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Ideological Cohesion and Precedent (Or Why the Court Only Cares About Precedent When Most Justices Agree With Each Other)

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IDEOLOGICAL COHESION AND PRECEDENT (OR WHY THE COURT ONLY CARES ABOUT PRECEDENT WHEN MOST JUSTICES AGREE WITH EACH OTHER)*

NEAL DEVINS**

This Article examines the profound role that ideological cohesion plays in explaining the Supreme Court's willingness to advance a coherent vision of the law—either by overruling precedents inconsistent with that vision or by establishing rule-like precedents intended to bind the Supreme Court and lower courts in subsequent cases. Through case studies of the New Deal, Warren, and Rehnquist Courts, this Article calls attention to key differences between Courts in which five or more Justices pursue the same substantive objectives and Courts which lack a dominant voting block. In particular, when five or more Justices pursue the same substantive objectives, the Court is far more willing to overturn precedent and embrace rule-like precedent. In contrast, when there is not a dominant voting block, the Court will either rule narrowly so as to keep its options open or issue seemingly broad rulings that are in tension with, but do not overrule, the important precedents of past Courts. By highlighting the profoundly important role of ideological cohesion among the Justices, this Article also offers a commentary on the models that political scientists use to describe judicial decisionmaking. Unlike political science models which focus on the desire of individual Justices to pursue favored policy outcomes, this Article suggests that the key variable in understanding Supreme Court policymaking is the presence or absence of five or more ideologically simpatico Justices at a particular moment in time. Finally, this Article speculates on the future of precedent on the Roberts Court. Noting that the Roberts Court lacks a dominant voting block, this Article suggests that the Roberts Court is unlikely to overrule significant

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** Goodrich Professor of Law and Professor of Government, College of William and Mary. Thanks to Mike Gerhardt for putting this conference together and sharing his thoughts about precedent with me. Thanks also to my good-natured research assistants—Svetlana Khavana, Jason Wool, and Brian Sterling. Thanks, finally, to Paul Hellyer of the William and Mary Law Library.

precedent or issue significant rule-like decisions (at least until a new President is able to use the appointment power to create a dominant voting block).

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INTRODUCTION

This Article will advance a commonsense argument about the Supreme Court's willingness to establish a coherent vision of the law—either by overruling precedents inconsistent with that vision or by establishing rule-like precedents intended to bind the Supreme Court and lower courts in subsequent cases. Specifically, this Article will call attention to the profound role that ideological cohesion plays in explaining the Court's willingness to embrace a coherent or incoherent vision of the law. When five or more Justices pursue the same substantive objectives, the Court will act as a coherent body. It will overrule precedents inconsistent with its vision and will establish constitutional precedents that embrace a coherent view of the law. In sharp contrast, when five or more Justices do not share the same vision of the law, Court decisionmaking will be defined by either divergent voting blocks or the predilections of so-called swing Justices. Lacking ideological cohesion, such a Court will not advance a consistent view of the law. For example, rather than establish a clear line of constitutional precedent, an incoherent Court will, at various times, rule narrowly so as to keep its options open or issue seemingly broad rulings that are in tension with, but do not overrule, the important precedents of past Courts.

This Article will illustrate differences between coherent and incoherent Courts through abbreviated case studies of the New Deal Court, the Warren Court (pre- and post-1962),¹ and the Rehnquist Court. The New Deal Court and post-1962 Warren Court exemplify the practices of coherent Courts—striking down important decisions inconsistent with their policy preferences and establishing bold precedents (many of which were truly trailblazing—advancing the Justices' preferences with little regard for earlier Court decisionmaking).² In this way, the dominant coalitions on the New Deal Court and post-1962 Warren Court recognized that precedents were both opportunities and constraints—a mechanism to advance their vision of the law while simultaneously placing limits on lower courts and possibly on subsequent Supreme Courts.³ Moreover, since

1. With respect to the Warren Court, there is some controversy over whether the early Warren Court ended in 1961 (when the Court began ruling in support of civil liberties interests) or 1962 (when Arthur Goldberg joined the Court, so that there was a solid block of five Justices backing progressive positions). Compare Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989) (arguing that the Goldberg appointment was largely inconsequential to the trajectory of Warren Court decisions), with Mark Tushnet, *The Warren Court as History*, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 7 (Mark Tushnet ed., 1993) (arguing that the Goldberg appointment was transformative). In my view, the Goldberg appointment transformed the Warren Court. As Lucas Powe points out, Segal and Spaeth's data does not take into account key cases that were held over—so that the Court could be reconstituted after the retirement of conservative-leaning Justice Charles Whittaker. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 498 (2000). In any event, the debate over whether 1961 or 1962 is the critical year is largely irrelevant to the points made in this Article. The key point is that there was a solid block of five or more Justices willing to back up progressive positions.

2. See *infra* Part II. For an article highlighting the dearth of cited precedents in the landmark rulings of the post-1962 Warren Court, see generally James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008). For a complimentary perspective in this Symposium, see generally Lee Epstein et al., *On the Capacity of the Roberts Court To Generate Consequential Precedent*, 86 N.C. L. REV. 1299 (2008) (highlighting critical role that ideological cohesion plays in determining Court's willingness to write significant decisions); and Nancy Staudt et al., *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361 (forthcoming 2008) (empirical study highlighting role of ideological homogeneity in generating consequential precedents).

3. See THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 12–14 (2006). For a provocative and somewhat competing perspective, see Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 341–42 (2007) (arguing that Supreme Court Justices will take into account lower court policy preferences when sorting out whether to embrace standards that give greater discretion to lower courts or rules that hamstring lower courts). As a theoretical matter, Jacobi and Tiller's argument makes sense. But, for me, it is a model that needs to be backed up with facts—as I do not think that the Justices are as nuanced in their calculations as are Jacobi and Tiller.

there was a majority of ideologically simpatico Justices on these Courts, the Chief Justice could use his opinion assignment power on the basis of the organizational needs of the Court and not ideology.⁴

On the other hand, the early Warren and Rehnquist Courts lacked a dominant coalition and, as such, were unable to free themselves of the shackles of precedent. Rather than feel empowered to advance their vision of legal policy, these Courts either operated in the shadow of earlier precedent or, alternatively, steered clear of establishing meaningful constitutional precedents. Their decisions thus amounted to a hodgepodge of constitutional avoidance, judicial minimalism, and the refusal to reconcile inconsistencies between past precedent when establishing seemingly contradictory constitutional doctrines. With respect to opinion assignments, the Chief Justice (or, if the Chief Justice dissented, the Senior Associate Justice in the majority) was more strategic—paying significant attention both to ideology and the need to make sure that five Justices would sign onto a majority opinion.⁵

Notwithstanding dramatic differences in the decisionmaking styles of coherent and incoherent Courts, these Courts (and that is to say, all modern Courts) approach the making or overruling of constitutional precedents as a means to an end—not something possessing significant, independent force.⁶ Coherent Courts pursue their vision of legal policymaking with zeal and are quite willing to overrule significant precedents that embrace a competing legal regime.⁷ For incoherent Courts, their failure to overturn significant precedents has little to do with some abstract belief in the rule-of-law benefits of stare decisis.⁸ Rather, incoherent Courts simply lack the

4. See Forrest Maltzman & Paul J. Wabelbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RES. Q. 551, 551 (2004).

5. See *id.*

6. The political science literature likewise describes precedent in instrumental terms—arguing that the Court preserves its political capital by acting like a court (making use of existing legal rules and principles). Consequently, while disagreeing over the constraints that precedent places on judicial policymaking, there is general agreement that the Justices cite precedent in order to demonstrate their legitimacy. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 163–77 (1998) (arguing that precedent limits the Justices in their pursuit of favored policies); HANSFORD & SPRIGGS, *supra* note 3, at 24–30 (arguing that the Justices legitimate policy choices by citing precedent); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 76–85 (2002) (arguing that precedent is cited for legitimacy purposes but does not meaningfully restrict judicial discretion).

7. See *infra* Part II.

8. For the classic rule-of-law defense of stare decisis, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992). For additional discussion, see *infra* notes 60–63 and accompanying text.

votes—there is no dominant coalition pushing the Court to embrace some shared vision of legal policymaking.⁹ Indeed, by either refusing to establish constraining precedents or by keeping on the books seemingly irreconcilable precedents, incoherent Courts have little use for a theory of *stare decisis* grounded in the stability of precedent.

This Article is divided into three parts. Part I examines incoherent Courts. It discusses in some detail the swing-Justice-dominated Rehnquist Court, drawing distinctions between the decisionmaking styles of Justices O'Connor and Kennedy. Part I also discusses the pre-1962 Warren Court, highlighting that Court's use of constitutional avoidance on national security issues. Part II examines coherent Courts. It uses the New Deal Court to illustrate the Court's willingness to overrule significant precedents in order to repudiate one legal regime (*laissez-faire*) in favor of another regime. Part II also uses the post-1962 Warren Court to demonstrate the ways a coherent Court feels unbounded by law in order to establish its vision of optimal legal policymaking. Part III ties together the case studies in a forward-looking way, speculating on the future of precedent in the Roberts Court.¹⁰

Before turning to Part I, a comment about the models that political scientists employ to describe judicial decisionmaking is necessary. Focusing on the desire of individual Justices to pursue favored policy outcomes, political scientists typically see Supreme

9. By emphasizing the presence or absence of a dominant coalition, this Article is not arguing that the vitality of precedent is linked to the size of the coalition that votes for a decision. See HANSFORD & SPRIGGS, *supra* note 3, at 126 (finding that coalition size has little impact on whether a precedent is interpreted positively or negatively). The point, instead, is that the existence of a dominant coalition is figurative in the Court's willingness both to overrule past precedents and establish bold precedents. See Epstein *at al.*, *supra* note 2.

10. Although this Article examines the New Deal, Warren, and Rehnquist Courts, the line that separates one Court from another is *not* the Chief Justice who presides over that Court. The focus, instead, is whether or not there is a solid coalition of five or more Justices who are ideologically simpatico—which may exist for some but not other years of any Chief Justice's tenure. For that reason, the Warren Court seems incoherent before 1962 and coherent afterwards. Also, there is an inevitable murkiness to the labels "coherent" and "incoherent." The degree of agreement among Justices varies, even in a coherent Court. The second Warren Court, for example, became more liberal and more coherent after Thurgood Marshall joined it. See Segal & Spaeth, *supra* note 1, at 107. Likewise, the substitution of Clarence Thomas for Thurgood Marshall moved the Rehnquist Court to the right—but not enough to make it a coherent Court. See *infra* Part I.A. Needless to say, there is sufficient turnover among Supreme Court Justices to suggest that the relative coherence/incoherence of a particular Court will vary over time. At the same time, the basic point of this Article remains true: the more cohesive the Court, the more likely the Court is to pursue a coherent vision of legal policymaking; conversely, the more incoherent the Court, the less likely the Court is to pursue a coherent vision.

Court Justices as simply voting their policy preferences (the attitudinal model) or making strategic choices to maximize their policy preferences—taking into account institutional legitimacy concerns as well as the preferences of other Justices and/or elected officials and the American people (the strategic actor model).¹¹ This Article approaches things in a somewhat different way and, in so doing, provides a commentary of sorts about the dominant political science models. In particular, by paying attention to whether there are five or more ideologically simpatico Justices at a particular moment in time, this Article suggests that different political science models work best in describing discrete Courts (the Rehnquist Court, the New Deal Court) or discrete periods of time (pre- versus post-1962 Warren Court). This will be developed further in Part III, highlighting a preference for a Court-centered view of judicial decisionmaking to a Justice-centered model. In so doing, Part III links this Article with the models that political scientists employ to describe judicial decisionmaking.

I. INCOHERENT COURTS

The Rehnquist and early (pre-1962) Warren Courts exemplify the practices of incoherent Courts. The Rehnquist Court did not overturn significant, controversial precedents of the Burger and post-1962 Warren Courts.¹² It did not break significant doctrinal ground outside of federalism, and its federalism revival was itself incoherent (limited in reach and marred by decisions that seemed to contradict each other).¹³ Moreover, it often divided five to four on controversial cases, with the Court's so-called swing Justices (Anthony Kennedy and Sandra Day O'Connor) sometimes voting with the "liberal" wing

11. See SEGAL & SPAETH, *supra* note 6 at 86–97 (describing the attitudinal model); EPSTEIN & KNIGHT, *supra* note 6, at 10–12 (describing the strategic actor model). For a somewhat competing account of the strategic model, see Lee Epstein, Jack Knight & Andrew Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 798 (2003) (suggesting that— notwithstanding earlier claims by most researchers (including themselves)—the strategic model sees Justices maximizing “goals,” not simply policy preferences).

12. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003); Robert F. Nagel, *Bowing to Precedent*, WKLY. STANDARD, Apr. 17, 2006, at 24.

13. See Linda Greenhouse, *Foreword: The Third Rehnquist Court*, in THE REHNQUIST LEGACY, at xiii, xiv, xx (Craig M. Bradley ed., 2006); Merrill, *supra* note 12, 579–81, 586–87 (noting shift from social issues to issues of federalism); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 907–08 (2006).

of the Court and sometimes joining forces with the Court's "conservative" wing.¹⁴

The early Warren Court was likewise sharply divided, issuing a significant number of five-to-four decisions on controversial cases.¹⁵ It too was reluctant to overturn significant constitutional precedents and had shifting voting alignments.¹⁶ And while it issued some watershed rulings,¹⁷ it made repeated use of "constitutional avoidance" techniques to sidestep constitutional rulings on free speech challenges to antisubversive legislation.¹⁸

In explaining Rehnquist and early Warren Court approaches to the making and following of precedent, this Article will focus on two abbreviated studies. For the Rehnquist Court, it will take a hard look at the Court's seemingly contradictory decisionmaking in *Washington v. Glucksberg*,¹⁹ which rejected a constitutional challenge to assisted-suicide prohibitions, and *Lawrence v. Texas*,²⁰ which invalidated same-sex sodomy laws. *Glucksberg*, as will be explained, exemplifies the Rehnquist Court's practice of keeping its options open in subsequent cases—either by making fact-specific rulings and/or by minimizing precedents that are not backed by a majority of the

14. See Dahlia Lithwick, *A High Court of One: The Role of the "Swing Voter" in the 2002 Term*, in *A YEAR AT THE SUPREME COURT 13* (Neal Devins & Davison M. Douglas eds., 2004). For additional discussion, see *infra* Part I.A.

