Opinion Assignment and the Chief Justice: 1888–1940*

Sandra L. Wood, University of North Texas
Linda Camp Keith, Collin County Community College
Drew Noble Lanier, University of Central Florida
Ayo Ogundele, University of North Texas

Objective. We seek to explore the opinion assignments of Chief Justices from 1888 to 1940 using three models: the organizational, institutional, and attitudinal models. Methods. We empirically examine opinion assignments from 1888 to 1940 through a data set that the authors have collected. Results. We find that earlier Chief Justices made assignments based on institutional and organizational criteria rather than for ideological reasons. Conclusions. We believe this difference is most likely related to contextual factors that have changed for the modern Court.

The ability to assign the Opinion of the Court has long been considered the keystone of the Chief Justice's power, especially on the modern Court (see, for example, Brenner, 1990; Rohde, 1972; Slotnick, 1979). A strategic Chief Justice can use his assignment power to ensure that the Court's written opinion closely reflects his own view (Danelski, 1960; Slotnick, 1978, 1979). However, the Chief Justice must balance his ideological needs against the institutional needs of the Court to efficiently carry out its business and to maintain its structural prestige (Maltzman and Wahlbeck, 1996). While modern Chief Justices have been extensively studied, the opinion assignments of earlier Chief Justices have not been thoroughly addressed.

Such longitudinal analysis provides crucial information to scholars because it gives a longer historical perspective of the Supreme Court than currently exists. But more important, such analysis would allow us to cross-validate our theories concerning the Supreme Court in time periods other than that of the modern Court.

*Direct all correspondence to Sandra Wood, University of North Texas, Political Science Department, P.O. Box 305340, Denton, TX 97203 (e-mail: sandyw@unt.edu). Data for purposes of replication will be made available three years from the date of publication. We gratefully acknowledge the support of the University of North Texas Research Initiation Grant and three anonymous reviewers.
In this paper, we consider competing hypotheses derived from the attitudinal, organizational, and institutional models and apply them to four Chief Justice Courts: Melville W. Fuller (1888–1909), Edward Douglass White (1910–20), William Howard Taft (1921–28), and Charles Evans Hughes (1929–40). First, we will explicate our hypotheses, and then we will consider contextual factors in light of the history of the earlier Court.

Models of Chief Justice Assignment

**Institutional Model.** As the Court’s official leader, the Chief Justice bears the responsibility of making sure that the Court maintains its independence, power, and prestige (Danelski, 1960; McCloskey, 1960). From those institutional needs, we derive the following hypothesis:

H1: The Chief Justice will overassign cases concerning judicial power to himself.

As the head of the judicial system, the Chief Justice may write a disproportionate share of judicial power opinions. Opinions from him may carry more weight in that area, and the expectation may be that he should develop expertise in that area himself.

**Organizational Model.** The Chief Justices themselves usually discuss their assignments in terms of organizational needs. We derive two hypotheses from this model:

H2: The Chief Justice will make equal numbers of assignments to each justice.

H3: The Chief Justice will give more assignments to the most efficient justices who write most quickly.

Work on the modern Supreme Court provides limited confirmation of these hypotheses. The Chief Justices themselves seem quite concerned with equality (Haines, 1977). As Warren noted, “I did try very hard to see that we had an equal work load” (Lewis, 1969:130). Rehnquist (1987:297) agreed: “At the start of the October 1986 term I tried to be as even handed as possible as far as numbers of cases assigned to each justice.” Some evidence suggests that the Chief Justices may reward efficiency, as Hypothesis 3 states (Haines, 1977; Brenner, 1985). Brenner and Palmer (1988) found that on the Vinson Court, justices who wrote quickly received more majority opinion assignments. Rehnquist wrote that “it only makes sense in the assignment of additional work to give some preference to those who are ‘current’ with respect to past work” (Marshall Papers, Box 492). Fuller was also pleased by Holmes’ ability to write quickly. “Nimble Holmes has got out his last. . . . [H]e I suppose [is] eager for more work” (Novick, 1989:256). At the other extreme, Taft deemed both
Van Devanter and Sanford "opinion shy" because they took so long writing opinions (Mason, 1964).

A final point about the organizational model must be made. The model predicts that the Chief Justice will assign opinions based on equality and efficiency. However, the desire for equality may conflict with the need for efficiency. That is, a Chief Justice who emphasizes equality may sacrifice efficiency. We believe that support for either hypothesis would be consistent with the organizational model.

