

27. See e.g., Danelski, "Influence of the Chief Justice" (1980); Walker, Epstein, and Dixon, "On the Mysterious Demise."

28. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993); Harold J. Spaeth and Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (Cambridge: Cambridge University Press, 2001).

29. Mark S. Hurwitz and Drew Lanier, "I Respectfully Dissent: Consensus, Agendas and Policymaking on the U.S. Supreme Court, 1888–1997," *Review of Policy Research* 21 (2004).

30. C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947* (New York: Macmillan, 1948).

31. See also Sheldon Goldman, "Backgrounds, Attitudes, and the Voting Behavior of Judges: A Comment on Grossman's 'Backgrounds and Judicial Decisions,'" *Journal of Politics* 31 (1969); George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *Journal of Legal Studies* 13 (1984); Epstein, Segal, and Spaeth "Norm of Consensus."

32. Goldman, "Backgrounds, Attitudes, and the Voting Behavior of Judges," 219.

33. Pamela C. Corley, Amy Steigerwalt, and Artemus Ward, *The Puzzle of Unanimity: Consensus on the United States Supreme Court* (Stanford, CA: Stanford University Press, 2013).

34. Ibid.

35. Lee Epstein and Jeffrey A. Segal, "Measuring Issue Salience," *American Journal of Political Science* 44 (2000).

36. Joel B. Grossman and Richard S. Wells, *Constitutional Law and Judicial Policy Making* (New York: Longman, 1989), 59.

37. Epstein and Segal, "Measuring Issue Salience."

38. Saul Brenner and Theodore S. Arrington, "Unanimous Decisions Making on the U.S. Supreme Court," *Political Behavior* 9 (1987); Thomas R. Hensley and Scott P. Johnson, "Unanimity on the Rehnquist Court," *Akron Law Review* 31 (1998); Hurwitz and Lanier, "I Respectfully Dissent."

39. If the case was reargued, we used the date the case was reargued.

40. Given the consistency of the results across model specifications, we present predicted probabilities for the two logit models as they are more easily interpretable.

41. Rosen, "Roberts's Rules."

42. Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), 89.

43. Segal and Spaeth, *The Supreme Court and the Attitudinal Model*; Spaeth and Segal, *Majority Rule*.

44. Fred P. Graham, "180 Years of Chief Justices: Some Nonentities, Some Giants," *New York Times*, June 24, 1969, 25.

45. Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (New York: New York University Press, 1983).

46. Ibid.

10 ~ Genuine Leader or Merely "First Among Equals"?

Probing the Leadership Capacity of the Chief Justice

BRANDON L. BARTELS AND PHILLIP J. WININGER

During his confirmation hearings, Chief Justice John Roberts articulated one of his main objectives for the Court: "I do think the chief justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me." Roberts's statement reflects a normative view that chief justices should use their position on the Court to pursue institutional maintenance, or act in ways that help preserve the Court's integrity, public image, and legitimacy. Such concerns recently entered the forefront during the highly salient *National Federation of Independent Business v. Sebelius*,¹ wherein Chief Justice Roberts drafted a majority opinion that upheld the controversial Affordable Care Act of 2010. Many commentators argued that he saved the statute—despite conservative views that may have led him to decide otherwise—in order for the Court to avoid the muddy waters of the intense political battle over health care.

Roberts's decision in the health care case, along with his statement, suggests a key empirical question: Do chief justices systematically behave in ways that demonstrate a special effort or ability to pursue institutional maintenance? Although generally labeled the "first among equals," chiefs do exercise certain powers that may enable them to fulfill this role. Chief justices, for example, control opinion assignment as a member of the majority coalition—a process studied by various political scientists.² The chief's pursuit of institutional maintenance, however, may extend beyond

these more “formal” powers. While David Danelski cautioned that the role of chief justice does not guarantee special sway with the Court, he recognized that the chief can use his personal interactions with other justices to empower himself as a social leader.³ Danelski’s insights suggest that if chiefs are truly more than just “first among equals” with respect to institutional maintenance, they may demonstrate special leadership capacity or attention to these concerns even when formal norms or rules provide that they behave just like an associate justice. Thus our research seeks to explore these more “informal” contours of the chief justices’ behavior and leadership capacity on the Court.

While extant research illuminates chief justice behavior in several limited contexts,⁴ we shift focus to a broadly systematic study of multiple empirical implications designed to test the degree to which the chiefs may or may not use their role to pursue institutional maintenance, a study that incorporates five chief justices and data ranging from 1946 to 2010. More specifically, we contend that several empirical implications should flow from an institutionally minded chief justice, three of which we test for here: he should enhance the Court’s unity by acting to build larger coalitions as the majority opinion writer, more readily join the majority following an initial conference dissent, and more forcefully adhere to or cite authoritative precedent so as to perpetuate perceptions of institutional and legal legitimacy. No formal norm mandates that the chiefs pursue these ends. But if the chiefs are in fact the caretakers of institutional maintenance, we suggest that such behavior should manifest itself in the chief to a greater extent than in the associate justices.

In order to evaluate these empirical implications, the analysis proceeds in four parts: (1) setting the context of chief justice leadership; (2) theoretical framework and associated empirical implications; (3) an overview of data and variables; and (4) a description of findings. Because this research delves into informal norms of behavior, rather than formal chief justice powers, it sets a high bar for evidence of a legitimacy-minded chief. Despite this heightened standard, some evidence emerges. The findings, even though primarily descriptive and exploratory, suggest that some of the chiefs—notably Vinson, Warren, and Burger—acted to build larger majority coalitions and exhibited a strong propensity to change votes in accordance with majority will. This research, however, does not yield conclusive evidence across all empirical implications and all chief justices explored in the study, and it suggests that factors such as increased polarization on the Court over time may impede the chief’s efforts at institutional maintenance.

Probing Chief Justice Behavior

Political scientists have not shied away from studying the behavior of justices who carry the special title of chief. Much of this research centers on how chief justices use their small collection of special powers, including opinion assignment and the ability to speak or vote first at private conference, to advance policy or other goals.⁵ Other studies examine how chiefs may advance goals in circumstances when chiefs and associates presumably carry equal power, such as the drafting of dissents and concurring opinions.⁶ In all, this body of work lays groundwork for the research presented here, research intended to more squarely and systematically probe the chief justice’s ties to institutional maintenance.

With respect to formal powers, researchers conclude that such powers have helped the chiefs advance multiple goals. Various political scientists have explored the degree to which chief justices use opinion assignment to pursue either policy goals or organizational/institutional goals.⁷ Forrest Maltzman and Paul Wahlbeck, for example, analyze opinion assignments by Chief Justice Rehnquist and find that he pursued policy in close, salient cases by disproportionately assigning opinions to his ideological friends.⁸ Meanwhile, he also pursued organizational goals, such as operational efficiency, by disproportionately assigning opinions to justices who timely completed prior assignments or who may have exhibited special expertise regarding the issues at hand. Scholars have extended analysis to other chief justice powers, such as the ability to speak and vote first at private conference.⁹

Collectively, this research demonstrates that chief justices may use their special powers to advance multiple goals, goals that include both policy and institutional maintenance. Execution of these formal powers gives rise to the best case scenario for chief justice leadership, as these powers directly place chiefs in a commanding role over associates. Alternatively, a more regimented test of the chief’s leadership capacity should account for behavior and interactions in situations in which the chiefs and associates presumably exert equal formal power. All justices, for example, share the power to draft dissents and concurrences. To this end, multiple scholars have sought to determine whether chiefs and associates differ in the extent to which they draft dissents and concurrences. They find that chief justices write fewer of these opinions.¹⁰ Some scholars argue that this finding may reflect the chief’s special attention to institutional concerns; they may reduce the number of concurring and dissenting opinions in order to lead

the way toward more consensus on the Court so as to project a positive institutional image.¹¹

Although this research singularly focuses on opinion drafting, it suggests that the chiefs may exhibit special behavior and seek to lead the Court, even outside of their formal duties. As Danelski has argued, being “chief” opens the door for a justice to assert himself as a social leader on the Court, leadership that may advance beyond the mere collection of formal powers he maintains.¹² Several scholars, for example, have studied whether chief justices have been able to assert leadership to guide the Court in particular policy directions. Sue Davis explores whether Rehnquist may have been partly responsible for a rightward shift in the Court after he was promoted to chief, but she finds little support for this proposition.¹³ On the other hand, Joseph Kobylka argues—based on a qualitative study of Burger’s votes, assignments, and written opinions—that he was able to move the Court toward greater accommodation of religion under the Establishment Clause.¹⁴ And Frank Cross and Stefanie Lindquist suggest that the Rehnquist Court moved in a more activist direction on certain issues such as federalism and states’ rights.¹⁵ Thus while the findings of these studies are mixed, they suggest the potential for the chief to assert broad policy leadership.

