



Journal of the Indiana Academy of the Social Sciences

Volume 21 | Issue 1

Article 45

2018

Chief Justice Leadership: A Brief Sketch of Its Landscape, Structure, and Operation

David A. Root
University of Indianapolis

Follow this and additional works at: <https://digitalcommons.butler.edu/jiass>

Recommended Citation

Root, David A. (2018) "Chief Justice Leadership: A Brief Sketch of Its Landscape, Structure, and Operation," *Journal of the Indiana Academy of the Social Sciences*: Vol. 21 : Iss. 1 , Article 45.
Retrieved from: <https://digitalcommons.butler.edu/jiass/vol21/iss1/45>

This Article is brought to you for free and open access by Digital Commons @ Butler University. It has been accepted for inclusion in Journal of the Indiana Academy of the Social Sciences by an authorized editor of Digital Commons @ Butler University. For more information, please contact digitalscholarship@butler.edu.

***Chief Justice Leadership: A Brief Sketch
of Its Landscape, Structure, and Operation****

DAVID A. ROOT
University of Indianapolis

ABSTRACT

This article examines chief justice leadership of the United States Supreme Court during the judicial decision-making process and develops a model of such leadership in three distinct parts: landscape, structure, and operation. The landscape consists of five interactive stages in the judicial decision-making process: certiorari, oral argument, conference, majority opinion assignment, and opinion drafting. Structurally, three prevailing conditions on the Court create a “democratic default”: life tenure, equal vote, and free voice. In terms of operation, the office employs small-group leadership and its twin pillars of task and social leadership in conjunction with behavioral leadership and its three types of leadership (autocratic, laissez-faire, and democratic). To highlight both small-group and behavioral leadership in action, case studies on Chief Justices Marshall, Stone, and Warren are briefly described. While no one leadership style is exclusively employed, the contours of chief justice leadership are chiefly social and democratic, making these leadership forms dominant. As such, the key finding of this paper is that, in order to successfully lead the court, the chief justice must be just as good a political negotiator as a competent legal judge.

KEY WORDS Chief Justice; Supreme Court; Leadership; Small-Group Leadership; Task Leadership

* Correspondence concerning this article should be addressed to Dr. David A. Root, University of Indianapolis, 1400 E. Hanna Ave., Good Hall 203B, Indianapolis, IN 46227.

I would like to thank my parents, Rev. Dr. Clyde R. and Maryanne Root, and my brothers, Mark and Jon Root, for all of their love and support. They are a constant source of personal stability, intellectual stimulation, and lively entertainment. I would also like to thank Dr. Gerald Berk, one of my dissertation advisers at the University of Oregon. Despite my ire and protestations, he wisely held me back for a year on completing my dissertation (from which this article derives). He understood the time demands of teaching that take away from pursuing a scholarly agenda and forced me to write a more complete and thorough dissertation so I could have a solid piece of writing to work from at the beginning of my career. Thanks, Gerry.

Since the United States Supreme Court established the power of judicial review in *Marbury v. Madison* (1803), the chief justice has led a powerful institution of constitutional import. The office has played a crucial role in the pressing issues of the times, from the establishment of national supremacy in *McCulloch v. Maryland* (1819) to the question of slavery in *Dred Scott v. Sandford* (1857), racial segregation and “separate but equal” in *Plessy v. Ferguson* (1896), economic recovery during the Great Depression in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), racial desegregation in public education and beyond in *Brown v. Board of Education* (1954), abortion and reproductive rights in *Roe v. Wade* (1973), electing the president in *Bush v. Gore* (2000), and comprehensive healthcare reform in *National Federation of Independent Businesses v. Sebelius* (2012). In each of these cases, which represent only a small portion of the landmark decisions handed down by the court, the chief justice has served as the institution’s leader and namesake.

But how, exactly, does the chief justice lead the court? Is she simply a task master distributing responsibilities and deadlines and overseeing the judicial decision-making process? Does she concern herself with the justices’ social relationships? How much control does she wield in the judicial decision-making process—all, none, or some?

Despite the office’s central role on the court and its institutional impact on constitutional law, questions such as these concerning its leadership remain severely understudied in the judicial literature. Rather than investigating them with a vigor commensurate to the office’s power and efficacy, when looking at chief justice leadership, the academy has typically done little more than zero in on analyses of aggregate majority opinion assignment patterns, neglecting the deeper thread of the office’s leadership. Consequently, little research investigates the office’s central role in the execution of its chief function to guide the court through the judicial decision-making process, making such an inquiry a valuable endeavor in the scholarship. As such, identifying the landscape, structure, and operation of chief justice leadership sets a robust base on which to build a solid model.

Danelski (1960) lays out a landscape by identifying five interactive stages of the judicial decision-making process: certiorari, oral argument, conference, majority opinion assignment, and opinion drafting. Given the amount of attention paid in the judicial literature to the chief justice’s assignment of majority opinions at the expense of the other four stages, Danelski’s schema provides an untapped institutional foundation to develop a more thorough model of chief justice leadership.

Building on the sturdy landscape provided by these five interactive stages, the model of chief justice leadership advanced here next adds a structural level of conditions that prevail on the court and create what can be called the democratic default. These conditions include life tenure, equal vote, and free voice. Each of these conditions influences how the chief justice leads the court, by creating a unique atmosphere of judicial independence, equality, and autonomy.

