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INTERPRETING JUDICIAL BEHAVIOR: HOW CONTENT ANALYSIS OF LAGUAGE REVEALS THE VALUES, PHILOSOPHY, AND JUDICIAL DECISION MAKING STYLE OF WILLIAM H. REHNQUIST

INTERPRETING JUDICIAL BEHAVIOR: HOW CONTENT ANALYSIS OF LAGUAGE REVEALS THE VALUES, PHILOSOPHY, AND JUDICIAL DECISION MAKING STYLE OF WILLIAM H. REHNQUIST

A thesis submitted in partial fulfillment
of the requirement for the degree of
Master of Arts in Political Science

By

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Weber State University
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ABSTRACT

The intention of this analysis was to comment on the democratic nature of the United States Supreme Court by analyzing the decision making style of Supreme Court justice, William H. Rehnquist. There were two main research questions that drove this inquiry. First, was Rehnquist a consistent jurist? And second, which decision making model best exemplified his decision making style? In order to answer these questions, a computer assisted content analysis was conducted on the language Rehnquist used to describe his judicial philosophy and the justifications he made in opinions he wrote pertaining to personal privacy issues that came before the Court. The data consisted of 16 articles that described Rehnquist's self-attributed judicial philosophy, followed by an analysis of 11 opinions he wrote in personal privacy cases. After testing, five main components presented themselves as characteristics of his judicial philosophy, they were: legal positivism, moral relativism, majoritarianism, originalism and federalism. It became clear through an analysis of his word choice that his judicial philosophy played a consistent role in shaping the opinions he wrote on personal privacy issues. After further analysis it was deduced that Rehnquist followed the legal model of decision making when deciding personal privacy cases. This conclusion was reached because he relied more on legal factors than his political values when he decided these cases. However it is important to note that these findings should not be generalized beyond the area of personal privacy as many times it seems that based on the legal area being analyzed justices use different methods for deciding cases. Thus, while ideal it seems to be impossible for a judge to completely divorce themselves from their political identity and thus there will be, based on what a judge believes their role is, varying degrees of influence of their political values on the process of judging.

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Chapter 1: Judicial Decision Making and Supreme Court Justice William H. Rehnquist

Introduction

The purpose of this paper is to study the opinions written by Supreme Court justice William H. Rehnquist pertaining to personal privacy cases that came before him during his 33 year long tenure on the Court. I seek to study the impact that his judicial philosophy had on the decisions he made on these issues and based on the components that become obvious in the opinions, place him into a model of judicial decision making. The data that is analyzed in this study is language, thus several psychological principles will instruct this paper. First, that words have meaning, and second that human beings reveal their values through the words that they choose. The more frequently that a person mentions a word or theme, the more strongly they feel about it. Combining psychological principles with decision making models' more quantitative approach to explaining judicial behavior will assist in filling in the holes that are often produced by said models because of their rigidity and the fluidity of human behavior. First, I hypothesize that Rehnquist will have a consistent and well defined judicial philosophy that will have a great impact on the way he decided personal privacy cases. Second I hypothesize that when deciding these cases he followed the legal model of judicial decision making. In other words I expect to find that though a strong conservative, he was not influenced by his political preferences but rather he reached decisions based on legal factors like precedent and the plain meaning of the Constitution, which are components of his judicial philosophy. The methodology utilized to test these hypotheses will be content analytic techniques. More specifically a computer text mining software program called T-lab will be used in order to remove bias and human error.

Chapter one begins with a biography of Rehnquist's life, highlighting key events that shaped his political ideology and judicial philosophy. Chapter two is an in depth exploration of

his self-articulated and attributed judicial philosophy. Chapter three is a review of judicial decision making literature, which provides the theoretical foundation of this paper. Chapter four presents the methods and findings of a content analysis conducted on Rehnquist's self-articulated judicial philosophy. Chapter five presents the methodology and results of a second content analysis which was conducted on the opinions he wrote on personal privacy cases during his tenure on the Court, with the purpose of finding consistency between his philosophy and the rulings he made on personal privacy cases. Chapter six places Rehnquist into a model of decision making and concludes this thesis.

Context

In order to better understand the relevance of this exploration a look at the context surrounding this subject is beneficial. The Supreme Court plays an influential role in the American political system and taking a look at its beginnings and evolution will prove to be an important starting point. From its inception, America has been a unique nation, designed as a Republic with three distinct branches of government with separate roles, functions and overlapping powers in order to discourage the possibility of a tyrannical government taking form. The judicial branch was expected by some of the Founding Fathers to be the weakest branch. Alexander Hamilton explained in Federalist Paper #78 that the Court possessed neither the purse nor the sword, only judgment, which would restrain its power and influence. The judicial branch was charged with safeguarding the Constitution by interpreting its text. Supreme Court justices were expected to be "objective, dispassionate and impartial" (Segal and Spaeth 2002, 6). However over time the role of the Court and that of a Supreme Court justice has evolved dramatically.

This evolution began with the infamous case, *Marbury* v. *Madison* (1803). With this ruling, justices were granted the power of judicial review, the ability to strike down laws created by the legislative branch that were found to be unconstitutional by the Court. Later on this power would extend to encompass legislation made by the executive branch as well. Immediately this brought into question whether or not the power of judicial review was democratic. With this new found power the Court now had the final say on almost all controversial issues, as famed French philosopher Alexis De Tocqueville remarked when he visited America in 1835, "…scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (quoted in Hudson 2006, 125). Through the decision in *Marbury* the Court's influence and power increased tenfold. Thus the question arose: would Supreme Court justices abuse their new-found power, making rulings based on their own personal preferences, or would they remain loyal protectors of the Constitution?

This question is what drives much of the research in the field of judicial studies, particularly the area of judicial decision making which seeks to discover the factors that influence an individual justice's or Court's decisions in order to answer the question of whether or not they are fulfilling the role that was intended for them. With this analysis I intend to contribute to this field of study by examining the judicial career of Supreme Court justice William H. Rehnquist. Rehnquist served on the Court for 33 years as an Associate Justice and then as Chief Justice. He is remembered today by many scholars as one of the most conservative justice's in the history of the Court, as well as one of the most successful, based on his administrative skills and ability to gain respect and cooperation from political opponents with whom he shared the bench (Greenhouse 2005, xxi; Hudson 2006, 147).

Judicial scholar Sue Davis wrote about the relevance of studying an individual justice in order to lend greater insight into how judges reach their decisions, she argued: "…the abundance of judicial biographies strongly suggests a firm belief among legal scholars that knowledge of the individual justices is essential to understanding the Supreme Court as a decision-making body…Prominent in this category are studies that analyze a justice's legal philosophy by utilizing his judicial opinions or papers with the goal of understanding his methods and values and the way they translate into judicial decisions" (1989, vi). This was precisely my intention, to study the opinions that Rehnquist wrote on personal privacy rights in order to uncover the components and rationale he used in the rulings he made. The questions that drove this analysis were, firstly, was Rehnquist a consistent jurist? While he was often outspoken about his judicial philosophy and what he believed the proper role of a Supreme Court justice should be, did he follow his own advice? In other words, is there evidence based on the language that he used in his opinions, to suggest that his espoused judicial philosophy influenced the decisions he reached? Secondly, which model of decision making did Rehnquist's judicial behavior best exemplify? Judicial decision making theory provides the foundation for this section of the investigation. Political Scientists who study judicial behavior have devised several models that explain the main components that influence a judge when they are making a ruling in a case that comes before them. These models seek at some level to quantify judicial behavior into a formula that systematically explains why judges vote the way they do. The main models that became the focus of this part of the analysis were the legal, attitudinal and behavioral models of judicial decision making.

The legal model exemplifies the ideal role of a Supreme Court justice. A judge that adheres to this model of decision making will base his rulings on the text of the Constitution, the

legal and historical traditions in America and precedent. The attitudinal model and the behavioral model share much in common. For the attitudinalist judge, their political values will influence the decisions that they reach. Behavioralism speaks to where those values came from, for example behavioral scholars study the political socialization process throughout a judge's life experiences and argue that those experiences influenced the development of the political ideology they espouse, which will then influence the decisions they make while on the bench. Political scientist Howard Ball once said: "The men and women who decide to hear these human dramas etched in legalese categorically draw upon a host of values they brought with them to the Court…these normative principles—as well as the Justice's strong beliefs about the role of unelected federal judges in the American polity—were embedded in them by the time they walked up the Supreme Court's marble steps…They were planted in their minds and hearts by their parents, by the books they read, by their ministers and rabbis, their friends and mentors—in university, in law school, and in politics—and by the myriad of personal experience they had to their elevation to the Court" (2002, 214).

As mentioned previously in this chapter, my hypothesis is that Rehnquist not only had a well defined judicial philosophy but also that his philosophy shaped the rulings he made when deciding cases based on personal privacy rights. I also hypothesized that he followed the legal model of decision making in these cases, thus also arguing that he did not allow his political ideology to influence the rulings he made. An important distinction must be made before this analysis is carried any further. Some might ask how a judicial philosophy is different than a political ideology. I believe that the difference between these terms was well articulated by legal scholars Francisco J. Benzoni and Christopher S. Dodrill in their article, "Does Judicial Philosophy Matter?: A Case Study" (2009). They wrote: "Though related, ideology and judicial

philosophy are not identical. Ideology concerns *outcomes* and the way that one thinks the world- and the law-ought to be. A judicial philosophy is a chosen, articulable, and rationally defensible *method* of judicial decision making that generally includes an explicitly articulated view of such things as the role and proper interpretation of the Constitution, the judiciary's place in our constitutional regime, the functions of the law, the separation of powers, federalism, and how relevant sources are to be interpreted." The authors go on to admit however that these two terms do share a close relationship, as the judicial philosophy that judges choose does often times correlates with their political ideology: "Still certain judicial philosophies are attractive to certain ideologies. For example, few 'liberal' jurists are strict textualists." Because these terms are correlated to one another this is a limitation to this analysis as some might argue that a judicial philosophy is simply a mask for ideology- however I believe that when Rehnquist's political views and his judicial philosophy are defined in more depth, it will become obvious that while they may share an association they are in fact two separate and distinct influences.

Keeping this in mind the remainder of this chapter will focus on the behavioral model by exploring Rehnquist's life through reviewing key events that influenced the development of his political ideology and judicial philosophy. Studying Rehnquist's life will lend greatly to identifying and understanding his political values in order to later test whether or not they played an influential role in his decision making as a Supreme Court justice. Many scholars advocate the study of the person behind the political actor in order to better evaluate their career as a public servant: "Knowledge about the enthusiasms, biases, foibles and personal habits of the individuals who affect great events [in history] contributes…to understanding and evaluating them" (Obermayer 2009, x).

Biography of Supreme Court Justice William Rehnquist

Early life, education and nomination to the Supreme Court

As mentioned previously this biography will focus on key events in Rehnquist's life that can be interpreted through a behavioralist lens as influential in shaping his political and judicial philosophy. Since many scholars suggest that where someone is born and raised has a significant influence on their attitudes and behaviors, I will begin with a discussion of Justice Rehnquist's early years. William Hubbs Rehnquist was born in Shorewood, Wisconsin on October 1, 1924. The town of Shorewood possessed several unique characteristics that possibly played a role in shaping some of Rehnquist's views. First, it was well known for its conservative political ethos, and the Rehnquist family was no exception to this rule, "[Rehnquist's] family had strong Republican loyalties" (Irons 1994, 47). Second, Shorewood was a predominantly white, affluent neighborhood with very few ethnic or racial minorities calling it home. This is significant because part of Rehnquist's legacy was his conservatism as well as some of his controversial views on race, a topic that will be explained in more detail later in this chapter.

Another aspect that received much attention from Rehnquist's biographers was his intelligence, which is proven through the number of degrees he received from various prestigious universities in America. He first attended Stanford University where he graduated with a bachelor's degree in political science. He then attended Stanford Law where he graduated first in his class, alongside classmate and future Supreme Court justice, Sandra Day O'Connor. He then received two master's degrees from Stanford and Harvard – both in political science (Irons 1994, 46-49; Hudson 2006, 2).

The second event that likely influenced Rehnquist's political and judicial philosophy was when he joined the army in 1943. At the time, the government had implemented a law that made it mandatory for all 18 year old males to join the army. Rehnquist would later express discomfort

with the law because he considered it to be a violation of the liberties of a certain sector of American citizens. This act would influence his views on the role and scope of government involvement in the personal lives of its citizens. Yet another event that shaped Rehnquist's views on the government also took place during this time. He read Friedrich Hayek's book *The Road to Serfdom*, years later he would tell C-SPAN's *Booknotes* that the book had a profound effect on his political and economic philosophy. The book draws a correlation between an increased number of social welfare programs and a decline of personal liberty in a nation state. Hayek's anecdotal evidence was Germany under Hitler and Italy under Mussolini (Obermayer 2009, 16-19). These experiences clearly led to Rehnquist's conservatism, particularly his belief in a limited role for the federal government.

The third event that likely influenced the development of Rehnquist's philosophies about politics and judging was his clerkship for Supreme Court justice Robert Jackson (Irons 1994, 49). Interestingly there were only two cases that pertained to privacy rights that came before the Court during his clerkship; however neither related to personal privacy issues but rather free speech and freedom of information. The influence of his childhood spent growing up in a mainly white neighborhood during the 1920s surfaced when he wrote what became a controversial memo on *Brown* v. *Board of Education* (1954). The memo argued that the "separate but equal" doctrine as laid out in the infamous case, *Plessy* v. *Ferguson* (1896) was constitutional (Obermayer 2009, xv, xvi). This memo would later come back to haunt Rehnquist during his confirmation hearings before the Senate.

In 1953, Rehnquist chose to relocate to Arizona where he practiced real estate law (Irons 1994, 49). This move facilitated the fourth key event in Rehnquist's life that would further cement his political and judicial philosophies. The political climate in Arizona during the 1960s

was a breeding ground for new grassroots conservatism with Senator Barry Goldwater becoming the spokesman for the movement. The movement was predicated on a belief in State and property rights, small government, and harsh criminal sentencing, with underlying tones of evangelical Christianity mixed in. Rehnquist quickly became involved with what was known as the "Arizona Mafia," working for Goldwater as a speechwriter when he ran for president in 1964 (Obermayer 2009, 41-42). While Goldwater ended up losing his bid for the White House, Rehnquist's involvement in the campaign laid the groundwork for the beginnings of his career in government. This is an important event because Goldwater was a controversial politician, running on a platform that included a "States rights" agenda which was often times used to justify racism.

Defending another controversial political figure in 1969, Rehnquist moved to Northern Virginia and became the assistant attorney general for the Office of Legal Counsel to the President for the Nixon administration. His role was to write "… legal opinions for the president and [advise] him on the constitutionality of presidential executive orders" (2009, 45). He held this position for three years.

Rehnquist's ascent to the Supreme Court was as unusual as it was unlikely. He was secretly recommended to President Nixon by Senator Goldwater when Nixon's first few nominations to the Court failed (Hudson 2006, 6). Rehnquist was an appealing choice because his political ideology seemed consistent with Nixon's search for "strict constructionists;" judges that would decide cases based on the text of the Constitution and not on their own personal preferences (S. Davis 1989, 3). Rehnquist's nomination was also political in nature. It went along with Nixon's "southern strategy." This was a move by the President to attract more conservative members of the Republican Party by appealing to their belief in "States rights." By appointing a

former member of the "Arizona Mafia" who had worked on the Goldwater campaign, Nixon hoped to gain votes. Still, Rehnquist's nomination shocked the nation as he was relatively unknown and had no prior judicial experience. The only thing on which to base his judicial philosophy were speeches that he had written on behalf of the Nixon administration (Irons 1994, 51).

Three events already covered above led to grueling confirmation hearings before the Senate. First was the memo he wrote defending the decision in *Plessy* v. *Ferguson* (1896). However Rehnquist argued that he had been expressing the sentiments of Justice Jackson, and not his own when he wrote the memo (Hudson 2006, 2, 6-7). Second was the work he did on the Goldwater campaign with allegations surfacing that he had personally intimidated African American voters in Arizona during the Goldwater election. Rehnquist adamantly denied these allegations (Irons 1994, 58-60). Third was the work he did defending the Nixon administration. In the end he was confirmed by a 68-26 vote: "the majority report noted that Rehnquist had shown a 'deep and unwavering commitment to the Constitution, professional competence, open-mindedness and a sense of fairness.'" While the minority report concluded that he was "outside the mainstream of American thought" (Hudson 2006, 8).

Chief Justice of the Supreme Court

Rehnquist served as an Associate Justice from 1972 to 1986. He quickly established a reputation for himself as a solo dissenter, which earned him the nickname "the Lone Ranger" (Irons 1994, 22). Then in 1986 Rehnquist was nominated to be Chief Justice of the Supreme Court by yet another polarizing political figure, Ronald Reagan (S. Davis 1989, 191). The second confirmation process was just as grueling as the first. The same questions involving his views on

race and his conservatism were raised once again. In the end, Rehnquist was confirmed, becoming the 16th Chief Justice of the United States.

Two events standout as important moments in Rehnquist's tenure as Chief Justice which give mixed insight into what influenced the decisions he made, whether it be his values or not. The first event was the 1998 impeachment of Democratic President Bill Clinton for perjury and obstruction of justice. The Chief Justice is given the duty by the Constitution to preside over the Senate hearings. Rehnquist apparently put his politics and personal feelings about President Clinton aside during the hearings. In fact, several Democratic senators admitted publicly that Rehnquist had been "fair" and "evenhanded" (Obermayer 2009, 79). Rehnquist even received a "golden gavel" at the end of the proceedings from the Senate to represent "[their] appreciation for the fair manner in which he conducted the [proceedings]…" (2009, 80). Even though he was a conservative judge, who had been nominated by conservative presidents, he did not allow those things to influence how he conducted himself as Chief Justice.

The second event is a decision that will live in infamy, *Bush* v. *Gore* (2000). It was the first time in the history of the United States that the Court stepped so deeply into a presidential election and had such a major influence in the outcome (Obermayer 2009, 81). The 2000 presidential election was too close to call and came down to Florida being the deciding state, a recount of the votes was called and Republican candidate George W. Bush was declared the winner. Democratic candidate Al Gore appealed the decision to the Florida Supreme Court which issued an order for a manual recount. Bush appealed and by December 9th the case was before the Supreme Court of the United States. Three days later on the 12th the 5-4 decision was given overturning the Florida Supreme Court's decision which made George W. Bush the 43rd

President of the United States (2009, 86-91). This event has been widely criticized as an example of judicial activism.

Death and Judicial Legacy

In 2004, after 32 years on the Court, Rehnquist was diagnosed with thyroid cancer. Even during chemotherapy and radiation treatment he continued to go to work, an illustration of the degree to which he loved his job (2009, 220). Eventually the cancer took its toll and on September 3, 2005 Rehnquist passed away, just shy of 81 years old (2009, x, 148). His funeral followed a Lutheran tradition, the faith he had embraced for all of his adult life. Many dignitaries spoke at his funeral, including long time friend and fellow justice, Sandra Day O'Connor, his successor and former clerk John Roberts and even President George W. Bush.

There were several characteristics that Rehnquist will be remembered for in his judicial career and many of these have became thematic throughout the scholarly literature which examined his career. First was his skill as an administrator. Upon assuming office, Rehnquist mentioned that one of his goals was to be remembered as an efficient administrator and he was, "many legal experts say that Rehnquist was one of the greatest judicial administrators" in the history of the Court (Bradley 2005, 3; Hudson 2006, 143; Merrill 2006, 496). One of the reasons for his success was his organizational skills: "he ran a tight ship," never allowing the other justices or lawyers to speak beyond their allotted time and his opinions were always delivered on time (Bradley 2005, 3; Rosen 2005, 3).

He will also be remembered for his ability to get along with political opponents with whom he shared the bench. He was genuinely liked by those who disagreed with him: "It is perhaps significant that Rehnquist genuinely appeared to like ideological rivals William Brennan and Thurgood Marshall and…they appeared to like him" (Hudson 2006, xi, 24). A. E. Dick

Howard stated that "…perhaps no justice at the Court generated more genuine warmth and regard among his colleagues and others who worked at the Court" (quoted in S. Davis 1989, 202).

Upon reviewing the biographies that informed this chapter, it became clear that certain aspects of Rehnquist's early life and career can be attributed as having had an influential role in the development of his political ideology and judicial philosophy. This is consistent with the behavioralist model of judicial decision making which states that the values which inform the decisions that political actors make can be traced back to their personal experiences and background. Based on the events discussed in this chapter, it becomes clear that Rehnquist was influenced by a conservative political philosophy. He even admitted this openly during his confirmation hearing before the Senate. However he also stated that he would not allow it to influence the decisions he made when serving on the Supreme Court (S. Davis 1989). Whether or not he was true to his word requires further analysis by more in depth study of his judicial philosophy as attributed by legal scholars and in his own words.

Chapter 2: The Judicial Philosophy of William H. Rehnquist

In the previous chapter several important events in Rehnquist's life were reviewed through the lens of the behavioral model. Proponents of the behavioralist perspective argue that judges make decisions based on political values and preferences that they acquire through life experiences. From this perspective, certain events in Rehnquist's life can be viewed as influential for the development of not only his political ideology but also his judicial philosophy as well. The focus of this chapter is to explore his judicial philosophy in more depth. A judicial philosophy is extremely important for a judge; it is how they define the role of a judge, justify the decisions they make, and identify the mission of the Court in the American political system. A philosophy, in short, describes and predicts how a judge will behave on the Court.

Rehnquist's judicial philosophy will be examined in two ways in the following chapter. First, how he described his philosophy in his own words and second how legal scholars have described his philosophy. Personal reflections provide an opportunity to uncover what a person defines as their guiding principles and the basic components of their decision making. But ultimately, individuals may make decisions and only believe they have followed various rubrics or principled arguments. Often an individual's behavior may seem more rational and systematic to them personally than it really is in actuality. Thus including scholarly evaluations, or third party evaluations, will provide yet another view of how Rehnquist made decisions and will better illustrate if the guiding principles he thought, or at least hoped, were guiding him were actually present in his opinions and to what degree.