Such leadership, or lack thereof, may also advance or undermine institutional maintenance. To this end, multiple scholars have attempted to determine the causal factors behind the demise of the so-called “norm of consensus” whereby the Court historically acted in a more unified manner when voting and issuing opinions.¹⁶ Collectively, this research suggests that multiple causal factors may underlie the demise, including ideological dispersion and polarization, the growth in “hard” cases and a discretionary docket, and the political context.¹⁷ And, notably, much of this research also suggests another major influence: the style of chief justice leadership. Thomas Walker, Lee Epstein, and William Dixon claim that Chief Justice Stone may have caused the demise through his failure to resolve acrimonious debates on the Court.¹⁸ Stacia Haynie shifts focus to Chief Justice Hughes and claims that patterns of dissents and concurrences increased under his watch.¹⁹ In latter studies, scholars examine voting patterns under the Burger and Rehnquist Courts to suggest through indirect aggregate analysis that these chiefs may have been responsible for altering levels of Court cohesion as well. Marcus Hendershot, et al., suggest that Burger may have contributed to a long-term trajectory toward dissenting behavior.²⁰ And Frank Cross and Stefanie Lindquist compare aggregate voting patterns under the Burger and Rehnquist Courts and find that the Rehnquist

Court experienced an overall increase in cohesion.²¹ While quibbling over which chief justice may be the main cause, all these studies suggest that chief justice leadership may matter in enhancing, preserving, or diminishing unity on the Court in particular contexts.

In all, an existing body of research concludes that chief justices may play a special role in either advancing, or perhaps inhibiting, policy or institutional goals. In light of this disparate collection of work that examines bits and pieces of chief justice behavior, it is important to step back for a moment and contemplate a broader, more systematic analysis of chief justice behavior, an analysis that zeroes in on institutional maintenance. In other words, while research shows that chief justice leadership may influence the Court in particular contexts or time periods, can we render any conclusions about whether chiefs systematically behave in ways different from associates with respect to institutional maintenance? And to what extent may a special attention to institutional maintenance be reflected in chief justice behavior beyond his special formal powers? These remain open questions that we intend to probe further.

Sizing Up the Chief Justice as an Institutional Legitim�izer

An attempt to answer these questions starts with a theoretical account as to why the chief justice may or may not pursue institutional maintenance. On one hand, theory suggests that chiefs should be primarily policy-oriented, as predicted by the attitudinal model of Supreme Court decision making.²² If so, chiefs may consistently favor policy goals over institutional goals so that little systematic evidence of an institutionally minded chief justice exists. Alternatively, theory also suggests that justices—notably chief justices—may care about institutional legitimacy and maintenance because the Court has no formal enforcement mechanisms and therefore relies on the goodwill of the other branches of government, the states, and the American public for implementation of and compliance with its rulings. If this is the case, certain empirical implications should follow, as set forth below.

As a starting point, many legal scholars agree with the contention that since Supreme Court justices serve life terms, sit atop the judicial hierarchy, and have discretionary jurisdiction to choose which cases they will hear, justices have significant discretion to pursue their personal policy preferences.²³ Research shows, for example, that chief justices can be policy-driven, just like any other justice, and that they may use their position as chief to this end.²⁴ This portrait of a policy-oriented chief justice

suggests that chiefs consistently keep their eye on the ball of policy goals while downplaying attention to other worthy goals such as institutional maintenance.

Despite the predominance of the attitudinal model, however, various research demonstrates that ideology may not fully explain or predict judicial decision making. Other forces are potentially at play. Legal norms may force justices to set aside their preferred policy choice, justices may listen to public opinion or congressional preferences, or justices may be compelled to strategically accommodate others on the Court.²⁵ Further, as Lawrence Baum has explained, justices may seek to satisfy multiple external audiences, including the public and other political institutions.²⁶ Thus the portrayal of a single-minded, policy-oriented chief justice may be an oversimplification. Indeed, research recognizes that chief justices pursue multiple goals—including ideological and institutional objectives—when fulfilling their duties on the Court.²⁷

Among the collection of forces that may influence judicial decision making, concerns with judicial legitimacy are particularly relevant here. It is well-recognized that the Supreme Court may constitute a weak institution in that it lacks the power of the “purse or sword.” In other words, the judiciary relies upon other political and societal actors to properly enforce judicial mandates. If society loses regard for the judiciary or its rulings, judges may find themselves to be inept actors in an institution powerless to bring about societal change.²⁸

While judicial legitimacy tends to be resilient over time in the eyes of the public,²⁹ various scholars suggest that public perceptions matter to the health of the judiciary and, consequently, have deeply analyzed how these perceptions may ebb and flow depending upon various contexts and circumstances.³⁰ To this end, a Supreme Court that consistently projects itself as an ideologically driven, divided institution may lose esteem in the eyes of the public over time. This concern with the Court’s image as a united or divided institution is widespread and readily apparent. Though scholarship has shown that the Court’s legitimacy is apparently immune to even the most ideologically divided and salient decisions, like *Bush v. Gore*,³¹ scholars have generated considerable research on judicial norms of consensus or dissensus.³² And both former and current Supreme Court justices, such as Sandra Day O’Connor and John Roberts, have repeatedly expressed the importance of legitimacy, unity, and the Court’s public image.

These examples illustrate that various actors, both internal and external to the Court, are mindful of and emphasize the importance of institutional

maintenance, particularly with respect to unity on the Court. Thus it is logical to surmise that chief justices may feel a special pressure to pursue this form of institutional maintenance due to their unique role on the Court: they carry a special title, exercise special formal powers, oversee the Court’s administration, and represent the Court to the public and other political institutions. Thus chief justices may assume the role of a social leader on the Court who must be especially attentive to institutional maintenance.³³

While formal powers, such as opinion assignment, may be used for such institutional goals,³⁴ Supreme Court dynamics may also allow for special leadership by the chief outside of these formal powers. Political scientists widely acknowledge that the Court’s decision making occurs within a strategic bargaining environment whereby justices may negotiate over votes and opinion content.³⁵ After all, no justice is a lone actor on the Court; he or she must pursue policy or other goals under the constraints of colleagues. This bargaining environment opens the door for a justice—namely, the chief justice—to assert leadership through personal interactions with others. While most research on bargaining and accommodation examines how justices pursue policy goals in this setting, it is plausible that the chief justice may leverage this environment for purposes of institutional maintenance, particularly with respect to the Court’s unity.³⁶ The chief, for example, may use his bargaining powers to compile larger majority coalitions when he acts as the majority opinion writer. We thus expect this general empirical implication to hold:

H1A: *Chief justices will be more likely than associate justices to build sizeable majority coalitions when acting as the majority opinion writer.*

Causal ambiguity exists with this hypothesis due to the possibility that the chief justice may assign himself opinions where large majority coalitions already exist. Alternatively, the chief may take cases where there is a close vote in order to try to persuade minority justices to join the majority. In other words, the fact that the chief will assign the majority opinion whenever he is in the majority leads to the possibility of selection effects. We can get leverage on this issue, however, by looking at “voting fluidity” between the conference vote on the merits and the final merits vote. An institutionally minded chief should be particularly intent on persuading initial dissenters to join the majority coalition and retaining large majority coalitions. Thus the following related empirical implications may unfold:

H1B: *Chief justices will be more likely than associate justices to (1) persuade initial conference dissenters to join the majority coalition, and (2) retain as many justices in the conference majority as possible.*

These first hypotheses require the chief to be particularly mindful of court unity and exert leadership to this end. In other words, the chief cannot achieve such unity absent his ability to persuade votes from other justices. But even if the chief is unable to sway the associate justices, he fully controls his own votes at all times. Voting fluidity may therefore evidence the chief's special mindfulness toward institutional maintenance and legitimacy, even when he is not the opinion writer and does not exercise power over other justices. If the chief contemplates institutional concerns more so than his colleagues, he may be more apt to rethink an initial dissent for the sake of court unity. An initial conference dissent may indicate an attitudinal predisposition against the majority, a policy position that subsequently gives way to the chief's desire to promote a unified Court. This suggests a hypothesis regarding the chief's propensity for voting fluidity:

H2: *Chief justices will be more likely than associate justices to acquiesce and join majority coalitions after dissenting in conference.*

A pursuit of institutional maintenance may extend to other areas beyond Court unity. As Lee Epstein and Jack Knight argue, institutional legitimacy demands a "norm of stare decisis," which constrains judicial behavior.³⁷ Research indicates that the public expects the courts to serve a legal role in consistently applying established legal doctrine over time.³⁸ While much of the American public recognizes that justices have discretion and do not necessarily follow a "mechanical jurisprudence" legal model, they also perceive the justices as using such discretion in a principled manner, which allows the Court to maintain ample levels of legitimacy.³⁹ If judges stray far from established legal rules or exercise discretion in an unprincipled manner, public or community expectations can be violated and the public's willingness to accept or comply with such decisions may diminish. Judges are socialized to defer to legal precedent in order to preserve long-term legitimacy, even though they may desire alternative outcomes in particular cases.⁴⁰ And evidence of legal norms is abundant: attorneys frame cases around legal doctrine; judges cite legal doctrine in their decisions; attorneys and judges debate legal doctrine in court hearings; and judges talk about legal doctrine in private conferences.⁴¹

This discussion suggests that legally principled decisions may be impor-

tant to an institutionally minded chief justice. A chief justice, over and above associates, may strive to portray a norm of stare decisis by grounding his decisions in legally authoritative precedent. Thus if the chief justice constitutes the caretaker of institutional maintenance, a second hypothesis may unfold:

H3: *Chief justices will be more likely than associate justices to forcefully adhere to or cite authoritative precedent in majority opinions.*

In our analysis, we also pay particular attention to how the chief's behavior compares to associates in highly salient cases that the public is more likely to hear about. If institutional maintenance motivations are influencing chief justices, they may be enhanced in highly salient cases in which the chief may seek to put an especially good face on the Court. We also note that these hypotheses may not exhaust all ways in which a chief justice may or may not pursue institutional maintenance. But they lay the foundation for a study of such behavior across a broad range of justices, cases, votes, and opinions. In other words, if a chief justice is more attentive systematically to institutional maintenance, some or all of these empirical implications should appear.

