

Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior

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As one of the few studies to examine internal influence among Justices on the United States Supreme Court, this Note seeks to identify the most influential individuals on the Rehnquist Court. Using an empirical analysis of non-majority opinion joining behavior, this Note examines two time periods separately: the entire Rehnquist Court (the 1986 to 2004 Terms) and the time when the membership on the Court was unchanged (the 1994 to 2004 Terms). Finding that the most influential Justices tend to be those who are neither at the ideological middle nor at the extremes, the results indicate that Chief Justice Rehnquist was the most influential conservative Justice, and Justice Souter was the most influential liberal. These results are used as a paradigm for predicting the effect that Chief Justice Roberts and Justice Alito will have on the Court, concluding that Chief Justice Roberts has a key opportunity to be very influential despite his freshman status on the Court.

*"As Justice [Byron] White used to say, when you change one justice, you change the whole Court."*¹ ~Justice Sandra Day O'Connor

I. INTRODUCTION

The year 2005 brought the end of the tenure of William Rehnquist as Chief Justice of the United States Supreme Court and the announcement of Justice Sandra Day O'Connor's retirement. The impact of the Rehnquist Court as a whole and the influence of these individual Justices raises many questions about the future direction of the Supreme Court. Although the long-term influence of the Rehnquist Court's decisions remains to be seen, this Note examines the internal dynamics of influence on the Rehnquist Court—specifically, which Justices exerted the most influence upon their peers during this era.

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¹ JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 334 (2005).

Observers of the Supreme Court consistently characterize Rehnquist and O'Connor as occupying pivotal roles,² and most are in agreement that their recent departures will significantly change the dynamics among the group of Justices.³ The addition of a new Chief Justice, John G. Roberts, and Samuel Alito as the replacement for Justice O'Connor, will have a significant impact on the nine Justices' interactions, and perhaps their decision making.⁴

In order to present an informed analysis of the effect Chief Justice Roberts and Justice Alito may have upon the current Justices, it is useful to understand how the Rehnquist Court's members interacted with one another, specifically the internal dynamics that describe the most and least influential Justices. Significantly, this Note is one of the few attempts to measure internal influence among jurists, and is among the early literature in legal academia to study the role of ideology in judicial decision making.⁵

If Justice O'Connor or Chief Justice Rehnquist exerted the significant impact on their colleagues that some commentators and observers believe, their departures will leave an important opportunity for new Justices or those already on the Court to play a similarly pivotal role on the Roberts Court. Realizing who among the Justices are the most influential provides a useful paradigm for predicting who on the Roberts Court will guide the Supreme Court's direction in the next several decades.

Much speculation exists throughout academia and the press as to which Justices were the most influential on the Rehnquist Court. Chief Justice Rehnquist is among those consistently mentioned. As Chief Justice, he was

² See *infra* notes 6–18 and accompanying text.

³ Linda Greenhouse, *New Justice on Court Is More than Just One Vote*, N.Y. TIMES, Sept. 4, 2005, at A22 (gathering several Justices' and judges' remarks in the past regarding new members, including Justice Harry A. Blackmun, who stated: "You get a new person, and the dynamics change."); *id.* ("Imagine the same nine people sitting around together day after day for 11 years . . . Just bringing in a new person into that dynamic is bound to have a dramatic impact." (quoting an interview with Lee Epstein, a political scientist at Washington University in St. Louis)).

⁴ *Id.* ("[W]hen a new member comes into a group, old members have established roles, and no one knows exactly where the newcomer will fit in.") (quoting an interview with Gerald L. Wilson, professor of communication at the University of South Alabama).

⁵ See David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 373 (1999) ("[T]o our knowledge, there have been only two attempts to measure systematically judicial influence among judges of equal formal authority."); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 747–53 (2005) (summarizing the very recent emergence of empirical research in legal academia on judicial decision making and ideology). This Note hopes to add to this small, but highly valuable, body of literature and its understanding of judicial behavior.

remembered after his death in fall 2005 as the Justice who “helped lead a conservative revolution on the Supreme Court.”⁶ Rehnquist’s leadership style was described as efficient, “straightforward and unadorned,”⁷ and his peers and law clerks often expressed their admiration for his leadership and effective administration of the Court.⁸

While Rehnquist was often cast among the conservatives on the Court,⁹ he was seen as “more pragmatic and politically savvy”¹⁰ than fellow conservatives Scalia and Thomas. This led many to view him as both an influential and effective leader during his thirty-three years on the Court and nineteen Terms as Chief Justice.¹¹ Notably, many state his legacy as Chief Justice is shown in the Court’s reorientation to the right, stated by some as “a personal war of sorts” against the liberal decisions under Chief Justice Earl Warren.¹²

However, Rehnquist’s efforts at moving the Court to the right were often thwarted by another Justice deemed to play a significant, if not *the* key role on the Court in the Rehnquist era: Justice Sandra Day O’Connor.¹³ Justice O’Connor, whose tenure on the Court ended with her retirement in 2006, was

⁶ Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A16.

⁷ Linda Greenhouse, *Court Nominee Well Schooled in Job’s Pitfalls*, N.Y. TIMES, Sept. 6, 2005, at A1.

⁸ See, e.g., Linda Greenhouse, *News Was Surprising to Colleagues on Court*, N.Y. TIMES, Sept. 5, 2005, at A19 (“[Rehnquist was] the fairest, most efficient boss I have ever had.” (quoting Justice Ruth Bader Ginsburg)); David G. Savage, *A “Life Well-Lived” is Remembered*, L.A. TIMES, Sept. 8, 2005, at A9 (noting Rehnquist’s leadership style was described by Justice Sandra Day O’Connor as “gentle persuasion”); David G. Savage, *Former Rehnquist Clerks Recall His Wit, Warmth*, L.A. TIMES, Sept. 7, 2005, at A13 (“He was wonderful to work for. He put everyone at ease.” (quoting Maureen Mahoney, a former Rehnquist law clerk)).

⁹ See Linda Greenhouse, *Court’s Term a Turn Back to the Center*, N.Y. TIMES, July 4, 2005, at A1.

¹⁰ Editorial, *The Rehnquist Era*, WASH. POST, Sept. 5, 2005, at A30 (“Chief Justice Rehnquist often chose statesmanship over ideology.”); Charles Lane, *The Rehnquist Legacy: 33 Years Turning Back the Court; Chief Justice Came to Realize Limits on His Power to Fight Liberal Drift*, WASH. POST, Sept. 5, 2005, at A8 (“[As Chief Justice, h]e grew into a very savvy operator.” (quoting Dennis J. Hutchinson, Professor of Law and History at the University of Chicago)).

¹¹ See Lane, *supra* note 10, at A8; Savage, *Life Well-Lived*, *supra* note 8, at A9.

¹² See Lane, *supra* note 10, at A8 (providing an account of a 1975 speech given by Rehnquist, where he characterized Chief Justice Warren and Justice Hugo Black as “left-wing philosophers”).

¹³ *Id.* (“[Chief Justice Rehnquist’s] impact was blunted by his inability to win over the court’s vital center, as represented by fellow Republican appointees O’Connor and Anthony M. Kennedy.”).

frequently cited as the “swing vote” and most influential Justice on the Rehnquist Court.¹⁴

Her position in the ideological middle of the Rehnquist Court and her role in casting the crucial fifth vote in many highly public decisions,¹⁵ led observers of the Court to comment that her retirement was “momentous, not because of her sex, but because of her influence.”¹⁶ As a Justice on the Court, O’Connor was considered to be hard-working and energetic, but recent accounts have also noted her role in strategic formation of majority coalitions for key decisions, a role frequently attributed to Justice William Brennan.¹⁷ Observers of the Court were in general agreement at her retirement that Justice O’Connor was influential in both her centrist position on the Court as well as in her interactions with her colleagues on the bench.

This fact was also acknowledged by her peers on the Court. In response to her retirement, Justice Scalia observed: “The statistics show that during her tenure she shaped the jurisprudence of this Court more than any other

¹⁴ Linda Greenhouse, *Consistently, a Pivotal Role*, N.Y. TIMES, July 2, 2005, at A1 (using “the O’Connor Court” to describe the recent Supreme Court).

¹⁵ See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (upholding an affirmative action admission policy for the University of Michigan School of Law and authoring the majority opinion); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 223–24 (2003) (generally upholding the campaign finance provisions of the McCain-Feingold Act); *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (striking down Nebraska’s partial birth abortion ban); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding unconstitutional the Gun Free Schools Act as beyond Congress’s power under the Commerce Clause). *But see* *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (upholding Congress’s regulation of marijuana under the Controlled Substances Act notwithstanding California’s own regulation of marijuana for medicinal purposes); *Kelo v. City of New London*, 125 S. Ct. 2655, 2668–69 (2005) (holding economic development by government use of eminent domain is permitted as “public use” under the Fifth Amendment).

In *Kelo* and *Raich*, O’Connor did not vote with the majority. Many observers hypothesize that these decisions, as well as others of the 2004 Term, indicate that perhaps O’Connor’s influence as a swing vote may have been waning in her last Term on the Court. See Linda Greenhouse, *Court’s Term a Turn Back to the Center*, N.Y. TIMES, July 4, 2005, at A1; see also *infra* Part V.B.3 for a discussion of which Justice may replace O’Connor’s pivotal position in the center.

¹⁶ Jan Crawford Greenburg, *From Early On, Grit Ingrained in O’Connor*, CHI. TRIB., July 3, 2005, § 1, at 20.

¹⁷ BISKUPIC, *supra* note 1, at 159 (stating that even in her early Terms on the Court, O’Connor became “more skilled at maneuvering among her male colleagues, most of them a generation older and considerably more experienced”); *id.* at 237 (providing the example of *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), as evidence of the “declining influence of Brennan and the ascension of O’Connor”).

Associate Justice.”¹⁸ To be sure, Justice O’Connor’s legacy on the Court will consistently be marked with her impact as a moderate jurist; however, as this Note explores, serving as the “swing vote” is not the only manner in which a Justice can exert influence.

This Note first provides an overview of judicial decision making theories and influence among jurists in Part II. These theories, which inform modern analysis of judicial decision making, include the legal model, attitudinal model, and the strategic model. Next follows a review of the research measuring how judges and Justices influence one another—specifically citation counts and non-majority opinion joining behavior.

In Part III, the methodology of this study, which adopts its methods from earlier opinion joining studies of the Warren and Burger Courts, are set forth. Using the decisions of Justices to join dissenting or concurring opinions of their peers, this Note measures influence between Justices in two time periods: the entire span of the Rehnquist Court (1986–2004 Terms) and the eleven consecutive Terms of unchanged membership on the Court (1994–2004 Terms). For both time periods, the data presented in Part IV shows that Justices are most likely to exert influence and to be influenced by those Justices who have similar policy views; that is, conservative Justices are more likely to influence their conservative colleagues. Furthermore, the most influential Justices overall tend to be those who are neither on an ideological extreme nor at the center.

Part V provides a discussion of the Justices who, based on this measure of influence, were the most influential on the Rehnquist Court. The implications of these results in light of the recent appointments of John G. Roberts and Samuel Alito are also addressed, including the potential short-term and long-term impact of these new Justices, as well as predictions for the changes in dynamics that may arise due to the recent replacement of Rehnquist and O’Connor. Finally, Part VI concludes the analysis with an examination of the impact of this research upon further studies of judicial influence in law and political science and avenues of future related research.

II. BACKGROUND TO JUDICIAL DECISION MAKING AND INFLUENCE

A. *Models of Judicial Decision Making*

In order to explain why judges make the choices they do, legal and political science scholars have developed several models to aid in

¹⁸ Charles Lane, *In the Center, Hers Was the Vote that Counted*, WASH. POST, July 2, 2005, at A8.

understanding judicial decision making.¹⁹ Such models, put simply, are “simplified representation[s] of reality”²⁰ that attempt to “validly and reliably explain and predict”²¹ judicial decision making behavior.

Within the judicial decision making body of scholarship, several models have developed. The most widely debated of these include the legal model and the attitudinal model, discussed in Parts II.A.1 and II.A.2, respectively. A third theory examined in Part II.A.3, the strategic model, has recently emerged as another way of describing judicial behavior.

1. *The Legal Model*

The legal model is considered the “traditional conception of judicial decision-making.”²² Under this theory, an individual Justice arrives at a decision through “systematic application of the external, objective sources of authority that classically comprise the law.”²³ Generally, the jurist’s reasoning for her decision is found within her legal analysis and the authority she cites in her opinion.

The legal model assumes that judges are non-political actors following a formal decision making process. This process involves three steps: finding similarity between cases (*i.e.*, finding an applicable precedent), stating the rule of law found in the precedent, and applying that rule of law to the facts at hand.²⁴ The application of facts using acceptable “legal tools” (e.g., statutory text, the Constitution, and applicable precedents) is central to the legal model.²⁵ If there are strong similarities between the facts of a case

¹⁹ See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* xi–xiv (2000); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 45–114 (2002).

²⁰ SEGAL & SPAETH, *supra* note 19, at 45.

²¹ *Id.* at 46.

²² Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 31 (2001).

²³ Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1462 (2003); see also Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1642 (1998) (“Under this familiar view of judicial decisionmaking, the judge reviews the case before her and draws inevitable conclusions based on its commonalities with earlier cases.”).

²⁴ Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992).

²⁵ Cross, *supra* note 23, at 1462; see also Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth, and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004, 1005 (“Precedent is the linchpin of the legal model . . . [I]f a justice does not practice reliance on the holdings of the Court’s past decisions . . . there is little reason to believe that the justice believes in making decisions because of the law.”). This reliance on precedent relates directly to the normative appeal of the legal model. See *infra* note 30 and accompanying text.

before the Court and an earlier case, that precedent is controlling and will guide the decision in the current case.²⁶

What is conspicuously missing in this theory's description is any reference to the judge's ideological or personal views. Inherent in the legal model is the idea, as stated by Justice Felix Frankfurter, that "[o]ur judicial system is absolutely dependent upon a popular belief that is as untainted in its workings as the finite limitations of disciplined human minds and feelings make possible."²⁷ Therefore, under the legal model, a judge's personal ideology does not factor whatsoever into the decisions he makes.

The legal theory of decision making finds its strongest support among the community of legal scholars.²⁸ A significant part of this support is attributable to the methods of legal analysis that lawyers and judges are taught in law school.²⁹ However, the primary appeal of the legal model is related to its nature as a normative explanation of how judges should make decisions: the primary duty of judges is to accord their decisions with the law and applicable precedents.³⁰ For them to do otherwise brings the legitimacy of the judiciary into question.³¹ Therefore, "[i]f the members of the

²⁶ Cross, *supra* note 23, at 1463; George, *supra* note 23, at 1642.