Rehnquist's Confirmation Hearing (1971)

When Rehnquist was nominated to the Supreme Court in 1971 by President Nixon he had no prior judicial experience thus he was questioned extensively about his judicial philosophy

during the confirmation hearing before the Senate. Supreme Court nominees are generally careful during confirmation hearings, revealing what is expected of them or evading questions altogether, thus while studying Rehnquist's philosophy as stated in the confirmation hearing is helpful it might not be a completely accurate assessment (S. Davis 1989).

Because of Rehnquist's lack of judicial experience, the Senate focused on his political career working for the Goldwater campaign and later the Nixon administration. He had a reputation for being a staunch conservative and the speeches and memos he wrote on behalf of these politicians presented tones of judicial deference, federalism and majoritarianism (Obermayer 2009). As mentioned briefly, Rehnquist was a firm defender of state and property rights, which was controversial during the 1960s because of its racial implications. When the federal government tried to mandate integration of African Americans into the white suburbs of the Sunbelt states, Rehnquist spoke out against the federal government getting involved in what he believed to be a private issue, one that ought to be left up to the state and local governments to solve (Irons 1994, 50).

Rehnquist's strong conservative ideology was the issue that most concerned the Democratic senators fighting against his nomination. They questioned him at length about whether or not he would check his ideology at the door of the Supreme Court in order to make decisions based solely on the Constitution. Rehnquist answered candidly saying he would, but admitted "…that he would [also] certainly take to the Court 'what I am at the present time. There is no escaping it. I have lived for 47 years, and that goes with me…I will try to divorce my personal views as to what I thought [the Constitution] ought to mean from what I conceive the framers to have intended'" (S. Davis 1989, 8). This revealed yet another important component of his judicial philosophy: originalism. Originalism is a method of interpreting the Constitution

where a judge attempts to look at the plain meaning of the text of the document and when that is too vague he will search for the "…intent of the framers" in other historical documents that were written at the time of ratification (1989, 9).

The second area that caused concern among those senators opposed to his confirmation was his view on the authority of precedent. Rehnquist believed that "…precedent carries greater weight in statutory construction than in constitutional interpretation" (1989, 9-10). He continued, saying that decisions that were "handed down by a sharply divided Court" or had "stood for a shorter period of time" held less authority and could more easily be overruled (1989, 10; Irons 1994, 58). His belief about the role of precedent would become an important point of contention after *Roe* v. *Wade* was handed down in 1973, giving women a constitutional right to privacy which encompassed the right to have an abortion. Rehnquist would later argue that overturning *Roe* and subsequent decisions that involved personal privacy rights was consistent with the rule of stare decisis[1].

A Notion of a Living Constitution

Another area that provides rich data of Rehnquist's self-articulated philosophy are the articles he wrote in various academic journals during his tenure on the Court. There is one article in particular that many scholars have cited as seminal to understanding his judicial philosophy as it presented "[his] jurisprudence in its most developed form" (Irons 1994, 61). The thesis of the article was his disagreement with the idea of the Constitution being considered a "living" document. The definition of a living Constitution is wide-ranging in the academic world; however Rehnquist defined it in two ways. The first definition promoted the idea that the

[1] *Stare decisis* is a Latin phrase meaning "let the decision stand." It represents the historic tradition for judges to honor past precedent when deciding cases.

Framers intentionally left the Constitution vague in order for it to apply to a changing society (1976, 401). Rehnquist believed that this was consistent with the language in the Constitution and the intent of the Framers as evidenced in historical documents from that time period. The second definition espoused that it is the Court's job to solve problems that arise within society today, thus the meaning of the Constitution can evolve and change as society does (1976, 403). This is the definition that Rehnquist was adamantly opposed to and which he presented a critique of in the rest of his article.

The first reason that he disagreed with this view of the Constitution was because he saw it as inconsistent with democratic values because it put too much power in the hands of the judiciary, an unelected branch of government. Rehnquist stated that the Constitution clearly gave the power to solve society's problems to the elected branches because they are constrained by the will of people (1976, 403-404). The Court's role is to step in when the other branches overstep their Constitutional bounds. In effect this is an argument for a limited role for the judicial branch and that of judicial restraint (1976, 404). The second reason that he disagreed with this interpretation of a "living" Constitution is that it "advance[d] subjective values through the judicial branch" (1976, 407). He wrote:

> The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizens own scale of values…There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgment of your conscience…it should not be easy for any one individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments. Indeed it should not be easier just because the individual in question is a judge (1976, 413-414).

The idea that a minority would set rules promoting their own subjective values seemed undemocratic to Rehnquist. Instead laws are only "good" or legitimate if they are in line with the majority will and are created through the correct process as espoused by the Constitution.

Scholarly Interpretations

Many scholars have examined Rehnquist's judicial philosophy based on what he wrote in "The Notion of a Living Constitution" (1976). The first component that scholars have pointed out is Rehnquist's appeal to legal positivism. A legal positivist is one who espouses that making laws is solely the duty of the legislative branch and that the role of a judge is to interpret law, "The American form of positivism…gives judges an independent but limited role in reviewing laws, constrained by precedent and the constitutional text…judges are expected to show deference to the legislative will" (Irons 1994, 61-62). Thus legal positivism can be equated with judicial restraint (S. Davis 1984, 717; Whittington 2003, 26). Rehnquist stated his belief in these values plainly when he alluded several times in his essay to the fact that the Court was not given the role of keeping the political system in tune with the times, but rather that role was left up to the popularly elected branches of government.

The second component of Rehnquist's philosophy is moral relativism: "the notion that no moral value is inherently superior to another" (Irons 1994, 63). Rehnquist articulated that a law is "good" when it is enacted through the proper process and when it reflects the will of the majority. He argued that "the minority has no authority to impose its value judgments on the country, even if the minority happens to be the Supreme Court" (S. Davis 1984, 719). Ultimately, the power to define a society's values depends on majority rule and the democratic process.

This leads to the third component of Rehnquist's philosophy, majoritarianism. Rehnquist espoused a firm belief that politicians ought to be responsive to the majority will in order for America to be truly democratic. Rehnquist once wrote: "The majority …will determine what the Constitutional rights of the minority are" (Whittington 2003, 15). The Court ought to intervene only when a "clear rights violations" has taken place (2003, 22). "It seems that, running through his opinions….is a deep commitment to the notion that our Constitution leaves important, difficult, and even divisive decisions to the People" (Garnett 2006, 1852). Thus, as previously stated in the component of moral relativism, in a democratic society laws and values are only legitimate when they are approved by the majority (S. Davis 1989, 26).

The fourth component is Rehnquist's narrow reading of the Constitution. Rehnquist espoused originalism as the correct interpretative method of the Constitution. This view states that judges ought to interpret the Constitution based on its text and the intent of the Framers at the time of enactment. His method of interpreting the Constitution was to "…rely on the document itself and to confine the meaning to the words of the text…when the words do not suffice… [he] …searche[s] for the intent of the framers" (S. Davis 1989, 28). This view can also be called "strict constructionism" (D. Davis 1991). Rehnquist believed that constitutional rights were solely "those enumerated in the first eight amendments…" (Irons 1994, 103). Thus Rehnquist was critical of decisions that are based on more than the text of the Constitution. For example: he was critical of the expansion of the Ninth Amendment to include a right to privacy. He espoused that because the word 'privacy' is not mentioned in the Constitution that it is in fact judge made law based on subjective values and preferences (S. Davis 1989, 27). To Rehnquist, this was the danger when judges stray from originalist interpretations of the Constitution. The

document is then transformed from its original meaning to a new subjective and evolving document (See Whittington 2004).

A fifth component of Rehnquist's philosophy that was not explicitly articulated in his own description of his philosophy is federalism. According to many legal scholars federalism is the value that seems to be the driving force behind the majority of the decisions he made while serving on the Court. Multiple studies that have been conducted on Rehnquist's judicial philosophy make reference to his devotion to federalism. The most influential studies will be reviewed below in chronological order.

The first study to be conducted was in 1976 when Rehnquist was as an Associate Justice. Legal scholar David Shapiro examined Justice Rehnquist's votes from his first term on the Court in 1972 to the end of the 1975 term. In total he analyzed 164 opinions that Rehnquist wrote himself. He found that there were three guidelines that Rehnquist followed when he decided cases and they were strongly correlated with his conservative ideology.

1) Conflicts between individuals and the government should, whenever possible, be resolved against the individual.
2) Conflicts between the state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible be resolved in favor of the states.
3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level should, wherever possible, be resolved against such exercise (294).

In the end, Shapiro found only 13 cases where these guidelines were not adhered to by Rehnquist. Shapiro believed that Rehnquist was driven by his ideology, particularly the high value that he placed on federalism and that there was evidence that precedent did not influence the decisions he made. This, according to Shapiro, led him to wrongly decide cases.

The focus of Jeff Powell's (1982) piece was also Rehnquist's belief in federalism or more specifically – states rights. Rehnquist argued that his theory of federalism was based on the values of the Founding Fathers, as expressed during the founding of this nation. Particularly those beliefs as espoused by Thomas Jefferson. Powell sought to develop a theory of Rehnquist's philosophy of federalism based on the opinions he wrote. He found that indeed federalism did play a significant role in Rehnquist's decision making; however Rehnquist was misguided when he argued that the federalism he espoused was that of the Framers of the Constitution, when in fact it was more in line with those beliefs espoused by those who opposed the ratification of the Constitution. Thus he was not an actual originalist.

In 1983 political scientists Robert E. Riggs and Thomas D. Proffitt sought to identify a consistent set of values that when taken together define the judicial philosophy of Justice Rehnquist. The authors searched for these values in three places – articles and statements made by Rehnquist himself, scholarly interpretations and those present in the opinions he wrote during his time on the bench. They narrowed their search to Rehnquist's conception of judicial review, fundamental constitutional norms and ideological orientations (1983, 555). They found that Rehnquist first believed the Constitution created a federal system where the states are sovereign. Second, that judges ought to defer to the elected branches. And third that judicial review should be practiced only when a law conflicts with the Constitution (1983, 598). All are consistent with that of a judicial conservative.

The more quantitative section of their paper began when they studied cases related to the categories expressed above which Rehnquist ruled on from 1976-1981. The authors tested the three claims made by David Shapiro in his 1976 article (presented above). Riggs and Proffitt's findings upheld the three claims made by Shapiro. However they cautioned critics from jumping

to the conclusion that this was proof that Rehnquist's decision making was based on his conservative political preferences, instead they argued that the way he decided the cases was driven by his conservative philosophy of how a judge ought to behave, i.e., deference to the popularly elected branches, support for states rights, harsh criminal sentencing, and a narrow interpretation of the First Amendment. Thus his rulings are more philosophically based than politically based (1983, 597).

Political scientist Sue Davis (1984) has conducted multiple studies on Justice Rehnquist. In one particular article she focused on his espoused judicial philosophy and the influence it had on the decisions he made on the equal protection clause. Davis' focus of Rehnquist's judicial philosophy was narrow – his article: "The Notion of a Living Constitution." However this source does represent his judicial philosophy in a detailed and concise form (Irons 1994). Davis tested for consistency between what Rehnquist proposed the proper role of a justice to be with the language present in his opinions. Many features became evident in the article Rehnquist wrote: legal positivism, moral relativism, majoritarianism, judicial deference and his avocation of originalism as the proper method by which to interpret the Constitution. Davis found these values present in his opinions on the Equal Protection Clause of the Fourteenth Amendment which she believed was confirmation that they played an important role in shaping the opinions that Rehnquist wrote.

Davis wrote about Rehnquist again in 1989, this time in a book entitled, *Justice Rehnquist and the Constitution: The Quest for a New Federalism*. Davis studied Rehnquist's term as an Associate Justice on the Supreme Court (1972-1986). In this investigation, she criticized the argument that Rehnquist based his decisions solely on his own policy preferences, instead she argued that his decisions were consistent with his espoused judicial philosophy. The

first component that she saw evidence of was legal positivism. Davis argued that there was a hierarchy of values that Rehnquist was consistent about in the rulings he made: federalism, private property and individual rights. These values when interacting with his judicial philosophy, framed his ideas of the democratic model, moral relativism and the way he interpreted the Constitution which produced the opinions he wrote (1989, 19). Davis focused her investigation on areas where Rehnquist wrote opinions related to property, federalism and individual rights and she found evidence of his belief about the democratic model, moral relativism and his use of originalism when he interpreted the text of the Constitution. Davis concluded that Rehnquist had a clearly defined judicial philosophy and that the values related to that philosophy were what shaped the opinions he wrote.

Following Davis' investigations were two studies that attempted to place Rehnquist into a model of decision making. The first was published in 1989 by Harold J. Spaeth and David W. Rohde. They espoused that contrary to what many scholars at the time were saying, Justice Rehnquist had not moved more to the center of the ideological spectrum of the Court, nor was he behaving strategically. The authors compared Rehnquist's last term as an Associate Justice to his first two terms as Chief Justice by looking at the decisions he made on civil liberties and civil rights cases. They found that the frequency that Rehnquist voted in either ideological direction did not change. Thus he was not moving to the center in order to behave strategically, but rather he was a consistent justice when it came to his conservative judicial philosophy shaping the votes he cast.

That same year Jeffery A. Segal and Albert D. Cover (1989) ranked Rehnquist's values as highly conservative (-.91; where -1.00 is extremely conservative and 1.00 is extremely liberal) based on a content analysis the authors conducted of newspaper editorials. His votes were in the

liberal direction only 19.5% of the time during his tenure on the Court as an Associate Justice and 23.0% of the time when he was Chief. Based on this analysis they labelled him an "attitudinalist," because he most often voted in the conservative direction.

Later, Segal, this time joined by Spaeth (2002), tested the entire Rehnquist Court from 1986-1998 in the area of declaring laws at any level (federal, state or municipal) unconstitutional. They tested each justice on the bench in 170 cases where at least one judge voted a law unconstitutional. They found, based on the number of times that a justice voted in an ideological direction that all but Associate Justice White and Chief Justice Rehnquist voted attitudinally. They stated that their findings were consistent with Sue Davis' conclusion regarding Rehnquist – that he was a legal positivist. They found that Rehnquist was the only justice who showed some support for states rights, which evidenced his value of federalism. This may seem to contradict Segal's 1989 conclusion that Rehnquist behaved attitudinally, but the discrepancy shows the importance of the issue being studied and the affect that it will have in placing a justice within a particular model of decision making. It would seem, based on Segal's contradictory findings that judges might utilize different methods of decision making depending on the type of issue that is before them. This is instructive for the analysis that I carry out in this paper as my findings are only applicable to cases pertaining to personal privacy.

Three years later in 2005, Spaeth called Rehnquist the "poster child" for the attitudinal model. He analyzed Rehnquist's entire tenure on the Court from 1972-2005 and checked for Rehnquist's judicial philosophy influencing his behavior on the Court. Particularly the level of restraint he put into practice and the degree to which his conservative ideology influenced the opinions he wrote. Spaeth found that during his tenure as an Associate Justice he consistently dissented in the conservative direction. However this trend declined when he became Chief

Justice. Spaeth found that Rehnquist was strongly driven by his ideological preferences; he voted with precedent only 5% of the time and 95% of the time he voted his preferences.

Upon reviewing the most influential studies that have been conducted on Rehnquist's judicial philosophy and decision making five main components become evident: legal positivism, moral relativism, majoritarianism, originalism and federalism. However there is disagreement among scholars as to which model best exemplified Rehnquist's decision making style. In order for my analysis to fully add to this debate I must properly review the models of decision making which will provide the theoretical foundation for this paper.

Chapter 3: Judicial Decision Making Theory

This chapter will review a growing and significant literature examining the various models of judicial decision making. The fascination with the way that justices make decisions, particularly at the Supreme Court level, stems from the controversial role that the Court plays in the American political system. Supreme Court justices are often assumed to be objective and impartial interpreters of the Constitution; however they are also political appointees, with set salaries and life tenure (Segal and Spaeth 2002). Philosophically speaking, it would seem impossible to suggest that a human being can completely reject their own notions of morality and political biases while making decisions on a wide range of controversial topics; however that is precisely what the American people expect of Supreme Court justices (see Scheb and Lyons 2001). Some scholars have likened judicial decision making to a moral decision (Golding 1963; Fiss 1982). According to some, a decision should be neutral and while certainly based on principles, the decisions should not simply rest on *personal* principles. Along these lines, many suggest that if a justice relies on the text of the Constitution then the Constitution will decide the victor in a case and not the justice herself. However others argue that the text of the Constitution is vague, outdated and not suited to solve the issues that our society faces today (See Segal and Spaeth 2002).

In this chapter, the various methods of interpreting the Constitution will be discussed in more detail when explaining the different models of decision making, as well as factors like judicial restraint and activism. Based on these factors, many political scientists seek to answer the fundamental concern that the Supreme Court may or may not be a democratic institution. One way to answer this question is by looking at what components influence individual justices when they decide cases. Is it legal factors like precedent and a respect for the rule of law? Or is it

their political preferences? The following literature will describe various models that legal scholars and political scientists have created in order to answer these very questions.

Judicial decision making theory has gone through several transformations over the years. The most important was the behavioral revolution of the 1950s and 60s. Scholars began to test their conclusions about political behavior more empirically, instead of relying on drawing conclusions through strictly descriptive means. They wanted to use statistical calculations that would make their work verifiable, replicable and generalizable (Shubert 1958; Heise 2002). There are two broad ways that judicial decision making can be viewed. We can first view it from a psychological standpoint – that values, attitudes, ideology, and background characteristics play a role in how a judge makes a decision. The second way is borrowed from the natural sciences and economic theory – that justices are rational actors and thus they will behave in ways that maximize their benefit and minimize cost. In these two camps lie several different models of decision making that will be explored in greater detail below. This thesis has been most informed by the psychological camp of judicial decision making. First by leaning on the behavioral model in chapter one in order to study Rehnquist's background experience that led to the creation of his political and judicial philosophies. In forthcoming chapters this lens will be used to study his decision making style based on the language he used to justify the decisions he made in the area of personal privacy. The content analytic methods used will be based on two assumptions about human behavior. First that words have meaning and second that human beings reveal their values through the language they use.

The Legal Model

The legal model maintains the ideal of how justices ought to make decisions. It promotes the idea that justices base their decisions on precedent, stare decisis and other legal factors.

Justices that follow the legal model also believe in protecting the legitimacy of the rule of law and the Supreme Court as an institution. The tenets of the legal model are first that decisions justices make are influenced by the "plain meaning" of the law in question and the Constitution. Plain meaning is another form of the interpretive method originalism, the idea that when a justice interprets the Constitution they look to the text and the intent of the Framers. Precedent also plays an authoritative role in the legal model (Segal and Spaeth 2002). The attitudinal model is the main opponent of the legal model, stressing that justices make decisions based on their subjective policy preferences. Proponents of the attitudinal model are critical of the legal model because they believe that the Constitution is difficult to interpret and that there is contradiction among the historical documents making it difficult, if not impossible, to know what the Framers' intentions were in any given area. Attitudinal scholars also posit that judges deal with precedent in the same way: "Judges may pick and choose among precedents to find those that accord with their policy preferences…" (Segal and Spaeth 2002, 80).

Donald Songer and Stefanie Lindquist (1996) conceded that values and preferences of justices do play a role in shaping their opinions. However the authors remained unconvinced that legal factors, like precedent do not also play an important role. Their article specifically took aim at attitudinal model advocates Segal and Spaeth. They espoused that Segal and Spaeth oversimplified the judicial decision making process, making it an either/or question when it is in fact much more complex. They encouraged the creation of a more integrated model that included justices behaving strategically in order to make a decision that is closest to their policy goals while still abiding by legal factors like precedent. After they retested a data set created by Segal and Spaeth (1994) by adding summary progeny and "coding a justice based on the positions they

take and not on the direction of their vote" they found that the support for preferences dropped from 89.4% to 68.8% (1996, 1055).

Several years later Howard Gillman (2001) wrote a review of Segal and Spaeth's article, "Majority v. Minority Will: Adherence to Precedent on the U.S. Supreme Court." One of the major criticisms that legal model advocates have of Segal and Spaeth's studies is that they do not properly represent the legal model. That criticism was the driving force behind Segal and Spaeth's decision to write the above article. They decided to test the legal model, mainly to see if justices do in fact follow precedent when they make decisions. They tested several cases that were revered for their reliance on precedent, i.e., *Planned Parenthood* v. *Casey* (1993). They found that 80-100% of votes cast by justices did not follow precedent and that they are in fact being influenced by their policy preferences. Gillman however disagreed with Segal and Spaeth's conclusions. He argued that they only tested one component of the legal model when in actually it consists of much more and that their study didn't definitively answer the question of what justices *are* relying on when making decisions.

Following Gillman's critique**,** Segal and Spaeth published a book entitled, *The Supreme Court and the Attitudinal Model Revisited* (2002). In the seventh chapter of their manuscript they tested the legal model and found, based on studying the language of opinions that justices wrote, that justices are in most cases not influenced by precedent. They did however find a link between ideology and following precedent – more conservative justices tended to heed precedent more often than liberal justices. Also the salience of the issue played an important role as well-the more salient an issue, the less role precedent played in shaping a justices' opinion.

The Behavioral Model

The behavioral model promotes that psychological factors and social background characteristics play a role in how justices decide cases (Aliotta 1988). The majority of the scholars who support this model advocate using content analytic techniques in order to evaluate the language justices' use in their opinions to decipher psychological characteristics that are influencing their decisions (Danelski 1966; Aliotta 1988). Many scholars also argue that while these results may not aid in predicting judicial votes, they play an important role in interpreting and explaining votes (1966; 1988).

David J. Danelski (1966) argued that values play a central role in explaining judicial behavior. He conducted a content analysis of solo dissents made by Justice Brandeis and Justice Butler from the 1935-1936 term, trying to discover the value that was most central to each justice. He found that Brandeis and Butler represented two opposing views of laissez faire economics. The assumption that Danelski used was that the values which people feel strongly about will be mentioned more frequently than others.