Data and Variables

To test Hypotheses 1a and 3, we gathered data from the Supreme Court Database⁴² spanning five chief justices—Vinson, Warren, Burger, Rehnquist, and Roberts—and the years 1946–2010. Data relevant to H3 (authority of precedent) only extends to 2002. We use the Court's decision in a case as the unit of analysis, and we examine all formally decided cases that listed a majority opinion writer. We excluded formally decided per curiam decisions. This leaves us with 6,723 cases. In each case, we have a measure of which justice wrote the majority opinion.

Variables

The hypotheses call for operationalization of several variables:

- *Margin of victory* (H1a) is simply the *number of majority votes* minus the *number of minority votes*. Thus the larger the vote margin, the larger the majority coalition. This measure is preferable to the number of majority votes since not all cases contain nine votes (due to brief vacancies and recusals).

- *Unanimous outcome* (H1a): Given the traditional focus on the chief justice pushing for unanimous outcomes, we also measure whether the Court produces a unanimous outcome (=1) or not (=0).
- *Closely divided outcomes* (H1a): Essentially the opposite of the prior variable, this variable measures whether decides a case by a one-vote margin (e.g., a 5-4 outcome) (=1) or not (=0).
- *Authority of Precedent* (H3) assesses the overall authority of precedent cited within a majority opinion. To quantify precedential authority, the analysis presented here incorporates a measure developed and employed by Fowler and Jeon.⁴³ This measure—a “hub score”—calculates both the number of precedent citations and the authoritativeness of those citations to arrive at an overall measure, with higher values reflecting the greater extent to which a majority opinion is well-grounded in the law.
- *Case Salience* (H1a and H3): Because we are interested in whether institutional maintenance concerns among the chief justice are heightened in cases receiving greater attention from the media and public discourse, we measure salience using Epstein and Segal’s measure for whether the Court’s decision appeared on the front page of the *New York Times* (=1) or not (=0).⁴⁴

Hypotheses 1b and 2. Testing these hypotheses requires an analysis of justices’ conference (preliminary) votes and their final votes to investigate instances of voting fluidity and, more specifically, instances of “conforming behavior,” where dissenting justices at conference subsequently join the majority opinion, and “retention behavior,” where justices in the majority at conference remain in the majority for the final opinion. For this analysis, we rely on the Vinson-Warren Supreme Court Judicial Database⁴⁵ and the Expanded Burger Court Judicial Database.⁴⁶ Systematic data for analyzing voting fluidity are limited to just three chief justice eras: Vinson, Warren, and Burger. We analyze 730 cases during the Vinson Court, 1,536 during Warren, and 2,408 during Burger.

For H1b, we are interested in majority opinion authors’ “conformity rates” (presiding over switches from minority to majority) and “retention rates” (presiding over instances where justices stay in the majority). To calculate conformity rates for each case, we divide the number of justices who switched from minority (in conference) to majority (final vote) by the total number of justices in the minority at conference. To calculate retention rates for each case, we divide the total number of justices who were in the

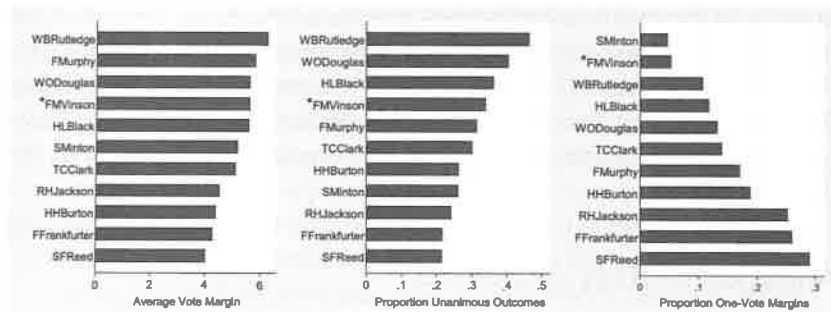
majority in the final vote by the total number of justices in the majority at the conference vote. We perform this analysis at the case level and calculate these two rates for each justice when he or she wrote the majority opinion. Testing H2 requires analyzing all justice-votes and comparing justices’ frequencies of switching from the minority in conference to the majority for the final vote.

Analytical Strategy and Results

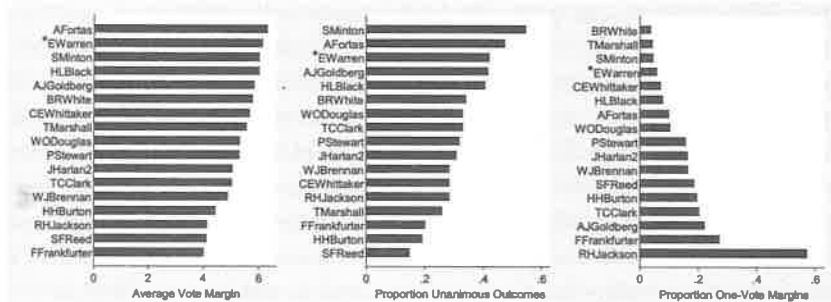
Our analytical strategy for the hypotheses proceeds in two parts. For each hypothesis, we first compare the chief justice’s behavior to each associate justice with whom the chief served during his tenure in order to examine whether the chief engages in each institutional-maintenance-oriented behavior to a greater degree than each of the associate justices. Second, because we posit that the chief justice might be especially attuned to institutional maintenance concerns in highly salient decisions, we provide the same analysis for salient and nonsalient decisions separately. Because just 15 percent of the decisions in our data are coded as salient decisions, a small-*n* problem arises for certain justices within certain eras. Thus, in our examinations of salient versus nonsalient decisions, we limit our analysis and comparisons to justices who were majority opinion writers in at least ten salient decisions within each chief justice’s time period. We return to descriptive statistics of majority authorship in salient versus nonsalient decisions further below. In addition, because the mission of this chapter is largely exploratory, we present our results below in terms of descriptive statistics.⁴⁷ Where appropriate, we discuss results in terms of statistical significance. We discuss the voting fluidity analysis central to Hypothesis 1b following the discussion of Hypothesis 1a.

Hypothesis 1a: Majority Coalitions

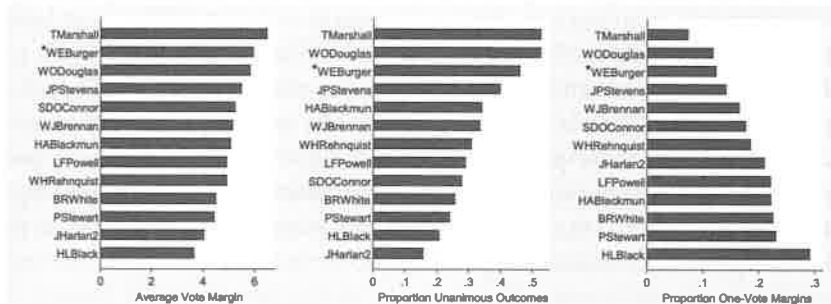
We first address whether the chief as majority author presides over larger majority coalitions than his associate justice colleagues. As discussed, we use three measures to capture this concept: (1) average margin of victory (#majority votes – #minority votes), (2) proportion of unanimous outcomes, and (3) proportion of outcomes with one-vote margins (e.g., 5-4 outcomes). Figure 10.1 presents the results for each “chief justice era” separately. Within each era, we present averages of each measure among each majority author. For all three measures, justices are sorted from greatest



A. Vinson Court

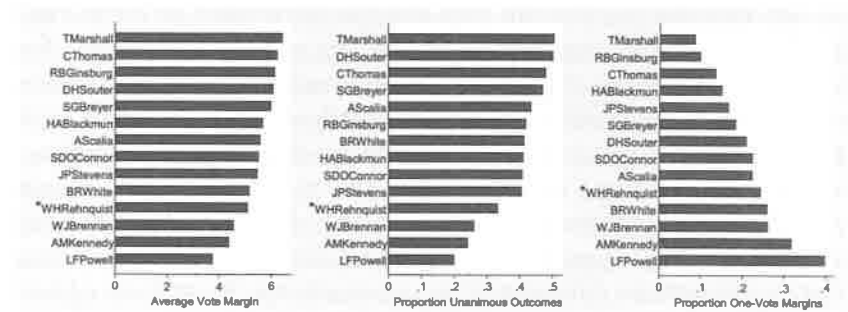


B. Warren Court

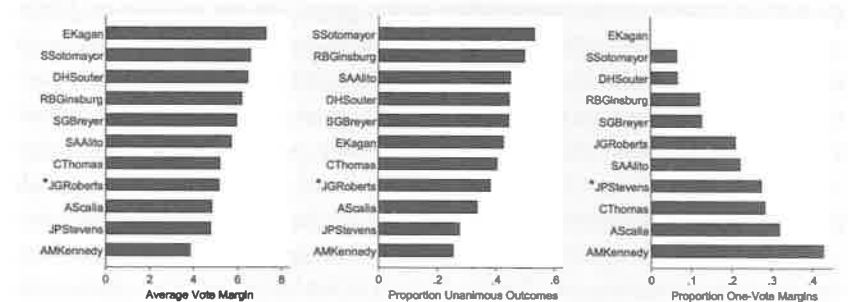


C. Burger Court

Fig. 10.1. Average vote margins, proportions of unanimous outcomes, and one-vote margins among majority opinion authors (Hypothesis 1a)



D. Rehnquist Court



E. Roberts Court

Fig. 10.1. (continued)

"majority size" (i.e., greater margin of victory, more unanimous outcomes, and fewer 5-4 outcomes) to smallest. We have placed an asterisk next to the name of the chief justice in each set of graphs.

