes, or Warren. Yet neither did Rehnquist, who nonetheless served successfully as Chief Justice.

Some of Roberts' actions suggest that institutional concerns may guide his conduct to a greater degree than that of most of his colleagues. During the last five years, he has voted with the majority more often than virtually all of the other Justices. As shown below,<sup>233</sup> in three of his five terms on the Court, he voted in the majority as or more often than any other member of the

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<sup>231</sup> Jeffrey Toobin, *No More Mr. Nice Guy*, *The New Yorker* (May 25, 2009) (available at [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin)).

<sup>232</sup> Sandra Day O'Connor, *John Roberts*, *Time Magazine* (Apr. 30, 2006) (available at <http://www.time.com/time/magazine/article/0,9171,1187207,00.html#ixzz19cWN2SGn>).

<sup>233</sup> Data in these tables is taken from the annual StatPack releases at SCOTUSblog. Tom Goldstein, SCOTUSblog, *Stat Pack*, <http://www.scotusblog.com/reference/stat-pack/> (accessed Jan. 19, 2011).



Court. Of course, other explanations may account for this tendency. It could reflect Roberts' influence in shaping majorities or suggest that he is the Court's pivot point. Yet it seems more plausible to believe that Roberts may sometimes join an apparent majority either to control the opinion assignment or to foster institutional solidarity or both, since the former may be simply a means to achieve the latter.

#### ROBERTS' MAJORITY OPINIONS

	OT05	OT06	OT07	OT08	OT 09
Rank	1	2	1	3(tie)	1(tie)
Percentage	93	88.4	89.7	81	91

Not only does Roberts rarely dissent, but he writes fewer dissenting opinions than does virtually any other Justice. In part, the paucity of his dissenting opinions may relate to the frequency with which he is in the majority. Yet Roberts also seems to write fewer dissents than most of the other Justices with high majority scores. In fact, of those on the Court since Roberts became Chief Justice, only Kennedy has written fewer dissents.<sup>234</sup> Roberts has never been the lone dissenter.<sup>235</sup>

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<sup>234</sup> Tom Goldstein, SCOTUSblog, *Final Super StatPack OT09*, <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf> (July 7, 2010).

<sup>235</sup> *Id.* Excluding newly-appointed Justice Kagan, Justice Sotomayor was the only other Justice not to have filed a lone dissent but she had only been on the Court for one term. *Id.* By

ROBERTS' DISSENTING OPINIONS

	OT05	OT06	OT07	OT08	OT 09
Dissenting Opinions	3	3	4	5	3
Rank	7-8 (tie)	8	7-9(tie)	7	9
Range for Court	3-14	1-14	4-11	3-15	3-12

Finally, Roberts also writes relatively few concurring opinions. In part, his opinion assignment power may be a factor. He may be able to choose authors who write majority opinions in a manner that gives him little reason to supplement the Court's written record. On the other hand, Roberts may restrain himself in order to promote institutional solidarity.

ROBERTS' CONCURRING OPINIONS

	OT05	OT06	OT07	OT08	OT09
Concurring Opinions	2	1	5	4	2
Rank	7-8 (tie)	9	6	6-7 (tie)	9
Range for Court	2-7	1-10	1-10	2-9	2-13

Roberts has received credit in some instances where observers have seen his hand in crafting relatively narrow holdings that commanded a Court consensus instead of broader but divided results.<sup>236</sup> Such judgments must be offered tentatively since the absence of information

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comparison, Stevens and Thomas had filed ten lone dissents, Souter four, Ginsburg two, and Scalia, Kennedy, Breyer, and Alito one each. *Id.*

<sup>236</sup> See e.g. *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010) (seven to two decision upholding, under the Necessary and Proper Clause, a federal law authorizing civil commitment

about the Justices' initial positions sometimes obscures whether Roberts forged a minimalist consensus "as an act of judicial statesmanship" or made a "strategic retreat."<sup>237</sup> His concurring opinion in *Citizens United v. Fed. Election Commn.*,<sup>238</sup> in which he defended the majority's opinion from the charge that it reflected judicial activism in reaching to decide an issue not necessarily before the Court and in not according proper respect to precedent, reflects concerns regarding the Court's institutional standing although it might also be seen as an effort to plant seeds for later attacks on other doctrine.

Yet Roberts clearly has not abandoned his convictions, and in some areas he has aggressively pursued jurisprudential goals.<sup>239</sup> Quite clearly, he is not simply content to make the engines run smoothly; there are some directions in which he wishes to lead the Court. Other contributions to this symposium have explored the substantive decisions of the Roberts Court in greater depth, but a few snapshots may contribute to the evolving portrait of the work of its Chief Justice.

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of a federal prisoner); *N.W. Austin Mun. Util. v. Holder*, 129 S. Ct. 2504, 2516–2517 (2009) (eight to one decision resolving voting-rights case on technical rather than constitutional ground).

<sup>237</sup> Jeffrey Rosen, *Roberts versus Roberts*, The New Republic (Mar. 2, 2010) (available at <http://www.tnr.com/article/politics/roberts-versus-roberts>).

<sup>238</sup> 130 S. Ct. 876, 917 (2010).

<sup>239</sup> Rosen, *supra* n. 237.

Although other Justices have drawn their share of high-profile controversial opinions,<sup>240</sup> Roberts has certainly not avoided writing contested decisions<sup>241</sup> nor has he always written them in a manner designed to minimize the disputed area. Perhaps the most glaring example occurred

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<sup>240</sup> See e.g. *McDonald v. Chi.*, 130 S. Ct. 3020, 3050 (2010) (Alito writing 5 to 4 opinion holding Second Amendment limits power of states to restrict gun possession); *Citizens United*, 130 S. Ct. at 917 (Kennedy, writing a five to four opinion invalidating restrictions on corporate expenditures in political campaigns); *D.C. v. Heller*, 554 U.S. 570, 636 (2008) (Scalia writing a five to four opinion holding the Second Amendment confers an individual right to gun possession); *Gonzales v. Carhart*, 550 U.S. 124, 130–132, 168 (2007) (Kennedy writing a five to four opinion upholding the constitutionality of a federal statute banning partial-birth abortion despite absence of exception to protect health of woman).

<sup>241</sup> See e.g. *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S. Ct. 3138, 3164 (2010) (writing a five to four opinion holding law unconstitutionally infringed president's power by giving executive power to officials beyond president's control); *D.A.'s Off. v. Osborne*, 129 S. Ct. 2308, 2323 (2009) (writing a five to four opinion denying defendant's constitutional right to obtain state's DNA evidence in postconviction proceeding); *Herring v. United States*, 129 S. Ct. 695, 704 (2009) (writing a five to four opinion holding that the exclusionary rule is inapplicable when an unlawful search is due to isolated police negligence); *Medellin v. Tex.*, 552 U.S. 491, 532 (2008) (holding a treaty non-self-executing and holding that a presidential order transcended presidential power); *Morse v. Frederick*, 551 U.S. 393, 409–410 (2007) (writing a five to four opinion upholding school officials who confiscated pro-drug banner against First Amendment claim). See also *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (writing dissent in a five to four decision striking down a regime for considering detainment of alien enemy combatants).

in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>242</sup> Roberts assigned himself the opinion for the Court although Justice Kennedy's dissent in *Grutter v. Bollinger*<sup>243</sup> must have signaled that any opinion Roberts wrote would probably only speak for four Justices on some points. Yet presumably Roberts thought himself best able to write an opinion that would command at least four votes in support of a rationale adverse to virtually any racial classifications. More surprising were the arguments he used to portray *Brown* as reflecting an anticlassificationist vision of the Equal Protection Clause and his insistence that the attorneys for the black school children shared that vision, an argument that depended on a selective citation of sources read out of their historical context.<sup>244</sup>

In a number of important cases, Roberts has been unable to craft an opinion that would commit five Justices to a common rationale.<sup>245</sup> On the other hand, consensus may have been impossible due to the ideological commitments of some Justices. In that case, the plurality

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<sup>242</sup> 551 U.S. at 797–798.

<sup>243</sup> 539 U.S. 306, 343–344 (concluding that diversity was a compelling interest and endorsing Justice Powell's approach in *Bakke*).

<sup>244</sup> Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of Brown*, 69 Ohio St. L.J. 791, 797 (2008); Snyder, *supra* n. 230, at 1237.

<sup>245</sup> See e.g. *Baze v. Rees*, 553 U.S. 35, 62–63 (2008) (upholding Kentucky's lethal injection protocol with only Justices Kennedy and Alito joining in the opinion); *Parents Involved*, 551 U.S. at 797–798 (finding diversity to be a compelling interest and allowing some consideration of race in student assignments); *Fed. Election Commn. v. Wis. Right to Life*, 551 U.S. 449, 503–504 (2007) (Justices Scalia, Kennedy and Thomas arguing for broader ruling overturning precedent and striking down statute).

opinions may reflect the intractability of the challenge rather than any failure on Roberts' part, and his willingness to undertake the assignment may be evidence of institutional commitment.

In addition to the attributes sketched above, Roberts has at least two other advantages that could greatly enhance his prospects of becoming a great Chief Justice. First, he is an extremely effective and telegenic verbal communicator. His performance during his confirmation hearings was simply awesome and attracted widespread praise.<sup>246</sup> Although twenty-two senators, all Democrats, voted against Roberts' confirmation, he attracted far greater cross-party support, and accordingly far fewer negative votes, than any other recent nominee.<sup>247</sup> Roberts won support

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<sup>246</sup> See e.g. Michael Fletcher, *Roberts Confirmed as 17th Chief Justice*, The Washington Post (Sept. 30, 2005) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html>) (noting that Chief Justice Roberts' confirmation hearing was almost flawless).

<sup>247</sup> Roberts was confirmed seventy-eight to twenty-two on September 29, 2005. U.S. Sen., *U.S. Senate Roll Call Votes 109<sup>th</sup> Congress - 1<sup>st</sup> Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=1&vote=00245](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245) (accessed Jan. 22, 2011). Alito, by comparison, was confirmed fifty-eight to forty-two on January 31, 2006, only four months later by the same Senate. U.S. Sen., *U.S. Senate Roll Call Votes 109<sup>th</sup> Congress - 2<sup>nd</sup> Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00002](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002) (accessed Jan. 22, 2011). Sonia Sotomayor was confirmed sixty-eight to thirty-one on August 6, 2009. U.S. Sen., *U.S. Senate Roll Call Votes 111<sup>th</sup> Congress - 1<sup>st</sup> Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00262](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262) (accessed Jan. 22, 2011). Sotomayor's nine Republican votes included four who had announced their retirement. *Id.*

from fifty-one percent of opposing party senators, a far better showing than other Supreme Court nominees in the last five years. Surely his evident talent and his ability to project a comforting judicial disposition persuaded many Democrats to support him, in part by making that a position their constituents would accept or embrace.

#### CONFIRMATION HEARING VOTES RECEIVED

	Opposing Party Votes	% of Opposing Party Votes Received
Roberts	23	51%
Alito	4	9%
Sotomayor	9	22.5%
Kagan	5	12.5%

Roberts' assets as a television performer coincide with technological change that may add value to those skills. Most of his predecessors served before the advent of C-Span gave the Court much prospect of substantial air time.<sup>248</sup> To date, Roberts has maintained a relatively low profile.<sup>249</sup> Nonetheless, in his public appearances and interviews, Roberts presents himself as a

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Elana Kagan was confirmed sixty-three to thirty-seven a year later, on August 5, 2010. U.S. Sen., *U.S. Senate Roll Call Votes 111<sup>th</sup> Congress – 2<sup>nd</sup> Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm?congress=111&session=2&vote=00229](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=111&session=2&vote=00229) (accessed Jan. 22, 2011).

<sup>248</sup> See Bruce Collins, *C-Span's Long and Winding Road to a Still Un-Televised Supreme Court*, 106 Mich. L. Rev. First Impressions 12, 12–13 (describing C-Span's coverage of the Supreme Court and its members).

<sup>249</sup> See e.g. Pew Research Ctr., *The Databank, 8% - Chief Justice Thurgood Marshall?* <http://pewresearch.org/databank/dailynumber/?NumberID=1056> (accessed Jan. 22, 2011)

likeable figure who communicates in an effective manner. Roberts' skill as a public and visible communicator is an asset that can enhance his, and the Court's, public stature and develop support for its jurisprudence.

Second, Roberts is likely to serve as Chief Justice for a long, long time. Earl Warren was sixty-two years old when Eisenhower nominated him as Chief Justice. When Roberts reaches sixty-two, he will have served longer than Hughes did as Chief Justice. When Roberts reaches sixty-seven, Hughes' age when appointed, he will have served longer than Warren did. If Roberts serves until the age at which Hughes (seventy-nine) or Burger (seventy-nine) retired or Rehnquist (eighty) died, he will have essentially served longer than any Chief Justice except Marshall.<sup>250</sup>

Roberts will no doubt encounter unanticipated circumstances. His opportunities to persuade may be limited if the Court remains ideologically divided and, in such a context, his

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(reporting that twenty-eight percent could identify Roberts as Chief Justice, compared to forty-three percent who correctly identified Rehnquist in November 1986).

<sup>250</sup> Roger Taney, the Chief Justice with the second-longest tenure, took office only days before his fifty-ninth birthday, served twenty-eight and a half years until he was eighty-seven. Abraham, *supra* note 1, at Roberts would pass Taney in length of service in spring 2034, a few months past his seventy-ninth birthday. Fletcher, *supra* n. 246 (noting that Roberts was fifty when he became Chief Justice in 2005). Burger retired a few days after turning seventy-nine; Hughes did so less than three months after reaching that milestone. Maltz, *supra* n. 1, at 8, 10; Pusey, *supra* n. 25, at 786–787. Warren retired three months after his seventy-eighth birthday; at that age, Roberts will be about a year short of Taney's service. Schwartz, *supra* n. 55, at 7, 764.



chance to lead may depend on which side of the divide he is on and whether he has colleagues who are amenable to persuasion in high-profile cases.

Yet his anticipated tenure provides Roberts with unique opportunities. Like Hughes, Warren, and Rehnquist, he is likely to experience several different Roberts Courts as different presidents replace senior colleagues, a process that has already begun. In all likelihood, he will serve with Court configurations which will provide a variety of leadership challenges and opportunities. The luxury of time allows Roberts to be patient in cases where he is not immediately able to achieve his jurisprudential goals. For a protracted period, Roberts will probably initiate and direct conference discussions, assign most Court opinions, and have the opportunity to foster an environment conducive to the sort of leadership a Chief Justice can provide. For many, he will become the face of one branch of American government, and his image may define the judiciary for a long time.

## V. Conclusion

“A Chief Justice,” Philip Kurland wrote, “despite the public image, has little authority that is not shared by his colleagues on the Court, except that which inheres in his personal capacities.”<sup>251</sup> Yet what “inheres in his personal capacities” channeled through the few formal powers attached to his office has allowed some Chief Justices to lead the Court whereas others have simply held the title.<sup>252</sup> Speaking in 1928, Charles Evans Hughes commented that John Marshall’s “preeminence was due to the fact that he was John Marshall, not simply that he was Chief Justice; the combination of John Marshall and the Chief Justiceship has given us our most

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<sup>251</sup> Kurland, *supra* n. 209, at 354.