15. During the 1960 Term, for example, the Court split five to four on twenty-three of fifty-three non-unanimous civil liberties cases. See Segal & Spaeth, *supra* note 1, at 104. For additional discussion, see *infra* Part I.B.

16. During its 1953–1961 Terms, the Court overturned eleven precedents (as compared to the thirty-one it overturned during its 1962–1968 Terms). See Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1075–77 (2007) (compiling data). For additional discussion, see *infra* Part I.B.

17. *Baker v. Carr*, 369 U.S. 186 (1962), broke significant doctrinal ground. In particular, by finding that challenges to legislative apportionment were justiciable, *Baker* overturned *Colegrove v. Green*, 328 U.S. 549 (1946), and laid the groundwork for judicial challenges to legislative distinctions. The pre-1962 Warren Court also broke doctrinal ground in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Mapp* both established the exclusionary rule and overturned longstanding precedent. For a discussion of the Court's willingness to overrule precedent in *Mapp*, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS 195–99* (2000). For a discussion of *Baker*'s significance, see Stephen Ansolabehere & Samuel Issacharoff, *The Story of Baker v. Carr*, in *CONSTITUTIONAL LAW STORIES 297* (Michael C. Dorf ed., 2004). See also *infra* notes 142–46 and accompanying text (discussing the post-1962 Warren Court's dramatic expansion of *Baker* in *Reynolds v. Sims*, 377 U.S. 533 (1964)).

18. For an excellent treatment of early Warren Court avoidance, see generally Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005). For additional discussion, see *infra* Part I.B.

19. 521 U.S. 702 (1997).

20. 539 U.S. 558 (2003).

Justices. That the Court overruled Texas's sodomy ban in *Lawrence* underscores the ultimate irrelevance of the *Glucksberg* precedent. Against this backdrop, this Article will provide additional details about the Rehnquist Court's reluctance to impose constraints on itself or lower courts through rule-like decisions.

For the early Warren Court, this Article will examine the constitutional avoidance and domestic security cases (beginning with the pro-communist *Red Monday* cases and ending with the Court's seeming abandonment of those cases).²¹ Like the Rehnquist Court, the early Warren Court kept its options open. By making use of statutory, not constitutional, law the Court did not have to overturn (or even confront) precedent when retreating from its earlier rulings. Correspondingly, the pre-1962 Warren Court's reluctance to overrule or establish significant constitutional precedents reflects the absence of a solid coalition able to advance a single ideological agenda.

A. *The Rehnquist Court*²²

The Rehnquist Court (1986–2005) promised, but did not deliver, a constitutional revolution. With four Justices nominated by Ronald Reagan (and with all four on the Court from 1987–2005),²³ the Rehnquist Court seemed destined to embrace Reagan's brand of judicial conservatism. When running for President in 1980 and 1984, Reagan both pledged to appoint judges who “share our commitment to judicial restraint” and reached out to social conservatives by condemning Supreme Court decisions on school prayer, busing, and especially abortion.²⁴ In particular, Reagan called for the overruling of *Engel v. Vitale*²⁵ and *Roe v. Wade*²⁶—saying that “God should [never] have been expelled from the classroom” and that *Roe* was as divisive and wrong as *Dred Scott v. Sanford*²⁷ had been.²⁸

21. See *infra* Part I.B.1.

22. Portions of this Section are drawn from Neal Devins, *Substantive Due Process, Public Opinion, and the “Right” To Die*, in THE REHNQUIST LEGACY, *supra* note 13, at 327.

23. Reagan nominee Anthony Kennedy was confirmed in February 1987, joining Reagan appointees Antonin Scalia, Sandra Day O'Connor, and Chief Justice William Rehnquist. Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Apr. 1, 2008).

24. 1984 Republican Party Platform, *reprinted in* 40 CONG. Q. ALMANAC 55-B (1984).

25. 370 U.S. 421 (1962).

26. 410 U.S. 113 (1973).

27. 60 U.S. (19 How.) 383 (1856).

28. See Remarks and a Question-and-Answer Session with the Student Body of Providence-St. Mel High School in Chicago, Illinois, 1 PUB. PAPERS 600, 603 (May 10,

The social conservative agenda, however, was not the agenda of the Rehnquist Court. By steering a centrist path, the Rehnquist Court avoided controversy and, for the most part, tracked public opinion.²⁹ Furthermore, with shifting voting alignments and a propensity to divide five to four (doing so in more than twenty percent of all cases and in a much higher percentage of controversial cases),³⁰ the Rehnquist Court's identity was largely defined by the voting predilections of Justices O'Connor and Kennedy.³¹ On abortion and school prayer, O'Connor and Kennedy, citing concerns of stare decisis and the Court's legitimacy, cast key votes to reaffirm the essential holdings of *Roe* and *Engel*.³² Indeed, "Republican domination of the [Rehnquist] Court" did not result "in the overruling of a single revolutionary Warren Court decision."³³

This is not to say that the Justices were unwilling to overturn precedent. The Rehnquist Court overturned forty-four constitutional precedents.³⁴ The Court's targets, however, underscore the incoherence of Rehnquist Court decisionmaking. The Court steered neither a liberal nor a conservative path when overturning precedents (reaching liberal results in forty-one percent and conservative results in fifty-nine percent of these cases).³⁵ More than that, the Rehnquist Court was highly selective in its invocation of stare decisis—taking the doctrine seriously when it backed up the result it preferred and ignoring it when it did not.³⁶

Justices O'Connor and Kennedy held the key to the Court's on-again, off-again approach to both making and adhering to precedent. These two Justices had dramatically different styles—and, not

1982) (commenting on school prayer); RONALD REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 16–21 (1984) (commenting on *Roe* & *Dred Scott*).

29. See Neal Devins, *The Majoritarian Rehnquist Court*, 67 LAW & CONTEMP. PROBS. 63, 63 (2004); Jeff Rosen, *Center Court*, N.Y. TIMES MAG., June 12, 2005, at 17, 17–18.

30. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 240–41 (4th ed. 2007) (detailing results in Table 3-4).

31. As to whether O'Connor or Kennedy was the "most powerful" Justice, compare JEFFREY TOOBIN, THE NINE 7 (2007) (arguing that O'Connor is the most powerful noting "few Justices in history dominated a time so thoroughly or cast as many deciding votes as O'Connor"), with Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 96 (1996) (describing Kennedy as the most powerful).

32. *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309 (1994) (upholding legality of abortion); *Lee v. Weisman*, 505 U.S. 577 (1992) (limiting school prayer in public schools).

33. Nagel, *supra* note 12, at 24.

34. See Ringhand, *supra* note 16, at 1040 tbl.3.

35. *Id.*

36. See *infra* notes 37–86.

surprisingly, dramatically different approaches to precedent. Also, their willingness to join a majority opinion (rather than filing a concurrence agreeing with the result but not the reasoning) sometimes hinged on the Court embracing a view of the law that seemed limited to the case at hand. In other words, rather than embrace a determinative view of some legal issue, the Court signaled that the doctrinal formula used in one case might well be limited to that case—either because of the narrowness of the ruling or the failure of the ruling to either cite or repudiate prior precedents. To make these points more concrete, this Article turns to *Washington v. Glucksberg*³⁷ and *Lawrence v. Texas*.³⁸

1. *Washington v. Glucksberg*

Written by Chief Justice William Rehnquist (for a five-member majority that included Justices Kennedy and O'Connor), *Glucksberg* found that there is no right to assisted suicide by applying "[o]ur established method of substantive-due-process analysis."³⁹ In fact, *Glucksberg* is a mess—filled with omissions, internal inconsistencies, and a general disregard of the precedent it claims to follow. The explanation: the Chief Justice thought it better to sacrifice a clear statement of doctrine in order to secure the votes of Justices Kennedy and O'Connor.⁴⁰

To win over Justice Kennedy, Chief Justice Rehnquist could not favorably cite *Bowers v. Hardwick*.⁴¹ In *Bowers*, the Court concluded that states can criminalize same-sex sodomy and, in so doing, limited the sweep of substantive due process protections.⁴² Contending that the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made [rights]," *Bowers* confined substantive due process to those rights that are grounded in our nation's legal traditions and practices.⁴³ In *Glucksberg*, the Court appeared to embrace and extend *Bowers*. It declared that fundamental rights

37. 521 U.S. 702 (1997).

38. 539 U.S. 558 (2003).

39. *Glucksberg*, 521 U.S. at 720.

40. The Chief Justice's willingness to strike such a deal followed his practice of "[taking] each case as it came." Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC MONTHLY, Apr. 2005, at 79, 87 (quoting Michael K. Young, a former Rehnquist clerk). This practice advanced his agenda without worrying about whether his decision cemented "an overarching theory of substantive constitutional interpretation." *Id.* (quoting Jack Goldsmith of Harvard Law School).

41. 478 U.S. 186 (1986).

42. *See id.* at 190–91.

43. *Id.* at 194.

must both be “objectively, ‘deeply rooted in this Nation’s history and tradition’ ” and “ ‘implicit in the concept of ordered liberty.’ ”⁴⁴

But Justice Kennedy disapproved of *Bowers*. Before casting the key vote in *Lawrence v. Texas*⁴⁵ (overturning *Bowers*), Justice Kennedy had signaled his discomfort with *Bowers*. In 1996, he wrote the majority opinion in *Romer v. Evans*,⁴⁶ a decision rejecting (on equal protection grounds) a Colorado law prohibiting the granting of “protected status” to gays.⁴⁷ Kennedy’s decision made no mention of *Bowers*⁴⁸—even though Justice Scalia’s dissent strenuously argued that it was nonsensical for the Court to allow one state to criminalize same-sex sodomy while forbidding another state from denying protected status to gays.⁴⁹

Assuming that Justice Kennedy would not sign on to a decision that strongly backed *Bowers*, the Chief Justice may have thought it better to ignore *Bowers* than to risk losing one of the Justices in his fragile five-member coalition. For similar reasons, Chief Justice Rehnquist seemed to limit *Glucksberg*’s reach in order to secure Justice O’Connor’s vote. In a telling footnote, he acknowledged that his “opinion does not absolutely foreclose” future challenges to assisted-suicide laws.⁵⁰ For such a challenge to succeed, however, the Court would have to depart from the standard it employed in *Glucksberg*, namely, that substantive due process rights be “objectively, ‘deeply rooted in this Nation’s history and tradition.’ ”⁵¹

In a concurring opinion, Justice O’Connor made clear that she would not join an opinion that absolutely barred substantive due process challenges to assisted-suicide laws. Noting that a mentally competent person experiencing great pain may have a fundamental right to hasten his or her death, Justice O’Connor joined *Glucksberg* insofar as there was “no reason to think the democratic process” would not strike the appropriate balance on the issue.⁵² For his part, Chief Justice Rehnquist was glad to have Justice O’Connor join his

44. *Glucksberg*, 521 U.S. at 720–21 (internal citations omitted).

45. 539 U.S. 558 (2003).

46. 517 U.S. 620 (1996).

47. *Id.* at 631–32.

48. *Id.* at 623–36.

49. *See id.* at 642 (Scalia, J., dissenting) (“If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”).

50. *Washington v. Glucksberg*, 521 U.S. 702, 735 n.24 (1997).

51. *See id.* at 720–21.

52. *Id.* at 737 (O’Connor, J., concurring). Justice Stephen Breyer supported the recognition of such a fundamental right and consequently joined the O’Connor concurrence “except insofar as it joins the majority.” *Id.* at 789 (Breyer, J., concurring).

opinion—even if it meant adding a footnote directly at odds with the decision’s purported methodology.⁵³

In addition to making concessions to Justices Kennedy and O’Connor, *Glucksberg* is replete with references to contemporary practices and the sensibility of state bans on assisted suicide.⁵⁴ To put it plainly: by following several different paths in *Glucksberg*, the Court did little more than announce an outcome. More than that, *Glucksberg*’s cavalier attitude to existing precedent (most notably, its refusal to discuss *Bowers*) suggests that subsequent courts need not even discuss *Glucksberg* when deciding the next relevant dispute. Witness, for example, the Court’s 2003 decision in *Lawrence v. Texas*.⁵⁵

2. *Lawrence v. Texas*

The irrelevance of *Glucksberg* as a precedent and the competing decisionmaking styles of Justices Kennedy and O’Connor were on full display in *Lawrence*. This Section starts with Justice Kennedy’s five-member majority opinion, in which *Glucksberg* played no role. Although overruling *Bowers*, Kennedy did not endeavor to distinguish the opinion he joined in *Glucksberg*.⁵⁶ But, as the *Lawrence* dissent made clear, the two decisions could not be reconciled.⁵⁷ In particular, rather than sort out whether a constitutional right to sodomy (or same-sex sodomy) is “objectively, ‘deeply rooted in this Nation’s history and tradition,’”⁵⁸ *Lawrence* speaks of “[f]reedom extend[ing] beyond spatial bounds,” of “[l]iberty presum[ing] an autonomy of self,” and of legal prohibitions of same-sex sodomy “involv[ing] liberty of the person both in its spatial and in its more transcendent dimensions.”⁵⁹

53. For a more thorough treatment of intra-Court dynamics in *Glucksberg*, see Devins, *supra* note 22, at 338–44.

54. See, e.g., *Glucksberg*, 521 U.S. at 730–35 (referencing the sensibility of a state ban on assisted suicide).

55. 539 U.S. 558 (2003).