Finally, from the leadership literature, small-group leadership and behavioral leadership provide two concurrent lenses with which to view chief justice leadership in operation. As the leader of nine justices on the court, the office exercises Verba’s (1961) twin towers of small-group leadership: task leadership and social leadership. Using these

twin towers as animating forces during each stage of the judicial decision-making process, this model of chief justice leadership examines Lewin, Lippitt, and White's (1939) three-way behavioral leadership typology of autocratic, laissez-faire, and democratic leadership.

Combining the democratic default, small-group leadership, and behavioral leadership in assessing the court's progression through the five interactive stages of the judicial decision-making process, the model sketched here identifies the office as chiefly democratic in structure and operation. This makes democratic leadership the dominant behavioral form. Meanwhile, for the small group of justices, social leadership plays an outsized role in the chief justice successfully leading the court across the landscape of making decisions and issuing opinions. Taken together, they point to the key finding: *In order to successfully lead the court, the chief justice must be just as good a political negotiator as a competent legal judge.*

SKETCHING A MODEL OF CHIEF JUSTICE LEADERSHIP: SOURCES, THEORIES, AND METHODS

In sketching this model of chief justice leadership, the formative research centers on four categories of sources that provide theories and methods that have yet to be applied to organize the office and study its leadership: justices' papers and effects, biographies, judicial scholarship, and leadership scholarship. In particular, the model advanced here relies heavily on the judicial and leadership scholarships to supply the theoretical, analytical, and methodological components of investigating chief justice leadership, while the justices' papers and effects and biographies supply much of the empirical data.

Justices' Papers and Effects

A number of justices have left papers, notes, and other writings concerning their time on the bench (e.g., Douglas 1981; Frankfurter 1980; Stevens 2011; Story 1851). As such, they offer primary source accounts of the judicial decision-making process that otherwise may have remained hidden inside the court's secluded halls, chambers, and conference room. Justice Story, who served for more than two decades with Chief Justice Marshall in the 19th century, provides candid and lucid insights on the leadership of the great chief justice. Meanwhile, Justices Frankfurter, Douglas, and Stevens are fruitful sources to draw from regarding the premodern and modern eras. Their combined service of more than 100 years coincides with seven chief justices from the late Hughes Court of the 1930s (Frankfurter and Douglas) through 2010, to the current Roberts Court (Stevens). In addition to providing observations from the bench, each justice also knew chief justices who served before they did, consequently expanding their coverage to include the whole of the 20th century and approximately 10–15 years on each bookend, beginning with Chief Justice Fuller (1888–1910) and concluding with Chief Justice Roberts (2005–present). Working from these justices' base, other justices' writings—some from chief justices—supply additional examples of chief justice leadership and insights (e.g.,

Brennan 1974; Curtis 1864; Rehnquist 1986; Roberts et al. 2005; Taft 1925; Warren 1977; White 1914).

Biographies

Biographical works about the chief justices offer additional empirical information augmenting the primary source accounts provided by various justices' papers and effects. Much of this biographical work is drawn firsthand from the chief justices' backgrounds, training, professional experiences, and personalities that drove their leadership. For instance, significant works have been produced about the three chief justices briefly investigated in this sketch: Marshall (autocratic), Stone (laissez-faire), and Warren (democratic). [See, for example, Beveridge (1919) for Marshall, Cray (1997) for Warren, and Mason (1956) for Stone .] In doing so, biographies offer qualitative pictures of who these men were rather than focusing narrowly on behaviors such as majority opinion assignment that can be numerically coded, mathematically quantified, and formulaically analyzed. In particular, these sources inform scholars of the chief justices' personal views and what specific influences and motivations affected their leadership—considerations that go far beyond what is contained in the current judicial literature. Additionally, biographies provide the views and perspectives of the biographers, which add further depth to the chief justices as both persons and leaders.

Judicial Scholarship

Danelski (1960) and Steamer (1986) offer two valuable studies within the judicial literature that provide theoretical and methodological bases from which to sketch a sturdy model of chief justice leadership. As highlighted above, Danelski's 1960 work provides the institutional foundations that supply the landscape of chief justice leadership, namely the five interactive stages of the judicial decision-making process. Utilizing his basic institutional foundation, and appreciating its fundamental character as establishing the terrain upon which chief justice leadership traverses, this model goes further by adding considerations of structure and operation to chief justice leadership that Danelski does not address.

Steamer (1986), meanwhile, highlights a methodological route to thoroughly study chief justice leadership. Specifically, his analysis divides chief justices into transformative and transactional leaders according to performance along the lines of Burns's seminal 1978 work regarding transformative and transactional leadership. In such efforts, Steamer classifies chief justices into four categories in a 1 + 3 fashion. First and foremost, inspirational chief justices who possess conviction—Chief Justices Marshall, Hughes, and Warren—are transformative leaders who revolutionize the court's impact on constitutional law. The rest of the chief justices, all inferior to inspirational justices, fall into three categories of transactional leaders bearing various stripes. These include persuasive and exemplar chiefs (Chief Justices Waite, Fuller, and White), chief justices involved with political and extra-court activities (Chief Justices Taft and Burger),

and chief justices minimized by short tenures Founding Era Chief Justices Jay, Rutledge, and Ellsworth and War Era Justices Chase, Stone, and Vinson).