<sup>252</sup> *Id.*

illustrious judicial figure.”<sup>253</sup> Being Charles Evans Hughes or Earl Warren may also furnish a head start.

Although the formal powers of the Chief Justice are limited, the manner in which they are deployed will affect the way in which the Court operates and the manner in which history recalls the Chief Justice. Recent history provides no single prescription for success in the role. Each Chief Justice operates in a different context, which will shape opportunities for leadership and the appropriate strategies. Ultimately, the success of a Chief Justice depends upon the manner in which he or she discharges his or her professional responsibilities and exercises interpersonal skill, and his or her capacity for leadership in the context presented.

John Roberts may not be John Marshall or Charles Evans Hughes or Earl Warren. Who is? That does not mean he will not emerge as a very consequential Chief Justice. Whether he does will depend on his ability to marshal his professional and personal resources, to adapt to the context circumstances present, and to deploy his formidable assets in service of a mission that history recognizes as enhancing the rule of law.

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<sup>253</sup> Charles Evans Hughes, *The Supreme Court of the United States* 58 (Columbia U. Press 1928).

## LEADING THE COURT: STUDIES IN INFLUENCE AS CHIEF JUSTICE

Joel K. Goldstein\*

John G. Roberts, Jr. has now served more than five years as the seventeenth Chief Justice of the United States. He has held that position longer than Harlan Fiske Stone did and for nearly twice as many days as John F. Kennedy was President.

Although Chief Justice Roberts' judicial opinions, and those of the Court, offer jurisprudence to analyze, it is too early to reach definitive judgments regarding his influence as Chief Justice or his success in that position. Roberts holds an office that, unique among high governmental positions, resists confident real-time assessment.

The office of Chief Justice is cloaked in ambiguity and mystery. Most of what the Chief does publicly either resembles the work of the Associate Justices (i.e., opinion writing), involves administration of the federal judiciary, or seems ceremonial. The Chief's administrative work may contribute importantly to the functioning of the judiciary,<sup>1</sup> yet these labors do not provide the

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\* © 2011, Joel K. Goldstein. All rights reserved. Vincent C. Immel Professor of Law, Saint Louis University School of Law. I am grateful to other participants at the Constitutional Law Discussion Forum at the University of Louisville Louis D. Brandeis School of Law on December 15–16, 2010, for helpful comments on an earlier draft of this Article, to the sponsors of that event, and to Russell Weaver and Mark Killenbeck for the invitation to participate. Stacy Osmond and Margaret McDermott, Esq. provided research assistance. I alone am responsible for the views and shortcomings of this Article.

1. For instance, William Howard Taft was instrumental in securing passage of the Judiciary Act of 1925, which made most of the Court's docket discretionary. Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* 184–185 (U. S.C. Press 1986). See also Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II* 238–239 (5th ed., Rowman & Littlefield Publishers, Inc. 2008) (describing Warren Burger's administrative achievements); Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969–1986*, at 10–11 (U. S.C. Press 2000) (also describing the administrative achievements of Warren Burger); Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 141–145 (Random House 2003) (discussing the initial skepticism that greeted Burger's administrative reforms); Steamer, *supra* n. 1 at 187–192 (discussing the administrative reforms of Chief Justice Burger); see generally Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More Than Just the Highest Ranking Judge*, 1 Const. Commentary 57

usual measure for assessing his or her contributions. Instead, history typically evaluates Chief Justices based largely on their perceived impact on the Court's institutional standing and on its decisions and opinions, particularly those regarding constitutional interpretation. Yet measuring that influence is difficult.

The formal powers of the Chief Justice regarding the Court's work are few—presiding at conference and assigning opinions when in the majority—and the linkage between a Chief's action and historic effect is often inscrutable. Most of the activities that may significantly and distinctively affect the Court's work occur behind closed doors, obscured from the view of all but a few observers. Those who witness it, primarily the other Justices, generally maintain a discrete silence, at least while the Chief presides, other than tossing occasional public praise his or her way.

The necessary customs of a small, collegial judicial institution may mandate these characteristics of invisible interactions and contemporary confidentiality, but those habits postpone informed judgment by denying outside observers critical information. Though these attributes characterize the Supreme Court generally, the Roberts Court presents some additional impediments to assessment. It has experienced a high degree of turnover with four new members, including the Chief, in five years.<sup>2</sup> That amount of transition in personnel imposes new challenges for many members, including the Chief. New members must become acclimated to the Court's work, practices, and personalities; continuing Justices must familiarize themselves with colleagues who have different attitudes, experiences, and styles than their predecessors. The new members include a new Chief Justice who many had previously experienced as an advocate or lower court judge. The retirements of Justices Sandra Day O'Connor, David Souter, and John Paul Stevens necessarily impacted the group dynamic by removing some powerful personalities from the institutional mix. Turnover also puts some members in new roles. Justice Anthony Kennedy now is senior to all but the Chief Justice and Justice Antonin Scalia. Justice Stevens' retirement means that

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(1994) (discussing the nonjudicial responsibilities of Chief Justice); Steamer, *supra* n. 1, at 16 (arguing that Taft's term saw the Chief Justice become the head of the judiciary rather than simply the presiding officer of the Court).

2. S. Ct. of the U.S., *Members of the Supreme Court of the United States*, <http://www.supremecourt.gov/about/members.aspx> (accessed Apr. 12, 2011).

Justice Kennedy gets to assign the opinion when he joins the four “liberal” Justices. These changes mark the Court as an institution currently in flux. Some time is needed before the Justices adjust to a changed context and before the component parts arrange themselves in discernible and predictable patterns.

Moreover, Roberts’ youth when appointed—he was fifty—raises the prospect that these first five years may be but a fragment of a tenure that could rival in length Chief Justice John Marshall’s thirty-four-year run. Even if Roberts does not match that record, life tenure and the actuarial tables would predict that his service will substantially exceed the seventeen-year average of his three most recent predecessors. Thus, Roberts may still be in the early moments of his tenure, a possibility that carries two significant consequences that, taken together, present a historical dilemma. The likely longevity of his term may allow him to exert a relatively unique impact on the Court and on American law. Nonetheless, much information regarding his leadership may remain hidden for some time, until his colleagues are willing to speak frankly and until his papers and those of other Justices are made available for scholars to assess. The history of his Chief Justiceship is being made, yet the history of his leadership will not be heard,<sup>3</sup> at least for a while.

Even though circumstances will defer informed assessments of Roberts’ impact, the patterns of the recent past may provide some useful analytical tools to help anticipate the likelihood that Roberts will exert influence as Chief Justice and the ways he might do so. Although the Chief Justice has “scant inherent powers”<sup>4</sup> and some suggest his office carries “no more authority than other members of the [C]ourt,”<sup>5</sup> anecdotal evidence suggests that a Chief can make a substantial difference, in discrete cases and in

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3. *Cf. Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 705 (2007) (Roberts himself wrote, “When it comes to using race to assign children to schools, history will be heard.”).

4. Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 192 (Simon & Schuster 1965).

5. Bernard Schwartz, *A History of the Supreme Court* 246 (Oxford U. Press 1993). See also Felix Frankfurter, *Chief Justices I Have Known*, 39 Va. L. Rev. 883, 901 (1953) (stating that “[a]side from the power to assign the writing of opinions . . . a Chief Justice has no authority that any other member of the Court has[ not]” and that the Court, was really “an institution in which every man is his own sovereign. The Chief Justice is *primus inter pares*.”).

the overall operation of the Court.<sup>6</sup> Historically, informed governmental observers have cared deeply who becomes Chief Justice, and their behavior provides some evidence that the office is consequential.<sup>7</sup>

Some consensus suggests that during the last century, there have been at least two great Chiefs—Charles Evans Hughes and Earl Warren<sup>8</sup>—although some would add a third, William Howard Taft, as “near great.”<sup>9</sup> At least three other Chief Justices—Harlan Fiske Stone, Fred Vinson, and Warren Burger—are regarded as rather unsuccessful measured by their leadership of the Court’s decisionmaking efforts.<sup>10</sup>

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6. *E.g.* Frankfurter, *supra* n. 5, at 899–902.

7. When Chief Justice Fuller died on July 4, 1910, several members of the Court wanted to succeed him and significant lobbying occurred before President Taft nominated Justice Edward White. Abraham, *supra* n. 1, at 133–134. When Chief Justice White died on May 19, 1921, Taft became Chief Justice. *Id.* at 135. This was after making clear that he would not accept appointment as an Associate Justice and after having previously declined such appointments. Mason, *supra* n. 4, at 17. When Chief Justice Harlan Fiske Stone died on April 22, 1946, some Justices reportedly sent word to President Truman that they would resign if Justice Robert Jackson became Chief Justice. Edwin M. Yoder, Jr., *Black v. Jackson: A Study in Judicial Enmity*, in *The Unmaking of a Whig* 3, 5–6 (Geo. U. Press 1990). When President Truman instead nominated Fred Vinson, Justice Jackson sent an unprecedented cable to two congressional committee chairs blasting Justice Hugo Black who he suspected of undermining his prospects for elevation. *Id.* at 45–46. Presidents care, too. President Taft stewed over the appointment in 1910, as did President Franklin D. Roosevelt in 1941, and President Truman in 1946. President Lyndon B. Johnson so wanted to elevate his friend, Justice Abe Fortas, that he ignored warning signs that such an appointment would receive a hostile reception. And senators place great stock in who occupies the center chair. Republicans and Southern Democrats invested considerable energies in successfully filibustering Justice Fortas’ promotion even though it would not change the Court’s composition. When President Ronald Reagan nominated Justice William Rehnquist to be Chief Justice, Senate Democrats focused on contesting his nomination but essentially ignored that of then Judge Antonin Scalia who President Reagan had nominated for Justice Rehnquist’s seat even though Justice Rehnquist’s elevation would not change the composition of the Court, whereas Scalia’s confirmation would.

8. See Abraham, *supra* n. 1, at 5–7, 158, 203 (discussing previous evaluations of the greatness of a Chief Justice, and recognizing Hughes as “great” and Warren as “[C]hief [J]ustice par excellence”); Steamer, *supra* n. 1, at 36 (identifying Hughes and Warren, along with John Marshall, as great Chief Justices); Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 *Yale L.J.* 405, 405–406 (1975) (describing Marshall and Hughes’ leadership as “outstanding” and stating that Warren should be included in that “special category”).

9. See Abraham, *supra* n. 1, at 147 (arguing that Taft was not a great Chief Justice despite his administrative and technical leadership, but was considered “near great”); Mason, *supra* n. 4, at 304 (observing that Taft was not commonly regarded as a great Chief Justice). Some would argue that Chief Justice Rehnquist was “great,” but it is too soon to reach that judgment. See *infra* pt. I(D) for a discussion of Chief Justice Rehnquist.

10. Maltz, *supra* n. 1, at 11 (arguing that Burger was not a distinguished Chief Justice based on his role in jurisprudential leadership); Alpheus Thomas Mason, *The Chief Justice*

The modest, some might say meager, formal powers of a Chief Justice may allow, but certainly do not guarantee, judicial leadership.<sup>11</sup> Whether a Chief leads, and leads well, depends on his or her capacity to exploit the opportunities the powers provide. This ability turns on his or her possession of intangible qualities, which are unevenly distributed among those who occupy the center chair. Between his two stints on the Court (at a time when he presumably thought his chance to be Chief Justice had passed), Hughes wrote that the Chief's "actual influence will depend upon the strength of his character and the demonstration of his ability in the intimate relations of the judges."<sup>12</sup> Professor David Danelski essentially echoed this conclusion in an important article a half century ago; he concluded that a Chief Justice's "actual influence depends upon his esteem, ability, and personality and how he performs his various roles."<sup>13</sup>

This Hughes–Danelski assessment seems clearly correct. Yet the experiences of Chief Justices during the last century suggest two refinements. First, there is no one model of background or conduct that predicts greatness as a Chief Justice. The traits that seem to correlate well with success as Chief Justice are intangible qualities of leadership, not any characteristics that lend themselves to easy measurement. Second, the influence of a Chief Justice inevitably depends on contextual factors as well as on personal attributes. Whether a Chief Justice can lead, and how, depends on the opportunities history provides, and those vary from Chief to Chief and often during any one incumbency.

Part I of this Article will outline the thesis of Danelski's 1960 article and apply it to the seven Chief Justices from Taft to Rehnquist. Relying on these sketches, Part II will discuss the impact of context on the Chief's influence. Part III will suggest that tangible qualities and particular practices do not correlate well with

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*of the United States: Primus Inter Pares*, 17 J. Pub. L. 20, 20 (1968) (stating that Stone "suffered from administrative ineptitude"); see generally Abraham, *supra* n. 1, at 183–184, 191, 239 (discussing Stone's "less [than] satisfactory" role as Chief Justice, Vinson's "lack of leadership," and Burger's "marginally successful attempts" to shift the judicial position).

11. David J. Danelski, *The Influence of the Chief Justice in the Decisional Process*, in Walter F. Murphy et al., *Courts, Judges & Politics: An Introduction to the Judicial Process* 675, 676 (6th ed., McGraw-Hill 2006) (stating that the office of Chief Justice "does not guarantee leadership").

12. Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* 57 (Garden City Publ. Co. 1936).

13. Danelski, *supra* n. 11, at 676.

success as Chief Justice. Part IV will apply some of these generalizations to Roberts before Part V offers conclusions.

### *I. THE INFLUENCE OF THE CHIEF JUSTICE IN THE DECISIONAL PROCESS*

#### *A. The Danelski Formulation*

Fifty years ago, David J. Danelski published a short study of the Chief Justice's influence in the Court's decisionmaking process based on his review of Court papers during the Taft, Hughes, and Stone Chief Justiceships. He identified task and social leadership as two distinct activities that contributed to the success and cohesion of the Court.<sup>14</sup> The former role focused on the Court's work to reach a decision whereas the latter emphasized the need of the members of the institution to remain sufficiently cohesive, socially, to accomplish its work. The Chief's success in performing those roles is not assured but is contingent on his or her mix of skills as perceived by his or her colleagues, his or her "esteem, ability, and personality and how he [or she] performs his [or her] various roles."<sup>15</sup>

Danelski suggested that the Chief Justice, as the presiding officer at the conference, was in a favorable but not inevitable position to exert both "task and social leadership."<sup>16</sup> The Chief Justice typically presented the cases to the conference, which Danelski regarded as "an important task function."<sup>17</sup> Although Danelski did not spell out the advantages associated with case presentation, presumably that function allows the Chief to frame the issues, a prerogative that may effectively steer discussion in a particular direction. Moreover, the right to be the first to state a position affords the Chief the opportunity to suggest a resolution before anyone else has verbally committed. Thus, presumably, the order of speaking at conference gives the Chief persuading advantages over those who get to weigh in only after others have already stated their views. Minds can and do change but most are more persuadable before, not after, they have shared a conclusion.