56. See *id.*

57. See *id.* at 594 (Scalia, J., dissenting) (noting that the majority opinion did not “describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest’”).

58. *Glucksberg*, 521 U.S. at 720–21 (citation omitted).

59. *Lawrence*, 539 U.S. at 562. *Lawrence*, moreover, looked beyond American history and norms to European Court of Justice interpretations of the European Convention of Human Rights. *Id.* at 573. For these and other reasons, commentators on both the left and right think that *Lawrence* “shatters” Chief Justice Rehnquist’s efforts to use *Glucksberg* to cabin substantive due process. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1573–75 (2004).

Likewise, Kennedy's decision paid scant attention to another opinion that he helped author, the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶⁰ *Casey* spoke broadly about the key role that stare decisis plays in the American legal system and set forth an elaborate test to assess whether *Roe v. Wade* should be reaffirmed.⁶¹ In *Lawrence*, the Court made no reference to the *Casey* test in explaining why it thought *Bowers* was wrongly decided.⁶² Instead, Kennedy's opinion refers to another aspect of *Casey*—the plurality's conclusion that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁶³

It is telling that Kennedy saw no reason to struggle over apparent inconsistencies with his *Lawrence* decision and the methodology he embraced in both *Glucksberg* and *Casey*. It is almost certainly true that Kennedy agreed with the outcomes in those decisions and did not want to disavow them. And if other Justices in the *Lawrence* majority disapproved of those decisions, their support of Kennedy's expansive language in *Lawrence* was sufficiently strong that they did not want to back Kennedy into a corner (by demanding, for example, that he disavow *Glucksberg*) or otherwise call attention to inconsistencies in Kennedy's jurisprudence (by filing a concurring opinion). For these Justices, it was enough for Kennedy to ignore

(condemning *Lawrence*'s lawlessness); Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 106 (2003) (celebrating *Lawrence*).

60. 505 U.S. 833 (1992).

61. See *id.* at 854–55. Although concluding that *Roe* should be reaffirmed, the Court determined that the trimester standard embraced by *Roe* should be jettisoned in favor of the so-called "undue burden" standard. See *id.* at 873–74. The Court also overturned decisions relying on the trimester standard, concluding that the trimester standard impermissibly limited state authority over abortion. See *id.* For critiques of *Casey* (suggesting, among other things, that it endorsed a makeshift, results-oriented approach to stare decisis), see Gerard V. Bradley, *Is the Constitution Whatever the Winners Say It Is?*, in *THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION* 10, 10–19 (Christopher Wolfe ed., 2004) [hereinafter *EMINENT TRIBUNAL*]; Robert F. Nagel, *Nationhood and Judicial Supremacy*, in *EMINENT TRIBUNAL*, *supra*, at 20, 20–36; and Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2005). Likewise, there is reason to doubt the sincerity of the Rehnquist Court's embrace of precedent in *Dickerson v. United States*, 530 U.S. 428 (2000). Although upholding *Miranda v. Arizona*, 384 U.S. 436 (1996), the Rehnquist Court severely gutted *Miranda* both before and after *Dickerson*. See Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda's Critics—And Then Its Supporters*, in *THE REHNQUIST LEGACY*, *supra* note 13, at 106.

62. In his *Lawrence* dissent, Justice Scalia remarked that the Court did not even "bother to distinguish—or indeed, even bother to mention—[*Casey*'s] paean to stare decisis." *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

63. *Casey*, 505 U.S. at 851.

disfavored decisions (just as it was enough for Justice Kennedy that Chief Justice Rehnquist ignored *Bowers* when writing *Glucksberg*).⁶⁴ The other telling feature of Kennedy's opinion is its sweeping language about the "transcendent dimensions" of "liberty," about "[f]reedom extend[ing] beyond spatial bounds."⁶⁵ This language, "like many of his opinions, was written to be quoted, not analyzed."⁶⁶ Reflecting both his intense interest in how his decisions are perceived and his "expansive view of the courts' role in public life,"⁶⁷ Kennedy was far more interested in "throwing down moral thunderbolts" than in following past precedent (even his own).⁶⁸

In sharp contrast, Justice O'Connor's concurring opinion in *Lawrence* broke no doctrinal ground. Reflecting her tendency "to focus on the particulars of the dispute before the Court" and to embrace "rationales on which diverse people can agree,"⁶⁹ Justice O'Connor argued that the Texas law was grounded in an impermissible purpose ("moral disapproval" of gays) and, consequently, there was no need to revisit *Bowers*.⁷⁰ In other words, just as she had carved out a palliative care exception in *Glucksberg*, O'Connor resisted Kennedy's expansive reasoning—preferring, instead, a "flexible," "context-specific" approach.⁷¹ In this way,

64. See generally Chris W. Bonneau et al., *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 891 (2007) (focusing on the discretion that other Justices give to a Supreme Court Justice tasked with writing a majority opinion). I also think it seems likely that Senior Associate Justice John Paul Stevens assigned *Lawrence* to Kennedy precisely because Kennedy was willing to write an expansive ruling, making use of substantive due process to invalidate the Texas sodomy law.

65. *Lawrence*, 539 U.S. at 562.

66. MARK TUSHNET, A COURT DIVIDED 178 (2005) (discussing Kennedy's "pomposity" in the flag-burning decision). For a similar critique of *Lawrence*, see Lund & McGinnis, *supra* note 59, at 1575.

67. JAN CRAWFORD GREENBURG, SUPREME CONFLICT 160 (2007); see also TUSHNET, *supra* note 66, at 176 (noting a former Kennedy clerk once told Jeffrey Rosen about Kennedy's seeming obsession with "how it's going to be perceived, how the papers are going to do it, how it's going to look").

68. Edward Lazarus, *The Pivotal Role of Justice Anthony Kennedy*, FINDLAW'S WRIT, Aug. 3, 2003, <http://writ.news.findlaw.com/lazarus/20030803.html>. For a similar critique of Kennedy's 2007 decision in the partial-birth abortion case, see Charles Fried, Op-Ed., *Supreme Confusion*, N.Y. TIMES, Apr. 26, 2006, at A25.

69. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1907 (2006).

70. See *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring). Justice O'Connor had joined *Bowers* (not to mention *Glucksberg*), and I think she had little interest in admitting error in prior decisions.

71. TUSHNET, *supra* note 66, at 54 (quoting favorably from NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 31 (1996)).

O'Connor kept her options open.⁷² A subsequent case could always be distinguished on factual grounds, so that (unlike Kennedy) there was no need for O'Connor to play fast and loose with precedent. Correspondingly, by filing concurring opinions, O'Connor made clear that she would not be constrained by the reasoning employed in the majority opinion.⁷³

3. Final Thoughts on the Rehnquist Court

Throughout his tenure as Chief Justice, William Rehnquist presided over a sharply divided, incoherent Court. Without a solid coalition of five (or more) ideologically simpatico Justices, the Rehnquist Court did not "make a single move that would radically change or unsettle existing constitutional doctrine."⁷⁴ Instead, the confluence of decisionmaking styles on the Rehnquist Court was a perfect storm for the making of an incoherent Court. Leading (so to speak) the Court was a pragmatic Chief Justice uninterested in an "overarching substantive theory of constitutional interpretation" and willing to sacrifice doctrinal coherence in order to cobble together a five member majority.⁷⁵ More significant, two radically different "swing" Justices typically cast the deciding votes in key cases—one of whom was a minimalist (whose fact-specific decisionmaking did not bind her or the other Justices in subsequent cases); and the other of whom was quite willing to make expansive statements about doctrine and the judicial role (but felt neither bound by those principles in subsequent cases nor obligated to contemplate

72. Mark Tushnet, in criticizing O'Connor, put it this way: "A reader [of O'Connor's opinions] could know what mattered to [her], but often not why it mattered so much—or so little." *Id.*

73. On O'Connor's propensity to file concurring opinions, see NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 52–68 (1996); and Richard Brust, *Balancing Act: Her Constitutional Tests and Strategic Concurrences Helped Make Sandra Day O'Connor a Force from the Center*, A.B.A. J., Sept. 2005, at 37, 41. For an extreme example of this practice, see *Bush v. Vera*, 517 U.S. 952 (1996), in which Justice O'Connor filed a concurrence to a decision that she authored. See *id.* at 990–95 (O'Connor, J., concurring); see also Jeffrey Rosen, *Sandramandered*, NEW REPUBLIC, July 8, 1996, at 6, 6 (condemning O'Connor's "analytically unintelligible" "contortions").

74. Lawrence Friedman, *The Rehnquist Court: Some More or Less Historical Comments*, in THE REHNQUIST COURT: A RETROSPECTIVE 146 (Martin Belsky ed., 2002); see also *supra* notes 29–33 and accompanying text.

75. Rosen, *supra* note 40, at 87 (quoting Jack Goldsmith); see also *supra* Part I.A.1 (discussing Rehnquist's willingness to trade off doctrinal coherence for a five-Justice majority in *Glucksberg*); *infra* note 77 and accompanying text.

precedents at odds with his decisionmaking).⁷⁶ This mix of personalities, as the above discussion reveals, was on full display in *Glucksberg* and *Lawrence*.

The Rehnquist Court, while unique in some respects, exemplifies the tendencies of incoherent Courts. Besides the individual preferences of the swing Justices, there are other structural explanations for why an incoherent Court would be less likely to issue broad opinions or overrule landmark precedents. In order to cobble together a majority coalition, Justices will often compromise their individual preferences regarding the reach of the decision.⁷⁷ As a result, the "Justices will often deliberately cloud their opinion to obtain the fifth vote" "so long as the ambiguity is not incompatible with their views."⁷⁸

On an incoherent Court, there are more closely divided cases and, as a result, more opportunities for Justices in the majority to make compromises in order to hold together a majority coalition. In particular, there are more occasions when Justices will ask the decision writer to address their concerns through addition or deletion and "tacitly threaten to withhold support if the changes are not made."⁷⁹ And when the opinion is being written by a swing Justice, it may be that other members of the majority coalition place fewer demands on the opinion writer—for fear that the swing Justice will drop out of the majority and file a special concurring opinion.⁸⁰ Against this backdrop, it is to be expected that the decisions of

76. The question of what animated Justices O'Connor and Kennedy is beyond the scope of this Article. For a sampling of literature discussing the predilections of Justices Kennedy and O'Connor, see *supra* notes 66–73, *infra* notes 242–45. See generally TOOBIN, *supra* note 31 (sharing various anecdotal and personal insights into the Justices of the Supreme Court).

77. See generally Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 521 (1998) (reviewing EPSTEIN & KNIGHT, *supra* note 6) (discussing then-Justice Rehnquist's "negotiating with John Stevens for a considerable time in order to produce a fifth vote" in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976)). In the case of a coherent Court, the final decision may not reflect the preferences of individual Justices in the majority coalition. Instead, these Justices may simply defer to the opinion writer. See *Bonneau et al.*, *supra* note 64, at 903. At the same time, Justices in the majority coalition of a coherent Court are both more likely to agree with each other and, therefore, are less likely to condition their vote on the inclusion or exclusion of certain language from the majority opinion. This is not to say that bargaining does not take place on a coherent Court; it is to say that there is less bargaining than one might expect. See *id.* at 892.

78. See Igor Kirman, *Standing Apart To Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2099 (1995).

79. Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 581 (1996).

80. See *supra* notes 56–68 and accompanying text (discussing Kennedy's opinion in *Lawrence*).

incoherent Courts will be in tension with each other—the rationales employed are not necessarily embraced by a majority of Justices, often muddled by compromise, and cases often turn on factual distinctions (because the legal rule is not intended to bind the Court in subsequent cases). This is certainly true of Rehnquist Court substantive due process decisions, but it is also true in the Court's decisions on religion, race, and its once-vaunted federalism revival.⁸¹

One final comment about the Rehnquist Court and, more generally, incoherent Courts: while such Courts are reluctant to overturn landmark precedents, *stare decisis* does not operate as a significant independent constraint. When convenient, *stare decisis* is invoked as a rationale for not overturning precedent. Rehnquist Court decisions upholding *Roe* and *Miranda v. Arizona*,⁸² for example, are paeans to precedent.⁸³ At the same time, the very Justices who wrote these opinions did not blink when overturning some abortion rulings or gutting much of *Miranda's* protections.⁸⁴ Likewise, some Justices (most notably Anthony Kennedy) ignore precedents—even *stare decisis* precedents—that stand in the way of preferred outcomes and rationales.⁸⁵ None of this is to say that precedent does not figure into the Justices' deliberation or thinking;⁸⁶ rather, it is to say that the reluctance of incoherent Courts to overturn landmark precedents is tied more to the lack of consensus on these Courts than to the saliency of *stare decisis*.

81. See *supra* notes 12–14 and accompanying text. See generally TUSHNET, *supra* note 66, at 223–48.

82. 384 U.S. 436 (1966).

83. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (upholding *Roe*); *Dickerson v. United States*, 530 U.S. 428 (2000) (upholding *Miranda*). The Court also embraced its power to make and overrule precedent. For example, when invalidating congressional efforts to overturn Supreme Court decisionmaking through the Religious Freedom Restoration Act, the Court emphasized both its power to interpret the Constitution and the need for Congress to adhere to such Court interpretations. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1996).

84. See *Casey*, 505 U.S. at 870 (repudiating the trimester test utilized in *Roe* and, in so doing, overturning earlier Court decisions protecting abortion rights); see also Kamisar, *supra* note 61, at 106 (describing tension between the Rehnquist Court's gutting of *Miranda* and the lopsided (seven to two) rejection of congressional efforts to statutorily overrule *Miranda*).

