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**THE MAKING OF THE SECOND REHNQUIST COURT:
A PRELIMINARY ANALYSIS**

THOMAS W. MERRILL*

I. INTRODUCTION

The Supreme Court is implicitly assumed to have a certain unity of character under each Chief Justice. Hence, we refer to the “Marshall Court,” the “Warren Court,” and the “Rehnquist Court.” A closer look at history reveals that this assumption of a natural Court defined by the tenure of each Chief Justice is often misleading. The Marshall Court had a different character late in its life than it did in its early years.¹ Similarly, the Warren Court became distinctively more liberal and activist after 1962 when Felix Frankfurter retired and was replaced by Arthur Goldberg.²

Although the Rehnquist Court is still with us, we can already perceive that there have been two Rehnquist Courts. The first Rehnquist Court lasted from October 1986 to July 1994. It featured frequent membership changes, a relatively full (but declining) calendar of argued cases, and majority coalitions that shifted from issue to issue. The questions that commanded the most

* John Paul Stevens Professor, Northwestern University School of Law. Helpful leads, suggestions, and corrections were provided by Ron Allen, Bob Bennett, Rick Brooks, Steve Calabresi, David Dana, Shari Diamond, Tracey George, Joel Goldstein, Heidi Kitrosser, Bill Marshall, Eric Muller, Emerson Tiller, and Albert Yoon. I have also benefited from workshop discussions at North Carolina and Penn Law Schools. Gene DeAngelis provided valuable research assistance.

I am especially grateful for the many fine and thoughtful commentaries on the lecture published in this issue. Although each of the commentators offers important insights and qualifications that ideally would result in modifications to the lecture, I have not made such changes in order to avoid creating a “moving target” problem for the commentators. Thus, my failure to acknowledge or respond to the commentators’ criticisms should not be taken to imply either that I agree or disagree with them, and it most certainly does not mean that I regard them as without force.

1. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 127-28 (1985) (noting that after a period of “remarkable unanimity,” differences of opinion began to emerge on the Marshall Court after 1827 as Marshall’s earlier colleagues were supplanted by new appointees).

2. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 415 (1990) (denominating the period after Frankfurter’s retirement “The Real Warren Court”).

attention were social issues, such as abortion (and in particular whether *Roe v. Wade*³ would be overruled), other privacy issues like the right to die, affirmative action, and government speech on religious topics (such as school prayer and crèches in city hall). Yet, notwithstanding its attention to these issues, the Court produced relatively few important doctrinal innovations in these areas, and high-profile cases often ended up with no opinion commanding the support of five Justices.

The second Rehnquist Court started in October 1994 and is still with us. This Court has had no change in its membership, has decided just half the number of cases the Court did in 1986, and is increasingly dominated by a single bloc of five Justices. Social issues like abortion, affirmative action, and school prayer have significantly receded from the scene. Instead, the dominant theme of the second Rehnquist Court has been constitutional federalism, including the scope of federal power under the Commerce Clause and Section 5 of the Fourteenth Amendment, Tenth Amendment limitations on federal power, and state sovereign immunity from private lawsuits reflected in the Eleventh Amendment. The Court has generated a number of important innovations in the interpretation of these provisions, nearly always in decisions in which the controlling opinion garners exactly five votes. These innovations, together with other controversial 5-4 decisions like *Bush v. Gore*⁴ and *Boy Scouts of America v. Dale*,⁵ have evoked heated accusations that we have entered a new era of “judicial sovereignty.”⁶

I am not the first to observe that the Rehnquist Court took a distinctive turn in the mid-1990s, nor to seek an explanation for this change. Indeed, three notable attempts to explain the Rehnquist Court’s behavior have recently been advanced by legal scholars. John McGinnis, in a sympathetic account, has argued the Rehnquist Court’s recent decisions reflect a pervasive concern with fostering localism and associational autonomy.⁷ Chris Schroeder, in a less sympathetic vein, has suggested the Court’s new jurisprudence reflects a general decline in trust in the federal government dating from the War in Vietnam and Watergate.⁸ Jed Rubenfeld, in the least sympathetic effort to find

3. 410 U.S. 113 (1973).

4. 531 U.S. 98 (2000).

5. 530 U.S. 640 (2000).

6. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001). Kramer is hardly alone in accusing the Rehnquist Court of turning to a new form of activism after the mid-1990s. See, e.g., Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

7. See John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

8. See Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307 (2001).

a unifying theme, thinks the new concern with constitutional federalism is a cover for the majority's hostility to extensions of antidiscrimination law beyond traditional concerns about invidious race and gender discrimination.⁹

I will forego any such ideational approach to understanding the second Rehnquist Court, largely because I am not persuaded that the Court's recent behavior can be neatly subsumed under any single conceptual rubric. McGinnis's devolutionary theory, for example, cannot account for the continued willingness of the Court to find state laws preempted by federal regulation, to strike down discriminatory state laws under the dormant Commerce Clause doctrine, and to eliminate state experimentation with different sorts of electoral regimes under an ever-expanding First Amendment.¹⁰ Schroeder's account suffers from the same failings, and it cannot explain why the decline in trust in the federal government began to affect the Court only in the mid-1990s, nor why it has affected only five of the nine Justices. Likewise, Rubinfeld's hypothesis of hostility toward newer antidiscrimination laws cannot explain why the Court has also invoked constitutional federalism to invalidate federal environmental laws, gun control laws, protections for intellectual property rights, causes of action against false advertising, and regulations that protect cruise ships that offer casino gambling.¹¹

Instead of explaining the emergence of the second Rehnquist Court in terms of some unifying *Weltanschauung*, I will search for answers using the harsh realism of political science. In particular, I will borrow from recent writings of political scientists who specialize in the study of the Supreme Court. My objective is not to pass myself off as a political scientist. I am not—I am a law professor. However, I believe that law professors have a good deal to learn by paying more attention to what political scientists have been writing about courts. Moreover, I suspect that political scientists have something to

9. See Jed Rubinfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

10. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding state products liability action impliedly preempted by policy of federal regulatory agency); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding state law prohibiting state from purchasing goods and services from Burma invalid under dormant Commerce Clause); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that California's experiment with blanket primary election system violates the First Amendment); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (holding state restrictions on ballot initiatives violate First Amendment).

11. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (ability of federal agency to hear complaint about discrimination against cruise ships that offer casino gambling); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (authority of EPA to regulate isolated waters); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (federal regulation of false advertising); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (federal protection of patent rights); *Printz v. United States*, 521 U.S. 898 (1997) (federal gun control law).

learn by paying attention to what law professors perceive to be happening on the Court. One of my goals in this lecture is to play the role of the go-between between these two groups of scholars, who tend to operate in isolation from each other. In drawing upon models from political science, I hope to encourage lawyers to make greater use of those models in their own work. Likewise, in discussing some recent developments on the Rehnquist Court, which may be more familiar to lawyers, I hope to stimulate political scientists to take a closer look at the changing behavior of the Rehnquist Court, using their superior empirical and model-building skills.

In this connection I could not be more pleased by the panel of commentators who have written responses to this lecture. They include some of the country's leading political scientists who study the Court, and some of the country's most astute legal observers of the Court. To a man and woman, each of them has displayed an unusual degree of awareness of the work of the other discipline. So this is a very auspicious group to inaugurate greater dialogue between these two disciplines about our collective understanding of an institution like the Supreme Court.

Recent political science literature has advanced three different hypotheses about judicial behavior.¹² I will draw upon each of these hypotheses in seeking to explain the two Rehnquist Courts, and, for good measure, toss in a fourth, which as far as I know has not been previously used to explain Supreme Court behavior.

The first hypothesis of the political scientists, which is the most reductionistic, is called the attitudinal model.¹³ It hypothesizes that the Justices vote reflexively in each case for the outcome that conforms most closely to their personal public policy preferences. Justices pay no attention to how other Justices are likely to vote or how other institutions are likely to react to their decisions. Furthermore, they engage in no logrolling or vote trading, even implicitly. Under this theory, the doctrine produced by the Court is a function of a summing of the individual policy preferences of each of the Justices.

The second hypothesis, which I will call the internal strategic actor hypothesis, modifies the simple attitudinal model by pointing out that it takes a majority of sitting Justices to produce an opinion that is regarded as a legally binding precedent.¹⁴ Consequently, in an effort to produce such precedents,

12. For overviews, see LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Frank B. Cross, *The Justices of Strategy*, 48 *DUKE L.J.* 511 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998)).

13. See SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992* (1995); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

14. See EPSTEIN & KNIGHT, *supra* note 12; FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

Justices are likely to modify their personal preferences by taking into account the preferences of the other Justices, at least four of whom must be persuaded to go along to form a controlling opinion. Under this theory, the doctrine produced by the Court will often be determined by the views of the median or “swing” Justice on any particular issue, with other Justices tempering their views to conform to those of the Justice with the critical fifth vote.

The third hypothesis, which I will call the external strategic actor model, further modifies the inquiry by pointing out that the decisions reached by the Court are often subject to resistance from, or modification by, other political institutions such as Congress and the Executive.¹⁵ Thus, a Justice who cares about advancing his or her personal policy preferences will take into account the preferences of these other institutions. Such an externally-oriented Justice will also want to consider public opinion, insofar as public opinion translates into potential opposition by other political institutions or into other reputational costs for Justices. Under this theory, the doctrine produced by the Court is a function not only of the policy preferences of the Justices, but also of their assessment of how far those preferences are sustainable given the probable reaction of those outside the Court.

Finally, I offer a fourth hypothesis, based on the differences between a Court experiencing extensive personnel changes, which I call a Court in flux, and a Court experiencing no personnel changes, which I call a Court in stasis. A Court in flux is more likely to change its institutional norms than a Court in stasis because new Justices are more likely to be the source of, and to be receptive to, new ideas about institutional behavior. In contrast, a Court in stasis will have more collective information about the preferences of each of the Justices than will a Court in flux. This should mean that the Justices on a Court in stasis will make fewer “mistakes” in predicting the positions of other Justices. Similarly, the Justices on a Court in stasis will have participated in more decisions with the other Justices, which should allow bonds of cooperation to develop more fully than on a Court in flux.

Each of these four hypotheses can be applied in intriguing ways to the contrasting behavior of the first and second Rehnquist Courts. Indeed, if I accomplish nothing else in this lecture, I hope I can inspire political scientists to take up the differences in the Rehnquist Court before and after 1994 as an appropriate subject for further investigation. My efforts at application will necessarily be tentative and impressionistic.

Part II of the lecture develops in greater detail the case that there have been two Rehnquist Courts. I focus in particular on five phenomena: differences in personnel and rates of change in personnel; differences in the number of cases heard by the Court; a shift in emphasis from cases presenting social issues to

15. See EPSTEIN & KNIGHT, *supra* note 12, at 138-77; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

cases presenting issues of constitutional federalism; differences in the number of 5-4 decisions and the willingness of the Justices to adopt important legal innovations in 5-4 decisions; and differences in the number of plurality decisions.

Part III takes up the attitudinal model. At first blush, it might seem that this model would predict no change over the span of the Rehnquist Court. The first Rehnquist Court started out with what has been characterized as a 5-4 conservative/liberal split. After the dust settled in 1994 and all the personnel changes were completed, the second Rehnquist Court was also characterized by a 5-4 conservative/liberal split. When we look more closely at the personnel changes that occurred, however, we find a potentially significant juxtaposition. Of the five conservatives who composed the majority in the original Rehnquist Court, one—Byron White—was, in fact, an old fashioned New Deal liberal. White believed in judicial restraint in cases involving social issues, but he also believed in a strong federal government and was skeptical about claims of states' rights. This mix of beliefs translated into conservative votes on social issues like abortion and gay rights, but liberal votes on issues of separation of powers and federalism. White's replacement in the second Rehnquist Court, not directly, but indirectly, was Clarence Thomas.¹⁶ Thomas, like White, is a conservative on social issues, but, unlike White, he is also conservative on issues such as constitutional federalism. Thus, at least one of the defining traits of the second Rehnquist Court—the emergence of an aggressively conservative jurisprudence in the area of constitutional federalism—can be explained in part by the substitution of Thomas for White.

Justice Thomas, of course, is only one Justice out of a majority coalition of five. In Part IV, I turn to the internal strategic actor hypothesis in order to consider whether it can account for the allegiance of other members of that coalition. In particular, I will consider the possibility that the contrast between the first and second Rehnquist Courts can be attributed in part to the strategic behavior of Antonin Scalia. When he joined the Court, Justice Scalia was an ardent proponent of the conservative agenda on social issues, but he was, at best, indifferent toward states' rights. A strategic actor who held these preferences would have rationally concentrated his energies during the first Rehnquist Court on social issues. At that time, there was reason to believe that, with further retirements of liberal Justices and their replacement by Republican appointees, the Court would begin to achieve important substantive changes on issues like abortion, other privacy rights, affirmative action, and school prayer. These hopes, however, were dashed. The watershed decision in

16. Thomas, a conservative, replaced Thurgood Marshall, a liberal, in 1991. White, a conservative, was replaced by Ruth Bader Ginsburg, a liberal, in 1993. The net effect was a conservative for a conservative, and a liberal for a liberal.

*Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁷ in 1992 revealed that Justices O'Connor, Kennedy, and Souter (all Republican appointees) did not support overruling *Roe v. Wade*.¹⁸ The retirement of Justice White in 1993 doomed any further effort along these lines for the foreseeable future.

In contrast to the grim prognosis on the social issues front in 1994, the prospect for doctrinal innovation in federalism cases was much brighter. Justices O'Connor and Kennedy had proven to be much more consistently supportive of states' rights than of rolling back individual rights in areas involving social issues. In these circumstances, a strategic actor in Justice Scalia's position could rationally conclude that his first set of preferences—social issues—should be put on the back burner, and his energies redirected to advancing what had theretofore been, at best, a secondary preference—states' rights. Although I have no conclusive evidence that Justice Scalia, in fact, made such a strategic choice, there is circumstantial evidence that something like this happened. In any event, the Court altered its agenda in the mid-1990s away from social issues to federalism issues, and Justice Scalia, in alliance with Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, became a steadfast proponent of limiting congressional power under the Commerce Clause and Fourteenth Amendments, and of erecting new protections for states' rights in the name of the Tenth and Eleventh Amendments.

In Part V, I turn to the third hypothesis of the political scientists—that the Justices take into account the views of external institutions and forces. This theory maps very nicely onto the contrast between the first and second Rehnquist Courts because the transition in the Court's behavior coincides almost exactly with a reversal in control of the Executive and the Legislative Branches of the federal government. During the first Rehnquist Court, the Republicans controlled the White House and the Democrats controlled both Houses of Congress. After Bill Clinton became President in 1993 and the Republicans took over Congress in the elections of 1994, this pattern was reversed. Under the external strategic actor hypothesis, therefore, one would expect the first Rehnquist Court to follow the lead of the Executive Branch in moving the law as far as possible in a conservative direction without triggering a backlash from Congress, whereas the second Rehnquist Court would ignore the views of the Executive Branch and freely impose its own preferences, so long as these remain to the left of the views of the Republicans who control the key committees of Congress. The evidence in support of this hypothesis, however, is weak. In matters of statutory interpretation, where one would expect to see the most pronounced effect of a reversal of control of the Legislative and Executive branches, we see the exact opposite of what the

17. 505 U.S. 833 (1992).

18. 410 U.S. 113 (1973).

external strategic actor model would predict: the second Rehnquist Court was, in fact, more deferential to executive legal interpretations than was the first Rehnquist Court.

On the other hand, it can plausibly be argued that public opinion played an important role in one of the key changes that led to the second Rehnquist Court: the “apostasy” of Justices O’Connor, Kennedy, and Souter in 1992 on abortion and school prayer. In particular, the failed nomination of Robert Bork, the barely successful nomination of Clarence Thomas, and the adoption of the Civil Rights Act of 1991 revealed intense opposition to the conservative agenda on abortion, other privacy issues, and issues of race and gender discrimination. This demonstration of hostile public opinion may have been enough to persuade the Court—or more accurately, its three moderate conservatives—either to abandon the conservative coalition altogether (Souter), or at least to steer clear of controversial rulings on social issues as much as possible (O’Connor and Kennedy). This, more than any other theory, explains the shift away from the high-profile social issues cases to the more obscure issues of constitutional federalism, which tend to fly below the radar screen of public awareness.

The fourth hypothesis, which is considered in Part VI, directs our attention to the different types of behaviors that are likely to prevail on a Court in stasis as opposed to a Court in flux. This hypothesis can plausibly explain three of the differentiating characteristics between the first and second Rehnquist Courts. First, the greater receptivity of a Court in flux to new institutional norms offers the best explanation of why the size of the Court’s docket shrank so dramatically during the years of the first Rehnquist Court. Second, the superior collective information of a Court in stasis may account for the decline in plurality decisions on the second Rehnquist Court relative to the first. Lastly, the stronger commitment of coalition members to cooperation and reciprocity on a Court in stasis may explain why we see increasing numbers of 5-4 decisions on the second Rehnquist Court, and why those decisions have increasingly announced significant legal innovations.

II. A PORTRAIT OF TWO COURTS

There are, of course, a number of points of continuity over the sixteen-year span of the Rehnquist Court, as indeed there are points of continuity between the Rehnquist Court and the Burger Court—and as there will be between the Rehnquist Court and whatever follows it. There are, however, also a striking number of differences between the Court that convened on the first Monday in October in 1986 and the Court that sits today. Cumulatively, those differences are sufficiently great to justify speaking of two Rehnquist Courts—the first Rehnquist Court, which sat from the fall of 1986 to the summer of 1994, and the second Rehnquist Court, which has sat from the fall of 1994 to the present. At least that is the premise on which this lecture proceeds.

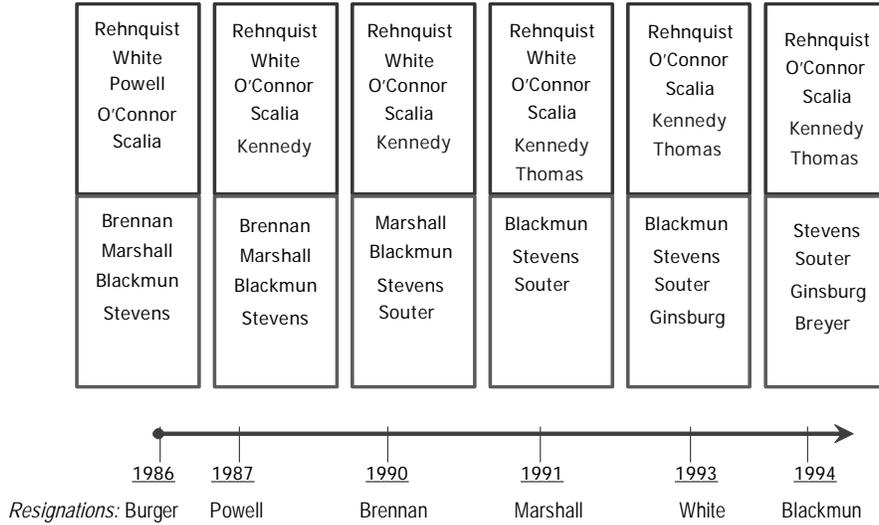
The most obvious difference—and the one that ultimately drives all others—is personnel. The Court that adjourned in the summer of 1986 contained six Justices who were no longer sitting when the Court convened in October 1994. In fact, the first point of contrast between the two Courts is that the first Rehnquist Court was characterized by a fairly steady rate of turnover in personnel—six replacements in eight years—whereas the second Rehnquist Court has been characterized by a nearly unprecedented stability in membership—no changes in over eight years. Not since the 1820s has a single group of Justices sat together for such a long unbroken period of time, and the Court of the 1820s contained only seven Justices.¹⁹ The basic contrast between a Court in flux and a Court of fixed composition will serve as a critical variable in my efforts in Part VI to explain the differences between the two Courts.

One might think that a turnover of six Justices in eight years would produce a significant shift in the political orientation of the Court. Indeed, given the way the retirements were spaced, the conservatives should have picked up one seat. Three retirements were from the conservative wing and three were from the liberal wing. They were replaced by four Justices nominated by Republican Presidents—two by Reagan and two by Bush senior—and two by a Democratic President—Clinton. In theory, therefore, the Republican Presidents should have been able to gain one conservative seat on the Court. This did not happen, however, because of a miscalculation by the first Bush Administration. President Bush replaced the retiring Justice William Brennan—the leader of the liberal wing—with David Souter—a reclusive and little-known judge from New Hampshire. After a couple years of uncertainty, Souter fell in with the liberal camp, where he remains firmly ensconced today. The upshot is that three conservatives were replaced by three other conservatives, and three liberals were replaced by three other liberals, so the general political balance on the Court remained undisturbed. Figure 1 on the next page summarizes the changes in personnel that have occurred during the years of the Rehnquist Court.

19. See Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131, 134 n.12 (2001).

FIGURE 1

Changes in Court Personnel, 1987-2002



Turning from personnel changes, perhaps the most striking difference in institutional behavior between the first and second Rehnquist Courts concerns the number of cases decided on the merits. During all the years of the Burger Court and up through the first year of the Rehnquist Court, the Court decided about 150 cases per year. During the years of the second Rehnquist Court, the Court has decided only about half that many cases. For seasoned observers, this is a truly stunning development. In the 1970s and 1980s, it was commonly assumed that 150 cases per year was the outer limit of the Court’s capacity, and that a serious problem was presented by the inability of the Court to go beyond this limit.²⁰ For the last eight years—the years of the second Rehnquist Court—the Court has been operating at about half this capacity. This is vividly illustrated by the Court’s daily schedule. The Court’s schedule is designed on the assumption that the Court will hear two argued cases in the morning, take a one-hour break for lunch, and then hear two argued cases in the afternoon. The second Rehnquist Court has only rarely needed an

20. See Peter L. Strauss, *One-Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

afternoon argument session. The Justices break for lunch and call it quits for the day.

FIGURE 2

Opinions Written by Term, 1986-2001

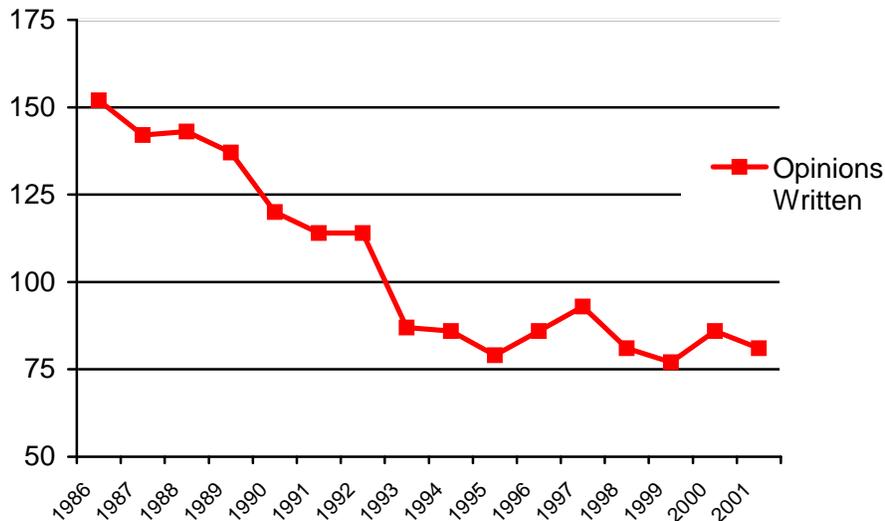


Figure 2 above traces the decline in the number of cases decided by the Rehnquist Court on a year-by-year basis.²¹ We see that the second Rehnquist Court is readily distinguishable from the first by the fact that it generates a much smaller body of precedent. In theory, the decisions it renders could have greater impact because the Court can devote more time to each case. As we shall see, the second Rehnquist Court does produce fewer plurality decisions than the first Rehnquist Court. It is debatable, however, whether the second Rehnquist Court otherwise is writing opinions of greater clarity or sweep than its predecessors.²² What is clear is that a Court that writes half as many

21. The numbers are taken from the statistics compiled in the annual Supreme Court volume of the *Harvard Law Review* published each November. They reflect a category that the *Review* calls "opinions written," which varies slightly from cases orally argued because it includes some per curiam decisions in which the Court does not hear argument and excludes some cases that are dismissed after argument without a decision. See, e.g., *The Supreme Court, 2001 Term—The Statistics*, 116 HARV. L. REV. 453 (2002).

22. It does appear that opinions have become longer over time. Full Court opinions by the Rehnquist Court are on average more than twice as long as full Court opinions during the Taft Court (1921-28). See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent*,

opinions necessarily has fewer occasions to influence policy. Why a Court would abdicate power in this fashion is a central mystery of the second Rehnquist Court.

Sheer numbers of decisions are one thing. Perhaps more importantly, the nature of the legal issues resolved by the Court—its legal agenda—is also significantly different before and after 1994. To be sure, we inevitably find a substantial degree of continuity with the past. The second Rehnquist Court, like the first—and like previous Courts—decides a mixture of constitutional and nonconstitutional cases. The constitutional cases present a wide diversity of issues, ranging from procedural protections for criminal defendants, to free speech, to government takings of property, to disputes about relations between the federal government and the states and among the three branches of the federal government. Yet, if we focus only on the relatively thin slice of constitutional cases that generate the most public comment and controversy, we find a significant shift in emphasis between the first and second Rehnquist Courts.