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*



Finally, the assignment power that the Chief exercises when in the majority confers substantial opportunity to shape the doctrine that will emerge from the decision.

Danelski pointed out that presiding at conference also positioned the Chief to exercise critical social functions. He was in position “to invite suggestions and opinions, seek compromises, and cut off debate [that] appears to be getting out of hand.”<sup>18</sup> His ability to engage his colleagues yet manage their interaction could contribute to the Court’s cohesion, or lack thereof.

Danelski also explored the importance of the opinion-assigning role, which falls to the Chief when he or she is part of the majority. That function presented four instrumental challenges: producing a valuable precedent, winning public acceptance for a decision, preserving a majority when the Court was divided, and massing the Court.

Finally, Danelski concluded that unifying the Court was among the Chief’s “most important roles.”<sup>19</sup> Quite clearly, the Chief’s skill as a task and social leader and in assigning opinions would contribute to his or her success in this role. So, too, would the extent to which he or she emphasized unanimity as a judicial norm.

## B. Successful Chief Justices

### 1. *Charles Evans Hughes*

Hughes’ great success as Chief Justice related in part to his ability to merge the roles of task and social leader. Danelski proclaimed Hughes “the most esteemed member of his Court” in large part due to his commanding performance at conference.<sup>20</sup> Hughes’ work won the respect of his colleagues. “Few men have been so fitted by talent and disposition to carry the heavy burden which unavoidably rests on the Chief Justice,” wrote Stone.<sup>21</sup> “He

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18. *Id.*

19. *Id.* at 681.

20. Danelski, *supra* n. 11, at 677.

21. Harlan F. Stone, *The Chief Justice*, 27 ABA J. 407, 407 (July 1941).

was master of the business,” said Frankfurter,<sup>22</sup> who likened Hughes presiding to Toscanini conducting.<sup>23</sup>

The Chief Justice’s case-stating prerogative probably contributed to Hughes’ influence even more than it enhanced that of his predecessors or successors. By all accounts, Hughes was an outstanding lawyer with a keen analytical mind and a formidable memory. He labored over case files until he had mastered them. At conference, he stated cases succinctly yet comprehensively, precisely, and impartially.<sup>24</sup> The case having been presented, he concluded by offering his preferred resolution, and his statements of proposed dispositions often commanded assent.<sup>25</sup> After listening to discussion, Hughes then summarized the Court’s position and reacted to the comments of the other Justices.<sup>26</sup>

In addition to Hughes’ task leadership, Danelski regarded him as the social leader of the Court who acted to ensure its cohesion.<sup>27</sup> Hughes was not a backslapping extrovert but maintained warm relations with his brethren, some of whom he had known for years before becoming Chief Justice.<sup>28</sup> Hughes was sensitive to

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22. Frankfurter, *supra* n. 5, at 901.

23. *Id.*; see also Felix Frankfurter, “The Administrative Side” of Chief Justice Hughes, 63 Harv. L. Rev. 1, 3 (1949) (“He knew that the manner of conducting the business of the Court affects the matter. . . . In Court and in conference he struck the pitch, as it were, for the orchestra.”).

24. Merlo J. Pusey, *Charles Evans Hughes* vol. 2, 664–665, 673–674 (Macmillan Co. 1951); Owen J. Roberts, *Charles Evans Hughes: The Administrative Master* in Alan F. Westin, *An Autobiography of the Supreme Court* 205, 208 (Greenwood Press 1978); Stone, *supra* n. 21, at 407 (referring to Hughes’ “extraordinary power of accurate and luminous statement”); Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv. L. Rev. 5, 14–15, 17 (1949) (discussing Hughes’ skill in stating cases and his elaborate preparation for conference); *Transcriptions of Conversations Between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 1: December 20, 1961*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas1.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas1.html) (accessed Apr. 13, 2011) (“Hughes covered all those in a very, very efficient way. One of the reasons that he did that was, first, he had tremendous capacity, an unusual capacity to get things done very fast.”).

25. Roberts, *supra* n. 24, at 208.

26. *Id.*; Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 Harv. L. Rev. 4, 40 (1967).

27. Danelski, *supra* n. 11, at 677.

28. Chief Justice Hughes had served with Justices Holmes, Van Devanter, and McReynolds during his first stint on the Court. *The Autobiographical Notes of Charles Evans Hughes* 298 (David J. Danelski & Joseph S. Tulchin eds., Harv. U. Press 1973). Hughes maintained warm relations with them, even with the incorrigible McReynolds, who reportedly deferred to him. Pusey, *supra* n. 24, at 667–668, 670–671. Hughes was particularly friendly with Van Devanter from their prior service. William G. Ross, *The Chief Justiceship of Charles Evans Hughes, 1930–1941*, at 19 (U. S.C. Press 2007). Hughes

the personalities and psychic needs of his colleagues, and he presided with tact. Hughes treated his colleagues in a courteous manner and did not let jurisprudential disagreements affect his interactions with them.<sup>29</sup>

Hughes' command in conference was no doubt enhanced by his behavior toward the other Justices outside of it. When Justice Van Devanter fell behind in his opinions, Hughes would sometimes reclaim some assigned cases, but always with the comment that Van Devanter had been overburdened.<sup>30</sup> The anti-Semitic McReynolds avoided social encounters with Louis Brandeis, so Hughes divided his colleagues between two annual dinners he hosted.<sup>31</sup> Hughes developed and maintained a close rapport with Owen Roberts,<sup>32</sup> and when Roberts was hospitalized for three weeks, Hughes visited him every weekday.<sup>33</sup> Knowing that Cardozo would immediately begin working on an opinion on Saturday night if he received an assignment after the conference, Hughes withheld Cardozo's allotment until Sunday or Monday to protect his health.<sup>34</sup> So Cardozo would not feel singled out, Hughes also deferred sending assignments to Van Devanter, Cardozo's neighbor.<sup>35</sup> He handled the delicate mission of suggesting to Holmes that it was time for the ninety-year-old to retire with such tact that Holmes immediately took the hint free of ill feeling.<sup>36</sup> Hugo Black had voted against Hughes' nomination as Chief Justice and had advocated the court-packing plan; yet, Hughes treated him with such courtesy and respect that Black became an admirer.<sup>37</sup>

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and Justice Brandeis had overlapped for only a few days in June 1916, but they had known each other as practicing lawyers and had a warm relationship. Danelski & Tulchin, *supra* n. 28, at 171, 298. Hughes and Justice Cardozo were old friends long before President Hoover nominated Cardozo to succeed Justice Holmes. *Id.* at 299–300; Pusey, *supra* n. 24, at 682. Hughes had served in President Herbert Hoover's Cabinet with Harlan Fiske Stone. Danelski & Tulchin, *supra* n. 28, at 298. Brandeis and McReynolds, representing opposite wings of the Court, both endorsed Hughes' nomination. Ross, *supra* n. 28, at 19–20.

29. Ross, *supra* n. 28, at 28, 219.

30. Pusey, *supra* n. 24, at 667–668.

31. *Id.* at 670.

32. Danelski & Tulchin, *supra* n. 28, at 298.

33. Pusey, *supra* n. 24, at 669.

34. William O. Douglas, *Mr. Justice Cardozo*, 58 Mich. L. Rev. 549, 549 (1960).

35. Pusey, *supra* n. 24, at 678.

36. *Id.* at 681–682.

37. *Id.* at 773.

Hughes never lobbied other Justices outside of the conference room although he was open to discussing a case if approached.<sup>38</sup>

Hughes facilitated the Court's work and generally won points with his colleagues by his efficient administration. He conducted Court business in a manner that was respectful of his colleagues' calendars. Conferences began on schedule, and Hughes enforced the time allotted to oral advocates (it was said, perhaps apocryphally, that he once cut an advocate off in the middle of the word "if") and was not afraid to end oral argument when no longer needed. Hughes typically circulated a list of cases he deemed unworthy of certiorari.<sup>39</sup> Although it was understood that any of the cases would be discussed at the request of a single Justice, such requests came about once every other year of Hughes' Chief Justiceship.<sup>40</sup>

Hughes put a good deal of thought into case assignments, which he considered his "most delicate task."<sup>41</sup> Although Hughes claimed that he tried to distribute important cases equally,<sup>42</sup> he was not averse to keeping a disproportionate number for himself (twenty-eight percent), a smaller percentage than Taft retained (thirty-four percent) but far more than did Stone (eleven percent).<sup>43</sup> He kept some important opinions for himself but also shouldered his share of the pedestrian cases.<sup>44</sup> He often assigned controversial cases to the Justice close to the Court's center to

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38. Danelski & Tulchin, *supra* n. 28, at 301; Pusey, *supra* n. 24, at 676–677; Roberts, *supra* n. 24, at 209–210 (stating that Hughes never discussed merits of cases with other Justices between argument and conference).

39. Pusey, *supra* n. 24, at 672.

40. *Id.* Hughes' efficient approach did not meet with universal acclaim. Stone thought Hughes ran conference like a "drill sergeant." Ross, *supra* n. 28, at 221. This left inadequate time for collective rumination of matters before the Court. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 101–103 (Oxford U. Press 1998). Stone tried to fill this gap by sometimes holding Friday afternoon rump sessions, which a few Justices attended. Ross, *supra* n. 28, at 222; Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953*, at 31 (U. S.C. Press 1997).

41. Danelski & Tulchin, *supra* n. 28, at 302; *see also* Frankfurter, *supra* n. 5, at 904 ("No Chief Justice, I believe, equaled Chief Justice Hughes in the skill and the wisdom and the disinterestedness with which he made his assignments.").

42. Danelski & Tulchin, *supra* n. 28, at 302.

43. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 260 (7th ed., W.W. Norton 2005). To some extent, these numbers may reflect the Chief picking up the slack for ill or less productive colleagues, as was true of Taft, for instance. *See* Ross, *supra* n. 28, at 230 (listing significant cases Hughes assigned himself).

44. Roberts, *supra* n. 24, at 209.

minimize division.<sup>45</sup> He tended to assign each Justice a range of cases<sup>46</sup> while considering the “special fitness of a Justice for writing in the particular case.”<sup>47</sup>

Finally, Hughes worked to achieve a consensus as broad as the Court’s composition allowed. In part, he led by example. He rarely wrote dissenting opinions, and his institutional commitment often caused him to acquiesce silently in a disposition rather than publish his disagreement.<sup>48</sup>

Hughes quite clearly commanded the admiration of the Brethren, many of whom effusively praised his leadership. Frankfurter said that Hughes “radiated authority, not through any other quality than the intrinsic moral power that was his.”<sup>49</sup> Douglas regarded Hughes as “a great man.”<sup>50</sup> So, too, did those who observed Hughes in action. Robert Jackson wrote of Hughes’ “impressive personality” and said he “imparted strength to the Court during our time by his character.”<sup>51</sup> Paul Freund, who encountered Hughes as a law clerk to Brandeis, as an attorney before the Court, and as a scholar, compared Hughes to John Marshall as a Chief Justice.<sup>52</sup>

## 2. *Earl Warren*

Warren lacked Hughes’ technical skill as a lawyer yet apparently presided with welcome authority.<sup>53</sup> His popularity among his colleagues disposed them in his favor, and he apparently provided able case summaries that highlighted the basic issues for decision followed with a clear statement of his position, except in an occasional technical matter in which he indicated he would

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45. Freund, *supra* n. 26, at 40.

46. Pusey, *supra* n. 24, at 678; Ross, *supra* n. 28, at 229.

47. Danelski & Tulchin, *supra* n. 28, at 302.

48. Freund, *supra* n. 26, at 37–38 (reporting that Hughes wrote only seventeen dissents and six concurrences out of more than two hundred and fifty opinions).

49. Frankfurter, *supra* n. 5, at 901.

50. *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 7a: January 18, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas7a.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas7a.html) (accessed Apr. 13, 2011).

51. Robert H. Jackson, *The Judicial Career of Chief Justice Charles Evans Hughes*, in *The Supreme Court and Its Justices* 142–143 (Jesse H. Choper ed., 2d ed., ABA 2001).

52. Freund, *supra* n. 26, at 43.

53. Michael R. Belknap, *The Supreme Court under Earl Warren, 1953–1969*, at 22–23 (U. S.C. Press 2005) (quoting Justice Stewart that Warren was “ideal” in presiding over the conference).

join any majority for lack of his own preference.<sup>54</sup> Warren reportedly presided in a fair and efficient manner and resisted the urge to argue with his colleagues, a practice that had undermined Stone's authority.<sup>55</sup> Warren's colleagues regarded him as persuasive in conference and a hard worker.<sup>56</sup> He drew on the skill of others to enhance his own performance. Warren and Black often discussed pending cases before and after conferences.<sup>57</sup> After Brennan joined the Court, Warren regularly strategized with him, meeting every Thursday before conference in Brennan's chambers.<sup>58</sup>

Warren reportedly provided simple, but effective, statements of cases that focused discussion on the underlying moral values at issue. Warren's eloquent statement at the December 12, 1953 conference on *Brown v. Board of Education*<sup>59</sup> was noteworthy in this respect.<sup>60</sup> Although Warren said he favored "pooling all of the humble wisdom of the Court[,]," he proceeded to state that "separate but equal" rested on the "basic premise that the Negro race is inferior," a conclusion Warren rejected as inconsistent with the three Civil War Amendments.<sup>61</sup> Warren's comments, when coupled with the prior term's discussion of the case, signaled that a clear majority existed to overturn *Plessy* and placed the constitutional issue in a moral frame that virtually compelled the ultimate decision.<sup>62</sup> Moreover, Warren astutely invited the confer-

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54. Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 143–144 (N.Y.U. Press 1983).

55. See William J. Brennan, Jr., *Chief Justice Warren*, 88 Harv. L. Rev. 1, 1–2 (1974) (praising Warren's skills presiding over conference); Schwartz, *supra* n. 54, at 144 (stating that Warren would rarely contradict others at conference, and allowed each Justice their full say).

56. Interview by T. H. Baker with Thurgood Marshall, Assoc. J., U.S. S. Ct. (July 10, 1969) (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/MarshallT/marshall.pdf>) [hereinafter *Marshall Interview*].

57. Jim Newton, *Justice for All: Earl Warren and the Nation He Made* 348 (Penguin Group 2006).

58. Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* 106, 183, 250–252 (Houghton Mifflin Harcourt 2010); Jeffrey T. Leeds, *A Life on the Court*, N.Y. Times 6 (Oct. 5, 1986).

59. 347 U.S. 483 (1954).

60. *Notes of Conference of December 12, 1953*, in *The Supreme Court in Conference: 1940–1985*, at 654 (Del Dickson ed., Oxford U. Press 2001) [hereinafter *The Supreme Court in Conference*].

