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Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on *Dickerson v. United States*

Daniel M. Katz¹

I. INTRODUCTION

Following a decade without change, the past year witnessed significant alteration to the composition of the United States Supreme Court. In the span of several months, the High Court experienced substantial changes in its membership brought about in part by the death of its most prominent member, Chief Justice William Rehnquist. In periods of transition such as this, it is natural to speculate on the future course of this institution, but equally compelling are the reflections concerning the historical significance of the recently completed era. In the most recent iteration, substantial attention centered upon the late Chief Justice, whose death focused interest not only on the institution which he guided for nearly two decades but also upon his personal jurisprudence. Comments regarding his legacy were wide-ranging and covered the gambit of cases that came before the High Court during his stewardship.²

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² See, e.g., Craig M. Bradley, *Rehnquist Scaled Back Rights of the Accused*, TRIAL, Dec. 2005, at 56 (“While Rehnquist failed in his effort to radically reconstruct criminal procedure law, he nevertheless enjoyed perhaps his greatest success in his 33 years on the Court by trimming back Warren Court initiatives in virtually every area of criminal procedure and habeas corpus.”); Erwin Chemerinsky, *Rehnquist’s Steady Conservatism Reshaped the Law*, TRIAL, Nov. 2005, at 70 (“William Rehnquist will be remembered as one of the most important Supreme Court justices in American history, partly for his length of service But more important, Rehnquist profoundly affected constitutional law by pushing it in a more conservative direction.”); R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10, 16 (2005) (“His views did not always prevail, but his steady hand at the helm—his vision, leadership, and unwavering principles—made this in every respect the Rehnquist Court.”); Justice Ruth Bader Ginsburg, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 6, 6 (2005) (“[O]f all the bosses I have had as a lawyer, law teacher, and judge, Chief Justice William Hobbs Rehnquist was hands down the fairest and most efficient.”); William N. La Forge, *Chief Justice William H. Rehnquist Remembered*, 52 FED. LAW., Oct. 2005, at 26, 28 (“Chief Justice Rehnquist was known as a pragmatist in many respects, and, through artful compromise and fair-minded debate intended to achieve the broadest majority possible, he strove to lead the Court with a

One case, *Dickerson v. United States*,³ garnered particular attention from commentators.⁴ In fact, even before his passing some argued this decision was critical to understanding the Rehnquist legacy.⁵ In *Dickerson*, the Chief Justice authored a seven-member majority opinion which sustained *Miranda v. Arizona*.⁶ The decision was a surprise. *Miranda* had been a pillar of the Warren Court revolution, and Chief Justice Rehnquist previously varied from meek support to outright dissent from the 1966 ruling.⁷ Thus, given his history, he seemed unlikely to author a supportive opinion in perhaps the key *Miranda* decision of the decade.

In the wake of the Chief Justice's ruling, legal scholars grappled to interpret this apparently anomalous decision. This process produced a litany of explanations.⁸ Some commentators pursued a separation-of-

show of judicial unity, while also preserving the integrity and credibility of the Court and the law."); Tony Mauro, *The Chief and Us: Chief Justice William Rehnquist, The News Media, and The Need For Dialog Between Judges and Journalists*, 56 SYRACUSE L. REV. 407, 407 (2006) ("He was a brilliant and modest jurist who loved the Supreme Court and loved history but did not, I am fairly sure, love the news media [H]e viewed [the media] as something of a distraction.").

³ 530 U.S. 428 (2000) (Rehnquist, C. J., delivered the opinion of the Court, in which Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined.).

⁴ See, e.g., Bradley, *supra* note 2; Cruz, *supra* note 2; Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251 (2003); Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda's Critics—and Then Its Supporters*, in THE REHNQUIST LEGACY 106 (Craig Bradley ed., 2006).

⁵ Jeffrey Rosen, *Rehnquist the Great*, THE ATLANTIC MONTHLY, Apr. 2005, available at www.theatlantic.com/doc/200504/rosen. With respect to *Dickerson*, Professor Rosen notes:

Rehnquist's evolution from *Miranda's* leading critic to its improbable savior infuriated conservatives and confused liberals; but in fact it was emblematic of his career [L]iberals have never understood how significantly and frequently Rehnquist departed from doctrinaire conservative ideology, and conservatives have failed to grasp that his tactical flexibility was more effective than the rigid purity of Scalia and Thomas. In truth, Rehnquist carefully staked out a limbo between the right and the left and showed that it was a very good place to be As for judicial temperament, he was far more devoted to preserving tradition and majority rule than the generation of fire-breathing conservatives who followed him.

Id.

⁶ 384 U.S. 436 (1966).

⁷ See *infra* notes 102, 108 and accompanying text.

⁸ See *infra* notes 9, 10, 12. For a small sample of additional commentary, see also Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898 (2001); Richard H. Fallon, *Constitutional Law and the Supreme Court: Judicial Legitimacy and the Unwritten Constitution—A Comment on Miranda and Dickerson*, 45 N.Y.L. SCH. L. REV. 119 (2001); *The Supreme Court 1999 Term: The Leading Cases*, 114 HARV. L. REV. 179, 199-209 (2000); Conor G. Bateman, Note, *Dickerson v. United States: Dickerson is Deemed a Constitutional Rule, But Does it Really Matter?*, 55 ARK. L. REV. 177 (2002); Andrew W. Muller, Note, *Congress' Right to Remain*

powers theory, positing that the Chief sought to protect the Court from encroachment by Congress.⁹ Some focused upon exogenous factors, arguing that public opinion motivated the Chief.¹⁰ Still others argued that the decision was strong evidence of Rehnquist's faithful adherence to the principle of stare decisis.¹¹ The *Dickerson* opinion itself particularly supports this latter account. Chief Justice Rehnquist specifically noted, "[W]hether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now."¹²

As written, many accounts accept the opinion at face value, thereby disavowing the potential of a strategic explanation. The difficulty with the non-strategic accounts is their failure to outline explicitly the evidence

Silent in Dickerson v. United States -or- How I Learned to Stop Worrying and Learn to Love Miranda v. Arizona, 34 CREIGHTON L. REV. 801 (2001).

⁹ See George M. Drey, *The "Illegitimate Exercise of Raw Judicial Power": The Supreme Court's Turf Battle in Dickerson v. United States*, 40 BRANDEIS L.J. 47, 80-81, 88 (2001) ("[T]he Court defended *Miranda* because, in attacking this decision, Congress was intruding upon the court's turf In short, 18 U.S.C. § 3501 struck a raw nerve; the Court felt the need to flex its judicial muscle in the face of what it perceived as a particularly well-targeted threat from a co-equal branch."); Arthur H. Garrison, *Rehnquist v. Scalia—The Dickerson and Miranda Cases: A Debate on What Makes a Decision Constitutional*, 25 AM. J. TRIAL ADVOC. 91, 133 (2001); Craig M. Bradley, *Behind the Dickerson Decision*, TRIAL, Oct. 2000, at 80. Professor Bradley advances two explanatory theories, the second of which argues that the separation of powers motivated the Chief. Specifically, he notes, "[T]his was likely because of the second reason Rehnquist's vote did not surprise me: his concern with maintaining the balance of power between the Court and Congress." *Id.* at 80.

¹⁰ Greenhouse, *supra* note 4, at 253 n.17 (arguing that the majority in *Dickerson* was unwilling to endure the public criticism which would follow from overruling *Miranda*) (citing KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* 207 (2002)); Bradley, *supra* note 9, at 80 (describing how William Rehnquist admired former Chief Justice Charles Evans Hughes because "Hughes believed that unanimity of decision contributed to public confidence in the Court") (citing William Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637 (1976)); Mitch Reid, Note, *United States v. Dickerson: Uncovering Miranda's Once Hidden and Esoteric Constitutionality*, 38 HOUS. L. REV. 1343, 1378-9 (2001) ("The simplest answer is that to hold otherwise the Court would have overturned a simple, yet comforting legal procedure embraced by most Americans Considering *Miranda's* popularity, imagine the enormity of public backlash the Court would have received if it overturned such a distinguished decision."). All of these arguments are bolstered by language contained within the opinion specifically noting that public opinion at least partially motivated the court. In particular, Justice Rehnquist wrote that public acceptance of *Miranda* has led it to become part of the "national culture." *Dickerson*, 530 U.S. 428, 443 (2000).

¹¹ See Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=830724 (December 12, 2006) ("Out of respect for stare decisis, the Court left in place *Miranda's* warnings but restricted its exclusionary rule and largely declined to extend *Miranda*."); Rosen, *supra* note 5 and accompanying text; Bradley, *supra* note 2, at 56-57. *Contra* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L.J. 53, 93-95; Kevin McNamee, Comment, *Do As I Say and Not As I Do: Dickerson, Constitutional Common Law and the Imperial Supreme Court*, 28 FORDHAM URB. L.J. 1239, 1293 (2001).

¹² *Dickerson*, 530 U.S. at 443.

supporting the uniqueness of their theory.¹³ Specifically, these explanations largely ignore the alternative set of preferences which could have produced the Chief's decision. This is troubling because prior scholarship demonstrates that a chief justice possesses a unique set of institutional powers which provides significant incentive for him to behave sophisticatedly.¹⁴ Many prevailing explanations for *Dickerson* at a minimum are incomplete because they fail to determine whether his vote and opinion were the result of moderation, fidelity to traditional legal principles, or, in fact, strategic behavior.

This article pursues its own uniqueness claim, arguing the gravamen of available evidence supports a strategic explanation for Justice Rehnquist's behavior in *Dickerson*. To do this, the article first reviews the methodological debate which exists within the social science scholarship, a debate relevant to the competing explanations for the *Dickerson* decision. Next, the article explores the strategic or quasi-game-theoretic approach by describing the multistage sophisticated process which produces all Supreme Court decisions. It culminates in Figure 1.1, a general diagram that is carried forward into Part III of the article.

Part III directly considers the *Dickerson* decision. This section begins with a description of the Supreme Court's *Miranda* jurisprudence before

¹³ However, there are a few works that reflect an exception to this trend. See Cruz, *supra* note 2, at 13-15; see also Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1 (2001); Yale Kamisar, *From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879 (2001); Kamisar, *supra* note 4; Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032-33 (2001); Jeffery Standen, *Symposium: Policy at the Intersection of Law and Politics—Panel One: The Politics of Miranda*, 12 CORNELL J.L. & PUB. POL'Y 555, 564 (2003).

¹⁴ Many books and articles either explicitly or implicitly advance this argument. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth Century Legacy* (Mar. 2006), University of Virginia Public Law and Legal Theory Working Paper Series, Working Paper 42, available at http://law.bepress.com/uvalwps/uva_publiclaw/art42. Unlike his predecessors, some have argued that Chief Justice Rehnquist did not use his administrative authority to obtain strategic advantage. This article argues against this view with respect to the discrete case of *Dickerson v. United States*. For a greater discussion of potentially strategic behavior of the late Rehnquist Court, see Linda Greenhouse, *Forward: The Third Rehnquist Court*, in *THE REHNQUIST LEGACY*, *supra* note 4, at xiii. Greenhouse, a prominent reporter for the *New York Times*, notes that in several major cases of the late Rehnquist Court, such as *Nevada v. Hibbs*, 538 U.S. 721 (2003), and *Locke v. Davey*, 540 U.S. 712 (2004), the Chief voted with large majorities and crafted opinions which were "cryptic" and "not long on legal analysis." *Id.* at xviii. She argues that the Chief chose to engage a "sacrifice of cogency" to further greater institutional and societal interests. Yet, although *Dickerson* is "not long on legal analysis," Greenhouse's claim is inconsistent with the account provided herein as this article contends that institutional and societal interests did not animate Chief Justice Rehnquist's decision in *Dickerson*.

reviewing the specific facts and procedural history of the case. Next, Part III reviews Justice Rehnquist's *Miranda*-related decisions which, taken together, demonstrate the truly anomalous nature of the *Dickerson* opinion. The article then outlines its strategic account, an approach rejecting many prevailing explanations of Rehnquist's behavior.

Strategic and non-strategic behaviors are often observationally equivalent. Thus, in order firmly to support its strategic theory, this article concludes with a discussion of several important post-*Dickerson* decisions, including *Chavez v. Martinez*,¹⁵ *Missouri v. Seibert*,¹⁶ and *United States v. Patane*,¹⁷ where the Chief Justice, to the surprise of some, supports the preservation of certain exceptions to *Miranda* even after his *Dickerson* opinion supposedly afforded *Miranda* full constitutional status. The cases are critical to the analysis because they help determine what end Chief Justice Rehnquist actually achieved in his *Dickerson* opinion. He successfully froze a set of pre-*Dickerson* *Miranda* exceptions that he personally developed during his thirty-year tenure on the Court. It is from this perspective that commentators in fact are correct to argue that *Dickerson* is critical to understanding the legacy of the late Chief Justice.¹⁸

II. TOWARD A MODEL OF SUPREME COURT DECISION-MAKING AND ACROSS THE GREAT METHODOLOGICAL DIVIDE

Like many other subfields in the social sciences, the public law scholarship divides scholars into several methodological camps. Although theories of judicial decision-making have been the subject of numerous articles, edited volumes, and books, the methods employed to substantiate these theories are quite varied. Generally the scholarship finds individuals

¹⁵ 538 U.S. 760, 767 (2003) (explaining that until unwarned statements are introduced at trial, there is no constitutional violation).