The shift can be illustrated by considering two “baskets” of issues, one which I will call the “social issues” basket, and the other the “federalism” basket. The social issues basket includes cases involving constitutional protection of abortion, other privacy rights such as parental rights and the right to die, affirmative action, gay rights, and government speech on religious topics (for example, school prayer and crèches in city hall). These are the “culture war” issues that sharply divide liberal urban elites and the predominantly rural and suburban religious right.²³ The federalism basket includes cases involving the scope of federal power under the Commerce Clause and Section 5 of the Fourteenth Amendment, Tenth Amendment limitations on federal power, and state immunity from suit associated with the Eleventh Amendment. These cases are perceived, at least by most nonlawyers, as presenting relatively technical issues whose relevance to questions of public

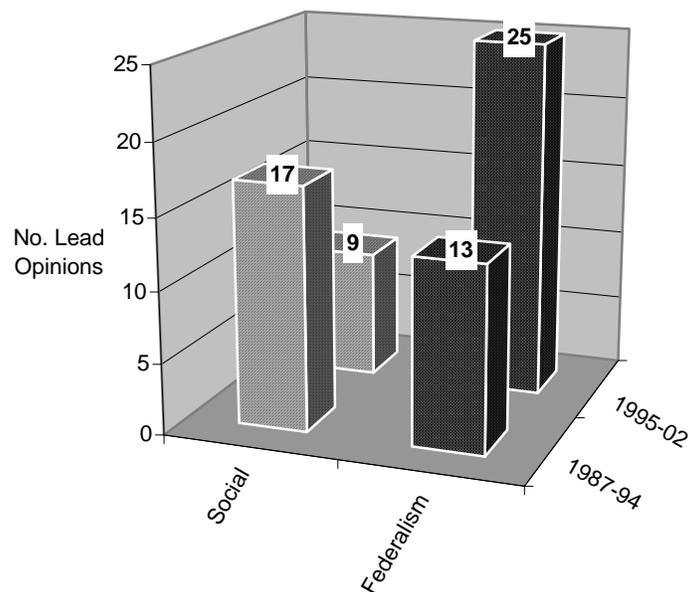
Legal Scholarship, and Decisionmaking in the Taft Court, 85 MINN. L. REV. 1267, 1281 (2001). Even more striking, however, is the rise of dissenting (and concurring) opinions. During the Taft Court, 84% of opinions were unanimous; today that number has fallen to 27%. *Id.* at 1283.

23. The judgment about what issues to include in the “social issues” basket is a subjective one, and other observers might quarrel with my exclusion of certain categories of cases, such as obscenity cases, death penalty cases, other types of Establishment Clause cases (such as school vouchers), and perhaps even cases involving legislative redistricting. I have selected the issues to include in the social issues basket based upon my judgment about those issues that present the sharpest and most intense divisions within society. Although obscenity, the death penalty, and so forth are divisive, they do not pose the same sharp cleavage along “culture war” lines as do the issues I have included. For example, many feminists support stronger regulation of obscenity, and new Democrats like Bill Clinton support the death penalty. In any event, if the social issues basket was expanded to include issues like obscenity and the death penalty, we would still see a shift away from these issues between the first and second Rehnquist Courts, although the shift would not be as pronounced as it is when we focus on my narrow definition of social issues.

policy is not immediately apparent. Figure 3 below presents a histogram that compares the relative distribution of social issues and federalism issues between the first and second Rehnquist Courts. With respect to the social issues basket, it shows a decline of nearly 50% in the number of significant cases decided—from seventeen during the first eight years to just nine in the second eight years. In contrast, with respect to the federalism basket, the number of significant cases nearly doubled—from thirteen in the first eight years to twenty-five in the second eight years.²⁴

FIGURE 3

Relative Frequency of Social Issues and Federalism Issues



When we go beyond a purely quantitative analysis and consider the role that some specific issues have played in the two periods, we find even more dramatic evidence of change. Abortion is the best example. The first Rehnquist Court heard five cases in eight years involving the substantive right

24. The cases used to generate Figure 3 are listed in Appendix A at the end of this lecture.

to an abortion;²⁵ the second Rehnquist Court heard only one such case in eight years.²⁶ This understates, however, the degree to which abortion was a dominating theme of the first Rehnquist Court and yet has had only a shadowy presence in the second. There was high drama in the first Rehnquist Court over the question whether the Court would overrule *Roe v. Wade*,²⁷ its landmark 1973 decision that first recognized a constitutional right to abortion. The Reagan Administration asked the Court to overrule *Roe* at the tail end of the Burger Court,²⁸ and again in *Webster v. Reproductive Health Services*²⁹ in the opening years of the Rehnquist Court. Four Justices signaled a willingness to do so. The Bush administration persisted in the assault on *Roe*, until the Court, in its dramatic decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁰ reaffirmed the basic holding in *Roe*.

With the *Casey* decision, the Court clearly lost its appetite for high stakes abortion controversies. With the exception of *Stenberg v. Carhart*,³¹ where a square circuit conflict left it no choice but to rule on the constitutionality of partial birth abortion bans, the second Rehnquist Court has avoided public debate about abortion rights. The second Rehnquist Court has, in fact, decided a number of cases involving abortion rights; however, with the exception of *Stenberg*, it has done so in per curiam opinions without hearing argument.³² It is most unusual for the Court to resolve substantive constitutional issues in this fashion. Moreover, the Court has continued to decide cases at the periphery of the abortion controversy, such as those involving civil and criminal prosecutions of anti-abortion demonstrators.³³ It clearly has no interest, however, in reengaging in a publicly visible way with the core question of whether or to what extent abortion is a substantively protected right.

25. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

26. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

27. 410 U.S. 133 (1973).

28. *See Thornburgh v. Am. Coll. of Obsts. & Gyns.*, 476 U.S. 747 (1986).

29. 492 U.S. 490 (1989).

30. 505 U.S. 833 (1992).

31. 530 U.S. 914 (2000).

32. *See Lambert v. Wicklund*, 520 U.S. 292 (1997) (5-4 summary reversal of Ninth Circuit decision on parental consent issue); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (5-4 summary reversal of Ninth Circuit decision invalidating statute requiring presence of physician at abortion); *Dalton v. Little Rock Family Planning*, 516 U.S. 474 (1996) (unanimous per curiam reversal of injunction against state abortion funding cutoff on the ground of the order's overbreadth).

33. *See, e.g., Hill v. Colorado*, 530 U.S. 703 (2000) (First Amendment challenge to state statute prohibiting protesters from approaching persons entering a clinic); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (First Amendment challenge to judicial order imposing separation between anti-abortion demonstrators and clinic patrons and employees); *NOW, Inc. v. Scheidler*, 510 U.S. 249 (1994) (civil RICO action against abortion opponents).

Affirmative action presents, in broad outline, a similar picture. The permissibility of affirmative action was a critical issue during the late years of the Burger Court, and the Rehnquist Court decided four such cases during its first eight years.³⁴ The Court was sharply divided in these cases, each of which was decided by the narrowest margin, with some decisions upholding affirmative action programs and others striking them down. In 1995, the Court decided the only affirmative action case to date by the second Rehnquist Court.³⁵ Again, the Court was sharply divided. In a 5-4 decision, it ruled that affirmative action programs designed to assist racial minorities are subject to a standard of strict scrutiny. The Court declined to apply this standard to the case at hand, however, and instead remanded to the lower courts for ultimate disposition, with the result that the ruling had an abstract quality about it. With that, the Court fell silent on the issue.³⁶

There are a variety of explanations for the disappearance of affirmative action cases from the Court's docket, and the evidence is mixed about whether the Court is really trying to avoid the issue.³⁷ For whatever reasons, however, the general picture of inactivity is clear. After a period in which the Court was vigorously, if somewhat chaotically, engaged with the issue of affirmative action, it entered a period in which the issue disappeared from the docket for seven years.³⁸

34. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987).

35. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

36. See Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260 (2002) (documenting divisions in lower courts in the wake of cryptic decision in *Adarand*).

37. Action by the Solicitor General has been important in keeping affirmative action off the Court's agenda. In the Clinton years, the Solicitor General sought unsuccessfully to keep the Court from reviewing one prominent affirmative action case, *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996) (en banc). When the Court granted review anyway, a collection of interest groups supporting affirmative action came up with enough money to induce the respondent to settle her legal action, and the School Board to drop its appeal. See Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 399 (2000). This episode suggests that the demise of affirmative action decisions has more to do with agenda manipulation by litigants than with the Court's own reluctance to rule on the issue. More recently, the second Bush Administration urged the Court, after it had granted review for a second time in *Adarand*, to dismiss the case as improvidently granted, which the Court did. See *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). This suggests perhaps that the Presidents of both parties would prefer to avoid a definitive ruling about affirmative action. Overall, the *Adarand* saga hardly suggests that the Court wants to keep affirmative action off its agenda. Not only did the Court grant review in the case twice, but an intermediate per curiam decision, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000), kept the case alive by overturning a lower court's ruling that the controversy had become moot.

38. This dry spell will evidently come to an end this Term, as the Court has agreed to resolve a conflict in the circuits over the constitutionality of minority preference programs at public

Cases involving government speech on religious topics reflect a somewhat similar pattern. For a time, it appeared that the Court would disavow the three-part test announced in *Lemon v. Kurtzman*³⁹ and permit religious expression by government provided it could not be said to coerce observance of religious belief.⁴⁰ These hopes, however, were thwarted in *Lee v. Weisman*,⁴¹ where the Court, speaking through Justice Kennedy, reaffirmed that prayers may not be spoken in public schools—including nondenominational prayers offered at graduation ceremonies. Two other Reagan-Bush appointees, Justices O'Connor and Souter, joined the Kennedy opinion in *Lee*, making it unlikely that the Court will revisit this position in the foreseeable future.⁴²

The second Rehnquist Court has continued to be active on the Establishment Clause front, but the most frequently litigated issues have centered on questions of access of religious schools to government funding, and of religious groups to government facilities. In these cases, the Rehnquist majority has continued to push toward greater accommodation of religion in public life.⁴³ Meanwhile, cases involving government speech on religious topics—probably the most explosive issue under the Establishment Clause—have gone quietly away.

When we turn from the second Rehnquist Court's reticence to engage with social issues to federalism issues, a very different picture emerges. Consider the cases presenting questions about the scope of congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment. Important decisions construing the scope of these powers have been rendered from time-to-time throughout the Court's history; but, for whatever reasons, no such decisions were handed down during the first Rehnquist Court. The second

universities. *See* *Gratz v. Bollinger*, 123 S. Ct. 602 (2002); *Gutter v. Bollinger*, 123 S. Ct. 617 (2002).

39. 403 U.S. 602 (1971). The three-part test requires that the challenged law have a secular purpose; that its primary effect be neither to advance or inhibit religion; and that it not foster excessive entanglement with religion. *Id.* at 612-13.

40. For example, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), a badly splintered Court invalidated a crèche display in the stairwell of one public building, but upheld a display with a Christmas tree and menorah outside a different building. Justice O'Connor, concurring, declined to use the *Lemon* test and instead urged an endorsement standard. *Id.* at 624-25. The four Justices that joined a dissenting opinion by Justice Kennedy, which pointedly criticized the *Lemon* test, would have upheld both displays because they did not entail any coercion of religious belief. *Id.* at 659-63.

41. 505 U.S. 577 (1992).

42. *See* *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grument*, 512 U.S. 687, 750-51 (1994) (Scalia, J., dissenting) (observing ruefully that his prediction in dissent in *Lee v. Weisman* that the *Lemon* test would soon be discarded had been premature).

43. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Rehnquist Court has now rendered eight decisions construing the scope of Congress's power under these two grants.⁴⁴

The emergence of these issues is not an accident. The Court moved eagerly to put issues about federalism on its agenda. The most striking example is *Seminole Tribe of Florida v. Florida*,⁴⁵ where the petition for certiorari sought review of a decision holding that Congress has more limited power to abrogate state sovereign immunity under the Indian Commerce Clause than under the Interstate Commerce Clause. The possibility that the decision would be used as a vehicle to reconsider *Pennsylvania v. Union Gas Co.*,⁴⁶ which had held five years before that Congress does have power to abrogate state sovereign immunity under the Interstate Commerce Clause, was barely mentioned in the briefs of the parties. Nevertheless, Chief Justice Rehnquist's opinion framed the issue broadly in a way that *Union Gas* was placed squarely in issue, and the Court proceeded to overrule that decision.⁴⁷

More important than the Court's agenda is what the Court does in the cases that appear on its agenda. The judgment here is necessarily a subjective one, but it is my sense that the second Rehnquist Court has enunciated a larger quotient of new doctrine in important areas of the law than did the first Rehnquist Court. Certainly this is true in the two areas of contrasting emphasis—social issues and federalism. Notwithstanding its relative preoccupation with social issues, the first Rehnquist Court did not stake out much new ground in this area. Its leading abortion precedent, *Casey*,⁴⁸ did not produce an opinion for the Court, is defensive in tone, and is best reviewed as a partial retrenchment from prior law rather than a new departure. In the affirmative action area, the Court succeeded largely in sowing confusion. In the privacy cases raising issues other than abortion, the Court swung back and

44. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Section 5); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (Commerce Clause); *Jones v. United States*, 529 U.S. 848 (2000) (Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (Commerce Clause and Section 5); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Section 5); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Section 5); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause).

45. 517 U.S. 44 (1996).

46. 491 U.S. 1 (1989).

47. *Seminole Tribe of Fla.*, 517 U.S. at 66. Similar aggressiveness can be seen in *United States v. Lopez*, 514 U.S. 549 (1995), the decision that inaugurated a new restrictive approach to interpretation of the scope of the Commerce Clause. The lower court had declared the Gun-Free School Zones Act unconstitutional on the narrow ground that Congress had made no findings connecting the possession of a gun near a school with interstate commerce. See *United States v. Lopez*, 2 F.3d 1342, 1362-66 (5th Cir. 1993). The Supreme Court granted review and affirmed on much broader grounds, citing the absence of findings as only one element in support of its ruling. See *Lopez*, 514 U.S. at 562-66.

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

forth between intervention and deference, and engaged in an inconclusive debate about the role of tradition in defining the scope of substantive due process rights.⁴⁹ With respect to public accommodation of religion, numerous Justices criticized but could never muster a majority for overruling *Lemon v. Kurtzman*,⁵⁰ and the Court ended up reaffirming a rule of strict separation in cases involving public expression on religious topics.

In contrast, the second Rehnquist Court has struck out boldly in its area of preferred activity. The Court's doctrinal innovations, primarily in the federalism area, have resulted in an unprecedented outpouring of decisions holding Acts of Congress unconstitutional.⁵¹ It has adopted a new "commercial activities" limitation on the "affecting commerce" rationale for federal regulation under the Commerce Clause,⁵² and a new "congruence and proportionality" limitation on Congress's powers under Section 5.⁵³ The greater capacity of the second Rehnquist Court to generate new doctrine is especially striking in Eleventh Amendment jurisprudence. The first Rehnquist Court was actually fairly active in the Eleventh Amendment area,⁵⁴ but its decisions mostly relied on a clear statement rule that was, in turn, rather poorly rationalized.⁵⁵ The second Rehnquist Court has established that the Eleventh Amendment incorporates a principle that Congress has no power to abrogate state sovereign immunity under its Article I powers,⁵⁶ that the principle is binding on state courts as well as federal courts,⁵⁷ and that it applies to federal administrative agencies as well as federal courts.⁵⁸ Although the soundness of

49. Compare *Turner v. Safley*, 482 U.S. 78 (1987) (striking down state prison regulation that prohibited marriages by inmates as a violation of substantive due process), with *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding against a substantive due process attack a state law denying visitation rights to biological father of child born to woman married to another man).

50. 403 U.S. 602 (1971).

51. See Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1974 (2001) (noting that only 127 federal laws were struck down by the Court in the first two hundred years of its existence—a rate of about 0.6 per year—whereas in the six years after 1995, 26 different federal statutes were invalidated—a rate of 4.3 per year).

52. *United States v. Morrison*, 529 U.S. 598, 610-11, 613 (2000).

53. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

54. See cases listed *infra* Appendix A.

55. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 (1985). Probably the best justification for a clear statement rule in this context is that it is necessary for the States to protect themselves through the political process. The Court advanced this justification in the context of statutory interpretation, see *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), but did not extend this reasoning to Eleventh Amendment decisions.

56. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

57. *Alden v. Maine*, 527 U.S. 706 (1999).

58. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

these developments is debatable,⁵⁹ there is no question that the Court has struck out in bold new directions and has vigorously defended its vision of the importance of state sovereign immunity in the constitutional scheme.

A further area of contrast concerns the prominence and stability of certain voting blocs. The Rehnquist Court started out divided between five conservatives and four liberals, and it remains divided in the same proportions today. As many commentators have observed, however, a very high percentage of the controversial decisions rendered by the second Rehnquist Court are 5-4 divisions that track exactly the 5-4 conservative/liberal split. Quantitative analysis seems to confirm this. Looking at data on all cases decided on the merits during the second Rehnquist Court, Paul Edelman and Jim Chen report that the conservative bloc has rendered nearly half of the Court's 5-4 decisions since 1994.⁶⁰ The dominance of the conservative bloc is underscored by the fact that the only other configurations of 5-4 occurring with any frequency are those in which either Justice O'Connor or Justice Kennedy peels off and joins the liberal foursome. In fact, putting aside the three most frequently observed coalitions—the conservative bloc and two alliances consisting of the liberals plus either Justice O'Connor or Justice Kennedy defecting from the conservative bloc—no other coalition of five appears with more than a trivial degree of frequency.⁶¹ Clearly, the second Rehnquist Court is divided into two camps, in which two Justices (O'Connor and Kennedy) are somewhat more weakly attached to the majority than are the other three Members.

59. For an especially cogent critique, arguing that the Court has gone overboard on immunity federalism at the expense of process federalism, see Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1.

60. Edelman & Chen, *supra* note 19, at 178-79.

61. *Id.* at 179.

FIGURE 4

Percent distribution of 5-4 decisions by coalition

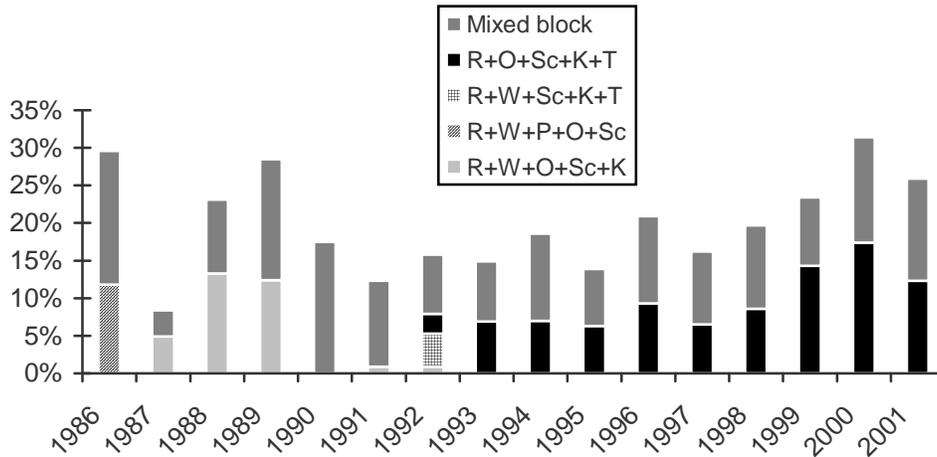


Figure 4 above offers a different perspective on this phenomenon, presenting data on the percentage of cases decided 5-4 for each Term of the Rehnquist Court from 1986 to the present, and the fraction of those cases in which the majority consists entirely of conservative Justices.⁶² The data reveal that bloc voting by conservatives is not new. Significant percentages of cases were decided by five-member conservative majorities in 1986, 1988, and 1989; however, the frequency of 5-4 conservative blocs fluctuates widely during the first Rehnquist Court, and, of course, because the composition of the Court was changing during these years, these are different conservative blocs from year-to-year. In one year, 1992, there were three different combinations of 5-4 conservative blocs within a single year. Thus, the 5-4 conservative majorities in these years do not have the same monolithic quality as the 5-4 conservative majorities during the second Rehnquist Court. Moreover, note that the percentage of 5-4 cases gradually increased in the late 1990s, reaching an all-time high of 31% in the 2000 Term,⁶³ with the dominant conservative coalition responsible for 17% of all decided cases in that year. This provides some

62. By expressing the numbers as percentages of all merits cases instead of absolute numbers, we adjust for the declining numbers of merits cases decided over the sixteen-year period.

63. For a complete tabulation of the percentage of 5-4 decisions up to 1990, see Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-1990*, 21 HOFSTRA L. REV. 667, 711-12 tbl.1 (1993).

evidence that the conservative majority is, in fact, becoming stronger and is controlling an increasing percentage of the decisions on the Court's docket.

A final area of contrast between the first and second Rehnquist Courts concerns the frequency with which five Justices are unable to agree on a single rationale for the disposition of a case. Such cases usually result in the judgment of the Court being announced by what is called a "plurality opinion," so we can call them plurality decisions for short. Plurality decisions are generally thought to be undesirable because they are weak precedents. The judgment of the Court in such a case is legally binding, but it is a precedent only to the extent of the "narrowest" rationale advanced in support of it by one or more Justices.⁶⁴ This could be the plurality opinion, or it could be a concurring opinion. Often it will be difficult to determine which of two or more opinions provides the narrowest rationale supporting the judgment. Consequently, plurality decisions frequently lead to disagreements among lower courts and require further clarification by the Supreme Court. Not surprisingly, they are more prone to being overruled than are other types of precedents.⁶⁵

One might think that as the frequency of 5-4 dispositions on a Court rises, the number of plurality decisions would also rise, since both are indicative of internal division on the Court. In fact, however, the opposite has happened on the Rehnquist Court, as summarized in Figure 5 on the next page. The first Rehnquist Court was much more prone to fragmenting in a way that resulted in a plurality decision than is the second Rehnquist Court. Indeed, in the first Rehnquist Court, over 9% of argued cases resulted in plurality decisions, and in one year, 1988-89, seventeen cases failed to generate a majority opinion—nearly 13% of all cases decided that year. In the second Rehnquist Court, by contrast, plurality decisions have fallen to just 6% of decided cases, and in the last two Terms the number of plurality opinions has fallen to very low levels. In fact, in the 2000 Term—the year of *Bush v. Gore*⁶⁶—the second Rehnquist Court produced only one plurality decision, an astonishing feat given the pressures under which the Court was operating that year. When we plot the three-year rolling percentage of all decisions that are plurality decisions (to smooth out the kinks), we see that the percentage does not change much up through the 1995 Term, but it then moves down gradually, yet perceptibly, during the later years of the second Rehnquist Court.

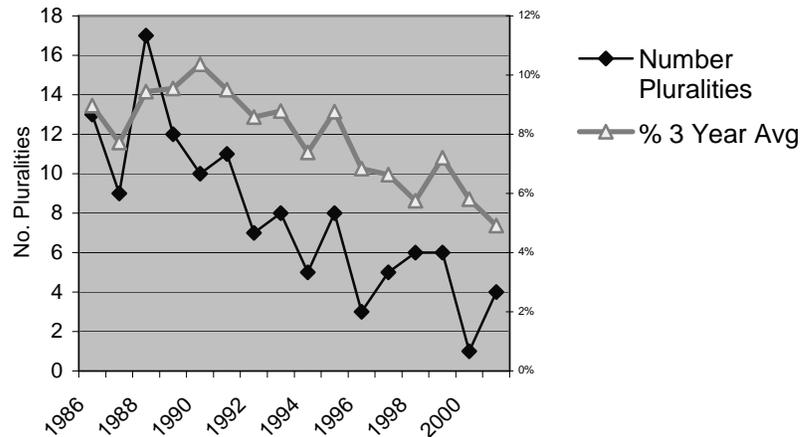
64. *Marks v. United States*, 430 U.S. 188, 193 (1977). See Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

65. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and citing as one reason that the prior precedent was only a plurality decision).

66. 531 U.S. 98 (2000).

FIGURE 5

Trend in Plurality Opinions



If one were to pick one word to describe the second Rehnquist Court, it might be “disciplined.” The Court is obviously very closely divided on many issues, but it has reduced the size of its case load, avoided getting much involved in controversial social issues, concentrated on areas where five Justices agree on the outcome, and minimized the amount of effort wasted on decisions that fail to generate a single majority opinion. Chief Justice Rehnquist presides over a well-oiled machine that, without undue effort, churns out legal doctrine he largely finds congenial.⁶⁷ It is quite a contrast to the frustrating spectacle presented by the first Rehnquist Court. It remains to explain how it happened that the Court was transformed in this fashion, sometime around the summer of 1994.