**Attitudinal Model.** The attitudinal model posits that the Chief Justice makes opinion assignments to further his ideological goals, suggesting three hypotheses:

- **H4:** The Chief Justice will overassign opinions to ideologically similar justices.
- **H5:** The Chief Justice will assign close cases to moderate justices.
- **H6:** The Chief Justice will overassign important decisions to himself.

Studies of the modern Chief Justice provide limited confirmation for the fourth hypothesis (Slotnick, 1979). Ulmer (1970) concluded that Warren made more assignments to justices with a similar ideology (i.e., Black and Douglas), and Haines (1977) noted that Burger turned most often to Rehnquist, his closest ideological ally. Thus, Chief Justices make strategic choices that will likely result in their policy views being propagated.

Our fifth hypothesis suggests that in close decisions, the most moderate justice will be assigned the opinion (Rohde, 1972). In a study of marginal justices, Brenner (1982) concluded that they received more opinions than expected by chance because assignors want to forestall defections. An ideologically motivated Chief Justice would try to make assignments to motivate potential defectors to remain aligned with the majority, especially because a change in vote may also change the outcome of the case.\(^1\) Hughes tried to select moderate justices to write in divided cases, often explicitly choosing a liberal justice to write in a conservative case, and vice versa (Steamer, 1986).

Hypothesis 6 suggests that Chief Justices will tend to assign themselves a higher proportion of opinions in important, groundbreaking constitutional cases (Daneski, 1960; Slotnick, 1978, 1979). As Frankfurter (1949) said, "[T]here are occasions when an opinion should carry the extra weight which pronouncement by the Chief Justice gives." Or, as Justice John H. Clarke said, "The great cases are written, as they should be, by the Chief Justice" (Daneski 1960:15). The Chiefs particularly would want to control the policy message when the decision is an important one.\(^2\)

\(^1\) However, Brenner and Spaeth (1986) found no relationship between opinion assignment to the marginal justice and survival of the conference coalition.

\(^2\) Some scholarship has suggested that Chief Justices self-assign more cases overall as well as in the two areas that we have identified (Slotnick, 1978, 1979). However, this behavior could be conceived as either ideological or organizational, so we focus on institutional hypotheses that can be clearly distinguished.
Placing Hypotheses in Historical Context. The historical context of our four Courts shape our expectations concerning how hypotheses drawn from the modern era will apply to earlier periods that may have had differing institutional and organizational norms. Three contextual factors may alter the hypotheses drawn from the modern Court, and even cause variation among our four Courts: (1) changes in the Court’s control over its docket culminating in the passage of the “Judge’s Bill” in 1925, (2) the provision of retirement benefits in 1937, and (3) the rise in dissent on the Court in the late 1930s and 1940s.

The Judge’s Bill gave the Supreme Court much greater control over its own docket and concomitantly led to a substantial reduction in the Court’s caseload. In 1888, the Fuller Court was deciding in excess of 250 cases per term, most of which were mandatory appeals. This mandatory jurisdiction caused the Court’s docket to swell, requiring three years for a case to reach the Court. Reforms to the Court’s jurisdiction implemented in 1914, 1916, and 1922 gave the Court some increased discretion in setting its agenda by extending its certiorari power to state court rulings. However, these docket-reducing reforms were insufficient because of the expansion of judicial business following the First World War. As a result of this burdensome docket, Chief Justice Taft and a committee of justices proposed to Congress that the Court’s mandatory docket be reduced and that its discretionary docket be expanded. The result was the Judiciary Act of 1925, which provided that the Court’s docket would include a large number of discretionary cases. This law gave the Court the power not to hear frivolous cases and to focus on significant legal questions.

Several implications may be drawn from this change in the Court’s docket control. Earlier courts were inundated with technical cases (e.g., patents and mining claims) and with trivial cases (e.g., wills and individual tax claims) that engendered little disagreement. The large number of unanimous cases resulting from the lack of discretionary power prior to the Judge’s Bill makes it more likely that organizational and institutional concerns would dominate the assignment practices of earlier Chief Justices, especially Fuller and White, who were Chief Justices prior to 1925.

Second, until the provision of judicial pensions in 1937, many Supreme Court justices were financially constrained to stay on the Court despite illness or old age. A comparison of the number of deaths on the bench up to 1937 and after 1937 shows that forty-one justices (60.2%) died while on the bench up until 1936, while only seven justices (24.4%) died while on the Court from 1937 until Blackmun’s retirement in 1994 (Epstein et al., 1994). Van Devanter, for example, admitted that he might have left the Court five years earlier due to poor health if retirement benefits had been available (Cushman, 1993:315). Such incapacities may result in inequalities

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3 The following is the average number of cases for the Chief Justice Courts: Fuller (216), White (223), Taft (193), and Hughes (151); and, for comparison, Rehnquist (131) (Epstein et al., 1994:155–58).
in opinion writing as other justices absorb the infirm justice’s share. This makes it more likely that earlier Chief Justices would assign opinions unequally, with a greater proportion being assigned to efficient justices. The Hughes Court, which benefited from the provision of pensions during half of its tenure, may be slightly more egalitarian than the three earlier courts.

