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THE FEDERAL COURT SYSTEM: A PRINCIPAL-AGENT PERSPECTIVE

TRACEY E. GEORGE & ALBERT H. YOON*

I. INTRODUCTION

We applaud Professor Merrill's bold and noteworthy effort to engage in a dialogue with political scientists who study the Supreme Court. He navigates a substantial body of social science scholarship largely ignored by legal scholars, but he does so with the critical eye of someone who firmly believes that "the law" matters. The result is keenly and refreshingly original and should influence work on both sides of the Supreme Court scholarship divide.

The most significant aspect of Merrill's article is his consideration of the Supreme Court as an *institution*. Court studies frequently treat the Court as a collection of individuals who act in response to personal views; the attitudinal model that Merrill discusses takes such a classical, micro-level approach. An institutional perspective, by contrast, emphasizes the influence of interactions among the Justices, as well as the context within which they make decisions. Merrill lucidly delineates both the internal and external aspects of institutional analysis. We wish to add an element to the Merrill model that we believe enriches it without diminishing its parsimony. The external characteristic that we consider is the Supreme Court's organizational relationship with lower courts, particularly courts of appeals.

Like Congress, the Supreme Court must delegate a great deal of its work, in this case to lower courts rather than to agencies. Since the Supreme Court is formally at the apex of the judicial pyramid, the Court's decisions can be conceptualized as a principal directing (or attempting to direct) its agents, the lower courts. The Supreme Court has limited resources to monitor the actions of lower federal courts and state courts; therefore, the possibility arises that judges will not comply with Supreme Court preferences. The Court obviously wishes to check these inconsistent rulings, but monitoring and enforcement is costly. We consider what the theory of congressional-bureaucratic relations

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can tell us about the Supreme Court's relational contract with lower courts, and, in particular, we consider whether it offers additional insight to the transition from the first to the second Rehnquist Court.

II. THE DELEGATION OF AUTHORITY TO LOWER FEDERAL COURTS

The United States Supreme Court is a constitutionally mandated national court that has ultimate authority over federal constitutional questions and final judicial say on interpretation of federal statutes. The Court's power, therefore, is immense. Its capacity for exercising that power, however, is constrained: As Merrill observes, it can consider annually only a limited number of disputes.¹ The Court greatly widens the scope of its power by delegating to lower courts. Congress has created an expansive federal judiciary that can assist the Supreme Court, and states have established separate court systems that can also implement Justices' rulings. In order to understand the consequences of the Supreme Court's delegation of its authority to lower courts, we can look to the extensive literature on congressional delegation to administrative agencies.

The dominant theory of the congressional-bureaucratic system draws on the principal-agent model of economics.² The model addresses a situation where one party (the agent) takes an action on behalf of another party (the principal). The authority relation is a type of contractual arrangement whereby the principal assigns limited powers to an agent in order to increase efficiency.³ The agent has distinct interests that may be in conflict with the principal's. The theory explains that the principal cannot perfectly control the agent's behavior, but can minimize conflicts through monitoring and incentives that form part of the agreement.⁴ The principal-agent model clarifies several key

1. Thomas M. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 578 (2003).

2. While the principal-agent relationship in law is roughly analogous to principal-agent theory, it is a *distinct* construct. Here, we are referring to a particular paradigm developed in economics and political science that examines the relationship of individuals with related authority but conflicting interests. See Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984). For early applications to public administration, see Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Barry M. Mitnick, *The Theory of Agency: The Policing "Paradox" and Regulatory Behavior*, 24 PUB. CHOICE 27 (1975); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective*, 44 PUB. CHOICE 147 (1984).

3. See generally R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386 (1937) (setting forth, in the landmark article on organizational theory, an explanation for the existence of firms and a contractual account of firm hierarchical structure).

4. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 780-83 (1972) (developing the related concepts of shirking and monitoring in an organization).

features of organizational relationships: the probability of conflicting interests,⁵ the need for mechanisms of control,⁶ and the crucial value of information.⁷

Bureaucrats act pursuant to statutory authority, but derive utility from making decisions that they prefer.⁸ Bureaucrats' preferences may align with Congress's, but a major influence on legislators' preferences—election—is absent.⁹ Congress cannot write statutes that are sufficiently detailed to constrain agencies completely. Bureaucrats have opportunities to extract rents or to shirk as a consequence of discretion coupled with information asymmetries.¹⁰ The principal-agent model helps us to conceptualize the politician-bureaucrat relation, as Moe explains, because it

focuses on information asymmetry and, in particular, on information available to bureaucrats—about their true “types” (honesty, personal goals, policy positions) and their true performance—that politicians do not automatically possess and often can only acquire with much imprecision and expense. It then encourages us to inquire into the monitoring devices and incentive structures—aspects of institutional design—that mitigate the asymmetry and thus minimize the problems of adverse selection and moral hazard that will otherwise cause bureaucrats to depart from their political directives.¹¹

5. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976) (“The problem of inducing an ‘agent’ to behave as if he were maximizing the ‘principal’s’ welfare is quite general. It exists in all organizations and in all cooperative efforts . . .”).

6. See generally PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* (1992); GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* (1992).

7. See Kenneth J. Arrow, *Control in Large Organizations*, 10 MGMT. SCI. 397, 404 (1964) (explaining why managers in large organizations will lack information about activities and the costs associated with communicating information within an organization).

8. The literature generally assumes that agents have their own utility function that is related to “private political values, personal career objectives, or, all else being equal, an aversion to effort.” David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 699 n.2 (1994). Legislators can seek to control bureaucrats’ preferences by selecting only like-minded agents to staff agencies. Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 590-91, 593-95 (1989) (presenting a game theoretic analysis of agency control by well-chosen appointments). Of course, this is a power limited by the reality of the appointments and hiring process and the problem of adverse selection. Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435-37 (1989).

9. See generally RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

10. See generally JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* (1997); MILLER, *supra* note 6, at 123-25; Moe, *supra* note 2, at 755.

11. Moe, *supra* note 2, at 766.

The Supreme Court and lower federal courts are in an analogous agency relationship.¹² The Court enunciates doctrine that is effectuated by lower courts. The Court is not capable of deciding cases that cover all possible sets of case facts, nor of writing decisions that are sufficiently explicit to allow for only one outcome in a particular dispute.¹³ Thus, lower court judges may make decisions that are different from those that the Court would otherwise have made. Circuit and district judges have their own preferences that reflect many factors, including policy goals, legal perspective, professional objectives, and personal desires.¹⁴ If those preferences are congruent with the Court's majority, then the judge will have no incentive to depart from the Court's preferences. If the preferences are divergent, a judge has an incentive to make a non-complying ruling.

The Supreme Court's obvious mechanism of control over lower court judges is reversal of their decisions. Likewise, the circuit judge's decision to make a decision on her ideal point, rather than the Court's, will be affected by the availability of sanctions and the probability that she will be caught.¹⁵ That is, a judge will consider the probability of reversal by the Supreme Court. Although the likelihood of reversal is relatively small given the Court's limited caseload, the cost of reversal may be perceived as higher than a rational actor model would dictate.¹⁶ For example, lower court judges who aspire to promotion to a higher court know that their success will depend in part on an evaluation of the number of times they have been reversed.¹⁷

12. See Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649 (2000).

13. See generally SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986); Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973).

14. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161-62 (1921) (observing that a judge, though not wholly free, has sufficiently wide discretion and will exercise it based on "all his ingredients"); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2, 31-39 (1993).

15. McCubbins, Noll & Weingast, *supra* note 2, at 249 (1987) (describing how the presence of sanctions multiplied by the likelihood of detection will deter noncompliance by agents).

16. Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208 (1978) (finding that stigma results from reversal); Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86 (1976); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

17. For an example, we need look no further than recently confirmed Bush nominee, Dennis Shedd. See Committee on the Judiciary, United States Senate, *U.S. Court of Appeals Confirmed Nominees*, at http://judiciary.senate.gov/nominations_appeals.cfm (last visited Jan. 24, 2003) (reporting that the Senate confirmed Shedd on November 19 with fifty-five ayes and forty-four nays). New Fourth Circuit Judge Shedd was questioned during his Senate Judiciary Committee

Some scholars have concluded that administrative agencies are essentially autonomous because Congress reviews very few agency decisions, plays a limited role in selecting administrative employees, and generally ignores agency operations.¹⁸ We could make the same assertion about lower federal courts' relationship with the Rehnquist Court. The Rehnquist Court reviews very few lower court rulings—less than one-half of 1% of circuit decisions. The Court has no role in the selection of circuit and district judges. Thus, we may conclude that circuit courts are basically free to do as they please. Consider, for example, that popular commentaries have frequently described the Ninth Circuit during the Rehnquist Era as a runaway court.¹⁹

Infrequent review, however, does not necessarily mean rogue agents. The most obvious point is one of observational equivalence.²⁰ The Rehnquist Court may be reviewing fewer cases because lower courts are hewing closely to the Court's preferred positions. Even if lower courts have conflicting interests, they may be constrained by actions other than the risk of direct Supreme Court review of their rulings. In the public administration literature, scholars have demonstrated that legislatures use the language of statutes and the delineation of procedures to constrain agencies.²¹ Likewise, the Rehnquist Court may use

hearing about a decision he made as a South Carolina district judge that was ultimately reversed by the Supreme Court. Jonathan Groner, 'Pledge' Case Stokes Debate: Judicial Nominations Rhetoric Flies After Ruling. Also, Shedd Gets Hearing for Fourth Circuit, *LEGAL TIMES*, July 1, 2002, at 16 (reporting Senate hearing questions regarding Condon v. Reno, 972 F. Supp. 977 (D. S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000)).

18. See generally *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980).

19. See, e.g., Adam Liptak, *Court That Ruled on Pledge Often Runs Afoul of Justices*, *N.Y. TIMES*, June 30, 2002, at 1; Ashbel S. Green, *Justice O'Connor Chides 9th Circuit for Frequently Reversed Decisions*, *PORTLAND OREGONIAN*, Aug. 20, 1997, at C5; Martin Kasindorf, *The Court Conservatives Hate*, *USA TODAY*, Feb. 7, 2003, at A3.

20. Weingast and Moran made this argument about Congress: "[T]he evidence marshalled to support the theory of agency independence—namely, the infrequency and superficiality of congressional hearings and investigations—is also consistent with a theory of congressional control of regulatory policy." Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, *REG.*, May/June 1982, at 33, 34. Weingast and Moran considered the case of the FTC in the 1970s, when it was considered by many to be a classic case of a runaway agency. They conclude that turnover and change in the composition of the Senate committee with oversight (the subcommittee on consumer affairs) reveals that the FTC was not out of line with the Senate preferences, as reflected in the relevant committee—until near the end of the 70s and early 80s. *Id.* at 33-38.

21. See generally DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002) (arguing that legislatures use specificity in statutory language to micromanage bureaucracy and testing this theory against state laws on Medicaid); McCubbins et al., *supra* note 8 (showing that Congress controls substantive output of agencies through the specification of procedures).

the language of its decisions and the structure of doctrine to limit options of lower courts.

How does the Supreme Court learn whether the courts of appeals are reaching decisions that conflict with the Court's preferences? For perfect enforcement, the Court would review every decision of the courts of appeals. The sheer volume of circuit decisions, however, make micromanagement infeasible. The Court must instead look for signals in individual cases and look more carefully at petitions in those cases. The Court also can decide to monitor certain circuits closely: those circuits with which it expects to disagree or that are likely to give it fodder for watershed rulings.

The Rehnquist Court may also be relying on others to alert them to divergent lower court rulings. McCubbins and Schwartz argued that Congress does not need to patrol all agency decisions because it can rely on fire alarms sounded by interested parties.²² Businesses and state governments have been particularly active in the past two decades, resulting in the availability of experienced, credible parties with compatible interests to inform the Court.²³ In turn, the Rehnquist Court, like previous Courts, has been more likely to grant review to a case in which interest groups, as amici curiae or litigants, urge review.²⁴

The Rehnquist Court may be looking for signals from the circuits themselves.²⁵ Monitoring the decisions of each circuit to learn if any three-judge or en banc panels have breached the agency agreement, however, is difficult and consumes limited resources. The Court will be more likely to learn of a breach when a circuit judge dissents because that judge has access to greater information than the Justices and has an incentive to set forth in an opinion reasons for Supreme Court review. Moreover, the mere fact of a dissent signals to the Court that it may justifiably expend resources to review the case or, at least, to look more closely at the petition for certiorari.²⁶ Studies

22. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); see also Weingast, *supra* note 2 (arguing that Congress monitors bureaucrats by constituency "decibel meters").