Jilda M. Aliotta (1988) extended Danelski's work by conducting a content analysis of the statements justices made at their confirmation hearings before the United States Senate Committee on the Judiciary and looked for "motive imagery." Motive imagery theory articulates that "human speech is a thought sample that reveals psychological dispositions such as motivation." Thus it can be used to study the motives behind the decisions that justices make (268). Aliotta utilized methods created by Psychologist David McClelland to search the statements made by the judges for three imagery aspects: achievement, affiliation and power. She then hypothesized that if a justice valued achievement, affiliation or power it would motivate them to behave differently while on the Court. For example if a justice craved power they would

compromise rarely, take great risks and try to control opinion assignments (270). The justices' statements were then coded for the presence or absence of the three imagery categories (273).

Aliotta tested the three imagery variables and several behavioral variables, like religion, socioeconomic status, place of rearing, and political party affiliation to see if they had an effect on the percentage of majority opinions, the percentage concurring-dissenting votes, and the percentage separate opinions (275). She used cases from the 1939 term to the 1981 term and found that both the imagery variables and the other behavioral variables did play a role in how judges participated on the Court and that the variables explained 64-83% of the variation of their behavior (277). To conclude, Aliotta explained that this method does little to aid in predicting justices' votes but she argued this method advances another important aspect of judicial decision making literature: interpretation of the behavior of the justices.

Narrowing the scope of Aliotta's work, James L. Gibson wrote an article entitled "Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making" in 1977 where he focused specifically on the attribute of self esteem and the effect that it had on judicial behavior. He interviewed 48 judges in California using two separate measures, one measured an individual justice's level of self-esteem and the other measured their role orientation. Role orientation is the idea that the way that a justice perceives his or her role will affect how they behave in it. The hypothesis is that those judges with low self esteem will acquiesce more and that those who perceive it as right to allow their policy preferences to shape their opinions will allow them too. He found that his hypotheses were correct. These findings also speak to judicial activism and restraint and its correlation to self esteem.

His next article also published in 1977 focused directly on judicial activism versus restraint. He hypothesized that an activist judge will more readily rely on his values to shape his

opinions rather than legal factors. He tested activism as it relates to sentencing severity in state courts. He included , among other things, several non-legal variables – the race and gender of the defendant, and whether the defendant was in jail or out on bail prior to the trial. He found significant variation among the judges in relation to their degree of reliance on legal factors. The average was 68.3% , and thus the influence of the non legal variables was relatively high. He used this as an activism measure and then related it to role orientation as measured in personal interviews with judges. Gibson found that almost 30% of the variance in the judges' activism measure was explained by how they perceived their role orientation.

His third article published in 1978 built on his previous body of work by developing a theory of judicial attitudes and role orientation as a predictor of judicial behavior. He studied Iowa trail court judges from the 1972-1974 terms. He was again looking at sentencing outcomes and the variables that affect the variance among sentences. He used several variables including the seriousness of the charge the defendant faced, whether or not the defendant was released on bail, and the gender of the defendant. Only two variables had an effect on the severity of the sentence the judge delivered. More importantly, the ideology and attitudes of judges toward crime had little impact on the sentence. Gibson found again that role orientation does explain judicial behavior. What a judge perceive their role to be will dictate the degree to which they allow their attitudes to shape the decisions they write. Judges who believe it is acceptable for them to allow their attitudes to influence their decisions will in fact allow their attitudes to influence their decisions.

The Attitudinal Model

The attitudinal model builds off of the behavioral model. Attitudinal scholars agree that social background characteristics are important because they influence the development of

political ideology which is the focus of the attitudinal model. They argue that justices make decisions based on their policy preferences or political values. This dispels the belief that the justices on the Supreme Court are impartial and objective and instead includes them as policy makers (Segal and Spaeth 2002). It is important to mention the first real study of judicial decision making which labeled justices as policy makers, Herman C. Pritchett's seminal piece, *The Roosevelt Court: A Study of Judicial Politics and Values* (1948). Pritchett looked at social and psychological characteristics that shaped how justices made decisions. Specifically, he focused on studying the liberal judicial philosophy of two justices on the Roosevelt Court – Justice Holmes and Justice Brandeis.

These two justices on the Court held opposing views of what the role of the Supreme Court ought to be in the American political system and the role of an individual Supreme Court justice as well. Holmes espoused that the attitude of the Court ought to be that of deference to the legislative branch because they are popularly elected; he argued that an activist Court is undemocratic. Brandeis on the other hand promoted a more activist role for the Court, arguing that it was part of a justice's duty to make decisions based on his policy preferences and ideology. This was the main tension that existed on the Roosevelt Court – the degree to which these liberal judges would defer to congressional will. This can be extrapolated to include the major debate that exists even to this day about the democratic nature of the Supreme Court. Pritchett claimed it was dangerous to have a Court that is not checked by the popular will or the other branches of government making policy. In the end, the legacy of the Roosevelt Court was that it expanded the role of the Court to be the protector of individual rights.

One of the major setbacks to testing the attitudinal model has been finding accurate independent measures of judicial values (Segal and Cover 1989; Epstein and Mershon 1996).

In 1989 Segal and Albert D. Cover sought to develop and test independent measures of judicial values – most studies up to this point used prior votes to predict future votes. According to Segal and Cover such logic seemed to be circular reasoning, which only served to weaken the attitudinal model. Consequently, they performed a content analysis of newspaper editorials that included statements made about a justice from the time of their nomination to their confirmation by the Senate. Each paragraph was coded for political ideology in order to produce an independent measure of the values of Supreme Court justices from Earl Warren to Anthony Kennedy. They found a correlation between a justice's ideological values and the votes they cast on civil liberties cases from 1953-1988.

Lee Epstein and Carol Mershon (1996) also wrote about the obstacles to finding independent measures of judicial ideology. They advocated using methods like Danelski used – content analysis of things that were written by justices such as scholarly papers, speeches, books, and judicial opinions, in order to get a more accurate reading of their judicial philosophy.

Segal, this time joined by Spaeth (1996) utilized one of Epstein and Mershon's suggested methods by conducted a systematic content analysis of dissenting opinions of Supreme Court justices. They took a random sample of landmark decisions and their progeny. The authors found that Supreme Court justices were not influenced by precedent if they did not agree with the precedent. Justices Potter Stewart and Lewis Powell were the only justices that showed any evidence of consistently supporting stare decisis. In conclusion, 90.8% of decisions conformed to the justice's preferences, while 9.2% followed precedent.

In the tenth chapter of their book, *The Supreme Court and the Attitudinal Model Revisited*, Segal and Spaeth (2002) argued that judicial activism is actually preferable to restraint or deference to the elected branches. They argued that it is the proper role of a Supreme Court

justice to safeguard the Constitution and the individual rights of American citizens. The Court ought to restrain the other branches by striking down policies they enact that are not consistent with the Constitution. Thus restraint ought not to be practiced because it is undemocratic. Allowing the other branches to overstep their Constitutional bounds is not what the Framers had in mind when they created the Supreme Court to be another check on the power of the other branches. Segal and Spaeth argued that activism increased when Rehnquist became Chief Justice. They tested every justice on the bench who decided the 170 cases that took place during the 1986-98 terms. They found that Associate Justice White and Chief Justice Rehnquist were the only justices on the bench that did not fit into the attitudinal model. They stated that their findings were consistent with Sue Davis' findings on Rehnquist – that he was a legal positivist. They found that Rehnquist was the only justice who showed some support for states rights, an allusion to his devotion to federalism, which became evident when studying his opinions.

New Institutionalism

The New Institutionalist model can be broken up into three different categories: rational choice or positive theory, historical institutional development and the constitutive model. All three categories share the same context - they espouse that justices are influenced to the greatest degree by the institution that they are a part of when making decisions (Gillman and Clayton 1999).

Rational Choice

This model developed out of economic theory. One of the basic premises is that rational actors will always behave in a predictable manner – maximizing their benefit and minimizing cost (Segal and Spaeth 2002). Those that promote rational choice argue that justices make decisions after making a calculation of the goals they want to achieve and the perceived risks that

they will face. They do concede that justice's policy preferences instruct their decision-making, however there are constraints placed on their behavior by the institution that will prevent them from always voting their preferences. Constraints are things such as: the other justices on the Court, the Constitution and the restraints it places on the branch, and the Court's agenda. Cooperation and bargaining are essential and thus justices must develop a long term strategy that informs the decisions they make (Maltzman, Spriggs, and Wahlbeck, 1999). Authors Lee Epstein and Jack Knight (1998) likened the strategic nature of decision-making to a "chess game."

One of the first seminal studies of strategic judicial behavior was Walter F. Murphy's *Elements of Judicial Strategy* (1964). In chapter eight, Murphy sought to answer the question that has haunted judicial theorists from the beginning: are justices' policy makers? He argued that justices are rational actors that do in fact have policy goals in mind when they come to the bench. However their options for attainting their goals are limited by their environment. Thus they must behave strategically in order to direct policy. Actions available to a judge can include anything from bargaining to writing opinions. Murphy argued that because judicial behavior is complex, a more integrated model of judicial decision making will be required if one wishes to explain and predict their behavior.

Murphy combined the rational choice model of decision making with psychological role orientation theory which argues that the way a judge perceives himself on the Court will dictate his actions (See Gibson). Thus a judge will develop a "grand strategy" or plan so that he allocates his time wisely and focuses most of his energy on tasks that bring him closer to achieving his goal (202). However Murphy argued that these theories must be balanced with the fact that justices are also concerned with public opinion and their desire to maintain the legitimacy of the Court. These act as constraints on their behavior.

Paul Brace, Melinda G. Hall and Laura Langer (1999) studied the rational choice model, the separation of powers model and the attitudinal model by focusing on the aspects that constrain Supreme Court justices. The separation of powers model is a branch of rational choice which argues that justices are constrained by the behavior or actions of the other branches. The authors were interested in testing whether judges vote based on the policy preferences or if they behave strategically given the relationship between the legislative and judicial branch. They tested the decisions that individual State Supreme Court judges made on challenges to states' abortion laws from 1974-1995. While they studied state judges, they argued that their findings were applicable to Supreme Court justices as well. While they do not face as many constraints as State level judges they are still constrained by Congress. Thus they will often defer to Congress for fear of the branch writing new legislation to overrule the Court's decision which would undermine the legitimacy of the Court.

The authors then conducted a comparative analysis of three of the major decision making models: rational choice, attitudinal and separation of powers. The authors tested many hypotheses, from the role of divided government, life tenured versus an elected judge, length of judicial term, discretionary dockets, etc. They found judges opinions were shaped by their environment and not their policy preferences and that behavioral characteristics like religion, party affiliation and age did not increase judges overturning statutes.

Forrest Maltzman, James F. Spriggs and Paul J. Wahlbeck (1999) argued that justices do take into account their policy preferences when making decisions, however there are constraints on their behavior imposed by the institution of the Supreme Court. These authors argued that there is a strategic element to being a political actor and justices must make calculated decisions based on the context in which they serve. One very important constraint that is mentioned is the

actions of the other justices on the Court. Also things like separation of powers, the Constitution and the Court's agenda place constraints on judicial behavior. The process is more important to study than the outcome and cooperation and bargaining is essential, judging requires a long term strategy that informs the decisions that judges make.

William G. Howell (2003) created a diagram of the separation of powers model which mapped out the possible actions that could be taken by the Court in relation to the other branches and also the ways that they can restrain the Court. The main constraint the Court faces is the fact their rulings have to be enforced by the other branches. The Court fears retaliation for decisions that do not line up with the administration or Congressional will. When rulings of the Court go unheeded this hurts their reputation and prestige, much of which is "pomp" and custom. Howell found that judges were less likely to overturn executive orders that were written by presidents who appointed them to the bench, as well as presidents with high approval ratings, and when the executive orders involved foreign policy. Second, when presidents did find their actions being challenged by the Court, they could rest easy because the majority of the time the Court affirmed a president's actions.

Howell's findings not only support the rational choice model but also institutionalism which argues that judges actions are restrained by the other branches of government and thus they are not free to simply decide cases as their policy preferences or own policy goals dictate.

Historical Institutional Development

The historical view focuses on the Court's decision making as a progression over time and proponents of this model focus on the larger social context and how it influences judicial decision making. Scholars of this theory espouse that justices are not simply self interested actors trying to get their way, but that they are serving a greater purpose which incorporates an

institutional mission and a sense of duty and responsibility. Thus decisions are best understood by looking at the historical context of a specific case. This theory would also support the idea that justices most often follow stare decisis or precedent when making decisions (Gillman and Clayton 1999).

In 1957, famed political scientist Robert Dahl claimed that the Supreme Court was a policy making institution. He argued that they do not impartially follow precedent, as precedent can often be found supporting two sides of an issue and they cannot rely solely on the text of the Constitution because it is vague. However he did not believe that this should cause alarm or that the Court would soon become tyrannical because he espoused that the Court was constrained by its external and internal political environment.

Howard Gillman (1999) made a case for the historical interpretive approach rather than rational choice. He argued that in fact rational choice requires that the historical context be explored first. Supreme Court justices are influenced by an institutional mission which Gillman called a shared goal. The second factor that influenced judicial decision making was organizational attributes like the founding documents. These two factors give the justices guidelines that mould their decisions. Instead of being self interested actors, as the rational choice model makes justices out to be, justices are in fact selfless, following historical precedent and norms that have been in place since the inception of America.

Many scholars who support the theory of new institutionalism are attracted to its incorporative nature. Rather than a competition among models, it generally espouses more incorporation of different aspects of the models in order to build a more encompassing model of judicial decision making. Lawrence Baum (1994) is an example. He began with the foundation that justices are rational actors – they have goals that they pursue strategically. They are also

influenced by their preferences, precedent, a desire for personal prestige and the legitimacy of the Court. Baum focused on the internal pressures on the Court that can play a role in influencing judicial decision making. First was their relationship with other justices that involved bargaining, and opinion assignments. He then focused on the possible external constraints from the legislative branch. The problem for the Court is that if they go against Congress to decide a case that is in alignment with their policy preferences Congress can write legislation that is even further away from their own preferences. Thus this forces them to behave strategically, rather than solely relying on their policy preferences.

Another example of integrating models was conducted by Lee Epstein and Tracey E. George (1992). They compared the attitudinal model and the legal model and found that both had ideological biases when applied over time. Thus they combined the models in order to compensate for the bias and found that early in the decision making process justices have a tendency to vote with past precedent, however as the issue evolves and time passes they tend to allow their political preferences to dictate the direction of the decisions they reach.

Hall and Brace (1999) also sought to create a more integrated model of decision making. They combined the rational choice and attitudinal models. They began with a similar foundation as Baum used, that judges are rational actors who behave strategically in order to achieve their policy goals which are shaped by their preferences. However they included a third element. They also believed that institutional constraints will affect their decisions as well. This according to these authors was the best explanation of variance in decisions. They conducted three separate tests to analyze dissents written by individual State supreme court justices from 1980-1988 on cases pertaining to the death penalty. They hypothesized that the institutional context will affect

which model the justices' follow (i.e. attitudinal, legal, etc). They found that the institutional context is indeed what accounts for the variance of behavior.

The Constitutive Model

The constitutive model promotes the idea that justices base their decisions on a distinctive set of norms, customs and legal principles. This model also fits in with the historical view, espousing that the duty of a Supreme Court justice is to protect individual rights and the Constitution and that this responsibility or mission is what drives judicial decision making. There are six major components that make up the constitutive model. First, justices are not driven by political pressure placed on them by electoral returns or the administration that appointed them. Second, their personal preferences do not inform their decisions. Third, they respect precedent and the common law system. Fourth, one of the main goals of a justice is to ensure that he or she make consistent rulings that increase the legitimacy of the Court. Fifth, justices interpret the Constitution in light of a changing society. And sixth, they always take into consideration the 'rights' principles that they have a duty to protect (Kahn 1999).

Ronald Kahn is a prominent scholar in this sub-field of judicial decision making. He wrote a book in 1994 entitled, *The Supreme Court & Constitutional Theory, 1953-1993.* In the introduction, Kahn explained that he was going to study the Burger, Warren and Rehnquist Courts in order to correct the misconceptions that many scholars had about the nature of these Courts being political rather than legal institutions.

Kahn promoted the idea that Supreme Court decision making is unified by the concept that all justices have polity and rights principles that they use when interpreting the Constitution. However these principles play a different role depending on the model that individual justices choose to follow. Kahn promoted the use of the constitutive model. He argued that justices make

decisions on the basis of their belief in continuing the legitimacy of the court and respect for the rule of law, often ruling against their policy preferences.

He disputed the use of the election returns and policy making models. These models argue that justices are policy makers who use polity and rights principles *instrumentally* to ensure their desired outcome. Kahn believed that it was the focus in judicial studies on the instrumental model which was to blame for the misconceptions that scholars had made about the Burger, Warren and Rehnquist Courts. According to Kahn, Supreme Court justices make decisions based on polity and rights principles and they are not active, partial policy makers.

In his concluding chapter, Kahn focused specifically on the Rehnquist Court. Kahn used this Court as evidence that the constitutive model better described judicial decision making than the other models. He examined cases from the 1991-1992 terms. Kahn argued that in the past political scientists had placed too much emphasis on the political ideology of the justices on the bench and the president who appointed them. Kahn argued that in fact the Rehnquist Court did not follow the advice of the presidents who elected the majority of the members to the Court but in fact made decisions based on polity and rights principles. Kahn used specific case examples, beginning with *Planned Parenthood* v. *Casey* (1993) a landmark abortion case that is often cited as an example of judicial restraint and following precedent. These justices, mostly conservatives, had the opportunity to strike down *Roe* which was a desire of the Reagan and Bush administrations but they instead honored precedent, even admitting in their opinions that they were going against their personal feelings about abortion. This example supported Kahn's point that the justices' respect for the law and legitimacy of the Court was what influenced their opinions and not their own policy principles.

Kahn once again wrote about the constitutive model in 1999, when he advocated for the supremacy of the constitutive model over the instrumental model because, according to Kahn, justices decisions are shaped by the norms and expectations that are placed on them in accordance to the institution in which they operate. According to this model, two important factors go into the decision making process, first are the "rights principles," rights guaranteed by the Constitution and second, "polity principles," ideas about the structure of political institutions. Kahn used the Rehnquist Court as an illustration. The majority of the justices on this Court were appointed by conservative presidents Ronald Reagan and George H. W. Bush, however they did not succumb to pressure from these administrations when they made decisions. Instead, they consistently made decisions based on precedent, even ignoring their own policy preferences – particular in cases involving the religion and privacy clauses.

This literature review focused on explaining the different models of decision making. Political scientists have tried to succinctly explain how judges reach the decisions they do when on the Court by identifying the most important components of the opinions they write. Various methods utilized by previous scholars as well as some that have not yet been used will be employed in the next chapter of this analysis in order to determine what the driving force behind Rehnquist's decisions on personal privacy was and which model best exemplifies his decision making style.

Chapter 4: Content Analysis of Justice Rehnquist's Self-Articulated Judicial Philosophy

Introduction

In the following chapters Justice Rehnquist's written opinions in personal privacy cases will be examined. Given that many scholars have argued that Rehnquist based his decision making on a consistent judicial philosophy, his written opinions should show such consistently across cases, while making reference to similar ideological and judicial values. That is, if Rehnquist really did base his decisions on a specific judicial philosophy, one that did not vary over time or across cases, then the justifications for his decisions should reveal consistent patterns – at least in terms of the values, words and arguments that he used to justify his decisions. Second, given the incongruent findings among judicial scholars concerning which decision making model Rehnquist best exemplified, I seek to study the language of the opinions he wrote on personal privacy cases in order to place him in the model that best characterizes his judicial decision making style. If Rehnquist was indeed a "legal model" decision maker, his opinions ought to include references to precedent, legal tradition, and the plain meaning of the Constitution. If he is an "attitudinalist" he ought to make rulings contrary to precedent, legal tradition and the text of the Constitution, while also making emotional or value driven arguments.

These hypotheses will be examined in the area of personal privacy cases not only because Rehnquist made several rulings in this area over the course of many years, providing a rich data source to evaluate his decision making over time, but also because personal privacy cases represent a clash between several competing political values that he could have chosen to use as justification for various decisions. Included among the personal privacy cases in this analysis are

those cases which relate to "…marriage, family relationships, abortion, sexual activities and the right to die" (Segal and Spaeth 2002, 161).

The first component to be tested is whether or not Rehnquist's written judicial opinions were influenced by his judicial philosophy. If his judicial philosophy was influential in his decision making then I should expect to find evidence of it in his written opinions. For example, in order to evaluate his judicial philosophy, Rehnquist's own writings will be studied and then compared to how he ruled in personal privacy cases. Rehnquist's written opinions will also be examined and compared to previous findings and various components of his judicial philosophy. Finally, the language that Rehnquist used in his opinions will be examined in order to determine whether the legal model or attitudinal model provides a better explanation of his jurisprudence. The reason that these two models became the focus of this paper was because they are the most commonly researched and are antithetical to one another.

In order to adequately test these hypotheses, computer assisted content analysis will be used in order to avoid bias or human error. The content analysis is based on the assumption that words have meaning and that people convey their values through the language that they use. The second assumption is that if a person feels strongly about something, they will rely heavily on that value or principle when arguing and defending their position. Many contemporary scholars advocate the importance of content analysis in order to uncover the values or methods by which political actors make decisions (Danelski 1966; Aliotta 1988; Irons 1993; Epstein 1996). In fact, judicial scholars advocate using various forms of written text when it comes to assessing Supreme Court justices: papers, speeches, opinions, books, etc. (Epstein and Mershon 1996). While some critics have argued that content analysis of written documents may not be helpful in predicting judicial votes, particularly since the written justifications appear after a case has been

decided, such analyses play an important role in explaining and interpreting why judges make various votes and the rationales they use in order to justify their decisions. Understanding how political actors explain themselves and the values and rhetoric they use in order to justify their decisions is an important area of inquiry (Danelski 1966; Aliotta 1988; S. Davis 1989).