Figure 10.1 reveals that during the first three eras, Chief Justices Vinson, Warren, and Burger built or maintained among the largest majorities when they were majority opinion authors relative to their associate justice colleagues in their respective eras. Figure 10.1a displays how Chief Justice Vinson averaged a robust vote margin just shy of six (something between an 8-1 and 7-2 vote margin), which falls just behind Douglas, Murphy, and Rutledge (who authored just twenty-eight majority opinions in the data), though the differences between Vinson and these three justices are not statistically significant.⁴⁸ Vinson secured a substantially larger margin of victory as majority author than several of his colleagues, particularly Justices Jackson, Burton, Frankfurter, and Reed (each of these four differences is statistically significant). Vinson also secured more unanimous outcomes as majority author than his colleagues. Roughly 35 percent of the opinions he authored were signed on to by all the justices; only Black, Doug-

las, and Rutledge top that rate, with Douglas just topping 40 percent and Rutledge nearing 50 percent (though recall the small *n* for Rutledge). But Vinson did best seven of his colleagues in securing unanimous opinions, though none of those differences are statistically significant at the .05 level. Reed, Frankfurter, and Jackson are again toward the bottom of the ranking, securing unanimity at a rate between 20 and 25 percent. Finally, Vinson was among the most successful at minimizing closely divided (e.g., 5-4) outcomes, registering only about 5 percent. Only Justice Minton eclipsed that rate, though this difference is not statistically significant. In fact, Chief Justice Vinson secured a significantly lower rate of 5-4 outcomes as majority author than five (the bottom five in the graph) of his colleagues. Once again, Jackson, Reed, and Frankfurter seem to be the least likely to build unanimity during the Vinson era, which fits with past perspectives, particularly with respect to Frankfurter and Jackson and the battles they had with Justices Black and Douglas. On the whole, while Vinson was not significantly better at securing larger majorities and more unanimity than all of his colleagues, he certainly ranks among the highest in these categories.

Figure 10.1b shows that a similar story emerges for Chief Justice Warren, who topped all but one (Justice Fortas) of his fellow associate justices in average margin of victory as majority author. Like Vinson, Warren boasted an average margin victory of nearly six, and the difference between Warren and Fortas is not statistically significant. Warren's margin of victory as majority author is substantially and significantly larger than Justice Douglas and the justices that fall below him (Stewart, Harlan, etc.). As in the Vinson Court, Justices Reed, Frankfurter, and Jackson registered the lowest margin of victories as majority authors, though Jackson and Reed were not on the Warren Court for long and therefore did not author many majority opinions during this era. Warren also topped most of his colleagues in securing unanimity (over 40 percent) and minimizing closely divided voting outcomes (under 6 percent) as majority author. Minton's (who authored just twenty-two majority opinions during the Warren Court) and Fortas's unanimity rates are not significantly higher than Warren's, and Warren's rate is substantively greater than several of his colleagues and significantly higher than five of his colleagues. Results for one-vote margin outcomes is similar: Warren had among the lowest rates of closely divided vote margins, his rate is not significantly lower than the three justices above him, and he has a substantially lower rate than many of his colleagues and significantly lower than nine of his colleagues.

Figure 10.1c shows a similar pattern for Chief Justice Burger as was seen for Chief Justices Vinson and Warren. Though only Justice Marshall

secured a larger vote margin (a difference that is actually statistically significant), Burger's vote margin of nearly six (similar to Vinson and Warren) is substantively higher than several of Burger's colleagues and significantly higher than nine of his colleagues (from O'Connor downward in Figure 10.1c). Burger secured unanimous outcomes in nearly 50 percent of the majorities he commanded, a figure substantively higher than Vinson and Warren, and authored closely divided (one-vote margin) opinions just 12 percent of the time. Both rates are topped by Douglas and Marshall only, though the differences between Burger and these two justices are not statistically significant for either facet. For unanimity, Burger exhibited a significantly higher rate than nine of his colleagues, and for one-vote margin outcomes he exhibited a significantly lower rate than six of his colleagues.

While Burger, Vinson, and Warren seem to show some semblance of leadership on the Court in terms of building majority coalitions as majority author and topping several, but certainly not all, of their associate colleagues, the same cannot be said for Chief Justice Rehnquist, whose average vote margin of just above five ranks toward the bottom compared to his colleagues. Moreover, Rehnquist's average is significantly lower than five of his colleagues and significantly higher than only one of his colleagues. Congruous results emerge for unanimity and closely divided votes, where Rehnquist's rate is 33 percent for the former (much lower than his predecessors) and 24 percent for the latter (much higher than his predecessors). Just as Burger, Warren, and Vinson reflected similar patterns for the 1946-1986 terms, results for Chief Justice Roberts reflect the pattern established by Rehnquist. We should note that the number of cases is not large for the Roberts Court (*n* = 422), and thus there is a small-*n* problem for some of the newer justices (particularly Sotomayor and Kagan). But the pattern is fairly clear: Roberts's average vote margin of just above five (similar to Rehnquist's) ranks toward the bottom compared to his colleagues. The only justice Roberts was significantly higher than was Kennedy, whose average margin is just under four. Roberts's unanimity rate is just shy of 40 percent, higher than Rehnquist's but lower than many of his colleagues. Roberts's rate for very close cases is just over 20 percent, similar to Rehnquist's and about the middle of the pack among his colleagues.

On the whole, Hypothesis 1a does not find significant support from the data, though Vinson, Warren, and Burger appear to show higher margins of victory and higher rates of unanimity as majority authors than many of the associate justices with whom they served, though they also show lower rates than some of their colleagues. The fact that Rehnquist and Roberts do not appear to be as successful as their predecessors in securing

larger majorities, speaking with one voice, and reducing the occurrence of 5-4 decisions could be due to the rise of ideological polarization on the Court. Where the Warren Court was filled with several liberal justices, particularly in the 1960s, the Burger Court had more individuals on both extremes (Brennan and Marshall on the left, Rehnquist and Burger on the right), though it had a robust middle with several swing justices, including Justices Stewart, Powell, and White, and eventually Justices Blackmun and Stevens, both of whom underwent ideological drift from the right to the left during the Burger era. Of course, the middle began to shrink in the later 1980s and into the 1990s, with the retirements of these swing justices from the Burger era. By the mid-1990s, after the appointments of Ginsburg and Breyer, the Court was fairly polarized, with four quite reliable liberals (Breyer, Ginsburg, Souter, Stevens), three reliable conservatives (Scalia, Thomas, and Rehnquist) and two right-of-center justices (Kennedy and O'Connor) who were capable of casting significant liberal votes but still voted conservatively more than liberally.

From figure 10.1 and the discussion of the results, one can also see some potential "opinion-assignment effects" potentially confounding some of the patterns in the results. For instance, in the Burger, Rehnquist, and Roberts Courts, we see that many of the swing justices had among the lowest margins of victory and unanimity rates. This could be because the chief justice (or whoever the senior member of the majority coalition is) assigns cases where the preliminary merit votes are very close to a moderate, swing justice in order to preserve the majority coalition. Moreover, the chief justice could be assigning himself some of these closely divided cases in conference in order to hold together the majority. So even in closely divided cases, the chief may be exerting leadership by attempting to hold together—but not necessarily expanding—the majority coalition. In the past when the Court was not so polarized, perhaps the task of expanding the majority was simpler, especially in highly salient cases, as in the famous anecdote of Warren seeking unanimity in *Brown v. Board of Education*. But in an age with greater polarization and more rigid ideologues who resist deferring to the majority opinion when they initially vote with the minority, merely holding together a thin majority coalition may be the best a chief—or any other justice—can ask for. We return to this issue in the analysis of voting fluidity (H1b).⁴⁹

Salience

Are chief justices even more attuned to institutional maintenance concerns in salient cases where the public, the media, and politicians are paying

more attention? Might they seek to build larger majorities and produce more consensus in these cases to show that the Court is "speaking with one voice" (a la Warren in *Brown*)? Such an inquiry presents a puzzle: Prior research shows that ideological divisions are more pronounced in salient cases than in nonsalient ones.⁵⁰ Such ideological divisions in these salient cases imply smaller coalitions and lower occurrences of unanimity. At the same time, chief justices tend to be majority opinion authors in salient cases at the highest rates compared to their associate justice colleagues. This is the case in our data. Do chief justices assign themselves salient decisions in order to at least *attempt* to have the Court speak in one voice, or are these institutional maintenance/legitimacy concerns not operative and the chief instead assigns himself these cases to make a significant policy imprint? Of course, in the contemporary era marked by greater polarization, there may be a mix of these motivations, with the chief wanting control over writing an opinion for a minimum winning coalition that, for instance, avoids conflict with the other branches (which some argue Roberts did in the 2012 health care ruling). While we cannot directly answer these questions with the current data, we can get some leverage on comparing vote margins and unanimity rates between the chief and his colleagues in both salient and nonsalient cases.

