The "Rehnquist" Court (?)[*]
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As the Rehnquist Court era draws to a close,[1] scholars will deploy a diverse set of tools to explore an equally diverse set of questions. We can imagine large-scale quantitative studies designed to investigate the degree to which the Court opted out of the "Court/Congress/President" game (Eskridge 1991; Segal 1997), as well as complimentary historical and doctrinal analyses assessing the extent to which "judicial supremacy" under the Rehnquist Court became "judicial sovereignty" (Kramer 2001, 13). Already receiving their fare share of scrutiny are particular decisions but especially *United States v. Lopez* (1995) (e.g., Symposium 1995; Frickey and Smith 2002), *Bush v. Gore* (2000) (e.g., Gillman 2001; Posner 2001), *Grutter v. Bollinger* (2003) (e.g., Symposium 2003; Devins 2003), and *Lawrence v. Texas* (2003) (e.g., Franke 2004; Koppelman 2004). More will inevitably follow—as will work on the various theories of constitutional and statutory interpretation expounded by the Chief Justice and his colleagues.

Here we take on nothing so grand. What we do instead is make use of a relatively new technology—Andrew Martin and Kevin Quinn's method of assessing the policy preferences of the justices—to explore whether we can fairly characterize the terms between 1986 and 2003 as part of a coherent era, the "Rehnquist Court era." As the legal scholar Thomas Merrill (2003) recently wrote:

> The Supreme Court is implicitly assumed to have a certain unity of character under each Chief Justice. Hence, we refer to the "Marshall Court," the "Warren Court," and the "Rehnquist Court." A closer look at history reveals that this assumption of a natural Court defined by the tenure of each Chief Justice is often misleading. The Marshall Court had a different character late in its life than it did in its early years. Similarly, the Warren Court became distinctively more liberal and activist after 1962 when Felix Frankfurter retired and was replaced by Arthur Goldberg. Ought we add the "The Rehnquist Court" to this list or has it been more uniform in its decision making than the others Merrill identifies?

Martin & Quinn's Approach to Assessing Policy Preferences

Before turning to this question, a few words are in order about the Martin & Quinn (hereinafter "M & Q) method—but only a few since we provide the details elsewhere. [For a technical description, see Martin and Quinn (2002); for a more conceptual, accessible explanation, see Martin, Quinn and Epstein (2005).] A chief goal of the M & Q method is to supply students of judicial politics with several quantities of interest— including an estimate of the ideal point of each justice in each term, an estimate of the location of the median justice for each term since 1937, and the identity of the justice most likely to have been the median, along with (and crucially so) an assessment of the degree of uncertainty that a particular justice was the median. So, for example, by invoking this method to characterize the 2003 term, we can say with probability 0.999, as Figure 1 shows, that Justice O'Connor was the Court's median justice; the only other justice with a non-zero probability of holding that key position was Kennedy (.001).

In the case of the 2003 term, then, O'Connor (to no one's great surprise) was the clear median justice: the M & Q estimates of her ideal point and that of the Court's median are virtually indistinguishable. But such is not always or even usually the case. Moving back just ten terms, to 1993, we can see (in Figure 1) that Martin and Quinn estimate the location of the median at 0.692. O'Connor is quite close, with an ideal point estimate of 0.845. Nonetheless, it is Kennedy (0.716) who was the most likely median that term; in fact, based on the M & Q estimates we can say that Kennedy was 3.24 times more likely than O'Connor to have been the pivotal justice in 1993.
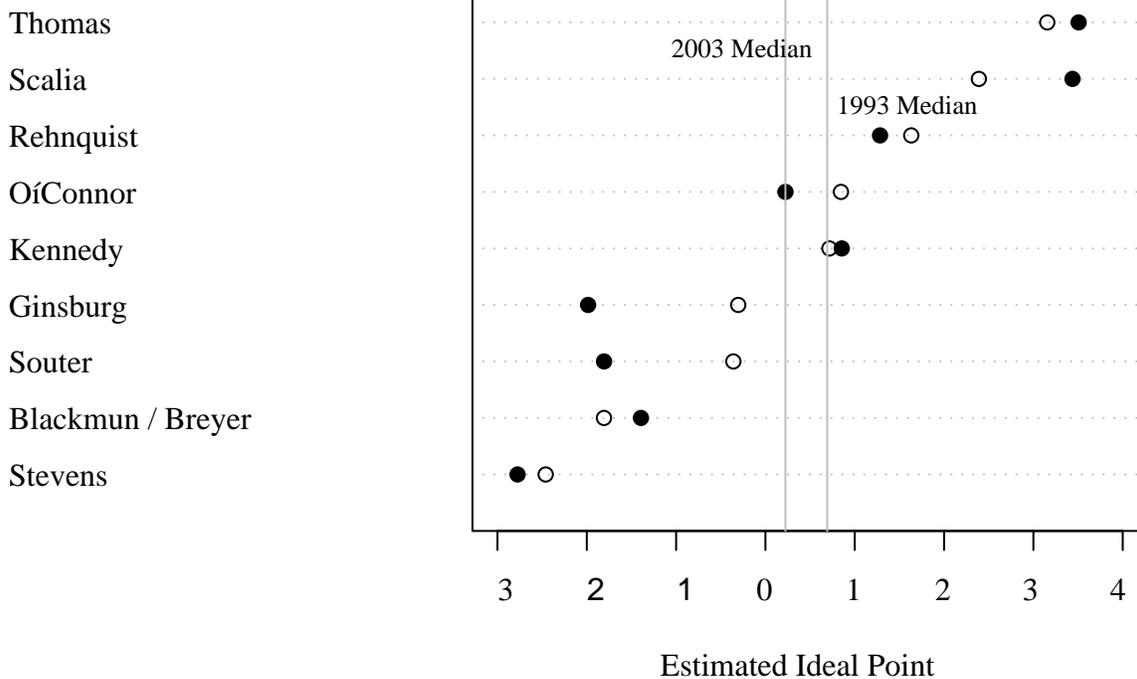
Figure 1: Estimated ideal points for the 1993 and 2003 terms. The hollow circles are the estimates for the 1993 term; the solid circles are those for the 2003 term. The gray vertical line on the left depicts the estimated location of the median justice in the 2003 term; the one on the right shows the same for the 1993 term. The data are available at: http://adm.wustl.edu/supct.php.