Methods

Scholars who have studied Rehnquist's judicial philosophy and the impact that it had on the way he justified his decisions have often selected a specific area of legal decisions rather than examining all his written opinions. In general, these scholars read through the cases carefully and find evidence to either refute or support their hypotheses about how Rehnquist ruled on various types of issues. While this approach has merit, and at times will be used in this analysis, there is a strong potential of allowing bias, even unconscious bias, to influence the conclusions. Unknowingly, scholars may find (or miss) various patterns based on what they expect to find and ignore or miss evidence that runs contrary to their expectations. In order to avoid such bias, this investigation will be based on recent advances in computer assisted content analysis. In the past several years, technology has greatly increased the rigor and options available for content analysis. In particular, computer assisted content analysis allows investigators to rigorously examine enormous amounts of text and quickly identify re-appearing words, phrases and patterns. Similarly, contemporary software allows for scholars to identify co-occurrences between words and phrases. More specifically, sophisticated computer programs now allow investigators to not only identify what words and patterns emerge from a body of text, but what words and phrases most often occur together. For example, we may find that a particular word, value or phrase occurs regularly within a text and is consistently found across time, or perhaps other words and phrases become more common in various situations or across time, but we may

also identify what patterns of words are most likely to occur next to each other in a body of text. While we certainly gain a great deal of insight simply from knowing the most common patterns emerging from a body of text, we learn exponentially more from also knowing the context in which those common patterns emerge. Further, the most sophisticated software now also allow output and findings to be displayed visually in graphs and charts, which make findings and patterns much easier to identify and visualize. The analysis software used in this study is called T-lab.[2] This software not only identifies patterns and themes that emerge within a body of text, for example, how many times various words are used, but also which words are most commonly used together.

Using T-lab this analysis will first focus on an examination of Rehnquist's judicial philosophy in order to discover the components and values that become evident in his writings and to see if they present a coherent judicial philosophy. In other words, Rehnquist's writings about his own judicial philosophy will be examined in order to identify the values, words and themes that he used in his own efforts to describe his judicial philosophy. The second part of this analysis will compare these findings with what other scholars have written about his judicial philosophy**.**

Previous Scholarly Findings

In previous chapters of this paper more detail was given about the specific methodologies and findings of the studies that have been conducted on Rehnquist's judicial philosophy. For the sake of not being redundant they are summarized briefly below in a thematic fashion.

The first theme that has garnered much attention from legal scholars was Rehnquist's devotion to legal positivism. A legal positivist is a judge who honors legal and historical tradition

[2] http://www.tlab.it/en/presentation.php

when making rulings (S. Davis 1984, 1989; Irons 1994; Segal and Spaeth 2002; Whittington 2003). The second theme that scholars have found in multiple arguments that Rehnquist made is an element of moral relativism (S. Davis 1984, 1989; Irons 1994). A third point of emphasis is Rehnquist's belief in majoritarianism (S. Davis 1984, 1989; Whittington 2003; Garnett 2006). A fourth theme is Rehnquist's advocacy of originalism as the proper method by which to interpret the Constitution (S. Davis 1989; D. Davis 1991; Irons 1994). Finally, the fifth theme is his promotion of federalism (Shapiro 1976; Powell 1982; Riggs and Proffitt 1983; S. Davis 1989; Segal and Spaeth 2002).

In addition to the above themes, there are a couple of studies that must be discussed in slightly more detail because they placed Rehnquist into a model of decision making and their methodology will be instructive to this paper's goal of placing him into either the legal or attitudinal model. In 1976 legal scholar David Shapiro conducted one of the first studies of Rehnquist's voting patterns. He examined 164 votes from 1972 to the end of 1975. He found that there were three guidelines pertaining to Rehnquist's regard for federalism and judicial restraint that influenced the way he decided cases. Shapiro found only 13 cases where these guidelines were not adhered to by Rehnquist. He concluded that Rehnquist was driven by his conservative ideology and in particular his belief in federalism.

In 1989 Harold J. Spaeth and David W. Rohde found that Rehnquist was a consistent justice when it came to his conservative judicial philosophy shaping the votes he cast. That same year Jeffery A. Segal and Albert D. Cover (1989) ranked Rehnquist values as highly conservative (-.91, where -1.00 is extremely conservative and 1.00 is extremely liberal) based on a content analysis the authors conducted of newspaper editorials. His votes were in the liberal direction only 19.5% of the time during his tenure on the Court as an associate justice and 23.0%

of the time when he was Chief. Based on this analysis they labeled him an "attitudinalist," because he most often voted in the conservative direction.

Later, Segal, this time joined by Spaeth (2002), tested the entire Rehnquist Court from 1986-1998 in the area of declaring laws at any level (federal, state or municipal) unconstitutional. They tested each justice on the bench in 170 cases where at least one judge voted a law unconstitutional. They found, based on the number of times that a justice voted in an ideological direction that all but Associate Justice White and Chief Justice Rehnquist voted attitudinally. They stated that their findings were consistent with Sue Davis' conclusion regarding Rehnquist – that he was a legal positivist. They found that Rehnquist was the only justice who showed support for states rights, which evidenced his value of federalism. This may seem to contradict Segal's previous conclusion that Rehnquist behaved attitudinally in the study he conducted in 1989, but the discrepancy shows the importance of the issue being studied and the affect that it will have in placing a justice within a particular model of decision making. It would seem, based on Segal's contradictory findings that judges might utilize different methods of decision making depending on the type of issue that is before them thus the findings in this paper should not be generalized beyond the area of personal privacy.

Three years later in 2005 Spaeth called Rehnquist the "poster child" for the attitudinal model. He analyzed Rehnquist's entire tenure on the Court from 1972-2005 and checked for Rehnquist's judicial philosophy influencing his behavior on the Court. Particularly the level of restraint he put into practice and the degree to which his conservative ideology influenced the opinions he wrote. Spaeth found that during his tenure as an Associate Justice he consistently dissented in the conservative direction. However this trend declined when he became Chief

Justice. Spaeth found that Rehnquist was strongly driven by his ideological preferences; he voted with precedent only 5% of the time and 95% of the time he voted his preferences.

The majority of legal scholars who have studied Rehnquist are in agreement about the five components that make up his judicial philosophy: legal positivism, moral relativism, majoritarianism, originalism, and federalism. However there remains disagreement on which component he held in highest regard. In line with the assumptions stated early on in this chapter, the components that Rehnquist valued the most will be mentioned more frequently throughout his writings. Thus using T-lab to analyze Rehnquist's own words will aid in defining his judicial philosophy and comparing those findings with the components that legal scholars have previously attributed to him.

Analysis

The data used in this part of the investigation are 16 articles and speeches that Rehnquist wrote or delivered that were published in various academic journals during his tenure on the Court.[3] I used Google Scholar to search for articles that Rehnquist wrote during his tenure on the Court which produced a list of 193. After reading through the brief synopses provided for each article, articles were selected which conveyed his opinion on the role of the Court, the role of a Supreme Court justice and privacy rights. Articles were removed if they were simply personal remarks about past judges, historical papers, advice for lawyers, year-end reports, and excerpts from various opinions and dissents. Excluding these articles should not affect the findings because they do not address the central component of this analysis – how Rehnquist described his own judicial philosophy. Focusing only on the articles in which Rehnquist elaborated or explained his own judicial philosophy and eliminating the others produced a list of 16 articles.

[3] A complete list of the articles used can be found in the references list (pg. 101).

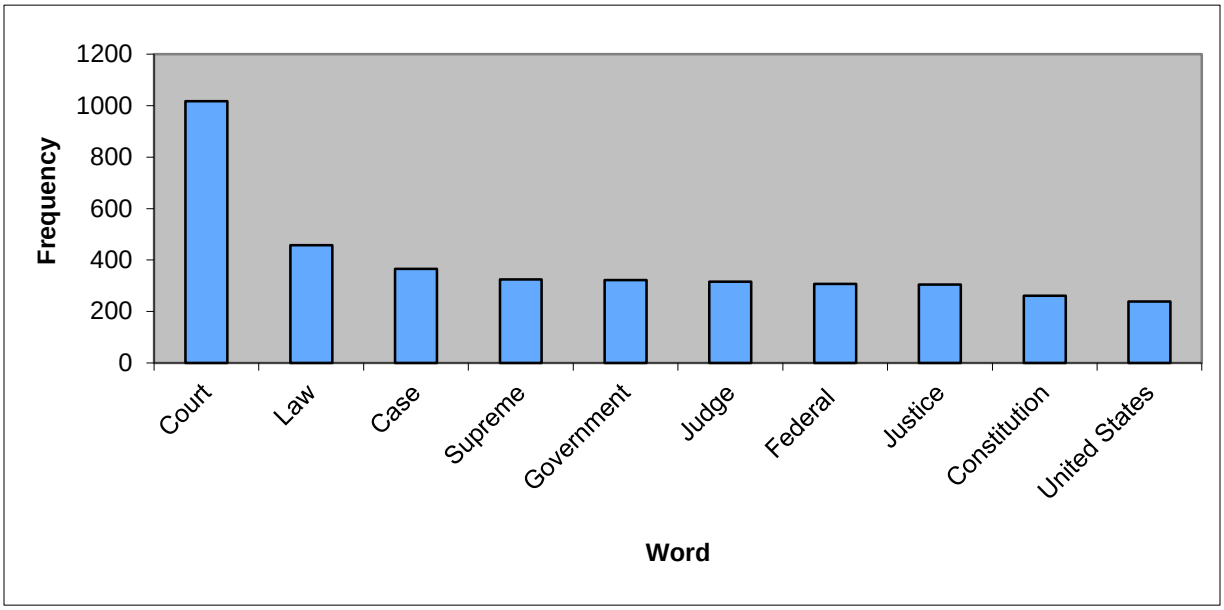
Using these articles as Rehnquist's explanation of his own judicial philosophy, I combined them all into one large file and examined the entire body of text in T-lab.

Analysis of Justice Rehnquist's Judicial Philosophy

Word Choice

In order to understand Rehnquist's judicial philosophy, it is important to identify the most commonly appearing words. This analysis is presented below in figure 4.1 showing a word count listing the number of times that Rehnquist used a particular word.

Figure 4.1: Word Frequencies in Rehnquist's Articles about His Judicial Philosophy

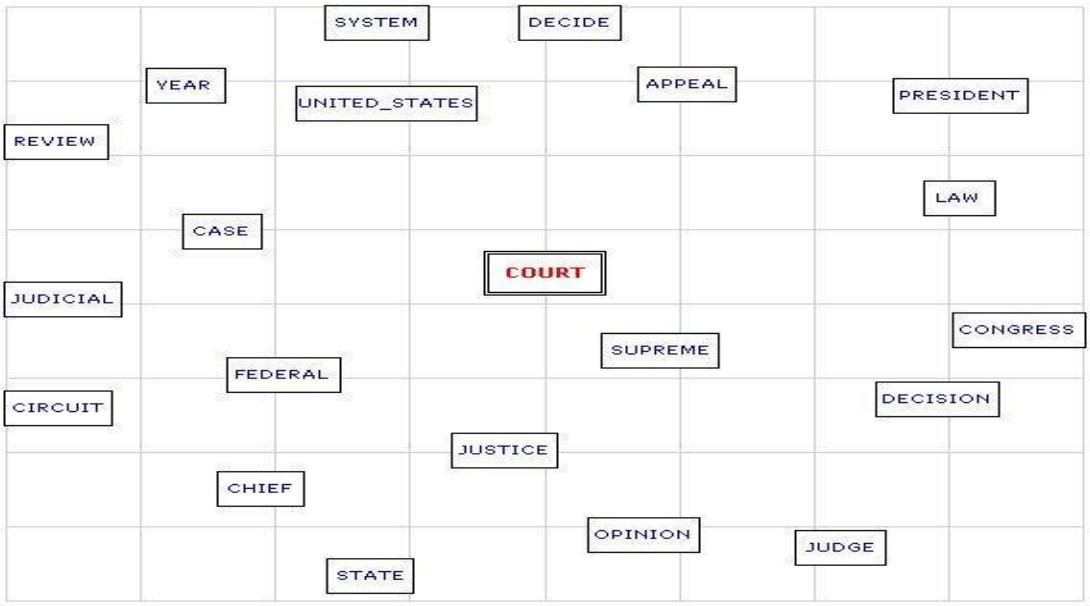


As presented in the histogram above, Rehnquist used the word "court" over 1000 times with the second word, "law" mentioned much less: 437 times. The next three words: "case," "Supreme," and "government" were all used approximately 300 times. Interestingly the top ten words all relate to the legal system. Rehnquist referenced the Court as a branch of the federal government as recognition of its supremacy. He also mentioned justices and judges and the factors that they take into account when they make a decision pertaining to the case before them: the law and the Constitution. These two key findings are corroborative of some of the scholarly findings about Rehnquist's belief that the role of the Court should be limited and that judges

should make rulings based on legal tradition and the text of the Constitution. It is interesting that the word "State" does not appear in the above list, given that many scholars have identified federalism as a primary component of Rehnquist's judicial philosophy. There is also no evidence based on the words presented above to corroborate the previous finding that he advocated majoritarianism or moral relativism as a component of his judicial philosophy.

In the next step of the analysis, word patterns were examined in order to identify what words and values Rehnquist used in conjunction with each other. This will show the context in which Rehnquist used the most commonly appearing words. The most commonly used word, "court" is located in the middle of the diagram and the distance between the outlying words shows how closely these words are associated with the word "court" as well as how closely they are associated with each another.

Figure 4.2: Word Patterns in Rehnquist's Articles about His Judicial Philosophy



Rehnquist used the word "court" most frequently and the word "Supreme" shares the closest association. This is to be expected as when Rehnquist mentioned the court he would most often be referring to the Supreme Court. "Justice" and "federal" are also closely associated with

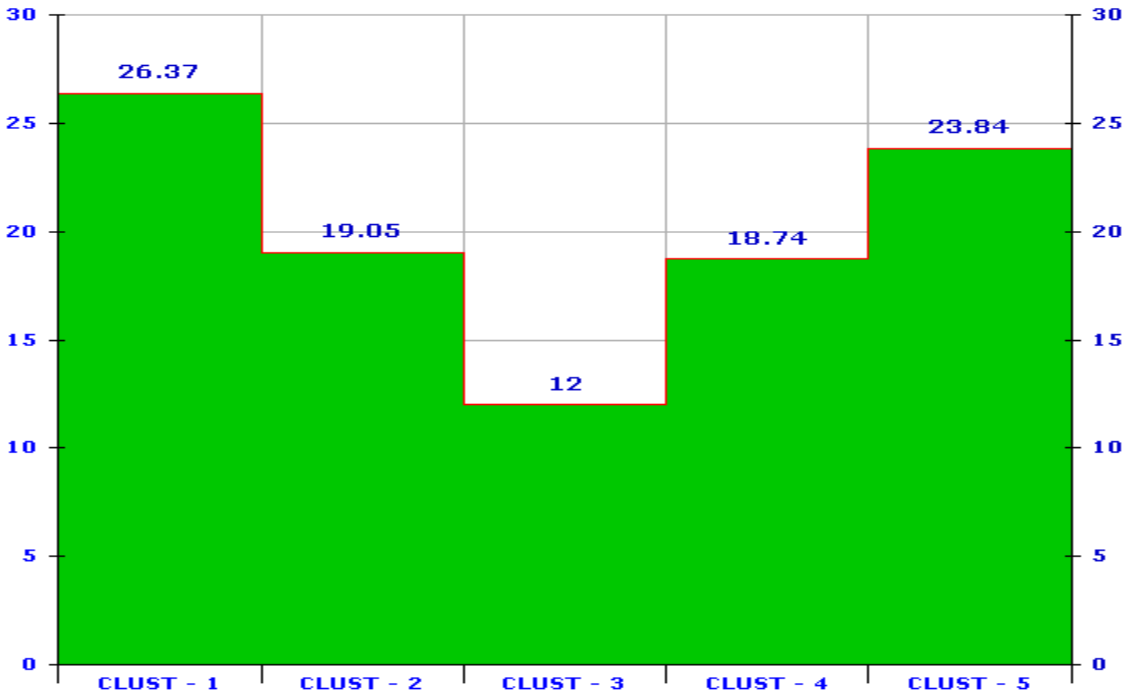
the word “court,” again this is to be expected. It is interesting that the other two branches (“president,” “Congress”) are mentioned closer to one another than they are to “court.” This might detract from a previous scholarly finding that Rehnquist espoused a limited role for the Court and delegation of power to the popularly elected branches, as in these figures the Court seems to take precedence, while the other two branches are mentioned in the outlying regions. “State” makes an appearance in the diagram, whereas it was notably absent from figure 4.1. This can be seen as evidence of the federalism component of Rehnquist’s judicial philosophy. While Rehnquist’s views of federalism were closely related to those of majoritarianism, there is still no clear evidence in the language presented in this word association figure to argue that majoritarianism was articulated by Rehnquist in these articles/speeches. Again there is no evidence of moral relativism as well. It is important to note however that moral relativism is difficult to discern from a simple analysis of word choice, as most often moral relativism becomes apparent through more in depth thematic analysis; thus because the above generalizations are based on only the top ten words that Rehnquist used most frequently broader analysis of themes and context will be conducted in order to offer greater insight into how Rehnquist articulated his own philosophy.

Thematic Context

The next step of this analysis of Rehnquist’s judicial philosophy is to look at themes that emerge within his writings. This will provide greater context for how Rehnquist justified his judicial decisions and the manner in which he organized his arguments. The textual material was analyzed for various clusters and themes that reoccurred within the text. These clusters move beyond the word associations and into more general themes and patterns of words and arguments. This analysis will provide context through entire sentences and paragraphs that

contain frequently used words in order to provide even more insight into how Rehnquist described his own judicial philosophy. The figure below illustrates the five thematic clusters that T-lab identified in the body of text representing Rehnquist's writings about his own judicial philosophy. Further, the percentage of the text that each theme encompasses is also presented.

Figure 4.3: Cluster Percentages of the Five Themes Identified In Rehnquist's Judicial Philosophy



Cluster One

The first cluster encompasses 26.37% of the text. The main words associated with this cluster were: justice, federal, opinion, appeal, court, law, decide, case and judge. After reviewing the paragraphs focused on these words there were generally four main points of emphasis in these sections. First Rehnquist emphasized the importance of knowing the history of the Supreme Court and the justices that sat on the bench in order to have a better understanding of the institution as it functions today. He alluded to his belief in originalism by discussing the Founding Fathers and the way that they set up the Court in Article III of the Constitution. He

admitted that because of the ambiguous nature of Article III, the Supreme Court's exact roles and duties can be difficult to define ("Remarks on the Process of Judging" 1992, 5). This is an important point of emphasis for Rehnquist because it created a conflict of jurisdiction between the state and federal courts. Rehnquist focused on how in many instances their jurisdictions overlap. For example, in an article entitled "Seen in a Glass Darkly: The Future of the Federal Courts" he argued that "…a significant portion of federal and state jurisdiction is concurrent. State courts are fully empowered to decide many issues of federal law. Federal courts, under their diversity jurisdiction, can hear and decide state law issues" (1993, 7). This position raises substantial questions about the appropriate areas of jurisdiction for the federal and states courts. Rehnquist argued that "…any vision of the 'proper' jurisdiction of the federal courts has inescapable substantive implications, and as a result an unavoidable political dimension" (1993, 5). This is where Rehnquist's belief in federalism began to become evident in his writings.

The second theme evident in this primary cluster was Rehnquist's emphasis on what the proper role of a judge ought to be. He admitted that there is a partisan nature to judging that is almost impossible to escape. He also pointed out that Supreme Court justices are appointed through a political process and that Presidents do take into account a judge's philosophy and ideology when appointing them to the Court. For example, he once stated that, "No doubt most Presidents whom historians regard as 'strong' Presidents considered what political, social and legal philosophy their Supreme Court nominees would follow after donning their judicial robes…Democratic Presidents almost invariably nominate Democrats to be federal judges, and Republican Presidents almost invariably nominate Republicans" ("Political Battles for Judicial Independence" 1974, 848; "An Independent Judiciary: Bulwark of the Constitution" 1988, 7).

The third component of this cluster was Rehnquist's discussion of the self imposed constraints that justices place on themselves. For example, Rehnquist argued that, "Judging inevitably has a large individual component in it, but the individual contribution of a good judge is filtered through the deliberative process of the court as a body, with all that this implies…an appellate judge's primary task is to function as a member of a collegial body which must decide important questions of federal law in a way that gives intelligible guidance to the bench and bar" ("Remarks on The Process of Judging" 1992, 270).

The fourth and perhaps most interesting component of this cluster was Rehnquist's answer to whether or not public opinion ought to influence a justice's decisions. He said:

> Important constitutional litigation can generate its own tides of public opinion, just as a large ship causes a considerable wake, and these more immediate tides may also affect the decision of the case. The judges of any court of last resort, such as the Supreme Court of the United States, work in an insulated atmosphere in their court house where they sit on the bench hearing oral arguments or sit in their chambers writing opinions. But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. Somewhere 'out there' - beyond the walls of the courthouse run currents and tides of public opinion which lap at the courthouse door. If these tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse. This is not a case of judges 'knuckling under' to public opinion, and cravenly abandoning their oaths of office. Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs...When we think about it, we should not be surprised that this form of public opinion should influence even judicial decisions ("Constitutional Law and Public Opinion" 1986, 769).

This quote references Rehnquist's esteem for majoritarianism. He argues that contrary to popular belief Supreme Court justices do take public opinion into account when they make decisions. This is important because Rehnquist would argue that it is yet another constraint placed on Court members to make rulings in line with democratic theory, rather than their own personal preferences.