23. See Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639 (1993).

24. See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Lee Epstein, *Courts and Interest Groups*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 335 (John B. Gates & Charles A. Johnson eds., 1991).

25. Stefanie A. Lindquist et al., *One Principal and Multiple Agents: Supreme Court Auditing of the United States Courts of Appeals* (2002) (unpublished manuscript, on file with authors).

26. See Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987) (explaining that dissents are often considered by majority judges as signals to the Supreme Court that the case is worthy of a grant of certiorari); see also Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998) (arguing that, under a

also have found that a circuit court's reversal of a lower court or agency's decision,²⁷ as well as en banc hearing, may act as a signal to the Supreme Court that the case presents an issue demanding an authoritative review.²⁸

A circuit court's composition may be another signal that a decision conflicts with the Court majority's position. The courts of appeals affect the Supreme Court's agenda when they make decisions with which the Court disagrees, requiring the Court to take action to correct.²⁹ One would expect, under this model, an ideologically conscious Court to grant review and then reverse divergent opinions in the lower courts. Thus, the changes in the Rehnquist Court's docket may reflect changes in circuit courts.

The circuits also can influence the Court's agenda by anticipating or moving ahead of the Court on certain issues, taking the lead on new legal questions or new approaches. Thus, the Court also can decide to monitor closely circuits that are likely to give it fodder for watershed rulings.

III. REHNQUIST COURT MONITORING OF CIRCUIT COURTS

In the principal-agent model, Supreme Court Justices utilize certiorari review to monitor the activities of its agents, namely court of appeals judges applying Supreme Court doctrine. As previously mentioned, one would expect, under this model, the Court to grant review and then reverse divergent opinions in the lower courts. If the Supreme Court uses certiorari primarily as a means of controlling recalcitrant circuits, it should reverse most of the decisions that it reviews. There is, in fact, a significant body of work that establishes exactly this pattern.³⁰

sophisticated model of judicial behavior, circuit judges are most likely to dissent when a panel reaches a decision that is contrary both to existing Court precedent and to their preferences).

27. See Caldeira & Wright, *supra* note 24 (observing that judicial clerks' memoranda on certiorari regularly note a circuit's reversal and presenting systematic evidence that the Court, statistically, is significantly more likely to grant certiorari when the appeals court reversed the lower court or agency).

28. See Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 S. CT. ECON. REV. 171, 195-197 (2001) (finding that the Supreme Court was more likely to review an en banc decision than a panel ruling).

29. For a development and empirical test of this model, see Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000).

30. See, e.g., Virginia C. Armstrong & Charles A. Johnson, *Certiorari Decisions by the Warren and Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141, 149 (1982) (finding that the Burger Court was more likely to grant certiorari to liberal appeals from court rulings in civil liberties and economic liberties cases, and the Warren Court was more likely to grant certiorari in conservative economic liberties cases, but not in conservative civil liberties disputes); Robert L. Boucher, Jr., & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995) (examining certiorari and merits votes of Vinson Court Justices from 1946 through 1952 and finding that Justices who voted to reverse a lower court decision were significantly more likely to

Both Rehnquist Courts, like past Supreme Courts, reversed the majority of circuit court decisions that they reviewed, but the second Rehnquist Court was much more likely to reverse circuit decisions.³¹ The second Rehnquist Court has achieved a reversal rate that is 11% higher than the first Rehnquist Court's, as reflected in Table 1. Of particular interest, the second Rehnquist Court was much more likely to reverse liberal appeals court rulings (a 16.1% increase in reversals of liberal rulings as compared to a 5.5% increase in reversals of conservative rulings). If the rate of reversal had increased without regard to ideology, then the second Rehnquist Court would, on average, be overturning liberal cases 66.2% of the time and conservative decisions 59.4% of the time, rather than 69.4% and 56.7%, respectively.

have voted for certiorari than Justices who voted to affirm); Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 832-833 (1989) (concluding, based on a sample of cases from selected terms of the Vinson, Warren, and Burger Courts, that Justices who voted in favor of certiorari were more likely to vote to reverse than Justices who opposed certiorari, termed an "error-correcting strategy").