¹⁶ 542 U.S. 600, 622 (2004) (O'Connor, J., dissenting) (noting that *Elstad* standard should control to analyze whether taint of initial unwarned statement is vitiated by second warned statement).

¹⁷ 542 U.S. 630, 637 (2004) (noting that physical evidence located pursuant to unwarned statements is admissible unless statements actually coerced).

¹⁸ See *supra* note 5 and accompanying text. Professor Rosen, citing *Dickerson*, argues the Chief Justice is misunderstood by both liberal and conservative commentators. Specifically, he notes how Rehnquist, unlike his more conservative counterparts on the Court, often departed from "doctrinaire conservative ideology." While Rosen's thesis may or may not be true, this article will show why Justice Rehnquist's behavior in *Dickerson* simply fails to substantiate his proposition that a reconsideration of Rehnquist jurisprudence is warranted. See Rosen, *supra* note 4 and accompanying text.

subscribing to one of three major approaches: the legal model,¹⁹ the behaviorist attitudinal model,²⁰ or some variant of the strategic model.²¹

The legal model is the traditional means to consider judicial outcomes. Typically advanced by certain members of the legal academic community, it is a normative case-based approach, which argues that judicial outputs should be the byproduct of a deliberate application of legal principles that are neutral as to the identity of the parties.²² The model argues both that justices view themselves as significantly constrained by precedent and that political considerations are largely antithetical to the jurisprudential decision-making process.

Proponents of Legal Realism,²³ one of the historically important perspectives set forth by the legal academy, argue that in fact judicial decision-making is often animated by non-doctrinal considerations. Realists do not deny the relevance of the legal model for many cases, but can be distinguished from other scholars in the extent to which they believe extra-legal considerations animate judicial behavior.²⁴ Therefore, for many, the approaches favored by social scientists and those favored by

¹⁹ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

²⁰ *Id.*

²¹ *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 14; SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES, *supra* note 14.

²² For one description of the legal model, see SEGAL & SPAETH, *supra* note 19, at 33-64. The legal model as described by Segal & Spaeth is very much akin to formalist models of judicial decision-making offered by the legal process scholars. For prominent work from the Legal Process School, see generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); HENRY M. HART & ALBERT SACKS, *THE LEGAL PROCESS* (William Eskridge, Jr., ed., 1994); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Herbert Wechsler, *Toward a Neutral Principal of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For other non-formalist strands of the legal model, see RONALD DWORKIN, *LAW'S EMPIRE* (1986); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

²³ Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 50-66 (W. Edmunson et al. eds., 2003). Legal realists responded to the formalism which once attached to the explanation of judicial decision-making. Formalists posited "that judges decide cases on the basis of distinctively legal rules and reasons, which justify a unique result in most cases (perhaps every case)." *Id.* at 50. Realists countered arguing that the law was indeterminate and thus other non-doctrinal considerations actually animated judicial decision-making. There are several major sub-sets of realist scholars. However, those most common identified with realism include Karl Llewellyn, Max Radin, Jerome Frank, Herman Oliphant, and Joseph Hutcheson. Some contend that legal realism is a discredited legal theory. *See* H.L.A. HART, *THE CONCEPT OF LAW* 124-54 (2d ed. 1994). Others contend that realism persists as a cogent theory of the law. *See* Michael S. Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1917 (2005).

²⁴ Richard A. Brisben, *Slaying the Dragon: Segal, Spaeth and the Function of the Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004, 1007 (1996) ("[U]sing jurisprudential reasoning, much of the academic legal community has abandoned the political assumptions of Old Legal Process scholarship . . .").

legal academics have to some extent converged. Therefore, the question is no longer whether “law matters” but rather the extent to which it matters. It is a question of degree. Those who subscribe to most current conceptions of the legal model view the law as important but also recognize the political outlook of the actors as an additional driving force.

As their name implies, behavioralists focus upon the objective behavior that typically manifests itself in the votes taken by judicial actors. In complete contrast to the legal model, Professors Segal and Spaeth, the primary proponents of the behavioral approach, posit judicial conduct can best be understood through their attitudinal model, an approach that argues justices cast votes to maximize their individual policy preferences.²⁵ Therefore, “Rehnquist votes the way he does because he is conservative while Marshall votes the way he does because he is extremely liberal.”²⁶ Attitudinalists view justices as decision makers who always vote their unconstrained attitudes.²⁷ Their outlook is methodologically attractive because it allows scholars to narrow their focus to the objective votes of the respective justices. Therefore, attitudinalists are able empirically to test their behavioral theories by studying publicly available voting records.

Attitudinalists have made significant contributions to the public law scholarship. In particular, they have succeeded in convincing many that policy preferences do indeed matter. Despite its contribution to the debate, the attitudinal model suffers from significant criticism.²⁸ While some of these demurrers lack an alternative hypothesis, the most sophisticated critique comes from those who seek to understand the strategic context

²⁵ In some sense, there is significant overlap between Segal and Spaeth, and Critical Legal Studies (CLS) theorists in so much as both view policy preferences or ideology as the exclusive motivation of judicial actors. CLS theorists expand upon the work of legal realists, arguing that realist scholars vastly understate the degree of indeterminacy in the law. In other words, “[B]eneath the patina of legalistic jargon, law and judicial decision-making are neither separate nor separable from disputes about the kind of world we want to live in.” Alan C. Hutchinson, *Introduction to CRITICAL LEGAL STUDIES* 4 (Alan C. Hutchinson ed., 1989). However, most directly, CLS emphasizes the connection between ideology and judicial outputs. CLS theorists believe that the logic of the law grows out of asymmetric power relationships. Thus, legal decision-making biases already favored groups. For a concise description of the argument of first order CLS scholars, see generally RICHARD W. BAUMAN, *IDEOLOGY AND COMMUNITY IN THE FIRST WAVE OF CRITICAL LEGAL STUDIES* (2002). For a discussion of the distinctions between realism and CLS, see Debra Livingston, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Studies*, 95 HARV. L. REV. 1669 (1982); Jeffery Standen, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. (1986).

²⁶ SEGAL & SPAETH, *supra* note 19, at 65.

²⁷ *Id.*

²⁸ For a small sample of critiques of the attitudinal model, see, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES*, *supra* note 14; FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000); Brisben, *supra* note 24.

through which justices maximize their individual policy preferences. Namely, as a follow-on to the wave of neo-institutional theories which have come to pervade the social sciences,²⁹ many judicial scholars recently have sought to better understand how institutional rules and norms channel the decision-making process within the judicial branch.³⁰

Specifically, although a justice may desire to vote in a liberal or conservative manner, there may be legal or institutional restraints which incentivize a contrary vote. Institutional scholar do not reject a neo-classical maximization framework, but instead argue the notion of policy preference maximization cannot truly be understood without reference to the institutional context in which judicial actors find themselves.

The foundation for the neo-institutionalist approach began with a focus upon the strategic stages of the jurisprudential decision-making process. For while decisions on the merits may reflect the Court's official outputs, these final votes derive from several earlier stages, each of which produces the possibility for strategic behavior. *Elements of Judicial Strategy*, the classic book by Walter Murphy, was the first text to pursue a contextual approach, arguing that justices act within strategic settings where they must behave sophisticatedly if they wish to implement their specific policy preferences.³¹

Epstein and Knight updated and expanded Murphy's account by specifically considering each of the various stages of Supreme Court decision-making.³² They focus tremendous attention upon the institutional rules and norms which help inform decision-making and argue that because each stage creates the potential for strategic behavior, public law requires a methodological approach which shifts "the focus away from discrete acts of simple vote counting"³³ toward a more fully informed

²⁹ The "New-Institutionalism" as contemplated within the rational choice wing of political science builds upon the institutional economic work of Nobelist Douglass North. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE vii (1990); Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991); Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEORETICAL POL. 355 (1990). For examples of other prominent work, see Daniel Diermeier & Keith Krehbiel, *Institutionalism as a Methodology*, 15 J. THEORETICAL POL. 123 (2003); James March & Johan Olsen, *Institutional Perspectives on Political Institutions*, 9 GOVERNANCE 247 (1996); James March & Johan Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984); Oliver E. Williamson, *The New Institutional Economics: The Institutions of Governance*, 88 AM. ECON. REV. 75 (1998).

³⁰ See *supra* note 14.

³¹ MURPHY, *supra* note 14, at 202.

³² EPSTEIN & KNIGHT, *supra* note 14.

³³ Gillman & Clayton, *supra* note 28.

account of the institutional incentives which ultimately produce *The Choices Justices Make*.³⁴

This article follows their approach as it attempts to explain Justice Rehnquist's otherwise anomalous behavior in *Dickerson*. However, before specifically turning to *Dickerson*, the article briefly outlines the strategic nature of various Supreme Court decision-making stages including certiorari, conference proceedings, opinion assignments, and post assignment coalition maintenance.

A. Stage 1: The Certiorari Decision

The United States Supreme Court enjoys a unique position within the federal judicial system. Not only does it sit atop a structural hierarchy, but it also enjoys almost complete control over its agenda. While a limited number of cases reach this Court through either original³⁵ or statutory jurisdiction,³⁶ the vast majority of litigants must file a petition for a writ of certiorari to seek Supreme Court review. The Court has complete authority to reject these petitions³⁷ and does so in all but a small number of cases.³⁸

³⁴ EPSTEIN & KNIGHT, *supra* note 14. For other examples of work adopting some variant of the strategic approach see BAUM, *supra* note 28, at 123; MALTZMAN, *supra* note 28, at 4-5; and Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 66 (1990) (describing a strategic view of State Supreme Court decision-making).

³⁵ "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2, cl. 2.

³⁶ See, e.g., 28 U.S.C. §§ 1254, 1257, 2350 (2000); RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 18 (3d ed. 2005). Wheeler and Harrison note that:

[d]espite the relatively modest changes in circuit structure, the federal courts today differ strikingly from their forerunners in 1891, and even more from those of 1789. The Supreme Court's limited certiorari jurisdiction in the 1891 Act has been broadened by successive legislation, the most noteworthy being the Judiciary Act of 1925, and the most recent being a 1988 act that eliminated most remaining categories of the Court's mandatory appellate jurisdiction.

Id. at 24. The 1925 Judiciary Act, passed at the urging of Chief Justice and former President William Howard Taft, is often described as part of a larger movement towards judicial autonomy which occurred during the 1920s. Taft's entrepreneurialism was critical in the crafting of the modern judiciary, as he is responsible not only for increasing the permissive jurisdiction of the Supreme Court but also for reorganizing and bureaucratizing the federal judiciary. For a detailed description, see Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. ___ (forthcoming 2007) (manuscript on file with author).

³⁷ SUP. CT. R. 10. Supreme Court Rule 10 states a "petition for certiorari will be granted only for compelling reasons." The stated reasons include but are in no way limited to a conflict among the United States Courts of Appeal, a conflict between a state court of last resort and another state or federal court or a state or Federal court decision which deviates from "relevant decisions" of the United States Supreme Court. *Id.*

³⁸ "In the 1995 term, for example, the Court granted certiorari to 92 of 2456 paid certiorari petitions (4%) and to 13 of 5098 pauperis petitions (0.3%)." Saul Brenner, *Granting Certiorari by the United*

The specific mechanism which determines the status of a particular petition is a sub-majoritarian collective choice rule commonly referred to as "the rule of four."³⁹ The rule is not actually a rule. Rather, it is an internal norm of the institution.⁴⁰ This norm typically is observed by its members but not required by the United States Constitution, a federal statute, or the Supreme Court's own published rules.⁴¹ Its historical origins are somewhat clouded, yet its existence was acknowledged by various Justices who testified before Congress in the early 1920s.⁴²

As the name implies, the rule requires the votes of at least four of the nine justices to grant a petition for certiorari. The sub-majoritarian nature of the collective choice rule is juxtaposed against the final decision on the merits, where a majority of justices, typically five or greater, must lend support to a position before it can carry precedential value. This discontinuity between the stage decision and the final decision helps define the strategic context that surrounds the certiorari vote.

