OF TIME AND JUDICIAL BEHAVIOR: TIME SERIES ANALYSES OF UNITED STATES SUPREME COURT AGENDA SETTING AND DECISION-MAKING, 1888-1989

DISSERTATION

Presented to the Graduate Council of the
University of North Texas in Partial
Fulfillment of the Requirements

For the Degree of

DOCTOR OF PHILOSOPHY

By

Drew Noble Lanier, B.A., J.D.

Denton, Texas

December, 1997

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This study examines the agenda setting and decision-making behavior of the United States Supreme Court from 1888 to 1989. Using Inter-University Consortium for Political and Social Research data and data that the author assisted in gathering, the study investigates the changing composition of the Court's agenda and the level of its unanimity. The study also examines the level of the liberalism of its decisions. The study specifies time series models and structural equations models to test the strength of the association between the justices' personal attributes and liberalism.

The study finds that economics decisions dominated the Court's docket up until the 1950s, when civil liberties-civil rights cases became more prominent. Judicial power decisions remained relatively constant. The unanimity of its decisions also declined across the period analyzed, first observed during the White Court. The liberalism of the Court's economics decisions was unexpectedly high for

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the Fuller and White Courts, but as expected for the Taft, Hughes and Stone Courts. The Court's civil liberties-civil rights jurisprudence was conservative through the 1940's, but became more liberal during the Warren Court. Judicial power liberalism was quite volatile.

Time series analysis demonstrates that the justices' religious affiliations, and agricultural origins were positively associated with the Court's economic liberalism, while judicial experience was negatively associated with the Court's economic policy preferences. The Great Depression and Roosevelt's Court-packing plan served to increase the liberalism of the Court's economics rulings. Partisan affiliation was shown to be related to the Court's civil liberties-civil rights liberalism. The occurrence of World War I is modestly related to a decline in liberalism. Judicial power liberalism is related to party identification, religious affiliation and career service, as well as the Judiciary Act of 1925.

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CHAPTER I

THE DECISION-MAKING AND AGENDA SETTING FUNCTIONS OF THE UNITED STATES SUPREME COURT, 1888-1989

This chapter first discusses the purpose, importance and general outline of this study of the United States Supreme Court's behavior. It then reviews the literature that relates specifically to the Court's agenda-setting process over time. It also reviews the literature dealing with the influences on the Court's decision-making. It discusses the studies of the justices' voting behavior before and after 1945 and offers ways by which knowledge gained from the studies can be advanced.

Purpose, Outline, and Importance of the Study

The most important work on the United States Supreme Court that scholars have done in the judicial politics subfield has been limited to analyses of the Courts composed after the end of the second World War. This study investigates the earlier Courts much more systematically than they have been studied to date, and it analyzes the shape of and influences on their agenda-setting mechanism and decision-making. It thereby provides a base against

which the findings for the post-1945 Court can be compared and a more comprehensive analysis for explaining and predicting the general political behavior of the Court and its members.

In particular, building on Pacelle (1991) and Casper and Posner (1976), this study investigates the change in the issues the Court considers, and their relative share of its decision-making agenda, beginning in 1888 and extending through 1989. Analytical emphasis is placed on the pre-1945 period since it has been less thoroughly studied than has been the post-1945 years. The study also examines the liberalism of the Court's decisions and its determinants, across major issue areas, providing a more complete picture of the agenda-setting and decision making of the Court across the same period. Hence, this study provides a bridge to link the studies of the post-1945 Court with a more comprehensive and systematic study of the Court's agenda-setting and decision making in prior years, thus providing an analysis of over a century of Supreme Court behavior.

The United States Supreme Court and Its Decision-Making And Agenda Setting

The United States Supreme Court and Politics

The United States Supreme Court has captured judicial politics scholars' attention for many years, beginning most notably with Pritchett's The Roosevelt Court (1948).

Pritchett's work formally inaugurates judicial politics as a subfield. It systematically analyzes for the first time the personal influences on the justices' decision making, thereby indicating the political nature of the Court's role within the American system of governance. Later, Schubert's The Judicial Mind (1965) and The Judicial Mind Revisited (1974) analyze the attitudes and ideologies of the Supreme Court justices from the Vinson Court through the Warren Court so as to more clearly understand the psychological basis of their decision-making. More recent work (e.g., Segal and Spaeth 1993) extends this notion of attitudinal influences beyond the Warren Court to include the Burger and Rehnquist Courts.

A second aspect of the behavior of the United States Supreme Court that has received scholarly attention is its agenda-setting process. By issuing rulings, the Court proclaims the issues that it will resolve, thereby greatly affecting the contour of American politics. Pacelle (1991) examines this aspect of the Court's behavior from the time of Franklin D. Roosevelt to that of Ronald Reagan. However, no other scholars have sought to extend Pacelle's analysis to periods prior to the Roosevelt Court. Such inquires are important since the Court is a counter-majoritarian institution beyond direct control of the electorate (e.g., Bickel 1968; Mishler and Sheehan 1993) and, thus, its

workings and the influences affecting its members' behavior should be carefully examined.

The Supreme Court's Agenda-Setting Process

By examining the composition of the Court's agenda, we can more clearly understand its priorities across time. Casper and Posner (1976) take a long-term perspective on the Court's agenda. They advance a theory of the caseload change of the Supreme Court and criticize Freund's (1972) theory which asserts that the number of cases that the Court hears will be positively associated with the size of the population and the growth of the economy (Casper and Posner 1976: 27). As those two factors increase, the number of cases on the Court's docket will increase, Freund argues.

Casper and Posner, on the other hand, assert that, first, the primary behavior underlying legal disputes will affect the frequency of those disputes (Casper and Posner 1976: 28-29). As the number of labor strikes or government contracts increase, for example, so will the number of cases filed in the Court dealing with them. Second, the relative costs of litigation affect the incidence of cases. Not surprisingly, the higher the costs, the fewer cases filed (Casper and Posner 1976: 29). Third, the uncertainty of the law can cause cases to be filed, since the parties are unsure of the state of the law. Uncertainty can increase "the difficulty of arriving at a mutually attractive

settlement by complicating the prediction of the outcome of litigation" (Casper and Posner 1976: 29). Fourth, the stakes that the parties have in the case can determine the number of cases filed (Casper and Posner 1976: 29). These stakes can "magnify any differences between the parties with respect to the settlement terms, relative to the costs of litigation" (Casper and Posner 1976: 29). If a party has a very large financial or personal stake in the outcome of his or her case, then that may make him or her less willing to settle the matter and, thus, more willing to pursue Supreme Court review. Fifth, the amount of previous litigation can decrease the frequency of cases filed, since previously-decided case serve as precedents for later-filed cases (Casper and Posner 1976: 29). Hence, Casper and Posner argue that Freund's theory of a monotonic increase in the workload of the Court due to an increase in the broad social trends of population and economic growth is simply inaccurate. A multivariate function more accurately describes the increase or decrease in the Court's docket over time.

Analyzing the Court's caseload during the period after the Civil War, the authors find that it was increasing largely due to acts of Congress enlarging the Court's jurisdiction. First, the Act of March 3, 1875 gave the Federal Courts for the first time general federal-question

jurisdiction, involving those cases arising under the laws, treaties or the Constitution of the United States (Casper and Posner 1976: 17). Second, in 1889, Congress authorized the Court to review criminal defendants' convictions in capital cases. In 1891, Congress extended this right of review to all cases of "'infamous crimes,'" which included all cases in which the accused could be sentenced to prison (Casper and Posner 1976: 17). Moreover, the Court itself contributed to its ever-growing docket by reversing state court decisions that had invalidated contracts that previous state decisions had authorized (Casper and Posner 1976: 18).

By 1890, the number of cases seeking space on the Court's limited docket was 1800. This massive burden led the Congress to authorize the establishment of Federal Circuit Courts of Appeals, in the Act of March 3, 1891 (Casper and Posner 1976: 18). Until then, the Court had served largely as an appellate court for the state courts (Casper and Posner 1976: 18). However, the creation of the Circuit Courts was only a stop-gap measure because of the increased demands on the Court's resources due to challenges to burgeoning federal legislation around 1900 (Casper and Posner 1976: 18). Also, the Court decisions striking down as unconstitutional social and economic legislation of the day led to an ever larger docket (Casper and Posner 1976:

18).

After the creation of the Circuit Courts in 1891, the Court's discretionary jurisdiction began to expand with several acts of Congress, notably the Judiciary Act of 1925 (Casper and Posner 1976: 18). The Judges' Bill, as the 1925 Act became known, gave the Court for the first time the power to grant certiorari only in cases that the justices deemed to be worthy of the Court's review (Casper and Posner 1976: 19-21). The primary purpose of the Act was to limit the Court's ever-growing docket. It did so, with the result that by 1930 the discretionary decisions comprised 85 percent of the Court's total jurisdiction, thereby giving the Court a powerful tool to whittle down the items claiming space on its limited docket and allow it to concentrate on cases involving Constitutional questions (Casper and Posner 1976: 20).

In empirically analyzing the Court's docket from 1956 to 1973, Casper and Posner find that what has driven a large part of the growth in the Court's workload responsibilities is the number of criminal cases. "In 1956, 48 percent of the docket was criminal; by 1973 the figure was 62 percent" (Casper and Posner 1976: 35). The growth of the criminal docket itself is due in part to a large increase in the number of federal criminal cases, itself increasing by 345 percent (Casper and Posner 1976: 38). These cases alone

account for 54 percent of the docket's growth over the period studied. Also, a very important factor in the growth of the criminal portion of the Court's docket was the Criminal Justice Act of 1964 (Casper and Posner 1976: 41). It provided that persons convicted of federal crimes could seek appellate review at public expense. In the eight years following the Act's passage, the number of federal criminal appeals grew by 314 percent (Casper and Posner 1976: 41).

However, the growth in the number of state criminal appeals outpaced even the phenomenal growth of the federal criminal docket. Casper and Posner attribute this change in the composition of the Court's workload to, at least in part, the jurisprudence of the Warren Court, which expanded the fundamental rights of the Constitution that are applied to the states through the due process clause of the Fourteenth Amendment (Casper and Posner 1976: 43-44).

On the civil side of the Court's docket, Casper and Posner find that it has increased by 61 percent during the time of their study (Casper and Posner 1976: 46). A significant portion of the overall growth of the Court's docket is due to an increasing number of Constitutional cases filed (Casper and Posner 1976: 49). From 1956 to 1973, there was an increase of 188 percent in the number of Constitutional cases relative to the number of non-Constitutional cases (Casper and Posner 1976: 49). If both

the criminal and the civil dockets are examined, the authors find that the number of Constitutional cases doubled during the roughly twenty years of the study. As of 1973, about two-thirds of the Court's overall docket was comprised of Constitutional cases (Casper and Posner 1976: 50-51).

A major factor driving the substantial increase during the period up until 1973 in the civil docket is the Court's expansive interpretation of the equal protection clause and Congress's enactment of civil rights statutes. Casper and Posner, thus, assert that when there is a confluence of an increase in the activities underlying litigation and an expansion of personal rights, the Court's docket will increase as a result, so as to allow the Court to resolve the conflicts that the legal hierarchy and the larger society itself cannot resolve (Casper and Posner 1976: 54-55). Hence, the authors reject Freund's theory as too simplistic and argue that what has primarily affected the size and composition of the Court's docket is changes in the law (Casper and Posner 1976: 55-56).

Casper and Posner conduct their analyses of the Court's workload over time. By doing so, they are able to discern the particular effects of influential factors. For example, they are able to trace the effect of the Criminal Justice Act of 1964 on the composition of the Court's docket. Their findings, thus, lead other scholars to build more

generalizable models of the Court's agenda-process.

The leading example of a theory-based analysis of the Supreme Court's agenda is Pacelle (1991). Pacelle systematically investigates the agenda-setting of the Supreme Court from the Roosevelt to the Reagan era. Pacelle theorizes that the agenda is driven by three sets of factors: goals, rules, and situations (Pacelle 1991: 23-24). The goals are those of the individual justices and their attitudes about what is proper public policy. The rules are the formal processes, procedures, and norms that underlie the judicial process. One such norm is that of role orientation (see Gibson 1978). The situations are the contextual conditions in which the Court is acting. The 1930s and FDR's New Deal provided a very favorable atmosphere in which the Court could expand its policymaking role, for example (Pacelle 1991: 23-24).

These three elements, Pacelle argues, combined to influence the Stone Court (1941-1946) in particular not to be an advocate of civil liberties (1991: 140). First, the individual members of the Court themselves opposed the expansion of civil liberties. Although Black was a strong supporter of civil liberties, many of the remaining members (Stone, Roberts, Reed, Frankfurter, Byrnes, Jackson, and Burton) were not strong advocates of such claims. Second, the dictates of the judicial role required that the Court

hear those cases that caused conflict among the courts below (Pacelle 1991: 140). These cases raised issues of regulatory power rather than civil liberties. Third, an important situational factor that caused a decline in support for civil liberties claims was the outbreak of the second World War and a naturally heightened suspicion of allowing increased liberty in such times (Pacelle 1991: 140). Pacelle argues these factors can help promote an issue on the Court's agenda, as well.

Pacelle conceptualizes the Court's agenda as being composed of two parts: the exigent and the volitional agendas (Pacelle 1991: 28). As the names imply, the exigent agenda is composed of items that require the Court's attention; for example, the Court must hear a case to resolve conflict among the courts below it (Pacelle 1991: 28). During the period from 1938 to 1952, in particular, economics cases comprised a large percentage of the Court's exigent agenda because of the institutional imperative to resolve issues necessary to ensure the smooth operation of the overall judicial administrative hierarchy (Pacelle 1991: 28).

The volitional agenda, on the other hand, is composed of those cases that help to fulfill the policy goals of some or all of the Court's members (Pacelle 1991: 28). For example, the volitional agenda was composed of civil

liberties items during the latter part of the Warren Court because the justices themselves had rational, policy goals to advance, even though concerns of judicial administration or the dictates of the judicial role did not require them to be addressed (Pacelle 1991: 28-29).

Because of the strictures of the American judicial process, and in particular the case or controversy requirement of Article III of the United States Constitution, the justices cannot advance their policy goals alone (Murphy 1964: 21-22). They must wait for a case to enter the judicial process before they can act. The justices must be concerned about stability and consistency in the law, as well (Pacelle 1991: 29). These elements of the judicial role tend to restrict the discretion that the justices possess to implement their policy views through the Court's agenda.

Pacelle suggests that they are greatly assisted in their endeavors by policy entrepreneurs (such as interest groups), who seek to advance a particular policy agenda themselves (Pacelle 1991: 29-30). They do so through filing petitions for certiorari (cert.). The number of groups that file cert. petitions in a particular case implicitly indicates to the justices the importance of the case to the larger society. Such actions provide a cue to the justices that they should include that issue or case on

the Court's agenda (Caldeira and Wright 1988: 1109-27). Thus, there is a rational basis underlying the Court's agenda-setting process, since the justices and the external policy entrepreneurs attempt to link similar issues with related policy pronouncements and thereby advance their respective policy goals (Pacelle 1991: 24-30).

Once the case has been filed, the justices do not follow a lock-step process in their consideration of the case. They may demonstrate what Pacelle calls "issue fluidity," by expanding or contracting the issue involved in a case, depending on their particular policy goals (Pacelle 1991: 32). Issue expansion involves opening agenda space to consider a theretofore unconsidered issue, a prime example of which is Gideon v. Wainwright (1963) (Pacelle 1991: 32-33), requiring states to provide counsel to all defendants who could not afford legal representation themselves. Pacelle suggests that a new issue area is almost always a function of related policy areas; these are known as "policy windows" (Pacelle 1991: 40). Occasionally, different issues areas will result in a new policy area being initiated; these are known as "spillover effects" (Pacelle 1991: 40). For example, the government's power to regulate in economics cases and the increasing frequency of U.S. regulation under the rubric of federalism led to the emergence of cases dealing with related substantive areas of

regulation, including such areas as labor relations, securities regulation, energy, and communications, while general regulation issues began to wane (Pacelle 1991: 114-15). In time, labor relations cases led the Court to hear cases dealing with First Amendment questions; regulation cases led to concerns of due process being considered (Pacelle 1991: 120-21). This is a process that Pacelle describes as "horizontal spillover." Hence, rather than creating novel issues out of wholly new cloth, the Court often combines previously-considered issues into novel ones, the existence of which depends on situational and conditional factors (Pacelle 1991: 41-42).

The primary mechanism of inaugurating such policy change is through landmark decisions (Pacelle 1991: 34-35). Agenda change is also affected by flux in the membership on the Court, since this influences the ideological mix of the justices (Pacelle 1991: 33). Additionally, the cases that the justices select to hear, and the language and tone of the opinions provide cues to litigants and lower courts concerning the direction that Supreme Court policy will likely take in the future (Pacelle 1991: 35-36). The Court's opinions, hence, lead policy entrepreneurs to file further cases, and the Court to hand down subsequent opinions, in a process that highlights the evolution of issues affecting American politics (Pacelle 1991: 35-36).

Thus, the dynamics of the Court's agenda-setting mechanism describe an iterative, incremental process involving the organized litigant groups and the justices themselves attempting to engineer policy change within the constraints of the institutional norms and structures of the American judicial process.

Substantively, Pacelle finds that the Court's agenda has historically been composed of two main elements since the 1930s: civil liberties and economics. Up until the 1960s, the agenda was dominated by economics cases, with very few civil liberties and rights issues being brought to the Court (Pacelle 1991: 63-65). But by 1964, economic cases comprised only 20 percent of the cases that the Court heard. This trend has continued, with such cases constituting only ten percent of the contemporary agenda (Pacelle 1991: 65).

When the Court upheld the government's exercise of power in economic and regulation decisions, it opened a window to incorporate the protections of the Bill of Rights into the 14th amendment. Slowly, the Court began to devote an increasing proportion of its agenda to questions of substantive individual liberties and rights rather than simply notions of due process, and, thus, a decreasing proportion of economics cases was observed (Pacelle 1991: 128-29). In the civil liberties domain, Pacelle argues that

the Supreme Court became the primary policymaker and, in doing so, fundamentally transformed its role in the American political system and indeed the overall complexion of American politics (Pacelle 1991: 190-92).

McCloskey (1994) provides an inspired examination of the history of the Supreme Court. Pacelle's results confirm, in part, McCloskey's observations about the transformation of the issues that the Court has considered since it began and the existence of three distinct periods of Supreme Court jurisprudence: 1787 to 1865 (dealing with issues of nationalism); 1865 to 1954 (dealing with issues of economics); and, 1954 to the present (dealing with issues of civil liberties and civil rights).

Determinants of Supreme Court Decision-Making

The majority of studies investigating aspects of the Supreme Court's political behavior have focused on the period after the end of World War II. These analyses may have been completed because of the ready availability of data, a concern with more contemporary matters, or simply a desire to study the most recent eras of the Court's behavior. While these inquiries are certainly important, they do not analyze the important trends of, and influences on, the Court's behavior in earlier periods.

Studies of the Post-1945 Period. Based in part on the pioneering work of Pritchett, Schubert's The Judicial Mind

(1965) was perhaps the first major empirical study of the influence of the attitudes and ideologies on the behavior of the Supreme Court justices in the post-1945 period. Schubert examined nonunanimous decisions that the Court handed down from the October term of 1946 to the end of the annual term in June 1963 (Schubert 1965: 44). Using Laswell's (1948) Power and Personality as a foundation, Schubert theorizes in his "psychometric model" that Supreme Court justices play political roles in the American system that allow them to displace their "private motives on public objects for which [they] then provide a rationalization in terms of public interest" (Schubert 1965: 12). They seek to effectuate their own attitudes in terms of public policy by using their voting behavior as institutionally-sanctioned vehicles in cases that come before the Court; they implement their political beliefs through their decision-making.

Because the justices' attitudes cannot themselves be directly observed, Schubert states that scholars must gain more knowledge about them through indirect methods: through observation of the justices' observable voting behavior (Schubert 1965: 20-21). If there are consistent regularities in the justices' manifest decision-making behavior, then Schubert asserts that scholars can validly infer that these regularities are being produced by constrained and organized syndromes of psychological

variables known as attitudes or values (Schubert 1965: 27).

Schubert posits that each justice's large-scale social views could be represented by an ideal point along a liberal-conservative continuum that reflects the best approximation of the collection of the justice's own values or attitudes and, thus, the justices' view of an ideal policy. This ideal, or i point, was compared with a stimulus point, j, that reflected the most salient issues present in a particular case the Court was considering (Schubert 1965: 27). The distance between the justices' individual ideal points is hypothesized to be a function of their ideological differences relative to the substance of the underlying psychological dimension (Schubert 1974: 18). "Differences in ideology (which are differences in their attitudes toward particular issue aggregates) cause the justices to vote differently in decisions of the Court in which such issues are at stake. The votes of the Supreme Court justices are, therefore, articulations of ideological differences" (Schubert 1974: 18). Hence, Schubert theorizes that the justices' ideologies affect their voting behavior.

If an ideal point was farther along one of three dimensions than was the corresponding stimulus point, then the justice's attitudes on that particular issue would be scored positive and its manifestation, his or her vote,

would reflect a relatively liberal ideology. Similarly, if the justice's ideal point was not as far along the continuum as was the stimulus point, then the vote, the empirical manifestation of his or her attitudes, were scored negative, reflecting a relatively conservative ideology (Schubert 1965: 38-39). By investigating the distance between the justices' individual ideal points estimated from their votes, this methodology allows Schubert to rank the justices based upon their relative support for the issue represented in the stimulus point (Schubert 1965: 102-03).

Schubert discovers that there were two major dimensions underlying the decision-making of the justices. He labels these dimensions the "C" scale, measuring the justices' support for civil liberties claims (Schubert 1965: 101), and the "E" scale, measuring support for governmental regulation of the economy and for the interests of the economically underprivileged against those of the economically well-off (Schubert 1965: 127-28). He finds these two dimensions to be consistent and stable across issues and justices (Schubert 1965: 99-103). He concludes that these dimensions represent a manifestation of the latent attitudinal structure of the justices themselves that provide a window on their ideologies and, hence, their liberalism (Schubert 1965: 233-35). By virtue of this rather complex methodology, Schubert succeeds in indirectly measuring a

fundamental influence on the behavior of the Court members and discovers a powerful explanation for their voting. Rather than simply asserting that the facts of the case and the law are exclusively influential, as legalistic explanations asserted, Schubert demonstrates that the justices' attitudes and ideologies are indeed important factors in their decision-making.

Moreover, Schubert finds that the justices' scores are consistently aligned on these two scales. This finding suggests two important hypotheses: (1) the justices' voting behavior has a latent structure, in which the attitudes underlying the C and the E scales have a constrained and consistent relationship; and, (2) the subsets of the justices are the manifestation of fundamental attitudinal types in such a latent structure (Schubert, 144). "There is indeed a universe of psychological content that might be called liberalism, but that it is not sufficiently homogenous to permit us to speak of an attitude of liberalism even though we might well speak of an ideology of liberalism" (Schubert 1965: 173). Therefore, Schubert theorizes that the fundamental factor explaining the variance in Supreme Court decision-making is the differing content of the justices' ideologies, rather than their discrete attitudes about particular issues of public policy. Their scores on the political and economic liberalism scales

are, thus, functions of this fundamental psychological construct.

However, Schubert's methodology of factor analyzing the decisions, creating axes from the underlying scales and then manually rotating them is problematic because there was (at the time of Schubert's original study) no commonly accepted standard for the correlation between the axes or the manner in which they were rotated. This lack of a standard is problematic because the relationship between the axes and the justices' relative position on them demonstrate the scales' validity and, in turn, that of Schubert's conclusions based on the Court members' cumulative scale rankings (Tate 1983). In The Judicial Mind Revisited, Schubert (1974) extends the period analyzed through the end of the Warren Court (1969); he essentially confirms his earlier study's findings concerning the two major scales (the C Scale and the E scale) underlying Supreme Court decision-making.

A recent influential attempt to demonstrate attitudinal influences on the post-1945 Court's decision-making is Segal and Spaeth (1993). Segal and Spaeth argue that justices' votes are largely influenced by their own attitudes. Their attitudinal model is contrasted with the legal model, which asserts that the justices decide cases by looking simply at the facts, dispassionately applying the law to them, and

coming to a ruling (Segal and Spaeth, 62-65; Horwitz 1992). Segal and Spaeth alleged that the justices' public support of the legal model is simply designed to obfuscate their efforts to write their policy views into the law.

Segal and Spaeth provided several measures to demonstrate the validity of their model. Segal and Spaeth use scores of the justices' ideologies to predict their voting behavior. The methodology, developed by Segal and Cover (1989), involves content analysis of newspaper editorials written about the justices between the time that they were appointed and their confirmation. The authors read the editorials and assigned a score ranging from most conservative (-1) to most liberal (1)(Segal and Spaeth 1993: 226). Segal and Spaeth correlate these scores with he justices' voting behavior and find a rather strong correlation (1993: 228). They also specify a mulitvariate model that includes facts of the case the justices decided and their ideological scores. They find that the influence of the justices' attitudes is significant (1991: 230). Further, there was a "marked difference separat[ing] the liberally inclined from the other justices" (Segal and Spaeth 1993: 252). Hence, the attitudinal model is explanatory, Segal and Spaeth argue, of Supreme Court behavior because if the legal model were truly explanatory, the justices (having been exposed to the same set of facts)

would have all voted the same way consistently over time.

However, Segal and Spaeth's findings may not be entirely explanatory of overall Supreme Court voting behavior. Segal, Epstein, Cameron and Spaeth (1995) attempt to extend the methodology that Segal and Spaeth (1993) employ back in time, and find that the relationship between the measure of the justices' attitudes and their voting behavior is less robust for the justices during the Roosevelt and Truman eras than for those in more contemporary periods (Segal, Epstein, Cameron and Spaeth 1995: 821). Moreover, Epstein and Mershon (1996) find that the use of Segal and Cover (1989) scores, as a measure of the justices' attitudes, in studies predicting votes in issue areas other than civil liberties-civil rights is problematic and, thus caution scholars not to use the Segal and Cover (1989) protocol for measuring the justices' ideologies in predicting votes in issue areas other than civil liberties-civil rights, the area for which Segal and Cover developed the scoring metric.

Tate (1981) and Tate and Handberg (1991) provide an alternative protocol for assessing justices' attitudes. They do so through the use of personal attribute models. Personal attribute theory suggests that one's personal attributes (e.g., party identification, regional origins, prior professional experience) greatly affects and shape's

one's worldview, thereby influencing one's attitudes (Glick 1993: 313-14). Because attitudes are so difficult to measure directly, Tate (1981) and Tate and Handberg (1991) employ attributes as surrogates for attitudes themselves because these data are much more readily available and manipulable than the attitudinal data themselves.

Tate (1981: 361) finds a strong association between a justice's social attributes and his voting in civil liberties and economics decisions. He specifies separate models for each type of voting. Tate's specification of his model of civil liberties decision-making, for example, included the justices' prior prosecutorial experience. He theorizes that if a justice had such a prior career, then he would be more likely to vote in the conservative direction in civil liberties decisions (that is, against the claim of civil liberties) because such experience is associated with a greater likelihood of favoring the government's interests (1981: 358-59). Overall, Tate's model explains 61 and 82 percent of the variance of the dependent variable for the economics cases, and civil rights and liberties cases, respectively (1981: 361).

Ulmer (1986) challenges Tate's (1981) analysis. Ulmer split his sample of the justices' votes into pre- and post-1930 subsamples. He finds that personal attribute models, regressed onto support for the government, performed well

for the post-1930 sample, but much less so for the earlier period (1986: 964). However, Ulmer's methodology is lacking in several respects. First, his study does not replicate Tate's (1981) model because Ulmer used an entirely different dependent variable than does Tate. Second, Ulmer's models only includes three variables: father as a state officer, father as a state officer interacting with time, and party identification. Ulmer's model, thus, may be under-specified and his results do not encourage the reader to have confidence in them.

Studies of the Pre-1945 Period. While the bulk of the literature exclusively deals with the post-World War II Supreme Court, a few studies investigate the pre-1945 period. Tate and Handberg (1991) respond to Ulmer's assertion that personal attribute models are timebound by replicating Tate's 1981 analysis for the period 1916 to 1988. They specify separate models for the justices' individual decision-making in economics and civil liberties-civil rights cases (1991: 464-71). Party identification and the appointing president's policy intentions are significant in both types of decision-making. Also, a measure of the justices' rural origins is significantly associated with their voting behavior, while regional origins is associated with economics voting only. As a measure of the career experience, Tate and Handberg find

that an index of judicial experience is associated with the justices' civil liberties-civil rights decisional behavior, and that a combined index of prosecutorial and judicial service is related to both types of decision-making (Tate and Handberg 1991: 474). Thus, these authors find that personal attributes are strongly associated with, and explain a great deal of, the variance of the Court's voting behavior (1991: 474).

A methodologically rigorous study that analyzes Supreme Court decision-making at the aggregate level and includes the pre-1945 period is Haynie and Tate (1990). These authors examine the liberalism of the Court, as expressed in the justices' votes in nonunanimous economics and civil rights and liberties cases from 1916 to 1988, a period including two World Wars, the Great Depression, the Cold War, the Oil Crisis, Watergate, and including 46 justices from Edward White to Anthony Kennedy (Haynie and Tate 1990: 2). The authors specify models of economic and civil liberties-civil rights decision-making that include individual-level influences and environmental influences. The former include the mean levels of the justices' partisanship, the appointing presidents' policy intentions, the justices' regional and agricultural origins, and a measure of the justices' prosecutorial and judicial experience (Haynie and Tate 1990: 6-7). The environmental

influences are modeled as shocks. These factors include crucial historical events that may affect the liberal outcomes of the Court (e.g., the Great Depression) (1990: 7). Similarly, the authors hypothesize that the intervention of the World Wars created an incentive for the Court to curtail civil rights and liberties (1990: 7).

The authors estimate separate models for civil rights and liberties liberalism, and for economic liberalism. In the civil rights-civil liberties model, the authors find that only the parameter measuring the rate of decay of the impact of World War II is significant (Haynie and Tate 1990: 16). This finding suggests that one term year's liberalism is significantly and positively related to the following term year's liberalism. Thus, there is a time serial component to civil rights-civil liberties liberalism. They also find that the impact of the Great Depression was positively significant, indicating that it caused the Court to become more likely to vote in the liberal direction in economics decisions (Haynie and Tate 1990: 16).

Handberg (1976) investigates the decision-making of the Supreme Court during the period from 1916 to 1921, a natural court marked by the appointment of Justice Clark in 1916 and the death of Justice White in 1921. Basing his study on Schubert's psychometric model, Handberg analyzes 261 nonunanimous decisions, three-quarters of which were

economics or E-scale cases; there was an insufficient number of cases to construct a valid C-scale (Handberg 1976: 363-64). He constructs quasi-scales for both the E and C dimensions, and he finds, similar to Schubert's results for later periods, that the two dimensional space fits the data quite well during this period of Supreme Court decision-making (Handberg 1976: 364-75). Thus, the Court's decision-making prior to 1945 can be analyzed along two attitudinal scales, reflecting the justices' views of economic and civil liberties-civil rights questions.

Renstrom (1972) examines the attitudinal influences on the decisional processes of the Stone Court (1941-1946). Using Guttman scaling techniques and 485 nonunanimous decisions, Renstrom finds three dimensions underlying the Court's voting behavior (1972: 89). He suggests that this multidimensionality indicates that the Stone Court was a transition Court because its predecessors' decision making was aptly described by a single dimension (Renstrom 1972: 106-07). Renstrom describes the dimensions he finds as "judicial power," "governmental regulation," and "administrative oversight" (1972: 89) The judicial power dimension relates to the judiciary's role in the political system and its connection to other political actors within that system. It measures the discretion of the judiciary to initiate policy change (Renstrom 1972: 107-08). The

governmental regulation dimension encompasses the Court's attitude toward general governmental regulation (Renstrom 1972: 124). The last dimension, the administrative oversight dimension, represents a combination of the other two dimensions, reflecting the interaction of the justices' attitudes about the appropriateness of governmental regulation and the Court's role in reviewing actions by other governmental actors. However, concerns for efficient and just procedures were also present in this dimension (Renstrom 1972: 133, 136).

Leavitt (1970) studies the effects of attitudes and ideology on the behavior of the White Court (1910 to 1920). Leavitt's analyzes the Court's behavior across two distinct periods. He splits his sample into two halves: 1910 to 1915, and 1916 to 1920 (Leavitt 1970: 3-4). He forms Guttman scales, ranks the justices on these scales, and then calculates a rank order correlation, factor analyzing the resulting matrix (Leavitt 1972: 146-47). From these data, he determines that attitudes are grouped into three categories: attitude systems (1972: 192-236), value systems (1972: 291-318), and ideologies (1972: 248-91) . He discovers that in the earlier period of the White Court, there was less ideological division among the justices than in the latter period, in which the justices were more polarized along the traditional liberal-conservative

continuum which, interestingly, did not fall along party lines. By the time of the Stone Court, the justices were in fact divided along party lines (1972: 246-47). This finding comports with subsequent research (Haynie 1992; Walker, Epstein, and Dixon 1988) that suggests the justices were undergoing vast changes in their role conceptions and their view of the Court in the political structure beginning in the early part of the twentieth century.

Furthermore, Leavitt notes that social background (personal attribute) models are appropriate for the White Court. Using multivariate analysis, he argues that a large part of the justices' decision-making is strongly related to off-Court influences including political party affiliation and political movements, such as Progressivism that was then on-going (1972: 331-34). Leavitt asserts that political party serves as a reference symbol, influencing Republicans to be more liberal on federalism issues and Democrats to be much more conservative, but that Republicans were more conservative than their Democratic fellows on issues of social welfare (Leavitt 1970: 274-77).

Leavitt's study is to be commended for its comparative design and for its multivariate methodology. However, it (like Renstrom's (1972) study) only examines a small portion of the Court's history, albeit a very important time in the development of the justices' role conceptions and view of

the Court in the American system. Leavitt's findings, thus, represent an important but limited contribution to the literature in the subfield.

Mattingly (1969) examines the attitudinal factors influencing decision-making on the Hughes Court. Selecting only nonunanimous cases, Mattingly compiles 189 decisions issued during a five year period from 1931 to 1936 (Mattingly 1969: 8). Using Guttman scalogram analysis with factor analysis and varimax rotation techniques, Mattingly finds that the justices' attitudes are best explained by a simple, one factor structure. Within this structure, Mattingly finds two major and one minor values. "Public welfare" is one of the dominant components. It relates to the legitimacy of governmental authority. The other major component was the "private rights" value, the focus of which is on the individual. The minor component was a "judicial process" value, the concern of which is the lower courts' conduct of judicial business (Mattingly 1969: 143-56). These three values, therefore, comprise the attitudinal dimensions influencing the behavior of the members of the Hughes Court.

While Mattingly's study does examine the pre-World War II Court, it does not compare behavior across different chief justice and natural courts. Walker, Epstein and Dixon (1988) find that the Hughes Court was a transitional Court

because, in part, of its increased rate of dissent and the greater expressiveness of the Court's members. Hence, The generalizability of these findings is limited.

Thus, there have been only a handful of studies examining the Court's behavior prior to 1946. Leavitt (1970) investigates the attitudinal influences on the policy preferences of the White Court (1910-1920). Handberg (1976) examines the White Court from 1916 to 1921, and finds a two-dimensional attitudinal structure underlying the justices' decision-making. Mattingly (1969) studies the influences on the voting behavior of the Hughes Court, spanning 12 years. Renstrom (1972) studies the attitudinal influences of the five year period of the Stone Court. Pritchett (1948) examines the growing voting division and ideological polarization on the Court during the tenures of Charles Evans Hughes (1930-1941) and Harlan Fiske Stone (1941-1946).

There are several additional studies that explore the behavior of the Court across a significant time period. Tate and Handberg (1991) investigate the economic and civil liberties-civil rights decision-making of the Court from 1916 (the final natural Court under Chief Justice Edward D. White) to 1988 (the first two and one-half term years under Chief Justice William H. Rehnquist). Also, Handberg and Tate (1990) study the influence of length of service on the liberalism of the Court members from 1916 to 1989.

Moreover, there are several studies that examine the change in the Court's agenda across time. Casper and Posner (1976) analyze the change in the Court's agenda from the Civil War (under Chief Justice Roger B. Taney) through 1973, the first years of the Burger Court. Completing a more theoretically-driven analysis, Pacelle (1991) finds that the Court's agenda is tied to the goals of the justices, the rules under which the Court must operate in the political system, and the situations in which the Court acts. Pacelle's (1991) findings support the historical observations of McCloskey (1994) who suggests that the Court's agenda since the 1780's has been characterized by three phases: from 1787 to 1865, the Court's decisions were predominately dealing with questions of nationalism; those from 1865 to 1954 dealt primarily with economic issues; and those from 1954 to the present largely involve questions of civil liberties-civil rights.

Chapter Summary

The bulk of the literature in the subfield of judicial politics has been limited to studying the Supreme Courts composed after 1945. This study provides a systematic analysis of the behavior of the United States Supreme Court from 1888 to 1989. It investigates the influences on the Court's decision-making behavior, both at the institutional

and the individual levels of analysis. It will thereby provide the longest empirical perspective on the Court's behavior now present in judicial politics research and provide a base against which the findings concerning the post-World War II Court can be compared.

Pacelle (1991) and Casper and Posner (1976) are the two major empirical works on the Court's agenda. Casper and Posner (1976) find that the Court's workload is a function of several variables. In particular, they assert that jurisdictional changes first enlarged and then (in 1925 in particular) decreased the workload of the Court. The 1925 Act gave the Court for the first time substantial powers of discretionary jurisdiction, thus allowing it to reduce its ever-growing docket. Moreover, Casper and Posner find that legislative acts have influenced the types of issues that the Court decided. For example, the Criminal Justice Act of 1964 provided for appellate review of convictions of persons accused of federal crimes. Finally, Casper and Posner find that the Court itself contributed to its burgeoning docket by its expansive interpretation of the equal protection clause.

Pacelle (1991) more systematically analyzes the changes in the Court's agenda from the time of Franklin Roosevelt to that of Ronald Reagan. He theorizes that three elements influence the composition of the Court's agenda. These are:

the goals of the justices, the rules structuring the American judicial process, and situational factors. He finds that these three factors influenced the Court to include on its agenda a large percentage of economics cases up until the 1950s. Thereafter, economics issues began to decline to make way for decisions dealing with civil liberties and rights. These findings confirm the observations of McCloskey (1994).

Building his work in part on Pritchett (1948), Schubert (1965, 1974) finds that a major influence on the justices' voting behavior is their attitudes. In his psychometric model, he is able to array the justices along scales measuring support for claims of economic regulation and civil liberties and civil rights. In so doing, he demonstrates a fundamental difference underlying Supreme Court decision making.

The theory of attitudinal influences on the Supreme Court has been applied to the Courts beyond the Warren Court by Segal and Spaeth (1993). These authors have also demonstrated the underlying psychological component to the Court's voting behavior. However, their measure of ideology has been shown to be less robust in the period of Franklin Roosevelt and prior periods (Segal, Epstein, Cameron and Spaeth 1995). Tate (1981) and Tate and Handberg (1991), in particular, employ personal attribute models as another

measure of ideology.

The next chapter discusse the historical events and personalities of the Supreme Court beginning with Fuller Court in 1888 and extending through 1945. This review provides the reader some context into which the latter analyses may be placed and, thus, better understood.

CHAPTER II

HISTORICAL SETTING OF THE UNITED STATES SUPREME COURT, 1888-1946

The Court in Historical Perspective

To provide some context to the analyses conducted in this study, this chapter provides a review of the historical setting in which the Court operated and the vast macro-political changes that occurred beyond the walls of the "Marble Temple" (O'Brien 1996: 145) from 1888 to 1946. Within that period, there were five different chief justices who led the Court, and indeed the nation itself, through twists and turns in jurisprudence that accompanied large scale changes in society and politics. They are: Fuller (1888-1910), White (1910-1921), Taft (1921-1930), Hughes (1930-1941), and Stone (1941-1946) (Epstein, Segal, Spaeth and Walker 1993: 307-11).

During the 1880s and up until the late 1930s, the Court's economic decisions allegedly reflected the laissez-faire perspective that prevailed in the country (Schwartz 1993). Thereafter, the Court consistently began to support social welfare liberalism. Swindler (1969) summarizes the sociological challenges on-going from the late 1880s to the

late 1930s:

> The passing of the frontier, the rise of an interstate industrialism, the shift from a rural to an urban distribution of population, the breakdown of nineteenth-century capitalism and the efforts to construct in its stead a twentieth-century capitalism, the breakthrough in science and technology, the change in the society of nations brought about global wars and the militant dialectic of totalitarianism -- the constitutional posture of the American people had to be readjusted in response to each of these (Swindler 1969: 1-2).

Being the final arbiter of jurisprudence for the United States legal system, the Supreme Court thus faced enormous challenges as it attempted to resolve the issues that it faced during this period. The effects of this changing milieu are expressed in the Court's decisions. These are more systematically discussed in Chapters III and IV.

The Fuller Court (1888-1910)

During Melville Fuller's tenure as Chief Justice, the Court's membership nearly completely changed. When he arrived at the Court in 1888, Fuller joined Samuel Miller, Stephen J. Field, Joseph P. Bradley, John Marshall Harlan I, Horace Gray, Samuel Blatchford, and Lucius Q. Lamar.

Brief Biographical Sketches of the Fuller Court Justices

Melville Fuller was born in Maine. His father was a prominent attorney, as was his uncle; his grandfathers were distinguished judges. Fuller attended Harvard Law School and himself became an attorney in 1855. In 1856, he moved

to Illinois and became involved in politics, joining the state Democratic party. He served two years in the state legislature, where he opposed many of Lincoln's policies including the Emancipation Proclamation (Furer 1986: 218). He then began to build a private practice devoted to real estate and corporate law. Fuller espoused a strict constructionist view, limiting the role of government in economic activity. President Cleveland nominated him in 1888 to replace Chief Justice Morrison Waite, who had died. His political views were conservative, supporting the doctrine of laissez-faire and the limited scope of federal power (Furer 1986: 218).

The most senior justice on the Fuller Court was Samuel F. Miller. Justice Miller was originally born in Kentucky, but left the South because of his opposition to slavery (Abraham 1993: 118). He grew up on a farm, and farmed himself after he earned a medical degree in 1838. He later earned a law degree as well and was in private practice when President Lincoln appointed him in 1862 (Furer 1986: 221). He had previously served as a justice of the peace. By all accounts, he was "scholarly, skillful and creative" (Abraham 1993: 119). During his time on the Court, Miller voted to support the national government's taxing power and its power to regulate interstate commerce, and (being an abolitionist) vigorously supported individual liberties

(Furer 1986: 221). However, he did write the majority opinion in the narrowly decided Slaughterhouse Cases (1873), holding that the Fourteenth Amendment did not prevent state governments from regulating economic activity (Furer 1986: 222).

The third justice to serve on the Fuller Court was Stephen J. Field. Justice Field read the law in his brother's law office and was admitted to the New York bar soon thereafter (Furer 1986: 223). He moved to California in 1849, served as chief magistrate for a newly-founded town and entered private practice. In 1857, he was elected to the California Supreme Court and became its Chief Justice in 1861. Field befriended railroad magnate Leland Stanford, who recommended Field to President Lincoln; Lincoln nominated Field in 1863 (Furer 1986: 224). During his entire tenure on the Court, Field was an ardent conservative and proponent of laissez-faire economic theory, defending the interests of businesses in the face of governmental regulation (Furer 1986: 224). He resigned from the Court in 1897.

Joseph H. Bradley was the fourth justice to serve on the Fuller Court. Bradley read law in an attorney's office, like many of the persons who would later become Supreme Court justices (Furer 1986: 226). He practiced law with a noted railroad lawyer. He eventually entered politics,

joined the Republican party and supported Lincoln's candidacy in 1860. Because of his political involvement, Bradley's name came to the attention of President Grant, who nominated him in 1870. Generally, Bradley voted to support the expansion and exercise of federal power while he was on the Court (Furer 1986: 227). Even though he had been a railroad lawyer, Bradley often voted to support governmental regulation of economic interests. He died in 1892 (Furer 1986: 227-28).

John Marshall Harlan I was also a member of the Fuller Court. His grandson would later serve on the Court. Justice Harlan's father was a prominent lawyer, Whig Congressman, and Secretary of State for Kentucky (Leavitt 1970: 335). The first Justice Harlan was born in Kentucky, read law in his father's law office and became an attorney in 1853 (Furer 1986: 229). He entered private practice and eventually became a county judge. When the Civil War broke out, Harlan was a vigorous supporter of the Union (Furer 1986: 230). In 1864, he was elected Kentucky Attorney General. Being a loyal Democrat, Harlan opposed Lincoln's renomination in 1864 and opposed Lincoln's Emancipation Proclamation and the proposed Thirteenth Amendment to the U.S. Constitution (outlawing slavery). Once the War ended, however, he aligned himself with the policy positions of the Republican party and became an ardent civil libertarian

(Furer 1986: 230). As a result of his party involvement, President Hayes nominated Harlan to replace Justice Davis who had resigned in 1877. Once on the Court, Harlan was a strong supporter of judicial restraint, leaving to the legislature questions of the formation of public policy and voting to support the Interstate Commerce Act and the Sherman Antitrust Act (Furer 1986: 230). Harlan is perhaps best known for his ringing dissent in Plessy v. Ferguson (1896), stating that "'[o]ur Constitution is color blind, and neither knows nor tolerates classes among its citizens'" (Furer 1986: 231).

Stanley Matthews was the next member of the Fuller Court. Justice Matthews was born in Lexington, Kentucky in 1824. His father was a mathematics professor who moved the family to Cincinnati in 1832 (Furer 1986: 232). Matthews read the law in Cincinnati, and then entered private practice. He was active in the abolitionist movement in the area, and became a judge on the Court of Common pleas in 1851 and served two years in the state senate (Furer 1986: 233). In 1858, President Buchanan appointed him United States Attorney for the Southern District of Ohio (Furer 1986: 233). After a stint in the Union Army, Matthews served as Superior Court judge in Cincinnati for two years, after which he returned to private practice, representing railroad interests. He also became active in Republican

state politics, helping an old school chum, Rutherford B. Hayes, become president (Furer 1986: 233). Matthews eventually became a U.S. Senator from Ohio. Hayes nominated Matthews in 1881, but the Senate blocked the nomination. President Garfield re-submitted Matthews's nomination and Matthews was quickly confirmed due in part to Garfield's influence (Furer 1986: 233). However, once on the Court, Matthews did not distinguish himself. He was generally a conservative in economic matters and in questions of civil rights.

Horace Gray was the seventh person to serve on the Fuller Court. Gray was born into a prominent Boston family, known for its involvement in shipping and commerce. He graduated from Harvard Law School in 1849 and shortly thereafter entered private practice (Furer 1986: 235). Gray became a member of the Republican party in 1855 and was a strong supporter of the Union. In 1864, he joined the Massachusetts Supreme Court and served as its Chief Justice beginning in 1873. His decisions on that tribunal betrayed a perspective supportive of property rights (Furer 1986: 236). President Arthur nominated him to the Court in 1881. Even thought Gray was an economic conservative, he was an ardent nationalist, voting to support the federal government's control over currency (Furer 1986: 236). Gray resigned from the Court in 1902.

Samuel Blatchford, born to a prominent Manhattan attorney's family, read the law in the New York governor's office and was admitted to the bar in 1842 (Furer 1986: 238). In 1867, he was appointed to the federal bench in the Southern District of New York (1986: 239). In 1872, he was appointed to the United States Court of Appeals for the Second Circuit. President Arthur nominated him to the Court in 1882. Blatchford was generally moderate in his economic policy preferences, but somewhat more liberal in decisions involving questions of civil liberties (Furer 1986: 239).

Lucius Q.C. Lamar was the last justice on the first natural court[1] during Fuller's tenure. Lamar was born in Georgia in 1825. He read the law there and entered private practice in 1847 (Furer 1986: 241). Through his law practice, Lamar was able to cultivate great respect and was elected to the Georgia legislature in 1853. In 1856, Lamar won election to Congress, representing Mississippi. Having been a plantation and slave owner, he was an ardent opponent of civil rights. When Lincoln won the presidency in 1860, Lamar himself authored the ordinance for Mississippi to leave the Union in January of 1861 (Furer 1986: 242). After the War, he returned to private law practice and was re-elected to Congress in 1872, becoming a prominent spokesman for states' rights (Furer 1986: 242). In 1876, he was elected to the United States Senate, and in 1884, President

Cleveland appointed him Secretary of the Interior. Three years later, Cleveland elevated him to the Court. Once on the Court, Lamar predictably was a conservative in economics and civil liberties-civil rights decisions, supporting a limited reach of the protections of the Fourteenth Amendment. However, he did occasionally vote to uphold state regulation when the public interest required it (Furer 1986: 243).

Within the first five years of the Fuller Court, four new members (David J. Brewer, Henry B. Brown, George Shiras, Jr., and Howell E. Jackson) joined the Court (Biskupic and Witt 1997: 30). Justice Brewer was born in 1837 to missionary parents (Furer 1986: 244). Brewer read law in his uncle's law office and was admitted to the bar in 1858, after which he moved to Kansas. In 1865, he was elected county attorney and in 1870 he was elected to the Kansas Supreme Court, where he was known as a judicial conservative. After his service on that court, Brewer was appointed to the Federal Court of Appeals for the Eighth Circuit, where he defended private property and espoused a laissez-faire perspective (Furer 1986: 245). In 1890, President Harrison nominated Brewer to the Court. Brewer joined his uncle, Justice Field, on the Court and together they represented a strongly conservative duo. Once on the Court, he continued his conservative tendencies, often

finding himself the lone dissenter as the Progressive era developed (Furer 1986: 245). He died suddenly in 1910 (Furer 1986: 246).

Henry Billings Brown also served on the Fuller Court. He was born in 1836 in Massachusetts. He attended Yale and Harvard Law Schools, read the law and eventually was admitted to the Michigan Bar (Furer 1986: 247). He opened a law office and began to specialize in admiralty, and joined the Republican party after arriving in Michigan. Brown served as a federal marshall and assistant United States Attorney for the Eastern District of Michigan (Furer 1986: 247). He also served as a county judge for Wayne County (Abraham 1993: 150). When President Harrison nominated Brown for the Court in 1890, Brown was serving as United States District Judge in Michigan, a post he had held for eight years at that point (Furer 1986: 248). Once on the Court, Brown often aligned himself with conservative Justices Peckham, Brewer and Fuller, although he did write the majority opinion in a decision in which the Court upheld a law prescribing the maximum numbers of hours a miner could work. However, Brown is perhaps best known for his majority opinion in Plessy v. Ferguson (1896), upholding the doctrine of separate-but-equal in public facilities (Abraham 1993: 150).

The third new justice to be appointed during the first five years of the Fuller Court was George Shiras. Shiras was born in 1832 in Pittsburgh to a wealthy brewer and his wife, being brought up on the family farm outside of town. He eventually attended Yale Law School and read law in a Pittsburgh attorney's office, passing the state bar in 1855 (Furer 1986: 250). He entered private practice and joined the Republican party (Furer 1986: 250-51). Shiras' clients included railroad, banking, oil, coal, and iron and steel concerns, some of which were headed by industrialist Andrew Carnegie. He refused an appointment to the U.S. Senate that the State legislature offered him, and he did not serve in any political or judicial office before coming to the Court. President Harrison nominated Shiras to the Court in 1892 (Furer 1986: 251). On the Court, Shiras's decision-making was consistently conservative, being more flexible than his more ardently conservative colleagues such as Chief Justice Fuller, Justices Field, Brewer or Peckham (Abraham 1993: 151).

The last of the new appointments to the Fuller Court during its first five years was Howell E. Jackson. Jackson was born in 1832 in Tennessee to a physician's family. He attended law school at the University of Virginia and Cumberland University, gaining admission to the Tennessee bar in 1856 (Furer 1986: 253). Jackson entered private

practice and accepted an administrative position in the Confederate government when the Civil War broke out. After the War, he joined the Democratic party and was appointed to the Provisional Court of Arbitration in Tennessee. In 1880, he was elected to the Tennessee legislature and one year later he was elected to the U.S. Senate (Furer 1986: 254). In 1886, President Cleveland nominated him to the Sixth Circuit Court of Appeals, where he served for six years until President Harrison nominated him to the Court. Jackson was on the Court only about two years due to recurring tuberculosis. When he did participate, however, he was a consistent conservative (Abraham 1993: 152; Fuller 1986: 254). However, Jackson is perhaps best known for his lone dissent in Pollock v. Farmers' Loan and Trust Co. (1895), in which the Court struck down the federal government's institution of an income tax (Fuller 1986: 254).

During the next 17 years, as justices died or retired, ten new justices were appointed. At the end of Fuller's tenure as Chief Justice, the only remaining members from Fuller's first natural Court were John Marshall Harlan I and Brewer (Epstein, Segal, Spaeth, and Walker 1993: 307-08). Thus, the Court's membership was in flux throughout Fuller's Chief Justiceship.

One of the justices to be appointed during the latter part of the Fuller Court was Edward D. White, who would later serve as Chief Justice. White, born in 1845, was the son of a prominent Louisiana lawyer, politician, judge, Congressman and governor. His father owned a large sugar plantation. White received Jesuit-sponsored instruction in his early education, and attended Georgetown College before the Civil War began. He then joined the Confederate army (Furer 1986: 256). After the War, White read the law, attended the University of Louisiana School of Law and passed the bar in 1868. He entered private practice and deeply involved himself in Democratic politics. He was elected to the state senate in 1874 and gained a post on the state Supreme Court in 1879 (Furer 1986: 257). After serving on that court for two years, White returned to private practice, becoming a prominent member of the New Orleans community. In 1891, White was appointed to the United States Senate, where he was largely a loyal Cleveland Democrat (Furer 1986: 257). In 1894, President Cleveland nominated him for the Court. Overall, White was conservative, supporting limited governmental power since he was an ardent defender of Southern interests. However, White would occasionally vote to uphold regulations that he believed benefitted the public interest (Abraham 1993: 145; Furer 1986: 257).

Two particularly influential appointments affected the tenor of the Fuller Court's decisions: Rufus Peckham in 1895 and Oliver Wendell Holmes in 1902 (Schwartz 1993: 178). Peckham was born in 1838 in Albany, New York. His father was a prominent attorney, who served on the New York Supreme Court (the trial court in New York state) and the Court of Appeals (the highest judicial authority in the state) (Furer 1986: 260). Peckham read the law and was admitted to the bar in 1859. He began private practice and became a district attorney in 1869 (Furer 1986: 260). In 1872, he returned to private practice in Albany and became actively involved in Democratic politics, being a steadfast opponent of New York's Tammany Hall. He was counsel to such tycoons as "Cornelius Vanderbilt, John D. Rockefeller,...and Pierpont Morgan" (Abraham 1993: 146). He served on the Supreme Court and the Court of Appeals. While on the Court of Appeals, Peckham espoused a conservative economic perspective, protecting private property from governmental regulation (Furer 1986: 261). "[H]is avowed political philosophy was very much Clevandesque Democratic: anti-Populist, antipaternalistic in government, economically and socially conservative. In fact, Peckham embraced a social Darwinist approach that went considerably beyond that of his nominator..." (Abraham 1993: 146).

Once on the Court, Peckham was predictably a proponent of the doctrine of liberty of contract, which posited that there should be limited governmental interference in the contracts of willing parties regardless of the fairness of the substance of the parties agreement.[2] This concept formed the foundation of Fuller Court jurisprudence in economics cases. Schwartz (1993) best summarizes this doctrine when he observes that the Fuller Court "furnished the legal tools to further the period's galloping industrialism and ensure that public power would give free play to the unrestrained capitalism of the era" (1993: 174).

Joseph McKenna joined the Fuller Court in 1898. He was born in Pennsylvania in 1843 (Furer 1986: 263). McKenna's father was an Irish immigrant who worked as a baker and who migrated to a small town in California. Justice McKenna became an orphan at age 15, forcing him to work in a bakery to help support his family (Leavitt 1970: 435). McKenna read law in California and passed the bar in 1865. He became more actively involved in politics than he was in his law practice. He joined the Republican party in the 1860's and was elected district attorney of Solano County. In 1875, he joined the state assembly and in 1884, he was elected to the U.S. Congress, becoming friends with then-House Ways and Means Chairman William McKinley (Furer 1986: 264). In

1892, President Benjamin Harrison nominated him to the Ninth Circuit Court of Appeals (serving the West Coast). When McKinley was elected president, he nominated McKenna to the post of U.S. attorney general. Only one year later, the President nominated him to the Court when Justice Field resigned (Furer 1986: 264). "As a result of his judicial inexperience and the lack of a solid legal background, McKenna never developed any consistent judicial philosophy, and his decisions often conflicted with each other in cases involving similar legal principles" (Furer 1986: 264). Sometimes, he would vote to uphold governmental regulation (dissenting when the majority struck down a child labor law) and sometimes he would vote to strike down attempts to regulate economic activity (Furer 1986: 264-65).

Perhaps the best known member of the Fuller Court was the justice from Beacon Hill: Oliver Wendell Holmes, Jr. Holmes' father was a prominent physician in Boston and "the acknowledged leader of a noted group of Massachusetts literati known as the Boston Brahmins" (Furer 1986: 266). His mother was the daughter of a Massachusetts Supreme Court justice. Holmes attended Harvard University and then enlisted to fight in the Union Army. He then returned to Harvard Law School and earned a law degree, being admitted to the bar in 1867. He was a prodigious scholar, publishing, among other works, his classic study The Common

Law, in 1881. In 1883, Holmes was appointed to the Massachusetts Supreme Court, serving there for twenty years and becoming its Chief Justice in 1899 (Furer 1986: 267). On that court, Holmes developed a reputation for progressivism and liberalism in his voting behavior (Furer 1986: 267). Holmes was not involved directly in Progressive politics, but he did befriend many Progressives, such as Louis Brandeis (Leavitt 1970: 203).

In 1902, Theodore Roosevelt chose Oliver Wendell Holmes to succeed Justice Gray. Although the Court was markedly conservative during the majority of Holmes' tenure, his greatest contribution to the development of the law was his dissents, which the Court would later cite as support for more progressive decisions (Furer 1986: 267). Although there was a chilling effect on the promulgation of social legislation because of the Court's conservative decisions, Holmes's idea of judicial restraint, expressed in dissent, began to lay the groundwork for the eventual change in the Court's jurisprudence to support regulatory laws and the coming welfare state (Schwartz 1993: 219). His voting was generally supportive of the progressive tradition, supporting the Sherman Anti-Trust Act, among other acts. He also is known for his relatively strong support of civil liberties, developing the idea of a marketplace of ideas in deciding free speech cases (Furer 1986: 267-68). He served

on the Court until 1932 (Furer 1986: 268).

William R. Day was also a member of the Fuller Court. Day was born in 1849 in Ohio. His father was a prominent attorney and served as Chief Justice of the Ohio Supreme Court. His family included many lawyers and judges. Day attended the University of Michigan as an undergraduate and its Law School, although he did not complete his legal studies there. After he left law school, he read the law and was admitted to the Ohio bar in 1872 (Furer 1986: 270). He entered private practice and began to represent large corporations. He became friends with another local attorney, William McKinley. Day joined the Republican party and became involved in local politics. In 1886, Day was elected to the Court of Common Pleas, but served only six months because of the poor salary. He was, however, continually active in politics helping his long-time friend McKinley become Ohio governor and, later, president in 1896. In 1898, McKinley appointed him secretary of state. In 1899, McKinley appointed him to the Sixth Circuit Court of Appeals (Furer 1986: 270). On that Court, he became friends with two future colleagues: William Howard Taft and Horace Lurton. President Roosevelt nominated him in 1903. Day became a relatively strong liberal, supporting the use of federal and state power in the regulation of economic and social concerns. He resigned from the Court in May 1923 due

to poor health (Furer 1986: 270).

William H. Moody joined the Fuller Court in 1906. Moody was born in 1853 in Massachusetts. After growing up on the family farm, Moody attended Harvard University as an undergraduate and Harvard Law School for one semester. Thereafter, he read the law and passed the bar in 1878 (Furer 1986: 272). He opened his own practice and began to handle corporate law cases. He soon involved himself in Republican politics and was appointed district attorney for eastern Massachusetts in 1890, serving as the prosecutor in the infamous Lizzie Borden case (Furer 1986: 273). Because of his involvement in the Republican party, he developed a friendship with a rising star, Theodore Roosevelt. In 1895, Moody was elected to Congress until 1902 when his friend, President Roosevelt, nominated him to be secretary of the Navy. In 1904, Roosevelt appointed him Attorney General, where he brought several suits against corporations charging them with violating antitrust laws in line with Roosevelt's progressive policies. In 1906, Roosevelt again looked to his friend and nominated Moody to the Court. Although he wrote relatively few decisions, Moody demonstrated a clear liberal policy perspective. He resigned from the Court in November 1910 (Furer 1986: 273-74).

Horace Lurton is the final justice to have served on the Fuller Court. Born in 1844, Lurton's father was a

physician who moved the family to Tennessee. Justice Lurton enlisted in the Confederate Army when the Civil War broke out (Furer 1986: 275). After the War, he entered Cumberland Law School and graduated in 1867. He was admitted to the Tennessee bar in the same year. He entered into private practice. In 1886, he was elected to the Tennessee Supreme Court and became its Chief Justice in 1893 (Furer 1986: 276). Later in 1893, President Cleveland nominated him to the Sixth Circuit Court of Appeals, where he stayed until 1910. While on the Court of Appeals, Lurton befriended William Howard Taft and William Day. On that court, Moody clearly demonstrated his conservative policy preferences (Furer 1986: 276). In 1909, President Taft, Lurton's long-time friend, appointed him to the Court. Once on the Court, however, he showed a liberal perspective, voting to uphold the Sherman Anti-Trust Act and numerous statutes designed to enlarge the federal government's regulatory powers (Furer 1986: 276-77). He died shortly after the end of the 1913 term year.

Substance of the Fuller Court's Decisions

The Fuller Court bridges two centuries, and it witnessed vast social, technological, and legal changes, reflected in its decisions. The Court had "one foot in the Gilded Age and another in the Progressive Era" (Kens 1990: 4). The Fuller Court had ample opportunity to affect

economic regulation since its agenda was composed mostly of economics decisions (McCloskey 1994: 89). Overall, the Fuller Court endorsed in its economics rulings the doctrine of substantive due process in Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota (1890). That concept provides the courts with the authority to review the substance of legislation and not simply the procedures that the law mandates, illustrating the prevailing relationship between government and business (McCloskey 1994: 88-89). It also extends the protections from state regulatory power of the Fourteenth Amendment to businesses. Hence, the Court began to review the wisdom of the economic theory underlying challenged legislation (Biskupic and Witt 1997: 29).

The Court's laissez-faire notions not only shackled the efforts of the states to regulate business activity but also the efforts of the U.S. Congress to regulate interstate commerce (Schwartz 1993: 180-182). Indeed, in United States v. E.C. Knight Co. (1895), the Court held that the Sherman Antitrust Act did not make illegal manufacturing monopolies because the Court did not consider manufacturing to be "commerce" and, thus, it was not within Congress' power to regulate under the Interstate Commerce Clause on which the Sherman Act was predicated, thus making the Act nearly useless (Biskupic and Witt 1997: 30). Further, in Pollock v. Farmer's Loan and Trust Co. (1895), the Court

struck down the Income Tax Act of 1894 as unconstitutional because the tax was a direct one on the people, rather than being apportioned among the states as the Constitution requires. "The case was used as the vehicle for a broadside attack upon governmental interference with private property" (Schwartz 1993: 184).

The Fuller Court's interpretation of the commerce clause complemented the laissez-faire conception of the proper role of government that prevailed in the political and economic theory of the day, culminating in Lochner v. New York (1905) (Schwartz 1993: 173). Lochner struck down a New York law regulating the maximum number of hours that bakery workers could work daily. The New York legislature had passed the law with the intent to provide some protection to the workers, who were mostly immigrants, from their employers' demands to work in dangerous and unhealthy conditions. The Court's ruling, in effect, affirmed the idea that the government cannot restrict two parties' freedom to contract, regardless of the fairness of the underlying bargain.[3] This decision marked the highpoint of the Court's laissez-faire jurisprudence, which continued up until the famous switch that the Court orchestrated in the face of growing national opposition to its repeated striking down of New Deal legislation. Because of the highly regressive nature of the ruling, the Lochner decision has

been compared to Dred Scott v. Sanford (1857) (holding that the slavery was constitutional) in its infamy (Schwartz 1993: 190).

The Fuller Court was equally hostile to the interests of organized labor. In In Re Debs (1895), the Court upheld the contempt conviction of labor organizer Eugene V. Debs who had led a Pullman railway strike in direct contradiction to a federal injunction against doing so (Biskupic and Witt 1997: 30). In 1908, the Court also struck down a law that invalidated "yellow-dog" contracts (those that require the employee to promise not to join a union as a condition of employment) and interpreted the Sherman Antitrust Act to forbid secondary boycotts (Biskupic and Witt 1997: 33). Hence, the Court generally held a narrow view of the rights that employees had as against their employers.

However, the Court was not entirely deaf to the pleas of workers. In Muller v. Oregon (1908), the Court upheld an Oregon law setting the maximum number of hours women were allowed to work in laundries. The Court's decision was largely based upon the brief of Louis Brandeis, who later joined the Court (in 1916). He cited sociological and historical data supporting his client's claim of the deleterious effects of long work hours on women and their children (Biskupic and Witt 1997: 32).

In addition to the issues of economics and labor relations, the Fuller Court issued several important decisions in the area of civil liberties and civil rights, foreshadowing the predominance that such cases would later exert on the Court's agenda (McCloskey 1994: 113). Perhaps the Court's most famous decision is one that some Court observers suggest was one of the Court's worst: Plessy v. Ferguson (1896). The decision affirmed the doctrine of separate but equal as constitutional and validated a Louisiana law requiring separate railroad cars for Whites and Blacks (Schwartz 1993: 188). Schwartz (1993) observes that the Fuller Court was "a reflection of the less tolerant society in which it sat"; it "could hardly hope to lift itself above the ingrained prejudices of its day" (1993: 189). "In lonely if prophetic dissent, Justice Harlan warned that this decision would 'in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case'" (Biskupic and Witt 1997: 30).

However, the Court was not entirely deferential to governmental power. In 1892, the Court held that the Fifth Amendment required that one could be forced to testify against himself only if the government agreed to not use that evidence against him in any way (Biskupic and Witt 1997: 29-30). Thus, while the Fuller Court's economics, civil liberties-civil rights, and labor relations decisions

were mostly conservative, some of them were liberal.

The White Court (1910-1921)

The White Court comprises eleven years of the Court's history. Overall, its decisions were moderately influenced by the reforms of the progressive era: it upheld laws governing employer liability, wage and hour laws, and workmens' compensation (Schwartz 1993: 209-212). Leavitt (1970) divides the Court into two subperiods for analytical purposes: 1910-1915, and 1916-1921. He notes that in the former period that, the Court had eleven different justices: Chief Justice Edward White, Justices Oliver Wendell Holmes, William Rufus Day, Joseph McKenna, Charles Evans Hughes, Willis Van Devanter, and Joseph Rucker Lamar served during the entire period. Mahlon Pitney replaced John Marshall Harlan I in March of 1912, and James C. McReynolds replaced Horace Lurton in October of 1914 (Leavitt 1970: 98; Epstein, Segal, Spaeth, and Walker 1996: 344).

Brief Biographical Sketches of the White Court Justices

Only those justices who joined the Court during White's tenure are discussed in this section since those justices who had served on the Fuller Court, and who continued to serve on the White Court, are discussed above. The justices who were new to the White Court were Charles Evans Hughes, Willis Van Devanter, Joseph Lamar, Mahlon Pitney, James

McReynolds, Louis Brandeis, and John Clarke (Epstein, Segal, Spaeth and Walker 1996: 309).

Leavitt (1970: 334-35) reviews the justices' fathers' occupations to illustrate the influence of their socioeconomic backgrounds on their political values. Charles Evans Hughes was the child of a "a poor [Welsh] immigrant who became a clergyman with a meager income" of $1,200 in 1866 (Leavitt 1970: 334). Hughes was a child prodigy who entered Brown University at 14 and went on to earn a Phi Beta Kappa key. He eventually graduated with highest honors from Columbia University (Abraham 1993: 169). He soon began to practice law, earning the respect and admiration of his colleagues, often taking cases of underdog clients. He worked as counsel for a New York state legislative committee investigating the gas utility monopoly and later assisted in the investigation of the insurance industry. He was elected governor of New York as a reform candidate in 1906 (Witt 1990: 849; Leavitt 1970: 414). William Howard Taft thought that Hughes was a political rival and nominated him to the Court in 1910 to prevent Hughes from competing in the upcoming presidential election. Once on the Court, Hughes was consistently liberal in his policy preferences, although he was more moderate than some of his brethren, such as Justice Brandeis. He supported state and national progressive policies and protected the

interests of labor and civil libertarians (Leavitt 1970: 415).

Willis Van Devanter's father was a successful lawyer in Indiana. In his youth, Van Devanter moved to Wyoming. While there, he became friends with the Republican territorial governor and U.S. Senator Francis Warren. Van Devanter served in several legislative offices and eventually became Chief Justice of the Wyoming Supreme Court (Abraham 1993: 172-173). He also served in the U.S. Department of Interior, specializing in public lands and Indian affairs, earning a reputation as a progressive. His progressivism influenced Teddy Roosevelt to nominate him to the Eighth Circuit Court of Appeals (Abraham 1993: 173). However, while on the Circuit Court, Van Devanter's voting behavior was consistently conservative, evidencing the ties that he previously had with powerful Western economic interests (Abraham 1993: 173). Taft, seeking to appease elements of the Republican party, chose Van Devanter because of his conservatism and his Western geographic origins. Once on the Court, he continued his conservative perspective, becoming one of the vaunted Four Horsemen of the Apocalypse, a coalition of ardently anti-New Deal justices (the other three members were James C. McReynolds, George Sutherland, and Pierce Butler (Abraham 1993: 173)).

Joseph Lamar came from a wealthy Southern family. His family fled the famous march to the sea of Union General William Tecumseh Sherman during the Civil War. As a result of this experience and the witnessing the ravages of Civil War, Lamar was a strong civil libertarian, seeking to "'preserve the rights of all by protecting the rights of each'" (Leavitt 1970: 410). Lamar entered law practice and represented both corporations and individuals suing corporations. In economic matters, Lamar was moderately conservative (Leavitt 1970: 410). Lamar was elected to the Georgia legislature and served from 1886 to 1889. He then went on to serve on the state supreme Court from 1902 to 1905 (Leavitt 1970: 410). President Taft appointed him to the Court in 1910, where he was a strong supporter of civil liberties and civil rights (Leavitt 1970: 411).