31. We rely on the Spaeth Supreme Court Database for calculation of figures reflected here. See Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-2001 Terms*, at <http://www.polisci.msu.edu/pljp/sctdata1.html> (last visited Feb. 15, 2003).

TABLE 1

Supreme Court Reversal Rates: Rehnquist I vs. Rehnquist II

		REVERSALS OF LOWER COURT	
		REHNQUIST I	REHNQUIST II
All Circuits	Liberal	59.8% (222)	69.4% (197)
	Conservative	53.7% (186)	56.7% (157)
	Total	56.9%	63.0%
FOURTH CIRCUIT	Liberal	66.7 % (16)	76.9% (10)
	Conservative	45.5% (15)	62.2% (23)
	Total	54.4%	66.0%
Ninth Circuit	Liberal	66.3% (63)	78.2% (79)
	Conservative	42.3% (18)	70.7% (29)
	Total	59.1%	76.1%

All data drawn from the Spaeth Supreme Court Database.

The number in parentheses is the total number of cases in that cell.

In order to get a sense of what is happening at a circuit level, we break out the two circuits currently described as the most ideologically extreme in Table 1, and we compare the change in reversal rates for all circuits in Figure 2. The change between the first and second Rehnquist Courts is most evident in its treatment of the most conservative circuit, the Fourth, and the most liberal, the Ninth.³² The Fourth Circuit generated the second highest number of Supreme

32. See David Firestone, *With New Administration, Partisan Battle Resumes Over a Federal Appeals Bench*, N.Y. TIMES, May 21, 2001, at A13 (reporting battle between Fourth Circuit senators over circuit seen as extremely conservative); Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1 (describing the Fourth Circuit as “the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members”).

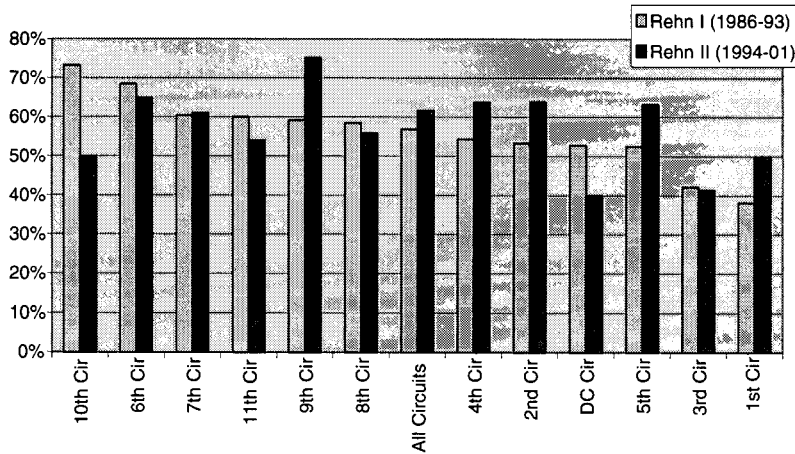
Court cases during the second Rehnquist Court (fifty) and one of the highest reversal rates (66%). The second Rehnquist Court reviewed more than twice as many conservative Fourth Circuit cases as liberal ones. The Court, however, did not do so to adopt the lower court's position: It reversed more than 62% of the Fourth Circuit's conservative decisions between 1994 to 2001, compared to approximately 57% of all conservative circuit cases during that period, and less than 46% of Fourth Circuit conservative rulings between 1986 and 1993.³³ One well-known example of the Supreme Court restraining the conservative lower court is *Dickerson v. United States* in which seven Justices, in an opinion authored by Chief Justice Rehnquist, reversed the Fourth Circuit's decision that a federal statute effectively overruled *Miranda* rights.³⁴

33. For a discussion of the 1999-2000 term, see Marcia Coyle, *Fourth Circuit No Longer a Star Pupil*, NAT'L L.J., July 10, 2000, at A4.