To be specific, a justice must cast a vote for or against certiorari without perfect knowledge of how others will vote once the case is actually decided on the merits. Because the exact positions of the fellow justices cannot be perfectly obtained, a justice seeking to maximize his or her policy preferences at the final stage cannot be assured at the certiorari stage that a favorable vote will produce a favorable outcome. Therefore, the decision

States Supreme Court: An Overview of the Social Science Studies, 92 LAW LIBR. J. 193, 195 (2000) (citing LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS*, 83 tbl.2-6 (2d ed. 1996)). In sum, for the 1995 term, the Court granted certiorari in 105 of 7554 petitions (1.3%). In more recent years, the probabilities are even less favorable to a would-be litigant. *Id.*

³⁹ While the "rule of four" dictates the decision with regard to certiorari, the justices, with the aid of their clerks, use an additional gate-keeping mechanism to ferret out meritorious petitions. Initially, a case must reach the "discuss list," a tally of cases which are openly considered during the justices' internal conference. Each case not placed upon the discuss list is automatically denied certiorari. See Gregory Caldeira & John Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 L. & SOC'Y REV. 807, 808 (1990). With the exception of Justice Stevens, each of the members of the court participates in the "cert pool" whereby the eight participating Justices pool their respective law clerks to produce recommendation memoranda regarding each petition for certiorari. While the Justices are of course free to vote as they wish, they often follow their clerks' advice. See Saul Brenner & Jan Palmer, *The Law Clerk's Recommendations and Chief Justice Vinson's Vote on Certiorari*, 18 AM. POL. Q. 68, 70-71 (1990).

⁴⁰ The origin of the rule of four is somewhat unclear. "What evidence there is suggests strongly that the rule was developed by the Court itself, and that it probably came into existence about the time the Court first received discretionary authority, that is, shortly following the Court of Appeals Act of 1891." Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957).

⁴¹ In fact, Justice Stevens discusses the interrelationship between the doctrine of *stare decisis* and the rule of four. He suggests that various changes to the Court's jurisdiction and practices make the rule of four less necessary and or desirable than it once was, and, also, more susceptible to change. John Paul Stevens, *The Life Span of a Judge Made Rule*, 58 N.Y.U. L. REV. 1, 18-21 (1983).

⁴² *Id.* at 10.

can be best described as a choice under uncertainty in which a justice, seeking to maximize his or her policy preferences, yet unsure of how colleagues ultimately might decide the case, could find it preferable to maintain the lower court decision rather than risk an adverse High Court, i.e., a ruling ideologically distant from that justice's ideal point.⁴³

Underlying motivation is difficult to ascribe to the certiorari votes of individual justices in individual cases because the comparison between the final votes on the merits and votes on certiorari may not necessarily provide insight into individual motivation.⁴⁴ For example, one justice may vote to grant certiorari to reverse the decision of a lower court;⁴⁵ another might vote to grant certiorari in order to nationalize the ruling below.⁴⁶ Also, since strategic interaction colors decisions at numerous stages, including the conference proceeding, opinion assignment, and post-assignment bargaining, each justice must consider how other justices are likely to behave, not only with respect to their final votes, but throughout the decision process. This realization complicates analysis of voting patterns at each stage because justices must make discrete decisions at various stages which ultimately lead to a final outcome. Nevertheless, it is not a world of complete indeterminacy because institutional rules and norms help to channel choices by providing certain justices with micro-incentives at various stages of the judicial decision-making process.

B. Stages 2, 3, and 4: Conference Proceedings, Tentative Votes, and Opinion Assignments

The certiorari stage is only the threshold stage of Supreme Court litigation. The next major stage is the conference, which typically follows oral argument. Justices gather privately to discuss the cases from the most recent court session. Like other points in the process, there are a number of social norms which accompany this gathering. One convention allows the chief justice to speak and vote first followed by each associate justice in order of seniority.⁴⁷ In recent years, an additional norm allows each

⁴³ H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); Robert Boucher & Jeffery Segal, *Supreme Court Justices as Strategic Decision Makers: Offensive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995).

⁴⁴ However, some argue such comparisons are fruitful. See, e.g., John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335 (1990); Jan Palmer, *An Economic Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387 (1982).

⁴⁵ Brenner, *supra* note 38, at 195-197.

⁴⁶ *Id.* at 201.

⁴⁷ WILLIAM H. REHNQUIST, THE SUPREME COURT 254 (new ed. 2001).

justice to speak once before acquiring a second opportunity to comment. Prior to these opening statements, all face a degree of uncertainty regarding the preferences of their fellow justices. The conference proceedings reduce this uncertainty. In fact, as the initial discussions conclude with the opening statement of the most junior associate justice, the formerly uncertain landscape is far more certain.

The potential for revealed preferences frame the strategic interaction at this stage. For example, some argue there are significant incentives for certain justices to deviate from the tentative voting norm.⁴⁸ By strategically passing, a justice can maximize information prior to casting a tentative vote. The actor with the greatest incentive to engage in this behavior is the chief justice because he can garner the potential power of opinion assignment if he finds himself in the majority.⁴⁹ By voting last, the chief justice can ascertain the tentative ideological distribution of his fellow justices before casting his vote, thereby maximizing his probability of acting as an opinion assignor.

There is some empirical evidence of such behavior in the historical records of conference proceedings.⁵⁰ Chief Justice Burger, for example, is reputed to have strategically passed or changed his tentative vote in a number of politically salient cases.⁵¹ In many instances, this behavior assured him a place with the majority, thereby securing to him the power of opinion assignment.

Much like certiorari votes, it is difficult to ascribe specific motivation to this passing decision as there can be both non-strategic and strategic motives underlying the observed behavior. However, with the referenced empirical support, the balance of the paper assumes a chief justice may always use his role as administrator of the conference either strategically to pass or change his vote to garner the power of opinion assignment.

Figure 1.1 is a flowchart which captures the various stages of decision-making that face the chief justice. It is not a formal game-theoretic model with a specific equilibrium prediction, but instead is simply a graphical representation of internal Supreme Court proceedings which define the path to a final decision on the merits. For ease, the diagram excludes certain complications such as plurality groupings, i.e., instances where no coalition can secure a majority. This simple figure demonstrates that there

⁴⁸ Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349 (2005).

⁴⁹ *Id.*; see also White, *supra* note 14.

⁵⁰ Johnson et al., *supra* note 48.

⁵¹ *Id.*

are a number of combinations of “states of the world” and sub-decisions which can produce a final observed vote by the chief justice.

Conditioned on the notion that the Court has granted certiorari, the figure begins with two potential branches. These branches capture two different states of the world in which, as assumed above,⁵² the chief can observe prior to making his tentative voting decision. Together, nodes 2A and 2B collapse the spectrum of potential vote distributions into two distinct branches. Bracketing the more complicated case of plurality, the conference vote can either produce four or more votes for a policy position which is in line with the chief’s own preferred position, or it can yield five or more votes for a contrary position. In the former instance, the strategic chief need not be strategic. Rather, he can simply vote his true, unbounded policy preference within the conference and still preserve for himself the power of opinion assignment. In that vein, node 3D is included only for analytical clarity.⁵³ It should never occur since a chief has no reason to vote against his policy preference when that preference has majority support.

The more complex decision for a strategic chief justice is how best to maximize his given policy preferences in a context where his preferences are unaligned with the majority of the Court.⁵⁴ The Figure’s upper branch reflects a state of the world where five or more votes support a position disfavored by the chief justice. If he maintains his genuine position, the chief will find himself in the minority, where his position has little chance of realization due to the loss of agenda control over the matter.⁵⁵ Thus, a strategic chief justice must decide whether it would best serve his policy goals to vote faithfully or sophisticatedly.⁵⁶

⁵² See Johnson et al., *supra* note 48. At least in politically salient cases, the chief can ignore the norm which typically finds the chief casting the first tentative vote. Alternatively, he could also strategically modify his vote following the tentative voting by his fellow justices.

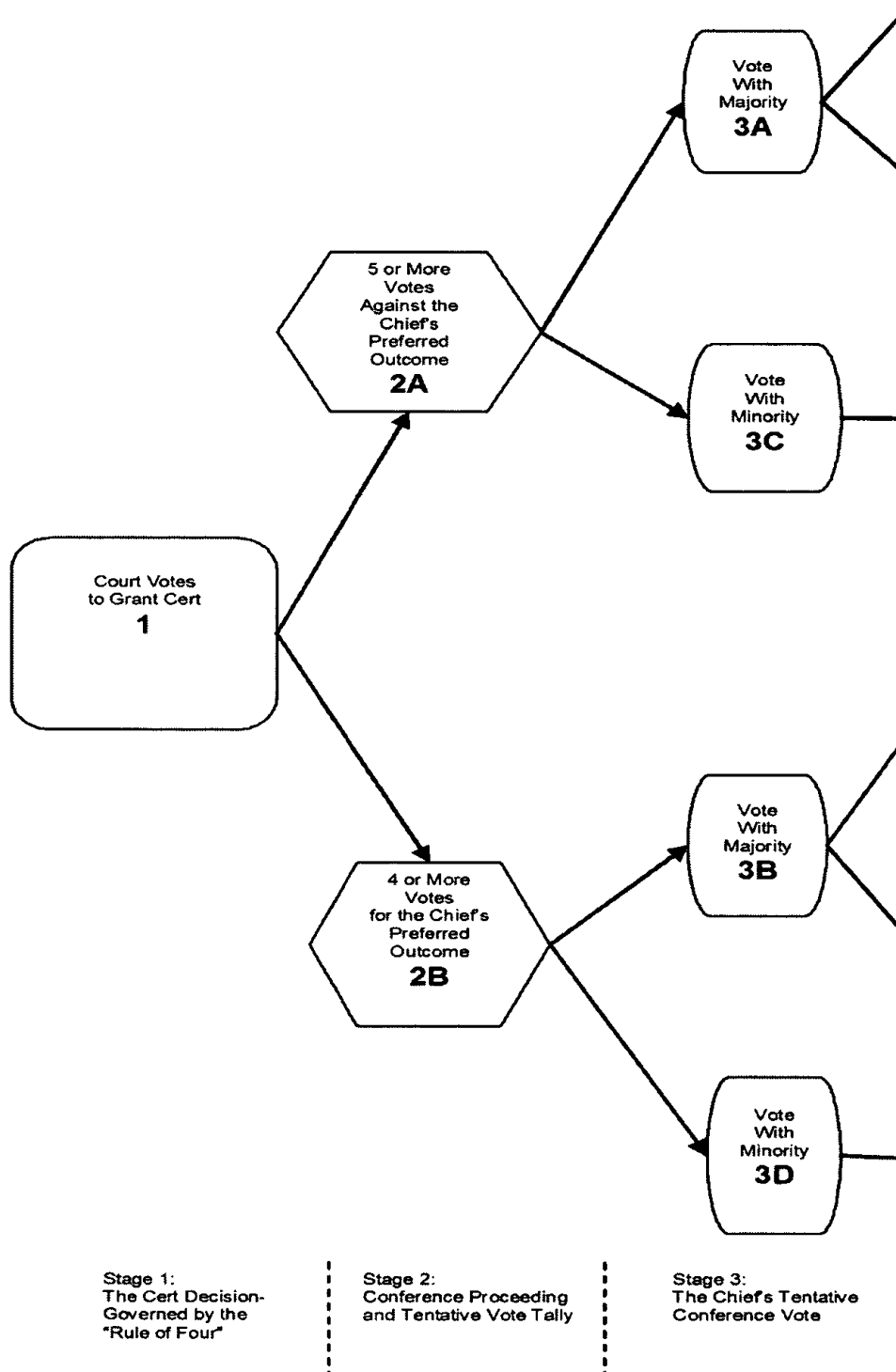
⁵³ It is a typical convention in decision trees and game theoretic models to outline all theoretically possible outcomes. This includes potential choices such as 3D, a choice which the actor has absolutely no incentive to adopt. Specifically, a chief who possesses four or more votes for his preferred outcome has no incentive to vote against his true preferences. Instead, he has every incentive to vote his true preferences, as this will provide a majority for his preferred view and allow him to maintain agenda control over the matter.