61. *Id.*

62. See e.g. G. Edward White, *Earl Warren: A Public Life* 165 (Oxford U. Press 1982) (arguing that Warren's statement used moral shame to attract support).

ence to discuss, but not to vote on, the case to make it easier for those with misgivings about overturning *Plessy* to change their minds later.<sup>63</sup> Although Warren was not solely responsible for achieving the unanimous result in *Brown*, he surely played an important role.<sup>64</sup>

*Brown* was by no means the only instance when Warren's opening identified a broad principle that the Court adopted. In *Miranda v. Arizona*,<sup>65</sup> Warren's conference statement articulated the basic ideals and specific requirements that later found their way into his opinion and commanded the essential assent of five others.<sup>66</sup> In *Loving v. Virginia*,<sup>67</sup> he declared that the Equal Protection Clause was designed to eliminate racial discrimination, but that miscegenation statutes "maintain white supremacy."<sup>68</sup> Bernard Schwartz found from his review of conference notes that Warren was usually able to lead the Court in the direction he chose.<sup>69</sup>

Warren also excelled as a social leader, and his popularity with his colleagues presumably enhanced his influence. He had immense interpersonal skills. The simple acts of a master politician paid important dividends. When Warren first arrived at the Court, he went directly to Black's chambers and introduced himself to Black's office staff and law clerks—a gesture Black appreciated.<sup>70</sup> He asked Black for a reading list to help with opinion writing, and after Black suggested Aristotle's *Rhetoric*, Warren immediately began to read it.<sup>71</sup> He invited Black, as senior Justice, to continue to preside at conference initially. Warren greeted Potter Stewart and his wife at the train station at

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63. *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 13: December 17, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas13.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas13.html) (accessed Apr. 13, 2011).

64. See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 *Geo. L.J.* 1, 1 (1979) (describing how the role of the Court's previous unanimous decisions on issues of racial segregation started a trend that helped bring about the unanimity in *Brown*).

65. 384 U.S. 436 (1966).

66. *The Supreme Court in Conference*, *supra* n. 60, at 515–518.

67. 388 U.S. 1 (1967).

68. *The Supreme Court in Conference*, *supra* n. 60, at 695.

69. Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* 12 (Addison-Wesley 1990); see also Belknap, *supra* n. 53, at 22 (stating that Warren could usually steer conference discussion).

70. Newton, *supra* n. 57, at 277.

71. *Id.* at 277–278.

6:30 a.m. when they first arrived in Washington, District of Columbia.<sup>72</sup> Warren routinely met other Justices, even those most junior, in their chambers rather than summoning them to his, persisting in the practice even when they protested that protocol demanded that they visit him.<sup>73</sup> This show of humility—institutional and personal—helped endear Warren to his associates. Warren personally hand-delivered his draft of the opinion in *Brown* to each of his colleagues, even taking it to Jackson in the hospital,<sup>74</sup> a gesture that signaled deference of a new Chief Justice for a senior colleague and afforded an opportunity for conversation, in addition to addressing the underlying confidentiality concerns associated with transporting the opinion outside of the Court. Warren won favor with other actions too, like lobbying Congress (unsuccessfully) to provide cars and drivers for the Justices<sup>75</sup> or resisting efforts to increase the differential between his salary and that of the Associate Justices from five hundred dollars to twenty-five hundred dollars.<sup>76</sup>

Warren also cultivated his colleagues socially—an enterprise that must have come naturally for someone Brennan recalled as being “marvelous with people.”<sup>77</sup> Warren and his family spent holidays with the Blacks; he hunted<sup>78</sup> and walked<sup>79</sup> with Clark; and he attended sporting events and otherwise regularly socialized with Brennan.<sup>80</sup> He persuaded all of his colleagues (except Black and Frankfurter) to join him at the Army-Navy football game most years; the Justices traveled to the game by rail during which time they socialized with one another and their families over breakfast and dinner.<sup>81</sup>

Save for Frankfurter and sometimes Douglas, Warren’s colleagues spoke of him effusively.<sup>82</sup> Brennan regarded him as “the

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72. Belknap, *supra* n. 53, at 21; Schwartz, *supra* n. 54, at 321.

73. See generally Leeds, *supra* n. 58 (citing Warren’s practice of meeting Brennan in his chambers as a reflection of Warren’s view that he was “Chief among equals”).

74. Hutchinson, *supra* n. 64, at 42.

75. Earl Warren, *The Memoirs of Earl Warren* 347–348 (Doubleday & Co. 1977).

76. Brennan, *supra* n. 55, at 3.

77. Leeds, *supra* n. 58.

78. Newton, *supra* n. 57, at 348.

79. Schwartz, *supra* n. 54, at 443.

80. Stern & Wermiel, *supra* n. 58, at 105; Leeds, *supra* n. 58.

81. Newton, *supra* n. 57, at 350; Stern & Wermiel, *supra* n. 58, at 104–105.

82. *The Douglas Letters* 124–125 (Melvin I. Urofsky ed., Adler & Adler 1987) (criticizing Warren in letters in spring, 1961); *Transcriptions of Conversations between Justice*



Super-Chief.”<sup>83</sup> Stewart called Warren “an instinctive leader whom you respected and for whom you had an affection.”<sup>84</sup> Clark thought Warren would be viewed as the equal to, or greater than, John Marshall;<sup>85</sup> Douglas ranked him with Marshall and Hughes.<sup>86</sup> Marshall described Warren as “one of the greatest people who ever lived” and thought history would rank him “probably the greatest Chief Justice who ever lived.”<sup>87</sup> Goldberg exaggerated only slightly in judging Warren as “beloved by all his brethren.”<sup>88</sup> Fortas said that Warren “provided an essence, an attitude, which set the tone and quality of the Court’s work.”<sup>89</sup>

Warren distributed assignments fairly, making an effort to give all members some opportunity to write important cases.<sup>90</sup> As with other Chief Justices, he wrote many of the historic decisions, such as *Brown, Bolling v. Sharpe*,<sup>91</sup> *Reynolds v. Sims*,<sup>92</sup> *Miranda, Loving*, and *Powell v. McCormack*.<sup>93</sup> Yet he also bore more than his share of those less coveted.<sup>94</sup> He often relied on Brennan to write delicate opinions or to preserve a precarious coalition, as in *Cooper v. Aaron*<sup>95</sup> or *Baker v. Carr*.<sup>96</sup> Yet strategic concerns probably dictated the assignments to Clark in *Abington v. Schempp*,<sup>97</sup> *Heart of Atlanta Motel, Inc. v. United States*,<sup>98</sup> and *Mapp v.*

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*William O. Douglas and Professor Walter F. Murphy, Cassette No. 11: June 9, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas11.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas11.html) (accessed Apr. 19, 2011).

83. Brennan, *supra* n. 55, at 5.

84. Belknap, *supra* n. 53, at 22.

85. Interview by Joe B. Frantz with Tom Clark, Assoc. J., U.S. S. Ct. (Oct. 7, 1969) (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Clark-T/Clark-T.PDF>).

86. William O. Douglas, in *Earl Warren—A Tribute*, 58 Cal. L. Rev. 3, 4 (1970).

87. *Marshall Interview*, *supra* n. 56.

88. Arthur J. Goldberg, in *Earl Warren—A Tribute*, *supra* n. 86, at 6.

89. Fortas, *supra* n. 8, at 411.

90. Schwartz, *supra* n. 54, at 30; Interview by Joe B. Frantz with Earl Warren, (Sept. 21, 1971) (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Warren-E/Warren-e.pdf>).

91. 347 U.S. 497 (1954).

92. 377 U.S. 533 (1964).

93. 395 U.S. 486 (1969).

94. Schwartz, *supra* n. 54, at 460–461.

95. 358 U.S. 1 (1958). Brennan did much of the drafting although the decision was issued as an opinion of all nine Justices. Stern & Wermiel, *supra* n. 58, at 145–152.

96. 369 U.S. 186 (1962). See Schwartz, *supra* n. 54, at 418–419 (discussing strategic considerations in assignment to Brennan).

97. 347 U.S. 203 (1963).

98. 379 U.S. 241 (1964).

Ohio,<sup>99</sup> and to Stewart in *Katz v. United States*<sup>100</sup>—cases in which a more conservative author might help keep the majority intact and gain greater public acceptance.

### 3. William Howard Taft

The Taft tenure demonstrated that a Chief Justice can, under certain circumstances, be highly successful without providing both task and social leadership. Taft, according to Danelski, acted as the Court's social leader while his appointee, friend, and ally, Van Devanter, emerged as the task leader of the conference.<sup>101</sup> Taft's good nature apparently paid dividends in easing tensions on the Court, and he quickly achieved cordial relations with Brandeis,<sup>102</sup> with whom he had previously endured high-stakes, public, and acrimonious clashes.<sup>103</sup> The rapprochement reflected their reciprocal efforts, but Taft certainly did his part by going out of his way to be solicitous about Brandeis' health and feelings and accommodating Brandeis' views and suggestions when he could. Taft's outreach was consistent with his "very genial"<sup>104</sup> personality, but it also reflected his desire to have the Court work collegially as a team.<sup>105</sup> Taft valued unanimity highly and accordingly tried to foster a climate conducive to compromise.<sup>106</sup> The Taft Court demonstrated a high degree of cohesion, handing down unanimous decisions eighty-four percent of the time. Taft set an example in this respect, writing only about two dissents per year.<sup>107</sup>

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99. 367 U.S. 643 (1961).

100. 389 U.S. 347 (1967).

101. Danelski, *supra* n. 11, at 677.

102. Alpheus Thomas Mason, *Brandeis: A Free Man's Life* 537–539 (Viking Press 1946).

103. Brandeis had humiliated Taft during the investigation of Secretary of Interior Ballinger in 1910 by demonstrating that Taft had lied in his statements about his own inquiry into matters in dispute. Six years later, Taft signed a letter along with former American Bar Association presidents opposing Brandeis' nomination to the Court on the grounds that he was unfit to serve. *See generally* Mason, *supra* n. 4, at 199–200 (describing how the two men began to mend relations after this event).

104. Frankfurter, *supra* n. 5, at 898 (describing Taft as having "great warmth" and "a great deal of comradery [sic] about him").

105. *See generally* Mason, *supra* n. 4, at 193–206 (describing ways in which Taft promoted teamwork and unanimity).

106. *The Supreme Court in Conference*, *supra* n. 60, at 74–75.

107. O'Connor, *supra* n. 1, at 116–117.

Taft won favor with his colleagues generally by generous and sensitive gestures toward them, ranging from Christmas cards, rides, and gift salmons, to arranging for the funeral of Mrs. Holmes at Arlington.<sup>108</sup> Taft's conduct in assigning opinions also no doubt endeared him to his colleagues. He wrote more than his share of the Court's opinions, in part because he assigned himself cases in areas like patent law, which others preferred to avoid, and he took on extra work when a colleague was ill or fell behind.<sup>109</sup> Brandeis credited Taft with "admirable" personal qualities, with smoothing out problems, and with conducting a harmonious conference.<sup>110</sup>

Although Taft lacked the legal skills that Hughes was to display, Van Devanter helped fill that void. Van Devanter's writer's block limited his output of opinions,<sup>111</sup> but his knowledge of procedure and the Court's precedents, as well as his ability at legal analysis were highly valued by his colleagues.<sup>112</sup> He often strategized with Taft before conference and reviewed memoranda before the Chief circulated them to the other chambers.<sup>113</sup> Brandeis claimed that Van Devanter ran the Court due to his knowledge of federal law and his willingness to be helpful to his colleagues.<sup>114</sup>

### C. Unsuccessful Chief Justices

By contrast, the Chief Justiceships of Stone, Vinson, and Burger have not been regarded as successful in terms of leading the Court. The Court fell victim to internecine strife during the

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108. Mason, *supra* n. 4, at 205; see also Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 S. Ct. Rev. 299, 336 (quoting Brandeis as praising Taft's generosity to other Justices).

109. Mason, *supra* n. 4, at 205–206, 231–232 (reporting that Taft wrote one-sixth of the Court's opinions and averaged ten opinions per year—more than his colleagues for most years); Urofsky, *supra* n. 108, at 321 (crediting Taft with assigning cases fairly).

110. Urofsky, *supra* n. 108, at 313, 322, 333.

111. Abraham, *supra* n. 1, at 136; Mason, *supra* n. 4, at 209 (describing Van Devanter as "opinion-shy" and a "perfectionist"); Pusey, *supra* n. 24, at 667–668 (referring to Van Devanter's "pen paralysis" as "almost an affliction").

112. David Burner, *Willis Van Devanter*, in *The Justices of the United States Supreme Court 1789–1978: Their Lives and Major Opinions* 1945, 1948, 1952–1953 (Leon Friedman & Fred L. Israel eds., Chelsea House 1980).

113. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, in *The Supreme Court and Its Justices*, *supra* n. 51, at 319; Mason, *supra* n. 4, at 222; Alpheus Thomas Mason, *William Howard Taft: President by Chance, Chief Justice by Choice*, in *The Supreme Court and Its Justices*, *supra* n. 51, at 139–140.

114. Urofsky, *supra* n. 108, at 310.

Chief Justiceships of Stone and Vinson, whom Herbert Johnson suggests “share the unenviable distinction of being perhaps the least collegial and most internally vindictive periods of the Court’s history.”<sup>115</sup>

### 1. Harlan Fiske Stone

Although Stone came highly recommended as Chief Justice,<sup>116</sup> he proved miscast in the center seat. Stone conducted conference quite differently than Hughes, in part due to his reaction to Hughes’ style of leadership, in part because he valued unanimity less and dissents more, and in part due to his own temperament. Stone’s praise of Hughes for not seeking “unanimity at the cost of the sacrifice . . . of strongly held convictions” and for recognizing the historic role of dissents<sup>117</sup> probably described Stone’s values more accurately than Hughes’ performance. Stone was more the academic than the man of action—a jurist whose contributions came more from his pen than his command.

Stone often came to conference without having reached a resolution of the matters for decision. His statements of cases lacked the authority of Hughes’ renditions and accordingly others embellished on them and competed for de facto leadership of the Court. Rather than presiding, he tended to join the debates.<sup>118</sup> Believing Hughes’ efficiency sacrificed full exploration of the issues, Stone allowed discussion to continue interminably.<sup>119</sup> Stone exacerbated matters by debating with others who differed with his views,<sup>120</sup> thereby sacrificing any ability to police the discussions. Whatever the benefits of longer deliberations, they had negative byprod-

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115. Herbert A. Johnson, *Editor’s Preface*, in Urofsky, *supra* n. 40, at ix.

116. Alpheus Thomas Mason, *Harlan Fisk Stone: Pillar of the Law* 566, 570 (The Viking Press 1956) (reporting praise of Stone from Hughes, Brandeis, and Frankfurter among others).

117. Stone, *supra* n. 21, at 408.

118. Danelski, *supra* n. 11, at 678; Mason, *supra* n. 116, at 790–792 (describing conferences under Stone); *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 2: December 20, 1961*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas2.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas2.html) (accessed Apr. 19, 2011) (describing Stone’s practice of debating points made by each Justice who spoke).