34. 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

FIGURE 2

Supreme Court Reversal Rates of Circuits



The Ninth Circuit, with twenty-eight active judgeships and nearly five thousand merits rulings annually, is easily the largest court of appeals and, likely, the most liberal.³⁵ The first Rehnquist Court reversed the Ninth Court slightly more often than average (59.1% compared to 56.9%), but less frequently than four other circuits, as shown in Figure 2. Under the second Rehnquist Court, the Ninth Circuit is by far the most reviewed and the most reversed court of appeals.³⁶ The reason, however, is not only liberal rulings: The Supreme Court reviewed forty-one conservative Ninth Circuit rulings, overturning twenty-nine. Yet, the Court is much more likely to hear challenges to liberal Ninth Circuit holdings and to side with the challengers.

One reasonable inference to draw from the reversal rate evidence is that the second Rehnquist Court was more efficiently and effectively monitoring

35. See Administrative Office of the United States Courts, *Judicial Business of the United States Courts, 2001*, at <http://www.uscourts.gov/judbus2001/contents.html> (last visited Feb. 15, 2003) (reporting the number of judgeships and cases in 2001 term); Michelle Munn, *Don't Split 9th Circuit, House Panel Is Told*, L.A. TIMES, July 24, 2002, § 2, at 8 (describing how debate over dividing the court is dominated by accusations of ideological bias in its decisionmaking).

36. At the beginning of the current term, the unanimous Supreme Court summarily reversed three Ninth Circuit rulings all in one day. See Jason Hoppin, *Ninth Circuit Reversed Three Times in One Day*, S.F. RECORDER, Nov. 5, 2002, at 1.

lower courts, granting review to cases that were more likely to be divergent. The Court focused on the outlier circuits, and, therefore, it could hear fewer cases to monitor. This conclusion is consistent with Merrill's analysis of the second Rehnquist Court as a more stable one.³⁷ The first Rehnquist Court reviewed more circuit cases on average (ninety) than the second (seventy). The relative decline in circuit cases (22%), however, was lower than the decline in cases from other courts (50%). Again, informative differences can be seen by looking at the circuit level.

37. See Merrill, *supra* note 1, at 638-51.

FIGURE 3

Rehnquist I (1986-1993) Percentage Points Over/Under-represented in Supreme Court Docket

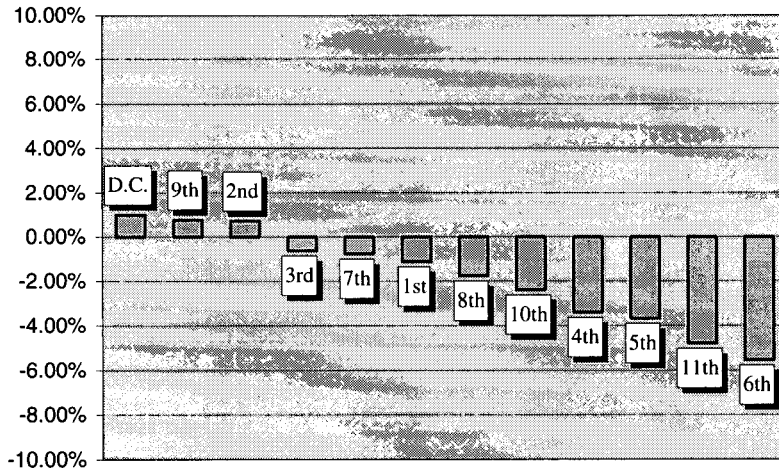
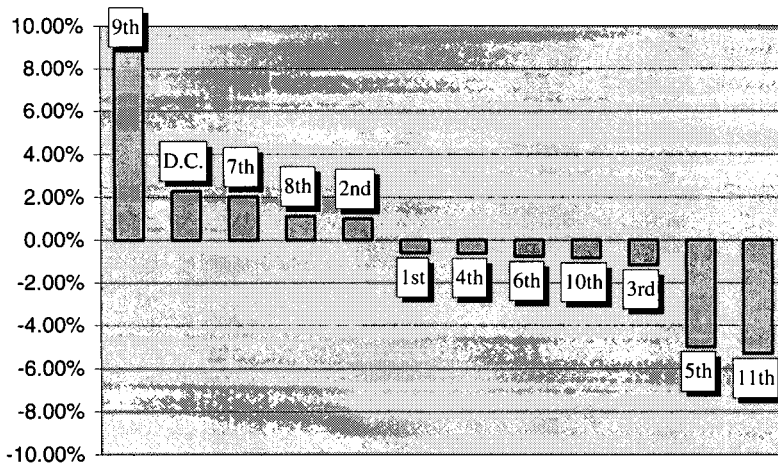