Third, the modern Courts may differ from the earlier Courts because of the increased level of dissent after 1940 (Haynie, 1992; Walker, Epstein, and Dixon, 1988). The rise in dissents and concurrences may have resulted in more openly ideological postures of some justices on the modern Court. The reduced caseload of the modern Court may also allow members more time to craft dissents and concurrences. Moreover, the increase in the number of law clerks provided additional drafting and research capability to justices, which would allow them to file a greater number of separate opinions. Thus, the attitudinal model may fit better in the modern Courts than in our earlier Courts, with the Hughes Court acting as a transitional Court. When the Chief Justice can choose practically any justice for virtually all opinions, ideological reasons may be less important than organizational and institutional concerns.

To summarize the effects on our hypotheses of considering context, we expect the institutional hypothesis, but not the ideological hypotheses, to be significant. In considering our organizational hypotheses, we expect that considerations of equality will be less important while concern about efficiency will be more salient.

Data

All cases in which the Court issued a formal opinion were coded (N = 10,506) from the case decisions as reported in Supreme Court Reporter; memoranda cases were excluded. Variables used in this article include several straightforward items such as term, vote, and majority opinion author. We coded data on the majority opinion assignor from the final vote. No data on the original conference vote is available for this time period.

We coded the issue area and the direction of each case following the protocol developed by Spaeth (1995). Issues were coded as criminal, civil rights, First Amendment, due process, privacy, attorney, union, economic, judicial power, federalism, interstate relations, federal taxation, and miscellaneous. Direction was coded as liberal or conservative. The following is a brief summary of that coding, in the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, and attorneys: the case was coded liberal if the decision was pro-person accused/convicted of crime, pro-civil liberties or civil rights claimant, pro-underdog, or anti-government in the context of due process, and coded conservative if the decision was the reverse. In cases involving economic activity, the decision was coded liberal if the decision was pro-competition, anti-business, anti-employer, pro-liability, pro-injured person, or pro-
debtor. In cases regarding judicial power, cases were coded liberal if they were pro-exercise of judicial power. In the context of federalism, cases were coded liberal if they were pro-federal power. In federal taxation decisions, cases were coded liberal if they were pro-United States.\(^4\)

Results

**Institutional Model Hypothesis**

*Judicial Power.* Hypothesis 1 concerns the self-assignment of judicial power cases, which usually involve questions of Court jurisdiction. To determine whether the Chief Justice self-assigned, we compute the Opinion Assignment Ratio (OAR). The OAR is the number of assignments obtained from the Chief Justice out of the total number of opportunities to join, which takes into account nonparticipation and dissent.\(^5\) For the first hypothesis, then, we compare the Chief's OAR in judicial power cases to that of the others on the Court. In three of the four cases, our hypothesis is strongly confirmed, with Fuller, White, and Taft all assigning themselves significantly more judicial power cases (\(p < .05\)). Hughes, however, has only a marginally significant self-assignment rate (\(p = .09\)), perhaps because he was the first Chief to fully reap the benefits of case selection due to the Judge's Bill. The Court agreed to hear fewer judicial power cases during the Hughes Court, so there was less need for the Chief to take on the burden of writing those cases. Therefore, we confirm this hypothesis, suggesting that for institutional reasons, the earlier Chief Justices self-assigned judicial power cases.

**Organizational Model Hypotheses**

*Equality.* Hypothesis 2 asserts that the Chief Justice will make opinion assignments based on equality. We test this hypothesis using coefficients of relative deviation (CRV) for each term (Segal and Spaeth, 1993; Slotnick, 1979). After computing the means and standard deviations for the number of assignments made by the Chief each term, the CRV divides the standard

\(^4\)If a particularly difficult case was encountered, additional members of the research group (at least one, usually all three) would also code the case and reach a consensus about how to code the case. These cases comprised less than 5 cases per term out of about 200 cases per term. We selected a random sample of 325 cases to test our reliability. The reliability scores for these checks indicated a high level of agreement: 99% overall, and 94% when considering only the issue area and direction.