119. Frankfurter, *supra* n. 5, at 902–903.

120. Joseph P. Lash, *From the Diaries of Felix Frankfurter* 152 (W.W. Norton & Co. 1975); *Transcripts*, *supra* n. 118 (describing Stone’s practice of debating points made by each Justice who spoke).

ucts.<sup>121</sup> Disposing of the Court's work became a more arduous enterprise as additional sessions were required to complete deliberation. Rather than being Saturday's work, conferences often continued on Monday, Tuesday, and Wednesday.<sup>122</sup> Moreover, disagreements between strong-willed members of the Black and Frankfurter wings of the Court often dominated the discussions and perhaps exacerbated some of the divisions between the Justices.<sup>123</sup> Stone apparently made derogatory comments about Black, which later became known to Black, thereby tempering his regard for the Chief Justice.<sup>124</sup>

## 2. Fred Vinson

Vinson lacked the legal skill of Hughes or Stone. He was a sociable person and a number of his colleagues liked him personally.<sup>125</sup> That did not translate into professional respect, however, from colleagues who viewed him as lazy and lackluster.<sup>126</sup> Frankfurter's famous comment at Vinson's funeral in September 1953 ("This is the first indication I have ever had that there is a God."),<sup>127</sup> may have revealed more about Frankfurter than about Vinson, yet it reflected a perception that Vinson was more obstacle than answer in the Court's effort to find a consensus solution in the then pending school-segregation cases. Even Henry Abraham's effort to present an even-handed judgment concludes that "overall, Vinson demonstrated an astonishing lack of leadership: the role of [C]hief [J]ustice was simply beyond his ken."<sup>128</sup> Vinson at times upset colleagues by acting in the more autocratic manner of a congressional committee chair or cabinet

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121. See Mason, *supra* n. 116, at 793–794 (describing some of the consequences of long deliberations under Stone's Chief Justiceship).

122. William O. Douglas, *Chief Justice Stone*, 46 Colum. L. Rev. 693, 695 (1946).

123. Lash, *supra* n. 120, at 207, 228; Mason, *supra* n. 116, at 793–795; O'Brien, *supra* n. 43, at 197–198; Urofsky, *supra* n. 40, at 39–40.

124. *Transcriptions No. 7a*, *supra* n. 50.

125. Urofsky, *supra* n. 40, at 149; Interview by Jerry N. Hess with Tom C. Clark, Assoc. J., U.S. S. Ct. (Oct. 17, 1972) (transcript available at <http://www.trumanlibrary.org/oralhist/clarktc.htm>) (recalling Vinson as popular with other Justices).

126. Urofsky, *supra* n. 40, at 149, 151.

127. Abraham, *supra* n. 1, at 199; see also *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 17: June 5, 1963*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas17.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas17.html) (describing Vinson as lacking "the elements of greatness" of other Chief Justices).

128. Abraham, *supra* n. 1, at 191.

official in circumstances when such hierarchical authority did not reside in the Chief Justice.<sup>129</sup> Vinson, though not otherwise a successful Chief Justice, distributed majority opinions evenly and indeed kept few “plums” for himself.<sup>130</sup> The Court rarely acted unanimously and dissents proliferated.

### 3. Warren E. Burger

Burger forfeited his roles of task and social leader by occasional inept and obtuse conduct. Like Stone and Vinson, he failed to impose structure on the conference, to his colleagues' regret.<sup>131</sup> His statements of the case were reportedly unimpressive and often incomplete.<sup>132</sup> He imposed little discipline but allowed each Justice to interrupt others and speak as long as he or she wished.<sup>133</sup> As a consequence, senior Justices often spoke multiple times before junior Justices were able to make their initial contribution, and often little was left to be said by the time the end of the queue was reached.<sup>134</sup> Conferences frequently continued into the following day.<sup>135</sup> Burger sometimes did not record conference votes correctly. Whether this failing was strategic or reflected carelessness, it was not appreciated.<sup>136</sup> Burger did not distinguish himself as a jurist or command the respect of his colleagues.<sup>137</sup> Other Justices rewrote a number of opinions in significant cases

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129. *Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 10: June 9, 1962*, [http://www.princeton.edu/~mudd/finding\\_aids/douglas/douglas10.html](http://www.princeton.edu/~mudd/finding_aids/douglas/douglas10.html) (discussing Vinson's act in calling a special session of the Court to review the stay of execution in *Rosenberg*).

130. John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. Chi. L. Rev. 212, 212–213, 241 (1954).

131. O'Brien, *supra* n. 43, at 200.

132. David G. Savage, *Turning Right: The Making of the Rehnquist Supreme Court* 52 (John Wiley & Sons, Inc. 1992).

133. O'Brien, *supra* n. 43, at 199.

134. *Id.*; Savage, *supra* n. 132, at 52 (describing Burger's unimpressive conference performance); Stern & Wermiel, *supra* n. 58, at 356 (describing Burger's case discussions as rambling).

135. Interview by Harold Hongju Koh with Harry A. Blackmun, Assoc. J., S. Ct. U.S. (Nov. 1, 1995) (transcript available at <http://lcweb2.loc.gov/diglib/blackmun-public/page.html?page=366&size=640&SERIESID=D09&FOLDERID=D0901>) [hereinafter *Blackmun Interview*].

136. O'Brien, *supra* n. 43, at 200, 202.

137. See generally Bob Woodward & Scott Armstrong, *The Brethren* 257, 272, 284, 315 (Simon & Schuster 1979) (describing how Chief Justice Burger, at times, frustrated his colleagues with his leadership style).

he assigned himself.<sup>138</sup> Unlike Hughes, he was not a proficient technical lawyer, and unlike Warren, he did not identify compelling ideals to furnish a foundation for constitutional jurisprudence. Burger often joined but rarely formed majorities in important cases.<sup>139</sup>

Burger compounded his failings as a task leader with social shortcomings.<sup>140</sup> He upset some members of the Court by moving a desk into the Court's conference room and appropriating it as his reception room.<sup>141</sup> Some colleagues resented his perceived practice of deferring initial comment and then strategically voting with the winning side so he, rather than Douglas or Brennan, would assign the Court's opinion.<sup>142</sup> His officious manner alienated Blackmun, his childhood friend.<sup>143</sup> The disparaging portrait of Burger in *The Brethren* apparently came in part from interviews with at least five of his colleagues, including many who were ideologically closest to him.<sup>144</sup>

#### D. William H. Rehnquist

Just five years after the end of an almost nineteen-year tenure, it is too early to assess fully the Rehnquist Chief Justiceship. Five of those who served with him as Associate Justices remain on the Court,<sup>145</sup> important papers remain closed, and the

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138. Stern & Wermiel, *supra* n. 58, at 357–358 (describing rewrites of Burger opinions in *Alexander v. Holmes Co. Bd. of Educ.*, 396 U.S. 19 (1975), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)); Woodward & Armstrong, *supra* n. 137, at 315–346 (describing rewrites of *United States v. Nixon*, 418 U.S. 683 (1975)).

139. Maltz, *supra* n. 1, at 11–12.

140. See Joan Biskupic, *Sandra Day O'Connor* 106 (HarperCollins 2005) (“The truth was that Burger’s personal style inspired rivalries.”); Maltz, *supra* n. 1, at 12 (arguing that Burger’s “personal characteristics” exacerbated divisions on the Court); see e.g. Woodward & Armstrong, *supra* n. 137, at 269, 359–360 (describing instances that illustrate Burger’s sometimes difficult leadership style).

141. Stern & Wermiel, *supra* n. 58, at 327–328.

142. Biskupic, *supra* n. 140, at 106; Stern & Wermiel, *supra* n. 58, at 356; Woodward & Armstrong, *supra* n. 137, at 100, 170–172, 258, 417–419.

143. Linda Greenhouse, *Becoming Justice Blackmun* 154–160, 185–188 (Times Books 2005); Tinsley E. Yarbrough, *Harry A. Blackmun: The Outsider Justice* 275, 287–288 (Oxford U. Press 2008).

144. David J. Garrow, *The Supreme Court and The Brethren*, 18 Const. Commentary 303, 304–305 (2001) (identifying Stewart, Powell, Blackmun, and probably White and Rehnquist as those interviewed); see also Leeds, *supra* n. 58 (reporting Brennan’s criticisms of Burger).

145. See S. Ct. of the U.S., *About the Supreme Court, Members of the Supreme Court of the United States*, <http://www.supremecourt.gov/about/members.aspx> (accessed Apr. 18,

fate of some strands of Rehnquist Court jurisprudence still hangs in the balance. Yet a few words are appropriate, not only because of the length of his service (the longest since Melville Fuller died a century ago), but because Chief Justice Roberts served as his law clerk when Rehnquist was an Associate Justice.<sup>146</sup>

Rehnquist surely had his impact, yet it is unclear that as Chief Justice he led the Court in crafting sustainable doctrine of the significance of that associated with Hughes and Warren. Moreover, the disposition of the major crisis on his watch—*Bush v. Gore*<sup>147</sup>—remains controversial and the extent of his leadership remains hidden. Accordingly, Henry Abraham's conclusion that Rehnquist was "a great [C]hief [J]ustice,"<sup>148</sup> seems generous and premature. Of the seven Justices who served with him just prior to, and who issued statements upon, his death, only Justice O'Connor used the word "great" in assessing his service.<sup>149</sup>

Nonetheless, Rehnquist appears to have successfully led the conference and left a mark as Chief Justice. If Rehnquist's final group of colleagues generally did not label him "great," the others all did use the words "fair" or "fairness" to describe him.<sup>150</sup> Although Justice O'Connor said she liked Chief Justice Burger, she described Rehnquist as a "terrific" and "wonderful Chief Justice."<sup>151</sup> Rehnquist presided in a "humble fashion," "put on no airs at all," and "held no grudges"<sup>152</sup>—assessments that were not often used in connection with Burger and accordingly draw a contrast. She credited Rehnquist with preserving harmonious personal relations among Justices with divergent jurisprudential

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2011) (showing that the five remaining Justices are Breyer, Ginsburg, Kennedy, Scalia, and Thomas).

146. S. Ct. of the U.S., *About the Supreme Court, Biographies of Current Justices of the Supreme Court*, <http://www.supremecourt.gov/about/biographies.aspx> (accessed Apr. 18, 2011).

147. 531 U.S. 98 (2000).

148. Abraham, *supra* n. 1, at 277.

149. S. Ct. of the U.S., *Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist*, [http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr\\_09-04-05b.html](http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-04-05b.html) (accessed Apr. 19, 2011).

150. *Id.*; see also Sandra Day O'Connor, in *In Memoriam: William H. Rehnquist*, 119 Harv. L. Rev. 3, 4 (2005) (describing Rehnquist as "fair"); Linda Greenhouse, *Court in Transition; William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. Times A16 (Sept. 5, 2005) (reporting on an earlier tribute by Stevens praising Rehnquist's impartiality in presiding).

151. Sandra Day O'Connor, *Response*, 58 Stan. L. Rev. 1673, 1674 (2006).

152. *Id.*



approaches.<sup>153</sup> Kennedy described Rehnquist as someone who stated his positions forcefully, but respected the “deliberative process,” and who was “a brilliant, effective, and dedicated Chief Justice.”<sup>154</sup> Justices who often disagreed with Rehnquist on high-profile matters, such as Brennan, Marshall, Stevens, and Ginsburg, were among those who praised his performance as Chief Justice.<sup>155</sup> That consensus signaled a professional respect for Rehnquist’s role as a task and social leader in marked contrast with their appraisals of his predecessor.

Rehnquist did not see conference as an occasion to change minds, and accordingly, he conducted them efficiently without opportunity for extended discussion. Rehnquist also deployed opinion-writing assignments to achieve strategic objectives. Although Rehnquist initially would seek to distribute them equally each term, he would minimize assignments during the second half of a term to a Justice who was slow to circulate a majority or dissenting opinion or to vote in a case in which opinions had circulated.<sup>156</sup> This practice, which was communicated to the other Justices, promoted efficiency in part by giving Justices incentive to complete their writing and to act so the Court could issue opinions expeditiously.

Just as Stone’s appreciation of Hughes signaled some of his own values, it is possible that what Chief Justice Roberts wrote of his predecessor may provide clues regarding his performance. Roberts admired Rehnquist’s intellectual curiosity, his lack of pretense, his direct manner, and his sense of whimsy, and Roberts described him as “a genuinely kind, thoughtful, and decent man.”<sup>157</sup> Years before his Court experienced a presidential

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153. O’Connor, *supra* n. 1, at 5; *see also* Savage, *supra* n. 132, at 362–363 (discussing the positive impact of Rehnquist’s interpersonal skills).

154. Anthony M. Kennedy, *William Rehnquist and Sandra Day O’Connor: An Expression of Appreciation*, 58 *Stan. L. Rev.* 1663, 1664, 1667 (2006).

155. Robert J. Giuffra, Jr., *A Tribute to Chief Justice William H. Rehnquist*, 58 *Stan. L. Rev.* 1675, 1676 (2006); *see also* O’Brien, *supra* n. 43, at 200–201 (stating that Brennan and Marshall praised Rehnquist as a “splendid’ [C]hief [J]ustice”); Savage, *supra* n. 132, at 14 (reporting praise of Rehnquist as Chief Justice from Brennan and Marshall); *Blackmun Interview*, *supra* n. 135 (discussing Rehnquist’s fair assignment of cases); Jeffrey Rosen, *Rehnquist the Great?* *The Atlantic* 79, 90 (Apr. 2005) (available at <http://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/3820/>) (describing how even liberals may come to view the conservative Chief Justice as successful).

156. O’Brien, *supra* n. 43, at 200–201.

157. John G. Roberts, Jr., *In Memoriam: William H. Rehnquist*, 119 *Harv. L. Rev.* 1, 2 (2005).

rebuke at the State of the Union,<sup>158</sup> Roberts spoke admiringly of Rehnquist's decision to skip one such occasion when it conflicted with his painting class.<sup>159</sup> Roberts called his former boss "a towering figure in American law" and, more pertinent to this Article, "one of a handful of great Chief Justices."<sup>160</sup>

## II. THE IMPACT OF CONTEXT

Success as Chief Justice, as in other leadership positions, depends on context as well as skill. Some background conditions remain relatively constant. For instance, the position of Chief Justice confers little hierarchical advantage. Unlike the President's Cabinet, the Court adheres to "one person, one vote," having done so long before the Court recognized that formula as a constitutional principle.<sup>161</sup> The Chief cannot remove other Justices and, except for the Taft anomaly of a Chief Justice who had, as President, appointed some of his colleagues, cannot expect loyalty from grateful associates who owe their positions to him or her.

Yet the context also presents variable elements that shape the historic possibilities of a Chief Justice. Chief Justices have presided under varying circumstances that presented different opportunities and constraints. Although history furnishes no mechanism to test counterfactuals, circumstance surely creates leadership opportunities and impacts outcomes and accordingly history's assessments. Important contextual factors include Court composition as well as the issues that the times present.