III. THE ATTITUDINAL MODEL: THE THOMAS-FOR-WHITE SWITCH

In order to give some structure to our search for explanations for the differences between the first and second Rehnquist Courts, it will be useful to draw upon some hypotheses that political scientists have developed in studying judicial behavior. The dominant hypothesis of the political scientists, at least until quite recently, has been what is known as the attitudinal model. This model posits that the Justices vote in each case for the outcome that

67. See Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 1, 2001, at A1 (“In the term that marked the chief justice’s 30th anniversary on the bench, the court moved far toward accomplishing his long-term goals . . .”).

corresponds with their individual policy preferences.⁶⁸ By “policy preferences,” attitudinal theorists have tended to mean political preferences in a fairly narrow partisan sense. Thus, some Justices are said to be “liberals,” meaning that they prefer expansive interpretations of civil rights, strict protection of the rights of criminal defendants, and aggressive government regulation of the economy; other Justices are said to be “conservatives,” meaning that they favor narrow interpretations of civil rights, broad discretion for police and prosecutors, and protections for private property rights.⁶⁹

Lawyers have generally reacted with hostility to attitudinal literature, finding that it reflects an overly-crude picture of judicial decision making.⁷⁰ The critics say it caricatures the Supreme Court as nothing more than a body of nine legislators unconstrained by the need to stand for election. Although lawyers occasionally grouse about the Court in similar terms, they know that this is not a complete picture of how the Court operates. For example, the attitudinal model has no way of explaining the constraining force of the language of authoritative texts and precedent in judicial decision making, not to mention the importance of doctrines pertaining to jurisdiction and justiciability.

More recent political science literature suggests, however, that the defining feature of the attitudinal model is not the crude depiction of Justices as being motivated solely by partisan preferences. Rather, the distinguishing feature of the theory is the assumption that judges vote reflexively in each case; that is, they cast their votes based solely on their individual reactions to the facts and legal issues presented, rather than by considering, in addition, how other judges or institutions are likely to react to the decision.⁷¹ The key premise of the attitudinal model, in other words, is that judges behave nonstrategically.

Once we see that the attitudinal model is, at its core, a hypothesis of reflexive behavior, then the question of how we depict the “policy preferences” of the Justices becomes a contingent feature of the model that can vary in accordance with the demands of the empirics. The traditional model of the attitudinalists, in which every Justice is either a monolithic “liberal” or a “conservative” concerned only with influencing public policy, is simply one, highly reductionistic version of “policy preferences.” This kind of

68. See BRENNER & SPAETH, *supra* note 13, at 60; Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

69. See, e.g., BRENNER & SPAETH, *supra* note 13, at 89 n.1.

70. In fact, the originators of the attitudinal theory drew upon behaviorist psychology, suggesting that judicial behavior corresponds to a psychological model of stimulus and response. The facts of a case are like a “stimulus” to the Justice, and the vote of the Justice in the case is the “response.” Show a Justice a brief that indicates the case involves a labor controversy, and the Justice will vote reflexively for the union side or the management side, depending on whether he or she is “liberal” or “conservative.”

71. See Cross, *supra* note 12.

reductionism can be useful in certain kinds of studies, for example, ones that look at very large numbers of cases presenting particular issues like abortion or the death penalty over a long period of time. It does not necessarily follow, however, that a more nuanced conception of “policy preferences” is inconsistent with the attitudinal theory. In particular, there is no reason why one cannot include in the definition of policy preferences a Justice’s judicial philosophy, including such variables as whether the Justice inclines more toward interpreting the Constitution according to its original or its evolved meaning, or inclines more or less toward following precedent.⁷² Adding these more lawyer-like attributes into the mix obviously makes life more complicated for the number-crunchers, so there may be reasons to reject these refinements as part of a particular study; however, there is nothing inherent in the attitudinal model that compels us to adopt a cartoon-like conception of judging, provided we are willing to suffer the consequences of a more complicated set of independent variables.

Once we understand the attitudinal model to be about reflexive, that is, nonstrategic, behavior, we can also see that there is nothing “tautological” about seeking to ascertain a Justice’s preferences by examining his or her voting record and opinions as a Justice, as the traditional attitudinalists have sometimes suggested.⁷³ Rather, we can view each decision of the Court as a little window that allows us to peer into the revealed beliefs and attitudes of the Justices. Armed with this information, we can make generalizations about those beliefs and attitudes, and use these generalizations to predict how each Justice is likely to vote and write in future cases that present similar issues.⁷⁴ The key to the attitudinal model is not the source of our information about judicial preferences; rather, it is the hypothesis that the Justices act reflexively in seeking to implement those preferences.

From the attitudinal perspective, the decisive variable in explaining the behavior of the Court is composition of the Court, and, in particular, the policy preferences of the majority bloc of Justices. If the Rehnquist Court has changed its behavior during the sixteen years of its existence, the attitudinal model would suggest that the place to look in explaining this change is to consider whether there has been a change in the policy preferences (understood for my purposes to include judicial philosophy) of the members of the majority bloc.

72. For an insightful discussion contrasting judicial preferences and judicial judgments, see Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 85-89 (1986).

73. Cf. EPSTEIN & KNIGHT, *supra* note 12, at 11 (also insisting that the goals of Justices must be specified independently of their behavior).

74. For an example of a recent study that proceeds this way (more systematically than I do) in developing a measure of Justices’ preferences, see Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 559-60 (1999).

The change of greatest potential relevance was the replacement of Justice White by Justice Thomas, which was completed when White retired in 1993.⁷⁵ Justice White is often described as an inscrutable figure who approached each case on its own terms without any overriding philosophy of government or theory of the judicial role; however, I think this is incorrect. The view of White as lacking any theoretical commitments is primarily a reflection of his unwillingness to give speeches or write law review articles, and of the terse, doggedly legalistic style of his opinions.⁷⁶ However, when one steps back and views the overall sweep of his judicial career, a reasonably clear pattern emerges. White was a New Deal liberal who basically shared the jurisprudence (but not the rhetorical style) of Felix Frankfurter.⁷⁷ Thus, he believed that the Constitution should be interpreted flexibly in order to allow Congress to create new types of administrative structures in response to unanticipated economic and social problems.⁷⁸ He believed that it was the mission of the federal government to redress problems of economic inequality, as by encouraging the use of collective bargaining and restricting the abuse of

75. I put aside the replacement of Justice Powell by Justice Kennedy in 1987. This is not because there are no intriguing contrasts between these two men. Rather, it is because the Kennedy-for-Powell switch occurred after just one year of the Rehnquist Court, and, thus, for practical purposes Justice Kennedy has been a fixture of the Court throughout its duration. Certainly, one cannot attribute any of the differences between the first Rehnquist Court and second Rehnquist Court to the substitution of Kennedy for Powell.

76. My characterization of White draws upon the fine biography by Dennis Hutchinson. *See* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998). On White's lack of extrajudicial writings, see *id.* at 330 (noting that at the time of White's nomination to the Supreme Court "[t]here was no written record to review, since White had given only six speeches as deputy attorney general and none touched on judicial review or allied issues"). On White's opinion-writing style, see, for example, *id.* at 356 ("[M]ost of White's opinions are precise, methodical, and impatient to finish the job. . . . There are few lapidary lines or memorable turns of phrase."); *id.* at 363 ("White wrote opinions that were often densely presented and no better than implicit about their theoretical premises.").

77. Hutchinson resists the notion that White was a New Dealer, although he admits that there were "chords" from the New Deal "that resonate insistently throughout White's judicial career—primarily his unswerving nationalism and his belief that judges should be wary of making social policy, particularly in comprehensive terms, without clear congressional authorization." *Id.* at 446-47.

78. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (White, J., dissenting) (defending Gramm-Rudman-Hollings Act as a novel solution to budgetary issues); *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting) (defending constitutionality of legislative veto); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 94 (1982) (White, J., dissenting) (supporting Congress's power to create special bankruptcy courts); *Buckley v. Valeo*, 424 U.S. 1, 258 (1976) (White, J., dissenting in part) (defending the "undoubted power of Congress to vindicate the strong public interest" in fair elections through creation of novel Commission formed of officers appointed by both executive and legislative branches).

private monopoly power.⁷⁹ Moreover, he supported efforts by the government to end segregated schooling and other forms of invidious discrimination against minorities.⁸⁰ He had little interest or patience, however, with the idea that an unelected judiciary should identify new rights that have not been marked as such by established democratic processes, whether it be new criminal procedural rights, First Amendment rights, or privacy rights.⁸¹ This was to invite the sort of judicial meddling with majoritarian politics that had threatened to undo the New Deal in the mid-1930s.⁸²

Justice White remained steadfast in these views, even as the issues of the 1960s gave way to those of the 1970s and 1980s.⁸³ Under the new conception of judicial politics that eventually emerged during the Burger Court years, a “liberal” came to be defined as a judge who participates enthusiastically in the creation of new rights, whether it be abortion rights, protections for gays and lesbians, affirmative action remedies, or procedural protections for death penalty defendants, without regard to whether these interests have been marked off as warranting heightened protection by legislative majorities or supermajorities. A “conservative” is a judge who opposes the recognition of

79. *See, e.g.*, *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490 (1989) (White, J.) (vacating injunction against RR strike); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982) (White, J.) (invalidating employers' attempt to withdraw from collective bargaining process); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967) (White, J.) (condemning price discrimination despite competitors' increase in profits); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (White, J.) (holding union minimum wage platform exempt from Sherman Act claims).

80. *See, e.g.*, *Missouri v. Jenkins*, 495 U.S. 33 (1990) (White, J.) (upholding novel desegregation decree that required local authorities to raise taxes to improve quality of schools); *N.Y. State Club Ass'n v. New York*, 487 U.S. 1 (1988) (White, J.) (upholding ordinance prohibiting discrimination by private clubs); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (White, J.) (invalidating state referendum as sanctioning private discrimination in housing). *Cf.* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (White, J.) (interpreting Title VII of the Civil Rights Act in such a way as to narrow application of the disparate impact test).

81. *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (White, J.) (stating that the level of protection afforded to private sexual conduct should properly be determined by state legislative decisions rather than through a judicially constructed “fundamental” right at odds with history and tradition); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (White, J.) (maintaining that the basis for a “newsman’s privilege” from subpoena rests on legislative determinations of fact rather than judicial interpretation of the First Amendment); *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting) (“[T]he Court has not discovered or found the law in making today’s decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy . . .”).

82. *See, e.g., Bowers*, 478 U.S. at 194 (White, J.) (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s. . .”).

83. *See HUTCHINSON, supra* note 76, at 445 (noting the essential continuity in White’s positions while on the Court).

these sorts of new rights. Some Justices, such as Brennan and Marshall, and in their later years Blackmun and Stevens, made successful adjustments to the new conception of progressive judging. White, however, did not. Thus, White came to be labeled a conservative, almost exclusively because of his stance on social issues, which, in turn, was a product of his philosophy of judicial restraint. The fact that White continued to support a powerful federal government, legal protection of labor unions, tough enforcement of antitrust laws, and vigorous implementation of desegregation decrees was deemed inconsequential under the popular mode of classification that emerged during this time.

In contrast to White, Clarence Thomas can only be described as conservative through-and-through. Thomas was raised by his grandparents in a strict religious household that instilled respect for traditional virtues of hard work and obedience to authority.⁸⁴ No doubt the roots of his conservatism can be found in this background; however, Thomas's behavior as a Justice can be fully understood only against the backdrop of his extraordinary confirmation experience. Before his nomination, Thomas had drawn attention to himself while serving as Chair of the Equal Employment Opportunity Commission for his public denunciation of affirmative action and intimations of opposition to *Roe v. Wade*.⁸⁵ At his confirmation hearings, however, Thomas sought to avoid any scrutiny of his views on controversial subjects by claiming that he did not have any; for example, he did not want to comment on *Roe*.⁸⁶ Angered by what they regarded as dissembling, the Democrats on the Senate Judiciary Committee retaliated by bringing forth a surprise witness—Anita Hill—who accused Thomas of engaging in inappropriate sexual advances when she was his subordinate at the EEOC.⁸⁷ Thomas made a blanket denial of the charges and accused the accusers of trying to engage in a “high-tech lynching for uppity-blacks.”⁸⁸ After opinion polls showed that slightly more viewers of this televised spectacle believed Thomas than Hill, he was confirmed by a vote of 52-48, the narrowest margin of confirmation in Supreme Court history.

The searing confirmation experience reportedly left Thomas deeply embittered,⁸⁹ and seems to have steeled his resolve to embrace only the most outspoken conservative views as a kind of revenge against his tormentors. Thus, for example, it has been reported that Thomas surrounds himself with

84. See generally JOHN GREENYA, *SILENT JUSTICE: THE CLARENCE THOMAS STORY* (2001).

85. See EDWARD P. LAZARUS, *CLOSED CHAMBERS* 449-50 (1998).

86. 1 *The Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 102d Cong. 127 (1991) [hereinafter *Nomination of Judge Clarence Thomas*].

87. GREENYA, *supra* note 84, at 200.

88. See 4 *Nomination of Judge Clarence Thomas*, *supra* note 86, at 157.

89. ANDREW PEYTON THOMAS, *CLARENCE THOMAS: A BIOGRAPHY* 469-70 (2001).

“uniformly archconservative clerks”⁹⁰ whom he encourages to draft opinions “remarkably provocative in result.”⁹¹

Whatever the truth of these accounts, Thomas’s opinions have been consistently distinguished by a kind of ultra quality since joining the Court. His most revealing statements appear in concurring and dissenting opinions, where he has embraced a variety of viewpoints—at times libertarian, at times originalist, at times federalist—but always at the far right end of the judicial spectrum. Thus, Thomas has authored several separate opinions which come closer to endorsing a purely originalist philosophy for interpreting the Constitution than has any other Justice in the Court’s long history.⁹² He has decried the continued use of the dormant Commerce Clause doctrine on the ground that it has no basis in constitutional text and unduly interferes with the states.⁹³ He has developed a compact theory of federalism based on the idea that the Constitution was ratified by the states as opposed to the people.⁹⁴ Moreover, he has adopted narrow interpretations of federal statutes in order to preserve traditional state prerogatives.⁹⁵

We also have more direct evidence of the differing preferences of Justices White and Thomas. These two men served together on the Court for most of two Terms. Consequently, we can look at their voting records during these two Terms for clues about how they compare in their response to a range of issues. Overall, we find that White and Thomas voted together in about 67% of the cases decided in these two Terms.⁹⁶ This is significantly higher than the rate of agreement between Thomas and either Justice Stevens or Justice Blackmun,⁹⁷ but it is significantly lower than the rate of agreement between

90. LAZARUS, *supra* note 85, at 457.

91. *Id.*

92. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (urging return to original understanding of the Commerce Clause); *Saenz v. Roe*, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting) (accusing majority of adopting interpretation of the Privilege or Immunities Clause of the Fourteenth Amendment contrary to the original understanding); *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) (urging return to original understanding of the Commerce Clause); *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) (Thomas, J.) (opinion for the Court holding that common law knock-and-announce rule was incorporated into the Fourth Amendment).

93. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

94. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting).

95. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 402 (1999) (Thomas, J., dissenting in part) (urging narrow interpretation of Telecommunications Act of 1996 in order to preserve traditional state authority over regulation of intrastate telephone service).

96. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 379 tbl.I(B) (1992); *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 373 tbl.I(B) (1993).

97. *The Supreme Court, 1991 Term—Leading Cases, supra* note 96 (approximate rates of agreement for Thomas and Stevens equal 41% (1991) and for Thomas and Blackmun equal 42%

Thomas and either Chief Justice Rehnquist or Justice Scalia.⁹⁸ Thus, based on his first two Terms on the Court, Thomas would appear to be aligned much more closely with the conservative jurisprudence of Chief Justice Rehnquist and Justice Scalia than with the type of conservatism associated with Justice White.

When we take a closer look at the cases in which White and Thomas disagreed during those two Terms, we find further confirmation that they are conservatives of a different stripe. For example, one can detect differing attitudes toward federal regulation of economic activity in *Lechmere, Inc. v. NLRB*.⁹⁹ Justice Thomas wrote the opinion for the Court, overturning a Labor Board ruling about when union organizers who are not members of the workforce can enter an employer's private property. Justice White, dissenting, would have deferred to the Board's ruling. *CSX Transportation, Inc. v. Easterwood*¹⁰⁰ suggests differing attitudes toward federal preemption of state law. This time Justice White wrote for the Court, finding that a train operated within speed limits set by a Department of Transportation regulation is immune from state-law tort suits predicated on negligence. Justice Thomas dissented in part, arguing that the federal rule was a regulatory floor, not a source of immunity from state tort liability. Furthermore, *Helling v. McKinney*¹⁰¹ reveals different attitudes toward sources of constitutional interpretation. Writing for the Court, Justice White concluded that the Court's Eighth Amendment jurisprudence does not foreclose a claim by a prisoner that being forced to share a cell with a chain smoker is cruel and unusual punishment. Justice Thomas dissented on the ground that the Eighth Amendment as originally understood applied only to the terms of punishments imposed at sentencing, not to conditions of confinement that arise while a sentence is being carried out. Thus, in his view (joined only by Justice Scalia), the prisoner's claim was not covered by the Eighth Amendment at all.

Given their distinctive judicial philosophies, one would expect to find significant areas of overlap in the substantive positions of Justices White and Thomas, but also areas where they would take sharply divergent positions. The areas where one would expect to find overlap include most of what I have

(1991)); *The Supreme Court, 1992 Term—Leading Cases*, *supra* note 96 (approximate rates of agreement for Thomas and Stevens equal 46% (1992) and for Thomas and Blackmun equal 51% (1992)).

98. *The Supreme Court, 1991 Term—Leading Cases*, *supra* note 96 (approximate rates of agreement for Thomas and Rehnquist equal 80% (1991) and for Thomas and Scalia equal 86% (1991)); *The Supreme Court, 1992 Term—Leading Cases*, *supra* note 96 (approximate rates of agreement for Thomas and Rehnquist equal 83% (1992) and for Thomas and Scalia equal 86% (1992)).

99. 502 U.S. 527 (1992).

100. 507 U.S. 658 (1993).

101. 509 U.S. 25 (1993).

previously identified as the “social issues” basket: abortion, other privacy rights, affirmative action, and religious accommodation. Although White and Thomas might reach these results for different reasons, they would generally end up at the same place. With respect to social issues, therefore, the Thomas-for-White switch would not be expected to induce any change in the overall doctrine of the Rehnquist Court.

There are, however, at least three areas where the preferences of Justices White and Thomas diverge fairly sharply and, hence, where the attitudinal theory would lead us to expect a potential shift in outcomes. Probably the most dramatic divergence is constitutional federalism, where Justice White’s strong nationalism and deference to Congress contrasts sharply with Justice Thomas’s originalism and commitment to state autonomy. Here, there is no doubt that the White-to-Thomas transfer has had major consequences. Most of the Court’s innovations in the area of federalism since 1993 have been decided by a margin of 5-4. In nearly all these cases, Justice Thomas has supplied the critical fifth vote.¹⁰² Nor can there be much doubt that if Justice White had remained on the Court, he would have disavowed these innovations. With respect to claims grounded in the Tenth and Eleventh Amendments we can be quite confident about this. Justice White dissented from the Tenth Amendment portion of the Court’s 1992 decision in *New York v. United States*.¹⁰³ Thus, it seems likely that if White were still on the Court in 1997, the background check requirement of the gun control law known as the Brady Bill would have been upheld in *Printz v. United States*,¹⁰⁴ rather than invalidated 5-4. With respect to the Eleventh Amendment, White authored a separate opinion in *Pennsylvania v. Union Gas Co.*¹⁰⁵ in 1989, creating a 5-4 majority for the proposition that Congress has the power, under Article I of the Constitution, to abrogate state sovereign immunity under the Eleventh Amendment.¹⁰⁶ After

102. Justice Thomas has supplied the fifth vote in thirteen major 5-4 federalism decisions: *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expenses Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995).

103. 505 U.S. 144 (1992).

104. *Printz*, 521 U.S. at 898.

105. 491 U.S. 1 (1989).

106. *Id.* at 57 (White, J., concurring in part and dissenting in part) (“I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.”).

White retired, the Court in *Seminole Tribe*,¹⁰⁷ overruled *Union Gas* and held 5-4 that Congress does not have power under Article I to abrogate state sovereign immunity.

A second area of potentially significant contrast is the First Amendment. Justice White was highly skeptical about claims for novel forms of protection under the Free Speech and Press Clauses of the Constitution. He authored a number of important opinions rejecting claims of special privileges for the press and construing important First Amendment doctrines narrowly.¹⁰⁸ Justice Thomas, in contrast, has often embraced a libertarian view of the First Amendment and, in select areas, has advocated greater protection for free speech rights than is recognized under current doctrine.¹⁰⁹

Although we can identify individual First Amendment cases where the replacement of Justice White by Justice Thomas may have affected the outcomes reached by the Court,¹¹⁰ they are few in number relative to the total number of First Amendment cases decided by the Court since 1994. In most First Amendment cases, Justice Thomas's vote either has not been critical in making a majority or has been cast in dissent. There are various reasons for this. In some areas, such as commercial speech, enthusiasm for the pro-speech position often includes Justices on both sides of the ideological divide, resulting in decisions by margins larger than 5-4.¹¹¹ In other areas, such as providing constitutional protection for campaign finance contributions or for anti-abortion demonstrators, either Justice O'Connor or Chief Justice Rehnquist, or both, has bailed out from the pro-speech position, leaving

107. *Seminole Tribe of Fla.*, 517 U.S. 44.

108. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (White, J.); *Herbert v. Lando*, 441 U.S. 153 (1979) (White, J.); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (White, J.); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (White, J.).

109. See, e.g., *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1509 (2002) (Thomas, J., concurring) (reiterating his view that the *Central Hudson* test for evaluating commercial speech restrictions should be abandoned in favor of granting full protection to commercial speech unless it promotes an illegal product or is false); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (arguing that campaign contributions are entitled to full First Amendment protection); cf. *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (Thomas, J., plurality opinion) (refusing to invalidate federal regulations designed to restrict access of juveniles to sexually explicit speech on the internet).

110. See, e.g., *Republican Party v. White*, 536 U.S. 765 (2002) (invalidating 5-4 a Minnesota rule prohibiting candidates for elected judicial offices from commenting on issues related to controversies likely to come before the court); *Thompson*, 122 S. Ct. 1497 (striking down 5-4 a federal statute prohibiting advertising by individual pharmacies that compound drugs in a manner not determined by the FDA to be safe and effective); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (overturning 5-4 as an infringement on First Amendment freedom of expressive association a New Jersey decision extending a state antidiscrimination law to an openly gay Scout leader).

111. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Thomas in the minority.¹¹² Probably the most important reason, however, is that Justice Thomas's libertarian view of the First Amendment is highly selective. He believes in strong, virtually absolute, protection for commercial speech and campaign finance contributions,¹¹³ but he is willing to accept extensive government regulation of sexually explicit speech, legal advocacy for the poor, and subsidies of the arts.¹¹⁴ Thus, at least part of the time—when the speech claim involves disfavored forms of expression—his views do not diverge from those of the general First Amendment skeptic, Justice White.

Separation of powers is another area where the transition from White to Thomas could, in theory, make a difference. Justice White was notorious for his defense of functionalism and deference to congressional experimentation in separation of powers cases.¹¹⁵ Thomas appears to be drawn to a more formalist and originalist approach to separation of powers issues.¹¹⁶ Here, however, we find no case in which Justice Thomas has cast a critical vote producing an outcome that would diverge from those that would be reached if Justice White were still around. The simple explanation seems to be that, although the appointment of Justice Thomas gave Justice Scalia a second vote in support of a strict, formalist approach to separation-of-powers controversies, this increased the number of Justices committed to such an approach from one to two. The lack of any broad-scale support for formalism can be seen most clearly in cases involving standing-to-sue, the most frequently litigated separation of powers question. Although Justice Scalia made some headway in support of tightening constitutional limits on standing late in the first Rehnquist Court, it appears, in retrospect, that this was largely a temporary phenomenon created by the Chief Justice's willingness to assign opinions to

112. See *FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431 (2001) (O'Connor, J., joining Souter, Stevens, Ginsburg, & Breyer, JJ., to uphold limitation on coordinated campaign spending); *Nixon*, 528 U.S. 377 (Rehnquist, C.J., Stevens, O'Connor, Ginsburg, Souter, & Breyer, JJ.); *Hill v. Colorado*, 530 U.S. 703 (2000) (Rehnquist, C.J., O'Connor, Souter, Ginsburg, & Breyer, JJ., join Stevens, J., in upholding speech restriction on abortion clinic protestors).

113. See cases cited *supra* note 109.

114. See, e.g., *Ashcroft*, 535 U.S. 564 (Thomas, J., plurality opinion) (rejecting facial attack on Child Online Protection Act); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (Thomas, J., joining dissent from judgment striking down limits on types of litigation that can be undertaken pursuant to Legal Services grants); *NEA v. Finley*, 524 U.S. 569, 590 (1998) (Thomas, J., joining Scalia concurrence denying that First Amendment provides a basis for challenging criteria for distributing arts grants).

115. See cases cited *supra* note 78.

116. The clearest manifestation of Justice Thomas's commitment to formalism in separation of power is *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), where he joined Justice Scalia's opinion for the Court rejecting a nondelegation challenge to the Clean Air Act, but filed a concurring opinion suggesting that he might vote otherwise in a future challenge to such a statute that argued more broadly that Congress had impermissibly transferred the "legislative power" to an agency.