Enabling researchers to make rational and coherent probability claims—such as those pertaining to the identity of the justice with the highest posterior probability of being the median (along with that probability)—is just one attractive feature of the M & Q approach; elsewhere we delineate others (see Martin, Quinn and Epstein 2005). But how does the approach work? E.g., how do the researchers arrive at the scores we present in Figure 1? Again, given explications of the approach in other fora, suffice it to note here that Martin and Quinn base their method on (1) a spatial model of voting on the Court, which they in turn use to derive (2) a probability model in which the votes of the justices are the dependent variables. The spatial model assumes that justices have a choice between two alternatives, each of which has policy consequences that we can represent by points in an issue space. Justices evaluate these policy consequences with utility functions that are single-peaked around some ideal policy point specific to each justice. The probability model is a means of accounting for variability in the votes of justices in relatively parsimonious terms. Its central building block is that the probability of justice j voting for the alternative coded 1 in case k is given by:

$$\phi\,(\alpha_k + \beta_k\theta_j)$$

where $\phi(\cdot)$ is the standard normal cumulative distribution function, α_k and β_k are deterministic functions of the policy locations of the two alternatives, and θ_j is the ideological location of justice j's most preferred policy (her ideal point). Because of the dichotomous nature of each justice's decision, the probability that justice j votes for the alternative coded 0 in case k is given by:

$$1 - \phi\,(\alpha_k + \beta_k\theta_j).$$

The mathematics involved here follow directly from the theoretical model of voting and are just a representation of the fact that, under the theoretical model, justice j will vote for the option generating the policy consequences she most prefers.

Martin and Quinn analyze this model from a Bayesian perspective, which is simply a means of rationally learning about the probable values of the model parameters. As a practical matter, this is very similar to finding the values α_k, β_k, and θ_j for all cases and justices that were most likely to have generated the observed votes (i.e., classical maximum likelihood estimation). A subtle (but important) difference between Bayesian inference and classical likelihood inference is that the former involves summarizing the joint probability distribution of all model parameters given the observed data, whereas classical inference involves the use of an estimator to pick a unique estimate of the model parameters along with an assessment of how this estimator would behave if new data samples were taken from the population of interest.