FIGURE 4

Rehnquist II (1994-2001) Percentage Points Over/Under-represented in Supreme Court Docket



IV. CIRCUIT COURTS INFLUENCING THE REHNQUIST COURT

Congress, on some occasions, grants regulatory agencies discretion in order to allow for experimentation or development in policies that Congress can later codify in statute. We can observe the same behavior in the second Rehnquist Court. As Merrill delineates, the second Rehnquist Court can be defined by the changes it has made in federalism doctrine.³⁸ We consider how this substantive shift followed decisions of lower courts in federalism cases.

The watershed case of the second Rehnquist Court must be *United States v. Lopez*.³⁹ The Fifth Circuit panel that heard the case described it as one of first impression: a challenge to the constitutionality of the Gun-Free School Zones Act of 1990.⁴⁰ The panel had one Reagan appointee, William Garwood, and two Carter appointees, Thomas Reavley and Carolyn Dineen King. The judges unanimously reversed the defendant's conviction on the ground that Congress had overstepped its Commerce Clause authority in passing the Act. In so doing, the panel acknowledged that it knew "of *no Supreme Court decision* in the last half century that has set aside such a finding as without rational basis. However, the Court has never renounced responsibility to invalidate legislation as beyond the scope of the Commerce Clause."⁴¹ The decision is ideologically mixed: It rules for the criminal defendant, typically a liberal outcome, while ruling against federal government encroachment on state powers, traditionally a conservative position.

The panel's decision was greeted with much criticism as well as praise, but most notably with a great deal of publicity because it marked a rare occasion when a federal court struck down a federal statute as unconstitutional based on the Commerce Clause. Despite the weightiness of the decision, the Fifth Circuit did not proceed en banc as requested by the losing U.S. Attorney.⁴² A Ninth Circuit panel addressed the constitutionality of the Gun-Free School Zone Act within a few months, and it explicitly disagreed with the Fifth Circuit's holding.⁴³ Ninth Circuit Judge Alarcon communicated that there was

38. *See id.* at 584-85.

39. 514 U.S. 549 (1995).

40. *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

41. *See id.* at 1364 n.43 (emphasis added).

42. *United States v. Lopez*, 9 F.3d 105 (5th Cir. 1993) (reporting without explanation the circuit's denial of suggestion for rehearing en banc).

43. *United States v. Edwards*, 13 F.3d 291, 294 (9th Cir. 1993), *vacated & remanded by*, 514 U.S. 1093 (1995) (recognizing that the panel's decision "will create an intercircuit conflict with the Fifth Circuit's opinion"). The *Edwards* panel held that the case was controlled by a prior Ninth Circuit case that could only be overturned by the en banc circuit. The panel, however, did not recommend en banc hearing because "we disagree with the Fifth Circuit's analysis in *Lopez*." *Id.* After *Lopez*, five district judges also issued published opinions on the constitutionality of the Gun-Free School Zone Act: three finding the Act within the Commerce Clause power, two

a breach of the relational agreement: "With respect, we believe the Fifth Circuit has misinterpreted, or refused to follow, the decisions of the United States Supreme Court that are binding on all courts inferior to our nation's highest court."⁴⁴

The Supreme Court granted certiorari after the circuit split, perhaps responding to arguments from many sources that the Fifth Circuit had acted outside its authority. The resulting opinions reflect circuit and district court opinions on the Act. Chief Justice Rehnquist, in his majority opinion, discussed at much greater length the history of America's federalist system, but ultimately accepted Garwood's analysis. The Supreme Court had the benefit of a full consideration of all arguments for and against the constitutionality of the Act, and it accepted the position of a panel that to many appeared to be a runaway. In fact, the panel had correctly anticipated the majority's position.⁴⁵