### A. The Composition of the Court

The makeup of the Court affects the context in which a Chief Justice operates. Composition may impact a Chief Justice's fortunes in at least three ways.

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158. Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. Times A12 (Jan. 29, 2010).

159. Roberts, *supra* n. 157, at 2.

160. *Id.*

161. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (stating that "one person, one vote" is a concept that has existed since the Declaration of Independence).

### 1. Ideological Balance

Chief Justices need to operate differently depending on the ideological balance on the Court and where they fall on the relevant spectrum relative to their colleagues. Some successful Chiefs have been centrists in the context of their Court. Taft, for instance, occupied a center position along with Sanford and McKenna.<sup>162</sup> Hughes' influence too, was enhanced by his ideological position on the Court. He and Owen Roberts occupied the middle of a Court that often divided between Butler, McReynolds, Sutherland, and Van Devanter to the right and Holmes (or Cardozo), Brandeis, and Stone on the left.<sup>163</sup> When Hughes and Roberts reached the same resolution, and sometimes when they did not, Hughes was able to dictate the outcome of many cases.<sup>164</sup> Roberts was closest to Hughes personally and ideologically and that double proximity enhanced Hughes' clout.

A Chief who occupies the center position is in a strong position to lead. The Chief's vote can decide many cases, thereby expanding his or her bargaining strength. The Chief's colleagues have additional reason to curry his or her favor. Not only can the Chief reward them through the assignment power, but he or she also can help those with strong predilections see their preferred outcomes prevail and perhaps see their views shape doctrine.

Whereas Taft and Hughes gained influence from their position at or near the Court's center, Warren ultimately emerged as the leader of the Court's liberal wing. In that position, he operated at different times in at least three distinct contexts. During the early years of his Chief Justiceship, he sometimes found himself as part of a minority faction, often with Black and Douglas. Following the appointment of Brennan in 1956,<sup>165</sup> the so-called liberal wing grew to include four reliable Justices.<sup>166</sup> This development enhanced Warren's position, not only by bringing him within a single vote of a majority in many cases, but also by add-

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162. Ross, *supra* n. 28, at 20.

163. Russell W. Galloway, Jr., *The Court That Challenged the New Deal (1930-1936)*, 24 Santa Clara L. Rev. 65, 89 (1984). From 1930 to 1936, the Court was, however, unanimous eighty-five percent of the time. *Id.* at 98.

164. *Id.*

165. S. Ct. of the U.S., *supra* n. 145.

166. These four Justices were Black, Douglas, Warren, and Brennan. Stern & Wermiel, *supra* n. 58, at 183.

ing Brennan's strategic skills to his coalition.<sup>167</sup> This circumstance lent greater significance to Warren's interpersonal skills, and he was often able to persuade Clark to join them.<sup>168</sup> Once Arthur Goldberg replaced Frankfurter in 1962, Warren was the leader of a generally reliable liberal majority, which allowed him to achieve results consistent with his philosophy.<sup>169</sup>

Like Warren, Rehnquist was the leader of an ideological faction, yet his Chief Justiceship reveals a fourth position that can provide leadership opportunity. After Justice Clarence Thomas joined the Court in 1992, Rehnquist found himself essentially in the center of a five-Justice conservative block consisting of himself and Justices O'Connor, Kennedy, Scalia, and Thomas. Although Rehnquist could not keep this group together on some issues of importance to him, like abortion or school prayer, he was able to achieve narrow majorities in a number of federalism cases.<sup>170</sup> Rehnquist often wrote the majority opinion in the first case in an area in order to produce an opinion that all five would join before distributing the pen to others.

And yet simply being part of the Court's majority has not always been a measure of success for a Chief Justice. In important cases, Vinson frequently was part of a majority consisting of himself, Reed, the three other Truman appointees (Burton, Clark, and Minton), and often Jackson.<sup>171</sup> Nonetheless, Vinson is not generally credited with having constructed the coalition nor is the resulting jurisprudence as a whole remembered as historic.<sup>172</sup> Burger sided with the majority in many of the most significant cases during his tenure, yet was not viewed as their architect.

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167. *Id.*

168. Schwartz, *supra* n. 54, at 208.

169. The Warren Court liberals consisted of Warren, Black, Douglas, Brennan, Goldberg or Fortas, and Marshall once he replaced Clark in 1967, although Black proved less reliable in later years. See e.g. Mark Tushnet, *The Warren Court as History: An Interpretation*, in *The Warren Court in Historical and Political Perspective* 1, 7–10 (Mark Tushnet ed., U. Press of Va. 1993) (illustrating how the appointments of White and Goldberg made a difference in specific cases).

170. See generally Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L.J. 569, 575 (2003) (explaining that Rehnquist was able to fashion majorities in some federalism cases but not in those dealing with certain social issues).

171. Frank, *supra* n. 130, at 243.

172. See generally *id.* at 242–244 (noting that it is not clear whether Vinson was a leader to his colleagues, and explaining that he was not as effective in the Chief Justice position as he had been in others).

## 2. Complementary Allies

The success of a Chief Justice may depend, in part, on the presence of dependable allies who possess talents that complement and supplement his or her own talents. Taft, for instance, was not a great technical lawyer but was able to rely on Van Devanter to provide that form of professional leadership for the Court.<sup>173</sup> Warren benefited from the presence of Brennan, a master strategist who was able to persuade colleagues to adopt his position and to craft opinions in a manner that would attract five votes.<sup>174</sup>

It is not enough simply to have friends—Stanley Reed had managed Vinson's congressional campaigns,<sup>175</sup> and Tom Clark was Vinson's colleague in Truman's Cabinet.<sup>176</sup> Vinson and Clark often voted together,<sup>177</sup> yet their friendship did not enable Vinson to succeed as Chief Justice.<sup>178</sup> What adds particular value are allies who bring needed qualities to the table.

Moreover, a Chief Justice can only exploit the resources the Court's personnel provides if he or she fairly assesses his or her own limitations and needs, and forms alliances with those who can help him or her. Taft was willing to use Van Devanter or even Brandeis to provide the technical help his Court needed.<sup>179</sup> Warren certainly benefitted from Brennan's talents, yet it was to Warren's credit that he recognized areas in which he could use help and was willing to seek it from Brennan.<sup>180</sup> By contrast, Burger's apparently inflated self-assessment may have undermined his ability to lead.<sup>181</sup>

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173. Frankfurter, *supra* n. 5, at 897 (quoting Taft, who described Van Devanter as his "lord chancellor").

174. David O. Stewart, *The Great Persuader*, 76 ABA J. 58, 58 (Nov. 1990).

175. Urofsky, *supra* n. 40, at 18.

176. Abraham, *supra* n. 1, at 190–192.

177. Frank, *supra* n. 130, at 245 tbl. 4.

178. Urofsky, *supra* n. 40, at 18, 155.

179. Steamer, *supra* n. 1, at 176.

180. See Schwartz, *supra* n. 54, at 205–206 (discussing the relationship between Warren and Brennan).

181. Maltz, *supra* n. 1, at 12.

### 3. *The Dispositions around the Table*

The mix of personalities around the table also affects a Chief's ability to lead. The tasks of Stone and Vinson were surely complicated by the presence of Black, Frankfurter, Douglas, and Jackson on the Court. They were strong-willed individuals who approached many legal issues quite differently once the questions relating to federal legislative power and economic substantive due process were resolved in the late Hughes years. All were highly intelligent, energetic, and not averse to giving voice, written and oral, to their convictions. Their propensity to concur and dissent, sometimes at length, consumed time that might have been spent producing majority opinions. Moreover, Frankfurter and Douglas were capable of real nastiness, which introduced an acrimonious tenor to Court deliberations.<sup>182</sup> The Court was increasingly divided, and often the opinions reflected the personal tensions.<sup>183</sup>

Of course, Black, Frankfurter, and Douglas also served under Hughes (and Warren) without being as disruptive, individually and collectively, as they were under Stone and Vinson. No doubt that reflected Hughes' (and Warren's) interpersonal skill. Hughes, after all, was able to manage a Court with McReynolds and Butler, neither of whom presented easy personalities. Yet Hughes also benefited from the fact that Black, Frankfurter, and Douglas served their first years on his Court at a time when they were still finding their way and had not divided ideologically or personally. Additionally, they may have showed someone of Hughes' rare stature a degree of deference they did not accord Stone, with whom they had served as a fellow Associate Justice.

Warren won the affection of his colleagues with the exception of Frankfurter, who clearly irritated him.<sup>184</sup> Although Jackson's death in 1954 cost the Court a gifted Justice,<sup>185</sup> Bernard Schwartz suggests that Jackson's death may have eased Warren's task because Black and Jackson were personally antagonistic to one

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182. Urofsky, *supra* n. 40, at 35–36.

183. *Id.* at 39–40, 42–43, 137, 149.

184. See Anthony Lewis, *Warren Says Frankfurter Degrades Court in Dissent*, N.Y. Times 1 (Apr. 25, 1961) (reporting Warren's response in Court to Frankfurter's statement); see also Schwartz, *supra* n. 54, at 253–257, 261–264, 286 (providing examples of the animosity between Warren and Frankfurter).

185. Abraham, *supra* n. 1, at 205.

another.<sup>186</sup> Frankfurter, of course, remained to stir the pot, but he also alienated many of his colleagues by the condescending manner in which he approached them. A more politic adversary may have complicated Warren's leadership task during the first part of his service. And Frankfurter's retirement in 1962 made the Court more harmonious during the last half of Warren's service.

Warren also may have been fortunate that the Court he joined included a number of former politicians. Black, Burton, and Minton were former senators;<sup>187</sup> Jackson and Clark had been Attorney General.<sup>188</sup> They no doubt had a fair measure of professional respect for Warren. Moreover, these men were sensitive to political considerations and, in many respects, were receptive to Warren's approach to constitutional issues. Some who later joined the Court, like Brennan, Harlan, Stewart, White, and Fortas, were also rather pragmatic people.

This discussion of Warren's colleagues suggests another generalization. A Chief Justice's influence also turns on how amenable his or her colleagues are to being persuaded. Warren served with a number of people who were more practical than ideological. They may have been susceptible to Warren's reason or charm in a way that a rival ideologue would not have been.

Taft and Hughes served among colleagues predisposed in their favor. Taft had appointed Van Devanter, with whom he served for sixteen years and played a considerable role in securing an Associate Justiceship for Pierce Butler.<sup>189</sup> Taft almost always served with five or six other conservative Justices and accordingly was in a position to lead the Court in a direction with which he sympathized.<sup>190</sup>

Although Hughes experienced a somewhat rocky confirmation battle in the Senate, he joined a Court that was glad to have him. Paul Freund pointed out that one attitude that Holmes and Brandeis shared with Van Devanter and McReynolds was their

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186. Schwartz, *supra* n. 54, at 36.

187. Abraham, *supra* n. 1, at 167, 189, 195.

188. *Id.* at 184, 192.

189. Taft also briefly overlapped with his appointee, Mahlon Pitney. S. Ct. of the U.S., *Members of the Supreme Court of the United States*, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (accessed Apr. 18, 2011).

190. From 1923 until 1925, in addition to Taft, the Court included Joseph McKenna, Van Devanter, McReynolds, George Sutherland, Butler, and Edward Sanford. *Id.* When McKenna retired in 1925, the more moderate Harlan Fiske Stone took his place. *Id.*

pleasure in Hughes' appointment,<sup>191</sup> a sentiment widely shared on the Hughes Court.

Other circumstances also gave Taft and Hughes some advantages in achieving a consensus that Vinson and Stone lacked. Brandeis may have been a great dissenter but he felt a strong institutional loyalty to the Court. As such, Brandeis looked for opportunities to work with Taft, and on a number of cases, their common efforts helped achieve Taft's ambition to mass the Court. Van Devanter had trouble writing,<sup>192</sup> McReynolds was lazy,<sup>193</sup> and Holmes was slipping during Hughes' service,<sup>194</sup> all of which may have reduced their propensity to dissent. Conversely, Stone and Vinson had Black, Frankfurter, Douglas, and Jackson in their primes, a collection that made unity more elusive.

### B. What Arises on a Chief's Watch

What matters arise during the term of a Chief Justice will also affect his or her opportunity to lead in a manner that history recalls. Hughes led the Court through the crisis the Court faced when the constitutional jurisprudence of the first third of the twentieth century collided with the politics of the New Deal.<sup>195</sup> The Court was no doubt fortunate that Hughes was its leader when President Franklin Roosevelt proposed his "Court-packing plan,"<sup>196</sup> but that crisis also contributed to Hughes' place in history by furnishing a stage on which he could star. Hughes drafted a "masterful letter" to Senator Burton Wheeler that refuted Roosevelt's arguments in convincing fashion<sup>197</sup> and generally outmaneuvered Roosevelt.

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191. Freund, *supra* n. 26, at 8.

192. Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891, 1944 n. 267 (1994).

193. Mason, *supra* n. 4, at 195, 215–217 (describing McReynolds' aversion to work among his deficiencies).

194. Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 371–375 (Little Brown & Co. 1989) (referring to Holmes' deterioration during his brief service on Hughes' Court).

195. See generally Cushman, *supra* n. 40 (describing the clash that occurred between a conservative Court and the liberal New Deal policies).

196. See Steamer, *supra* n. 1, at 23 (explaining that Franklin Roosevelt planned to add six more Justices to the Supreme Court to make a total of fifteen Justices).

197. *Id.*; Freund, *supra* n. 26, at 27–30 (citing the profound impact of Hughes' letter in defeating the Court-packing plan). See also McElwain, *supra* n. 24, at 5 (discussing the



President Dwight Eisenhower did not put Warren on the Court to handle the assault on “separate but equal,” but that work, from *Brown* in 1954 to *Loving* in 1967, essentially framed Warren’s service. Warren’s leadership in that area was certainly not all history recalls of his tenure, which included major doctrinal shifts regarding criminal procedure,<sup>198</sup> reapportionment,<sup>199</sup> and privacy,<sup>200</sup> among other areas. But it, along with these other areas, formed a coherent record of judicial leadership that history has largely viewed in a positive manner.

That *Brown* arose at the beginning of Warren’s tenure was fortuitous in terms of his professional standing. The unanimous opinion in *Brown* was rightfully seen as among Warren’s great contributions. It established his credentials in a way that provided an early infusion of capital in his account, with history and with his colleagues.

The timing of *Brown* illustrates another important point. When matters arise may affect a Chief’s legacy. Warren may have been fortunate that *Brown* arose at the very outset of his term when leaders of the Court’s competing wings were vying for his favor and accordingly may have been more receptive to his leadership.

Yet the accidents of timing should not be overestimated in accounting for Hughes’ and Warren’s success. The appearance of great cases did not propel Stone<sup>201</sup> or Burger<sup>202</sup> to successful stints

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impact of Hughes’ statesmanlike handling of the Court-packing crisis on Hughes’ historical standing).