Deploying the M & Q Scores to Study the Court

Resulting from the Martin and Quinn analyses are the estimated ideal points and other quantities of interest for all justices (and Courts) serving since 1937. We have posted these data (at http://adm.wustl.edu/supct.php) in a variety of forms (Excel, Stata, SPSS, et al.) with the hope of encouraging a range of researchers to deploy them to address an equally searching set of questions—whether on the Court's relationship with the other branches of government, the lower courts, or the states; the extent of (revealed) preference change among the justices; the factors affecting case selection; explanations of opinion assignment; and, the effect of public opinion, the economy, and crime (to name but a few socio-legal factors) on the decisions of particular justices. More to the point, virtually any research project that has previously relied on votes, party affiliations, or the Segal & Cover scores (Segal and Cover, 1989) to identify the ideal points of the justices, the median justice, and so on can now invoke the M & Q estimates—and can do so without confronting the substantial drawbacks of those other approaches. So, for example, the M & Q method does not suffer from the problem of "circularity" that plagues the use of votes (Segal and Spaeth 2002): By purging the particular issue area of interest and recomputing the M & Q estimates, they are perfectly appropriate for analyses of Court decision making; employing them in this way does not, in other words, amount to using votes to predict votes.[2] Nor are the M & Q estimates more or less suitable for investigating particular areas of the law, a possible drawback to the Segal & Cover scores (see, e.g., Epstein and Mershon 1996).

In light of their versatility (and despite their relatively recent appearance), it is perhaps not so surprising that scholars already have deployed the Martin & Quinn scores to study Court-Congress interactions (Sala and Spriggs 2004; Friedman and Harvey 2003; Baird and Horowitz 2004, e.g.); and we ourselves have put them to use to describe the Court's median over time, as well as to analyze the extent to which President Bush will be able to remake the current Court via the nominations process (Martin, Quinn and Epstein 2005). Here we turn to another dimension of the Rehnquist Court: whether we can fairly characterize it as a singular, coherent era.

Emerging conventional wisdom suggests that we cannot. Earlier we quoted Merrill on the inadvisability of assuming "a certain unity of character . . . of Courts under the leadership of John Marshall and Earl Warren." Merrill speaks for many legal academics when he makes the same claim about the present Court:

Although the Rehnquist Court is still with us, we can already perceive that there have been two Rehnquist Courts. The first Rehnquist Court lasted from October 1986 to July 1994. It featured frequent membership changes, a relatively full (but declining) calendar of argued cases, and majority coalitions that shifted from issue to issue. . . . The second Rehnquist Court started in October 1994 and is still with us.

These words would resonate with political scientists as well. Over the course of Rehnquist's years at the helm, the Court experienced five membership changes, resulting in six "natural courts" (see Figure 2). Surely such turnover, virtually all judicial specialists would argue, ought lead to alterations in the results reached by the Court, not to mention in its jurisprudence.
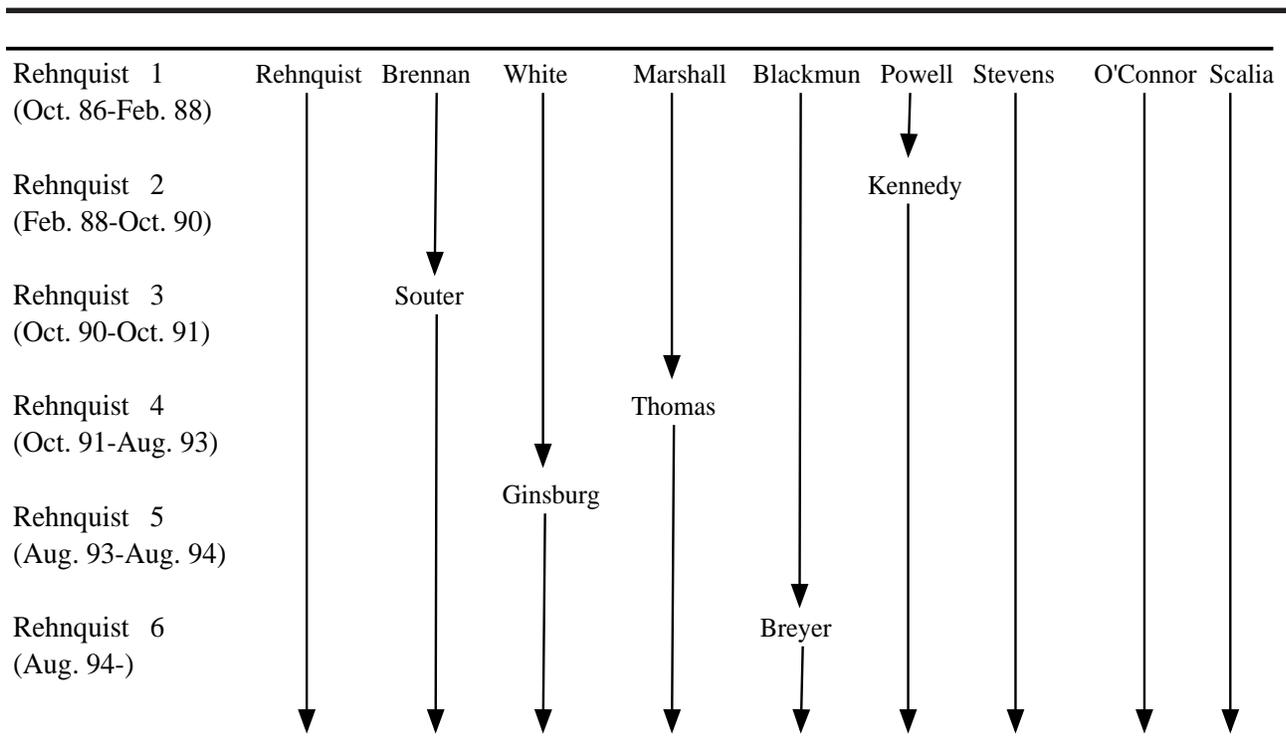
Rehnquist 1 (Oct. 86-Feb. 88)	Rehnquist	Brennan	White	Marshall	Blackmun	Powell	Stevens	O'Connor	Scalia