Table 10.1 presents the average margin of victory and unanimity rates for all justices in each of the five chief justice time periods. But it does so separately for salient and nonsalient cases and it includes the difference between the two for each justice. Recall that we analyze only justices who were majority opinion authors in at least ten salient cases. Within each chief justice era, Table 10.1 sorts justices by average margin of victory and unanimity rates in salient cases.

First off, a clear pattern emerges in table 10.1: Nearly all majority opinion authors see their margin of victory and unanimity rates decrease in salient cases. For the most part, this difference is similar for chiefs and associates alike. Justice Fortas seems to be a clear anomaly, where his average margin of victory and unanimity rate as majority writer skyrockets in salient cases compared to nonsalient cases. In the contemporary era, Chief Justices Rehnquist and Roberts have particularly lower values of both facets in salient cases compared to their predecessors, again potentially reflecting the rise of polarization on the Court.

On the whole, the results suggest a dilemma faced by the chief justice. Chiefs may want to write the majority opinion in salient cases (they do so at a greater rate than associate justices), perhaps in an effort to attempt to get the Court to speak with one voice, but these are also the cases that elicit

TABLE 10.1. Average Margin of Victory and Proportion of Unanimous Outcomes Among Majority Opinion Authors in Salient and Nonsalient Decisions (Hypothesis 1a)

Average Margin of Victory				Average Proportion Unanimous Outcomes			
Maj. Auth.	Nonsalient	Salient	Difference	Maj. Auth.	Nonsalient	Salient	Difference
<i>Vinson Court</i>				<i>Vinson Court</i>			
Black	5.65	5.22	-0.43	Black	0.37	0.33	-0.03
Vinson	5.84	5.06	-0.79	Vinson	0.36	0.28	-0.08
Douglas	5.76	4.92	-0.84	Douglas	0.43	0.23	-0.20
Reed	4.13	3.22	-0.91	Reed	0.23	0.11	-0.12
<i>Warren Court</i>				<i>Warren Court</i>			
Fortas	5.73	8.10	2.37	Fortas	0.40	0.70	0.30
Warren	6.21	6.04	-0.17	White	0.34	0.36	0.02
Harlan	5.06	5.04	-0.02	Black	0.42	0.34	-0.08
Black	6.29	4.94	-1.35	Warren	0.47	0.32	-0.15
Douglas	5.43	4.83	-0.60	Harlan	0.31	0.30	-0.02
White	5.99	4.79	-1.20	Clark	0.34	0.29	-0.05
Stewart	5.50	4.68	-0.82	Douglas	0.35	0.23	-0.12
Clark	5.16	4.52	-0.65	Frankfurter	0.20	0.22	0.03
Brennan	5.12	4.36	-0.76	Stewart	0.35	0.21	-0.14
Frankfurter	4.12	3.67	-0.45	Brennan	0.32	0.20	-0.12
<i>Burger Court</i>				<i>Burger Court</i>			
Marshall	6.48	6.40	-0.08	Marshall	0.54	0.40	-0.14
Burger	6.11	5.27	-0.83	Burger	0.48	0.36	-0.12
Black	2.50	4.50	2.00	Black	0.10	0.29	0.19
White	4.58	4.22	-0.36	White	0.27	0.20	-0.07
Stewart	4.54	3.96	-0.58	Stewart	0.25	0.18	-0.07
Rehnquist	5.16	3.80	-1.36	Brennan	0.36	0.17	-0.19
Powell	5.26	3.55	-1.71	Rehnquist	0.34	0.15	-0.19
Blackmun	5.24	3.42	-1.82	Stevens	0.43	0.12	-0.32
Stevens	5.78	3.24	-2.54	Powell	0.33	0.11	-0.22
Brennan	5.47	3.10	-2.37	Blackmun	0.36	0.11	-0.26
<i>Rehnquist Court</i>				<i>Rehnquist Court</i>			
Blackmun	5.69	5.55	-0.14	White	0.44	0.33	-0.11
Stevens	5.64	4.76	-0.88	Souter	0.53	0.29	-0.24
Souter	6.24	4.71	-1.53	Blackmun	0.43	0.27	-0.16
White	5.37	4.42	-0.96	Scalia	0.46	0.26	-0.19
Scalia	5.79	3.74	-2.05	Stevens	0.45	0.24	-0.21
Rehnquist	5.67	3.46	-2.21	Rehnquist	0.39	0.18	-0.21
Kennedy	4.71	3.14	-1.57	Kennedy	0.28	0.11	-0.17
O'Connor	6.04	3.03	-3.01	O'Connor	0.47	0.11	-0.36
Brennan	5.24	2.69	-2.56	Brennan	0.36	0.00	-0.36
<i>Roberts Court</i>				<i>Roberts Court</i>			
Roberts	5.45	4.13	-1.33	Roberts	0.45	0.13	-0.33
Kennedy	4.24	2.09	-2.15	Kennedy	0.28	0.09	-0.18

the highest degree of ideological divisions because the legal and policy stakes tend to be higher. So attempting to maximize the margin of victory or the chances of unanimity may be futile. On the other hand, the chief may simply want to write for the majority in salient cases for policy reasons.

Hypothesis 1b: Voting Fluidity, Conformity, and Retention Rates

As noted, ambiguity exists over the precise mechanism driving the results surrounding H1a. We note that there is no magic bullet for ascertaining this mechanism using our current data.⁵¹ However, examining "switching" behavior from the conference vote on the merits to the final merits vote facilitates a more in-depth look at whether the chief justice is more intent on building and maintaining larger majority coalitions than his associate justice colleagues because it examines coalition expansion and maintenance *after* the opinion has already been assigned. Figures 10.2a and 10.2b show conformity and retention rates, respectively, for each majority opinion writer during the Vinson, Warren, and Burger eras. The graphs show the proportion of the time each justice, as majority author, attracted a conference dissenter (fig. 10.2a) and retained justices in the conference majority (fig. 10.2b).⁵²

Figure 10.2a shows that Chief Justice Vinson presided over a conformity rate of nearly 50 percent, which bests the colleagues with which he served by a large margin. These results work in conjunction with our prior results showing that Vinson was near the top in his attempt to forge larger majority coalitions as opinion author. These results show that after opinion assignment, Vinson sought to—and was relatively successful at—enlarging the coalition by, for instance, persuasion, bargaining, or accommodation.⁵³ Chief Justice Warren was not quite as successful as Vinson in this venture and, at about a 40 percent rate, falls in the middle of the pack when compared to his colleagues. It is again intriguing to see how successful Justice Fortas was at forging consensus. Chief Justice Burger possessed an even lower conformity rate than Warren, at just over 30 percent, and again falls in the middle of the pack when compared to his colleagues. It appears that both Warren and Burger were either not as successful or not as concerned with building larger coalitions after opinion assignment than their colleagues. In sum, there appears to be a chief justice effect during the Vinson Court but not for the Warren and Burger Courts.

The retention rates in figure 10.2b show little differences across justices. While Vinson was the highest among his colleagues in conformity rates, he is the lowest for retention. His retention rate is still above 90

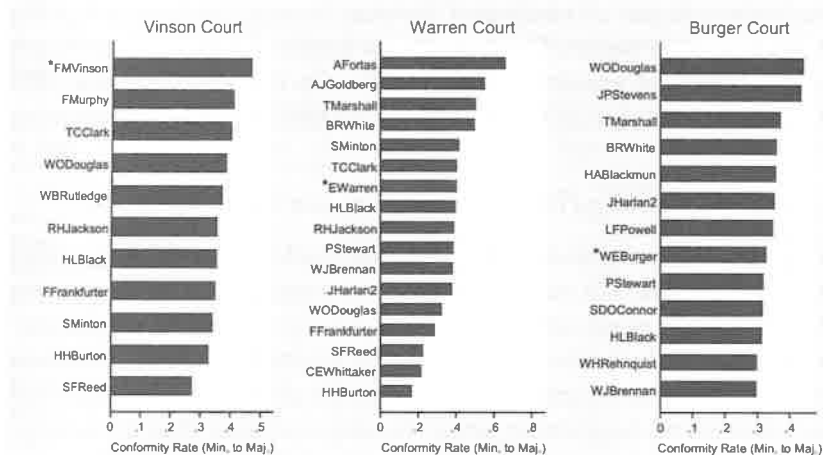


Fig. 10.2A. Majority author conformity rates (Hypothesis 1b)