²⁷ George, *supra* note 23, at 1643 (quoting FELIX FRANKFURTER, FELIX FRANKFURTER ON THE SUPREME COURT 78 (Philip Kurland ed., 1970)).

²⁸ See, e.g., SEGAL & SPAETH, *supra* note 19, at 50–53 (summarizing briefly the works in legal academia in support of the legal model); Frank B. Cross, *Political Science and the New Legal Realism*, 92 NW. U. L. REV. 251, 261 (1997) (“[A] basic formalism pervades legal writing and is difficult to escape. Without formalism, there is relatively little need for lawyers and, hence, professors of law.”). Some academics outside the legal community have also voiced some support for the legal model. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 37 (1977) (arguing the importance of the law as a system of rules); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL* 8–15 (1999) (reviewing literature outside legal academia in supporting key aspects of the legal model).

²⁹ Gerald N. Rosenberg, *Across the Great Divide (Between Law and Political Science)*, 3 GREEN BAG 2D 267, 268 (2000) (“Legal education trains lawyers to do [doctrinal and interpretive analysis consistent with the legal model], it is a predominant form of legal discourse, and legal academics have a level of expertise in doing it that is seldom, if ever, matched by those who lack legal training.”).

³⁰ Cross, *supra* note 23, at 1463; see also Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 211 (2000) (“[N]o study, however formulated, can undermine the persistent normative appeal for the legal model of judging.”).

³¹ Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1022 (1996) (“If the members of the community believe that the legitimate judicial function involves the following of precedent, then they will reject as normatively illegitimate the decisions of any court that regularly and systematically violate precedent.”). But see SEGAL & SPAETH, *supra* note 19, at 53 (“[T]he legal model and its components serve only to rationalize the [United States Supreme] Court’s decisions and to cloak the reality of the decision making process.”).

community believe that the legitimate judicial function involves the following of precedent, then they will be rejected as normatively illegitimate the decisions of any court that regularly and systematically violate precedent.”³²

Despite this normative strength, the most prominent criticism of the legal theory is its lack of empirical support, especially as compared to the attitudinal model.³³ Several studies by scholars in political science and law have attempted to empirically test the legal model through judges’ adherence to precedent.³⁴ Many of these studies have found that courts have not adhered to precedent at the level expected by the legal model, leaving factors other than precedent (e.g., attitudes and/or strategic behavior) to explain jurists’ decisions.³⁵ In discussing the falsifiability³⁶ of the legal model, some scholars concede that “the reasons [judges] present[] for decisions are not falsified but perform an authentically disciplining function that constrains judges’ decision making.”³⁷ Certainly, the lack of empirical support for the legal model lends support to other models of decision making, but it does not readily eliminate the legal model as useful in understanding jurists’ behavior.

2. *The Attitudinal Model*

According to the attitudinal model, Justices make decisions “by considering the facts of the case in light of their ideological attitudes and

³² Knight & Epstein, *supra* note 31, at 1022; see also Brisbin, *supra* note 25, at 1005; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 406 (1989).

³³ See *infra* note 49 and accompanying text; SEGAL & SPAETH, *supra* note 19, at 66; Cross, *supra* note 23, at 1467.

³⁴ Cross, *supra* note 23, at 1467–68.

³⁵ See, e.g., SPAETH & SEGAL, *supra* note 28, at 163–286 (analyzing application of precedents controlled for area of law for the Warren, Burger, and Rehnquist Courts); Knight & Epstein, *supra* note 31, at 1023–32 (examining the influence of precedent during pre-vote and conference discussion of thirteen cases decided by the Burger Court). *But see* Cross, *supra* note 23, at 1500–04 (finding support for the legal model’s reliance on precedent from Court of Appeals’ deference to findings of fact by lower courts); Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 207, 218 (1999) (finding support for the legal model in courts’ deference to administrative agencies); cf. Mark S. Hurwitz & Joseph V. Stefko, *Acclimation and Attitudes: “Newcomer” Justices and Precedent Conformance on the Supreme Court*, 57 POL. RES. Q. 121, 127 (2004) (concluding newer Justices tend to follow precedent more often than their more experienced colleagues).

³⁶ A theory is falsifiable when it is “capable of being proved false.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 820 (3d ed. 2002).

³⁷ Cross, *supra* note 28, at 262. See also *supra* notes 30–32 and accompanying text (discussing the normative appeal of the legal model).

values.”³⁸ Such attitudes consist of an “interrelated set of beliefs about an object or situation”³⁹ where, in the context of judicial decision making, “objects” are parties to the suit before the Justices and the “situation” is the legal issue they face.⁴⁰

The attitudinal model views judges as independent, atomistic actors.⁴¹ Thus, any analysis under the attitudinal model is characterized by micro-level investigation of the relationship between jurists’ policy preferences and their decision making behavior, assuming they are “atomistic maximizer[s] of policy preferences.”⁴² However, attitudinalists maintain that this independence largely exists at certain stages of the decision making process, specifically when Justices submit their votes on the merits of cases.⁴³

Using Justices’ voting behavior, the attitudinal model assumes that a particular Justice’s ideology can be placed on a continuum, where the most “conservative” Justice would be at one extreme while the most “liberal” Justice is at the other.⁴⁴ Looking at individual Justices’ voting behavior over time, the Justice who accumulates the most conservative votes will be placed at one end of the continuum, while the Justice with the most liberal votes will be placed at the other extreme—thus, the measure of Justices as “conservative” or “liberal,” at least when considering voting behavior, is largely a relative measure.⁴⁵ Such a continuum can be formulated for all

³⁸ SEGAL & SPAETH, *supra* note 19, at 110; *see also* Harold J. Spaeth, *The Attitudinal Model*, in CONTEMPLATING COURTS 296 (Lee Epstein ed., 1995).

³⁹ SEGAL & SPAETH, *supra* note 19, at 91 (quoting HAROLD J. SPAETH, AN INTRODUCTION TO SUPREME COURT DECISION MAKING: REVISED EDITION 65 (1972)).

⁴⁰ *Id.*

⁴¹ George, *supra* note 23, at 1642.

⁴² *Id.* at 1646.

⁴³ This allows Justices to influence one another at other stages of their decision making, such as deciding whether to join or write a non-majority opinion. Thus, there may be some situations where Justices are not solely guided by their ideology in this area, although proponents of the attitudinal model would likely maintain that ideology is the most explanatory variable of behavior at other stages of the decision making process.

⁴⁴ SEGAL & SPAETH, *supra* note 19, at 89–91; Spaeth, *supra* note 38, at 306–07, 311–12; *see also* Cross, *supra* note 23, at 1471. The political party of the appointing President is also a useful starting point for determining a Justice’s ideology. George, *supra* note 23, at 1651–52 (“[O]n average, judges reflect the ideological position of the President who appoints them.”). *See, e.g.*, Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496–97 (1975) (using the political party of the appointing president to explain the votes of Court of Appeals judges).

⁴⁵ *See* SEGAL & SPAETH, *supra* note 19, at 320–22; *see also infra* Part IV.A, Tables 1 and 2 (voting behavior continuums for the Rehnquist Court).

cases a particular group of Justices face, or may be categorized by a particular subject area of the law.⁴⁶

Of course, such a spectrum based on voting behavior assumes that a vote in favor of one party may be labeled conservative, while a vote for the other party is liberal. For example, in criminal law and procedure, a vote in favor of the government is considered conservative and a vote in favor of the criminal defendant is considered liberal. In contrast, in cases with issues of federalism or federal taxation, a pro-federal government vote is considered liberal.⁴⁷

The attitudinal model presents a striking contrast to the legal model, because it assumes that Justices' ideologies guide their decision making rather than the traditional understanding that they consider the facts of the case in light of precedent and other controlling authorities, where ideology does not play a role and judges are impartial, apolitical actors.⁴⁸ Also, in contrast to the legal model is the empirical strength of the attitudinal model—several researchers have found a correlation between the perceived ideology of Justices and their decision making behavior.⁴⁹

The study that follows largely assumes that Justices' ideologies can be placed on such a continuum, and the discussion throughout uses the terms "liberal" and "conservative" to describe the Justices' behavior and ideology.⁵⁰ Although the attitudinal model is not without its critics,⁵¹ the

⁴⁶ See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1738–48 (1997) (surveying ideology as a factor in environmental regulation cases over time periods in the 1970s and 1980s); Goldman, *supra* note 44, at 496–97 (using the political party of the appointing president to explain the votes of appeals judges in several areas including criminal procedure, civil liberties, and labor); Spaeth, *supra* note 38, at 311 (using voting behavior in affirmative action cases to form a continuum for the Rehnquist Court).

⁴⁷ LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 489, note to Table 6-2 (3d ed. 2003). However, this labeling is not intuitive for some issues that come before the Court. See LAWRENCE BAUM, *THE SUPREME COURT* 146–47 (8th ed. 2004) (discussing some areas of law that "do not have obvious liberal and conservative sides").

⁴⁸ See *supra* note 27 and accompanying text. Recall that the impartiality and apolitical nature of the judiciary is the normative view of the proper role of jurists, especially in the federal system where judges and Justices are not elected and serve lifetime appointments. See U.S. CONST. art. II, § 2; art. III, § 1.

⁴⁹ See, e.g., SEGAL & SPAETH, *supra* note 19, at 323. This study determined the ideologies of the Justices using a measure (called a "Segal-Cover Score") derived from newspaper editorials written from the time of nomination to the Supreme Court until confirmation. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989) (first introducing this concept). See *infra* Part V.B.2 for a more detailed description of Segal-Cover Scores.

⁵⁰ See George, *supra* note 23, at 1641 n.10 (observing there exists a "common sense perception" of the behavior of labeling Justices as "liberal" and "conservative" by social

purpose of this Note is not to criticize or defend the attitudinal model or any other model of decision making, but rather to present an analysis of opinion joining behavior assuming the empirical validity of the attitudinal model.

3. *Strategic (Rational Choice) Model*

While the attitudinal model considers the individual Justice in isolation, the strategic theory of judicial decision making focuses on the Justices' interactions with one another in a larger institutional process.⁵² This theory acknowledges "justices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes."⁵³ Therefore, "justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."⁵⁴

There are three components to the strategic model: (1) the goals of the Justices, (2) their strategic interaction with one another, and (3) the institutions involved in their decision making environment.⁵⁵ A key goal of the Justices is to "see the law reflect their preferred policy positions,"⁵⁶ and

commentators and observers of the Court). This observation is consistent with the assumption underlying much of the analysis later in this Note—that Justices can for the most part be labeled as conservative or liberal based on their decision making behavior. See *infra* Part IV.A.

⁵¹ See, e.g., Cross, *supra* note 28, at 309 ("[T]he political science empirical evidence [used to support the attitudinal model] has limited explanatory power, and is not sufficient to support a thick rational concept of the attitudinal model's claim to explain all judicial results."). But see Sisk & Heise, *supra* note 5, at 747–53 (summarizing the very recent emergence of empirical research in legal academia on judicial ideology).

Generally, legal academics have largely discredited or ignored the attitudinal body of scholarship, while political science scholars are in "widespread agreement" as to the attitudinal model's contribution to understanding judicial behavior. George, *supra* note 23, at 1654 n.65. As a result of this disagreement, a debate exists between the legal and political science communities regarding the decision making theory that best describes judicial behavior. See, e.g., Gerald N. Rosenberg, *Incentives, Reputation, and the Glorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 637, 637 (2000) ("For many political scientists, the legal method is a smokescreen for disguising the policy preferences of judges. For many lawyers and legal academics, this political science 'attitudinal model' misunderstands what judges actually do and politicizes courts.").

⁵² George, *supra* note 23, at 1655.

⁵³ EPSTEIN & KNIGHT, *supra* note 19, at 10; see also George, *supra* note 23, at 1655 (stating the strategic model "acknowledge[s] that justices seek to satisfy policy goals but emphasize the influence, or effects, of strategic factors").

⁵⁴ EPSTEIN & KNIGHT, *supra* note 19, at 10.

⁵⁵ *Id.* at 10–11.

⁵⁶ *Id.* at 11.

choose the course of action that will most likely lead to the achievement of that goal. To attain these goals, Justices will interact strategically; that is, Justices will anticipate and consider their peers' preferences as well as the reactions of other political institutions such as Congress.⁵⁷ Finally, Justices behave within a certain set of institutional standards that guide the decision making, and maximizing those norms contributes to the strategic interaction of Justices.⁵⁸

The strategic model recognizes internal and external influences that can affect a jurist's decisions, even in the face of individual ideology. Both internal and external forces act as a constraint on the attainment of a Justice's sincere policy preferences, and thus each actor must seek his or her policy goals within these internal and external constraints.⁵⁹ Control of internal dynamics relies on the assumption that Justices make collective decisions,⁶⁰ and a "Justice must consider and respond to the preferences and expected actions of her colleagues to attain the outcome closest to her own initial preference."⁶¹ External forces play a role in that a "Justice truly seeking to maximize her sincerely-held preferences would want to consider whether her decision would be overturned by an actor above her in the hierarchy."⁶² Strategic behavior has been used to explain unanimity on the Supreme Court,⁶³ formation of majority coalitions,⁶⁴ as well as particular outcomes in certain important cases in the Court's history.⁶⁵

While the strategic model is not necessarily inconsistent with the attitudinal model, important differences exist between the two theories. A

⁵⁷ *Id.* at 12-13.

⁵⁸ *Id.* at 17. For example, in order for an opinion to have the force of law, a majority of the Justices must join it. Thus, crafting an opinion to obtain majority support necessarily involves some bargaining on the part of Justices. See Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294, 297 (1998) ("A strategic justice who has been assigned the majority opinion will recognize that it is sometimes rational to yield on some issues in order to maintain control of the opinion."). The papers of retired Justices have provided the information needed to investigate this strategic interaction among Justices. *Id.* at 301-02.

⁵⁹ George, *supra* note 23, at 1657-65.

⁶⁰ *Id.* at 1657 n.70 (summarizing sources that express the collective decision making nature of appellate courts).

⁶¹ *Id.* at 1657.

⁶² *Id.* at 1664.

⁶³ Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 407 (1998).

⁶⁴ Wahlbeck et al., *supra* note 58, at 308.