Cluster Two

The second cluster encompasses 19.05% of the text. The main words associated with this cluster were: governmental, freedom, individual, amendment, arrest, and enforcement. Examination of these sections also revealed four primary arguments associated with these sections. The largest one was Rehnquist's discussion of privacy which will be instructive for this paper. Rehnquist discussed the dilemma of balancing values in a society. When more freedom, in this context privacy, is given to individual citizens it becomes more difficult for the government to enforce order or keep people safe. There is always a tradeoff:

> The second shortcoming seems to me to be a failure to recognize the extent to which many claims of privacy, if accepted, would be established at the expense of other competing values, such as the interest in effective law enforcement...In Hitler's Germany and Stalin's Russia, there was very efficient law enforcement, there was very little privacy, and the winds of freedom did not blow. But there is ultimately a paradox involved if we are both to increase the extent of government regulation of our lives and to place increasing difficulties in the path of governmental enforcement of these regulations ("Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?" 1974, 21).

Rehnquist then went on to break privacy down into two main categories. First is what he called the "core area of privacy," which he defined as "freedom from unauthorized oversight or observation." He argued that this was the kind of privacy that is found to be protected by the Fourth Amendment (1974, 3). However the second category of privacy that we refer to today is an evolution of the first category. Rehnquist said about this new form of privacy:

> Protected right of privacy prevented the state from prohibiting a doctor from performing an abortion on a pregnant woman, at least during the first three months of her pregnancy. In these cases, I would suggest, the right of privacy being espoused is a quite different right from the traditional fourth amendment concept of privacy. For here the constitutional ban is not upon governmental intrusion into private papers or governmental entry into a private dwelling house; it is a ban on legislative regulation of an entire area of conduct. In the case of an abortion, the woman who becomes pregnant, consults a doctor, and then proceeds to undergo a surgical procedure designed to abort the fetus is likewise engaging in a transaction involving a number of people other than herself; her interest is not in confidentiality but in the right to have the operation performed. I think that for purposes of clarity and analysis it would be far better to recognize that this second category of 'privacy' claims involves a series of relationships thought to be

> sufficiently intimate that the government is prohibited from substantively regulating them (1974, 5).

The second component of this cluster was Rehnquist's allusion to his belief in originalism or seeking out the intent of the Framers when interpreting the constitution. He said: **"**In philosophy, of course, we may hypothesize as to what we believe desirable, whereas in deciding questions of constitutional law we judges must take what the Framers have given us. But it would be foolish to suggest that the single sentence comprising the first amendment to the Constitution by its own language answers all of the questions which have been decided under it; judges will necessarily have to resort to at least the philosophical beliefs which motivated James Madison and others who drafted and adopted the Bill of Rights in fleshing out the language of the first amendment" ("The First Amendment: Freedom, Philosophy and the Law" 1976, 2).

The third component of this cluster was Rehnquist's reference to his belief in majoritarianism and legal positivism, he said: "When amendments guaranteeing individual rights against governmental abridgment have been added to the Constitution, they have been added by the process of amendment which is an exercise in a particular form of majority rule prescribed by the Constitution itself" ("Government by Cliché" 1980, 392). For Rehnquist, the process is very important in ensuring democratic government and one of those processes is that the will of the majority be followed.

Cluster Three

The third cluster encompasses 12% of the text. The primary words associated with this cluster were: senate, trial, judiciary, judicial, Chase, and impeachment. The main component of this cluster is one that encompasses three interrelated ideas. This component discusses the independent nature of the judicial branch, the role of judicial review and what these two ideas

say about the democratic nature of the Court. Rehnquist discussed in the text that the Founding Fathers were successful in creating an independent judicial branch. However he argued that the dilemma that arose was the fact that the Court gave itself the power of judicial review in *Marbury* v. *Madison* (1803). With the Supreme Court now able to strike down legislation written by the legislative or executive branch, some question whether the Supreme Court is still a democratic institution. Rehnquist opined similarly, "Yet an independent judiciary, which has been given such latitude as the loose language of the fourteenth amendment allows, runs the risk that its highest court-the Supreme Court of the United States-may turn into nine platonic guardians…each of them totally independent of public opinion or the will of the people." ("Dedicatory Address: Act Well Your Part: Therein All Honor Lies" 1980, 985). However Rehnquist argued that ultimately the Constitution is the check on the power of the judiciary:

> Under the familiar principle of judicial review, the courts in construing the Constitution are, of course, authorized to invalidate laws that have been enacted by Congress or by a state legislature but that those courts find to violate some provision of the Constitution. John Marshall's justification for judicial review makes the provision for an independent federal judiciary not only understandable but also thoroughly desirable. Since the judges will be merely interpreting an instrument framed by the people, they should be detached and objective. Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light ("The Notion of A Living Constitution" 1976, 695).

In this quote Rehnquist referenced majoritarianism and originalism by arguing that the will of the people is upheld when judges act as guardians of the Constitution, through utilizing their power of judicial review to keep the other branches of government in check.

Cluster Four

Cluster four encompasses 18.7% of the text analyzed. The main words associated with this cluster were: bill, Constitution, people, government and right. There are two main components included in this cluster. The largest one is the notion of individual rights in

American society. Rehnquist's main frustration was with the idea that the Constitution is a "charter which only guaranteed rights to individuals against the government" ("Government by Cliché" 1980, 379). He argued that the Bill of Rights can be described as such but the Bill of Rights is not the entire Constitution, nor should it be equated as such. Judges who view the Constitution through this lens often see it as their duty to protect individual rights. However Rehnquist held a different view:

> The Supreme Court of the United States, in deciding a case in which individual rights are pitted against the claim of the national government or of state governments to regulate individual conduct, 'upholds' the Constitution by simply holding the balance true to the best of its ability. To suggest that it should 'tilt' that balance in favor of individual rights, or in favor of governmental authority, breaches faith with the assumptions upon which the Constitution was adopted and upon which the Supreme Court has to the best of its ability operated for nearly two centuries. It is no more accurate to say of our Court that it is the ultimate guardian of individual rights than it is to say that it is the ultimate guardian of national authority or of states' rights. Its function is to decide among these conflicting claims as truly and accurately as it can in accordance with a fundamental charter and later' amendments which have been adopted by the source of all governmental authority-the people of this country (1980, 379).

Another misconception that Rehnquist addressed in this cluster was the claim that the Supreme Court ought to right society's ills, he argued that it was not the Court's role to "…solve a social problem simply because other branches of government have failed or refused to do so" ("A Notion of a Living Constitution" 1976, 694). He continued, "When these branches overstep the authority given them by the Constitution, in the case of the President and the Congress, or invade protected individual rights, and a constitutional challenge to their action is raised in a lawsuit brought in federal court, the Court must prefer the Constitution…"(1976, 696).

The second component present in this cluster was an allusion to Rehnquist's moral relativism and majoritarianism. For example, Rehnquist argued that "If such a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these

safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people" (1976, 703).

Cluster Five

The fifth cluster encompasses 23.84% of the text. The main words associated with this cluster were: justice, federal, opinion, decide, case, appeal, and court. The component of this cluster is comprehensive, relating to three interrelated concepts: jurisdiction, federalism, and originalism. According to Rehnquist, "Federalism…requires continued sensitivity so that federal courts do not cause friction by interfering with the legitimate interests of State court systems" ("Welcoming Remarks: National Conference on State-Federal Judicial Relationships" 1992, 1657). He continued by arguing that even though Article III is vague about the exact role of the Supreme Court, "…the Framers provided two important guideposts. Federal courts were intended to complement state court systems, not supplant them. And federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not" ("Seen in a Glass Darkly: The Future of the Federal Courts" 1993, 5).

Observations

Judicial scholars have argued that Rehnquist often exhibited five main themes that can be combined to be called his judicial philosophy: legal positivism, moral relativism, majoritarianism, originalism and federalism. Based on the analysis conducted by T-lab, many of these established findings are confirmed. For example, all five components that the scholars discussed were evidenced in the T-lab output. Interestingly though there are some components,

based on the number of times they are mentioned, that seem to have been more important to Rehnquist. For example, based on the analysis above Rehnquist emphasized federalism and originalism more frequently than some of the other components, such as legal positivism.

Rehnquist also presented a consistent judicial philosophy based on the fact that throughout the articles he wrote, certain themes were consistently emphasized. Another interesting observation is that the components of Rehnquist's philosophy appear to be connected to some degree. Viewed in this manner, as an encompassing whole, it is easier to see an overarching theme across Rehnquist's philosophy – namely, restraint. Rehnquist espoused a prescription for a judge that would place constraints on their ability to make rulings based on their subjective political preferences. First, Rehnquist placed particular emphasis on history, and the roles, duties and functions of the Supreme Court and Supreme Court justices. For Rehnquist, justices ought to be impartial, simply interpreting the Constitution based on its language and the intent of the Framers at the time of ratification. This is the only method that will ensure that individual justices' values do not dictate the outcome of their decisions. It is clear based on his discussions of federalism that he believed in a limited role for the Supreme Court, and more power of jurisdiction to State courts and legislatures. Second, he also emphasized the importance of the democratic process -- the people are the ultimate rulers and the opinions of the majority should be followed in order to ensure the United States remains a democracy. These components in combination give the Supreme Court a restrained role in the American political system. This is important because restraint is often times related to the legal model of decision making, where as activism is often times related to the attitudinal model.

Expectations

Based on these findings I expect that Rehnquist will focus his disagreements with personal privacy rights on the fact that the exact terminology is not found in the Constitution and that there is little evidence to support that it was the intention of the Framers. He will also defer to the states to make the decision to either allow or disallow abortion or the right to die. The arguments he makes will be less emotional, not based on the life of a potential human being or the suffering of a person in a vegetative state, but they will focus instead on the proper process by which to decide these kinds of matters. The process was very important to Rehnquist as proven by his belief in majority rule and moral relativism, laws are legitimate when they are created by the correct process as prescribed in the Constitution, not based on what is morally right or wrong. In summary, I expect to find evidence of the components of his judicial philosophy in the decisions he made on personal privacy cases. Psychologists would agree arguing that political figures, like judges, who clearly define their philosophy in public may be more likely to adhere to this philosophy: "There is a large literature in psychology which demonstrates that publicly committing oneself to a certain position leads to consistency in action. Therefore, a judge who publicly endorses a given judicial philosophy may be more likely to follow that philosophy faithfully, even when it conflicts with his ideology" (Benzoni and Dodrill 2009). Rehnquist was outspoken about his judicial philosophy and thus it can be reasonably expected that he will follow his philosophical beliefs more than his subjective political preferences.

Chapter 5: Analysis of Rehnquist's Personal Privacy Decisions

This chapter focuses on a content analysis of the 11 opinions Rehnquist wrote on personal privacy rights during his tenure on the Court. It was conducted in order to see the degree to which his judicial philosophy influenced his decision making and to evaluate his overall consistency. The right to privacy is a contentious issue in American society with an interesting history as to how it came to be defined as fundamental by the Court (Ball 2002). In order to aid in understanding the arguments that Rehnquist made about privacy, I believe it is important to begin with a brief history of how the Court has decided personal privacy issues over time.

A History of the Court's Decisions on Personal Privacy Rights

The Ninth Amendment: The enumeration in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people.

The Fourteenth Amendment (Section 1): No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without the due process of law.

These two amendments to the Constitution are the linchpins that have secured a right to privacy for American citizens. The controversy that arises is that the word privacy is never actually mentioned in these amendments, but judges have interpreted these amendments, along with others in the Bill of Rights to create a "zone of privacy" that protects citizens against government intrusion on decisions that are considered private.

In order to better understand the reasoning and justifications that Rehnquist used in his opinions on personal privacy cases it would be instructive to provide greater context by looking at how the right to privacy was first defined by the Court. This section will include a brief

synopsis of the key cases and key areas explored in the creation of the right to personal privacy. Personal privacy rights encompass a myriad of issues. Political scientist Martin Belsky defines them this way, "…constitutional protection of certain personal decisions, especially those involving family, sexual, and reproductive choices made by an individual against governmental intrusion. [More specifically] contraceptive devices, abortion, [the] right to marry, [the] nature of the family, [and the] right to die" (2000, 43). Several important questions arose when the Supreme Court ruled on these issues. Primarily, the question is whether the right to privacy is a fundamental right protected by the Constitution. In order for a right to be defined as "fundamental" the Court looks back through history at the established legal tradition to see if this right is rooted there (Ball 2002, 9).

Another issue that arises in cases pertaining to privacy rights is a competition of political values. Judges must balance opposing values when deciding these cases. For example in privacy cases, freedom is pitted against order. The more freedom (privacy) that citizens are given, the less power government has to maintain order. Often in these cases, judges will balance a citizen's right to privacy and the state's interest in maintaining order. There are several steps that judges will go through in order to reach a decision in these cases. First judges must see if a citizen's rights were violated and second the state must present "compelling reasons" for why the law that represses said right was put into effect. If the state fails to present "compelling reasons" the law is deemed unconstitutional (2002, 20-21).

Marriage and Child-Rearing

In the early 1900s cases began to come before the Supreme Court which dealt with personal privacy issues. The first issues to be addressed were child-rearing and marriage. Beginning in 1923 in *Meyer* v. *Nebraska* parents were given authority to raise their children the

way they wanted to. This case specifically dealt with a Nebraska statute that made it illegal to teach in a foreign language in public schools. The law was upheld by the Court because they asserted that parents have the right to make decisions about the education of their children (2002, 127). The next case pertained to the right to marry. In the case *Loving* v. *Virginia* (1967) a Virginia statute the made interracial marriage illegal was struck down by the Court for violating the Fourteenth Amendment's equal protection clause (2002, 42). The next year in the case *Eisenstaedt* v. *Baird* (1968) a Massachusetts law outlawing the distribution of birth control to the unmarried was struck down as unconstitutional for violating the same provision of the Constitution. The majority found that distinguishing between married and single people violated the equal protection clause (2002, 87-89).

Abortion

Abortion remains to this day one of the most controversial issues in American society. In 1965 in the case, *Griswold* v. *Connecticut*, the Supreme Court struck down a Connecticut statute that made it illegal to distribute birth control devices. This case laid precedent for the *Roe* v. *Wade* decision in 1973 that made privacy a fundamental right and gave women the constitutional right to choose to have an abortion. The majority in *Griswold* found that while there is no exact language detailing a right to privacy, through combining the First, Third, Fourth and Fifth Amendments there was a "zone of privacy" which was protected by the Ninth Amendment and the due process clause of the Fourteenth Amendment. This right to privacy made citizens decisions pertaining to intimate matters free from governmental intrusion unless there was a compelling state interest for interference.

After *Roe* made a woman's right to choose an abortion a fundamental right, other issues resulted as a consequence: federal funding, minor's rights, and partial birth abortion. In *Planned*

Parenthood of Central Missouri v. *Danforth* (1976) the Court ruled that minors seeking abortions were not required to attain parental consent, but rather the decision ought to be left up to the minor and her physician. In *Bellotti* v. *Baird* (1979) the Court reaffirmed this decision, granting a parental bypass option. They ruled on a significant conflict that arises between the right of a minor to privacy and the right of a parent to raise their child (2002, 113).

Other legal questions surfaced following the *Roe* decision and one of the most controversial involved the degree to which states could restrict abortions. In *Roe* a trimester framework was created which gave states the ability to restrict abortions only during the third trimester. An Ohio statute was challenged and struck down for placing several restrictions on a woman's right to have an abortion in *Akron* v. *Akron Center of Reproductive Health* (1983) (2002, 103). A couple of years later in *Webster* v. *Reproductive Health Services* (1989) restrictions that a Missouri law placed on abortion were upheld (2002, 103). In a case famous for its division of the Court and the majority opinion's use of stare decisis, *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), Justice O'Conner created the "undue burden standard" which would test the constitutionality of abortion restrictions. This case also upheld the basic framework of the *Roe* decision (2002, 109). Specifically, the case pertained to a Pennsylvania law that restricted abortions – it was argued that these restrictions did not violate the Constitution because they did not impose an undue burden on the woman except for one that required a woman to get permission from her husband before attaining an abortion.

Lastly the issue of abortion methods came before the Court in the case *Stenberg* v. *Carhart* (2000). The Court struck down a Nebraska statute that banned partial birth abortion because it placed an undue burden on the woman seeking an abortion (2002, 115).

Homosexual Rights

Another important area of personal privacy rights are those relating to homosexual activity. This issue began surfacing in the Supreme Court in the 1980s but it remains a heated debate today centered on the right for homosexuals to marry. The question that arose after the *Loving* decision was whether or not the right of interracial couples to marry extends to homosexuals (2002, 60). The first case *Bowers* v. *Hardwick* (1986) pertained to a Georgia statute that outlawed homosexual sodomy. The Court decided that this law did not violate the right to privacy. After reviewing the legal and historic traditions, the right was not deemed to be fundamental (2002, 8). The next case took place in 1996. In *Romer* v. *Evans* an amendment was proposed in Colorado that protected against discrimination based on sexual orientation, the Court upheld the constitutionality of the amendment which was interpreted by some observers as a "step toward recognizing gays and lesbians as a suspect class" (2002, 28). In a more recent case, *Lawrence* v. *Texas* (2003), the Court struck down a Texas statute that made homosexual sodomy illegal, overruling the *Bowers* decision and making the activity legal in every state and a protected right by the Fourteenth Amendment.

The Right to Die

Another more recent debate has taken place of the extension of privacy rights to encompass a constitutional right to die. There are three categories that are encompassed in this issue. First, can a competent, terminally ill patient refuse life sustaining treatment? Second, can a loved one request on behalf of an incompetent, terminally ill patient to end life sustaining treatment? Third, can a physician assist a patient in ending their life (2002, 168)? In 1990 *Cruzan* v. *Director, Missouri Department of Health* was heard by the Court regarding a surrogate to request the removal of life sustaining treatment on behalf of their daughter who was in a persistent vegetative state. The State required that the family present "clear and convincing

evidence" that their daughter had indeed requested, prior to her accident, that she wanted her feeding tube removed. The Court ruled that this procedural rule was constitutional and that the family had not presented enough evidence, thus they could not request that their daughter's feeding tube be removed (2002, 177). *Washington* v. *Glucksberg* and *Vacco* v. *Quill* both took place in 1997 and pertained to physician assisted suicide. In these cases the Court made the distinction between "killing and letting die." They ruled that the due process clause did not grant a person the right to commit suicide or to assist someone in killing themselves (2002, 182; 193).

Methods

The purpose of this chapter is to analyze the opinions that Rehnquist wrote on personal privacy issues in order to calculate the impact that Rehnquist's judicial philosophy had on these opinions. I used T-lab to analyze the text of several opinions he wrote. The cases were selected from the Supreme Court Database which was created by political scientist Harold J. Spaeth. The years selected for study were 1972-2005 (Rehnquist's tenure) and those cases that were categorized as "privacy" cases were chosen for analysis. This produced a list of 88 cases. These cases were then narrowed to 44 which pertained to personal privacy. And finally 11 cases were selected for analysis where Rehnquist wrote an opinion or dissent. There are several limitations to this analysis, first is that 11 cases is a small dataset, however figure 5.1 (below) lists the total number of pages and words analyzed which will more adequately show the large amount of data that was tested. The chart also lists the case name, year it was heard and the specific issue that it pertains to.

Figure 5.1: Data Table

Case	Issue	Number of Pages	Word Count
Roe v. *Wade* (1973)	Abortion	7	2,228
Doe v. *Bolton* (1973)	Abortion	1	118
Carey v. *Population*	Minor's rights	2	720

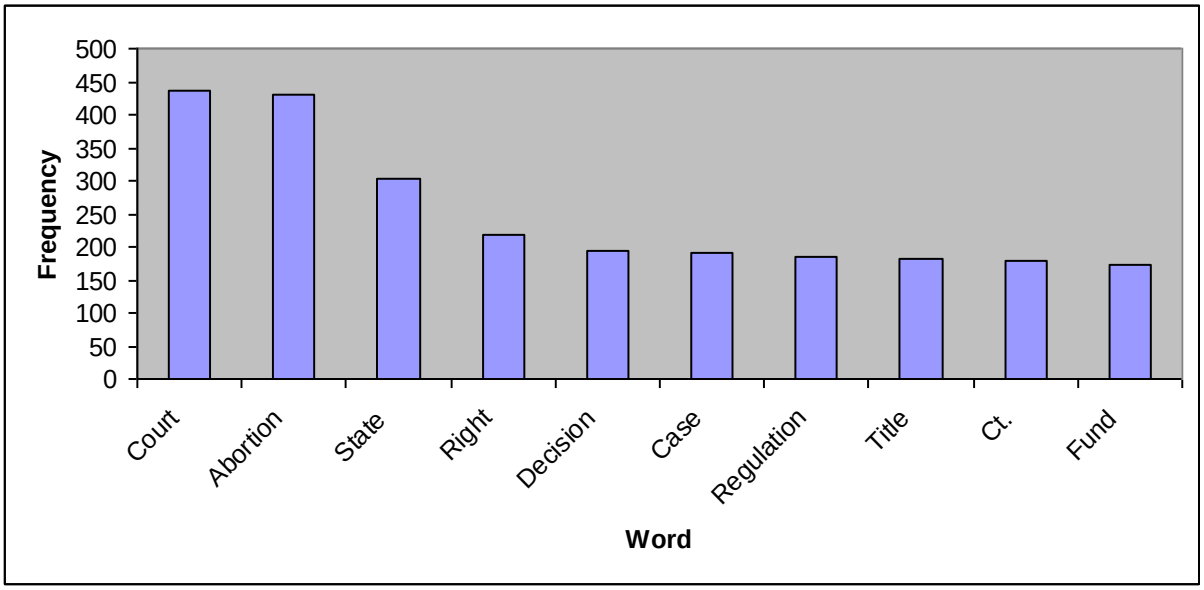
Services International (1977)			
Bellotti v. Baird (1979)	Minor's rights	1	102
Webster v. *Reproductive Health Services* (1989)	Funding abortion	20	7,873
Cruzan v. *Director, Missouri Department of Health* (1990)	"Right to die"	10	6,065
Rust v. *Sullivan* (1991)	Funding abortion	14	8,029
Planned Parenthood v. *Casey* (1992)	Abortion	27	11,939
Washington v. *Glucksberg* (1997)	Physician assisted suicide	16	7,416
Vacco v. *Quill* (1997)	"Right to die"	5	2,740
Stenberg v. *Carhart* (2000)	Partial-birth abortion	1	126
Total Cases 11	**--**	**Total Pages 104**	**Total Words 47,356**

The second limitation is that data on other justices who wrote opinions in these cases were not analyzed and thus there is no control variable with which to compare the results found on Rehnquist. I believe that this analysis is still relevant however as it offers an in depth study of Rehnquist and leaves room for future research of comparing these results with other justices.