Kennedy

Souter

Thomas

Ginsburg

Breyer

Figure 2: Membership turnover during the Rehnquist Court, 1986-2004terms. Data Source: Epstein et. al. 2003 (379-80).

To assess this contention we depict, in Figure 3, the Martin & Quinn estimates of the location of the median justice in each term since 1986, as well in the various natural courts (shown in the vertical gray lines). Although we could offer any number of observations about these data, two seem relevant. First, the conventional wisdom appears to have some basis in fact: It would be difficult to characterize the era as uniform in its decision making. Over the course of the last 17 terms, the median has been as conservative as 1.007 (1988 term) and as liberal as 0.224 (2003 term)—though "liberal," at least historically, is hardly an accurate term. While the Rehnquist Court was, in 1988, among the most conservative to have sat since 1937, its "liberalness"—even in the 2003 term— pales in comparison to, say, the 1963 Court (with a median M & Q score of -0.791).[3] Second, we do not even observe stability within natural court eras. To take the current one (1994-present) as an example, we see a clear linear trend toward the left: Over the last decade or so, the Court's median—as derived from the same set of justices—has moved from a relatively conservative 0.577 to a more moderate 0.224.

Of course and once again this is not to say that the current Court is "liberal"; comparatively, that is not the case. It is rather to call attention to the (apparently) changing (revealed) preferences of the contemporary justices—and to the possible effect of those changes on the law. To see this last point, return to Figure 3 and observe the horizontal line indicating the "cutpoint" for *Grutter v. Bollinger* (2003), such that points above the line indicate a probability of greater than 0.500 of voting to strike down the affirmative action program, while those below the line indicate a greater than 0.500 probability of voting to uphold the program. Only in the last three terms—despite the lack of membership change in the previous seven—did the median justice fall on the side of the University of Michigan. Likewise, if we consider (in the counterfactual world) how the Court as a whole would have approached *Grutter* in, e.g., 1988, the model suggests only a 0.136 probability of reaching the outcome that it did in the 2002 term. That figures increases to 0.239 in 1993 but only exceeds 0.500 in 2001 and beyond.

Figure 3: Martin & Quinn's estimates of the location of the median justice, 1986-2003 terms. The gray vertical lines represent natural court eras (see also Figure 2). The dashed line is the estimated cut point for Grutter v. Bollinger. The data are available at: http://adm.wustl.edu/supct.php

Discussion

In a separate paper we speculate on the reasons behind this particular shift—primarily O'Connor's move to the left (Martin, Quinn and Epstein 2005)—but several more general lessons emerge here. First, to Merrill's list of "Chief Justice"-labeled eras that changed in character over time we could add Rehnquist: the Court of today is distinct in its decision making from the Court of 1986 or even of 1994. Second and relatedly, the data draw attention to the utility of the "natural court" as a conceptual and analytic device. For decades now scholars have assumed that during periods of stability in Court membership little, if any, change in the median's location occurs. Our analysis, however, supplies cause for pause this assumption: At least during the Rehnquist Court years, the location of the median fluctuated considerably over and even within the six natural courts.

Whether this holds for other "eras" remains to be seen but the Martin & Quinn estimates provide one plausible method for so determining.

Notes

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1 We suppose we should qualify this with an "in all likelihood," though by all indications it seems that Chief Justice Rehnquist will retire by the end of the term if not before.

2 See Martin and Quinn (2004). On the other hand, this paper demonstrates that as an empirical issue, it matters not if scholars invoke the purged estimates or those based on all votes.

3 On the other hand,, across the entire Rehnquist Court period the difference between the most liberal and most conservative locations of the median justice was just 0.791. The figures for the Warren (1953-1968 terms) and Burger (1969-1985) Courts, by contrast, were 1.497 and 1.005, respectively.