Mahlon Pitney's father was a distinguished lawyer and judge who co-founded a bank, having been the Vice Chancellor of New Jersey. Pitney was active in Republican state politics, and served in Congress from 1895 to 1898. He served in the state senate and eventually became its president. Three years later, he was elected to the state supreme court. While on the state courts, his decision-making was clearly opposed to civil liberties' claims and the interests of labor. However, he was moderately liberal in economic decisions (Leavitt 1970: 421-22). He continued

these voting trends when he joined the Supreme Court (Leavitt 1970: 422-23).

Similarly, James McReynolds's family was from the upper social class. His father was a moderately wealthy surgeon who also owned a plantation (Leavitt 1970: 335). McReynolds attended the University of Virginia Law School, graduating in 1884, and entered governmental service. In 1903, be began to serve as an assistant attorney general in the administration of Theodore Roosevelt initially being involved in the antitrust prosecution of tobacco companies (Abraham 1993: 177). He also served in the Taft administration in the same position, but McReynolds resigned twice from his post when the administration acted in ways in which McReynolds did not approve, finally turning his back on the Republican party entirely (Abraham 1993: 177). Eventually, McReynolds joined the Democratic party and supported Woodrow Wilson. Wilson appointed him Attorney General of the United States in 1913, where McReynolds continued his trust-busting work. Wilson nominated him to the Court in 1914 with the hope that he would continue his progressivism. "History would prove him utterly wrong -- for McReynolds, continuing to manifest his violent temper and abrasive nature on the bench, not only became a member of the anti-New Deal Four Horsemen, he turned into their loudest, most cantankerous, sarcastic, aggressive,

intemperate, and reactionary representative" (Abraham 1993: 178). McReynolds was consistently conservative in both economic and civil liberties decision-making (Leavitt 1970: 445-46).

In the later subperiod that Leavitt analyzes (1916-1921), the White Court saw only nine different justices. Louis Brandeis replaced Charles Evans Hughes in 1916 when Hughes resigned from the Court to run for the presidency. An emigree from Prague, Brandeis entered Harvard Law School, graduating two years later. His father was a Jewish immigrant who became wealthy as a grain merchant (Leavitt 1970: 334). Justice Brandeis eventually became a partner in a prominent Boston law firm, representing corporate clients, which made him a millionaire. He later began to represent underdog clients who were suffering economic and political injustices (Abraham 1993: 181). He argued Muller v. Oregon before the Fuller Court in 1908, and authored his famous Brandeis Brief in which he included statistical data underlying the issue to be considered (Abraham 1993: 181). He worked to prevent corporations from becoming too powerful, striving for example to prevent two railroads from gaining a monopoly in New England (Leavitt 1970: 466). He also supported Progressive policies, assisting in their passage and implementation in Massachusetts. Brandeis was a key advisor to the Wilson administration, helping to create

the Federal Trade Commission and the Federal Reserve System (Leavitt 1970: 467). Brandeis continued to provide counsel to the administration after he joined the Court (Leavitt 1970: 467). Brandeis was consistently liberal in his policy preferences (Leavitt 1970: 468-69).

The last justice to join the White Court was Justice John Clarke, joining the Court in 1916, replacing Horace Lurton (Leavitt 1970: 151). Holmes, Pitney, McReynolds, Day, Van Devanter, and McKenna remained on the Court (Leavitt 1970: 151). John Clarke's father was an immigrant of Irish descent, who was involved in Democratic party politics and later became a lawyer and prosecuting attorney (Leavitt 1970: 334). Clarke held Progressivist ideas, supporting various reform efforts and, being a former newspaper publisher, was a strong supporter of civil liberties, particularly the First Amendment (Leavitt 1970: 458). Although Clarke's clients included corporations and railroads, he did support labor's interests and was a moderate Progressive (Leavitt 1970: 459-60). In 1914, President Wilson nominated Clarke to the federal bench. Wilson was impressed by Clarke's Progressive voting and appointed him two years later to the Court. Clarke was more liberal on civil liberties and civil rights questions than he was on questions of economics while he was on the Court (Leavitt 1970: 460-61).

When Brandeis and Clark joined the Court, they became the strongest supporters of Progressivist ideals. They and Pitney and Holmes formed a liberal wing on the Court (Leavitt 1970: 277). Occasionally, Harlan and Hughes would vote with the liberal block (Leavitt 1970: 288). Anti-Progressives were McReynolds, Lamar, Van Devanter, and White. Although McKenna had Progressive tendencies in the first period, he became anti-Progressive in the second subperiod (Leavitt 1970: 288).

Political Context of the White Court

During the period from 1910-1915, the majority of the cases that the Court heard involved laws passed under the Republican Taft Administration, although in the last two years of this subperiod the Court operated under the more progressive Wilson administration (Leavitt 1970: 98). Also during this time, the larger Progressive movement was still unified, and not yet fragmented over the questions of trusts and interest group-friendly legislation (Leavitt 1970: 99). Progressivism generally involves the support of governmental intervention to protect "interests of equality" (Leavitt 1970: 253).

From 1916 to 1921, the Court considered many acts and policies arising from Woodrow Wilson's second term (Leavitt 1970: 151). Even if an act had been passed during a Republican administration, Wilson was able, as a Democrat,

to interpret and implement them with his policy preferences in mind (Leavitt 1970: 151-52). Thus, Leavitt argues that the Democrats on the Court were aligned in favor of federal action and Republicans opposed to such power (Leavitt 1970: 151-52). Moreover, during the last half of the White Court, Democrat Woodrow Wilson became the leader of the Progressive movement, although he was not in the mold of Theodore Roosevelt or even William Howard Taft, who supported and took credit for several Progressivist policies (Leavitt 1970: 223). Because of the conflict with the President, many of the Republican justices did not identify with Wilson or his policies, or even the national movement in general (Leavitt 1970: 223).

Substance of the White Court's Decisions

Generally, the White Court had not become entirely deferential to legislatures. In Hammer v. Dagenhart (1918), for example, it held as invalid a federal law that prohibited the placement of goods that children had manufactured into the stream of interstate commerce (Schwartz 1993: 212). It reasoned that Congress had been trying to regulate manufacturing, which was beyond the reach of Congress' powers under the interstate commerce clause.

Also, the Court breathed new life into the Sherman Antitrust Act by ruling that the Act outlawed unreasonable restraints of trade, rather than all such restraints as it

had previously held, thereby breaking up the Standard Oil trust (Biskupic and Witt 1997: 33). It later upheld Congress' power, through the Interstate Commerce Commission, to prescribe rates even for railroads operating within only one state (Biskupic and Witt 1997: 34). Hence, the Court was beginning to uphold larger exercises of governmental power, although these were by slim majorities (Biskupic and Witt 1997: 35).

In the area of civil liberties, the Court's decisions were more liberal than were those of the Fuller Court. The White Court ruled that the exclusionary rule (making inadmissable evidence seized in violation of the Constitution) applied to the federal government. It would not extend the rule to the states until 1961. It also struck down Oklahoma's grandfather clause (basing one's right to vote on whether his or her grandfather had the right to vote) as violative of the Fifteenth Amendment (Biskupic and Witt 1997: 34).

However, during the years surrounding World War I, the Court's civil liberties and civil rights decisions appeared to be more conservative. In Schenck v. United States (1919), the Court upheld the conviction of Schenck, who had been distributing leaflets advocating resistance to the draft, because his actions presented a "clear and present danger" to the security of the United States (Biskupic and

Witt 1997: 35). Further, the Court upheld the constitutionality of the Selective Service Act in 1918. Hence, the Court looked to concerns of national security and national welfare when announcing rulings involving issues of civil liberties in the period near World War I.

The Taft (1921-1930) Court

The Taft Court was composed of the following justices: William Howard Taft (Chief Justice), Joseph McKenna, William Day, Oliver Wendell Holmes, Willis Van Devanter, Mahlon Pitney, James C. McReynolds, Louis Brandeis, John Clarke, George Sutherland, Pierce Butler, Edward Sanford, and Harlan Fiske Stone. In addition to the Chief Justice himself, Justices Sutherland, Butler, Sanford, and Stone were new appointments to the Taft Court (Epstein, Segal, Spaeth and Walker 1993: 309-10).

Brief Biographical Sketches of the Taft Court Justices

As before, a brief review of the justices who joined the Court during the tenure of William Howard Taft is completed to provide context to the Court's decision-making during this period. Taft had served as President, but truly coveted the position of Chief Justice. Taft began his political service in 1887 when Ohio Governor Foraker appointed him to the Superior Court of Ohio. In 1892, he resigned the post of solicitor general to accept an

appointment on the Sixth Circuit Court of Appeals, after which he served as the governor of the Philippine Islands (Mason 1958: 41). In 1903, President Roosevelt nominated him to be Secretary of War. Eventually, Taft was nominated for and was elected President of the United States, but he still longed to be Chief Justice (Mason 1958: 42-43). Taft's lifelong dreams were fulfilled when President Harding nominated him to the Court when Chief Justice Edward White died in May of 1921. Once on the Court, Taft was consistently conservative. He did manage to engineer significant reforms during his tenure, including the Judiciary Act of 1925 (enlarging the Court's discretionary docket) (Abraham 1993: 188).

George Sutherland joined the Taft Court in October of 1922. Sutherland was from Utah and brought to the Court a significant amount of legal and judicial experience (Abraham 1993: 189). He was an expert in constitutional law and was a leader member of the state bar. He had served in the U.S. Congress and the state and U.S. senate. While in the U.S. Senate, he befriended Warren Harding and later served as a policy advisor to Harding when he became president. Once on the Court, Sutherland espoused a lucid conservative perspective, joining the coalition of McReynolds, Butler and Van Devanter (Abraham 1993: 189). However, Sutherland did approve of some exercises of governmental power, especially

relating to foreign affairs (Abraham 1993: 189-90).

Pierce Butler was Harding's third appointment to the Court. Butler was a member of large, Irish Catholic family from Minnesota. Butler was a self-made millionaire who earned his wealth by representing several railroads. However, in 1910, he did represent the federal government in several antitrust prosecutions (Witt 1990: 856). He was a Cleveland Democrat and "no friend of liberals or progressives" (Abraham 1993: 190-91). Once on the Court, Butler continued his ultraconservatism, being one of the Four Horsemen of the Apocalypse, although one of the less distinguished members of that voting coalition (Abraham 1993: 190).

Edward Sanford joined the Taft Court in 1923. Born in Tennessee in 1865 in one of the few Republican areas of the post-Civil War South, Sanford rose from an impoverished background to amass fortune from the lumber and construction business (Witt 1990: 857). He involved himself in Republican politics and rose to prominence in that party. He eventually became an attorney and entered private practice. As a Special Assistant to U.S. Attorney General William H. Moody, Butler earned a reputation as a trustbuster (Witt 1990: 857). In 1907, he was appointed as an assistant attorney general. Only a year later, President Roosevelt nominated him to the federal district court for

Tennessee, a post which he held until 1923 when President Harding nominated him to the Court (Witt 1990: 857).

The last justice to join the Taft Court was Harlan Fiske Stone. Stone was born in New Hampshire in 1872. He earned a law degree from Columbia University in 1898 and soon thereafter began to practice law at a prominent Wall Street firm. He also served as a law professor and dean at Columbia (Witt 1990: 857-58). In 1924, President Coolidge appointed him Attorney General and began to reform the Justice Department. In 1925, the President nominated Stone for the Court (Abraham 1993: 195). Once on the Court, Stone often voted with liberals Holmes and Brandeis, and was a strong advocate of the doctrine of judicial self-restraint (Abraham 1993: 197; Renstrom 1972: 66). Even though he was a nominal Republican, Stone often voted with Brandeis and Holmes, and his policy-preferences were generally liberal throughout his tenure on the Court, although a current study (Wood et al. 1997) suggests that Stone became more moderate when Roosevelt elevated him to the Chief Justice position.

Substance of the Taft Court's Decisions

The Taft Court continued the trend that the White Court had initiated, approving some legislation designed to remedy the profound social and economic problems that the nation faced during the Great Depression. "William Howard Taft's

term as Chief Justice spans the 'fabulous' nineteen twenties, an era of expansion, expense, and high finance. The gospel of goods -- make the goods, sell the goods, get the goods -- then dominated the American people. Industrial leaders inflamed by victory in war, encouraged by the political glory of Harding's triumphant election in 1920, were certain that under such a national administration progress must be unending" (Mason 1958: 39). Perhaps the most celebrated justice on the Court who led the vanguard to approve such laws was Justice Louis D. Brandeis. "If 20th century law has enabled the society to move from laissez-faire to the welfare state, that has been true in large part because it has accepted Justice Brandeis's approach" (Schwartz 1993: 216).

However, the Taft Court did rule conservatively in a larger percentage of economic and labor relations decisions than did the White Court, striking down both federal and state laws. For example, in Adkins v. Children's Hospital (1923), the Court declared a law requiring a minimum wage for women to be unconstitutional, using the freedom of contract doctrine as its reasoning (Schwartz 1993: 218). Its labor relations decisions, additionally, made it easier for management to invoke antitrust laws against labor unions (Biskupic and Witt 1997: 37).

In the areas of civil liberties and civil rights, the Taft Court's decisions would have long-lasting effects. "The Court's role as balance wheel can give its work a paradoxical character. So it was in 1925 when the conservative Court ignited the spark that eventually would flare into the 'due process revolution' of the 1960s" (Biskupic and Witt 1997: 37). In Gitlow v. New York, the Court stated that the Fourteenth Amendment protected individuals' rights against state action (Biskupic and Witt 1997: 37). This statement would form the basis for the Court later striking down state laws violative of the First Amendment beginning in the 1930s.

However, the Court's liberalism then did not extend as far for civil rights issues. In Corrigan v. Buckley (1926), the Court held that the Fourteenth Amendment did not apply to private discrimination, upholding racial restrictive covenants applying to the sale of real estate to Blacks (Biskupic and Witt 1997: 38). Yet, the Court did strike down discriminatory state action by invalidating "white primaries."

The Taft Court, moreover, considered questions of separation of powers. In Myers v. United States (1926), the Court held that the Congress did not have to consent to the president's removal of postmasters. And, it approved "Congress's delegation of power to the president to adjust

tariff rates in response to the competitive conditions" (Biskupic and Witt 1997: 38).

The Hughes Court (1930-1941)

The fourth chief justice court contained within the pre-1945 period under analysis herein is the Hughes Court. The political context in which the Hughes Court operated was largely determined by the Great Depression and the New Deal policies designed and implemented in response to the demands of the Depression. Mattingly (1969) suggests that what made the Hughes Court in part unique was the great exposure that accompanied the initial conservative nature of its decision-making, the inevitable clash with the President and the Congress, Franklin D. Roosevelt's subsequent Court-packing plan, and the abrupt turnabout in the Court's voting behavior to become more supportive of greater governmental power in many matters, principally economic regulation (1969: 37).

Brief Biographical Sketches of the Hughes Court Justices

The justices who joined the Hughes Court were: Owen J. Roberts, Benjamin Cardozo, Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy, in addition to the nomination of Charles Evans Hughes to the position of Chief Justice. Oliver Wendell Holmes, Willis Van Devanter, James C. McReynolds, Louis Brandeis, George

Sutherland, Pierce Butler, Edward Stanford, and Harlan Stone continued to serve on the Court during at least part of the Hughes' tenure.

Owen J. Roberts was born to a prominent Philadelphia family. He attended the University of Pennsylvania and the University's Law School. After graduation, he entered private practice, representing corporate clients, including the Pennsylvania Railroad. For four years, he served as assistant district attorney in Philadelphia (Witt 1990: 858). In 1918, he was appointed special deputy attorney general, prosecuting cases under the Espionage Act and the Teapot Dome oil scandals (Abraham 1993: 202-03; Witt 1990: 859. When President Hoover's nomination of John J. Parker failed, Hoover named Roberts to the Court in 1930 (Witt 1990: 859). Once on the Court, Roberts initially voted with the conservative bloc, but then began to become more liberal, alleging switching his vote in the 1937 term to uphold a key piece of New Deal legislation (Abraham 1993: 203). After Justice McReynolds left the Court in 1941, however, Roberts became more conservative in his decision-making (Abraham 1993: 203-04).

The last Hoover appointment to the Court was that of Benjamin Cardozo, named to replace the aging Oliver Wendell Holmes. Cardozo was born in 1870 in New York City to a Jewish family. He attended Columbia University and its Law

School, although he did not graduate. He was admitted to the bar in 1891 and began to practice law (Witt 1990: 859). In 1914, Cardozo ran against the dominant political machine, Tammany Hall, and was elected to New York's trial court. Soon thereafter, Cardozo was appointed to the New York Court of Appeals on which he served for 18 years. He also served as that court's chief justice. In addition, Cardozo was a scholar, publishing many classic legal works, including The Nature of the Judicial Process (1921). Hoover nominated him to the Court in 1930 (Witt 1990: 859). Once on the Court, Cardozo predictably joined the liberal wing of the Court (Brandeis and Stone), supporting major pieces of the New Deal program as well as broader protections for civil liberties (Abraham 1993: 206).

The first of the nine Roosevelt appointees was Senator Hugo L. Black. Black was born in 1886 in Alabama to a family headed by a Baptist merchant and farmer. Although he never finished high school, he graduated from the University of Alabama Law School in 1906 (Abraham 1993: 214; Witt 1990: 860). He established a private practice, representing the United Mine Workers, among other clients. In 1914, Black was elected county solicitor and investigated the unwarranted use of force by the local police department. In 1918, he returned to private practice and began to specialize in labor law and personal injury cases. In 1923,

he joined the Ku Klux Klan but later resigned and denounced that organization to make a bid for the United States Senate, which he won. While in the Senate, he was active in introducing liberal legislation, including one setting the length of a maximum workweek (Witt 1990: 860). This bill became the Fair Labor Standards Act. A strong supporter of New Deal programs and the Roosevelt administration, President Roosevelt nominated him to the Court in 1937 (Witt 1990: 860). Black held a literalist view of the Constitution, thus being quite liberal in matters of civil liberties and supporting the complete incorporation of the protections of the Bill of Rights against the actions of the states (Pritchett 1948: 131, 258). He authored the landmark majority opinion, for a unanimous Court, in Gideon v. Wainwright (1963) (holding that the Sixth Amendment required states to provide counsel to any criminal defendants who could not otherwise afford to hire one). His decision-making was equally liberal in economic matters (Abraham 1993: 215-16; Pritchett 1948: 89, 258).

The second justice to join the Hughes Court during the Roosevelt administration was Stanley Reed. Reed was born in Kentucky in 1884. His father was a physician. He attended Yale University, and the University of Virginia and Columbia Law Schools. Reed entered private practice in Kentucky and was elected to that state's general assembly for four years

(Witt 1990: 860-61). Reed served in the Hoover administration, acting as general counsel to a federal agency that made loans to Depression-era banks, business and agricultural concerns (Witt 1990: 861). Franklin Roosevelt appointed him Solicitor General in 1935, and he argued many cases before the Supreme Court, including a successful argument on behalf of the constitutionality of the National Labor Relations Act, a key piece of labor legislation during the Roosevelt administration. The President nominated him in 1938 when Justice Sutherland died (Abraham 1993: 219; Witt 1990: 860-61). Although Reed did occasionally join the liberal bloc on the Court, he more consistently voted conservatively in economic and civil liberties-civil rights matters, fitting more "into the law-and-order mold" (Abraham 1993: 219; Pritchett 1948: 131, 260). Reed aligned himself with the conservative bloc of Justices Burton, Clark, and Minton in matters of civil liberties (Renstrom 1972: 69).

Felix Frankfurter joined the Hughes Court in 1939 after Justice Cardozo died. Born in Vienna, he immigrated to the United States when he was twelve where his family lived in the squalor of New York's Lower East Side. He attended City College of New York and then Harvard Law School. After graduation, he began to practice law with a prominent New York attorney (Witt 1990: 861). In 1914, Frankfurter took a teaching post at Harvard Law School, which afforded him

the opportunity to argue many highly publicized cases, notably the defense of Sacco and Vanzetti, who had been accused of treason. He was a founding member of the American Civil Liberties Union (ACLU) and active with the National Association for the Advancement of Colored People (NAACP). Frankfurter developed a friendship with Franklin Roosevelt and became a confidant and advisor to him (Witt 1990: 861-62). Once on the Court, Frankfurter was quite conservative in civil liberties decisions, being almost the most extreme member on such questions (Pritchett 1948: 131, 260). In state regulation and taxation decisions, however, he was much more liberal, although in other types of economics cases he voted consistently conservative (Pritchett 1948: 89, 260). Overall, Frankfurter's voting behavior tends to be conservative, even though he himself espoused the notion of judicial self-restraint in judicial decision-making (Renstrom 1972: 70).

William O. Douglas joined the Court in 1939. He was born in Minnesota in 1898 to an economically disadvantaged family. He attended Columbia Law School, graduating in 1925. Douglas entered private practice but quickly realized that he did not like representing corporate clients. He then accepted a position teaching law at Columbia (Witt 1990: 862). Franklin Roosevelt nominated Douglas to the Securities and Exchange Commission in 1936, becoming its

chair in the following year. Roosevelt nominated him in 1939 to the Court to replace Justice Brandeis (Witt 1990: 862-63). Douglas was a moderate in questions of civil liberties, although his voting does have liberal tendencies. In economic decisions, however, Douglas was clearly liberal, second only to Justice Black (Pritchett 1948: 131, 257).

The last justice that Franklin Roosevelt nominated to the Hughes Court, and to the Court generally for that matter, was Frank Murphy. Murphy was born in 1890 in Michigan to an Irish Catholic family. His father was a country lawyer He attended the University of Michigan as an undergraduate and a law student. After law school, Murphy worked as chief assistant attorney general in Michigan and after three years, he became a criminal court judge (Witt 1990: 862). Being a pro-labor Democrat, Murphy was elected Detroit mayor, serving three years until 1933. He held several additional political offices prior to joining the Court, including Governor of Michigan and Governor General of the Philippine Islands, where he implemented New Deal policies. In 1938, Roosevelt then named Murphy attorney general. In that position, Murphy prosecuted many political bosses, instituted antitrust prosecutions and established the first civil liberties division in the Justice Department (Witt 1990: 862; Renstrom 1972: 71). When Justice Butler died in 1939, Roosevelt appointed Murphy to the Court. Once

on the Court, Murphy was part of the liberal wing of the Hughes Court, being more liberal on questions of civil liberties-civil rights than he was on economics matters; he thus joined the voting coalition of Douglas and Black on these questions (Pritchett 1948: 259). For example, he filed a dissent in Korematsu v. United States (1944) (upholding the interning of Japanese-Americans during World War II) (Renstrom 1972: 71). He brought to the Court a strong pro-labor orientation and filled the so-called Catholic seat on the Court that Butler had occupied previously (Renstrom 1972: 71).

Substance of the Hughes Court's Decisions

As the Court's administrative head, Charles Evans Hughes faced four colleagues (Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler) who had voted with the Adkins majority to strike down a minimum wage law (Schwartz 1993: 228). However, the Court's membership was soon to change. As indicated above, in 1932, Judge Benjamin Cardozo succeeded Oliver Wendell Holmes. Cardozo was a vital member of the liberal wing of the Court that resisted the Hughes Court's ardent conservatism (Schwartz 1993: 229). Cardozo, like Holmes, helped move the law eventually from the prevailing conception of the law as being one of a disinterested referee to one of an effective instrument of social change (Schwartz 1993: 230).

The change in the jurisprudence of the Hughes Court can be better understood if the Court is divided into two periods: the first Hughes Court (1930-1937), and the second Hughes Court (1938-1941). Pritchett (1948) finds that prior to 1936, the centrist bloc was not too distant from either the left or right voting coalitions (1948: 248-50). In 1936, however, Hughes (and to lesser extent Roberts) aligned themselves with the liberal bloc, serving to create a majority of the liberal justices and to make the justices on the right a minority. Hughes' shift also made the voting coalitions more polar (Pritchett 1948: 249), being associated with an increase in the rate of concurring opinions (Haynie 1992).

In the earlier period of the Hughes Court, the Court's decisions were dominated by a string of cases in which the Court struck down many significant New Deal laws as well as state attempts to regulate business activity. These laws included the National Industrial Recovery Act and the Agricultural Adjustment Act (Schwartz 1993: 232). Robert H. Jackson (1941), then-attorney general, member of the New Deal coalition, and later a member of the Court, observes

> [t]he Court is almost never a really contemporary institution. The operation of life tenure in the judicial department, as against elections at short intervals of the Congress, usually keeps the average viewpoint of the two institutions a generation apart. The judiciary is thus the check of a preceding generation on the present one; a check of conservative

> legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being (Jackson 1941: 315).

Thus, the Court serves to retard proposed public policy changes that the Congress and the President may try to legitimate. The Hughes Court, in particular, continued the laissez-faire perspective of previous Courts.

However, the Court did change course somewhat when it ruled in Nebbia v. New York (1934) that any business could be subject to "reasonable regulation" rather than simply those that were "'affected with a public interest'" (Biskupic and Witt 1997: 40). The Court extended this holding, in piecemeal fashion, to regulation of bread weights, sales of tickets, and the operation of employment agencies. It also approved a state law imposing a moratorium on mortgages, even in the face of a liberty of contract challenge, because the Court considered the law to be a reasonable response to the economic crisis of the Great Depression (Biskupic and Witt 1997: 40).

In April of 1937, the Court drastically altered its course, and began to consistently uphold New Deal legislation and approve a larger scope of governmental power. The Court did so in West Coast Hotel Co. v. Parrish (1937), in which it upheld Washington State's minimum wage law, thereby overruling Adkins and similar decisions (Biskupic and Witt 1997: 41). The Court, with Chief

Justice Hughes writing the majority opinion, reasoned that the Fourteenth Amendment did not protect liberty of contract, but rather "liberty in a social organization which requires the protection of the law against the evils which menace the health, safety, morals, and welfare of the people" which the Washington law protected (West Coast Hotel, 391). Chief among other decisions upholding the New Deal, and the NIRA more specifically, was NLRB v. Jones & Laughlin Steel Corp. (1937). The Court also went on to uphold the Social Security Act of 1935, the Federal Farm Bankruptcy Act, and provisions of the Railway Labor Act relating to collective bargaining (Biskupic and Witt 1997: 41-42).

Schwartz suggests that the change in philosophy of the Court to one of more judicial pragmatism was due in large part to the changes in ideology that were taking place in the country as a whole (Schwartz 1993: 234). This change in the Court's perspective was due to the justices' realization that the liberty of contract doctrine, on which Adkins was based, was simply inadequate in the face of the enormous demands of the Great Depression and their realization that an unregulated market was unable to support even a modicum of social welfare (Schwartz 1993: 235).

In the realms of civil liberties and civil rights, the Hughes Court allegedly continued the drift toward greater

liberalism that the Taft Court had initiated. For example, in Near v. Minnesota (1931), the Court invalidated a state law punishing newspapers that criticized public officials because the law violated the protections of the press (Biskupic and Witt 1997: 38). Additionally, it extended the Sixth Amendment right to counsel and Seventh Amendment right to a fair trial, through the Fourteenth Amendment, to defendants in state courts (Biskupic and Witt 1997: 39). However, the Court did hold that the Texas Democratic party's exclusion of blacks from membership was not barred by the Fourteenth Amendment because no direct state action was involved (Biskupic and Witt 1997: 39). It also ruled that the due process clause of the Fourteenth Amendment protected only "fundamental" rights listed in the Bill of Rights, rather than all the guarantees contained therein (Biskupic and Witt 1997: 42).

After the transformative year of 1937, the second Hughes Court was drastically different than its predecessor, largely due to a drastic change in the Court's members. Justices no less than Senator Hugo Black, SEC Chairman William O. Douglas, and Harvard Law Professor Felix Frankfurter joined the Court (Schwartz 1993: 238-40). Over the following six years, Roosevelt would be able to nominate eight justices and select the Chief Justice. "The men he would place on the Court were young enough to be the sons of

the men they succeeded, and the views of the Court would change accordingly" (Biskupic and Witt 1997: 42).

During the post-1937 years of the Hughes Court, the Court retreated from the hard-line concept of substantive due process that had colored many of its prior decisions. And, it moved toward the conception that Holmes had proffered in the 1920s: adopting a test in which the law would pass constitutional muster if legislators could rationally have thought the law would reach its desired outcome. Under the post-1937 conception of judicial interpretation, the Court's job was not to judge the appropriateness of the economic theory that undergirded the law at hand (Schwartz 1993: 244). This transformation reached its high-point when the Court upheld the Fair Labor Standards Act of 1938 in United States v. Darby Lumber Co. (1941). The Act made illegal child labor and prescribed a minimum wage for workers in interstate commerce and a maximum numbers of workweek hours (Biskupic and Witt 1997: 43).

The revolution also extended to issues of civil liberties and civil rights. This turnabout was most clearly expressed in United States v. Carolene Products (1938), in which the Court enunciated a two-tiered standard of review in constitutional cases. If the law regulated economic activity, the Court would presume the law to be

constitutional, unless it was demonstrated otherwise. If the law impinged upon civil liberties that the Bill of Rights protected, then the Court would be less willing to uphold the law's validity because such laws curtail the very political processes necessary to repeal repressive laws (Biskupic and Witt 1997: 42). This was not the case for laws restricting economic activity.

Thus, decisions involving issues of civil liberties and civil rights began to consume more of the Court's agenda then. For example, in Lovell v. Griffin (1938), the Court held that the guarantees of freedom of religion, contained within the First Amendment, prohibited a city from requiring Jehovah's Witnesses to be licensed before they could lawfully pass out religious tracts to residents of the city (Biskupic and Witt 1997: 43). It also held in 1938, as a precursor to Brown v. Board of Education (1954), that the Constitution mandated that states provide equal opportunity to higher education for white and black residents. This standard was not satisfied by Mississippi paying for a black student to attend law school in another state (Biskupic and Witt 1997: 44).

However, the Court's support of civil liberties was supposedly curtailed when the war in Europe broke out. In 1940, the Court upheld a state law requiring public school students to recite the Pledge of Allegiance even though to

do so conflicted with the students' religious beliefs (Biskupic and Witt 1997: 44).

The Court also reconsidered issues of labor rights and federalism. The Court turned away from its anti-union bias of the past and, in Hague v. CIO (1939), invalidated a city ordinance that prohibited union members from gathering and discussing issues of common concern since the law violated the First Amendment. And the Court ruled that federal and state officials' salaries were subject to state and federal taxes, respectively (Biskupic and Witt 1997: 43).

Hence, during the Hughes Court, there had been a true revolution because the Court recognized the validity of increased governmental power that had long been dismissed as contrary to the needs of the marketplace (Schwartz 1993: 245). The period also witnessed a drastic transformation in the balance of power among the branches. After 1937, the Court became much more subdued than it had been in prior years (Schwartz 1993: 245).

The Stone Court (1941-1946)

The fifth and last chief justice court concentrated on in this study is the Stone Court. The justices who served on the Stone Court were almost completely nominees of Franklin Roosevelt, who appointed nine of the 11 members who served. Owen Roberts, a Hoover appointee, and Harold

Burton, a Truman appointee, were the only exceptions (Renstrom 1972: 19). To underscore the importance of Franklin Roosevelt's appointments to the Court from 1937 to 1947 (covering the period of the Hughes and the Stone Courts), C. Herman Pritchett titles his book The Roosevelt Court (1948), rather than identifying the Court by the chief justices who were its titular leaders during that time period, as is customarily done. Through his appointment power, therefore, Franklin Roosevelt re-formed the Court and, thus, affected the tenor of its decision-making and policy-preferences, especially with regard to economic regulation decisions.

In addition to Chief Justice Harlan Fiske Stone, ten associate justices served during the five-year period from 1941 to 1946. They are: Hugo L. Black, William O. Douglas, Felix Frankfurter, Frank Murphy, Owen Roberts, Stanley Reed, James F. Byrnes, Robert H. Jackson, Harold Burton, and Wiley B. Rutledge (Renstrom 1972: 64). Byrnes, Jackson, Burton and Rutledge were newcomers to the Court.

Brief Biographical Sketches of the Stone Court Justices

James C. McReynolds retired from the Court during the 1941 term year, giving Roosevelt his sixth opportunity to impact the Court's decision-making. The President chose James F. Byrnes of South Carolina. Since his family was impoverished, Byrnes completed no formal education. He did

manage to read the law and was admitted to the bar in 1903. He served in the United States House of Representatives beginning in 1910, where he became acquainted with Franklin Roosevelt. He was elected to the Senate in 1931, supporting the Roosevelt administration, despite his personal objection to New Deal policies. He resigned from the Court in 1942 to become the Director of Economic Stabilization. Although Byrnes was strongly liberal in economics decisions, he was much less so in deciding questions of civil liberties claims. Indeed, after he left the Court, he was highly critical of the Warren Court's civil liberties voting and particularly its desegregation decisions (Renstrom 1972: 72). Byrnes was elected South Carolina governor in 1950 on a platform of states' rights and separate-but-equal education (Witt 1990: 864).

When Roosevelt nominated Stone to be chief justice, Roosevelt also nominated Robert Jackson to fill the vacancy that Stone left. Jackson, like Byrnes, read the law, rather than attending formal legal education (Renstrom 1972: 72-73). Jackson entered private practice in New York, working as a corporate lawyer until he joined the Roosevelt administration as General Counsel for the Bureau of Internal Revenue in 1934. He then went on to serve as Assistant Attorney General, Solicitor General, and finally Attorney General of the United States for several years prior to

being elevated to the Court. His service as Solicitor General allowed Jackson the opportunity to voice his support for New Deal policies. During the 1945 term year, Jackson did not participate in any decisions of the Court, acting as the Chief United States Prosecutor of the International Military Tribunal at Nuremburg (Renstrom 1972: 73). Overall, Justice Jackson was moderately conservative in civil liberties cases and much closer to the right wing of the Court in economics matters (Pritchett 1948: 89, 261).

The last of the Roosevelt justices was Wiley Rutledge, who succeeded Justice Byrnes. Rutledge was born in 1894 in Kentucky. His father was a Baptist preacher. Rutledge graduated from the University of Colorado Law School in 1922. He practiced for a short period and then took a position teaching law (Witt 1990: 865-66). He also served four years on the District of Columbia Court of Appeals. Like many of the Roosevelt appointees, Rutledge was an ardent supporter of New Deal policies. On the Court, he was a member of the liberal bloc, being an advocate of civil liberties (Renstrom 1972: 73). Overall, Rutledge was highly liberal in questions of civil liberties, but not as a strong supporter of those claims as was Justice Murphy (Pritchett: 259-60). He was relatively moderate in his economic policy preferences (Pritchett 1948: 89).

The final member to join the Stone Court was Justice Harold Burton, appointed by President Truman just prior to the start of the 1945 term year to fill Justice Roberts' seat. Burton attended Harvard Law School and, after graduation, moved to Ohio and became mayor of Cleveland (Renstrom 1972: 74). He then sought and won a seat in the United States Senate, an office which he occupied at the time that Truman appointed him to the high court. Although he was a Republican, he was more of a moderate on many issues and did not bring to the Court a traditional Midwest conservative perspective, being more liberal on economics issues than he was on civil liberties questions (Renstrom 1972: 74; Pritchett 1948: 89).

Renstrom (1972: 154) calculates interagreement scores for the justices on the Stone Court and finds two distinct voting blocs. The liberal bloc members are Justices Black, Douglas, Murphy, and Rutledge. The conservative bloc included Jackson, Frankfurter, and Reed, with Burton being a marginal member of this voting coalition (Renstrom 1972: 154). Stone was often a member of this coalition after he was elevated to the chief justiceship. Byrnes' voting positioned him between these two blocs. Roberts' voting is not strongly associated with either voting coalition, however (Renstrom 1972: 154).

Substance of the Stone Court's Decisions

The occurrence of World War II may have significantly affected the Court's decision-making. The nation had just emerged from the Great Depression when the Stone Court began. It had, during the period from 1929 to 1939, decided questions of the expansion of governmental power during a national emergency and the limits that a constitutional structure places on governmental action. Having decided these types of questions, the Court was somewhat better prepared to meet the challenges that faced the national judiciary during the Second World War. The nation had weathered a previous World War only about twenty years earlier. The Stone Court was, thus, once again called upon to decide compelling questions of national policy, especially as they related to civil liberties in light of the compelling threat to national security that the War represented.

Renstrom (1972) states that the decision-making of the Stone Court was particularly substantively rich because it finely tuned the policy direction of the Court that had been begun during the Hughes Court. It did so in such decisions as NLRB v. Jones-Laughlin Steel Corp. (1937), yet it did not become ardently activist even in light of the strong policy preferences of President Roosevelt and the Congress (Renstrom 1972: 18). Rather, it simply lent its sanction to

policies that other branches had legitimized, that broadened the powers of the federal government, especially as they related to regulation of business activity (Renstrom 1972: 18-19).

Perhaps the most important decisions the Court announced during Stone's tenure dealt with the U.S. government's war effort and, consequently, with issues of civil liberties. Chief among these was Korematsu v. United States (1944), upholding the government's decision to intern Americans of Japanese ancestry, for fear that they may be collaborating with Imperialist Japan to sabotage American national security (Schwartz 1993: 250). Yet, the Court reversed itself, in Murdock v. Pennsylvania (1943), when it ruled that cities could not lawfully require people seeking to distribute religious literature to obtain licenses because that requirement unduly burdened the free exercise of religion (Biskupic and Witt 1997: 44-45). It went on to strike down Texas's white primary in 1944 because, the Court reasoned, the primary is a vitally important part of the electoral process that the Fourteenth Amendment protects (Biskupic and Witt 1997: 45). The Stone Court also upheld the enactment of price controls in Yakus v. U.S. (1944) (Schwartz 1993: 252). Hence, the decisions of the Stone Court generally deferred to claims of governmental power in economics decisions and began to support claims of civil

liberties and civil rights more readily.

Chapter Summary

From the waning days of the nineteenth century to the period surrounding World War II, the decisions of the Supreme Court drastically changed, from those endorsing a laissez-faire economic philosophy (during the Fuller and White Courts particularly) to those deferring to reasonable laws the legislature has passed. This change was due, in part, to the change in the prevailing economic theory, the enormous challenges of the Great Depression, the change in the Court's membership (notably the appointments of Justices Holmes, Brandeis, and Cardozo), and the crisis of institutional legitimacy that resulted from the Court's steadfast refusal, prior to 1937, to uphold consistently governmental attempts to regulate business activity.

Its civil liberties decisions, however, tended to remain rather conservative across the entire period analyzed. The Court consistently approved governmental power during times of war, upholding the internment of Japanese-Americans during World War II. However, during the Stone Court, the Court's decisions became somewhat more moderate than they had been in previous years, due in part to the changing membership and the justices' realization that civil liberties claimants did not represent as great a

danger to national security as they had previously thought.

Chapter III analyzes the content and change of the Court's agenda over time. It documents the change from a docket largely characterized by economics decisions to one dominated by questions of civil liberties and civil rights. These changes illustrate the Court's changing role within the American system of governance.

NOTES

1. A natural court refers to a period of Supreme Court history in which the Court's membership is stable (Epstein, Segal, Spaeth, and Walker 1996: 348).

2. For further information on this development with the law of contracts, see Horwitz 1992.

3. For a detailed discussion of the history and politics leading up to and surrounding the Court's decision, see Kens (1990).

CHAPTER III

INSTITUTIONAL LEVEL ANALYSES: COMPOSITION AND DYNAMICS OF THE WORKLOAD AND THE AGENDA OF THE UNITED STATES SUPREME COURT, 1888-1989

This chapter analyzes the composition of the United States Supreme Court's agenda during the period from 1888-1989. This period comprises more than a century of Supreme Court jurisprudence, during which time the Court's agenda was drastically changing, from one dominated by economics cases to one dominated by civil liberties and rights cases (McCloskey 1994; Pacelle 1991). These agenda changes portend larger developments in the surrounding environment in which the Court operated and the changes in the institutional role that the Court fulfilled in the political system. This chapter first discusses the process by which the data were collected and shown to be reliable by the original researchers. It then turns to analyze the changes within the Court's agenda, and their determinants.

Data Collection Process

In the fall of 1994, Professor Sandra L. Wood of the Political Science faculty at the University of North Texas sought to implement her idea of extending the United States

Supreme Court database that Professor Harold J. Spaeth had initiated. The Spaeth database has been checked for reliability, and it has provided data for numerous studies (e.g., Segal and Spaeth 1993). Professor Spaeth had collected and coded decisions of the Supreme Court, and classified them into various issue areas (Spaeth 1993). However, Spaeth's dataset then only included decisions of the Court handed down since the beginning of the 1953 term year, marked by Earl Warren becoming the tribunal's Chief Justice. Professor Wood herself had collected and coded data for her own dissertation (Wood 1994) following the protocol set out in the United States Supreme Court database for the period from 1937 to 1954. Her proposal sought to extend the Spaeth dataset into the latter part of the nineteenth century so as to provide one dataset that was continuous for at least a century through 1989.

With the assistance of three Political Science doctoral students at the University of North Texas (Linda Camp Keith, Ayo Ogundele, and this writer), Professor Wood began to extend her data for the Supreme Court back to 1888. The beginning date was chosen because it represented the beginning of the Fuller Court and it witnessed an increase in federal statutory law, increasing the demands on the Court's agenda. All cases in which the Court issued a formal opinion were coded (N=10,506) from the case decisions

as reported in the Supreme Court Reporter; memoranda cases were excluded. This task took the four members of the research group approximately nine months to complete.

Each of the research group members coded approximately one-quarter of the cases for the term year period from 1888 to 1937. The coders met periodically to discuss decision rules about how to code, for example, the direction of the decision, the issue area of the case, and so on. If a particularly difficult case was encountered, additional members of the research group (at least one, if not all three other members) would also code the case and a consensus would be reached as to how to code the case. These cases numbered less than five out of approximately 200 per term. Furthermore, the coders conducted periodic reliability checks in which a random sample of cases for a particular term year would be exchanged among the members and the members' codings for the cases would be compared. We selected a random sample of 325 cases to test our intercoder reliability. The reliability scores for these checks indicated that there was very high agreement among the codes that research members assigned to the sample of cases: 99 percent overall, and 94 percent when considering only the issue area and the decision direction, the most difficult coding. When there were differences in coding, the research group discussed the matter and reached a

consensus as to how to code the particular case in question and similar cases.

The items coded are noted on the code sheet sample located in Appendix A. Appendix B summarizes the coding protocol for each of these items. These items include, among others, the direction of the decision the Court has announced (liberal or conservative), how each justice voted, whether the justices wrote special opinions, and, if so, with whom, and which of the 14 separate issue areas that best described the subject matter of the decision. The 14 issue areas followed the subject matter classifications set out in the codebook that accompanies the Spaeth dataset. These are: criminal, civil rights, first amendment, due process, attorney, union, economic, judicial power, federalism, interstate relations, federal taxation, miscellaneous, and separation of powers. All of these but the separation of powers issue area are included in Spaeth (1993).

The content of these issue areas bears explanation. Based on Spaeth's (1993) methodology and operationalizations, the 14 issues were coded and categorized. Criminal cases deal with the gamut of issues involving criminal procedural rights, such as the right to counsel and the right to a fair trial. Civil rights cases involve allegations of discrimination based on an immutable

characteristic, such as gender, race, disability. The types of issues involved in this category include voting rights, affirmative action, gender discrimination, immigration and citizenship questions. First Amendment cases deal with issues of free expression and free association, including free speech, free press, right to assembly, right to petition, freedom of religion, and obscenity. Due process, the fourth issue category, involves issues of fairness in administrative procedures. Fifth, privacy decisions deal with matters of personal integrity, including abortion, contraception, and so on. The attorneys issue area includes decisions involving attorney's fees, admission to the bar, disciplinary actions, and advertising. Union cases deal with matters of arbitration, antitrust, bargaining and negotiation with employers, and the like involving the relationship between labor and management generally.

The eighth issue category deals with economics cases. This issue category is quite varied, including within its ambit bankruptcy, mergers, general regulation of business, liability, securities regulation, patents, and copyrights. Judicial power cases deal with issues of civil and criminal procedure, mootness, venue, standing, judicial review, judicial administration and comity. Federalism cases involve issues of federal pre-emption of state regulation or of state court jurisdiction and the general relationship

between the Federal government and the state governments. Interstate Relations cases are self-explanatory. Federal taxation cases deal with disputes regarding federal taxation of individuals or corporations. Separation of powers involves questions of the relative share of power that the institutions of the Federal government possess. The miscellaneous case category is self-explanatory.

Size and Composition of the Court's Caseload

Total Reported Decisions

These analyses combine the three datasets discussed above (Spaeth 1993, Wood 1994, and Wood et al. 1996) so as to examine the entire period from 1888 to 1989. Because very little empirical data exists concerning the behavior of the Court for the period 1888-1937, the size and composition of its caseload over time is first examined here. Vast changes have occurred in the number of cases in which the Court issued a formal opinion during this period.

As Figure 3-1 and Table 3-1 show, the number of cases decided follows a generally downward trend across the first two-thirds of the period examined, from 1888 to 1953. It hits both an historic high and low in this period. In 1890, the Court decided 291; in 1913, 292 cases. After 1913, the series declines rather consistently until 1917 and temporarily stabilizes. After 1925, however, the Court's

Table 3-1. United States Supreme Court's Agenda, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMICS	JUDICIAL POWER	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	PRIVACY	DUE PROCESS	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	ATTORNEY	UNION	ECONOMIC DIMENSION DECISIONS	CIIVIL LIBERTIES-CIVIL RIGHTS DIMENSION DECISIONS	JUDICIAL POWER DIMENSION DECISIONS	OTHER DIMENSION DECISIONS
1888	240	67.9	27.1	.0	3.3	.4	.0	.0	.4	.4	.0	.4	.0	.0	67.9	4.2	27.1	.8
1889	274	66.4	22.3	.0	4.7	1.5	.0	.0	1.8	2.6	.7	.0	.0	.0	66.4	8.0	22.3	3.3
1890	291	66.7	21.6	.7	7.2	1.7	.0	.0	.3	.7	.3	.3	.3	1.0	67.7	9.3	21.6	1.4
1891	263	76.0	15.2	.4	4.9	1.5	.4	.0	.4	.4	.4	.0	.4	1.0	76.8	7.2	15.2	.8
1892	256	75.4	15.6	.8	4.3	2.0	.0	.0	1.6	.4	.0	.0	.0	.0	76.2	7.8	15.6	.4
1893	277	64.3	20.6	1.8	10.5	.4	.0	.0	.4	.4	.4	.4	1.1	3.0	67.1	11.2	20.6	1.1
1894	235	58.7	23.4	1.7	13.2	.9	.0	.0	.0	.4	.4	.9	.0	.0	60.4	14.0	23.4	1.7
1895	257	52.1	21.4	2.7	17.1	1.2	.8	.0	.8	1.6	.8	.8	.4	1.0	55.3	19.8	21.4	3.1
1896	218	61.0	20.6	.0	11.0	1.4	.5	.0	3.7	.9	.0	.5	.5	1.0	61.5	16.5	20.6	1.4
1897	173	68.8	17.3	.0	11.0	1.7	.0	.0	1.2	.0	.0	.0	.0	.0	68.8	13.9	17.3	.0
1898	162	61.1	21.6	1.9	6.2	2.5	.0	.0	6.8	.0	.0	.0	.0	.0	63.0	15.4	21.6	.0
1899	212	59.9	23.6	2.4	3.8	.5	.5	.0	7.1	1.9	.5	.0	.0	.0	62.3	11.8	23.6	2.4
1900	190	64.2	18.9	4.7	4.7	2.1	.0	.0	1.1	1.1	2.1	.5	.0	.0	68.9	7.9	18.9	3.7
1901	181	66.9	23.2	1.7	4.4	1.1	.0	.0	1.1	.6	.6	.6	.0	.0	68.5	6.6	23.2	1.7
1902	206	62.6	23.8	.0	4.4	2.4	.0	.0	2.9	2.4	1.0	.0	.0	.0	62.6	9.7	23.8	3.4
1903	209	63.6	18.7	1.9	6.7	5.3	.0	.0	2.9	1.0	.0	.0	.0	.0	65.6	14.8	18.7	1.0
1904	195	58.5	24.6	1.5	6.7	1.5	.0	.0	2.1	3.1	2.1	.0	.0	.0	60.0	10.3	24.6	5.1

Table 3-1. United States Supreme Court's Agenda, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMICS	JUDICIAL POWER	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	PRIVACY	DUE PROCESS	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	ATTORNEY	UNION	ECONOMIC DIMENSION DECISIONS	CIIVIL LIBERTIES-CIVIL RIGHTS DIMENSION DECISIONS	JUDICIAL POWER DIMENSION DECISIONS	OTHER DIMENSION DECISIONS
1905	173	64.7	19.1	.6	7.5	.6	.0	.0	2.9	1.7	2.9	.0	.0	.0	65.3	11.0	19.1	4.6
1906	207	63.8	15.5	.5	8.2	1.4	.0	.0	8.7	.5	1.0	.0	.5	1.0	64.7	18.4	15.5	1.4
1907	175	57.1	24.0	.6	8.6	.6	.0	.0	4.6	2.3	.6	.0	1.1	2.0	59.4	13.7	24.0	2.9
1908	178	56.7	24.2	.6	11.8	.6	.6	.0	.6	.6	2.2	.0	1.1	2.0	59.0	13.5	24.2	2.8
1909	172	58.7	19.2	1.2	12.2	2.3	.0	.0	5.2	.6	.0	.0	.6	1.0	60.5	19.8	19.2	.6
1910	167	67.1	13.8	.6	11.4	.6	.0	.0	4.2	.6	1.2	.6	.0	.0	67.7	16.2	13.8	2.4
1911	219	71.7	15.1	.9	4.6	1.8	.5	.0	2.7	.9	.5	.9	.5	1.0	73.1	9.6	15.1	2.3
1912	266	63.5	12.8	.8	11.7	1.9	.4	.0	8.3	.0	.0	.0	.8	2.0	65.0	22.2	12.8	.0
1913	292	61.3	19.2	3.4	6.2	1.0	.0	.0	3.1	3.1	1.4	.7	.3	1.0	65.1	10.3	19.2	5.1
1914	247	68.8	14.2	1.6	5.3	1.6	2.0	.0	1.6	2.0	1.2	.4	.4	1.0	71.3	10.5	14.2	3.6
1915	242	70.7	12.4	.8	8.7	.8	.0	.0	5.0	.4	.4	.0	.4	1.0	71.9	14.5	12.4	.8
1916	215	66.5	20.0	.9	4.7	.9	.0	.0	2.3	1.9	.0	1.9	.0	.0	67.4	7.9	20.0	3.7
1917	207	60.9	11.1	6.3	5.3	2.4	1.0	.0	1.4	5.3	2.9	1.9	.0	.0	68.1	10.1	11.1	10.1
1918	216	66.2	11.1	2.8	7.4	.9	.5	.0	7.4	2.3	.9	.0	.5	1.0	69.4	16.2	11.1	3.2
1919	174	56.9	13.2	4.0	6.9	1.7	.0	.0	4.6	9.2	2.3	.0	1.1	2.0	62.1	13.2	13.2	11.5
1920	214	57.9	15.9	5.6	7.9	.9	.9	.0	2.3	6.1	.9	.5	.0	.0	64.0	12.1	15.9	7.5
1921	169	56.2	10.1	10.1	7.1	1.2	.0	.0	3.6	7.1	2.4	.0	.0	.0	66.9	11.8	10.1	9.5

Table 3-1. United States Supreme Court's Agenda, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMICS	JUDICIAL POWER	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	PRIVACY	DUE PROCESS	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	ATTORNEY	UNION	ECONOMIC DIMENSION DECISIONS	CIVIL LIBERTIES-CIVIL RIGHTS DIMENSION DECISIONS	JUDICIAL POWER DIMENSION DECISIONS	OTHER DIMENSION DECISIONS
1922	220	71.2	11.4	3.2	5.0	2.3	.9	.0	4.1	1.4	.0	.0	.5	1.0	74.9	12.3	11.4	1.4
1923	205	66.3	14.1	3.9	5.9	4.9	.0	.0	.5	1.0	1.5	1.5	.0	.0	70.7	11.2	14.1	3.9
1924	225	49.8	20.0	8.0	6.2	2.7	.4	.0	6.2	5.3	.4	.0	.0	.0	58.7	15.6	20.0	5.8
1925	202	62.8	11.1	11.1	8.5	.0	.0	.0	.5	2.5	1.5	1.0	1.0	2.0	74.9	9.0	11.1	5.0
1926	196	60.2	8.2	6.1	16.3	2.0	.0	.0	5.6	1.0	.0	.0	.0	.0	66.3	24.0	8.2	1.0
1927	168	45.8	15.5	10.1	4.8	1.8	.0	.0	4.2	14.9	1.2	.0	.6	1.0	56.5	10.7	15.5	16.1
1928	127	56.7	11.8	11.0	3.9	3.9	1.6	.0	2.4	6.3	.8	.0	.8	1.0	68.5	11.8	11.8	7.1
1929	131	58.0	11.5	16.0	4.6	.0	.0	.0	1.5	.0	3.8	4.6	.0	.0	74.0	6.1	11.5	8.4
1930	153	49.0	3.9	27.5	7.8	2.6	.7	.0	3.9	2.6	1.3	.0	.7	1.0	77.1	15.0	3.9	3.9
1931	149	59.1	9.4	16.1	6.0	3.4	.0	.0	2.0	.7	.7	.7	.7	1.0	75.8	11.4	9.4	2.0
1932	168	51.8	10.7	23.8	6.0	3.6	.0	.0	3.0	.0	1.2	.0	.0	.0	75.6	12.5	10.7	1.2
1933	157	48.4	11.5	14.6	6.4	.0	.0	.0	5.7	8.3	3.2	1.3	.0	.0	63.7	12.1	11.5	12.7
1934	154	48.7	17.5	16.2	3.2	.6	.0	.0	1.3	10.4	.6	.0	.0	.0	64.9	5.2	17.5	11.0
1935	145	52.4	8.3	24.1	2.1	1.4	.7	.0	.0	6.2	2.1	2.8	.0	.0	76.6	4.1	8.3	11.0
1936	144	55.6	6.9	16.0	8.3	1.4	3.5	.0	.0	4.2	.0	.0	.0	.0	75.7	13.2	6.9	4.2
1937	149	49.7	6.7	23.5	7.4	.0	.7	.0	1.3	4.0	2.0	2.0	.0	.0	75.8	9.4	6.7	8.1
1938	140	50.0	11.4	16.4	3.6	4.3	.7	.0	1.4	3.6	3.6	.7	.0	.0	70.7	10.0	11.4	7.9

Table 3-1. United States Supreme Court's Agenda, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMICS	JUDICIAL POWER	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	PRIVACY	DUE PROCESS	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	ATTORNEY	UNION	ECONOMIC DIMENSION DECISIONS	CIVIL LIBERTIES-CIVIL RIGHTS DIMENSION DECISIONS	JUDICIAL POWER DIMENSION DECISIONS	OTHER DIMENSION DECISIONS
1939	137	49.6	13.1	17.5	5.1	.0	3.6	.0	1.5	2.9	2.2	.0	.0	.0	71.5	10.2	13.1	5.1
1940	164	37.8	15.2	25.0	7.3	1.8	1.8	.0	.6	4.9	3.0	.0	.0	.0	65.2	11.6	15.2	7.9
1941	161	51.6	11.2	13.7	9.3	2.5	4.3	.0	.6	4.3	1.2	.0	.0	.0	66.5	16.8	11.2	.4
1942	172	43.0	15.1	11.0	16.9	2.9	5.2	.0	.6	4.7	.6	.0	.0	.0	54.1	25.6	15.1	3.3
1943	136	44.1	14.7	11.0	13.2	3.7	2.2	.0	.7	5.1	2.9	.0	.0	.0	57.4	19.9	14.7	1.0
1944	161	39.8	11.8	16.1	9.9	5.0	.6	.0	3.7	6.2	2.5	.0	.6	1.0	59.6	19.3	11.8	.8
1945	138	39.1	7.2	13.8	15.2	2.9	3.6	.7	1.4	4.3	1.4	.0	.7	1.0	63.0	23.9	7.2	.4
1946	144	47.9	6.3	5.6	17.4	2.8	.7	.0	.7	6.3	1.4	.0	.0	.0	63.2	21.5	6.3	.7
1947	121	34.7	11.6	4.1	29.8	8.3	2.5	.0	.0	2.5	4.1	.0	.0	.0	40.5	40.5	11.6	.9
1948	124	37.9	12.9	7.3	20.2	4.0	2.4	.0	2.4	4.8	1.6	.0	.0	.0	50.8	29.0	12.9	2.3
1949	100	31.0	16.0	8.0	14.0	7.0	7.0	.0	7.0	8.0	1.0	.0	1.0	1.0	40.0	35.0	16.0	.9
1950	101	40.6	11.9	4.0	10.9	8.9	6.9	.0	4.0	3.0	4.0	.0	.0	.0	49.5	30.7	11.9	.0
1951	97	36.1	12.4	4.1	23.7	8.2	7.2	.0	2.1	1.0	3.1	.0	.0	.0	42.3	41.2	12.4	.0
1952	115	31.3	13.9	7.8	13.9	10.4	2.6	.0	2.6	2.6	3.5	.0	1.7	2.0	50.4	29.6	13.9	2.4
1953	87	37.9	10.3	3.4	18.4	9.2	5.7	.0	1.1	6.9	.0	.0	.0	.0	48.3	34.5	10.3	3.2
1954	95	23.2	13.7	11.6	20.0	10.5	5.3	.0	3.2	5.3	.0	.0	2.1	2.0	41.1	38.9	13.7	1.1
1955	103	27.2	13.6	6.8	13.6	12.6	3.9	.0	1.9	4.9	2.9	.0	.0	.0	43.7	32.0	13.6	3.4

Table 3-1. United States Supreme Court's Agenda, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMICS	JUDICIAL POWER	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	PRIVACY	DUE PROCESS	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	ATTORNEY	UNION	ECONOMIC DIMENSION DECISIONS	CIVIL LIBERTIES-CIVIL RIGHTS DIMENSION DECISIONS	JUDICIAL POWER DIMENSION DECISIONS	OTHER DIMENSION DECISIONS
1956	126	26.2	14.3	6.3	15.9	11.9	7.1	.0	3.2	4.0	.0	.0	2.4	3.0	43.7	38.1	14.3	1.0
1957	152	22.4	18.4	6.6	24.3	10.5	5.9	.7	2.6	5.3	.0	.0	.0	.0	32.2	44.1	18.4	5.1
1958	136	36.8	14.7	4.4	20.6	5.9	8.1	.0	.0	4.4	1.5	.0	.0	.0	44.9	34.6	14.7	4.6
1959	134	22.4	17.9	9.7	13.4	10.4	6.0	.0	3.7	6.0	.0	.0	.0	.0	42.5	33.6	17.9	1.4
1960	137	19.7	8.8	8.0	23.4	10.9	16.8	.0	.7	3.6	.0	.0	.0	.0	35.8	51.8	8.8	2.9
1961	117	23.1	18.8	6.0	17.1	10.3	7.7	.0	4.3	4.3	.0	.0	.0	.0	36.8	39.3	18.8	2.8
1962	156	23.1	16.0	5.8	16.7	16.7	5.1	.0	1.9	7.1	.0	.0	.6	1.0	36.5	40.4	16.0	.6
1963	180	18.9	12.2	3.3	20.6	24.4	8.3	.0	.0	6.1	1.1	.0	.0	.0	27.2	53.3	12.2	1.8
1964	132	15.9	19.7	7.6	13.6	19.7	9.1	.0	1.5	2.3	1.5	.0	.0	.0	32.6	43.9	19.7	1.4
1965	136	20.6	21.3	6.6	18.4	14.7	10.3	.0	2.9	2.9	.0	.0	.0	.0	29.4	46.3	21.3	.0
1966	146	16.4	20.5	1.4	26.0	12.3	15.8	.0	.0	2.1	.0	.0	.7	1.0	23.3	54.1	20.5	4.5
1967	192	12.5	12.5	1.6	33.9	14.1	14.6	.0	1.0	3.1	.0	.0	2.1	4.0	20.8	63.5	12.5	3.2
1968	138	13.0	23.9	2.9	26.8	17.4	8.0	.0	2.2	3.6	.0	.0	.0	.0	18.1	54.3	23.9	.8
1969	136	8.1	14.0	5.1	25.0	25.0	12.5	.0	.7	2.9	.7	.0	1.5	2.0	19.1	63.2	14.0	1.9
1970	140	11.4	16.4	3.6	20.0	22.1	15.0	.7	2.9	1.4	.0	.0	.7	1.0	21.4	60.7	16.4	8.2
1971	174	17.2	11.5	2.3	24.7	19.5	10.3	.6	7.5	1.1	1.1	.0	.0	.0	23.6	62.6	11.5	3.2
1972	180	15.0	14.4	2.8	22.2	20.6	10.6	1.7	5.0	2.2	1.1	.0	1.1	2.0	22.2	60.0	14.4	11.5

Table 3-1. United States Supreme Court's Agenda, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMICS	JUDICIAL POWER	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	PRIVACY	DUE PROCESS	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	ATTORNEY	UNION	ECONOMIC DIMENSION DECISIONS	CIVIL LIBERTIES-CIVIL RIGHTS DIMENSION DECISIONS	JUDICIAL POWER DIMENSION DECISIONS	OTHER DIMENSION DECISIONS
1973	172	11.6	17.4	4.1	20.9	21.5	9.9	1.2	4.7	2.9	.6	.0	1.2	2.0	20.9	58.1	17.4	7.0
1974	149	18.1	17.4	3.4	19.5	19.5	5.4	2.0	4.7	5.4	.0	.0	.7	1.0	26.2	51.0	17.4	9.5
1975	179	17.9	21.2	.6	20.7	17.3	7.3	1.7	7.8	1.7	1.1	.0	.0	.0	21.2	54.7	21.2	1.4
1976	175	10.9	13.7	2.3	24.0	24.0	8.0	3.4	4.6	4.0	.6	.0	.6	1.0	17.7	64.0	13.7	2.4
1977	152	20.4	13.2	4.6	21.7	20.4	5.3	.7	3.3	3.9	.0	.0	2.6	4.0	30.9	51.3	13.2	5.8
1978	156	17.3	12.2	2.6	21.2	25.6	5.8	3.2	6.4	1.9	.0	.0	.0	.0	23.7	62.2	12.2	4.0
1979	156	18.6	13.5	.0	25.0	14.7	7.1	3.8	6.4	1.3	2.6	.0	3.2	5.0	25.6	57.1	13.5	1.0
1980	143	17.5	15.4	4.2	19.6	21.0	7.7	.7	3.5	3.5	.0	.0	.7	1.0	28.0	52.4	15.4	16.1
1981	170	15.3	17.6	1.8	15.9	21.8	7.6	2.4	5.9	3.5	.0	.0	1.8	3.0	24.1	53.5	17.6	7.1
1982	165	18.8	10.9	2.4	21.8	17.0	6.7	2.4	4.8	7.3	1.2	.0	1.2	2.0	26.7	52.7	10.9	3.8
1983	170	15.3	10.0	2.4	30.0	17.1	7.1	1.2	5.9	5.3	1.2	.0	1.2	2.0	22.4	61.2	10.0	3.9
1984	153	19.6	10.5	2.6	24.8	15.7	7.2	.7	5.9	5.9	.0	.0	3.9	6.0	29.4	54.2	10.5	1.3
1985	163	8.6	19.6	3.1	28.2	19.0	6.7	.0	3.1	6.1	.0	.0	2.5	4.0	16.6	57.1	19.6	1.2
1986	160	11.9	12.5	3.1	26.9	15.0	7.5	.6	7.5	9.4	.6	.0	1.9	3.0	19.4	57.5	12.5	11.5
1987	148	16.9	16.2	2.0	21.6	13.5	8.1	.7	6.1	6.8	.0	.0	2.0	3.0	25.7	50.0	16.2	11.0
1988	149	11.4	14.8	2.7	22.8	18.8	9.4	2.0	3.4	6.0	.0	.0	4.0	6.0	21.5	56.4	14.8	8.3
1989	138	16.7	14.5	4.3	28.3	7.2	10.1	2.2	3.6	6.5	.7	.0	2.9	4.0	26.8	51.4	14.5	4.2

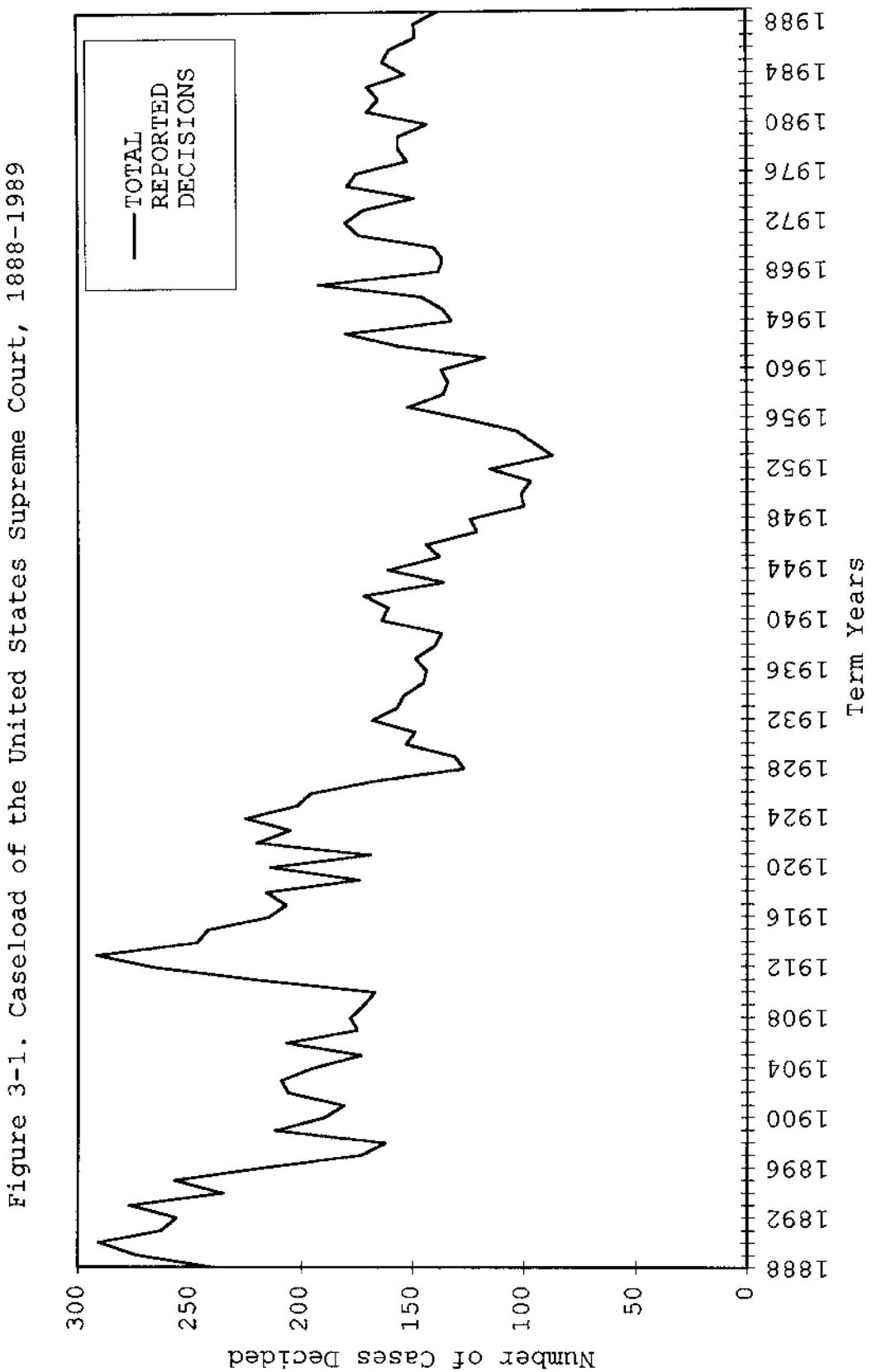


Figure 3-1. Caseload of the United States Supreme Court, 1888-1989

caseload declines permanently: in no year since has it decided as many as 200 cases. It did so frequently before 1925. From that point until 1953, the series gradually declines. The Court issued 196 decisions in 1926 and only 87 cases in 1953, its nadir. Beginning in 1954, the Court's caseload appears to change course again and exhibits a moderate upward trend that stabilizes in 1972. In 1987, however, it appears to begin to decline once again; in fact, from 1989 to 1994, the Court has issued an average of about 106 decisions per term (Epstein, Segal, Spaeth, and Walker 1996: 194).

Casper and Posner (1976) posit that four important variables influence the change in the Court's caseload. They are: "(1) the number and scope of federal rights, (2) the procedural devices that facilitate or obstruct the enforcement of federal rights, (3) the costs to litigants of asserting such rights at various stages of the litigation process, and (4) the certainty or definiteness of the rights" (Casper and Posner 1976: 56). Prior to 1925, the large number of decisions the Court issued is, in part, a function of the uncertainty of the law. The Court was then grappling with untested questions of law arising from the increased level of regulation of business activity during a period of unprecedented industrialism and Progressive efforts to reform the law. As a result, there were many

unsettled areas of Constitutional jurisprudence, most notably the protection the due process clause of the Fourteenth Amendment guarantees to economic concerns. Thus, the Court's caseload was large so that the Court was able to resolve these pressing issues.

Moreover, the Judiciary Act of 1925 affected the Court's caseload. The Act greatly expanded the Court's discretionary jurisdiction, allowing it to whittle down the number of cases claiming space on its agenda to only important, unsettled issues of law (Halpern and Vines 1977: 475-76). Hence, the gradual but permanent decline in the number of opinions is most likely in part caused by the Court's new-found power arising from the Act that allowed it accept fewer cases to hear initially and, in turn, the number of decisions declined. Yet, the number of cases hovers around 150 per year (rather than declining even further) from 1929 to the post-World War II era, perhaps due to challenges brought against the public policies enacted as result of the Great Depression and, and the Depression's reflex, the New Deal. The national government was forced to implement social welfare legislation to meet the demands of that national crisis. But because the situation was so unique, there were many unsettled questions that the Court ultimately had to review. Thus, the Court's caseload may have increased as a consequence.

Also, the moderate upward trend in the series that begins in 1954 may be due to the changing subject matter of the Court's decisions. The Court's civil liberties-civil rights jurisprudence, under Warren, was allegedly liberal and, thus, announced that the Constitution gave petitioners greater rights than had been established previously. Thus, the number of opinions that the Court issued would accordingly increase due to this expansion of Constitutional guarantees. Yet, the series begins to decline in 1987, possibly because of the Rehnquist Court's more restrictive view of Constitutional protections. This decrease in the number of opinions may also be due to the Court having resolved many of the prevailing issues of civil rights and liberties, much as the Court during Fullers and White's tenures did with respect to issues of economic regulation. Hence, the series may have stabilized as a result.