⁶⁵ See EPSTEIN & KNIGHT, *supra* note 19, at 1-9 (providing an account of the decision making process for *Craig v. Boren*, 429 U.S. 190 (1976), as an example of strategic behavior).

Justice will not be guided solely by her individual policy preferences (as the attitudinal model assumes), but instead will be guided by a strategic consideration of her policy preferences, internal dynamics, and external forces.⁶⁶ Under the attitudinal model, a Justice only considers her internal policy beliefs and does not necessarily consider the views or reactions of peers or other political institutions, at least in the initial vote on the merits.⁶⁷ In contrast, institutional dynamics play an important role in strategic decision making, including formation of majority coalitions and the potential reactions of other branches of government, such as Congress.⁶⁸ Also, a Justice behaving strategically in some cases would be willing to forego voting for an outcome that is most consistent with her policy views, if in exchange she avoids what she considers to be the least desirable result.⁶⁹ Under the attitudinal model, a Justice would not choose an outcome inconsistent with her policy preferences, even if doing so would give her strategic advantages in her interactions with her peers.

A key similarity between the attitudinal and strategic models is that both assume Justices want the law and their policy preferences to be consistent, while the legal model assumes Justices will consider only proper authority to arrive at their decisions, such as precedent and statutory text. Another similarity between the strategic and attitudinal models exists in the context of opinion joining behavior, which is relevant to the investigation of internal influence this Note conducts.⁷⁰

B. *Measuring Influence Among Jurists*

In light of the theories of decision making discussed above, certain factors allow for individuals on the bench to both exert influence and be

⁶⁶ George, *supra* note 23, at 1655–56; *see also supra* notes 50–56.

⁶⁷ The attitudinal model does allow for some strategic behavior at the opinion writing stage, however. Wahlbeck, et al., *supra* note 58, at 296 (observing “the majority opinion author ‘is not, however, a free agent who can simply write the opinion to satisfy solely his own preferences’”) (quoting DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 172 (1976)).

⁶⁸ *See* Hensley & Johnson, *supra* note 63, at 395–96 (1998) (“Justices’ actions are based upon their own goals in conjunction with the preferences and expectations of other actors and institutions.”).

⁶⁹ For example, a Justice may support a certain outcome, but not consider it the most preferable result in light of her policy preferences. She may nevertheless vote for the less preferable outcome because doing so will maximize other important goals, including being part of the majority coalition, providing input (or writing) the majority opinion, or assuming a pivotal voting position, such as “swing votes.” Cross, *supra* note 23, at 1488, 1489.

⁷⁰ *See infra* Part III.

influenced by their jurist-peers. While many studies focus upon the influence individual Justices have upon legal doctrine⁷¹ or how personal characteristics of jurists affect decisions,⁷² the survey that follows focuses upon measures of influence that are internal to the judiciary—those ways in which judges and Justices influence one another in their decision making. Part II.B.1 discusses studies of opinion citations among judges, a method popular among legal academics for measuring influence. Part II.B.2 considers opinion joining behavior as a measure of influence, an area traditionally explored in political science literature and directly relevant to the methods of this Note.

1. Citation As Influence

“Legal citology” is the “systematic study of the citation practices of those professors, research assistants, and law review editors who produce articles in journals widely circulated in the legal academy.”⁷³ Citology methods (or “citation counts”) have been applied beyond legal academia, including judges’ citation practices.⁷⁴ Thus, when a judge cites either to her

⁷¹ See, e.g., BISKUPIC, *supra* note 1, at 334 (“[O’Connor] shaped the law with her Western pragmatism, her feel for the American center—and a shrewd but quiet negotiating skill.”); Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. CITY L. REV. 275, 313 (reviewing the impact of Justice Ginsburg’s concurring and dissenting opinions in gender discrimination cases); Christopher E. Smith & Madhavi McCall, *Justice Scalia’s Influence on Criminal Justice*, 34 U. TOL. L. REV. 535, 537 (2003) (finding Scalia influential upon criminal Justice doctrine due to his frequency of casting the determinative fifth vote).

⁷² See, e.g., Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1553–56 (1966) (summarizing the early political science research in this area); Brenda Kruse, Comment, *Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions?*, 36 U. TOL. L. REV. 995, 1005–21 (2005) (providing an analysis of Justice Ginsburg’s and Justice O’Connor’s opinions in Title VII, ADA, and ADEA disputes); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 938 (2005) (arguing Justice Thomas’s decision making is “intrinsicly linked to his identity as a Southern black man”); see generally James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1682–94 (1999) (summarizing research on the “social background” approach to judicial decision making).

⁷³ J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843, 843 (1996).

⁷⁴ The most influential initial study of judicial citation is William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976). This study, while not the first to explore these methods, is considered

own earlier opinions or opinions of her peers, that citation is considered a measure of influence.⁷⁵ For example, when Judge *A* cites an opinion written by Judge *B*, Judge *A* is the object of Judge *B*'s influence. Judge *B*, in turn, has exerted influence upon Judge *A*. Such a citation "reflects either the precedential value of that opinion or its ability to influence the decision of another judge in a subsequent case."⁷⁶ Therefore, the more often a judge's opinions are cited, the more influence she exerts upon her peers.⁷⁷

Citation counts have been utilized to measure influence among judges on the federal courts of appeals⁷⁸ and for the high court of Australia.⁷⁹ However, no study has yet applied citation counting methods among Justices of the current Supreme Court.⁸⁰ While this Note does not conduct a citation count analysis, it is important to recognize this as a future area of research to explore the influence among Supreme Court Justices who sit contemporaneously, as well as the potential influence of past Justices' opinions on the current Court.⁸¹

one of the most important among the early studies in this area. See Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 337 n.12 (1998).

⁷⁵ See William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271 (1998); see also Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J. LEGAL STUD. 223, 225–27 (2001) (describing the rationale for citation counts as a measure of influence); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 29–32 (2004) (utilizing citation counts as one measure in a "tournament" to compare the relative merit of judges on the U.S. Courts of Appeals); Klein & Morrisroe, *supra* note 5, at 374–76 (measuring prestige by citation where the name of the judge is expressly mentioned).

⁷⁶ Landes et al., *supra* note 75, at 271. Citing an opinion because of its precedential value is consistent with the legal model, the foundation of which rests upon judges' consideration of precedent in their decision making. See *supra* notes 24–26 and accompanying text. Citation to an opinion that is non-binding authority, however, reflects its persuasive value. Judges taking into account other factors in their decision making, namely that the cited opinion reflects their policy preferences, may explain why this is a reliable measure of influence, perhaps founded in the strategic or attitudinal models.

⁷⁷ Landes et al., *supra* note 75, at 271.

⁷⁸ See, e.g., Choi & Gulati, *supra* note 75, at 48–61; Klein & Morrisroe, *supra* note 5, at 374–76; Landes et al., *supra* note 75, at 271–76.

⁷⁹ See Bhattacharya & Smyth, *supra* note 75, at 242–51.

⁸⁰ However, a citation count study has been conducted to measure the influence of retired Justices over the entire history of the Supreme Court. See Kosma, *supra* note 74, at 337–42.

⁸¹ Citation count studies are not without their drawbacks, however. Among these include a "trademark" or "superstar" effect of citing a certain judge, citations to opinions

2. Opinion Joining as Influence

Regarding Justices' choices to write or join non-majority opinions, they can be considered "free agents."⁸² That is, with the exception of the majority opinion,⁸³ Justices have free choice in whether to author their own opinion or join one written by another, regardless of whether they vote in the majority or minority.⁸⁴

Furthermore, Justices receive no benefits or tradeoffs from writing their own opinions or joining others'; that is, there is little possibility for exchange of "side payments" regarding joining behavior for dissenting and concurring opinions.⁸⁵ Because Justices are free agents and no coercion, authority, or control is involved in Justices' choices to write or join non-majority opinions, if a Justice is not persuaded by her peer's opinion, she has greater incentive to simply write her own opinion rather than join her colleague's.⁸⁶ In sum, due to this principle of "free agency" and lack of side payments, a Justice will join a non-majority opinion of another when she agrees with the

that are binding instead of persuasive authority within a particular jurisdiction, a failure to distinguish between approving and disapproving citations, differences in length of time on the bench, the increasing role of law clerks instead of judges writing opinions, self-citations, and several other concerns scholars have noted. *See, e.g.*, Landes et al., *supra* note 75, at 272-76 (listing these drawbacks and others).

⁸² SEGAL & SPAETH, *supra* note 19, at 395; Michael F. Altfeld & Harold J. Spaeth, *Measuring Influence on the U.S. Supreme Court*, 24 JURIMETRICS J. 236, 237 (1984); Harold J. Spaeth & Michael F. Altfeld, *Influence Relationships Within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 W. POL. Q. 70, 71 (1985).

⁸³ Traditionally, the Chief Justice (or the most senior Justice if the Chief Justice does not vote with the majority) assigns who within that bloc will author the majority opinion. *See* BAUM, *supra* note 47, at 165. A similar practice exists for the primary dissenting opinion as well. *See id.* at 136.

⁸⁴ Spaeth & Altfeld, *supra* note 82, at 71 ("[N]o justice can be forced to write a special opinion; no justice can be prevented from writing one (even when he is a member of the majority opinion coalition); and no justice can be forced to or prevented from joining in the special opinion of another justice.").

⁸⁵ *Id.* However, it can be argued that one Justice may join the non-majority opinion of another with the expectation that a colleague will reciprocate in the future. But in most cases, the number of Justices who join a non-majority opinion is unlikely to increase the overall influence of the policy statements expressed therein because it is not the controlling opinion of the Court. Furthermore, viewing influence as "an effect, not a motivation," *id.*, future reciprocal behavior of the Justices is unlikely to be considered in the context of whether to join a particular dissent or concurrence in the specific case before the Justices. SEGAL & SPAETH, *supra* note 19, at 395. The results of this study support this assertion. *See infra* note 125 and accompanying text.

⁸⁶ *But see infra* notes 100-101 and accompanying text (discussing the role of the assigning Justice and principal dissenting opinions).

statements of policy therein; if she does not agree with that opinion, she is free to write her own or join another's.⁸⁷

Assuming the principles above are accurate characterizations of the Supreme Court, several studies have attempted to describe influence by examining the non-majority opinion joining behavior of Justices.⁸⁸ Defining influence as “the act of producing an effect on the behavior of another without the use of coercion, authority, or political control,”⁸⁹ these studies found joining concurrences and dissents of colleagues as a strong measure of influence among pairs of Justices.

The principles underlying these studies can be linked to the attitudinal as well as the strategic model of judicial behavior. Because the attitudinal model assumes that Justices, as independent actors, base their votes upon their ideology, the model allows for the influence of other Justices at the opinion coalition stage of decision making.⁹⁰ Also, the strategic model's recognition of internal dynamics, which maintains that Justices take into account the reactions of their colleagues in making their own choices,⁹¹ would be consistent with these studies' overall assertion of influence among Justices in non-majority opinion joining behavior. In this manner, both the attitudinal and strategic models allow for Justices to influence one another at the opinion coalition stage of decision making.

In their study of the first thirteen Terms of the Rehnquist Court, Jeffrey Segal and Harold Spaeth found Justice Scalia to be the most influential among the conservatives on the Court, and Justice Stevens was the most influential liberal.⁹² Segal and Spaeth concluded that these two Justices wielded the most influence on the Court for that time period, although they hold positions at opposite ends of the ideological spectrum. The authors also

⁸⁷ Of course, if a Justice votes with the majority, she has a strong incentive to join the majority opinion. See Spaeth & Altfeld, *supra* note 82, at 71 (“[E]specially when the [majority] coalition is of a minimum winning size . . . [Justices] may withdraw from the coalition, thus precluding formation of a majority opinion.”). A similar incentive does not exist for the “assigned” principal dissenting opinion, because there is no majority coalition to maintain or pronouncement of binding precedent in a dissenting opinion.

⁸⁸ SEGAL & SPAETH, *supra* note 19, at 394–403 (examining the first thirteen Terms of the Rehnquist Court); Altfeld & Spaeth, *supra* note 82, at 244–47 (examining such behavior for the first twelve Terms of the Burger Court); Spaeth & Altfeld, *supra* note 82, at 74–82 (presenting a comparison of the influence relationships on the Warren and Burger Courts).

⁸⁹ Altfeld & Spaeth, *supra* note 82, at 237.

⁹⁰ SEGAL & SPAETH, *supra* note 19, at 383–84.

⁹¹ See *supra* Part II.A.3.

⁹² SEGAL & SPAETH, *supra* note 19, at 403.

found that seniority does not play a role in influence, and influential relationships tend to be prevalent among Justices with similar ideologies.⁹³

These findings were consistent with the attitudinal model, which would predict that influential relationships exist according to ideological lines. However, more needs to be explained—why are certain Justices more influential than others? Beyond the ideology of the Justices, are there strategic considerations that need to be taken into account?

III. METHODOLOGY⁹⁴

Joining behavior for non-majority opinions⁹⁵ is useful in measuring influence between Justices and has yet to be applied to the entire span of the Rehnquist Court.⁹⁶ This Note explores quantitative measures of internal influence on the United States Supreme Court, specifically examining Justices' choices to write and/or join the non-majority opinions of their colleagues. Adopting in part the process used by Segal, Spaeth, and Altfeld,⁹⁷ this Note examines which of the Justices who served on the Rehnquist Court were most influential upon their colleagues.

As discussed, Justices have few incentives to join a concurring or dissenting opinion written by a peer, as compared to the incentives for joining a majority opinion.⁹⁸ Concurrences and dissents in this context can be seen as an opportunity for individual Justices to express their personal views on an issue that will not carry the force of law; as a result, other Justices do not have great incentive to join unless they agree with the views expressed therein. Therefore, if Justices opt to sign on to a concurring or dissenting opinion, it is possible they are persuaded by the position taken in it and, as a result, are influenced by the views of the opinion's author.⁹⁹

⁹³ *Id.* at 402.

⁹⁴ A more detailed explanation of this Note's methodology is found in the Appendix: A Note on Methodology [hereinafter Appendix].

⁹⁵ Bear in mind that when referring to "non-majority opinions," this Note does not include plurality opinions; that is, those situations in which the leading opinion of the Court failed to have a majority of Justices join it.

⁹⁶ As scholars in this area have noted, there have been very few attempts to measure internal influence in either political science or law. *See supra* note 5.

⁹⁷ *See* SEGAL & SPAETH, *supra* note 19, at 399–403; Altfeld & Spaeth, *supra* note 82, at 239–40; Spaeth & Altfeld, *supra* note 82, at 72–73.