Justice Scalia in this area at that time.¹¹⁷ More recently, standing rules have been relaxed again as the conservative majority has narrowed and assignments have been passed around to other Justices, often with Scalia and Thomas in dissent.¹¹⁸

All-in-all, the attitudinal model, and more particularly the substitution of Thomas for White, does a good job in explaining one critical difference between the first and second Rehnquist Courts: it changed the balance of power on the Court on federalism issues, tipping from 5-4 in support of the traditional New Deal conception to 5-4 in support of a revisionist, states' rights conception. Thus, the attitudinal model can explain, in a parsimonious and convincing fashion, the signature jurisprudential development of the last eight years.

When we consider the matter more closely, however, it becomes clear that the attitudinal model only gets us so far. In particular, it accounts for only one of the five votes in the post-1994 federalism coalition. Moreover, because both Justices White and Thomas cast conservative votes in cases presenting social issues, it does not account for the decline in emphasis on social issues. Nor does it explain the paucity of doctrinal innovations in cases involving social issues during the first Rehnquist Court, in contrast to the stream of substantive innovations on federalism during the second Rehnquist Court. Nor can the model account for the collapse in the size of the Court's docket, the increased willingness to render controversial rulings by 5-4 margins, or the reduced number of plurality decisions. If we want an explanation for these other elements that distinguish the second Rehnquist Court from the first, we will have to turn to other hypotheses about judicial behavior.

IV. THE INTERNAL STRATEGIC ACTOR MODEL: JUSTICE SCALIA AND STATES' RIGHTS

In recent years, political scientists have been intrigued by the idea of displacing, or at least supplementing, the simple attitudinal model with more complex models that hypothesize that judges act strategically. Like the attitudinal model, these strategic models begin by positing that Justices seek to maximize their personal policy preferences. Unlike the attitudinal model, however, the strategic models do not assume that judges vote reflexively in each case for the outcome that corresponds most closely with their preferences. Instead, they act interdependently, taking into account the views of other actors whose behavior is relevant to whether they will succeed in implementing their

117. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (Scalia, J.).

118. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 198 (2000) (Scalia, J., dissenting, joined by Thomas, J.); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (Thomas, J., dissenting, joined by Scalia, J.).

preferences. As Epstein and Knight put it, “To say that a justice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions.”¹¹⁹

Broadly speaking, political scientists have identified two types of reasons why Justices might act strategically.¹²⁰ One reason is that it takes a majority of sitting Justices to enshrine a particular position as precedent. Justices will thus sometimes adopt positions that do not reflect their sincere judgment of the best outcome in order to secure the outcome that is in their view the best that can be attained under the circumstances, given the positions of the other Justices. I will call the model of judicial behavior that focuses on this type of strategic consideration the “internal strategic actor” model. Another reason why judges might behave strategically is because of apprehensions about how other political institutions—such as Congress, the executive, or the states—might react to their decision, or how the public might react. I will call this model of judging the “external strategic actor” model and take up its implications in Part V.

Strategic behavior is not necessarily insincere behavior. For example, it may happen that what a judge sincerely wants is what the judge perceives other relevant actors also want. In this situation, there is no incompatibility between a judge acting on his or her sincere preferences and behaving strategically.¹²¹ Political scientists, however, have argued that judges also act strategically in the sense that they act “insincerely” in order to realize their preferences.¹²² In other words, judges sometimes censure the impulse to embrace the outcome they prefer most and, instead, support outcomes they regard as less desirable or second best because of their perceptions of the values embraced by other actors who have the power to block the realization of the judge’s first preference.

The line between sincere and insincere judicial behavior is often hard to determine, especially if we continue to follow the suggestion set forth in Part III that we broaden the definition of judicial “preferences” to include judicial philosophy. Multi-member courts, by their very nature, require judges to temper or compromise their individual preferences in order to produce majority rulings. As Justice Frankfurter once observed, “When you have to have at least five people to agree on something, they can’t have that comprehensive completeness of candor which is open to a single man, giving

119. EPSTEIN & KNIGHT, *supra* note 12, at 12.

120. *See id.* at 12-17.

121. *See* Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 397 n.8 (2002); *see also* Caldeira et al., *supra* note 74, at 550-51.

122. *See* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2302 (1999).

his own reasons untrammelled by what anybody else may do or not do”¹²³ It is not clear that this kind of temporizing of views to achieve collegial unity should be called insincere behavior because it is not clear that it reflects a deliberate suppression of a judge’s true preferences. Surely one of the “preferences” held by judges sitting on a collegial court is the desire that the court produce majority rulings. Thus, when a collegial judge trims back on the “untrammelled” views he or she would espouse if sitting as a single judge, one can say that the judge simply is weighing the sincere desire for clear majority rulings more highly than the sincere desire to prevail on the issue at hand, with the result that the temporizing behavior is totally sincere.¹²⁴ Once we recognize this complexity, however, the line between sincere temporizing to achieve “collegial unity” and insincere dissembling to manipulate outcomes is often difficult to identify, especially for outside observers. I will return to this problem in the conclusion to this Part.

An example of insincere strategic behavior, which has taken on a kind of canonical status in the literature, is Lee Epstein and Jack Knight’s account of *Craig v. Boren*,¹²⁵ a leading gender discrimination precedent of the Burger Court. By examining the docket sheets and memorandums in the case, as reflected in the files of several former Justices, Epstein and Knight concluded that the Court was essentially divided into three factions: first, a liberal faction, led by Justice Brennan, that preferred to adopt a rule that would subject gender discrimination to a standard of strict scrutiny; second, a moderate faction, led by Justice Powell, that preferred a standard of intermediate scrutiny; and third, a conservative faction, led by Justice Rehnquist, that preferred a rational basis standard of scrutiny. Epstein and Knight showed that Justice Brennan, who assigned the case to himself as the senior Justice in the majority, decided to draft an opinion that endorsed intermediate scrutiny, his second preference, rather than strict scrutiny, his first preference. They suggested that he did so because he calculated that if he wrote an opinion urging strict scrutiny, the result might have been that five Justices would have joined another opinion applying rational basis scrutiny, his least preferred outcome.¹²⁶ Thus, Brennan’s opinion did not reflect a mere desire to achieve collegial unity; rather, it was designed to forestall an outcome that he feared and wished to avoid.

123. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 298 (1960).

124. In other words, in looking for insincere behavior in a judge what we are looking for is “behavior that transgresses both her own convictions per se, and her convictions as appropriately modified to respond to the pressures of collegial unity and sound collegial outcome.” Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 53 (1993).

125. 429 U.S. 190 (1976).

126. EPSTEIN & KNIGHT, *supra* note 12, at 13.

In this section, I consider the possibility that the reorientation of the Rehnquist Court in the mid-1990s can be explained by strategic behavior of the internal actor variety. To date, accounts of strategic behavior of the internal actor variety have largely focused on the behavior of an individual Justice in a single case, such as Justice Brennan's strategizing in *Craig v. Boren*. The hypothesis I consider also focuses on a single individual—Justice Scalia—but posits strategic behavior on a scale that dwarfs anything considered by political scientists up to this point. I will suggest that Justice Scalia has behaved strategically in seeking to influence the entire course of the Rehnquist Court over the last eight years.

A. *Scalia's Choice*

When Justice Scalia joined the Court in 1986, he had an extraordinarily ambitious agenda that was in part substantive and in part methodological. In terms of substantive outcomes, he wanted to overturn *Roe v. Wade*,¹²⁷ end affirmative action, develop a new policy of public accommodation toward religion, establish the principle of the unitary executive in separation of powers, and strengthen constitutional protection for private property. However, his agenda was also, to a degree very unusual among Justices, methodological. He wanted to create a jurisprudence that was grounded in the public meaning of texts rather than legislative intent, which would require judges systematically to accept executive interpretations of ambiguous statutes, and which would be oriented toward the articulation of clear rules rather than multi-prong lists of factors or balancing tests.¹²⁸ One item that notably was not on the agenda, however, was greater devolution of power to the states.

During the first Rehnquist Court, Justice Scalia had every reason to persist in vigorously pursuing both his substantive and methodological agendas. Indeed, after only a few years, he began to achieve a significant degree of success in moving the Court toward his methodological views. Although there was no definitive capitulation by the other Justices, opinions for the Supreme Court—and, to a degree by emulation, opinions by courts throughout the country—began to reduce their reliance on legislative history, to take agency views more seriously, and to eschew the creation of new formulaic multipart tests. Progress on the substantive front, however, proved more elusive. The Court always seemed to fall one vote short of overturning precedents like *Roe*

127. 410 U.S. 113 (1973).

128. We know all of this because he has published books and articles espousing each of these positions. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997) (attacking the use of legislative history in the interpretation of statutes); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) (defending mandatory judicial deference to agency interpretations of ambiguous statutes); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating a jurisprudence of rules).

and *Lemon v. Kurtzman*.¹²⁹ Moreover, Justice Scalia's views on affirmative action received a severe blow in *Metro Broadcasting*,¹³⁰ as did his views on separation of powers in *Morrison v. Olson*.¹³¹

As the new decade of the 1990s dawned, however, there was reason to believe that the tide would soon turn. Indeed, for roughly a three-year period toward the end of the first Rehnquist Court—from October 1990 to the summer of 1993—the conservatives reasonably could imagine that they were on the threshold of supermajority status within the Court. Brennan's replacement by Souter in the summer of 1990 theoretically gave the conservatives a 6-3 margin. We now know that this was illusory because Souter either was, or decided to become, a member of the liberal faction; however, the other conservative Justices might well have imagined they were more powerful than they had been in 1986. In 1991, this became a reality, as Thurgood Marshall stepped down and was replaced by Clarence Thomas. Thomas soon proved to be a staunch conservative. For roughly a two year period thereafter—from October 1991 to the summer of 1993—the conservatives really did enjoy a 6-3 margin on the Court.

The fact that the conservatives either were or imagined that they were becoming an increasingly dominant faction would have been an extremely important datum for an internally-oriented strategic actor in Justice Scalia's position, and it would have led such a Justice to anticipate that success in achieving his ends was just around the corner. This sense of expectation for the future is arguably captured by a line in Justice Scalia's concurring opinion in a 1990 abortion case: "The Court should end its disruptive intrusion into this field *as soon as possible*."¹³²

By 1993, however, Justice Scalia's substantive agenda lay in shambles. The basic problem was the unwillingness of three Republican appointees—Justices O'Connor, Kennedy, and Souter—to disrupt the constitutional status quo. Most dramatically, these three had colluded together in 1992 to produce the reaffirmation of the "essential holding" of *Roe in Casey*,¹³³ citing concerns about stare decisis and the Court's legitimacy.¹³⁴ With White's departure in 1993, the prospect for eliminating *Roe* and other manifestations of modern substantive due process were gone for the indefinite future. Similarly, the cause of religious accommodation had been dealt a severe blow by *Lee v.*

129. 403 U.S. 602 (1971).

130. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (upholding minority preference policies in awarding broadcasting licenses).

131. 487 U.S. 654 (1988) (upholding the Independent Counsel Act against separation of powers objections).

132. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 521 (1990) (Scalia, J., concurring) (emphasis added).

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

134. On the secretiveness of the *Casey* trio, see LAZARUS, *supra* note 85, at 472.

Weisman,¹³⁵ decided the same term as *Casey*. There, the same three Republican appointees who defected in *Casey* reaffirmed the rule against prayer in public school settings; worse, after previously having made sympathetic noises, Justices Kennedy and O'Connor got cold feet and appeared to disavow Justice Scalia's drive to overturn *Lemon*.¹³⁶ With respect to affirmative action and other issues involving race, such as redistricting and busing, the situation was less dire, but Justice Souter was likely to side with the liberals on these issues, and Justice O'Connor had signaled her unwillingness to adopt a clear rule prohibiting preferential racial classifications.¹³⁷ So the best that probably could be achieved going forward was endless hairsplitting distinctions in plurality decisions. Separation of powers was the most distressing of all. Here, Justice Scalia had become completely isolated in cases like *Morrison*¹³⁸ and *Mistretta*.¹³⁹ To cap it all off, a Democratic President was newly installed in the White House, and, thus, there was no prospect for the foreseeable future of gaining ground in any of these areas through new appointments to the Court.

In this situation, a strategic actor in Justice Scalia's position would have perceived essentially two choices. One was to persist in the substantive agenda he had been seeking since his appointment to the Court and become, in effect, a chronic dissenter. The other was quietly to abandon, or at least shelve, this substantive agenda, and seek out some other agenda as to which he could find common ground with four other Justices. A rational actor seeking to maximize his policy preferences would have perceived a number of advantages to pursuing the latter, that is, the strategic, course.

1. *Influencing majority opinions.* It is always better to be part of a winning coalition than to lose. Being a member of a winning coalition creates opportunities to frame legal doctrine that disappear when one loses. In Justice Scalia's case, this consideration should loom especially large given his strongly held methodological preferences. If part of the majority, for instance, Justice Scalia could continue to work to extirpate balancing tests from constitutional law, either by writing majority opinions that disavow such an approach or by asking that such tests be eliminated as a condition of joining other majority opinions. Moreover, if and when he was assigned periodically

135. 505 U.S. 577 (1992).

136. 403 U.S. 602 (1971); *see also supra* note 40 and accompanying text.

137. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (O'Connor, J., plurality); *cf. id.* at 735-36 (Scalia, J., concurring in part and concurring in judgment).

138. *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the Independent Counsel Act against separation of powers objections); *id.* at 697-734 (Scalia, J., dissenting).

139. *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding delegation of power to U.S. Sentencing Commission to adopt binding guidelines for maximum and minimum federal criminal sentences); *id.* at 413-27 (Scalia, J., dissenting).

to write majority opinions, he could use the occasion to plant seeds for future developments in other areas he regards as being more important.

2. *Potential reciprocity.* Providing a key vote to make a majority for other Justices could potentially yield future benefits in terms of reciprocity. It is often observed—correctly—that logrolling is prohibited under the decisional norms of the Supreme Court,¹⁴⁰ but it is impossible to erase considerations of good will entirely from human behavior. If someone with whom you interact frequently does a number of favors for you, the expectation is that these favors will, in some fashion, be returned. If Justice Scalia had learned anything from the abortion cases, it should have been that trying to browbeat other Justices through invective and sarcasm does not work. Perhaps cooperating politely as part of a functioning majority on issues of lower public visibility would lead to better relations, in particular with Justice O'Connor, which might bear fruit down the road if she were willing to reciprocate.

3. *Please the Chief.* Cooperating with the other four conservatives could win brownie points with the Chief Justice. There is evidence that the Chief Justice did not always favor Justice Scalia with the best opinion writing assignments during the first Rehnquist Court.¹⁴¹ There are a number of possible reasons for this, one of them, no doubt, being that Scalia's persistent efforts to enshrine his methodological preferences in the law often ended up costing him votes, sometimes even majority support. The Chief Justice was probably baffled by Justice Scalia's strongly-held methodological commitments, and often irritated by his verbal pyrotechnics and the hard feelings they engendered with other Justices. Adopting a policy of quietly joining the other conservatives to form a majority in other areas—especially ones near and dear to the Chief's heart—might induce Rehnquist to look more kindly upon Scalia when opinion assignments came up in other areas where he cared more deeply about the outcome.

4. *The legacy.* Finally, and perhaps most importantly for an ambitious Justice like Scalia, it is important to be able to say that one's tenure on the Court has made a difference in the course of history. By 1993, it appeared that persevering in his original substantive agenda might produce a lot of sound and fury signifying nothing. Better to leave some kind of legacy than none at all.

Suppose, to continue to spell out the hypothesis, that Justice Scalia had engaged in the foregoing reasoning process or something like it in the mid-1990s, and, to reverse the old jingle, that he concluded it is "better to switch

140. See Caminker, *supra* note 122, at 2333.

141. See Albert P. Melone & Thea F. Rubin, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 JUDICATURE 98, 99-100 (1988) (reporting that Scalia's Majority Opinion Assignment Ratio (OAR) was the lowest of any member of the court in the 1986 term despite a plethora of concurring and dissenting opinions); Sue Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, 74 JUDICATURE 66, 70 (1990) (calculating that Scalia's 12.12 OAR in "important cases" falls well below those of White and Powell).

than to fight.” What course of conduct would he have pursued? The obvious strategy would have had two sides: an affirmative side and a negative side.

On the affirmative side, a strategic actor in Justice Scalia’s position would have sought to identify areas of potential agreement among the five remaining conservatives. Constitutional federalism would seem to be a prime candidate. Justice O’Connor, born and raised in Arizona and a former state legislator, had signaled repeatedly that she cares deeply about such issues.¹⁴² Justice Kennedy, another westerner who was the son of a state lobbyist and a former state lobbyist himself, also seemed committed to states’ rights.¹⁴³ The Chief Justice’s support was a foregone conclusion.¹⁴⁴ Justice Thomas, lastly, appeared willing to support any conservative position that was anathema to the Democratic left. Other possibilities for cooperation included racial preferences other than affirmative action programs (such as the creation of majority-minority districts in voting rights cases), cases involving viewpoint-neutral subsidies that include religious schools and organizations, and the Takings Clause. Having identified these areas of potential agreement, the strategic Justice would work to identify and vote to hear cases presenting issues as to which the conservative coalition would likely hang together. He would then signal through repeated behavior a willingness to join without qualification any majority opinion in these areas supported by the other four conservatives. This would embolden the others to take on important cases in these areas and reach results that would push the envelope in a conservative direction. It would also stake out a claim for reciprocal treatment by other members of the coalition, including perhaps on other issues, and more favorable opinion assignments from the Chief.

On the negative side, a strategic actor in Justice Scalia’s position would vote to deny certiorari and work to convince others to deny certiorari in cases presenting issues in which the conservative coalition would be likely to fall apart. This would include abortion, affirmative action, government speech on religious topics, and many separation of powers issues.

If someone in Justice Scalia’s position had adopted such a strategic plan in 1994, the result would have been a sharp break in the character of the Rehnquist Court, and that break would have corresponded fairly closely to the changes outlined in Part II: The Court’s agenda would have turned away from

142. See SANDRA DAY O’CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002). For examples of Justice O’Connor’s commitment to federalism, see, for example, *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

143. See, e.g., *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997).

144. All commentators agree that Chief Justice Rehnquist has been steadfastly committed since his days as an Associate Justice to achieving a reduction of federal power and an enhancement of states’ rights. See Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 623 (1994) (and sources cited therein).

social issues toward constitutional federalism; shifting coalitions would have been replaced by a persistent 5-4 split with the conservatives in the majority, and the Court would begin to reach significant doctrinal innovations in its new areas of concentration.

The fact that one can hypothesize a the strategy that a rational actor in Justice Scalia's position might have adopted in mid-1990s that "fits" the facts as they have unfolded since that time must be counted as at least some evidence that the hypothesized strategy was in fact adopted. However, it is hardly conclusive evidence. Some day, when the Justices' papers for the period in question become available, scholars may be able to uncover direct evidence that either confirms or disconfirms the hypothesis of strategic behavior by Justice Scalia. Unfortunately, one consequence of a Court with no retirements is that no papers have become available for this period. For now, we have to content ourselves with circumstantial evidence that either tends to confirm or refute the hypothesis. That evidence is mixed. In order to keep the discussion within manageable bounds, I will confine myself to the circumstantial evidence about Justice Scalia's position on questions of constitutional federalism.

B. Circumstantial Evidence Supporting the Strategic Hypothesis

There are a number of reasons to believe that when Justice Scalia joined the Court in 1986 he could not be described as an advocate of states' rights or a general proponent of devolution of power from the federal government to the states. Nothing in his background would suggest such an orientation. In contrast to the other four members of today's conservative coalition, Scalia had never worked in state government, nor had he been active in state or local politics.¹⁴⁵ His entire professional career had been in federal service or in teaching federal administrative law at national law schools.¹⁴⁶ His three and one-half years on the D.C. Circuit did nothing to deflect this orientation since that court deals primarily with questions of federal law, and especially federal administrative regulation.

Given this background, it is not surprising that Scalia had little occasion to consider questions of constitutional federalism before he was appointed to the Supreme Court. He did address the question of federal sovereign immunity, writing early in his academic career one of the leading articles on this arcane subject before it was largely rendered moot by amendments to the

145. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 292 (2d ed. 1996).

146. For a full chronological account of Scalia's pre-judicial career and writings, see RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 16-32 (1997).

Administrative Procedure Act.¹⁴⁷ This article and other remarks on the subject¹⁴⁸ indicate that Justice Scalia recognized that the doctrine of sovereign immunity has little claim either to historical legitimacy or practical efficacy. Someone harboring these views about federal sovereign immunity would be unlikely to give an unqualified endorsement to state sovereign immunity; certainly he or she would be unlikely to press for an expansion of such immunity, such as we have seen in recent years.

With respect to the more general topic of federalism, Justice Scalia's prejudicial attitude is best captured in a short essay entitled *The Two Faces of Federalism*, based on a speech he gave at the first National Symposium of the Federalist Society, held at the Yale Law School in April 1982.¹⁴⁹ In this speech, Scalia criticized conservatives for their "unthinking extension" of notions of natural autonomy from individuals to state governments. The decision as to which level of government ought to decide any particular matter should be "a pragmatic one," he argued, not one driven by a "generalized hostility towards national law which has become a common feature of conservative thought."¹⁵⁰ Scalia warned against a tendency on the part of conservatives to content themselves with having the federal government do nothing and urged instead that they actively seek out areas where federal preemption of state law and policy would promote "a policy of market freedom."¹⁵¹ As examples, he cited federal preemption of municipal franchise restrictions on cable television systems and federal preemption of local rent control laws. He concluded: "I urge you, then—as Hamilton would have urged you—to keep in mind that the federal government is not bad but good. The trick is to use it wisely."¹⁵²

This evidence from the period before his nomination is confirmed by Justice Scalia's behavior once he assumed his position on the Court. In his first year, in a preview of things to come, the eight more senior Justices engaged in a skirmish over the Eleventh Amendment in *Welch v. Texas Department of Highways*.¹⁵³ Justice Brennan, on behalf of four Justices, urged the overruling of the venerable decision in *Hans v. Louisiana*,¹⁵⁴ which had extended the Eleventh Amendment beyond its narrow text (which mentions

147. Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

148. See Antonin Scalia, *Historical Anomalies in Administrative Law*, in SUPREME COURT HISTORICAL SOCIETY, YEARBOOK 1985, at 103, 104, quoted in Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1210 (2001).

149. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19 (1982).

150. *Id.* at 20.

151. *Id.* at 21.

152. *Id.* at 22.

153. 483 U.S. 468 (1987).

154. *Id.* at 478.

only suits by noncitizens) to include suits by citizens based on the presence of a federal question.¹⁵⁵ Justice Powell, writing for four other Justices, defended *Hans*, primarily on grounds of stare decisis. The Court's junior Justice declined to take sides in the dispute, noting that the issue had barely been mentioned in the briefs and at oral argument. He said:

I find both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.¹⁵⁶

As his brief concurring opinion in *Welch* makes clear, Justice Scalia was at this time genuinely dubitante on the issue. He seemed to regard *Hans* as presumptively unsound, given its deviation from constitutional text and its perpetuation of an outmoded doctrine. The issue was how to strike a balance between the infirmities of the decision and the claims of stare decisis. (Three years later, in *Pennsylvania v. Union Gas Co.*,¹⁵⁷ Justice Scalia resolved his doubts in favor of reaffirming *Hans* as a matter of stare decisis.)

A further piece of circumstantial evidence tending to suggest the strategic nature of Justice Scalia's behavior on constitutional federalism is his voting record in preemption cases. A true believer in states' rights presumably would want to see greater power devolve from the federal government to the states. Such a sincere federalist would not only support formal limits on congressional power and immunities for states from suits by private citizens grounded in federal law, but he or she would also want to interpret the preemptive effect of federal statutes narrowly, so as to leave as large an ambit of state regulatory authority as possible.¹⁵⁸ Yet Justice Scalia has been and remains one of the most consistent supporters of *broad* interpretations of the preemptive scope of federal law. Examples of this tendency on his part are legion; I list in the footnote only some of those cases where Justice Scalia has supported federal preemption, but either Chief Justice Rehnquist or Justice Thomas (both of

155. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

156. *Welch*, 483 U.S. at 496 (Scalia, J., concurring).

157. 491 U.S. 1, 29-45 (1989) (Scalia, J., concurring in part and dissenting in part).