Issue Areas

While the overall number of decisions reported fluctuates within its generally downward trend across the period analyzed, the decisions themselves can be further analyzed according to the issue areas in which they fall. Figures 3-2 through 3-6 and Table 3-1 show the relative proportion of the Court's agenda for 14 issue areas[1] for the years 1888 to 1989, inclusive. The content of these issue areas is described above. Following the classification

scheme that Spaeth (1993) originates, the decisions were placed in one of the following issues areas: criminal, civil rights, first amendment, due process, attorney, union, economic, judicial power, federalism, interstate relations, federal taxation, miscellaneous, and separation of powers.

Economics Decisions

The first finding that is most noticeable from the figures is that, as Figure 3-2 shows, economics cases constituted the largest proportion -- usually an overwhelming majority of the decisions the Court announced for about 60 of the 102 years analyzed (1888-1950). Indeed, economics so overwhelmed the other series as to make them unreadable if they were plotted in one figure for this period. Thus, Figures 3-2 through 3-6 separately display the proportions for the other issue areas in a more readable form.

As one can see from Figure 3-2, the proportion of economics decisions displays a clear downward trend across the period, and an especially strong downward trend from the mid-1930s through 1969. The series experiences its historical high of 76 percent (199 decisions) in 1891, and its historic low of 8.1 percent (3 decisions) in 1969. This decline even continues through the period of the Great Depression when one would expect the Court, as the nation's highest judicial authority, to be deluged with requests from

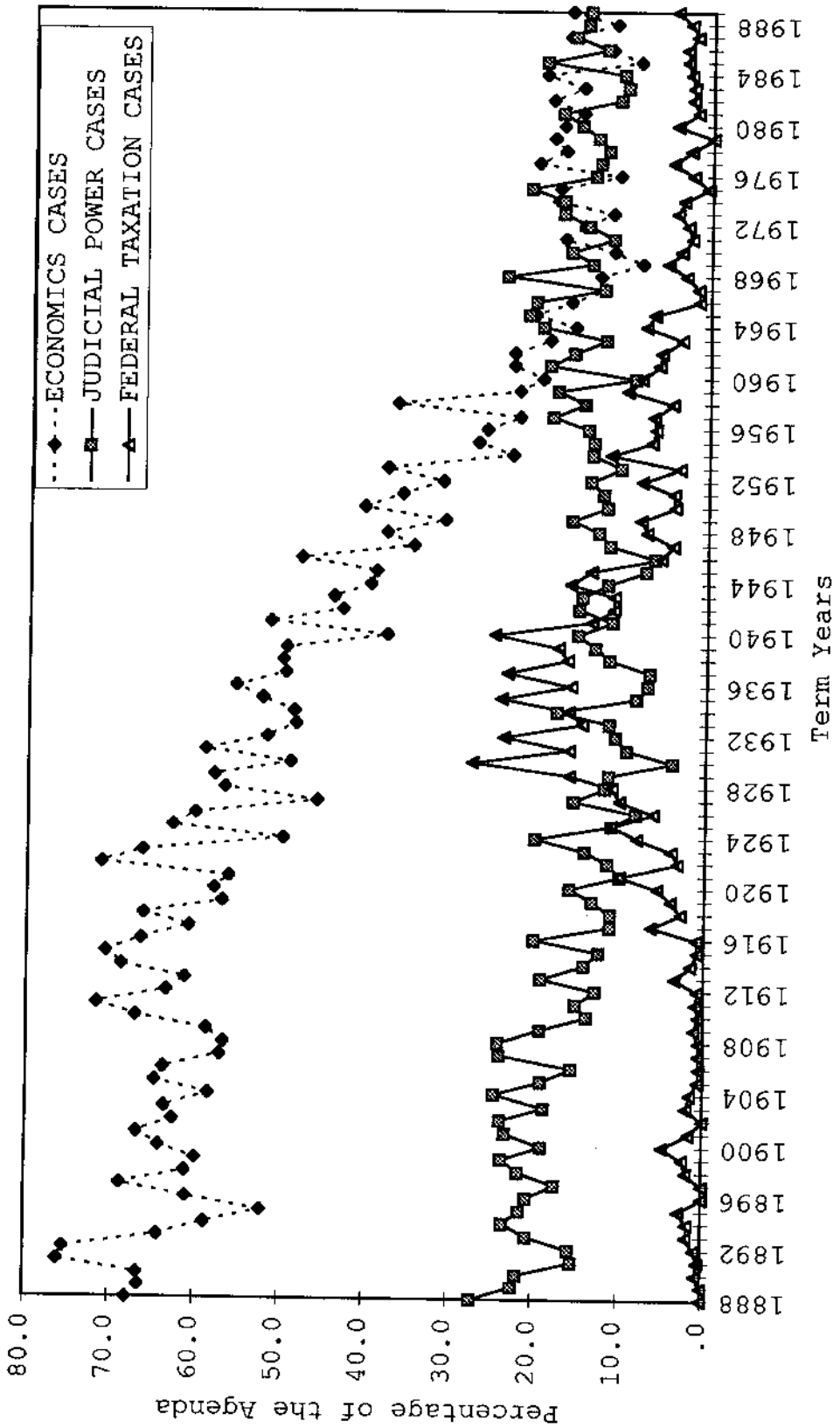


Figure 3-2. Composition of the Agenda of the United States Supreme Court, 1888-1989

parties seeking redress and the lower courts seeking guidance as to how to resolve the unprecedented problems then facing the national economic order.

Pacelle (1991) examines the composition of the Court's agenda from 1933 to 1987. He categorizes the cases into slightly different issue areas than is done in the present analysis (1991: 207-09). For example, he disaggregates cases that the present coding system would have coded as "economic" into five different categories. These are U.S. Regulation, State Regulation, State as a Litigant, United States as a Litigant, and Ordinary Economic (Pacelle 1991: 57). The "State as a Litigant" cases involve "boundary disputes between two states, navigable waters cases, and state liability for certain actions" (Pacelle 1991: 208). These cases more closely correspond to what the current coding scheme would classify as "Interstate Relations." Hence, if the remaining case types (those other than the "State as a Litigant" cases) are aggregated, then a valid comparison between Pacelle's analysis and the present analysis can be made.[2]

Based on this re-definition of economics cases, Pacelle's results are quite similar, although not identical, to those of the present analysis. Examining the average percentage of cases across five term years, Pacelle reports that economics cases comprised 55.4 percent of the Court's

agenda for 1933-1937 (1991: 57). The present analysis indicates that the figure is 52.46 percent.[3] Both Pacelle's and these findings do show the same steady decrease in the percentage of the agenda that the Court dedicated to economics cases. The historic high for the series is found within the first period (1933-1937) (Pacelle: 55.4 percent; present study: 52.46 percent) (Pacelle 1991: 57). The most recent period (1983-1987) exhibits the series' historic low (Pacelle: 24.3; present: 20.06) (Pacelle 1991: 57). Throughout the entire period, the two analyses provide similar results and implications: economics cases constituted about one-half of the cases that the Court announced in the term years prior to the end of World War II, but in more recent times constitute only about one-fifth of the Court's docket. However, Pacelle's results do differ slightly from those of this analysis in that his results tend to show larger absolute percentages. This may be an artifact of the differences in coding methodology between the two studies.

Judicial Power

Figure 3-2 also displays the percentage of the Court's agenda constituted by judicial power cases.[4] Such cases comprise a fairly significant proportion of the Court's agenda during the years from 1888 to 1989. In the first half of the period analyzed, these cases experienced a

downward trend, ending in 1930. In 1888, the series begins with its period high proportion of 27 percent; in 1930 it experiences its historic low of 3.9 percent. Also, beginning in 1930, the series becomes rather volatile, exhibiting several large scale changes, but moving rather steadily upward. It exceeds 20 percent in 1965 and 1966, and reaches a mark of 23.9 percent in 1968, when it once again turns gently downward.

Federal Taxation

The third series shown in Figure 3-2 plots the proportion of Federal taxation cases on the Court's agenda. The series shows a clear increasing pattern, especially after 1926. These cases reach their historic high -- 27.5 percent of the agenda -- in 1930. This finding is consistent with theorectial expectations since the 16th amendment, providing for a Federal personal income tax, was adopted in 1913. The series falls off to 5.6 percent in 1946, and thereafter exceeds ten percent only once -- in 1954. In later years, it rarely exceeds five percent. There are several years in which no such cases were issued, all but one occurring before 1903.

Pacelle (1991: 57) similarly finds that from 1933 to 1937, federal taxation cases consumed 17.8 percent of the Court's docket, the historic high. Thereafter, the percentage dwindles to 8.4 percent between 1953 and 1957,

and then to 3.2 percent during the term years 1983 to 1987. Pacelle's historic low occurs between 1978 and 1982, at 2.5 percent (Pacelle 1991: 57). The present study, however, finds that the historic low is zero percent. This discrepancy may be explained by the different coding techniques of the two studies: Pacelle employs an average across five term years, while in the present study the results are reported for individual term years.

Similarly, the present investigation finds that the historic high occurred between 1933 and 1937, with federal taxation cases comprising 18.88 percent of the Court's docket on average across those five years, and that the series declines to consume only 6.94 percent of the Court's decisions on average by 1953-1957, and only 2.64 percent by 1983-1987. As Pacelle finds, the historic low occurred between 1978 and 1982, when these cases accounted for only 2.20 percent of the Court's agenda.

Criminal Procedure

Figure 3-3 plots the percentage of the agenda that criminal procedure, civil rights and First Amendment cases comprise. Looking first at criminal procedure cases, one can see that this series demonstrates a strong upward trend, but a trend that does not become established until 1939. Before that term year, it exhibits occasional increases that raise it above its otherwise normal five to ten percent. As

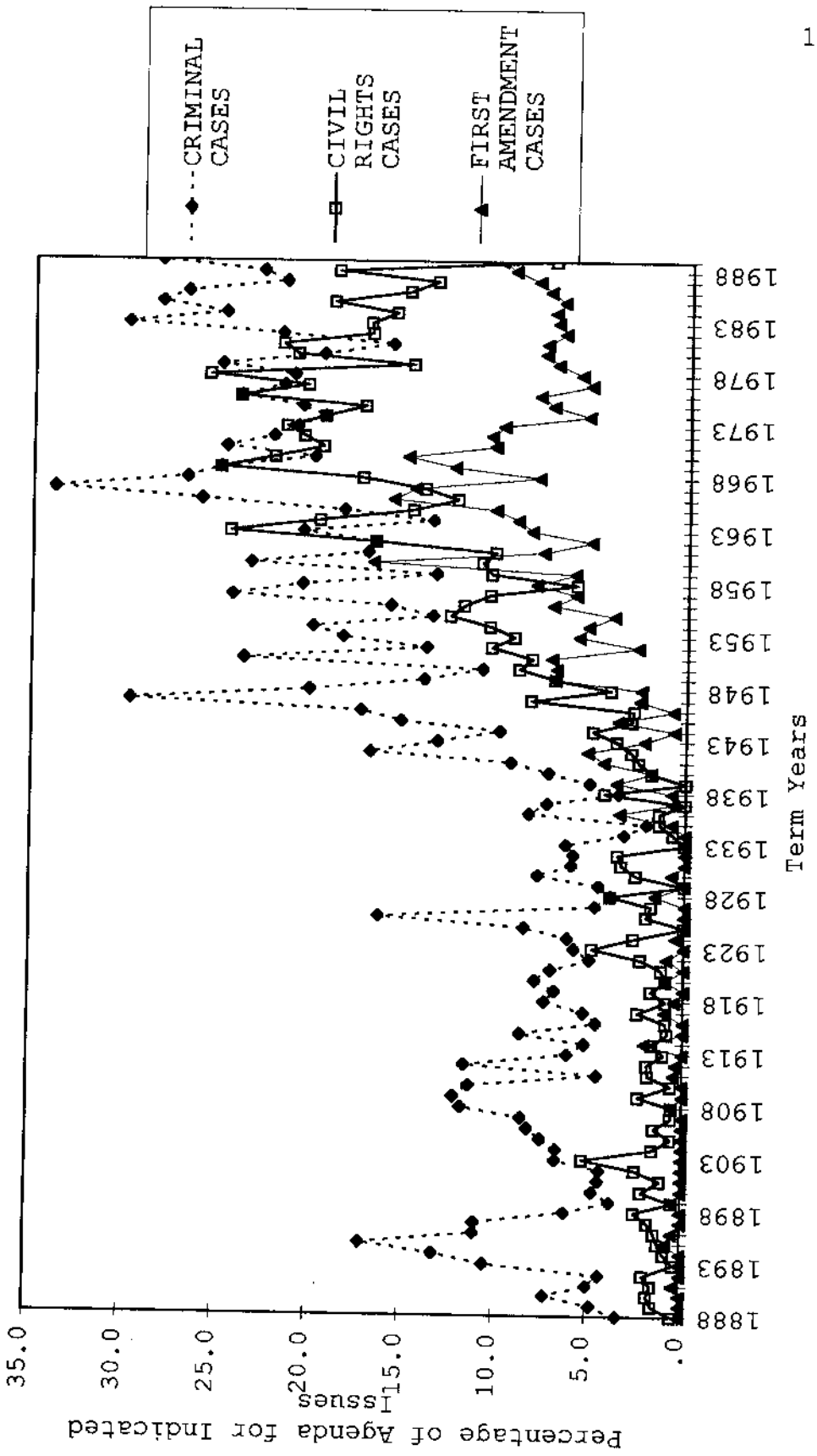


Figure 3-3. Composition of the Agenda of the United States Supreme Court, 1888-1989

the figure shows, the series demonstrates a rather strong upward trend, with large but temporary increases in the early 1890s, and in the 1960s, the latter perhaps due to the agenda priorities of the Warren Court. The series hits its high in 1967, capturing 33.9 percent of the Court's decisions that term year. As noted, criminal cases begin to garner significantly more space on the Court's agenda in the late 1930s, moving from 3.6 percent in 1938 to 20.2 percent only ten years later in 1948. The series exhibits a notable shift in its level in 1942; thereafter it never dropped below ten percent (rounded) of the Court's decisions. Although it continued to fluctuate rather strongly thereafter, the series never returned to the low levels observed in the 1930s and prior, and its mean steadily rises.

Pacelle categorized "criminal" decisions slightly differently (Pacelle 1991: 207). He defines "due process" cases as those including "primarily, but not exclusively, criminal procedure cases. Among the areas are search and seizure, self-incrimination, death penalty, right to counsel, jury procedure, and double jeopardy. In addition, due process considerations in administrative proceedings are included" (Pacelle 1991: 207). Pacelle, also, defines "criminal law" cases as those "that turned on a substantive interpretation of a criminal statute by the Court" (Pacelle

1991: 207). Those cases dealing with the fairness of administrative proceedings were coded herein as "due process" cases; all others were coded as being "criminal procedure" cases.

Thus, the results in these four categories (Pacelle's "Due Process" and "Criminal Law," and "Criminal Procedure" and "Due Process" in the present analysis) are compared. Using once again the tack that Pacelle takes (employing the average percentage of the docket consumed across a five year period), the results of the two studies are somewhat different overall. From 1933 to 1937 and from 1938 to 1942, the two studies' findings are quite similar: the five year average for due process, criminal law and criminal procedure is about seven percent.

From 1943 to 1947, however, they begin to diverge. Pacelle finds that these cases comprised 12.6 percent of the docket; whereas, this study suggests that 18.40 percent of the Court's agenda was consumed by such cases. From 1948 to 1952, Pacelle's analysis finds that these cases consumed 18.30 percent of the Court's agenda, while the present study finds that they represent 20.16 percent of the docket (Pacelle 1991: 56). In the two succeeding five-year periods, Pacelle's results indicate that the series increases from 22 percent (for 1953 and 1957) to 24.10 percent (for 1958 to 1962) to 27.40 percent (for 1958 to

1962) to 34.1 percent (its historic high) for 1968 and 1972 (Pacelle 1991: 56).

However, the present analysis demonstrates that between 1948 and 1962, remained relatively flat. The series comprises 20.16 percent from 1948 to 1952, 20.84 percent from 1953 to 1957, and 20.36 percent from 1958 to 1962. Between 1963 and 1967, however, these cases increase somewhat, comprising 23.58 percent of the docket; between 1968 and 1972, the figure climbs to 27.40 percent. Between 1973 and 1977, the series reverses course and declines to 26.38 percent.

From 1973 to 1977, these cases begin to consume less of the Court's docket. Pacelle finds that they are 29.8 percent of the Court's docket; whereas, the present study finds that they are 26.4 percent of the agenda. Between 1978 and 1982, their decline continues (Pacelle 1991: 56). The present study finds that they represent 26.16 percent of the decisions announced, while Pacelle notes that the figure is 28.6 percent. But both studies indicate that the series then rebounds. Pacelle finds that they comprise 31.3 percent of the Court's agenda from 1982 to 1988; the present study 32.0 percent, its historic high (Pacelle 1991: 56).

Hence, as I have found with other issue areas, the two studies' findings do diverge. Although they do agree generally as to whether there is a trend occurring and its

direction, the studies disagree as to the magnitude of the proportion of the Court's docket that these cases comprise, differences reaching as high as seven percent. They also disagree as to when the series' historic high occurs. Pacelle states that it occurs from 1968 to 1972, whereas the present study finds that it occurs during the five-year period from 1982 to 1988. Again, these discrepancies may be due to different coding methodology, disagreements as to what category a decision best fits in, differences in simple calculation of the percentages, or some combination of these factors.

Civil Rights

Figure 3-3 also shows the frequency of civil rights cases on the Supreme Court's agenda. As the figure shows, the series attains five percent or greater only twice (in 1903 and 1944) during the 58 term years from 1888 and 1945. Its historic low of zero percent occurs several times during this period, observed first in 1925. After 1945, the series becomes a continuous part of the Court's agenda. Civil rights cases then begin to experience an upward trend in 1947, attaining 8.3 percent in that year, 8.9 percent in 1950, 10.4 percent in 1952, 12.6 percent in 1955, and 16.7 percent in 1962. The series hits an historic high in 1978 of 25.6 percent of the decisions the Court announced in that term year. This latter mark is nearly matched in the term

years 1963 (24.4 percent), 1969 (25.0 percent), and 1976 (24.0 percent).

This upward movement in the proportion of civil rights cases that the Court decided supports McCloskey's (1994) observations that the Court's priorities were changing from one focused on economics questions to issues of civil rights, due in part to the questions of most pressing concern and conflict within the American political structure as a whole. The Court as the nation's highest conflict resolving institution would naturally begin to consider those questions that were being increasingly debated in the larger political context. Indeed, the Court did not begin to consider them until they were arising in other political venues. Prior to the 1950s, the extant political culture did not support the expansion of civil rights, being more concerned with how to best handle the challenges that growing industrialism presented to nation, whether through vigorous economic regulation or through other policies. Hence, the increase in the proportion of civil rights cases that the Court considered, beginning in the 1950s, reflects a fundamental change in the substance of the Court's agenda from one concerned with issues related to the regulation of business activity to one dominated by questions of civil rights and civil liberties.

Pacelle (1991) examines the percentage of civil rights cases on the Court's agenda across time. He labels such cases "Equality" cases, "characterized as civil rights and involve alleged discrimination on the basis of race, gender, age, disability, or similar factors" (Pacelle 1991: 208). Until 1968, he finds these cases did not consistently consume more than 10 percent of the Court's docket (Pacelle 1991: 56). From 1933 to 1962, civil rights cases, in an average a term year, comprise 3.38 percent of the total decisions of the Court. Even after 1962, such cases exceed 15 percent only once (1983-1987) (Pacelle 1991: 56).

Pacelle's findings do differ rather substantially from those found in this study, however. From 1933 to 1962, the results of the present analysis are about double those of Pacelle (compare 2.7 percent with 4.54 percent for 1943 and 1947; compare 5.1 percent with 10.94 percent for 1953 to 1957). Moreover, whereas Pacelle finds that the historic high for the series (16.6 percent) occurred between 1983-1987 (Pacelle 1991: 56), the historic high in the present study occurred between 1968 and 1972 (20.92 percent), followed closely by the averages observed during 1973 to 1977 (20.54 percent) and 1978 to 1982 (20.02 percent). During the period in which Pacelle (1991: 56) finds the apogee of civil rights cases (1983-1987), this study finds that such cases began to decline in frequency, consuming an

average of 16.06 percent of the agenda. Nevertheless, Pacelle's finding that civil rights cases do not begin to become more frequent until the 1960s is confirmed herein.

First Amendment

The third series that Figure 3-3 plots is First Amendment cases. Like civil rights decisions, First Amendment cases do not begin to significantly increase their share of the Court's agenda until the 1950s; indeed, they usually do not even appear on the agenda before 1935. It is not until the 1950s that these cases regularly exceed five percent of the agenda. Not until 1965 do such cases consistently comprise 10 percent or more of the Court's term decisions. The series high is observed in 1960 (16.8 percent), and there are many term years before 1935 in which no First Amendment cases were decided. As discussed above, the Court was previously more concerned with resolving economic issues. This series parallels the changes in the relative share of the agenda that civil rights decisions comprise. Again, these findings confirm Pacelle's results (1991: 56, 158-59) and McCloskey's (1994: 113) observations about the growth of civil rights decisions during the last 40 years.

Privacy

The first issue area plotted in Figure 3-4 depicts the proportion of privacy cases from 1888 to 1989. The most

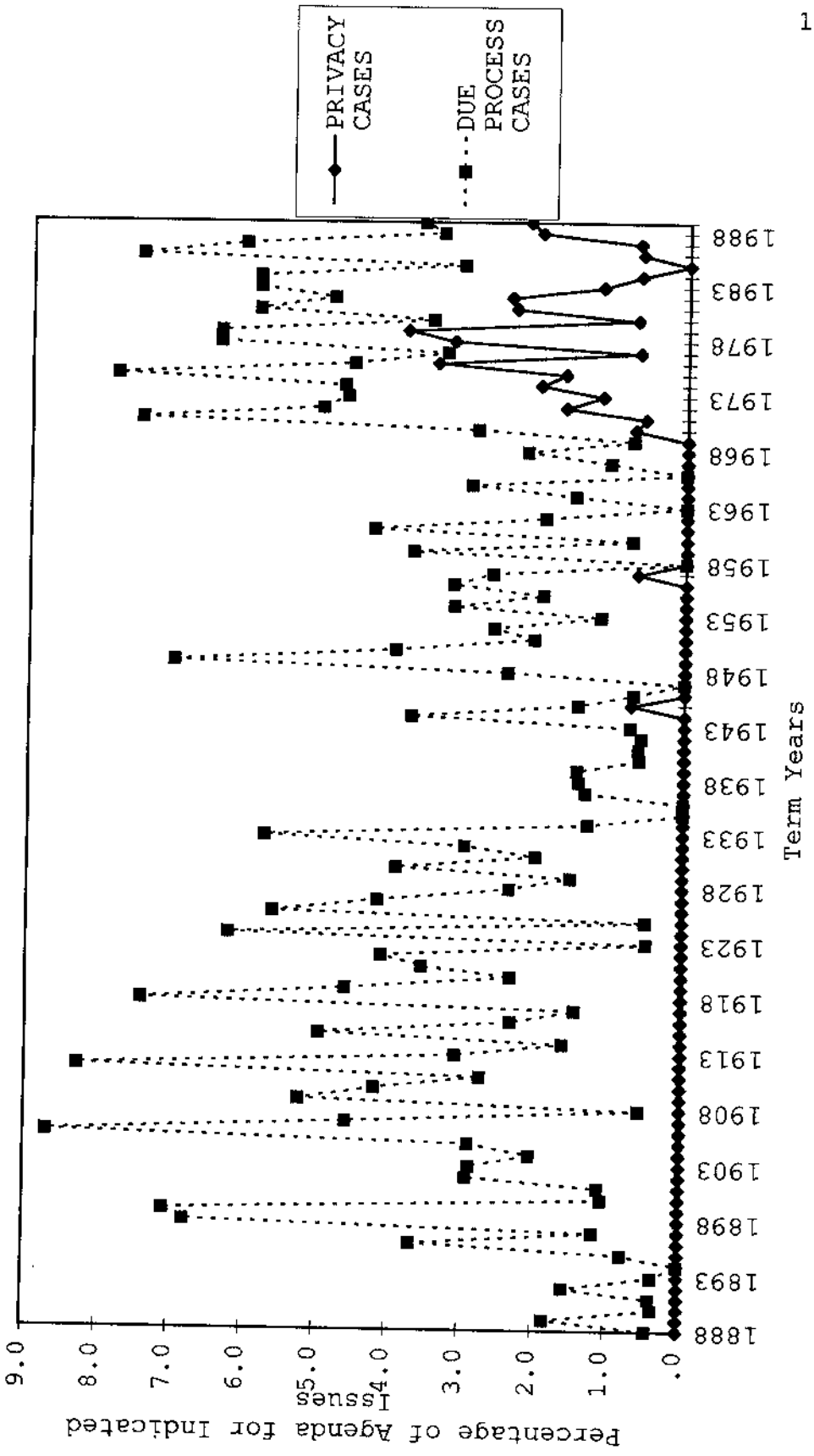


Figure 3-4. Composition of the Agenda of the United States Supreme Court, 1888-1989

apparent finding when one examines this series is that in a the majority of term years, the Court's agenda does not include any such decisions because Supreme Court precedent did not recognize the right of privacy until 1965 when, in Griswold v. Connecticut (1965), the Court held unconstitutional a state statute that made the use and prescription of contraceptives illegal.[5] Although there are two single term-year increases (1945 and 1957), the series does begin to increase, although only marginally, in 1970. However, it begins to decline soon thereafter, in 1979. Moreover, its historic high is only 3.8 percent, also observed in 1979. Thus, privacy cases have not comprised even a modest portion of the Court's agenda across the 102 term years analyzed.

Pacelle (1991) examines the relative frequency of First Amendment and Privacy cases. He labels these "Substantive Rights" cases, and aggregates them into a single issue area along with decisions involving "[i]ndividual rights to an abortion, rights of privacy, and cases involving conscientious objectors and alleged Communists are also included" (Pacelle, 207). Hence, to make a valid comparison, Pacelle's "Substantive Rights" cases will be compared with the five-year averages within the First Amendment and Privacy issue areas in the present investigation.

The results of the two studies show differences and similarities, as with previous issue areas. The historic low for both Pacelle and the present study is observed in the earliest five-year period (1933-1937) (Pacelle 1991: 56). Similarly, both studies' results indicate that the historic high occurred between 1968 and 1972 (Pacelle: 16.2 percent; here: 11.88 percent). Thereafter, both studies find that the percentage of these cases increases consistently through the period from 1973 to 1977, when it begins to decline. In the last five-year period Pacelle discusses (1983-1987), he finds that such cases comprise only 10.7 percent of the docket (1991: 56); the present study finds they that represent 7.96 percent of the tribunal's agenda.

Due Process

Figure 3-4 also plots the annual proportions of due process cases. The first finding one notices is that the proportion of the Court's agenda fluctuates rather wildly (between zero and nine percent) across the entire period at hand. There is no apparent upward or downward trend that one can discern from the figure, as there clearly is with economics decisions. The series maximum occurs in 1906, comprising 8.7 percent of the Court's decisions. There appears to be a downward trend from about 1900 to 1940. There are several term years (1894, 1935, 1936, 1947, 1958,

1963, and 1966) in which the Court announced no due process decisions. However, much like the other issue areas of civil liberties, civil rights, and First Amendment cases, the series does experience a jump in level beginning in 1967. From 1967 until 1989, this issue area consumes at least a modest portion of the Court's agenda, although it declines near the end of the series, comprising only 3.6 percent of the Court's decisions in 1989.

The findings for the two studies do differ in terms of the magnitude of the percentages across time. The present study's findings are generally smaller than are those of Pacelle, although the difference is often only two or three percentage points. The two studies agree in that they both affirm the timing and the general trend in the growth and then the decline in First Amendment and privacy cases on the Court's docket across the period from 1933 to 1987.

Federalism

Figure 3-5 plots the proportions of federalism, interstate relations, and separation of powers cases. Among the three series, federalism cases clearly occur most frequently. Beginning around 1916, federalism cases trend erratically upward, although the slope of the series line is not terribly steep. There are several large increases in the 1920s and 1930s, although the series is rather dynamic during those years. This finding supports Pacelle's finding

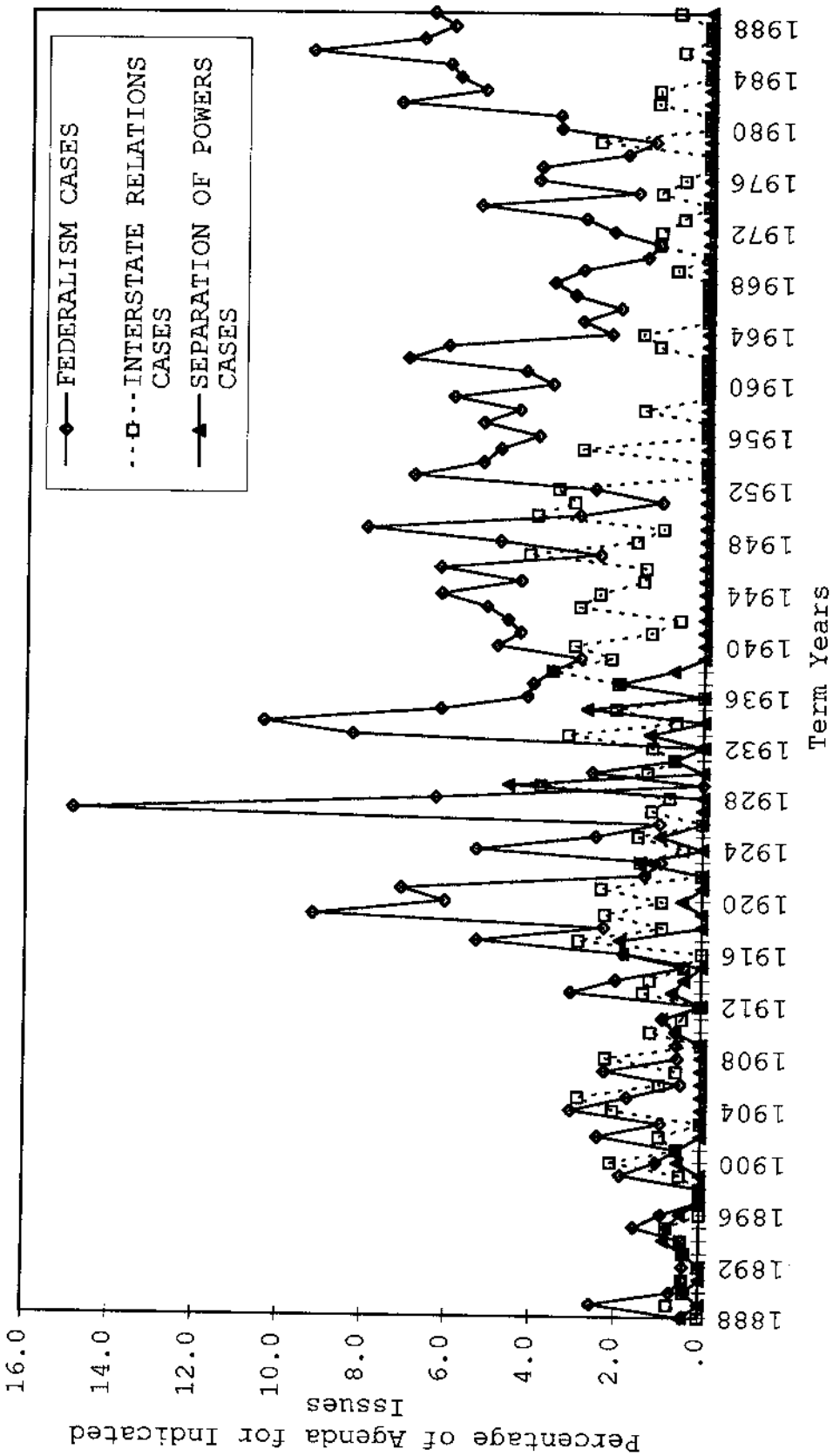


Figure 3-5. Composition of the Agenda of the United States Supreme Court, 1888-1989

of an increase in such issues on the Court's docket (Pacelle 1991: 56-57). It also bolsters Schwartz's (1993) observation that the Court was moving, albeit slowly, toward a philosophy supportive of social welfare, which could be best effectuated by bolstering the national government's power (1993: 242-43). The series stabilizes in 1954, begins to decline in 1963, and then describes a upward trend again in 1971. Its historic high of 14.9 percent occurred in 1927, and in several term years, it consumes no space on the Court's agenda.

Pacelle (1991: 57) finds that federalism cases[6] decline over the period from 1933 to 1987. His results indicate that the historic high is observed between the years of 1933 and 1937. Thereafter the series declines to 5.4 percent, between 1968 and 1972, after which it rebounds somewhat to 10.0 percent during 1983-1987 (Pacelle 1991: 57). This study similarly indicates that the series generally declines through 1968-1972, consuming only 2.24 percent of the Court's docket. It then slowly returns to approximately the level first observed in 1933-1937 (6.62). The present study's findings suggest that the historic high for federalism cases occurred in 1933-1937, similar to those of Pacelle (Pacelle 1991: 57). The studies also agree that the historic low occurred between 1968-1972, although once again there are differences in the absolute magnitude of the

results.

In this context, however, the differences often reach eight or nine percentage points. Part of this discrepancy can be accounted for by the different methodologies of the studies. Pacelle (1991) coded only cases whose opinions were at least a page long, whereas in the present study all cases were coded regardless of the opinion's length (1991: 207). Further, the different researchers involved may simply have disagreed as to what category the decision best represented. Some decisions that one researcher may place in the federalism category may also be placed in economics, for example. These differences in coding may explain the different results of the two studies.

Interstate Relations

As Figure 3-5 shows, interstate relations cases do not consume more than four percent of the Court's agenda during the period at hand. From 1888 to 1930, such cases do not demonstrate a clear trend. They comprise less than two percent of the Court's docket on average up until 1930. Then, there was a temporary increase in their proportion, lasting through the end of World War II and ending in 1950, when the series begins to trend downward to a point of less than an average of two percent of the Court's agenda through 1989. The series high is experienced in 1947 when these cases comprise 4.1 percent of the Court's decisions.

Thereafter, the series declines substantially.

No direct comparison can be made between these findings and those of Pacelle (1991) because of his coding scheme. He operationalizes "State as a Litigant" cases as including "boundary disputes between two states, navigable waters cases, and state liability for certain actions" (Pacelle 1991: 208, emphasis added). In the present study, only the first two categories are included in the operationalization of "Interstate Relations" cases. The third category, involving state liability, is included within the "Economics" issue area. Based on the data displayed in Table 3-1, these latter decisions comprise the bulk of the three types of cases. Hence, any comparison between the findings of the two studies would be misleading.

Separation of Powers

Finally, separation of powers cases are even less frequently on the Court's agenda than are interstate relations cases, as Figure 3-5 shows. The series' historic high occurs in 1929, when it comprised 4.6 percent of the Court's docket. In several term years, the Court issued no separation of powers rulings. Thus, the series showing no such cases after 1954 is somewhat misleading for these types of cases since no direct comparison can be made between the pre- and post-War periods. Pacelle (1991) finds that the series increases, although only modestly, from 1933 to 1982.

Between 1933 and 1937, the percentage of these cases on the Court's docket was 0.4 percent; between 1983 and 1987, it only reached 1.2 percent (Pacelle 1991: 56).

One should note that Spaeth (1993) did not include an issue area for such cases in his original dataset. The research team at the University of North Texas, headed by Dr. Sandra L. Wood, chose to create such a category because they encountered a non-trivial number of such decisions.

Attorney and Union Cases

Figure 3-6 displays the proportion of the Court's agenda dedicated to two relatively infrequent series: attorney cases and union cases. The proportion of union cases remains near zero until 1936, when the series becomes a visible proportion of the Court's caseload. It fluctuates from about two percent to about 10 percent until 1960, when it subsides to a relatively steady two to five percent per term year. The series' high occurs in 1959 at 10.4 percent. In this and other series, there are several term years in which the Court issued no decisions in this issue area.

This finding of an increase in the series in the late 1930s confirms Pacelle's (1991: 56) results and Schwartz's observations (1993: 236-38) as to the fundamental change in the Court's priorities in the Roosevelt era. The Court had for the first time adopted a judicial philosophy that was supportive of New Deal and regulatory legislation and,

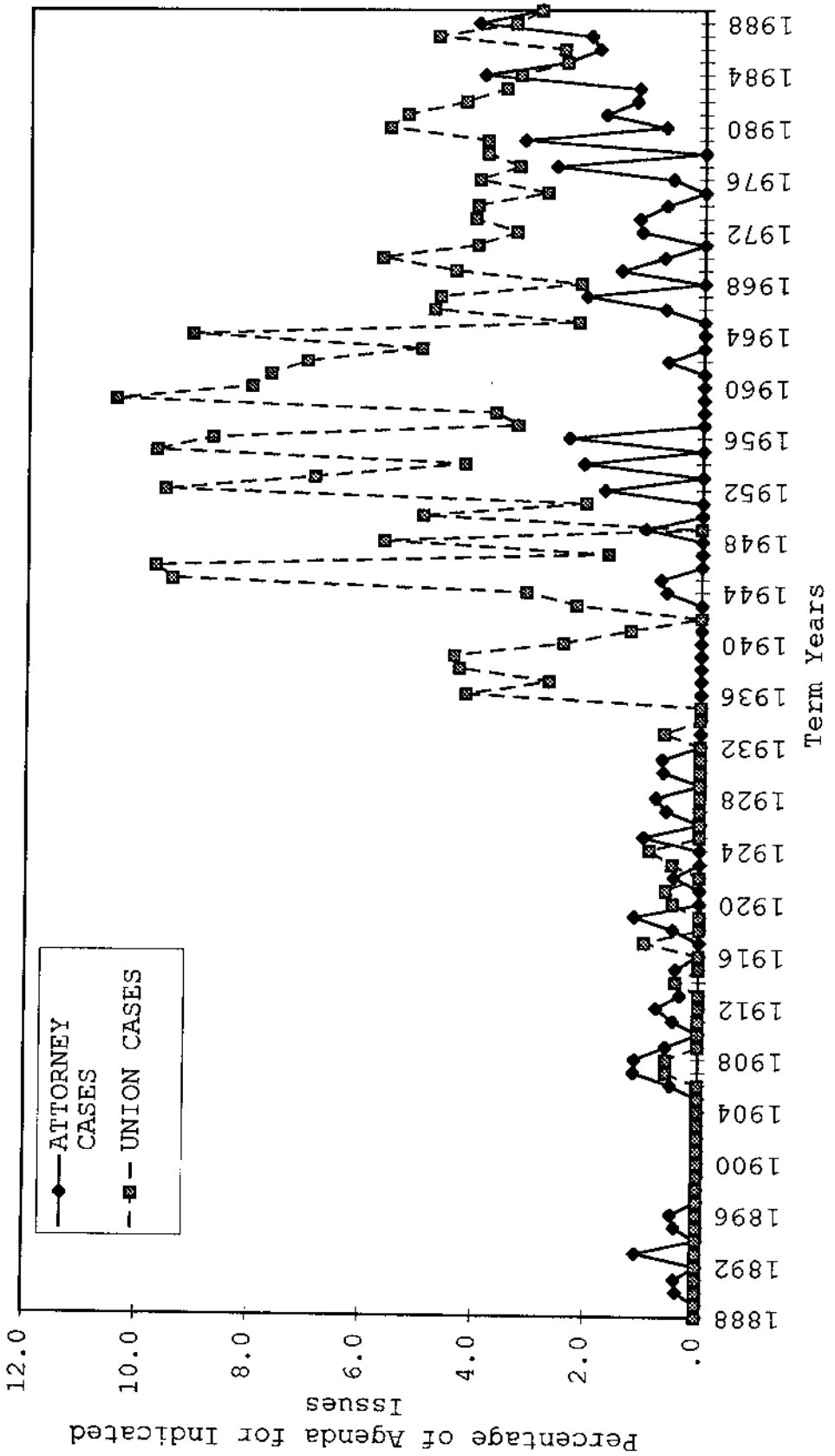


Figure 3-6. Composition of the Agenda of the United States Supreme Court, 1888-1989

indeed, a social welfare state, as opposed to the laissez-faire philosophy that had dominated the Court's decision making beginning most prominently in the late 1800s (Schwartz 1993: 244-45). This apparently led it to devote some agenda space to union-related issue. The liberalism of these decisions will be discussed in the next Chapter.

Attorney Cases

Figure 3-6 also displays the proportion of attorney cases. Only after the end of World War II do such cases consume even a tiny portion of the Court's agenda. There are relatively large increases in 1952 (1.7 percent), 1954 (2.1 percent), and 1956 (2.4 percent), but these decline quickly. Prior to that time, there are very small and fleeting changes in the proportion of the Court's agenda dedicated to attorney cases. Only in 1979 does the series begin to demonstrate anything resembling a trend; it reaches its historic high of four percent in 1988.

Major Issue Areas

To more clearly determine the trends in the various types of decisions that the Court issued across the 102 years analyzed in the present study, the 14 issue types are aggregated into four major categories, following the methodology of Pacelle (1991) and Schubert (1965, 1976). In Pacelle's (1991) analysis of the major issue dimensions, he aggregates "Due Process," "Substantive Rights," and

"Equality" in a "Civil Liberties" dimension, and "Internal Revenue," "State Regulation," "United States as a Litigant," "State as Litigant," and "Ordinary Economic" into an "Economic" dimension (1991: 209).

Schubert (1965) finds that two major scales, the "C" scale and the "E" scale, dominated Supreme Court decision making from 1946 to 1969. Schubert's "C" scale is comprised of the justice's views on the broad range of civil liberties and civil rights issues. The scale, therefore, "consists of claims to personal (as distinguished from property) rights and freedoms" (Schubert 1965: 101). These are the rights of free speech, press, religion, assembly, and petition located in the First Amendment. They also include rights of due process and racial equality, listed in the Fourth through Eighth Amendments (as against the Federal government), and the 14th Amendment (as against the state governments) (Schubert 1965: 101).

Schubert's "E" scale, moreover, deals with the justices' views on matters of economic regulation. Schubert "group[s] together sets of cases which involved disputes between unions and employers; governmental regulation of business activities; fiscal claims of workers against employers; and disputes between small businessmen and their corporate competitors" (Schubert 1965: 127).

Schubert (1974) theorizes the existence of four

subscales beyond the major "C" and "E" scales. He finds some evidence of the "F" scale, dealing with matters of governmental taxing authority. Schubert (1965) also posits three other subscales: the "N" (Federalism), "A" (Judicial Activism), and, "J" (Judicial Centralization) subscales (Schubert 1965: 150-57). There is no substantial empirical support for the existence of these latter scales, however.

The Content of the Issue Areas

The 14 disaggregated issue areas used in the present investigation are aggregated as follows: decisions in criminal, civil rights, first amendment, privacy and due process cases are combined into an overall civil liberties-civil rights dimension; decisions in attorney, union, economics and federal taxation cases are combined into an overall economics dimension; decisions in judicial power cases are combined into a single dimension; and, decisions in federalism, interstate relations, separation of powers and miscellaneous cases are combined into a dimension labelled "other" to indicate the rather diverse, residual nature of the cases that the dimension comprised. Interstate Relations decisions (what Pacelle calls "State as a Litigant" cases) are not included in the aggregated economic dimensions herein because such causes are conceptually distinct from the other issue types within that dimension.

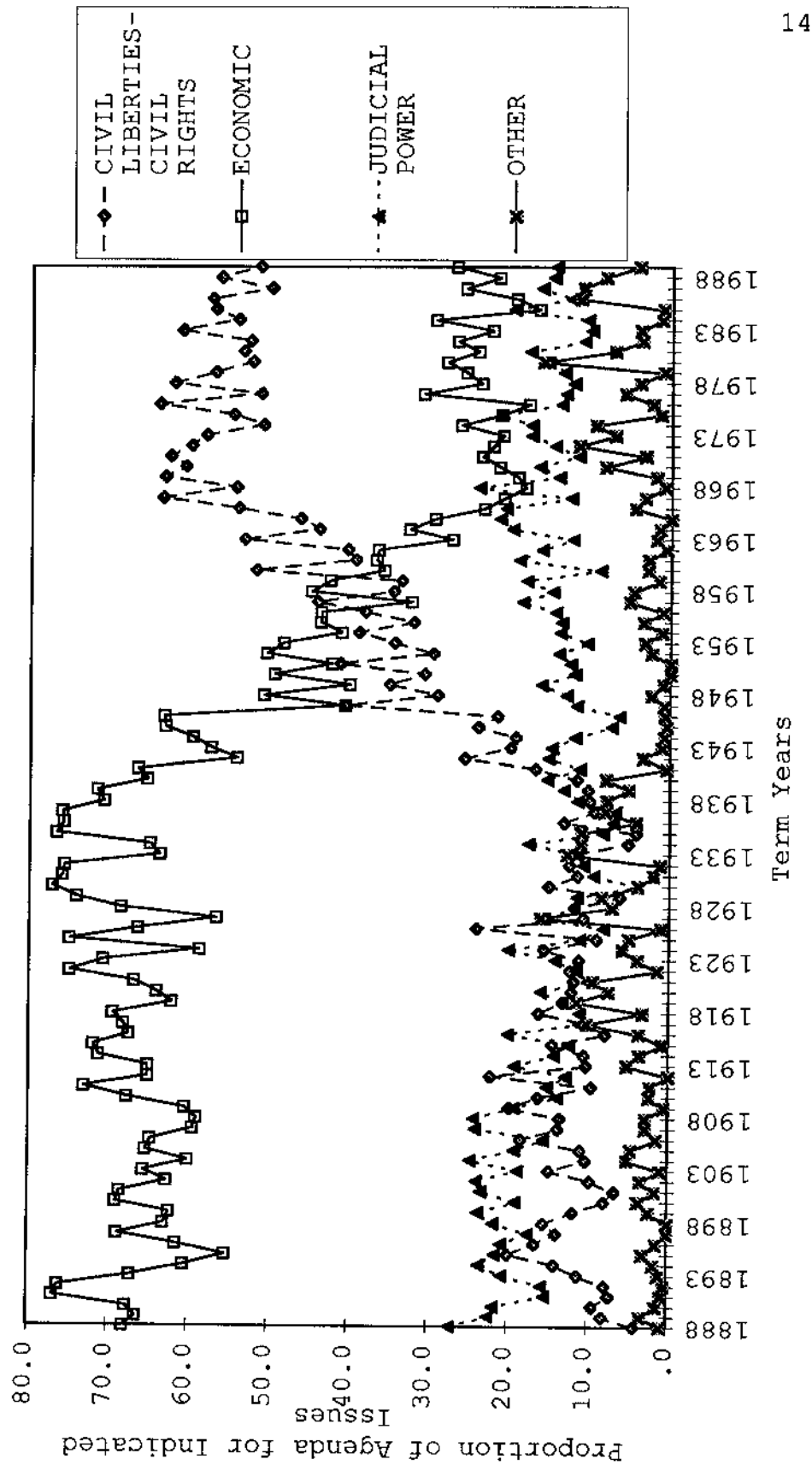


Figure 3-7. Composition of the Agenda of the United States Supreme Court
Based on Major Issue Dimensions, 1888-1989

Economics Decisions

Figure 3-7 shows the proportions of the Court's agenda due to each of the four major areas during each of the term years from 1888 to 1989. Figures 3-8 through 3-11 plot the individual major issue dimensions over this time period. As Figures 3-7 and 3-8 clearly show, economic decisions overwhelmingly dominated the Court's agenda for more than 60 years (1888-1948). The series hovers around sixty-five percent during this period. During the Great Depression era (1929 to 1939), the series temporarily increases to over 70 percent of the Court's docket.

These findings are theoretically consistent. In addition to the political and legal demands that the Great Depression caused on the Court's docket, the Progressive movement, and subsequent reforms, may have caused the Court to be primarily concerned with questions of economics. Progressivism sought to "restrict the excesses of big business by attacking monopolies, settling industry-wide strikes, and conserving natural resources. These efforts produced a considerable expansion of federal power..." (Degler et al. 1981: 424). The Progressive reforms involved setting maximum workweek length, minimum wages, prohibiting child labor, prescribing working conditions, and even regulating labor-management relations, each of which was brought to the Court for a ruling on its

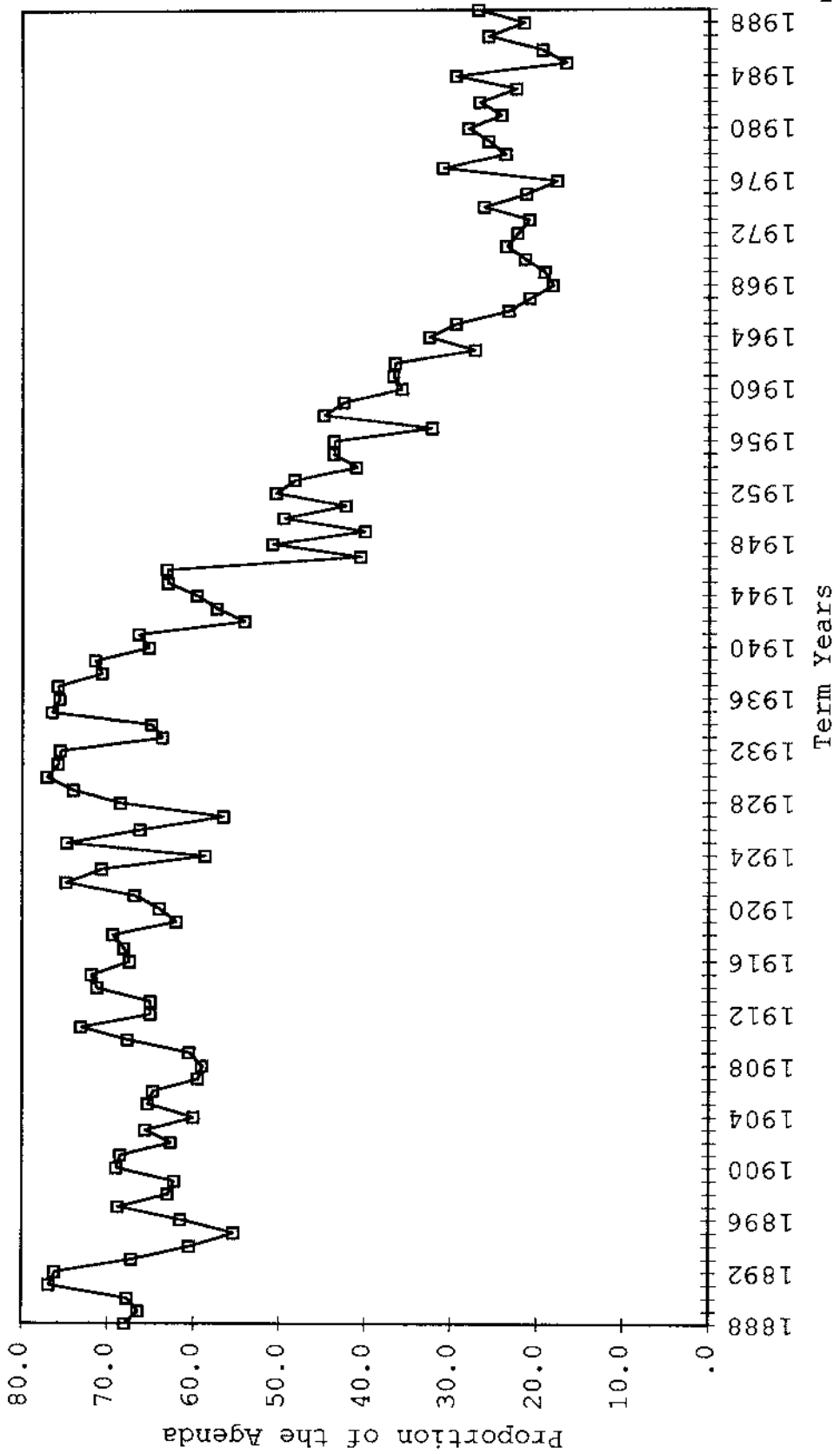


Figure 3-8. Proportion of United States Supreme Court's Agenda Comprised by Economics Decisions, 1888-1989

Constitutionality (McCloskey 1994; Schwartz 1993; Kens 1990). Thus, the Court's agenda was dominated by challenges to such legislation.

However, in the late 1940s, economics decisions begin a sharp downturn (see Figure 3-8 and Table 3-1), becoming stable in the late 1970s and 1980s, attaining an average of 24.18 percent of the Court's agenda. These findings demonstrate the validity of the much-discussed transition that occurred in the Court's post-World War II agenda (Pacelle 1991; McCloskey 1994), with civil liberties-civil rights decisions moving to win the lion's share of the Court's agenda thereafter (see Figures 3-7 and 3-9). The historic high for economic dimension cases occurred in 1930, when they comprise 77.1 percent of the Court's rulings. The overall low occurred in 1985, at 16.6 percent of the tribunal's agenda.

Pacelle (1991) operationalizes his economic dimension somewhat differently than does the present investigation. He includes within his operationalization these issue areas: "Internal Revenue," "State Regulation," "State as Litigant," "United States as Litigant," and "Ordinary Economic" (Pacelle 1991: 56-57). Strangely, however, he fails to include decisions within the "U.S. Regulation" issue area, which theoretically should be aggregated with the other issue area decisions. To more directly compare the findings

of this study with his, all these categories, with the exception of "State as Litigant," are combined. The "State as Litigant" issue area is excluded because of its inclusion of cases dealing with boundary disputes between states, which are not theoretically associated with the remainder of the decisions that involve state liability. Cases involving border disputes comprise a maximum of 2.4 percent in any five-year period. On average, they comprise less than 1.2 percent of the Court's annual docket. Hence, their exclusion present no significant problems of comparison or interpretation.

Pacelle's findings are comparable to those in the present investigation. Both his findings and the present findings indicate that economic cases have declined consistently since 1933 to a point where they comprise about one-quarter of the Court's docket between 1983 and 1987. The historic high for Pacelle (73.2 percent) and this study (71.34 percent) occurred between 1933 and 1937. The historic low for Pacelle (28.7 percent) and this study (20.86 percent) also occurred within the same five year period (1968-1972) (Pacelle 1991: 56-57). Thereafter, both studies indicate that the series begins to increase modestly. It does not return to the levels observed during the 1930s when it comprised nearly three-quarters of the Court's docket. Hence, both studies confirm McCloskey's

observation that economics cases, while once occupying the preeminent place on the Court's docket, have substantially declined, giving way to civil rights and liberties decisions.

Civil Rights and Liberties

As Figure 3-9 shows, the series depicting civil rights and civil liberties decisions is relatively flat through 1936. From 1888 to 1936, the series attains or exceeds approximately 20 percent only four times (1895, 1909, 1912, and 1926). The series average during this time is about 12 percent. The series' minimum occurs in 1935, at 4.1 percent, when economics cases dominated the Court's docket. Many of these cases during this time involved questions of free speech, often regarding the limit of Constitutional guarantees during times of war (e.g., Schenck v. U.S. (1919), holding that distributing anti-draft leaflets represented a "clear and present danger" to the security of the United States).

A strong, upward trend for civil rights and liberties begins in 1937. For example, the Court's changing priorities may be illustrated by its ruling in Palko v. Connecticut (1937), holding that the Bill of Rights protected "fundamental rights" from the actions of state governments and established the doctrine of selective incorporation of Constitutional guarantees. This decision

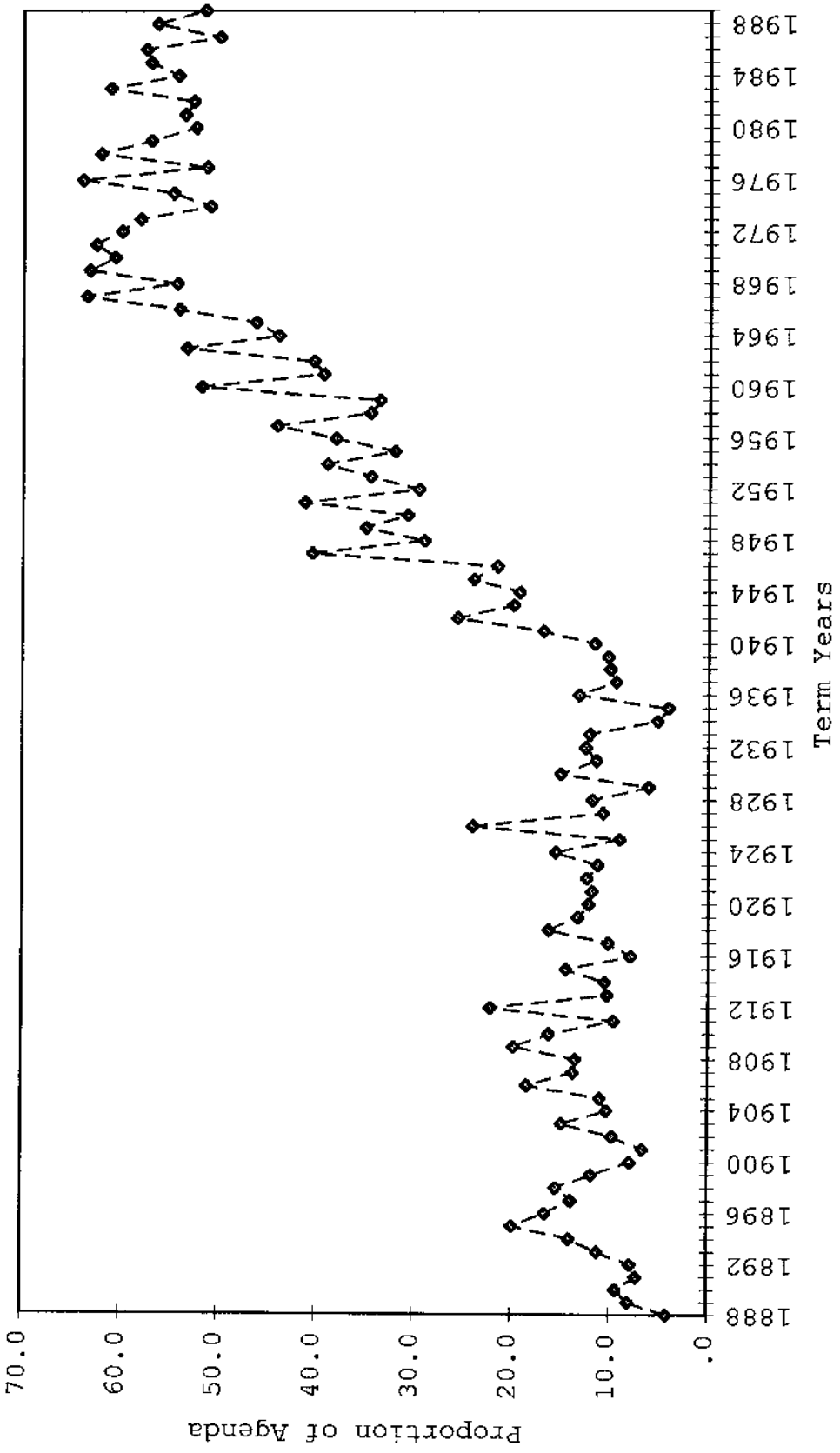


Figure 3-9. Proportion of United States Supreme Court's Agenda Comprised by Civil Liberties-Civil Rights Decisions, 1888-1989

is a landmark ruling for it created precedent on which later civil liberties jurisprudence would be erected (Duncan v. Louisiana (1967), holding that the right to a jury trial is a fundamental guarantee protected by the Fourteenth Amendment). The series reaches its historic high of 64 percent in 1976, and stabilizes in the late 1970s and 1980s, at slightly more than one-half of the agenda. In recent years, civil liberties-civil rights decisions nearly achieved the percentage of the Court's agenda that economics decisions reached between the 1890s and 1930s.

Pacelle (1991) finds that the series describes an upward trend, beginning in 1933. Between 1933 and 1937, civil liberties-civil rights cases comprised only 9.30 percent of the Court's docket (Pacelle 1991: 56, 138). Thirty years later (between 1963 and 1967), the figure had climbed exactly forty points (to 49.30). The next five term years show an increase even over this highpoint. Civil liberties-civil rights decisions comprise 62.30 percent of the Court's decisions on average between 1973 and 1977 (Pacelle 1991: 56, 138). Thereafter, the series begins to decline, although only modestly. By 1983-1987, such cases consume on average 58.60 percent of the Court's agenda (Pacelle 1991: 56, 138).

The present study largely confirms Pacelle's findings. Its results suggest several conclusions about the Court's

changing priorities with regard to civil rights and liberties. First, as McCloskey (1994) observes, these decisions were not a high priority for the Court prior to 1937. The Court's attention was structurally limited by its consideration of economics issues. This is an expected finding because the nation, and thus the Court, was grappling with novel questions of the Constitutional limits of economic regulation during a period when the nation overall was becoming much more industrialized and commercial, and when it was enduring the economic and political challenges of the Great Depression. Second, the present results suggest that there has been a steady, upward trend in the average percentage of civil liberties-civil rights decisions the Court has announced, beginning in 1937. By that time, the Court had resolved many pressing economic questions and began to dedicate at least a growing portion of its agenda to issues that had begun to become more prominent in the national policy-making process. Similar to Pacelle's findings, the historic high is observed between 1968 and 1972 (60.16 percent); the historic low between 1933 and 1937 (8.80 percent). Thereafter, again as the results of Pacelle imply, the series begins to decline, although only marginally. Between 1983 and 1987, the series accounts for an average of 56.0 percent of the Court's agenda. Again, as I have found in other issue areas, there are

slight differences in magnitude between the results of the present study and those of Pacelle perhaps due to different coding procedures.

The economics and civil liberties patterns confirm Pacelle's findings concerning the transition in the Court's agenda that occurred in the late 1930s and 1940s, and reaffirm Schubert's description of the post-World War II Court as one whose workload was dominated mostly by economics and civil rights and liberties decision making. Further, the overall trends in the proportions of these decision types support the conclusions of McCloskey (1994) who suggests that economics issues dominated the Court's agenda from the latter part of the nineteenth century until the time of the New Deal, when civil liberties and civil rights issues began to be prevalent and, eventually, to dominate the body of decisions that the Court announced.

Judicial Power

The third most important major issue in Supreme Court decisions (quantitatively) is judicial power. As Figure 3-10 shows, the series is relatively stable from 1888 to 1907, hovering around twenty percent of the Court's docket. From 1908 to 1939, the percentage of judicial power decisions slopes fairly gently downward. Thereafter, it slopes very gently upwards until the 1970s, after which it stabilizes. The gentle upward trend supports the growing,

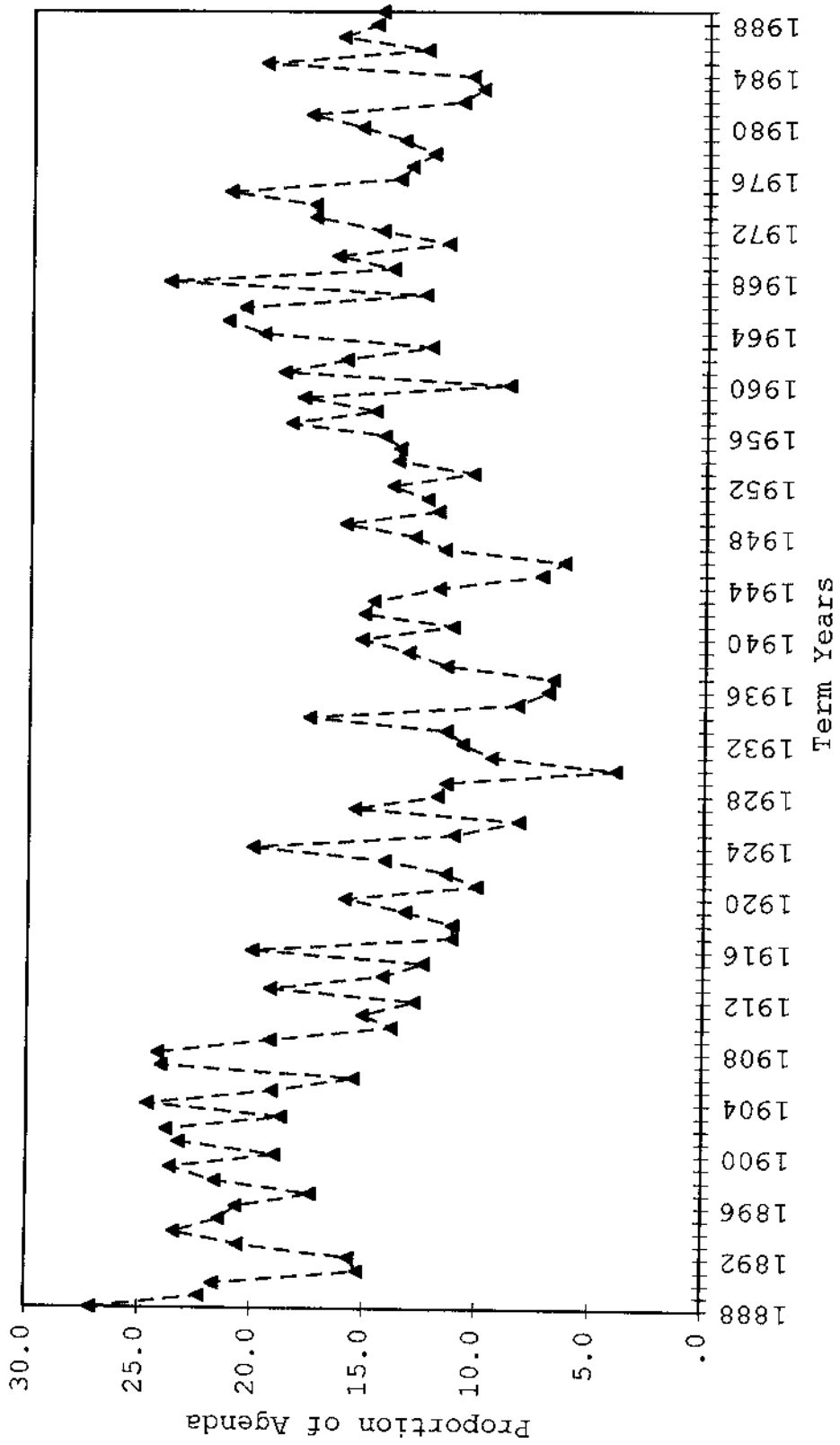


Figure 3-10. Proportion of the United States Supreme Court's Agenda Comprised by Judicial Power Decisions, 1888-1989

although modest, concern of the Court with issues of judicial power and, more generally, governmental power that surrounded the New Deal era. Only once does the series exceed 25 percent of the Court's agenda (in 1888). After 1925 and until the early 1960s, it stays below 20 percent, usually below 15 percent. However, from 1957 to 1989, it is typically between 15 and 20 percent, and exceeds 20 percent on several occasions. Its historic high is observed in 1888, at 27.1 percent; its historic low in 1930, at 3.9 percent.

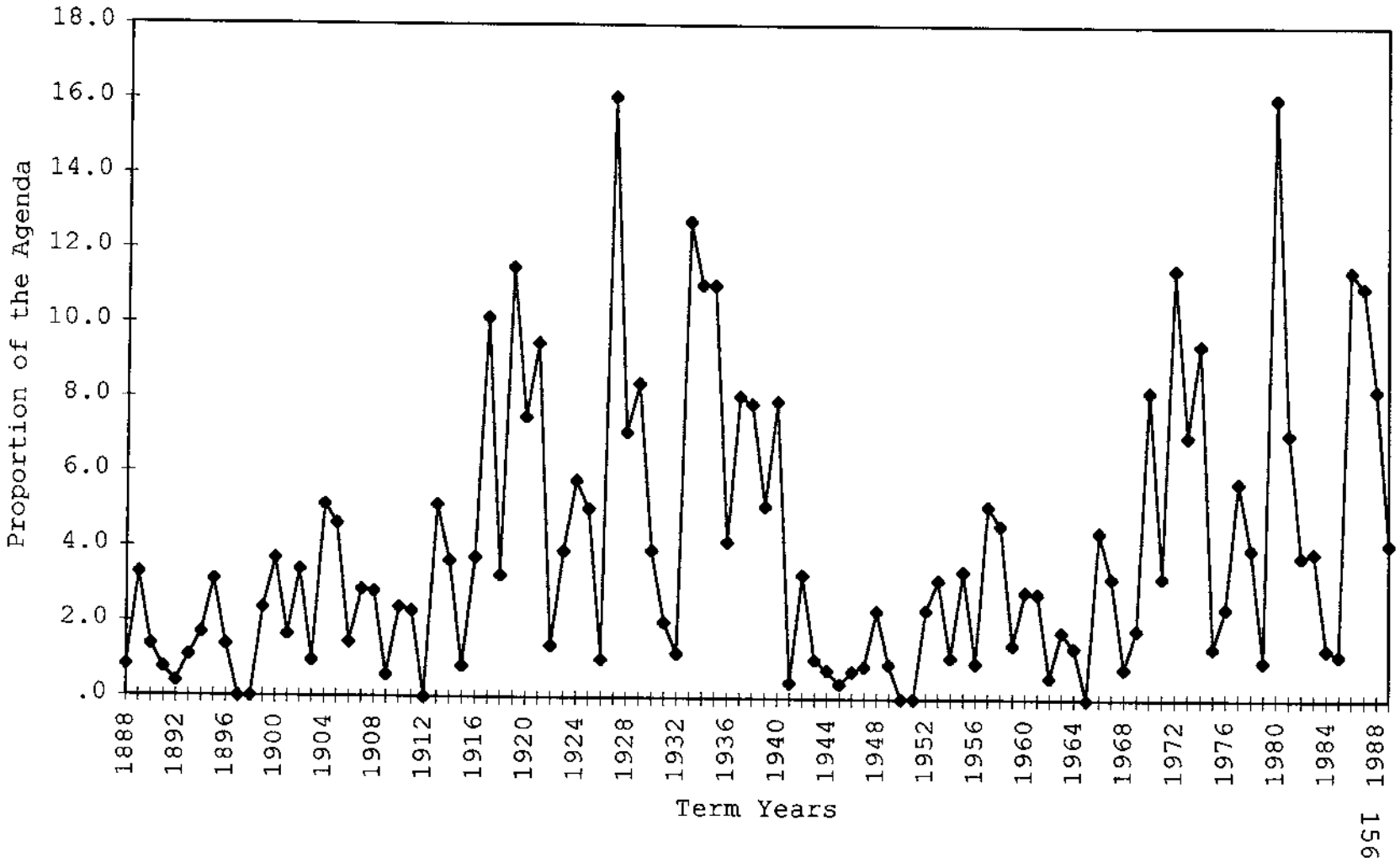
Other

The remainder of the Court's agenda is accounted for by the proportion of the decisions in the residual "other" dimension. As Figure 3-11 depicts, the series is quite volatile, especially in the late 1920s and early 1930s, experiencing historic highs in 1927 and in 1980 of 16.1 percent. But typically, these decisions account for less than six percent of the Supreme Court's agenda throughout the entire period analyzed here.