⁹⁸ *See supra* note 87.

⁹⁹ Here, as in the studies by Segal, Spaeth, and Altfeld, *see supra* note 82, influence is seen as "an effect, not a motivation." Spaeth & Altfeld, *supra* note 82, at 71. That is, the measure here assumes Justices opt to join an opinion in reaction to the content of the non-majority opinion, rather than as a motivation for future reciprocal behavior. *See supra* note 85.

It is important to note here the types of opinions included in the data and analysis to follow and the reasons why they were included. Because a similar practice of opinion assignment has emerged for dissenting Justices, the Chief Justice (when he votes in dissent) or the most senior Associate Justice will assign the principal dissenting opinion for the minority coalition.¹⁰⁰ Therefore, it is true that disparate influence exists for the assigning Justice in both the majority and minority blocs—that is, “the opinion assigner possesses something like a coercive instrument.”¹⁰¹ And because of this opinion assignment practice, the members of the minority may feel prompted to join the principal dissent in a similar manner to the incentive that exists for joining a majority opinion. However, writing the principal dissent does not require similar accommodation and bargaining as required to keep a majority coalition intact, and if a Justice does not agree with the principal dissent, he may write his own dissent without undermining the minority coalition (as could occur in the case of a majority-voting Justice opting to write a concurrence, depending on its content). For these reasons, the methodology of this study nevertheless includes joining behavior for dissenting opinions, as well as concurrences.

The methods in this study differ from earlier studies in several important respects. First, in examining opinion joining behavior, the only cases included were those when the two Justices’ votes agreed; by definition, a Justice may only join an opinion authored by one with whom her vote agrees.¹⁰² Earlier studies in this area did not control for vote agreement. Second, this study looks at the overall influence of each particular Justice by measuring Justices’ total influence by calculating a ratio of opportunities

¹⁰⁰ BAUM, *supra* note 47, at 136.

¹⁰¹ Spaeth & Altfeld, *supra* note 82, at 71.

¹⁰² That is, a Justice who votes with the majority coalition may not join a dissent (assuming that Justice does not change his vote later). This is notwithstanding the potential for influence among Justices at the stage when they vote on the merits, which in turn may influence opinion coalition behavior and subsequent joining of non-majority opinions. However, assuming the correctness of the attitudinal model, *see supra* Part II.A.2, Justices as atomistic actors will decide their vote on their merits independently, being affected only by their personal ideology. On the other hand, the strategic model, *see supra* Part II.A.3, seems to be in tension with this assertion of an independent vote on the merits, because that theory contends that strategic behavior occurs at each stage of the decision making process. Recognizing this tension, it is also true that Justices are more available to join the opinions of those with whom their votes agree, hence the reason the methods in this Note control for vote agreement although previous studies have not done so.

For a detailed explanation of the methods used to control for vote agreement, see *supra* notes 174–75 and accompanying text.

taken by peers to join non-majority opinions.¹⁰³ Third, the data covers the entire span of the Rehnquist Court, thus allowing for a full analysis of the Justices who had the most overall impact, while examining in detail the eleven Terms of the Court when its membership was unchanged.

Despite the differences from earlier studies of internal influence, the basic methodology for this study is in many respects the same. First, a non-majority opinion is defined as an opinion where “the author specifies a reason for his vote.”¹⁰⁴ Therefore, where a Justice joins a concurrence or dissent of another, without expressing his own views, he is considered a joiner to that opinion.¹⁰⁵ Second, only cases orally argued before the Court were included;¹⁰⁶ for example, opinions that dissented or concurred with the denial of certiorari are excluded. Third, cases are counted by citation and not docket number; therefore, when cases are combined for argument, they are counted as one case rather than by their separate docket numbers.¹⁰⁷ Finally, examining Justices in pairs, their opinion joining behavior was examined for only those cases where their votes are in agreement.

Using the above criteria, data was collected from the Supreme Court Judicial Database.¹⁰⁸ Since influence in the Rehnquist era is examined, only those Terms in which he served as Chief Justice were included: the 1986 through 2004 Terms. Within this time span, two time periods were analyzed separately: 1986 to 2004 and 1994 to 2004. These time periods were chosen separately for some important reasons. First, by looking at the entire span of the Rehnquist Court, it would be possible to get a sense of the dynamics of influence for those Justices who served early in Rehnquist’s tenure as Chief Justice. Second, membership on the Court was stable from the 1994 Term through the 2004 Term. Influence could thus be examined without taking into account personnel changes.

For each Justice on the Rehnquist Court, the total number of non-majority opinions written was calculated. Non-majority opinions include regular concurrences (where a particular Justice agreed with both the outcome and the reasoning of the majority bloc of Justices), non-majority concurrences (where a particular Justice agreed in the result only), and

¹⁰³ This calculation, referred to as Total Ratio 1, is explained more fully at *infra* note 111 and accompanying text.

¹⁰⁴ Spaeth & Altfeld, *supra* note 82, at 72.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 72.

¹⁰⁸ Harold J. Spaeth, The Original United States Supreme Court Judicial Database, available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>. This database provides voting and opinion information for each decision made from the 1953 Term through the current complete Term, and it is a very useful research tool for studying the behavior of Justices on the United States Supreme Court.

dissenting opinions. After obtaining this total for each Justice, Justices were examined in pairs, where only those cases were selected in which the Justices' votes in the pair agreed.¹⁰⁹ Selecting these cases allowed for the total number of opportunities to join an opinion for each in the pair, which served as a denominator of the ratio.

To calculate the numerator of the Relationship Ratio, the total number of opportunities was calculated for each Justice to join the non-majority opinions of the Justices with whom their votes agreed. In other words, the ratio expresses the frequency of how often an "influenced" Justice joined opinions by an authoring peer for every pair of Justices who served together on the Rehnquist Court. This ratio can be expressed as the following:

$$\text{Relationship Ratio} = \frac{\text{Frequency that Justice } B \text{ joined the non-majority opinions of } A}{\text{Total number of non-majority opinions written by } A \text{ when } A \text{ and } B \text{ voted together}}$$

The ratio above can be expressed by the total number of opportunities Justice *B* had to join a non-majority opinion by Justice *A* divided by the actual number of opportunities Justice *B* took advantage of.

After the Relationship Ratios for each pair of Justices were determined, two additional Total Ratios—Total Ratio 1 and Total Ratio 2—were calculated for each Justice-author. Total Ratio 1 (TR1) expresses the total of all opportunities each Justice had to join each Justice-author's opinions divided by all opportunities taken by the Justice's peers. In other words, denominators derived from the Relationship Ratio were totaled and then divided by the total of the Relationship Ratio numerators.

The mean and standard deviation of TR1, expressed as a percentage of opportunities taken, were then calculated. Using this average, influential relationships were defined as those relationships that were at least one standard deviation greater than the mean of TR1.¹¹⁰

A second ratio, Total Ratio 2 (TR2), was calculated as a simple average of the Relationship Ratios for each Justice-author. This differs from TR1 in

¹⁰⁹ For example, Justice *A* and Justice *B* serve together during Term *X*. In Hypothetical Case 1, Justices *A* and *B* both vote in the minority coalition and Justice *A* writes a dissenting opinion. Hypothetical Case 1 presents an opportunity for Justice *B* to join a non-majority opinion of Justice *A*, and this case would be counted in the denominator of the ratio measuring the influence of Justice *A* upon Justice *B*. In contrast, consider Hypothetical Case 2 where Justice *A* votes in the minority and writes a dissent, while Justice *B* votes with the majority. This case would not be counted in the ratio, because it does not present an opportunity for Justice *B* to join Justice *A*'s dissenting opinion.

¹¹⁰ See *infra* note 111 and accompanying text.

that it is not an overall expression of the frequency of opportunities taken to join a Justice-author's opinion, but rather an average of each of the Relationship Ratios. Furthermore, rather than using the Total Ratios themselves to calculate the mean and standard deviation, the mean and standard deviation of the Relationship Ratios were utilized instead to determine an influential relationship for TR2.¹¹¹ Thus, an influential relationship for TR2 is one mean above the standard deviation of all Relationship Ratios.

$$\text{Total Ratio 1} = \frac{\text{Sum of all numerators for each Relationship Ratio (opportunities taken to join Justice-author's opinions)}}{\text{Sum of all denominators for each Relationship Ratio (opportunities available to join Justice-author's opinions)}}$$

$$\text{Total Ratio 2} = \frac{\text{Total value of Relationship Ratios}}{\text{Number of Justices the Justice-author served with on Court}}$$

Thus, for both TR1 and TR2,¹¹² an influential relationship was determined to be one standard deviation above the mean calculated, whether the mean and standard deviation of the total ratios themselves (as for TR1) or the mean and standard deviation of the Relationship Ratios (as for TR2).

$$\text{Influential Relationship} \geq \text{Mean} + \text{Standard Deviation}^{113}$$

¹¹¹ TR1 was calculated in order to understand the total ratio of opportunities other Justices took to join the opinions of the Justice-author. Such a measure has not been used in previous internal influence studies. TR2, in contrast, calculates the average Relationship Ratios for each Justice and gives equal weight to a Justice's influence over each of the other Justices. As presented in the Results section, *infra* Part IV, some differences in results of the two ratios exist.

¹¹² Recall that TR1 is a reflection of a Justice's overall influence using a total of the Relationship Ratios for each Justice, while TR2 is a calculation of the average of the Relationship Ratios for each Justice-author.

¹¹³ An influential relationship is defined as one standard deviation greater than the mean for some important reasons. This was the measure used to define an influential relationship in earlier studies by Altfeld, Segal, and Spaeth with similar methods. *See supra* notes 104–07 and accompanying text. Furthermore, the standard deviation, as a simple measure of statistical dispersion, when combined with the mean, is more likely to show a noteworthy relationship than a figure that is simply above average. This is due to the fact that averages do not as accurately account for statistical variance in the same manner as a standard deviation. *See Appendix, supra*.

IV. RESULTS

The results of this study are presented in three parts. Part IV.A provides basic data of the voting behavior of the Rehnquist Court Justices, thus providing foundational support for the later discussion that refers to Justices as liberal, conservative, or moderate based upon their voting behavior for the relevant time periods. Part IV.B provides an analysis of all nineteen Terms of the Rehnquist Court, the 1986 to 2004 Terms. Building on the results in Part IV.B, Part IV.C examines the eleven Terms of the Rehnquist Court when membership was unchanged, thus providing a more in-depth analysis of those nine Justices that served together during the 1994 to 2004 Terms.

A. Laying the Foundation: Voting Behavior and the Ideological Continuum of Rehnquist Court Justices

Because the following discussion of opinion joining behavior and influence assumes a continuum of Justices' ideologies,¹¹⁴ it is useful to first present the voting behavior of the Rehnquist Court Justices. Using data on voting behavior from the Supreme Court Judicial Database,¹¹⁵ which assigns votes in cases as "liberal" or "conservative,"¹¹⁶ Table 1 shows a ranking of the percentage of liberal votes cast by the fourteen Justices who served on the Rehnquist Court (1986 to 2004 Terms), the time period studied in Part IV.B.

¹¹⁴ See *supra* notes 44–46 and accompanying text.

¹¹⁵ Spaeth, *supra* note 108. The data presented in Tables 1 and 2 were gathered using the filters described in the Appendix. See *supra* notes 172–73 and accompanying text. Upon filtering the data, an inquiry was run using the "vote direction" variable, which characterizes the votes of each Justice as "liberal" or "conservative." See Harold J. Spaeth, *The Original U.S. Supreme Court Judicial Database Documentation*, 73 (2006), available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>; see also *supra* note 47. The percentages listed in Tables 1 and 2 reflect the percentage of liberal votes based upon the results of the vote direction inquiry for each Justice.

¹¹⁶ See *supra* note 47 and accompanying text.

Table 1. Voting Behavior for Rehnquist Court Justices: 1986–2004 Terms

Justice	Percentage of Liberal Votes
Marshall	77.1%
Brennan	75.7%
Stevens	65.2%
Blackmun	64.5%
Ginsburg	61.2%
Souter	58.6%
Breyer	57.9%
White	44.0%
Kennedy	41.7%
O'Connor	40.5%
Powell	40.5%
Scalia	34.0%
Rehnquist	33.4%
Thomas	30.4%

Interpreting these results as a continuum of the most liberal Justices to the most conservative, Marshall cast the highest percentage of liberal votes (77.1%) and Thomas the lowest (30.4%). Table 2 presents similar data for the nine Justices who served for the second time period examined in Part IV.C.

Table 2. Voting Behavior for Rehnquist Court Justices: 1994–2004 Terms.

Justice	Percentage of Liberal Votes
Stevens	67.1%
Ginsburg	61.9%
Souter	61.7%
Breyer	57.9%
O'Connor	42.3%
Kennedy	41.9%
Rehnquist	33.9%
Scalia	30.9%
Thomas	28.7%

For the 1994 to 2004 time period, Justice Stevens' voting behavior was the most liberal, with 67.1% liberal votes, and Thomas's was again the most conservative, with 28.7%. Justice O'Connor, as to be expected, is squarely in the middle of the continuum.

With this foundation of the Justices' voting behavior in place, much of the analysis that follows makes reference to the above tables. Those Justices that have the highest-ranking liberal voting behavior are labeled liberal for purposes of the following analysis; for example, Stevens, Ginsburg, Souter and Breyer are considered to be the liberal bloc of Justices for the 1994–2004 time span, while Thomas, Scalia, Rehnquist, and Kennedy are the conservatives. Those Justices at the extremes are considered the most liberal or conservative, respectively, and those more toward the middle can be labeled moderately so; for example, Justice Breyer is moderately liberal based on this relative ranking of the Justices.

B. Influence for the Entire Rehnquist Court: The 1986 to 2004 Terms

Fourteen Justices served during Rehnquist's tenure as Chief Justice, and the influence among them was examined using two ratios which are presented separately. As will be described more fully, some anomalies exist largely because of the personnel changes that took place during this time period, but the results are very similar for both Total Ratio 1 (TR1) and Total Ratio 2 (TR2).

1. Total Ratio 1: Ratio of Opportunities Taken by Joiner-Justices

At the outset, it is important to note that few influential relationships between the Justices exist. As seen in Table 3, of the 152 total possible dyads of the fourteen Justices who served from 1986 to 2004, only thirty-four of those were influential relationships (22%).¹¹⁷ Of those thirty-four influential relationships, only seventeen were mutually influential; for example, Justice Breyer was influenced by Justice Ginsburg and vice versa.