The methodology employed here is similar to that used in Steamer's (1986) work, applying classic concepts from the leadership literature to the chief justice in order to examine the office and its leadership in new ways. Building from Steamer's work, the argument here appreciates Steamer's facility in adapting leadership concepts to study the office but differs on which concepts are selected and how they are applied. Where Steamer used Burn's 1978 transformational and transactional leadership and evaluated efficacy of leadership, this paper uses Verba's 1961 twin concepts of small-group leadership combined with Lewin et al.'s 1939 three-way behavioral typology to investigate execution of leadership. In this way, the focus of this work seeks to provide a closer view of the leadership that the office employs in carrying out the day-to-day functions involved in the judicial decision-making process, rather than concentrate on evaluative claims of performance (although some consideration of performance cannot be severed from the analysis of different behavioral leadership styles). By focusing on execution of leadership rather than on effectiveness of leadership, this work distinctly differs from Steamer's.

Leadership Scholarship

The leadership scholarship offers work wholly independent of the court that can be adapted to illustrate the office's leadership in operation. Importantly, this work comes from outside of the judicial literature. By doing so, it provides objective concepts and ideas from which can be drawn an analytical model of chief justice leadership.

As mentioned above, the two main leadership studies applied in this model of chief justice leadership consist of Verba's small-group leadership (1961) and Lewin et al.'s the three-way behavioral leadership typology (1939). The two key takeaways from this leadership scholarship highlight (1) the importance of social leadership over task leadership and (2) how the democratic default on the court makes democratic leadership the dominant form of chief justice leadership. A more thorough accounting of these leadership styles is provided below.

LANDSCAPE: THE FIVE INTERACTIVE STAGES OF THE JUDICIAL DECISION-MAKING PROCESS

Before highlighting the democratic default, small-group leadership, and behavioral leadership, this section provides a brief description of each interactive stage involved in the judicial decision-making process, to set the landscape of where such leadership occurs.

Certiorari

Since Chief Justice Taft's leadership in bringing about the enactment of the Judiciary Act of 1925 and its expansion of certiorari (or "cert"), the court possesses complete discretion

in deciding which cert petitions it will grant oral arguments to dispose of the merits of the case. This decision consists of two steps. First, to be considered by the justices at conference, cert petitions must be placed on the “discuss list.” Generally, the chief justice dominates the selections for the discuss list, but her determinations are not exclusive, as the associate justices can also suggest cert petitions to be included and all such suggestions are accepted for discussion.

Second, at conference, the justices briefly discuss whether to grant or deny a cert petition. The chief justice introduces each petition and frames the issues to be discussed and considered, for which each petition normally receives about five minutes. In this process, the court has developed and adopted an internal “Rule of Four” that requires only four justices to agree to grant cert. Nonetheless, despite requiring fewer than half of the justices to approve of a hearing, roughly only 2 percent of the approximately 10,000 cert petitions filed each year receive one.

Oral Argument

Following certiorari, oral argument constitutes the hearing in which counsel for each party highlights the arguments made in their filed briefs and all of the justices are free to participate in asking questions. This is the first time the justices engage collectively on the merits of a case and is the only public stage in the judicial decision-making process. As a matter of function, the chief justice presides over the hearing, which lasts for one hour with each side receiving thirty minutes to present its argument, although the chief justice can grant additional time in any given case (but this happens only infrequently). Most justices actively engage in asking questions, and the chief justice must monitor the proceeding to ensure that it moves along timely and that both sides are given their fair day in court, as well as maintain a bench that presents itself civilly and judiciously.

Conference

At the heart of the judicial decision-making process sits the conference, or the private meeting of the justices to discuss and vote on the merits of argued cases (and whether to grant cert petitions). Following the chief justice’s opening summary, comments, and framing of each case, each associate justice contributes his or her comments and viewpoints in descending order of seniority, starting with the senior associate justice. During this portion of the discussion, tradition forbids the justices, including the chief justice, from interrupting the speaking justice. After the first round of comments concludes, the justices take an initial vote, beginning with the junior associate justice and working their way back up to the chief justice, who votes last. If the initial vote does not result in unanimous agreement, the discussion opens up and the justices fully debate until all comments and viewpoints are expressed. In these instances, the chief justice must exercise astute democratic and social leadership, as well as timely task leadership, to maintain a healthy atmosphere and move the court along in its business.

Majority Opinion Assignment

Following conference, opinions are assigned by the senior justice in the majority, which by custom is always the chief justice when in the majority. In such cases, the chief justice may assign the opinion to any majority justice, including herself, but must be perceived as doing so fairly—meaning even distribution of both important and mundane cases. As the judicial scholarship has made clear by its overwhelming concentration on this stage, this decision constitutes the most—perhaps only—concrete lever of power that the chief justice possesses in the judicial decision-making process. This power results from the fact that this decision plays a critical role in determining what direction the court’s final opinion will take as well as influences the judicial legacies of each justice.