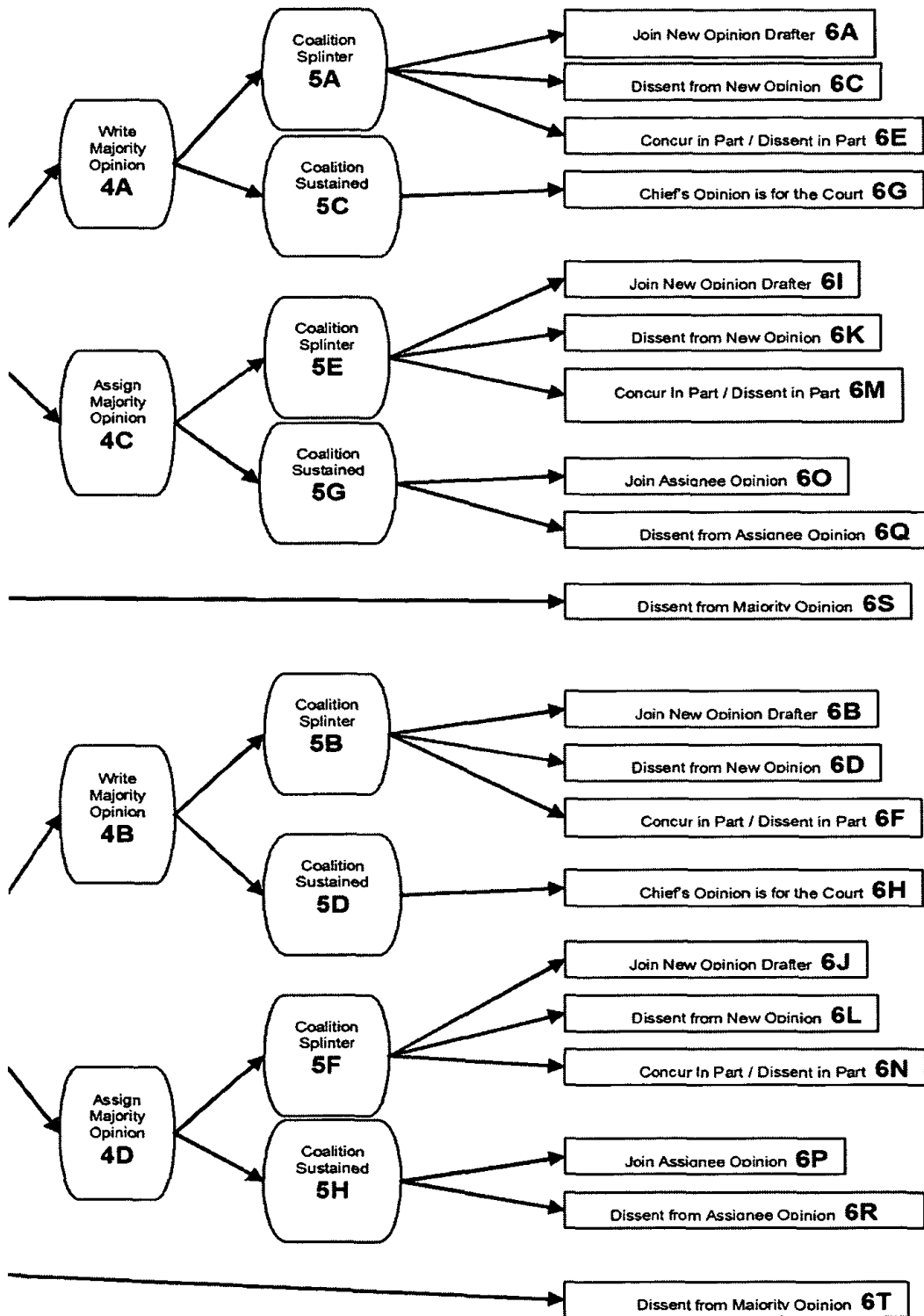
⁵⁴ Theodore Arrington & Saul Brenner, *Strategic Voting for Damage Control on the Supreme Court*, 57 POL. RES. Q. 565 (2004). “At least nine different highly respected Supreme Court scholars assert that the justices on the Court, whether they are likely opinion assigners or not, will sometimes vote insincerely at the conference vote and with the majority in order to pursue damage control.” *Id.* at 565. The authors cite a number of recent papers presented at major conferences, as well as some books. For an example of such works, see DAVID O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* (5th ed. 2000).

⁵⁵ See Arrington & Brenner, *supra* note 54.

⁵⁶ *Id.*

FIGURE 1.1 CHIEF JUSTICE'S DECISIONAL FLOWCHART





Stage 4:
Assignor CJ's Opinion
Assignment Decision

Stage 5:
Post Opinion Assignment
Bargaining and Coalition
Maintenance

Stage 6:
CJ's Final Observed Behavior

As noted earlier, if the chief justice elects to vote with the majority, he has the power to select the author of the Court's opinion. Yet, this authority transfers to the most senior associate justice when the chief finds himself outside of the majority. When voting in the shadow of the rule for opinion assignment, a voter must consider a variety of factors including the salience of the case at issue, the ideological distance between the chief justice and the court majority, and the ideological distance between the chief and the senior associate justice likely to be in the majority.⁵⁷

However, regardless of whether the chief initially finds himself on the strategic path at node 4A or the non-strategic path at 4B, he still faces a decision with respect to whom to assign the task of drafting the opinion of the Court. The Court's internal norm empowers him to assign the opinion to himself or to another justice within the winning coalition. Principally, this decision could take a variety of forms. Yet, since writing an opinion is a timely enterprise, and each justice is resource-constrained, an assignor cannot elect to retain every opinion. The assignor chief therefore must choose to assign some subset of the cases over which he initially has agenda control.

The chief could employ either a strategic or non-strategic decision rule to guide this choice. For example, the assignor chief could randomly assign the opinion to a member of the winning coalition. Alternatively, the assignor could follow a parity rule, assigning the case to a coalition justice with the fewest number of outstanding assignments. A knowledge rule could also guide the assignment decision whereby the drafting task is delegated to a justice with particular expertise within the relevant subject domain. Such non-strategic notions almost certainly motivate some of the chief's assignment decisions.⁵⁸

Yet this decision, like all others on the path to the final decision on the merits, contains the conditions for strategic behavior. The scholarship argues that opinion assignment can follow a number of strategic paths. For example, a strategic assignor might choose to assign cases to "an ideologically moderate justice" in the unstable coalition as part of a co-

⁵⁷ For consideration of the calculus of opinion assignment, see Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 425-26 (1996) (discussing some of the factors that affect case assignment).

⁵⁸ Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RES. Q. 551 (2004). Maltzman and Wahlbeck find that "[f]ar from single mindedly seeking ideological gains, the chief justice pursues multiple goals through his power of opinion assignment . . ." *Id.* at 36. Further, they find that "[a]s a Court term nears completion, the chief is less concerned with equity, expertise and ideology and more concerned with efficiency." *Id.*

option strategy.⁵⁹ Alternatively, the chief may choose to retain the case or assign the opinion to a justice closely aligned with his position in an effort to yield a final opinion close to his ideal point.⁶⁰ The specific facts of the case as well as the nature of the coalition will ultimately frame the chief's choice at the assignment stage.

C. Stages 5 & 6: Post-Opinion Assignment Bargaining and Final Observed Behavior

If the chief chooses to bear the cost of opinion writing, the strategic setting does not abate. Rather, either the chief or his assignee must focus attention upon maintaining agreement within the coalition. Thus, he or she must bargain with fellow coalition members regarding both the language and tone of the opinion.⁶¹ The need for relative consensus provides the drafter with only bounded authority over the substance of the majority opinion. The ideological distance between the author and remaining coalition members greatly influences the probability of coalition maintenance. Strife contains a downside risk for the opinion drafter because the quest to pull the decision toward his or her personal policy preference could result in the splinter of the coalition. Figure 1.1 contemplates a coalition splinter through nodes 5A and 5B for the chief justice and 5E and 5F for the assignee.

If the coalition dissolves and a new drafter arises, a chief must make a calculated response. He may join the new opinion drafter at 6A or 6B, dissent from the new opinion at 6C and 6D, or file some sort of mixture of concurrence and dissent at 6E and 6F. Finally, because of incomplete information a chief may initially assign an opinion to a fellow coalition member who ultimately drafts an opinion with which the chief disagrees. Thus, in response to arriving at either 5G or 5H, the chief may reply with terminal actions 6O, 6Q, or 6P, 6R, respectively.

This brief review of Figure 1.1 demonstrates that the chief is a unique player in the judicial decision-making process. Although he has been called a "first among equals," it is unclear whether this label is

⁵⁹ Maltzman & Wahlbeck, *supra* note 57, at 426.

⁶⁰ *Id.*

⁶¹ See James Spriggs et al., *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485 (1999). The authors write that "once the opinion draft is circulated, 'the fur begins to fly'" (quoting Tom Clark, *Internal Operation of the United States Supreme Court*, 43 JUDICATURE 45, 51 (1959)). See also PHILLIP COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* (1995); Paul Wahlbeck et al., *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294 (1998).

understated.⁶² Substantial institutional authority surrounds his position. The chief is the only player on the Supreme Court for whom the strategic path, i.e., the ability to vote with the majority at 3A despite his underlying disagreement, is always available.

The chief also possesses exclusive administrative authority over the proceedings as well as the conditional power of opinion assignment. In a world of complete information without costs, these institutional powers might be of limited import. However, because Supreme Court decision-making is one where actors must cast votes with limited information and where significant costs attach to alternative coalition formation, institutional rules matter, and those rules clearly favor the chief.⁶³

III. THE EVIDENCE FROM *DICKERSON V. UNITED STATES*

“You have the right to remain silent. If you give up that right, anything you say can and will be used against you in a court of law. You have the right to an attorney and to have an attorney present during questioning. If you cannot afford an attorney, one will be provided to you.”⁶⁴

Hardly an hour of a television police drama passes without the recital of these famous words, the warnings which have come to be identified with the Supreme Court’s 1966 decision in *Miranda v. Arizona*. The *Miranda* decision remade the topography of confessional jurisprudence by requiring

⁶² See White, *supra* note 14.

⁶³ This agenda control account described herein is familiar to many political scientists. Congressional scholars, in particular, have long argued that institutional rules and norms provide agenda control. This agenda control favors certain actors and potentially distorts the outputs of the legislative branch. For but a small sample of this extensive literature, see GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005); Gary W. Cox & Mathew D. McCubbins, *Agenda Power in the U.S. House of Representatives, 1877 – 1986*, in *PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 107 (David W. Brady & Mathew D. McCubbins eds., 2002); Gary W. Cox, *On the Effects of Legislative Rules*, 25 *LEGIS. STUD. Q.* 169 (2000); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 *PUB. CHOICE* 503 (1981); Kenneth Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 *AM. POL. SCI. REV.* 85 (1987); Susan Webb Yackee, *Punctuating the Congressional Agenda: Strategic Scheduling by House and Senate Leaders*, 56 *POL. RES. Q.* 139 (2003).

⁶⁴ The opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966), does not specifically delineate any exact wording which the warnings must follow. Therefore, jurisdictions employ some variant of the warnings cited above. Chief Justice Warren’s opinion, however, does describe the required core components which a warning should include: the right to remain silent, *id.* at 467-68, that silence will not be used against an individual, *id.* at 468, that anything said can and will be used against the individual, *id.* at 469, the right to counsel, *id.* at 471, and the provision of counsel for indigent individuals, *id.* at 472.

that all individuals subject to a custodial interrogation be apprised of both their Fifth Amendment protection against self-incrimination as well as their Sixth Amendment right to counsel.⁶⁵ Chief Justice Earl Warren, speaking for the Court majority, crafted the relatively controversial bright-line rule requiring suppression of all custodial confessions obtained in the absence of the warnings—regardless of whether the confession was “coerced” or “involuntary” in the traditional pre-*Miranda* sense.

The *Miranda* decision expanded upon an existing regime called the voluntariness test, a criterion which required that all statements be voluntarily provided. The origins of that standard can be traced to English common law, as the courts of England typically rejected involuntary confessions on reliability grounds. The United States Supreme Court imported the voluntariness standard through the 1897 decision in *Bram v. United States*.⁶⁶ *Bram* and its progeny established that trial courts were charged with the responsibility of reviewing the totality of the circumstances surrounding a confession in order to ensure that the statement was voluntarily provided. This totality approach is rather amorphous and arguably provided little guidance to authorities regarding the boundaries of acceptable conduct. Therefore, even prior to the Court’s decision in *Miranda*, law enforcement organizations such as the FBI provided similar warnings to those mandated in *Miranda* to ensure that statements would survive a voluntariness hearing.⁶⁷

Even today, the mere provision of the warnings does not absolve the police from a voluntariness challenge because *Miranda* did not replace the voluntariness requirement; it only acted as an additional layer of protection. Thus, voluntariness continues to be a required component of the constitutional analysis and a reviewing court still can deem a custodial environment excessively coercive even if the *Miranda* warnings preceded a custodial confession.⁶⁸

⁶⁵ *Miranda*, 384 U.S. at 444.

⁶⁶ *Bram v. United States*, 168 U.S. 532 (1897).

⁶⁷ See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 552-58 (11th ed. 2005). For a more general discussion, see Yale Kamisar, *What Is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963).

⁶⁸ For a brief description see KAMISAR ET AL., *supra* note 67, at 715. See also, e.g., *United States v. Ricardo D.*, 912 F.2d 337, 343 (9th Cir. 1990) (concluding that despite *Miranda* warnings, juvenile’s confession made while in custody was suppressed due to the coercive nature of an illegal arrest); *In Re Andre M.*, 88 P.3d 552 (Ariz. 2004) (finding juvenile’s waiver of right to remain silent after *Miranda* warnings insufficient to overcome coercive atmosphere where mother was excluded from interrogation).