Analysis of All Personal Privacy Cases

The first test will analyze the aggregate results of all 11 opinions. Thus the texts of the opinions were condensed into one document and analyzed using T-lab. In order to evaluate the degree to which Rehnquist's judicial philosophy influenced the opinions he wrote in these cases a list of the most commonly occurring words was produced. In figure 5.2 the top ten most frequently used words are presented in a bar chart.

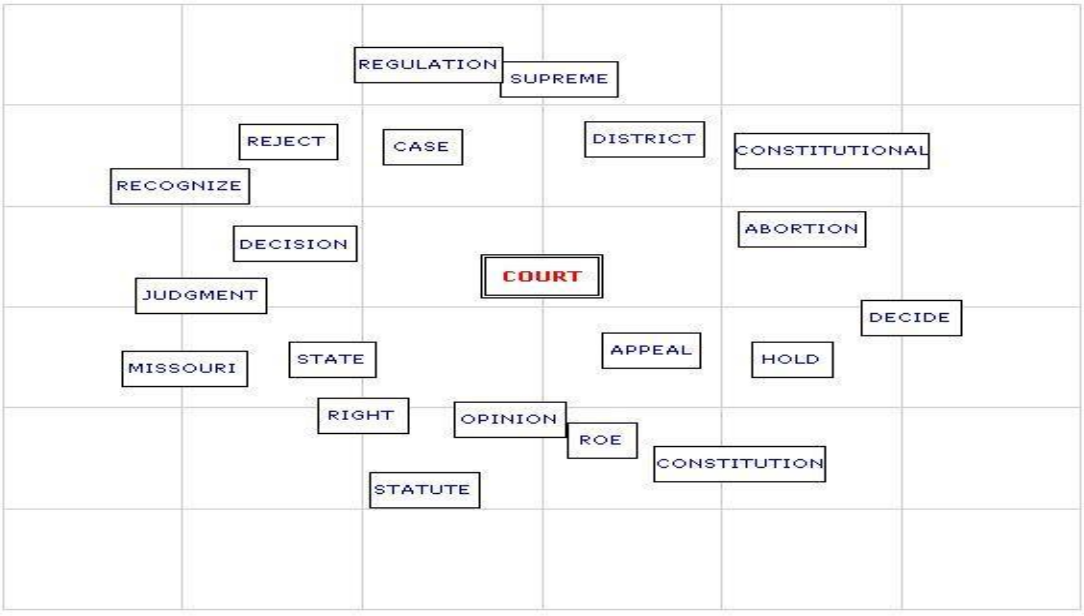
Figure 5.2: Word Frequencies in Rehnquist's Personal Privacy Decisions



Interestingly "court" was the word that Rehnquist used most frequently in his articles describing his judicial philosophy and it was the word the he used most frequently in the opinions he wrote on personal privacy as well, citing it 436 times. Right away this shows consistency between his judicial philosophy and the decisions he made on personal privacy issues because the same word is used most frequently in both instances. "Abortion" was the second most commonly cited word, it was mentioned almost as frequently as "court," 430 times. "State" was mentioned 303 times, followed by "right" at 217 and "decision" rounding out the top five with 194 mentions. Several important dilemmas that present themselves in personal privacy cases are evidenced in Rehnquist's word choice. First is the balancing act between a person's "right" to privacy and the "State's" interest in protecting life. The second dilemma is the use of federal funds for abortions, as evidenced by the words: "regulation," "title," and "fund." The only component of his judicial philosophy that seems to be present in this output is federalism, due to the fact that Rehnquist used the word "State" and "regulation."

In order to provide greater context, word patterns were analyzed. The word that was used most frequently, "court," is located in the middle of the diagram. The distance between the outlying words show how closely the words are associated with "court" and one another.

Figure 5.3: Word Patterns in Rehnquist's Personal Privacy Decisions



Noticeably in this chart all the words are relatively close to one another. However "appeal" shares the closest association to the main word, "court", this is straightforward as the Supreme Court is an appellate court. More components of Rehnquist's judicial philosophy become evident in this chart, for example the theme of federalism is present again but now "statute" and "Constitution" are also present, revealing originalism and legal positivism. There is still no evidence of majoritarianism or moral relativism. However one could argue that the word choice and word association tests are not adequate to find evidence of moral relativism because it presents itself through the structure of an argument. However it might also be said that the lack of emotional or value laced language could be evidence of moral relativism in and of itself. However these findings are only based on the top ten words that Rehnquist most frequently used. Broader analysis of themes and context will provide greater insight into whether or not

Rehnquist's opinions of personal privacy were influenced by components of his judicial philosophy.

Thematic Context

In order to better illustrate the relationship between Rehnquist's judicial philosophy and his personal privacy decisions it is necessary to analyze his opinions more holistically in order to decipher reoccurring themes and patterns that appear in the text of his decisions. Unlike the section on Rehnquist's judicial philosophy, the clusters that T-lab produced for the personal privacy cases were difficult to read and did not produce coherent results. Thus I decided to utilize the methods that countless other legal scholars used to explore a judge's judicial philosophy: I analyzed the opinions by reading through them carefully and looking for evidence of the components of Rehnquist's judicial philosophy. Whether or not these components are present will also speak to the consistency of Rehnquist's method of deciding cases.

Thus I began my analysis by reading the 11 opinions that Rehnquist wrote on personal privacy cases to study further whether or not there was evidence that Rehnquist's judicial philosophy was influencing the way he chose to decide these cases. After reading each case it became evident that the components that define Rehnquist's judicial philosophy were evidenced in his opinions on personal privacy cases. Excerpts were selected from the cases in order to illustrate the way that the components of his judicial philosophy became apparent in the opinions he wrote.

Moral Relativism

The topics involved in personal privacy decisions are some of the most controversial and divisive issues in American society. Thus one might expect that these sorts of issues would illicit judges to vote with their preferences more than any other type of case. However one of the

components that has been identified as part of Rehnquist's judicial philosophy is moral relativism. Thus I expected that he would not be influenced by his moral or ethical beliefs about these issues. This is supported in several of the cases that he wrote opinions for. His entire argument in *Roe* v. *Wade* (1973) can be seen as illustrative of his moral relativism. In this dissent Rehnquist did not write about whether abortion was morally right or wrong. He also stayed away from emotional arguments against abortion, making little mention of the sanctity of life or the potential life that is being destroyed by abortion. Instead his dissent in this case took on the form that many of the opinions he wrote took. First he stated that the historical and legal traditions of America did not provide evidence of a "fundamental" right to privacy that encompasses a woman's right to have an abortion. When interpreting the due process clause of the Fourteenth Amendment, the Supreme Court decided that it protects fundamental rights that are "deeply rooted in this Nation's history and tradition" (*Washington* v. *Glucksberg* 1997, 8). This explains why in the majority of the opinions that Rehnquist wrote he began by arguing that there was no support for the Court deciding abortion or right to die cases for the states based on historical tradition: when the Fourteenth Amendment was ratified, many states had laws in effect that restricted abortion and yet the authors did not see them as conflicting with the Fourteenth Amendment. For Rehnquist this meant that they never intended it to address a right to privacy. Second he argued that the language of the Constitution did not provide evidence that the Fourteenth Amendment included a right to privacy, as the word is not used in the text. Third Rehnquist espoused that these types of decisions ought to be left up the states to decide. This skeleton of how Rehnquist wrote opinions remained consistent throughout the cases I reviewed. The reason that *Roe* presents such a clear illustration of his moral relativism is that his focus was not abortion and whether it was right or wrong, but instead he focused on the fact that the

Constitution is silent on the issue and thus it ought to be an issue that the states have authority to decide.

Originalism

As evidenced above Rehnquist interpreted the Constitution as an originalist. This was evidenced clearly in his dissent in *Roe*. Rehnquist believed that the Court's majority opinion in this case was an example of judicial activism where judges were making law instead of leaving that function up to the states. He said of the decision in *Roe*: "… [it] partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment" (1973, 3). Rehnquist believed that the role of a Supreme Court justice was really quite simple, they were to look at the historical and legal traditions of American society, look at the language of the Constitution and if that was too vague look for the intentions of the Framers. To Rehnquist, it was clear that the Framers never intended for abortion to be protected by the Fourteenth Amendment because it was ratified when there were statutes in place that restricted abortions (*Roe* v. *Wade* 1973). In *Carey* v. *Population Services International* (1977) he dramatically stated that the Founding Fathers and Civil War heroes did not risk their lives to have the Fourteenth Amendment stretched in order to protect the rights of minors to attain contraceptives (1). He argued that they would be appalled to see the Court interpret the Fourteenth Amendment in this way. In *Webster* v. *Reproductive Health Services* (1989) Rehnquist stated that the "*Roe* framework… [is] not found in the text of the Constitution…" and thus he discredited its legitimacy (14). Rehnquist stated explicitly in *Planned Parenthood* v. *Casey* (1992) that the abortion code that the Court was creating was "judge made constitutional law" because it was not tied to explicit language in the Constitution (8).

Majoritarianism

Rehnquist did not make that many explicit references to majoritarianism in his personal privacy opinions. He briefly alluded to it in the case *Webster* v. *Reproductive Health Services* (1989) when he countered a claim made in the majority opinion that it was the role of the Court to solve "politically divisive" issues (15). Rehnquist disagreed: "But the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not" (15-16).

Federalism

Federalism was the second largest component that Rehnquist made reference to in the opinions he wrote. The great debate that presented itself when Rehnquist discussed federalism was the conflict between a person's liberty and a state's interest in promoting order through protecting human life at any stage. Beginning with *Roe,* Rehnquist made the argument that abortion was a "legislative judgment" and not a judicial one (1973, 2). In *Webster* Rehnquist mentioned that the states had an interest in "protecting potential human life throughout pregnancy" (1989, 14). In *Cruzan* v. *Director, Missouri Department of Health* (1990) he again discussed the interests of the states but this time it was in reference to protecting life when it came to the "right to die" issue. Rehnquist argued that it was constitutional for the states to restrict certain behavior or actions in the interest of protecting the life of their citizens, particularly those who are most vulnerable. In *Casey* Rehnquist discussed that the Court had gone too far in restricting the states from making laws pertaining to abortion. He stated that, "under the guise of the Constitution, this Court will still impart its own preferences on the states

in the form of a complex abortion code...a woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but states may regulate abortion procedures in ways rationally related to a legitimate state interest" (1992, 17).

Legal Positivism

Legal positivism was the most repeated value found in the opinions that Rehnquist wrote. As stated previously, Rehnquist followed a formula when he wrote his decision in a case. He began by searching out the legal or historical traditions for a certain behavior. He then moved on to the language of the Constitution and the intent of the Framers. In *Roe* Rehnquist based much of his dissent on the fact that the legal tradition in America gave the States the power to make laws pertaining to abortion. In many of the cases Rehnquist discussed the legal doctrine of stare decisis. In *Webster* Rehnquist stated that he believed that stare decisis was an important part of the American legal tradition but that it holds less weight in Constitutional cases (1989, 14). This is consistent with what he stated during his confirmation hearings before the Senate and with what Riggs and Proffitt found in their 1983 article on Rehnquist's judicial philosophy. This lack of authority that Rehnquist gave to precedent is one factor that seems to be inconsistent with classifying him as a conservative jurist (599). The *Cruzan* opinion relied heavily on common law tradition and the evolution of privacy in the American legal system. Interestingly in *Casey* Rehnquist argued that reversing *Roe* would be consistent with the principle of stare decisis, arguing that a decision that was wrongly decided ought to be overturned: "We have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions" (1992, 12).

Conclusions

After this part of the analysis several conclusions can be reached. First, Rehnquist presented a consistent judicial philosophy in the articles that he wrote during his tenure on the Court. Second there is strong evidence to support the claim that his judicial philosophy shaped the opinions he wrote on personal privacy issues. Based on the themes present in his opinions, it becomes clear that he felt most strongly about legal positivism, federalism and originalism. He followed a precise formula when determining the constitutionality of a given issue. First he discussed the legal or historical traditions of America and whether or not they support the statute in question. Second he looked to the language of the Constitution and the intent of the Framers. Rehnquist made it clear that to him the role of a Supreme Court justice was limited to applying the language of the Constitution to cases that come before the Court and leaving the law making decisions up to the states. This makes reference to his belief in majoritarianism and the democratic process being what gives a law its legitimacy, not whether it is a morally correct action.

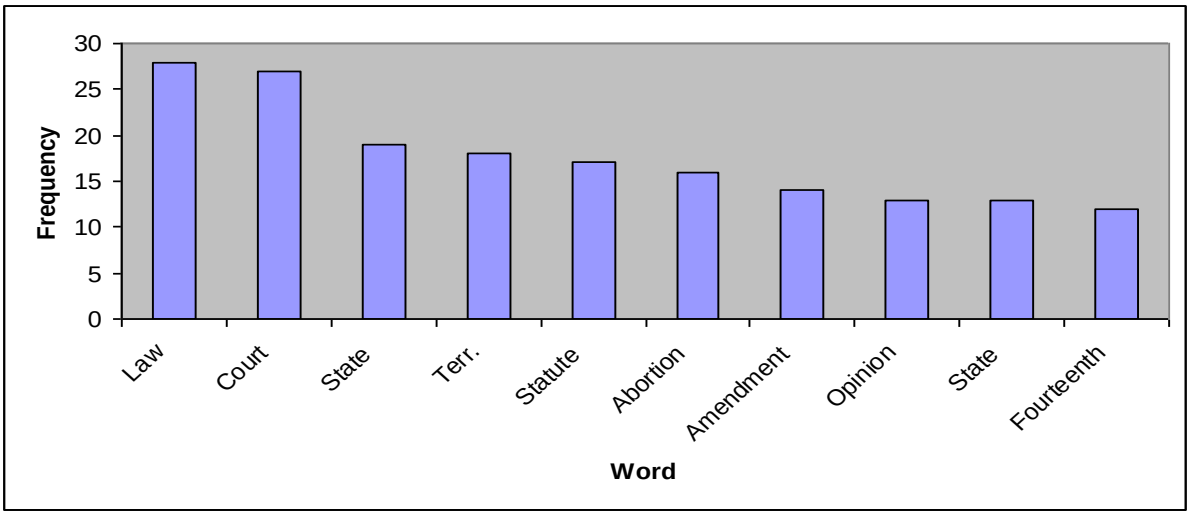
Individual Case Analysis

While studying the cases together presented some interesting findings, they fall short of presenting a completely accurate picture of whether or not Rehnquist's decisions on personal privacy cases were consistent and which components of his judicial philosophy were influencing his decisions. Thus the next part of the analysis will be to analyze the text of each opinion in T-lab. After running the opinions separately I analyzed each list that was produced for each opinion he wrote searching for similar words of patterns in order to show consistency or evidence of his judicial philosophy. Two of the cases, *Bellotti* (1979) and *Carhart* (2000), were too short for T-lab to produce word counts or a word association chart. T-lab was able to produce

a word list but not word association charts for *Doe* (1973), *Carey* (1977) because they are relatively short opinions as well.

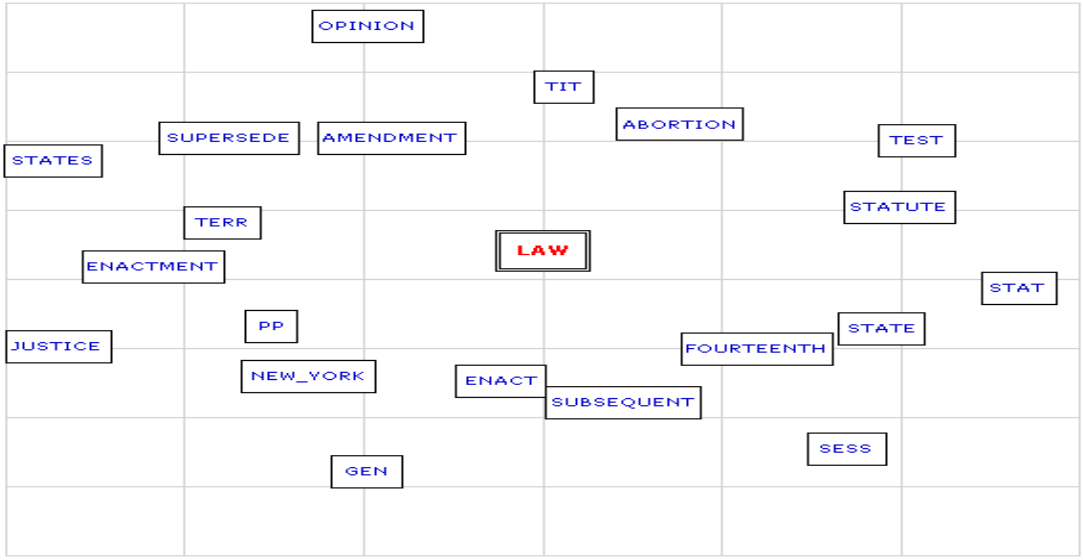
***Roe* v. *Wade* (1973)**

Figure 5.4: Word Frequencies in *Roe*



Roe is the case that gave women a constitutional right to have an abortion under the Fourteenth Amendment's due process clause. Rehnquist dissented in this case. The word that he used most frequently was "law," which he used 28 times. "Court" was a close second, used 27 times. Followed by "State," cited 13 times, "Terr.," 18 times and "statute" 17 times. "Terr." is legal citation so it doesn't carry any relevance to his judicial philosophy. However based on several words he used frequently (state, court, law, statute) there is a clear theme of federalism and legal positivism in this dissent. Also, his mention of the Fourteenth Amendment is an allusion to originalism. One of the main arguments that Rehnquist took up in *Roe* was with the language of the Constitution not explicitly expressing a right to privacy. As mentioned previously in this chapter Rehnquist's dissent in *Roe* relies heavily on moral relativism. However based solely on the words that are most frequently used there is no evidence of moral relativism or majoritarianism.

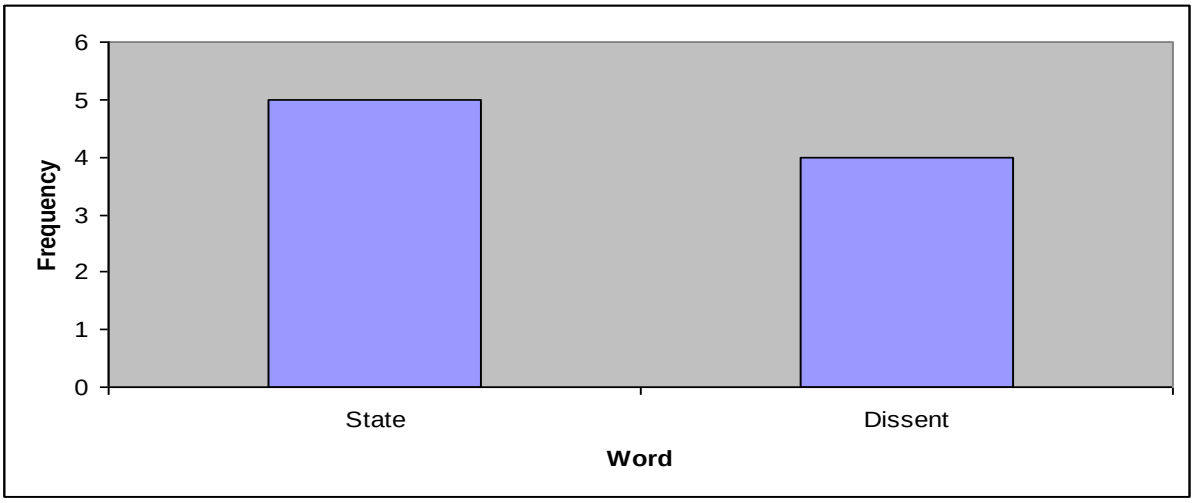
Figure 5.5: Words Patterns in *Roe*



The words are fairly evenly distributed around "law." The words that are located closest are "abortion," "Fourteenth," and "amendment." This is consistent with the word frequencies findings, that Rehnquist based his dissent in *Roe* on the language of the Fourteenth Amendment.

***Doe* v. *Bolton* (1973)**

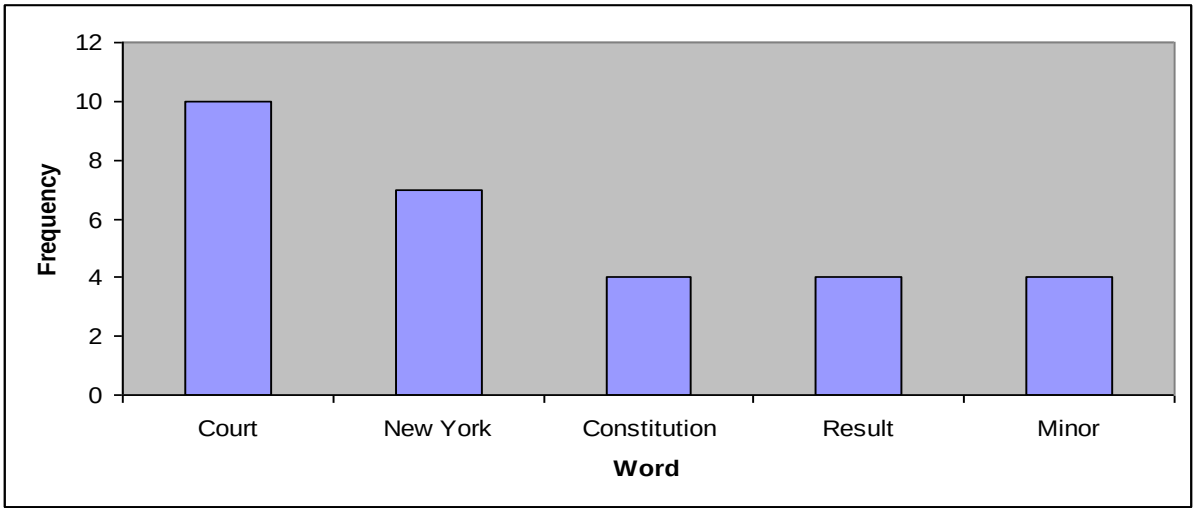
Figure 5.6: Word Frequencies in *Doe*



The *Doe* case also concerned a women's right to choose to have an abortion. Rehnquist wrote a short dissent, thus T-lab only produced a word count listing the two most commonly used words. "State" was used the most and it can be interpreted as an allusion to Rehnquist's belief in federalism.