Opinion Drafting

After an opinion has been assigned, the process of drafting it can take a variety of paths, whether one of smooth sailing as the justices in the majority largely agree on the decision’s outcome and its reasoning, or one that may require several rounds of negotiation with justices joining and abandoning the majority. During the ebb and flow of these internal transactions, the chief justice sits at the center of the court’s information network, meaning that although she cannot dictate that certain positions or arguments be advanced or eliminated, she does maintain a soft social presence in the process. Additionally, and importantly, each justice may write a concurring or dissenting opinion in every case, which again the chief justice may influence one way or another but possesses no formal power to include, shape, or prevent.

STRUCTURE: THE DEMOCRATIC DEFAULT ON THE COURT

As noted above, three conditions combine to create the democratic default on the court: life tenure, equal vote, and free voice. Life tenure means that the justices cannot lose their seats because of the decisions they make. They have a lifetime job. This provides them with judicial independence, an important underlying characteristic that allows the court to constitutionally function to the full extent that judicial review intends it to.

Equal vote means that each justice, including the chief justice, has only one vote in the judicial decision-making process. Nine members means nine votes, one per justice. Consequently, in the final tally, each justice operates under the condition of judicial equality. Additionally, this makes the chief justice *primus inter pares*, or first among equals. The chief justice may lead the court, but she is not the court.

Lastly, free voice means that each justice, when not drafting the majority opinion, remains free to write a concurrence or dissent in every case. Coupled with life tenure, this gives the associate justices the ability to write with complete judicial autonomy, as the chief justice possesses no formal authority to influence their decisions whether or not to write a concurrence or a dissent, nor possesses any control over what such opinions might say.

Each of these three conditions of the democratic default significantly influences the structure in which the chief justice operates, making it vitally important that she

appreciate how they affect the way she leads the court. In terms of both small-group and behavioral leadership, the chief justice must exercise sagacious social leadership within the ambit of democratic leadership. That may sound ironic for the court, especially because such conditions intentionally remove its members from the political process, but like any human group charged with executing responsibilities, the court remains a political animal.

OPERATION: SMALL-GROUP AND BEHAVIORAL LEADERSHIP

In assessment of chief justice leadership of the court, small-group and behavioral leadership provide two lenses with which to judiciously examine the office. Small-group leadership encompasses task and social leadership, which supply the everyday actions and considerations of guiding the court through the judicial decision-making process. Importantly, they animate the behavioral leadership styles of autocratic, laissez-faire, and democratic leadership. These behavioral styles, in turn, systematically provide analytical frameworks illustrating consistent patterns in how the chief justice leads the court, thereby also supplying the model's methodology.

Small-Group Leadership

As the leader of nine justices on the court, the office exercises Verba's (1961) small-group leadership. Task leadership focuses on producing group outcomes, while social leadership concerns the individual well-being of each member as well as group cohesion. Unlike the typical small-group leader who leans toward either task or social leadership, however, during the judicial decision-making process, the associate justices expect the chief justice to exercise both task and social leadership. Consequently, the office demands comprehensive small-group leadership.

On the task side, such leadership consists of choosing which cert petitions to place on the discuss list, presiding over oral argument, leading the conference discussion on argued cases (and cert petitions), assigning opinions when in the majority, and overseeing opinion drafting. Similar to those of most small-group leaders, the chief justice's task leadership responsibilities are relatively straightforward; nonetheless, they cannot be ignored or neglected because they must be competently completed in order for the court to fulfill its essential function of deciding cases and issuing opinions. If the chief justice fails to lead the court in executing the responsibilities incumbent of the judicial decision-making process, the associate justices will jockey with each other to fill the leadership void, which will produce a disproportionate amount of social strife relative to the number of opinions handed down. In this way, the court will never go without a task leader, but this does not solve its small-group leadership calculus.

The key to solving this calculus is social leadership, for which the chief justice must work to ensure court cohesion, solidarity, and harmony by navigating the complex web of considerations intensified by the three conditions that create the democratic default. She must attempt to establish a healthy atmosphere on the court by seeking to reach broad agreement among the justices in decided cases. She does so by undertaking

efforts to minimize disagreements and cool tensions during oral argument, conference (both on cert petitions and argued cases), and opinion drafting. During oral argument and particularly conference, defusing disagreements often requires the chief justice to enter into the fray and evenhandedly mediate the argument as an impartial referee, a responsibility that involves immense emotional muscle and restraint alongside social adroitness and personal wisdom. In this capacity, as well, when assigning majority opinions, the chief justice must consider the justices' workload, feelings, and aspirations in order to evenly disperse the court's work and be perceived as fair in doing so, taking into account each justice's various interests and expertise—including her own—and balancing them against each other.

In addition to being a neutral referee during the various stages of the judicial decision-making process, at all times—and unlike the associate justices—the chief justice must maintain a heightened level of judicial decorum that not only commands formal deference but also, more importantly, engenders personal respect. Consequently, one thing a chief justice can never do is slight her colleagues in written opinions, even ones she vehemently disagrees with, which some associate justices are wont to do. The chief justice must rise above such temptation, both professionally and personally, for the social good of the court.

Bringing all of these considerations together, the chief justice must exercise competent task leadership in order for the court to execute its essential function, but, more importantly, for the court to function efficiently and effectively, social leadership constitutes the key to successful chief justice leadership no matter which behavioral form it may take.

Behavioral Leadership

Autocratic Leadership. Classically defined as command-and-control leaders, autocratic leaders make all of the decisions for the group and seek no opinion, counsel, or votes from group members. Such a leader is the principal, while group members are the agents. This makes an autocratic leader a dominant task leader and one who may or may not exercise social leadership.