The developments in the circuit courts are not always in line with changes in the Supreme Court. Merrill describes the sharp decline in social issues relative to federalism issues on the Court docket as a telling distinction between the two eras.⁴⁶ For example, the Court heard five substantive abortion cases in the 1986-1993 period, but only one from 1994 to 2001.⁴⁷ The number of published abortion decisions in the circuit courts increased between the two periods (from twenty-six cases to forty), even controlling for the increase in lower court caseload.⁴⁸ The lower courts could not refuse to hear these cases, but they could have selected to issue unpublished rulings as is usual in cases involving settled legal questions.

However, the one Supreme Court abortion ruling after 1993, *Stenberg v. Carhart*,⁴⁹ is a good example of the Court's role as monitor of lower courts.

adopting Lopez's position. Compare *United States v. Glover*, 842 F. Supp. 1327 (D. Kan. 1994), *United States v. Ornelas*, 841 F. Supp. 1087 (D. Colo. 1994), and *United States v. Holland*, 841 F. Supp. 143 (E.D. Pa. 1993), with *United States v. Trigg*, 842 F. Supp. 450, 453 (D. Kan. 1994) ("With due respect to the Ninth Circuit, the court finds the views articulated by the Fifth Circuit to be more faithful to the values of federalism embodied in our Constitution."), and *United States v. Morrow*, 834 F.Supp. 364 (N.D. Ala. 1993). The most striking conflict was that two Kansas defendants, Glover and Trigg, who were accomplices, but were tried separately, found themselves with opposite outcomes.

44. *Edwards*, 13 F.3d at 294.

45. In a later Commerce Clause case, the divided en banc Fourth Circuit in *United States v. Morrison* made a dramatic ruling that the Supreme Court ultimately accepted. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom United States v. Morrison*, 529 U.S. 598 (2000). The en banc court reversed a contrary panel ruling. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997).

46. See Merrill, *supra* note 1, at 580-85, 581 fig.3.

47. *Id.* at 654 app.A.

48. These numbers reflect a search of the Westlaw Court of Appeals Database.

49. 530 U.S. 914 (2000).

Stenberg involved a ban on “partial birth abortions.” Five circuit courts had struck down state partial birth abortion bans as unconstitutionally vague or imposing an undue burden on a women’s right of privacy.⁵⁰ The only circuit to reach a different conclusion was the Seventh Circuit in a closely divided en banc case, *Hope Clinic v. Ryan*.⁵¹ Judge Frank Easterbrook, a well-known jurist and scholar, authored the majority opinion. Judge Richard Posner, an even better known jurist and scholar, penned for the four dissenters, claiming in the end that his analysis was based on “[t]he Constitution as interpreted by the Supreme Court in decisions that we are not free to palter with.”⁵² The Supreme Court agreed with Posner and the five circuits.

V. CONCLUSION

Professor Merrill ably demonstrates that Supreme Court decisions should be examined as the product of an inherently political institution. Observers who assert that Justices are best understood as prophets of the law are practicing an intellectual sleight of hand that allows them to ignore the non-doctrinal factors that affect judicial behavior. Such an effort is understandable. The Court is a much more complicated subject if its rulings reflect nonlegal factors as well as legal ones. The desire, however, to ignore the true character of the Court produces accounts of its behavior that are inadequate, incorrect, or wholly without content.

Legal scholars who want to explain court decisions must consider closely the analysis offered by Merrill as well as his methodology. Moreover, scholars who wish to prescribe legal rules without understanding Merrill’s arguments risk folly for they fail to consider how rules are adopted and applied by courts.

50. See *Richmond Med. Ctr. for Women v. Gilmore*, 224 F.3d 337 (4th Cir. 2000); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386 (8th Cir. 1999); *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999); *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999); *Summitt Med. Assocs. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999); *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997).

51. 195 F.3d 857 (7th Cir. 1999) (en banc), *vacated summarily*, 530 U.S. 1271 (2000).

52. *Id.* at 890 (Posner, J., dissenting).