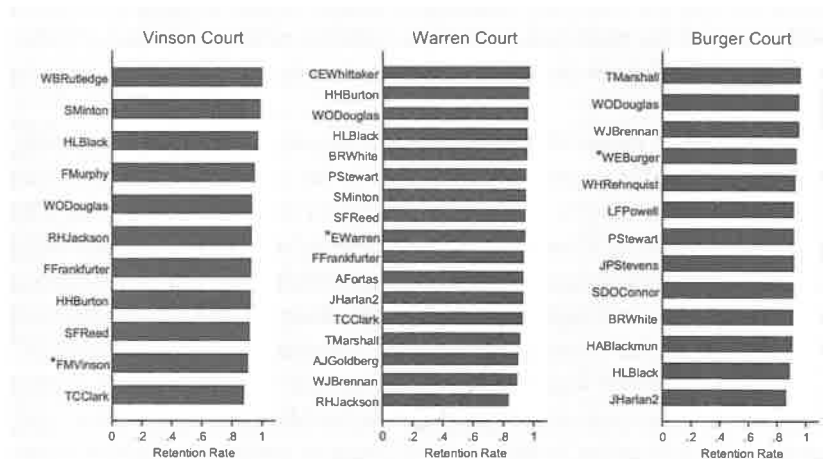


Fig. 10.2B. Majority author retention rates (Hypothesis 1b)

percent, however, which is quite high. One place to look for insight to this seeming paradox is the average size of the conference majority coalition for each justice as majority author. Vinson presided over the lowest average conference majority size—at 5.6—as majority opinion author compared to his colleagues (Rutledge presided over the highest, at 6.6). One explanation, then, is that Vinson was prone to assigning the majority opinion to

himself in fairly close cases. Perhaps he bargained and accommodated the views of his dissenting colleagues to the benefit of winning them over but at the cost of losing colleagues originally in the majority. Chief Justices Warren and Burger are again toward the middle of the pack with retention rates around 95 percent. In contrast to Vinson, Warren and Burger rank near the top in average conference majority size for opinions they assigned to themselves, which means their capacity for attracting dissenters was lower than Vinson's and their capacity for retaining justices in the majority was higher. Though it is difficult to draw definitive conclusions, these results seem to suggest some semblance of "opinion-assignment effects" occurring in the analysis associated with H1a, but they do not seem to be too drastic. The results suggest that further investigation is needed to probe these dynamics.

Hypothesis 2: The Chief Justice's Rate of Switching from Minority to Majority

While voting fluidity can provide insight into the chief justice's ability to attract or retain justices as majority opinion writer, it can also help demonstrate the chief's personal voting patterns. Figure 10.3a identifies the tendency of Vinson, Warren, and Burger to subsequently join the majority after an initial conference dissent, as compared to other justices on their respective Courts. In all, the three chiefs appeared quite willing to change their initial dissenting vote. When compared to members of his Court, Vinson tops the list. In approximately 52 percent of cases in which he initially dissented, Vinson chose to subsequently switch to the majority. Notably, this rate of voting fluidity exceeds the next three highest justices—Minton, Clark, and Murphy—by several percentage points. And it far exceeds Justice Douglas, who sits at the bottom of the list with a vote change rate of just 25 percent.

Although Chief Justices Warren and Burger are not the most likely to change their votes when compared to their colleagues, they demonstrate respectable rates near the top of the lists. Warren changed his vote to majority in approximately 45 percent of cases in which he initially voted in the minority. Only four justices on his Court yield higher rates: Goldberg (53 percent), Fortas (49 percent), Minton (48 percent), and Clark (47 percent). Meanwhile, Burger switched to the majority in approximately 39 percent of cases, a rate edged out by only Powell (44 percent), White (41 percent) and Stewart (40 percent). Both chiefs were considerably more likely to change votes when compared their lowest-ranking colleagues, who conceded to the majority in less than 30 percent of cases.

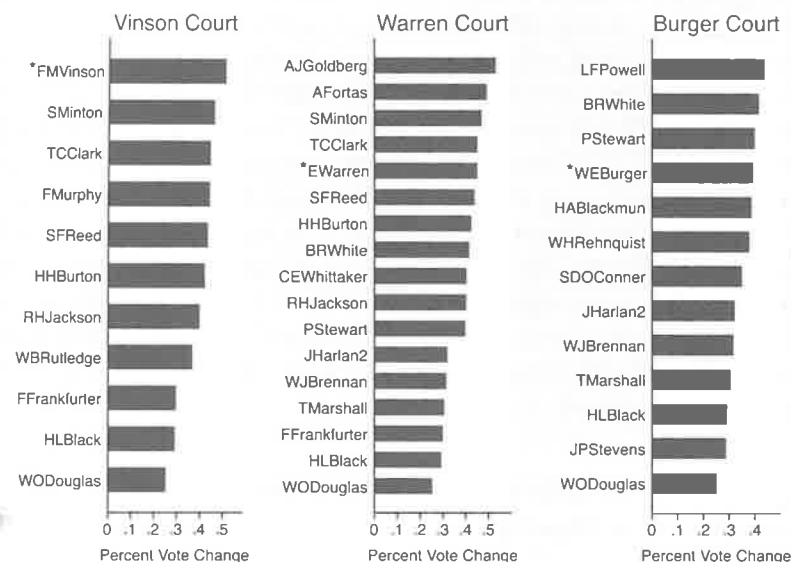


Fig. 10.3A. Justices' rates of switching from minority to majority, all cases (Hypothesis 2)

To account for the impact of case salience, Figure 10.3b ranks the justices for the three Courts based on a smaller subsample of salient decisions. Although the chiefs are slightly less willing to change votes in salient cases—perhaps due to hardened policy preferences—the results do not vary much overall. Vinson changed from the minority to the majority in 42 percent of such cases, while Warren and Burger changed votes in approximately 39 percent of such cases. Vinson moves from first to third place behind Murphy and Minton but still retains a position near the top. Warren retains his position and Burger actually moves up a notch from fourth to third place. Thus, despite the strong policy positions that often accompany salient cases, the chiefs remained willing to rethink their initial dissents, and at a rate higher than the vast majority of their colleagues.

Hypothesis 3: Citing Authoritative Precedent

As we argued, for institutional maintenance purposes the chief justice may be more attuned to citing authoritative precedent as majority author than his associate justice colleagues will. We use the “hub” score,⁵⁴ where higher

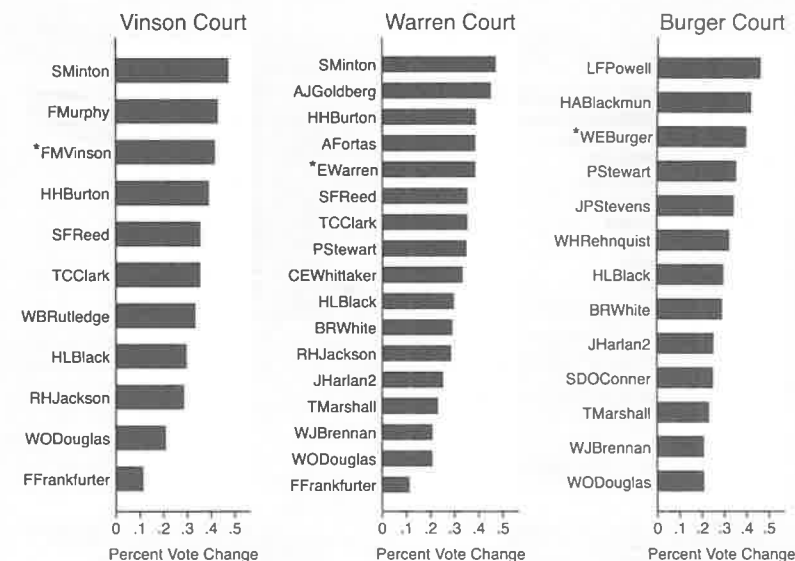


Fig. 10.3B. Justices' rates of switching from minority to majority, salient cases (Hypothesis 2)

values reflect that the majority opinion cites more “authoritative” precedent. Since this measure only goes to 2002, we exclude all years after 2002, which eliminates the Roberts Court. Since this measure is skewed and contains some extreme values toward the high end of the distribution, we report the median hub score for each majority author in each of the four chief justice time periods.

The results from figure 10.4 suggest that all the chief justices rank near the top in citing authoritative precedent when they are the majority opinion author, though they do not clearly stand out in this regard from their associate justice colleagues. Thus there is not strong support for Hypothesis 3 in this regard. Note also that while Chief Justice Rehnquist did not rank toward the top in securing a substantial margin of victory or unanimity rate, he is toward the top in terms of citing authoritative precedent, though he was also toward the top when he was associate justice during the Burger Court. Thus this may not be a “chief effect” per se for Rehnquist.

More interesting for purposes of this analysis is whether chief justices, being focused on institutional maintenance and legitimacy, are especially attuned to citing more authoritative precedent in salient cases versus non-