Fourteen Justices served over the nineteen-Term period of 1986 to 2004, the entire span of the Rehnquist Court. Table 3 shows the joining behavior for non-majority opinions for the Justices who served together during this time.

¹¹⁷ Note that this is greater than expected because the standard deviation was calculated from the fourteen Total Ratios, rather than from the Relationship Ratios.

Table 3. Non-majority Opinion Joining Relationships for the Rehnquist Court: 1986-2004 Terms, Total Ratio 1 in %

	Opinion Author													
	Blkmm	Brn	Brey	Gins	Ken	Mar	O'Con	Pow	Rehn	Scal	Sout	Stev	Thom	Wht
Blackmun	-	51.2	**	41.7	19.6	70.5	25.9	10.0	47.4	8.5	42.9	42.9	12.5	32.8
Brennan	49.3	-	**	**	0.0	90.0	16.7	27.3	0.0	10.0	**	34.0	**	17.6
Breyer	**	**	-	59.4	17.0	**	43.1	**	12.5	2.5	45.8	43.2	5.5	**
Ginsburg	12.5	**	44.1	-	17.9	**	13.7	**	18.8	8.1	57.3	43.8	5.0	**
Kennedy	4.0	4.5	3.2	9.4	-	0.0	17.6	**	43.8	17.6	11.1	5.9	14.7	20.0
Marshall	58.0	83.6	**	**	33.3	-	9.7	66.7	0.0	12.0	50.0	41.8	**	23.3
O'Connor	20.0	5.4	34.8	12.5	21.8	10.0	-	81.8	52.6	18.5	12.3	12.2	9.0	27.4
Powell	18.2	0.0	**	**	**	0.0	31.3	-	100.0	5.9	**	0.0	**	30.0
Rehnquist	4.2	0.0	13.8	14.8	28.5	0.0	26.5	62.5	-	23.2	6.6	6.7	27.0	39.7
Scalia	3.6	0.0	10.0	3.9	26.9	10.0	26.9	28.6	52.0	-	10.8	5.8	47.0	20.0
Souter	22.0	**	38.5	44.6	14.6	0.0	25.0	**	20.0	9.9	-	33.0	5.4	28.6
Stevens	28.8	36.0	39.2	42.7	13.2	55.8	20.6	10.0	19.2	6.2	43.0	-	14.9	35.3
Thomas	6.7	**	2.0	1.9	21.1	**	25.7	**	57.8	55.8	10.6	8.9	-	0.0
White	3.4	8.1	**	**	14.3	10.0	8.1	11.1	58.1	11.9	26.3	17.7	0.0	-
Total Ratio	24.0	38.1	26.7	27.4	20.7	56.6	23.0	34.8	43.6	18.6	28.4	24.3	20.2	27.9

Influential Relationship $\geq 40.1\%$

Legend:

- ** Justices did not serve on Supreme Court together
- By definition, a Justice cannot join his own opinion

The Justices listed in the top row of the table are the opinion authors (those exerting influence), while the Justices listed in the left column are joiners (those who are the objects of influence). Thus, to find the influence of Justice Blackmun upon Justice Brennan (that is, the percentage of opportunities Brennan took to join Blackmun's non-majority opinions), one would find Blackmun, as opinion author, in the column and Brennan (the joiner) in the row. Where they meet, one can see Brennan joined 49.3% of Blackmun's non-majority opinions when the two Justices' votes agreed—an influential relationship. Conversely, Blackmun joined 51.2% of Brennan's opinions. Since both of these figures are at least one standard deviation above the mean of Total Ratio 1 (that is, greater than 40.1%), Brennan influenced and was influenced by Blackmun, for those Terms on the Rehnquist Court they served together.

A common pattern emerges when considering which Justices influenced whom. First, it appears that Justices with a similar ideology (as determined by their voting behavior)¹¹⁸ were the most frequent joiners. Therefore, the most influential relationships were found between Justices whose views are essentially the same; for example, liberal Justices were more likely to influence and be influenced by other liberal Justices. This is consistent with non-majority opinion joining behavior in general; the best incentive a Justice has to join a non-majority opinion of another is if she agrees with the expression of views expressed therein. If two Justices' ideologies agree, they are more likely to join one another's opinions.

The strongest mutually influential relationships are seen in pairs of Justices who predictably align themselves together. These include Brennan and Marshall on the left, and Scalia and Thomas on the right. Although each of these four Justices were highly influential to one another,¹¹⁹ they exerted influence on few (if any) other Justices.

Table 4 provides a ranking of the Justices' total ratios, providing a comparison of each Justice's overall influence.

¹¹⁸ See *supra* Part IV.A and Table 1 for a continuum of the voting behavior of the Justices during this time period.

¹¹⁹ In the case of Brennan and Marshall, the joining ratio for both Justices was high enough to perhaps skew Marshall's and perhaps Brennan's influence. Total Ratio 2, which averages Relationship Ratios and thus better takes into account a Justice's lack of influence over his colleagues, attempts to remedy this problem. See *infra* Part IV.B.2.

Table 4. Ranking of Total Ratio 1: 1986–2004 Terms

Marshall	56.6%
Rehnquist	43.6%
Brennan	38.1%
Powell	34.8%
Average	29.6%
Souter	28.4%
White	27.9%
Ginsburg	27.4%
Breyer	26.7%
Stevens	24.3%
Blackmun	24.0%
O'Connor	23.0%
Kennedy	20.7%
Thomas	20.2%
Scalia	18.6%

Justice Marshall was the most influential, and only four Justices were above average in their overall influence. Justice Marshall's and Justice Brennan's high rankings are likely attributable to their significant mutually influential relationship: Brennan joined 83.6% of Marshall's non-majority opinions and Marshall joined 90% of Brennan's. These figures were significantly higher than those of any other dyad examined. Of the four Justices above average in their total influence, Chief Justice Rehnquist, while second in his total influence, exerted his influence on the most Justices, influencing seven, more than any other Justice.

Analyzing the liberal and conservative blocs of Justices separately, the most influential Justice among the conservatives was Chief Justice Rehnquist. Among the liberals, excepting the unusually high relationship between Marshall and Brennan, Justice Souter was perhaps the most influential among the left-leaning Justices. Although his total ratio is slightly below average, he influenced five of his peers, more than any another among the liberal ranks.

A curious result from Tables 3 and 4 is the notable lack of influence of Justices at the center. Justice O'Connor influenced only Breyer, which is inconsistent with the popular view of her influence on the Rehnquist

Court.¹²⁰ Kennedy and White did not influence any Justices; however, both were influenced by Rehnquist. Justice Scalia ranked at the very bottom, a position also inconsistent with the results of earlier studies of internal influence¹²¹ and the popular perception of his influence on the Court as well.¹²² Justice White, meanwhile, was at the fringes, and did not exert influence nor was he influenced by his peers.

2. Total Ratio 2: Overall Influence of Each Justice

To address some of the anomalies found in TR1, TR2 was calculated to examine the descriptive statistics of the Relationship Ratios. That is, the mean and standard deviation of the Relationship Ratios were used to define an influential relationship instead of the ratios of opportunities taken divided by opportunities available.

Table 5 illustrates the influential relationships for TR2. While both Tables 3 and 5 contain Relationship Ratios calculated for each pair of Justices, the mean and standard deviation that defines an influential relationship is calculated from the Relationship Ratios, instead of the Total Ratios themselves. As a result, there are fewer influential relationships. Thus, a Relationship Ratio must be at least 44.1% to be influential here.¹²³ Of the 152 combinations of Justices, only 22 were influential (14%).

¹²⁰ See *supra* notes 13–18 and accompanying text. But see *infra* note 131 and accompanying text for an analysis of why O'Connor is not influential based on this measure.

¹²¹ See *supra* notes 92–93 and accompanying text (discussing the Segal and Spaeth study that examined the Rehnquist Court through the 1998 Term). However, Segal and Spaeth did not control for vote agreement as done here, which may explain in part the different results.

¹²² See *infra* notes 129–30 and accompanying text (discussing Scalia's lack of influence based upon this measure).

¹²³ Compare this to 40.1%, the ratio required for an influential relationship to exist under TR1.

Table 5. Non-majority Opinion Joining Relationships for the Rehnquist Court: 1986–2004 Terms, Total Ratio 2 in %

	Opinion Author													
	Blkmm	Brn	Brey	Gins	Ken	Mar	O'Con	Pow	Rehn	Scal	Sout	Stev	Thom	Wht
Blackmun	-	51.2	**	41.7	19.6	70.5	25.9	10.0	47.4	8.5	42.9	42.9	12.5	32.8
Brennan	49.3	-	**	**	0.0	90.0	16.7	27.3	0.0	10.0	**	34.0	**	17.6
Breyer	**	**	-	59.4	17.0	**	43.1	**	12.5	2.5	45.8	43.2	5.5	**
Ginsburg	12.5	**	44.1	-	17.9	n	13.7	**	18.8	8.1	57.3	43.8	5.0	**
Kennedy	4.0	4.5	3.2	9.4	-	0.0	17.6	**	43.8	17.6	11.1	5.9	14.7	20.0
Marshall	58.0	83.6	**	**	33.3	-	9.7	66.7	0.0	12.0	50.0	41.8	**	23.3
O'Connor	20.0	5.4	34.8	12.5	21.8	10.0	-	81.8	52.6	18.5	12.3	12.2	9.0	27.4
Powell	18.2	0.0	**	**	**	0.0	31.3	-	100.0	5.9	**	0.0	**	30.0
Rehnquist	4.2	0.0	13.8	14.8	28.5	0.0	26.5	62.5	-	23.2	6.6	6.7	27.0	39.7
Scalia	3.6	0.0	10.0	3.9	26.9	10.0	26.9	28.6	52.0	-	10.8	5.8	47.0	20.0
Souter	22.0	**	38.5	44.6	14.6	0.0	25.0	**	20.0	9.9	-	33.0	5.4	28.6
Stevens	28.8	36.0	39.2	42.7	13.2	55.8	20.6	10.0	19.2	6.2	43.0	-	14.9	35.3
Thomas	6.7	**	2.0	1.9	21.1	**	25.7	**	57.8	55.8	10.6	8.9	-	0.0
White	3.4	8.1	**	**	14.3	10.0	8.1	11.1	58.1	11.9	26.3	17.7	0.0	-
Total Ratio 2	19.2	21.0	23.2	25.7	19.0	24.6	22.4	37.2	37.1	14.6	28.8	22.8	14.1	25.0%

Influential Relationship ≥ 44.11%

Legend:

- ** Justices did not serve on Supreme Court together
- By definition, a Justice cannot join his own opinion

Although there were fewer influential relationships here, the results in Table 5 help to clarify some of the anomalies found in Table 3. For example, Marshall and Brennan did not rank as highly in their influence. Table 6 shows the ranking of the Justices' overall influence using TR2.

Table 6. Ranking of Total Ratio 2: 1986–2004 Terms

Powell	37.2%
Rehnquist	37.1%
Souter	28.8%
Ginsburg	25.7%
White	25.0%
Marshall	24.6%
Average	23.7%
Breyer	23.2%
Stevens	22.8%
O'Connor	22.4%
Brennan	21.0%
Blackmun	19.2%
Kennedy	19.0%
Scalia	14.6%
Thomas	14.1%

However, Table 6 has an anomaly of its own—Justice Powell was ranked highest. While his influence was also above average for TR1, this result is unlikely to be indicative of Powell's overall influence, because these results account only for Powell's last Term; in 1988 Justice Kennedy replaced him on the Court. Due to the short amount of time included in the analysis of his behavior, it is unlikely that any meaningful conclusions can be drawn from Powell's high ranking.

The similarities between results using TR1 and TR2 allow for some tentative conclusions to be drawn from the entire span of the Rehnquist Court. First, the Chief Justice and Justice Souter consistently ranked high; however the two Justices influenced different colleagues—neither influenced the same Justice. For both Total Ratios, the Chief Justice influenced Blackmun, O'Connor, Powell, Scalia, Thomas, and White, while Justice Souter influenced Breyer, Ginsburg, and Marshall. Neither Justices were likely to be the object of influence by other Justices: Rehnquist was

influenced only by Justice Powell¹²⁴ and Souter was influenced only by Ginsburg. This lack of mutuality for the two most influential Justices arguably supports the assertion that there are no side-payments involved in the joining of non-majority opinions.¹²⁵ If Justices expected reciprocal behavior from their colleagues, we would expect to see at least some mutuality among the most influential Justices.

For both Total Ratios, Thomas and Scalia were the two least influential Justices. While the ratios for opinion agreement were strong between the two, they exerted little influence upon anyone else. Consistently below average for both ratios were O'Connor and Kennedy, those Justices traditionally in the center of the Court.

C. Influence When Membership Was Unchanged: The 1994 to 2004 Terms

Because there were no new Justices appointed for the final eleven Terms of the Rehnquist Court, examining this time period allows for a more in-depth analysis of influence without taking into account personnel changes. For the 1994 to 2004 Terms, similar patterns emerge, but there are some interesting differences in influence, explained in more detail for both Total Ratio 1 (TR1) and Total Ratio 2 (TR2).

1. Total Ratio 1: Ratio of Opportunities Taken by Joiner-Justices

Turning to the final eleven Terms of the Rehnquist Court, a similar pattern emerges. Table 7 expresses the results for these Terms. Again, few relationships were influential. Nineteen of the thirty-six dyads were influential, slightly more than half (53%).

¹²⁴ However, this is certainly not conclusive, because the data include only one Term of Justice Powell's tenure on the Court.

¹²⁵ See *supra* note 85 and accompanying text.

Table 7. Non-majority Opinion Joining Relationships for the Rehnquist Court: 1994–2004 Terms, Total Ratio 1 in %

	Opinion Author									
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas	
Breyer	-	58.6	17.0	43.1	12.5	2.5	45.8	43.2	5.5	
Ginsburg	43.6	-	17.4	14.3	20.0	9.9	62.9	43.6	3.8	
Kennedy	3.2	11.6	-	12.9	51.6	15.2	13.3	7.2	16.0	
O'Connor	30.3	13.3	22.0	-	52.2	19.6	10.0	5.1	6.4	
Rehnquist	13.8	14.0	28.2	22.5	-	23.4	4.3	2.7	27.9	
Scalia	10.0	4.9	23.2	27.1	50.0	-	14.3	2.9	46.8	
Souter	38.5	47.9	8.5	31.3	7.7	7.5	-	38.7	5.2	
Stevens	38.1	44.9	11.1	15.9	0.0	6.3	40.2	-	13.7	
Thomas	2.0	2.3	17.9	29.7	59.1	57.3	11.1	8.0	-	
Total Ratio	26.0	29.6	19.1	24.9	41.7	22.0	31.6	24.6	20.5	

Influential Relationship ≥ 33.6%

Rehnquist and Souter again topped the ranks of total influence. Table 8 shows the rankings of the total ratios for all nine Justices. The three least influential Justices were Scalia, Thomas, and Kennedy, the same three from the entire nineteen-Term period.