158. A somewhat analogous issue concerns the scope of the "*Ex parte Young*" exception to state immunity from suit under the Eleventh Amendment. Presumably, a "true believer" in the Eleventh Amendment would favor a narrow *Ex parte Young* doctrine. In *Idaho v. Coeur d'Alene Tribe*, Justice Kennedy wrote an opinion for the Court that included a section seeking to narrow *Ex parte Young* in a number of respects. 521 U.S. 261, 270-80 (1997). However, he secured only the vote of the Chief Justice for this section of the opinion; Justice O'Connor, joined by Justices Scalia and Thomas, wrote a concurring opinion objecting to the attempt to narrow *Ex parte Young*. *See id.* at 288. *Coeur d'Alene Tribe* may, therefore, suggest that the Chief Justice and Justice Kennedy may be more ardent states' rights advocates, at least insofar as immunity from suit is concerned, than are the other three conservatives, including Justice Scalia.

whom are more consistent supporters of states' rights) have voted against a finding of preemption.¹⁵⁹

Moving forward to the period after 1993, we find other contextual evidence that Justice Scalia's behavior in the constitutional federalism cases is strategic. One piece of evidence—reminiscent of Sherlock Holmes's dog that did not bark—is the absence of any separate concurring opinions by Justice Scalia in the Court's post-*Lopez* federalism decisions.¹⁶⁰ Justice Scalia has written in only three of these cases, each time presumably pursuant to an assignment by Chief Justice Rehnquist to write the opinion for the Court. In sharp contrast to the other members of the federalism five, he has chosen not to offer any additional thoughts or clarifications of his own views in concurring opinions.¹⁶¹ Since one does not see similar self-restraint by Justice Scalia in other contexts where he clearly cares about the issue,¹⁶² this suggests that he remains, at best, uninterested in issues of constitutional federalism.

Closely related to the absence of separate opinions is the glaring contradiction in many recent cases between the majority's mode of analysis and some of Justice Scalia's most fervently held substantive and

159. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (Scalia, J., voting with majority finding preemption; Thomas, J., voting with dissent); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (Scalia, J., writing for Court finding FCC rules broadly preemptive of state regulation; Thomas, J., concurring in part and dissenting in part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part, calling for total preemption of state tobacco liability claims; Rehnquist, C.J., joining opinion of Stevens, J., finding only partial preemption); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (Scalia, J., writing opinion for the Court finding federal preemption of state regulation; Rehnquist, C.J., joining dissent); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (Scalia, J., voting with majority for preemption; Thomas, J. dissenting); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (Scalia, J., writing dissent finding state regulation of land use on federal lands preempted; Rehnquist, C.J., writing for majority finding no preemption). For a detailed survey of Justice Scalia's alignment in federal preemption cases see BRISBIN, *supra* note 146, at 128-34.

160. Justice Scalia filed a concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507 (1997), but only to address Justice O'Connor's attack on his Free Exercise Clause opinion in *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), which Congress had sought to overturn in the Religious Freedom Restoration Act.

161. In *Lopez*, for example, Scalia was the only Justice voting in the majority who did not either write an opinion or join a separate opinion besides Chief Justice Rehnquist's majority opinion. See *United States v. Lopez*, 514 U.S. 549 (1995).

162. Justice Scalia has written concurring or dissenting opinions in virtually every abortion and affirmative action case that has been decided since he joined the Court. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("I had not intended to write separately here until the focus of the other separate writings (including the one I have joined) gave me cause to fear that this case might be taken to stand for an error different from the one that it actually exemplifies."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (outlining a more unyielding position on affirmative action than the one adopted in Justice O'Connor's plurality opinion).

methodological convictions. As the Court's federalism rulings have grown bolder, some of its decisions have reached substantive judgments with which Justice Scalia must be uncomfortable. Especially striking in this regard is *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹⁶³ which held that the Eleventh Amendment bars a private action against the state for patent infringement. The holding effectively denies individual patent owners any means of vindication for an important type of property right when it is taken by a state.¹⁶⁴ For the Court's most consistent defender of property rights, joining this decision must have entailed some hard swallowing.

Even more pronounced is the tension between the new federalism and Justice Scalia's methodological convictions. Both the Tenth Amendment's anti-commandeering principle and the extension of the Eleventh Amendment to include actions in state court and before federal administrative agencies lack any foundation in the text of the Constitution.¹⁶⁵ In other contexts, such as substantive due process and the dormant Commerce Clause, Justice Scalia has been scornful of judicial doctrines that have no perceived foundation in the constitutional text.¹⁶⁶ Similarly, in both its Commerce Clause decisions (for example, *Lopez*¹⁶⁷ and *Morrison*¹⁶⁸) and its Section 5 decisions (for example, *Florida Prepaid*,¹⁶⁹ *Kimel*,¹⁷⁰ and *Garrett*¹⁷¹) the Rehnquist majority has engaged in a close analysis of whether Congress has made sufficient "findings" to justify its exercise of legislative power under these grants of authority. This

163. 527 U.S. 627, 647-48 (1999).

164. See Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637 (2000).

165. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (interpreting principle underlying the Eleventh Amendment to extend to complaints filed with federal administrative agencies, notwithstanding that the text is limited to "any suit in law or equity"); *Alden v. Maine*, 527 U.S. 706 (1999) (interpreting principle underlying Eleventh Amendment to extend to suits in state courts, notwithstanding that the text is limited to "[t]he judicial power of the United States," that is, federal courts); *Printz v. United States*, 521 U.S. 898 (1997) (acknowledging that anti-commandeering principle lacks explicit textual basis in the Constitution).

166. See *County of Sacramento v. Lewis*, 523 U.S. 833, 860 (1998) (Scalia, J., concurring) (decrying the majority's subjective "shocks-the-conscience" test for substantive due process violations); *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (declining to "fashion a new due process right out of thin air"); *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Scalia, J., concurring in part and dissenting in part) (arguing that there is no basis for a right to abortion in text of the Constitution); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting in part and concurring in part) (stating that dormant Commerce Clause has no textual basis in the Constitution and should not be expanded).

167. *United States v. Lopez*, 514 U.S. 549 (1995).

168. *Morrison v. Olsen*, 487 U.S. 654 (1988).

169. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

170. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

171. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

process-based review entails an extensive foray into legislative history and would seem to implicate all of the dangers of illegitimacy and manipulation that Justice Scalia has cited in opposing the use of legislative history to construe ambiguous statutes.¹⁷²

Yet Justice Scalia has joined all of the Court's recent constitutional federalism decisions without any comment on the evident tension they present with his otherwise fervently maintained methodological positions. As Phil Frickey and Steven Smith have recently written in connection with process-based review in Commerce Clause and Section 5 cases, "[t]he majority's constitutional methodology of due deliberation in congressional proceedings is so dramatically inconsistent with the statutory interpretation methodology of [Justice Scalia] that concerns about candor and strategic behavior are obvious."¹⁷³

Another source of evidence tending to suggest that Justice Scalia has been behaving strategically is the content of the three states' rights opinions he has been assigned to write for the five-Justice majority. Although judgments about these things are necessarily subjective, it is my impression that these opinions reflect relatively little enthusiasm or engagement with the immediate question at hand—constitutional federalism.¹⁷⁴ Take *Printz v. United States*,¹⁷⁵ his first majority assignment in a post-*Lopez* federalism case. It is striking to compare Justice O'Connor's 1992 opinion for the Court in *New York v. United States*¹⁷⁶ with Justice Scalia's 1997 opinion in *Printz*. Justice O'Connor's opinion speaks with conviction and advances a clear theory of the case: that federal statutes compelling state governments to enforce federal law destroy the accountability of both federal and state governments and, hence, undermine the integrity of the democratic process. Justice Scalia's opinion, by contrast, is listless and defensive; it begins by acknowledging that no textual provision of

172. For discussion of Justice Scalia's approach to statutory interpretation and use of legislative history, see Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (including quotations from Antonin Scalia, *Speech on Use of Legislative History* (1986), *see id.* at 454-55); Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401 (1994). Justice Scalia has also lectured the Court about the proper use of legislative history in many judicial opinions. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).

173. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1751 (2002).

174. This characterization also applies to the few constitutional federalism decisions he wrote during the first Rehnquist Court. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991) (Scalia, J., writing for 6-3 majority (including Souter) holding that the States' immunity under the Eleventh Amendment includes suits filed by Indian Tribes); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part).

175. 521 U.S. 898 (1997).

176. 505 U.S. 144 (1992).

the Constitution addresses the issue, spends many pages arguing against the proposition that the anti-commandeering principle of *New York* is contrary to historical practice and understandings, and ultimately finds the “most conclusive[.]” affirmative case to be the Court’s “prior jurisprudence,”¹⁷⁷ meaning Justice O’Connor’s opinion five years earlier in *New York*.

Finally, there is also considerable evidence in his three assigned opinions that Justice Scalia has sought to use these opportunities to create doctrine that will have spillover effects in other areas of constitutional law. That is to say, Justice Scalia’s federalism opinions tend not to be about federalism, but about something else, if at all possible. In *Printz*, for example, his otherwise wooden opinion becomes animated only when discussing a structural reason for invalidating federal laws commandeering state officers, namely, that this “shatter[s]” the principle of the unitary executive, thereby permitting Congress to reduce the power of the President.¹⁷⁸ Here we see Justice Scalia attempting to re-ground the anti-commandeering principle in the separation of powers doctrine of the unitary executive, a Scalia favorite rejected by the Court in *Morrison*,¹⁷⁹ but which he has subsequently sought to promote indirectly in a number of contexts.¹⁸⁰

The desire to use federalism cases to achieve other ends appears even more starkly in his majority opinion in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.¹⁸¹ The Court had granted certiorari presumably to resolve a conflict in the circuits over whether the Eleventh Amendment bars an action against a state by an individual bringing a *qui tam* suit in the name of the United States.¹⁸² Justice Scalia threw himself with considerable gusto into the threshold question whether *qui tam* suits violate the cases and controversies limitation of Article III of the Constitution. This, of course, is another separation of powers question, not a federalism question, and he resolved it in favor of constitutionality—but with minimal damage to the unitary executive theory—by reasoning that the *qui tam* relator acts as an assignee of the claim

177. *Printz*, 521 U.S. at 925.

178. *Id.* at 923.

179. *Morrison v. Olson*, 487 U.S. 654 (1988).

180. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651 (1997) (adopting a test for distinguishing inferior and principal officers that rests on whether the officer is accountable to a superior in the executive hierarchy, along the lines he had advocated in his dissent in *Morrison v. Olson*, 487 U.S. 654 (1988)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding unconstitutional congressional grant of standing to sue under the Endangered Species Act to any citizen in part because this interferes with unitary executive control of law enforcement).

181. 529 U.S. 765 (2000).

182. In such an action, any damages awarded are divided between the *qui tam* relator, as a reward for bringing the action, and the United States Treasury. Thus, the suit falls somewhere in between an action by the United States against a state for damages (permissible under Eleventh Amendment precedent) and an action by an individual against a state for damages (not permissible under Eleventh Amendment precedent).

of the United States. Then, after puzzling briefly over which issue should be tackled next—the Eleventh Amendment or the question of statutory interpretation whether states are “persons” under the False Claims Act—he resolved to decide the statutory question first. The conclusion was that Congress had not clearly included states within the definition of person; hence, it was unnecessary to reach the Eleventh Amendment question. The upshot was that Justice Scalia was able to write a separation of powers opinion and a statutory interpretation opinion—two congenial exercises—and avoided having to say anything about federalism at all.

A similar pattern can be discerned in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.¹⁸³ This was another Eleventh Amendment case, the question being whether Congress could create a cause of action against state governments for engaging in false advertising about a commercial product offered by a state agency. Two issues were presented: first, whether Congress had the power to abrogate state sovereign immunity against such a suit under Section 5, on the ground that the legislation protected individuals from deprivations of their property without due process of law by states; and second, whether the state had constructively waived its immunity by entering the commercial marketplace with knowledge of the existence of the federal cause of action.

On the abrogation issue, Justice Scalia avoided the path of other recent Section 5 decisions, which examine whether Congress has developed an adequate record of state disregard of constitutional rights to justify legislation enforcing the Fourteenth Amendment against the States.¹⁸⁴ Instead, Justice Scalia reasoned that the Fourteenth Amendment did not apply because the plaintiff had no property right in being free of false advertising. In effect, he confined the scope of “property” under the Due Process Clause to private exclusion rights—a holding that avoided any need to delve into legislative history, and that might work in future cases to cut back the scope of substantive due process (a disfavored doctrine in Justice Scalia’s eyes).¹⁸⁵ With respect to waiver, Justice Scalia was able to write an essay on the general circumstances in which an individual can be said to waive a constitutional right. The central point was that the Court generally requires that such waivers be knowing and voluntary, conditions Scalia found not satisfied by merely entering a certain field of commercial activity.¹⁸⁶ Again, the objective seemed to be at least in part to reinforce the unconstitutional conditions doctrine, rather

183. 527 U.S. 666 (1999).

184. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

185. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 997 (2000).

186. *Coll. Sav. Bank*, 527 U.S. at 681-83.

than enter into the fray on the question of the proper scope of sovereign immunity per se. In any event, Scalia managed once again to write a majority opinion in a federalism case without saying much about states' rights. This is consistent with the hypothesis that Justice Scalia's support for the Rehnquist majority in these cases is strategic.

C. *Circumstantial Evidence Against the Strategic Hypothesis*

Not all the circumstantial evidence supports the strategic actor hypothesis, however. There are, first of all, a number of problems of timing. The biggest is Justice Scalia's separate opinion in *Pennsylvania v. Union Gas Co.*,¹⁸⁷ written in 1989. The question was whether an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, defining the parties potentially liable to pay for waste cleanup costs, had abrogated the states' immunity from such suits under the Eleventh Amendment. The Justices addressed two issues: first, whether Congress had spoken sufficiently clearly in the CERCLA amendment to abrogate state sovereign immunity and, second, whether Congress, in fact, has constitutional authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity. The Court fractured badly, but when the dust settled there were five votes for the proposition that Congress had spoken sufficiently clearly, and five votes for the proposition that Congress had the power. Justice Scalia's separate opinion contributed to the complex math needed to patch together this outcome.¹⁸⁸ He took the position that Congress had spoken sufficiently clearly, but that it did not have the power to abrogate. On the latter point, Justice Scalia's opinion foreshadowed the Court's decision in *Seminole Tribe*¹⁸⁹ in 1996, which overruled *Union Gas*.

On its face, Justice Scalia's opinion in *Union Gas* would suggest that, at least with respect to the Eleventh Amendment, he willingly joined up with the states' rights coalition in 1989, well before the critical period of 1993-94 when I have suggested a strategic actor in his position would have made such a move. A closer consideration of his position in *Union Gas*, however, does not completely support this assessment. If Scalia had deliberately decided to join forces with the federalism team in 1989, one would expect him to agree with the other conservatives that CERCLA did not clearly abrogate the states' immunity. This would have changed the outcome in the case (since Justice White found that Congress had not clearly abrogated), delivering a 5-4 conservative victory. In contrast, the position he adopted (clear abrogation, but no power to abrogate) translated into a conservative *defeat* by giving the liberals five votes in support of state liability—hardly what a true believer in

187. 491 U.S. 1 (1989).

188. See Kornhauser & Sager, *supra* note 124, at 18-20.

189. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

states' rights would desire. Still, Justice Scalia had undeniably crossed the Rubicon on whether Congress has power to abrogate the Eleventh Amendment under its Article I powers, a proposition that forms one of the pillars of the federalism revolution of the second Rehnquist Court, and he did so in 1989—well before the watershed events that marked the turning point in the character of that Court.

*New York v. United States*¹⁹⁰ marks another, if lesser, problem of timing. There, Justice Scalia silently joined Justice O'Connor's opinion creating another pillar of the Rehnquist federalism revolution—the anti-commandeering principle of the Tenth Amendment. This was in 1992, again slightly before the time period when I have hypothesized that a strategic Justice Scalia would have become a federalist. Of course, it is possible that Justice Scalia was being strategic in this case for more conventional reasons. Both *Casey*¹⁹¹ and *Lucas v. South Carolina Coastal Council*,¹⁹² a landmark takings case in which Scalia was critically dependent on Justice O'Connor's vote, were also pending before the Court, and Justice Scalia may have been anxious to appear supportive of Justice O'Connor's efforts in *New York* in the hope of securing reciprocal cooperation in these other cases (he failed, of course, in *Casey*, but succeeded in *Lucas*).

Somewhat more subtly, there is evidence from Justice Scalia's dissenting opinions from as late as 1996 that he continued to assess the progress of the Court largely in terms of its judgments in cases raising social issues. This was the year of the Colorado anti-gay rights initiative¹⁹³ and the VMI sex discrimination case,¹⁹⁴ both of which elicited furious Scalia dissents. His frustration boiled over at the end of the Term. Dissenting in a pair of First Amendment-political patronage decisions, he wrote: "The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."¹⁹⁵ Justice Scalia made no mention in this dire assessment of *Seminole Tribe*,¹⁹⁶ also decided that Term, or *Lopez*,¹⁹⁷ decided the year before. Evidently, these conservative victories did not loom very large in his thinking about the overall direction of the Court's constitutional jurisprudence.

My strategic hypothesis also posits that after 1993 Justice Scalia would deliberately abstain from voting to grant review in social issues cases, recognizing that he did not have the votes to achieve his substantive

190. 505 U.S. 144 (1992).

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

192. 505 U.S. 1003 (1992).

193. *Romer v. Evans*, 517 U.S. 620 (1996).

194. *United States v. Virginia*, 518 U.S. 515 (1996).

195. *Bd. of County Comm'rs, v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

196. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

197. *United States v. Lopez*, 514 U.S. 549 (1995).

objectives.¹⁹⁸ Since we do not have docket sheets for the years in question, it is impossible to say for sure how Justice Scalia has voted in such cases after 1993. The fragmentary evidence that does exist, however, is not consistent with this supposition of strategic self-restraint on his part. In fact, Justice Scalia, joined by the Chief Justice and either Justice White or Justice Thomas, has dissented from denials of certiorari in three abortion cases since *Casey*, including two that arose after Justice White left the Court.¹⁹⁹ Similarly, in 2001 the Court declined to review a decision ordering the removal of a granite monument outside the Elkhart, Indiana court house commemorating the Ten Commandments. Once again, three Justices joined in a written dissent from denial—Chief Justice Rehnquist, joined by Justices Scalia and Thomas.²⁰⁰ These episodes tend to suggest that it is not the most conservative Justices, including Justice Scalia, who are resisting the urge to put hot button social issues cases on the docket. Rather, that resistance is coming from Justices O'Connor and Kennedy, who are evidently content to leave the Court's doctrine in these areas where it stands.

D. *On Balance*

So is the phenomenon of the second Rehnquist Court a product of strategic behavior by Justice Scalia or not? The final judgment is difficult because it is hard to distinguish between two characterizations of the evidence: (1) that Justice Scalia has been behaving strategically in the constitutional federalism cases, in the sense that he does not sincerely believe in the Court's innovations but has gone along out of a desire to achieve some of the goals listed in subpart A (obtaining majority opinion assignments, building up obligations of reciprocity with other Justices, pleasing the Chief, ensuring a legacy); and (2) that Justice Scalia has not been behaving strategically, because he sincerely

198. Political scientists have shown that Justices at least occasionally vote strategically at the certiorari stage in light of their assessments of the probable votes of other Justices on the merits of the case. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991) (interview data); Caldeira et al., *supra* note 74 (regression analysis of all petitions on the discuss list in one Term).

199. See *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1037 (1998) (Thomas, J., dissenting, joined by Rehnquist, C.J. & Scalia, J.) (dissenting from denial of certiorari from decision striking down state abortion statute on the authority of *Casey*); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1176 (1996) (Scalia, J., dissenting, joined by Rehnquist, C.J. & Thomas, J.) (dissenting from denial of certiorari from decision invalidating parental notification statute); *Ada v. Guam Soc'y of Obsts. and Gyns.*, 506 U.S. 1011 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J. & White, J.) (dissenting from denial of certiorari from decision striking down as facially invalid a Guam statute prohibiting all non-emergency abortions).

200. *City of Elkhart v. Books*, 532 U.S. 1058, 1059 (2001) (Rehnquist, C.J., dissenting, joined by Scalia & Thomas, JJ.).

believes that the states' rights position in these cases is marginally preferable to the nationalist position.

My own judgment is that evidence somewhat better supports the strategic characterization. First, this is not a situation where Justice Scalia's behavior can be chalked up to a sincere desire for clear majority rulings on issues of importance. Justice Scalia presumably could implement such a desire either by voting with the states' rights faction, or voting with the nationalist faction. In a closely divided Court, he is, in effect, the swing vote on this issue and could produce a clear majority ruling by going either way.

Second, Justice Scalia's voting record in recent years has gone well beyond what one would expect of a Justice with only a mildly sincere preference for the states' rights position. Take the Eleventh Amendment. Even if we grant that Justice Scalia sincerely concluded in 1989 that *Hans*²⁰¹ should not be overruled on grounds of stare decisis, it does not follow that he would then feel compelled to join opinions *extending* the Eleventh Amendment to actions filed in states' courts or federal administrative agencies. Someone who sincerely thought that the case for preserving *Hans* was slightly better than the case for overruling *Hans* would most logically take the position thereafter that the principle of *Hans* should be confined to its historical sphere (that is, private actions against states in federal courts). Instead, Justice Scalia has joined in a series of 5-4 decisions that have transformed the Eleventh Amendment into one of our most sweeping and vigorously enforced constitutional rights.

So I conclude that Justice Scalia has been behaving strategically and that the consequences have been huge. I will be the first to acknowledge, however, that a final accounting on this intriguing question will have to await further excavations of more complete archival materials.

V. THE EXTERNAL STRATEGIC ACTOR MODEL: TIMIDITY AT THE CENTER

In addition to strategic behavior within the Court, political scientists have also hypothesized that Justices behave strategically by modifying their preferences in light of the views of other political institutions and the general public. They do so, it is assumed, because they want their policy preferences to stick—to be respected and enforced by other power centers in society. The external strategic actor model, like its internal counterpart, begins with the assumption that Justices seek to maximize their personal policy preferences.²⁰² It further posits, however, that to accomplish this goal, the Justices must not only assemble coalitions of at least five votes within the Court, they must also

201. *Hans v. Louisiana*, 134 U.S. 1 (1890).

202. See Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 28-33 (1997) (providing an overview of this branch of strategic actor theory).

calibrate the reactions of other political institutions and the public at large in order to determine how far those views can be pressed without triggering a backlash. The external strategic model therefore comes in two versions: the separation-of-powers version, which focuses on strategic interaction between the Court and the other branches of government,²⁰³ and the public opinion version, which focuses on the strategic interaction between the Court and the views of the public.²⁰⁴

Both versions hypothesize highly sophisticated behavior on the part of individual Justices. The separation of powers version assumes that the Justices have extensive knowledge about the preferences of each House of Congress, including the key members of its complex committee system, and that they have relevant information about the policy positions of important actors within the executive branch, including not just the White House, but also the far-flung system of administrative departments and agencies. The public opinion version assumes that the Justices are aware of the distribution of views of the public on a variety of issues that come before the Court, and that they know something about the intensity with which those views are held and how they are distributed demographically.

These are rather heroic assumptions, to say the least, and they lend an air of implausibility to the external strategic actor models.²⁰⁵ Although the Justices read newspapers, and some of them socialize with Washington politicians, they generally lead insulated lives, spending most of their days ensconced in a marble building overseeing a staff of eager young lawyers processing piles of legal papers. When they venture forth to make speeches or receive awards, they are escorted by U.S. Marshals and treated by their hosts like visiting royalty. To be sure, the Justices may be able to rely on various proxies for the views of other political institutions and the general public, such as *amicus curiae* briefs, the filing of which has ballooned in recent decades.²⁰⁶

Undoubtedly, the most important source of information for the Court about the views of the other branches is the Solicitor General, the official in the Justice Department who is charged by statute with presenting the position of the government in any case “in which the United States is interested.”²⁰⁷ Except in rare cases, the Solicitor General represents all executive branch

203. EPSTEIN & KNIGHT, *supra* note 12, at 138. For an analysis by a legal scholar amplifying some of these concerns, see Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149 (1998).

204. EPSTEIN & KNIGHT, *supra* note 12, at 138.

205. See Segal, *supra* note 202, at 31 (noting that the theory assumes perfect and complete information by Justices).

206. See generally Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000) (documenting the rise of *amicus* briefs and attempting to measure their influence).

207. 28 U.S.C. § 518(a) (2000).

entities before the Court—traditional departments and independent agencies alike. Moreover, the Solicitor General usually—but not always—represents the views of both the executive and Congress.²⁰⁸ Thus, the Solicitor General acts as a kind of synthesizer who presents the Court with a position that the other branches of the federal government can “live with.” The external strategic actor model would predict that the Court would give great weight to these views, and, in fact, innumerable studies have shown that the Solicitor General enjoys an extraordinary degree of success, both in influencing the Court’s agenda and its outcomes.²⁰⁹

A. *The Separation of Powers Version*

The separations of powers version of the external strategic actor model is especially intriguing as a source of explanation for the changing character of the Rehnquist Court after 1994.²¹⁰ This date corresponds almost exactly with an inversion in control of the two other major branches of the federal government. As of 1992, a conservative administration and liberal legislature had come to be seen as almost part of the natural political order. The Republicans had controlled the White House for twelve straight years, and for twenty of the last twenty-four years. During this same span of time, Congress had been nearly always controlled by the Democrats. Then, in the span of two years, everything turned upside down. Bill Clinton ousted George Bush senior from the White House in the election of 1992; just two years later, the Republicans roared into control of both Houses of Congress under the banner of their “Contract with America.” For the first time in most people’s memory, suddenly we had a liberal administration and conservative legislature.