Chapter Summary

This chapter analyzes the long-term trends in the caseload and types of issues the United States Supreme Court has decided across the period from 1888 to 1989. Generally, the caseload of the Court has experienced a downward trend

Figure 3-11. Proportion of the United States Supreme Court's Agenda Comprised by Other Decisions, 1888-1989



from its maximum in 1914 perhaps due in part to the institutional changes that accompanied the Judiciary Act of 1925. Specifically, we find that economics cases tend to overwhelm the remaining issue areas, as Pacelle finds and McCloskey (1994) predicts, through the end of World War II possibly due to the challenges of the Great Depression and the policies of the New Deal. Thereafter, civil liberties and civil rights cases became predominant in the Court's agenda and economics cases begin to wane, a finding that also confirms McCloskey's (1994) observations and Pacelle's (1991) results. Moreover, judicial power cases comprise an average of about 15 percent of the Court's agenda across the 102 term years analyzed in this Chapter.

NOTES

1. In Spaeth's (1993) original dataset, he specified a category for miscellaneous cases. These cases cannot be meaningfully analyzed here. Hence, they are excluded and the analysis is completed on the remaining 13 issue areas.

2. Another slight difference between this analysis and that of Pacelle is that he coded only those cases that covered one page or more in the United States Reports, so to exclude "relatively trivial cases" (Pacelle 1991: 207). The present analysis covers all decisions that the Court announced during the time period at hand.

3. The figures for the present analysis aggregate "Economic," "Attorney," and "Union" cases so as to provide a closer comparison to Pacelle's protocol and results.

4. Pacelle does not have a distinct category of cases that correspond to the conceptualization of judicial power cases as discussed in this analysis.

5. In deciding the case in favor of the individual, the Court looked to the "penumbras" of the Bill of Rights, "formed by emanations of those guarantees that help give them life and substance." (Griswold v. Connecticut 1965: 480).

6. The operationalizations of these cases of the two studies are equivalent.

APPENDIX A

NUMBER_____

Data Entry 1888

FulName:_____

v

_____

Party 1(8 letters) _ _ _ _ _ _ _ _ v Party 2 _ _ _ _ _ _ _ _

US Reports _____ US _____

SCT ____ SCT _____

Docket _____

Date Oral ____/____/_____

Decision Date ____/____/____

Source_____

Issue_____

Direction_____

Solicitor General _____

Dir Lower Court _____

Decision Type _____

Vote _____

Vote Questionable _____

Majority Author_____

Assigned By _____

#	Justice	Majority	Wrote	A1	A2
51	Fuller				
62	Miller				
57	Field				
60	Bradley				
49	Harlan				
63	Matthews				
56	Gray				
59	Blatchford				
61	Lamar				

APPENDIX B

Coding Protocol for Agenda and Decisional Data for the United States Supreme Court, 1888-1989

Number: unique number identifying each decision.

FulName: names of the two parties.

Party1 and 2: eight letter identification of each party.

US Reports: U.S. Reports citation following volume-page format.

SCT: Supreme Court Reporter citation following volume-page format.

Docket: the docket number the Clerk of the Court assigned the case.

Date Oral: the day on which oral argument was heard. It follows the standard month-day-year format. If oral argument continued more than one day, then only the first day was noted.

Decision Date: the day on which the Court announced the decision. It follows the standard month-day-year format.

Source: indicates the court from which the case was appealed. Federal Circuit courts are identified with the number or set of letters associated with them (e.g., "8C" for Eighth Circuit, or "DCC" for the D.C. Circuit). Federal District Courts are noted by their geographic place. For example, the North District Court of Texas is coded "NDTX." State Courts are identified with the United States Postal abbreviation for their state (e.g., "TX" for the Texas Supreme Court). Trial courts carry the abbreviation "TR." State appellate courts carry the abbreviation "AP."

Issue: identifies one of the 14 issue areas into which cases are categorized. Most often, only one issue area was identified for each decision. In some cases, two issue areas were identified. The issues, and their respective codes, are:

1 = Criminal Procedure	9 = Judicial Power
2 = Civil Rights	10 = Federalism
3 = First Amendment	11 = Interstate Relations

4 = Due Process
5 = Privacy
6 = Attorneys
7 = Unions
8 = Economics
12 = Federal Taxation
13 = Miscellaneous
14 = Separation of Powers

Direction: indicates the liberalism of the decision. Those decisions that were liberal were scored "1"; those conservative scored "0."

Solicitor General: indicates the participation of the Solicitor General's and the Attorney General's Office, and the filing of amicus curiae briefs.

0 = No participation
1 = Solicitor General's Office
2 = Attorney General's Office
4 = Amicus Briefs Filed

Dir Lower Court: notes the disposition of the Court relative to the lower court's ruling. If the decision was affirmed, then this variable is scored "1"; if it was reversed, then it is scored "0."

Decision Type: indicates the form of the decision. The decision types are:

1 = The Court heard oral argument and it issues a signed opinion indicating a particular justice as the author of the majority opinion.

2 = Decisions that received a full opinion but the Court did not hear oral argument. These are known as "per curiam" opinions.

3 = These are brief decisions that involve certioari petitions, individuals' various requests, and many other motions, orders, and rulings that the Court has issued. These are known as "memorandum" opinions.

4 = Decrees. This type of decision most often involves the Court's original jurisdiction. These decisions are labeled "decree" at the top of the decision, to distinguish it from the other types of decisions.

5 = Judgment of the Court. These are decisions in

which there is an equally divided vote. The lower court's ruling in this context is affirmed.

6 = No signed opinion. This decision is similar to the formally, signed opinion, but this type ruling does not bear any justice's name as the opinion's author. Although they are orally argued (and, hence, different than type 2 decisions, they receive the label "per curiam."

Vote: indicates the number of votes in the majority and in the minority. If there are eight votes in the majority and one in the minority, then this variable would be coded "81." If there are only eight justices participating, then the code would be "80."

Vote Questionable: notes whether the decision was "affirmed in part, and reversed in part." If so, then the variable is coded "1"; otherwise, it is coded "0."

Majority Author: indicates the unique number assigned to the author of the majority opinion. Each of the justices who were on the Court during the period of analysis were assigned such a number.

Assigned By: indicates the unique number of the justice who assigned the writing of the majority opinion.

#: justices' identifying number.

Justice: the justice's name.

Majority: whether a justice joined the majority opinion, wrote a concurring or a dissenting opinion, or did not participate.

1 = voted with the majority
2 = dissented
3 = regular concurrence (agreed with both the opinion and the disposition of the case)
4 = special concurrence (agreed with the disposition of the case, but not with the Court's opinion)
5 = nonparticipation
6 = judgment of the Court
7 = dissent from denial of certioari
8 = jurisdictional dissent

Wrote: indicates if the justice wrote any kind of opinion

(majority, concurring, or dissenting) or not. If so, then the variable is scored "1"; "0" otherwise.

A1 and **A2**: indicates the opinion of another justice which the justice joined. For example, refer to Appendix A. If Taft (#40) wrote a concurring opinion, which Holmes (#39) joined, then "39" would appear in Taft's A1 column. The same would hold true if another justice joined Taft's opinion too. The second justice's identifying number would appear in the A2 column.

CHAPTER IV

INSTITUTIONAL LEVEL ANALYSES: UNANIMITY OF UNITED STATES SUPREME COURT DECISION-MAKING, 1888-1989

The research effort in this chapter investigates patterns of change and stabilization in the unanimity and policy outcomes that the Supreme Court's decisions represent from 1888 to 1989. To do so, it first discusses the proportions of the Court's decisions that were unanimous, and then those in which the justices dissented or concurred, and filed dissenting or concurring opinions.

The Court's decisions during this century began to move away from the historical tradition of predominantly unanimous decisions (Epstein, Segal, Spaeth, and Walker 1996: 195-204), and towards those in which concurrences (Haynie 1992) and dissents (Walker, Esptein and Dixon 1988) occurred.

Unanimity Explored

There are fewer unanimous decisions in the post-1940 than there are in previous years (see Figure 4-1). Unanimity is of particular concern to scholars studying the

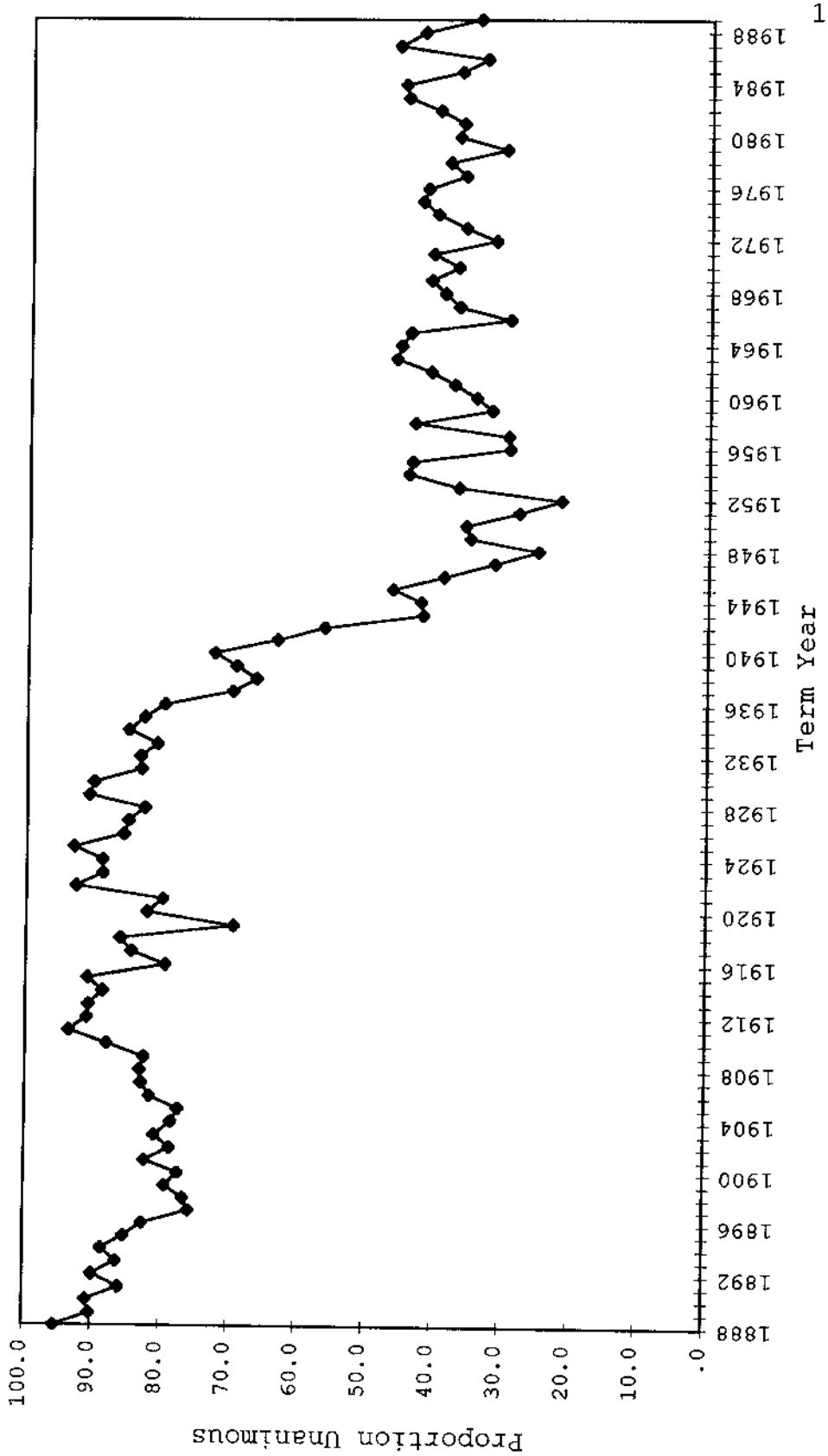


Figure 4-1. Percentage of Unanimous Decisions of the United States Supreme Court, 1888-1989

Court because its absence in decisions indicates that the Court is departing from concerns of institutional solidarity to begin to express the individual policy views of the justices. Pritchett (1948) indicates that nonunanimous decisions are the only window on the justices' differing policy perspectives, because if one studies unanimous decisions only there is no variance in the voting behavior of the justices to examine (1948: xii-xiii). Hence, nonunanimous cases represent the boundary of the Court's agreement on important questions of public policy.

From the perspective of the justices, unanimous decisions increase the authority of the Court's decisions. Judge Learned Hand declares that nonunanimous decisions were "disastrous" because they vitiate "the impact of monolithic solidarity on which the authority of a bench of judges so largely depends" (Hand 1958: 72-73).[1] Taft "`expected [the Chief Justice] to promote teamwork [e.g., unanimity] by the Court so as to give weight and solidarity to its opinions'" (Danelski 1989: 496). If the justice did not strongly believe that the majority erred in some important concept, Taft believed that a justice "should be a good member of the team, silently acquiesce in the views of the majority, and not to try to make a record for himself by dissenting" (Danelski 1989: 496). Hence, during his tenure, Taft socialized his brethren into the "no-dissent-unless-

absolutely necessary tradition and most of them learned it well" (Danelski 1989: 496). This long-standing preference for unanimous decisions continued to be part of the Court's norms beyond Taft's stint as chief justice, although some chief justices viewed it more favorably than others (see Danelski 1989: 497-98). Thus, scholars and some of the justices of the pre-1940s themselves underscore the importance of unanimous decisions.

However, there is a price to be paid for unanimous decisions. They often require the justices to sacrifice some of their individual expressiveness so that a consensus can be formed among the Court, serving to dilute the policy views of the justices (Pritchett 1948: 49). "[Oliver Wendell] Holmes [Jr.], gazing mournfully upon the wreck of one of his own original drafts, described this process as pulling out all the plums and leaving the dough" (Schlesinger 1947: 78). Therefore, unanimous decisions sometimes misleadingly portray the Court as announcing a policy stand which all the justices whole-heartedly support.

Unanimity Examined

The unit of analysis for this investigation of unanimity is the case decision reported in Supreme Court Reporter. Decisions in which there were no dissenting votes cast are considered herein as unanimous. Table 4-1 shows the percentage of such decisions that garnered 9-0, 8-0,

Table 4-1. Percentage of Unanimous Decisions and Concurring Votes and Decisions of the United States Supreme Court, 1888-1989

TERM YEAR	UNANIMOUS	9-0 VOTES	8-0 VOTES	7-0 VOTES	6-0 VOTES	5-0 VOTES	AT LEAST ONE CONCURRING VOTE	ONE CONCURRING VOTE	TWO CONCURRING VOTES	THREE CONCURRING VOTES	FOUR CONCURRING VOTES	FIVE CONCURRING VOTES	SIX CONCURRING VOTES	SEVEN CONCURRING VOTES	EIGHT CONCURRING VOTES	AT LEAST ONE CONCURRING OPINION	ONE CONCURRING OPINION	TWO CONCURRING OPINIONS	THREEE CONCURRING OPINIONS	FOUR OR MORE CONCURRING OPINIONS
1888	95.4	90.4	3.8	1.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	11.3	11.3	0.0	0.0	0.0
1889	90.1	81.4	8.0	0.7	0.0	0.0	1.8	1.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	9.5	9.5	0.0	0.0	0.0
1890	90.7	77.3	10.0	3.1	0.3	0.0	1.4	0.7	0.3	0.3	0.0	0.0	0.0	0.0	0.0	10.0	10.0	0.0	0.0	0.0
1891	85.9	71.9	6.8	6.5	0.8	0.0	2.7	2.3	0.0	0.4	0.0	0.0	0.0	0.0	0.0	6.1	5.7	0.4	0.0	0.0
1892	89.8	80.9	7.4	1.2	0.4	0.0	0.8	0.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.2	1.2	0.0	0.0	0.0
1893	86.3	22.4	57.0	5.8	1.1	0.0	2.2	1.1	0.7	0.0	0.4	0.0	0.0	0.0	0.0	1.8	1.4	0.4	0.0	0.4
1894	88.5	12.8	71.5	4.3	0.0	0.0	1.3	1.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	4.7	4.3	0.4	0.0	0.4
1895	85.2	56.8	25.7	2.7	0.0	0.0	2.3	1.6	0.4	0.4	0.0	0.0	0.0	0.0	0.0	2.3	2.3	0.0	0.0	0.0
1896	82.6	76.1	5.5	0.9	0.0	0.0	3.7	2.8	0.5	0.5	0.0	0.0	0.0	0.0	0.0	0.5	0.5	0.0	0.0	0.0
1897	75.7	69.4	5.8	0.6	0.0	0.0	5.2	4.0	0.0	1.2	0.0	0.0	0.0	0.0	0.0	1.7	1.2	0.0	0.6	0.0
1898	76.5	71.0	4.9	0.6	0.0	0.0	1.2	0.6	0.6	0.0	0.0	0.0	0.0	0.0	0.0	0.6	0.6	0.0	0.0	0.0
1899	79.2	70.8	6.6	1.9	0.0	0.0	5.7	3.8	1.4	0.5	0.0	0.0	0.0	0.0	0.0	1.9	1.4	0.5	0.0	0.0
1900	77.4	70.5	5.8	1.1	0.0	0.0	5.3	3.7	0.0	0.0	1.6	0.0	0.0	0.0	0.0	2.6	1.6	1.1	0.0	0.0
1901	82.3	56.4	21.0	4.4	0.6	0.0	4.4	2.8	1.1	0.0	0.0	0.0	0.6	0.0	0.0	0.6	0.6	0.0	0.0	0.0
1902	78.6	39.3	35.4	3.4	0.5	0.0	7.3	4.4	1.0	1.0	0.5	0.5	0.0	0.0	0.0	10.1	7.2	1.9	1.0	0.0
1903	80.9	72.2	7.2	1.4	0.0	0.0	8.6	5.7	1.9	1.0	0.0	0.0	0.0	0.0	0.0	1.4	1.0	0.5	0.0	0.0
1904	78.5	75.9	2.6	0.0	0.0	0.0	6.2	4.6	1.0	0.0	0.5	0.0	0.0	0.0	0.0	1.0	1.0	0.0	0.0	0.0
1905	77.5	74.0	2.9	0.6	0.0	0.0	8.1	5.8	1.7	0.6	0.0	0.0	0.0	0.0	0.0	4.6	4.6	0.0	0.0	0.0

Table 4-1. Percentage of Unanimous Decisions and Concurring Votes and Decisions of the United States Supreme Court, 1888-1989

TERM YEAR	UNANIMOUS	9-0 VOTES	8-0 VOTES	7-0 VOTES	6-0 VOTES	5-0 VOTES	AT LEAST ONE CONCURRING VOTE	ONE CONCURRING VOTE	TWO CONCURRING VOTES	THREE CONCURRING VOTES	FOUR CONCURRING VOTES	FIVE CONCURRING VOTES	SIX CONCURRING VOTES	SEVEN CONCURRING VOTES	EIGHT CONCURRING VOTES	AT LEAST ONE CONCURRING OPINION	ONE CONCURRING OPINION	TWO CONCURRING OPINIONS	THREEE CONCURRING OPINIONS	FOUR OR MORE CONCURRING OPINIONS
1906	81.6	70.0	11.1	0.5	0.0	0.0	7.7	6.3	0.5	1.0	0.0	0.0	0.0	0.0	0.0	1.4	1.4	0.0	0.0	0.0
1907	82.9	80.0	2.9	0.0	0.0	0.0	4.6	3.4	0.6	0.0	0.6	0.0	0.0	0.0	0.0	4.0	3.4	0.6	0.0	0.0
1908	83.1	74.2	9.0	0.0	0.0	0.0	2.2	1.7	0.6	0.0	0.0	0.0	0.0	0.0	0.0	1.1	1.1	0.0	0.0	0.0
1909	82.6	44.8	36.6	1.2	0.0	0.0	7.0	5.2	1.7	0.0	0.0	0.0	0.0	0.0	0.0	0.6	0.6	0.0	0.0	0.0
1910	88.0	41.9	7.8	38.3	0.0	0.0	3.0	2.4	0.6	0.0	0.0	0.0	0.0	0.0	0.0	10.8	9.0	1.2	0.6	0.0
1911	93.6	39.3	54.3	0.0	0.0	0.0	0.5	0.0	0.5	0.0	0.0	0.0	0.0	0.0	0.0	14.2	13.7	0.0	0.5	0.0
1912	91.0	86.1	4.1	0.4	0.4	0.0	4.5	4.1	0.4	0.0	0.0	0.0	0.0	0.0	0.0	9.8	9.8	0.0	0.0	0.0
1913	90.8	89.4	1.4	0.0	0.0	0.0	2.1	1.4	0.7	0.0	0.0	0.0	0.0	0.0	0.0	8.6	8.6	0.0	0.0	0.0
1914	88.7	70.0	18.2	0.4	0.0	0.0	2.0	1.6	0.0	0.0	0.4	0.0	0.0	0.0	0.0	13.0	13.0	0.0	0.0	0.0
1915	90.9	76.9	14.0	0.0	0.0	0.0	2.1	1.7	0.4	0.0	0.0	0.0	0.0	0.0	0.0	1.2	1.2	0.0	0.0	0.0
1916	79.5	73.5	5.6	0.5	0.0	0.0	2.8	2.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	3.3	3.3	0.0	0.0	0.0
1917	84.5	74.4	9.7	0.5	0.0	0.0	2.4	1.9	0.5	0.0	0.0	0.0	0.0	0.0	0.0	1.4	1.4	0.0	0.0	0.0
1918	86.1	83.8	2.3	0.0	0.0	0.0	3.2	1.9	0.9	0.5	0.0	0.0	0.0	0.0	0.0	1.4	1.4	0.0	0.0	0.0
1919	69.5	64.9	4.0	0.6	0.0	0.0	4.6	2.9	0.6	0.0	0.6	0.6	0.0	0.0	0.0	5.2	4.0	0.6	0.0	0.6
1920	82.2	72.4	8.4	1.4	0.0	0.0	10.3	3.3	7.0	0.0	0.0	0.0	0.0	0.0	0.0	5.1	3.3	1.9	0.0	0.0
1921	79.9	70.4	9.5	0.0	0.0	0.0	7.7	7.1	0.0	0.6	0.0	0.0	0.0	0.0	0.0	1.8	1.8	0.0	0.0	0.0
1922	92.7	90.9	1.8	0.0	0.0	0.0	1.4	0.9	0.5	0.0	0.0	0.0	0.0	0.0	0.0	0.9	0.9	0.0	0.0	0.0
1923	88.8	85.9	2.9	0.0	0.0	0.0	2.9	2.0	1.0	0.0	0.0	0.0	0.0	0.0	0.0	2.4	2.0	0.5	0.0	0.0

Table 4-1. Percentage of Unanimous Decisions and Concurring Votes and Decisions of the United States Supreme Court, 1888-1989

TERM YEAR	UNANIMOUS	9-0 VOTES	8-0 VOTES	7-0 VOTES	6-0 VOTES	5-0 VOTES	AT LEAST ONE CONCURRING VOTE	ONE CONCURRING VOTE	TWO CONCURRING VOTES	THREE CONCURRING VOTES	FOUR CONCURRING VOTES	FIVE CONCURRING VOTES	SIX CONCURRING VOTES	SEVEN CONCURRING VOTES	EIGHT CONCURRING VOTES	AT LEAST ONE CONCURRING OPINION	ONE CONCURRING OPINION	TWO CONCURRING OPINIONS	THREEE CONCURRING OPINIONS	FOUR OR MORE CONCURRING OPINIONS
1924	88.9	61.3	27.1	0.4	0.0	0.0	0.9	0.9	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.3	1.3	0.0	0.0	0.0
1925	93.1	86.6	6.4	0.0	0.0	0.0	4.0	3.0	0.5	0.5	0.0	0.0	0.0	0.0	0.0	3.0	3.0	0.0	0.0	0.0
1926	85.7	82.1	2.6	0.5	0.5	0.0	6.6	4.1	1.0	1.0	0.5	0.0	0.0	0.0	0.0	2.6	2.6	0.0	0.0	0.0
1927	85.1	78.0	6.0	1.2	0.0	0.0	2.4	1.8	0.6	0.0	0.0	0.0	0.0	0.0	0.0	1.2	1.2	0.0	0.0	0.0
1928	82.7	79.5	2.4	0.8	0.0	0.0	4.7	2.4	1.6	0.8	0.0	0.0	0.0	0.0	0.0	3.1	3.1	0.0	0.0	0.0
1929	90.8	40.5	41.2	9.2	0.0	0.0	6.1	2.3	2.3	1.5	0.0	0.0	0.0	0.0	0.0	9.2	9.2	0.0	0.0	0.0
1930	90.2	82.4	3.9	3.9	0.0	0.0	0.7	0.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	2.0	2.0	0.0	0.0	0.0
1931	83.2	50.3	32.2	0.7	0.0	0.0	1.3	0.7	0.7	0.0	0.0	0.0	0.0	0.0	0.0	2.0	2.0	0.0	0.0	0.0
1932	83.3	79.2	3.6	0.6	0.0	0.0	5.4	3.0	1.2	0.6	0.6	0.0	0.0	0.0	0.0	1.8	1.2	0.6	0.0	0.0
1933	80.9	76.4	3.2	1.3	0.0	0.0	5.7	2.5	1.9	0.0	1.3	0.0	0.0	0.0	0.0	7.0	3.2	1.3	0.6	4.5
1934	85.1	81.2	3.9	0.0	0.0	0.0	5.8	2.6	2.6	0.6	0.0	0.0	0.0	0.0	0.0	3.2	3.2	0.0	0.0	0.0
1935	82.8	73.1	9.0	0.7	0.0	0.0	6.2	1.4	0.0	2.1	2.8	0.0	0.0	0.0	0.0	4.8	4.1	0.0	0.7	0.0
1936	79.9	42.4	33.3	4.2	0.0	0.0	5.6	2.8	1.4	0.7	0.7	0.0	0.0	0.0	0.0	2.8	2.8	0.0	0.0	0.0
1937	69.8	18.1	23.5	27.5	0.7	0.0	14.8	10.7	2.7	1.3	0.0	0.0	0.0	0.0	0.0	6.7	5.4	1.3	0.0	0.0
1938	66.4	5.7	47.9	11.4	1.4	0.0	14.3	6.4	5.7	1.4	0.7	0.0	0.0	0.0	0.0	12.1	10.0	1.4	0.7	0.0
1939	69.3	19.7	44.5	4.4	0.7	0.0	13.9	9.5	2.9	0.7	0.7	0.0	0.0	0.0	0.0	5.1	5.1	0.0	0.0	0.0
1940	72.6	59.1	11.6	1.8	0.0	0.0	7.9	4.3	3.0	0.6	0.0	0.0	0.0	0.0	0.0	3.7	3.7	0.0	0.0	0.0
1941	63.4	34.8	23.6	3.7	1.2	0.0	13.7	6.2	3.1	3.1	1.2	0.0	0.0	0.0	0.0	12.4	10.6	0.6	0.0	1.2

Table 4-1. Percentage of Unanimous Decisions and Concurring Votes and Decisions of the United States Supreme Court, 1888-1989

TERM YEAR	UNANIMOUS	9-0 VOTES	8-0 VOTES	7-0 VOTES	6-0 VOTES	5-0 VOTES	AT LEAST ONE CONCURRING VOTE	ONE CONCURRING VOTE	TWO CONCURRING VOTES	THREE CONCURRING VOTES	FOUR CONCURRING VOTES	FIVE CONCURRING VOTES	SIX CONCURRING VOTES	SEVEN CONCURRING VOTES	EIGHT CONCURRING VOTES	AT LEAST ONE CONCURRING OPINION	ONE CONCURRING OPINION	TWO CONCURRING OPINIONS	THREEE CONCURRING OPINIONS	FOUR OR MORE CONCURRING OPINIONS
1942	56.4	12.8	38.4	4.1	1.2	0.0	16.9	9.9	5.8	0.6	0.6	0.0	0.0	0.0	0.0	11.6	8.7	2.3	0.6	0.0
1943	41.9	36.0	3.7	2.2	0.0	0.0	24.3	13.2	7.4	2.9	0.7	0.0	0.0	0.0	0.0	19.1	14.7	3.7	0.7	0.0
1944	42.2	37.3	3.7	0.6	0.6	0.0	35.4	23.6	9.3	2.5	0.0	0.0	0.0	0.0	0.0	19.3	16.1	2.5	0.6	0.0
1945	46.4	0.0	39.9	5.8	0.7	0.0	29.0	17.4	7.2	3.6	0.0	0.7	0.0	0.0	0.0	21.7	15.2	5.8	0.7	0.0
1946	38.9	35.4	3.5	0.0	0.0	0.0	28.5	23.6	2.8	1.4	0.7	0.0	0.0	0.0	0.0	22.2	20.1	0.7	1.4	0.0
1947	31.4	24.8	4.1	1.7	0.8	0.0	31.4	16.5	7.4	0.8	5.8	0.8	0.0	0.0	0.0	24.0	18.2	5.0	0.8	0.0
1948	25.0	22.6	0.8	1.6	0.0	0.0	33.9	16.1	10.5	4.8	2.4	0.0	0.0	0.0	0.0	25.8	14.5	9.7	0.8	0.8
1949	35.0	4.0	24.0	7.0	0.0	0.0	20.0	10.0	7.0	2.0	1.0	0.0	0.0	0.0	0.0	12.0	5.0	6.0	1.0	0.0
1950	35.6	26.7	6.9	2.0	0.0	0.0	27.7	14.9	9.9	2.0	1.0	0.0	0.0	0.0	0.0	19.8	16.8	2.0	0.0	1.0
1951	27.8	11.3	13.4	3.1	0.0	0.0	22.7	8.2	8.2	4.1	2.1	0.0	0.0	0.0	0.0	15.5	12.4	3.1	0.0	1.0
1952	21.7	16.5	3.5	1.7	0.0	0.0	21.7	11.3	5.2	4.3	0.0	0.9	0.0	0.0	0.0	15.7	11.3	2.6	1.7	0.0
1953	36.8	26.4	6.9	3.4	0.0	0.0	20.7	12.6	6.9	1.1	0.0	0.0	0.0	0.0	0.0	12.6	12.6	0.0	0.0	0.0
1954	44.2	5.3	37.9	0.0	1.1	0.0	21.1	12.6	5.3	3.2	0.0	0.0	0.0	0.0	0.0	13.7	9.5	4.2	0.0	0.0
1955	43.7	33.0	8.7	1.9	0.0	0.0	20.4	14.6	4.9	0.0	0.0	1.0	0.0	0.0	0.0	13.6	11.7	1.9	0.0	0.0
1956	29.4	15.1	12.7	1.6	0.0	0.0	21.4	10.3	7.1	2.4	1.6	0.0	0.0	0.0	0.0	15.9	13.5	2.4	0.0	0.0
1957	29.6	25.0	4.6	0.0	0.0	0.0	23.0	13.2	3.3	5.3	1.3	0.0	0.0	0.0	0.0	12.5	7.9	4.6	0.0	0.0
1958	43.4	36.0	5.9	1.5	0.0	0.0	24.3	14.0	4.4	2.2	2.2	0.7	0.7	0.0	0.0	17.6	15.4	2.2	0.0	0.7
1959	32.1	26.9	5.2	0.0	0.0	0.0	29.9	11.2	8.2	4.5	5.2	0.7	0.0	0.0	0.0	19.4	11.9	6.0	0.7	0.7

Table 4-1. Percentage of Unanimous Decisions and Concurring Votes and Decisions of the United States Supreme Court, 1888-1989

TERM YEAR	UNANIMOUS	9-0 VOTES	8-0 VOTES	7-0 VOTES	6-0 VOTES	5-0 VOTES	AT LEAST ONE CONCURRING VOTE	ONE CONCURRING VOTE	TWO CONCURRING VOTES	THREE CONCURRING VOTES	FOUR CONCURRING VOTES	FIVE CONCURRING VOTES	SIX CONCURRING VOTES	SEVEN CONCURRING VOTES	EIGHT CONCURRING VOTES	AT LEAST ONE CONCURRING OPINION	ONE CONCURRING OPINION	TWO CONCURRING OPINIONS	THREEE CONCURRING OPINIONS	FOUR OR MORE CONCURRING OPINIONS
1960	34.3	29.2	2.9	1.5	0.7	0.0	28.5	10.9	11.7	3.6	2.2	0.0	0.0	0.0	0.0	24.1	17.5	5.1	1.5	0.0
1961	37.6	14.5	7.7	14.5	0.9	0.0	37.6	19.7	7.7	6.0	4.3	0.0	0.0	0.0	0.0	22.2	16.2	3.4	2.6	0.0
1962	41.0	30.1	9.0	1.9	0.0	0.0	28.8	16.0	9.0	2.6	0.6	0.6	0.0	0.0	0.0	21.2	16.0	3.8	1.3	0.0
1963	46.1	35.0	8.3	0.0	1.7	1.1	28.3	16.1	6.1	2.8	1.1	2.2	0.0	0.0	0.0	20.6	12.8	6.7	1.1	0.0
1964	45.5	34.8	3.0	6.8	0.0	0.8	37.1	9.8	12.1	11.4	2.3	0.8	0.8	0.0	0.0	28.0	15.9	7.6	4.5	0.0
1965	44.1	31.6	9.6	2.2	0.0	0.7	30.1	16.9	5.9	2.9	2.2	1.5	0.7	0.0	0.0	22.1	13.2	5.9	2.2	0.7
1966	29.5	24.7	2.7	2.1	0.0	0.0	28.1	15.1	7.5	4.1	1.4	0.0	0.0	0.0	0.0	21.2	16.4	2.7	0.7	1.4
1967	37.0	17.2	16.7	2.6	0.5	0.0	39.6	19.3	9.9	7.3	2.6	0.5	0.0	0.0	0.0	25.5	16.7	5.2	3.1	0.5
1968	39.1	17.4	16.7	4.3	0.7	0.0	45.7	25.4	12.3	5.1	2.2	0.7	0.0	0.0	0.0	34.8	24.6	8.0	2.2	0.0
1969	41.2	2.9	30.9	5.9	0.7	0.7	43.4	22.8	9.6	5.1	4.4	0.7	0.7	0.0	0.0	30.1	18.4	8.1	2.9	0.7
1970	37.1	27.9	5.7	2.9	0.0	0.7	52.1	23.6	14.3	8.6	2.9	1.4	1.4	0.0	0.0	38.6	21.4	12.1	4.3	0.7
1971	40.8	16.7	4.0	20.1	0.0	0.0	39.1	20.1	9.8	5.7	2.3	1.1	0.0	0.0	0.0	29.3	21.3	6.3	1.7	0.0
1972	31.7	25.6	2.8	2.8	0.6	0.0	31.1	16.1	5.6	5.0	2.2	1.1	1.1	0.0	0.0	24.4	15.6	7.2	0.6	1.1
1973	36.0	27.3	5.2	1.7	1.7	0.0	32.0	15.1	7.6	4.7	4.7	0.0	0.0	0.0	0.0	28.5	22.7	4.7	1.2	0.0
1974	40.3	26.2	12.8	1.3	0.0	0.0	32.2	15.4	6.7	7.4	2.0	0.7	0.0	0.0	0.0	27.5	20.1	4.7	2.0	0.7
1975	42.5	19.0	20.1	1.1	1.7	0.6	44.7	19.6	16.2	3.9	4.5	0.0	0.6	0.0	0.0	36.9	24.0	11.7	0.6	0.6
1976	41.7	30.3	8.6	1.7	1.1	0.0	42.9	20.0	11.4	6.3	3.4	1.7	0.0	0.0	0.0	34.9	21.1	8.0	4.0	1.7
1977	36.2	20.4	14.5	1.3	0.0	0.0	40.1	14.5	12.5	5.3	5.9	1.3	0.0	0.0	0.7	35.5	17.1	14.5	2.6	1.3

Table 4-1. Percentage of Unanimous Decisions and Concurring Votes and Decisions of the United States Supreme Court, 1888-1989

TERM YEAR	UNANIMOUS	9-0 VOTES	8-0 VOTES	7-0 VOTES	6-0 VOTES	5-0 VOTES	AT LEAST ONE CONCURRING VOTE	ONE CONCURRING VOTE	TWO CONCURRING VOTES	THREE CONCURRING VOTES	FOUR CONCURRING VOTES	FIVE CONCURRING VOTES	SIX CONCURRING VOTES	SEVEN CONCURRING VOTES	EIGHT CONCURRING VOTES	AT LEAST ONE CONCURRING OPINION	ONE CONCURRING OPINION	TWO CONCURRING OPINIONS	THREEE CONCURRING OPINIONS	FOUR OR MORE CONCURRING OPINIONS
1978	38.5	24.4	12.8	1.3	0.0	0.0	44.2	21.2	12.2	5.1	4.5	1.3	0.0	0.0	0.0	39.7	28.2	9.0	2.6	0.0
1979	30.1	21.8	6.4	0.6	1.3	0.0	39.7	16.0	12.2	8.3	1.3	1.3	0.6	0.0	0.0	35.3	21.8	10.3	2.6	1.3
1980	37.1	25.9	8.4	0.0	1.4	1.4	49.7	21.7	16.8	6.3	2.8	2.1	0.0	0.0	0.0	45.5	28.7	13.3	2.8	0.7
1981	36.5	30.6	3.5	1.2	1.2	0.0	46.5	24.7	10.6	5.3	2.4	3.5	0.0	0.0	0.0	40.6	29.4	8.2	2.9	0.0
1982	40.0	34.5	3.6	1.2	0.6	0.0	37.6	18.2	7.3	6.7	4.2	0.6	0.6	0.0	0.0	33.9	26.1	4.8	3.0	0.0
1983	44.7	37.6	4.7	1.2	1.2	0.0	38.8	21.8	5.9	4.1	3.5	2.4	1.2	0.0	0.0	30.6	22.9	5.3	1.8	0.6
1984	45.1	23.5	17.0	3.9	0.7	0.0	36.6	14.4	12.4	6.5	2.6	0.7	0.0	0.0	0.0	34.6	26.8	7.8	0.0	0.0
1985	36.8	28.2	3.7	2.5	1.2	1.2	42.3	16.0	12.9	6.1	4.3	2.5	0.0	0.0	0.6	38.0	27.0	7.4	3.1	0.6
1986	33.1	26.3	3.8	2.5	0.6	0.0	40.0	21.3	10.0	4.4	2.5	0.6	0.6	0.0	0.6	37.5	26.3	9.4	1.9	0.6
1987	45.9	18.9	24.3	1.4	0.7	0.7	37.8	14.2	12.2	6.8	4.1	0.7	0.0	0.0	0.0	35.8	25.0	9.5	1.4	0.0
1988	42.3	34.2	5.4	0.7	2.0	0.0	47.0	23.5	8.7	7.4	6.0	1.3	0.0	0.0	0.0	43.6	31.5	7.4	4.0	0.7
1989	34.1	33.3	0.7	0.0	0.0	0.0	42.8	20.3	10.1	6.5	4.3	0.7	0.7	0.0	0.0	40.6	27.5	10.9	2.2	0.0

7-0, 6-0, and 5-0 votes aggregated across the term years 1888 to 1989. Decisions with less than nine votes occur because the justices, for various reasons, do not participate in the decisional process. Such reasons may include their recusal because of a prior involvement with the case, or they simply have been too ill to participate. For example, Howell Jackson (who served on the Fuller Court between 1893 and 1895) spent much of the time in California after he joined the Court recuperating from tuberculosis (Abraham 1993b: 152; Hall 1992: 442). Decisions that received less than five majority votes are not considered binding rulings of the Court, but are only considered judgments in which the lower court's ruling is affirmed (Abraham 1993a: 199; Wasby 1993: 237). Thus, they are excluded from this analysis.

In the present study, the majority of unanimous decisions received either a 9-0 or a 8-0 vote. In 1910, 38.3 percent of the Court decisions received a 7-0 vote, an historic high. Thereafter, they occur consistently through 1989. Decisions with a 6-0 vote are first observed in 1890 and then occasionally through 1936. They begin to occur more frequently in 1937, although they remain quite rare. From 1968 to 1989, all but five terms 1989 saw at least one 6-0 vote. Their historic high is observed in 1988 (2.0 percent). It is not until 1963, however, that a 5-0 is

first registered. Such votes are, through 1989, an infrequent occurrence, not exceeding 1.5 percent in any one term year.

Overall, from 1888 to 1989, unanimity on the United States Supreme Court has decreased substantially. As Figure 4-1 shows, over 75 percent of the Court's annual decisions were unanimous until 1937. In many of the term years from 1888 to 1937, the unanimity rate hovered near 80 percent (see Table 4-1). The series' historic high is observed in 1888 when 95.4 percent of the Court's decisions were unanimous, followed closely by 93.6 percent of the decisions in 1911, after which the series is relatively stable through 1935. After 1936, however, it drops quite consistently until 1952, when it reaches its historic low of 21.7 percent. Then, the series begins to recover and stabilize at a much lower level (typically 30 to 40 percent) than that observed during the more consensual years observed prior to the mid-1930s. From 1952 to 1966, there are some moderate swings in the series, but nothing like the downward change that occurred from 1937 to 1952. This moderating influence may be due to the more effective leadership that Chief Justice Warren provided after Chief Justice Vinson retired, since Vinson is considered by many scholars not to have been an effective leader of the Court (Abraham 1993b: 256). After 1952, no change in the unanimity rate from one term

year to the next exceeds nine percent. From 1967 to 1989, the average rate of unanimous decisions is 38.60 percent. Hence, in the latter nineteenth and the early twentieth centuries, the Court's decisions were predominately unanimous. Beginning in the 1940s and continuing through the 1980s, however, the Court's decisions become typically nonunanimous.

Schubert (1974; 1965: 45) first notes the trend in the level of, and timing in changes to, the unanimity of the Court's decisions for the period 1946-1989. Epstein, Segal, Spaeth, and Walker (1996: 193-94) record data that document that trend through the early 1990's. These latter authors' data are very nearly but not quite identical to those of the present study because their data do not include non-orally argued per curiam opinions as this study does.

The Influence of the Chief Justice on Unanimity

At least two significant studies have tried to explain this dramatic change in the unanimity of Supreme Court decision-making. Walker, Epstein, and Dixon (1988) analyze the decline in unanimity since the early 1940s. They find that Stone's particular social and task leadership style significantly contributed to a decline of consensus on the Court, as compared to prior years (Walker, Epstein, and Dixon 1988: 384-85). Effective chief justices must be able

social leaders. Social leaders are able to ameliorate the "`negative aspects of conference' through activity `relieves tension, shows solidarity, and makes for agreement'" (Walker, Epstein, and Dixon 1988: 379). For example, during the Fuller Court, there may have been relatively few concurring opinions written because of the able social and task leadership that Fuller provided (see O'Brien 1996: 292).

Chief justices must also be effective task leaders. In that role, they attend to the business of the Court, ensuring that cases are processed and decisions announced (Walker, Epstein, and Dixon 1988: 379). To do so, task leaders "initiate and receive more interaction than others" in conference (Danelski 1989: 489). "Usually, [he] makes more suggestions, gives more opinions, and successfully defends his ideas more often than others. Usually, he is regarded as having the best ideas for the decision of the cases and is highly esteemed by his associates" (Danelski 1989: 489). Therefore, effective chief justices must be skilled social and task leaders to be able to minimize the disruptive effects of conflict among the justices and, thus, foster unanimity in the Court's decision-making.

Chief Justice Stone was not a particularly good social leader because he was unable, or perhaps simply unwilling, to "smooth ruffled tempers, relieve tensions and maintain

solidarity" among the justices (Walker, Epstein, and Dixon 1988: 379). "He was also a vain, sensitive man whose ego was easily bruised, who sometimes responded to criticism sarcastically, and who did not hide his low opinion of the abilities of some of his colleagues" (Danelski 1986: 33). He also was not an able task leader because he had not formulated clearly enough his position on the cases to be discussed in conference and because he did not structure the discussion among the other justices (Danelski 1989: 492). Stone's "leadership problems were not in writing persuasive opinions but in conference discussion. His presentation of cases as chief justice tended to be rambling, and in conference he did not remain above the fray so that he might later be in a position to reconcile differences among his colleagues" (Danelski 1986: 32). Thus, Chief Justice Stone's peculiar leadership style is associated with the decline in unanimity on the Court since the early 1940s.

Haynie (1992) extends Walker, Epstein and Dixon's (1988) analysis by examining the decline of unanimity during the Hughes Court (1930-1941). She, too, asserts that the leadership style of the chief justice can significantly affect the occurrence of conflict on the Court and, thus, the level of unanimity (Haynie 1992: 1160). Chief Justice Charles Evans Hughes retained tight control over conference discussion, which may have actually heightened tensions

among the justices (Haynie 1992: 1167). Although Hughes is considered by other scholars to have been an able social and task leader for the Court (e.g., Walker, Epstein, and Dixon 1988: 382; Danelski 1989: 491), Haynie suggests that Hughes' own words, speaking to the concept of dissensus generally, belie a somewhat more expressive tendency (Haynie 1992: 1167). Hughes writes: "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed" (Hughes 1928: 68). Hence, the institutional preference for unanimous decisions has been drastically reduced, especially since the 1930s, reflecting in part the change in leadership on the Court (Haynie 1992: 1167; Walker, Epstein, and Dixon 1988: 384).

Unanimity on the Supreme Court, 1888-1946

The average rates of unanimity for each of the four pre-1945 chief justice courts were calculated to depict this pattern over the period of time that is primarily analyzed here. The average rate of unanimity for the Fuller Court (1888-1910) is 83.24 percent. The White Court (1910-1921) average increases very slightly from that for the Fuller Court to 85.09 percent. A similar slight increase occurs in

the Taft Court (1921-1930), which allowed an average unanimity rate of 87.5 percent. Thus, for 32 term years (1888-1929), more than 80 percent of the Court's decisions were unanimous, and there was no significant sign of any decrease in this high level of consensus. However, Hughes' service as chief justice (1930-1941) is associated with a decline in unanimity; the Court average is 78.5 percent, a decrease of 10.2 percent from the Taft Court level. In similar fashion, Stone's tenure witnessed a continuation of that decline to an average of 50.06 percent, reflecting a change of 36 percent from the average observed during the Hughes Court. Both decreases played a key role in the analyses of Walker, Epstein, and Dixon (1988) and Haynie (1992).

Concurring Votes

If a justice does not agree with the reasoning of the Court's opinion, he or she can concur. Justices may choose to cast concurring votes because they disagree with the Court's opinion but may defer writing separate opinions perhaps because a concurring opinion may be seen as weakening the Court's opinion.

The coding scheme for the present analysis specified two types of concurring votes. Following the protocol of Spaeth (1993), the justices' votes are scored as a "regular concurrence" if the justice agreed with Court's opinion and

with its disposition and, thus, joined the majority but wrote a separate opinion as well (see Epstein, Segal, Spaeth and Walker 1996: 561). A "special concurrence" is noted if the justice agreed with the Court's disposition of the case but not its opinion (see Epstein, Segal, Spaeth, and Walker 1996: 561). A concurring justice is considered to be a member of the majority coalition in terms of the case vote.

Figure 4-2 shows the percentage of cases with at least one concurring vote (either a regular or a special concurring vote) from 1888 to 1989. As one can see, there has been a dramatic increase in the series across the period of analysis. Up until 1936, concurring votes were an infrequent occurrence, due to the strong norms of unanimity that prevailed on the Court up until the 1930s and the skilled leadership of Fuller, White and Taft (O'Brien 1996: 139, 292; Schwartz 1993: 175-76).[2] Indeed, the chief justice court averages support those interpretations. For example, the Fuller Court average percentage of decisions with at least one concurring vote is 4.07, while the rate for the White Court declines somewhat to 3.41 percent. For the Taft Court, the average returns to the exact level observed during the Fuller Court (4.07 percent). However, the Hughes Court witnessed an 82 percent change in the series' average, increasing to 7.41 percent. The Stone Court additionally saw a dramatic increase as well; 23.86

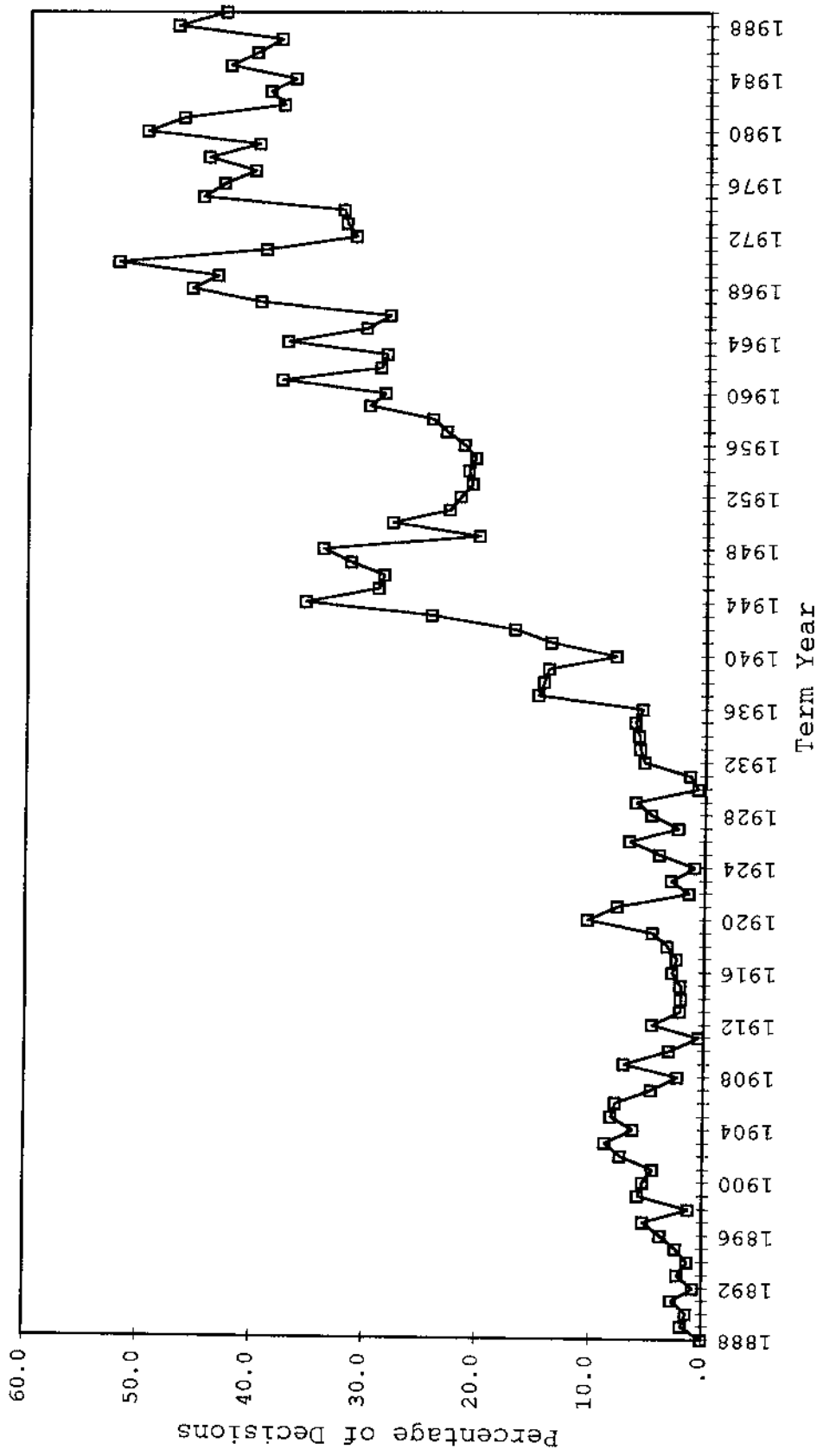


Figure 4-2. Percentage of United States Supreme Court Decisions With At Least One Concurring Vote, 1888-1989

percent of the decisions had at least one concurring vote during the five term years, a change of 222 percent.

Overall, the series exceeds 10 percent only once (in 1920) through 1936. Thereafter, however, the series begins to trend[3] sharply upward. In 1936, the rate was 5.6 percent; in 1937, the rate climbed to 14.8 percent. Between 1951 and 1958, the series stabilizes around 25 percent. Then, it begins to increase once again. The historic high is observed in 1970 (52.1 percent). It declines slight from that level through 1989, hitting the mark of 42.8 percent. Overall, then, the rate of concurring votes has increased dramatically, most clearly from 1937 to 1944.

Concurring Opinions

There may be times when a justice not only wishes to express his disagreement with the Court's opinion (though not with the case's result) but also to state the reasons why he believes the majority's reasoning is in error. He may do so by writing a concurring opinion. Pritchett (1948) posits that concurring opinions are a sign of judges who fervently support the influence of reason in decision-making and who feel a profound responsibility for their role in the law's development (1948: 52).

Figure 4-3 and Table 4-1 report the percentage of decisions with at least one concurring opinion. As the

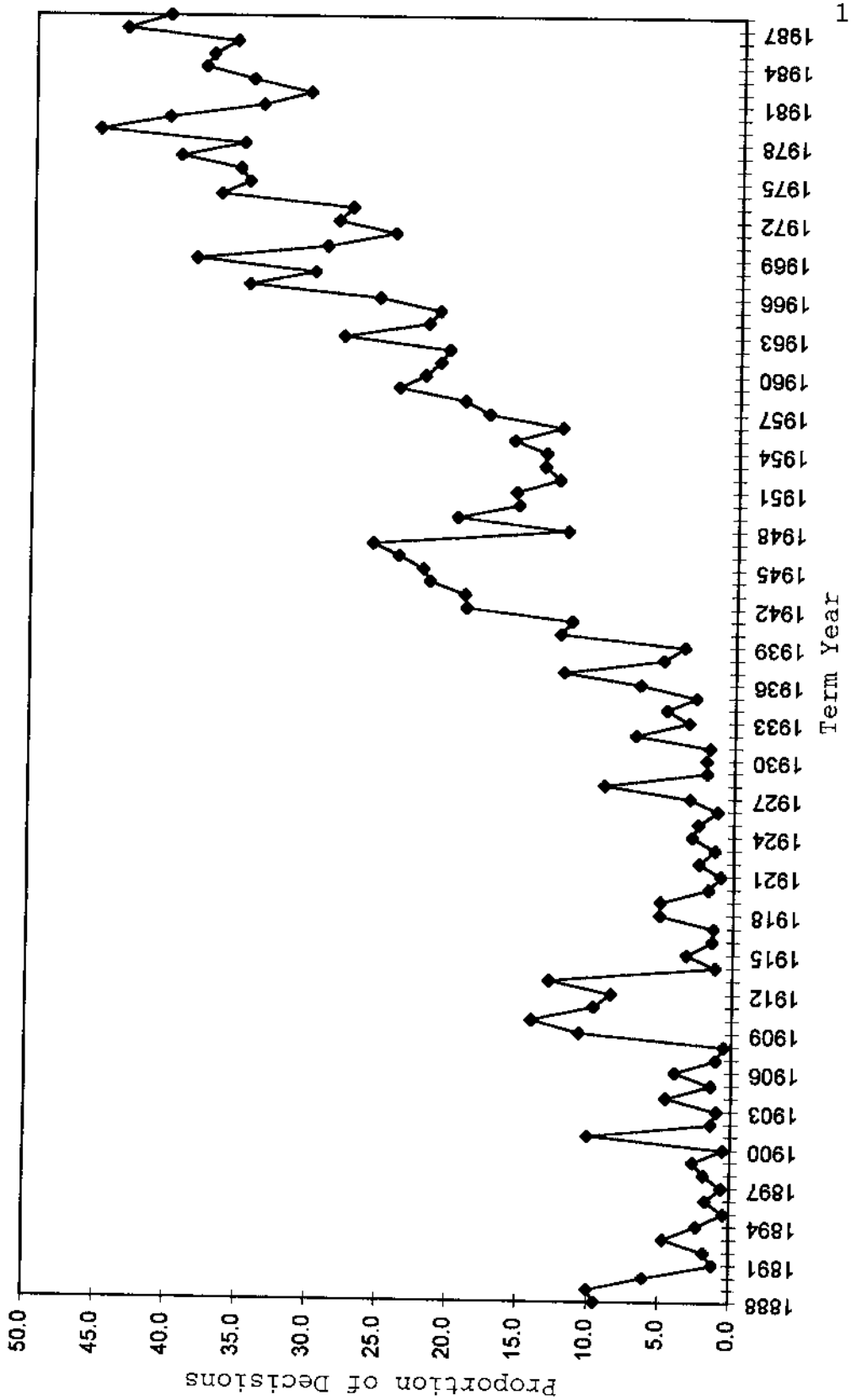


Figure 4-3. Percentage of United States Supreme Court Decisions With At Least One Concurring Opinion, 1888-1989

figure clearly shows, concurring opinions were consistently infrequent until 1941 (with the exception of the outlier in 1902). The series exceeds 10 percent only five times prior to that term year. There is a relatively sharp increase in the series during the first five years of the White Court (1910-1915). The data of Walker, Epstein and Dixon (1988: 363) and Haynie (1992: 1159) report a similar increase during this period. Haynie finds that White's tenure is not significantly associated with an increase in the number of concurring opinions the justices filed, employing a dummy variable specification (1992: 1163). Moreover, Walker, Epstein and Dixon (1988) dismiss White as a contributing factor to the increase in concurring opinions, concluding that White was an able leader of the Court and preferring to focus their analytical efforts on Stone.

The series continues to climb through 1936, although only modestly. Thereafter, the series begins to trend consistently upward. It never declines below 10 percent after 1941, the year in which Franklin D. Roosevelt nominated Harlan Fiske Stone as Chief Justice. Pritchett (1948: 48)[4] finds a similar increase in the rate of concurring opinions during the Roosevelt Court. The series average from 1941 to 1989 is 26.30 percent. The series' historic high (after 1902) occurs in 1980, at 45.5 percent. This series generally reflects the overall decline in

unanimity in the Court's decisions since the 1930s.

As before, the chief justice court averages provide an overall indication of the institutional changes in the Court's decision-making during the pre-1946 period. The Fuller Court average is 3.31 percent (excluding the outlier in 1902).[5] The White Court years increase the rate of concurring opinions to 6.72 percent. However, this increased level is short-lived because the Taft Court average is only 2.83 percent. Under Hughes, the Court's rate increased once again to 4.89 percent. The series continues to increase during Stone's tenure to 16.82 percent, an extraordinary relative increase of 243 percent. Indeed, Stone apparently affected the series level because it was 3.7 percent in 1940, but by 1941 (the first year that Stone served as chief justice) it jumped to 12.4 percent.

Epstein, Segal, Spaeth, and Walker (1996: 201-04) also report the increase in the proportion of cases with at least one concurring opinion beginning in the 1930s in their analysis of Blaustein and Mersky's data (see Blaustein and Mersky 1978: 127-36). Their proportions, however, are smaller in magnitude than those of the present study. This difference is perhaps due to the fact that the data they analyze, for the pre-1953 period, includes only signed opinions of the Court, whereas the present analysis includes all opinions of the Court (Epstein, Segal, Spaeth, and

Walker 1996: 204).

Haynie (1992) models this increase in the percentage of concurring opinions filed since the 1930s. She asserts that the decline in the norms of consensus on the Court began during the Hughes Court, and finds the peculiar social and task leadership of Chief Justice Hughes increased the occurrence of concurring opinions by 20 percent during his tenure from 1930 to 1940 (Haynie 1992: 1163). Although the chief justice is not the sole factor influencing the change in patterns of unanimity on the Court, Haynie states that Hughes' leadership style is a crucial variable explaining the rise of dissensus, first expressed in more frequent concurring opinions observed since the 1930s (Haynie 1992: 1166).[6] Hence, Haynie concludes that the decline of unanimity on the Court began during Hughes' tenure. However, Walker, Epstein, and Dixon (1988) argue that Hughes was an effective task leader due in part to his concise and persuasive case summaries he presented in conference and the taut running of conference (1988: 382).

Furthermore, during Hughes' period as chief justice, the Court was under attack from the Congress and particularly President Franklin Roosevelt for consistently striking down of New Deal legislation. The Hughes Court may then have first realized that it was no longer insulated from the politics that engulfed the other two branches

(Haynie 1992: 1167). Indeed, from 1936 to 1938, the rate of concurring opinions increased from 2.8 percent to 12.1 percent. This awakening among the justices may have contributed to the rancor that first appeared in the Hughes Court in the form of an increased rate of concurring opinions. Similarly, Haynie finds that Stone increased the percentage of decisions with at least one concurring opinion by 18 percent, while Warren's tenure is associated in time with a 5.8 percent increase (Haynie 1992: 1163). Thus, dissensus on the Supreme Court was first expressed under White, continued during the leadership of Charles Evans Hughes, consolidated under Harlan Fiske Stone, and then stabilized under Earl Warren (Haynie 1992: 1164).

Though the data used in this study were somewhat differently generated, it, not surprisingly, is generally consistent with previous studies. However, there are some differences. Perhaps the most significant difference is the finding that the White Court saw an increase in the frequency of concurring opinions, the rate more than doubling from that observed during the Fuller Court. Neither Walker, Epstein, and Dixon (1988) nor Haynie (1992) analyze this increase.

This study, also, finds that there is no apparent large increase in the percentage of cases with at least one concurring opinion immediately associated with the beginning

of the Hughes Court in 1930, but the series does indeed increase during the period of his control. The average percentage of decisions with at least one concurring opinion increased from 2.83 percent during Taft's tenure to 4.89 percent during Hughes' stint as Chief Justice, an increase of 73 percent (see Table 4-2).

The present analysis also confirms that the tenure of Chief Justice Harlan Fiske Stone (beginning in 1941) is associated with even larger increases in the series. From 1942 to 1943, for example, the series increases by 7.5 percent, a change of 65 percent. Overall, the average percentage of decisions with at least one concurring opinion increased dramatically under Stone. Whereas the figure was 4.89 for Hughes, the average concurrence rate during the years of the Stone Court is 16.82 percent, an increase of 244 percent. Therefore, Haynie's (1992) findings are echoed by the present study's results.

Dissenting Votes: Behind the Purple Curtain

Pritchett (1948: xii-xiii) argues that to truly understand the interactions that occur among the justices, one must look to nonunanimous decisions. "For the fact of disagreement demonstrates that the members of the Court are operating on different assumptions, that their inarticulate major premises are dissimilar, that their value systems are differently constructed and weighted, that their political,

economic, and social views contrast in important respects" (Pritchett 1948: xii). A nonunanimous decision "admits the public to the Supreme Court's inner sanctum" that lies behind the Purple Curtain (Pritchett 1948: xii; see also Schubert 1965: 14). This is particularly true of decisions with dissenting votes. In contrast to the traditions of other legal systems,[7] the norms of the American judicial process do not insist that judges hide the existence of disagreement among their colleagues behind the pretense of unanimity (Pritchett 1948: 24). If Supreme Court justices disagree not only with the majority's reasoning but also its disposition of the case, they may vote in dissent. They may choose not to express the reasons for their votes and, thus, not write a separate opinion outlining their positions on the case. A justice voting in dissent gives an even stronger statement of his or her disagreement with the majority than when writing a concurring opinion. In dissent, he records his opposition to the means and the ends of the Court's opinion. Having expressed their disagreement with the majority's position, justices oftentimes do not file another dissent again when a succeeding case involves the same question (Pritchett 1948: 24).