\(^5\)Brenner (1990) has three major criticisms of the OAR approach, which we believe merit attention. First, he argues that the original coalition and the final coalition may not be the same pool of justices. Although true, this is a minimal problem during this time period due to the low number of nonunanimous decisions; further, the data is unavailable. Second, Brenner argues that the OAR measure is insufficiently precise because it does not take into account the size of the winning coalition. Once again, given the number of unanimous decisions in our data set, this is not a critical failing. Third, the OAR favors those who frequently dissent. Again, this is less problematic during this time period because of the low incidence of dissent. Additionally, Maltzman and Wahlbeck (1996) argue that a multivariate approach allows for control of varying factors and maintains the individual level of analysis. The paucity of data on the earlier Court and the large number of cases (more than 10,000) in our data set preclude such an approach here.
deviation for each term by the mean for that year, which controls for the total number of assignments in each term (lower scores indicate more equitable opinion assignments). The CRVs range from .14 (for White in 1920) to .77 (Fuller in 1894). The averages for the four Chief Justices are as follows: Fuller (.38), White (.28), Taft (.32), and Hughes (.38). The level of inequality for these four Courts is much higher than the level that Segal and Spaeth (1993:269) found for Warren (.22), Burger (.21), and Rehnquist (.23), but roughly equals that which Slotnick (1979) found for Stone (.39) and Vinson (.35). Clearly, earlier Chief Justices were less egalitarian in making opinion assignments than modern Chief Justices are. Therefore, we conclude that Hypothesis 2 is not supported during this earlier period, as our earlier contextual analysis suggests.

Efficiency. Hypothesis 3 suggests that Chief Justices may make assignments more often to efficient justices and less often to inefficient justices. To measure efficiency, we computed the average time the justices took to write their assignments by subtracting the announcement day from the oral argument (or reargument) date. We compare this measure of efficiency to the number of cases written per term by each justice.

On the Fuller Court, the most efficient justices were Howell Jackson (18 days), Blatchford (32 days), and Holmes (33 days). The hypothesis is confirmed for Blatchford, who wrote 37.5 opinions per year ($p < .05$) and is marginally significant for Holmes ($p < .10$). Jackson, however, wrote few opinions. Because of Jackson's extreme ill health while on the bench, Fuller may have given him particularly simple cases to write, which would give him an artificially low efficiency score (Cushman, 1993). The least efficient justice was Gray (114 days), but he wrote an average number of cases per year.

On the White Court, Holmes (40 days) and McKenna (42 days) were the most efficient. Holmes wrote significantly more opinions than his colleagues ($p < .05$), but McKenna's score does not achieve statistical significance, although he wrote more opinions than average. The least efficient justices were Hughes (99 days) and Van Devanter (103 days), who both wrote an average number of cases.

On the Taft Court, McKenna (23 days) and Holmes (26 days) were again the most efficient but neither received more than his share of opinion assignments. The least efficient justices were Pitney (123 days) and Van Devanter (143 days). Taft definitely gave them fewer assignments (Pitney, $p < .05$; Van Devanter, $p < .10$).

On the Hughes Court, Cardozo (26 days), Black (24 days), Douglas (28 days), and Holmes (27 days) were the most efficient. None of these justices received significantly more assignments, although all were above average in efficiency.

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6 Thus, if the standard deviation were 10 and the mean were 20, the CRV would be .5 for that year.
their opinion writing. The least efficient justice was Van Devanter (116 days per opinion), who wrote significantly fewer opinions \((p < .01)\).

Therefore, our results show modest support for the hypothesis that the Chief Justices consider efficiency when distributing opinion assignments, but in quite different ways. Fuller and White gave more cases to the efficient justices, while Taft and Hughes gave fewer cases to inefficient justices. Overall, then, as our historical analysis suggested, we find that earlier Chief Justices did not use equality as a criterion when making assignments, but did make assignments based on efficiency, most likely because of the burdensome workload.

**Attitudinal Model Hypotheses**

**Ideology.** Hypothesis 4 suggests that Chief Justices will assign opinions more frequently to ideologically compatible justices. To measure each justice's ideological closeness to the Chief Justice, we calculated that justice's overall and issue-specific agreement scores with the those of the Chief Justice and compared their interagreement scores with their OAR. Table 1 presents the OARs for the justices in overall cases.

Overall, those who agreed most strongly with the Chief Justices did not write significantly more decisions than those ideologically opposed, either overall or in specific issue areas. Fuller did not assign more to Lucius Lamar or Horace Blatchford; White did not assign more cases to Willis Van Devanter or Joseph Lamar; Taft did not make more assignments to Van Devanter or Sanford; and Hughes did not make more assignments to Roberts and Brandeis, with the exception of Roberts in due process cases \((p < .05)\).\(^7\) One other exception exists: In federal taxation cases, Taft agreed strongly with Stone and McKenna; McKenna’s OAR is significant \((p < .05)\) and Stone’s is marginally significant \((p < .10)\). However, these are exceptions. Most often, the Chief Justices did not assign cases to ideologically aligned justices.