How would a Court dominated by a narrow conservative majority react to such an upheaval in the external political world? One prediction would be that the Court would become less deferential to executive branch legal positions. The argument runs as follows: Before 1993 the executive would tend to adopt conservative legal positions. These positions might not reflect the

208. At least, Solicitors General have generally recognized an obligation to defend the statutes enacted by Congress before the Court, unless they impinge upon the constitutional prerogatives of the executive or are patently unconstitutional under settled precedent. For a discussion, see Waxman, *supra* note 51.

209. See, e.g., EPSTEIN ET AL., *supra* note 145, at 632 tbl.7-13 (success rates on the merits); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988) (success rates in influencing grant of review).

210. This model is one of the few political science theories about judicial behavior that has been developed and applied extensively by a law professor, William Eskridge of Yale Law School. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*]; Eskridge, *supra* note 15.

administration's sincere conservative views—they would be moderated by the threat of override by the more liberal Congress. Congressional override, however, would not be automatic, of course, since Congress has a finite capacity to adopt legislation in any given session, and any attempt at override must take into account the threat of a presidential veto. So the administration's legal positions would tend to be conservative, but tempered by the strategic reality of potential congressional opposition. A strategic conservative Justice, in turn, understanding this, would tend to endorse the positions of the conservative administration, regarding them as a reasonably good barometer of how conservative one could get in interpreting the law without triggering a legislative override.

After 1994, the calculus would change. Now the executive would tend to adopt liberal legal positions, tempered by the threat of override from what is now a conservative, but as always agenda- and veto-constrained, Congress. In these circumstances, a strategic conservative Justice would have a greater incentive to reject the executive position. The executive might successfully calibrate its positions so as to minimize the risk of direct override by Congress. If those positions were rejected by the Court in favor of a more conservative interpretation, however, the executive would find it virtually impossible to mobilize a conservative Congress to take affirmative steps to override the Court's interpretation. In short, the external strategic actor model would predict that the strategic conservative Justice would switch from a position of deference to executive interpretations of law during the 1986-1992 period, to a position tending to reject executive interpretations during the 1995-2001 period.

It is not difficult to find individual cases that are consistent with this hypothesis. Compare, for example, *Rust v. Sullivan*,²¹¹ decided toward the end of the first Rehnquist Court in 1991, with *FDA v. Brown & Williamson Tobacco Corp.*,²¹² decided during the second Rehnquist Court in 2000. *Rust* involved the Public Health Service Act of 1970, a statute that provides federal grants to family planning clinics. The Reagan Administration adopted a regulation interpreting the statute as precluding any mention of abortion by doctors providing counseling to women in clinics funded under the Act. The administration apparently calculated (correctly, it would seem) that Congress would not seek to override the interpretation, since it involved funding of clinics serving poor women, but did not interfere with reproductive options of women more generally. True to what the external strategic actor model would seem to predict, the first Rehnquist Court upheld this restrictive interpretation, concluding in a 5-4 decision that it was entitled to deference, notwithstanding the presence of plausible constitutional objections based on the First

211. 500 U.S. 173 (1991).

212. 529 U.S. 120 (2000).

Amendment and the abortion decisions. This would seem to be an illustration of a conservative Court majority deferring to the judgment of a conservative administration and avoiding override by a liberal Congress.²¹³

Brown & Williamson, decided during the second Rehnquist Court, presented the question of whether the Food and Drug Administration has regulatory jurisdiction over tobacco products as conventionally marketed. The Clinton Administration, in one of its boldest domestic policy initiatives, interpreted the Federal Food, Drug and Cosmetic Act as conferring such authority on the FDA, even though the FDA had consistently disclaimed such authority in the past. The agency proceeded to adopt far-reaching regulations, designed to curb smoking by teens, that would affect the way cigarettes are marketed and sold in every corner store in the country. In another 5-4 decision, the Court invalidated the regulations, holding that the overall pattern of legislation related to tobacco products, enacted against the backdrop of the FDA's historical hands-off position, meant that Congress had a "clear intent" to deny the agency any jurisdiction over tobacco products. Here, we would seem to have an illustration of a conservative majority overriding an interpretation by a liberal administration. So far, the conservative Congress has not moved on legislation that would reverse the decision and confer regulatory authority over tobacco products on the FDA.²¹⁴

This kind of anecdotal evidence is not especially persuasive, however, since it is always possible to find isolated cases that appear to support a particular prediction about judicial behavior. Unfortunately, more systematic testing of the external strategic actor hypothesis is difficult for a variety of reasons. One problem is that the cases involving executive interpretations of statutes that might test the hypothesis range from highly controversial questions of public policy—such as the abortion counseling regulation in *Rust* and the tobacco marketing regulations in *Brown & Williamson*—to dry and technical issues—such as how to calculate offsets to social security benefits for past overpayments.²¹⁵ Thus, some cases will elicit strong reactions from the Justices based on their individual policy preferences, and others will not. Where the Justices do not care much about the policy, presumably they will not devote much time to pondering the reactions of the other branches to their decision. Another problem is time lags. Sometimes executive interpretations come before the Court many years after they have been promulgated, and the

213. As one of his first official acts as President, Bill Clinton directed that the interpretation be reversed. See Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 305 (1994). The new interpretation also avoided override by Congress.

214. Senator Edward Kennedy has introduced legislation to overturn the decision, but so far it has not made significant progress. See Allison Fass, *Senator Kennedy's Attempt to Give the F.D.A. Power Over the Tobacco Industry Faces Hurdles*, N.Y. TIMES, July 22, 2002, at C9.

215. See *Sullivan v. Everhart*, 494 U.S. 83 (1990).

degree of commitment of the current administration to the interpretation is unclear. A third problem is that the Court gives different degrees of deference to executive interpretations, depending on the formality with which the interpretation has been rendered.²¹⁶ Finally, the cases present infinite variety in terms of how much interpretative latitude the statute in question truly confers. All Justices are committed to invalidating executive action that is manifestly inconsistent with legislation duly enacted by Congress. So legal factors always have to be weighed against the desire to effectuate policy preferences. Given all these difficulties, it is not necessarily meaningful to compare the overall “affirmance” and “reversal” rate for executive interpretations in the two Rehnquist Courts.

In an effort to avoid some of these problems, I offer a more limited study, based on the Court’s acceptance or rejection of the Solicitor General’s position in cases involving interpretations of civil rights statutes.²¹⁷ These are all cases in which the Court’s decision is subject to override by Congress. They are also cases in which the Justices almost always know the position of the executive branch because the Solicitor General invariably files a brief informing the Court of the incumbent administration’s position about how the statute should be interpreted. Finally, nearly all these cases involve issues that have relatively high political salience, and, hence, the Justices are likely to have policy preferences about how they should be resolved.

Specifically, I examined all civil rights cases decided by the first Rehnquist Court during the last three years of the Reagan Administration (October Terms 1986, 1987, and 1988), and compared this to all civil rights cases decided by the second Rehnquist Court during the last three years of the Clinton Administration (October Terms 1997, 1998, and 1999). By coincidence, there were twenty-three civil rights decisions during each three-year period. In all but one of the forty-six cases, the Solicitor General filed a brief, either as a party or, more commonly, as *amicus curiae*. For each case, I determined the position of the Solicitor General, the disposition of the Court, and, if the Court’s disposition differed from the position of the Solicitor General, whether the disagreement was in the direction of a more “liberal” position (pro-plaintiff or expansive view of civil rights), a more “conservative” position (pro-defendant or narrow view of civil rights), or an “unclear” position (not easy to

216. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); Thomas W. Merrill & Kristen E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 852-63 (2001).

217. I include in the category of civil rights statutes Sections 1981 and 1982 of the original Civil Rights Acts, the Civil Rights Act of 1964 as amended, and more recent enactments such as the Age Discrimination in Employment Act, the Rehabilitation Act, and the Americans with Disabilities Act. I consider only cases that turn on the proper interpretation of these statutes (as opposed to their constitutionality).

categorize or no Solicitor General brief). The results are summarized in Table 1 below.²¹⁸

TABLE 1

Civil Rights Cases: Agreement With Solicitor General

	Total Cases	Agree w/ SG	Disagree w/ SG	SG Success Rate	Liberal Deviation	Conservative Deviation	Unclear
OT 86-88	23	10	12	43%	8	2	2
OT 97-99	23	17	6	74%	0	6	0

The results are inconsistent with what the separation of powers model would suggest in a number of ways. The model suggests that during the first Rehnquist Court, the conservative majority would be especially deferential to the conservative administration. Instead, we find that the Court adopted the position advocated by the Solicitor General in only 43% of these cases—well below the overall benchmark rate of success of the Solicitor General as amicus filer (about 70%).²¹⁹ Moreover, when the Court during these years rejected the position of the Solicitor General, it was much more likely to do so in a liberal, rather than a conservative, direction. To confound matters even further, shortly after this period, Congress retaliated against the overly “conservative” nature of the Court’s civil rights decisions by enacting the Civil Rights Act of 1991,²²⁰ which overruled no less than six of the Court’s civil rights decisions from the three years in question.²²¹ Thus, it would appear that either the Court

218. The cases used to generate Table 1 are listed in Appendix B at the end of this lecture.

219. See Reginald S. Sheehan, et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 465 tbl.1 (1992) (reporting 67.3% success rate for the Solicitor General representing the United States as a party from 1951-1988); Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 136 (1988) (reporting 75% success rate for Solicitor General as amicus curiae during similar period).

220. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

221. The Civil Rights Act of 1991 overruled five of these decisions: *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The sixth decision, *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), was separately overruled by the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978. The Civil Rights Act of 1991 also

was not being very strategic during this period, or that the Justice Department did a poor job of gauging how far the law could be pressed without triggering a congressional reaction, or both.

A closer look at the decisions during this period reveals some possible explanations for these curious results. The liberal deviations nearly all occur in the 1986 and 1987 Terms and, hence, may in part reflect the fact that Justices White and Powell (and even Justice Scalia during this time period) were far from invariably conservative in civil rights cases. By the time we get to the October 1988 Term, however, the Court had shifted toward a much more consistently conservative pattern in its rulings. Indeed, in this year the Court rejected the Solicitor General's position in favor of an *even more conservative* position in two cases, both of which became targets in the congressional overruling exercise.²²² So it may be that the administration was not that far off in calibrating how far the Court could go without triggering congressional retaliation, but the Court undershot the mark in 1987 and 1988, and then overshot the mark in 1989. Obviously, however, even this revised interpretation provides no support for the thesis that the Justices behave strategically in the sense of calculating the risk of retaliation from other branches of government. It appears more accurate to characterize the first Rehnquist Court as bungling along in a very nonstrategic fashion in civil rights cases.

When we look at the years 1997, 1998, and 1999 during the second Rehnquist Court, we also find that the outcomes do not correspond with the predictions of the model. During these years, the Court agreed with the submission of the Solicitor General 74% of the time, which is at or slightly above the overall success rate of the Solicitor General. In other words, the Court was considerably *more* deferential to the Clinton Administration in civil rights cases than it had been to the Reagan Administration. The only inkling of a result that corresponds with the model is that when the Court deviated from the path outlined by the Solicitor General in these years, it invariably did so by adopting a more conservative position. Overall, however, although the second Rehnquist Court appears to behave much more consistently in civil rights cases than the first Rehnquist Court, one would have to characterize its behavior as at most very mildly strategic in a separation of powers sense.

I do not suggest that this modest study is, in any respect, the last word on the separation of powers model. It does suggest, however, that this version of the external strategic actor model is of limited value in explaining the

overruled seven other decisions not included in my sample. See Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 210, at 333 n.4 (1991).

222. The two cases were *Betts* and *Lorance*, *see supra* note 221. In the negotiations over the Civil Rights Act of 1991, the Bush Administration did not object to the overruling of these two decisions.

differences between the first and second Rehnquist Courts.²²³ This is not to say that the switch in control of political branches after 1994 has played no role at all in the transformation of the Rehnquist Court. Most critically, Republican control of Congress has probably eliminated any significant risk of a congressional counterattack against the Court's many invalidations of its enactments based on States' rights principles. It has been reported that key Republicans in Congress are "comfortable with most of the Court's rulings,"²²⁴ which, of course, greatly reduces, if it does not eliminate, any threat to overturn them. Indeed, there has been no indication to date of any backlash against the federalism rulings from Congress.

B. *Public Opinion*

The second version of the external strategic actor model focuses on public opinion. Political scientists have long been fascinated by the possibility that the Justices, although insulated by design from public accountability, in fact take public opinion into account in formulating their more important decisions.²²⁵ The reasons why a strategically-minded Justice might want to take public opinion into account are similar to, if slightly more complicated than, the reasons why such a Justice might want to take the views of the other branches of government into account.

One reason builds from the logic underlying the proposition that a strategic Justice will want to take into account the preferences of other political institutions like Congress and the executive. Again, we start with the assumption that the Justice seeks to maximize his or her personal policy preferences. This requires not only that the Justice assemble a coalition of five votes inside the Court, but also that the other political branches do not nullify the resulting decision. The other political branches, in turn, are subject to periodic elections, and, thus, their preferences will be attuned to public opinion. Ultimately, then, a strategic Justice will realize that the decisions of the Court will be implemented by the other branches of government only if they do not deviate too far from dominant public opinion.

Another reason why a Justice might heed public opinion is more direct. Various commentators have speculated about the possibility that the Justices, or some of them at least, are motivated by a desire to enhance their

223. See Segal, *supra* note 202 (expressing skepticism about the empirical support for the separation of powers model).

224. Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 461 (2001) (quoting Representative Lee Hamilton).

225. For an overview, see THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

reputations.²²⁶ Having a good reputation translates into tangible benefits, such as expense-paid appearances at seminars held in posh resorts, and intangible benefits, such as awards, honors, and praise from editorial writers and other opinion leaders. For a Justice motivated by these kinds of reputational concerns, it might be important to assure that the Court reaches decisions supported by a majority of the public, or at least by elite opinion leaders, because this will tend to push up the “approval ratings” of the Court (and of the Justice) and, with it, the Justice’s general reputation.

The public opinion hypothesis, to a greater extent even than the separation of powers model, lacks plausibility as applied to all but a small fraction of the Court’s caseload. Public opinion can be ascertained with confidence on only a few issues, like abortion, prayer in public schools, and the death penalty.²²⁷ For most of the issues considered by the Court, there are no polling data, and if there were, they would be largely worthless. Consider the Eleventh Amendment, an issue that has excited some of the most energetic exchanges among the Justices during the second Rehnquist Court. If pollsters asked members of the general public whether they think the States should enjoy immunity from private lawsuits grounded in federal law, the response would most likely be: “No opinion.” Still, one should not rule out the possibility that public opinion matters as to the narrow slice of cases in which the issues are salient and the public has ascertainable views.

In considering the role of public opinion in influencing the behavior of the Rehnquist Court, it is natural to focus our attention on two Justices: O’Connor and Kennedy. Court watchers have long suggested that these two Justices are the most sensitive to external forces.²²⁸ Political scientists have also theorized

226. See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 619-24 (2000).

227. See EPSTEIN ET AL., *supra* note 145, at 675-702 (collecting public polling data on a variety of issues such as abortion, the death penalty, affirmative action, and prayer in the schools, but not federalism and separation of powers issues).

228. Indeed, scholars have debated which of the two is the “most dangerous” Justice. See Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 96 (1996) (nominating Kennedy); Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187, 206-07 (1996) (responding to Edelman and Chen and nominating O’Connor); Edelman & Chen, *supra* note 19, at 192 (responding to Baker and renominating Kennedy). The answer appears to depend on whether one asks who is most likely to be the median voter in contested cases (answer: Justice O’Connor), or asks who demonstrates the penchant for joining the greatest variety of coalitions of Justices (answer: Justice Kennedy). Lynn Baker has nominated O’Connor based on her status as median voter; Edelman and Chen urge that the accolade goes to Kennedy, given his dexterity in joining the largest variety of coalitions.

that moderate Justices are more likely to be influenced by changes in public opinion and have developed statistical tests tending to support this proposition.²²⁹

In order to say that public opinion can explain the differences between the first and second Rehnquist Courts, it is necessary to show that something happened in the early-to-mid-1990s that would have caused the Court, or at least Justices O'Connor and Kennedy, to become sensitized to public opinion in a way that it or they had not been before. That is, we need to identify some dramatic event or events that would have driven home the reality of public opposition in such a way as to have caused certain Justices to abandon the conservative position on social issues or, at least, to seek to avoid cases that present those issues.

When we cast our eyes back to the fall of 1991, we can, in fact, reconstruct how just such a jolt may have been delivered. It did not happen in a single blow, but rather in a series of events over a compressed period of time, which, as far as I know, have never been linked together and considered from the perspective of the sitting Justices.

The first event was the climax of the Clarence Thomas confirmation hearings. The main part of the hearings were completed in the summer of 1991, and featured many of the same issues that had dominated the hearings over the nomination of Robert Bork in 1987—such as abortion, other privacy rights, and affirmative action.²³⁰ Many of the same political forces that had been aligned against Bork also came out against Thomas. This may have been discomfiting to the conservative Justices, but no more so than the process had been four years earlier when Bork was subjected to a grilling on these issues. What was surely far more unsettling was the unexpected reopening of the Thomas hearings that took place on national television on October 11-13, 1991, featuring Anita Hill's allegations of inappropriate sexual advances and Thomas's heated denial and counter-allegation of racism. One subliminal message this extraordinary spectacle sent to the Justices was that the opposition to the nominee and the positions it was assumed he would support was extremely intense—so intense that the opponents were willing to breach unwritten norms about the type of uncorroborated accusations that are fit for public ventilation in confirmation hearings. The severe hazing of Thomas thus served as a warning to the sitting Justices that if they persisted down the path

229. See William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996). Mishler and Sheehan include Justices O'Connor and Kennedy on the list of moderate Justices from 1953-1992 who appear to be more responsive to public opinion than other Justices. *Id.* at 188.

230. See, e.g., *2 Nomination of Judge Clarence Thomas*, *supra* note 86, at 261-474 (testimony of Patricia King, Marcia Greenberger, and Judith Lichtman).

of seeking to overturn *Roe* and securing other conservative objectives, they could expect equivalent retaliation of an unspecified nature.

The second event, which followed close on the heels of the Thomas hearings, was the Bush Administration's capitulation in the enactment of the Civil Rights Act of 1991.²³¹ The statute was designed to be, and was, a massive rebuke to the Court. The Bush Justice Department, which included many lawyers who had urged the Justices to adopt the positions the statute would repudiate, initially fought the measure, and Bush successfully sustained a veto of an earlier version of the Act in 1990. After the debacle of the Thomas hearings, however, several Senators who had voted to sustain the earlier veto told the Administration it could no longer count on their votes.²³² Seeing the handwriting on the wall, the Administration cut the best face-saving deal it could under the circumstances, and the President signed the revised measure. No doubt observing all this with keen interest, the Justices could not but help draw the conclusion that the path the Court had been following in civil rights cases—often at the urging of the Republican Justice Department—in fact, lacked popular political support.

The third event was the filing of the petition for certiorari in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²³³ the abortion case that was to become the defining moment of the Rehnquist Court. The petition was filed on November 7, shortly after the Administration announced its capitulation on the Civil Rights Act and two weeks before the bill was signed into law. Two things were extraordinary about the petition. First, it was filed more than two months before the filing deadline, indicating that the pro-choice petitioners were racing to have the petition granted and argued before the end of the 1991 Term. Second, there was only one question presented: "Has the Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"²³⁴ Clearly, the petitioners—who favored abortion rights—were angling for a definitive showdown on abortion by July 1992. Why would they want that? The most logical inference, which has been subsequently confirmed by interviews with the attorneys involved,²³⁵ is that they were playing a high-stakes game of chicken with the Court. Either the

231. For a good account of the politics of the Act, focusing on the position of the Bush Administration, see Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 982-999 (1993).

232. *Id.* at 996. Two Senators, John Warner of Virginia and Ted Stevens of Alaska, informed the Administration of their decision on October 23, and the Administration announced its willingness to compromise and sign the Civil Rights Act on October 24. *Id.*

233. 505 U.S. 833 (1992).

234. Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at i, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-744).

235. LAZARUS, *supra* note 85, at 460-66.

Court, reinforced now with the vote of Justice Thomas, would persist in its apparent path toward overruling *Roe*, or the Court would blink and reaffirm *Roe*. If the Court chose the former path, then the 1992 Presidential elections would become a massive referendum on abortion rights, which the petitioners assumed they would win, resulting in the election of a Democratic President and Senate and the appointment of new Justices sympathetic to *Roe*. If the Court chose the latter path, then *Roe* and the right to abortion would be secured for the indefinite future.

There is evidence that the Justices were fully aware of the trap that was being set for them. Chief Justice Rehnquist reportedly relisted the *Casey* petition for several weeks after it was ready for consideration, evidently seeking to delay a vote by the Conference until it would be too late to schedule the case for argument in the spring of 1992.²³⁶ If this happened, then the case would be argued in October or November 1992, and the decision would be handed down after the Presidential election was safely over. However, Justice Blackmun (perhaps joined by Justice Stevens) protested against this transparent maneuver, and Chief Justice Rehnquist eventually relented.²³⁷ When the *Casey* petition was granted on January 21, the Court made one last, desperate effort to avoid a showdown on *Roe*, limiting the grant of certiorari to whether specific provisions of the Pennsylvania statute were unconstitutional.²³⁸ The parties, however, ignored the limited grant in their briefs, and when the case was argued on April 22, 1992 (the last argument day of the 1991 Term), they openly debated the soundness of *Roe*—as, of course, the Justices did in their decision.

In short, in October-November 1991, three events transpired in quick succession, which cumulatively may have sent a stark warning to the Court that it was courting disaster in terms of its standing with public opinion: the public humiliation of Thomas, followed by the Bush Administration's acquiescence in the repudiation of the Court's position on civil rights, followed by the petition in *Casey*, daring the Court to overrule *Roe* before the 1992 elections. The upshot, as we now know, is that the Court blinked. Not only did five Justices vote to reaffirm the "essential holding" of *Roe* in *Casey*, but the Court also reaffirmed the strict ban on prayer in public schools in *Lee v. Weisman*.²³⁹ The Court's strategic retreat in June 1992 did not, however, end the warning signals about public opinion. The 1992 elections not only resulted in the ouster of George Bush and the election of President Clinton, but—perhaps more tellingly—they also produced a near doubling in the number of

236. *Id.* at 462-63.

237. *Id.*

238. *Planned Parenthood of Southeastern Pa. v. Casey*, 502 U.S. 1056, 1056-57 (1992) (Order List).

239. 505 U.S. 577 (1992).

women elected to serve in Congress.²⁴⁰ Observers have credited a still-simmering backlash by women voters over the perceived treatment of Anita Hill during the Thomas confirmation hearings, as well as continuing concerns about abortion rights and civil rights, as important elements in these electoral outcomes.²⁴¹

What do we have in the way of more specific evidence that would suggest these signals about public opinion altered the behavior of the Court, and in particular Justices O'Connor and Kennedy? Certainly one piece of evidence is the *Casey* case itself. The story of *Casey* has been told many times and is without doubt "one of the most extraordinary in the annals of the modern Supreme Court."²⁴² For our purposes, the main point is that Justices O'Connor and Kennedy, both of whom had previously sent signals of disapproval about *Roe*, entered into a secretive cabal with Justice Souter to produce a "joint opinion" reaffirming *Roe*'s central holding of constitutional protection for elective abortion. Without advance notice, they sprang the joint opinion on the other members of the Court immediately after the Chief Justice circulated his opinion, which was designed to be the opinion for the Court.²⁴³ At the end of the day, the joint opinion became a plurality opinion for the Court. Together with Justices Blackmun and Stevens, the joint opinion reaffirmed the constitutional right to abortion; together with the Rehnquist opinion, joined by Justices White, Scalia, and Thomas, the joint opinion upheld all of the provisions of the challenged statutes, except the spousal consent requirement.²⁴⁴

240. The 103rd Congress elected in 1992 had a total of fifty-four women (forty-seven Representatives and seven Senators); the 102nd Congress elected in 1990 had only thirty women (twenty-eight Representatives and two Senators). U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001—THE NATIONAL DATA BOOK 245 (2001).

241. See Alan I. Abramowitz, *It's Abortion, Stupid: Policy Voting in the 1992 Presidential Election*, 57 J. POL. 176 (1995) (arguing that abortion was a more critical issue than the economy in the 1992 election).

242. JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLES INSIDE THE REHNQUIST COURT* 156 (1995).

243. LAZARUS, *supra* note 85, at 473.

244. It is relevant to note in this regard that the outcome reached in *Casey* corresponds closely with the abortion control regime preferred by a majority of Americans. The Court's decision in *Roe* followed upon an increase in support for elective abortion within both public and elite opinion. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 260-62 (1991). Subsequent refinements in the constitutional abortion control regime tend to track majoritarian views closely. For a recent overview of polling data on abortion, relating it to different legal issues resolved by the Supreme Court, see Michael Vitiello, *How Imperial is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will*, 34 U.S.F. L. REV. 49 (1999). Vitiello reports that, with one exception, the Court's doctrine mirrors the preferences of a majority of the public, as reflected in opinion polls. The exception is spousal consent: The Court has consistently invalidated spousal consents requirements, even

Some observers have conjectured that Justice O'Connor's participation in the joint opinion reflects a concern about her reputation.²⁴⁵ The usual claim is that O'Connor did not want to be remembered by history as the first woman to serve on the Supreme Court, with the immediate caveat that she had betrayed her gender by casting the decisive vote to overturn *Roe*.²⁴⁶ O'Connor's overall record on abortion is consistent with this supposition. In the 1980s, when there was a solid majority in support of *Roe*, she wrote opinions that were highly disparaging of *Roe*'s trimester framework, and she urged the adoption of an "undue burden" test that seemed designed to allow her to vote to approve every statutory restriction on abortion that came before the Court.²⁴⁷ Her attitude seemed to change in *Webster*, when she held the balance of power between retaining or scuttling *Roe*. There, she wrote a separate opinion that strained to find a variety of highly restrictive provisions did not pose an undue burden on the abortion right, even though Justice Scalia was able to show in his opinion that this was implausible.²⁴⁸ The next year, in *Hodgson*, she voted for the first time to invalidate an abortion restriction as being an undue burden.²⁴⁹ Then came *Casey*, where she joined the joint opinion that treated *Roe* as a kind of core, inviolable constitutional right, although one subject to regulation provided that it is not an undue burden on the right. What is constant in all this is the focus on undue burdens; what changes, most decisively in *Casey*, is the underlying attitude toward *Roe* and the way in which the undue burden standard is applied.

We have no hard evidence, however, that the motivation for this evolution in Justice O'Connor's views was concern about her reputation or historical legacy. That is one possible interpretation. Another is that her sincere views simply evolved over time. The fact that O'Connor voted with the liberals in 2000 to strike down legislative bans on partial birth abortions²⁵⁰ is consistent

though a majority of the public supports them. *Id.* at 94-95. The congruence between the *Casey* decision and majoritarian views on abortion did not go unnoticed at the time of the decision. *See, e.g.,* E.J. Dionne, Jr., *Justices' Abortion Ruling Mirrors Public Opinion; Polls Show Americans Would Keep Procedure Legal, but Are as Divided as Court on Limits*, WASH. POST, July 1, 1992, at A4.

245. Lazarus reports that Justice O'Connor disliked hearing abortion cases because, in the words of her brother, "half the people will hate her no matter what she does." LAZARUS, *supra* note 85, at 470.

246. *See, e.g.,* SIMON, *supra* note 242, at 156 ("As the first woman on the Court, O'Connor took her role as a model for other women seriously, and was not eager to cast the fifth vote to overrule the Court decision.").

247. *See Thornburgh v. American Coll. of Obsts. & Gyns.*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

248. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 522 (1989) (O'Connor, J., concurring); *id.* at 536 n.* (Scalia, J., concurring).

249. *Hodgson v. Minnesota*, 497 U.S. 417, 458 (1990) (O'Connor, J., concurring).

250. *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring).

with the hypothesis that her sincere beliefs about the value of the underlying right, and about the degree of burden necessary to make a burden “undue,” have simply changed during her tenure on the Court.

In Justice Kennedy’s case, the about-face in *Casey* is much more striking, and more strongly suggestive of insincere behavior. Kennedy joined Chief Justice Rehnquist’s plurality opinion in *Webster*, which applied a rational basis test inconsistent with the strict scrutiny mandated by *Roe*.²⁵¹ It is reported that he circulated a memorandum to the other conservative Justices at the time, stating that he was prepared to vote to overrule *Roe*.²⁵² His participation in the *Casey* joint opinion is quite inconsistent with such a representation. Moreover, there does not appear to be any linear evolution of views in Kennedy’s case, since he broke ranks with O’Connor and Souter in the partial-birth abortion case in 2000 and wrote a rather impassioned dissent urging that partial birth abortion bans be upheld, reverting, it would seem, to the attitude he held back in 1989.²⁵³

In Kennedy’s case, therefore, there is greater reason to surmise that he was behaving strategically in joining the joint opinion in *Casey* and reaffirming *Roe*. The most plausible reason for such strategic behavior would be concern on his part about the Court’s standing in the eyes of the public if it took the unpopular step of repudiating a constitutional right to abortion. One might also conjecture that Kennedy was worried about the impact of a decision overruling *Roe* on Bush’s reelection chances. This was a reasonable concern, given the obvious strategic design being pursued by the pro-choice forces in seeking to have the case decided before the presidential election. But, of course, it is entirely far-fetched to imagine that Justice Kennedy (or any other Justice) would decide a case in a particular way in an effort to influence the outcome of a Presidential election!²⁵⁴

Casey is only one case, of course, although one that loomed very large both in the eyes of the Justices and the general public. Yet the inferences that can be drawn from *Casey* are reinforced by *Lee v. Weisman*,²⁵⁵ which was decided only a few days earlier.²⁵⁶ The issue was whether the recitation of a nondenominational prayer by a member of the clergy at a middle school graduation ceremony violated the Establishment Clause. The Court had previously mustered four votes for a more accommodating approach to such traditional forms of government-sanctioned religious expression, and with the

251. *Webster*, 492 U.S. at 498 (opinion of Rehnquist, C.J., joined by Kennedy, J.).

252. LAZARUS, *supra* note 85, at 406-07.

253. *Stenberg*, 530 U.S. at 956 (Kennedy, J., dissenting).

254. *Cf. Bush v. Gore*, 531 U.S. 98 (2000).

255. 505 U.S. 577 (1992).

256. *See* LAZARUS, *supra* note 85, at 471 (reporting that Justice Kennedy voted at conference to reject the constitutional challenge in *Lee*, but changed his mind while working on the opinion for the Court and ended up upholding the challenge).

addition of Justices Souter and Thomas it seemed that the three-part test of *Lemon v. Kurtzman*²⁵⁷ would likely be abandoned in *Lee*. Instead, Justices O'Connor, Kennedy, and Souter joined forces with Justices Blackmun and Stevens to produce a majority decision reaffirming the strict rule against prayer in public schools. Justice Kennedy, who had previously been critical of *Lemon*,²⁵⁸ deemed it unnecessary in his opinion for the Court to reconsider *Lemon* in order to reach this result. Justice O'Connor, who had previously been critical of *Lemon*,²⁵⁹ joined a concurring opinion by Justice Blackmun that went out of its way to reaffirm *Lemon*.²⁶⁰

The outcome in *Lee* was probably inconsistent with what a majority of Americans would want,²⁶¹ but there is no question that elite opinion was solidly in favor of the rule banning all prayer in public schools. By switching sides and reaffirming the strict separationist position, Justice O'Connor and Kennedy spared the Court from another round of critical editorials. Their behavior is at least consistent with the public opinion hypothesis.

My modest study of civil rights decisions, previously reported in Table 1, can also be read as providing inferential support for the public opinion model. Recall that the study shows that the Court gave much more deference to the Clinton Administration Solicitor General in civil rights cases in the late 1990s than it gave to the Reagan Administration Solicitor General in the late 1980s. This cannot be explained by the separation of powers model; however, it makes perfect sense in terms of the public opinion model, especially after the Court had been rebuked by Congress in 1991 for adopting conservative positions in civil rights cases. The fact that both elected branches of government signed onto the mass overruling of Supreme Court decisions on civil rights told the Court—or at least certain key Justices—that its performance in this area was out of step with public opinion.

Under this explanation for the Court's more liberal stance on civil rights in the 1990s, we would expect to find that Justices O'Connor and Kennedy played a key role in assuring that the Court followed the lead of the Solicitor General after 1994. In fact, when we examine more closely the seventeen decisions from October Terms 1997-1999 in which the Court accepted the views of the Solicitor General, we find, as expected, that Justice O'Connor

257. 403 U.S. 602 (1971).

258. See *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting).

259. See *Aguilar v. Felton*, 473 U.S. 402, 426 (1985) (O'Connor, J., dissenting).

260. *Lee*, 505 U.S. at 602 (Blackmun, J., concurring).

261. See EPSTEIN ET AL., *supra* note 145, at 694 tbl.8-23 (reporting that no more than 40% of respondents to annual opinion polls have ever endorsed the Supreme Court's decisions banning prayer in schools).

voted with the majority in sixteen of these cases. In the one case she did not, Justice Kennedy took her place.²⁶²

A further piece of evidence supporting the public opinion model has already been mentioned in connection with the discussion of Justice Scalia's strategic behavior. It appears from published dissents from the denial of certiorari during the second Rehnquist Court that the self-restraint shown by the Court in not granting petitions presenting cases in the social issues basket has not come from Chief Justice Rehnquist and Justices Scalia and Thomas. They have periodically gone public with complaints about the Court's failure to hear such cases. Rather, the self-restraint appears to be coming from Justices O'Connor and Kennedy.

The most plausible basis for this self-restraint would appear to be apprehension on the part of Justices O'Connor and Kennedy about the reputational costs (for themselves and the Court) if the Court agrees to hear such cases. If Justices O'Connor and Kennedy sincerely preferred to reach liberal outcomes in these cases, then the votes would easily be there to hear them. The four liberals alone have the power to grant these cases under the rule of four. The fact that the liberals do not vote to hear these cases suggests that *they* perceive Justices O'Connor and Kennedy as not sincerely preferring liberal outcomes in these cases. The three most conservative Justices, in contrast, have indicated by their published dissents that they *do* want to hear these cases. This may mean that they believe Justices O'Connor and Kennedy sincerely prefer the conservative position in these cases. Therefore, the fact that Justices O'Connor and Kennedy do not want to hear these cases may mean that they perceive certain costs to flow from the mere fact of considering and rendering decisions in these cases. Perhaps those costs consist of an unhappy choice—unhappy at least for Justices O'Connor and Kennedy—between incurring the excoriation of the liberal media or the excoriation of their fellow conservatives on the Court, especially the sharp-penned Justice Scalia. To avoid this unhappy dilemma, they have engaged in strategic behavior—in the form of resisting adding such cases to the Court's docket, if at all possible.

The public opinion hypothesis thus allows us to round out our explanation for the transformation of the Rehnquist Court that occurred around 1994. We have already seen how the rise of constitutional federalism can be attributed to the replacement of Justice White by Justice Thomas and by what appears to have been a strategic decision by Justice Scalia to become a consistent supporter of states' rights. We are now in a position to explain why the Court turned away from social issues at the same time: because Justices O'Connor

262. Only a minority of these cases were 5-4, and some were unanimous. In divided decisions, however, the most common pattern was for Justice O'Connor to switch sides and vote with the liberals, with Chief Justice Rehnquist, Justices Scalia and Thomas, and sometimes Justice Kennedy, in dissent.

and Kennedy found the costs of continuing to engage with these issues in terms of public opinion to be unacceptably high. The cases that fall in what I have called the social issues basket—abortion, other privacy rights, affirmative action, and public expression on religious topics—all involve questions as to which most people have an ascertainable opinion. The general public opposes the Rehnquist-Scalia-Thomas view on only some of these issues—namely, abortion and privacy rights. There is little doubt, however, that elite opinion as reflected in major media outlets opposes the conservative judicial view on all these issues.²⁶³

In contrast, although the cases in what I have called the federalism basket involve issues that are quite controversial among lawyers, so far the public reaction to these decisions has been nil. As Neal Devins has explained, the Court's recent federalism decisions have not prevented Congress from responding to constituent demands by using other powers like the Spending Clause. Moreover, because much of what has been struck down is "redundant of state enactments," Congress has felt "relatively little constituent pressure to respond to the Court."²⁶⁴ Thus, for Justices who are anxious to achieve some constitutional change that can be described as "conservative" but are skittish about public opinion and the possibility of backlash against such change, the states' rights campaign is virtually ideal.

Although the pieces of the puzzle are now starting to fall together, this still leaves unexplained several distinguishing attributes of the second Rehnquist Court—such as the greatly diminished size of the case load, the increase in 5-4 decisions, and the decline in plurality opinions. To explain these developments, we need a new theory.

VI. THE IMPORTANCE OF MEMBERSHIP FLUX AND STASIS

In order to make a final pass at explaining the differences between the first and second Rehnquist Court, I will focus on one very obvious institutional difference: the first Rehnquist Court experienced extensive and frequent changes in membership, while the second Rehnquist Court has experienced no change in membership—it has functioned with the same cast of characters now for over eight uninterrupted years. Neither legal scholars nor political scientists have paid much attention to the possible significance of membership

263. For an anticipation of this thesis, couched in normative rather than positive terms, see Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1178 (1988) (interpreting Bork's defeat by the Senate in 1987 "as a marker of a failed constitutional moment, in which a political movement, after raising a new agenda for constitutional reform, fails to generate the kind of deep and broad support necessary to legitimate a change in" constitutional law).

264. Devins, *supra* note 224, at 461.

flux versus membership stasis in analyzing judicial behavior over time.²⁶⁵ So I am operating here in largely uncharted territory. Nevertheless, it seems to me that there are three differences one might expect from a Court in stasis as opposed to a Court in flux. I will leave to others any attempt to develop these or other differences into a more formal model, although it seems to me that this is something that profitably could be modeled and empirically tested.

A. *Receptivity to Change in Institutional Norms*

First, a Court in flux is more likely to be amenable to changes in institutional norms than is a Court in stasis. The Court, like other institutions, is governed by consensual norms. These include things like the rule that it takes four votes to hear a case, that opinions are assigned by the senior Justice in the majority, that the deliberations of the Court take place in secret, and so forth.²⁶⁶ These norms are generally stable and resistant to change. As Caldeira and Zorn observe:

[S]ocialization to the behavior of the justices is learned from other justices upon taking office. Normally, a single justice joins the Court on which sit eight veterans of the institution. Thus, we expect norms . . . to be propagated from one generation of justices to the next, . . . imbuing them with long-memory characteristics.²⁶⁷

To the extent the Court's norms change, we would expect that this will be associated with changes in personnel. Change in norms requires new ideas and a willingness to modify established patterns of behavior. New Justices are much more likely to have new ideas and to be receptive to trying them out than established Justices will be. Change is probably most likely to occur with the appointment of a new Chief Justice. Turnover among other Justices, however, will be important as well since consensual norms are supported by all members of the Court.²⁶⁸ In contrast, when all nine Justices have sat on the Court for many years, norm change is highly improbable.

265. An exception is Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POLITICS 361, 373-74 (1988) (briefly discussing the possible role of "youth and inexperience" on the Court as contributing to norm change); see also Timothy M. Hagle, "Freshmen Effects" for Supreme Court Justices, 37 AM. J. POL. SCI. 1142 (1993).

266. See EPSTEIN & KNIGHT, *supra* note 12, at 118-135; Gregory A. Caldeira & Christopher J. W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM J. POL. SCI. 875, 876 (1998).

267. Caldeira & Zorn, *supra* note 266, at 880.

268. See Walker et al., *supra* note 265, at 373-74 (noting the possibility that the sudden rise in the percentage of cases with dissenting and concurring opinions in the Stone Court may have been due in part to the high percentage of young and inexperienced Justices, and observing that "[h]igh levels of inexperience may also provide conditions conducive to a breakdown in decision-making norms").

We can see some confirmation of this hypothesis in the history of the Burger Court. The Burger Court, like the Rehnquist Court, started off with a burst of turnover (Burger, 1969; Blackmun, 1970; Powell, 1972; Rehnquist, 1972; Stevens, 1975), and then settled down to a long period of stability (six years with no turnover from 1975 to 1981). The early years of the Burger Court were a period of significant change for the Court in terms of its practices and norms. The time allotted to oral argument was cut in half (thereby doubling the Court's capacity to hear argued cases), the number of law clerks per Justices was doubled (from two to four), the cert. pool was established, and even the shape of the bench was changed to permit better interaction among Justices at oral argument.²⁶⁹ In addition, the number of cases heard per Term jumped up, from around 120 to 150. In the later years of the Burger Court, there were no institutional changes of equivalent magnitude. A plausible explanation for this pattern is that during the early years of the Burger Court, new blood (including a new Chief Justice) brought with it new ideas about how to discharge the Court's business, and a receptiveness to adopt these new ideas, which was missing during the later period of stasis.

This hypothesis about flux versus stasis can, I believe, help to understand the remarkable reduction in the size of the Court's docket that we see between the first and second Rehnquist Courts. A variety of explanations have been advanced for this phenomenon.²⁷⁰ These theories can be broadly divided into external and internal theories. External theories, which have been endorsed by

269. See DAVID O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 166 (3d ed. 1993) (noting that the number of law clerks was two per Justice throughout the Warren Court and increased to three and then four after 1970); BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 4 (1990) (describing change in the shape of the bench); David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 790 (1997) (tracing origins of cert. pool to a suggestion made by newly appointed Justice Powell, which was then endorsed by Chief Justice Burger).

270. For overviews of possible explanations and the evidence for and against each, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403. For longer term trends in the number of opinions issued by the Court per year, see Post, *supra* note 22, at 1280. Before the Judiciary Act of 1925, the Court typically rendered over 200 opinions per year. This fell to a level of about 100 per year during the Vinson Court, increased to about 120 cases per year during the Warren Court, and then jumped back up to 150 per year during the Burger Court. This history suggests that the long-term trend is in the direction of fewer opinions per year (200 per year prior to 1925 to 80 per year today), but also that significant variations exist from one natural Court to another (for example, 150 per year under Burger to 80 per year under Rehnquist). See also Cordray & Cordray, *supra*, at 745-750 (describing how personnel change in the early years of the Vinson Court led to a drop in the size of the docket from 150 cases per year to about 100 cases per year).

some of the Justices,²⁷¹ include such factors as Congress's repeal of most of the Court's mandatory jurisdiction in 1988, reduced requests for review filed by the Solicitor General, reduced activism by lower court judges, a falloff in new legislation during an era of divided government, and greater ideological harmony between the courts of appeals and the Supreme Court. Internal theories include such factors as increased reliance on the cert. pool by Justices to screen petitions, a decline in the use of "join-3 votes" by newer members of the Court,²⁷² and greater pursuit of leisure by the Justices.

Referring back to Figure 2 (in Part II), we can see that the explanation for the shrinkage in the docket must be to a significant degree internal rather than external. The change in the size of the docket was a phenomenon of the first Rehnquist Court, and it occurred quite rapidly and in close connection with changes in the personnel on the Court. The docket began to shrink shortly after the ascension of William Rehnquist to the Chief Justiceship and the appointment of Antonin Scalia as Associate Justice in October 1986, fell fairly steadily for several years, paused at around 115 cases per year in the early 1990s, and then plunged to a new equilibrium level at around 75-85 argued cases per year after the retirement of Justice White—*before* the beginning of what I have called the second Rehnquist Court.

This pattern is inconsistent with explanations that center on external forces. If external forces, such as a decline in lower court activism or increased ideological harmony between the courts of appeals and the Supreme Court, were the primary cause, one would not expect to see such a precipitous drop followed by a leveling off. In fact, toward the end of the second Clinton Administration, as the courts of appeals began to include increasing numbers of Democratic appointees, one could expect to see an uptick as the ideological harmony started to wear off. There is, however, no sign of such an uptick.²⁷³ The one external factor that appears to have some explanatory force is a reduction in requests for review by the Solicitor General in civil cases starting in the mid-1980s, which apparently tracks a reduction in the number of losses experienced by the federal government in such cases in the lower courts.²⁷⁴

271. Justice Souter has publicly suggested that increased ideological harmony between appeals courts and the Supreme Court may provide part of the explanation. See Shannon P. Duffy, *Inside the Highest Court: Souter Describes Justices' Relationship, Caseload Trend*, PA. L. WEEKLY, Apr. 17, 1995, at 11.

272. See O'Brien, *supra* note 269.

273. See Cordray & Cordray, *supra* note 270, at 772.

274. *Id.* at 763-771. The falloff in government petitions and supported petitions does not extend to criminal cases. Cordray and Cordray show that the decline in government requests in the civil area appears to be partly a function of fewer civil suits involving the government, and partly a function of higher government success rates in the lower courts in civil cases. *Id.* at 768-770.

This factor, however, accounts for, at most, only about one-third of the magnitude of the change.²⁷⁵

The internal explanations have a much better claim to explanatory force. The growing dominance of the cert. pool cannot be wholly eliminated as part of the explanation. The pool started out with five chambers participating (the four Nixon appointees to the Court plus Justice White) and four not participating (Justices Douglas, Brennan, Stewart, Marshall). This arrangement assured that each petition received close scrutiny by at least one law clerk (the pool clerk); the fact that four chambers remained outside the pool and that the clerks in these chambers (at least in theory) reviewed all petitions independently provided a check on the pool if for some reason the pool clerk missed a case potentially worthy of review. When Justice O'Connor was named to the Court in 1981, she joined the pool, increasing the participation to six chambers. Then, when Justices Brennan and Marshall retired in 1990 and 1991, their successors (Justices Souter and Thomas) also joined the pool, bringing the participation up to eight chambers. After 1991, only Justice Stevens remained outside the pool. Justices Ginsburg and Breyer also joined the pool, but their participation merely kept the level of participating chambers at eight.

Why might the increasing dominance of the cert. pool lead to a decline in the number of cases heard by the Court? One possibility is that, with only Justice Stevens' chambers now providing a check on the pool clerk, more mistakes (in terms of missing potentially important cases) go unchecked. Another possibility might be that, with each pool clerk now writing for eight Justices of highly diverse views, the pool clerks have adopted a very cautious approach to assessing cert. petitions. With more responsibility for determining the cases that make it onto the discuss list, the pool clerks might become more risk averse, for fear of missing a potential jurisdictional flaw or other weakness in the case that might emerge later in the process, bringing down ridicule on their heads. The influence of the cert. pool, however, seems hardly sufficient to explain fully the decline in the docket. There was no decline when the pool expanded from five to six (in 1981), and the recent decline began in 1987, well before the further expansions to seven and then eight took place.²⁷⁶

A better explanation, in my view, is that the decline reflects a new norm about the standards that should be applied in determining whether a petition qualifies for Supreme Court review—a new norm implanted with the changes

275. *Id.* at 764. Cordray and Cordray estimate that the decline in civil petitions by the Solicitor General is responsible for a reduction in about fifteen cases per year, and a decline in petitions supported by amicus briefs filed by the Solicitor General for about ten cases per year. *Id.* This would account for about twenty-five cases out of a total decline of about seventy-five cases per year in the size of the docket.

276. *See* Cordray & Cordray, *supra* note 270, at 792-93.

in personnel that began in 1986, which then spread and became entrenched as other new Justices came on board throughout the first Rehnquist Court. This is consistent with the findings of other scholars who have examined the available data, each of whom has concluded that the most plausible explanation for the shrinkage in the docket is that the Justices “have been applying a different—and more rigorous—standard in deciding whether to hear the cases.”²⁷⁷

The question is: Who is the agent of change that convinced the Justices on the first Rehnquist Court to adopt a more rigorous standard in assessing cert. petitions? Ordinarily, one would point to the new Chief Justice as the most likely influence in generating a new norm of institutional practice such as the standard for reviewing cert. petitions. The Chief Justice is responsible for putting together the initial discuss list of petitions that receive the full attention of the Conference, and he leads off the discussion of the cases that are put on the list. The Chief, therefore, undoubtedly has more influence over the size and composition of the Court’s docket than any other individual. Also, the timing of the shrinkage is consistent with the hypothesis that Rehnquist is responsible: The Court’s docket began to shrink within one year of his elevation to Chief Justice.

There is no evidence, however, that William Rehnquist assumed the office of Chief Justice with any intention to cut back on the number of cases heard by the Court. As an Associate Justice, Rehnquist was a frequent filer of dissents from denial of certiorari, implicitly advocating that more, rather than fewer, cases be heard.²⁷⁸ On the eve of his appointment, he published an article bemoaning the inability of the Court to decide more cases and urging the creation of the National Court of Appeals to take up the slack.²⁷⁹ Moreover, at his confirmation hearings in 1986, he told the Senate “I think the 150 cases [per year] that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at.”²⁸⁰

In contrast, we know from published reports that Justice Scalia, from his early years on the Court, strongly favored reducing the number of cases heard by the Court in order to allow more time for each case and improve the quality

277. Hellman, *supra* note 270, at 425. *Accord* Cordray & Cordray, *supra* note 270; O’BRIEN, *supra* note 269, at 166.

278. See Arthur D. Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist’s Proposal*, 14 FLA. ST. U. L. REV. 15, 26 (1986) (noting that during his last eight years as Associate Justice, Justice Rehnquist “published a dissenting opinion or notation in more than 120 cases in which the Court denied review”).

279. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 10-14 (1986).