Figure 4-4 displays the percentage of decisions with at least one dissenting vote filed from 1888 to 1989 (see also Table 4-2). As the figure clearly shows, the justices

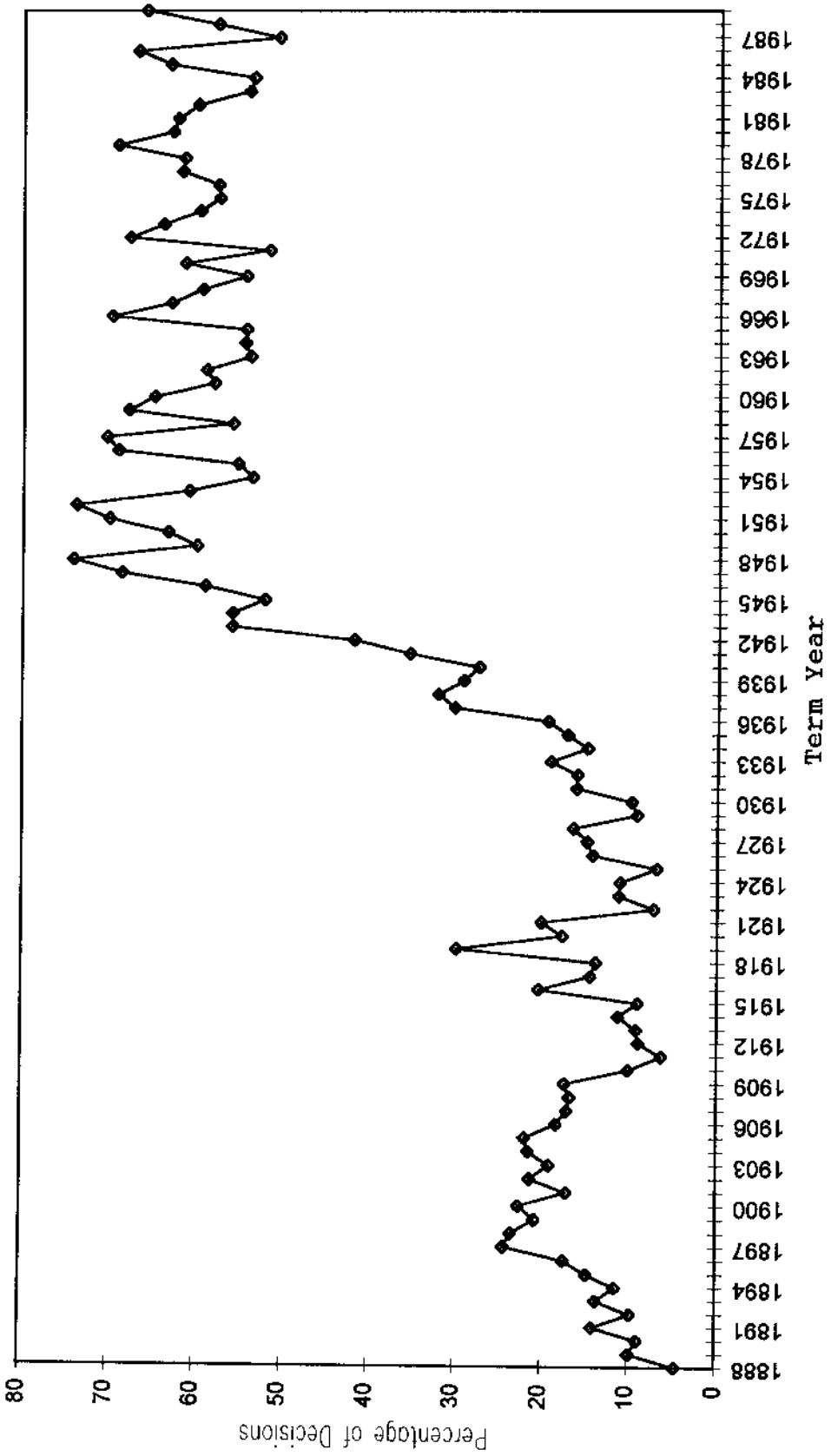


Figure 4-4. Percentage of Decisions of the United States Supreme Court With At Least One Dissenting Vote, 1888-1989

Figure 4-2. Percentage of United States Supreme Court Decisions With Dissenting Votes and Opinions, 1888-1989

TERM YEAR	AT LEAST ONE DISSENTING VOTE	ONE DISSENTING VOTE	TWO OR MORE DISSENTING VOTE	TWO DISSENTING VOTES	THREE DISSENTING VOTES	FOUR DISSENTING VOTES	AT LEAST ONE DISSENTING OPINION	ONE DISSENTING OPINION	TWO DISSENTING OPINIONS	THREE DISSENTING OPINIONS	FOUR DISSENTING OPINIONS
1888	4.6	2.9	1.7	1.7	.0	.0	2.5	2.5	.0	.0	.0
1889	9.9	3.3	6.6	2.9	3.6	.0	5.5	5.5	.0	.0	.0
1890	8.9	4.1	4.8	2.4	2.1	.3	5.5	5.2	.3	.0	.0
1891	14.1	8.7	5.3	2.7	2.3	.4	8.0	7.2	.8	.0	.0
1892	9.8	4.3	5.5	4.7	.8	.0	7.4	6.6	.4	.4	.0
1893	13.7	4.3	9.4	6.5	2.2	.7	8.3	7.9	.4	.0	.0
1894	11.5	6.0	5.5	3.0	1.7	.9	7.7	6.4	.9	.0	.4
1895	14.8	7.4	7.4	3.1	3.1	1.2	10.1	8.2	1.9	.0	.0
1896	17.4	8.7	8.7	3.7	2.8	2.3	6.0	5.0	.0	.9	.0
1897	24.3	9.8	14.5	9.2	4.0	1.2	11.0	11.0	.0	.0	.0
1898	23.5	5.6	17.9	9.9	4.3	3.7	11.1	8.6	2.5	.0	.0
1899	20.8	9.0	11.8	5.7	3.8	2.4	6.1	5.2	.9	.0	.0
1900	22.6	4.2	18.4	5.8	6.3	6.3	13.2	11.6	1.6	.0	.0
1901	17.1	3.9	13.3	8.3	2.2	2.8	7.7	7.2	.0	.0	.6
1902	21.4	4.4	17.0	12.1	3.9	1.0	4.9	3.4	1.5	.0	.0
1903	19.1	4.8	14.4	6.2	4.8	3.3	8.6	7.7	1.0	.0	.0
1904	21.5	9.2	12.3	3.1	5.6	3.6	10.3	9.7	.5	.0	.0
1905	22.0	4.6	17.3	6.9	6.4	4.0	11.0	10.4	.6	.0	.0
1906	18.4	7.7	10.6	8.2	1.4	1.0	4.3	3.9	.5	.0	.0
1907	17.1	8.6	8.6	5.1	1.7	1.7	8.6	6.3	1.7	.6	.0
1908	16.9	6.7	10.1	7.3	2.2	.6	8.4	6.7	1.1	.6	.0

Figure 4-2. Percentage of United States Supreme Court Decisions With Dissenting Votes and Opinions, 1888-1989

TERM YEAR	AT LEAST ONE DISSENTING VOTE	ONE DISSENTING VOTE	TWO OR MORE DISSENTING VOTE	TWO DISSENTING VOTES	THREE DISSENTING VOTES	FOUR DISSENTING VOTES	AT LEAST ONE DISSENTING OPINION	ONE DISSENTING OPINION	TWO DISSENTING OPINIONS	THREE DISSENTING OPINIONS	FOUR DISSENTING OPINIONS
1909	17.4	7.6	9.9	5.2	4.1	.6	5.8	5.8	.0	.0	.0
1910	10.2	6.6	3.6	2.4	1.2	.0	6.0	6.0	.0	.0	.0
1911	6.4	2.3	4.1	2.3	.9	.9	4.6	4.6	.0	.0	.0
1912	9.0	3.8	5.3	2.3	1.9	1.1	4.1	4.1	.0	.0	.0
1913	9.2	5.8	3.4	2.1	1.4	.0	3.1	2.7	.0	.3	.0
1914	11.3	3.2	8.1	3.6	2.8	1.6	7.3	6.9	.0	.4	.0
1915	9.1	3.7	5.4	5.0	.4	.0	3.7	2.5	1.2	.0	.0
1916	20.5	6.0	14.4	6.0	5.1	3.3	9.8	6.0	2.8	.9	.0
1917	14.5	4.8	9.7	4.8	3.9	1.0	6.8	4.8	1.9	.0	.0
1918	13.9	5.6	8.3	3.2	2.8	2.3	6.5	5.1	1.4	.0	.0
1919	29.9	9.2	20.7	13.2	3.4	4.0	12.1	9.8	2.3	.0	.0
1920	17.8	5.6	12.1	5.6	4.2	2.3	6.1	4.7	1.4	.0	.0
1921	20.1	5.3	14.8	5.3	8.3	1.2	10.1	8.3	1.2	.6	.0
1922	7.3	1.4	5.9	4.5	1.4	.0	5.0	3.6	.5	.9	.0
1923	11.2	3.9	7.3	5.4	2.0	.0	8.3	5.9	2.4	.0	.0
1924	11.1	6.2	4.9	2.2	1.8	.9	4.9	3.6	.0	.9	.4
1925	6.9	3.5	3.5	1.5	1.5	.5	4.0	3.0	1.0	.0	.0
1926	14.3	4.1	10.2	4.1	4.1	2.0	9.2	8.2	.0	1.0	.0
1927	14.9	2.4	12.5	3.6	5.4	3.6	11.3	6.0	3.6	.6	1.2
1928	16.5	6.3	10.2	3.1	6.3	.8	11.8	8.7	3.1	.0	.0
1929	9.2	.8	8.4	2.3	6.1	.0	8.4	6.1	2.3	.0	.0

Figure 4-2. Percentage of United States Supreme Court Decisions With Dissenting Votes and Opinions, 1888-1989

TERM YEAR	AT LEAST ONE DISSENTING VOTE	ONE DISSENTING VOTE	TWO OR MORE DISSENTING VOTE	TWO DISSENTING VOTES	THREE DISSENTING VOTES	FOUR DISSENTING VOTES	AT LEAST ONE DISSENTING OPINION	ONE DISSENTING OPINION	TWO DISSENTING OPINIONS	THREE DISSENTING OPINIONS	FOUR DISSENTING OPINIONS
1930	9.8	2.6	7.2	2.0	2.0	3.3	7.2	5.9	.7	.0	.7
1931	16.1	6.0	10.1	3.4	5.4	1.3	10.7	10.1	.7	.0	.0
1932	16.1	2.4	13.7	7.1	4.2	2.4	11.9	6.5	4.2	1.2	.0
1933	19.1	5.7	13.4	2.5	5.7	5.1	12.1	10.8	.0	1.3	.0
1934	14.9	3.2	11.7	1.9	4.5	5.2	7.8	7.8	.0	.0	.0
1935	17.2	1.4	15.9	2.8	8.3	4.8	13.8	11.0	2.1	.7	.0
1936	19.4	4.9	14.6	4.9	.7	9.0	13.9	10.4	2.1	1.4	.0
1937	30.2	9.4	20.8	14.8	4.0	2.0	22.8	20.1	2.7	.0	.0
1938	32.1	7.1	25.0	16.4	5.0	3.6	25.0	24.3	.7	.0	.0
1939	29.2	12.4	16.8	5.8	9.5	1.5	16.8	16.8	.0	.0	.0
1940	27.4	4.9	22.6	9.1	11.0	2.4	19.5	17.7	1.8	.0	.0
1941	35.4	5.0	30.4	9.3	11.2	9.9	32.3	26.7	2.5	3.1	.0
1942	41.9	11.0	30.8	9.9	15.1	5.8	39.0	32.6	4.7	1.7	.0
1943	55.9	14.7	41.2	16.2	13.2	11.8	50.0	40.4	7.4	2.2	.0
1944	55.9	14.3	41.6	11.2	11.2	19.3	44.7	34.2	8.7	1.2	.6
1945	52.2	19.6	32.6	15.9	16.7	.0	49.3	44.2	3.6	1.4	.0
1946	59.0	9.7	49.3	16.0	16.7	16.7	50.0	32.6	15.3	2.1	.0
1947	68.6	11.6	57.0	19.8	17.4	19.8	52.9	43.0	8.3	1.7	.0
1948	74.2	8.9	65.3	14.5	23.4	27.4	62.9	46.8	12.1	4.0	.0
1949	60.0	25.0	35.0	23.0	10.0	2.0	56.0	38.0	15.0	3.0	.0
1950	63.4	11.9	51.5	13.9	21.8	15.8	53.5	37.6	14.9	.0	1.0

Figure 4-2. Percentage of United States Supreme Court Decisions With Dissenting Votes and Opinions, 1888-1989

TERM YEAR	AT LEAST ONE DISSENTING VOTE	ONE DISSENTING VOTE	TWO OR MORE DISSENTING VOTE	TWO DISSENTING VOTES	THREE DISSENTING VOTES	FOUR DISSENTING VOTES	AT LEAST ONE DISSENTING OPINION	ONE DISSENTING OPINION	TWO DISSENTING OPINIONS	THREE DISSENTING OPINIONS	FOUR DISSENTING OPINIONS
1951	70.1	14.4	55.7	21.6	23.7	10.3	48.5	35.1	7.2	3.1	3.1
1952	73.9	19.1	54.8	27.8	20.9	6.1	58.3	43.5	13.9	.9	.0
1953	60.9	10.3	50.6	21.8	18.4	10.3	55.2	44.8	8.0	2.3	.0
1954	53.7	11.6	42.1	20.0	21.1	1.1	44.2	31.6	12.6	.0	.0
1955	55.3	5.8	49.5	14.6	22.3	12.6	47.6	38.8	6.8	1.0	1.0
1956	69.0	15.9	53.2	19.8	23.0	10.3	61.1	47.6	11.9	1.6	.0
1957	70.4	13.2	57.2	18.4	19.1	19.7	59.9	45.4	10.5	3.9	.0
1958	55.9	7.4	48.5	11.8	18.4	18.4	47.8	37.5	8.8	1.5	.0
1959	67.9	13.4	54.5	14.9	20.9	18.7	62.7	43.3	16.4	3.0	.0
1960	65.0	11.7	53.3	16.1	18.2	19.0	62.0	43.1	14.6	2.2	2.2
1961	58.1	19.7	38.5	23.1	11.1	4.3	53.0	44.4	7.7	.9	.0
1962	59.0	17.9	41.0	19.2	13.5	8.3	48.1	43.6	4.5	.0	.0
1963	53.9	12.8	41.1	16.7	16.1	8.3	52.2	41.1	8.9	2.2	.0
1964	54.5	19.7	34.8	16.7	10.6	7.6	48.5	37.9	8.3	1.5	.8
1965	54.4	18.4	36.0	15.4	10.3	10.3	49.3	40.4	5.1	2.2	1.5
1966	69.9	19.2	50.7	11.6	21.2	17.8	66.4	53.4	9.6	3.4	.0
1967	63.0	25.0	38.0	19.3	17.2	1.6	54.2	44.3	6.8	3.1	.0
1968	59.4	16.7	42.8	21.0	18.1	3.6	57.2	37.0	15.9	3.6	.7
1969	54.4	11.0	43.4	24.3	19.1	.0	54.4	39.7	11.8	2.9	.0
1970	61.4	14.3	47.1	12.1	14.3	20.7	62.9	39.3	17.1	5.0	1.4
1971	51.7	14.4	37.4	14.9	10.9	11.5	58.0	37.9	15.5	2.9	1.7

Figure 4-2. Percentage of United States Supreme Court Decisions With Dissenting Votes and Opinions, 1888-1989

TERM YEAR	AT LEAST ONE DISSENTING VOTE	ONE DISSENTING VOTE	TWO OR MORE DISSENTING VOTE	TWO DISSENTING VOTES	THREE DISSENTING VOTES	FOUR DISSENTING VOTES	AT LEAST ONE DISSENTING OPINION	ONE DISSENTING OPINION	TWO DISSENTING OPINIONS	THREE DISSENTING OPINIONS	FOUR DISSENTING OPINIONS
1972	67.8	11.7	56.1	13.3	25.0	17.8	66.1	38.9	20.6	5.6	1.1
1973	64.0	15.1	48.8	8.1	22.7	18.0	64.0	45.3	14.0	4.1	.6
1974	59.7	18.1	41.6	10.7	19.5	11.4	54.4	37.6	15.4	1.3	.0
1975	57.5	8.9	48.6	24.6	15.6	8.4	53.6	39.1	11.7	2.8	.0
1976	57.7	12.6	45.1	16.6	15.4	13.1	58.9	41.1	10.9	6.9	.0
1977	61.8	9.9	52.0	17.8	23.0	11.2	64.5	47.4	14.5	2.6	.0
1978	61.5	13.5	48.1	11.5	19.9	16.7	60.3	45.5	11.5	3.2	.0
1979	69.2	12.2	57.1	15.4	24.4	17.3	71.8	51.9	14.7	3.8	1.3
1980	62.9	12.6	50.3	15.4	23.1	11.9	65.7	51.0	12.6	2.1	.0
1981	62.4	11.8	50.6	10.6	20.6	19.4	64.1	48.2	13.5	1.8	.6
1982	60.0	12.7	47.3	10.3	18.2	18.8	61.8	46.7	13.3	1.8	.0
1983	54.1	9.4	44.7	12.4	16.5	15.9	55.9	42.9	11.8	.6	.6
1984	53.6	9.8	43.8	13.1	19.0	11.8	56.9	41.8	11.1	2.6	1.3
1985	63.2	10.4	52.8	10.4	20.9	21.5	67.5	42.9	20.9	3.7	.0
1986	66.9	4.4	62.5	13.8	22.5	26.3	70.6	51.3	17.5	1.9	.0
1987	50.7	8.1	42.6	14.2	19.6	8.8	54.7	46.6	8.1	.0	.0
1988	57.7	6.0	51.7	10.1	18.8	22.8	61.1	44.3	16.1	.7	.0
1989	65.9	7.2	58.7	13.8	15.2	29.7	64.5	51.4	12.3	.7	.0

dissented at a modest rate until 1930. The average percentage of cases with at least one dissenting vote is 16.67 percent for the Fuller Court and about 13 percent for the White[8] and Taft Courts each. For the last five years of the White Court, the series average is 19.3 percent. Handberg (1976) reports that the average is 21.4 percent (1976: 364). In the present study, the dissent rate is initially 20.5 percent, decline to 14.5 percent in 1917 and to 13.9 percent the following year. But then, the series rebounds to 29.9 percent in 1919, attaining 17.8 percent in the final year of the White Court, 1920. Handberg (1976) finds that the dissent rate varied from about 26 percent in 1916 to a high of about 39 percent in 1919. The rate then declined to around 18 percent in 1920 (1976: 364).

The results of the present study confirm the timing of this rise and fall of the dissent rate during the last half of the White Court, although there are differences in magnitude between the two studies' results. These differences may be due to several factors. First, Handberg (1976) only examined nonunanimous decisions. The dissent rate he discusses may be simply the frequency of dissenting votes in such cases. Second, it may include both the frequency of dissenting votes and dissenting opinions. Third, it may be that Handberg is simply characterizing the

dissent rate in only economic cases. His description of the data may, thus, be somewhat ambiguous.

This increase in the division within the last natural court of the White Court is an unexpected, finding. During these years, the Court was beginning to move away from the strict adherence to the economic doctrine of laissez-faire and began to support progressive reforms, upholding antitrust laws and governmental regulation of business activity (Biskupic and Witt 1997: 33-34; McCloskey 1994: 104-105; Schwartz 1993: 210-212). In Wilson v. New (1917), for example, the Court upheld the constitutionality of the Adamson Act, a provision of which set the maximum number of hours a railroad employees could be required to work in a day.

Moreover, there were changes in the Court's membership during this time. Justice Hughes joined the Court in 1910 and Justice Brandies was nominated in 1916. Although Hughes was more moderate than Brandeis, Hughes voted with the liberal wing of the Court, headed by Oliver Wendell Holmes. However, Willis Van Devanter (in 1911) and James McReynolds (in 1914) joined the White Court's conservative wing (Abraham 1993b: 418-419). The confluence of these two developments (the beginnings of a more liberal policy perspective and the change in the Court's membership) may have been associated with a moderate increase in conflict

within the high tribunal, thus leading to this increased rate of concurring opinions. However, the Court was still largely operating under the norms of consensus. Thus, the justices may have not felt completely free to dissent whenever they wanted to do so. The increase in the dissent rate during the White Court may, therefore, represent the Court's attempt to reconcile these competing interests within the structural and historical constraints that then prevailed. Hence, the decline in unanimity that prior studies find to have begun during the Hughes Court (Haynie 1992) or the Stone Court (Walker, Epstein and Dixon 1988) may have had its precursors in the White Court.

The finding of a decline in the dissent rate during the Taft Court from that observed during the last half of the White Court is expected, too. The average rate during the Taft Court was about 13 percent, a change of about 33 percent. During Taft's tenure as Chief Justice, the Court returned to its consistent conservative policy perspective (McCloskey 1994: 106-08). Also, two of the ardently conservative "Four Horsemen" were nominated to the Court (George Sutherland and Pierce Butler in 1922) during this period, joining strong conservatives James McReynolds, Willis Van Devanter, and Chief Justice William Howard Taft (Abraham 1993b: 418-19). Thus, the Taft Court was more cohesive in its membership and its policy perspective,

leading to more cohesive voting behavior and, thus, fewer dissenting votes being filed.

When one examines the years of the Hughes Court, however, there is a dramatic increase over the rate observed during the Taft Court: 21.05 percent of the decisions had at least one dissenting vote filed with them. This rate represents an increase of 70 percent over the series' average level during Taft's tenure. Thus, the dissent rate during the Hughes Court is more similar to that found during the last five years of the White Court. Halpern and Vines (1977: 478) and Blaustein and Mersky (1978: 130-36) report similar levels for the rate of dissenting votes during the Hughes Court, with a large increase in the rate of dissenting votes occurring after 1930.

Across the entire period, the justices dissented more frequently than they cast concurring votes, strangely enough. Given the norms of consensus prevailing prior to the 1930s, one would expect justices to concur more often than they dissent because concurrences announce to the public and other political actors less conflict with the majority than do dissents. After 1930, the series increases dramatically, until 1948 when it reaches a new equilibrium.

As one can see from the figure, the increase is particularly steep following the 1941 term year, when Chief Justice Stone assumed the helm of the Court. The dissent

rate under Stone increased even beyond the unprecedented levels observed during Hughes' tenure. The average dissent rate for Stone was 48.26 percent, a phenomenal increase of 129 percent from that during Hughes' leadership. Moreover, the legacy that Stone left on the Court is still apparent on the contemporary Court. From 1948 to 1989, for example, the series average is 61.33 percent (see Table 4-2). Hence, about two-thirds of the Court's decisions on average then have at least one dissenting vote expressed and, thus, some amount of dissensus noted, as compared to the pre-1930 period when only about 15 percent of the Court's decisions did.

Pritchett (1948) examines the new-found tendency of the justices appointed by President Franklin Roosevelt, from 1937 to 1947, to dissent more frequently than justices had in the past (Pritchett 1948: 24-25). He, too, reports the increase in the dissent rate beginning in 1930 (Pritchett 1948: 25; see also Cushman (1946: 231)). Although the findings of this study and that of Pritchett[9] differ slightly in terms of magnitude, they do agree in the existence of an increase in that rate in 1930, a slight decrease after the 1938 term, and then a large increase beginning in 1941, culminating in about 60 percent of the decisions handed down during the 1946 term having at least one dissenting vote (Pritchett 1948: 25). More

illustrative of the level of conflict that pervaded the Stone Court perhaps is the justices' tendency to depart from the institutional custom of dissenting only in matters of importance (Pritchett 1948: 49). They began to dissent more frequently over matters of that were not always vital (Pritchett 1948: 50). Hence, the change in the rate of dissent was not only a quantitative one but also one involving a qualitative transformation.

The Judges' Bill and Dissensus

Scholars have examined the influence of the Court's changing jurisdiction, and thus its agenda, on the dissent rate. Halpern and Vines (1977) investigate the effect of the Judiciary Act of 1925, also known as the "Judges' Bill." The Act gave the Court increased discretion to limit the kinds of cases it would hear. Previously, its jurisdiction mostly consisted of obligatory cases, which often represented well-settled issues of the law. The decisions on such cases presumably did not cause a great deal of conflict among the justices (Halpern and Vines 1977: 480). The authors find that the promulgation of the Act did affect the rate of dissent subsequently. As expected, the largest effect came in cases which the Court was obliged to hear, rather than in those on its discretionary docket (Halpern and Vines 1977: 475-76).

Halpern and Vines suggest that the Act may have signaled the justices that they should adopt a new, more active role. "The Act's supporters advanced a conception of the Court as an institution which should reserve its judgments only for the most important national policy questions," thereby changing the place of the Court as an institution within the American system of governance. (Halpern and Vines 1977: 481). Hence, the Act's rationale made it more acceptable, if not expected, that the justices would more frequently dissent. Justice Cardozo once remarked that cases of national importance are "not necessarily and ineluctably subject to one 'correct' solution" (Halpern and Vines 1977: 481). Thus, the Act may have contributed to a change in the Court's role conception, which was exacerbated by the political turmoil in which the Court was soon to find itself in the mid-1930s.

However, Walker, Epstein and Dixon (1988) discount the impact of the Act on the dissent rate. They assert that a significant escalation in the dissent rate did not occur until the early 1940s even though the Court's discretionary jurisdiction expanded following the Act (Walker, Epstein and Dixon 1988: 365). They dismiss the hypothesized effect that Halpern and Vines (1977) attribute to the Act because the rate of dissent shortly thereafter returned to the levels observed prior to the statute's passage. Moreover,

Haynie (1992) does not find that the Act significantly increased the rate of dissensus on the Court (1892: 1165). Indeed, Figure 4-4 supports these studies' conclusions about the alleged effect that the Act had on the dissent rate on the Court. It had some effect, but the change immediately after its passage was not substantial. A larger increase in dissents developed some 15 years later.

Yet, one should not entirely discount the Act's effect in implying a new role for the Court to play in the resolution of conflict within the political system. This change in role conception may have taken several term years to percolate and develop, and its effect may only have been expressed much later. This delayed effect may partially explain the increased dissent rate that Walker, Epstein, and Dixon (1988), Halpern and Vines (1977), and this study find in the early 1940s.

Multiple Dissents

One aspect of the qualitative change that occurred in the Court's decision-making during the pre-1945 period involves multiple dissents. Multiple dissents indicate a more divided Court than decisions in which there is only one dissenting vote or none at all. As Figure 4-5 and Table 4-2 show, the historic high for decisions with two or more dissenting votes occurred in 1948 when 65.3 percent of the

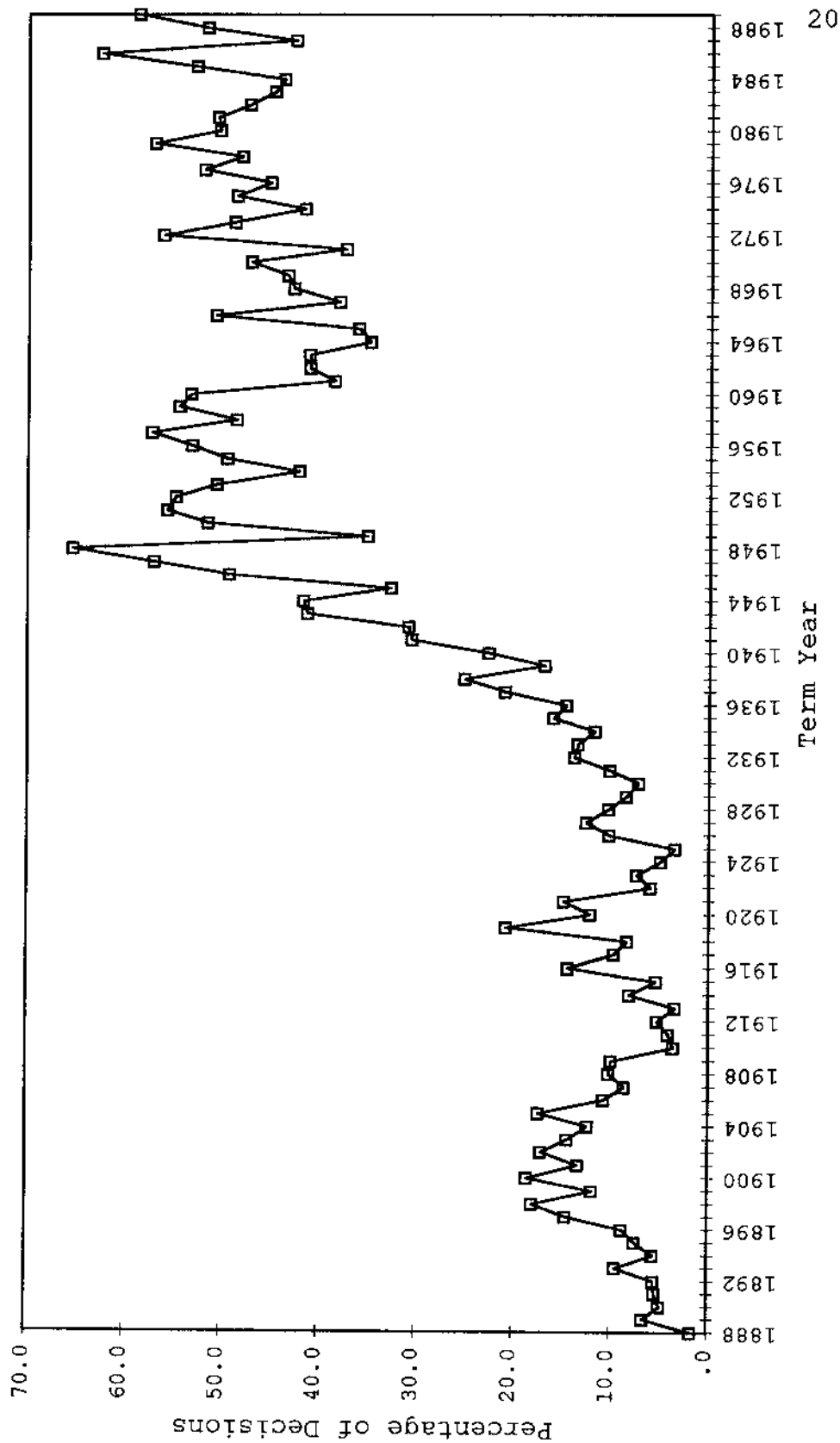


Figure 4-5. Percentage of United States Supreme Court Decisions With Two or More Dissenting Votes, 1888-1989

Court decisions contained two or more dissenting votes. The series historic low is observed in 1888 when only 1.7 percent of the decisions had such voting patterns.

Decisions with a 5-4 vote are particularly illustrative of the division among the justices because such votes represent the boundary of the Court's dissensus; this is the maximum possible dissensus where the Court's opinion can still have any precedential value. Figure 4-5 shows that the series high for 5-4 decisions is observed in 1989, when 29.7 percent of the Court's decisions had such votes.

There are several years in which no 5-4 decisions were announced. Three term years during Fuller's (1888, 1889 and 1892), and Taft's (1922, 1923 and 1929) tenures had no 5-4 decisions; the White Court had two years (1913 and 1915) with none of those decisions. On the other hand, the Hughes and the Stone Courts had at least one such decision during each of their respective term years. The average percentage of 5-4 decisions in the Fuller Court is 1.73. It declines somewhat to 1.50 percent for the White Court and even further, to 0.87 percent, for the Taft Court. This latter finding is not unexpected given Taft's view of dissenting votes. One would predict that he would particularly disfavor 5-4 decisions because of the level of division within the Court such decisions announce to the public and other policy actors. The Hughes Court saw an increase in

the proportion of 5-4 decisions. Its rate is 3.69 percent, an increase of 135 percent from the average observed across the three prior chief justice courts. The rate during the Stone Court climbed to 9.36 percent, a change of 154 percent. Hence, from 1930 to 1946, the rate of 5-4 decisions increased an incredible 583 percent.

Clearly, 5-4 decisions were a rather infrequent occurrence prior to 1930 due to the norms of consensus that pervaded the Court. Even so, the Fuller Court had a higher percentage of such opinions than the rates found for the White or Taft Courts. This result is somewhat surprising given the norms of consensus that allegedly were stronger during the earlier Courts. Perhaps the large amount of regulatory legislation brought to the Court for review first during the Fuller Court may have caused this increased dissent rate (see Schwartz 1993: 179-84). Thus, the Court became much more sharply divided in its voting behavior during the pre-1946 period.

Similarly, Pritchett finds an increased rate of 5-4 decisions during the period of the Roosevelt Court (Pritchett 1948: 25). He finds that the average rate of 5-4 decisions during the Hughes Court was 3.55 percent, as opposed to 3.69 percent in the present study (Pritchett 1948: 25). He reports an increased rate during the Stone Court. However, the figure is 12.80 percent, as opposed to

9.36 percent here (Pritchett 1948: 25). This discrepancy may be due to Prichett's analysis only including non-unanimous cases, whereas the present study includes all opinions. Therefore, this study agrees with Pritchett's findings of increased division among the justices and the timing of that increase from 1930 to 1946.

The promulgation of the Judges' Bill in 1925, too, may have caused an increase in the frequency of multiple dissents (Halpern and Vines 1977: 476-77). To more clearly assess the effect of the Act, the averages for each chief justice court prior to 1946 are calculated. The Fuller Court average is 10.50 percent, while that for the White Court declines to 8.32 percent. To parse out the effect of the Judges' Bill, Taft's tenure as Chief Justice is split into halves: 1920 to 1926, and 1927-1929.[10] The division point of 1927 is chosen because some of the cases the Court decided in 1926 pre-dated the Act (Halpern and Vines 1977: 473). From 1921 to 1926, 7.77 percent of the Taft Court decisions had multiple dissent votes included in them. From 1927 to 1929, however, the figure rises 2.6 percentage points to 10.37, a change of 33 percent. Thus, the Act did not appear to substantially increase the multiple dissent rate, as Halpern and Vines assert. However, as Figure 4-5 shows, the 1926 term year did show an increase in the rate of multiple dissents over the rate for the past four term

years and a reversal in the direction of the series. After 1925, it begins to turn upward.

For the Hughes Court, the average observed is 15.62 percent, an increase of 51 percent over that for the Taft Court. While this change is rather large, it does not compare to the magnitude of changes seen during the Stone Court, when 35.32 percent of the cases involved multiple dissents, which represents a change of 126 percent from the prior Court's average.

Overall, the series from 1926 to 1960 trends upward, although the change from one term year to the next is not all that large. The steepest increases in the series occur after 1941, lending credence to Walker, Epstein, and Dixon's (1988) assertion that Stone's leadership style permanently altered the norms governing the voting behavior of the justices (1988: 384). However, the effect of the Judges' Bill and of Hughes should not be overlooked since the series begins to increase, albeit modestly, after 1925. Hence, the growing percentage of cases with two or more dissenting votes since 1926 documents the expanding level of dissensus that characterized the voting of and the interpersonal relations among the justices of the Court (see Prichett 1948: 40).

The Decline of Consensual Norms

In addition, these results shed light directly on those studies that attempt to discover the cause of the "mysterious demise of consensual norms" during the 1930s and 1940s (Walker, Epstein and Dixon 1988: 361). The last five years of the White Court (1916-1920) appear to have initiated a decline in the norms of consensus that had prevailed until that time, perhaps due to the particular members then serving on the Court and a subsequent, temporary change in its policy preferences. Also, this study's findings generally support Haynie's (1992) conclusion that suggest Hughes' tenure, beginning in 1930, is associated with a continuing decline of consensus that was later institutionalized under Chief Justice Stone. Although Haynie examined only dissenting opinions (as opposed to analyzing dissenting votes too), her analysis suggests that Hughes' distinctive leadership style contributed to the decline in the norm of consensus Hughes' interpersonal style and judicial inclinations, thus, allowed for a more individualistic environment in which dissenting votes flourished.

On the other hand, Walker, Epstein, and Dixon (1988) suggest that Hughes did not contribute to the rise of dissensus on the Court (1988: 381-83). However, their

methodology largely involved analysis of graphs depicting the number of dissenting opinions per 100 majority opinions, whereas Haynie (1992) employed a more formal time series methodology to demonstrate the effect of Hughes and Stone on the dissent rate of the Court. Hence, Haynie's (1992) findings are strongly confirmed by the present analysis, while those of Epstein, Walker and Dixon (1988) are less clearly supported in the present study.

Dissenting Opinions

Perhaps the most clear expression of a justice's disagreement with the majority is represented by a dissenting opinion. Rather than quietly recording his conflict with the majority by issuing a dissenting vote, he publicly announces his disagreement and the reasons for it, thus clearly demonstrating the lack of cohesion on the Court and the reasons for it. The norms of consensus on the Court that discouraged the writing of dissenting opinions largely prevailed until the 1940s because they were perceived to weaken the authority of the Court's opinion and, indeed, the Court as an institution if it were seen to be divided concerning an issue. On the other hand, some authors of dissenting opinions argue that their opinions look to the future and the development of the law.

Figure 4-6 displays the percentage of decisions with at least one dissenting opinion. As one can clearly see, the

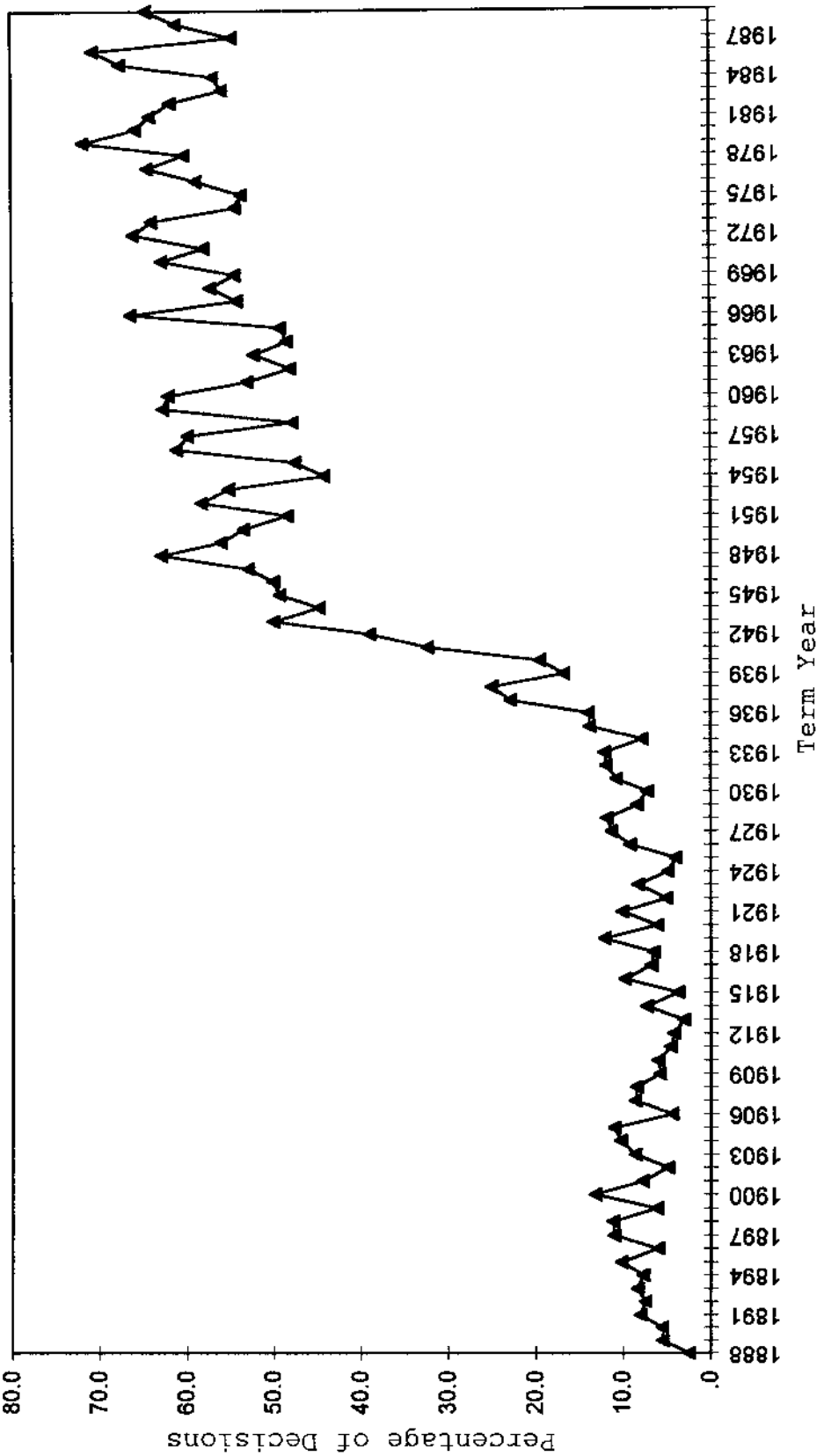


Figure 4-6. Percentage of Decisions of the United States Supreme Court With at Leasst One Dissenting Opinion, 1888-1989

series does not exceed 15 percent prior to 1934. Through the Fuller, White, Taft Courts and the first four years of the Hughes Court, dissenting opinions were an infrequent event in Supreme Court decision-making. Thus, consensus prevailed on the high tribunal until that point in time. The averages for those three chief justice courts illustrates that notion. The percentage of cases with at least one dissenting opinion during the Fuller Court was 7.86 percent. It declined during the White Court to 6.37 percent. The rate during the last five years of the White Court is 8.26 percent. The series increased slightly, to 8.29 percent, during the Taft Court.

Thereafter, however, the series dramatically increases through 1989. The largest increases occur from 1935 through 1948. The figure rose rather abruptly to 14.74 percent during the Hughes Court. This represents an increase of 78 percent. The Stone Court's dissent rate was extraordinary: 43.18 percent of the decisions on average had at least one dissenting opinion during his tenure. This rate represents a change of 193 percent from that observed during the Hughes Court. Epstein, Segal, Spaeth, and Walker (1996: 196-99) report similar data, documenting the magnitude of dissenting opinions and the timing of their increase during the Hughes and the Stone Courts (see also Blaustein and Mersky 1978: 130-36).

Once again, the findings of Haynie (1992) are confirmed by this analysis. While Stone's tenure increased the rate of the decline of consensus on the Court, Haynie argues this decline was initiated during Hughes' tenure (Haynie 1992: 1167). When Stone assumed the Court's helm in 1941, that trend toward allowing, if not expressly encouraging, individual expression through dissent that Hughes had begun continued (Haynie 1992: 1167). Stone's views on dissent are quite clear. He states "[s]ound legal principles ...never sprang full-fledged from the brains of any man or group of men. They are the ultimate result of the abrasive force of the clash of competing and sometimes conflicting ideas..." (Mason 1956: 629). For Stone, "conflict represented intellectual, not personal differences" (Mason 1956: 591). Therefore, the unique leadership styles of both Hughes and Stone and their perspectives on dissents are associated, at least in part, with this dramatic increase in the dissent rate.

Moreover, one should bear in mind the unique political, social and legal circumstances in which the Court then operated. "Basically the dissents and concurrences which characterize the Roosevelt Court reflect the conflicts of a society faced with unprecedented new problems of public policy and the deadly earnest in which the Court is considering proposed solutions" (Pritchett 1948: 52-53).

The findings of the present study bear out these differences by empirically demonstrating the transformation that they wrought on the decisional trends of the United States Supreme Court. This change manifests itself in large increases in the rate of concurring votes and opinions, and dissenting votes and opinions, as compared with their relative infrequency in the prior 43 term years that extend back to Melville Fuller's time as Chief Justice of the United States.

Chapter Summary

This chapter has examined the trends in the institutional-level decision making of the United States Supreme Court from 1888 to 1989. The results presented in the Chapter demonstrate that the Court's decisions have become much more nonunanimous over time, most particularly since the 1930s. While the norms of consensus held the Court together during the Fuller and Taft Courts, those institutional customs began to unravel during the last half of the White Court, beginning in 1916. Chief Justices Fuller and Taft socialized the justices on their Courts into a tradition of not dissenting unless it were absolutely necessary to promote the legitimacy of the Court's decisions. They also sought to limit split votes so as to protect the Court's prestige by distinguishing it from the

Congress or the presidency whose business is sullied by politics. While approximately 80 percent of the decisions during the Fuller and Taft Courts were unanimous, the rate begins to drop in the White Court, recovers during the Taft Court, descends again during the Hughes Court and continues to do so during the Stone Court, reaching by 1947 rates of only about 35 percent unanimous. The Court's decisions remain stable at that approximate level of unanimity from 1947 to 1989.

This nonunanimity that describes the Court's decisions since the 1940s is expressed in a rising tide of concurring votes and opinions, and dissenting votes and opinions. The decline of consensus on the Court is illustrated by the growing rate of concurring votes and opinions and dissenting votes, beginning at the midway point of the White Court (1916). While Taft served as a mediating influence to dampen the conflict on the Court, Hughes' tenure is associated with the unanimity rate returning to the depressed levels first observed during the latter years of the White Court. Haynie (1992) suggests that this decline occurs because of Hughes' distinctive leadership style -- that resolved conflict among the justices but also fostered an atmosphere in which individual expression by the justices was encouraged -- is associated with this increase in the rate of concurring votes and opinions and, thus, the

continued erosion of the long-standing norms of consensus in Supreme Court decision-making.

This trend of declining consensus was in full bloom during the tenure of Harlan Fisk Stone (1941-1945). The chapter shows that the rate of dissenting votes and opinions flourished during his tenure. Walker, Epstein and Dixon (1988) attribute that rise to Stone's belief that dissent was beneficial for the intellectual growth of the Court and the doctrine the Court announced in its decisions. Thus freed from the time-honored restraints of consensus, the justices began to dissent at a significantly higher rate during the five term years that Stone occupied the center chair. Whereas the average dissent rate during the pre-1930 chief justice courts was about twenty percent, the post-1945 rate hovers near 65 percent. It continues to do so through 1989.

Split opinions provide a unique opportunity to gaze into the justices' minds and examine their policy orientations. Chapter V will examine the liberalism of the Court's decisions in each of the issue areas discussed in Chapter III from 1888 to 1989. It will also provide an analysis of the trends in the Court's decision-making in the four aggregated issue dimensions introduced in that chapter. This is done so as to provide a glimpse into the Court's changing perspective on vitally important issues of public

policy with which the nation wrestled. These include such large-scale social events as the Panic of 1893, the Spanish-American War, the election of Progressive Theodore Roosevelt to the presidency in 1904, two World Wars, the Great Depression, Franklin Roosevelt's New Deal social welfare program and Roosevelt's attempt to pack the Court in 1937 (perhaps the largest threat to the Court's independence and legitimacy during its history) that have occurred during the 102 term years analyzed in this study.

NOTES

1. For further support of the institutional benefits of consensus, see Vinson (1964), Swisher (1965), and Schwartz (1957), Frank (1968).

2. For example, Fuller was an able social and task leader due in part to his sharp wit and sense of humor. "There is also the story of Holmes's interrupting one of the senior John Harlan's discourses, violating the unwritten rule against interruptions. `But that won't wash,' he said, outraging Harlan. Thereupon Chief Justice Melville Fuller quickly started a washboard motion with his hands and said, `But I just keep scrubbing away, scrubbing away'" (O'Brien 1996: 292). Also, Chief Justice Fuller began the custom of the justices shaking hands before they go on to the bench or before beginning conferences (O'Brien 1996: 139).

3. Trend is defined as movement in a specific upward or downward direction or, more particularly, "any systematic change in the level of a time series process" (McDowell et. al 1980: 19-20).

4. See also Pritchett (1941) for an analysis of the occurrence of divided opinions from 1939 to 1941.

5. Walker, Epstein, and Dixon (1988: 363) and Haynie (1992: 1159) find no significant increase in the number of concurring opinions during this term year.

6. For a dissenting opinion on the influence of Chief Justice Hughes in contributing to the decline of norms of consensus on the Court, see Walker, Epstein, and Dixon (1988).

7. For example, dissents have only recently been allowed in Germany's Constitutional Court. They are, however, not allowed in the courts of Italy or France (Murphy and Pritchett 1986: 555).

8. For an analysis of the dissent rate during the last five years of the White Court, see Handberg (1976: 364-65).

9. Prtichett's findings are as follows:

TERM YEAR	NONUNANIMOUS OPINIONS

1930	11
1931	17
1932	16
1933	16
1934	13
1935	16
1936	19
1937	27
1938	34
1939	30
1940	28
1941	36
1942	44
1943	58
1944	58
1945	56
1946	64

Pritchett (1948: 25).

10. For example, Taft retired in February 1930 (Epstein, Segal, Spaeth, and Walker 1996: 345). Because he served as Chief Justice for the majority of the 1929 term year, he is scored as Chief for that year. Similar decisions are made for the calculation of the averages for the other chief justices.

CHAPTER V

INSTITUTIONAL LEVEL ANALYSES: LIBERALISM OF UNITED STATES SUPREME COURT DECISION-MAKING, 1888-1989

This chapter examines the policy content of the Supreme Court's decision-making over time. It analyzes the liberalism of the cases the Court has considered from 1888 to 1989 in each of the issue areas discussed in Chapter III. It then examines the liberalism of the Court's decisions in each of the four aggregated issue areas, introduced in Chapter III. It provides speculative reasons as to the causes of the changes in the Court's liberalism during a period in which the nation endured the Panic of 1893, the Spanish-American War (1898), two World Wars, a Great Depression, a president's attack on the legitimacy of its Supreme Court (1937), political and social upheaval, and the Civil Rights movement.

Politics, Liberalism and the Supreme Court

Beyond examining the rates of dissents or concurrences, one can also examine the decisional trends of the United States Supreme Court by analyzing its policy outputs over

time. A key concept here is the common one of "liberalism." It is now routine, though once it was quite controversial (Pritchett 1948: xiii; Horwitz 1992: 4-7),[1] to classify Supreme Court decisions as "liberal" or "conservative" because they favor or oppose certain policy interests.

This controversy arises out of a myth that the Court is an apolitical institution, whose prestige and image are not to be sullied by the worldly interaction of the Congress or the president. "Every Court prior to the Roosevelt Court had enjoyed the protection of perhaps the most potent myth in American political life -- the myth that the Court is a non-political body, a sacred institution on which politics must not lay its profane hands" (Pritchett 1948: 14). The justices were presumed simply to find and apply the law without reference to their own individual attitudes on the matter but with exclusive reference to the dictates of the Constitution and precedent (Pritchett 1948: 15).

But, the Court cannot be an apolitical institution, Pritchett argues, because it must eventually resolve the most important political questions of the day (Pritchett 1948: 16). "[J]udicial decisions are not babies brought by constitutional storks, but are born out of the travail of economic circumstance...[J]udges are human, and...the judicial power need be no more sacred in our scheme than any other power" (Lerner 1941: 259). Hence, the Supreme Court

and its decisions are inherently political and, thus, the liberalism of the latter can, and should, be systematically analyzed.

Nevertheless, the Court is somewhat constrained by the judicial functions it must complete. It must base its decisions on the rule of law; and because of the limiting language of the Constitution, it can issue decisions only in cases or controversies (United States Constitution 1787, Article III; see also Murphy 1964: 19-29). Therefore, while the Court's decisions are driven largely by the justices' public policy preferences, they presumably operate within a more restrained environment than does the president or Congress because of the institutional checks circumscribing the Court's power.

In time serial analyses such as those presented in this study, there is the question of the comparability of the liberalism rates reported for the Courts in different periods. Because of the changing issue content of the cases brought to the Court across this rather substantial analytical period, the difficulty of the Court issuing a liberal decision may not be the same throughout the period studied. Baum (1988, 1989) has suggested that to truly understand the change in the Court's policy preferences over time, one must measure the degree to which there exists policy change, or simply the difficulty of the justices

casting a liberal vote. Baum (1988) devises a method to measure policy change of the Court from 1945 to 1985, by subtracting the change in each of the member's voting behavior from the change in the Court's decision-making due to personnel changes (1988: 907). He finds that his method of correction did not produce any fundamental differences in the Court's policy trends, although there were slight modifications suggested by his analysis.

While the Court did in fact hear different issues across the period analyzed, the cases are most likely equally difficult due to the changing norms of society. While a decision to uphold legislation outlawing child labor or an anti-lynching law were no doubt difficult to issue in 1905, such cases would be relatively trivial for the Court to decide today. However, other, novel issues have replaced those prior issues that may have caused the Court difficulty in past years. There is now an on-going debate about the constitutionality of abortion or other privacy claims that appears to be of similar difficulty to the civil liberties-civil rights claims that earlier Courts heard. Hence, although there may be a need for very slight modification of the liberalism rates, they are comparable across the period of analysis of the present study.

Liberalism Defined

To begin, it is necessary to define how the policy content of the decisions of the Supreme Court is measured. Political liberalism is a syndrome of attitudes that is associated with support for the interests of the downtrodden or less powerful in society, in contrast to the elites or those holding powerful positions in the social order (Wilson and DiIulio 1995: 122). Ulmer (1978) classifies the former as "underdogs" and the later as "upperdogs" to illustrate their perceived relative position within society. Conover and Feldman (1984: 374) state that "liberals seem to favor change and progress even at the expense of governmental involvement; conservatives, on the other hand, wish to preserve traditional arrangements particularly those threatened by governmental involvement." In this analysis, "liberal" decisions are operationalized following these general concepts and the issue-specific definitions set out in the Spaeth Supreme Court database (1993) that advance the interests of the "underdogs" in the American political system.

In economics cases, for example, a decision that approved an expansive degree of governmental regulation of economic activity is considered to be a liberal decision. Second, cases involving attorneys are liberal if they favor

the interests of the attorneys because attorneys are thought to be "underdogs" with respect to the government, much as labor is an underdog to management (Spaeth 1993: 68-69). Third, union cases are liberal if they uphold the rights of the union to organize and operate, and if they generally benefit the union's interests. Federal taxation decisions, the fourth issue area, are liberal if they uphold the interests of the Federal government as opposed to the interests of the taxpayer, because it favors expanded governmental power, in the same vein as with economics decisions.

Fifth, in criminal cases, those decisions that favor or benefit the accused are liberal, which usually involves a diminution of governmental power. In civil rights cases (the sixth issue area), those decisions that lead to expansion of civil rights are considered to be liberal. For First Amendment cases, those decisions that protect claims of freedom of speech and strike down governmental attempts to regulate speech are considered to be liberal. The eighth issue category is for privacy cases, which are liberal if they uphold claims of privacy as against intrusion by governmental officials.

Ninth, decisions dealing with questions of judicial power are liberal if they serve to expand the level of a court's authority, because the courts are part of the larger

governmental structure. Federalism decisions, the tenth issue category, are liberal if they uphold the federal government's claims of power as against those of a state government. Interstate relations and separation of powers cases are not considered in this analysis of the liberalism of the Court's decisions since no liberal content can be theoretically ascribed to such decisions presently.

There is also a residual category ("other," listed in Table 5-1) that contains all the decisions that do not fall within any of the above categories. Since their content is a combination of a myriad of issues, this category resists systematic examination and, thus, no policy orientation is attributed to such cases in this analysis.

Liberalism in Individual Issue Areas

Table 5-1 reports the percentage of decisions in each of these single issue areas that were decided in the liberal direction from 1888 to 1989. Figures 5-1 through 5-11 display the percentage of liberal decisions for these individual issue areas during that period. Since the Court's decisions predominantly involved economic issues up to the 1940s, they are examined first.

Economics

Figure 5-1 shows the liberalism of the Court's economic decisions across time. The series' historic high is

Table 5-1. Percentage of Liberal Decisions of the United States Supreme Court in Indicated Issues, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMIC	ATTORNEY	UNION	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	DUE PROCESS	PRIVACY	JUDICIAL POWER	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	OTHER
1888	240	45.4	.0	.0	.0	50.0	.0	0	.0	.0	26.2	.0	.0	.0	.0
1889	274	53.8	.0	.0	.0	46.2	75.0	0	40.0	.0	24.6	14.3	.0	.0	.0
1890	291	45.9	.0	0	50.0	28.6	40.0	0	.0	.0	17.5	100.0	.0	.0	.0
1891	263	52.0	.0	0	100.0	23.1	75.0	100.0	.0	.0	20.0	.0	.0	.0	.0
1892	256	42.0	.0	0	100.0	36.4	.0	0	.0	.0	7.5	100.0	.0	.0	.0
1893	277	45.8	33.3	0	80.0	44.8	.0	0	.0	.0	12.3	.0	.0	.0	.0
1894	235	52.6	0	0	50.0	29.0	50.0	0	0	.0	23.6	100.0	.0	.0	.0
1895	257	65.2	.0	0	.0	37.2	33.3	50.0	50.0	.0	7.3	25.0	.0	.0	.0
1896	218	57.9	100.0	0	.0	50.0	66.7	.0	50.0	.0	13.3	100.0	.0	.0	.0
1897	173	49.6	0	0	.0	15.8	33.3	0	.0	.0	30.0	.0	.0	.0	.0
1898	162	56.6	0	0	66.7	60.0	50.0	0	36.4	.0	17.1	.0	.0	.0	.0
1899	212	46.5	0	0	40.0	25.0	100.0	.0	13.3	.0	26.0	100.0	.0	.0	.0
1900	190	62.0	0	0	55.6	11.1	.0	0	.0	.0	16.7	50.0	.0	.0	.0
1901	181	63.6	0	0	33.3	.0	50.0	0	50.0	.0	38.1	100.0	.0	.0	.0
1902	206	64.3	0	0	.0	33.3	.0	0	16.7	.0	22.4	40.0	.0	.0	.0
1903	209	54.1	0	0	75.0	35.7	18.2	0	.0	.0	23.1	100.0	.0	.0	.0
1904	195	54.0	0	0	33.3	23.1	.0	0	25.0	.0	25.0	66.7	.0	.0	.0
1905	173	60.7	0	0	100.0	.0	.0	0	20.0	.0	21.2	100.0	.0	.0	.0
1906	207	56.8	.0	0	100.0	29.4	66.7	0	33.3	.0	15.6	100.0	.0	.0	.0
1907	175	62.0	50.0	100.0	100.0	33.3	100.0	0	37.5	.0	47.6	.0	.0	.0	.0
1908	178	62.4	100.0	.0	100.0	38.1	.0	.0	.0	.0	9.3	.0	.0	.0	.0
1909	172	51.5	.0	0	100.0	9.5	.0	0	11.1	.0	18.2	100.0	.0	.0	.0

Table 5-1. Percentage of Liberal Decisions of the United States Supreme Court in Indicated Issues, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMIC	ATTORNEY	UNION	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	DUE PROCESS	PRIVACY	JUDICIAL POWER	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	OTHER
1910	167	70.5	0	0	100.0	10.5	.0	0	.0	.0	21.7	.0	.0	.0	.0
1911	219	59.0	100.0	0	100.0	10.0	.0	100.0	.0	.0	21.2	100.0	.0	.0	.0
1912	266	46.2	50.0	0	50.0	19.4	.0	100.0	22.7	.0	14.7	.0	.0	.0	.0
1913	292	67.6	100.0	0	50.0	44.4	.0	0	55.6	.0	30.4	77.8	.0	.0	.0
1914	247	59.3	100.0	.0	.0	15.4	75.0	.0	50.0	.0	25.7	60.0	.0	.0	.0
1915	242	58.5	.0	.0	50.0	23.8	50.0	0	8.3	.0	20.0	100.0	.0	.0	.0
1916	215	65.7	.0	.0	100.0	20.0	.0	0	20.0	.0	23.3	100.0	.0	.0	.0
1917	207	59.5	.0	.0	61.5	27.3	60.0	.0	33.3	.0	17.4	63.6	.0	.0	.0
1918	216	55.2	.0	.0	50.0	18.8	.0	.0	.0	.0	20.8	100.0	.0	.0	.0
1919	174	64.6	.0	.0	57.1	16.7	66.7	0	12.5	.0	21.7	68.8	.0	.0	.0
1920	214	53.2	.0	.0	75.0	23.5	50.0	.0	40.0	.0	17.6	69.2	.0	.0	.0
1921	169	58.9	.0	100.0	52.9	8.3	100.0	0	16.7	.0	23.5	58.3	.0	.0	.0
1922	220	53.8	.0	.0	71.4	36.4	.0	.0	33.3	.0	20.0	33.3	.0	.0	.0
1923	205	61.0	0	100.0	25.0	8.3	10.0	0	100.0	.0	27.6	100.0	.0	.0	.0
1924	225	53.6	0	50.0	72.2	14.3	33.3	0	35.7	.0	51.1	50.0	.0	.0	.0
1925	202	46.8	.0	0	66.7	35.3	0	0	.0	.0	31.8	40.0	.0	.0	.0
1926	196	52.5	.0	0	33.3	31.3	25.0	0	36.4	.0	31.3	100.0	.0	.0	.0
1927	168	50.6	100.0	0	64.7	25.0	.0	0	28.6	.0	53.8	64.0	.0	.0	.0
1928	127	52.8	100.0	0	64.3	.0	.0	.0	66.7	.0	80.0	87.5	.0	.0	.0
1929	131	43.2	.0	0	81.0	33.3	.0	0	50.0	.0	20.0	.0	.0	.0	.0
1930	153	54.7	100.0	0	64.3	58.3	25.0	100.0	50.0	.0	50.0	75.0	.0	.0	.0
1931	149	58.0	.0	0	62.5	22.2	40.0	0	33.3	.0	21.4	100.0	.0	.0	.0

Table 5-1. Percentage of Liberal Decisions of the United States Supreme Court in Indicated Issues, 1888-1989

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1932	168	74.7	0	.0	82.5	60.0	.0	0	.0	.0	61.1	.0	.0	.0	.0
1933	157	63.2	0	100.0	60.9	50.0	.0	.0	44.4	.0	61.1	69.2	.0	.0	.0
1934	154	45.3	0	.0	64.0	60.0	.0	.0	100.0	.0	59.3	75.0	.0	.0	.0
1935	145	68.9	0	.0	37.1	100.0	50.0	100.0	0	.0	36.4	55.6	.0	.0	.0
1936	144	60.0	0	100.0	69.6	33.3	50.0	60.0	0	.0	40.0	66.7	.0	.0	.0
1937	149	73.0	0	100.0	77.1	54.5	.0	100.0	100.0	.0	50.0	66.7	.0	.0	.0
1938	140	78.6	0	66.7	52.2	40.0	83.3	100.0	.0	.0	50.0	80.0	.0	.0	.0
1939	137	77.9	0	100.0	79.2	71.4	.0	80.0	.0	.0	33.3	50.0	.0	.0	.0
1940	164	82.3	0	50.0	78.0	50.0	100.0	33.3	100.0	.0	40.0	62.5	.0	.0	.0
1941	161	75.9	0	50.0	68.2	53.3	75.0	42.9	.0	.0	33.3	71.4	.0	.0	.0
1942	172	62.2	0	.0	73.7	62.1	40.0	88.9	.0	.0	38.5	50.0	.0	.0	.0
1943	136	68.3	0	100.0	80.0	27.8	60.0	66.7	.0	.0	40.0	57.1	.0	.0	.0
1944	161	65.6	.0	60.0	76.9	75.0	62.5	100.0	33.3	.0	26.3	60.0	.0	.0	.0
1945	138	64.8	100.0	69.2	78.9	57.1	50.0	100.0	.0	100.0	60.0	50.0	.0	.0	.0
1946	144	71.0	0	64.3	62.5	28.0	.0	.0	100.0	0	33.3	77.8	.0	.0	.0
1947	121	76.2	0	.0	100.0	52.8	80.0	100.0	0	0	50.0	100.0	.0	.0	.0
1948	124	70.2	0	14.3	100.0	52.0	60.0	33.3	33.3	0	68.8	66.7	.0	.0	.0
1949	100	71.0	.0	0	62.5	14.3	57.1	.0	57.1	0	37.5	62.5	.0	.0	.0
1950	101	53.7	0	20.0	100.0	54.5	44.4	42.9	25.0	0	50.0	66.7	.0	.0	.0
1951	97	50.0	0	.0	75.0	47.8	50.0	42.9	50.0	0	58.3	100.0	.0	.0	.0
1952	115	44.4	.0	45.5	66.7	25.0	83.3	66.7	33.3	0	56.3	33.3	.0	.0	.0
1953	87	48.5	0	66.7	100.0	43.8	62.5	40.0	.0	0	44.4	66.7	.0	.0	.0

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1954	95	81.8	100.0	100.0	90.9	52.6	70.0	80.0	33.3	0	30.8	80.0	.0	.0	.0
1955	103	82.1	0	80.0	71.4	42.9	69.2	75.0	100.0	0	42.9	60.0	.0	.0	.0
1956	126	87.9	100.0	72.7	75.0	65.0	46.7	55.6	75.0	0	50.0	80.0	.0	.0	.0
1957	152	70.6	0	40.0	60.0	51.4	75.0	77.8	50.0	.0	53.6	12.5	.0	.0	.0
1958	136	68.0	0	80.0	100.0	50.0	62.5	81.8	0	0	40.0	100.0	.0	.0	.0
1959	134	83.3	0	64.3	53.8	55.6	78.6	50.0	80.0	0	41.7	50.0	.0	.0	.0
1960	137	55.6	0	90.9	90.9	62.5	66.7	34.8	.0	0	25.0	60.0	.0	.0	.0
1961	117	66.7	0	88.9	85.7	70.0	83.3	77.8	60.0	0	45.5	80.0	.0	.0	.0
1962	156	80.6	100.0	63.6	100.0	76.9	96.2	87.5	66.7	0	60.0	63.6	.0	.0	.0
1963	180	82.4	0	66.7	50.0	83.8	93.2	93.3	0	0	40.9	81.8	.0	.0	.0
1964	132	76.2	0	50.0	80.0	55.6	73.1	75.0	100.0	0	50.0	100.0	.0	.0	.0
1965	136	82.1	0	33.3	55.6	64.0	80.0	64.3	100.0	0	48.3	.0	.0	.0	.0
1966	146	79.2	.0	71.4	50.0	63.2	77.8	78.3	0	0	40.0	66.7	.0	.0	.0
1967	192	75.0	100.0	44.4	100.0	82.8	85.2	75.0	50.0	0	41.7	100.0	.0	.0	.0
1968	138	72.2	0	66.7	100.0	64.9	79.2	90.9	66.7	0	48.5	50.0	.0	.0	.0
1969	136	72.7	100.0	33.3	85.7	38.2	79.4	70.6	.0	0	26.3	50.0	.0	.0	.0
1970	140	62.5	100.0	62.5	80.0	32.1	54.8	57.1	100.0	.0	17.4	50.0	.0	.0	.0
1971	174	53.3	0	28.6	50.0	53.5	67.6	55.6	61.5	100.0	25.0	50.0	.0	.0	.0
1972	180	70.4	100.0	50.0	80.0	32.5	54.1	26.3	44.4	66.7	19.2	75.0	.0	.0	.0
1973	172	55.0	50.0	42.9	71.4	38.9	48.6	64.7	37.5	.0	33.3	60.0	.0	.0	.0
1974	149	51.9	.0	66.7	100.0	48.3	62.1	62.5	57.1	.0	19.2	87.5	.0	.0	.0
1975	179	43.8	0	40.0	100.0	18.9	54.8	53.8	28.6	66.7	26.3	100.0	.0	.0	.0

Table 5-1. Percentage of Liberal Decisions of the United States Supreme Court in Indicated Issues, 1888-1989

TERM YEAR	TOTAL REPORTED DECISIONS	ECONOMIC	ATTORNEY	UNION	FEDERAL TAXATION	CRIMINAL PROCEDURE	CIVIL RIGHTS	FIRST AMENDMENT	DUE PROCESS	PRIVACY	JUDICIAL POWER	FEDERALISM	INTERSTATE RELATIONS	SEPARATION OF POWERS	OTHER
1976	175	36.8	100.0	57.1	75.0	35.7	42.9	42.9	37.5	16.7	25.0	57.1	.0	.0	.0
1977	152	67.7	50.0	60.0	57.1	57.6	35.5	62.5	40.0	.0	40.0	50.0	.0	.0	.0
1978	156	44.4	0	50.0	50.0	42.4	42.5	22.2	20.0	60.0	15.8	33.3	.0	.0	.0
1979	156	58.6	80.0	33.3	.0	41.0	56.5	63.6	50.0	.0	42.9	100.0	.0	.0	.0
1980	143	56.0	100.0	75.0	50.0	39.3	30.0	45.5	40.0	.0	22.7	60.0	.0	.0	.0
1981	170	50.0	66.7	88.9	66.7	22.2	54.1	69.2	40.0	.0	30.0	83.3	.0	.0	.0
1982	165	54.8	.0	57.1	75.0	22.2	53.6	45.5	37.5	25.0	44.4	58.3	.0	.0	.0
1983	170	38.5	50.0	66.7	75.0	19.6	58.6	33.3	20.0	.0	23.5	66.7	.0	.0	.0
1984	153	43.3	33.3	60.0	100.0	28.9	58.3	45.5	11.1	.0	50.0	55.6	.0	.0	.0
1985	163	42.9	25.0	50.0	80.0	28.3	41.9	36.4	.0	0	43.8	60.0	.0	.0	.0
1986	160	36.8	.0	75.0	80.0	37.2	54.2	50.0	50.0	100.0	35.0	60.0	.0	.0	.0
1987	148	64.0	66.7	14.3	66.7	43.8	45.0	50.0	55.6	.0	41.7	70.0	.0	.0	.0
1988	149	52.9	66.7	.0	75.0	26.5	46.4	42.9	.0	33.3	45.5	44.4	.0	.0	.0
1989	138	47.8	75.0	75.0	83.3	30.8	60.0	35.7	.0	.0	50.0	55.6	.0	.0	.0

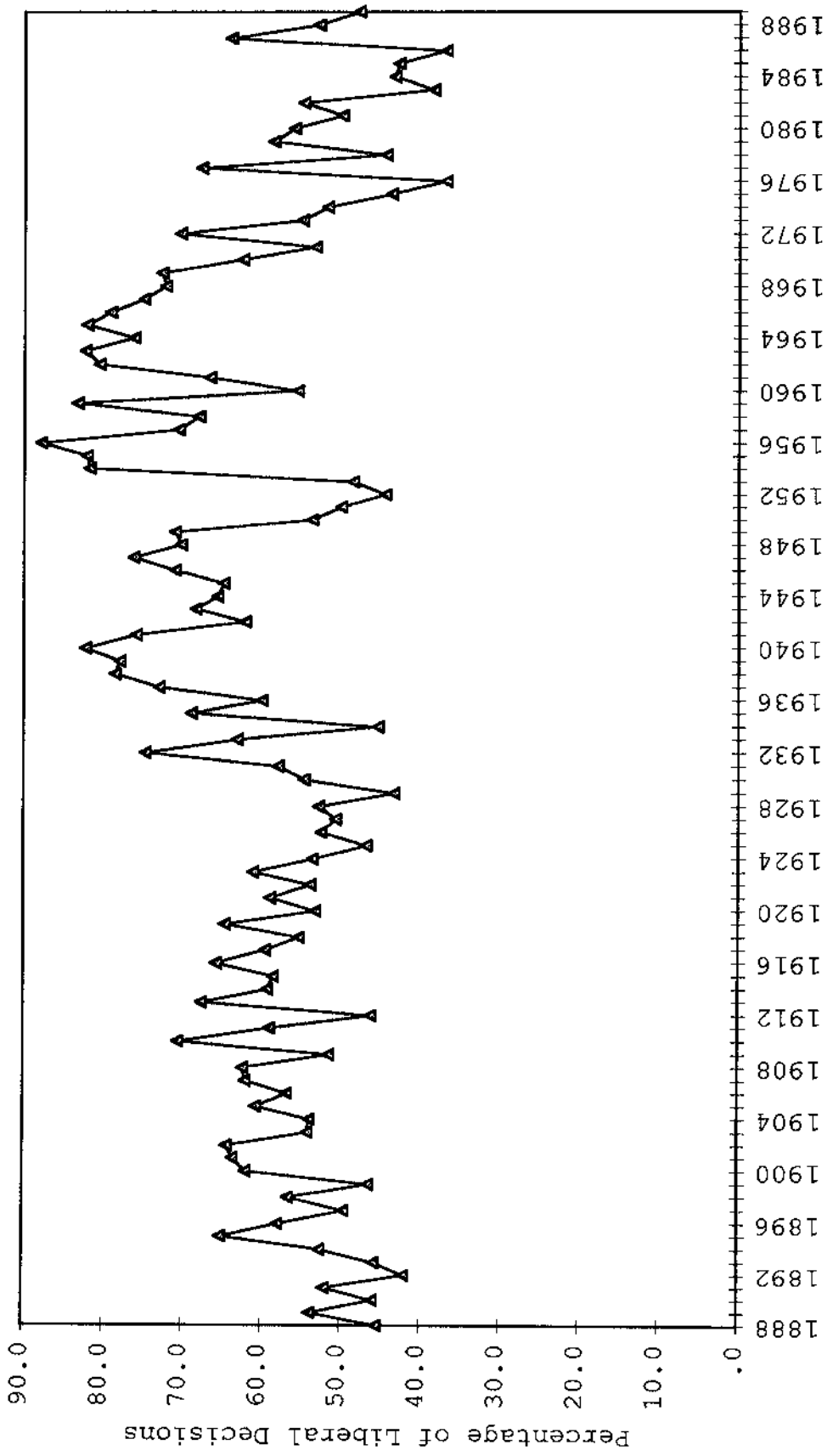


Figure 5-1. Percentage of Liberal Decisions of the United States Supreme Court in Economics Cases, 1888-1989

observed in 1956 when 87.9 percent of the Court's economic decisions were liberal; the historic low occurs in 1976 (36.8 percent). The average percentage of liberal economic decisions for the Fuller Court is 54.76. The rate for the White Court is 59.94, only a slight increase over that for the Fuller Court. These results are somewhat unexpected because of the purported laissez-faire perspective of these Courts when considering economic issues (see Schwartz 1993: 174, 209). These Courts appear to be more liberal than historical analyses have previously suggested. The Taft Court's average percentage of liberal economic decisions is slightly lower than that for the White Court, at 52.58. This result may be due to the continuing conservatism of the Court, in particular due to the conservative policy preferences of Chief Justice William Howard Taft. The Hughes Court's average, on the other hand, is 66.96, representing an increase of 27 percent in the average proportion of liberal economic decisions. The Stone Court's average does not increase appreciably from that of the Hughes Court; the former's is 67.36 percent. Thus, the Hughes Court's decision-making initiated a rather substantial change in the liberalism of economics decisions from the historic conservatism of the Court in prior years, a trend which the Stone Court, and the following Courts for that matter, continued.

As one can see, the series is somewhat dynamic through the 1930s. Prior to the 1931 term year, the series average is 55.62 percent. The pre-1930 historic low occurs in 1892 (42 percent). The pre-1930 historic high occurred in 1910, the first year of the White Court, with 70.5 percent of the Court's economic decisions being liberal. This latter result is a surprising finding given the generally conservative nature of the Court during White's tenure.

Beginning in 1932, however, the series becomes more dynamic, trending sharply upward and reaching unprecedented levels by 1940. Many scholars have suggested that the Court changed its posture toward economics issues abruptly when it began to engender high levels of public and political opposition, notably President Roosevelt's attempted Court-packing plan of April 1937 (e.g., McCloskey 1994 117-120; Schwartz 1993: 233-36). Although the series trends upward beginning in 1933, the series does increase surrounding Roosevelt's attack on the Court, and it continues to do so until 1940, when it reaches its highest point (82.3 percent) since 1888. This result supports the conclusion that the Supreme Court is sensitive to the changes in the political environment in which it operates.

After 1940, the series begins to decline to a lowpoint in 1952 when only 44.4 percent of the decisions were liberal but then, only four terms later, the series attains its

maximum. It then begins to decline sharply, reaching its historic low in 1976 of only 36.8 percent. This is an expected finding since the Court was led, beginning in 1969, by conservatives Chief Justice Warren Burger and later, beginning in 1986, by Chief Justice William Rehnquist. It also illustrates the declining liberalism of the Warren Court's economic decisions, starting in 1965. Perhaps the Court then perceived that it should conserve its political capital for other matters, particularly civil liberties and civil rights issues that were then consuming large shares of its agenda.

Pritchett (1948) examines the Court's nonunanimous decisions only, and finds that the Court ruled in the liberal direction 68 percent of the time from 1936 to 1946. This result refers to an aggregate of cases involving issues of state taxation and regulation, as well as federalism (Pritchett 1948: 89). Pritchett argues that the Court thereby adopted Holmes's conception of legislative supremacy and judicial restraint. Although it is difficult to parse out the differential effects of the issue types included in this analysis as opposed to those Pritchett examines, the results here appear to confirm Pritchett's findings since the average liberalism for economic and federalism decisions for the Stone Court is 66.15 (see Table 5-1).

Federal Taxation

Figure 5-2 displays the percentage of liberal decisions in federal taxation cases from 1888 to 1989. The series is quite volatile, which is due, in part, to the relative infrequency of tax decisions on the Court's docket, as is the case with many of the other, minor issue categories analyzed in the present study. The historic low of zero percent occurs first in 1895. The historic high (100 percent) occurs in several term years, first observed in 1891. However, this result is based upon a very small number of cases; in 1891, for example, the Fuller Court heard only one case. After 1916, the series becomes much more stable, most likely due to the higher number of decisions brought to the Court in the wake of the 16th Amendment, providing for a federal income tax. The series then trends upward rather consistently until 1946 when it becomes somewhat more stable. In 1975, the series begins to decline and by 1979 the percentage of liberal decisions is zero for the first time since 1914. Thereafter, the series once again begins to climb, attaining a percentage of 83.3 in 1989.