198. See e.g. *Miranda*, 384 U.S. at 491–499 (establishing rules to create a voluntary waiver of right against self-incrimination in custodial interrogations); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that an indigent defendant in a criminal case had a right to appointed counsel); *Mapp*, 367 U.S. at 660 (holding that evidence seized in violation of the Fourth Amendment should be inadmissible in state-court prosecution).

199. See e.g. *Reynolds*, 377 U.S. at 575–576 (1964) (holding that state legislative districts in both houses of the state legislature had to be roughly equal in population); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that congressional districts must be roughly equal in population); *Baker*, 369 U.S. at 236–237 (1962) (holding that legislative malapportionment presented a justiciable question).

200. See e.g. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the constitutional right to privacy prevented the state from prohibiting use of contraceptives by a married couple).

201. Stone’s first terms included the Court’s path-blazing First Amendment and Commerce Clause decisions in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (holding that members of religious minority had First Amendment right not to participate in mandatory school flag salute), and *Wickard v. Filburn*, 317 U.S. 111, 133 (1942) (holding that Congress could use its power under the Commerce Clause to regu-

as Chief Justice. Yes, the reputations of Hughes and Warren benefitted from the circumstances they were dealt, yet their presence and leadership also shaped American history and the position of the Court.

### III. DIFFERENT MODELS

These sketches of recent Chief Justices caution against associating success in that position with tangible factors in any formulaic way. The differences among the very successful Chief Justices far exceeded their similarities, and the qualities found in some successful Chief Justices also appeared in some who fared less well.

For instance, extraordinary legal skill and experience help, but do not guarantee success, as Chief Justice. Hughes was a great lawyer who had extensive experience at the upper echelons of his profession.<sup>203</sup> Yet the same might be said about Stone, who was Attorney General and a highly regarded Associate Justice. Warren, by contrast, had relatively modest experience as a lawyer.<sup>204</sup> Yet Hughes and Warren succeeded whereas Stone did not.

Hughes, Stone, and Rehnquist had served on the Court prior to being named its Chief. They were familiar with the Court and its operations. Their conduct as Chief Justice in part represented a reaction to that of the Chief Justice under whom each had served.<sup>205</sup> Conversely, Warren was a neophyte regarding the Court. But for Vinson's unexpected death, he was destined to

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late intrastate productive activities intended simply for a producers own consumption).

202. Burger fumbled leadership opportunities in early cases dealing with school desegregation like *Alexander v. Holmes County Board of Education*, 396 U.S. at 19, and *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. at 1; and with presidential power, like in *New York Times v. United States*, 403 U.S. 713 (1971), and *United States v. Nixon*, 418 U.S. 683 (1974), in part because his preferred disposition was at odds with that of the majority. Stern & Wermiel, *supra* n. 58, at 332–334, 355–358, 379–382.

203. See Ross, *supra* n. 28, at 10 (stating that Hughes' persuasive gifts were such that Cardozo, when on the New York Court of Appeals, would defer ruling for twenty-four hours on any case Hughes had argued to "resist Hughes' [ ] magnetism").

204. Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 *Tulsa L.J.* 477, 481 (1997).

205. Lash, *supra* n. 120, at 313–315 (explaining that Hughes believed White was frequently unprepared for the conference and thus learned from White's mistakes); Mason, *supra* n. 116, at 787–792 (contrasting Stone's leadership style with that of Hughes); Ross, *supra* n. 28, at 220–221 (reporting that Hughes thought White failed to structure or limit conference discussion); cf. Rosen, *supra* n. 155 (discussing Burger and Rehnquist's styles of leadership).

become Solicitor General to prepare him for a later move to the Court.<sup>206</sup> When he arrived at the Court much earlier than expected, he needed to spend time understanding the basic roles of Court employees and observing a few conferences before he took the helm.

Nor does prior judicial experience correlate with success as Chief Justice. Seven of the eight Chief Justices since Taft had prior judicial experience. Hughes, Stone, and Rehnquist had served on the Court; Taft, Vinson, Burger, and John Roberts had been appellate court judges. Warren had not. The novice Warren succeeded as did some, but not all, of the seasoned jurists.

Hughes, Stone, and Rehnquist were gifted intellects. Warren was not,<sup>207</sup> although as Justice Stewart pointed out, to his credit he did not pretend to be one.<sup>208</sup>

Nor does prior relationship with others on the Court guarantee success as Chief Justice. Taft, Hughes, and Rehnquist came to the Court with strong relations with most of its members and these prior relationships no doubt aided them. The same advantage did not confer success on Stone or Vinson, each of whom was well acquainted with most of their colleagues. And Warren's lack of a prior relationship with his colleagues<sup>209</sup> did not inhibit his success as their leader.

Even running conference does not need to follow one method. Hughes and Rehnquist apparently operated most efficiently whereas Stone, Vinson, and Burger were less structured. Yet Warren apparently allowed substantial discussion without loss of control.<sup>210</sup>

Nor does success depend upon occupying a particular place in the ideological spectrum. Taft and Hughes were centrists on their Courts but Vinson probably was, too. Warren and Rehnquist successfully led factions at opposite wings of their Courts, but Stone also had been a somewhat ideological jurist, yet was unsuccessful as Chief Justice.

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206. Schwartz, *supra* n. 54, at 3.

207. See Philip B. Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 Mich. L. Rev. 353, 354 (1968) ("Unlike Stone and Charles Evans Hughes before him, Warren can hardly be regarded as the intellectual or forensic superior of any of his brethren.")

208. Schwartz, *supra* n. 54, at 31.

209. See Warren, *supra* n. 75, at 276 (reporting that he knew only Clark well, and Jackson and Douglas slightly).

210. *Id.* at 282–283.

Finally, the secret of success does not reside in the manner of seeking to establish Court majorities. Hughes avoided discussions of cases outside of conference unless initiated by one of his colleagues. Warren, however, frequently engaged in one-on-one and small-group discussions to good effect. His “persuasive powers” helped entice Reed and perhaps others to make the majority opinion in *Brown* unanimous.<sup>211</sup> Yet whereas Warren’s efforts enhanced his leadership, Burger apparently more often offended his colleagues through these efforts.

Notwithstanding the absence of one precise mold from which the successful Chief Justices are cut, less tangible attributes do seem to be associated with successful Chief Justices. First, success requires that a Chief Justice discharge functions with professional skill. Taft, Hughes, Warren, and Rehnquist, in different ways, met this challenge. All worked hard, came to conference well prepared, and distributed work strategically, yet fairly. Those who have been less successful were deficient in one or more of those respects. Stone was not a leader; Vinson was lazy; Burger was mediocre.

Second, interpersonal skills matter. Taft, Hughes, Warren, and Rehnquist were successful social leaders who conducted their relations with the other Justices in a collegial fashion. Disagreement did not make them disagreeable. A Chief Justice’s charm cannot eliminate all strife,<sup>212</sup> but social skills can mitigate tension and promote collegiality. Stone and Burger were less skilled in dealing with others. They could not draw from personal capital with their associates, and the atmosphere surrounding their Courts deteriorated.

Third, those who were most successful understood both the limits and possibilities of their role as Chief Justice, taking account of the powers their position conferred and the context in which they operated. Taft, Hughes, and Warren understood rather quickly that their power came from their ability to persuade, and they acted to maximize their ability to do so. A

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211. Tushnet, *supra* n. 169, at 4; *see also* Schwartz, *supra* n. 54, at 90, 94 (describing Warren’s sessions with Reed on *Brown*); Leeds, *supra* n. 58 (explaining, from Justice Brennan’s point of view, how Warren was effective at persuading other Justices to vote a particular way).

212. *See* Frankfurter, *supra* n. 5, at 898–900 (discussing conflicts on the Court notwithstanding Taft’s social talents).

successful government bureaucrat like Vinson or law-school dean like Stone may find that being Chief Justice does not confer the accustomed benefits a hierarchical structure affords other leaders.

Moreover, those who succeeded managed to pursue achievable goals through appropriate strategies. Warren could operate differently after Brennan joined the Court than before;<sup>213</sup> Goldberg's arrival changed the equation further.<sup>214</sup> Warren adapted to changing circumstances. Stone, by contrast, apparently failed to appreciate the peril to his position as Court leader of debating the points each colleague made.

Fourth, the successful Chief Justices demonstrated awareness about themselves and the context in which they functioned. Taft and Warren understood that they lacked some technical skills but borrowed them from Van Devanter and Brennan respectively. Conversely, Burger's pretentious behavior alienated some of his colleagues.<sup>215</sup>

Fifth, it helps if the Chief Justice really enjoys shouldering the extra burdens that position imposes. Clearly, Taft, Hughes, and Warren relished being Chief Justice, and that attitude probably contributed to their success. Stone's views were ambivalent at best. He once likened being Chief Justice to being a law-school dean, a position he had also held, because both have "to do the things that the janitor will not do."<sup>216</sup> The administrative demands weighed on him, and he viewed them as a distraction from judging, the activity he most enjoyed.<sup>217</sup> Burger gravitated to his administrative and ceremonial roles regarding the judiciary and legal profession and contributed in these respects, but one wonders whether his preoccupation with those parts of the job came at the expense of judging and working with his colleagues.

The common ingredient of those who found success as Chief Justice was the ability to lead given the opportunities and confines of the position. Leadership, Robert Steamer observed, "is

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213. See Schwartz, *supra* n. 54, at 205–206 (discussing the close relationship between Warren and Brennan).

214. See *id.* at 446 (explaining how Goldberg became one of Warren's strongest supporters).

215. Maltz, *supra* n. 1, at 12.

216. Steamer, *supra* n. 1, at 18.

217. Mason, *supra* n. 116, at 581, 606, 639–640, 787–788.

intrinsic.”<sup>218</sup> It requires professional and interpersonal skill, energy, awareness—and something more.

Hughes, Warren, and Taft all brought unique stature to the Court based on their imposing resumes. Hughes’ experience included service as Governor of New York, Associate Justice, Republican presidential candidate in 1916, and Secretary of State.<sup>219</sup> Warren had been a highly successful Governor of California and Republican vice-presidential candidate,<sup>220</sup> Taft, an appellate court judge, Secretary of War, and President.<sup>221</sup>

Yet their stature rested on more than the credits on their resumes. Hughes, Paul Freund observed, exuded a “Jovian figure.”<sup>222</sup> One suspects his presence inspired a difficult bunch. Frankfurter wrote: “Everybody was better because of Toscanini Hughes, the leader of the orchestra. . . . One man is able to bring things out of you that are there, if they’re evoked, if they’re sufficiently stimulated, sufficiently directed. Chief Justice Hughes had that very great quality.”<sup>223</sup>

Hughes’ professional reputation and public standing also enhanced the Court’s stature. Jackson credited Hughes’ presence as helping the Court weather the storm during the 1930s when it abandoned some recent and long-standing precedents.<sup>224</sup> Hughes was “a symbol of stability as well as of progress” whose presence “gave the country a sense of steadiness.”<sup>225</sup>

Warren brought some of these same qualities. “The most important feature of Earl Warren’s [C]hief [J]usticeship,” legal historian Ted White wrote, “was his presence. . . . He was regarded as one of the great Chief Justices in American history because of the intangible but undeniable impact of his presence on the Court.”<sup>226</sup>

Ultimately, the greatest Chief Justices are measured not simply by their ability to lead, but by the direction and distance they took the Court and constitutional law. Hughes outmaneu-

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218. Steamer, *supra* n. 1, at 31–32.

219. See e.g. Pusey, *supra* n. 24, at 181–190, 271–281, 315–359, 411–425.

220. See e.g. Schwartz, *supra* n. 54, at 1.

221. See e.g. Mason, *supra* n. 4, at 20–21, 24–33.

222. Freund, *supra* n. 26, at 13.

223. Frankfurter, *supra* n. 5, at 902.

224. Jackson, *supra* n. 51, at 143.

225. *Id.*

226. White, *supra* n. 62, at 161.

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vered Roosevelt on the court-packing plan and led the Court in doctrinal directions that accommodated the New Deal. Warren led the Court through doctrinal revolutions regarding civil rights, criminal procedure, and legislative apportionment. As John Hart Ely wrote of Warren, “[h]e was a leader because he was a man with a mission, and because the mission was good.”<sup>227</sup>

#### IV. SPECULATING ON CHIEF JUSTICE ROBERTS

Although it is premature to assess John Roberts’ influence as Chief Justice, the preceding discussion offers some measures to inform speculation on that score. Roberts certainly brings imposing assets to his position. He came to the Court after a highly successful career as a Supreme Court advocate;<sup>228</sup> he is perhaps the ablest lawyer to serve as Chief Justice since Hughes. He clearly is very bright and energetic, well versed in the work of the Court, and curious about it. His professional record leaves no doubt regarding his abilities to read and master an appellate record and the relevant cases, to frame issues in a compelling manner, to distinguish cases, to anticipate consequences of doctrinal choices, and to respond to arguments. Roberts’ formidable talent and success as an appellate advocate makes him well suited to lead the Court in its tasks.

Roberts also gives every appearance of possessing strong interpersonal skills. He has a reputation for working well with people who have differing viewpoints.<sup>229</sup> As O’Connor wrote, “[f]ew have made the transition as seamlessly and effectively as Roberts. He knew our traditions well, as he had clerked in 1980 for then Associate Justice Rehnquist. His sense of humor and articulate nature and calm demeanor combine to make him a very effective Chief.”<sup>230</sup> Roberts does not bring the stature of a Taft,

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227. John Hart Ely, *The Chief*, 88 Harv. L. Rev. 11, 11 (1974).

228. See Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 Ohio St. L.J. 1149, 1228–1230 (2010) (describing Roberts’ success as Supreme Court advocate); Jeffrey Rosen, *Roberts’s Rules*, *The Atlantic* 104, 105 (Jan.–Feb. 2007) (available at <http://www.theatlantic.com/magazine/archive/2007/01/roberts-apos-s-rules/5559/>) (describing Roberts’ success as advocate).

229. Jeffrey Toobin, *No More Mr. Nice Guy*, *The New Yorker* 42, 44 (May 25, 2009) (available at [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin)).

230. Sandra Day O’Connor, *John Roberts*, <http://www.time.com/time/magazine/article/0,9171,1187207,00.html#ixzz19cWN2SGn> (posted Apr. 30, 2006).

Hughes, or Warren. Yet neither did Rehnquist, who nonetheless served successfully as Chief Justice.

Some of Roberts' actions suggest that institutional concerns may guide his conduct to a greater degree than that of most of his colleagues. During the last five years, he has voted with the majority more often than virtually all of the other Justices. As shown below,<sup>231</sup> in three of his five terms on the Court, he voted in the majority as or more often than any other member of the Court. Of course, other explanations may account for this tendency. It could reflect Roberts' influence in shaping majorities or suggest that he is the Court's pivot point. Yet it seems more plausible to believe that Roberts may sometimes join an apparent majority either to control the opinion assignment or to foster institutional solidarity or both, since the former may be simply a means to achieve the latter.