280. *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings before the Senate Committee on the Judiciary*, 99th Cong. 143 (1986) (statement of Hon. William H. Rehnquist).

of the Court's deliberations.²⁸¹ We also know, based on docket sheets released as part of Justice Marshall's papers, that Justice Scalia voted to grant review less frequently than any other Justice on the first Rehnquist Court through the 1990 Term.²⁸² Although Scalia joined the Court at the same time as Rehnquist was elevated to the Chief Justiceship, Scalia's voice on certiorari policy was a new one. Thus, it is my opinion, although I admit it is only an educated guess, that Justice Scalia is the change agent here. In other words, when Justice Scalia joined the Court in 1986, he threw himself with typical gusto into the effort to convince the Justices to adopt a more restrictive standard of review. His arguments had little effect on the older Justices fixed in their ways, like Powell, Brennan, Marshall, White and Blackmun. As these Justices retired, however, and were replaced by new Justices with no pre-established views about the appropriate standard of review, Scalia's ideas about the standard of review—and hence the proper size of the docket—gradually prevailed.²⁸³

I am not inclined to attribute any deep strategic significance to what I have surmised to be Justice Scalia's advocacy of a smaller case load. The decline has little to do with the politically-significant cases, which are too few in number to explain the shrinkage of the docket we have witnessed. What has happened is that the number of more routine cases involving statutory interpretation and civil and criminal procedural rights issues has been cut roughly in half.²⁸⁴ If pressed to explain Justice Scalia's motivation for wanting to get rid of half of the lower-profile cases, I would suggest that it may have something to do with the fact that he is heavily involved in drafting and revising the opinions that issue under his name. The prospect of doing this against a base of 150 decisions a year is far more exhausting than doing so against a base of 80 decisions a year. Other Justices who joined the Court during the first Rehnquist years, including Justices Souter and Breyer, are also heavily involved in the opinion-production process. So they too might welcome relief from having to produce their share of an extra seventy opinions, most of which involve rather routine and unexciting issues.²⁸⁵

281. Stuart Taylor, Jr., *Ruining Fixed Opinions*, N.Y. TIMES, Feb. 22, 1988, at A16 (reporting comments by Justice Scalia in a question-and-answer session at George Washington University Law School).

282. See Cordray & Cordray, *supra* note 270, at 785 n.242.

283. Cordray and Cordray report that through the 1990 Term, Justice Kennedy had the second-lowest number of votes for certiorari after Justice Scalia. *Id.*

284. See Hellman, *supra* note 278, at 26.

285. Another factor that may be relevant here is the recent custom of appointing only current court of appeals judges to the Supreme Court. Doris Provine's research suggests that a key variable in determining a Justice's propensity to vote to hear cases is his or her level of trust in the ability of lower court judges to reach fair results. DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 116-17 (1980). Thus, Justices Black and Douglas had a generally low opinion of lower court judges and felt it was important to keep a close watch over them. They voted to hear a large number of cases. Justices Frankfurter and Burton, in contrast,

B. Better Information

Another consequence of the difference between a Court in flux and a Court in stasis is the amount of information that the Justices have about the preferences (defined broadly to include legal philosophy) of the other Justices on the Court. The Justices never have perfect information about the preferences of the other Justices. They must act on subjective estimates of the probability that the other Justices will take certain positions in each case. These subjective estimates are continually being updated with each case the Court decides as it sits together. The longer a given Court sits together, the more accurate the probability estimates that each Justice will make regarding the other Justices.

The process by which a Court of nine Justices continually updates probability estimates of the preferences of other Justices can be described by analogy to Bayesian logic.²⁸⁶ Thus, we can say that each Justice starts with a certain estimate of the prior probability that another Justice will take a particular position x^* with respect to issue y^* . As cases are decided that are related to the issue in question, such as y' , the Justices develop subjective probabilities that express the likelihood that a person who takes position x' as to y' will also take position x^* as to y^* . After observing the position that the Justice actually takes on y' , the other Justices then revise their estimate of the prior probability that the Justice will take position x^* with respect to y^* , developing a new posterior probability. This process continues until the Court actually considers issue y^* , at which time the Justice's true position as to y^* (x^* or not x^*) is finally revealed.

To make this more concrete, consider the situation when David Souter is first appointed to the Court. The other Justices are all anxious to develop an

were less sensitive to the plight of the petitioner, and concerned themselves primarily with the systemic significance of the case. They voted to hear many fewer cases. It is possible that the recent fall off in certiorari grants may reflect a similar shift in attitudes toward lower court judges and a corresponding move away from the importance of error correction in the management of the Court's docket. Each of the six new Justices named to the Court from 1986 to 1994 had previously served as a federal court of appeals judge. In contrast, a number of the Justices they replaced (Rehnquist, Powell, Brennan, and White) did not have such experience. Prior service on the court of appeals may be correlated with an attitude of greater trust toward lower court judges. Thus, as we move toward a Court in which a higher percentage of Justices have had such prior lower court service, the overall propensity to grant review may decline.

286. For a general introduction to Bayesian logic, see Richard D. Friedman, *Assessing Evidence*, 94 MICH. L. REV. 1810 (1996). There is an extensive debate as to whether or to what extent it is accurate to model ordinary trials as following Bayesian logic. See Ronald J. Allen, *Rationality, Algorithms and Juridical Proof: A Preliminary Inquiry*, 1 INT'L J. OF EVIDENCE & PROOF 254, 263-71 (1997). Whatever one thinks about trials, it may be that the process by which Supreme Court Justices develop estimates of the preferences of their colleagues is less problematically described as Bayesian in nature because the "evidence" unfolds in a highly structured, incremental fashion.

estimate of the probability that Souter will vote to overrule *Roe v. Wade*. Each of the other Justices starts with some information about Souter—that he was a Rhodes Scholar, he is a bachelor, he served as a criminal prosecutor in New Hampshire before becoming a judge, he was appointed to the Court by President Bush, and so forth—and on the basis of this fragmentary information develops a preliminary estimate of the probability that Souter will vote to overrule *Roe*. The other Justices then observe Souter as he sets to work deciding cases with them. If a case arises presenting a substantive due process question, for example, they will observe closely to see whether he is comfortable invoking that doctrine (on which *Roe* is based). In effect, they develop a likelihood ratio for whether a Justice who is comfortable applying substantive due process will vote to overrule *Roe*. Once they observe his behavior in the substantive due process case, they then revise their original estimate of whether he will vote to overrule *Roe*. Then another case arises, presenting a question of how much weight to give to stare decisis in constitutional law. The Justices each develop another likelihood ratio for whether someone who is willing to overrule such a constitutional precedent will vote to overrule *Roe*. They then observe how Souter behaves in this case and revise once again their estimate of the probability he will vote to overrule *Roe*. The process proceeds in the fashion, with each Justice presumably developing a more accurate estimate of probability of Souter's decisive vote as the decisional process unfolds.

The point of all this is that the accuracy of the estimates of positions on potential issues that each Justice has about the other eight Justices will differ significantly on a Court in flux than on a Court in stasis. For a Court in flux, each new appointment means that the other Justices must start from scratch developing estimates of probabilities for the new Justice's position on a host of issues.

How long will it take before the other Justices develop a reasonably accurate picture of the new Justice's preferences? No doubt, the answer varies for each new Justice. If Robert Bork had been confirmed as an Associate Justice in 1987, it would have taken relatively little time for the other Justices to ascertain his views on a number of controversial issues, compared to, say, the time it took to size up Justice Kennedy.²⁸⁷ There is reason to believe, however, that for the ordinary fledgling Justice the period of acclimation—and

287. Bork was rejected by the Senate, of course, precisely because his views on controversial topics were relatively predictable. The lesson of the Bork episode is that, at least during a time of divided government, the President is better advised to nominate persons to the Court whose views are unknown or middle-of-the-road. This means persons who will take a relatively long time to signal their views to other Justices. Thus, to the extent that future Presidents continue to follow the strategy of appointing persons of unknown or moderate views to the Court, we can expect that the efficiency of the Court likely will be disrupted to a relatively large degree during periods of flux, as it apparently was during the first Rehnquist Court.

hence the period of uncertainty for the other Justices—is usually more than just a few years. Justice White was fond of quoting Justice Douglas to the effect that “it takes five years to go around the track once.”²⁸⁸ The point of the remark is that it takes five years for a new Justice to become reasonably acquainted with the legal doctrine that pertains to the full menu of issues that come before the Court, to gain familiarity with the other Justices’ positions on these issues, and to stake out a personal position. If this is correct, then a Court that sits together for five years and longer should begin to perform in ways qualitatively different from Courts that experience normal turnover.

What this means, in practical terms, is that the Justices on a Court in flux will make more “mistakes” about the positions of other Justices than will the Justices on a Court in stasis. The senior Justices on a Court in flux will be operating with inaccurate estimates of the positions of the junior Justices, and the junior Justices may be operating with somewhat inaccurate estimates of the positions of the senior Justices (assuming that one gains information from personal interaction that goes beyond what can be gained by studying prior opinions). The mistakes created by this incomplete information will take many forms: Justices will vote to grant certiorari predicting a particular outcome on the merits when the outcome turns out differently; the Chief Justice or the Senior Associate Justice will assign opinions assuming a certain mode of analysis when the analysis turns out differently; and Justices will draft proposed opinions for the Court assuming at least four supporting votes when it turns out that there are less than four supporting votes. In a word, a Court in flux will perform less “efficiently” in generating new law than will a Court in stasis.

These conjectures provide a possible explanation for how it is that the second Rehnquist Court could decide a higher percentage of cases by 5-4 margins, while simultaneously reducing the percentage of cases that result in plurality decisions. Plurality opinions can be seen as potential 5-4 opinions that fail to make the grade because of incomplete information about the preferences of at least four other Justices. Given the high premium placed on securing five votes for a single opinion in support of the judgment, we can assume that immediately after Conference on a case the Justices voting in the majority would nearly always like to see at least five votes for a single rationale. If they fail to achieve this result, then the reason in most cases is because someone miscalculated the views of one or more of the others. The first Rehnquist Court, as a Court in flux, was more likely to be plagued by these kinds of mistakes, and, hence, was behaving as expected in producing

288. See HUTCHINSON, *supra* note 76, at 349. Justice White, according to his biographer, said that Justice Douglas attributed the remark to Chief Justice Hughes, *id.*, suggesting that at least three Justices serving at different times and having different temperaments (White, Douglas, and Hughes) agreed with this assessment.

relatively fewer 5-4 decisions and relatively more plurality decisions. As the membership of the second Rehnquist Court remained unchanged and the Justices came to have more and more information about each other's preferences, the number of mistakes declined, resulting in a mounting number of 5-4 decisions and a declining incidence of plurality decisions.

One would never expect the Court to eliminate all plurality opinions because novel issues have a way of popping up (such as the constitutionality of term limits or the line item veto), as to which there will inevitably be uncertainty about the positions of the Justices. Also, some Justices' views may change over time, creating another source of uncertainty. Nevertheless, all else being equal, a Court in stasis should be more efficient at turning coalitions of five votes for a judgment into five votes for a single opinion of the Court, and this is what we in fact have seen in recent years on the Rehnquist Court.

C. *Bonds of Reciprocity*

It is likely that a Court in stasis differs from a Court in flux in ways more profound than simply having better information about the preferences of each of its members. A Court that sits together for a long period of time is more likely to develop coalitions that feature stronger bonds of cooperation and reciprocity. This, at least, would seem to be a plausible prediction suggested by the literature on game theory. That literature indicates that participants in infinitely-repeated games are more likely to adopt cooperative strategies than are participants in single-play games or games with fixed termination points.²⁸⁹ This literature further indicates that games of uncertain length will, in this respect, tend to resemble infinitely-repeated games.²⁹⁰ If it is plausible to think of the Supreme Court as being engaged in a strategic game of uncertain length played by nine Justices, then one would predict that over time the participants in this game would tend to evolve cooperative strategies or conventions. More specifically, one would predict that a coalition of at least five Justices would form and would cooperate in reaching outcomes in contested cases, that the cooperation within this coalition would persist, and that the range of cases over which the coalition cooperates would very likely expand as the game progresses.

If Supreme Court decision making can be modeled as a game, it is obviously an extraordinarily complex one. If one were searching for a simple, two-party game on which to begin to think about coalition building on the Supreme Court, it might be "stag hunt." In this game, there are two hunters, who must decide whether to hunt for a stag or a hare. Each hunter can catch a

289. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); MICHAEL TAYLOR, *THE POSSIBILITIES OF COOPERATION: STUDIES IN RATIONALITY AND SOCIAL CHANGE* (1987).

290. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 167 (1994).

hare on his own, but it takes two working together to kill a stag. The payoff from sharing in half a stag, however, is worth more than the payoff from catching a hare. In this game, “[t]he hunters’ interests do not conflict. Each prefers to hunt stag, but only if the other does—and neither can be certain that the other will. Stag hunting will take place only if each is assured that the other will hunt stag.”²⁹¹ Analogously, one can say that groups of Justices who agree on the judgment in a case have a choice between writing separate opinions reflecting their own individual sincere views that justify the result, or joining a single opinion that reflects the shared views of at least five Justices. Writing separately (like killing a hare with certainty) has some payoff—one’s views may be applauded by law review writers and conceivably may lead to a change in law some day. Joining an opinion for the Court, however, (like sharing in the kill of a stag) has a much larger payoff since this produces a binding precedent. Obtaining the higher payoff, however, requires cooperation if it is to be achieved.

The exact mechanism by which an extraordinarily complex, nine-player game of uncertain duration would generate an equilibrium of cooperative behavior is unclear, and such an outcome is by no means guaranteed. The players may eventually learn of the benefits of cooperation by trial and error, or they may stumble upon strategies like tit-for-tat (in which players respond to cooperation by rewarding the cooperator and respond to defection by punishing the defector), which may conduce toward cooperation.²⁹² The relevant point for present purposes is that whatever the precise mechanism by which cooperation comes about, if the game is sufficiently complex and has multiple players, it presumably takes time to achieve a cooperative equilibrium. A Court in flux is less likely to achieve such an equilibrium because the introduction of new players disrupts the expectations and strategies of the other players, requiring in effect that the game start over. A Court in stasis, in contrast, may be able to sustain enough rounds of play so that cooperation becomes the dominant and stable strategy within a coalition of at least five Justices.

A number of distinguishing features of the second Rehnquist Court, such as its domination by a single five-Justice coalition, its greater willingness to declare acts of Congress unconstitutional, its superior capacity to achieve doctrinal innovations, and its greater ability to avoid plurality decisions, may plausibly be explained on the hypothesis that the Court, by the very reason of its stability over a long period of time, has reached a state in which the majority coalition enjoys stronger cohesion than one would expect to find within majority coalitions on Courts that experience normal turnover. The growth in 5-4 decisions and the decline in plurality decisions, on this theory, is

291. *Id.* at 36.

292. AXELROD, *supra* note 289, at 54.

not just a function of greater precision into predicting the positions of other Justices, as suggested earlier. It is in addition or, alternatively, a function of the emergence of a convention shared by the members of the primary coalition.

One especially intriguing implication is that the majority coalition on the Rehnquist Court may be expanding the sphere of cooperation beyond the original core of constitutional federalism to incorporate a wider variety of issues. There have been a number of signs that this may be happening in recent Terms. For example, in *Boy Scouts of America v. Dale*,²⁹³ the majority coalition engaged in an expansive interpretation of the First Amendment in order to preserve the Scout's policy against openly gay scout leaders. Furthermore, in the most recent Term, the same five Justices held together to uphold school voucher programs against the allegation that this represents impermissible public funding of religion.²⁹⁴

By far the most interesting illustration of how the original sphere of cooperation may be expanding over time is the controversial decision in *Bush v. Gore*,²⁹⁵ where the Court, defying expert predictions, intervened in the legal free-for-all over the unresolved presidential election in Florida and, in so doing, awarded the Presidency to George W. Bush. As reconstructed by Michael Abramowicz and Maxwell Stearns,²⁹⁶ the Court was divided into four groups of Justices immediately after the second oral argument in the controversy. On the right, Chief Justice Rehnquist and Justices Scalia and Thomas wanted to reverse outright the Florida Supreme Court's recount decision as a violation of Article II. On the left, Justices Stevens and Ginsburg wanted to affirm outright. In the middle, Justices O'Connor and Kennedy were dubious about the Article II argument, but felt that the Florida court's recount raised equal protection concerns. Also in the middle, Justices Souter and Breyer agreed that the Florida decision raised equal protection concerns, but they would have remanded to the Florida courts with directions to conduct a recount that was consistent with equal protection principles. The question was whether Justices O'Connor and Kennedy would join forces with Justices Souter and Breyer in an equal protection ruling with a remand, or whether Justices O'Connor and Kennedy would form a coalition with the three most conservative Justices on some basis.

What happened, as we know, is that O'Connor and Kennedy fell in with the three committed conservatives. The three conservatives evidently compromised on legal theory, joining a per curiam opinion that adopted the equal protection rationale and relegating their Article II theory to a concurring

293. 530 U.S. 640 (2000).

294. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

295. 531 U.S. 98 (2000).

296. Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849 (2001).

opinion. Justices O'Connor and Kennedy, for their part, agreed that the disposition in the per curiam opinion would be a reversal rather than a remand, thereby ending the recount and awarding the Presidency to George Bush.

There are a variety of possible explanations for why Justices O'Connor and Kennedy decided to join the three conservatives rather than try to form a coalition with Justices Souter and Breyer.²⁹⁷ Surely one possible explanation, however, is that by late 2000, Justices O'Connor and Kennedy had become thoroughly familiar and comfortable with forming coalitions with the conservatives. Dense bonds of reciprocity had formed among the five most conservative Justices, and cooperation—which entailed both some compromise by the three conservatives on the legal theory and may have entailed some compromise by O'Connor and Kennedy on the remedy—was relatively easy to achieve. Cooperating with Justices Souter and Breyer was less familiar and, hence, more difficult. Thus, we see how something as simple as the judicial longevity of a Court may have fateful consequences.

VII. CONCLUSION

I have covered a lot of ground, which makes summing up more than ordinarily difficult. Let me close by emphasizing three lessons this exercise may offer: one for lawyers, one for political scientists, and one for both.

The lesson for lawyers is that they should be more cautious about attributing the behavior of the Supreme Court to the influence of legal ideas. From a jurisprudential perspective, the Supreme Court over the last eight years looks like an institution on a mission. Five Justices appear to have dedicated themselves to the revival of states' rights as a bedrock principle of constitutionalism, and they have pursued this vision with single-minded determination. It seems natural to attribute this behavior to the Justices' commitment to ideals of federalism. This type of explanation, however, leaves many scratching their heads, for it is doubtful that significant numbers of Americans, at this point in our history, care very much about constitutional federalism. In this sense, the current Rehnquist Court reflects the rather odd spectacle of a Court on a mission, but without a popular mandate.

The puzzle may be easier to explain if we start not with ideals, but with the assumption that the Justices rationally are seeking to maximize certain preferences. At least, I have attempted to argue that the puzzle is explainable in these terms. We are having a federalism revolution because, given the mix of motives and strategies among the nine Justices, it is basically the only revolution to be had.

297. One, of course, is that joining with the three conservatives created a majority of the Court; whereas joining Souter and Breyer still left the "equal protection" Justices one vote short of a majority.

This is not to suggest that lawyers should forgo normative analysis of legal questions. That is their job. I do think, however, that normativity could use a healthy dose of realism now and then. Understanding the preferences and the strategies that lie behind the jurisprudence may provide insights into what kinds of arguments are likely to succeed and why, and it may give us some sense of how permanent the jurisprudential preferences of the current Justices are likely to be.

The lesson for political scientists, I think, is that different theories of judicial behavior may apply in different degrees to different Justices. There is a tendency in the political science literature to seek out some universal model for judicial behavior, to the effect that all judges behave reflexively, or all engage in strategic behavior of one stripe or another. The truth may be far more complex. Some Justices—Justice Blackmun perhaps—may be highly reflexive and give little thought to how other Justices and institutions will react to their decisions. Other Justices—like Justice Brennan—may be intensely strategic. Within the ranks of the strategic, some strategic Justices will be more sensitive internally to other Justices, while others may be more focused externally on public opinion.

My study of the second Rehnquist Court is illustrative. It may be that the five-member coalition for states' rights is composed of two Justices who are relatively attitudinal or reflexive—Chief Justice Rehnquist and Justice Thomas; two Justices who are strategic in the sense that they are fleeing to federalism because of their fear of public opinion if they concentrate on other issues—Justices O'Connor and Kennedy; and one Justice who is a strategic federalist of the internal actor variety because he cannot get any action on any other front—Justice Scalia.

Again, I am not suggesting that political scientists should forego reductionistic models in favor of historical or biographical narratives. Building and testing reductionistic models is what political scientists do. It is quite possible, however, that in studying an institution like the Supreme Court, where the behavior of each individual plays such a critical role in the performance of the institution, a more complex or multi-dimensional theory of judicial behavior will have more explanatory power than a single-dimensional theory.

Finally, a lesson for both lawyers and political scientists is that far too little attention has been given in the past to the rate of turnover on collegial courts. One can distinguish three states of affairs: normal turnover, which historically has been about one new Justice every two years; above normal turnover; and subnormal turnover. The first Rehnquist Court was a Court of above normal turnover; the second Rehnquist Court a Court of subnormal turnover. I have argued in a preliminary fashion that a Court with above normal turnover is more likely to experience important changes in institutional inputs—the norms that govern institutional behavior. A Court with subnormal turnover is more

likely to develop stable and powerful coalitions that produce important changes in institutional outputs—the legal doctrine produced by such Courts.

Given the closely divided nature of the Rehnquist Court and the divided government and society in which it operates, I think it is very unlikely that the Court would have generated the important changes in the law of constitutional federalism we have seen in the last eight years without the added boost from subnormal turnover. This is surely a phenomenon that deserves greater study in the future, by both lawyers and political scientists—hopefully in collaboration.

APPENDIX A

Cases Underlying Figure 3

Cases 1985-1994	Cases 1995-2002
Abortion	
Hodgson v. Minnesota, 497 U.S. 417 (1990).	Stenberg v. Carhart, 530 U.S. 914 (2000).
Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990).	
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).	
Rust v. Sullivan, 500 U.S. 173 (1991).	
Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).	
Affirmative Action	
Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).	Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).	
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).	
United States v. Paradise, 480 U.S. 149 (1987).	
Government Speech on Religious Topics	
County of Allegheny v. ACLU, 492 U.S. 573 (1989).	Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).
Edwards v. Aguillard, 482 U.S. 578 (1987).	Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
Lee v. Weisman, 505 U.S. 577 (1992).	
Gay Rights	
	Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
	Romer v. Evans, 517 U.S. 620 (1996).
Other Privacy Rights	
Cruzan by Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261 (1990).	M.L.B. v. S.L.J., 519 U.S. 102 (1996).
Michael H. v. Gerald D., 491 U.S. 110 (1989).	Troxel v. Granville, 530 U.S. 57 (2000).
Reno v. Flores, 507 U.S. 292 (1993).	Washington v. Glucksberg, 521 U.S. 702 (1997).
Turner v. Safley, 482 U.S. 78 (1987).	
Washington v. Harper, 494 U.S. 210 (1990).	

Commerce Clause	
	Jones v. United States, 529 U.S. 848 (2000).
	Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).
	United States v. Lopez, 514 U.S. 549 (1995).
	United States v. Morrison, 529 U.S. 598 (2000).
Tenth Amendment	
Gregory v. Ashcroft, 501 U.S. 452 (1991).	Printz v. United States, 521 U.S. 898 (1997).
New York v. United States, 505 U.S. 144 (1992).	Reno v. Condon, 528 U.S. 141 (2000).
	U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
Eleventh Amendment	
Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991).	Alden v. Maine, 527 U.S. 706 (1999).
Dellmuth v. Muth, 491 U.S. 223 (1989).	Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).
Hafer v. Melo, 502 U.S. 21 (1991).	Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197 (1991).	California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).
Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989).	Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).
Howlett v. Rose, 496 U.S. 356 (1990).	Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).
Missouri v. Jenkins, 491 U.S. 274 (1989).	Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).	Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).
Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).	Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).
Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).	Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989).	Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002).
	Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002).
	Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997).

	Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
	Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002).
	Vt. Agency of Natural Res. v. United States <i>ex rel</i> Stevens, 529 U.S. 765 (2000).
	Wis. Dep't of Corr. v. Schacht, 524 U.S. 381 (1998).
Section 5 of 14th Amendment, Not Otherwise Counted	
	City of Boerne v. Flores, 521 U.S. 507 (1997).

APPENDIX B

Cases Underlying Table 1

Cases OT 86-88	Cases OT 97-99
N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6 (1986).	Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).
Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).	Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).	Texas v. United States, 523 U.S. 296 (1998).
City of Pleasant Grove v. United States, 479 U.S. 462 (1987).	Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998).
Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).	Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616 (1987).	Bragdon v. Abbott, 524 U.S. 624 (1998).
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).	Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).	Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
Marino v. Ortiz, 484 U.S. 301 (1988).	Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).
Honig v. Doe, 484 U.S. 305 (1988).	Haddle v. Garrison, 525 U.S. 121 (1998).
Traynor v. Turnage, 485 U.S. 535 (1988).	Lopez v. Monterey County, 525 U.S. 266 (1999).
EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1988).	NCAA v. Smith, 525 U.S. 459 (1999).
Loeffler v. Frank, 486 U.S. 549 (1988).	Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999).
Florida v. Long, 487 U.S. 223 (1988).	Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).	Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999).
Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527 (1989).	West v. Gibson, 527 U.S. 212 (1999).

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).	Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).	Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
Martin v. Wilks, 490 U.S. 755 (1989).	Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).
Lorance v. AT&T Techs. Inc., 490 U.S. 900 (1989).	Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
Patterson v. McLean Credit Union, 491 U.S. 164 (1989).	Olmstead v. L.C., ex rel. Zimring, 527 U.S. 581 (1999).
Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).	Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000).
Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989).	Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).