The chief justice court averages provide a glimpse into these changes over time. The Fuller Court's average rate of liberalism is 69.64 percent, based on 53 decisions. There

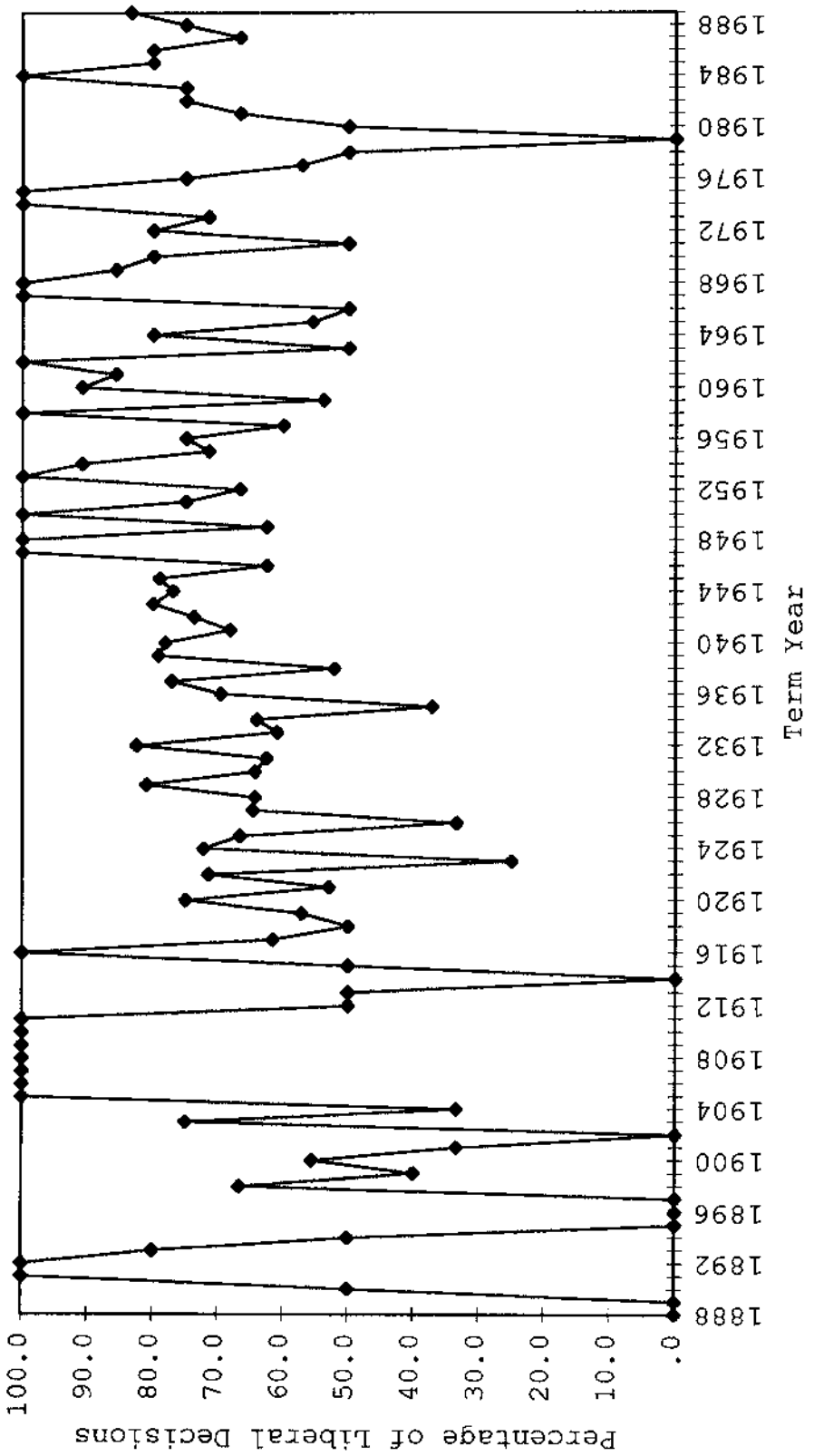


Figure 5-2. Percentage of Liberal Decisions of the United States Supreme Court in Federal Taxation Cases, 1888-1989

are only five term years (1888, 1889, 1896, 1897, and 1902) in which the Court considered no federal taxation decisions. The White Court's average increases to 63.05 percent for 51 decisions across the eleven term years. In only one year (1914) does the Court issue zero liberal decisions for this issue area.

The Taft Court's liberalism rate descends slightly to 59.06, based upon a total of 136 decisions. The Taft Court was the first Court included in this study to issue at least one liberal tax decision during every term year. Perhaps this finding indicates that the Court was becoming more liberal in its policy stances with regard to federal taxation.

The Hughes Court's liberalism rate, the first court contained entirely in the Great Depression period, is 71.81, representing an increase of about 22 percent from that for the Hughes Court. Moreover, the Hughes Court decided a larger number of federal taxation cases (N = 274), more than doubling the number on the Taft Court's docket. Similar to the Taft Court, each of the term years of the Hughes Court contained at least one liberal decision. Also, the rate for the Stone Court, composed of all Roosevelt appointees, increases modestly to 75.54. Yet, the Court heard only 101 federal taxation cases, a substantial decrease in the number of overall decisions.

These results are in some respects surprising and in others, they are expected. First, they are expected in that the series shows a generally increasing rate of liberal decisions. This result is theoretically consistent, given the changing membership on the Court. Second, from 1934 to 1946, the series is much more stable than it is in the prior or later years. This finding is also expected because of the increasing demands placed on the federal government arising from the burdens of the Great Depression. This result is strengthened by Pritchett's similar finding that the Court ruled in the government's favor in 70 percent of nonunanimous federal taxation cases (Pritchett 1948: 262). One would expect that the decisions would be liberal in policy orientation because such decisions strengthen the government's taxing power, thus providing much-needed revenue to the government so as enable it to finance New Deal programs. The series does not begin to increase immediately after 1929 because it certainly took some time to develop and implement the policies needed to remedy the macroeconomic problems the nation faced then, and even longer for the disputes to arrive at the Court for resolution.

All the term years for that period achieve liberalism rates that are 50 percent or greater; nine of the 16 years have rates that are 60 percent or greater. However, the

series during the Warren Court appears to decline moderately. Additionally, the results are as one would expect based upon other analyses of the Court's policy preferences for this issue category (Segal and Spaeth 1993: 244).

The results of this analysis of the liberalism of federal taxation decisions are somewhat surprising in several respects. During the Fuller, White and Taft Courts, the series is no lower than 53 percent liberal. Indeed, during the White and Taft Courts, the average remains around 60 percent. These findings are surprising given the alleged conservatism of the Court's policy stances during the White and Taft Courts (see Schwartz 1993: 212-24; McCloskey 1994: 96-108). One would expect that the Court's decisions would be more consistently conservative than the results actually portray. This trend of increasing liberalism mirrors the rise of such policy outputs that occurs with respect to other issue areas, such as economic decisions.

Second, the Fuller Court's liberalism in these decisions is somewhat unexpected in that only four of the 21 term years in which the Court actually heard a federal taxation case (1895, 1899, 1901, and 1904) attain scores of less than 50 percent. It reaches a perfect liberal score (100 percent) in seven term years, although these scores represent no more than two decisions in any term year.

These results, too, are surprising because of the putative conservatism that the Court expressed toward concerns of substantive due process, most clearly expressed in Pollock v. Farmer's Trust (1894) (striking down a federal income tax law), even when one discounts the findings in the years with only a handful of these decisions.

Third, as with other issue areas, the Burger (1969-1986) and Rehnquist (1986-present) Courts are more liberal than one would anticipate given the alleged conservatism of both these chief justice courts. From 1969 to 1986, there is only one term year (1979) whose rate is less than 50 percent. The remainder are 50 percent liberal or greater. During the first three years of the Rehnquist Court term years analyzed here, the series remains above approximately 65 percent liberal. Thus, this figure and its analysis belie a somewhat different description of the liberalism of the decisions of the Fuller, White, Taft (through the 1932 term), Burger and Rehnquist Courts, while it meets one's expectations based upon other studies of the post-1932 Taft Court, the Stone Court, and the Warren Court.

Judicial Power

Figure 5-3 plots the percentage of liberal decisions involving issues of judicial power. As the figure clearly shows, the series increases modestly until 1963 when it

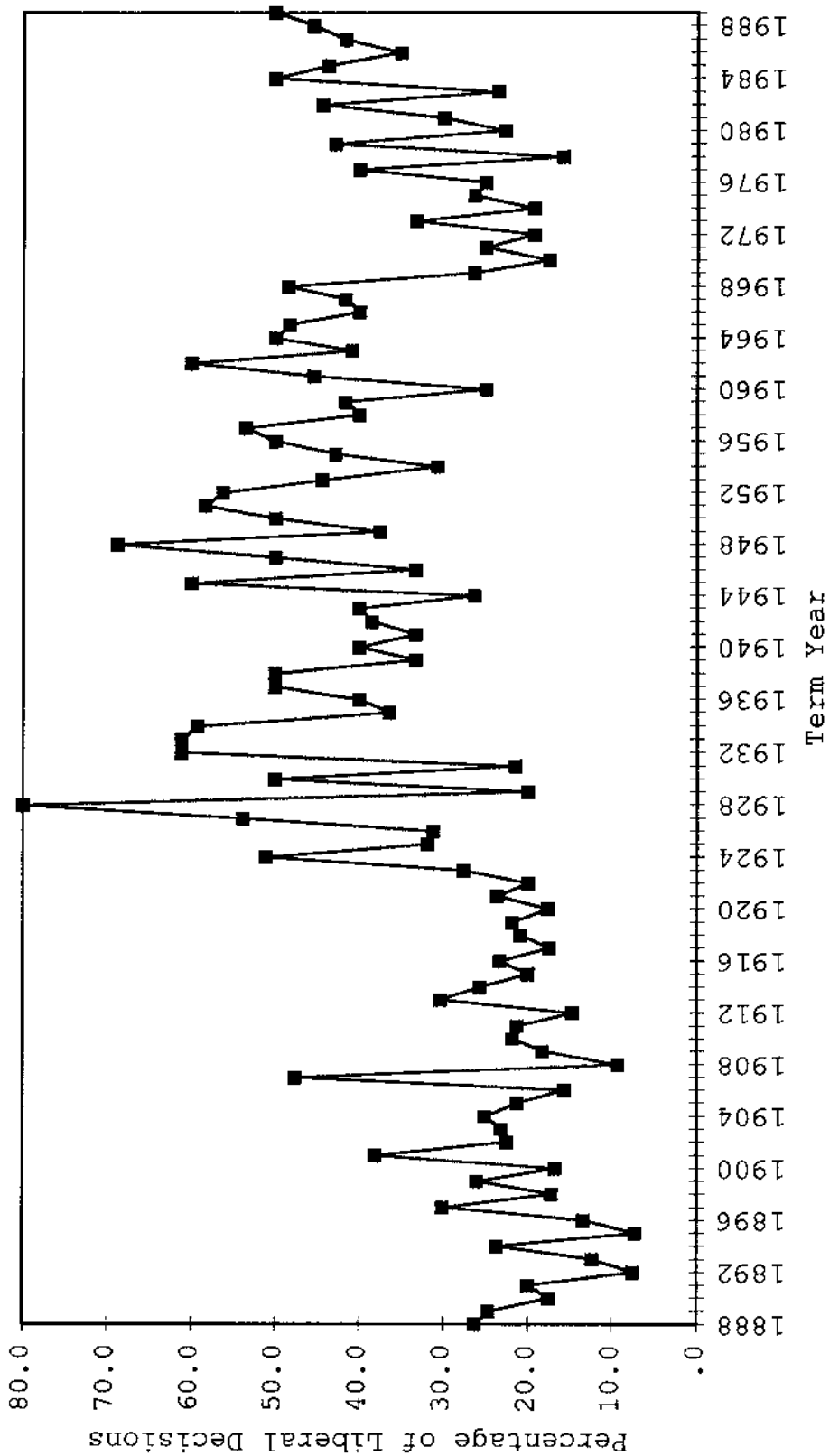


Figure 5-3. Percentage of Liberal Decisions of the United States Supreme Court in Judicial Power Cases, 1888-1989

begins to decline. It does so until 1970 when it turns upward once again. Given the Fuller Court's alleged distaste for governmental intervention in the economy and the social order in general, it is expected that the Court's decisions in this area would be, in general, relatively conservative. The Court members may have felt a compulsion to deny their judicial colleagues powers that they denied to other governmental actors at various levels throughout the political system. The rates for only two of the 22 years comprising the Fuller Court exceed 30 percent. The historic low for the series (7.3 percent) is observed in 1895, during the heyday of the Fuller Court's battle with the Progressive forces. The average liberal percentage of the Fuller Court is 21.03, indicating that one out of five decisions of the Court was liberal.

The White Court was similarly conservative in its outlook on issues of judicial power. The series during White's tenure is somewhat more dynamic and it turns out to be very slightly more liberal too (21.32 percent on average). However, the series does increase during Chief Justice Taft's tenure (1921-1930). It trends upward consistently and, in 1928, the series hits 100 percent, its historic high, in 15 decisions. The series average during Taft's Court rises to 37.68, indicating that the Court became much more liberal over time as compared to its

predecessors. The intervention of the passage of the Judges' Bill of 1925 may explain the increases in liberalism during this period because the Court may have had to resolve more controversial issues as a result.[2] The Court also may have perceived the Act to imply that courts generally should be involved in more matters and, thus, be given more power of administration.

This trend toward expanded liberalism continues with the Hughes Court. The Court's average is 45.69, a change of eight percent from that observed during the Taft Court. Although the series is on average larger in magnitude during the Hughes than it is during the Taft tenure, the series initially increases but then begins to decline in 1935 and does so through 1944. This diminished level of liberalism continues in the Stone Court; its average is 39.62, a slight decrease from the average observed during the Hughes Court. However, the figure indicates that the series is somewhat more consistent during the Stone Court than in the prior Court. Thus, the Stone Court perhaps consolidated the movement toward a greater degree of liberalism in decisions involving issues of judicial power that began with the Taft Court some twenty years earlier.

After the Stone Court, the series declines to 17.4 percent in 1970. In 1978, the lowest point in the series since 1908 is observed (15.8 percent). Thereafter, the

series begins to increase rather consistently, indicating that the Burger and the Rehnquist Courts were moving toward a relatively increased level of liberalism. Indeed, the last term year of the Rehnquist Court (1989) analyzed here attains a moderate rate of 50.0 percent (in 20 decisions), although this does not exceed the much consistently higher rates of liberal decisions that are observed during the Taft and Stone Courts and, to a lesser extent, during the Hughes Court.

Criminal Procedure

In addition to these issue areas, the Court issued decisions involving questions of criminal procedure. Figure 5-4 displays the percentage of liberal decisions in criminal cases during each of the term years from 1888 to 1989. There are three term years (1901, 1904, and 1928) in which the Court issued no liberal decisions in this area, although the Court did have the opportunity to hear such cases. Among the term years in which the Court issued at least one liberal decision in this area, the historic low (8.3 percent) occurs in 1921 and in 1923. The series also hits its maximum of 100 percent in 1935. Excluding that term year (because it represents only three decisions), the historic high is observed in 1963 when 83.8 percent of the Court's criminal decisions were decided in the liberal

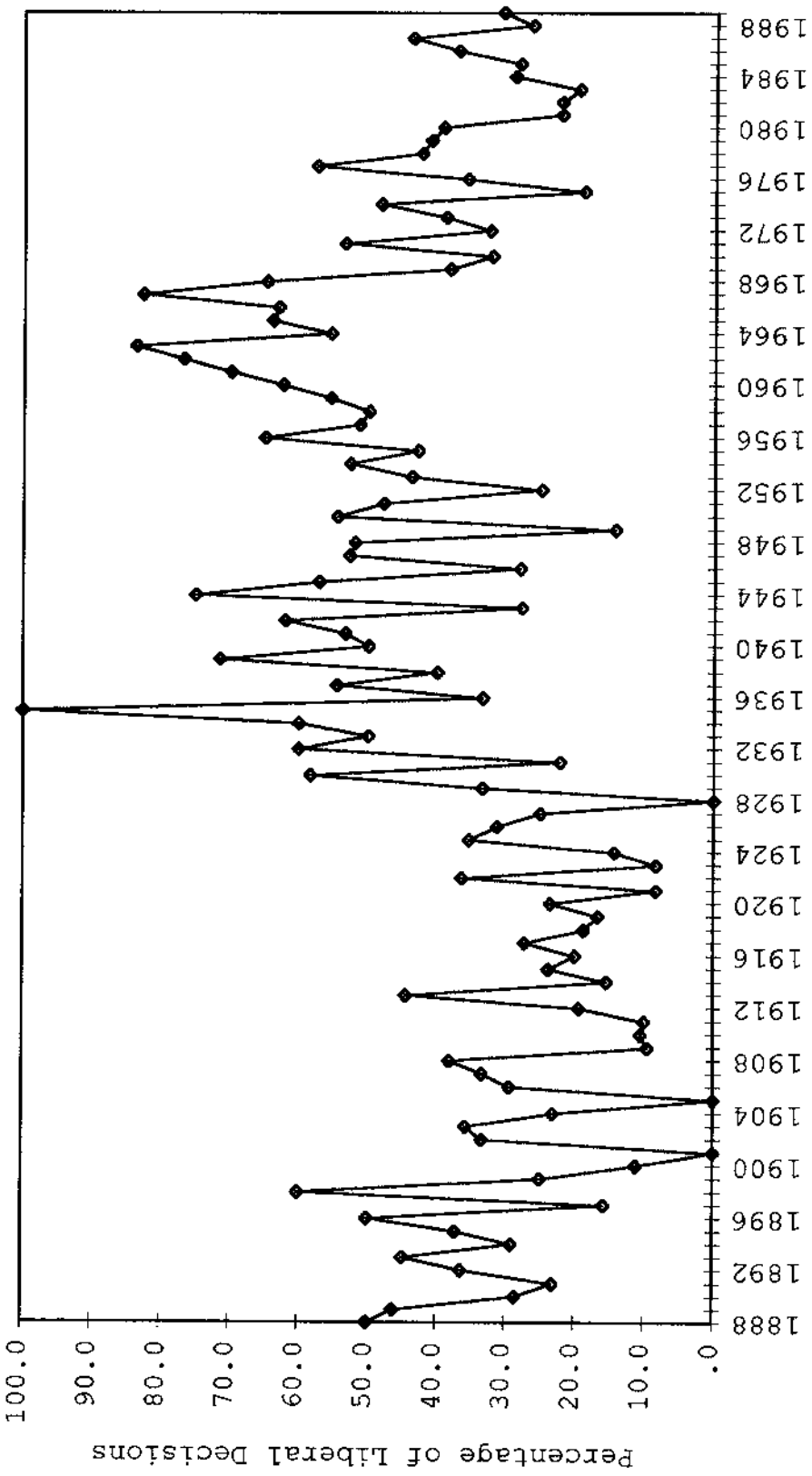


Figure 5-4. Percentage of Liberal Decisions of the United States Supreme Court in Criminal Cases, 1888-1989

direction, that is favoring the rights of the accused.

Over time, the series is rather dynamic. From 1888 to 1928, the series declines. Beginning in 1928, however, the series increases dramatically, reaching 100 percent in 1935, when it begins to trend downward once again. From 1953, the year that Earl Warren ascended to the center chair, the percentage of liberal decisions increases consistently and rather strongly until 1963, when it dips to 64.9 percent in 1968. From 1969 to 1989, the series exceeds the 50 percent point only twice. During the Burger Court years in particular (1969-1986), the series indicates that the Court became more conservative and declined rather precipitously from 1977 (57.6 percent liberal) to 1983 (19.6 percent liberal).

The chief justice court averages for the Fuller, White, Taft, Hughes and Stone Courts provide an overview of the changes in the Court's decision-making over time in matters of criminal law and procedure. The average liberalism rate for the Fuller Court is 31.41 percent, while that for the White Court is 20.89 percent, representing a move toward less liberalism (or more conservatism) of 33 percent. The Taft Court is nearly identical to the White Court, with its average liberalism rate being 21.36 percent. The Hughes Court, however, is substantially more liberal on average (54.52 percent). This represents an increase of 23 percent

from the liberalism rate observed during the Taft Court. The Stone Court continued the Hughes Court's practice, with 55.06 percent of its decisions being liberal in direction. However, Pritchett (1948) finds that the Court from 1941 to 1946 held for the accused in 41 percent of the nonunanimous cases involving questions of the right to counsel, jury trials, coerced confessions, search and seizure, and martial law (1948: 141).

Additionally, this study and Epstein, Walker and Dixon (1989) find that the liberalism of the Vinson Court's (1946-1953) criminal procedure decisions declines through 1949, but then begins to increase in 1953 when Earl Warren takes the center chair (Epstein, Walker, and Dixon 1989: 834). In 1953, the series consistently increases until 1969 when it surprisingly begins to decline rather quickly during the first term year of the Burger Court (Epstein, Walker and Dixon 1989: 834). The series trends strongly downward, not surprisingly, during the Burger and the Rehnquist Courts, given the putative policy perspective of both those Courts (Epstein, Walker and Dixon 1989: 834).

Civil Rights

As Chapter II discusses and Chapter III demonstrates, there were very few civil rights cases on the Court's agenda prior to the 1940s. The Court's docket was filled with more

pressing economic concerns as the nation strove to adapt the challenges of growing industrialism and the Great Depression. Structural constraints, thus, prevented the Court, at least in part, from considering such questions. Moreover, the political context in which the Court engaged in decision-making simply was not conducive to hearing these issues debated. The Court under the helmsmanship of Fuller, White and Taft held conservative policy preferences with respect to questions of civil rights and civil liberties generally. Perhaps the most noteworthy civil rights case the Court decided during the pre-1940 period was Plessy v. Ferguson (1896), which certainly announced a conservative policy perspective on race relations as the nation was on the verge of new century. However, this decision would later provide fodder for the Court to initiate a change in its civil rights policy stances (e.g., Brown v. Board of Education (1954)).

As Figure 5-5 indicates, the series is very dynamic, moving from zero percent to 50 percent or greater and then back again between several terms. It does not become stable and evince any significant degree of consistency until 1948. This dynamism in the series is due, in part, to the relative infrequency of these types of cases being brought to the Court for resolution prior to that time. The Fuller, White and Taft Courts collectively heard 149 cases, which is

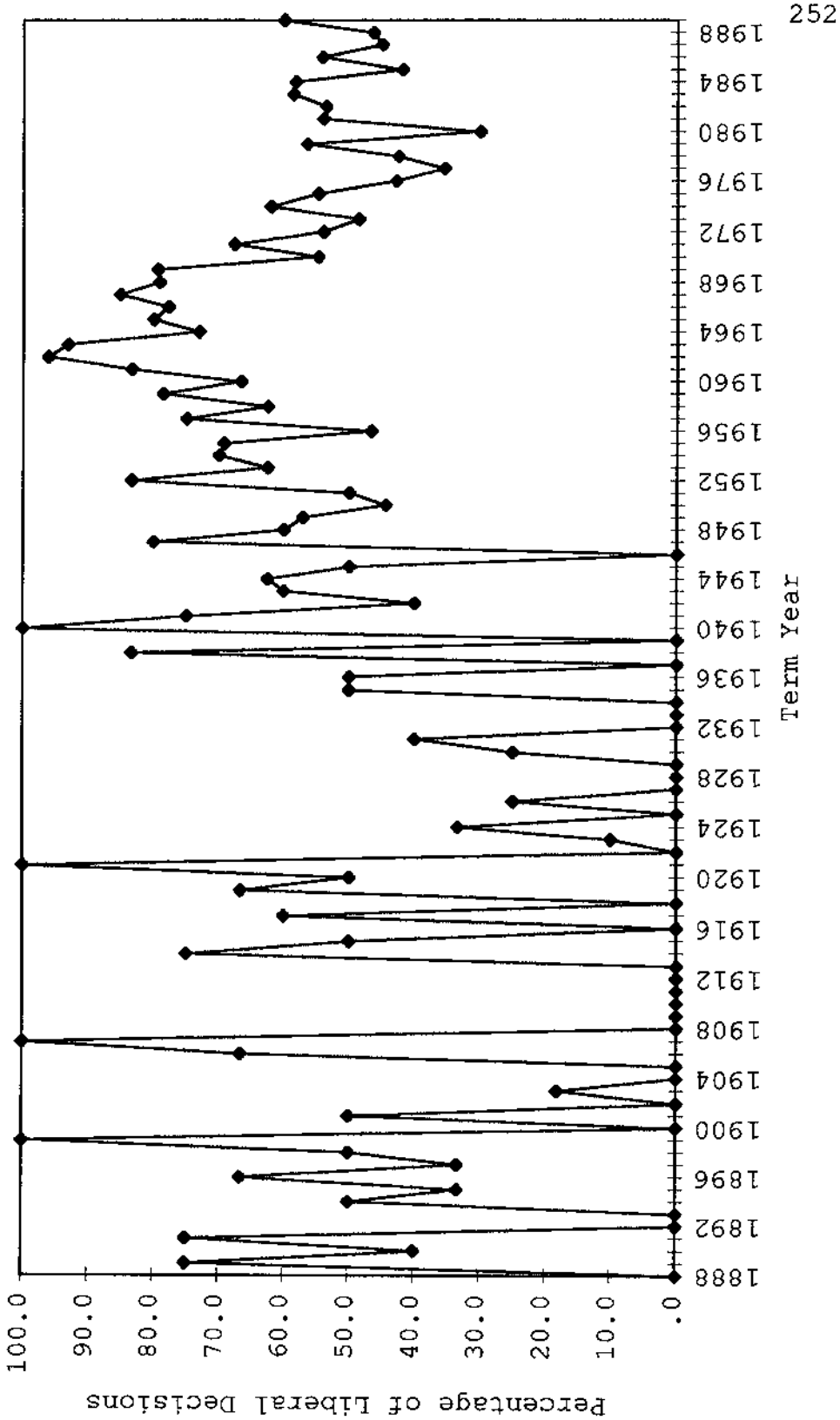


Figure 5-5. Percentage of Liberal Decisions of the United States Supreme Court in Civil Rights Cases, 1888-1989

slightly more than 3 cases on average per term year.

From 1888 to 1947 (60 term years), the series overall exceeds 50 percent liberal 24 times. From 1948 to 1989, on the other hand, the series meets or exceeds the 50 percent mark 32 times during the 42 term years. Thus, three-quarters of these later terms are associated with a relatively liberal period of Supreme Court decision-making for this issue area. After 1950, the series increases rather consistently through 1966. It reaches its historic high in 1962 (96.2 percent liberal), setting aside the 100 percent rates observed in the pre-1948 period because of a low number of decisions then. From then until 1979, the series begins to trend downward. However, the series then rebounds somewhat in the latter years of the series and begins to experience less change from one term year to the next. The post-1948 historic low is observed in 1980 when 30 percent of the civil rights decisions were liberal.

The chief justice court averages inform us about the change in the Court's perspective on matters of civil rights. The Fuller Court's average percentage of liberal decisions is 34.46 based upon 71 decisions across the 22 terms. The White Court's average is 27.43 based upon 33 decisions, indicating a slight decrease in the liberalism of the Court across these two chief justice courts. The Taft Court continued the trend toward decreased liberalism; its

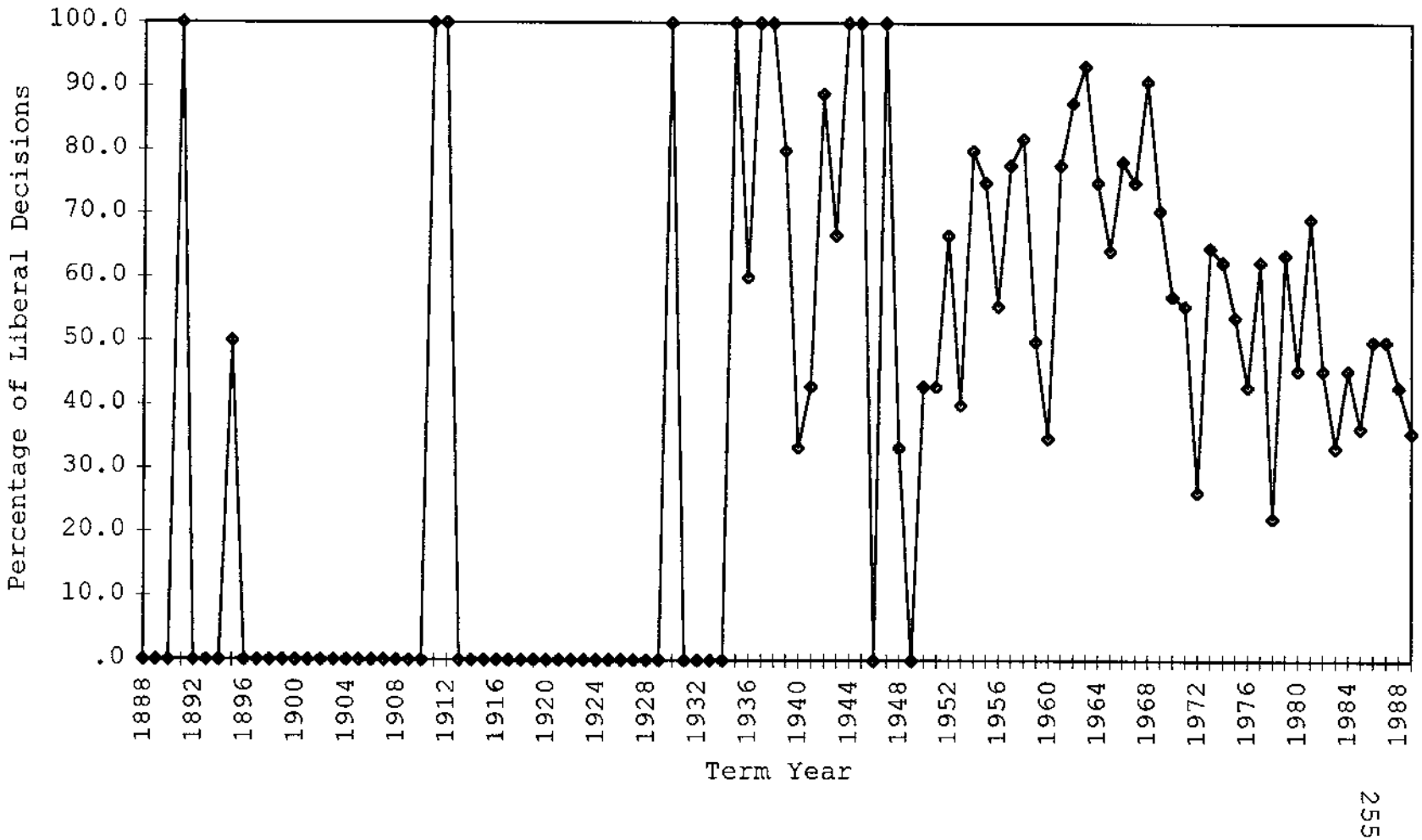
average is 24.04 in 45 decisions. Indeed, Figure 5-6 portrays that decline. There are many term years prior to 1921 whose scores are at or above the 40 percent mark, while there are none that exceed that mark during the Taft Court.

During the first years of the Hughes Court, the liberalism of these decisions continued to decrease. The average rate of liberalism from 1930 to 1935 is 23 percent. But in 1938, the Court's decisions became much more liberal. This increase in liberal policy preferences for decisions involving questions of civil rights may be due to the Court's liberal policy preferences in other issue areas. In fact, the Hughes Court's average liberalism rate is 43.54 percent, a 19 percent increase over that for the Taft Court. The Court under Stone's leadership similarly garnered an average of 57.50 percent, representing an increase of 14 percent over the level reached during the Hughes Court. Hence, the Court's civil rights jurisprudence underwent a drastic transformation over time. In particular, it moved toward an increased level of liberalism during the last 41 years of the series when it decided this type of case.

First Amendment

Figure 5-6 plots the percentage of liberal decisions of the Supreme Court in First Amendment cases. The first finding that is apparent is that from 1888 to 1934 there are

Figure 5-6. Percentage of Liberal Decisions of
the United States Supreme Court in First Amendment Cases



only five years with any liberal decisions. During the Fuller, White and Taft Courts, only 23 First Amendment decisions were announced. When such decisions were announced by the Court in the pre-1930 period, they were rather conservative, the series being on average less than about 30 percent liberal across the Fuller, White and Taft Courts.

However, from the time of the United States' entry into World War I in 1917 to the end of the War, there are no liberal decisions even though the Court considered First Amendment questions in 1917, 1918, and 1920. This finding confirms the historical analyses of Schwartz (1993: 221-23), McCloskey (1994: 115-16) and Biskupic and Witt (1997: 37) who suggest that the Court became much more conservative when dealing with First Amendment issues surrounding the War due to concerns about national security. Between 1934 and 1949, the series becomes somewhat more stable, although there still remains a good amount of movement from one term year to the next, which is perhaps due in part to the low number of cases the Court considered dealing with these issues. After 1949, the series' movement across term years is vastly reduced. It increases from that point in the series until 1963, after which it begins to trend downward until 1976 when it once again turns modestly upward.

The chief justice court averages summarize these changes in the Court's decision-making in First Amendment cases during the pre-1946 period. There is an increasing rate of liberalism, generally, across the four Courts considered in the present study. The Fuller average is 30 percent, based on six cases in five term years (1891, 1895, 1896, 1899 and 1908). The average rate of liberalism increases to 33 percent for the White Court, based upon 12 decisions in six term years (1911, 1912, 1914, 1917, 1918 and 1920). This result comports with historical analyses of the Court that suggest that the Court's decision-making became somewhat more liberal during the White Court (McCloskey 1994; Schwartz 1993).

However, the series then declines to zero percent liberal during the Taft Court, based upon five cases in three term years (1922, 1924 and 1928). This finding similarly supports Schwartz's (1993) and McCloskey's (1994) observations about the retrenched conservatism describing the Taft Court's decision-making. The series' average dramatically climbs to 81.90 percent during the Hughes Court, based on 18 decisions in seven term years (1930, 1935, 1916, 1937, 1938, 1939 and 1940). The liberalism rate during the Stone Court declines slightly to 79.70 percent, based upon 25 decisions in five term years (1941 to 1945). Pritchett (1948) finds that the Court ruled liberally in 62

percent of its nonunanimous, first amendment decisions (1948: 131). Hence, the Court decision-making in matters of First Amendment issues became more consistently liberal over time, most especially during the period from 1930 to 1945.

This finding of increased liberalism is expected. Based on the observations and results of the existing literature examining the Court's decisions in related issue areas (Epstein, Walker, and Dixon 1989), the Court is hypothesized to be relatively conservative in its perspective on First Amendment issues from the latter nineteenth century to well into this century (e.g., McCloskey 1994: 115-16). The Court is found in this study to have been particularly restrictive of rights of free expression and free exercise of religion during the First World War, but it was, somewhat unexpectedly, relatively liberal during the Second World War. During that period, the Court did not revert to the lower levels of liberalism observed during the era of World War I that arose from concerns of national security due to the country's involvement in a global conflict. Only two term years of the World War II era are associated with rates of less than 50 percent.

Certainly, the personnel of the Court had changed in the interim between the Wars: the Court during the 1940s

and the entire War period was composed of nine Roosevelt appointees who were noted for their liberal policy orientations (Pritchett 1948). In fact, the Court in 1943 overruled its prior decision requiring Jehovah's Witnesses to salute the flag even though such action violated their religious beliefs (Pritchett 1948: 98-99). Thus, the Court became more expansive during the 1930s and 1940s in its view of the civil liberties protections the Constitution required. These rulings would later serve as precursors to the increased liberalism of the Warren Court.

Due Process

Figure 5-7 shows the percentage of liberal decisions dealing with due process issues. As one can see, there is no apparent trend to the series. It moves abruptly from one term year to the next. However, the series does reach 100 percent many times during the period from 1933 to 1940. The other term years (1888 to 1932, and 1941 to 1945) achieve percentages that are somewhat less liberal and somewhat more consistent than the rates observed during the last seven years of the Hughes Court (1933-1940).

To provide some indication of the Court's liberalism over time, the Chief Justice Court averages are when dealing with First Amendment issues surrounding the War. The Fuller Court average is low, at 18.25 percent, based upon 112

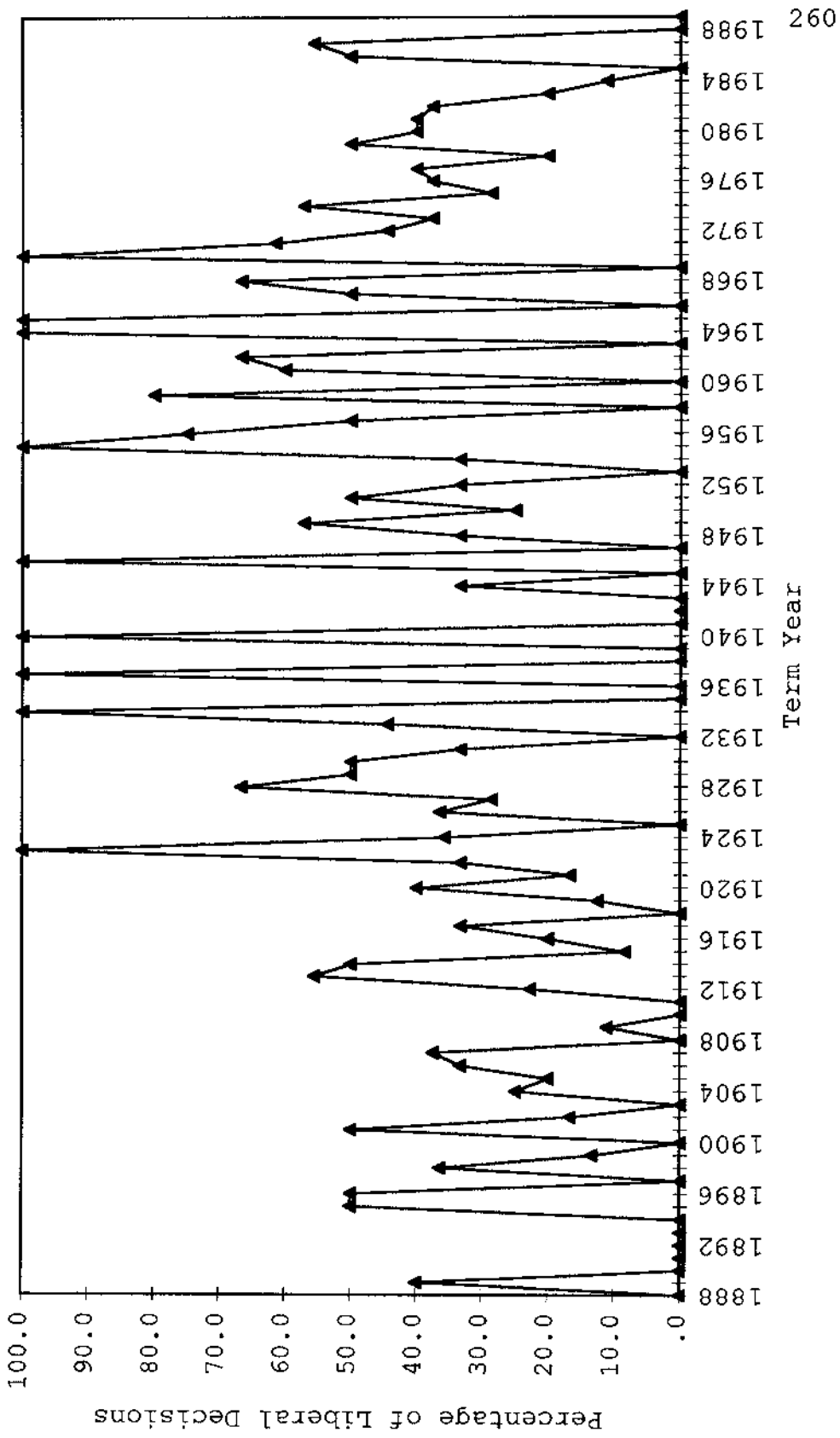


Figure 5-7. Percentage of Liberal United States Supreme Court Due Process Decisions, 1888-1989

decisions in 21 of the 22 term years during Fuller's tenure. The series increases somewhat during the White Court, whose average is 22.04 percent based upon 97 decisions across the 11 term years of White's tenure. This result indicates that the Court became somewhat more liberal in the period from 1910 to 1921, again confirming the alleged growth in liberalism during the White Court. The Taft Court, on the other hand, is much more liberal than its predecessors, its average being 40.82, based upon 54 decisions, across these nine years of Taft's tenure. The Hughes Court was somewhat more liberal than was the Taft Court, with 47.52 percent of its due process decisions being liberal on average (based upon 32 decisions) across the 11 term years it comprises. The Stone Court became much more conservative in its due process decision-making, with an average liberal decision-making rate of 6.66. Hence, the Court's decisions in the area of due process were at first rather conservative, became much more liberal during the next 30 term years, and then ended up being more conservative, on average, than they initially were.

At the end of the series, the percentage of liberal decisions declines, beginning in 1971 and continuing through 1985. This drop certainly reflects the effect of the leadership of Chief Justice Warren Burger and Chief Justice William Rehnquist, and the growing conservative policy

perspectives that the justices on those Courts possessed. However, one should remember that the results for the pre-1945 period are based on relatively small numbers of decisions during each term year, although they do give some perspective on the liberalism of the Court's decisions during the period at hand.

Privacy

Figure 5-8 portrays the percentage of liberal privacy decisions that the Supreme Court issued from 1888 to 1989. As Pacelle (1991) indicates, the Court did not consider many decisions involving privacy issues prior to the 1960s and 1970s, largely because the Court had not specifically read the Fourth Amendment as protecting against governmental intrusions. However, in Olmstead v. U.S. (1928), Justice Brandeis, in dissent, argued that evidence gathered as a result of a wiretap on a telephone violated the search and seizure provisions of the Fourth Amendment, a key part of the reasoning that would later become part of the Court's enunciation of privacy rights within the Constitution. Indeed, prior to this time, the figure bears out Pacelle's findings since the Court considered in 1945 the first privacy case, which it decided liberally. The Court also considered one privacy case in 1957 but ruled conservatively.

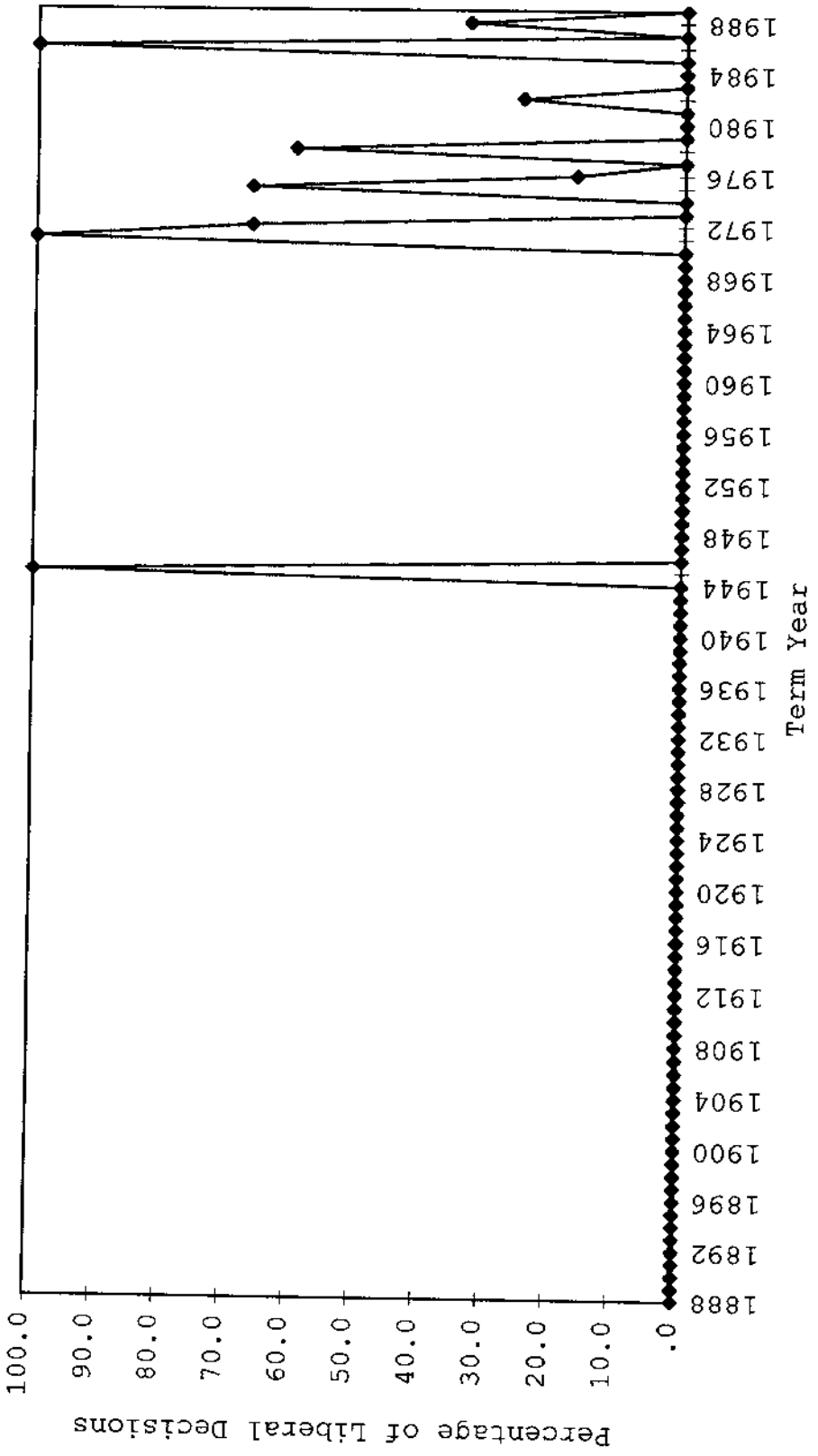


Figure 5-8. Percentage of Liberal Decisions of the United States Supreme Court in Privacy Decisions, 1888-1989

The records of the Burger and Rehnquist Courts are somewhat mixed. From 1969 to 1986 (the Burger Court years), the series exceeds 50 percent only four times. The remainder of the term years are found to attain liberalism rates of less than 30 percent, and oftentimes the series is observed to be zero percent. During the Rehnquist Court, the Court attained a rate of 100 percent in 1985, but fell back to zero percent the next term year. The series rebounds to 33.3 percent in 1988, but then declines once again to zero percent in the final term year, 1989.

Federalism

The final issue that is discussed in this part of the study involves cases deciding issues of federalism; it is displayed in Figure 5-9. As with several other of the series examined above, this series is quite volatile. There are several term years, especially in the early part of the Court's history, that move from zero to 100 percent rather abruptly. The series becomes less abrupt briefly from 1933 to 1959.

The Fuller Court's average rate of liberal decisions is 59.80 percent, based upon 50 decisions in 20 term years. Only two term years (1897 and 1898) contain no federalism decisions. This finding is somewhat surprising given the Fuller Court's purported policy perspective on questions of

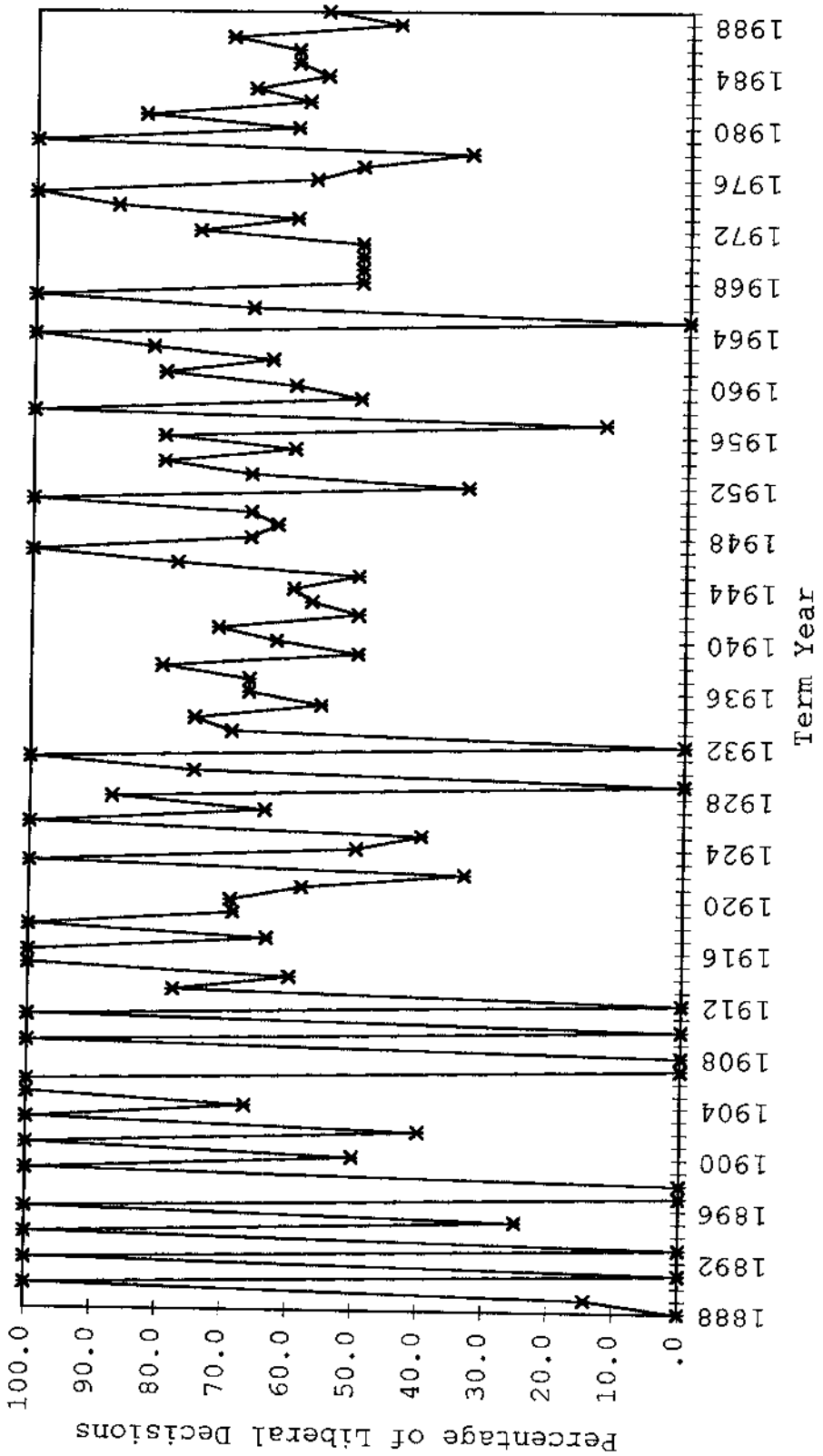


Figure 5-9. Percentage of Liberal Decisions of the United States Supreme Court in Federalism Cases, 1888-1989

regulatory power. However, the Fuller Court may have been ensuring that the Federal government was supreme over the powers of the states. These rulings may have paved the way for the Court in later years to begin to incorporate the protections of the Bill of Rights against the states through the Due Process Clause of the Fourteenth Amendment.

The White Court's federalism decisions are more liberal, attaining an average rate of 73.94 percent in 67 decisions. Only one term year (1912) had no federalism decisions. Moreover, as one can tell from the figure, the series during this time becomes more consistent. There is less movement from one term year to the next. Hence, the Court's perspective on issues of Federalism may have begun to coalesce. By upholding federal power vis-a-vis the states, the Court may have unwittingly created precedent that laid the groundwork necessary for the transformation in the Court's outlook on the larger question of governmental power to remedy social and economic problems that were to occur over the next 20 years and particularly during the Hughes Court.

The Court's decisions during the Taft and Hughes Courts bear out this change. The Taft Court's average rate of liberal decisions is 66.64 percent (based upon 69 decisions). During the Hughes Court (and in particular after 1932), the series becomes much more stable, with

movement between term years limited to around 13 percent on average. The largest change between term years is 30 percent which occurred only once, between 1938 (80 percent) and 1939 (50 percent). The Court's average rate is 63.70 (in 172 decisions), although the series does move downward modestly.

This decline in liberalism continues during the Stone Court. Its average is 57.70 percent (in 38 decisions), a decline of six percent from the level observed during the Hughes Court. However, as the figure shows, the series is rather stable during Stone's tenure. It neither increases nor decreases appreciably. The Stone Court's decision-making in federalism cases appears, thus, to be a rather quiet point positioned between the bitter battles over Federal power that characterized the decision-making of the Court during the New Deal and the coming battle that the Warren Court was to wage, dealing with the conflict over federal and state power in the realm of civil liberties and civil rights.

Indeed, when one examines the figure for the 1960s, one finds that the series becomes much more dynamic than it had been during the latter part of the Hughes Court and the Stone Court. The change from one term year to the next is quite large for several years, even though the Court heard 96 cases across Warren's tenure (1953-1969). Overall,

however, the series average for the Warren Court suggests that the Court's decisions were relatively liberal. Its average rate of liberal decisions is 65.71, thus indicating a swing back to an increased level of liberalism that was observed during the White Court. Thereafter, the series becomes somewhat less liberal. The averages for the Burger and the Rehnquist Courts are, respectively, 64.52 and 57.50. Thus, even during the putative conservative years of these Courts, more than one-half of the Supreme Court's decisions involving federalism issues were liberal.

Attorneys

In addition to decisions involving issues of federalism, the Court during the period of study considered issues involving the regulation of attorneys. Figure 5-10 shows the percentage of decisions dealing with such issues that were decided liberally. As one can see, there is no clear trend to the series. The function line is quite dynamic, moving from zero to 100 percent and then back in several of the term years. Although there are increases surrounding the Great Depression, they are short-lived and do not portray a consistent pattern that depicts an underlying tendency of growth or decline in the liberalism of these decisions. Much of the movement in the series arises because of the relatively small number of cases on

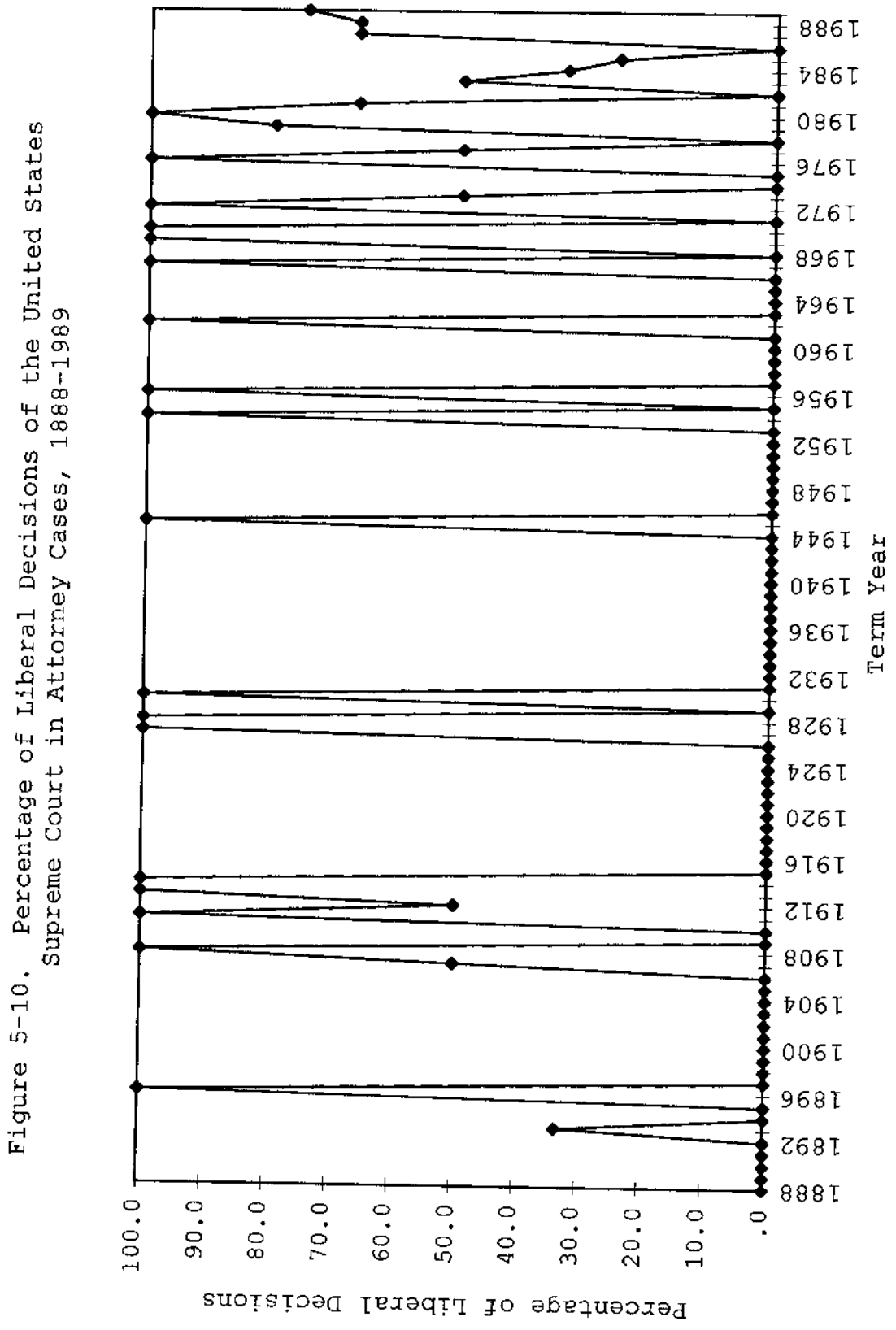


Figure 5-10. Percentage of Liberal Decisions of the United States Supreme Court in Attorney Cases, 1888-1989

the Court's docket.

The Fuller Court heard this type of case during only nine of its 22 term years. These are 1890, 1891, 1893,1895, 1896, 1906, 1907, 1908, and 1909. In the other 14 terms, the Court did not consider any such cases. During the terms that the Fuller Court actually did hear at least one attorney case, the average percentage of liberal decisions is 31.48 percent. However, the Court considered only 13 cases during these years.

The White Court's docket contained no attorney decisions in only three (1916, 1917, and 1920) of its 11 term years. During the years in which the Court did actually hear at least one such case, the liberalism rate is 50 percent. However, the number of decisions on which this rate is based is quite low, at nine cases across the entire period of the White Court.

The Taft Court heard attorney cases in only four term years (1922, 1925, 1927, and 1928). During these years, the average liberal percentage was 25 percent. Yet, much like the prior Courts, the Taft Court only heard a total of five attorney cases across its ten term years.

The Court under Charles Evans Hughes heard only two cases. It heard one case each during the 1930 and 1931 term years. One was decided liberally; the other in the conservative direction. Thus, the Court's average liberal

percentage for these cases is 50 percent. Similarly, the Stone Court only heard two cases during its five years: one each in 1944 (decided in the conservative direction) and in 1945 (decided in the liberal direction). Hence, the average liberal percentage for the Stone Court's decision-making in attorney cases is 50 percent.

Unions

Figure 5-11 shows the percentage of union decisions that were decided liberally. The historic high for the series is 100 percent, which is achieved in several term years. The historic low is zero percent, which is also observed in several term years. As with Figure 5-10 (dealing with matters of attorneys), the series displaying the liberalism of union decisions is quite dynamic, moving abruptly from one term year to the next, and displaying no clear trend, until 1954. This pattern is due to the relatively small number of union cases that the Court considered. This consistency in liberalism in these decisions that it did announce could be associated with the Court's perception of the need for legal protection of the interests of unions during the expansion of Constitutional rights to other "underdogs" (Ulmer 1978).

After 1954, the series' movement across term years drastically decreases and the series generally becomes

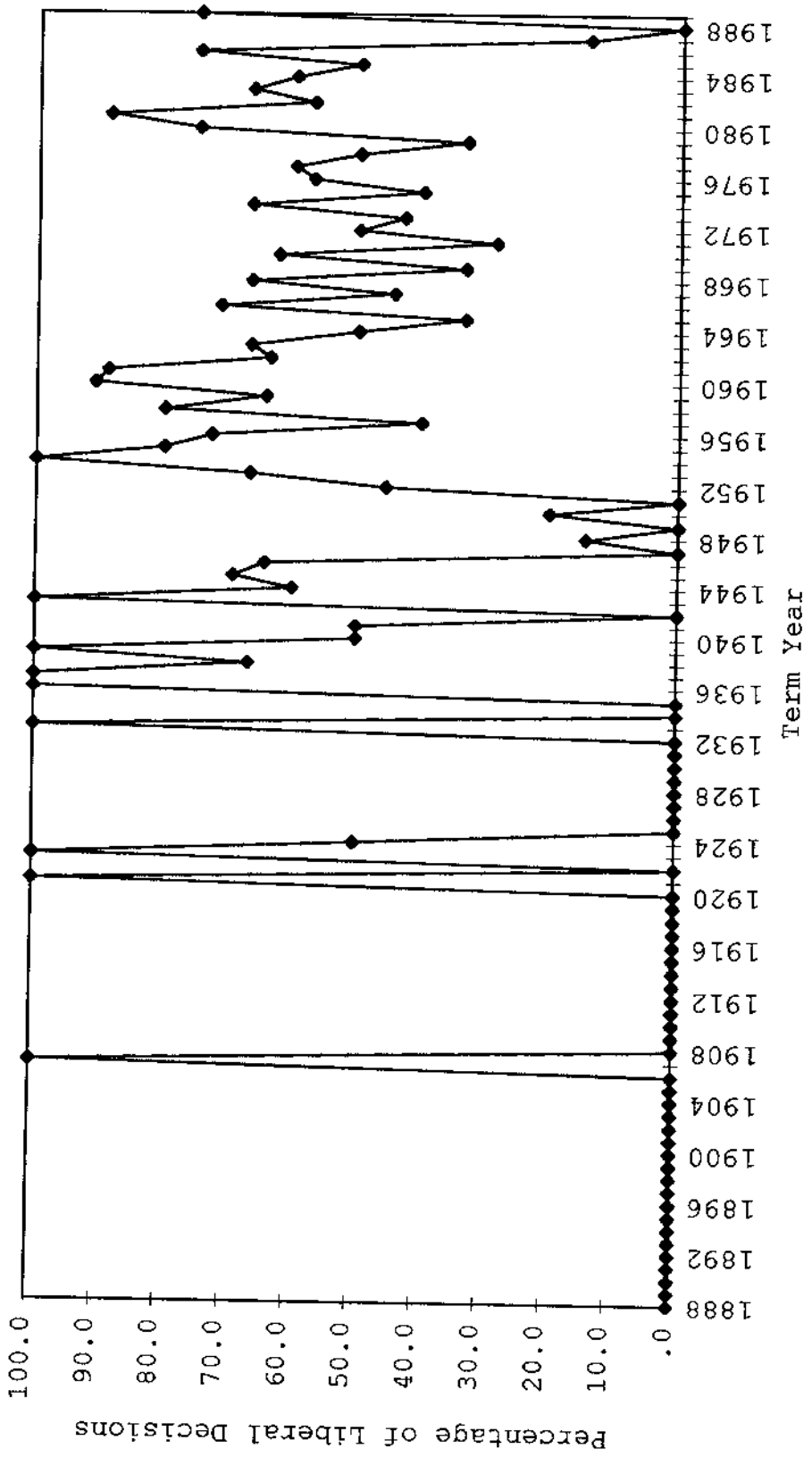


Figure 5-11. Percentage of Liberal Decisions of the United States Supreme Court in Union Cases, 1888-1989

somewhat more stable due, in part, to union cases being a consistent component of the Court's agenda, although there remains a large amount of movement across term years. The series also then begins to trend downward until 1961. This decline is a somewhat surprising trend given the Warren Court's liberalism in other issue areas (such as civil liberties) that have their genesis in regulatory areas such as union decisions (Pacelle 1991: 120-21). After 1971, the series changes course and begins to trend upward until 1981 when it again turns downward. This too is an interesting (and somewhat surprising finding) given the Burger Court's putative conservatism on economic issues. At the end of the series, the changes between term years appear to become more dramatic, with the series returning to the level of liberalism observed prior to 1954.

As has been done with the other series, the average percentages for each of the first four Chief Justice courts are calculated for this issue area. The Fuller Court's average is 50 percent, although this rate is based upon the decisions in only two term years (1907 and 1908). The White Court's average is zero percent, although it heard four union cases (cumulatively) in 1911, 1914, 1917, and 1920. The Taft Court's rate is 83.33 percent across three term years (1921, 1923, and 1924). However, this figure is also based upon a very small number of decisions: the Taft Court

issued only four rulings involving questions of unions.

Union cases become much more frequent during the Hughes Court, attaining an average of 86.12 percent liberal outcomes. Although the Hughes Court rate is similar to that for the Taft Court, the figure for the Hughes Court is based on a much larger number of cases (27, as opposed to only four). Thus, the results for the Court during Hughes's tenure may be a more accurate representation of the Court's policy preferences with respect to union cases than the rate for the Taft Court.

Finally, the Stone Court's decisions reflect an average rate of liberal decisions is 69.80 percent. In four of the Stone Court's five term years, 37 union decisions were issued. Similarly, Pritchett (1948) finds that the Stone Court ruled in the liberal direction in nonunanimous decisions of this type 68 percent of the time (1948: 208, 257).

From the first year of the Taft Court (1921) to the last year of the Stone Court (1945), there appears to be a growing trend of consistent liberal policy outputs across the five Chief Justice Courts examined here. The Fuller Court decided only one-half of its cases liberally. By the time of the Taft Court, the average liberal percentage had grown to about 83 percent, and continued to grow during the Hughes Court (about 86 percent). However, the series

declines moderately during the Stone Court (to 69.8 percent), although it remains at a relatively high level, despite the growing number of rulings the Court issued during this period.

Liberalism in Aggregated Issue Areas

Next, the specific issue areas are aggregated into the more manageable four major issue dimensions -- economics, civil rights and liberties, judicial power, and other -- described earlier in Chapter III. The 14 individual issue types are aggregated into four major categories, following the methodology of Pacelle (1991) and Schubert (1965, 1976).

The Content of the Issue Areas

The 14 disaggregated issue areas used in the present investigation are aggregated as follows: decisions in criminal, civil rights, first amendment, privacy and due process cases are combined into an overall civil liberties-civil rights dimension; decisions in attorney, union, economics and federal taxation cases are combined into an overall economics dimension; and decisions in judicial power cases are combined into a single dimension. Decisions in federalism, interstate relations, separation of powers and miscellaneous cases are combined into a dimension labeled "other."

Table 5-2 gives the annual proportions of liberal decisions in each issue area. Figures 5-12 through 5-15 display the percentage of liberal Supreme Court decisions in each of the four major issue areas for term years 1888 to 1989.

Economics

Figure 5-12 shows the percentage of liberal economics decisions. This series' maximum point occurs in 1954 (87.2 percent); its minimum in 1892 (42.0 percent). Overall, the series is rather stable beginning in 1888 and extending through 1930. Thereafter, the series increases gradually through 1941 when it declines through 1952. It trends very strongly upward in 1953, the year in which Earl Warren succeeded Fred Vinson as chief justice. The Warren Court's decisions were consistently liberal, and well above the rate for the prior Courts examined here. After Warren left the Court in 1969, the series declines, due to the growing conservatism of the Court under Burger and Rehnquist.