***Carey* v. *Population Services International* (1977)**

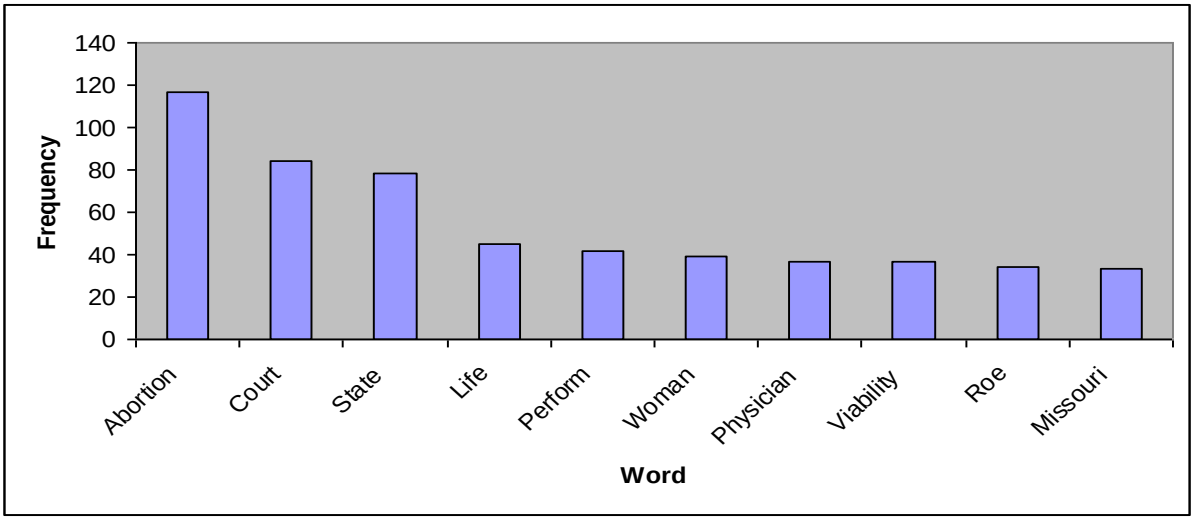
Figure 5.7: Word Frequencies in *Carey*



Carey concerned the constitutionality of a statute that made it illegal to sell non-prescription contraceptives to minors. In this case Rehnquist wrote a brief dissent. He used the word "court" most frequently, which is evidence of his legal positivism. The other most frequently used words also reveal evidence of other components of his judicial philosophy, for example, his reference to the state of "New York" is federalism and "Constitution" is originalism.

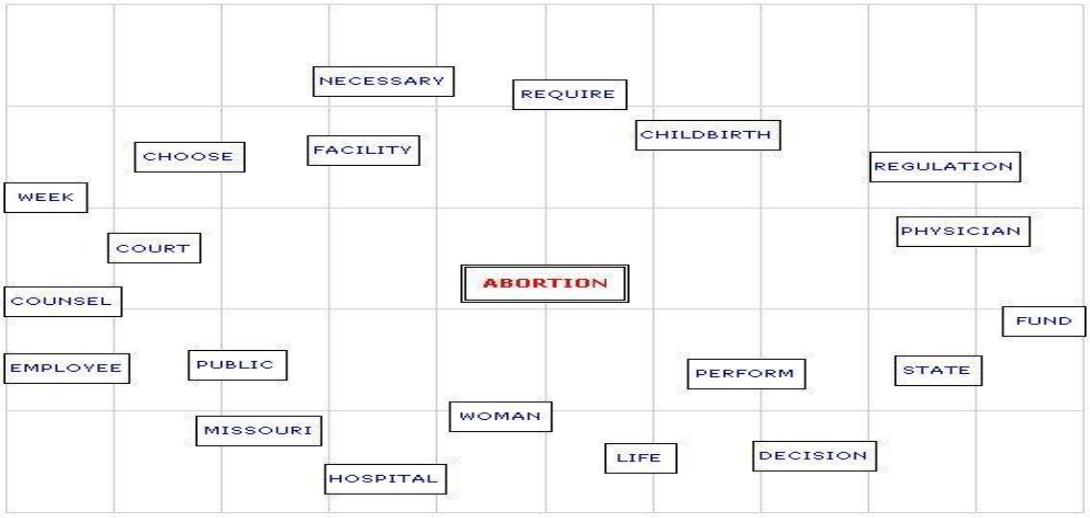
***Webster* v. *Reproductive Health Services* (1989)**

Figure 5.8: Word Frequencies in *Webster*



In his *Webster* opinion Rehnquist used the word "abortion" over 100 times signifying the issue that was before the Court in this case. More specifically the case tried to define the appropriate parameters of a State's ability to restrict abortions. The second most commonly used word was "court," used 84 times, "State," 78, "life," 45 and "perform" 42. Based on these words there is evidence of several components of Rehnquist's judicial philosophy present in this opinion: federalism and legal positivism. Notably absent is any evidence to support the presence of the component of originalism, moral relativism and majoritarianism.

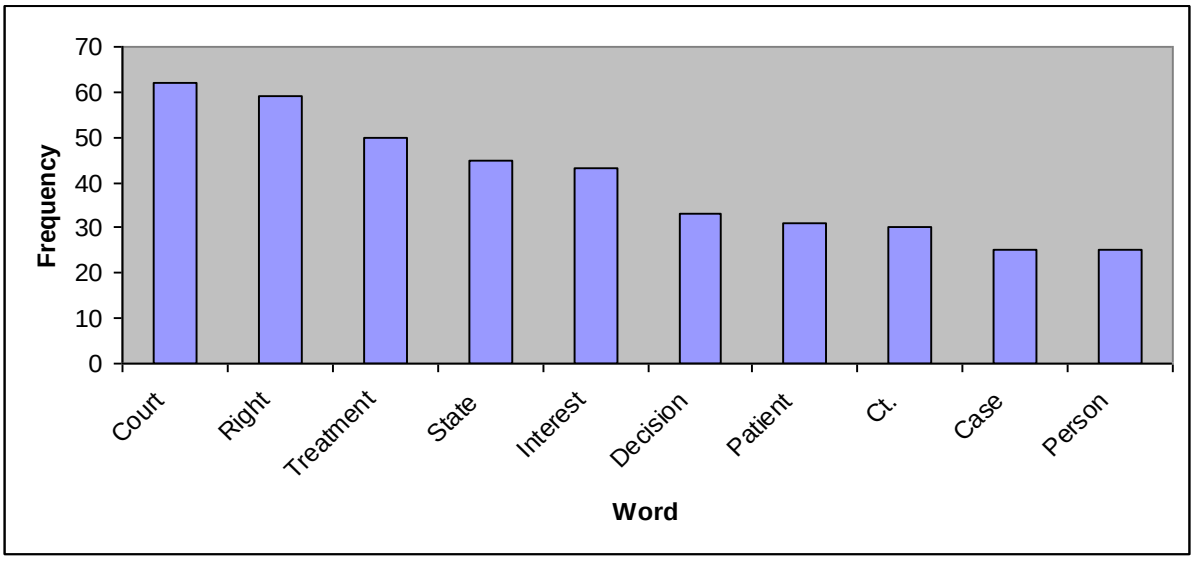
Figure 5.9: Word Patterns in *Webster*



"Abortion," the most frequently used word, is most closely associated with "woman," and "perform." Some of the outliers are interesting, such as, "public," "court," and "state" which give evidence of several components of his judicial philosophy: majoritarianism, federalism and legal positivism. However originalism and moral relativism are still absent.

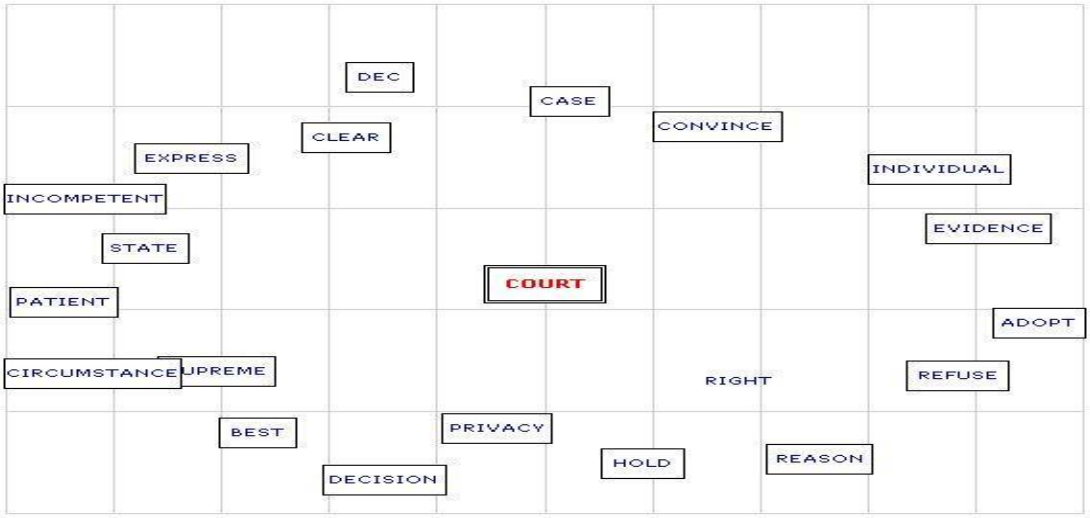
***Cruzan* v. *Director, Missouri Department of Health* (1990)**

Figure 5.10: Word Frequencies in *Cruzan*



Cruzan was a case that pertained to the "right to die." In his opinion Rehnquist used the word "court" the most, 60 times. "Right" was a close second cited 59 times, followed by "treatment" at 50, "State" 45, and "interest" 43. These words provide evidence for two components of his judicial philosophy: federalism and legal positivism. However there is no evidence of originalism, moral relativism or majoritarianism influencing the opinion he wrote.

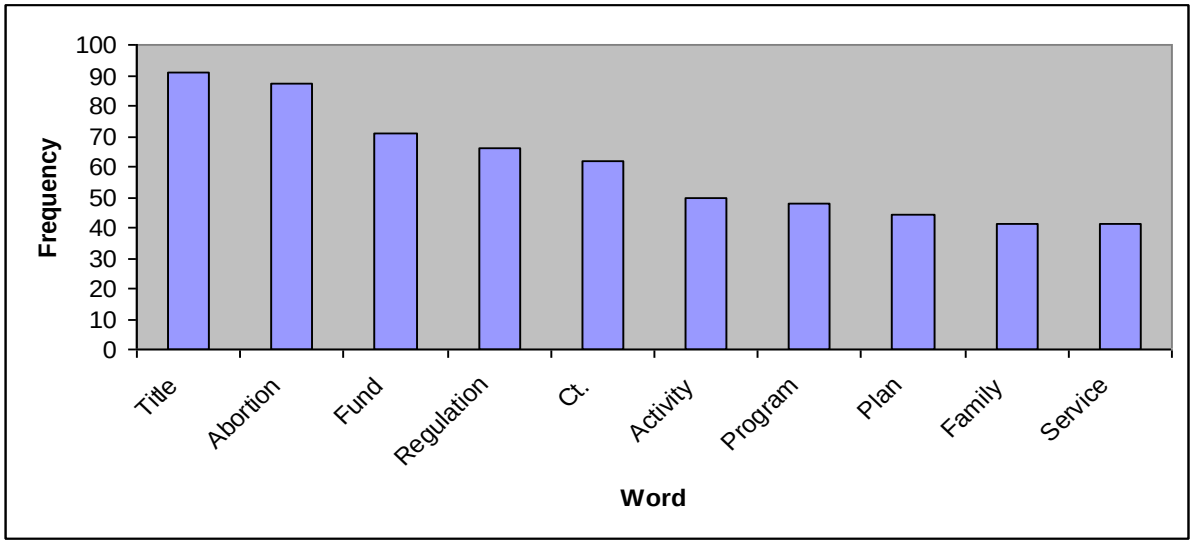
Figure 5.11: Word Patterns in *Cruzan*



In this word association chart the words are widely dispersed, showing very little relationship between them. There are many words that relate to proof (evidence, reason, hold, express, clear, convince), which can be related to the legal system or legal positivism. There is also evidence of federalism based on the use of the word "state." There remains no evidence of majoritarianism, moral relativism or originalism in this opinion.

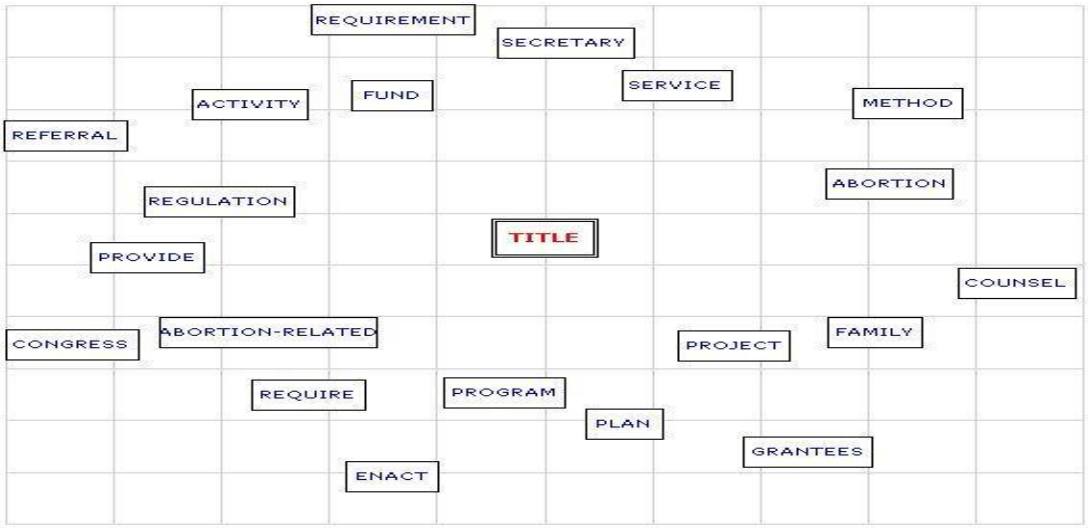
***Rust* v. *Sullivan* (1991)**

Figure 5.12: Word Frequencies in *Rust*



In *Rust* the major issue was whether or not a federal funding project called, Title X, could exclude funding for abortions. In the opinion Rehnquist used the word "title" most frequently, citing it 91 times. He used the word "abortion" 87 times, followed by "fund" at 71, "regulation" 66 and "Ct" 62. "Ct." is another legal citation term and thus has no connection to Rehnquist's judicial philosophy. The components of federalism and legal positivism are present due to the argument surrounding funds being distributed by the federal government to the states by law. However there is no evidence, based on these top ten words of other elements of Rehnquist's judicial philosophy being present.

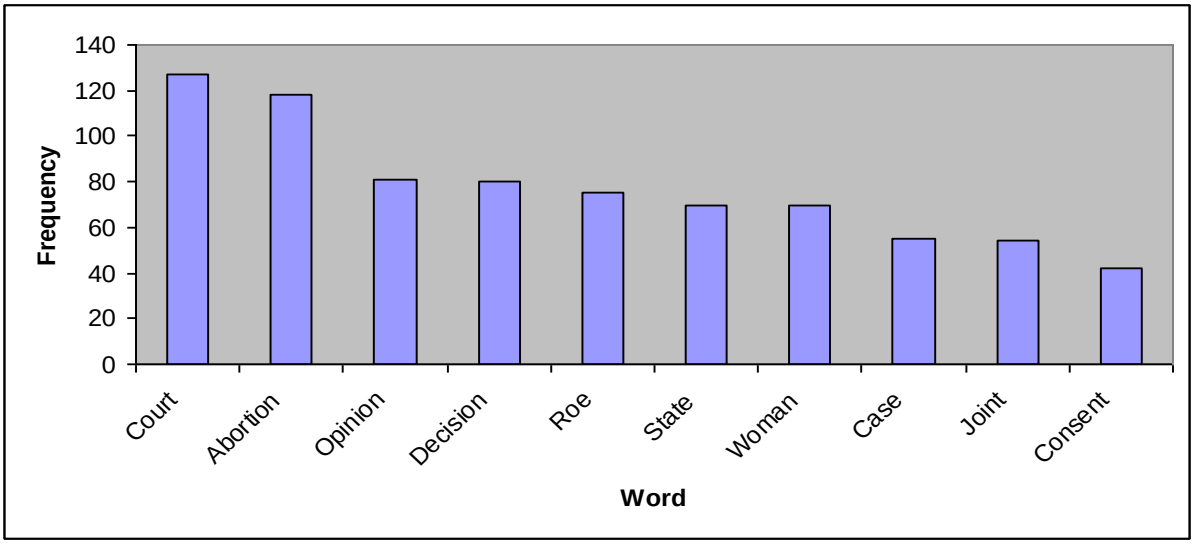
Figure 5.13: Word Patterns in *Rust*



The main word "Title" is not closely associated with other words. Based on several words for example: "congress," "program," "project," "secretary," "requirement," "regulation," there is evidence of federalism and legal positivism. However the other components are again absent.

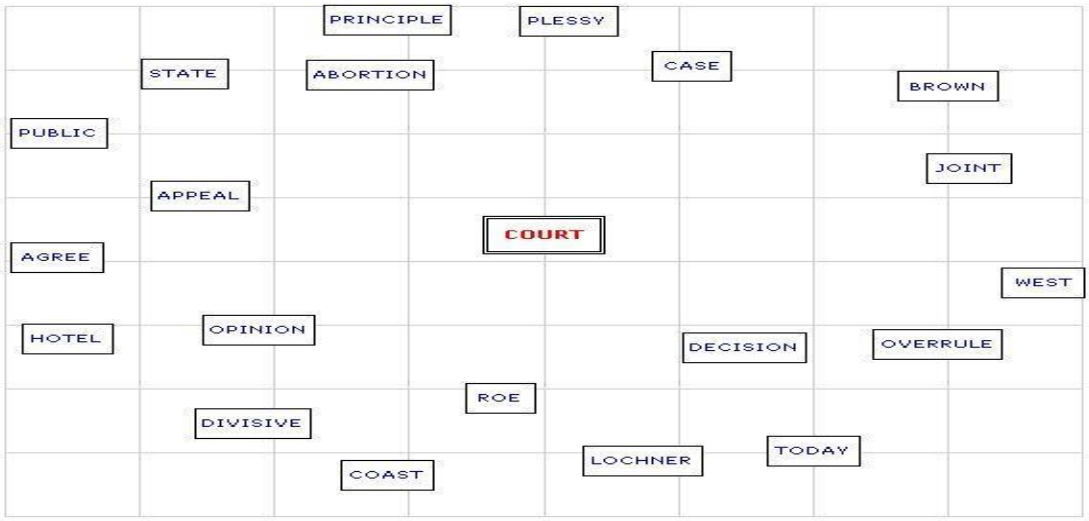
***Planned Parenthood* v. *Casey* (1992)**

Figure 5.14: Word Frequencies in *Casey*



In *Casey* Rehnquist dissented because multiple portions of a State law that regulated abortions was struck down by the Court. The word "court" once again showed up most frequently, over 120 times. "Abortion" at 118 was the second most frequently used word, followed by "opinion" 81 "decision" 80 and "Roe" 75. Based on these words there is evidence of legal positivism and federalism. However originalism, majoritarianism and moral relativism do not seem to be present once again.

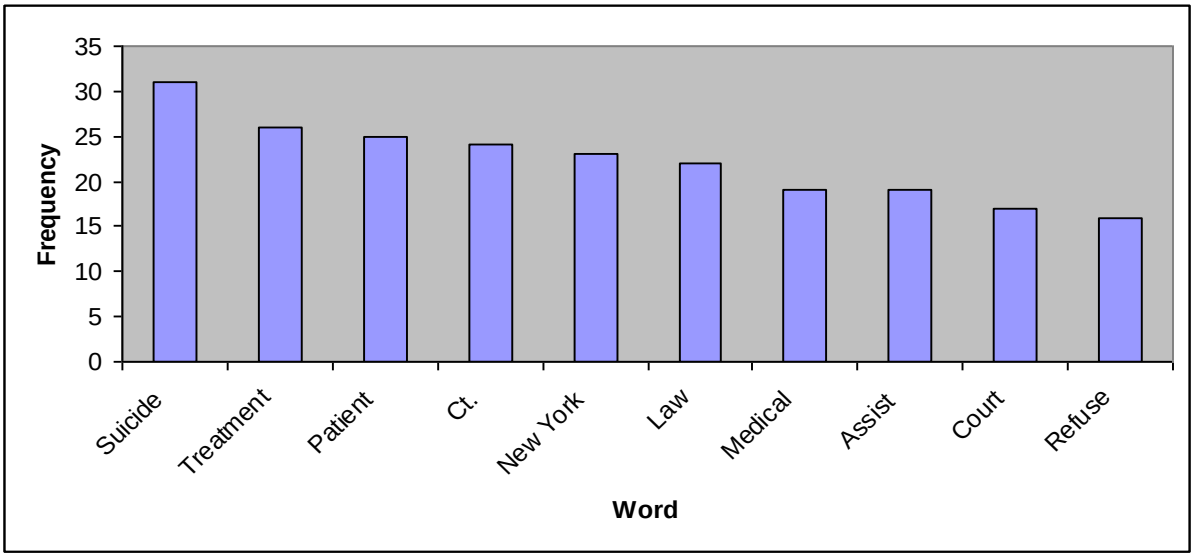
Figure 5.15: Word Patterns in *Casey*



These words on this chart are extremely spread out, showing very little association between words. There is strong evidence of legal positivism in this dissent as several other cases are cited, *Plessy, Brown, Lochner* and *Roe.* There is evidence of federalism by Rehnquist's use of the word "state." This chart does not offer any evidence of originalism, moral relativism or majoritarianism.