**Moderation.** Hypothesis 5 posits that in close decisions (5-4, 5-3, 4-3), the Chief Justice will assign the opinion to moderate justices. To identify moderate justices, liberalism scores were computed for each of the fourteen issues for each Chief Justice Court, and for each vote the majority joiners were ranked according to liberalism.\(^8\) If the case had a liberal outcome and

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\(^7\) We also explored whether Chief Justices would be more likely to assign important cases to ideologically close colleagues. None of the Chief Justices did so, except Fuller, whose OAR to Blatchford was statistically significant \((p < .05)\), but it only involved two important cases, one of which was assigned to Blatchford.

\(^8\) Interstate conflict and miscellaneous cases were eliminated because directionality could not be determined. First Amendment, unions, and attorney categories were eliminated due to small numbers. Cases were coded liberal in civil liberties if the criminal defendant or underdog prevailed. Economic cases were coded liberal if they favored small business, government over business, or individual litigants. Judicial power cases were coded liberal if they expanded judicial power. Federalism cases were coded liberal if they favored the federal government. A complete coding list is available from the authors.
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**Note:** The OAR is the number of assignments obtained from the Chief Justice out of the total number of opportunities to join.
the most conservative justice in the majority wrote the opinion, this assignment was attributed to the moderate justice. The same was done for conservative outcomes. The total percentage of opinions assigned to the moderate justice was then calculated for each Chief Justice Court. This hypothesis fails to be supported. Assignments made to the moderate justice in these close cases were as follows: Fuller (27%), White (33%), Taft (12%), and Hughes (25%). Tests of significance show that none of the Chief Justices assigned cases more frequently to the moderate justice.

Important Decisions. Hypothesis 6 suggests that the Chief Justice, seeking to lend the weight of his office to important decisions, will assign those decisions to himself. We measure importance three ways. First, we consider landmark decisions (n = 56). Second, we consider cases that overruled previous Court precedent (n = 15). Third, we consider cases in which the Court declared either a state (n = 344) or congressional law (n = 42) unconstitutional. All data are drawn from the Supreme Court Compendium (Epstein et al., 1994).

Our results are mixed. In landmark cases, Hughes followed a strong strategy of self-assignment (p < .05) while White and Taft did so somewhat (p < .10). Fuller self-assigned significantly more cases that changed precedent (p < .05), but none of the other chiefs did. None of the chiefs self-assigned significantly more cases in nullification cases. Thus, support for this hypothesis depends on the definition of importance. The Chief Justices may have followed a self-assignment strategy in some important cases, but not consistently across all categories. Therefore, as our contextual analysis suggested, ideological hypotheses were not important for the earlier courts.

Discussion and Conclusions

Our study suggests that assigning opinions may be more complicated for Chief Justices than scholars have suggested. Our analysis shows that responsibility for the smooth operation of the Court and its institutional reputation may overshadow ideological goals. First, it appears that the Chief Justices in our study valued efficiency and assigned opinions on that basis. None of them, however, placed any premium on equality. This is not necessarily inconsistent with the organizational model because Chief Justices who value expertise and/or efficiency when assigning opinions would naturally be less motivated by concerns about equality, and this supports our historical view that equality may have been difficult to obtain on the earlier Courts. Second, we find that the Chief Justice does attend to

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9Our tests of significance are difference of means tests that consider the average of the entire court compared with that of the Chief Justice. We always use two standard deviations as our level of significance in all tests.
the institutional demands of the Court by writing more judicial power cases than other justices do.

However, the results are mixed for the hypotheses derived from the attitudinal model. The Chief Justices do tend to self-assign in important cases, but they do not overassign to ideologically proximate colleagues or make assignments to the marginal justice in close cases. Perhaps ideologically based explanations are best suited to courts that have full control over their own dockets (Segal and Spaeth, 1993).

Our work bolsters scattered current evidence supporting the organizational and institutional models (Maltzman and Wahlbeck, 1996). Assumptions about the ideological nature of opinion assignments, which are generally accepted concerning the modern Court, are simply not supported in this earlier period. Our study of the Fuller, White, Taft, and Hughes Courts suggests that workload and institutional maintenance considerations may play a more important role in opinion assignment by the Chief Justice than the ideological disposition of the members of the Court. Scholars should continue to consider the vitality of the organizational and institutional models, as well as the attitudinal model, in analyzing opinion assignment.

REFERENCES