Table 8. Ranking of Total Ratio 1: 1994–2004 Terms

Rehnquist	41.7%
Souter	31.6%
Ginsburg	29.6%
Average	26.7%
Breyer	26.0%
O'Connor	24.9%
Stevens	24.6%
Scalia	22.0%
Thomas	20.5%
Kennedy	19.1%

Another interesting result from this later time period is the strong mutuality among the four more liberal Justices on the Court: Breyer, Ginsburg, Stevens, and Souter. Each of the four Justices influenced and were influenced by one another. While Justice Souter was not often the object of influence for the 1986–2004 Terms, it appears he was more likely to join the opinions of the other three Justices in the liberal bloc in the later Terms of the Rehnquist Court.

However, the mutuality seen in the liberal bloc of Justices is not present for the conservatives. Rehnquist was not influenced by any other Justice, in spite of the strong mutuality between Justices Scalia and Thomas and the fact that both were influenced by Rehnquist. Justice Kennedy did not influence any of his peers, and was only influenced by the Chief Justice.

2. Total Ratio 2: Overall Influence of Each Justice

TR2 produces comparable results to TR1; however, there are some interesting differences. Table 9 shows the results for TR2 for the 1994 through the 2004 Terms.

Table 9. Non-majority Opinion Joining Relationships for the Rehnquist Court: 1994–2004 Terms, Total Ratio 2 in %

	Opinion Author									
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas	
Breyer	-	58.6	17.0	43.1	12.5	2.5	45.8	43.2	5.5	
Ginsburg	43.6	-	17.4	14.3	20.0	9.9	62.9	43.6	3.8	
Kennedy	3.2	11.6	-	12.9	51.6	15.2	13.3	7.2	16.0	
O'Connor	30.3	13.3	22.0	-	52.2	19.6	10.0	5.1	6.4	
Rehnquist	13.8	14.0	28.2	22.5	-	23.4	4.3	2.7	27.9	
Scalia	10.0	4.9	23.2	27.1	50.0	-	14.3	2.9	46.8	
Souter	38.5	47.9	8.5	31.3	7.7	7.5	-	38.7	5.2	
Stevens	38.1	44.9	11.1	15.9	0.0	6.3	40.2	-	13.7	
Thomas	2.0	2.3	17.9	29.7	59.1	57.3	11.1	8.0	-	
Total Ratio 2	22.4	24.7	18.2	24.6	31.6	17.7	25.2	18.9	15.6	

Influential Relationship \geq 39.4%

There are slightly fewer influential relationships using TR2—seventeen of thirty-six (47%). Table 10 shows the ranking of the Justices for TR2. Consistent with the results presented earlier, Rehnquist and Souter rank highest, and Scalia and Thomas are lowest. Justice O'Connor fares better, and for the first time is above average in her influence.

Table 10. Ranking of Total Ratio 2: 1994–2004 Terms

Rehnquist	31.6%
Souter	25.2%
Ginsburg	24.7%
O'Connor	24.6%
Breyer	22.4%
Average	22.1%
Stevens	18.9%
Kennedy	18.2%
Scalia	17.7%
Thomas	15.6%

The strong mutual relationships among the liberal bloc of Justices is not present in TR2, as Breyer comes very close to influencing Souter and Stevens, but the ratios are not high enough to be influential for this measure. Similar relationships exist among the conservative Justices, where Scalia and Thomas again have strong mutually influential ratios, and both Justices and Justice Kennedy are influenced by Rehnquist.

V. DISCUSSION

In light of the results of this study, the discussion is presented in two parts. Part V.A identifies the most and least influential Justices on the Rehnquist Court, while providing an analysis of the factors explaining these outcomes. Part V.B addresses the future implications of these results applied to the Roberts Court, specifically the potential effect of the two newly appointed Justices and who among the Roberts Court may potentially fill the voids left by Rehnquist and O'Connor.

A. *Who Were the Most Influential Justices on the Rehnquist Court?*

Examining the 1986–2004 and 1994–2004 tables together, some conclusions can be drawn. Justices were more likely to join the non-majority opinions written by Rehnquist and Souter when their votes were in agreement, and this is true for both the ratio of opportunities taken to join to

those available to join (TR1), and for the average ratio of joining for all Justices (TR2). Justice Scalia and Justice Thomas, while consistently influencing one another, failed to impact other colleagues and rank at the bottom for both time periods and ratios. Kennedy and White were the only two Justices who influenced no one, and Kennedy's lack of influence also existed in the 1994–2004 results. Overall, Justices tended to influence and were influenced by peers who shared similar ideology, as shown by their voting behavior.

Why were Chief Justice Rehnquist and Justice Souter the most influential Justices? Neither Justices, relative to their peers, were at the ideological extreme nor squarely in the middle. Rather, the two Justices were aligned—based on their voting behavior—as moderately conservative and moderately liberal, respectively.¹²⁶ Perhaps their influence can be explained because their policy preferences, as stated in their non-majority opinions, were not quite as extreme as those contained in their more liberal or conservative counterparts. Indeed, such a “middling” effect has been seen in citation count studies, where the more extreme a judge's views are, the less likely she is to be cited by other judges.¹²⁷

If a middling norm exists for the joining of non-majority opinions as well, this may explain the stark lack of influence by Scalia and Thomas. Both Justices are positioned on the far right, and, given their position at the extreme, they may feel more often the need to express their personal views by authoring a concurrence or dissent. Furthermore, even though Scalia's and Thomas's colleagues may agree with their conservative views, their peers may nevertheless be hesitant to associate themselves with the extremes.¹²⁸

¹²⁶ See *supra* Part IV.A and Tables 1 and 2. In fact, the ideological positions of Justice Souter and Chief Justice Rehnquist in Table 2 are mirror-images—both have two Justices more liberal and more conservative, respectively. Regarding Chief Justice Rehnquist, Table 2 is more consistent with his being a “moderate” conservative than in Table 1 (keep in mind that his being “moderate” is relative to Scalia and Thomas, not moderate overall). In Table 1, Thomas is the only Justice more conservative than Rehnquist. Although the Chief Justice's percentages of liberal votes are nearly equal for both tables (33.4% and 33.9%, respectively), Thomas and Scalia tended to vote in a more conservative direction for the 1994–2004 time period, thus making the relative nature of ideology readily apparent.

¹²⁷ Landes, et al., *supra* note 75, at 275 (“Judges . . . are unlikely to cite judges perceived to be at an extreme, even if they are following this extreme judge's views.”). In fact, this middling norm is considered to be one of the drawbacks to using citation studies, and potentially may be a drawback to measuring influence here. See *infra* note 127.

¹²⁸ Just as Justices are “conservative citers” regarding extreme opinions, for both liberal and conservative ideology, Landes, et al., *supra* note 75, at 275, they may also be conservative joiners. That is, if Justices have a more moderate option (which they almost

Given the option to author one's own opinion in most cases, the middling norm in fact may be present for this measure of influence as well.

Certainly, Justice Scalia's failure to influence his colleagues is inconsistent with earlier formulations of influence-measuring methods¹²⁹ and a popular conception among the judiciary and legal academics that Scalia is in fact a very influential figure on the Court.¹³⁰ On the other hand, if the middling norm affected these results, one would not expect the notable lack of influence of two Justices squarely in the middle of the Rehnquist Court—O'Connor and Kennedy.

Why weren't O'Connor or Kennedy more influential? Opinion assignment may shed some light on this issue. Given these Justices' position in the center of the Court,¹³¹ it may simply be that they chose to write their own dissents and concurrences because their views were more moderate than those in the assigned opinions. For example, because an assigned principal dissenting opinion need not accommodate the views of the minority in the same manner as the opinion of the Court, there is little incentive for a dissenting opinion author to take into account more moderate views. Furthermore, as the Court's central vote, Justice O'Connor was also more likely to vote with the majority bloc, and given her pivotal voting position on

always do because each Justice is free to author his or her own opinion), they may take it instead of aligning themselves with views more extreme than their own.

Potentially of note here is "judicial etiquette," which may prevent some judges from acknowledging the presence of influence when it in fact exists. See HERBERT HOVENKAMP, *JUDICIAL OPINIONS IN ENTERPRISE AND AMERICAN LAW* 269 (1991) (noting that for the time period he studied, "judicial etiquette" hampered citation to political economists despite their influence on judicial opinions) (*cited in* Landes, et al., *supra* note 75, at 275 n.12).

¹²⁹ See *supra* notes 92–93 and accompanying text for the results of the Segal and Spaeth study, which found Scalia to be the most influential conservative on the Court using similar methods as this study. *But cf. supra* note 128 regarding judicial etiquette. Judicial etiquette is an interesting concept regarding Justice Scalia, because many expected him to be a pivotal conservative at the time of his appointment; however, his sometimes acerbic and harsh opinions may have undermined his influence. See, e.g., DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 206 (1996) ("[Scalia's] decision to write his own separate opinions can provide a source of disagreement and conflict with usual allies who share many of his values and policy preferences."); CHRISTOPHER E. SMITH, *JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT* 132 (1993) ("Scalia intentionally refuses to engage in diplomatic behavior or strategic interactions in order to persuade his colleagues to join his opinions.").

¹³⁰ See, e.g., Alex Kozinski, *My Pizza with Ninó*, 12 *CARDOZO L. REV.* 1583, 1590 (1991) ("[I]t really doesn't matter very much that Scalia's ideas are frequently expressed in dissents or concurrences. These are seeds placed in the intellectual soil of the law, and many, perhaps most of them, will take root and grow.").

¹³¹ See *supra* Part IV.A, Tables 1 and 2.

many issues, she was likely to carry much sway in getting the majority opinion to conform to her views even when she was not the author of the Court's opinion, defeating the need for her to write her own concurring opinion in many cases.

Rehnquist's influence may lie in his role as Chief Justice. The Chief Justice, whether voting in the majority or minority, assigned the principal opinion for that bloc of Justices. Although Rehnquist had the practice of assigning opinions equally among his peers,¹³² the role of opinion-assigner carries with it significant discretion, including self-assignment. Chief Justices tend to assign themselves important cases, and "disproportionately bestow[] others on their ideological kin."¹³³

Therefore, the Chief Justice's opinion assignment duties granted him the power to assign an opinion, be it a majority opinion or principal dissent, to a colleague with whom his ideology aligns. This defeated the need for him to write his own concurrence or dissent. For example, when the Chief Justice wrote a dissent, the incentive for other Justices to join that opinion perhaps increased due to self-assignment of the principal opinion for the minority.

Opinion assignment cannot explain everything, as Justice Stevens is not as influential as Rehnquist, and his influence was consistently below average for both time periods.¹³⁴ As the most senior Justice in the liberal bloc, Stevens often had opinion assignment power when he did not vote with Rehnquist, which occurred often given their differing ideologies. However, Stevens' voting behavior was also the most liberal of the Rehnquist Court Justices for the 1994–2004 time period. This points to ideological position being indicative of influence based on this measure—the more extreme a Justice's views are, the less likely he is to influence his peers.¹³⁵

In summary, the results here indicate that a few important factors can contribute to a Justice being influential based on this measure. Opinion assignment and the Chief Justice perhaps both play a role. Ideology also indicates influence; those Justices who were neither squarely in the middle nor at the ideological extreme tended to be the most influential.

¹³² See SEGAL & SPAETH, *supra* note 19, at 372 (describing the first five Terms of the Rehnquist Court as the "most equitable" regarding equality of opinion assignment). In fact, there exists a "norm of equal distribution" of opinion assignments for the Court that constrains opinion assigners from disproportionately self-assigning or assigning to those Justices who share similar policy views. *Id.* at 376.

¹³³ *Id.* at 378.

¹³⁴ See Tables 5 and 7.

¹³⁵ This is true at least for those peers whose views are less extreme; recall the strong mutuality of influence between Justices Scalia and Thomas. See Tables 3, 5, 7, and 9.

B. *Future Considerations: How Will the Addition of Chief Justice Roberts and Justice Alito Affect Internal Dynamics?*

The appointment of Chief Justice Roberts and Justice Alito will certainly have an impact on the Justices' interactions with one another. The results of this study are useful to examine the effects the two most recent appointments to the Court will have on internal dynamics among the Justices.

Although no comparable database to the Supreme Court Judicial Database¹³⁶ exists to analyze the non-majority opinion joining behavior for judges on the Courts of Appeals, an analysis of the two Justices' influence on their respective circuits is unlikely to be helpful in understanding their influence as Justices on the Supreme Court.¹³⁷ However, it is possible in some respects to speculate as to the potential influence new appointees may have upon their peers. Part V.B.1 examines the short-term impact of new Justices in light of the "freshman effects" theory. Part V.B.2 addresses the long-term influence Chief Justice Roberts and Justice Alito may have upon their peers. Finally, in light of the results of this study, Part V.B.3 addresses who among the new and existing Justices may assume the roles of Chief Justice Rehnquist and Justice O'Connor.

1. *Short-Term Impact of New Justices and the "Freshman Effect"*

The short-term impact of new Justices is primarily addressed in existing literature through the "freshman effects" theory. The freshman effect¹³⁸ is a

¹³⁶ See *supra* note 108.

¹³⁷ There are several reasons for this, including the ideology of the judges with whom Roberts and Alito served. Given the results of this study tend to indicate that influence will exist among judges with similar ideology, a conservative judge that serves on a liberal circuit will exert little influence. Furthermore, the system of entertaining cases by three-judge panels in the circuit courts means that if there is a dissent or concurrence written, by definition no other judges may join it. Therefore, the methods used in this study are useful only to those unusual cases heard *en banc* by the Courts of Appeals, and so far have not been applied to any circuit. *But see supra* note 78 and accompanying text (discussing citation counts as a measure of influence among judges on the Courts of Appeals).