The *Miranda* decision created substantial unrest and confusion which its opponents, most notably William Rehnquist, exploited.⁶⁹ Chief Justice Warren's opinion contained a series of seemingly contradictory statements that, when viewed in isolation, undercut the basis for the Court's holding.⁷⁰ Namely, it did not delineate whether the warnings were constitutionally mandated or instead were merely a sub-constitutional, common law requirement. Chief Justice Warren noted that "[o]ur decision in no way creates a constitutional straitjacket" and "we cannot say that the Constitution necessarily requires adherence to any particular solution."⁷¹ Furthermore, the Court appeared to invite Congress and the states to craft alternative mechanisms.⁷² Taken together, this language favored the notion that *Miranda* was a common law holding since Congress and state governments are not empowered to craft constitutional standards through statutes. Yet, the Court provided an important caveat which frustrated any common law interpretation. Chief Justice Warren noted, "However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed."⁷³

Congress purported to follow the Court's invitation and a crafted a standard designed to quell the substantial public outcry which followed the *Miranda* decision. Through the 1968 Omnibus Crime Control and Safe Streets Act,⁷⁴ Congress adopted a standard for evaluating custodial interrogations that was nearly identical to the prior voluntariness analysis.⁷⁵

⁶⁹ See Kamisar, *supra* note 4, at 114-19.

⁷⁰ *Id.* Professor Kamisar describes how Justice Rehnquist's opinion in *Michigan v. Tucker*, 417 U.S. 433 (1974), took language in the *Miranda* opinion out of context, thereby vectoring the future of the doctrine far away from Chief Justice Warren's original opinion.

⁷¹ *Miranda*, 384 U.S. at 467.

⁷² *Id.*

⁷³ *Id.* For a more complete discussion, see Kamisar, *supra* note 4, at 114-19.

⁷⁴ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. § 3501 (2000)).

⁷⁵ § 3501 provides, in part, as follows:

(a) [A] confession . . . shall be admissible . . . if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment . . . , (2) whether

Such an obvious rebuke to the *Miranda* decision promised that final resolution of *Miranda's* constitutional status would soon obtain. However, its ultimate interpretation was stymied as every subsequent President and respective Attorney General refused to implement § 3501.⁷⁶ For more than thirty years, the constitutionality of the statutory provision and thus *Miranda* remained in flux.

Groundwork for the ultimate resolution of the question began in *Davis v. United States*,⁷⁷ where Justice Scalia noted that the Court finally should visit the constitutionality of § 3501.⁷⁸ Soon thereafter, the Court of Appeals for the Fourth Circuit followed Justice Scalia's suggestion.⁷⁹ The stage was ready for the ultimate review of the question by the nation's highest court.

A. *The Facts and Procedural History of Dickerson v. United States*

January 24, 1997, began like any other day at the First Virginia Bank. Tellers filled their drawers while the branch manager oversaw the start of business. Customers entered the premises and conducted a variety of transactions including deposits, withdrawals, and check cashing. The normality of the day, however, vanished when an individual brandishing a semi-automatic handgun entered the bank and demanded money. The tellers quickly complied while bank customers and other employees waited fearfully. The suspect collected the proceeds and quickly fled.⁸⁰

Officers arrived and diligently secured the scene. Their investigation immediately produced a witness who saw the suspect leave the bank. He described the suspect and provided police with a license plate number from

such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Id.

⁷⁶ *Davis v. United States*, 512 U.S. 452, 463-64 (1994) (Scalia, J., concurring) (“[W]ith limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago.”).

⁷⁷ *Id.* at 462-65.

⁷⁸ “As far as I am concerned, such a time will have arrived when a case that comes within the terms of this statute is next presented to us.” *Id.* at 464.

⁷⁹ *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

⁸⁰ *Id.* at 673.

the getaway car.⁸¹ The plate matched a white Oldsmobile registered to Charles Dickerson of Takoma Park, Maryland.⁸²

FBI agents visited Mr. Dickerson at his residence and asked him to accompany them voluntarily to the local field office for questioning.⁸³ He was not arrested,⁸⁴ although he later testified he felt he had no choice but to go to the FBI office.⁸⁵ Initially, Mr. Dickerson denied participation in the bank robbery.⁸⁶ A warrant was obtained to search his apartment.⁸⁷ When told of the warrant and the imminent search, Dickerson admitted to being the getaway driver⁸⁸ and was arrested.⁸⁹ The search yielded incriminating evidence including the handgun, dye-stained money, masks, and a bait bill from a prior robbery.⁹⁰

Mr. Dickerson's attorney sought to suppress the statement and the outcome of the search, arguing the confession was obtained in violation of *Miranda*.⁹¹ The trial court granted the defense motion.⁹² In response, the government first filed a motion to reconsider, providing additional information about the circumstances and arguing the statements were voluntary and, therefore, admissible under § 3501.⁹³ When this motion was denied,⁹⁴ the prosecutor filed an immediate interlocutory appeal asking the Fourth Circuit Court of Appeals to reinstate Mr. Dickerson's confession.⁹⁵ While the government initially pursued a § 3501 claim in the motion to reconsider in the district court, on appeal it instead pursued its claim under the more difficult but less controversial traditional *Miranda* confessional jurisprudence.⁹⁶ The Fourth Circuit reviewed the § 3501

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at n.2.

⁸⁶ *Id.* at 673.

⁸⁷ *Id.* at 673-74.

⁸⁸ *Id.* at 674.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 675.

⁹³ *Id.* at 676.

⁹⁴ *Id.* at 677. The district court did not address the government's claim under § 3501, relying instead on Rule 59(e) of the Federal Rules of Criminal Procedure. See *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997).

⁹⁵ *Dickerson*, 166 F.3d at 677.

⁹⁶ Brief for the United States at n.19, *id.* (No. 97-4750).

claim sua sponte.⁹⁷ In so doing, the court followed Justice Scalia's suggestion in *Davis v. United States*.⁹⁸

In order to properly consider § 3501, the Fourth Circuit invited prominent *Miranda* critic Paul Cassell to present the sua sponte argument.⁹⁹ On the strength of his argument, the Fourth Circuit subsequently held § 3501 was an appropriate standard under which to consider Mr. Dickerson's confession.¹⁰⁰ Under that standard, it reversed the District Court and reinstated the defendant's confession.¹⁰¹ Mr. Dickerson's attorney challenged the Fourth Circuit's ruling by appealing to the United States Supreme Court. The High Court granted the defendant's petition and set the case for oral argument.¹⁰²

B. Keeping Your Enemies Closer: Chief Justice Rehnquist's Decision in Dickerson

As the Supreme Court's 2000 term drew to a close, many significant issues remained. From determining the constitutionality of restrictions on partial birth abortion to the permissibility of California's blanket primary, weighty issues of social significance awaited resolution. June 26, 2000, brought some answers. The day began with the rendering of the Court's opinion in *California Democratic Party v. Jones*¹⁰³ in which the Court invalidated the aforementioned blanket primary. The second and final decision of the day, however, substantially overshadowed this first decision by providing some closure to a nearly thirty-five year debate regarding *Miranda*'s constitutionality.

Prior to the Court's decision in *Dickerson v. United States*,¹⁰⁴ even *Miranda*'s strongest supporters had significant reason for concern. A decision upholding its constitutionality required the Supreme Court not only to rebuke the Congressional effort to legislatively limit *Miranda*, but also to disagree with the Fourth Circuit, an appellate court with whom the

⁹⁷ *Dickerson*, 166 F.3d at 672 (“[T]he Department of Justice cannot prevent us from deciding this case under governing law [§ 3501] simply by refusing to argue it.”).

⁹⁸ 512 U.S. 452, 464 (1994) (Scalia, J., concurring).

⁹⁹ The Justice Department's unwillingness to advance the § 3501 argument required the court to appoint Professor Cassell. The Fourth Circuit's opinion contains a detailed and lengthy description of its displeasure with the position taken by the government regarding § 3501. See *Dickerson*, 166 F.3d at 680-82.

¹⁰⁰ *Id.* at 672.

¹⁰¹ *Id.* at 695.

¹⁰² The Supreme Court similarly appointed Professor Cassell to argue the § 3501 theory. Solicitor General Seth Waxman, acting in an amicus capacity, argued against the enforcement of the statute.

¹⁰³ 530 U.S. 567 (2000).

¹⁰⁴ 530 U.S. 428 (2000).

Supreme Court often sided. Yet, the most troubling hurdle that stood in front of *Miranda*'s continued viability was the prior voting record of the Court's membership. In particular, given his history there was substantial reason to believe Chief Justice Rehnquist would use *Dickerson* to finally purge the confessional jurisprudence of Chief Justice Warren's controversial 1966 decision.

Ultimately this concern was unrealized as Chief Justice Rehnquist, in a 7-2 majority opinion, declared *Miranda* to be a constitutional rule, thereby invalidating Congress's 1968 attempt to nullify it.¹⁰⁵ To support this proposition, the Chief argued that the *Miranda* court majority believed it imposed a constitutional rule because it specifically stated that it had granted certiorari to "give concrete *constitutional* guidelines for law enforcement agencies and courts to follow."¹⁰⁶ Further evidence of its constitutionality was demonstrated through *Miranda*'s application against the states.¹⁰⁷ Specifically, because the Supreme Court typically refuses to apply non-constitutional mandates upon state authorities, and *Miranda*'s mandate upon state authorities was clear from its caption, *Miranda* had to be a constitutional decision.

Beyond the doctrinal rationales, the Chief also relied upon several policy justifications. First, he noted that in the years since its initial decision *Miranda* had become part of the "national culture."¹⁰⁸ Essentially, he argued that although there was initial opposition to *Miranda*, it had through subsequent modification become a rule which both law enforcement and the public had come to accept. Of great significance, Chief Justice Rehnquist asserted that the doctrine of *stare decisis* also counseled against overruling *Miranda*. As cited earlier, "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."¹⁰⁹

The Chief recognized the confusion of the Court of Appeals.¹¹⁰ In particular, his opinion notes how the lower court focused upon language contained in a series of post-*Miranda* decisions—opinions written by

¹⁰⁵ *Id.* at 438.

¹⁰⁶ *Id.* at 439 (citing *Miranda*, 384 U.S. at 441-442) (emphasis added).

¹⁰⁷ *Id.* at 438.

¹⁰⁸ *Id.* at 443.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 438. The Chief's recognition is only fair since it is Justice Rehnquist who created much of the confusion in the first place. Professor Kamisar argues, "I doubt that any justice in Supreme Court history has dismissed his own majority opinions more summarily or nonchalantly" than Chief Justice Rehnquist in *Dickerson*. Kamisar, *supra* note 4, at 120.

Justice Rehnquist himself. Specifically, the Fourth Circuit “relied on the fact that we have, after our *Miranda* decision, made exceptions from its rule.”¹¹¹ For Rehnquist, “These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable.”¹¹² He further stated, “If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling”¹¹³

C. Uniqueness Claims and The Problem of Observational Equivalence

For many, the surprising part of *Dickerson* was not so much the underlying result but rather the Chief’s position as author for the Court’s majority. The Chief’s opinion was such a vast departure from his prior reasoning that it left many scholars grappling for some sort of unifying doctrinal explanation. As noted earlier, many candidate theories purport to advance the unique explanation for Justice Rehnquist’s observed behavior.¹¹⁴ However, for a variety of reasons, these current explanations ultimately prove wanting.

First, most observers focus their doctrinal theses upon the wrong justice, since despite his authorship, it is not the Chief so much as Justices Kennedy and O’Connor who were likely swayed by such prudential considerations.¹¹⁵ Yet, most importantly, much of the current scholarship is at best incomplete because it entertains only a non-strategic view of Supreme Court decision-making.

In Part II, the article argued that Supreme Court decision-making is more than the final observed decision. The process contains a series of important procedural stages, each of which produces the conditions for strategic behavior. While not every judicial outcome is the byproduct of a sophisticated maneuver, the prospect looms in every discrete case. Thus, any candidate explanation must successfully account for this possibility. Simply put, no uniqueness claim is supportable without complete consideration and refutation of potential alternative explanations. This point is demonstrated clearly through Figure 1.1. Therein, symmetry exists between upper and lower branches as virtually every upper trunk branch has a corresponding lower trunk complement. Although similar and in

¹¹¹ *Dickerson*, 530 U.S. at 441.

¹¹² *Id.*

¹¹³ *Id.* at 443.

¹¹⁴ See *supra* notes 8-11 and accompanying text.

¹¹⁵ See Cruz, *supra* note 2, at 14 (“As a practical matter, there was no way that Justice O’Connor or Justice Kennedy would possibly be willing to overrule *Miranda*. It was too established, too much a part of the legal firmament, for either of them to hazard extinguishing it.”).

many ways observationally equivalent, the branches are not, in fact, identical. For example, the path to terminal branches 6A and 6B, i.e., where the Chief Justice joins the New Opinion Drafter, may appear similar. However, these two cases differ materially in stage 2.