The series average during the Fuller Court is 54.68, which is a somewhat surprising finding given the Court's purported (McCloskey 1994; Schwartz 1993) conservative bent in economics issues. This study shows that the Court voted in the liberal direction in more than half of the economics cases it heard. Hence, the picture that prior descriptive

Table 5-2. Percentage of Liberal Decisions of the United States Supreme Court in Aggregated Issue Dimensions, 1888-1989

TERM YEAR	ECONOMIC	CIVIL LIBERTIES-CIVIL RIGHTS	JUDICIAL POWER	OTHER	TERM YEAR	ECONOMIC	CIVIL LIBERTIES-CIVIL RIGHTS	JUDICIAL POWER	OTHER
1888	45.4	40.0	26.2	.0	1905	60.7	5.3	21.2	100.0
1889	53.8	50.0	24.6	14.3	1906	56.4	34.2	15.6	100.0
1890	45.6	29.6	17.5	75.0	1907	62.1	37.5	47.6	20.0
1891	51.7	36.8	20.0	50.0	1908	62.5	33.3	9.3	50.0
1892	42.0	20.0	7.5	100.0	1909	51.0	8.8	18.2	100.0
1893	45.6	41.9	12.3	66.7	1910	70.5	7.4	21.7	25.0
1894	52.6	30.3	23.6	60.0	1911	59.2	9.5	21.2	100.0
1895	64.7	38.0	7.3	45.5	1912	46.2	20.3	14.7	50.0
1896	58.2	50.0	13.3	100.0	1913	67.8	43.3	30.4	63.2
1897	49.6	16.7	30.0	.0	1914	59.2	29.6	25.7	33.3
1898	56.6	48.0	17.1	66.7	1915	58.1	20.0	20.0	66.7
1899	46.5	20.0	26.0	66.7	1916	65.7	17.6	23.3	100.0
1900	62.0	6.7	16.7	54.5	1917	58.6	33.3	17.4	62.5
1901	63.6	16.7	38.1	50.0	1918	54.9	8.6	20.8	72.7
1902	64.3	20.0	22.4	40.0	1919	63.4	21.7	21.7	65.2
1903	54.1	22.6	23.1	83.3	1920	52.8	26.9	17.6	72.0
1904	54.0	20.0	25.0	55.6	1921	59.4	20.0	23.5	55.2
1922	53.5	25.9	20.0	60.0	1939	79.7	64.3	33.3	75.0
1923	61.3	13.0	27.6	40.0	1940	80.3	57.9	40.0	75.5
1924	53.5	25.7	51.1	63.3	1941	73.8	51.9	33.3	71.4
1925	46.8	33.3	31.8	61.5	1942	64.5	63.6	38.5	50.0
1926	52.5	31.9	31.3	46.7	1943	71.8	37.0	40.0	57.1
1927	51.3	22.2	53.8	65.1	1944	67.7	64.5	26.3	60.0
1928	53.4	13.3	80.0	72.7	1945	69.0	60.6	60.0	50.0
1929	43.2	37.5	20.0	81.0	1946	69.2	25.8	33.3	77.8
1930	55.3	52.2	50.0	65.2	1947	75.5	61.2	50.0	100.0

Table 5-2. Percentage of Liberal Decisions of the United States Supreme Court in Aggregated Issue Dimensions, 1888-1989

TERM YEAR	ECONOMIC	CIVIL LIBERTIES-CIVIL RIGHTS	JUDICIAL POWER	OTHER	TERM YEAR	ECONOMIC	CIVIL LIBERTIES-CIVIL RIGHTS	JUDICIAL POWER	OTHER
1931	57.3	29.4	21.4	64.0	1948	68.3	50.0	68.8	66.7
1932	74.7	28.6	61.1	82.5	1949	67.5	28.6	37.5	62.5
1933	63.6	47.4	61.1	63.9	1950	54.0	45.2	50.0	66.7
1934	45.3	62.5	59.3	65.1	1951	50.0	47.5	58.3	100.0
1935	68.9	83.3	36.4	40.9	1952	46.6	50.0	56.3	33.3
1936	62.8	42.1	40.0	69.0	1953	54.8	46.7	44.4	66.7
1937	74.4	64.3	50.0	75.6	1954	87.2	59.5	30.8	80.0
1938	77.6	57.1	50.0	57.1	1955	80.0	60.6	42.9	66.7
1956	83.6	58.3	50.0	80.0	1973	55.6	46.0	33.3	60.0
1957	65.3	59.7	53.6	12.5	1974	59.0	53.9	19.2	87.5
1958	72.1	59.6	40.0	100.0	1975	44.7	37.8	26.3	100.0
1959	71.9	64.4	41.7	50.0	1976	48.4	38.4	25.0	57.1
1960	71.4	53.5	25.0	60.0	1977	63.8	47.4	40.0	50.0
1961	74.4	73.9	45.5	66.7	1978	45.9	39.2	15.8	33.3
1962	80.7	85.7	60.0	63.6	1979	57.5	46.1	42.9	100.0
1963	75.5	89.6	40.9	81.8	1980	60.0	36.0	22.7	60.0
1964	69.8	69.0	50.0	100.0	1981	61.0	42.9	30.0	71.4
1965	72.5	71.4	48.3	.0	1982	54.5	36.8	44.4	58.3
1966	73.5	70.9	40.0	66.7	1983	47.4	31.7	23.5	66.7
1967	72.5	81.0	41.7	100.0	1984	48.9	37.3	50.0	55.6
1968	76.0	73.3	48.5	50.0	1985	48.1	32.3	43.8	60.0
1969	69.2	60.5	26.3	50.0	1986	45.2	45.7	35.0	60.0
1970	66.7	49.4	17.4	50.0	1987	55.3	45.9	41.7	70.0
1971	48.8	59.6	25.0	50.0	1988	50.0	34.5	45.5	44.4
1972	70.0	40.7	19.2	75.0	1989	59.5	32.4	50.0	55.6

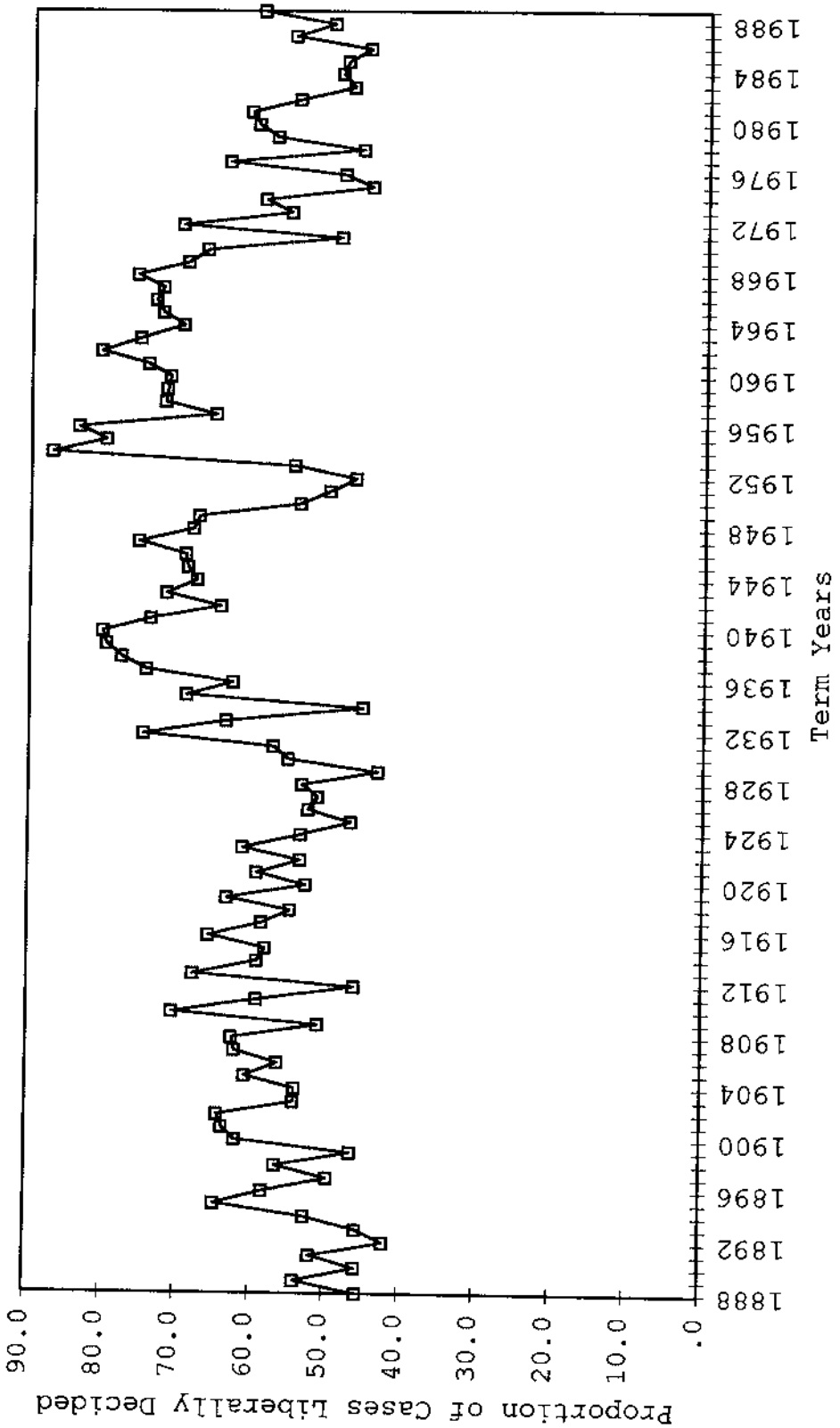


Figure 5-12. Proportion of Liberal Economics Dimension Decisions of the United States Supreme Court, 1888-1989

studies paint of an entrenched Court seemingly entirely unwilling to uphold even the smallest liberal policy is somewhat inaccurate. The average for the White Court increases somewhat to 59.67. This, too, is a surprising finding given the policy perspective that most historical analyses lend to the White Court, although Schwartz (1993) and McCloskey (1994) do state that the Court became moderately more liberal in its decisions, upholding some of the Progressive reforms it reviewed.

The slightly increased liberalism of the White Court is most likely due, at least in part, to the change in its membership. Louis D. Brandeis and John H. Clarke both arrived at the Court and brought with them their Progressive ideals (Handberg 1976: 360). Moreover, James C. McReynolds had a reputation as a "trust-buster" prior to joining the high tribunal (Handberg 1976: 360). "Every era of history represents a period of transition for the Court, but for this period it was especially true, since the conservative hegemony in political and economic life was threatened by the early Wilsonian movement....[However,] the threat of a nonconservative Court majority faded with the return to `normalcy' and the arrival of Chief Justice William Howard Taft" (Handberg 1976: 360).

When Taft was appointed Chief Justice, the Court did become slightly more conservative on average than was the

White Court. Willis Van Devanter and George Sutherland joined the Court, and formed, with Pierce Butler and James McReynolds, the ardently conservative voting coalition known as "The Four Horsemen of the Apocalypse." The series average during Taft's tenure is 52.77, declining below the level observed during the Fuller Court. This result is not surprising given Taft's and his colleagues' common policy orientation towards economic regulation and governmental power.

When one examines the period surrounding the New Deal and the Great Depression, the figure demonstrates a fairly significant upsurge in the proportion of decisions that the Court decided liberally. Most of the term years surrounding 1937 (the year in which Roosevelt attempted his Court-packing scheme) in particular prove to be increases over the proportion of liberal decisions for the previous several terms. Indeed, the average rate of liberalism for these decisions during the Hughes Court is 67.26, a change of 15 percent over that seen during the Taft Court. The series begins to increase in 1930, declines temporarily in 1934, but then increases consistently reaching then-historic highs. The growth in the series continues through 1940, when it declines once again. The series average for the Stone Court is slightly elevated over the rate for the Hughes Court; the Court's average is 69.36. The series

declines modestly beginning in 1941, lasting through 1953 when it begins to increase once again.

Thus, the Court's economic decisions were frequently liberal in the years prior to 1937, despite what Roosevelt and other political actors, and the public at large may have believed about the policy content of the Court's rulings. Indeed, the series dips below 50 percent liberal only once (1934, 45.3 percent) during Roosevelt's incumbency. These results are in marked contrast to the civil rights-civil liberties series, which exceeds 50 percent liberal only once up until 1935 (see Figure 5-13). However, the attack on the Court is associated with a slight increase in the Court's liberalism in decisions involving economic issues. The change may be due to the direct effect of the crisis of legitimacy that it allegedly suffered, but perhaps also due to a steady and gradual adoption of a supportive view of the social welfare policies with which the government and the nation as a whole was then grappling, for the justices themselves were equally aware of the macroeconomic problems that the nation faced. This result of increasing liberalism during the Hughes Court is thus associated with the liberal economic policy preferences that the justices brought to the Court. Indeed, Franklin Roosevelt nominated them to the Court, in part, for that very reason (Abraham 1993: 212).

Pritchett (1948) also examined the liberalism of the Court during the Stone Court. He finds that the Court decided liberally in 58 percent of the nonunanimous cases involving questions of Federal regulation, the Interstate Commerce Commission, Labor Relations, Monopolies, and State regulation (Pritchett 1948: 257). This categorization of case types is quite similar to the economic dimension discussed immediately above, although there are differences in the issues included in each analysis. This study aggregates within the economic dimension decisions involving questions of general economic regulation, regulation of attorneys and unions, and the implementation of the Federal income tax. The results of the present study indicate that the rate for such all cases (unanimous and nonunanimous) from 1937 to 1947 is slightly more than 69 percent (see Table 5-2). Haynie and Tate (1990) similarly examine nonunanimous decisions within this aggregated dimension and find a similar pattern of advancing and declining liberalism beginning in 1916 and extending through 1988 (1990: 18, Figure 2a). Hence, the results for Pritchett's, Haynie and Tate's studies and the present investigation are comparable, even though Pritchett's and Haynie and Tate's results are somewhat smaller in magnitude, which is most likely due to the slight difference in the issues both studies combine in this dimension and the type of data analyzed.

Throughout the Warren Court (1953 to 1969), the series stays well above 50 percent liberal. Although the series declines slightly during Warren's tenure, the average percentage of liberal economic decisions is 73.83. Thus, nearly three-quarters of the Court's decisions were liberal. Also, the change in the series across term years is much less than that for prior Courts. However, the series does decline below 50 percent when Chief Justice Burger's tenure begins. This trend of declining liberalism continues through the Rehnquist Court. This finding is not surprising due to the well-documented policy views of both these Chief Justices and the growing conservative viewpoint of the associate justices who served with them (Segal and Spaeth 1993: 244-55).

Civil Liberties-Civil Rights

Figure 5-13 describes the time series of the rate of liberal decisions in the civil liberties-civil rights issue dimension. The series declines from 1888 to 1905; the series' historic low occurs in 1905 (5.3 percent). After 1905, it begins to increase. The overall average for the series during the Fuller Court is 28.47. This result confirms prior studies' findings of the Court's conservative outlook on matters of civil liberties during the period at hand (Haynie and Tate 1990: 19, Figure 2b). The Court

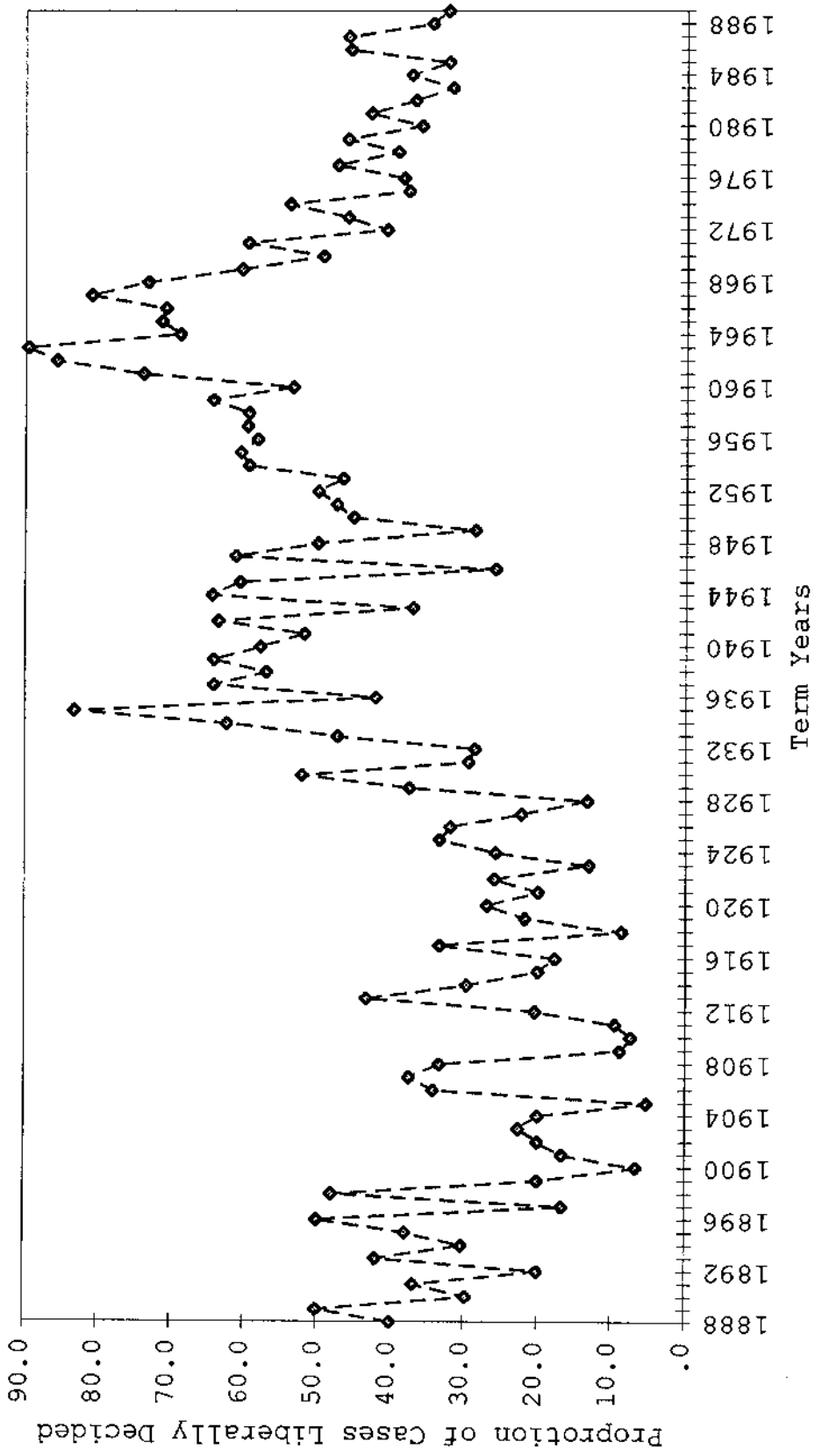


Figure 5-13. Proportion of Liberal Civil Liberties-Civil Rights Decisions of the United States Supreme Court, 1888-1989

becomes even more conservative (or less liberal) during the White Court, whose average is 21.65, a change of 24 percent from the rate observed during the Fuller Court. However, the Taft Court becomes somewhat more liberal; its average rate is 24.76 percent, perhaps due to the Court not making its decisions during times of war.

Beginning in 1928, the series increases quite dramatically until 1962, when it begins to decline. During the period of the Hughes Court (1930-1940), the Court's average jumps dramatically up to 53.55, an increase of 29 percent from that observed during the Taft Court. As many other scholars have noted, the Court was beginning to become more supportive of expanded claims of civil liberties during the mid-1930s (e.g., Haynie and Tate 1990: 19, Figure 2b). Hence, this increase in the series during the Hughes Court confirms these expectations, although the Court certainly was not as liberal as the Warren Court was to be some thirty years later. The series does not increase significantly during the Stone Court. The average for the Stone Court is 55.54, representing approximately a two percent change over the rate observed during the Hughes Court.

These findings support the results of Epstein, Walker and Dixon (1989), Haynie and Tate (1990), and the historical observations of Schwartz (1993) and McCloskey (1994), all of whom suggest that a decreased level of liberalism in civil

liberties-civil rights decisions occurred during the period surrounding the two World Wars. Haynie and Tate (1990), in particular, empirically examine the liberalism of the Court from 1916 to 1988 in nonunanimous decisions. They find similar periods of growth and decline in the series, and observed levels of liberalism across the term years analyzed. However, they suggest that the series is much more dynamic when considering only nonunanimous decisions. For example, their study indicates a large and abrupt decline in the series from 100 percent in 1922 to zero percent in 1928, although the authors do mention the small number of cases on which these results are based (Haynie and Tate 1990: 19, Figure 2b). In this study, Figure 5-13 and Table 5-2 show that indeed the series declines, but only by 12.6 percent.

Furthermore, Pritchett (1948) examines the Stone Court's decision-making in issues of civil liberties, and the rights of criminal defendants (1948: 254). He finds that the Court ruled in favor of these claims in 49 percent of such nonunanimous decisions (Pritchett 1948: 254). Thus, the results of the present investigation generally are in line with all of these studies' findings, although there are slight differences in magnitude.

After 1948, the series begins gradually to increase in liberalism through 1960 when the change between term years

increases dramatically. In only four term years (1960 to 1963), the series increases from 53.5 percent to 89.6 percent, the historic high. In no year during the Warren Court does the series decline below 50 percent liberal. This finding corresponds with other conceptions of Warren Court decision-making in this aggregated issue dimension (Segal and Spaeth 1993: 244; Haynie and Tate 1990: 19).

During the Burger and Rehnquist Courts, however, the series begins to decline in liberalism, and does so rapidly reaching a point in the term year 1989 of 32.4 percent liberal decisions. Again, this finding confirms the findings of prior studies of the Court's policy orientations during these years (Segal and Spaeth 1993: 244-55).

Judicial Power

Figure 5-14 shows the proportion of judicial power cases the Court decided liberally.[3] Overall, the series is rather volatile throughout the period of analysis. The historic low occurs in 1895 (7.3 percent). From 1924 to 1949, it fluctuates rather wildly, changing from its historic high of 80 percent in 1927 to only 20 percent in the very next year, 1928. From 1951 to 1970, the series declines modestly. Indeed in 1968 and 1969, it decreases drastically, but then begins to trend upward yet again in 1971. However, some of this volatility is due to the rather

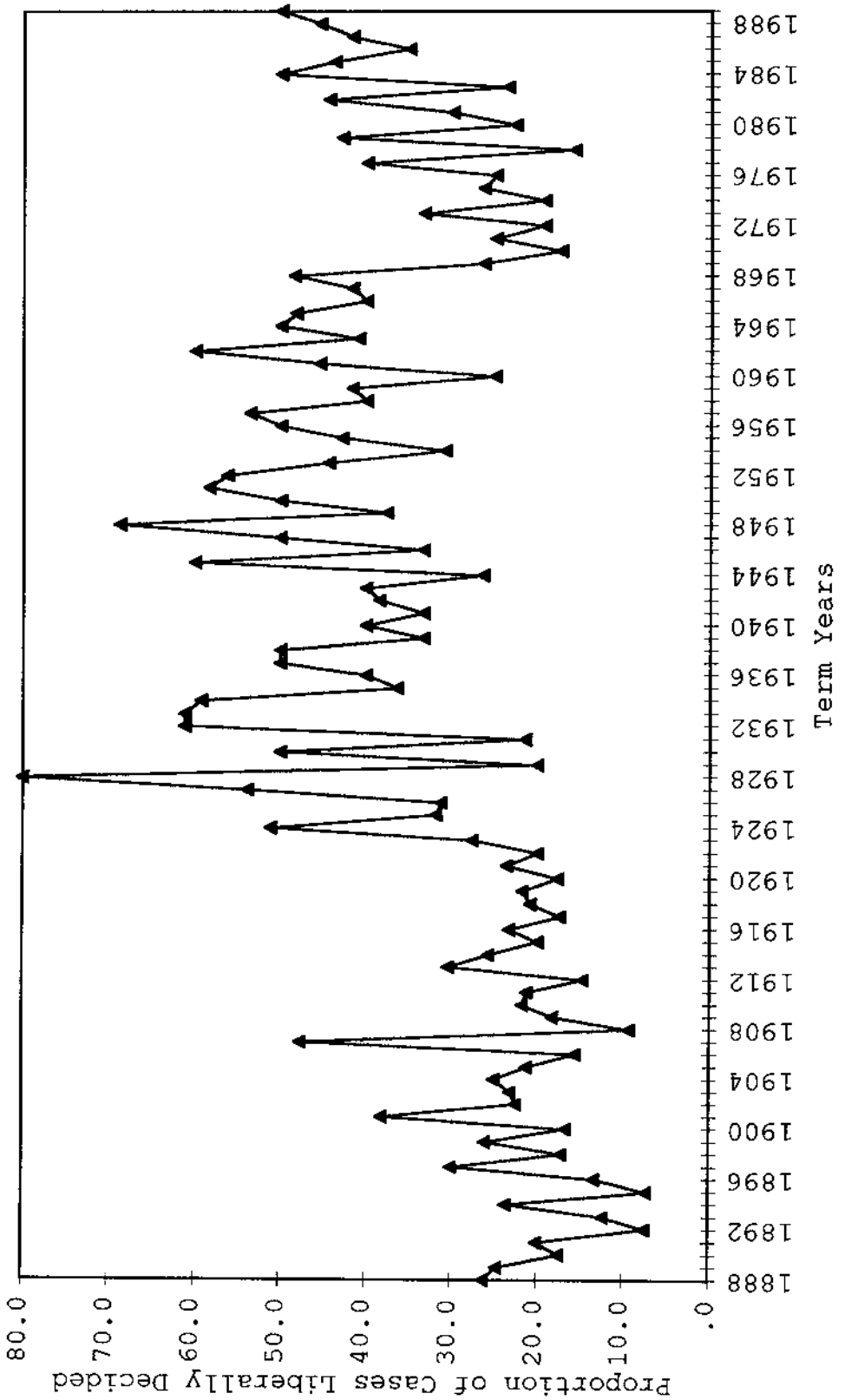


Figure 5-14. Proportion of Liberal Judicial Power Decisions of the United States Supreme Court, 1888-1989

small number of cases that the Court considered in this issue area.

Other

Figure 5-15 shows the series for the proportions of liberal decisions in the "other" issue area. Because of the small number of cases involved in this area, the series is quite volatile. It experiences three years in which the Court issued no liberal decisions, and it experiences 14 years in which 100 percent of its decisions in this issue were liberal. Sometimes these disparate scores immediately follow each other, such as in 1957 and 1958, and in 1896 and 1897. However, there is a period of less dynamism from 1917 to 1945, although no clear trend can be discerned from these years' scores. Thus, it is evident that this series is mostly noise due to small N's and it therefore resists accurate analysis.

To provide some indication of the direction and magnitude of the series, the average rates of liberal decisions during each of the Chief Justice courts are presented for this issue area. During the Fuller Court, the rate is 59.01 percent. The average remains about the same during the White Court to 59.15. It increases very slightly to 60.61 percent during the Taft Court and then to 66.71 percent during the Hughes Court. However, during the Stone

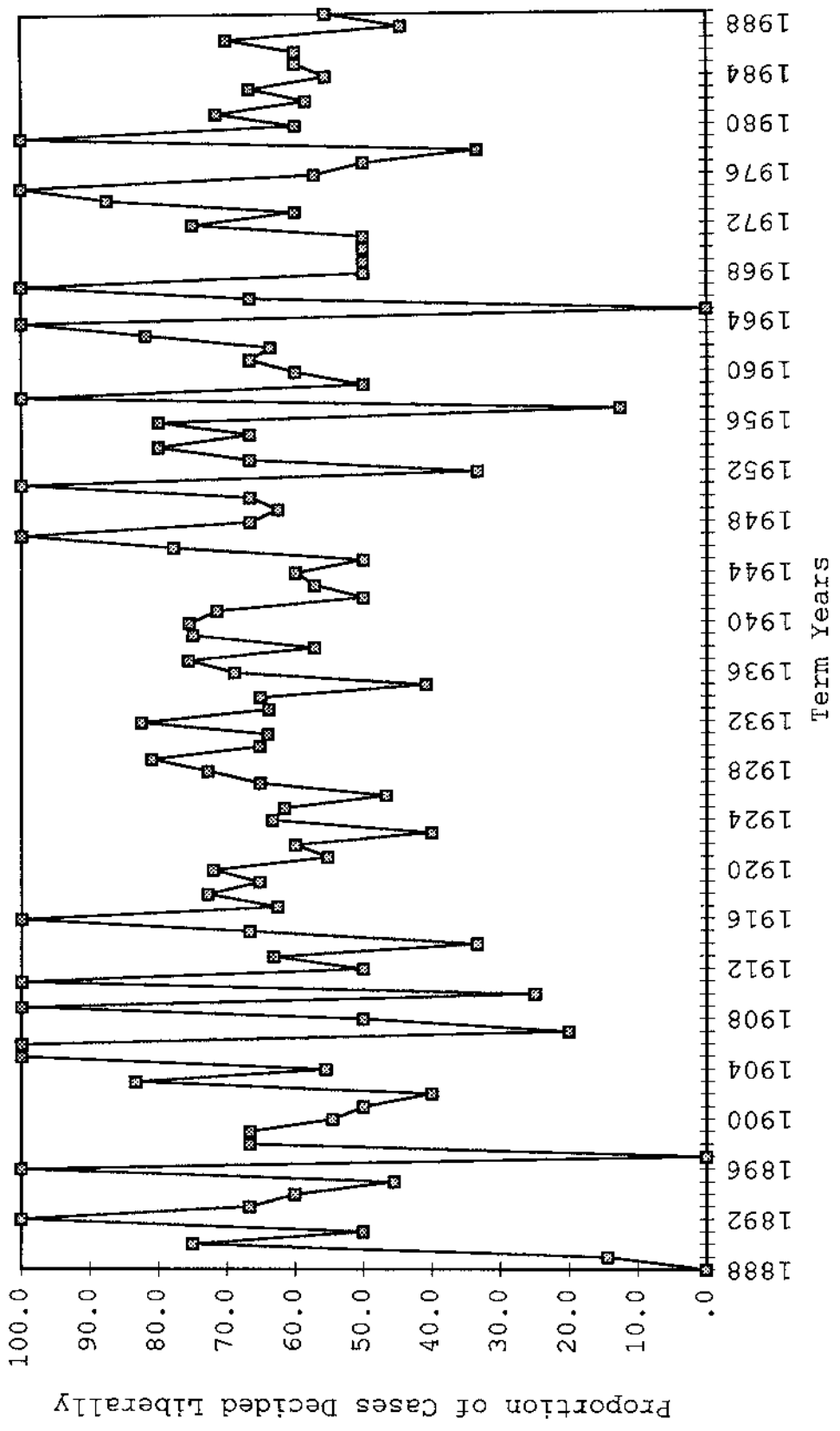


Figure 5-15. Proportion of Liberal Other Decisions of the United States Supreme Court, 1888-1989

Court, the series average declines to 57.70 percent. Hence, even this amalgamation of decisions portrays a general trend toward increasing liberalism across the four Chief Justice Courts and the 58 term years analyzed here.

Chapter Summary

This chapter examines the liberalism of the decision-making of the United States Supreme Court during the period from 1888 to 1989 across several issue areas. It finds that decisions involving economic issues (economics, attorneys, unions, and federal taxation) were initially relatively conservative during the Fuller, White and Taft Courts, although not as conservative as we might expect based upon prior descriptions of the Court during this period. These three Courts maintained a rate of about 50 percent liberal across the 42 terms years that they comprise. However, with the advent of the Hughes Court, these decisions became progressively more liberal President Roosevelt's attack on the Court in 1937 as a result of its alleged conservative rulings in these issue areas is associated with a slight increase in its institutional liberalism. The trend toward increasing levels of liberalism continued in the Stone Court. Moreover, the rates of liberalism overall became much more consistent and less volatile beginning most notably with the Hughes Court. The Warren Court's decision-

making is predictably liberal as well, but the series begins to decline during the latter Courts. These results affirm the findings of Haynie and Tate (1990), and the observations of McCloskey (1994), Schwartz (1993) and other scholars that the Court held a conservative policy perspective in economic matters.

In the realm of civil liberties and civil rights, the Court was predictably conservative during the first three chief justice courts examined herein, attaining a rate of about 25 percent across these Courts. The Fuller Court's decisions became even more conservative surrounding the period of World War I, ruling against the majority of claims of civil liberties generally. The White and Taft Court continued that trend of conservative decisions in these issue areas.

Mirroring the changes in the level of liberalism for the economic series, the Court became more liberal over time for decisions involving questions of civil liberties and civil rights. Once again, the Hughes Court's decision-making proves to be a turning-point in the policy perspective of the Court. The Hughes Court and the Stone Court issued more consistently liberal decisions in these issue areas. Their combined average is 54.17, more than double that of the prior three courts. However, the Stone Court's rulings during the World War II period became less

liberal than the Court had been previously, although the decline was less than that observed for the Fuller Court's decisions in the era of the First World War. Predictably, the Warren Court's jurisprudence is found to have been very liberal. The series falls off during the Burger and Rehnquist Courts. Thus, these results demonstrate the growth in the liberalism of the Court's decisions that has occurred in the United States Supreme Court's decision-making across more than a century of American jurisprudence. Perhaps more importantly, they also demonstrate that the Court began to assume a much larger responsibility for resolving particular issues of civil liberties and civil rights, as Pacelle (1991) finds.

NOTES

1. "For the last couple of years Charles E. Merriam has been predicting gleefully that I would wind up before the bar of the Supreme Court on a contempt charge. I hope it will be obvious to anyone who reads this book that I am amicus curiae, with a deep respect for the judicial process and a great sympathy for the present Court. The attempts made here to examine into the personal foundations of judicial decisions may be wide of the mark, but in any event they are honest attempts and not intended to suggest that the present justices are motivated by their own preferences to any greater extent or are more politically minded than their predecessors. It is my view that the Supreme Court inevitably acts in a political context, and that the greatest danger to the Court and from the Court comes when that fact is inadequately realized" (Pritchett 1948: xiii).

2. However, Walker, Epstein and Dixon (1988: 370) discount this influence.

3. See also the discussion of the liberalism of judicial power in the section analyzing the individual issue areas.

CHAPTER VI

INSTITUTIONAL LEVEL ANALYSES: TIME SERIES ANALYSES OF UNITED STATES SUPREME COURT LIBERALISM, 1888-1989

This Chapter undertakes time series analyses of the liberalism of the United States Supreme Court's decisions in three aggregated issue dimensions: economics, civil liberties-civil rights, and judicial power. Separate models for each category of decisions are identified, specified and estimated using the Box-Jenkins-Tiao modeling scheme. Each estimates the effects of institutional and environmental influences so as to provide a theoretically-based and methodologically rigorous explanation of the Court's institutional decision-making across over a century of Supreme Court jurisprudence that includes the Panic of 1893, the Spanish-American War, the rise of Progressivism, two World Wars, a Great Depression, a president's bid to pack the Court, and the enactment of the Judiciary Act of 1925 ("the Judges' Bill"). The Court began to issue consistently liberal decisions, especially during the period in which it reviewed the constitutionality of New Deal legislation in the mid- to late 1930s. There are significant changes in

the percentage of liberal decisions across issue areas, but the policy output of these decisions is dynamic as the Court as an institution was transformed by the political and legal battles fought within and without its walls.

By undertaking time series analyses of Supreme Court decision-making, we obtain a better understanding of these dynamics in the level of liberalism expressed in the Court's decisions, and in particular the influence of various factors on those public policy outcomes that its decisions represent within the American political system. Because the Court has come to be a significant force within the American system, especially in this century, detailed analysis of its decisions across time is indeed appropriate.

Overview of Box-Jenkins-Tiao Modeling Scheme

The analyses conducted in this Chapter employ Box-Jenkins-Tiao modeling procedures. Accordingly, a brief review of them is appropriate.

General Rationale and Procedure

Mean and Variance Stationarity. According to the procedures of the Box-Jenkins-Tiao protocol, one specifies autoregressive and/or moving average parameters for each of the variables to be included in one's analysis and thereby estimates an "ARIMA" model (see Liu 1988: 429-82; McLeary and Hay 1980; Box and Jenkins 1976). One must first ensure

that the series examined is variance and mean stationary (Liu 1988: 434). If it is not, then the results obtained from one's model may be spurious (Engle and Granger 1987). A series is mean stationary when it has a well-defined mean, one that does not trend across time (Engle and Granger 1987). A series is not mean stationary if it has a unit root, that is if the coefficient relating a past value of a series to its present value is equal to one. Thus,

$$Y_t = 1.0Y_{t-1} + v_t \text{ where } v_t \sim N\ (0,\ \sigma^2\ ).$$

This equations states that the series of interest at time $\underline{t}$, Y_t, is equal to its prior value in the immediately preceding period plus some well-behaved error term, v_t, that is distributed normally with a mean of zero and a constant variance equal to σ^2 .

One of the most common test statistics that allows one to determine if a series has a unit root is the Dickey-Fuller Unit Root Test (Dickey and Fuller 1979). The test's null hypothesis is that the series is mean nonstationary; the alternative hypothesis is that it is stationary. The critical value for the Dickey-Fuller test statistic is -2.86 ($p<.05$) (Dickey and Fuller 1979). The distribution of the critical values for the test statistic, thus, do not follow the conventional distribution of the t-statistic. If the series is in fact mean nonstationary, then one customarily

makes it stationary by taking the first differences of it; that is, one subtracts adjacent values from each other (i.e., $Y_t - Y_{t-1}$) (Liu 1988: 432). If a series becomes stationary after the first differences of the series, the series is said to be integrated of order one (Liu 1988: 432).

To be properly identified, the series in question must also be variance stationary (Liu 1988: 434). One can detect whether the series is so by examining a graph of its values over time. If the magnitude of the change between observations remains constant, then the series is variance stationary. If the change between observations is dynamic on the other hand, then the series will be variance non-stationary. This type of non-stationarity upsets the hypothesis testing process that is a key component of statistical analyses. One can usually make the series variance stationary by taking the natural logs of the data (i.e., $Y_t^* = \ln(Y_t)$) (McCleary and Hay 1980: 51-52).

Autoregressive or Moving Average? After ensuring that the series is mean and variance stationary, one identifies and estimates a univariate model by adding autoregressive and moving average parameters as needed. One customarily begins the modeling process with the dependent variable of interest to generate a so-called "noise model" (Liu 1988: 432). To build a noise model, one first generates and examines the

autocorrelation function (ACF) and partial autocorrelation function (PACF) of the series at hand. The ACF and the PACF plot the Pearsonian correlations between observations across successive time periods (Liu 1988: 434). The PACF differs from the plot of the ACF in that the PACF removes the correlations of intervening lags (Liu 1988: 434). Their analysis enables the modeler to identify the underlying data generation process by displaying the lags at which there are statistically significant correlations in the ACF and the PACF. For example, if there is a gradual dying down pattern of the series on the ACF and a single significant spike followed by the series abruptly becoming nonsignificant on the PACF, the series most likely will be properly specified as an autoregressive process operating with a lag of one period, a so-called "AR1" process (Liu 1988: 434). Of course, one's identification is guided by empirical knowledge and theoretical underpinnings of the process investigated by looking to the findings of prior studies that have examined the question at hand and the researcher's theory.

Based on these initial tests, one specifies a univariate model of the series of interest using autoregressive (AR) or moving-average parameters (MA), or a combination of both, at particular lags. The model can be expressed in (p,d,q) notation, where "p" indicates the

number of autoregressive parameters, "d" indicates the order of integration of the series (that is, how many differences are necessary to make the series mean stationary), and "q" the number of moving average parameters (Liu 1988: 432). An autoregressive specification models the current value of the variable based on some portion of the series' past value, plus some well-behaved error term (Liu 1988: 431). For example, a differenced series (Z_t) could be modeled as a first-order autoregressive (AR1) process thusly: $Z_t = \hat{\phi} Z_{t-1} + a_t$. In this case, the series is equal to some portion of the series' value one period prior to the current period plus the error term. Such a model can be expressed as a (1,1,0) model, providing that the series is integrated of an order of one.

Similarly, the series may be modeled using a moving average (MA) specification in which the current value of the series is equal to a past well-behaved error term, minus some portion of a past shock to the series. Thus, a first-order moving average process (MA1) can be modeled thusly: $Z_t = a_t - \hat{\theta}_1 a_{t-1}$. This model can also be expressed as a (0,1,1) model. Alternatively, one could model the series using a mixture of both AR and MA terms. If properly specified, the autoregressive and moving average components should be statistically significant at conventional levels. Moreover, the Ljung-Box Q statistic (L-B Q) should be less

than 30 at 20 lags as a rule of thumb. The L-B Q tests the null hypothesis that the ACF does not differ from zero up to a specified lag. It is distributed as chi square "with k-m degrees of freedom, where k is the number of lags examined and m is the number of parameters estimated" (Liu 1988: 441). In short, this statistic expresses the correlation existing between residuals at consecutive lags of the series at hand (Bowerman and O'Connell 1993: 496).

The Conditions of Stationarity and Invertability. As a further test of the adequacy of an ARIMA model, one should determine if the specification satisfies the conditions of stationarity and invertability. For series including autoregressive processes, the absolute values of the estimates of the individual autoregressive parameters ($\Phi's$) and their sum and differences should be less than one (Liu 1988: 440). This characteristic is known as the condition of stationarity, which guarantees that the series is stationary about its mean (Liu 1988: 440). If this condition were not imposed, the impact from shocks to a mean nonstationary series "from the distant past [would] not diminish over time and this is not consistent with autoregressive behavior" which suggests that the effect of prior values of the series become less influential on the present value of the series the more distant in time they become (McCleary and Hay 1980: 56-57). Thus, a further test

of the adequacy of an autoregressive specification is the magnitude of the parameter estimates.

For series including moving average parameters ($\Theta's$), the absolute value of the individual parameters, and their sum and difference should be less than one (Liu 1988: 440). This latter characteristic is known as the condition of invertability, which is the counterpart of the condition of stationarity for autoregressive parameter estimates. This guarantees that the series converges. If these bounds are not satisfied, the impact of "observations in the distant past become greater and greater" (McCleary and Hay 1980: 64).

Transfer Functions

One customarily begins the ARIMA modeling process by identifying the dependent variable, developing a univariate model. Once one has properly identified the dependent variable, one follows the same rationale as above to model the continuous (i.e., non-binary) independent variables. These are known as transfer functions. They specify a relationship between a continuous, predictor variable and the output series, similar to a linear regression function (Liu 1988: 457; see also Norpoth 1986). After having identified whether each of the continuous independent variables is properly composed by an autoregressive process

or a moving average process, or a mixture of both, one "pre-whitens" the dependent variable. One does so by filtering the residuals (the difference between the actual value of the independent variable and the value of the independent variable that the model predicts) of each of the univariate ARIMA models that one previously developed through the univariate model that one has constructed for the dependent variable (Liu 1988: 458). Then, to determine at what lags the two variables are causally related, one computes the cross-correlation of their residuals and analyzes the resulting graph for significant correlations at specific lags (Liu 1988: 458). The cross-correlation function (CCF) indicates the specific lags at which there is a significant relationship between the predictor variables and the dependent, output series (Liu 1988: 458). These results enable one to model the transfer function portion of the model at hand.

Interventions

In addition, one may want to include so-called intervention variables which are binary in their metric (see Box and Tiao 1975). These variables are coded as 0/1 dummy variables, affecting the dependent variable only at discrete times. One specifies that these variables take on a value of one when they are influential on the dependent variable,

and zero at all other times. One also specifies whether the intervention has one or more impacts, whether it exerts a temporary or permanent effect, and whether it occurs abruptly or gradually (Liu 1988: 446-450).

Diagnostics

Once one has specified and run the model which is thought to properly reflect the underlying process, the modeler can use several diagnostic techniques to determine if residual information is left in the series, and, thus, if one's model is adequate or not. The first diagnostic one can use is the Ljung-Box Q statistic, as was done in modeling the univariate series. As before, the test statistic should be less than 30 at 20 lags (Liu 1988: 441). A second diagnostic one can use is the autocorrelation function of the residuals of the series. If they do not exhibit any significant correlations, then the series is said to be "white noise." In this case, no significant information is left in the residuals by the specification the modeler proffers (Liu 1988: 441). Third, one can look to the residual mean square (RMS) statistic of the series. It provides an indication of the model's goodness-of-fit (McCleary and Hay 1980: 101). If the relative magnitude of the RMS is small, then one can be reasonably satisfied with the specification of the overall model. Fourth, the

correlations between the individual parameters must not be too relatively high, as in the context of linear regression modeling. A common value used to test for multicollinearity is 0.60, although researchers have used other, higher values. If estimates are generally greater than this figure, the parameters most likely express redundant information and, therefore, suffer from multicollinearity. If they do, one should re-specify the model until the value of the parameter correlations is less than this value.

Models of Institutional Liberalism

Based on the categories of influences on the Court's decision-making that the literature finds, three separate models of the Court's liberalism over time are identified, specified, and estimated. Each of the models explains the Court's liberalism in one aggregated issue dimension across the 102 term years examined in this study.

Case Selection

Consistent with the analyses in prior chapters, all decisions of the Court are considered in this modeling endeavor. While some studies select only the nonunanimous decisions of the Court when examining its liberalism over time, many of those studies are conducted at the individual level of analysis (for exceptions, see Haynie and Tate 1990 and Epstein, Walker and Dixon 1989). They do so because

they seek to understand the limits of the individual justices' agreement on important questions of public policy, which is most appropriately investigated in nonunanimous decisions. This inquiry, on the other hand, investigates the institutional liberalism of the Court. Hence, to obtain a more complete explanation of its policy preferences over time, it uses all of the Court's decisions, whether they be unanimous or nonunanimous. Additionally, to select only the nonunanimous cases for analysis would have greatly restricted the number of cases upon which the data on the Court's liberalism is based, thereby limiting the confidence we have in the results obtained.

Aggregated Issue Dimensions

As demonstrated in Chapter V, the decisions of the Supreme Court can be aggregated into four issue dimensions. Three of these (Economic, Civil Liberties-Civil Rights, and Judicial Power) are separately examined here; they represent the dependent variables in the time serial analyses conducted below. The fourth issue dimension, "Other," is not considered because of the divergent types of decisions that comprise that dimension, making the modeling process extremely difficult and, consequently, drawing any inferences based upon the results obtained may lead to invalid conclusions. Moreover, these three issue dimensions

comprise the bulk of decisions the Court has announced from 1888 to 1989 (see Chapter IV) and are, thus, central to understanding the level of the Court's institutional liberalism and its dynamics.

Individually considering each of the three dimensions that comprise the aggregate function of the Court's liberalism allows one to more clearly determine the influence of the continuity and change in the Court's agenda over time on its resulting decisional trends. That is, when the Court began to consider fewer economics decisions beginning in the 1940s (see Table 3-1), the influence on its policy-making may also have changed. This methodology is particularly appropriate for the period of analysis in the present study since their relative share of the Court's agenda has dramatically changed from a time in which economic decisions dominated the Court's agenda to a more contemporary period in which the Court, along with the remainder of the American political system, has turned its attention to issues of civil liberties and civil rights (Pacelle 1991).

Economic Liberalism

Dependent Variable. The Box-Jenkins-Tiao modeling protocol discussed above is followed, first, to identify and build a univariate model for the Court's economic liberalism

(ECONLIB). This aggregated issue dimension is composed of decisions involving questions of economics, attorney regulation, union-labor relations, and federal taxation (see Chapter III, Figure 3-8 and attendant discussion). Recall that this variable is measured from zero, representing entirely conservative decisions, to 100, representing entirely liberal decisions. The variable is calculated for each of the 102 term years examined.

To achieve mean stationarity, the series is first differenced. As shown in Table 6-1, the series is identified as a (1,1,2) process. The parameters are all significant, the Ljung-Box Q is less than 30 at 20 lags, the residual mean square is relatively low, and the residual autocorrelation function (not displayed) is white noise. Hence, the specification is satisfactory. Algebraically, the model is:

$$ECONLIB_t = \phi_1 ECONLIB_{t-1} + a_t - \theta_1 a_{t-2} - \theta_2 a_{t-4}$$

The univariate model of the Supreme Court's economic liberalism is, thus, a function of a portion of its liberalism in the immediately preceding prior term year ($\phi_1 ECONLIB_{t-1}$) plus an error term (a_t) less a portion of a shock in the second ($\theta_1 a_{t-2}$) and fourth prior term years ($\theta_2 a_{t-4}$) . Therefore, for economic liberalism, the negative coefficient for the first-order autoregressive

Table 6-1

Univariate ARIMA Model of United States Supreme Court Economic Liberalism, 1888-1989

Component	Parameter	Coefficient Estimate	Standard Error	T
First-order Autoregression	AR1	-0.5689	0.0935	-6.09**
Second-order Moving Average	MA2	0.3393	0.1095	3.10**
Fourth-order Moving Average	MA4	0.2080	0.1004	2.07*

Residual Mean Square = 71.609
Degrees of Freedom = 97
Ljung-Box Q (20 lags) = 15

** Significant at the 0.002 level, two-tail test
* Significant at the 0.05 level, two-tail test

component estimate informs us that the series has declined over time and that prior shocks affect the Court's decision-making in the current period.

Independent variables. Following the Box-Jenkins modeling protocol, a similar process is conducted to model each of the independent variables hypothesized to influence the Court's economic liberalism.[1] Each of these is considered in turn. The continuous variables described below serve to measure the institutional influences that Baum (1995) and

others have described. They serve as proxies for the justices' values, which are difficult to directly measure given the cloistered nature of the Court. Moreover, it is well-nigh impossible to obtain accurate data from justices who served long ago. Although there are many variables that theoretically could be included in the model, those variables that are thought to be most closely associated with the Court's institutional liberalism across the period at hand are included.

Political Factors

The current dominant model in explaining the voting behavior of the justices of the United States Supreme Court is the attitudinal model (Segal and Spaeth 1993). It asserts that justices vote the way that they do because of their personal political values or ideologies (see Segal and Cover 1989). Simply, Thurgood Marshall voted liberally because he was a liberal; William Rehnquist votes conservatively because he is a conservative. Most of the persons who become justices of the Supreme Court are beyond their mid-40s. They, therefore, bring to the bench a well-formed and cohesive macro-political world-view and attitudinal structure (Baum 1995: 167). It is thus reasonable to theorize that their policy preferences, based on their attitudes, affects their voting behavior.

Moreover, most of the justices' decision-making remain stable over time (Handberg and Tate 1990). Hence, their attitudes are also most likely stable.

Therefore, the dynamics of the liberalism of the Court's decisions over time are largely influenced by the change in its membership. Since the justices' attitudes affect their decision-making, any change in who those justices are (and, hence, what attitudes they possess) will affect the institutional liberalism of the Court's policy outputs (Baum 1995: 169-70; Baum 1992: 21-22). Therefore, the president can exert tremendous influence on the Court's policy-making by nominating fellow ideologues or partisans. Indeed, Franklin Roosevelt's opportunity to nominate nine justices during his tenure may have made the Court more receptive to a transformation in economic and social welfare legislation that the Court reviewed during the New Deal. However, Baum (1995) notes that the impact of membership change should not be exaggerated since the Court during the 1970s and 1980s, when there were a number of putative conservatives on the Court, did not engineer as a large-scale policy shift as some Court observers expected by solely looking to the policy preferences of the individual justices (1995: 171).

Party Identification. One indicator of the justices' political values or attitudes is their respective political

party affiliations. The party identification of each of the justices who served on the Court during a particular term year is assessed. Following Tate (1981), Tate and Handberg (1991), and Haynie and Tate (1990), this variable is scored with zero (0) representing justices who considered themselves to be Republicans, one (1) for justices who were independents, and two (2) for justices who were Democrats. Although most justices identify with either the Democratic or Republican parties, Felix Frankfurter was the lone independent on the Court (Epstein, Segal, Spaeth, and Walker 1996: 319). Based on this scoring, a mean is calculated for each term year. At the institutional level of analysis, Haynie and Tate (1990: 16) find that the justices' partisanship is marginally significant and positively associated with the Court's economic liberalism indicating that as the variable's mean increases, the Court's liberal policy-outputs increase as well. For each term year, a mean score is calculated based on this scoring protocol so as to provide an indication of the institutional policy stance of the Court. Although some studies (e.g., Epstein, Walker, and Dixon 1989) simply look to which party claimed a majority of seats on the Court, the partisan composition is more aptly captured by examining the party identification of all the justices so as to indicate the prevailing partisan balance on the Court. The data used in the construction of

this variable come from The Supreme Court Compendium (Epstein, Segal, Spaeth, and Walker 1996: 315-321). Only those justices who served a majority of the term year are considered in the calculation of this, and all the other, independent variables.

Because Democrats tend to support economic liberalism more strongly than do Republicans, a positive relationship is hypothesized to exist between this measure of political party identification and the Court's decision-making in economic matters. Hence,

H_1: As the mean score of the justices' partisan affiliations increase, the level of the United States Supreme Court's institutional economic liberalism will increase.

Presidential Intentions. Another indicator of a justice's attitudinal content may theoretically be represented by the policy intentions of the president who nominated the justice to the Court originally. That is, if a president is known to be ideologically conscious (either in a liberal or a conservative direction) in his Supreme Court nominations, then such may evidence the justice's policy preferences. The president's intentions may reflect changes in elite opinion as well (see Haynie and Tate 1990: 3). Prior studies (Baum 1995: 40-49; Abraham 1993; Scigliano 1971) have discussed the policy intentions of all

the presidents who have nominated justices who served during the period of analysis of this study and provide solid historical evidence that allows one to discern the policy intentions of presidents. Hence, their policy intentions with regard to Supreme Court nominees are relatively clear and discerned without undue effort.

In this study, justices who were nominated by a conservative conscious president are scored negative one (-1); those who were nominated by presidents with moderate or no ideological intentions are scored zero (0); and, those who were nominated by liberal conscious presidents are scored one (1). Many presidents expressly seek to influence the Court's decision-making by appointing justices who share their policy preferences. Conservative presidents may try to influence the Court by nominating conservative justices; liberal presidents may attempt the same maneuver by nominating judges whom they perceive to hold liberal policy perspectives. Ideologically conscious presidents, thus, may search for nominees who have a common ideology and who will, once nominated, advance the views of the president on various issues. If chief executives do have these strong views in mind when nominating justices to the Court, the president is scored as being conscious of the nominee's policy views. Because the president himself selects the nominee based upon a relatively common set of policy

preferences, the attitudes of the justice are inferred from his selection. Other less ideologically-concerned presidents may simply have no interest in the policy view of their nominees to the Court, or a president may be moderate in his policy views, as opposed to holding ardent stances on various issues.

This coding scheme in the present study adopts the operationalizations of Handberg and Tate (1991: 466). These authors, based on Abraham's (1993) study and other studies, classify Taft, Harding, Nixon, and Reagan as conservative conscious presidents. They classify Woodrow Wilson, Franklin Roosevelt, and Lyndon Johnson as liberal conscious presidents (Tate and Handberg 1991: 466-67). This study followed Tate and Handberg's coding protocol and additionally identifies Grover Cleveland, Ulysses Grant, and Benjamin Harrison as conservative conscious presidents. Theodore Roosevelt and Abraham Lincoln are similarly identified as additional liberal conscious presidents. All other presidents are scored as moderates or having no conscious ideological goals in nominating a Supreme Court justice. As before, a mean is calculated for this variable across the 102 term years analyzed. Thus,

H_2: As the mean of presidential policy intentions increases, the level of the United States Supreme Court's institutional economic liberalism will increase.

Cleavages

Mass voting behavior has been shown to be influenced by cleavages that have affected the development of partisanship in Western nations (Lipset and Rokkan 1967). These cleavages include religion, urban/rural, and region, among others. This study investigates the effects of these divisions by examining the influence of the justices' religious preferences, urban/rural origins and Southern regional origins on their voting behavior.

Non-Protestants. Judicial voting behavior has been shown to be affected by social background characteristics (Tate and Handberg 1991; Tate 1981). One variable that taps into the differing socialization processes through which the justices have gone is their religious preference. Non-Protestants are typically more liberal in their policy preferences than Protestants (Goldman 1975; Ulmer 1973). In the present study, a justice whose religious affiliation is non-Protestant is scored one (1), while Protestant justices are scored zero (0). A mean is calculated for each term year analyzed. The data for this variable come from The Supreme Court Compendium (Epstein, Segal, Spaeth, and Walker 1996: 239-251). Thus,

H_3: As the mean of the justices' religious affiliations increases, the level of the United States

Supreme Court's institutional economic liberalism will increase as well.

Agricultural Origins. As discussed above, one of the principal cleavages that has affected mass political behavior in Western industrialized nations is the urban/rural division. In the last one hundred and fifty years, the United States has become much more industrialized. Tate and Handberg (1991: 468) suggest the process of industrialization and the growth of urban areas influenced the public's attitudes about the legitimacy of the government's efforts to regulate the economy so as to control the deleterious effects that growing industrialism had on the populace (see Dickens [1854] 1980).

Haynie and Tate (1990: 16) investigate the effect of the justices' agricultural origins but find no significant relationship. Following Tate and Handberg's (1991) operationalization, a justice is considered to have agricultural origins if his father was a farmer. The data for this variable come from The Supreme Court Compendium (Epstein, Segal, Spaeth, and Walker 1996: 239-51). A mean of the number of justices with agricultural origins is calculated for each term year analyzed. Thus,

H_4: As the mean of justices with agricultural origins increases, the level of the Court's economic liberalism will decrease.

Southern Regional Origins. One of the most clear factors that distinguishes political attitudes in the United States is American geographic origins. In particular, the South, with its unique history and culture, tends to produce attitudes in its residents that are more conservative than those of persons who were socialized in other areas of the nation. Accordingly, Southern United States Supreme Court justices will most likely be more conservative in their economic decision-making than those justices who hail from other regions of the country.

Although the West and the Midwest certainly are regionally important, no clear theory can be proposed about their effect on political attitudes. For example, many people who reside in the West (primarily California, Oregon and Washington) tend to have liberal political attitudes. Many others in these same states tend to hold conservative attitudes. Furthermore, the Western region more generally is difficult to clearly operationalize for its includes the Big Sky states of Montana, Wyoming, Idaho and Utah, all of which tend to be generally associated with a conservative ideology. This confounds construction of measures of the likely effect on political attitudes. Moreover, contemporary literature in the judicial politics subfield and in American politics generally do not disaggregate regional origins beyond the traditional South/Non-South

dichotomy.

The data for this variable of Southern regional origin come from The Supreme Court Compendium's listing of the justices' home states (Epstein, Segal, Spaeth, and Walker 1996: 305-21). As with the other independent variables, a proportion of the justices with Southern regional backgrounds is calculated for each term year. Based on Key's (1949) study, the South includes the 11 states of the Old Confederacy and two Border States, Kentucky and Oklahoma. Thus,

H_5: As the mean of justices with Southern regional origins increases, the Court's level of economic liberalism will decrease.

Career Experiences

In addition to the larger social context in which Supreme Court justices were raised, their pre-appointment career experiences may serve to influence attitudes and, in turn, the Court's economic decision-making.

Judicial Experience. The associations that prior studies find between a justice's pre-appointment experience and their economic decision-making are mixed. Johnston (1976) asserts, based in part on research conducted by John Schmidhauser (1963), that there is a negative relationship between the two constructs because individuals with such

experience "would be more likely to develop attitudes of restraint and would possible make decisions based upon 'law and precedent' than upon their perspective of the political, social, and economic needs of the moment" (Johnston 1976: 83). However, Tate and Handberg (1991) find a positive association between judicial experience and economic voting behavior (1991: 474). Because of the mixed results the literature has found for this variable, this study adopts the theoretical justification that Johnston (1976) offers, based upon Schmidhauser's prior research.

Following the scoring methodology of Tate and Handberg (1991) and Haynie and Tate (1990), a justice's judicial experience is scored in the following manner: two (2) if he had five or more years of pre-appointment experience; one (1) if he had some but less than five years experience; and, zero (0) if he had no judicial experience. An index of judicial experience is used rather than the actual years of experience because the latter is skewed strongly to the left since a large number of Supreme Court justices had no such experience (see Tate and Handberg 1991: 470-71). A mean of the extent of the justices' prior judicial experience is calculated for each term year, based upon data compiled in The Supreme Court Compendium (1996: 296-303). Thus,

H_6: As the extent of the justices' judicial experience increases, the level of economic liberalism decreases.

The Court's Environment

Although the Court has been described as a "marble temple" (O'Brien 1996: 129) and a "monastery" (Berry 1978: 27), the Court operates within a highly charged political environment. Its decision-making is, thus, oftentimes influenced by discrete events that occur at one point in time and affect the justices' voting behavior for only that limited period. To properly construct explanatory models of the institutional liberalism of the Court, one must specify and estimate the effects of events that may impact its rulings that may occur beyond the marble walls of the Court building but yet within the Court's political environment.

The Panic of 1893. Although lesser in scope and magnitude than the Great Depression, the Panic of 1893 also may theoretically impact the Supreme Court's economic policy-making. The stock market failed shortly after Grover Cleveland assumed the presidency in 1893. As a result, many banks called in their loans and diminished the amount of credit they would extend to their customers (Degler et al. 1981: 411). Before the end of the year, 500 banks and nearly 16,000 business had declared bankruptcy. No sector of the economy escaped the effects of the Panic. "Everywhere mills, factories, furnaces, and mines closed down in large numbers, and hundreds of thousands of workers

lost their jobs...The panic developed into a major depression" (Degler et al. 1981: 411). Thus, the Panic of 1893 was a significant economic event in the pre-twentieth century Court's environment whose effect should be empirically investigated.

The Panic's occurrence is hypothesized to increase the Court's economic liberalism for reasons similar to those that are proffered for the Great Depression: the Court as the last court of resort within the judicial system must resolve the issues causing concern in the courts below. The lower courts of the day were most likely struggling with issues of how to deal with the economic and labor demands that were associated with the Panic of 1893, as they would do nearly forty years later. Moreover, the Panic is important in terms of partisan politics because it led, in part, to the critical election of 1896 resulting in a subsequent partisan realignment (Gates 1992: 8). The intervention modeling the Panic of 1893 is scored zero (0) up until 1893 and one (1) thereafter. Thus,

H_7: The Panic of 1893 is associated with an increase in the liberalism of the Supreme Court's economic decision-making.

Election of Theodore Roosevelt. Theodore Roosevelt had a reputation as being a trust-buster and a reformer, seeking to propose policies that would protect the consumer,

increase the level of regulation of business activity, prevent monopolies and reduce the level of corruption in government (Degler et al. 1980: 456-57). Although he did serve as vice-president under President William McKinley and assumed the presidency when McKinley was assassinated in 1901, the electorate did not have the opportunity to vote on him as president until 1904. Even though Roosevelt later ran as the Bull Moose Party Candidate, he had developed a reputation as a reformer while he served as president from 1901 to 1904 (Degler et al. 1980: 456-57). His election may have signaled a rise in popular support for Progressive reforms. This event may, thus, have influenced the Court to become more liberal in its economic decision-making because of the perceived change in public opinion on issues of reform that Roosevelt's election represented.

Thus, the election of Roosevelt is scored zero (0) through 1903 and one (1) beginning in 1904. The variable is hypothesized to be a continuous influence because Roosevelt's efforts to enact reform policies, in part, helped to energize the Progressive movement that permanently transformed the complexion of American politics. We have, for example, not repealed the antitrust laws that bind economic interests. Hence,

H_8: The election of Theodore Roosevelt as President of the United States in 1904 is associated with an increase in

the level of the Court's economic liberalism.

Great Depression. Perhaps the single most important macro-economic event to occur in United States history is the Great Depression. It transformed the political system from one that was dominated by a laissez-faire, non-interventionist attitude toward one that adopted a progressive social welfare system. "It was an emergency, as Justice Brandeis remarked 'more serious than war'" (McCloskey 1994: 109). The Social Security Act of 1935, providing for unemployment insurance and assistance to the needy, was passed into law as a result of this event (Wilson 1995: 501). As a result of the Depression, the federal government began to provide more and more services to residents and to delve deeper into regulation of many aspects of the economy. Historical accounts suggest that the Supreme Court was at first an unwilling conspirator in this transformation, "maintaining a position on the margin of the political arena" (McCloskey 1994: 109). But in 1937, it became a full-fledged partner in the effort to deal with the enormous challenges facing the government, the economy, and the nation as a whole as a result of the Great Depression. It did so by supporting greater economic liberalism (McCloskey 1994: 117-20).

Since the Supreme Court is located at the apex of the judicial system, it is likely that the Court's economic

decision-making would be impacted by such a large-scale event. Indeed, it seems very unlikely that the Court's rulings would not be affected by this event. Because it was a discrete occurrence, it is modeled as an intervention affecting the Court's economic policy-making. Accordingly, this variable is scored as taking on the value of zero (0) up to 1928 and one (1) beginning in 1929. Thus,

H_9: The advent of the Great Depression is associated with an increased level of liberalism in the economic decision-making of the Supreme Court.

Roosevelt's Court-Packing Plan. Many authors have noted the Supreme Court's abrupt turnabout in its economic decision-making to become more supportive of New Deal legislation and the government's efforts to regulate the economy and business activity after Franklin D. Roosevelt announced his Court-packing plan (e.g., McCloskey 1994; Schwartz 1993). The Court had struck down as unconstitutional a string of laws the Congress had passed to ameliorate the tremendous demands of the Depression, thus continuing the Court's laissez-faire perspective that dominated its institutional decision-making for the prior fifty years or more. Notable among this legislation were parts of the National Industrial Recovery Act, the cornerstone of the New Deal program. "At a moment when the political pressure for economic legislation was greater than

ever before, the Court had chosen to call a halt; at a moment when the Constitution's famous flexibility was most required, the Court had chosen to regard judicial review as the automatic application of static principles. The depression, and the New Deal which was its reflex, were forces too cosmic for those Canutes to withstand" (McCloskey 1994: 117). Labor relations had also grown violent, graphically illustrating the "grim fact that the national economic dilemma was still very acute" (McCloskey 1994: 117).

In response, President Roosevelt proposed in February 1937 that the Court's membership be expanded, having been re-elected in 1936 by a landslide and thus claiming a popular mandate (McCloskey 1994: 113). He suggested that for every justice who was older than 70 years of age who failed to retire that he have the opportunity to nominate an additional justice. Roosevelt argued that these additional justices were needed in order to lighten the Court's burgeoning workload because the Court's septuagenarians allegedly were not efficient and timely in fulfilling their judicial responsibilities (Scigliano 1971: 44). Roosevelt's plan, had it been enacted, would have allowed him to nominate six new justices and thereby insure the approval of the New Deal program (McCloskey 1994: 113; Scigliano 1971: 44).

The justices who caused Roosevelt the most consternation were the vaunted "Four Horsemen of the Apocalypse" (Schwartz 1983: 279): George Sutherland, Willis Van Devanter, James C. McReynolds, and Pierce Butler. Prior to 1936, Owen Roberts and Charles Evans Hughes would occasionally vote with the conservative bloc. In reality, however, the justices that Roosevelt was particularly concerned about were the very ones that were the staunchest opponents of his New Deal programs (Scigliano 1971: 45). As McCloskey (1994) notes, the Court cannot lag too far behind the nation if the institution is to survive. Roosevelt's proposal brought that grim reality home for the justices, who had previously sought to disassociate the Court as an institution from what the justices considered to be the distasteful and unseemly ordinary political process of the day. The bill's "passage would set a precedent from which the institution of judicial review might never recover. It is not too much to say that the ambiguous and delicately balanced American tradition of limited government was mortally endangered by this bill. And it was offered by a President who had just received an overwhelming popular vote of confidence and who had not yet been denied in Congress any of his important demands. Even the five or six judges who had provoked this threat must have slept rather uneasily for a few months" (McCloskey 1994: 113).

The President's plan may have, thus, affected, if only subconsciously, the justices' voting behavior. "No one, perhaps not even Justice Roberts, could say which of these circumstances was decisive for him; but it is hard to doubt that they played a part in the new tone of judicial decision that began to be sounded in the early months of the year" (McCloskey 1994: 117). Thus, Roosevelt's attack on the legitimacy of the Court's decision-making and a thinly-veiled attempt to restructure its membership served to demonstrate the boundary of the Court's authority and power within the American political system.

While the proposal of Roosevelt's Court-packing plan is certainly an historically and politically significant event in Supreme Court history, only Schubert (1959) has sought to empirically investigate whether the plan is in fact associated with the Court becoming more liberal in its overall economic decision-making. Schubert notes that the Court during the 1936 term (during which Roosevelt announced his plan) was composed of three voting coalitions: liberal (Cardozo, Brandeis, and Stone), right (Van Devanter, McReynolds, Sutherland, and Butler), and moderate (Hughes and Roberts) (1959: 193). Before Roosevelt announced his plan, Schubert finds that Hughes and Roberts voted with the right coalition more frequently than with the left. After the plan was announced, however, the moderates joined the

left bloc at a much higher rate than they joined the right, presumably to reduce the conflict with the President (Schubert 1959: 193-194). Constructing strategies and incentives, Schubert adopts a game theoretic model of the voting coalitions during the 1936 term year that would maximize the amount of power of each of the blocs, based upon the structural imperative of a minimum five-member majority coalition (Schubert 1959: 198-99). He finds that the actual voting behavior closely resembled the voting coalitions that his model predicted. The Court's first alternative was to build a unanimous decision so as to show a united front to other political actors, notably the President and the Congress. If that alternative was not possible, then Hughes and Roberts' optimum strategy was to align themselves with the liberal coalition because of the greater influence they gained as a result of forging a majority and because of the justices' perceived desire to move the Court's policy announcements closer to the President's preferred position (Schubert 1959: 206-10). Thus, Schubert implicitly asserts Roosevelt's plan increased the level of liberalism of the Court's decision-making.

Certainly, legal scholars and historians can point to the Court's decisions in individual cases as evidence of an abrupt transformation in the Court's posture towards the New Deal and the government's efforts to intervene in the

economy. Yet, the literature in the subfield of judicial politics has not systematically addressed the effect of the President's plan on the institutional liberalism of the Supreme Court's overall economic decision-making.

Hence, this study does so. A variable measuring the effect of Roosevelt's Court-packing plan is estimated, along with the other variables discussed above. Since it is a discrete event, it is modeled as an intervention, taking the value zero (0) through the 1936 term year, and one (1) thereafter. Although Roosevelt's plan was sent to Congress in February of 1937, the intervention is not specified to begin to be effective until the following full term-year (1937). This is theoretically more plausible than specifying that it take on a value of one beginning in the 1936 term year because there were several months during that period in which the intervention was not theoretically influential since Roosevelt had not yet proposed it then. Moreover, because the Court, and indeed the American political system in general, has been allegedly permanently changed by this historic event, the variable will be modeled as a permanent process rather than as a temporary one. Thus,

H_{10}: President Franklin D. Roosevelt's Court-packing plan of 1937 increases the level of economic liberalism in the Court's decision-making.

Findings. Two different combinations of the variables listed above are specified in an attempt to find the best fitting model to explain the Court's economic liberalism across the period from 1888 to 1989. A variable whose estimate is non-significant in the first model is eliminated in the second model, with one exception which is discussed below. Each of them is presented and discussed in turn. The results for each are shown in Table 6-2.

In model one, three of the six continuous variables are related to the Court's economic liberalism. The mean of the number of Non-Protestants is statistically significant and signed consistent with its hypothesis: as their number increases, so does the Court's economic liberalism. Similarly, the mean of the number of justices with agricultural origins is negatively signed, consistent with our theoretical expectations: as the number of justices with agricultural origins increases, the Court's economic liberalism decreases. Judicial experience is negatively related to economic liberalism. Thus, as the justices' service on lower court benches increases, the liberalism of the Court's economic decision-making decreases. However, the justices' party identifications, presidential intentions and the justices' southern origins do not affect the Court's institutional economic decision-making since they do not reach conventional levels of statistical significance.

Table 6-2

Multivariate ARIMA Models of United States Supreme Court Economic Liberalism, 1888-1989

Component	Model One	Model Two
Justices' Party	-1.397[1] (6.49) -0.22	----
Non-Protestants	21.32 (15.94) 1.34*	28.47 (13.34) 2.13**
Ag. Origins	-25.28 (14.02) -1.80*	-31.00 (13.06) -2.37**
Pres. Intentions	-0.554 (1.57) -0.35	----
Southern Origins	9.692 (12.64) 0.77	----
Judicial Exp.	-16.06 (6.01) -2.67**	-13.92 (4.88) -2.85**
Great Depression	2.618 (6.31) 0.41	5.905 (4.05) 1.46*
Court-Packing Plan	9.804 (7.37) 1.33*	13.28 (5.37) 2.47**
Panic of 1893	6.198 (6.29) 0.99	----

Table 6-2. Continued

Component	Model One	Model Two
Roosevelt's Election	2.807 (6.1897) 0.45	----
First-Order Autoregressive	-0.7186 (0.096) -7.45**	-0.7175 (0.090) -7.90**
Second-Order Moving Average	0.5391 (0.132) 4.06**	0.598 (0.122) 4.90**
Fourth-Order Moving Average	0.1495 (0.1173) 1.27*	0.091 (0.111) 0.82
RMS[2]	62.256	59.597
DOF[3]	86	91
L-B Q[4](20 lags)	21	12

** Significant at the 0.05 level (one-tail test)
* Significant at the 0.10 level (one-tail test)

[1]These are the coefficient estimate, (the standard error), and the t score, respectively.
[2]Residual Mean Square
[3]Degrees of Freedom
[4]Ljung-Box Q Test Statistic

This is a surprising finding given their statistical significance in other studies, particularly the justices' party identifications (see Tate and Handberg 1991: 474). Party has been a consistent indicator of the justices' attitudes in cross-sectional studies (Tate and Handberg 1991), although Haynie and Tate (1990) find no relationship

between party affiliation and economic liberalism in their longitudinal analyses.

Turning to the interventions, model one includes shocks due to the Great Depression, Franklin Roosevelt's 1937 Court-Packing Plan, the Panic of 1893, and Theodore Roosevelt's election. First, the Great Depression is not statistically significant, although its coefficient is positively signed. This is a surprising finding given the significant effect that the Depression had on the policies the other institutions of the federal government enacted to respond to the challenges that event caused. It seems somewhat theoretically implausible that the Court's decision-making would be immune to the large-scale influence of perhaps the most significant macroeconomic event to occur in United States history. Thus, the effect of the Great Depression on the Court's policy preferences is retained in Model Two despite its statistical insignificance.