¹³⁸ See Eloise C. Snyder, *The Supreme Court as a Small Group*, 36 SOC. FORCES 232, 237–38 (1958) (first introducing this theory); Woodford Howard, *Justice Murphy: The Freshman Years*, 18 VAND. L. REV. 473, 475–77 (1965) (first applying the "freshman effect" theory to a Supreme Court Justice). More recently, researchers have explored freshman effects for contemporary appointments to the Court. See, e.g., Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238, 239–42 (1992); Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6, 7–12 (1990); Thea F. Rubin & Albert P. Melone, *Justice Antonin Scalia:*

phenomenon that some scholars have argued newly appointed Justices experience, as outsiders to a small collaborative decision making group. It consists of three predictions for behavior: (1) new Justices lack the confidence to perform their duties because of the awesome nature of their appointment; (2) more senior Justices respond to this by assigning new Justices an unequal share of opinion writing assignments; and (3) new Justices do not immediately align themselves with the liberal or conservative voting bloc.¹³⁹ Recent applications of the freshman effects hypothesis have found that it did not necessarily predict the behavior of O'Connor,¹⁴⁰ Kennedy,¹⁴¹ or Scalia;¹⁴² however, in some respects the theory applied well to Souter.¹⁴³

Considering the results of this study, behavior consistent with the freshman effects theory would indicate that new Justices are more likely to be the objects of influence rather than exerting it themselves. That is, when new Justices are not assigned the majority opinion or principal dissent, they may be timid to depart from those opinions to write their own concurrences or dissents. On the other hand, assuming it is true that freshmen Justices are assigned fewer opinions,¹⁴⁴ they may also be prompted to author their own concurrences and dissents, and if these opinions are persuasive, new Justices may influence their peers in this manner.¹⁴⁵

However, this effect is unlikely to occur in the case of Roberts due to his role as Chief Justice. He has the power to assign opinions whether voting in the majority or minority;¹⁴⁶ unless he bypasses himself for opinion

A First Year Freshman Effect?, 72 JUDICATURE 98, 99–101 (1988); John M. Scheb, II & Lee W. Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 JUDICATURE 9, 11–12 (1985); Christopher E. Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 173–74 (1993).

¹³⁹ Melone, *supra* note 138, at 6; Rubin & Melone, *supra* note 138, at 98.

¹⁴⁰ Scheb & Ailshie, *supra* note 138, at 12 (“[T]here is substantial evidence that Justice O'Connor does not fit the traditional model of a freshman Supreme Court Justice . . . [S]he comes to the Court with a clear orientation in terms of ideology and policy.”).

¹⁴¹ Melone, *supra* note 138, at 12.

¹⁴² Rubin & Melone, *supra* note 138, at 102.

¹⁴³ Johnson & Smith, *supra* note 138, at 243 (finding that Souter, while predictably aligned with the conservative bloc in his first Term, authored few “important” majority opinions and his behavior seemed more consistent with the theory than that of O'Connor, Scalia, and Kennedy).

¹⁴⁴ SEGAL & SPAETH, *supra* note 19, at 377 (observing “a tendency to give fewer assignments to newcomers”).

¹⁴⁵ See Rubin & Melone, *supra* note 138, at 102 (noting that Scalia authored several of his own concurrences and dissents in his first two Terms on the Court).

¹⁴⁶ SEGAL & SPAETH, *supra* note 19, at 358 (“By definition, the Chief is considered the most senior even though, like Warren, he initially was the most junior.”).

assignments because of his newcomer status, he is likely to author as many opinions as his colleagues.¹⁴⁷ Moreover, given the tendency for Chief Justices to self-assign in important cases,¹⁴⁸ Roberts's early opinions as Chief Justice may play a very significant role. Opinion assigners also tend to assign based upon similar ideology; as a fellow conservative, Justice Alito is unlikely to be passed up for opinion assignments, at least for those cases in which he votes with the new Chief Justice.¹⁴⁹

The freshman effects theory has been disproved in many cases, and given the current culture of individuality on the Supreme Court¹⁵⁰ and the experience expected of Supreme Court nominees,¹⁵¹ its assumptions may be

¹⁴⁷ *Id.* at 377 (noting that among newcomer Chief Justices, Warren authored an equal number of majority opinions his first Term and Chief Justice Burger wrote one more).

¹⁴⁸ The tendency of the Chief Justice to self-assign in so-called "important cases," *id.*, has already been seen for the Roberts Court, where two of the most publicized decisions of the current Term have been authored by the new Chief Justice. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006) (unanimously upholding the Solomon Amendment and its application to military recruitment on college campuses); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (unanimously allowing religious sect to import hallucinogenic tea under the Religious Freedom Restoration Act as an exception for religious practice under the Controlled Substances Act). This pattern, however, appeared to decline especially for decisions released at the end of Roberts's first Term. *See Linda Greenhouse, Roberts Is at Court's Helm, But He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006 ("In the Court's most significant nonunanimous cases, Chief Justice Roberts was in dissent almost as often as he was in the majority. His goal of inspiring the court to speak softly and unanimously seemed a distant aspiration as important cases failed to produce majority opinions . . .").

¹⁴⁹ In fact, Roberts mentioned in his confirmation hearings that he intended to continue Rehnquist's practice of equal assignments among the nine Justices. *See Charles Lane, As Chief, Roberts Would Be Tested*, WASH. POST, Sept. 18, 2005, at A6. However, if Alito were to vote in a bloc of Justices where a non-conservative colleague, such as Justice Stevens, were to assign the opinion, he may get fewer assignments. Whether this is due to the tendency of Justices to assign in line with their own ideology or because of freshman status is uncertain, and perhaps unascertainable.

¹⁵⁰ *See, e.g.,* Scott D. Gerber & Keeok Park, *The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices*, 91 AM. POL. SCI. REV. 390, 405 (1997) (examining nonconsensual opinion writing and voting of Justices, concluding that Justices with prior judicial experience become less consensual when elevated to the Supreme Court bench).

¹⁵¹ Roberts was a frequent advocate before the Court both as Principal Deputy Solicitor General and as a private practitioner, and he served as a law clerk to then-Associate Justice Rehnquist during the 1980 Term. Alito served as a judge on the Court of Appeals for the Third Circuit from 1990 until his confirmation in early 2006. Supreme Court of the United States, Biographies of Current Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

outdated and ill-fitting to the current Court.¹⁵² But if freshman effects hold true for the newest Justices, their short-term influence may be inhibited.

Because of the opinion assignment duties of the Chief Justice, it is unlikely that Roberts will author disproportionately fewer opinions as a freshman Justice. Therefore, part of the freshman effects hypothesis regarding opinion assignments may not hold true for at least one of the new Justices, and if the most senior Associate Justices (Stevens and Scalia) and Roberts assign opinions equally, Alito is likely to play an equal role in his first Term.¹⁵³

2. Long-Term Impact of New Justices

The long-term impact of Chief Justice Roberts and Justice Alito, considered with the results of this study, may be dependent upon where the new Justices align themselves ideologically. Justices at the extremes and the ideological center tend to not be influential based upon this measure.¹⁵⁴ For example, if either of the new Justices assumes a position as conservative as Justice Scalia or Justice Thomas, he would be likely to influence one or both of those Justices. But a Justice at the extreme is unlikely to influence anyone else. If, on the other hand, Roberts or Alito tend to be moderately conservative relative to the existing Justices, their impact may be similar to Chief Justice Rehnquist's. This is especially true for Roberts, because of the influential role he possesses in opinion assignment. Roberts, therefore, has an especially favorable opportunity to wield long-term influence over his peers on the Court.

Predicting the ideological positions of new Justices is difficult; however, some scholars have attempted to do so. The Segal-Cover Score is calculated as a prediction of a Justice's ideology after nomination but prior to Senate

¹⁵² Melone, *supra* note 138, at 13 (attributing the declining support for freshman effects to the modern trend of intensive screening of judicial candidates and more efficient staffing and management in Justices' chambers); *see also* Terry Bowen & John M. Scheb, II, *Reassessing the "Freshman Effect": The Voting Bloc Alignment of New Justices on the United States Supreme Court, 1921-90*, 15 POL. BEHAV. 1, 12 (1993) (concluding that the "freshman effect . . . established as part of the conventional wisdom regarding the Court simply does not exist" for voting bloc alignment). *But see* Timothy M. Hagle, "Freshman Effects" for Supreme Court Justices, 37 AM. J. POL. SCI. 1142, 1153 (1993) (stating acclimation to a voting bloc exists for some freshman Justices); *cf.* Hurwitz & Stefko, *supra* note 35, at 127 (finding freshman Justices more likely to follow precedents instead of personal ideology early in their tenure on the Court).

¹⁵³ Bear in mind, however, that because Justice Alito did not serve for the entire 2005 Term (he was not confirmed until January 31, 2006), the raw number of the opinion assignments for his first Term will be less than his colleagues' assignments.

¹⁵⁴ *See supra* notes 118-20, 124-26 and accompanying text.

confirmation.¹⁵⁵ This score takes assessments of a nominee's ideology from newspaper editorials, assigning the potential Justice a value ranging from 0 (unanimously conservative), to 0.5 (moderate), to 1 (unanimously liberal).¹⁵⁶ These values have been assigned to judicial nominees from Justice Hugo Black through the most recent nominees in 2005.¹⁵⁷ Table 11 shows the continuum of these values for the Roberts Court, from most liberal (Ginsburg) to most conservative (Scalia).¹⁵⁸

Table 11. Segal-Cover Scores for Current Justices¹⁵⁹

Justice	Segal-Cover Score
Ginsburg	0.680
Breyer	0.475
Kennedy	0.365
Souter	0.325
Stevens	0.250
Thomas	0.160
Roberts	0.120
Alito	0.100
Scalia	0.000

The ideological positions of Roberts and Alito, based on their Segal-Cover Scores, suggest their ideologies will place them in the conservative bloc. However, both appear, from this measure at least, to be more moderate than Rehnquist, whose Segal-Cover Score prior to his elevation to Chief Justice was 0.045.¹⁶⁰ This prediction is certainly not conclusive, especially

¹⁵⁵ See Segal & Cover, *supra* note 49, at 559; Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1287–91 (2005).

¹⁵⁶ See Jeffrey A. Segal, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005*, <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf> (updating ideological values to include Roberts, Harriet Miers, and Alito). See also LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); Segal & Cover, *supra* note 49, at 559 (using a range of –1 to +1).

¹⁵⁷ Segal, *supra* note 156.

¹⁵⁸ Note that the Segal-Cover Scores are not perfectly consistent with the ideological continuum based upon voting behavior discussed in Part IV.A for the 1994–2004 time period. See *supra* Table 2.

¹⁵⁹ Data obtained from Segal, *supra* note 156.

¹⁶⁰ *Id.* However, Roberts's and Alito's scores also indicate they are more conservative than Justice Thomas. Because Justice Thomas' voting behavior is the most conservative among all of the Justices he served with, see Tables 1 and 2, he may

given the inconsistencies between the Justices' later voting behavior and their Segal-Cover Score.¹⁶¹

Therefore, if either of the new Justices align themselves in an ideological position similar to Chief Justice Rehnquist, there is a potential (especially for Roberts in his role as opinion assigner in many cases) to exert significant influence based on this measure examined in this Note.

3. *Replacing Rehnquist and O'Connor*

Considering freshman effects and the results of this study, the gap Rehnquist left as the most influential conservative will need to be filled. It is uncertain whether Rehnquist's influence was based upon his role as Chief Justice, his ideological position, or a combination of the two. If his influence is attributable to his ideology, both new Justices are in a position to assume Rehnquist's pivotal role. Furthermore, Roberts is well-known to the Justices as a former clerk and frequent advocate, and this familiarity among the Justices, combined with the charisma and congeniality Roberts exhibited in his confirmation hearings, may point to his being a very influential member of the Court in years to come.

O'Connor's departure may also have some interesting effects. She exerted little influence on her peers based on this particular measure, but her role in the ideological center cannot be discredited as not influential overall. Justice Kennedy, whose voting behavior is only slightly more conservative than O'Connor's,¹⁶² may be poised to be the new centrist Justice. Justice Breyer, whose ideology also places him near the Court's center, may also assume this role.

However, the departure of O'Connor and Rehnquist may also affect the dynamics among the seven remaining Justices, including the strong mutuality among the four liberal Justices and between Scalia and Thomas. An opportunity exists for a strong mutual coalition to be formed among conservative Justices as seen in the liberal bloc.¹⁶³ If Alito, Roberts, or both, were to consistently join the more conservative positions of Scalia and Thomas, the potential for the Court to move in a more conservative direction is possible if Justice Kennedy is willing to provide the fifth vote necessary to

maintain this position on the Roberts Court despite his less-conservative Segal-Cover Score.

¹⁶¹ For example, Justice Stevens's voting behavior was the most liberal for the 1994–2004 time period, *see* Table 2, but his Segal-Cover Score places him in the ideological middle of the Roberts Court. *See also* SEGAL & SPAETH, *supra* note 19, at 322 (observing there is not an exact correlation between ideological values and voting behavior).

¹⁶² *See supra* Part IV.A, Tables 1 and 2.

¹⁶³ *See supra* Part IV.C.1.

form a majority. If, on the other hand, Kennedy lends his support to the already mutually influential group of Stevens, Souter, Ginsburg, and Breyer, the Court may be poised to move in a completely different direction.

Thus, if Roberts and Alito are as conservative as their Segal-Cover Scores and other commentators predict, Justice Kennedy is placed in a key position. But based on this measure, Kennedy is consistently among the least influential Justices, and O'Connor's overall influence was consistently higher than Kennedy's. Whether this difference will affect his future influence upon his peers on the Roberts Court remains to be seen.

In sum, Chief Justice Rehnquist's departure will, at least based on this measure of influence, have a huge impact on the influence among the Justices on the Roberts Court. Either of the two new Justices is positioned to assume Rehnquist's very influential role, although Chief Justice Roberts appears to be most likely to exert influence similar to the former Chief Justice.

VI. CONCLUSION

This Note applies a measure of influence that has yet to be applied to the entire span of the Rehnquist Court and explores research that, although well-established in the political science field, is newly emerging in legal academia. While the legacy of the Rehnquist Court's nineteen Terms will take many years to be fully understood, the impact Chief Justice Rehnquist had upon his peers is evident.

Considering the theories of judicial decision making,¹⁶⁴ each is important in understanding Justices' behavior at all stages of the judicial decision making process. Being aware of the progress made in understanding judicial behavior in both political science and law can only contribute to greater understanding. Utilizing methods adopted from earlier political science research in this area,¹⁶⁵ this Note seeks to add to this field of important research.