The observable facts of *Dickerson* as applied to Figure 1.1 demonstrate the difficulty with supporting a uniqueness claim. In *Dickerson*, the Chief voted with the majority, thereby garnering the power of opinion assignment. After assigning the opinion to himself, he successfully bargained with his fellow justices, thereby sustaining his coalition. Each of these observable facts is consistent with terminal branches 6G and 6H, respectively. Much like those branches discussed above, while branches 6G and 6H feature deceptively similar final outcomes, they are not analogous; terminal branch 6G reflects strategic behavior while its counterpart, 6H, reflects a genuine, non-strategic path to the final outcome.

With two candidate explanations, only one of which can accurately reflect the true state of the world, query as to how to adjudicate between competing potential accounts? This article follows the available evidence reflected in Chief Justice Rehnquist's pre- and post-*Dickerson* *Miranda*-related jurisprudence.¹¹⁶ This evidence overwhelmingly favors 6G, the strategic explanation, as the unique explanation for the Chief's otherwise anomalous behavior in *Dickerson v. United States*.

D. Evaluating the Evidence: Justice Rehnquist's Prior Miranda Jurisprudence

Chief Justice Rehnquist's treatment of *Miranda* prior to *Dickerson* could hardly be deemed supportive of the rule. At virtually every turn, he sided against the 1966 ruling. Rehnquist first encountered *Miranda* while working for the Department of Justice. Through an April 1, 1969, memorandum, then-Assistant Attorney General Rehnquist first disparaged Chief Justice Warren's holding by suggesting that the President impanel a commission to consider a constitutional amendment to overturn *Miranda*.¹¹⁷ Two months later, another memorandum, one with which Rehnquist was likely familiar and perhaps even authored, circulated throughout the Nixon Justice Department. This second memo outlined a set of litigation strategies designed to undercut the impact of the *Miranda*

¹¹⁶ At this point, the available evidence is limited to publicly observable voting behavior. Future research should review the internal conference notes and memoranda if and when such material becomes accessible.

¹¹⁷ Kamisar, *supra* note 4, at 109.

ruling.¹¹⁸ As Professor Kamisar has noted, the memo “foreshadowed the reasoning in later Supreme Court opinions disparaging *Miranda*.”¹¹⁹ “Indeed, looking back on the memorandum more than three decades later, it seems to have provided a road map for those who wanted to read *Miranda* as narrowly as possible.”¹²⁰

Just over two years later, Assistant Attorney General Rehnquist was nominated and then confirmed to the United States Supreme Court.¹²¹ Despite his recent entry to the institution, the newly minted Justice Rehnquist authored one of the first major post-*Miranda* rulings. In *Michigan v. Tucker*,¹²² he began his more than quarter century of *Miranda* decisions by substantially limiting the scope of the doctrine. Rehnquist focused attention upon the specific text of Chief Justice Warren’s *Miranda* opinion, noting that the Constitution does not require “adherence to any particular solution.”¹²³ To Justice Rehnquist, this implied the *Miranda* warnings were less than fully constitutional. Therefore, in the *Tucker* opinion, he referred to them as “protective guidelines”¹²⁴ or “recommended procedural safeguards.”¹²⁵

Following *Tucker*, Justice Rehnquist’s continued his contribution to *Miranda*’s de-constitutionalization. Whether in the majority or minority, Rehnquist cast consistent votes to minimize the reach of the doctrine. For example, in *North Carolina v. Butler*,¹²⁶ he agreed with the majority that, for *Miranda* purposes, an explicit waiver of an attorney is not required if the facts and circumstances support the notion that a waiver was executed. In *Rhode Island v. Innis*,¹²⁷ he voted to allow police to speak to an accused while transporting him even after the accused has invoked his right to counsel, as long as the conversation was not designed to produce incriminating statements. In *Jenkins v. Anderson*,¹²⁸ he joined a majority which permitted the State to impeach an accused who chooses to testify

¹¹⁸ *Id.* at 112-13. Even though the exact authorship of the second memorandum is unclear, it follows that through his administrative role as the head of the Office of Legal Counsel, a division which often provides opinions regarding the constitutionality of federal legislation, Assistant Attorney General Rehnquist must have been aware of, if not explicitly approved of, its contents. *Id.* at 113-14.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 113.

¹²¹ William H. Rehnquist was sworn in as an Associate Justice of the United States Supreme Court on January 7, 1972.

¹²² 417 U.S. 433 (1974).

¹²³ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

¹²⁴ 417 U.S. at 443.

¹²⁵ *Id.*; see also Kamisar, *supra* note 4, at 116.

¹²⁶ 441 U.S. 369 (1979).

¹²⁷ 446 U.S. 291 (1980).

¹²⁸ 447 U.S. 231 (1980).

using his pre-arrest silence. Later, in *New York v. Quarles*,¹²⁹ Justice Rehnquist crafted a majority opinion creating a public safety exception to *Miranda*. The opinion relies heavily upon the notion of sub-constitutionality which he originally advanced in *Tucker*.

A year later, in *Oregon v. Elstad*,¹³⁰ Justice Rehnquist joined an opinion authored by Justice O'Connor in which the Court substantially limited the reach of the "fruit of the poisonous tree" doctrine.¹³¹ Like *Quarles*, the *Elstad* opinion relied heavily on *Tucker*, a move which appeared to solidify the notion of *Miranda*'s sub-constitutionality into the landscape of confessional jurisprudence. In sum, between his decision in *Tucker* and his elevation to Chief,¹³² in essentially all of the thirty-three *Miranda*-related cases he encountered, Justice Rehnquist voted to limit the scope of the Court's original 1966 ruling.¹³³

¹²⁹ 467 U.S. 649 (1984).

¹³⁰ 470 U.S. 298 (1985).

¹³¹ The phrase "fruit of the poisonous tree" was first used by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338, 341 (1939). It references the application of the exclusionary rule to secondary or derivative evidence obtained as a byproduct of an underlying illegal action by authorities. The court is left to determine whether such evidence is "tainted" by the violative act. For a discussion of the history and application of the fruit of the poisonous tree doctrine, see KAMISAR ET AL., *supra* note 67, at 702-15, 906-22.

¹³² William H. Rehnquist was sworn in as Chief Justice of the United States on September 26, 1986.

¹³³ Arguably in all thirty-three major *Miranda* related cases within the time period, Justice Rehnquist either distinguished or otherwise voted to limit the core doctrine. See *Oregon v. Elstad*, 470 U.S. 298 (1985) (finding that a statement made after receiving *Miranda* warning admissible even though the same statement had been made before the warning); *Shea v. Louisiana*, 470 U.S. 51 (1985) (Rehnquist, J., dissenting) (concluding that the new *Miranda* standard decided while case was on appeal should not apply when police properly relied upon old rule); *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) (Rehnquist, J., dissenting) (asserting that police should be allowed to inquire as to whether accused's words actually invoked *Miranda* rights); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (affirming that roadside questioning does not constitute "custodial interrogation" for purposes of *Miranda*); *New York v. Quarles*, 467 U.S. 649 (1984) (finding a public safety exception to *Miranda* exists when police ask for location of weapon hidden in public supermarket); *Solem v. Stumes*, 465 U.S. 638 (1984) (holding that *Edwards* was not retroactive as it does not enhance truth finding function of court, it was not foreshadowed, police relied upon prior standard, and retroactivity "would have a disruptive effect on administration of justice"); *Minnesota v. Murphy*, 465 U.S. 420 (1984) (stating that no *Miranda* warning needed when accused made incriminating statements to probation officer during required meeting, even when the "probation officer consciously sought incriminating evidence"); *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam) (refusing to require *Miranda* rights to be read when the defendant voluntarily went to the police station); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (clarifying that after invoking *Miranda* rights, accused can initiate conversation that eventually leads to admissible incriminating statements); *South Dakota v. Neville*, 459 U.S. 553 (1983) (holding that "admission into evidence of defendant's refusal to submit to blood-alcohol test does not offend his privilege against self-incrimination" and requires no warning at the time of refusal); *Taylor v. Alabama*, 457 U.S. 687 (1982) (O'Connor, J., dissenting) (arguing confession after illegal arrest should be admitted into evidence, given *Miranda* warning, lack of police intimidation, intervening events, and lack of continuous interrogation); *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam) (concluding that since defendant chose to testify, his post-arrest silence can be used for impeachment); *California v.*

This article contends that institutional rules matter and thus, following his elevation to Chief, the strategic environment arguably changed for Chief Justice Rehnquist. As a result, one might expect to observe unusual and potentially strategic voting patterns by the now-Chief Justice. In reality, for many *Miranda*-related cases following his elevation, strategic

Prysock, 453 U.S. 355 (1981) (per curiam) (deciding that “content of *Miranda* warnings need not be a virtual incantation of the precise language contained in the *Miranda* opinion”); *Edwards v. Arizona*, 451 U.S. 477 (1981) (Powell, J., concurring) (refusing to create a new per se rule requiring defendant to initiate communication after invoking his *Miranda* rights); *Estelle v. Smith*, 451 U.S. 454 (1981) (Rehnquist, J., concurring) (noting that he does not find a right to counsel at a pre-trial medical examination, though notice needed to be given if the doctor was to testify); *California v. Prysock*, 451 U.S. 1301 (1981) (ordering stay on judgment reversing conviction due to inadequate warning under *Miranda*); *United States v. Henry*, 447 U.S. 264 (1980) (Rehnquist, J., dissenting) (arguing that post-arrest conversation between defendant and a government informant should not require *Miranda* warning to be admissible); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that prearrest silence can be used to impeach a testifying defendant); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (finding statement by defendant to police after invocation of *Miranda* rights admissible so long as police did not expressly question the defendant or know that their comments were “reasonably likely” to provoke incriminating response); *Roberts v. United States*, 445 U.S. 552 (1980) (permitting defendant’s failure to cooperate with police to be used as aggravating factor to secure consecutive sentences); *Fare v. Michael C.*, 442 U.S. 7071 (1978) (distinguishing that request to speak to probation officer is not per se invocation of *Miranda* rights); *Dunaway v. New York*, 442 U.S. 200 (1979) (Rehnquist, J., dissenting) (arguing that even after an illegal arrest, “voluntary” incriminating statements given in police custody after a *Miranda* warning should be admissible); *North Carolina v. Butler*, 441 U.S. 369 (1979) (requiring no explicit waiver of right to an attorney as long as facts and circumstances support such a conclusion); *Fare v. Michael C.*, 439 U.S. 1310 (1978) (granting state request for stay of California Supreme Court ruling that juvenile request for probation officer constitutes invocation of *Miranda* rights); *Brewer v. Williams*, 430 U.S. 387 (1977) (Blackmun, J., dissenting) (arguing that, after a defendant has asserted his right to counsel, police comments on desire to find and preserve body of victim were not “interrogation” and defendant’s responses should be admissible if voluntary, even without an express waiver of *Miranda* rights); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) (concluding that interrogation of suspect at police station who came voluntarily and was allowed to leave without hindrance was not “custodial” for purposes of *Miranda* rule, even if police informed man he was a suspect and lied about evidence they had against him); *Doyle v. Ohio*, 426 U.S. 610 (1976) (Stevens, J., dissenting) (arguing that prosecutors should be allowed to use post-arrest silence to impeach defendants who choose to testify); *United States v. Mandujano*, 425 U.S. 564 (1976) (finding that “putative” defendant need not be given *Miranda* warnings when called to testify to a grand jury and false statements can be used to bring perjury charges); *Beckwith v. United States*, 425 U.S. 341 (1976) (holding that non-custodial interview by Internal Revenue agents about tax liability of defendant does not require *Miranda* warnings); *Garner v. United States*, 424 U.S. 648 (1976) (holding that incriminatory disclosure on tax return not protected under Fifth Amendment, as defendant could have claimed privilege against self-incrimination on return); *Michigan v. Mosley*, 423 U.S. 96 (1975) (finding no *Miranda* violation if accused invoked right to silence before one detective and hours later is interviewed by a different one on a different matter, so long as first request “was scrupulously honored” as to the first case); *Michigan v. Tucker*, 417 U.S. 433 (1974) (concluding that evidence gained as a result of interrogation prior to *Miranda* decision upon warning of right to counsel but no warning of state’s willingness to provide one at no cost if needed need not be excluded, given adherence of police to the law of the time and reliability of the evidence). In the only *Miranda*-related Supreme Court decision considered by Justice Rehnquist prior to *Tucker*, Justice Rehnquist again voted to limit the core holding of *Miranda*. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (Powell, J., concurring) (agreeing with the Court’s holding that police need not inform a person of the right to refuse for a consent search to be voluntary).