While Chief Justice Marshall employed a sweeping autocratic hand in leading the court during its formative years, particularly in oral argument, conference, majority opinion assignment, and opinion drafting (cert did not exist on the Marshall Court), this form of chief justice leadership is antiquated to his time on the bench. Nonetheless, even though autocratic leadership finds only limited application on the modern court in composing the discuss list in the cert stage (i.e., task leadership) and, while technically in task operation but not social cohesion, majority opinion assignment, looking at Marshall's leadership remains valuable in considering each of the classic types of behavioral leadership.

During oral argument, an autocratic chief justice would simultaneously exercise task and social leadership either in silence or by exclusively questioning counsel. The latter route has never been employed; Chief Justice Marshall set a silent tone in leading his bench. In

either case, without meaningful verbal participation by any of the associate justices, an autocratic chief justice may command the associate justices to singularly function as note-takers for the chief justice in helping to reach the court's decision. In this capacity, the chief justice would not request any associate justices' opinions but rather would instruct each of them to simply keep track of important items that arise in oral argument.

At conference, the Great Chief Justice dominated the justices' nightly discussions that took place in their boardinghouse accommodations, where they lived together during the annual winter term in Washington, DC, when the court sat in session. These boardinghouse arrangements played a crucial role in Marshall's autocratic leadership by creating physical conditions conducive to it. From this base of the home hearth, his command of the cases, their issues, and the applicable law were complete and, coupled with his eloquently simple turns of phrase and the endearing force of his personality and temperament, his task and social leadership blended together and proved to be an instrumental spearhead in determining the court's decisions and opinions.

As a result, the majorities he commanded were formed through astute social leadership. Marshall found ways to speak to each associate justice and comfortably persuade all on correct (his) outcome in the case. When he could not convert associate justices to his view, he found ways to roundly criticize them around the boardinghouse, making their daily lives uncomfortable until they acquiesced to his position. With Marshall leading in such fashion, his majorities were usually unanimous, particularly in seminal constitutional cases such as *Marbury v. Madison* (1803), *McCulloch v. Maryland* (1819), and *Gibbons v. Ogden* (1824).

He recognized that unanimity must be the norm to transform the court from a weak institution of only passing and nominal governing import into one that would grow into a constitutional force. To achieve this goal, along with plying an autocratic hand at conference, he also exercised autocratic task leadership by eliminating the old English practice of seriatim, in which each justice wrote a separate opinion in every case, replacing it with one in which a single justice spoke for the majority. Moreover, he established the tradition that, whenever in the majority (which Marshall usually was), the chief justice would assign the opinion to its author. Naturally, he frequently assigned the opinion to himself, writing 47 percent of Marshall Court decisions and 58 percent of constitutional ones. In landmark constitutional cases, he wrote every opinion except for *Martin v. Hunter's Lessee* (1816), in which he recused himself because his brother possessed a significant interest in the case.

In drafting opinions, meanwhile, Marshall demonstrated simple logic and clear prose, coupled with flashes of majestic and sweeping phrases for rhetorical effect. He set a strong tone for the associate justices that when drafting opinions, the court would speak clearly and forcefully. Frequent unanimous opinions also added to this clarity and forcefulness. In instances when justices sought to write concurrence or dissent, Marshall stoutly discouraged such behavior on account of damaging the court's credibility.

Marshall maintained an acute awareness of the institutional statecraft in which he was engaged. Consequently, he intentionally made an attempt—and succeeded—at building up the court to be a powerful institution of the national government and a coequal branch with the president and Congress. This, in turn, enhanced the prestige of

the court and the justices, which gave Marshall additional leverage to autocratically command his court.

Laissez-Faire Leadership. Laissez-faire leadership is classically defined as hands-off leadership, in which the group leader is uninvolved with group members and participates very little, if any, in decision making. Consequently, such leaders make no policies or group-related decisions (i.e., no task leadership), nor are they involved with their members (i.e., no social leadership). Instead, group members are responsible for all tasks, processes, and decisions, along with creating and maintaining group cohesion. As a result of such complete group governance, laissez-faire leaders generally hold little to no authority within their groups.

As Chief Justice Stone's tenure dramatically demonstrated, laissez-faire leadership as a dominant form is not appropriate on the court. The chief justice, although not an autocratic command-and-control leadership position, nevertheless has clearly defined tasks that are required to be completed for the court to competently function, and the associate justices expect the chief justice to execute these tasks. This is the first aspect of leading the court at which the chief justice must succeed if the office is to lead the institution in any way.

Equally important on the social side, while the associate justices are highly intelligent, ambitious, and self-motivated individuals, they operate in an institutional setting that demands personally attentive leadership from the chief. Leaving the associate justices to man the bench without social direction, discipline, and diplomacy, as Stone did, leaves the court in institutional tatters as the associate justices fight each other for leadership in every stage. [See, e.g., *Ex parte Quirin* (1942), for which Justices Roberts and Black controlled the certiorari process; *Smith v. Allwright* (1944), for which Stone accepted Justice Jackson's majority opinion assignment advice concerning the public's reception of the court's controversial ruling in a racially charged voting rights case arising from Texas; and *Jewell Ridge Coal Corp. v. United Mine Workers of America* (1945), for which Justice Jackson's concurrence sparked an internal war with Justice Black over the latter's lack of recusing himself for a conflict of interest.]