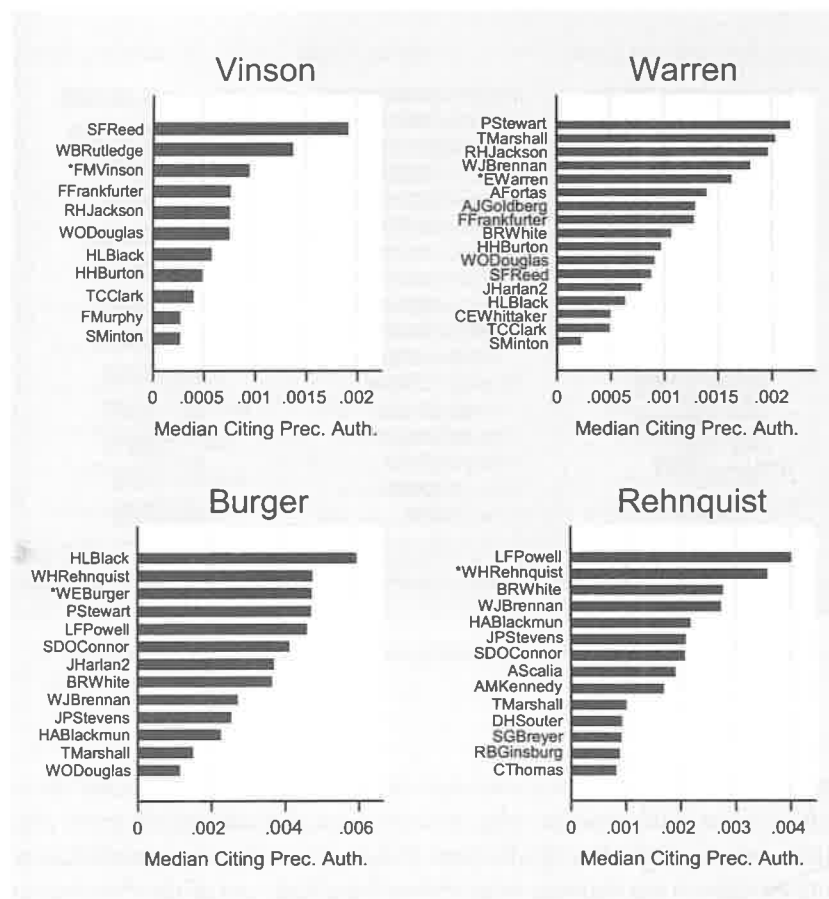


Fig. 10.4. Median citing precedent authority among majority opinion authors (Hypothesis 3)

salient cases. In salient cases, the chief justice may want to present the very strongest legal arguments in order to justify the outcome to outside audiences. Figure 10.5 presents results from this analysis. Again, median hub scores measuring authoritativeness of precedent being cited are presented for each majority opinion author, for both salient and nonsalient cases. The results are fairly clear that the four chief justices analyzed here do appear to cite more authoritative precedent in salient cases compared to nonsalient ones. But so do nearly all of the associate justices. If there is an institutional maintenance motivation underlying the chiefs' behavior, the data would

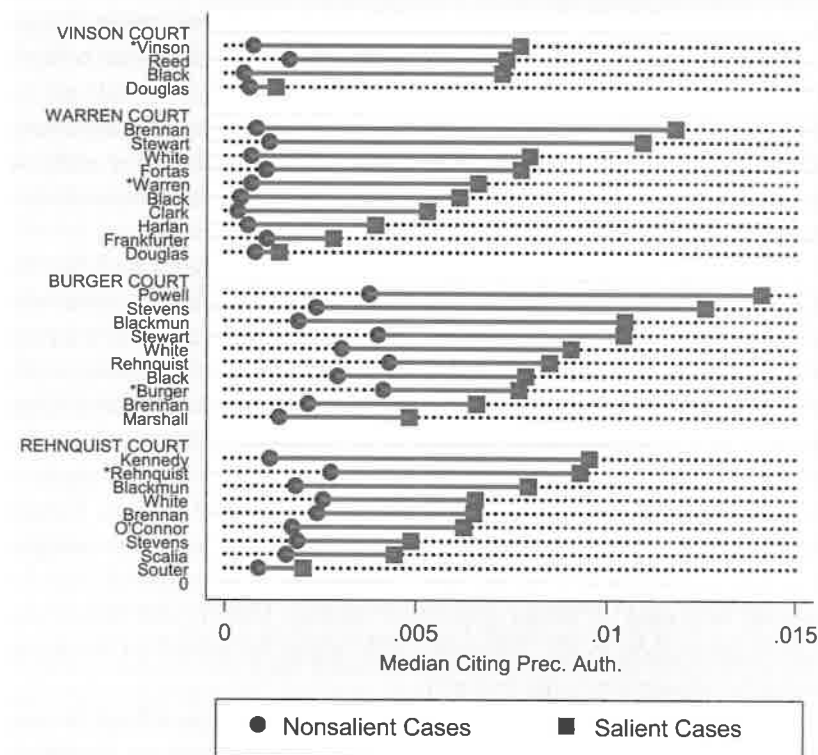


Fig. 10.5. Median citing precedent authority among majority opinion authors in salient and nonsalient decisions (Hypothesis 3)

suggest that the same motivation underlies many of the associate justices' behavior as well.

Conclusion

In theory, we may expect the chief justice to engage in behavior more reflective of institutional maintenance and legitimacy concerns to a greater extent than his colleagues. Whether the chief exhibits genuine leadership—aside from the more formal powers, like opinion assignment—or is merely “first among equals,” essentially acting the same way as his associate colleagues, is a key question surrounding the leadership capacity of the chief justice. We

have focused on three aspects of this issue: (1) whether the chief justice, as majority author, is more successful than his colleagues in maintaining larger vote margins and higher unanimity rates; (2) whether the chief is more likely than associates to change his vote in accordance with majority will; and (3) whether the chief justice is more attuned to maintenance and legitimacy concerns vis-à-vis the citing of more authoritative precedent. For each, we investigated whether the chief is more sensitive to institutional maintenance and legitimacy concerns in salient versus nonsalient cases.

Admittedly, the hypotheses explored in this chapter set a high bar for discovering chief justice behavior indicative of devotion to institutional maintenance and legitimacy. Our research looks beyond the chief's formal powers (e.g. opinion assignment) and assesses whether chiefs are especially mindful of institutional concerns even when they may presumably share the same power and incentives as their fellow associates. Despite this stringent test, we find some evidence of chief leadership and special sensitivity to institutional concerns, at least among certain chief justices. Vinson, Warren, and Burger were ranked toward the top with respect to margins of victory as opinion writers and their willingness to subsequently join the majority following an initial conference dissent. Vinson also ranked the highest (in relation to the colleagues with whom he served) in attracting conference dissenters to the majority.

The evidence, however, is not consistent over time. Chief Justices Rehnquist and Roberts are toward the bottom of the pack on margin of victory, though, as we discussed, this could result from the increasing polarization on the Court. The findings corroborate prior studies showing that average margin of victory and unanimity rates are lower in salient cases than in nonsalient ones. This suggests a dilemma facing the chief: While the chief likes to write opinions in salient cases (chiefs exhibit the highest, or among the highest, rates of majority opinion writing in salient cases), the chief may be unlikely to implement institutional maintenance and legitimacy goals in these decisions due to greater ideological rigidity. Thus the chief may implement institutional maintenance goals simply by trying to hold together (instead of expanding) a majority coalition, especially in the contemporary era marked by increasing ideological polarization. Evidence from the voting fluidity analysis for the Warren and Burger eras seem consistent with this argument.

With respect to citation of authoritative precedent, the results again do not suggest clear differences between chiefs and associates. Chiefs tend to cite authoritative precedent more in salient cases compared to nonsalient cases, but so do many associate justices. We are not arguing that the chief

ignores institutional maintenance concerns, just that chiefs do not appear to use precedent citation to satisfy legitimacy concerns at a substantially higher rate than associate justice colleagues.

In many ways, the exploratory nature of our inquiry raises as many questions and avenues for new inquiry as it answers. Arguably, chief justices have exhibited behavior suggestive of a special mindfulness toward institutional maintenance and legitimacy, even in circumstances when they share equal formal power with associates. But this behavior has not remained consistent over time among all chiefs, perhaps due to changing dynamics on the Court that render it difficult for chiefs to influence polarized justices. To delve further into the aspects presented here, we urge scholars to probe questions of how political dynamics on the Court, including justice composition, may impact the chief justice's—and all justices for that matter—behavior and leadership with respect to institutional maintenance and legitimacy.

NOTES

1. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).
2. See, e.g., Forrest Maltzman and Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," *American Journal of Political Science* 40 (1996); Saul Brenner, Timothy Hagle, and Harold J. Spaeth, "Increasing the Size of the Minimum Winning Original Coalitions on the Warren Court," *Polity* 23 (1990).
3. David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in *Courts, Judges, & Politics: An Introduction to the Judicial Process*, 6th ed., ed. Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight (New York: McGraw-Hill, 2006).
4. See, e.g., Drew Noble Lanier, "Acclimation Effects and the Chief Justice: The Influence of Tenure and Role on the Decisional Behavior of the Court's Leader, 1888–2007," *American Politics Research* 39 (2011); Saul Brenner and Timothy M. Hagle, "Opinion Writing and Acclimation Effect," *Political Behavior* 18 (1996).
5. See, e.g., Maltzman and Wahlbeck, "May It Please the Chief?"; Paul J. Wahlbeck, Timothy R. Johnson, and James F. Spriggs II, "Passing and Strategic Voting on the U.S. Supreme Court," *Law and Society Review* 39 (2005).
6. Lanier, "Acclimation Effects."
7. Maltzman and Wahlbeck, "May It Please the Chief?"; Forrest Maltzman, James E. Spriggs II, and Paul Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000); Saul Brenner, Timothy Hagle, and Harold J. Spaeth, "Increasing the Size of the Minimum Winning Original Coalitions on the Warren Court," *Polity* 23 (1990); Sue Davis, "Power on the Court: Chief Justice Rehnquist's Opinion Assignments," *Judicature* 74 (1990); Elliot E. Slotnick, "Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger," *American Journal of Political Science* 23 (1979); David W. Rohde,

"Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court," *Midwest Journal of Political Science* 16 (1972); David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman, 1976); Sidney S. Ulmer, "The Use of Power on the Supreme Court: The Opinion Assignments of Earl Warren, 1953-1960," *Journal of Public Law* 30 (1970); Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

8. Maltzman and Wahlbeck, "May It Please the Chief."

9. See, e.g., Wahlbeck, Johnson, and Spriggs, "Passing and Strategic Voting."

10. Lanier, "Acclimation Effects"; Frank B. Cross and Stefanie Lindquist, "The Decisional Significance of the Chief Justice," *University of Pennsylvania Law Review* 154 (2006); Saul Brenner and Eric S. Heberlig, "In My Opinion . . .": Justices' Opinion Writing in the U.S. Supreme Court, 1946-1997," *Social Science Quarterly* 83 (2002); Drew Noble Lanier and Sandra L. Wood, "Moving Up: Institutional Position, Politics, and the Chief Justice," *The American Review of Politics* 22 (2001); Saul Brenner and Timothy M. Hagle, "Opinion Writing and Acclimation Effect," *Political Behavior* 18 (1996); Sidney S. Ulmer, "Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger," in *Judicial Conflict and Consensus: Behavior Studies of American Appellate Courts*, ed. Sheldon Goldman and Charles M. Lamb (Lexington: University Press of Kentucky, 1986).