85. See Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1168–200 (2008) (discussing incoherence of *stare decisis* methodology employed in *Casey*); *supra* notes 56–68 and accompanying text.

86. See EPSTEIN & KNIGHT, *supra* note 6, at 28–33 (discussing the Justices' invocation of precedent in their deliberations).

B. The Early Warren Court

There were two Warren Courts. The 1962–1968 Terms were, as Lucas Powe put it, “history’s Warren Court.”⁸⁷ That Court, as Part II will detail, was a coherent Court willing both to overturn precedent and make significant doctrinal advances. The 1953–1961 Terms tell a far different story. The Court rarely overturned precedent (eleven during this period) and was sharply divided.⁸⁸ Justices Potter Stewart and Tom Clark generally alternated as the swing Justices for much of this period.⁸⁹ But on national security cases, which dominated much of this period, Justices Felix Frankfurter and John Marshall Harlan cast the decisive votes.⁹⁰

The national security cases are emblematic of the early Warren Court. Rather than embrace a “hard” view of the Constitution, the Court made extensive use of constitutional avoidance—permitting the Justices to initially rule in favor of Communists and other subversives while allowing themselves the freedom to change their minds in subsequent cases. And Justices Frankfurter and Harlan did change their minds—responding to congressional opprobrium by backing away from their initial pro-civil liberties rulings.

Minimalist decisionmaking also characterizes the two most significant constitutional rulings of the early Warren Court—*Brown v. Board of Education*⁹¹ and *Baker v. Carr*.⁹² In both *Brown* and *Baker*, the Court declared an important principle without ordering consequential relief. *Baker* rejected political question objections to legislative apportionment cases—but left the details of the substantive doctrine to subsequent cases. *Brown*, although repudiating separate-but-equal, left it to southern school systems to devise appropriate remedies (and the Warren Court subsequently denied certiorari in related challenges to state antimiscegenation laws).⁹³ As a result, the most consequential statements about school desegregation and legislative apportionment were made by the post-1962 Warren

87. POWE, *supra* note 1, at 209, 497–99.

88. See *supra* notes 15–18 and accompanying text.

89. See generally Steven Smith, *Justices Stewart and Clark: Swing Votes on the Warren Court*, 19 SANTA CLARA L. REV. 1009 (1979) (discussing swings from 1958–1960).

90. See Frickey, *supra* note 18, at 401–02.

91. 347 U.S. 483 (1954) (effectively overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. 369 U.S. 186 (1962), overruling *Colegrove v. Green*, 328 U.S. 549 (1946).

93. See *Naim v. Naim*, 350 U.S. 885 (1956). For the classic statement of why the Court had good reason to steer clear of antimiscegenation, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 46–60 (1986).

Court.⁹⁴ Likewise, it was the post-1962 Warren Court⁹⁵ that issued definitive constitutional rulings on antisubversive legislation and, in so doing, provided expansive civil liberties protections to Communists and other critics of the government.⁹⁶

1. Red Monday and Its Aftermath⁹⁷

During its 1956–1957 Term, the Court decided twelve cases involving Communists, ruling against the government in every case.⁹⁸ Most significant, on June 17, 1957 (Red Monday), the Court handed down four decisions that severely limited Smith Act prosecutions (for the “knowing or willing” “advocacy or teaching” of the “desirability or propriety of overthrowing the Government of the United States”).⁹⁹ These decisions, while signaling the unconstitutionality of governmental efforts to clamp down on subversives, were decided on statutory grounds.¹⁰⁰ For example, in *Yates v. United States*,¹⁰¹ the Court (in an opinion by Justice Harlan) concluded that the Smith Act was limited to “incitement” and did not extend to abstract advocacy.¹⁰²

Congress responded with a vengeance, coming—as Chief Justice Warren put it—“dangerously close” to enacting legislation that would

94. See POWE, *supra* note 1, at 239–71 (detailing post-1962 reapportionment cases); Neal Devins, *The Judicial Role in Equality Decisionmaking*, in REDEFINING EQUALITY 219, 221 (Neal Devins & Davison M. Douglas eds., 1998) (discussing the sharp divide between pre- and post-1962 Warren Court school desegregation decisions). For additional discussion of the pre-post 1962 divide in legislative reapportionment, see THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 551–53 (Julian E. Zelizer ed., 2004). See also *infra* Part II.A.

95. See *infra* Part II.A.

96. See Frickey, *supra* note 18, at 426–39. For this very reason, Walter Murphy described the Warren Court’s earlier retreat on anti-Communist legislation as a “tactical withdrawal, not a rout.” WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 246 (1962).

97. The discussion draws from Neal Devins, *Should the Court Fear Congress?*, 90 MINN. L. REV. 1337, 1342–43 (2006). In that prior essay, I argued that the Court had good reason to fear congressional retaliation. See *id.* at 1348–58. The following analysis represents a partial rethinking of my position in that prior paper. Here I make a somewhat different argument—emphasizing that the Justices who switched positions in anti-Communist cases had weak policy preferences. Cf. *id.*

98. POWE, *supra* note 1, at 90–91 (summarizing cases dealing with Communism during the 1956–1957 Term).

99. 18 U.S.C. § 2385 (2000) (criminalizing the “knowing or willing . . . advocacy or teaching . . . [of the] desirability or propriety of overthrowing the Government of the United States”).

100. See generally Frickey, *supra* note 18 (describing the early Warren Court’s constitutional avoidance tendencies).

101. 354 U.S. 298 (1957).

102. *Id.* at 313.

have stripped the Supreme Court of appellate jurisdiction in five domestic security areas.¹⁰³ The Court relented, issuing decisions that limited the scope of earlier rulings and otherwise permitted the government to prosecute subversive cases.¹⁰⁴ In *Barenblatt v. United States*,¹⁰⁵ for example, the Court (in a quite different Harlan opinion) upheld a six-month contempt-of-Congress sentence for a witness's refusal to answer questions before the House Un-American Activities Committee.¹⁰⁶ Concluding that personal liberties must be balanced against pressing public needs, the Court backed away from *Yates* and other Red Monday decisions. The fact that the Court did this after the defeat of proposed jurisdiction-stripping measures was significant, prompting *The New York Times*, for example, to complain that "what Senator Jenner [the principal sponsor of court-stripping legislation] was unable to achieve [in Congress] the Supreme Court has now virtually accomplished on its own."¹⁰⁷

The New York Times had good reason to highlight the curious timing of the Court's retreat. At the same time, the retreat was hardly that of the entire Court, which was sharply divided on national security cases. Pro-civil liberties cases in the 1956–1957 Term were often decided by a vote of five to four. Following the Court's retreat, the Court was again divided, often deciding cases five to four.¹⁰⁸ The real retreat, in other words, was the work of the Court's centrist Justices—John Marshall Harlan and especially Felix Frankfurter.¹⁰⁹ Consider, for example, Justice Frankfurter: from 1959–1962, he cast only one dissenting vote on a national security case (and that case was "nonconsequential, nonconstitutional").¹¹⁰

103. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 313 (1977).

104. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 48–66 (2004) (discussing the Court's retreat and the related scholarly debate about the Court's role in checking governmental excess); POWE, *supra* note 1, at 235–56.

105. 360 U.S. 109 (1959).

106. *Id.* at 134.

107. MURPHY, *supra* note 96, at 245 (quoting Editorial, N.Y. TIMES, Mar. 2, 1960, at 36:1).

108. See Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 ("[A] vote of 5-4 decided 23 of the 52 non-unanimous civil liberties decisions.").

109. See Frickey, *supra* note 18, at 432–37.

110. POWE, *supra* note 1, at 142. For this and other reasons, Frankfurter was described as the leader of the Court's cautious wing. See William Eskridge, *Civil Rights Legislation in the 1990s: Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 619 n.28 (1991); see also *infra* note 117 and accompanying text (discussing Frankfurter's judicial philosophy).

2. Constitutional Avoidance and the External Strategic Actor

In theory, a strategic, policy-oriented Court might make use of constitutional avoidance in ways quite similar to the pre-1962 Warren Court. For example, recognizing potential political backlash to pro-Communist rulings, the Court might have used avoidance to return the issue to Congress. In particular, if Congress did not countermand the Court, the Justices would understand that they could be more aggressive in their pursuit of favored policies—grounding their decisions in the Constitution and thereby making it harder for Congress (through legislation) and future Courts (through statutory interpretation) to advance a competing policy agenda. In contrast, if their decisions did prompt a legislative backlash, the Court could beat a strategic retreat. It could defuse congressional backlash by interpreting subsequent statutes in ways that lawmakers supported (and hold off on reaching the constitutional questions until the political climate was more favorable).

The question remains: was the Warren Court's retreat strategic? My past writings argued that the 1957 Warren Court had reason to fear Congress—and that it would have been sensible for a “strategic” Justice to take into account Court-curbing proposals.¹¹¹ Whether or not this earlier analysis is correct, such strategic behavior played little or no role in explaining the Court's retreat. Instead, the Warren Court's flip-flop speaks more to the pre-1962 Warren Court's incoherence than anything else.

To start, a Justice truly committed to the policy goals of 1956–1957 Term civil liberties decisions would have run the risk that Congress would strike back at the Court. This explains the willingness of Justices Black, Douglas, Brennan, and Warren to oppose the Court's retreat—often filing vociferous dissents.¹¹² In particular, the 1960 Court had reason to think that Congress would acquiesce to pro-civil liberties rulings. Earlier Court-curbing proposals failed, and the Court controversy was not a major factor in the 1958 elections.¹¹³ More significantly, “the Congress became more liberal. Seven Republican Senators who had battled the Court,

111. See Devins, *supra* note 97, at 1343–44; see also MURPHY, *supra* note 96, at 246 (defending the Court's retreat as “tactical”); Frickey, *supra* note 18, at 431–32 (describing the Court's reaction to Congressional criticism).

112. See KECK, *supra* note 104, at 53–54 (discussing Justice Black's dissent in *Barenblatt* and Black's subsequent public statements about the failings of the Harlan-Frankfurter balancing test).

113. Frickey, *supra* note 18, at 431.

including Jenner, . . . had left due either to retirement or electoral defeat."¹¹⁴

But for Justice Frankfurter (and presumably his ally, Justice Harlan),¹¹⁵ the hue and cry following the Court's 1956–1957 Term rulings was too much. Not only did Congress seek to slap the Court down, the American Bar Association and Judge Learned Hand launched sharp attacks against the Court.¹¹⁶ Frankfurter was a pro-government New Dealer who sought to limit judicial intrusions into the legislative process by advancing any number of “judicial restraint” doctrines.¹¹⁷ His antigovernment decisions were a departure from this norm and, as such, there is reason to think that he was not strongly committed to the civil liberties agenda championed by Black, Douglas, Warren, and Brennan. By retreating from 1956–1957 Term decisions and returning to his typical mode of decisionmaking, he was able to demonstrate his bona fides to Court critics.¹¹⁸

To summarize, the Court's retreat from 1956–1957 Term rulings is not a story of a Court acting strategically—by issuing minimalist nonconstitutional decisions in an effort to best assess how to advance its pro-civil liberties agenda. Instead, the Harlan/Frankfurter flip and the vociferous criticism of that flip by pro-civil liberties Justices speaks to divergent preferences on an incoherent Court. Frankfurter and Harlan had weak preferences and, as such, were not truly aligned with the Court's four liberals (Warren, Douglas, Black, and Brennan). That Frankfurter and Harlan preferred nonconstitutional decisions in the 1956–1957 Term speaks to those weak preferences;

114. *Id.* (citing MURPHY, *supra* note 96, at 237–38).

115. On the allegiance between Harlan and Frankfurter, see KECK, *supra* note 104, at 53 (describing Harlan as Frankfurter's “closest ally”); and POWE, *supra* note 1, at 143 (describing Harlan as “closely associated” with Frankfurter, pointing to a Harlan opinion as “Frankfurter lite”).

116. See POWE, *supra* note 1, at 127–34; Frickey, *supra* note 18, at 431–32.

117. Frankfurter was known for deference to elected officials, state judges, and Congress; he was not known for engaging issues on a constitutional level (another reason why Frankfurter would have been predisposed to making use of avoidance in lieu of constitutional rulings). 1 *ENCYCLOPEDIA OF THE U.S. SUPREME COURT* 389–90 (Thomas T. Lewis & Richard L. Wilson eds., 2001). Correspondingly, Frankfurter believed that mores and police power were the proper locus of power and, as such, he was especially upset when allegations of judicial activism were levied against the Warren Court (another reason why Frankfurter would have been especially sensitive to the criticisms of the bar, Congress, and Judge Hand). See *id.*

118. For a treatment of the desire of Justices to seek approval from “audiences” that matter to them, see generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006). See also *id.* at 42, 44 (noting Learned Hand's influence on Frankfurter, as well as Frankfurter's desire to portray himself as a civil libertarian committed to judicial restraint).

their willingness to flip in response to anti-Court criticism by Congress, the bar, and respected jurists also speaks to those weak preferences.¹¹⁹

Finally, there is a link between the discussions of the Rehnquist and early Warren Courts. Just as the Justices on the Rehnquist Court compromised with each other in order to piece together five-member majority coalitions, the early Warren Court likewise compromised in the first round of antisubversive cases. Unable to get five Justices willing to strike down governmental conduct on constitutional grounds, the "divided and besieged set of Justices avoided the sharpest confrontations with each other by agreeing to issue indeterminate opinions."¹²⁰ These decisions, in other words, announced results and did not make law. The Court's swing Justices could peel away from the pro-civil liberties coalition without admitting error. Equally telling is that following the Frankfurter/Harlan flip, the Court's four liberals—no longer needing to compromise with the swing Justices—could now issue strongly worded dissents, dissents that reveal that this group of Justices formed an ideologically simpatico coalition. For the Warren Court, as the next part will detail, 1962 proved to be the defining year. Felix Frankfurter retired and Arthur Goldberg took his seat; this change in the Court's composition was transforming. No longer incoherent, the Court could aggressively pursue a coherent vision of the law.