Characterizing Rehnquist and Souter as the two most influential Justices on the Rehnquist Court¹⁶⁶ is unusual in the sense that most commentators and scholars focus upon the "swing vote" position of Justice O'Connor. But, as this Note maintains, influence among members of a small group can take many forms.

Realizing that Justices who share similar ideology are likely to influence one another¹⁶⁷ adds an important component to the existing research on

¹⁶⁴ See *supra* Part II.A.

¹⁶⁵ See *supra* Part III.

¹⁶⁶ See *supra* Part V.A.

¹⁶⁷ See generally, *supra* Parts IV-V.A.

judicial behavior and influence. However, more avenues can be pursued. Examining citation practices among Supreme Court Justices, researching concurring and dissenting opinion joining behavior independently, and exploring the impact of newly appointed Justices through their non-majority opinion writing and joining behavior are just a few of the potential areas worthy of further research.

Whether Chief Justice Roberts and Justice Alito as individuals will influence their peers, or whether one of the remaining seven will assume Rehnquist's and O'Connor's influential roles, remains to be seen. Regardless, it is clear that the addition of two new Justices, including a new Chief Justice, will undoubtedly make an impact on the future direction of the Supreme Court.¹⁶⁸

¹⁶⁸ See *supra* Part V.B.1-3.

I. APPENDIX: A NOTE ON METHODOLOGY

The data for this Note comes primary from the Original U.S. Supreme Court Judicial Database (“Database”), compiled and maintained by Harold J. Spaeth, Principal Investigator, Research Professor of Law and Professor Emeritus, Michigan State University. The Database’s coverage reaches from the first Term of the Warren Court (1953) until the most recent complete Term of the Roberts Court (2005 at the time of this writing).

The Database has six broad categories regarding each decision handed down for the last half century. These categories include: (1) classification variables, including case citations and docket number; (2) background variables, such as the circuit court from which certiorari was granted; (3) chronological variables like the date of decision and the Term in which it was decided; (4) substantive variables that describe the specific area of law at issue in each case; (5) outcome variables, such as whether the Court affirmed or reversed the lower court; and (6) voting and opinion variables, recording the Justices’ voting and opinion behaviors.¹⁶⁹

This Note used the Database as a data source in this study because it is a comprehensive record of voting and opinion behavior for the Justices of the Supreme Court—data directly relevant for the objectives of this study. Furthermore, it is the source used in previous studies that examine the non-majority opinion behavior as a measure of influence between Supreme Court Justices.¹⁷⁰ Finally, while the methodology that follows may seem a bit cumbersome, using this data source was vastly more efficient than creating a special data source especially for this study.

The explanation of methodology is limited to the central results of this study, presented *supra* in Parts IV.B–C.¹⁷¹ The Appendix is intended to allow readers and researches to replicate this study if desired, and to lend additional understanding of the measures used and how the results of this study were obtained in more depth than that described in Part III.

A. *Filtering the Data*

Initially, the cases were limited from this universe using three variables. The cases were classified first by case citation, using the unit of analysis

¹⁶⁹ See Harold J. Spaeth, *The Original U.S. Supreme Court Judicial Database Documentation* ii (2006), available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> [hereinafter Codebook].

¹⁷⁰ See *supra* notes 88–93 for a description of these prior studies and *supra* notes 104–07 for the relationship of their methods to that of this study.

¹⁷¹ For a brief explanation of the methods involved in calculating Tables 1 and 2, that illustrate the ideological voting patterns of the Justices, see *supra* note 116.

variable (“ANALU”). While the database can classify cases based upon docket number as an alternative, the case citation classification was used in this study to address those cases with multiple docket numbers that the Court combined for hearing; in other words, cases that dealt with similar issues that the Court merged for oral argument and wrote one opinion on their merits.

The cases were further narrowed by date, depending on the time period examined, using the term variable (“TERM”). This variable organizes cases by the Term in which they were decided, which begins in October and concludes in June of the following year.¹⁷² For example, a case argued in January 1992 whose opinion was handed down in June 1992 would be decided within the 1991 Term that commenced in October 1991. Two time periods were examined: the entire span of the Rehnquist Court (1986 through 2004 Terms) and the Terms in which membership on the Court was unchanged (1994 through 2004 Terms). The first time period was chosen because it covered the entire Rehnquist Court and was consistent with the purposes of this study to address influence while William Rehnquist was Chief Justice. The second time period was unique in the Court’s history as the longest time period in which there were no personnel changes; therefore, influence between pairs of Justices could be examined in depth without reservations regarding changes in membership and shifts of power on the Court.

Because this study focuses upon the joining behavior for non-majority opinions, the cases were sorted to reflect those situations where the norms of the Court allow Justices to write concurring and dissenting opinions, thus offering an opportunity for their colleagues to join. Consequently, cases were sorted using the decision type variable (“DEC_TYPE”) to include those in which the Court heard oral argument and issued an opinion, whether it be an opinion of the Court, a per curiam opinion, or an announcement of the judgment of the Court (usually in the form of a plurality opinion).¹⁷³

B. Examination of Opinion Joining Behavior by Pairs of Justices

With these initial filters in place, the behavior of pairs of Justices was examined, a reflection of the objectives of this study to determine how an individual Justice may influence an individual colleague. For each dyad, the cases were filtered to include only those in which the Justices’ votes agreed. The Database allows this through a variable that documents whether each

¹⁷² See Codebook, *supra* note 169, at 28.

¹⁷³ See Codebook, *supra* note 169, at 55–57.

Justice's votes were in the majority or minority bloc.¹⁷⁴ This filter was put in place because a Justice may only join the non-majority opinion of a Justice with whom his vote agrees; that is, a Justice may join a dissenting opinion of his colleague only when he votes in the minority bloc.

An inquiry to the database consisted of the following variables and values:¹⁷⁵

ANALU=0 and (DEC_TYPE=1 or DEC_TYPE=6 or
DEC_TYPE=7) and TERM ≥ 1994 and TERM ≤ 2004 and
BRYM=2 and GINM=2

This inquiry would be used to find those orally-argued cases during the 1994 through the 2004 Terms in which the votes of Justice Breyer and Justice Ginsburg were both in the dissenting coalition. Because of the need for simplicity in tabulating the frequencies of opinion joining behavior, for each pair of Justices *two* inquiries were run for each time period, one inquiry aimed at filtering cases where the Justices both voted with the majority and the other with the dissenters. Therefore, to obtain the entire picture of the opinion joining behavior for Breyer and Ginsburg, performance of a second inquiry was necessary, changing only the last two variables to "BRYM=1 and GINM=1" to isolate those cases in which the two Justices both voted with the majority. Similar inquiries were run, changing the last two variables to account for the pair of Justices and the time period being studied (accounting, of course, for Justices who did not serve on the Court simultaneously).¹⁷⁶

With the cases filtered by citation, time period, decision type, and vote agreement, a frequency tabulation of the two Justices' opinion joining behavior was obtained. Using the variables that record each Justices' votes, opinions written (whether a majority, concurrence, or dissent), and opinions

¹⁷⁴ See Codebook, *supra* note 169, at 67–68. Each Justice has a two- to four-letter code derived from his or her surname. In the example inquiry above, Breyer's code is "BRY" and Ginsburg's is "GIN." For a list of each Justice's code, see *id.*, at 66–67.

¹⁷⁵ The software utilized to analyze the data in this study was SPSS. The data source is available in several formats for software used in social science research, including SPSS, Stata, and ASCII. The examples of inquiries that follow thus are applicable to use with SPSS, although the variable names are consistent regardless of the software used.

¹⁷⁶ This resulted in a total of 304 inquiries for the 1986–2004 time period, not including Justices who did not serve together (where no inquiry could be run that would produce data). For the 1994–2004 time period, 144 inquiries were completed. Because membership was unchanged, each Justice had opportunities to join the opinions of eight other Justices, requiring sixteen inquiries for each Justice (eight when two Justices both voted with the majority, and eight when both dissented).

joined,¹⁷⁷ two relevant figures were calculated. The first was the total number of times a particular Justice joined her counterpart's opinions in the pair of Justices being examined. The second was the total number of opportunities each Justice had to join her counterpart based upon their vote agreement. For example, in the two inquiries run above for Justices Breyer and Ginsburg, the frequency tabulations¹⁷⁸ would provide the total number of times Ginsburg joined Breyer's opinions as well as the total number of opinions Breyer wrote in those cases where the two Justices voted together. Thus, the first figure represents the number of opportunities *taken* by Ginsburg to join a non-majority opinion by Breyer and the second figure represents the opportunities *available* to her. Conversely, the tabulation was also used to obtain the frequency with which Breyer joined Ginsburg's opinions and the opportunities he had to do so.

C. Relationship Ratios and Total Ratios 1 and 2

1. Relationship Ratios

A "Relationship Ratio," expressed as a percentage in Tables 3, 5, 7, and 9, *supra*, was calculated using the frequency totals to illustrate the opinion joining behavior for each pair of Justices: the ratio of opportunities taken (opinions joined) to opportunities available (opinions joined when the Justices' votes agreed). The Relationship Ratio is expressed as the following:

$$\text{Relationship Ratio} = \frac{\text{Frequency that Justice } B \text{ joined the non-majority opinions of } A}{\text{Total number of special opinions written by } A \text{ when } A \text{ and } B \text{ voted together}}$$

The percentages that appear in Tables 3, 5, 7, and 9 where Justices' names meet are the Relationship Ratios for those Justices—where Justice *A* is the Justice whose name appears in the column (the influencing Justice-author) and Justice *B* is the Justice in the row (the influenced Justice-joiner).

¹⁷⁷ See Codebook, *supra* note 169, at 61–66 for a detailed explanation of these variables and the coding used for each Justice.

¹⁷⁸ Note that because there were two inquiries for each pair of Justices, two frequency tabulations were run for each pair of Justices, with the resulting figures being the sum of the respective values in each tabulation.

2. Total Ratio 1

Using the Relationship Ratios, Total Ratio 1 (TR1) is a figure that expresses the sum of all opportunities taken by joining Justices divided by the total of all opportunities available to the Justice-author's colleagues. This was calculated by first converting the Relationship Ratios to fraction form (rather than as a percentage as expressed in the tables). All numerators of the fractions were totaled, as well as all denominators. The two resulting sums (sum of all numerators of the Relationship Ratios and sum of all denominators) were then used to calculate TR1:

$$\text{Total Ratio 1} = \frac{\text{Sum of all numerators for each Relationship Ratio (opportunities taken to join Justice-author's opinions)}}{\text{Sum of all denominators for each Relationship Ratio (opportunities available to join Justice-author's opinions)}}$$

For example, TR1 for Justice Breyer in Table 7 was calculated in the following manner:

	Breyer (author)
Breyer	-
Ginsburg	41 / 94
Kennedy	2 / 63
O'Connor	23 / 76
Rehnquist	8 / 58
Scalia	6 / 60
Souter	35 / 91
Stevens	37 / 97
Thomas	1 / 49
Totals	153 / 588

The numerator of the total in the bottom line (153) results from the sum of the numerators above (41 + 2 + 23 + 8, and so on) and the denominator (588) was obtained from the sum of the denominators above (94 + 63 + 76 + 58, and so on). The final TR1 is the 153/588 expressed as a percentage, or 26.0%, as seen at the bottom of the Breyer column in Table 7.

While earlier studies of non-majority opinion joining behavior compared only the relationships among the Justices, TR1 was developed in this study to attempt to understand a Justice's overall influence beyond his relationship with individual Justices. Thus, TR1 attempts to determine how often opportunities are taken *overall* by the individual Justices to join the non-majority opinions of a Justice-author—and the resulting figure illustrates this through a ratio of all opportunities taken to all opportunities available.

3. Total Ratio 2

In addition to TR1, a second ratio, Total Ratio 2 (TR2) was calculated as an alternative to each Justice's overall influence. TR2 is a simple average of each Justice's Relationship Ratios, that is, the typical level of influence he has over the colleagues with whom he served on the Court for the given time period.

$$\text{Total Ratio 2} = \frac{\text{Total value of Relationship Ratios}}{\text{Number of Justices the Justice-author served with on Court}}$$

For example, in Table 9, TR2 for Justice Breyer is the average of the Relationship Ratios down the column. Thus, the final value of 22.4% at the bottom of Breyer's column is derived by adding the percentages of the column above (43.6% + 3.2% + 30.3%, and so on) and then dividing the sum by the number of Justices Breyer served with during that time period—eight.

Like TR1, TR2 was not used in prior studies, but is another attempt to show each Justices' overall influence in a manner that allows comparisons among the Justices to be made. By having two figures to represent Justices' overall influence, both total ratios provide a means for a broader picture of each Justices' influence and comparative figures that take into account Justices who frequently joined their non-majority opinions, as well as those who did not.

D. Definition of an Influential Relationship

For both total ratios, an influential relationship was derived in the same way: by calculating a mean and standard deviation for a set of numbers, and defining an influential relationship as one standard deviation above that mean. An influential relationship was defined in this manner because a percentage that is at least one standard deviation greater than average shows more than an "above average" level of influence—it illustrates a degree of influence that cannot be explained by simple deviations in the data. Also, prior studies measuring influence between Justices in this manner defined an influential relationship in a similar way. For TR1 and TR2, therefore, an influential relationship is expressed as the following:

$$\text{Influential Relationship} \geq \text{Mean} + \text{Standard Deviation}$$

However, a different set of numbers was inputted for each of the total ratios; that is, the figures from which the mean and standard deviation were derived differ for each total ratio. For TR1, the set of numbers used were the total ratios calculated from each Justice-author (that is, those numbers at the

bottom of each column in Tables 3 and 7). This is consistent with the purpose behind TR1—to understand overall influence. Thus, to see a more complete picture of overall influence, the total numbers for each Justice were compared. For example, in Table 7, 26.7% was the average of all TR1s (the figures in the bottom row of Table 7) for the nine Justices who served from the 1994 through the 2004 Terms. The standard deviation of these values was 6.9%; therefore for a Relationship Ratio to be “influential” it had to be at least 33.6% (the sum of 26.7% and 6.9%).

In contrast, the Relationship Ratios were used to calculate the mean and standard deviation to define the threshold for an influential relationship involving TR2, Tables 5 and 9. Because TR2 for each of the Justices was an average of each Justice’s Relationship Ratios, it made little sense to “average the averages” and calculate an influential relationship similarly as TR1. Therefore, all Relationship Ratios were used as an across-the-board comparison for all Justices in deriving an influential relationship in Tables 5 and 9.