When selecting cert petitions to place on the discuss list, and like his laissez-faire leadership in majority opinion assignment, Stone allowed far too much leeway to the associate justices in its composition. He did not decisively control the process, which resulted in numerous petitions for discussion and thus irritated the justices in terms of frivolous petitions being given time for assessment and evaluation. Moreover, at conference, and like his leadership on argued cases, Stone's laissez-faire leadership allowed discussion to ramble on lengthily without decisive decision making. Thus, the justices spent an unreasonable amount of time working through a largely procedural matter rather than disposing of it in a preferred, rote manner. This failure of both task and social leadership during a mundane stage of the judicial decision-making process raised the ire of the justices and set the tone from the beginning that fostered antagonism and discord among them.

This rancor and division easily made their way into oral arguments on the Stone Court. Although Stone led for only five years, the derisive voices of opinion tore his court

apart in open air, free for the nation and world to see, as the associate justices chided each other freely on the bench. A tit-for-tat mentality among intelligent men rapidly descended into childish slights and barbs designed not to unravel the deeper issues of the cases but instead to insult and humiliate judicial enemies seated on the same supreme bench. Meanwhile, Stone exercised no task leadership aiming to quell the justices' pointed attacks at each other, soiling their social relationships and leaving the court to look like a pack of wild dogs ravenously foaming at the mouth for each other's demise.

Unsurprisingly, this caused the associate justices to more deeply cascade at conference into their petty skirmishes of personal rifts and slights. Stone fostered such hostile relations by allowing the associate justices to extensively debate in a freewheeling fashion, one that strongly resembled an upper-level law-school seminar course seeking not to arrive at any definite decision but rather to analyze all of the possible positions that a case presented. Coupled with the social characteristics of hyper-egotistical justices appointed by President Franklin D. Roosevelt beginning in the late 1930s—namely Justices Black (1937), Frankfurter (1939), Douglas (1939), and Jackson (1941)—this unguided task leadership proved to be too much for seating a bench capable of civil disagreement. As a result, conferences on the Stone Court exhausted and strained the associate justices physically, mentally, psychologically, and socially. The justices also frequently failed to conclude on time, often being held over until well into the following week, which further grated on them. In each of these ways, Stone lost control of the conference and thereby lost the ability to corral the Roosevelt justices. This, in turn, disaffected his leadership of the court in all five stages.

Moreover, Justice Stone allowed the social acrimony of the conference to spill over afterward, most notably by allowing the associate justices far too free a rein in majority opinion assignment by being a frequent dissenter. In exercising this negative task leadership, he abdicated influence over opinions' content, tone, and language, which are important for steering the general course of the court. When he did find himself in the majority, Stone would entertain assignment suggestions from the associate justices, thus creating social competition and jealousy among them.

During opinion drafting, meanwhile, the associate justices began to express themselves more stridently in majority opinions and more frequently (and stridently) in concurrences and dissents. This converted poor task leadership into poor social leadership. In terms of task leadership, it slowed down the ability to timely produce opinions, which brought groans from both the associate justices and the public. Socially, and published in print that history continues to encounter with discomfort, the associate justices wrote with a fevered pitch of animosity and division never before seen on the court. It was a bench at war with itself, producing written opinions that detailed the various battlefields and their casualties. The result spoke poorly for the court, its eminent status as the nation's high bench, and Chief Justice Stone, who otherwise enjoyed a sterling and highly celebrated judicial record as an associate justice (in which he sat in all eight seats, including senior associate justice).

In addition to difficult personalities and their acrimonious expressions in writing, Stone also attempted to lead the court from home while the associate justices established their chambers in the new Supreme Court Building, completed in 1935. When the court

first moved into its new home, Stone, then an associate justice, growled about its grandiose size and ornate architecture, which, he complained, made the justices look like nine black beetles scuttling about the Temple of Karnak. He hated the new facility and continued to work from home even after being appointed chief justice in 1941. By the end of his tenure in 1946, only he continued working from home. Thus, he exercised laissez-faire task and social leadership not only in terms of failing to lead during the judicial decision-making process but also as an absent leader in terms of physical presence. It is difficult to lead a small group of ambitious and egotistical men and mass them together into a productive and cohesive unit when they assemble daily without the leader's presence, particularly when they do so by the leader's own choosing.

Democratic Leadership. Democratic leadership concerns a balance between task and social leadership in which leaders follow structures to ensure that decisions are made and objectives achieved (i.e., task leadership) while at the same time taking into account group members' needs, thoughts, and feelings (i.e., social leadership). Such leaders lead in the decision-making process and may exercise influence, but they do not singularly make decisions like autocratic leaders nor allow the group to make decisions without any leadership from them like laissez-faire leaders.

In exercising task leadership as a first among equals, a democratic leader leads and initiates discussion in which decisions are reached through a participatory process followed by a democratic vote that results in either a unanimous, consensus, or majority agreement. As a social leader, meanwhile, a democratic leader looks at all group members in terms of responsibilities rather than status or rank and therefore equally consults others in decision making. Such leaders find ways to involve everyone in the group in reaching the group's decision. In other words, each member contributes input into the group's discussion and exercises a vote in its final decision. This makes each group member feel like an integral part of the decision and take some level of ownership in that decision, at least when they are in the majority. When members are in dissent, a democratic leader seeks to assuage their rejection by assuring them that their ideas were fully considered.