behavior was simply unnecessary. Specifically, with respect to limiting the *Miranda* doctrine, Justice Rehnquist had willing partners in Justices O'Connor and Kennedy.¹³⁴ Their support allowed the Chief to vote his "genuine" preferences without concern.¹³⁵

¹³⁴ The Chief Justice must have known that Justices O'Connor and Kennedy had a substantial history supporting his position on *Miranda*. Of the most significant *Miranda* opinions decided since she joined the Court in September 1981, Justice O'Connor supported Chief Justice Rehnquist twenty-five times. See *Davis v. United States*, 512 U.S. 452 (1994); *Winthrow v. Williams*, 507 U.S. 680, 697 (1993) (O'Connor, J., concurring in part, dissenting in part); *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (Parts I, II, IIIA, IV); *Illinois v. Perkins*, 496 U.S. 292 (1990); *New York v. Harris*, 495 U.S. 14 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Greer v. Miller*, 483 U.S. 756 (1987); *Arizona v. Mauro*, 481 U.S. 520 (1987); *Colorado v. Spring*, 479 U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Michigan v. Jackson*, 475 U.S. 625, 637 (1986) (Rehnquist, C. J., dissenting); *Moran v. Burbine*, 475 U.S. 412 (1986); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Shea v. Louisiana*, 470 U.S. 51, 61, 65 (1985) (White, J., dissenting and, also separately, Rehnquist, J., dissenting); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984); *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *South Dakota v. Neville*, 459 U.S. 553 (1983); *Taylor v. Alabama*, 457 U.S. 687 (1982). Justice Kennedy commenced his service in February 1988. Although his mutual association was shorter than Justice O'Connor, out of fourteen opportunities, he voted ten times exactly with the position of the Chief Justice. See *Davis v. United States*, 512 U.S. 452 (1994); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Illinois v. Perkins*, 496 U.S. 292 (1990); *New York v. Harris*, 495 U.S. 14 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Duckworth v. Eagan*, 492 U.S. 195 (1990); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Arizona v. Mauro*, 481 U.S. 520 (1987) (Kennedy, J., dissenting). To be considered a common vote, the positions must be exact. For example, the Chief Justice might join with a concurring opinion of the Associate Justice. This would be an exact match. If the Chief and Associate Justice wrote separate concurring opinions, this would not be an exact match, even though the two opinions might take similar positions. Per curiam decisions also were excluded as these tend to be rather routine matters. The decisions of Justices O'Connor and Kennedy to vote in favor of the constitutionality of *Miranda* must have conveyed a powerful message to the Chief Justice.

¹³⁵ In the time between his elevation and his opinion in *Dickerson*, the Rehnquist Court considered an additional twenty-four *Miranda* related cases. In each of these cases, just as before his elevation, Justice Rehnquist took every possible opportunity to undercut, distinguish or otherwise limit the initial *Miranda* decision. See *Thompson v. Keohane*, 516 U.S. 99 (1995) (Thomas, J., dissenting) (arguing that the trial court was best suited to determine if the accused was in custody and in so doing it held no *Miranda* violation); *Davis v. United States*, 512 U.S. 452 (1994) (concluding that when a request for a lawyer is ambiguous, the questioning can continue without a *Miranda* violation); *Stansbury v. California*, 511 U.S. 318 (1994) (per curiam) (finding that custody is an objective, not subjective, standard); *Winthrow v. Williams*, 507 U.S. 680 (1993) (O'Connor, J., concurring in part and dissenting in part) (stating that there is no federal habeas relief for a *Miranda* violation); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (finding that a *Miranda* violation occurred but it was harmless error based on facts of case); *Illinois v. Perkins*, 496 U.S. 292 (1992) (holding that *Miranda* is not violated if the accused elects to speak to a fellow inmate placed undercover in his cell); *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (holding that there is no federal indirect attack for *Miranda* violations); *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (deciding that an accused who had counsel for one crime can be questioned for another crime after *Miranda* warnings); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (Scalia, J., dissenting) (arguing that an accused who had counsel, and consulted with counsel, could waive his *Miranda* rights and be questioned further by police); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (Rehnquist, C. J., concurring in part, concurring in result in part, and dissenting in part) (stating that questioning for driving under the influence of alcohol, in the absence of *Miranda*, is non-testimonial

For example, consider *New York v. Harris*,¹³⁶ where the now-Chief Justice voted that even after a warrantless search in violation of the Fourth Amendment, the exclusionary rule did not apply to a subsequent incriminating statement made after *Miranda* warnings were given. In *Illinois v. Perkins*,¹³⁷ he joined a court majority that declared *Miranda* was not violated when an undercover inmate elicited a statement from a fellow inmate. In *Withrow v. Williams*,¹³⁸ Justice Rehnquist joined a dissent that voted to exclude *Miranda* violations from federal habeas review. Finally, in *Davis v. United States*,¹³⁹ he supported an opinion that held that so long as the request for a lawyer was ambiguous, questioning could continue without a *Miranda* violation.

Taken together, from *Tucker* to *Dickerson*, the Chief participated in a total of fifty-seven major *Miranda*-related cases.¹⁴⁰ Arguably in all of

because it shows the impact on the speech); *New York v. Harris*, 495 U.S. 14 (1990) (holding that no exclusionary rule applies when, after *Miranda* warnings, an accused made incriminating statement after an illegal search of the home); *Michigan v. Harvey*, 494 U.S. 344 (1990) (asserting that statements acquired in violation of *Miranda* can be used to impeach the accused); *Duckworth v. Eagan*, 492 U.S. 195 (1989) (concluding that a *Miranda* form which states that a lawyer would be appointed only “if and when” he goes to court does not violate *Miranda*); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (per curiam) (deciding that ordinary traffic stops do not amount to custody requiring *Miranda* warnings); *Patterson v. Illinois*, 487 U.S. 285 (1988) (finding that *Miranda* warnings effectively waived counsel despite the fact the accused had already been indicted); *Arizona v. Roberson*, 486 U.S. 675 (1988) (Kennedy, J., dissenting) (arguing that even though the accused had invoked his rights, this was a separate investigation involving a separate crime so no *Miranda* violation occurred); *Greer v. Miller*, 483 U.S. 756 (1987) (finding that a comment at trial on the defendant’s right to silence was error, but it was harmless here since the Court made two curative instructions); *Arizona v. Mauro*, 481 U.S. 520 (1987) (holding that statements made by the accused to his wife in the presence of the police are not suppressible); *Colorado v. Spring*, 497 U.S. 564 (1987) (finding no *Miranda* violation if, after *Miranda* rights were read, the accused believed the interview involved one crime but really was designed for another); *Connecticut v. Barrett*, 479 U.S. 523 (1987) (determining that after *Miranda* warning there was no violation if the accused refused a written statement but agreed to an oral one); *Colorado v. Connelly*, 479 U.S. 157 (1986) (finding no *Miranda* violation when a mentally ill person waives his rights and holding that the state must prove a waiver of rights only by preponderance of evidence); *Michigan v. Jackson*, 475 U.S. 625 (1986) (Rehnquist, C. J., dissenting) (concluding that there is no Sixth Amendment violation where the accused requested an attorney at an arraignment and later waived an attorney after administration of *Miranda* rights); *Moran v. Burbine*, 475 U.S. 412 (1986) (finding no *Miranda* violation when an accused waived his rights although he was unaware that an attorney already had been appointed for him); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (Rehnquist, C. J., concurring) (holding that a request for a lawyer does not imply guilt, so comments before the jury possibly could have been harmless).

¹³⁶ 495 U.S. 14.

¹³⁷ 496 U.S. 292.

¹³⁸ 507 U.S. 680.

¹³⁹ 512 U.S. 452.

¹⁴⁰ See *Dickerson v. United States*, 530 U.S. 428 (2000); *Thompson v. Keohane*, 516 U.S. 99, 116 (1995) (Thomas, J., dissenting); *Davis v. United States*, 512 U.S. 452 (1994); *Stansbury v. California*, 511 U.S. 318 (1994); *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O’Connor, J., concurring in part and dissenting in part); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990)

these cases, the Chief either voted to distinguish or limit the scope of the 1966 ruling.¹⁴¹ In case after case, the *Miranda* doctrine found no friend in William Rehnquist.

Yet, when it came to *Dickerson*, the trend abruptly ended. Admittedly, it is possible that despite nearly thirty years of behaving otherwise, Justice Rehnquist genuinely believed in *Miranda*'s constitutionality. Alternatively, perhaps the truth is precisely as the Chief described it in his opinion. Specifically, stare decisis is such an important value that it induced his capitulation. Yet, because in *Dickerson* the Chief could no longer count upon his long-standing alliance with Justices O'Connor and Kennedy,¹⁴² his true policy preferences cannot be derived from within the *Dickerson* decision. Simply put, regardless of the Chief's vote in *Dickerson*, it appears the majority of the Court—including some of *Miranda*'s critics—was going to support the centerpiece of the Warren Court's criminal procedure revolution.¹⁴³

(Scalia, J., dissenting); *Pennsylvania v. Muniz*, 496 U.S. 582, 603 (1990) (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part); *Illinois v. Perkins*, 496 U.S. 292 (1990); *New York v. Harris*, 495 U.S. 14 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Arizona v. Roberson*, 486 U.S. 675, 690 (1988) (Kennedy, J., dissenting); *Greer v. Miller*, 483 U.S. 756 (1987); *Arizona v. Mauro*, 481 U.S. 520 (1987); *Colorado v. Spring*, 479 U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Michigan v. Jackson*, 475 U.S. 625, 638 (1986) (Rehnquist, J., dissenting); *Moran v. Burbine*, 475 U.S. 412 (1986); *Wainwright v. Greenfield*, 474 U.S. 284, 296 (1986) (Rehnquist, J., concurring); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Shea v. Louisiana*, 470 U.S. 51, 61, 67 (1985) (White, J. and Rehnquist, J., dissenting); *Smith v. Illinois*, 469 U.S. 91, 100-01 (1984) (per curiam) (Rehnquist, J., dissenting); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984); *Minnesota v. Murphy*, 465 U.S. 420 (1984); *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *South Dakota v. Neville*, 459 U.S. 553 (1983); *Taylor v. Alabama*, 457 U.S. 687, 697-98 (1982) (O'Connor, J., dissenting); *Fletcher v. Weir*, 455 U.S. 603 (1982); *California v. Prysock*, 453 U.S. 355 (1981); *Edwards v. Arizona*, 451 U.S. 477, 491-92 (1981) (Powell, J., concurring); *Estelle v. Smith*, 451 U.S. 454, 475 (1981) (Rehnquist, J., concurring); *California v. Prysock*, 451 U.S. 1301 (1981); *United States v. Henry*, 447 U.S. 264, 293-94 (1980) (Rehnquist, J., dissenting); *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Roberts v. United States*, 445 U.S. 552 (1980); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Dunaway v. New York*, 442 U.S. 200, 226 (1979) (Rehnquist, J., dissenting); *North Carolina v. Butler*, 441 U.S. 369 (1979); *Fare v. Michael C.*, 439 U.S. 1310 (1978); *Brewer v. Williams*, 430 U.S. 387, 435-36 (1977) (White, J. and Blackmun, J., dissenting); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Doyle v. Ohio*, 426 U.S. 610, 620-21 (1976) (Stevens, J., dissenting); *United States v. Mandujano*, 425 U.S. 564 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976); *Gamer v. United States*, 424 U.S. 648 (1976); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974).

¹⁴¹ See *supra* notes 120-131 and accompanying text.

¹⁴² Cruz, *supra* note 113 and accompanying text.

¹⁴³ *Id.* Those arguing that the Chief Justice's decision was the product of a sensitivity to public opinion, respect for the principle of stare decisis, or separation of powers might better apply those theories to explain the behavior of Justices O'Connor and Kennedy in *Dickerson*.

As noted before, Justices O'Connor and Kennedy, along with the Chief, had similar histories of voting to limit *Miranda*.¹⁴⁴ Had they voted with Justices Scalia and Thomas in the conference, the Chief Justice would only need to join them to make a five member majority. Given his grudging interpretation of the *Miranda* doctrine,¹⁴⁵ it is difficult to believe that if given the opportunity to cast a deciding vote, he would have come to *Miranda*'s rescue. However, by all indications, Justices O'Connor and Kennedy were initially in the pro-*Miranda* majority.¹⁴⁶ This reduced the Chief's feasible set, leaving him with one remaining question: whether to vote with the majority and thereby secure for himself the assignment decision or allow that authority to be exercised by Justice Stevens.

The Chief chose the former. His choice does not itself completely elucidate the true nature of the Chief's policy preferences. Again, it is possible that, in his later years, the Chief moderated his views.¹⁴⁷ In order to evaluate this contingency, as well as to fully understand the nature of the strategic maneuver, a review of Justice Rehnquist's post-*Dickerson* behavior is warranted.