II. COHERENT COURTS

The post-1962 Warren and New Deal (1937–1949) Courts exemplify coherent Courts. Five or more Justices on these Courts were ideologically simpatico and pursued a shared vision of legal policymaking. Sometimes that meant overturning landmark constitutional precedents; sometimes that meant embracing novel legal doctrines. The post-1962 Warren Court overturned thirty-two constitutional precedents in the 1962–1968 Terms (thirty of which

119. In arguing that the Court did not act strategically, I am not making the stronger claim that strategic concerns did not figure into the calculus of *any* Justice. For example, Justices Frankfurter and Harlan may well have seen their flip as a mechanism for the Court to improve relationships with Congress. At the same time, these Justices were less interested in advancing a pro-civil liberties agenda than were the Court's four liberals. Frankfurter, in particular, was a strong proponent of judicial restraint. See KECK, *supra* note 104, at 38–66. Thinking that the Court should only invalidate laws that "unambiguously" violated the Constitution, Frankfurter regularly put his views of the judicial role in front of his preferred policy outcomes. *Id.* at 45. In this way, Frankfurter's approach to judging does not jibe with the policy-driven strategic actor model.

120. Frickey, *supra* note 18, at 401.

advanced liberal outcomes).¹²¹ The Warren Court, moreover, advanced its nationalistic agenda through a series of doctrinal innovations—constitutionalizing criminal procedure and fundamentally revamping the First and Fourteenth Amendments. The New Deal Court overturned thirty-two decisions from 1937–1946 (nearly all of which advanced the New Deal Court’s embrace of economic regulation).¹²² By freeing the government’s hand to regulate economic matters, moreover, the New Deal Court transformed the work of the Supreme Court—moving it away from economic issues and towards civil rights and liberties. Consider, for example, the 1935 Term (immediately before the start of the New Deal Court). Unlike the modern era, the 1935 Court heard only two (out of 160) cases that implicated civil rights and liberties.¹²³

In explaining post-1962 Warren and New Deal Court decisionmaking, this Article both provides some details of ideological cohesion among the Justices of these two Courts and takes a closer look at an exemplary decision from each Court. For the Warren Court, this Article looks at *Miranda*—a case that showcased the Warren Court’s willingness to hand down prophylactic rules that looked more like statutes than judicial edicts. For the New Deal Court, it discusses *Wickard v. Filburn*,¹²⁴ a case in which the Court self-consciously abandoned its authority to check Congress’s Commerce Clause powers.

A. *The Second Warren Court*

“History’s Warren Court,” the Court that “virtually rewrote the corpus of our constitutional law,” began with the 1962 appointment of Arthur Goldberg.¹²⁵ In sharp contrast to Felix Frankfurter (the Justice whose seat Goldberg filled), Goldberg was self-consciously

121. Ringhand, *supra* note 16, at 1075–77. Likewise, from 1962–1968, sixty-six state statutes were invalidated. Sixty-two of these invalidations advanced liberal outcomes. *Id.* at 1058–61.

122. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 213–36 (1995); see also Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 265–66 (1992); *infra* Part II.B (discussing other measures of the New Deal Court’s willingness to overturn precedent).

123. LEUCHTENBURG, *supra* note 122, at 235.

124. 317 U.S. 111 (1942).

125. MICHAEL BELKNAP, *THE SUPREME COURT UNDER EARL WARREN 1953–69*, at 308 (2005) (quoting *THE BURGER COURT: COUNTER REVOLUTION OR CONFIRMATION?* 261 (Bernard Schwartz ed., 1998)).

liberal and activist.¹²⁶ Together with Warren, Douglas, Black, and Brennan, Goldberg gave the Court five secure votes for liberal outcomes. Goldberg (and Abe Fortas, the Justice who replaced Goldberg in 1966) agreed with Warren about ninety percent of the time, and the intra-agreement rate among the five liberals likewise hovered around ninety percent.¹²⁷ When Thurgood Marshall joined the Court in 1967 (replacing Tom Clark), the Court moved even further to the left.¹²⁸ Marshall was in the majority ninety-five percent of the time (second only to Brennan who was in the majority ninety-eight percent of the time), and the intra-agreement rate among “the most cohesive bloc in modern Court history” (Fortas, Warren, Brennan, and Marshall) was near ninety-three percent.¹²⁹

Ideological cohesion within the Warren Court played out in innumerable ways. More than any Court before it, the Warren Court was willing to overturn constitutional precedent.¹³⁰ Correspondingly, the Warren Court was not especially concerned with the niceties of doctrinal consistency; instead, it was much more focused on reaching preferred outcomes. Mark Tushnet describes this as the “willfulness” of the Court: its willingness to reach the “correct” result even when the “doctrinal tools . . . were not readily at hand.”¹³¹ For example, rather than engage in a high-minded debate about whether the Fourteenth Amendment incorporates the Bill of Rights, the Warren Court thought it good public policy to mandate that the states be subject to the same Bill of Rights limits as the federal government. It did not “bother[] to come up with a decent theory supporting [this conclusion], because the Warren Court’s members were not concerned with constitutional theory.”¹³² Perhaps for this reason, the

126. POWE, *supra* note 1, at 211–12. On the question of whether 1961 or 1962 is the critical year, see *supra* note 1. See also Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 312 (1995) (suggesting that there was “ideological continuity” throughout the Warren era).

127. POWE, *supra* note 1, at 212. A more empirically minded study places the agreement rate among Warren, Goldberg, Brennan, and Douglas near eighty-seven percent. See Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 845 (1980).

128. Eskridge, *supra* note 110, at 619–20 n.28.

129. Heck, *supra* note 127, at 872; see also POWE, *supra* note 1, at 290. Justice Douglas—who had a propensity to file lone dissents—regularly voted for liberal outcomes but had a lower intra-agreement score. Heck, *supra* note 127, at 872.

130. BELKNAP, *supra* note 125, at 308.

131. Tushnet, *supra* note 1, at 10.

132. *Id.* at 18. Tushnet’s conclusion is shared by both supporters and opponents of Warren Court innovations. Consider, for example, *Griswold v Connecticut*, 381 U.S. 479 (1965). Robert Bork condemned *Griswold* for its lawlessness, arguing that it—like many other Warren Court decisions—“fail[ed] every test of neutrality” and, as such, the decision

Warren Court saw little reason to ground their doctrinal innovations in past precedent and, as such, cited fewer precedents than other Supreme Courts.¹³³

The ideological coherence (and corresponding ambitiousness) of the Warren Court is also reflected in the ways in which the Court pursued its policymaking agenda. The Court rewrote constitutional law and, in critical respects, the Court was more ambitious in pursuing its liberal agenda than were Congress and the White House (even during the Johnson administration, when Democrats controlled both Congress and the White House). The key to all this was Earl Warren who, as Bernard Schwartz observed, "strongly believed that the law must draw its vitality from life rather than precedent" and that the Court needed "to perform a transforming role, usually thought of as more appropriate to the legislator than the judge" in order for the Court "to keep step with the twentieth century's frenetic pace of social change."¹³⁴ In particular, Warren and the dominant coalition on the post-1962 Court aggressively pursued the nationalization of political problems and processes, especially equality for the underrepresented (minorities, the poor, the accused, and children).¹³⁵ In so doing, the Court opened up areas that had "been thought closed to the exercise of judicial power,"¹³⁶ often "articulating broad rules that went well beyond the particular circumstances of individual cases."¹³⁷

Consider, for example, the ways in which the post-1962 Warren Court extended the doctrinal innovations of the pre-1962 Warren Court. In *Brown*, the pre-1962 Court declared a basic principle but then left it to southern school systems to sort out how to put that

was an "unprincipled" effort of the Justices to impose their value choices on elected officials. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971). Defenders of the Warren Court's reinvigoration of the right to privacy are also critical of the Court's reasoning. Most significant (and consistent with Mark Tushnet's claim about the Court's interest in getting to "yes"—and not worrying about constitutional theory), David Garrow's review of the Justices' internal deliberations revealed that several Warren Court Justices were searching for a theory to back their conclusion that Connecticut's ban on contraceptives was unconstitutional. DAVID J. GARROW, *LIBERTY AND SEXUALITY* 245–50 (1994).

133. See Fowler & Jeon, *supra* note 2, at 3, 7.

134. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 275, 263 (1993).

135. See RICHARD Y. FUNSTON, *CONSTITUTIONAL COUNTERREVOLUTION?* 297–307 (1977); see also sources cited in Kermit L. Hall, *The Warren Court in Historical Perspective*, in *THE WARREN COURT: A RETROSPECTIVE* 293–95 (Bernard Schwartz ed., 1996).

136. FUNSTON, *supra* note 135, at 314.

137. Barbara Palmer, *Issue Fluidity and Agenda Setting on the Warren Court*, 52 POL. RES. Q. 39, 42 (1999) (citation omitted).

principle into action.¹³⁸ “[O]ne decade after *Brown*, only [two percent] of black children attended biracial schools in the eleven southern states.”¹³⁹ In an effort to make the *Brown* decision consequential, the post-1962 Warren Court reentered the fray, declaring in 1964 that “[t]he time for mere ‘deliberate speed’ has run out”¹⁴⁰ and rejecting, in 1968, freedom of choice plans that allowed white and African American students to opt into one-race schools.¹⁴¹ Likewise, the post-1962 Court dramatically extended the reach of *Baker v. Carr*¹⁴² (which simply held justiciable legal challenges to legislative apportionment schemes). In *Reynolds v. Sims*,¹⁴³ the Court declared voting a fundamental right and established the “one person, one vote” principle.¹⁴⁴ In so doing, the Court effectively put in issue “[ninety] percent of the districts in the House of Representatives. . . . [and] virtually every single seat in the upper houses of state legislatures and most of the seats in lower houses.”¹⁴⁵ The decision was so far-reaching that Anthony Lewis, Supreme Court correspondent for *The New York Times*, observed that “[e]ven some liberal-minded persons, admirers of the modern Supreme Court, found themselves stunned.”¹⁴⁶

The Court’s willingness to push the limits of earlier doctrinal innovations calls attention to another central feature of post-1962 Warren Court decisionmaking. On the one hand, the Court was a product of its times. Elected government and the American people had become more liberal—so much so that some have argued that the post-1962 Warren Court became “politically in tune with the liberal changes that were about to sweep the country”¹⁴⁷ and that “the Court

138. See J. Harvie Wilkinson, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485 (1978) (discussing the South’s response to *Brown II*, 349 U.S. 294 (1955), the Court’s decision to leave the implementation of *Brown* to Southern school officials and district court judges).

139. Neal Devins, *What Brown Teaches Us About the Rehnquist Court’s Federalism Revival*, PS: POL. SCI. & POL., Apr. 2004, at 212.

140. *Griffin v. County Sch. Bd.*, 377 U.S. 218, 234 (1964) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955)).

141. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

142. 369 U.S. 186 (1962).

143. 377 U.S. 533 (1964).

144. *Id.* at 558.

145. POWE, *supra* note 1, at 252; see also THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY, *supra* note 94, at 549–51 (noting that *Reynolds* is a dramatic extension of *Baker* and attributing that extension to Goldberg’s replacement of Frankfurter).

146. Anthony Lewis, *Supreme Court Moves Again To Exert Its Powerful Influence*, N.Y. TIMES, June 21, 1964, at E3.

147. Gerald N. Rosenberg, *Bringing Politics Back In*, 95 NW. U. L. REV. 309, 311 (2000) (reviewing POWE, *supra* note 1).

was a functioning part of the Kennedy-Johnson liberalism of the mid- and late-1960s.¹⁴⁸ For example, *Baker* was universally applauded, and Congress backed *Brown* by enacting landmark civil rights legislation, most notably the Civil Rights Act of 1964.¹⁴⁹ At the same time, the Court tested the limits of what elected government and the American people would tolerate. The post-1962 Warren Court's push towards numerical measures of racial equality in the schools, its "one person, one vote" standard, its constitutionalization of criminal law, and much more did not resonate with elected officials or the American people.¹⁵⁰ Indeed, Richard Nixon and George Wallace's 1968 presidential bids both took aim at Supreme Court liberalism.¹⁵¹ As such, the post-1962 Warren Court's liberal majority was willing to run risks, "to be in tension with the dominant political culture."¹⁵² The post-1962 Warren Court's willingness to test limits, to go as far as it could in advancing its vision of legal policymaking, is a hallmark of a coherent Court.¹⁵³

1. Goodbye Constitutional Avoidance; Hello Prophylactic Rules

If the hallmark of the first Warren Court was its use of constitutional avoidance in antisubversive cases,¹⁵⁴ the post-1962 Warren Court demonstrated its willingness to impose a hard view of

148. POWE, *supra* note 1, at 494.

149. On *Baker*, see ROBERT H. BORK, *THE TEMPTING OF AMERICA* 85–86 (1990); and POWE, *supra* note 1, at 203–05. On the relationship between the 1964 Civil Rights Act and the Court's ruling in *Brown*, see Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1032–34 (1992) (reviewing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991)).

150. For example, the Warren Court also revolutionized the First Amendment—liberalizing obscenity standards, limiting libel prosecutions, and striking down loyalty oaths. See POWE, *supra* note 1, at 303–21, 336–57.

151. See William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 434–37 (2002) (concluding that "[j]udicial issues may have influenced the outcome of the 1968 election more than any other election in the nation's history").