11. See, e.g., Lanier, "Acclimation Effects"; Brenner and Hagle, "Opinion Writing."

12. Danelski, "The Influence of the Chief Justice."

13. Sue Davis, "The Supreme Court: Rehnquist's or Reagan's?" *Western Political Quarterly* 44 (1991).

14. Joseph Kobylka, "Leadership on the Supreme Court of the United States: Chief Justice Burger and the Establishment Clause," *Western Political Quarterly* 42 (1989).

15. Cross and Lindquist, "Decisional Significance."

16. Pamela Corley, Amy Steigerwalt, and Artemus Ward, *The Puzzle of Unanimity: Consensus on the United States Supreme Court* (Stanford, CA: Stanford University Press, 2013); Marcus E. Hendershot et al., "Dissensual Decision-Making: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court" (unpublished manuscript, 2011); Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, "The Norm of Consensus on the U.S. Supreme Court," *American Journal of Political Science* 45 (2001); Gregory A. Caldeira and Christopher J. W. Zorn, "Of Time and Consensual Norms in the Supreme Court," *American Journal of Political Science* 42 (1998); Stacie L. Haynie, "Leadership and Consensus on the U.S. Supreme Court," *Journal of Politics* 54 (1992); Thomas G. Walker, Lee Epstein, and William J. Dixon, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," *Journal of Politics* 50 (1988); Stephen C. Halpern and Kenneth N. Vines, "Institutional Disunity, the Judges' Bill and the Role of the Supreme Court," *Western Political Quarterly* 30 (1977).

17. See Hendershot et al., "Dissensual Decision-Making."

18. Walker, Epstein, and Dixon, "On the Mysterious Demise."

19. Haynie, "Leadership and Consensus."

20. Hendershot et al., "Dissensual Decision-Making."

21. Cross and Lindquist, "Decisional Significance."

22. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).

23. Ibid.; Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998).

24. See Wahlbeck, Johnson, and Spriggs, "Passing and Strategic Voting"; Kobylka, "Leadership on the Supreme Court."

25. Brandon L. Bartels, "The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court," *American Political Science Review* 103 (2009); Jack Knight and Lee Epstein, "The Norm of Stare Decisis," *American Journal of Political Science* 40 (1996); Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *Journal of Politics* 66 (2004); Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court*.

26. Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006).

27. Forrest Maltzman and Paul J. Wahlbeck, "A Conditional Model of Opinion Assignment on the Supreme Court," *Political Research Quarterly* 57 (2004).

28. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 2008).

29. James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "Measuring Attitudes Toward the United States Supreme Court," *American Journal of Political Science* 47 (2003).

30. See, e.g., Brandon L. Bartels and Christopher D. Johnston, "On the Ideological Foundation of Supreme Court Legitimacy in the American Public," *American Journal of Political Science* 57 (2013); James L. Gibson, "Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and 'New Style' Judicial Campaigns," *American Political Science Review* 102 (2008); Gibson, Caldeira, and Spence, "Measuring Attitudes"; Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (1992).

31. Gibson, Caldeira, and Spence, "Measuring Attitudes"; See also *Bush v. Gore*, 531 U.S. 98 (2000).

32. See, e.g., Hendershot et al., "Dissensual Decision-Making"; Epstein, Segal, and Spaeth, "Norm of Consensus"; Caldeira and Zorn, "Of Time and Consensual Norms."

33. See, e.g., Lanier, "Acclimation Effects."

34. Maltzman and Wahlbeck, "May It Please the Chief."

35. Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court*; Murphy, *Elements of Judicial Strategy*.

36. See David Danelski and Jeanne Danelski, "Leadership in the Warren Court," *American Court Systems* (1989).

37. Epstein and Knight, *Choices Justices Make*.

38. James L. Gibson, "The Legitimacy of the US Supreme Court in a Polarized Polity," *Journal of Empirical Legal Studies* 4 (2007).

39. Gibson and Caldeira, "Legal Realism."

40. Epstein and Knight, *The Choices Justices Make*.

41. See, e.g., *ibid.*

42. Harold J. Spaeth, Sara C. Benesh, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Theodore J. Ruger, "The Supreme Court Database, Version 2012, Release 01," <http://supremecourtdatabase.org>.

43. James H. Fowler and Sangick Jeon, "The Authority of Supreme Court Precedent," *Social Networks* 30 (2008).

44. Lee Epstein and Jeffrey A. Segal, "Measuring Issue Salience," *American Journal of Political Science* 44 (2000).

45. Harold J. Spaeth, *The Vinson-Warren Supreme Court Judicial Database* (Program for Law and Judicial Politics, Department of Political Science, Michigan State University, 2001).

46. Harold J. Spaeth, *Expanded Burger Court Judicial Database* (S. Sidney Ulmer Project for Research in Law and Judicial Politics, University of Kentucky, 2007).

47. We have explored various control variables and the results we have are largely robust to such controls.

48. To determine statistical significance, we regress the relevant dependent variable (here, margin of victory) on a dummied-out (nominal) operationalization of the justices in a case-level model. We include each associate justice dummy variable (e.g., Rutledge, Murphy, Douglas, etc.) and exclude the chief justice (here Vinson), which serves as the baseline of comparison. Coefficients associated with each justice dummy represent differences in margin of victory between the given justice and the chief justice (since the chief is the baseline category). Note that we do not include any control variables in these models, so these results should be considered exploratory, though still highly instructive. This is essentially akin to a simple difference of means test (*t*-test). For binary dependent variables, like unanimous outcome or one-vote margin, we use logit instead of linear regression.

49. Two other forces may be at play regarding opinion assignment. First, anecdotal evidence exists that chiefs tend to assign newer justices more consensual opinions. Thus it is possible that number of years on the bench or accounting for the "freshman phase" may exhibit some influence vis-à-vis such a phenomenon. Second, equity in opinion assignments may also complicate interpretation of these findings. Slotnick, "Who Speaks for the Court," showed that the "equality principle" did not emerge until the late Vinson era/early Warren era. Both are interesting phenomena that may have an impact on our findings, though a full examination of them is beyond the scope of the present study, which seeks to uncover broad trends in a more descriptive fashion.

50. See, e.g., Brandon L. Bartels, "Choices in Context: How Case-Level Factors Shape the Magnitude of Ideological Voting on the U.S. Supreme Court," *American Politics Research* 39 (2011); Isaac Unah and Ange Hancock, "US Supreme Court Decision Making, Case Salience, and the Attitudinal Model," *Law & Policy* 28 (2006).

51. Performing an in-depth analysis of certain justices' papers would be a promising avenue to pursue.

52. We do not account for instances where the initial dissenting opinion author becomes the majority author, which appears to occur roughly 8 percent of the time. Our results are extremely similar when excluding such instances.

53. See, e.g., Murphy, *Elements of Judicial Strategy*; Epstein and Knight, *The Choices Justices Make*.

54. Fowler and Jeon, "The Authority of Supreme Court Precedent."

11 ~ Herding Scorpions

The Chief Justice as Social Leader

RYAN C. BLACK, RYAN J. OWENS, AND JUSTIN WEDEKING

During John Roberts's testimony before the Senate Judiciary Committee to be Chief Justice of the United States, he stressed to senators that he would seek to enhance collegiality on the Court. "[I]f I am confirmed," he stated, "I think one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court."¹ In speech after speech across the country, he declared the Court should decide cases to achieve broader agreement among the justices.² "[T]he rule of law," he stated, "benefits from a broader agreement."³ His mantra seemed to be consensus and collegiality.⁴

Whether posterity will judge Roberts as a collegial consensus builder, we cannot be sure. What is clear, however, is that students of the Court often base their impressions of chiefs on their ability and eagerness to enhance collegiality on the Court and in their opinions. For example, in his seminal piece on "successful" chief justices, Danelski denoted two kinds of chiefs: those who, during the Court's conferences, are task leaders and those who are social leaders.⁵ Danelski defined a task leader as one who can ensure the smooth functioning of the Court by his knowledge of precedent and past history. More important for our immediate purposes, though, was Danelski's discussion of the chief as social leader. A social leader, he argued, understands personalities, knows how to inspire others and, critically, knows how to ensure that judicial business remains collegial.⁶

To be sure, academics are not alone in imputing importance to collegiality and social leadership. Presidents also consider the chief's ability to build consensus, and they sometimes opt for nominees who carry such genes. For example, social leadership was a primary reason President Tru-