#### ROBERTS JOINS MAJORITY OPINIONS

	OT 05	OT 06	OT 07	OT 08	OT 09
RANK	1	2	1	3 (tie)	1 (tie)
PERCENTAGE	93	88.4	89.7	81	91

Not only does Roberts rarely dissent, but he writes fewer dissenting opinions than does virtually any other Justice. In part, the paucity of his dissenting opinions may relate to the frequency with which he is in the majority. Yet Roberts also seems to write fewer dissents than most of the other Justices with high majority scores. In fact, of those on the Court since Roberts became Chief Justice, only Kennedy has written fewer dissents.<sup>232</sup> Roberts has never been the lone dissenter.<sup>233</sup>

231. Data in the tables at pages 754 and 755 is taken from the annual StatPack releases at SCOTUSblog. Tom Goldstein, SCOTUSblog, *Stat Pack*, <http://www.scotusblog.com/reference/stat-pack/> (accessed Apr. 3, 2011).

232. Tom Goldstein, SCOTUSblog, *Final Super StatPack OT09*, 14, <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf> (July 7, 2010).

233. *Id.* at 15. Excluding newly appointed Justice Elena Kagan, Justice Sonia Soto-



**ROBERTS' DISSENTING OPINIONS**

	<b>OT 05</b>	<b>OT 06</b>	<b>OT 07</b>	<b>OT 08</b>	<b>OT 09</b>
DISSENTING OPINIONS	3	3	4	5	3
RANK	7-8 (tie)	8	7-9 (tie)	7	9
RANGE FOR COURT	3-14	1-14	4-11	3-15	3-12

Finally, Roberts also writes relatively few concurring opinions. In part, his opinion-assignment power may be a factor. He may be able to choose authors who write majority opinions in a manner that gives him little reason to supplement the Court's written record. On the other hand, Roberts may restrain himself in order to promote institutional solidarity.

**ROBERTS' CONCURRING OPINIONS**

	<b>OT 05</b>	<b>OT 06</b>	<b>OT 07</b>	<b>OT 08</b>	<b>OT 09</b>
CONCURRING OPINIONS	2	1	5	4	2
RANK	7-8 (tie)	9	6	6-7 (tie)	9
RANGE FOR COURT	2-7	1-10	1-10	2-9	2-13

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mayor was the only other Justice not to have filed a lone dissent, but she had only been on the Court for one term. *Id.* By comparison, Stevens and Thomas had filed ten lone dissents, Souter four, Ginsburg two, and Scalia, Kennedy, Breyer, and Alito one each. *Id.*

Roberts has received credit in some instances in which observers have seen his hand in crafting relatively narrow holdings that commanded a Court consensus instead of broader but divided results.<sup>234</sup> Such judgments must be offered tentatively because the absence of information about the Justices' initial positions sometimes obscures whether Roberts forged a minimalist consensus as "an act of judicial statesmanship" or made a "strategic retreat."<sup>235</sup> His concurring opinion in *Citizens United v. Federal Election Commission*,<sup>236</sup> in which he defended the majority's opinion from the charge that it reflected judicial activism in reaching to decide an issue not necessarily before the Court and in not according proper respect to precedent, reflects concerns regarding the Court's institutional standing although it might also be seen as an effort to plant seeds for later attacks on other doctrine.

Yet Roberts clearly has not abandoned his convictions, and in some areas he has aggressively pursued jurisprudential goals.<sup>237</sup> Quite clearly, he is not simply content to make the engines run smoothly; there are some directions in which he wishes to lead the Court. Other contributions to this symposium have explored the substantive decisions of the Roberts Court in greater depth, but a few snapshots may contribute to the evolving portrait of the work of its Chief Justice.

Although other Justices have drawn their share of high-profile, controversial opinions,<sup>238</sup> Roberts has certainly not

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234. See e.g. *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010) (issuing a seven-to-two decision upholding, under the Necessary and Proper Clause, a federal law authorizing civil commitment of a federal prisoner); *N.W. Austin Mun. Util. v. Holder*, 129 S. Ct. 2504, 2516–2517 (2009) (authoring an eight-to-one decision resolving a voting-rights case on technical rather than constitutional grounds).

235. Jeffrey Rosen, *Roberts Versus Roberts: Just How Radical is the Chief Justice?* *The New Republic* 17, 17–18 (Mar. 11, 2010).

236. 130 S. Ct. 876, 917 (2010).

237. Rosen, *supra* n. 235.

238. See e.g. *McDonald v. Chi.*, 130 S. Ct. 3020, 3050 (2010) (Alito writing a five-to-four opinion holding that the Second Amendment limits the power of states to restrict gun possession); *Citizens United*, 130 S. Ct. at 917 (Kennedy writing a five-to-four opinion invalidating restrictions on corporate expenditures in political campaigns); *D.C. v. Heller*, 554 U.S. 570, 636 (2008) (Scalia writing a five-to-four opinion holding that the Second Amendment confers an individual right to gun possession); *Gonzales v. Carhart*, 550 U.S. 124, 130–132, 168 (2007) (Kennedy writing a five-to-four opinion upholding the constitutionality of a federal statute banning partial-birth abortion despite absence of exception to protect health of woman).

avoided writing contested decisions<sup>239</sup> nor has he always written them in a manner designed to minimize the disputed area. Perhaps the most glaring example occurred in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>240</sup> Roberts assigned himself the opinion for the Court although Justice Kennedy's dissent in *Grutter v. Bollinger*<sup>241</sup> must have signaled that any opinion Roberts wrote would probably speak for only four Justices on some points. Yet presumably, Roberts thought himself best able to write an opinion that would command at least four votes in support of a rationale adverse to virtually any racial classifications. More surprising were the arguments he used to portray *Brown* as reflecting an anticlassificationist vision of the Equal Protection Clause and his insistence that the attorneys for the black schoolchildren shared that vision, an argument that depended on a selective citation of sources read out of their historical context.<sup>242</sup>

In a number of important cases, Roberts has been unable to craft an opinion that would commit five Justices to a common rationale.<sup>243</sup> On the other hand, consensus may have been impossible due to the ideological commitments of some Justices. In that case, the plurality opinions may reflect the intractability of the

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239. See e.g. *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S. Ct. 3138, 3164 (2010) (writing a five-to-four opinion holding that a law unconstitutionally infringed the President's power by giving executive power to officials beyond the President's control); *D.A.'s Off. v. Osborne*, 129 S. Ct. 2308, 2323 (2009) (writing a five-to-four opinion denying a defendant's constitutional right to obtain state's DNA evidence in a postconviction proceeding); *Herring v. United States*, 129 S. Ct. 695, 704 (2009) (writing a five-to-four opinion holding that the exclusionary rule is inapplicable when an unlawful search is due to isolated police negligence); *Medellin v. Tex.*, 552 U.S. 491, 532 (2008) (holding a treaty non-self-executing and holding that a presidential order transcended presidential power); *Morse v. Frederick*, 551 U.S. 393, 409–410 (2007) (writing a five-to-four opinion upholding school officials who confiscated a pro-drug banner against a First Amendment claim). See also *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (dissenting in a five-to-four decision striking down a regime for considering detainment of alien enemy combatants).

240. 551 U.S. at 797–798.

241. 539 U.S. 306, 343–344 (concluding that diversity was a compelling interest and endorsing Justice Powell's approach in *Bakke*).

242. Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of Brown*, 69 Ohio St. L.J. 791, 797 (2008); Snyder, *supra* n. 228, at 1237.

243. See e.g. *Baze v. Rees*, 553 U.S. 35, 62–63 (2008) (upholding Kentucky's lethal injection protocol with only Justices Kennedy and Alito joining in the opinion); *Parents Involved*, 551 U.S. at 797–798 (finding diversity to be a compelling interest and allowing some consideration of race in student assignments); *Fed. Election Commn. v. Wis. Right to Life*, 551 U.S. 449, 503–504 (2007) (Justices Scalia, Kennedy and Thomas arguing for a broader ruling overturning precedent and striking down a statute).

challenge rather than any failure on Roberts' part, and his willingness to undertake the assignment may be evidence of institutional commitment.

In addition to the attributes sketched above, Roberts has at least two other advantages that could greatly enhance his prospects of becoming a great Chief Justice. First, he is an extremely effective and telegenic verbal communicator. His performance during his confirmation hearings was simply awesome and attracted widespread praise.<sup>244</sup> Although twenty-two senators, all Democrats, voted against Roberts' confirmation, he attracted far greater cross-party support, and accordingly far fewer negative votes, than any other recent nominee.<sup>245</sup> Roberts won support from fifty-one percent of opposing party senators, a far better showing than other Supreme Court nominees in the last five years. Surely, his evident talent and his ability to project a comforting judicial disposition persuaded many Democrats to support him, in part by making that a position their constituents would accept or embrace.

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244. See e.g. Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, Wash. Post A1 (Sept. 30, 2005) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html>) (noting that Chief Justice Roberts' confirmation hearing was almost flawless).

245. Roberts was confirmed seventy-eight to twenty-two on September 29, 2005. U.S. Sen., *U.S. Senate Roll Call Votes 109th Congress—1st Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=1&vote=00245](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245) (accessed Apr. 3, 2011). Alito, by comparison, was confirmed fifty-eight to forty-two on January 31, 2006, only four months later by the same Senate. U.S. Sen., *U.S. Senate Roll Call Votes 109th Congress—2nd Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00002](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002) (accessed Apr. 3, 2011). Sonia Sotomayor was confirmed sixty-eight to thirty-one on August 6, 2009. U.S. Sen., *U.S. Senate Roll Call Votes 111th Congress—1st Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00262](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262) (accessed Apr. 3, 2011). Sotomayor's nine Republican votes included four who had announced their retirement. *Id.* Elena Kagan was confirmed sixty-three to thirty-seven a year later, on August 5, 2010. U.S. Sen., *U.S. Senate Roll Call Votes 111th Congress—2nd Session*, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00229](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00229) (accessed Apr. 3, 2011).

**CONFIRMATION HEARING VOTES RECEIVED**

	<b>OPPOSING PARTY VOTES</b>	<b>% OF OPPOSING PARTY VOTES RECEIVED</b>
ROBERTS	23	51%
ALITO	4	9%
SOTOMAYOR	9	22.5%
KAGAN	5	12.5%

Roberts' assets as a television performer coincide with technological change that may add value to those skills. Most of his predecessors served before the advent of C-Span gave the Court much prospect of substantial airtime.<sup>246</sup> To date, Roberts has maintained a relatively low profile.<sup>247</sup> Nonetheless, in his public appearances and interviews, Roberts presents himself as a likeable figure who communicates in an effective manner. Roberts' skill as a public and visible communicator is an asset that can enhance his, and the Court's, public stature and develop support for its jurisprudence.

Second, Roberts is likely to serve as Chief Justice for a long, long time. Earl Warren was sixty-two years old when President Eisenhower nominated him as Chief Justice. When Roberts reaches sixty-two, he will have served longer than Hughes did as Chief Justice. When Roberts reaches sixty-seven, Hughes' age when appointed, he will have served longer than Warren did. If Roberts serves until the age at which Hughes (seventy-nine) or

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246. See Bruce D. Collins, *C-Span's Long and Winding Road to a Still Un-Televised Supreme Court*, 106 Mich. L. Rev. First Impressions 12, 12–13 (describing C-Span's coverage of the Supreme Court and its members).

247. See e.g. Pew Research Ctr., *The Databank, 8%—Chief Justice Thurgood Marshall?* <http://pewresearch.org/databank/dailynumber/?NumberID=1056> (accessed Apr. 3, 2011) (reporting that twenty-eight percent could identify Roberts as Chief Justice, compared to forty-three percent who correctly identified Rehnquist in November 1986).

Burger (seventy-nine) retired or Rehnquist (eighty) died, he will have essentially served longer than any Chief Justice except Marshall.<sup>248</sup>

Roberts will no doubt encounter unanticipated circumstances. His opportunities to persuade may be limited if the Court remains ideologically divided and, in such a context, his chance to lead may depend on which side of the divide he is on and whether he has colleagues who are amenable to persuasion in high-profile cases.

Yet, his anticipated tenure provides Roberts with unique opportunities. Like Hughes, Warren, and Rehnquist, he is likely to experience several different Roberts Courts as different presidents replace senior colleagues, a process that has already begun. In all likelihood, he will serve with Court configurations that will provide a variety of leadership challenges and opportunities. The luxury of time allows Roberts to be patient in cases in which he is not immediately able to achieve his jurisprudential goals. For a protracted period, Roberts will probably initiate and direct conference discussions, assign most Court opinions, and have the opportunity to foster an environment conducive to the sort of leadership a Chief Justice can provide. For many, he will become the face of one branch of American government, and his image may define the judiciary for a long time.

## V. CONCLUSION

“A Chief Justice,” Philip Kurland wrote, “despite the public image, has little authority that is not shared by his colleagues on the Court, except that which inheres in his personal capacities.”<sup>249</sup> Yet what “inheres in his personal capacities” channeled through the few formal powers attached to his office has allowed some

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248. Roger Taney, the Chief Justice with the second-longest tenure, took office only days before his fifty-ninth birthday, and served twenty-eight-and-a-half years until he was eighty-seven. Abraham, *supra* n. 1, at 80. Roberts would pass Taney in length of service in spring 2034, a few months past his seventy-ninth birthday. Babington & Baker, *supra* n. 244 (noting that Roberts was fifty when he became Chief Justice in 2005). Burger retired a few days after turning seventy-nine; Hughes did so less than three months after reaching that milestone. Maltz, *supra* n. 1, at 8, 10; Pusey, *supra* n. 24, at 786–787. Warren retired three months after his seventy-eighth birthday; at that age, Roberts will be about a year short of Taney’s service. Schwartz, *supra* n. 54, at 7, 764.

249. Kurland, *supra* n. 207, at 354.

Chief Justices to lead the Court whereas others have simply held the title.<sup>250</sup> Speaking in 1928, Charles Evans Hughes commented that John Marshall's "preeminence was due to the fact that he was John Marshall, not simply that he was Chief Justice; the combination of John Marshall and the Chief Justiceship has given us our most illustrious judicial figure."<sup>251</sup> Being Charles Evans Hughes or Earl Warren may also furnish a head start.

Although the formal powers of the Chief Justice are limited, the manner in which they are deployed will affect the way in which the Court operates and the manner in which history recalls the Chief Justice. Recent history provides no single prescription for success in the role. Each Chief Justice operates in a different context, which will shape opportunities for leadership and the appropriate strategies. Ultimately, the success of a Chief Justice depends upon the manner in which he or she discharges his or her professional responsibilities and exercises interpersonal skill, and his or her capacity for leadership in the context presented.

John Roberts may not be John Marshall or Charles Evans Hughes or Earl Warren. Who is? That does not mean he will not emerge as a very consequential Chief Justice. Whether he does will depend on his ability to marshal his professional and personal resources, to adapt to the context circumstances present, and to deploy his formidable assets in service of a mission that history recognizes as enhancing the rule of law.

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250. *Id.*

251. Hughes, *supra* n. 12, at 58.