152. Hall, *supra* note 126, at 327.

153. In this way, the Warren Court was not especially interested in having a true dialogue with Congress. Instead, it pushed its agenda as far as it could go—seeking to avoid a legislative countermand *but* willing to craft doctrine in ways that did not match legislative preferences. See Neal Devins in Phillip P. Frickey et al., *Congress and the Earl Warren Court*, BULLETIN OF THE AMERICAN ACADEMY 15–16 (Summer 2004), available at <http://www.amacad.org/publications/bulletin/summer2004/scheiber.pdf> (examining the Court's willingness to use a Reconstruction-era civil rights statute to advance a broader vision of fair housing rights than the just-enacted fair housing legislation). This Article's conclusion notes this type of decisionmaking tracks one of the models of judicial decisionmaking advanced by political scientists, the external strategic actor. See *supra* note 11; see *infra* notes 158, 174.

154. See *supra* notes 87–96 and accompanying text.

legal policymaking by embracing prophylactic rules—rules intended to bind lower courts and government officials (even if it meant sometimes prohibiting otherwise constitutional behavior).¹⁵⁵ This bit of constitutional bravado highlights the fundamental differences between pre- and post-1962 Warren Court decisionmaking. The post-1962 Court knew its mind on legal policy questions and, as such, was willing to bind itself, lower courts, and government officials. Consequently, instead of invoking the avoidance canon when considering the legality of antisubversive legislation, the post-1962 Warren Court “brought the domestic-security apparatus to a halt,”¹⁵⁶ declaring unconstitutional federal laws banning Communists from working in defense facilities and limiting the mailing of “communist propaganda.”¹⁵⁷ More than that, the post-1962 Court was willing to risk elected-branch disapproval in order to advance their legal policy agenda.¹⁵⁸

Miranda v. Arizona is the quintessential example of the post-1962 Warren Court’s willingness to run risks and pursue its vision of legal policymaking. Notwithstanding public opinion polls showing significant opposition to post-1962 Warren Court criminal procedure decisions and the calls by twenty-seven states (in an amicus brief) for the Court to slow down its criminal procedure revolution,¹⁵⁹ *Miranda* mandated a specific set of warnings that police must read to criminal suspects.¹⁶⁰ In so doing, the Court required every state to change its interrogation practices.¹⁶¹ More than that, the decision read like a legislative code, not a constitutional opinion.¹⁶² Correspondingly, in

155. See *infra* notes 159–66 and accompanying text.

156. POWE, *supra* note 1, at 316.

157. *United States v. Robel*, 389 U.S. 258, 263–64 (1967); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306–07 (1965).

158. The question remains: were the Justices simply voting their policy preferences or did they make a strategic decision to advance the law as far as they could without risking legislative override? Attitudinalists embrace the former view; the external strategic actor model embraces the latter view. Compare SEGAL & SPAETH, *supra* note 6, at 86–97, with EPSTEIN & KNIGHT, *supra* note 6, at 9–18. For additional discussion, see *infra* note 174 (discussing the criminal procedure scale back).

159. POWE, *supra* note 1, at 394–95.

160. *Miranda v. Arizona*, 384 U.S. 436, 473 (1966).

161. Fowler & Jeon, *supra* note 2, at 29. For this reason, *Miranda* is described as “hands down” the post-1962 Warren Court’s most controversial criminal procedure decision, if not “the most controversial decision by the Warren Court.” POWE, *supra* note 1, at 394. Measures of precedential salience likewise see *Miranda* as a defining decision for the post-1962 Warren Court. See Fowler & Jeon, *supra* note 2, at 28–29.

162. See Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 532 (describing *Miranda* as a “legislative-like directive[]”).

overturning the long-standing totality of the circumstances test, the Court gave "disproportionate attention" to matters of policy, not law.¹⁶³ Among other things, the Court began by announcing a new rule "so specific that there could be no claim that [it] flowed directly from the text of the Constitution."¹⁶⁴ More striking, by embracing a prophylactic rule,¹⁶⁵ the Court concluded that it was better (as a matter of policy) to foreclose some constitutionally permissible interrogations in order to stop unconstitutional interrogations.¹⁶⁶

In understanding the Court's willingness to impose its views on elected officials and the police, defenders of *Miranda* highlight the "failure of other agencies of law to assume responsibility for regulating police practices."¹⁶⁷ Also, because of his experiences as Attorney General of California, Chief Justice Warren invested significant energy in constitutionalizing criminal procedure.¹⁶⁸ From 1958–1962, the Court decided fourteen criminal cases—ruling for the liberal bloc in only six of these cases.¹⁶⁹ When Warren stepped down, over a fifth of the Court's docket consisted of criminal cases—with the post-1962 Warren Court regularly ruling in favor of criminal suspects.¹⁷⁰ For this very reason, we now "speak of 'constitutional criminal procedure' instead of simply 'criminal procedure.'"¹⁷¹

The Warren Court's federalization of criminal procedure is a hallmark both to its legal policy agenda and to the ability of a coherent Court to advance such an agenda. A strong advocate for those who were poorly served by the political process, the Court

163. G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 269 (1982). Likewise, John Marshall Harlan (one of the four dissenters in *Miranda*) expressed strong disapproval of the Court's handiwork. In the conference following oral arguments, he argued that the Court was "repudiating 'all our precedents and history,'" that the Court's "'radical' innovation" should take place only after "'more empirical data'" was assembled, and that the Court should "'leave law reform to others.'" BELKNAP, *supra* note 125, at 245 (quoting Justice Harlan).

164. POWE, *supra* note 1, at 395.

165. On the Warren Court's tendency to issue per se (or prophylactic) rules, see Allen, *supra* note 162, at 532; and Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 932–39 (1999).

166. See Landsberg, *supra* note 165, at 933–34.

167. Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970).

168. Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, in *EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW* 91, 93–112 (Harry N. Scheiber ed., 2007).

169. Steven Smith, *Justices Stewart and Clark: Swing Votes on the Warren Court*, 19 SANTA CLARA L. REV. 1009, 1025–26 (1979).

170. Fowler & Jeon, *supra* note 2, at 30.

171. Steven F. Smith, *Taking Lessons from the Left?: Judicial Activism on the Right*, 1 GEO. J.L. & PUB. POL'Y 57, 59 (2002).

pursued doctrinal innovations to protect racial minorities, the poor, the accused, juveniles, religious minorities, political dissidents, and underrepresented voters. In so doing, the Court cared about results—not legal niceties (such as adhering to or even citing precedent).¹⁷² More than that, the Court embraced politically unpopular targets.¹⁷³ And after turning itself into an election issue, a majority coalition of five Justices—while scaling back on their controversial criminal procedure revolution¹⁷⁴—nonetheless proved willing to risk elected-government backlash in order to pursue that which they thought was right.¹⁷⁵

172. See *supra* notes 131–37 and accompanying text.

173. Consider, for example, the Court's nationalization of criminal procedure. Fred Graham wrote about the remarkable "coincidence in timing between the rise in crime, violence[,] and racial tensions . . . and the Supreme Court's campaign to strengthen the rights of criminal suspects against the state." FRED GRAHAM, *THE SELF INFLICTED WOUND* 4 (1970).

174. See Yale Kamisar, *The Warren Court and Criminal Justice*, in *THE WARREN COURT: A RETROSPECTIVE*, *supra* note 135, at 116–17 (suggesting a scale back in criminal procedure during the final two years of the Warren Court); see also Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 194–97 (1999) (discussing congressional efforts to override *Miranda*). The willingness of the Warren Court to scale back its criminal procedure revolution suggests that the Justices were sensitive to possible elected branch reprisals and, as such, provides some support for the external strategic actor model. For additional discussion, see *infra* text accompanying note 224.

175. The willingness of a coherent Court to take risks tracks the theory of groupthink. Most famously explored by Irving Janis, groupthink is characterized as the decisionmaking process that often takes place in highly cohesive groups such that individual members of the group fail to identify and explore alternative decisions that could be more rational or effective in order to avoid disrupting group cohesion. IRVING JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN POLICY DECISIONS AND FIASCOS* 9 (1972). This desire not to disrupt the group's general agreement can arise out of fear of angering other members of the group, or even fear of the possibility of embarrassment for voicing an unacceptable opinion. See *id.* at 3. Janis defined groupthink as follows: "A mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action." *Id.* at 9. In the context of a cohesive Court, groupthink might be manifested in several ways. As already noted, Justices on a coherent Court are likely to vigorously pursue their shared ideological agenda—perhaps at the expense of exploring alternatives that are less likely to provoke a public outcry. Perhaps more significant, Justices on a coherent Court are more likely to defer to the views of the opinion writer—even if they would write a different opinion themselves. Specifically, Justices on a coherent Court, by definition, are part of a voting block of five or more Justices. Consequently, these Justices are more apt to sign on to opinions with which they do not fully agree, but with which their disagreement is not powerful enough to warrant disrupting the solid coalition of Justices of which the particular Justice is a member. Empirical studies of opinion assignment in the second Warren Court track this claim. See *supra* notes 4–5 and accompanying text (discussing the work of Forrest Maltzman and Paul J. Wahlbeck).

B. *The New Deal Court*

The power of the President and the Senate to use their appointment and confirmation powers to transform Supreme Court decisionmaking were on full display during the New Deal Court from 1937 to 1949.¹⁷⁶ In 1938, President Roosevelt put two final nails into the coffin of the *Lochner* era,¹⁷⁷ replacing two of the Court's staunchest proponents of laissez-faire (Justices Willis Van Devanter and George Sutherland) with New Dealers Hugo Black and Stanley Reed.¹⁷⁸ These appointments guaranteed that the Court, in fact, would uphold both federal and state efforts to regulate the economy—something that it had just begun to do (with Owen Roberts's apparent defection from laissez-faire in the wake of Roosevelt's 1936 electoral landslide).¹⁷⁹ By 1940, Roosevelt further

176. For sources detailing Roosevelt's appointments to the Supreme Court, see generally ALBERT P. BLAUSTEIN & ROY M. MERKY, *THE FIRST ONE HUNDRED JUSTICES* (1978); CLARE CUSHMAN, *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1993*, at 376-420 (1993); and III-V *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* (Leon Friedman & Fred L. Israel eds., 1995).

177. The *Lochner* era (1890-1937) is a period in which the Court often struck down state and federal efforts to regulate the economy by, among other things, limiting the reach of Congress's commerce power and reading economic liberties into the Constitution. For an excellent overview of this period, see generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

178. Van Devanter and Sutherland were two of the so-called Four Horsemen, "a quartet of adamantly conservative judges whose ideas had been molded in the heyday of laissez-faire in the late nineteenth century, voting" together to "[strike] down more important socioeconomic legislation than at any time in history." LEUCHTENBURG, *supra* note 122, at 168. For a competing perspective of these Justices, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 34-43 (1998) (highlighting the profound role of legislative drafting in the pre-1937 Court's repudiation of early New Deal reforms). My previous writings have highlighted the importance of lawyering—while also calling attention to the profoundly important role of the 1936 elections in the so-called switch-in-time. See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 250-54 (1996).

179. When Roberts joined the liberals on the Court, he joined a coherent bloc of Justices. The liberals had joined together in dissent when the Court was invalidating New Deal reforms and, after the Roberts switch, continued to vote as a "tight bloc; they had to remain cohesive in order to muster a majority." Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773, 788 n.22 (1980).

On the question of whether Roberts was moved by external forces (the Court-packing plan or the 1936 elections) or internal forces (better lawyering or better legislative drafting), see CUSHMAN, *supra* note 178, at 84-105 (using "minimum wage cases" to highlight internal forces in explaining Justice Roberts's so-called switch-in-time); LEUCHTENBURG, *supra* note 122, at 132-62 (highlighting the Court-packing plan); and Devins, *supra* note 178, at 250-67 (rejecting Court packing as the source of the switch and

solidified his New Deal Court with three more appointments to the Court. By 1943, eight of the nine Justices were FDR appointees. The consequence of all this: the shift away from demanding judicial scrutiny of economic regulation was more than guaranteed; in its stead, the Court turned its attention towards individual rights.

The series of events culminating in the formation of the New Deal Court began with the 1935–1936 power struggle between the “Old Court” and Roosevelt over the fate of the New Deal. The New Deal, proclaimed Roosevelt, “implied that the Government itself was going to use affirmative action to bring about its avowed objectives . . . [and] that a new order of things designed to benefit the great mass . . . would replace the old order of special privilege.”¹⁸⁰ “Swept into office with a mandate to repair the ravages of the Depression,”¹⁸¹ Congress and the White House set about to revamp the relationship between the federal government and the American people—pushing through (sometimes sight unseen, sometimes with less than an hour of debate) poorly designed legislative reforms.¹⁸² For the Supreme Court, New Deal initiatives were met with skepticism. The Court began to hear cases involving federal legislation in December 1934, and it quickly became clear that the administration would “pa[y] the costs of sloppy procedures [and] poor draftsmanship,” especially given a cohesive four-Justice bloc of conservatives who “despised the New Deal program as anti-American and socialistic and condemned it out of hand as unconstitutional.”¹⁸³ More to the point: one of the Court’s two moderates (typically Associate Justice Owen Roberts but

arguing that Roberts was moved by both the 1936 elections and lawyering/legislative drafting).

For the purposes of this Article, it does not matter which account is correct. No one disputes that FDR’s nominees were like-minded on the question of economic regulation and, as such, operated as a coherent Court. Likewise, there is good reason to question whether Roberts’s 1937 switch, by itself, would have resulted in a fundamental retooling of Court doctrine. As Bill Ross observed: “[Roberts and Hughes] remained more restrained in their doctrinal positions than did their more liberal brethren” and, consequently, the New Deal Court’s embrace of economic legislation was a by-product of “death and resignations produc[ing] numerous vacancies that Roosevelt was able to fill with justices who did not disappoint him.” WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES: 1930–1941*, at 134, 136 (2007).