Democratic leadership constitutes the primary form of leadership employed by modern chief justices. As a result, and unlike Marshall, the chief justice must work with the associate justices rather than dictate her own opinions as those for the court. She may lead the conference discussions on cert petitions and argued cases, as well as preside at oral argument, assign majority opinions when in the majority, and oversee opinion drafting, but she cannot demand that the associate justices approach cases, decide them, or draft their opinions in one way or another. Rather, chief justice leadership is closely tied to participation and influence, which are tools of democratic leadership best deployed through skillful social leadership, far from command and control as exercised by autocratic leaders.

The chief justice also cannot rely on laissez-faire leadership, even though this form may often arise in conjunction with democratic leadership. The chief justice must exercise competent task leadership, which requires plying a steady hand at the judicial till to ensure that quality opinions are produced. More importantly, though, she must be a

constant social presence among the associate justices and around the court. She must function like a social thermometer, constantly taking the temperature of the associate justices and making sure passions do not rise to explosively hot levels or descend to irretrievably cold depths. Within the confines of the democratic default, democratic leadership emphasizes social leadership over task leadership by making the associate justices integral contributors to the court's opinions. This means that, unlike an associate justice, to effectively lead the court in its essential function, the chief justice must be just as skilled a political negotiator as a competent legal judge. She must allow discussion and debate to prevail at oral argument, at conference (cert petitions and argued cases), and in written opinions but, unlike Stone, not to a laissez-faire extent that results in unproductiveness at best and bitter personal warfare at worst. Instead, the chief justice must be able to tread the middle ground between producing opinions on the task side, and handling the justices' personalities, partisanship, and judicial philosophies on the social side, all while remaining comfortable with the mediating effects that democratic leadership often espouses on the court.

As a prime example of such skillful democratic leadership, Chief Justice Warren led a carousel court of numerous justices that—at base—continued to consist of a core of Roosevelt justices held over from the Stone Court (and through the Vinson Court). As a former governor of California, Warren politically understood the court's mediating tendencies and allowed the justices to express their individuality and predilections. At the same time, Warren fashioned strong agreement and even unanimity in some of the most controversial cases in the court's history (e.g., *Brown v. Board of Education* 1954). He worked daily with the associate justices one on one, exercising skillful social leadership in the justices' chambers and the court's hallways that converted task outputs into a constitutional revolution in several areas, including racial desegregation, political reapportionment, and criminal justice. He gave the associate justices free rein to express themselves but kept a lid on that expression in oral argument, in conference, and during opinion drafting in their majorities, concurrences, and dissents.

When composing the discuss list for cert petitions, Warren exercised a fair amount of single-handed autocratic leadership, but this did not upset the associate justices, who accepted his decisions without much, if any, push back. Moreover, when an associate justice wanted to add a petition to the list, Warren not only never refused but also never expressed any verbal disagreement to its inclusion. As such, he skillfully led in terms of both task and social leadership by composing the list, keeping the associate justices content with his selections, and including theirs without question when suggested. At conference discussing cert petitions, as well, Warren proved adept at letting all of the justices speak their views about whether to grant oral argument, while keeping comments limited so as to move the process along.

At oral argument, Warren combined both task and social leadership with laissez-faire and democratic leadership to create a well-behaved bench. Often quiet but not silent, the chief justice allowed the associate justices plenty of time to talk and ask questions of counsel, thus using task leadership to demonstrate social leadership and allowing laissez-faire leadership to couple with democratic leadership. When an associate justice threatened the civility that Warren worked hard to cultivate on the bench, however, he would step in

and redirect the discussion to avoid rising tensions. In this way, Warren interjected at oral argument when he had to, in order to keep the justices functioning peacefully.

Warren applied democratic task and social leadership most impressively at conference. Working with an intensely egotistical and caustic core of Roosevelt justices, he subdued them into a professionally working team even as their personal fissures continued to split them apart. He led at conference by framing the cases in his desired direction but also exercised patience in allowing the associate justices to present their views and form their alliances. The reasons for deciding a case a certain way mattered little to Warren. Instead, he was much more interested in reaching a certain decision, however that may be done. As such, his task leadership to reach certain decisions created significant space to exercise social leadership in allowing the associate justices to democratically participate and influence one another. At the same time, however, Warren exercised the leadership prerogatives of the chief justice and made sure that his colleagues kept on task and off each other.

Warren also democratically spread his assignments of majority opinions across the associate justices and himself, sometimes using such assignment to entice a justice into the majority (task leadership), and at other times seeking to maintain a healthy balance of opinion writers on the court (social leadership). Moreover, only in the truly landmark of landmark cases (e.g., *Brown* or *Miranda v. Arizona* 1966) did Warren consistently assign the opinion to himself. Otherwise, he spread desirable opinions equally among the associate justices, although he had his favorites, such as Justice Brennan, and his not-so-favorites, like Justice Frankfurter. Usually in the majority, Warren made good use of this concrete lever of power held by the chief justice.