E. Evaluating the Evidence: Chief Justice Rehnquist's Post-Dickerson Miranda Jurisprudence

Between his decision in *Dickerson* and his death, the Rehnquist-led Court considered five major *Miranda*-related cases.¹⁴⁸ In each of these cases, the Chief resumed exactly where he left off prior to *Dickerson*. Consider *Chavez v. Martinez*,¹⁴⁹ where Justice Rehnquist voted to prevent a § 1983 claim against police officers, holding that until unwarned statements are used at trial, there is no violation.¹⁵⁰ This vote is curious

¹⁴⁴ See *supra* note 132 and accompanying text.

¹⁴⁵ For a description of Justice Rehnquist's *Miranda*-related voting record, see *supra* notes 120-131 and accompanying text.

¹⁴⁶ Cruz, *supra* note 113 and accompanying text.

¹⁴⁷ See Rosen, *supra* notes 5, 18 and accompanying text. *Contra* Cruz, *supra* note 2 and accompanying text.

¹⁴⁸ See *United States v. Patane*, 542 U.S. 630 (2004); *Missouri v. Seibert*, 542 U.S. 600 (2004); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Fellers v. United States*, 540 U.S. 519 (2004); *Chavez v. Martinez*, 538 U.S. 760 (2003).

¹⁴⁹ 538 U.S. 760 (2003).

¹⁵⁰ Rehnquist explained:

We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning. Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action. And

because it is inconsistent with the position he purported to announce in *Dickerson*. Specifically, *Chavez* implies that a failure to comply with *Miranda* is somehow different from other violations of the Constitution where § 1983 permits recovery.¹⁵¹

His behavior in *Chavez* was soon followed by the 2004 companion “fruit of the poisonous tree” cases, *Missouri v. Seibert*¹⁵² and *United States v. Patane*.¹⁵³ In *Seibert*, although a combined majority of the Court condemned the intentional use of a two-stage interrogation process designed to frustrate *Miranda*, the Chief joined the dissenting justices.¹⁵⁴ In *Patane*, Justice Rehnquist again joined an opinion which furthered the notion that a *Miranda* violation is different from and less important than violations of other portions of the Constitution,¹⁵⁵ as evidenced by descriptions of non-*Miranda* constitutional rights as “core protection,”¹⁵⁶ “core privilege,”¹⁵⁷ “actual right,”¹⁵⁸ “actual protections,”¹⁵⁹ and “actual violations,”¹⁶⁰ thus distinguishing *Miranda* issues from “true”

the absence of a “criminal case” in which Martinez was compelled to be a “witness” against himself defeats his core Fifth Amendment claim.

Id. at 772-73 (citations omitted).

¹⁵¹ Apparently, for the Chief, a *Miranda* violation held a lower constitutional status than, for example, a violation of the Fourth Amendment. It has long been held that an illegal search in violation of the Fourth Amendment can be authority for § 1983 action. *See, e.g.,* *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by* *Monell v. Dep’t of Soc. Services*, 436 U.S. 658 (1978) (finding that unreasonable search and seizure by police officers supports a claim under § 1983); *Finsel v. Cruppenik*, 326 F.3d 903 (7th Cir. 2003) (holding that unlawful searches, excessive use of force and false imprisonment are actionable under § 1983 where deputy could not reasonably believe he could kick in a motel door and forcibly enter a room simply to effectuate motel clerk’s desire to have a patron’s truck moved); *Bolden v. Village of Monticello*, 344 F. Supp. 407 (S.D.N.Y. 2004) (finding that because no reasonable officer could believe a no-knock warrant authorizing search of a location and all persons located inside without naming specific individuals authorized invasive strip and body cavity searches, a § 1983 claim may be pursued); *Terrell v. Petrie*, 763 F. Supp. 1342 (E.D. Va. 1991) (concluding that a search incident to a pretext arrest is unreasonable and violates Fourth Amendment, for which a claim under § 1983 is available).

¹⁵² 542 U.S. 600 (2004).

¹⁵³ 542 U.S. 630 (2004). For a discussion of *Siebert*, *Patane*, and *Chavez*, see Yale Kamisar, *PostScript: Another Look at Patane and Siebert, the 2004 Miranda “Poisoned Fruit” Cases*, 2 OHIO ST. J. OF CRIM. L. 97 (2004).

¹⁵⁴ *Seibert*, 542 U.S. at 622 (O’Connor, J., dissenting). Justice O’Connor relied heavily on the analysis in *Oregon v. Elstad*, 470 U.S. 298 (1985), stating, “*Elstad* commands that if *Siebert*’s first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change of circumstances.” *Id.* at 628.

¹⁵⁵ 542 U.S. at 633.

¹⁵⁶ *Id.* at 637.

¹⁵⁷ *Id.* at 638.

¹⁵⁸ *Id.* at 639.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 642.

constitutional doctrines.¹⁶¹ *Patane*, much like its pre-*Dickerson* counterpart *Elstad*,¹⁶² operates to preclude the application of the fruit of the poisonous tree doctrine to *Miranda* violations.¹⁶³ This differential treatment in *Elstad* was based upon the notion of *Miranda*'s sub-constitutionality.¹⁶⁴ Following Chief Justice Rehnquist's opinion in *Dickerson* declaring *Miranda* a constitutional rule, the notion of sub-constitutionality no longer seemed sustainable. Yet, Justice Thomas's opinion in *Patane* follows this sub-constitutional approach anyway by using the "prophylactic" language—terminology associated with *Miranda*'s sub-constitutionality—which does not appear anywhere in the Chief Justice's opinion in *Dickerson*.¹⁶⁵

Despite his opinion in *Dickerson* supporting *Miranda*'s constitutionality, Justice Rehnquist supported positions in *Seibert*, *Patane*, *Chavez*, and other cases that described a *Miranda* violation as somehow different from other constitutional violations. For Chief Justice Rehnquist, that difference operated to preclude the application of traditional constitutional remedies such as § 1983¹⁶⁶ as well as the suppression mechanism available through the fruit of the poisonous tree doctrine.¹⁶⁷ Simply put, the Chief's post-*Dickerson* behavior, taken together with his pre-*Dickerson* voting, makes it almost impossible to avoid the conclusion—despite what he seemed to say in *Dickerson*—that Chief

¹⁶¹ This point is appropriately raised by Professor Kamisar:

At no time in *Dickerson* did Chief Justice Rehnquist contrast the prophylactic rules of *Miranda* with the "actual Self-Incrimination Clause." Nor, in *Dickerson*, did he ever contrast *Miranda* violations with a "core" violation of the Self-Incrimination Clause itself. Indeed at no time in *Dickerson* did Rehnquist call the *Miranda* rules "prophylactic." However, in his *Patane* plurality opinion, Justice Thomas repeatedly characterized the *Miranda* rules as "prophylactic" and repeatedly refers to "the core protection afforded by the Self-Incrimination Clause," "the core privilege against self-incrimination" protected by prophylactic rules, "the actual right against compelled self-incrimination" and "actual violations" of the Due Process Clause or the Self-Incrimination Clause.

Kamisar, *supra* note 4, at 125-26.

¹⁶² *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

¹⁶³ "Thus, unlike unreasonable searches under the Fourth Amendment or *actual* violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to *mere* failures to warn, nothing to deter. There is therefore no reason to apply the 'fruit of the poisonous tree' doctrine of *Wong Sun*." *Patane*, 542 U.S. at 642 (emphasis added). See Kamisar, *supra* note 4, at 124-26.

¹⁶⁴ 470 U.S. at 305.

¹⁶⁵ Kamisar, *supra* note 4, at 125-26.

¹⁶⁶ *Chavez v. Martinez*, 538 U.S. 760, 776 (2003).

¹⁶⁷ *Patane*, 542 U.S. at 642.

Justice William Rehnquist did not really believe that *Miranda* was a constitutionally based decision.

F. *Setting the Record Straight on Dickerson v. United States*

From these post-*Dickerson* cases, it is clear that the Chief's 2000 decision did not reflect a new found respect for *Miranda*. Instead, with the direct question of *Miranda*'s constitutionality already decided by a majority of the *Dickerson* Court, Chief Justice Rehnquist did the best he could given the reduced choices in his feasible set.¹⁶⁸ Rather than allow Justice Stevens the power of opinion assignment, he voted with the majority and assigned himself the opinion.¹⁶⁹ Given his decision to craft a majority opinion, the Chief needed a rationale sufficient to garner a court majority. Thus, he cited stare decisis and the Warren Court's own view of what it was doing as justification for his support of *Miranda*.¹⁷⁰

With the apparent elevation of *Miranda* to a fully constitutional status, the exceptions that had been built upon *Miranda*'s sub-constitutional foundation stood in peril. Justice Stevens, the alternative opinion assignor, had a long history of resisting the *Miranda* exceptions.¹⁷¹ After spending nearly thirty years crafting limitations to *Miranda*, it is hard to believe the Chief would allow Justice Stevens the opportunity to undo his legacy. Chief Justice Rehnquist thus took control of the future of the doctrine and

¹⁶⁸ See Cruz, *supra* note 2, at 15 ("Although not what one would describe as the tightest of logical syllogisms, it was the best that could be gotten from the current members of the Court.").

¹⁶⁹ "Had the Chief voted with the dissenters, the majority opinion would have been assigned by the senior Justice in the majority, in this case Justice Stevens [I]n my judgment, the Chief acted decisively to avoid that consequence. He voted with the majority and assigned the opinion to himself." *Id.* at 14-15.

¹⁷⁰ *Dickerson v. United States*, 530 U.S. 428, 442-43 (2000). Cruz, a former Rehnquist clerk, implies that the stare decisis rationale is a subterfuge. In responding to questions regarding *Dickerson*'s logical underpinning, Cruz responds, "Do not ask why, and please, never, ever, ever cite this opinion for any reason." Cruz, *supra* note 2, at 15.

¹⁷¹ A cursory review of the voting records demonstrates that most of the *Miranda* exceptions supported by Chief Justice Rehnquist were opposed by Justice Stevens. See, e.g., *New York v. Harris*, 495 U.S. 14 (1990); *New York v. Quarles*, 467 U.S. 649 (1984); *Rhode Island v. Innis*, 446 U.S. 291 (1980); *North Carolina v. Butler*, 441 U.S. 369 (1979). Additionally, in some cases with *Miranda* issues, Justice Stevens prevailed while Chief Justice Rehnquist dissented. See, e.g., *Thompson v. Keohane*, 516 U.S. 99 (1995); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Michigan v. Jackson*, 475 U.S. 625 (1986); *Shea v. Louisiana*, 470 U.S. 51 (1985); *Smith v. Illinois*, 469 U.S. 91 (1984); *Taylor v. Alabama*, 457 U.S. 687 (1982); *United States v. Henry*, 447 U.S. 264 (1980); *Dunaway v. New York*, 442 U.S. 200 (1979). Evidence of Justice Stevens' view is also prominently demonstrated in *Oregon v. Elstad*, 470 U.S. 298 (1985), where the oral argument displayed an exchange between Justices Stevens and O'Connor regarding the constitutional underpinning of the *Miranda* decision. "I must confess that if it's not a constitutional violation, I don't know where this Court ever had the power to set aside any state conviction It seems to me analytically it must be a constitutional violation or else we have no business in this area at all." Transcript of Oral Argument at 49, *id.* (No. 83-773).

crafted an opinion that both studiously avoided discussion of the continued viability of the *Miranda* exceptions and included language designed to aid in his final stand. Although dicta in *Dickerson*, he argued that *Miranda*'s newly discovered constitutionality was premised on its current form, a form which included all of its exceptions. Specifically, he stated, "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while re-affirming the decision's core ruling" ¹⁷²

This sentence later became a centerpiece of the *Patane* opinion. ¹⁷³ Justice Thomas, with the support of the Chief, argued that both this language as well as the *Dickerson* Court's reliance upon cases such as *Tucker* and *Elstad* "demonstrate[d] the continuing validity of those decisions" following *Dickerson*. ¹⁷⁴ Although dicta, Rehnquist's wording that "subsequent cases [had] reduced the impact on law enforcement" somehow passed without public objection, as *Dickerson* features the complete absence of any concurring opinion. Yet, it is this sentence which is the Trojan horse of the *Dickerson* decision. To be precise, the genius of the stare decisis rationale as applied by the Chief Justice in *Dickerson* is that he applied it to *all* aspects of the *Miranda* doctrine, exceptions included.

Thus, once again, when the Chief Justice elected to join the majority and assigned the opinion to himself, he both denied Justice Stevens control over the matter and crafted the very language which would later be used to argue that all of the exceptions are part of his constitutional decision. Many of those exceptions, of course, are based upon the sub-constitutional treatment for this "constitutional" rule.

¹⁷² *Dickerson*, 530 U.S. at 443.

¹⁷³ *United States v. Patane*, 542 U.S. 630 (2004).

¹⁷⁴ *Id.* at 640.