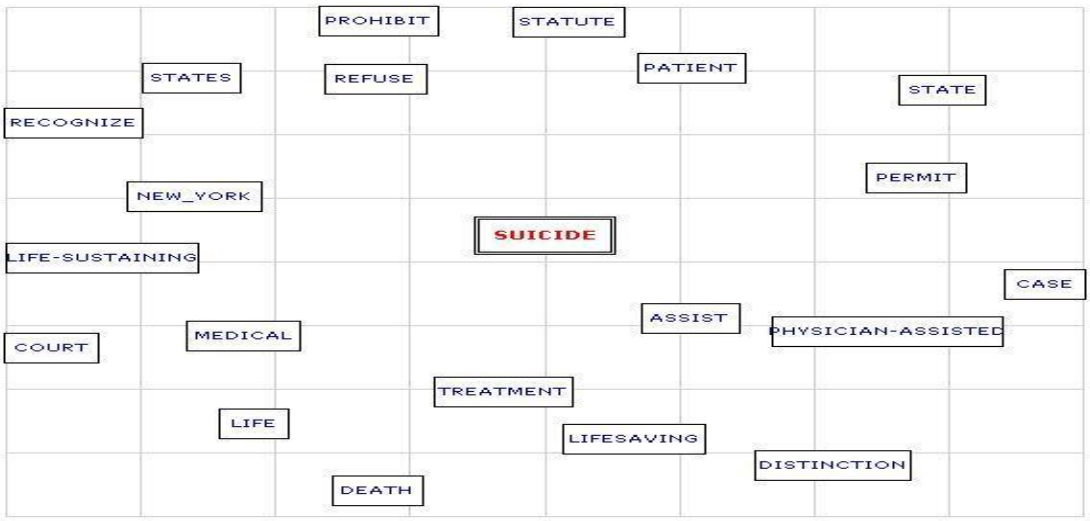
***Vacco* v. *Quill* (1997)**

Figure 5.16: Word Frequencies in *Vacco*



This case pertained to the constitutionality of physician assisted suicide. Thus it makes sense that Rehnquist's used the word "suicide" most frequently, over 30 times. Followed by "treatment" at 26, "patient" 25, "ct.," 24, and "New York" 23 times. Based on the words he used there is evidence of the components of legal positivism and federalism. However moral relativism, majoritarianism and originalism are absent.

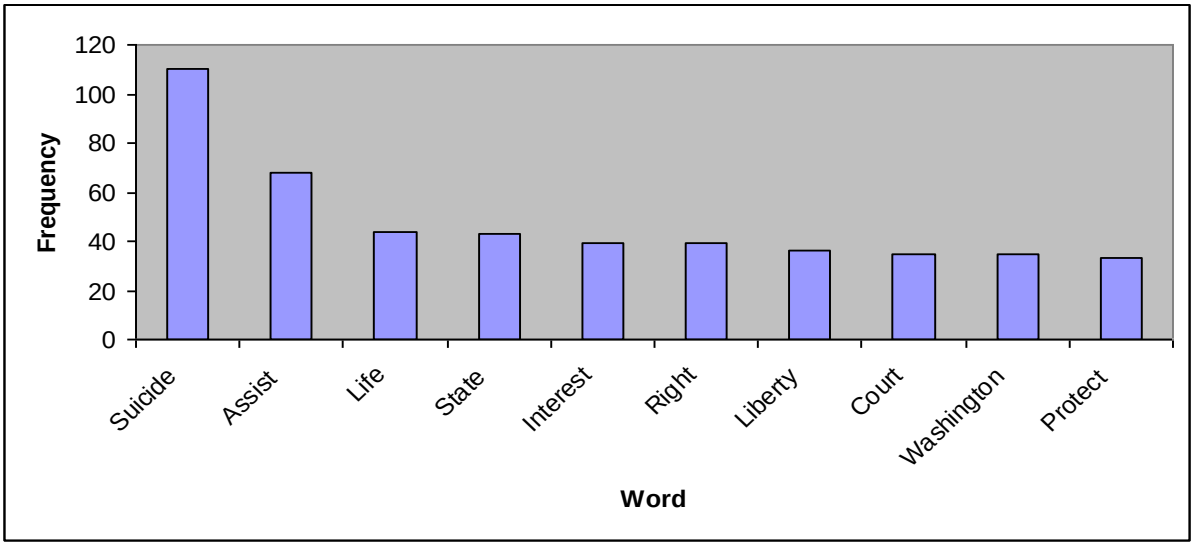
Figure 5.17: Word Patterns in *Vacco*



The closest association is "assist." The other words are quite spread out. There is evidence of federalism and legal positivism, as the word frequency chart conveyed. There is still no evidence of the other components of his philosophy.

***Washington* v. *Glucksberg* (1997)**

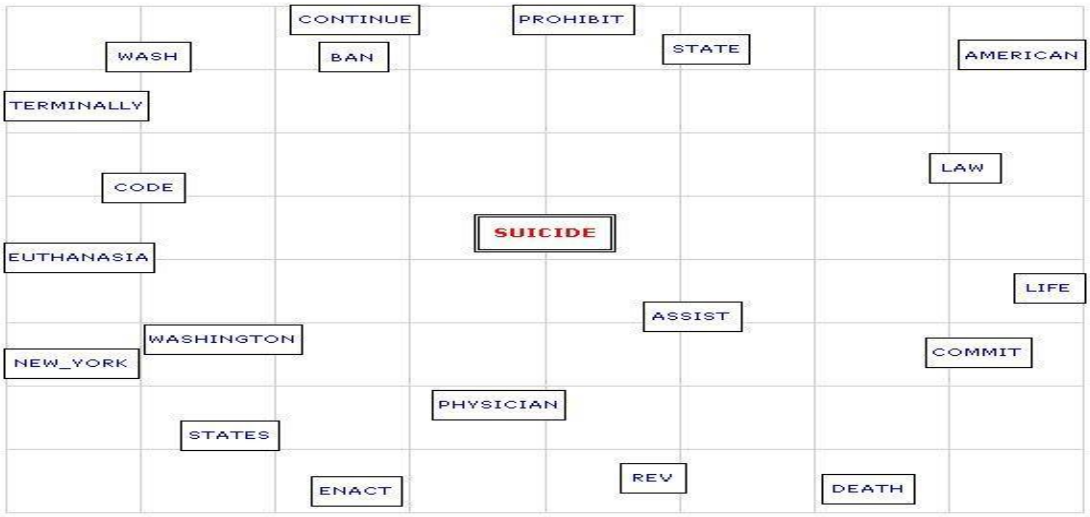
Figure 5.18: Word Frequencies in *Glucksberg*



Glucksberg was another case pertaining to the constitutionality of physician assisted suicide. In this opinion Rehnquist used the word "suicide" the most, over 100 times, this was

followed by “assist” 68, “life” 44, “state” 43 and “interest” at 39. These words convey evidence of the component of federalism.

Figure 5.19: Word Patterns in *Glucksberg*



The closest association is “assist.” Based on the greater context supplied in this chart there is evidence of legal positivism and federalism. He used the words: “code,” and “law.” However the other components remain absent.

Observations

Every single output showed the component of federalism. Legal positivism showed up in all but *Doe*, which could be explained by how brief it is. Based on these outputs only *Casey* and *Roe* clearly advocate originalism. Majoritarianism was explicitly mentioned in *Webster*, but, generally speaking, when Rehnquist espoused federalism, he was talking about majoritarianism as well. The two terms are interconnected; to Rehnquist the states or state legislators exist as an extension of the will of the people. The component of moral relativism is difficult to quantify based on word choice, or even word associations because it is often found in the structure of an argument. Thus the cases must be examined holistically in order to better define that component. Thus the aggregate findings presented above expressed that *Roe* was the best example of

Rehnquist's use of moral relativism. However all of his opinions carry this tradition out as they are emotionally charged issues (i.e., the right to die, abortion, etc) and he stayed away from emotional arguments but rather focused on legal tradition and the text of the Constitution.

Word Choice

To add slightly more detail to these findings I carefully examined each case's word list looking for similar words or words that revealed his judicial philosophy. The first thing that I noticed upon surveying the output was an emphasis on the number of times that Rehnquist used words that related to order and freedom. He placed particular emphasis on the conflict that these two values experience in the privacy debate. There is always a tradeoff, the more freedom (privacy) that individuals are given, the less order there can be in society. Some of the words that Rehnquist used when referencing order included: ban, regulate, provide, protect, require, infringe, prohibit, force, consent, restriction, supersede, compel, impose, violate. When Rehnquist referred to freedom he mentioned: freedom, individual, human, person, right, free, choose, choice, autonomy, liberty. It is clear that Rehnquist's belief in states having the jurisdiction to decide personal privacy issues was emphasized in the opinions he wrote. Rehnquist placed emphasis on the role of federalism in the American political system. For Rehnquist there are separate spheres or duties that the national government ought to fulfill and that the state ought to fulfill; these roles should not mix. He was wary of a national government that continually usurps the power or jurisdiction of the state governments.

The second thing that I noticed was that Rehnquist made many references to legal terminology pertaining to the American political system: law, constitution, the Fourteenth Amendment, proof, court, states, Congress, congressional, legislative, statute, amendment, authority, government, duty, deference, interest, common law, tradition, history, sustain, clause,

stare decisis, precedent, justice, judge, legislature, prevent, rule, statutory, evidence, and convince. These words are consistent with his belief in legal positivism. Also several of these words would place him more in the legal model of decision making, i.e., stare decisis, precedent, deference, etc. Rehnquist also made mention of several words that allude to his belief in originalism as the proper method of constitutional interpretation.

In conclusion, I found evidence of several characteristics of his judicial philosophy throughout these cases, particularly: legal positivism, originalism, and federalism. It is clear that these three values played a significant role in how he decided the cases on personal privacy. As mentioned previously a clear limitation to this analysis is the lack of a control variable in order to bring clarity and context to these findings. I believe this leaves room for future research that might study the entire Court's opinions on these cases in order to compare word choice and thematic context with the findings presented here on Rehnquist.

Chapter 6: Assessing Justice Rehnquist's Decision Making Style

In the previous chapter, the evidence suggested that Rehnquist espoused a judicial philosophy that encompassed many of the tenets of the legal model of decision making and that Rehnquist relied heavily on his judicial philosophy when deciding cases on personal privacy issues. Thus it could be deduced that he was following the legal model of decision making. This chapter will try to validate this deduction through more in depth analysis. The methods utilized in this chapter are uncharacteristic of judicial decision making literature. Judicial scholars will most often place a judge into a model of decision making in two ways. First, in order to test whether or not a judge followed the legal model, scholars examine how often the judge followed precedent when deciding cases. Second, in order to test whether or not a judge followed the attitudinal model, they examine how often the direction of their vote was in a partisan direction. There are weaknesses to both of these tests. First, precedent is not the only component of the legal model and second the partisan direction of a vote does not always mean that a judge is voting based on their preferences.

The methods used in this chapter will consist of a content analysis of the language that Rehnquist used in his opinions in order to place him in a model of decision making. The content analysis was based on several assumptions, first, words have meaning and human beings reveal their values through the words they use. Second the more that a person mentions something the stronger they feel about it. In this chapter, the 11 personal privacy opinions that Rehnquist wrote are analyzed as one single document. This will provide insights into the words and themes that Rehnquist used most frequently and how those words were used. I used the data that T-lab produced when the 11 personal privacy opinions that Rehnquist wrote were analyzed as one text document, providing a key word list which cites words that show up most frequently in the text.

While this method does have its limitations it is supported by previous research. For example: Gibson's research on role orientation (1977, 1978) argued that how a judge defines their role or how they see their duties, is a good predictor of how they will actually behave as a judge. Danelski and Aliotta (1966; 1988) also advocated using content analytic techniques of writings and speeches that political actors produced in order to decipher the motivations behind the decisions they made. Epstein and Mershon (1996) agreed arguing that personal papers and opinions would be an excellent way to evaluate a judge's motivations. Segal and Spaeth argued that the criteria that judges base their decisions on can aid in placing them into a specific model of decision making. For example if a judge relies on precedent, the text of the Constitution or the intent of the Framers they are following the legal model, but if they rely on their personal preferences in a case they are following the attitudinal model (2002, 287). Thus language is an adequate dataset with which to evaluate Rehnquist's motivations and rationales in order to better classify his decision making style.

The Legal Model

Judicial scholars had previously cited five main components that made up Rehnquist's judicial philosophy: legal positivism, moral relativism, majoritarianism, originalism and federalism. In chapter four of this analysis these components were confirmed to be main components of his philosophy through a content analysis conducted on 16 articles that Rehnquist wrote which described his judicial philosophy. Then in chapter five these components were found to have had a significant influence on the rulings that Rehnquist made on 11 personal privacy cases that came before him during his tenure on the Court. These five components encompass many of the characteristics that would place a judge into the legal model of decision making, i.e., plain meaning of the Constitution, stare decisis, etc. Thus it would seem that based

on the fact that Rehnquist espoused and followed this philosophy, it could be argued that he followed the legal model when deciding cases pertaining to this specific legal area.

The first component of his philosophy was identified as legal positivism. Rehnquist relied on legal tradition and common law when he began almost every opinion he wrote on personal privacy by reviewing the historical tradition of the statute or behavior in question. Second, Rehnquist was an originalist. He continually made reference to the intent of the Framers and the Constitution. Third, his belief in federalism and majoritarianism gave more power to the elected branches of government, the states and the people. Finally, Rehnquist's opinions on the controversial area of privacy contained tones of moral relativism. He did not argue against abortion or the right to die based on whether it was right or wrong, but rather he argued against it on the grounds that it was not rooted in historic tradition and was not defined explicitly in the language of the Constitution – thus it ought to have been left up to the states to decide. If his political preferences were influencing the decisions he made, we would expect to see more emotional arguments about protecting the rights of those who are most vulnerable in society, a traditionally conservative position. For example some have compared his opinions on abortion with those of a conservative cohort with whom he shared the bench, Antonin Scalia. Scalia consistently made emotional arguments in the opinions he wrote in abortion cases, rooting his qualms with the procedure to statistics and medical testimony. These sorts of arguments are noticeably absent from Rehnquist's opinions. Instead of taking a subjective stance against abortion his focus was on the text of the Constitution and historic tradition, while arguing that this was an issue best left to the states to decide (Johnson 2005, 307-311).

Judicial restraint

As stated previously, Rehnquist's judicial philosophy when taken as a whole reveals an overall advocacy of restraint. Based on the key word output that T-lab produced on the 11 opinions that Rehnquist wrote, the following words exemplified this characteristic:

Figure 6.1: Word Choice - The Legal Model

Word Mentioned	Number of Mentions
State	303
Regulation	184
Statute	127
Law	124
Constitution	80
Government	78
Amendment	72
Congress	72
States	53
Intent	52
Clause	43
Fourteenth	32
Code	31
Policy	31
Scope	30
Authorize	29
Agency	27
Legislature	24
Deference	4

The legal model articulates characteristics that amount to defining a restrained role for a judge. Thus this is another trait that seems to place Rehnquist into the legal model of decision making. Some might argue that restraint, states rights and Framers intent are traditionally Conservative positions, so wouldn't this prove that Rehnquist was in fact behaving attitudinally? While this is a valid point, the difference goes back to Benzoni and Dodrill's (2009) definition of a judicial philosophy versus a political ideology: they are correlated but not synonymous terms. Thus Rehnquist seems to fit into the legal model of decision making because his disagreements are more philosophical than ideological. However it is important to point out that trying to

decipher human behavior and what motivates it is an impossible task, thus in the end a best guess is all we have.

The Attitudinal Model

Trying to place Rehnquist in the attitudinal model proved to be a more challenging task. According to scholars judges behave attitudinally when they make decisions based on their policy preferences or political ideology. Thus if Rehnquist was an attitudinal jurist I would expect him to allow his conservative ideology to influence his decision making.

An attitudinalist will behave in the opposite way of a judge who follows the legal model. Meaning they will not follow precedent or legal tradition and they will make rulings that are more activist in nature because they will not restrain themselves by looking for the legislative intent. Rehnquist did follow legal tradition and practice deference by valuing federalism and originalism thus seeming to place him into the legal model. In order to counter those findings I looked for words in the 11 opinions he wrote on personal privacy that might give hints that he ruled based on his conservative ideology or words that conveyed emotion or subjectivity.

Figure 6.2: Word Choice - The Attitudinal Model

Word Mentioned	Number of Mentions
Right	217
Life	148
Death	55
Principle	44
Necessary	41
Fetus	34
Human	32
Encourage	32
Argue	30
Care	29
Legitimate	29
Die	28
Believe	28
Integrity	28
Appropriate	26

Permissible	23
Compassion	6
Vulnerable	6
Belief	6
Pain	5
Conception	5
Depression	4

Admittedly these words are not a completely accurate measure of whether or not Rehnquist was voting based on his political preferences, however based on the methods used they present an adequate picture. However a major limitation is that they are not in context and not controlled for by being compared with other justices on the bench. As previously mentioned this would be a good future analysis.

Vote Direction

The majority of legal scholars study the direction of votes in order to place a judge into a model of decision making. Using the Supreme Court Database created by Spaeth I put in Rehnquist's term (1972-2005) and selected "privacy" as the area of analysis. In the "analysis overview" section there is a chart created that gives the decision direction of Rehnquist's votes. Findings are presented in a figure below.

Figure 6.3: Decision Direction in Personal Privacy Cases

Date	**Case**	**Decision Direction**
1973	*Roe*; *Doe*	Conservative
1977	*Carey*	Conservative
1979	*Bellotti*	Conservative
1989	*Webster*	Conservative
1990	*Cruzan*	Conservative
1991	*Rust*	Conservative
1992	*Casey*	Liberal
1997	*Vacco*; *Glucksberg*	N/A
2000	*Stenberg*	Conservative

Based on the fact that Rehnquist voted most often in the conservative direction when he decided cases on personal privacy, this chart would place him into the attitudinal model of decision making. However, I do not believe that decision direction is an adequate measure of whether or not judges are voting with their political preferences, as it oversimplifies the judging process. Just because a judge votes in an ideological direction does not mean they are following their preferences.

Based on the evidence, it seems more likely that Rehnquist followed the legal model of decision making; he cited precedent, advocated deference to the elected branches of government, and sought out legislative or the Framers intent. However the most convincing piece of evidence is the way that he shaped his arguments concerning the controversial issues involved in the area of personal privacy. When Rehnquist argued against abortion, a traditionally conservative position, he did not do it from an emotional or moral standpoint. In other words he didn't focus on whether abortion was right or wrong, but instead he focused on the constitutional correctness of the Court deciding the manner. He was not opposed to abortion because he was a conservative but because he believed the right to privacy, on which the right to abortion is based, is not found in the text of the Constitution and that abortion rights ought to be decided at the state level.

Admittedly it is difficult to place a judge in a model of decision making based solely on the language they used in the opinions they wrote, and it is possible for many of the legal factors to mask ideological preferences. This brings to the surface the real challenge of judicial decision making – is it realistic to expect justices to forsake their political preferences when they take the bench? I would argue that it is not, as judicial philosophy and ideology are so closely correlated they are going to be influenced to some degree or another by their political ideology. While ideally speaking in a democracy it is desirable for justices to be apolitical, because Supreme

Court justices are unelected and hold a powerful political position, it seems an impossible task for a human being to completely reject values that are so deeply ingrained into their psyche. The only real safeguards set in place are the text of the Constitution and the hope that judges will respect the role given them and carry it out with honor and diligence.

Conclusion

Judicial decision making is an important area of study as it speaks to the components that influence a judge's ruling in a case as well as to the larger impact that those rulings have on American history. These decisions have an enduring impact on American society long after judges have left the bench. As De Tocqueville noted in 1835, Supreme Court justices have the task of deciding some of the most controversial issues in American society. Balancing this with the fact that they are political appointees who receive life tenure and protected salaries there is sound reason behind the questions that arise concerning the democratic nature of the Supreme Court. One of the goals of this thesis was to present a small snapshot of this dilemma through the study of one influential justice in history – William H. Rehnquist. Rehnquist was impressive on many different levels -from the number of the degrees he attained, to his unlikely rise to the Supreme Court, which culminated in one of the longest careers spent serving on the Court in history. By studying his legacy and decision making in one of the most controversial areas of constitutional law, privacy, one can see the dilemmas that arise in the judging process and how they were resolved by a particular judge.

In judicial decision making theory political scientists seek to quantify the decision making process and summarize it down to a calculation of rationality. However human behavior is much more complex and thus incorporating psychological principles better aids in explaining the complex decision making process. The question that became the focal point of this paper was

whether or not a judge can forsake their political identity when they make rulings? The answer seems to be a resounding no as even the way they define their judicial philosophy can be influenced, to some degree, by their political leanings. However the key is that not all judges are influenced to the same degree by their ideology. For example Rehnquist was clearly a conservative based on his upbringing and early political career, however based on studying the decisions he made on personal privacy issues it can be argued that he did not allow his political values to influence the decisions he made, as he relied on a judicial philosophy that articulated a restrained role for a Supreme Court justice.

Although there are limitations to the methods used in this analysis I believe applied in this context, studying a judge's opinions in order to determine rational and justification provides an adequate answer to explaining their motivations.

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