Similar to his ambivalence to the reasoning of how a decision was reached at conference, Warren displayed a significant amount of deference as to the shape and form of an opinion during its drafting. He kept track of the development of an opinion but largely delegated its course to the assigned author. In this way, both his task and social leadership during this phase resembled a combination of *laissez-faire* and democratic leadership, but with a much more democratic tilt, as he empowered the author to take control but did not completely abdicate authority and oversight in its direction. Also in terms of democratic leadership, he recognized the necessity of concurrences to bring justices into the majority—which differed significantly from an autocratic Marshall and cannot be compared to an absent Stone—thereby achieving, through the exercise of open and inclusive democratic task leadership, many significant results that otherwise would not have been socially possible.

In essence, Warren understood how democratic participation and decision making were required to make the court function to its greatest institutional capability. Following his leadership, which marks the beginning of the modern chief justice, each of his successors—Chief Justices Burger, Rehnquist, and Roberts—has followed to varying degrees Warren's example in making democratic leadership his dominant form of guiding the court during the judicial decision-making process.

CONCLUSION: LEADING THE THIRD COEQUAL BRANCH OF AMERICAN GOVERNMENT

In brief summation, the mixture of landscape, structure, and operation of chief justice leadership in the judicial decision-making process emphasizes social and democratic leadership. This does not, however, foreclose the inquiry from further investigation. Quite the opposite; it provides a baseline from which to build more sophisticated models of how the chief justice leads the court in its essential function of hearing and deciding cases. Nonetheless, it highlights a key finding: *To successfully lead the court, the chief justice must be just as good a political negotiator as she is a competent legal judge.* While standing as the third coequal branch of American government, and the one of legal and constitutional import, the court remains a political animal that must be tamed by skillful chief justice leadership.

REFERENCES

- Beveridge, Albert J. 1919. *The Life of John Marshall* (4 Vols.). Cambridge, MA: Houghton Mifflin.
- Brennan, William J. 1974. "Chief Justice Warren." *Harvard Law Review* 88(1):1–5.
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- Burns, James MacGregor. 1978. *Leadership*. New York: Harper Perennial.
- Bush v. Gore*, 531 U.S. 98 (2000).
- Cray, Ed. 1997. *Chief Justice: A Biography of Earl Warren*. New York: Simon & Schuster.
- Curtis, Benjamin. 1864. "Notice of the Death of Chief Justice Taney." *Proceedings in Circuit Court of the United States for the First Circuit*.
- Danelski, David J. 1960. "The Chief Justice and the Supreme Court." PhD dissertation, Department of Political Science, University of Chicago.
- Douglas, William O. 1981. *The Court Years 1939–1975: The Autobiography of William O. Douglas*. New York: Random House.
- Dred Scott v. Sandford*, 60 U.S. 393 (1857).
- Ex parte Quirin*, 317 U.S. 1 (1942).
- Frankfurter, Felix. 1980. "From Fuller to Stone: Chief Justices I Have Known." *Supreme Court Historical Society, Publications-Archives*: 1980.
- Gibbons v. Ogden*, 22 U.S. 1 (1824).
- Jewell Ridge Coal Corp. v. United Mine Workers of America*, 325 U.S. 161 (1945).
- Lewin, Karl, Ron Lippitt, and R. K. White. 1939. "Patterns of Aggressive Behavior in Experimentally Created 'Social Climates.'" *Journal of Social Psychology* 10:271–99.
- Marbury v. Madison*, 5 U.S. 137 (1803).
- Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

- Mason, Alpheus Thomas. 1956. *Harlan Fiske Stone: Pillar of the Law*. New York: Viking.
- McCulloch v. Maryland*, 17 U.S. 316 (1819).
- Miranda v. Arizona*, 384 U.S. 436 (1966).
- National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).
- National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).
- Plessy v. Ferguson*, 163 U.S. 537 (1896).
- Rehnquist, William H. 1986. "Constitutional Law and Public Opinion." *Suffolk University Law Review* 20(4):751.
- Roberts, John G. Jr., Sandra Day O'Connor, Ruth Bader Ginsburg, R. Ted Cruz, James C. Duff, David G. Leitch, and Maureen Mahoney. 2005. "In Memoriam: William H. Rehnquist." *Harvard Law Review* 119(1):1.
- Roe v. Wade*, 410 U.S. 113 (1973).
- Smith v. Allwright*, 321 U.S. 649 (1944).
- Steamer, Robert J. 1986. *Chief Justice: Leadership and the Supreme Court*. Columbia, SC: University of South Carolina Press.
- Stevens, John Paul. 2011. *Five Chiefs: A Supreme Court Memoir*. New York: Little, Brown and Company.
- Story, William W., ed. 1851. *Life and Letters of Joseph Story: Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University* (Vols. 1 and 2). Boston: Charles C. Little and James Brown.
- Taft, William H. 1925. "The Jurisdiction of the Supreme Court Under the Act of February 13, 1925." *Yale Law Journal* 35(1):1-12.
- Verba, Sydney. 1961. *Small Groups and Political Behavior: A Study of Leadership*. Princeton, NJ: Princeton University Press.
- Warren, Earl. 1977. *The Memoirs of Earl Warren*. Garden City, NY: Doubleday & Company.
- White, Edward Douglass. 1914. "The Supreme Court of the United States.." *American Bar Association Journal* 7(7):341-43.