180. Introduction, 2 *PUB. PAPERS* 3, 5 (Nov. 1, 1937).

181. PETER H. IRONS, *THE NEW DEAL LAWYERS* 3 (1982).

182. LEUCHTENBURG, *supra* note 122, at 32–33 (discussing the enactment of the Railroad Retirement Act whose provisions were questioned by the President before signing).

183. MELVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 4 (2001).

sometimes Chief Justice Charles Evans Hughes) joined the conservative bloc to rule against New Deal initiatives.¹⁸⁴

When Roosevelt was able to seize control of the Court in 1937, a coherent Court advanced his New Deal agenda by overturning precedent and pursuing doctrinal innovations that insulated governmental efforts to regulate the economy. From 1937 to 1944, the New Deal Court had created a "new constitutional order," overruling thirty cases—"two-thirds as many as had been overruled in the Court's previous history."¹⁸⁵ Over the course of its twelve-year tenure (1937 to 1949), the Court handed down forty-two rulings that overturned at least fifty-nine of its prior decisions.¹⁸⁶ The majority of these decisions had broad support—with only five of these cases decided by a five-to-four vote (as compared to ten unanimous overruling decisions).¹⁸⁷

The legacy of the New Deal Court was "free-wheeling adjudication."¹⁸⁸ The Court "thoroughly repudiated the entire doctrinal system of constitutional limitations on federal power over the national economy" in a series of decisive strokes in the late 1930s and early 1940s.¹⁸⁹ Rather than reinterpret or work against the backdrop of existing precedent, the Court proclaimed that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it [in past decisions]."¹⁹⁰ Correspondingly, in "swiftly" overruling longstanding precedent,¹⁹¹ the Court did more than put in place a legal regime backed by the

184. LEUCHTENBURG, *supra* note 122, at 208–15. For his part, Roosevelt lashed out at the Court's conservatives for taking the country back to the "horse-and-buggy" days and, ultimately, sought to appoint a coherent group of pro-New Deal Justices through his ill-fated Court-packing plan. The Two Hundred and Ninth Press Conference, 4 PUB. PAPERS 200, 209 (May 31, 1935).

185. POWE, *supra* note 1, at 485–86.

186. Albert P. Blaustein & Andrew H. Field, *Overruling Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 184–94 (1958); see also Banks, *supra* note 122, at 266 (highlighting a correlation between the number of overrulings and the changing composition of the Court); S. Sidney Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414, 414–36 (1959) (detailing a correlation between Senate confirmation hearings and Court overrulings; and showing a positive correlation in general and a strikingly positive correlation from 1939–1941, where six Senate confirmations yielded twenty-three overruled decisions).

187. See Blaustein & Field, *supra* note 186, at 184–94.

188. Raoul Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 751 (1984).

189. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 47 (1999).

190. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491–92 (1938) (Frankfurter, J., concurring).

191. BORK, *supra* note 149, at 156 (discussing the New Deal Court).

President and Congress. It also overruled important precedents in cases where nobody asked it to do so. *Erie Railroad Co. v. Tompkins*¹⁹² is the most striking example of this practice. In *Erie*, both parties sought to preserve *Swift v. Tyson*,¹⁹³ that is, the federal courts' then-existing practice of applying federal common law in diversity cases.¹⁹⁴ The Court, however, overruled *Swift* without briefing—concluding that it, and not the parties to a controversy, decides whether a legal argument is or is not waivable.¹⁹⁵ Another (perhaps more striking) example of the Court unilaterally overruling precedent is *Helvering v. Hallock*.¹⁹⁶ In *Helvering*, the Court “overruled fifty [precedents] . . . five of which were its own, merely in order to change a rule of statutory construction.”¹⁹⁷

Against this backdrop, it is little wonder that the New Deal Court pursued significant doctrinal innovations—particularly with respect to the power of Congress and the states to regulate economic issues. Consider, for example, the Court’s repudiation of *Hammer v. Dagenhart*’s¹⁹⁸ constrained view of federal regulatory power and its embrace of seemingly limitless power in *Wickard v. Filburn*.¹⁹⁹ *Hammer* struck down a federal statute prohibiting the shipping (in interstate commerce) of goods manufactured by children within specified age ranges.²⁰⁰ Concluding that the production and manufacture of goods were not part of commerce, the Court boldly claimed that our federalist system would be “destroyed” by such congressional encroachments into the state police power.²⁰¹ Nearly twenty-three years later, the New Deal Court unanimously overruled *Hammer* in *United States v. Darby*²⁰² and, in so doing, rejected the

192. 304 U.S. 64 (1937).

193. 41 U.S. (16 Pet.) 1 (1842).

194. For an excellent discussion on this point, see generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 100 (2000).

195. On the appropriateness of the Court sua sponte asserting its power to control a case’s underlying legal regime, compare generally Neal Devins, *Asking the Right Questions*, 149 U. PA. L. REV. 251 (2000) (defending Supreme Court’s sua sponte power), with Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287 (2000) (criticizing the Court’s sua sponte consideration of Congress’s power to statutorily overrule *Miranda*).

196. 309 U.S. 106 (1940).

197. S. Sidney Ulmer, Book Review, 90 AM. POL. SCI. REV. 418, 418 (1996) (reviewing SAUL BRENNER & HAROLD J. SPAETH, *STARE DECIDIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992* (1995)).

198. 247 U.S. 251 (1918).

199. 317 U.S. 111 (1942).

200. *Hammer*, 247 U.S. at 268–69 n.1, 277.

201. *Id.* at 276.

202. 312 U.S. 100 (1941).

Lochner Court's distinction between intrastate manufacture and interstate shipment.²⁰³ At that time, however, there was reason to think that the Court expected Congress to assemble some type of record to back up its invocation of Commerce Clause authority. Not only did the Court encourage Congress to make findings that commerce indeed was affected, the Court's job was made easy by Congress's "sustained and increasingly thoughtful" efforts to demonstrate the nexus between its regulatory scheme and our increasingly integrated national economy.²⁰⁴

For this very reason, the Secretary of Agriculture's 1941 efforts to extend a quota on wheat production to a farmer who grew wheat for home consumption seemed vulnerable to constitutional attack. The Agriculture Adjustment Act, the law that authorized the Secretary's actions, was passed without a factual record.²⁰⁵ In defending this statute, the government relied on stipulated facts.²⁰⁶ Indeed, when the Court heard oral arguments in *Wickard* (in May 1942), the Justices initially voted to remand the case so that a trial court could make additional factual findings.²⁰⁷ But this nod to limited judicial review of congressional invocations of the Commerce Clause was abandoned and, in its stead, the Court effectively granted Congress carte blanche authority to use its Commerce Clause power to regulate anything arguably economic. Not only did the Court dispense with the requirement that Congress assemble some type of record, *Wickard* explicitly recognized that Congress may regulate economic conduct "trivial by itself" so long as the aggregation of similar activity by other actors affects interstate commerce.²⁰⁸ Recognizing (in private correspondence) that we no longer have "legal judgment upon economic effects which we can oppose to the policy judgment made by Congress in legislation," *Wickard*'s author,

203. *Id.* at 116–17.

204. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 711 (1996).

205. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1138 (2000).

206. *Id.*

207. *Id.*

208. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942). For an excellent treatment of *Wickard*'s reach and the factual context of the decision, see Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Congressional Power over Commerce*, in CONSTITUTIONAL LAW STORIES, *supra* note 17, at 69.

Associate Justice Robert Jackson, observed: "I really know of no place . . . where we can bound the doctrine . . ."²⁰⁹

Wickard exemplifies what a coherent Court can do. Not needing to engage in horse trading over votes, a coalition of five or more Justices can advance an expansive view of the law. Furthermore, when prior precedents are at odds with that view of the law, the Court (as it did in *Darby*) can simply overturn the earlier precedent. Unlike the post-1962 Warren Court, however, New Deal Court decisions embracing federal and state regulation of economic activities were not countermajoritarian in any way.

One final comment about the New Deal Court: that the Court operated as a coherent Court on economic questions does not mean that the Court was coherent in all respects. Roosevelt used his appointment power to ensure that the Court would allow the regulatory state to grow without judicial interference. But Roosevelt was not especially interested in constitutionalizing civil liberties and civil rights.²¹⁰ At the time of his proposed Court-packing plan, the issue of economic regulation (including the power of government to establish a regulatory state) was the only one that mattered.²¹¹ New

209. Cushman, *supra* note 205, at 1143 (quoting a memorandum from Justice Jackson to his law clerk, Costelloe); *id.* at 1145 (quoting a letter Justice Jackson sent to his friend, and later Associate Justice, Sherman Minton).

210. For example, the Roosevelt Justice Department steered clear of Supreme Court litigation involving Texas's practice of prohibiting non-whites from voting in the Democratic primaries. See Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 79 (2001). Moreover, Roosevelt backed the World War II internment of Japanese Americans (and did not end the internment until Felix Frankfurter notified the administration that the Supreme Court was set to rule against the administration in *Ex Parte Endo*, 323 U.S. 283 (1944)). See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 249-51 (4th ed. 2006); Patrick O. Gudridge, *Essay: Remember Endo?*, 116 HARV. L. REV. 1933, 1934 (2003). Finally, Roosevelt used his "plethora" of Supreme Court nominees to advance his regulatory agenda. Civil rights and civil liberties issues played no meaningful role in these appointments (and, indeed, FDR's Supreme Court nominees did *not* operate as a cohesive group when deciding cases implicating civil rights and liberties). See Jack M. Ballan & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to National Coalition State*, 75 FORDHAM L. REV. 489, 497 (2006); Harry G. Huspelling, *The Roosevelt Court and the Changing Nature of American Liberalism*, in FRANKLIN D. ROOSEVELT AND THE TRANSFORMATION OF THE SUPREME COURT 216, 238 (Stephen Shaw et al. eds., 2004).

211. On Roosevelt's interest in centralizing governmental authority, see generally PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 81-117 (1986); RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT* (1966); and Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163.

Deal reforms concerned economic matters, not individual rights,²¹² at the time of Court-packing, the Court's docket had next-to-no cases implicating civil liberties and civil rights.²¹³ With the Court's approval of the modern welfare-regulatory state, the Court inevitably turned to other matters—and that meant the Court turned its attentions to individual rights issues.²¹⁴ “Having abdicated the responsibility of determining whether legislation was rationally related to a legitimate public purpose,” as Howard Gillman put it, “judges created for themselves a new role in the political system, one that involved identifying those ‘preferred freedoms’ or ‘suspect classifications’ that might provide a basis for trumping the otherwise unrestrained power of the modern legislature.”²¹⁵ Here, the Court's liberals divided—over the appropriateness of deferring to governmental conduct that limited civil liberties, over the incorporation of the Bill of Rights into the Fourteenth Amendment, and much more.²¹⁶ This division persisted through the end of the pre-1962 Warren Court.²¹⁷

III. CONCLUSION: PRECEDENT AND THE ROBERTS COURT

By highlighting differences between coherent and incoherent Courts, this Article has backed up a series of commonsense claims about the role of ideological cohesion in Supreme Court decisionmaking. In particular, coherent Courts are far more willing than incoherent Courts to overturn landmark constitutional precedents, to pursue doctrinal innovations, and to embrace rule-like decisionmaking (in an effort to bind lower courts, government officials, and others). This Article has also called attention to some not-so-obvious differences between coherent and incoherent Courts. On a coherent Court, power resides with a majority coalition, not the median Justice. Specifically, Justices in the majority coalition rarely

212. I do not mean to suggest that individual rights played no role in New Deal policymaking. President Roosevelt, for example, proposed a second Bill of Rights on January 11, 1944. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 1–2, 9–14 (2006); William Forbath, *Rights Stuff*, *AMERICAN PROSPECT*, Aug. 13, 2004 (reviewing SUNSTEIN, *supra*).

213. See LEUCHTENBURG, *supra* note 122, at 235 (noting that only two of 160 written opinions in the 1935 Term implicated civil rights and liberties).

214. See *id.* at 235–36; KECK, *supra* note 104, at 17–37.

215. GILLMAN, *supra* note 177, at 202–03.

216. KECK, *supra* note 104, at 26–37 (noting this divide, especially the competing jurisprudential approaches of Felix Frankfurter and Hugo Black).

217. See *id.* at 38–67 (noting Frankfurter's profound role in shaping pre-1962 Warren Court decisionmaking and, relatedly, the inability of the Warren Court to operate as a coherent Court until Goldberg took Frankfurter's seat).

break rank and, as such, are more willing to sign onto opinions with which they disagree.²¹⁸ During the post-1962 Warren era, for example, the Chief Justice paid little attention to ideological considerations when assigning opinions.²¹⁹ The reason: the majority coalition stayed together, and individual Justices were typically willing to defer to their colleagues' decisions (even if they would have written a somewhat different opinion).²²⁰ Likewise, the New Deal Court granted Congress more power than some members of the majority coalition thought appropriate.²²¹

In sharp contrast, power resides with the median Justice on an incoherent Court. During the pre-1962 Warren Court, Justices Frankfurter and Harlan pushed for constitutional avoidance in antisubversive cases (even though four members of the Court would likely have been willing to issue pro-civil liberties constitutional rulings).²²² During the Rehnquist Court, Justice O'Connor and, to a lesser extent, Justice Kennedy sought to narrow the scope of Court decisionmaking through the filing of concurring opinions and/or conditioning their vote on the majority making concessions—giving them wiggle room to rule differently in related cases.²²³

Differences between coherent and incoherent Courts are also relevant in understanding the models that political scientists use in studying the Court. For a coherent Court, Justices in the majority coalition typically vote their legal policy preferences (since they agree with each other). At the same time, the doctrine produced by a coherent Court may not reflect the precise preferences of Justices in the majority coalition (since they are more apt to defer to an opinion writer—with whom they generally agree—than to demand concessions). Coherent Courts, moreover, are willing to risk political backlash. They have stronger policy preferences and, as such, will only back away from those preferences when there is very good reason to fear retaliation. For this reason, Warren Court liberals did

218. See *supra* notes 127–29 and accompanying text (noting intra-Court agreement rates); *supra* note 5 and accompanying text (noting the deference accorded opinion writers by other Justices in majority).

219. See Maltzman & Wahlebeck, *supra* note 4, at 560–61.

220. For general treatments of this subject, see EPSTEIN & KNIGHT, *supra* note 6, at 95–107. See generally Chris W. Bonneau et al., *Agenda Controls, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 891 (2007) (documenting Supreme Court decisions between 1969 and 1986 where typically the agenda-setting power of the majority opinion author was most influential on judicial outcomes).

221. See *supra* note 209 and accompanying text.

222. See *supra* notes 115–18 and accompanying text.

223. See *supra* Part I.A.

not back away from pro-Communist rulings in the wake of failed efforts to strip the Court of jurisdiction (and *did* retreat from their criminal procedure revolution after Congress enacted legislation that ostensibly reversed *Miranda*).²²⁴ Put another way, the attitudinal model largely prevails on a coherent Court, although opinion writers on the majority coalition exercise disproportionate power *and* some attention is paid to external factors (including, for example, political backlash).²²⁵

By contrast, the attitudinal model appears to be an unreliable predictor for an incoherent Court. Swing Justices have comparatively weak policy preferences and, as such, are more apt to pay attention to the risk of backlash, elite opinion,²²⁶ and their desire to maintain power (by maintaining their median Justice status).²²⁷ Consider, for example, Justice Frankfurter's and Justice Harlan's backing away from pro-civil liberties rulings in antisubversive cases. It may be that these Justices feared congressional reprisals (the Court-curbing bill was barely defeated) and/or these Justices may have been stung by the criticism of bar groups, distinguished jurists, and lawmakers.²²⁸ Likewise, Justices Kennedy and O'Connor seemed very sensitive to external forces—going so far as to emphasize (when reaffirming *Roe* in *Casey*) both the costs of “overrul[ing] under [political] fire” and explicitly linking the Court’s “legitimacy” to people’s “confidence in the Judiciary.”²²⁹ Correspondingly, median Justices on an incoherent

224. See *supra* notes 174–75 and accompanying text. For a discussion of Congress’s response to *Miranda*, see Cassell, *supra* note 174, at 194–97.

225. There is one other reason why the attitudinal model may place too much emphasis on the policy preferences of the median Justice. In particular, the majority coalition operates as a group and it may be that the median Justice does not pull other members of the group to their policy preferences. The median Justice, as noted above, might defer to the opinion writer. It may also be that the preferences of the median member of the majority coalition is a better bellwether for how the Court will rule than are the preferences of the median member of the Court.

226. “Elite opinion” includes the views of, among others, academics, journalists, distinguished jurists, and bar groups. For a provocative treatment of the importance of elites and other groups to judicial decisionmaking, see generally BAUM, *supra* note 118.

227. For treatment of this subject, see generally *id.* (suggesting that Supreme Court Justices are interested in maintaining their status among groups that matter to them). As to whether Baum is correct, it depends. His arguments are most persuasive in the case of swing Justices and less persuasive with respect to Justices who sit on a coherent Court—who, as noted above, are more apt to vote their policy preferences (even if the final decision is not precisely what they would have written).

228. See *supra* notes 116–19 and accompanying text.

229. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992). For a more detailed treatment of the role of external forces in O’Connor and Kennedy decisionmaking, including the decision not to hear divisive religion and race cases, see

Court—as noted above—are more likely to engage in strategic bargaining over the content of majority opinions and/or file concurring opinions. For all these reasons, incoherent Courts do not seem driven by policy-maximizing decisionmaking. Policy preferences, no doubt, figure into decisionmaking, but external forces also figure into the decision, as does internal strategic behavior (such as Chief Justice Rehnquist's efforts to cobble together a five-Justice majority in *Glucksberg*).²³⁰

* * *

What then of the Roberts Court and its attitudes towards precedent? Much has been made about the perceived preferences of Chief Justice John Roberts and Justice Samuel Alito to narrow and reinterpret precedent (rather than to overrule disfavored precedent).²³¹ For reasons detailed in this Article, it is premature to speculate on whether Chief Justice Roberts and Justice Alito truly prefer to operate as legal craftsman *or* whether they would prefer to overturn disfavored precedent and make significant doctrinal innovations.²³² Specifically, after two Terms, the Roberts Court is an incoherent Court. There is a solid liberal block of four (that typically operates as a coherent block, signing onto each other's opinions in significant cases);²³³ there is a less solid but generally cohesive block

generally Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 773 (2003).

230. See *supra* Part I.A.1.

231. The Court has been criticized from both the right (for not overruling) and the left (for ignoring stare decisis through dishonest opinions that, in fact, nullify longstanding precedent). Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/commentary-the-assault-on-faux-judicial-restraint> (June 25, 2007, 17:14 CDT) (discussing Justice Scalia's criticism of the Court for not overruling precedent); Posting of Geoffrey R. Stone to The Huffington Post, http://www.huffingtonpost.com/geoffrey-r-stone/roberts-alito-and-the-ru_b_54273.html (June 28, 2007, 19:30 EST) (criticizing Scalia and Roberts for writing opinions guided by "rank ideology, . . . [not] respect for the rule of law"). For a discussion both of Chief Justice Roberts's and Justice Alito's purported commitment to judicial modesty (including adherence to precedent), as well as a preliminary assessment of why the Roberts Court "will not make constitutional law in an unusually modest fashion," see David E. Klein, *Modesty, of a Sort, in the Setting of Precedents*, 86 N.C. L. REV. 1213, 1245 (2008).

232. On this point, former Kennedy clerk Michael Dorf speculated that Roberts and Alito are acting strategically—appealing to Kennedy by making "incremental moves and not acknowledging when he's overturning precedents." *Morning Edition: The Roberts Court and the Role of Precedent* (National Public Radio broadcast July 3, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=11688820> (quoting Michael Dorf).

233. See Epstein et al., *supra* note 2, at 1319, 1328 (noting that the current Court consists of four liberals and four conservative Justices in addition to Justice Kennedy); see also TUSHNET, *supra* note 66, at 49–70 (contrasting the competing decisionmaking styles

of four conservatives (who typically agree with each other on outcomes but do not issue unitary opinions that speak for all four Justices).²³⁴ And one Justice, Anthony Kennedy, stands in the middle. Indeed, as Lee Epstein's Article in this Symposium Issue demonstrates, Kennedy's ideological preferences are significantly more conservative than the liberal bloc and significantly more liberal than the Court's four conservatives (so much so that there is no prospect of Kennedy consistently joining either the Court's liberals or conservatives).²³⁵

If presidential appointments resulted in a five-member conservative bloc, Kennedy's vote would no longer be salient—and, consequently, the Roberts Court could overrule precedent and pursue doctrinal innovations without fear of losing Kennedy's vote. This is particularly true today because the elected branches seem comfortable with the Court's assertions of supremacy and, more generally, the Court's power to invalidate federal statutes and executive initiatives.²³⁶ Likewise, if a Democratic President were able to use her appointments power to create a five-member liberal bloc, Kennedy's vote would not be consequential. Such a Court (with Roberts at the helm) might well overturn disfavored Rehnquist Court rulings and, in their stead, pursue progressive doctrinal innovations intended to bind elected officials and lower courts.

For the time being, of course, Kennedy's vote is extremely salient. In the 2006–2007 Term, Kennedy was in the majority in each of the Court's twenty-four five-to-four rulings.²³⁷ In the nineteen cases where the Court split five to four along liberal-conservative lines, Kennedy joined the conservative bloc on thirteen occasions and the liberal bloc on six occasions.²³⁸ Likewise, in the 2005–2006 Term,

of conservatives on the Rehnquist Court—a comparison that applies with equal force to the Roberts Court).

234. See Epstein et al., *supra* note 2, at 1320.

235. See *id.* (noting “the gap between Kennedy and the Justices to his right and left”).

236. See generally KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007) (highlighting ways in which the executive branch backs judicial supremacy); Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001) (discussing ways Congress has facilitated judicial assertions of supreme interpretive authority, including judicial invalidations of federal law). For a somewhat competing perspective, see Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) (arguing that the Rehnquist Court's willingness to invalidate federal statutes is tied to fact that Congress agrees with such invalidations).

237. See Charles Lane, *Narrow Victories Move Roberts Court to the Right*, WASH. POST, June 29, 2007, at A4.

238. *Id.*

Kennedy cast the decisive votes on cases where the Court divided on liberal-conservative lines,²³⁹ most notably ruling against the government in *Hamdan v. Rumsfeld*.²⁴⁰ In the 2007–2008 Term, Kennedy is likely to be in the majority, if not casting the deciding vote, in key cases involving enemy combatants and the constitutionality of lethal injections.²⁴¹

When Kennedy and O'Connor were the "swing" Justices on the Rehnquist Court, Kennedy seemed willing both to write sweeping opinions (whose reasoning he might not be willing to extend to other cases) and to sign onto expansive opinions that he did not fully agree with (so long as those opinions did not refer to precedents with whose outcome he disagreed).²⁴² Now that he is the indisputable median Justice on the Roberts Court, Kennedy may be playing things more cautiously—writing concurring opinions (as he did in *Hamdan* and in the pair of 2007 public school "affirmative action" cases)²⁴³ or by

239. Charles Lane, *Kennedy Reigns on the Supreme Court*, WASH. POST, July 2, 2006, at A6.

240. 548 U.S. 557 (2006).

241. See Edward Lazarus, *The Upcoming Supreme Court Lethal Injection Death Penalty Case: How It Will Likely Illustrate the Serious Ideological Divisions That Continue To Separate the Justices*, FINDLAW'S WRIT, Sept. 27, 2007, <http://writ.lp.findlaw.com/lazarus/20070927.html>; Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/commentary-and-analysis/commentary-can-constitutional-issues-be-finessed> (Dec. 5, 2007 13:33 CST). Indeed, some commentators have suggested that Kennedy—after initially demurring on the enemy combatant case—supported the grant of certiorari in order to side with the liberals. Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11. In so doing (so the speculation goes), Kennedy hopes to respond to claims that he is not a true swing Justice but, instead, a junior varsity member of the Court's conservative wing. For a related argument, see Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (arguing that Kennedy is at once sensitive to his role as "swing Justice" on the Roberts Court and his longstanding belief in constitutional liberalism). Kennedy was in the majority in the case of *Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520 (2008) (upholding the constitutionality of Kentucky's lethal injection protocol).

242. See *supra* notes 41–49, 56–68 and accompanying text. For this reason, Lee Epstein may overstate things when highlighting the relative cohesiveness of the liberal and conservative blocs on the Roberts Court as the explanatory variable in understanding the Roberts Court's willingness to embrace sweeping precedents. Epstein et al., *supra* note 2, at 1303. It may be, instead, that Kennedy's willingness to sign onto opinions that he does not fully support is the key factor in explaining this phenomenon.

243. For an analysis of Kennedy's decisions in the school cases, see Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1387, 1389–91, 1393 (2008); and Gerken, *supra* note 241. See also Bill Mears, *Justice Kennedy Works on His Swing*, CNN.COM LAW CENTER, Jan. 29, 2006, <http://www.cnn.com/2006/LAW/09/25/scotus.kennedy/index.html> (noting that Kennedy "writes cryptically ... suggesting a standard of his own making that is not fully developed").

writing plurality opinions that try to find a middle ground between the Court's liberals and conservatives (something he did in *United States v. Rapanos*,²⁴⁴ a 2006 environmental law ruling).²⁴⁵ In this way, Kennedy may both give himself more room to "swing" in subsequent cases and give lower courts and elected officials significant leeway to interpret Supreme Court decisions.²⁴⁶ Whether or not Kennedy acts more cautiously, one thing is clear: the Roberts Court is, for the time being, an incoherent Court. It is unlikely to overrule significant constitutional precedent or embrace rule-like doctrines that will bind it, lower courts, and government officials.

244. 547 U.S. 715 (2006).

245. Charles Lane, *Justices Rein in Clean Water Act*, WASH. POST, June 20, 2006, at A1.

246. Alternatively, Kennedy can do what he did on the Rehnquist Court—embrace sweeping opinions whose logic is at odds with other opinions that he has written or joined. This is what Kennedy seemed to do in the Court's 2007 opinion upholding federal partial-birth abortion legislation. *Gonzalez v. Carhart*, 550 U.S. ___, 127 S. Ct. 1610 (2007); see Fried, *supra* note 68 ("Justice Kennedy fails to come to grips with his own jurisprudence . . ."). Writing for the majority, Kennedy paid short shrift to opinions he had written about both abortion rights and Congress's obligation to engage in meaningful fact finding when enacting legislation at odds with an existing Supreme Court ruling. See Fried, *supra* note 68 (criticizing Kennedy for failing to follow earlier precedent, some of which he authored). On the other hand, Kennedy added a curious caveat to his approval of the federal ban—noting that the decision was a facial challenge and suggesting that he might rule the statute unconstitutional in an "as applied" challenge. See *id.* In this way, Kennedy kept his options open. For a competing perspective on Kennedy's role on the Roberts Court, see Cass R. Sunstein, *Split Decision*, in INST. OF BILL OF RIGHTS LAW, 2007-2008 SUPREME COURT PREVIEW 484, 484 (2007) (claiming that Kennedy, like Roberts and Alito but unlike Scalia and Thomas, "avoids theoretical ambition" in his decisions).