Roosevelt's Court-packing plan of 1937 did impact the Court's economic liberalism. The plan's coefficient is statistically significant, even when the effect of the Great Depression is considered. Hence, the President's attack on the Court indirectly achieved its goal: the Court became more liberal in its economic policy preferences even though Roosevelt did not immediately obtain the opportunity to nominate additional justices to the high tribunal. This is

a theoretically constructive finding because it demonstrates that the Court during this critical event in its history became distinctly aware of the limits of its authority within the extant political structure. This finding is particularly intriguing because the variable is specified as an abrupt, permanent process, suggesting that the Court was transformed by this battle with the popularly-elected branches of the government and the public at large.

The third intervention specified in model one is the effect of the Panic of 1893. Like the finding for the Great Depression, the estimate of the variable's coefficient is not statistically significant, although the coefficient is signed positively. This is not an unexpected finding, given the relatively small magnitude of the Panic as compared to the Depression. Its effects did not compare to the scope and extent of the effect of the Great Depression that was to restructure the nation's economic order. Also, the election of Theodore Roosevelt is not significantly related with an increase in the liberalism of the Court's economic policy preferences. Perhaps the rise of Progressivism that Roosevelt's election was hypothesized to represent did not influence the Court's level of economic liberalism.

Also, the moving average and autoregressive parameters of the model are all statistically significant. All of the parameter estimates meet the tests of stationarity and

invertability. Overall then, model one is satisfactory. The residual mean square statistic is slightly more than 62, and the Ljung-Box Q statistic is 21 at 20 lags. The magnitude of the residual mean square figure has no absolute meaning, but only has meaning relative to competing models. It is, thus, used to compare alternative specifications. The Ljung-Box Q statistic, however, is within customary limits: it is less than 30 at 20 lags. The only cause for some concern is the statistical insignificance of four of the variables.

As indicated above, the first model of the Court's economic liberalism is re-estimated, using only the statistically significant variables plus the intervention of the Great Depression. The Depression's effect is estimated, despite its statistical insignificance in the prior model, because of the theoretic plausibility that it should be significantly related to the Court's economic liberalism because of the magnitude of the effect of that event on the political, economic and social order of the United States. It seems unlikely that the Court as the nation's ultimate forum of conflict resolution would escape the effects of such a large scale event.

Turning the results displayed in Table 6-2 , all the coefficient estimates are significant. The mean of the number of non-Protestants on the Court remains statistically

significant and positively signed, indicating that as their number increases the Court's economic decision-making becomes more liberal. This is a theoretically consistent finding since the religious preferences of the justices can provide a window on their policy preferences (Ulmer 1973). Similarly, the coefficient for agricultural origins is robust and strongly significant, and it is negatively signed once again indicating that the growing number of justices with agrarian social backgrounds is associated with a declining level of institutional liberalism. Also, the estimate of the justices' judicial experience is quite significant and negatively-signed. This finding indicates that the more extensive the justices' pre-appointment experiences are, the less liberal their decision-making will be. This result supports Johnston's (1976) assertion that prior judicial service is a conservative influence on the Court's decision-making. Hence, the factors measuring the influence of urban and religious cleavages and prior career experiences do affect the Court's institutional policy-making across the 102 years of the Supreme Court jurisprudence examined in this study.

Additionally, the Great Depression is statistically significant and positively signed, consistent with its hypothesis. This result indicates that the occurrence of the Depression is associated with the Court becoming more

liberal in its economic decision-making. This is an intuitively pleasing finding in that it demonstrates that the political environment does effect the Court's policy-making. Moreover, the Depression is specified as being an abrupt, permanent process. This type of specification models the Depression's effect as occurring without any gradation in strength. Because of the transformation that the Depression wrought on the political system, the intervention is modeled as having a permanent effect on the Court's decision-making, as opposed to affecting it for only a limited duration. "As the Civil War had settled the basic question underlying the nation-state conflict, so the Depression and the New Deal had resolved the basic question of economic control" (McCloskey 1994: 119). Hence, the Great Depression is empirically associated with an enduring increase in the liberalism of the Court's economic policy preferences.

Also, the President's Court-packing plan is significant once again. This finding suggests that his thinly-veiled attack on the legitimacy of the Court is associated with an increase in its institutional liberalism, consistent with the expected effect of the plan. Thus, despite the partial structural insulation it possesses from the dynamics of the political environment, the Court's liberalism is sensitive to changes within the extant political system. This is an

theoretically consistent finding since the Court is a significant policy-maker within the American system of government. Perhaps the Court does, as Mr. Dooley says, "follow the election returns" (Schwartz 1993: 186).

The model's autoregressive and one of the moving average parameters are statistically significant; both lie within the bounds of stationarity and invertability. The only cause for concern is the statistical insignificance of the fourth-order moving average (affecting the level of the Court's economic liberalism across four lags). If it is not included, the parameter estimates for the remaining autoregressive and moving average components increase out of the bounds of stationarity and invertability.

This second model's residual mean square is somewhat less than that for model one, indicating that it represents a relative better fit to the data than does the prior model. Overall then, model two is an acceptable explanation of the Court's decision-making. All of the variables in the model are statistically significant and the estimates are generally robust, indicating strong relationships with the Court's economic liberalism.

Moreover, one can test if the parameters of a model are stable over time by conducting Chow's First Test (Gujarati 1995: 261-62). This test involves splitting the original period of analysis into two sub-periods, obtaining the

residual sum of squares (RSS) for the two subperiods and for the overall period, and then calculating an F-test based on the difference in the combined RSS from the two subperiods and the overall RSS. Customarily, the overall period of analysis is split in half.

Calculating Chow's First Test yields a test statistic of 0.14. The critical value for (8,102) degrees of freedom is 2.02 at the 0.05 level of statistical significance. Thus, we cannot reject the null hypothesis that the parameters of model three are stable over time. Therefore, we can conclude that the estimates discussed above for the continuous variables employed in the construction of an explanation of the Court's institutional economic decision-making are stable and consistent across the entire period of analysis.

Civil Liberties-Civil Rights Liberalism

An explanation of the Court's civil liberties-civil rights liberalism is also constructed. As with economic liberalism, the Box-Jenkins-Tiao protocol is followed to identify and estimate the individual variables included in each of the models. While this second aggregated issue area is a large part of the Court's current agenda, it was not a dominant portion of the docket prior to the 1950s, when its

Table 6-3. Summary of Research Findings With Regard to Individual Hypotheses of Economic Liberalism

Hypothesis	Finding
H_1: Party affiliation Positively Associated With Liberalism	Not Supported
H_2: Presidential Policy Intentions Positively Associated With Liberalism	Not Supported
H_3: Religious Affiliations Positively Associated With Liberalism	Supported
H_4: Agricultural Origins Negatively Associated With Liberalism	Supported
H_5: Southern Regional Origins Negatively Associated With Liberalism	Not Supported
H_6: Judicial Experience Negatively Associated with Liberalism	Supported
H_7: Panic of 1893 Positively Associated With Liberalism	Not Supported
H_8: Election of Theodore Roosevelt in 1904 Positively Associated With Liberalism	Not Supported
H_9: Occurrence of the Great Depression Positively Associated With Liberalism	Supported
H_{10}: Franklin Roosevelt's Court-Packing Plan Positively Associated With Liberalism	Supported

decisions were dominated by economic concerns (see Chapter V). Nevertheless, to understand accurately the Court's decisional processes throughout the period from 1888 to

1989, one must examine the various influences on this second type of institutional policy-making.

Dependent Variable. The dependent variable for this section of the analysis of the Court's institutional decision-making is its liberalism rate across the period from 1888 to 1989 for issues within the aggregated issue dimension of civil liberties-civil rights. The variable, as discussed in previous Chapters, is a percentage. To achieve mean and variance stationary, the series is first-differenced and its natural log taken, resulting in the transformed series (CLCRLIBL). It is identified as a (1,1,2) process. Algebraically, it is:

$$CLCRLIBL_t = \phi_1 CLCRLIBL_{t-1} + a_t - \theta_1 a_{t-2} - \theta_2 a_{t-5}$$

Table 6-4 shows the estimates for this model. This model implies that the Court's current level of liberalism is a function of the Court's liberalism in the immediately preceding term year ($\phi_1 CLCRLIBL_{t-1}$) plus an error term at time t (a_t) less a portion of a shock in each of the second ($\theta_1 a_{t-2}$) and fifth ($\theta_2 a_{t-5}$) preceding term years.

Independent variables. There are several influences on the Court's civil liberties-civil rights decision-making that could be included in an explanation. In this analysis, however, a select few of these are included, due in part to concerns of parsimony. Two of the independent variables that are used in this specification of civil liberties-civil

Table 6-4

Univariate ARIMA Model of United States Supreme Court Civil Liberties -Civil Rights Liberalism, 1888-1989

Component	Parameter	Coefficient Estimate	Standard Error	T
First-order Autoregression	AR1	-0.6488	0.0900	-7.21**
Second-order Moving Average	MA2	0.6003	0.0878	6.84**
Fifth-order Moving Average	MA5	-0.2792	0.0792	-3.53**

Residual Mean Square = 0.1698
Degrees of Freedom = 97
Ljung-Box Q (20 lags) = 24

** Significant at the 0.002 level, two-tail test

rights liberalism are used above in the development of an explanation of the Court's economic liberalism. These are the justices' party identifications and their agricultural origins.

Agricultural Origins

The process of industrialization and urbanization tend to engender liberal attitudes among urban residents. Those persons who were socialized in agrarian areas tend to develop conservative attitudes toward these issues. Hence

the association of the justices' agricultural origins' relationship with the Court's decision-making is expected to be negative. Thus,

H_{11}: As the mean of the number of justices with agricultural origins increases, the liberalism of the Court for civil liberties matters decreases.

Party Identification

The direction of the hypothetical association of the proportion of the justices' party identification, however, changes in direction in the context of developing an explanation of the Court's institutional civil liberties decision-making.[2] Whereas the Democrats are during the period of analysis generally thought to be more supportive of economic liberalism than were Republicans, the opposite is true in the civil liberties context. "There is a seeming paradox in the liberal's attitude toward the state, for he welcomes its intervention in economic affairs, but seeks to limit very severely its restrictions on individual expression of intellectual and physical freedom. In the former area, liberalism is typically pro-state; in the latter, its fundamental bias is anti-statist" (Pritchett 1948: 273). The opposite is true in the civil liberties-civil rights juridical context up until the 1960s. Up until 1964, Democrats, at least in Congress, tended to be less

supportive of civil liberties-civil rights claims than did Republicans (Carmines and Stimson 1989: passim).

While the period of analysis contains 26 term years in which the Republicans were often opponents of efforts to expand the protections afforded civil liberties and civil rights (1964-1989), the bulk of the period (76 term years, 1888-1963) is associated with partisans aligning themselves on this bundle of issues in such a way as to suggest that those who identify themselves as Democrats are less supportive of civil liberties claims than are Independent or Republican identifiers. Accordingly,

H_{12}: As the mean of the justices' party identifications increases, the Court's institutional civil liberties liberalism decreases.

Prosecutorial-Judicial Experience

The third variable in this specification of the Court's civil liberties decision-making is the justices' pre-appointment prosecutorial-judicial experience. Like judicial experience alone, a justice's experience as a prosecutor can serve to shape his attitudes and policy preferences, especially those relating to civil liberties. As a prosecutor, the justice advocated the government's position, arguing in a court of law against granting a dissident or civil liberties claimant some freedom, or

granting a criminal defendant some protection or procedural right (Tate and Handberg 1991: 471). These prior career experiences influence the justice to hold attitudes that are generally not supportive of expanded civil liberties. These attitudes bring the justice into conflict with liberal civil liberties policy preferences (Tate and Handberg 1991: 471). Additionally, Tate and Handberg (1991) suggest that a justice's prior prosecutorial experience is best modeled as an interaction with any prior judicial experience that he may have (Tate and Handberg 1991: 471; Tate 1981: 362). These authors argue that judicial experience may moderate the much more conservative influence of prior prosecutorial service. Indeed, at the individual level of analysis, they find that there is a negative relationship with civil liberties liberalism while an index measuring only the justices' prior judicial experiences is not significantly associated with their voting behavior (Tate and Handberg 1991: 471). Justices who have been prosecutors but have not held judicial office are less liberal than those who have been prosecutors and judges, who are in turn less liberal than those justices who have held neither office (Tate and Handberg 1991: 474-75, note 21).

Moreover, Haynie and Tate (1990) examine the effect of a justice's combined prosecutorial and judicial experience at the institutional level of analysis. They find that the

coefficient for this variable is negatively signed and marginally significant (Haynie and Tate 1990: 16). Following these authors' protocol, the variable is scored in this manner: two (2) for justices with no prosecutorial or judicial experience; one (1) for justices with both prior prosecutorial and judicial experience, or with judicial experience only; and, zero (0) for those justices who had only experience as a prosecutor. An index is specified here, as with judicial experience in the analysis of economic decision-making, because a large number of the justices had no prior judicial experience. As before, a mean of the index for each term year is calculated. Thus,

H_{13}: As the mean of the justices' prosecutorial-judicial experience increases, the Court's institutional civil liberties liberalism increases.

Interventions. There have been a number of events that may have served to influence the Court's civil liberties policy-making for limited periods.

Wars

Perhaps the most influential events that influence the Court's civil liberties policy-making are wars in which the United States is a participant. Because of the perceived threat that political dissidents or protestors represent to national security, the Court has historically been less

receptive to civil liberties claims during times of war. "As Justice Holmes wrote in 1919, 'when a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight'" (McCloskey 1994: 170). During the period at hand, the U.S. has been involved in several wars or conflicts with other nations. Three of these are considered here.

They are modeled as interventions or shocks to the Court's institutional civil liberties liberalism since they theoretically affected the Court's decision-making only at discrete times. These are the Spanish-American War (1898), World War I (1914-1919), and World War II (1939-1945). They are hypothesized to be initially associated with a decline in the Court's liberalism because of the extant threat to the nation's security. The intervention's effect is expected to gradually decline, because the Court will perceive that the threat has subsided and increased caution in deciding civil liberties cases is no longer warranted. Indeed, Haynie and Tate (1990: 16) find that the intervention of World War II caused a temporary decline in the Court's liberalism, but then the conservative effect of the War subsided over time and the series eventually returned to its baseline level. Thus,

H_{14}: The occurrence of the Spanish-American War (1898) initially decreases the Court's civil liberties liberalism, which then gradually increases and stabilizes after the intervention.

H_{15}: The occurrence of World War I (1914-1919) initially decreases the Court's civil liberties liberalism, which then gradually increases and stabilizes after the intervention.

H_{16}: The occurrence of World War II (1939-1945) initially decreases the Court's civil liberties liberalism, which then gradually increases and stabilizes after the intervention.

Findings. Table 6-5 shows the coefficient estimates for three models of the Court's institutional liberalism in civil liberties decisions. Model one includes three continuous variables measuring the influence of the justices' partisan and religious affiliations and their prior career experiences on the Court's civil liberties policy preferences. Variables measuring the influence of the justices' agricultural and southern regional origins, and the policy intentions of the president who nominated them are not included in model one because they are found to be non-significant in other analyses. Haynie and Tate (1990: 16), for example, find no association between regional origins and the Court's level of liberalism.

Table 6-5

Multivariate ARIMA Models of United States Supreme Court Civil Liberties Liberalism, 1888-1989

Component	Model One	Model Two
Justices' Party	-0.2891[1] (0.2753) -1.05	-0.4945 (0.2722) -1.82***
Non-Protestants	0.5042 (0.9195) 0.55	----
Pros.-Jud. Exp.	-0.6166 (0.5561) -1.11	-0.6823 (0.5916) -1.15
World War I (Impact)	-0.3082 (0.2167) -1.42**	-0.3352 (0.2305) -1.45**
World War I (Decay)	0.5331 (0.4856) 1.10	0.4523 (0.5603) 0.81
World War II (Impact)	0.1296 (0.2418) 0.54	----
World War II (Decay)	-0.9012 (0.4685) -1.92	----
Spanish-Am. War (Impact)	-1.021 (0.4489) -2.27*	----
Spanish-Am. War (Decay)	-0.1054 (0.4353) -0.24	----

Table 6-5. Continued

Component	Model One	Model Two
First-Order Autoregressive	-0.6667	-0.6526
	(0.1083)	(0.1071)
	-6.16***	-6.09***
Second-Order Moving Average	0.6235	0.5455
	(0.1168)	(0.1131)
	5.34***	4.82***
Fifth-Order Moving Average	-0.1908	-0.1949
	(0.0959)	(0.0950)
	-1.99***	-2.05***
RMS[2]	0.1748	0.1823
DOF[3]	82	87
L-B Q^4 (20 lags)	22	27

*** Significant at the 0.05 level (one-tail test)
** Significant at the 0.10 level (one-tail test)
* Marginally significant at the 0.10 level (one-tail test)

[1]These are the coefficient estimate, (the standard error), and the t score, respectively.
[2]Residual Mean Square
[3]Degrees of Freedom
[4]Ljung-Box Q Test Statistic

In model one, the mean number of non-Protestants on the Court, the index of the justices' career experiences and their party identifications are not significantly related to the Court's civil liberties liberalism. These findings are intriguing. One would think that at least one of the variables measuring the effect of religious affiliation or party identification would have been strongly associated

with the Court's decision-making.

However, these types of findings are not unprecedented. Segal, Epstein, Cameron and Spaeth (1995) attempt to extend the use of Segal and Cover's (1989) scores back to the 1930s. They find that the scores, as proxies for the justices' attitudes, are much less robust than they are in more contemporary periods (Segal, Epstein, Cameron and Spaeth 1995: 818). Hence, the results of the present study may confirm the finding that the justices' behavior during this earlier period may be less associated with their attitudinal content.

The interventions are also specified, so as to more completely assess the determinants of the Court's civil liberties liberalism. The First World War is specified as being a gradual, temporary process. This specification suggests that the War's effect occurred over more than one term year and that the level of the dependent variable eventually returned to its pre-War level. As Table 6-4 shows, the War's initial impact is significant and negatively signed, consistent with its hypothesis. This result implies that the Court's civil liberties liberalism initially declined as a result of the occurrence of the War. Indeed, this is an expected finding, given the observations of historical analyses (Biskupic and Witt 1997; McCloskey 1994; Schwartz 1993) that have found that the Court's civil

liberties jurisprudence (particularly, free speech decisions) became less liberal during that time. The parameter measuring the decay of the War's impact is statistically insignificant. It is positively signed, indicating that the Court's liberalism eventually returned to the higher, pre-War levels. The magnitude of the coefficient (0.5331), indicates that 53 percent of the War's impact is retained in each succeeding period. This finding of an initial decline and then a re-equilibration across several periods following World War I is a theoretically consistent result. The Court would naturally be less supportive of civil liberties claims during times of war, but then gradually return to its pre-War policy preferences after the war is over when fears and concerns of national security subside. Thus, the War did affect the Court's civil liberties policy preferences for a relatively extended period.

However, the effect of World War II on the Court policy preferences is not borne out by these analyses. The coefficient assessing the influence of the War's initial impact does not reach conventional levels of statistical significance, or even come close to doing so. Also, the estimate for the decay of the War's effect is signed inconsistently with its hypothesis. Thus, this result implies that the occurrence of World War II did not affect

the level of the Court's civil liberties liberalism. However, Haynie and Tate (1990: 16, Table 1) find that the War was associated with a decline in the Court's civil liberties liberalism. But they analyze only non-unanimous cases, which may explain the difference in the results between their study and the present study.

At first blush, the statistical insignificance of World War II may be cause for concern. Yet, Pritchett (1948: 117) suggests that the Court may have understood that it need not be as restrictive in its decision-making as it was during the World War I era, because the fears and concerns for national security were simply exaggerated; there are, of course, notable exceptions in the Court's decision-making to this proposal (e.g., Korematsu v. United States (1944), interning Japanese-Americans on the West Coast for fear of their collaboration with Japan). Thus, the Court may have been more supportive of civil liberties than it had been in previous times of war.

The third intervention modeled in model one is the occurrence of the Spanish-American War in 1898. The impact of the War itself is statistically significant and signed consistent with its hypothesis. However, the parameter indicating the decay of the War's effect is not significant, or even marginally significant. Thus, the results imply that the Spanish-American War did not affect the level of

the Court's civil liberties liberalism.

The model's autoregressive and moving average parameters are statistically significant and meet the bounds of stationarity and invertability. The residual mean square for Model One is 0.1748. The Ljung-Box Q statistic is 22, which satisfies the standard that it be less than 30 at 20 lags. Thus, this model suggests that the level of the Court's civil liberties liberalism is marginally associated with the justices' party identifications and their prior career experiences, and with the occurrence of World War I.

Model two is estimated in an attempt to construct a better explanation of the Court's civil liberties liberalism across time. Only those variables whose coefficient estimates are significant, or at least marginally so, in model one are generally included in the specification of this second model. First, the justices' party identifications are associated with the dependent variable. The coefficient estimate is negative, indicating that Democrats tend to be less supportive of civil liberties claims than are Republicans during the period examined herein.

Second, the justices' prior prosecutorial-judicial experience is marginally significant and negatively associated with the Court's civil liberties policy-making. However, the number of justices with neither prosecutorial

nor judicial experience is not related to the Court's liberalism. This finding is inconsistent with Johnston's (1976) hypothesis of the effect of the justices' prior career experiences on the Court's institutional voting behavior.

Model two also estimates the effect of the occurrence of World War I. It is included in this second specification because the coefficient measuring the War's impact and its decay are at least marginally significant in model one. As in model one, the War's effect is modeled as a temporary intervention whose effect gradually decays over time. As Table 6-4 shows, the occurrence of World War I is associated with a temporary decline in the liberalism of the Court's civil liberties policy-making, supporting the theoretical proposition that the Court's civil liberties policy making becomes more conservative during times of heightened suspicion. However, the decay parameter's coefficient is not statistically significant.

The autoregressive and moving average components of the model are significant and meet the bounds of invertability and stationarity. The Ljung-Box Q statistic is satisfactory at 27, because it meets the rule of thumb of being less than 30 at 20 lags. The residual mean square is 0.1823.

Overall, neither model one nor model two is clearly better than the other. Model one's residual mean square is

somewhat less than that for model two, although the difference is not terribly large. This indicates that the first model represents a relatively better fit to the data. However, model one has two variables whose coefficient estimates are non-significant (World War II and the Spanish-American War), whereas model two has only one variable (the decay of World War I's impact) that is not significant, or even close to being so. The justices' party identifications are strongly related to the dependent variable and the extent of the statistical significance of the justices' prosecutorial-judicial experience increases very slightly in model two. These ambiguous results may arise from the changing policy preferences of the justices during the period examined in this study. This switch suggests that the association between the justices' attributes and the Court's civil liberties liberalism is not demonstrated in the earlier period. Indeed, Haynie and Tate (1990: 16) find that of their three continuous variables (justices' partisanship, southern regional origins and prosecutorial-judicial experience) and one intervention (World War II), only the War's estimate is significantly related to the Court's civil liberties liberalism. Hence, the Court's civil liberties policy preferences may resist systematic analysis during this time because of the changes in political affiliations that occurred.

Chow's First Test is calculated on model two to determine if the parameter estimates are stable over time. The test statistic obtained for the civil liberties analysis is 0.02. The critical value is 2.09 at the .05 level of statistical significance. Thus, we cannot reject the null hypothesis that the parameters are stable overtime. Therefore, the estimates are stable influences on the Court's institutional decision-making.

Judicial Power Liberalism

While economics and civil liberties decisions comprise the bulk of the Court's decision-making across the 102 term years analyzed in this study, the Court also considered a large number of cases that involved issues of judicial power. Indeed, an investigation of the influence on the Court's decisional processes for this issue area is an appropriate inquiry because since the 1930s, the government has become more involved in the economic and social order of the nation. Because the courts are a significant element of the American political structure, the Supreme Court's policy preferences in decisions involving issues of judicial power empirically demonstrate the contours of its liberalism, beyond the large scale effects that arise from its economics and civil liberties decision-making.

Table 6-6. Summary of Research Findings With Regard to Individual Hypotheses of Civil Liberties-Civil Rights Liberalism

Hypothesis	Finding
H_{11}: Agricultural Origins Negatively Associated With Liberalism	Not Supported
H_{12}: Party Affiliation Negatively Associated With Liberalism	Supported
H_{13}: Prosecutorial-Judicial Experience Index Positively Associated With Liberalism	Not Supported
H_{14}: Occurrence of Spanish-American War Initially Associated With a Decrease in Liberalism	Not Supported
H_{15}: Occurrence of World War I Initially Associated With a Decrease in Liberalism	Supported
H_{16}: Occurrence of World War II Initially Associated With a Decrease in Liberalism	Not Supported

Dependent Variable. The variable measuring the Court's liberalism for judicial power decisions is, similar to the decisional measures for economics and civil liberties, is a percentage. The series is differenced to achieve mean stationarity and logged to make it variance stationary. It is identified as a (0,1,1) process. Table 6-7 shows the moving average component coefficient estimate and related statistics. The parameter coefficient is highly significant

Table 6-7

Univariate ARIMA Model of United States Supreme Court Judicial Power Liberalism, 1888-1989

Component	Parameter	Coefficient Estimate	Standard Error	T
First-order Moving Average	MA5	0.7630	0.0642	11.89**

Residual Mean Square = 0.1470
Degrees of Freedom = 100
Ljung-Box Q (20 lags) = 15

** Significant at the 0.002 level, two-tail test

and indicates that the Court's judicial power liberalism in a term year is a function of a contemporaneous error term (a_t) less a portion of the shock ($\theta_1 a_t$-5) in the fifth preceding term year. Algebraically, it is:

$$JDPWRLIB_t = a_t - \theta_1 a_{t-5}$$

Also, the parameter meets the bounds of invertability required of moving average components, and the residual mean square is relatively small. Hence, this specification of the Court's judicial power liberalism is acceptable.

Independent Variables. There are four continuous variables that are modeled as transfer functions in this analysis of judicial power liberalism. They are: the justices' party identifications, their religious affiliations, their

agricultural origins, and their pre-appointment judicial experience. The first two variables (justices' partisan affiliations and religious preferences) are all hypothesized to be positively associated with the dependent variable because of the generally increasing liberalism with which they are associated in other decisional contexts (see the above analysis of the Court's economic liberalism). Hence,

H_{17}: As the proportion of the Democrats on the Supreme Court increases, the Court's judicial power liberalism increases.

H_{18}: As the proportion of non-Protestants on the Supreme Court increases, the Court's judicial power liberalism increases.

The latter two variables (the justices' agricultural backgrounds and their extent of prior judicial experience) are hypothesized to be negatively associated with the dependent variable. The agrarian context in which a justice spends his formative years is associated with a conservative tendency in political attitudes, and, in turn, in Supreme Court economic voting behavior (Tate and Handberg 1991: 471). Hence,

H_{19}: As the mean number of justices with agricultural origins increases, the Court's judicial power liberalism decreases.

The prior career experience of judicial service is mixed in its effect. Some studies find that it is positively associated with liberal economics and civil liberties decision-making (Tate 1981: 361). Other studies (Johnston 1976: 83) assert a negative relationship with voting behavior. In the context of judicial power decision-making, however, it is proposed that greater judicial experience on lower courts serves to educate judges about the limits of the judiciary's authority and the restrictions of the process on the injection of their partisan attitudes into their decision-making. Hence,

H_{20}: As the prior judicial experience of the justices of the Supreme Court increases, the Court's liberalism in judicial power cases decreases.

The Congress should theoretically exert some degree of influence on the Court's decision-making. Under the Constitution (see Article III), the Congress has the power to restrict the Court's jurisdiction (Baum 1995: 157). It has, in fact, transformed it over time, particularly with the passage of the Judiciary Act of 1925, reducing the Court's mandatory jurisdiction and expanding its discretionary power. Congress can also determine how much their salaries will be raised and how many members the Court has. The justices, thus, have several incentives to avoid conflict with Congress (Baum 1995: 157). Hence, Congress may

influence the Court's decision-making.

The single intervention hypothesized to represent the influence of Congress on the Court's judicial power liberalism policy-making during the period at hand is the promulgation of the Judiciary Act of 1925. The "Judges' Bill," as the Act was dubbed, gave the Court much greater control over the kinds of cases that it would hear (Baum 1995: 125). The passage of the Judges' Bill, thus, may have signaled the Court that courts generally should be involved in more matters and be given more power of administration than they had in prior years. Halpern and Vines (1977) conclude that "[a]n enlarged discretionary jurisdiction broadened the Court's opportunities to provide cues to litigants, encouraging the appeal of certain issues while discouraging others. In these ways, the Judges' Bill enhanced the opportunities of the justices to pursue a variety of judicial strategies to advance goals consonant with their values and to make the high tribunal a more 'activist' institution" (1977: 483). Hence,

$H_{21:}$ After the enactment of the Judiciary Act of 1925, the Court's judicial power liberalism increased.

Findings. Table 6-8 shows the results of the analysis of the Supreme Court judicial power liberalism. In model one, the proportion of the justices' party identifications is significant and signed consistent with its hypothesis,

Table 6-8

Multivariate ARIMA Models of United States Supreme Court Judicial Power Liberalism, 1888-1989

Component	Model One	Model Two
Justices' Party	0.3143[1]	0.3240
	(0.2071)	(0.200)
	1.52*	1.62*
Non-Protestants	2.193	2.179
	(0.6533)	(0.6287)
	3.36***	3.47***
Ag. Origins	-0.1752	-0.2124
	(0.6361)	(0.6094)
	-0.28	-0.35
Judicial Exp.	0.1335	0.3250
	(0.2341)	(0.2374)
	0.57	1.37
Jud. Act of 1925 (Impact)	0.4771	1.027
	(0.2550)	(0.3418)
	1.87**	3.01**
Jud. Act of 1925 (Decay)	----	-0.8003
		(0.1115)
		-7.18***
First-Order Moving Average	0.8552	0.7668
	(0.0669)	(0.0754)
	12.79****	10.17***
RMS[2] =	0.1414	0.1292
DOF[3] =	91	90
L-B Q[4](20 lags)=	17	19

**** Significant at the 0.002 level (two-tail test)
*** Significant at the 0.001 level (one-tail test)
** Significant at the 0.05 level (one-tail test)
* Significant at the 0.10 level (one-tail test)

[1]These are the coefficient estimate, (the standard error), and the t score, respectively.
[2]Residual Mean Square
[3]Degrees of Freedom
[4]Ljung-Box Q Test Statistic

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indicating that an increasing number of Democrats on the Court increases the Court's liberalism in this issue area. However, the justices' agricultural origins are not significantly related to the Court's judicial power liberalism. The same is true for the justices' pre-appointment judicial experience.

The finding of statistical insignificance of agricultural origins is somewhat unexpected, but this finding may result perhaps because this background factor may not systematically be associated with the development of distinct policy preferences, as it is in the realms of economics and civil liberties policy-making. The finding regarding judicial experience is particularly interesting in the context of the Court's decision-making in this issue area; the extent of the justices' prior judicial service is not associated with their decision-making in an issue area where theoretically it should be <u>most</u> influential because such prior service should educate them about the limits of the judiciary's authority.

Turning to the intervention of the Judiciary Act of 1925, model one specifies it as an abrupt, permanent

process, impacting the level of the Court's judicial power liberalism immediately and without any decay in its effect. As one can see, the estimate for this specification is statistically significant and positively signed. This indicates that the Act's promulgation affected a permanent increase in the Court's judicial power policy-making, making it more liberal than it was prior to the Act, consistent with our theoretical expectations.

Overall, the First-Order moving average component is robust and statistically significant. It meets the bounds of invertability, required in Box-Jenkins-Tiao modeling. The model's Ljung-Box Q is 17 at 20 lags. Hence, the model is an acceptable specification of the Supreme Court's liberalism in the judicial power issue area.

Model two is specified and estimated in an attempt to improve the fit of model one. The continuous variables are similarly significant as they are in model one. The only real difference for them in this context is that judicial experience becomes more positively associated with the dependent variable. Even though the coefficient is not signed consistent with its hypothesis, this finding may imply that prior judicial service inculcates judges with the knowledge of the power that the courts in general possess within the American structure and that they become more willing to use that power the longer that they serve on the

bench.

The intervention of the Judiciary Act of 1925 is specified in model two as a gradual permanent process, in which the Act initially impacts the Court's judicial power policy-making and then its effect decays over time. The impact coefficient estimate implies that the Act, as in model one, initially is associated with an increase in the liberalism of the Court's decision-making in cases involving questions of judicial power. The decay coefficient estimate is significant and negatively signed, indicating that the effect of the Act subsided across several term years. Indeed, the magnitude of the coefficient itself (-0.8033) portends that the shock that the Act represents decayed at a relatively slow rate; only about 20 percent of its effect decreases from one period to the next.

Overall, model two is a slight improvement over the fit obtained in model one. The moving average component is robust and highly significant. The residual mean square declines somewhat from that for model one and the Ljung-Box Q statistic is well within the bounds of 30 at 20 lags. Thus, model two is an acceptable specification of the factors influencing the Court's decision-making in judicial power decisions.

As with the other aggregated issue dimensions analyzed in this Chapter, Chow's First test is conducted to determine

if the parameter estimates of the Court's judicial power liberalism are stable over time. All the continuous variables are selected to calculate this test, in addition to the moving average component. The observations are divided into two equal parts in order to calculate the test statistic. The test statistic is 0.36; the critical value with (5,88) degrees of freedom at the 0.05 level is 1.35. Thus, we cannot reject the null hypothesis that the parameters are stable over time.

Table 6-9. Summary of Research Findings With Regard to Individual Hypotheses of Judicial Power Liberalism

Hypothesis	Finding
H_{17}: Party Affiliation Positively Associated With Liberalism	Supported
H_{18}: Religious Affiliation Positively Associated With Liberalism	Supported
H_{19}: Agricultural Origins Negatively Associated With Liberalism	Not Supported
H_{20}: Judicial Experience Negatively Associated With Liberalism	Not Supported
H_{21}: Passage of the Judiciary Act of 1925 Positively Associated With Liberalism	Supported

Chapter Summary

This chapter has examined the institutional liberalism of the Supreme Court's decision-making in three aggregated issue areas: economics, civil liberties-civil rights, and judicial power. An ARIMA model is built for each using the Box-Jenkins-Tiao modeling protocol to develop a theoretically and statistically powerful explanation of the factors driving the Court's policy in each of those issue areas across the 102 term years examined in this study. The analysis of the Court's economic policy-making demonstrates that the justices' religious affiliations, agricultural origins and pre-appointment judicial experience are associated with the level of the Court's liberalism. As hypothesized, the greater the mean number of non-Protestants on the Court, the more liberal the Court's economic decisions are. However, the justices' agricultural origins are conservative influences, making the Court less liberal in its decision-making. The hypothesized effects of the presidential policy intentions and the justices' party affiliations and their southern regional origins are not significantly associated with the Court's liberalism. The extent of the justices' judicial experience is significant and negatively signed, indicating that there is an inverse relationship with the level of the Court's economic liberalism.

Moreover, specific discrete events impact the Court's economic liberalism. Interventions are specified for the Panic of 1893, Theodore Roosevelt's election in 1904, the Great Depression, and Franklin Roosevelt's Court-packing plan of 1937. The Great Depression abruptly transformed the Court's economic policy-making, serving to make it more liberal across time. This is a theoretically consistent finding, given the macro-economic demands that the Great Depression represented to the nation. President Roosevelt's Court-packing plan similarly is associated with an increase in the Court's liberalism. Not only is the Court's decisional processes sensitive to changes in the economic environment, but also in the political environment. However, the Panic of 1893 and Theodore Roosevelt's election are not associated with an increase in the Court's liberalism in economic decisions. Nevertheless, the analyses do show that the Court's economic policy-making is influenced not only by some of the social background characteristics of the justices, but also by historical events within the Court's political and economic environment. Hence, future efforts to construct explanations of the Court's decisional behavior across time may wish to include these kinds of components.

The Court's institutional civil liberties-civil rights decision-making is also examined. In this context, the justices' party identifications are not associated with the

Court's voting behavior. Note that this is contrary to the finding of an direct relationship with the Court's liberalism in economic decisions. The justices' prior prosecutorial-judicial experiences are not significant but the estimate is negatively signed, implying that these prior career experiences serve to make the Court more conservative in its civil liberties-civil rights policy preferences. However, the justices' religious affiliations is not associated with the Court's decision-making, contrary to the association found with the Court's level of economic liberalism.

Moreover, the impact of the interventions of the Spanish-American War, World War I, and World War II are examined. As hypothesized, the impact of the occurrence of World War I exerts a temporary decrease in the Court's civil liberties policy preferences. However, neither the Spanish-American War nor World War II are associated with a decrease in the Court's institutional liberalism.

Overall, the results of the analysis for this issue dimension do not demonstrate a clearly better model of the Court's liberalism. Two of the social background characteristics (party affiliation and prosecutorial-judicial experience) are at least marginally associated with changes in the Court's liberalism across time. Similarly, only the occurrence of World War I is associated with

changes in the level of the Court's policy making through time. Perhaps the justices' attitudes serve to dampen the effect that specific events might otherwise have on the Court's decisional process, making the changes in its liberalism less dynamic through the 102 term years examined in this study.

The third aggregated issue dimension examined here is the Court's decisional trends in judicial power cases. As we find with economic and civil liberties-civil rights decisions, the Court's behavior is influenced by the justices' party identifications, their religious affiliations, agricultural origins, and judicial experience. Here, the partisan affiliations of the Court are positively associated with the dependent variable, indicating that as the proportion of Democrats on the Court increases, its liberalism also increases. Similarly, as the proportion of non-Protestants on the Court increases, the Court's liberalism increases. However, the justices' agricultural origins are not associated with the Court's decisional behavior. The justices' prior judicial experience is not associated with the Court's judicial power policy-making. Thus, we find that the justices attitudes, as indicated by their social background characteristics, exert a rather high degree of influence on the Court's institutional decision-making.

The sole intervention specified for this issue area is the enactment of the Judiciary Act of 1925. The results demonstrate that the Act is associated with a gradual but permanent increase in the liberalism of the Court's decisions. This finding implies that the Act transformed how the Court views issues of judicial power and the role of the courts within the structure of American politics more generally.

Hence, this third explanation of the Court's decision-making indicates that the Court is influenced by the justices' partisan identifications and their religious affiliations, but not by their agrarian backgrounds or their prior judicial experience. However, the Court's behavior is also influenced by changes in its jurisdiction, implying that the Court's decision-making behavior is driven, in part, by changes within its political environment in addition to the influence of the Court's political values.

NOTES

1. For considerations of space, the entire modeling process for each of the continuous independent variables is not discussed.

2. For ease of usage, "civil liberties" is used to refer to the aggregated issue dimension of civil liberties-civil rights, discussed in more detail in Chapter V.

CHAPTER VII

CONCLUSION

This chapter summarizes the findings discussed in the prior Chapters and discusses the implications of the study. It also offers suggestions for future research in the field of judicial politics.

Overview and Importance of the Study's Findings

This study has examined the agenda setting and decision-making behavior of the United States Supreme Court from 1888 to 1989. Its primarily analytical focus, however, was on the period prior to 1945, since the bulk of the existing research investigates the behavior of the Court in the post-World War II period.

The Court in Historical Context

Given the predominant focus of prior studies on the post-World War II period of Supreme Court behavior, the study summarized the historical context in which the Court acted from 1888 to 1946. There were four chief justices during those years: Melville Fuller (1888-1910), Edward D. White (1910-1921), William Howard Taft (1921-1930), Charles Evans Hughes (1930-1941), and Harlan Fiske Stone (1941-1946). Each of the Chief Justices served during a uniquely

important part of the Court's history.

Melville Fuller served on the Court from the waning days of the nineteenth century to the Progressive period. The Fuller Court's decision-making was allegedly conservative during this period (Biskupic and Witt 1997; McCloskey 1994; Schwartz 1993), upholding the interests of the powerful and wealthy within society. The Fuller Court's decision-making in civil liberties was also allegedly conservative.

By the time Melville Fuller left the bench and Edward White replaced him as Chief Justice in 1910, the nation was in the throes of the Progressive era, marked by the efforts to increase the legal protections offered consumers and workers and reform the political system. This context was associated with a modest increase in the liberalism of the Court's economic decision-making, although its civil liberties-civil rights liberalism remained at the level observed during the Fuller Court. The membership of the White Court changed as well: staunch liberals such as Benjamin Cardozo and Louis Brandeis joined the ranks of the high tribunal.

When Taft became the Court's leader in 1921, the Court's economic decision-making returned to the conservative levels found during the Fuller Court. This was due in part to the change in membership that had occurred.

George Sutherland and Pierce Butler joined arch conservatives James McReynolds and Willis Van Devanter, forming the infamous "Four Horsemen of the Apocalypse." These four justices, along with Chief Justice Taft, constituted an ardent conservative majority that eroded whatever increases in liberalism that had been gained during the White Court.

The Hughes Court was markedly different than its predecessors for several reasons. During the first six years of Hughes's tenure (1930-1936), the Court continued the trend of ruling conservatively in economic matters. This led President Roosevelt to propose his famous Court-packing plan in February of 1937. After the President's plan was announced, the Court's economic policy preferences allegedly became more consistently liberal. The Hughes Court's membership similarly changed. Liberals such as Hugo L. Black, William O. Douglas, Stanley Reed, and (to a somewhat lesser extent) Felix Frankfurter joined the Court. All these individuals were nominees of Franklin Roosevelt.

When Harlan Fiske Stone became Chief Justice in 1941, the Court allegedly continued to issue liberal economic decisions at the same rate as the Hughes Court had. However, there was one important distinction from earlier periods: the Stone Court's civil liberties-civil rights decision-making was more liberal than had prior Courts been

during times of war. Overall, its policy preferences in this aggregated issue dimension were conservative, serving to uphold the interests of governments over those of civil liberties-civil rights claimants.

Importance of the Dataset

One important aspect of this study is to build and explore a dataset that contains data on the Court's agenda setting and voting behavior across more than a century of jurisprudence. Prior studies have been primarily limited to investigating the Court's behavior in the post-1945 period. The dataset employed in the present study enables more long term analyses than have heretofore been completed, during a period that contained many important historic events, such as World Wars I and II, the Panic of 1893, the Great Depression, the New Deal, and Franklin Roosevelt's attack on the Court. Accordingly, these results obtained from such studies may be more generalizable than findings of those studies limited to the post-1945 period have reported.

Workload and Agenda Dynamics

During the period of analysis, the present study finds that the Court's workload has declined. The Court issued an historic high of 292 decisions in 1913, but the number of cases on its docket during each term year has steadily decreased. The high number of rulings that the Court

announced during the early part of the series may be due to the uncertainty that then characterized the law, as Casper and Posner (1976) suggest. Due to the unprecedented expansion of industrialism and economic activity surrounding the turn-of-the-century, the Court was faced with novel questions regarding the constitutional guarantees afforded businesses against regulatory efforts.

However, the number of decisions that the Court announced did decline, beginning in the 1920's. This decline may be due to the promulgation of the Judiciary Act of 1925. The Act gave the Court increased discretionary jurisdiction, which allowed the Court to reduce the number of cases claiming space on its agenda. After the Act was passed, the Court did not decide more than 200 cases in a term year. There were moderate increases in the size of the Court's caseload during the 1960's perhaps due, in part, to the increase in expanded rights recognized by the Court's decision-making, particularly in its civil liberties-civil rights jurisprudence. Near the end of the period analyzed, however, the series began to decline. From 1986 to 1994, the Court issued only about 106 decisions on average per term.

The substance of the Court's decisions has also been quite dynamic during the period the study examines. From 1888 to 1950, economics cases constituted the largest

portion of the Court's agenda. In 1891, the Court issued 199 economic decisions alone. This finding is expected because of the prevailing concern within the political system at that time of the limits of governmental regulation of business activity. Economics cases comprised around 60 percent of the decisions that the Court announced through the 1930's, when they began to decline in number. This decline continued even through the period of the Great Depression when one might expect that the Court to be overwhelmed with requests to resolve economic issues. For the period from 1933 to 1937, Pacelle (1991: 57) reports similar findings. In more recent times, Pacelle's study and the present investigation found that economic cases comprise only about one-fifth of the cases on average the Court hears in a term year.

The second issue area analyzed in this study of the Court's agenda is judicial power. The Court issued a relatively large share of these cases during the entire period of analysis. Its historic high occurred in 1888 (27 percent); its historic low in 1930 (3.9 percent). From 1888 to 1930, the proportion of judicial power decisions on the Court's docket declined. After 1930, the series was relatively volatile, moving upward sharply from one term year to the next. It increased through 1968 when it turned gently downward once again.

The third issue series examined in this chapter is the proportion of federal taxation decisions. Since 1926, the series increased, reaching its historic high in 1930 (27.5 percent). This is a theoretically consistent finding, since the 16th Amendment (authorizing a federal income tax) was adopted in 1913. The series after 1930 declined and rarely exceeded 10 percent. In the later years of the series, it rarely exceeded five percent. There are some discrepancies between the findings of the present study and those of Pacelle (1991). However, these differences may be due to the different methodologies of the two studies: Pacelle reports five-year averages, which may be less precise than the single year figures employed in this investigation.

The Court's agenda also included criminal procedure decisions. The series overall increased during the period analyzed. However, the series did not become well established until 1939, before which it comprises five to ten percent of the Court's agenda on average. The series historic high was observed in 1967 (33.9 percent), perhaps due to the expansive rulings of the Warren Court. Although there are differences between the findings of Pacelle (1991) in terms of the magnitude of the series in specific term years, the present study's findings agreed with the existence of a trend in the series and its direction across the period from 1933 to 1989.

Civil rights cases were relatively small portions of the Court's agenda through 1945. Prior to that year, the series exceeded five percent only twice (1903 and 1944). Civil rights decisions comprised zero percent of the Court's docket several times, the first year being 1925. After 1945, however, these decisions became a consistent part of the Court's rulings. The historic high occurs in 1978 (25.6 percent), with three term years (1969: 24.4 percent; 1969: 25.0 percent; and, 1976: 24.0 percent) nearly matching that mark. This upward movement in the proportion of civil rights cases supports McCloskey's (1994) observation that the Court's priorities were changing to begin to support civil rights cases. This is an expected finding since the Court, as the nation's ultimate forum of conflict resolution, would consider the issues that the larger political system was debating. This increasing trend in the proportion of civil rights cases demonstrates a fundamental change in the Court's agenda: from one dominated by concerns of economic regulation to one more closely concerned with issues of civil rights.

First Amendment cases also comprised a very modest proportion of the Court's agenda from 1888 to 1989. These cases did not appear on the docket until 1935. Even then, they did not comprise a significant portion of the rulings announced until the 1950s, and did not consistently consume

more than 10 percent of the docket until 1965. The series high was observed in 1965 (16.8 percent). The growth and decline of the series paralleled the proportion of the Court's decisions that civil rights rulings represent.

Similarly, privacy cases did not comprise a significant part of the Court's docket. In many of the term years examined, the Court issued no such decisions, largely because Supreme Court precedent did not recognize privacy rights until the 1960s. The series did increase, although modestly, in 1970 but then begins to decline in 1979. The historic high is observed in 1979 (3.8 percent).

Due process cases did not show a consistent trend during the period of analysis. The series maximum occurs in 1906 (8.7 percent), and there are several term years in which the Court announced no due process rulings. However, their number does increase in the 1960s. At the end of the series, due process decisions accounted for only 3.6 percent of the Court's agenda.

Federalism cases were an erratic component of the Court's docket from 1888 to 1989. There are several large increases during the 1920s and the 1930s. The series stabilizes in 1954, declines in 1963 and then trends upward once again in 1971. The historic high for the series occurred in 1927 (14.9 percent). Like many other series examined in this study, federalism cases comprised zero

percent of the Court's agenda in many term years investigated.

Interstate relations and separations of power cases did not individually comprise more than five percent of the Court's agenda. Interstate relations case increase during the period surrounding World War II, but thereafter they began to decline. Through 1989, they comprised less than two percent of the Court's decisions on average. Separation of powers cases attained their historic high in 1929 (4.6 percent). Pacelle (1991) finds that the series increases from 1933 to 1982. Between 1983 and 1987, these cases comprised 1.2 percent of the Court's agenda.

Attorney and union cases were found to be very small portions of the Court's decisions during the period of analysis. Until 1936, union cases were nearly non-existent. After 1936, they fluctuate from about two percent to about 10 percent in 1960. This growth is an expected finding since the Court was then beginning to turn its attention to the interests of economic "underdogs." Thereafter, the series subsides to a consistent two to five percent. The series high was observed in 1959 (10.4 percent).

Attorney cases were similarly a very modest portion of the Court's decisions. Only after the end of the Second World War do they represent even a very small proportion of the Court's docket. It increased slightly from 1952 to

1956. By 1979, the series became more consistent and by 1988 it reached four percent of the Court's agenda, its historic high.

In addition to examining the proportion of these individual issue areas, this study reported the relative share of the Court's agenda that four aggregated issue dimensions captured from 1888 to 1989. As the analysis of individual issue areas reflects, economics decisions comprised the largest part of the Court's agenda across time. From 1888 to 1948, the series hovers around 65 percent. During the Great Depression, the series increases to over 70 percent. These are findings are theoretically consistent. The Court's docket theoretically should have been dominated by these types of cases because the nation was in the throes of perhaps the most significant macroeconomic event it has experienced during its existence. In addition, the Progressive movement sought to implement increased regulation of business activity, which were sure to be challenged and brought to the Court for resolution. In the late 1940s, economics decisions began to consume less of the Court's agenda. In the late 1970s and 1980s, they on average comprised 24.18 percent of the Court's rulings.

Civil liberties-civil rights cases were relatively infrequent until 1937. Because of the dominance of economics cases and the structural constraints on the Court,

this is an expected finding. Prior to that time, the series attained 20 percent or more only four times (1895, 1909, 1912, and 1926). Its average from 1888 to 1936 is roughly 12 percent. In 1937, the Court began to include more of these decisions, perhaps due to the changing membership on the Court who more strongly supported the rights of the criminally accused and civil liberties claimants than prior justices generally had. The series attained its historic high in 1976 (64 percent) and then stabilized in the late 1970s and 1980s at slightly more than 50 percent. Thus, in recent years, civil liberties-civil rights cases nearly matched the level that economics decisions had reached during the early part of the period analyzed.

These findings confirm the observations of McCloskey (1994) who suggested that the Court's priorities early in the century focused on questions of economic regulation. However, McCloskey (1994) also suggests that, by the 1950s, the Court began to turn away from such issues and refocused its priorities on questions of civil liberties and civil rights because the nation as a whole was beginning to consider these questions in depth. Moreover, the findings redocument Schubert's (1965, 1974) description that suggested that the Court's docket after World War II was primarily composed of economics and civil liberties-civil rights decisions.

The third aggregated issue area that was analyzed in the present study is that of judicial power. From 1888 to 1907, the series hovered around 20 percent, after which it begins to decline until 1939. Thereafter, the series began to increase gently until the 1970's when it stabilized. Between 1925 and the early 1960s, the series remained below 20 percent, and often 15 percent. Thereafter until 1989, the series was on average between 15 and 20 percent, and exceeded 20 percent several times. The historic high occurs in 1888 (27.1 percent); the historic low in 1930 (3.9 percent).

The final aggregated issue dimension, "other," is quite volatile. The historic high was observed in two term years (1927 and 1960, 16.1 percent). Typically, however, these decisions accounted for less than six percent of the Court's agenda throughout the 102 terms years analyzed in the present study.

Unanimity of Decisions

The study found that the Court's decisions have become much less unanimous over time, particularly since the 1930s. Before 1937, approximately 75 percent of the Court's decisions were unanimous. The series declines thereafter until it reaches its historic low in 1952 of 21.7 percent. It stabilizes after 1952 around 35 percent.

Prior to Chief Justice Hughes's tenure (1930-1941), strong norms of consensus prevailed due to the social and task leadership of Chief Justices Melville Fuller and William Howard Taft, both of whom sought to unite the Court behind a single opinion. While Hughes is found in prior literature to have begun to unravel these norms, the study found that the White Court may have represented an earlier erosion of unanimity on the Court. The rate of concurring opinions increased from nearly zero to approximately 10 percent across the first five years of the White Court (1910-1915). Across the entire White Court, the rate of concurring opinions is more than double that for the Fuller Court (6.72 as opposed to 3.31 during Fuller's tenure). Once Taft joined the Court in 1921, the rate of concurring opinions returned to about three percent on average. However, it increased once again when Hughes becomes Chief Justice and jumps dramatically under Harlan Fiske Stone.

The rate of dissenting votes also changed considerably during the period of analysis. The rate jumped to 19.3 percent during the last five years of the White Court (1916-1921) from the rate seen during the Fuller Court (about 16 percent). This increase may be due to the Court's consideration of Progressive reforms, which may have increased the level of conflict on the Court. Justices such as Louis Brandeis and Charles Evans Hughes joined Oliver

Wendell Holmes on the Court, all of whom were generally liberal in their policy orientations.

However, when Taft joined the Court in 1921, the series declined to 13 percent. During Taft's tenure, the final two members of the conservative voting coalition known as the "Four Horsemen" joined the Court (George Sutherland and Pierce Butler). Although the promulgation of the Judiciary Act of 1925 has been linked with an increase in the dissent rate, this study found that the series did not appreciably increase after it was enacted.

During the Hughes Court, the dissent rate increased, just as the rate of concurring opinions had. Approximately 21 percent of the Court's decisions had at least one dissenting vote filed with them. The dissent rate increased even further during the tenure of Harlan Fiske Stone, reaching an average of 48.26 percent. After Stone left the Court, the dissent rate remained high. From 1948 to 1989, the average is 61.33 percent.

The study also found an increase in the rate of decisions with two or more dissenting votes. Mirroring the changes in the rates of dissenting votes and concurring opinions, the rate of multiple dissents was relatively flat through 1937 when the series begins to trend upward. The Fuller Court, however, had a higher rate of 5-4 decisions than did the White or Taft Courts. This is a surprising

finding given the strong norms of consensus that allegedly prevailed during Fuller's tenure. The Judiciary Act of 1925 was not associated with a significant increase in the multiple dissent rate. During Stone's tenure, the rate increases dramatically. The historic high is observed in 1948 (65.3 percent). Although the series declined somewhat, it stabilized thereafter around 50 percent through 1989. Hence, the changes that occurred in the norms of consensus during the Hughes and Stone Courts (and to some extent the White Court) affected the rate of multiple dissents through 1989.

Thus, this study's findings support the results of Haynie (1992) who found that the unanimity rate declined during Hughes's tenure and continued to do so during the Stone Court. However, this study found that the increased dissent rate during the last five years of the White Court also increased, perhaps initiating the erosion of the consensual norms that had prevailed since the Court began deciding cases with a single majority opinion in the early 1800's. Also, this study lends less support to the results that Walker, Epstein and Dixon (1988) report. They attribute the rise of nonunanimity to Harlan Fiske Stone's peculiar social and task leadership. Although the dissent rate dramatically increased during Stone's tenure, the rate began to increase during Edward White's time at the helm,

continued to do so under Hughes, and then greatly increased during the Stone Court.

However, the study's findings do support the previous studies' findings of a rise of dissenting opinions during the last several years of the Hughes Court. Up to 1937, dissenting opinions were relatively infrequent. During the Hughes Court, the rate jumps to 14.74 percent (up from 8.29 percent during the Taft Court). The series continued to increase during the Stone Court: it rose to 43.18 percent. Hence, the results reported by Haynie (1992) and Walker, Epstein, and Dixon (1988) of an increase in the rate of dissenting opinions are supported by the findings of the present study.

Liberalism of the Court's Decisions

The level of the liberalism of the Court's decisions has changed dramatically during the period of the study. The results are in some respects surprising based upon the findings reported in prior studies of the Court's policy preferences. First, the rate of liberal economic dimension decisions during the Fuller, White and Taft Courts was higher than previous studies have suggested (McCloskey 1994; Schwartz 1993). The present study found that these courts issued liberal rulings in slightly more than 50 percent of their economics decisions. One would have predicted, based

on existing literature, that the figure would have been much less than this rate. Thus, the Fuller, White and Taft Courts' economic policy preferences were relatively liberal.

Second, the study found that the rate of liberal economic decisions did increase during the Hughes Court, perhaps due to the much publicized conflict with President Roosevelt over the Court consistently striking down New Deal legislation. The rate is around 70 percent on average during Hughes tenure. This high level of liberalism is an expected finding given the policy preferences of the justices who composed the Hughes Court and the environmental demands put on the Court by the Great Depression and the New Deal, in addition to Roosevelt's attack on the Court's legitimacy. The liberalism rate during the Stone Court declined somewhat, but it still approximated 60 percent liberal. After the Stone Court, the level of the series declined, but then rebounded sharply in 1953. The average liberalism rate during the Warren Court was 73.83. Thereafter the series declines, particularly during the Burger and Rehnquist Courts. These latter results are expected given the purported conservatism of the justices who served on those Courts. The findings of Pritchett (1948) and Haynie and Tate (1990) are quite similar to those that this study found.

The second major issue dimension analyzed in the present study is civil liberties-civil rights. The findings for this issue area conform to the expectations arising from prior studies. The Court's policy preferences for this aggregated issue area were generally conservative from 1888 to 1930. During the Hughes Court, the series increased dramatically to over 50 percent liberal. It remained near that level during the Stone Court. These findings support the results that prior studies report (Segal and Spaeth 1993; Haynie and Tate 1990; Epstein, Walker, and Dixon 1988; and, Pritchett 1948) and the suggestions of historical analyses (McCloskey 1994; Schwartz 1993).

The liberalism rate of judicial power decisions hovered around 20 percent from 1888 to the early 1920's. Thereafter, the series fluctuates wildly but on average it is about 35 percent. This finding is consistent with theoretical expectations given the Court's demonstrated liberalism in reviewing economics cases. Since the courts are part of the governmental structure, it follows that the Court would be likely to uphold claims for greater judicial power. The series stabilized in the mid-1930's through the mid-1960's at approximately 45 percent, at which time it declined. In 1970, however, the series rebounded and began to increase. In 1989, the series exceeded 40 percent liberal.

The series describing the rate of liberalism of decisions in the "other" aggregated issue area showed no consistent trend. The series became less dynamic from 1917 to 1945, although it was mostly noise due to the small number of cases on which the series is based. The averages during the four chief justice courts increased slightly from Fuller (59.01 percent) to Hughes (66.71 percent), but then declined during the Stone Court (57.70 percent).

Explaining the Supreme Court's Liberalism

Models of the Court's policy preferences were specified for economics, civil liberties-civil rights, and judicial power decisions. The best fitting model of economic liberalism demonstrated that some of the justices' personal attributes were related to the Court's decision-making. First, as the mean number of non-Protestants on the Court increased, the Court's economic decision-making became more liberal. This result supports the assertion that non-Protestants typically bring to the Court greater support for economic underdogs than do Protestants. Second, as the mean number of justices with agricultural origins increased, the level of the Court's economic liberalism declined. This finding supports the hypothesis of the conservative influence that an agrarian background has on the justices' decision-making. Alternatively, it suggests that an urban

environment will tend to increase the occurrence of liberal voting behavior because of the greater industrialism in urban areas. Third, the study found that the greater the justices' pre-appointment judicial experience, the less conservative the Court's economic decisions become. This is consistent with the assertion of Johnston (1976) who finds that prior judicial service tends to be associated with conservative attitudes.

In addition to these personal attributes, the Court's level of liberalism was shown to be associated with certain events within the Court's political environment. First, the Great Depression was shown to be associated with a permanent and abrupt increase in the liberalism of the Court's economic decisions, supporting Haynie and Tate's (1990) finding of a similar association. This is an expected finding since the Depression was arguably the most significant macroeconomic event to occur in United States history. Second, Franklin Roosevelt's proposal of a Court-packing plan in February of 1937 similarly was associated with an increase in the Court's economic liberalism. This too is an expected finding since the Court, by virtue of Roosevelt's challenge, was made aware of the boundaries of its power and legitimacy. The Court's economic decisions became more liberal so as to bring its policy pronouncements more closely in line with the policy preferences of the

President, the Congress, and the public in general. Third, the effect of the Panic of 1893 was examined. It, however, was not shown to be significantly related to the Court's level of economic liberalism.

Thus, the results demonstrate that the level of the Court's economic policy preferences were related to the justices' personal attributes. These variables were used as proxies for the justices' attitudes, which are very difficult to measure directly. However, attributes which have been shown in other contexts to be related to the Court's decision-making were found to be insignificant in these analyses. For example, the justices' party identification and their Southern regional origins were found not be significantly related to the level of the Court's economic rulings, which is contrary to the results that Haynie and Tate (1990) report. Moreover, Tate and Handberg's (1991) finding of the significance of presidential policy intentions is not supported by the present analyses. Hence, this study found not only that the Court's economics decision-making was related to the attributes of the justices who serve on the Court, but that the Court's rulings were related to changes within the extant political environment. However, there may be period effects that may cause some of these variables to be insignificant. Future analyses should explore this

possibility.

The dynamics of the level of the Court's civil liberties-civil rights liberalism were also explored in this study. Unlike the result found in the analyses of the Court's economic liberalism, the justices' party identifications were significantly related to the Court's liberalism. In this context, their partisan affiliations were found to be negatively related to the Court's decision-making, implying that Democrats were less supportive of claims of civil liberties and civil rights than were Republicans during the bulk of the period. However, the association with the dependent variable was modest. Second, the extent of the justices' pre-appointment prosecutorial and judicial experience was shown not to be related to the Court's liberalism. Although significant in the analysis of economics decisions, the justices' religious affiliations were not associated with the level of the Court's civil liberties-civil rights liberalism. These results comport with the findings of Segal, Epstein, Cameron and Spaeth (1995) who find that the scores of the justices' ideologies were less robust for justices who served during the Roosevelt era than they are for justices who served during more contemporary periods.

There were three environmental shocks whose effect on the Court's civil liberties-civil rights liberalism were

examined in the study. These are World War I, World War II, and the Spanish-American War. Only World War I's impact was negatively related, albeit quite modestly, to the liberalism of the Court's decisions. This finding implies that the Court's decisions became less liberal during the War. This is an expected finding since historical analyses have suggested that the Court's decisions became more conservative during times of war due to concerns of national security (McCloskey 1994; Schwartz 1993). However, the impact of the other two wars were found not to be associated with the Court's liberalism in this aggregated issue area. Perhaps the Spanish-American War simply did not represent as significant a national threat as the more large-scale conflict of the First World War did. The finding of the non-significance of World War II is contrary to the findings of Haynie and Tate (1990) who report that the War is associated with a decline in the Court's civil liberties-civil rights liberalism. However, Pritchett (1948) suggests that the Court was less concerned about issues of national security during the War than had the Court been during the First World War. Thus, the Court's liberalism may not have declined as much as it otherwise would have due to the occurrence of the War.

The third aggregated issue area examined in this study is judicial power. The justices' party affiliations were

shown to be positively related to the level of liberalism of the Court's decisions. This finding implies that Democratic party affiliation is associated with a tendency to vote liberally. This is a theoretically consistent finding since Democrats tend to hold liberal policy preferences in economic matters. The justices' religious affiliations, also, were shown to be associated with the level of the Court's liberalism in judicial power rulings. However, neither the justices' agricultural origins nor their level of judicial experience were related to the level of the Court's liberalism. Thus, the results are mixed for the use of personal attributes as proxies for the justices' attitudes with respect to questions of judicial power.

The study also examined the impact of the promulgation of the Judiciary Act of 1925 on the Court's liberalism in judicial power decisions. It found that the Act is initially associated with an increase in the level of the series. The Act gradually but permanently impacted the level of the Court's liberalism. The impact of the series decays somewhat over time but not completely. The series, thus, attains a new, higher level of liberalism due to the occurrence of the Act. Hence, the level of the Court's judicial power liberalism is associated with the justices' partisan affiliations and religious preferences, and with the passage of the Judiciary Act of 1925.

Importance of the Study's Findings

The findings of the study are important to research in the subfield of judicial politics and the discipline of political science in several respects. First, the study provides systematic analysis of the Court's agenda across more than a century of Supreme Court history, as opposed to prior studies of the Court that have focused on one chief justice court or a limited period of the Court's history. While McCloskey (1994) and Schwartz (1993) suggested that the Court's docket was composed primarily of economics decisions up until the 1940s, this study is the first to demonstrate the empirical validity of those observations. The study also finds that when economics rulings became less frequent, civil liberties-civil rights decisions began to increase, signaling a change in the Court's priorities. This result, too, confirms the suggestions of McCloskey (1994), Schwartz (1993) and other scholars.

Second, the study demonstrates the large decline in unanimity that has occurred in Supreme Court decision-making. This finding underlines the rise of dissents and concurrences that prior studies have found during the Hughes and Stone Courts. However, the present study's findings do suggest that there was a temporary increase in the proportion of concurrences and dissents during the last five years of the White Court (1916-1921). Perhaps this decline

of unanimity led to the permanent erosion of the norms of consensus under which the Court operated observed in the later years of the Hughes Court.

Third, this study's findings are important because they demonstrate that the Court's economic policy preferences during the Fuller, White and Taft Courts were not as conservative as prior studies had suggested. During these years (and throughout the period of analysis), the Court's liberal rate was on average about 50 percent, hardly reaching the level of entrenched conservatism that prior studies had suggested described the Court's decision-making in this aggregated issue dimension. Moreover, the Court's liberalism in civil liberties-civil rights rulings was, as prior studies implied, consistently conservative prior to the 1950s.

Fourth, the study demonstrates, through the time serial analyses, that several of the justices' personal attributes are associated with the Court's institutional policy preferences in economics, civil liberties-civil rights and judicial power rulings. However, the study did demonstrate that their attributes were less strongly associated with the Court's civil liberties-civil rights liberalism than with economics decisions. This finding supports the reported finding of prior studies that have found less robust results for this aggregated issue dimension in the pre-1945 period.

Fifth, many of the hypotheses generated in studies examining the Court's behavior in the post-1945 period are not supported in these longer analyses. This is an important finding, too. Perhaps these results suggest that the Court has undergone a structural change in its relation to the larger political environment of which it is a part. Franklin Roosevelt's attack on the Court in 1937, the unprecedented demands placed on it as a result of the Great Depression and the New Deal, and the rise of civil liberties-civil rights issues may have contributed to the development of a more political perspective among the justices. As a result of these tremendously important historic events, the Court may have permanently transformed as a result, moving away from its cloistered posture to a position more integrated into the political dynamics of the American political system.

Suggestions for Further Research

This study's findings are in some respects unexpected based on the results reported in prior research. Accordingly, the results reported in the present investigation suggest that further work should be done to more completely explore the agenda setting and decision-making of the United States Supreme Court.

First, the analyses of the unanimity of the Court's decisions provided some surprising findings. It was found

that the proportion of unanimous decisions has declined during the period of the study, confirming the results reported in several prior studies. An unexpected finding is that the decline in unanimity began with the White Court. The Court experienced an increased, albeit modest, rate of concurring opinions and dissenting votes, perhaps due to the change in membership on the Court and the novel issues of economic and political reform that it was considering. Although this study found that the rate of concurrences and dissents also increased during the Hughes and Stone Courts, the norms of consensus that long held the Court together began to erode during the White Court. Indeed, even during the very congenial and cohesive Fuller Court, there was a very high number of 5-4 decisions. Thus, these rather unexpected findings suggest that further investigation should be done to determine if Courts prior to 1888 experienced any decline in unanimity. Perhaps the conclusions that prior research has drawn may be premature because of the limited time period that such studies examined.

Additionally, scholars should endeavor to collect decisional data on the Court prior to the 1880s. This process, while certainly expensive and time-consuming, will yield a rich resource in which many further studies can be completed, including case-studies of particular Courts or

comparative analyses with more contemporary Courts. Each of these potential investigations would provide scholars a greater understanding of the dynamics underlying the Court's agenda-setting and decision-making processes.

This study, which was largely based on newly-collected data, yielded some surprises with regard to the liberalism of some of the chief justice courts examined here. The Fuller and White Court's economic liberalism were found to be more liberal than prior analyses implied. This is an intriguing finding. Perhaps scholars' impressions of the policy preferences of prior Courts were guided too strongly by decisions in particular cases. While the Fuller Court did strike down several regulatory laws as being unconstitutional, its jurisprudence cannot be accurately assessed without examining the entire body of rulings that it issued. While McCloskey (1994), Schwartz (1993) and others have suggested that the White Court became somewhat more liberal in its economic voting behavior, the White Court was consistently more liberal than even these studies had suggested. Hence, as with the analyses of unanimity, scholars should endeavor to explore the policy preferences of prior Courts. Perhaps they are more liberal than prior research has suggested.

The study also examined the composition of the Court's agenda over time. It confirmed the observations of

McCloskey (1994) and Schubert (1974, 1965), most notably, that economics cases dominated the Court's docket during the pre-1945 period. Although the study suggested possible explanations for growth and decline in the various issues areas examined, further research may attempt to formally model the changes in the Court's agenda. More systematic analysis would lead to greater theory-building about the relationship between the Court's priorities (expressed in the cases they consider) and the structural and environmental demands placed on it. Scholars would, thus, gain a greater and more comprehensive understanding of the Court's place within the institutional structure of the American government.

The study developed time series models of the level of the Court's liberalism in three aggregated issue areas. The results demonstrated that the justices' personal attributes were only modestly related to the Court's policy preferences. However, the Segal and Cover (1989) methodology of scoring the justices' ideologies has been shown to be less robust in the era of Franklin Roosevelt (Segal, Epstein, Cameron and Spaeth 1995). These scores may be even weaker indicators of the justices' attitudes in earlier periods. Moreover, a prior study (Wood et. al 1996) has suggested that replication of the Segal and Cover protocol is simply impossible. Thus, although the study

did not find very strong associations between the justices' personal attributes and the Court's policy-making, this kind of data are readily available for all of the Supreme Court justices. For the moment, it is perhaps the best indicator scholars can use to indirectly measure the attitudes of the justices in periods prior to 1945. Hence, scholars should endeavor to develop personal attribute models of Supreme Court decision-making prior to the 1880's. Perhaps the influence of attributes will decline, which will provide even more grist for the theoretical mill of judicial politics.

Similarly, the study estimated structural equations models. They, like the time series analyses, demonstrated that the justices' personal attributes are modestly related to the latent construct of the justices' policy attitudes. However, analyses conducted for subperiods showed that the justices' attributes became much less strongly related to their attitudes than in more contemporary times. Further investigations may seek to extend this methodology back in time to determine if the association between attributes and attitudes declines in time, or if some other result is found.

Moreover, scholars may seek to add a comparative perspective to their analyses. The American judiciary is unique among the court systems of the world because of its

power of judicial review. Perhaps this structural power has effected the relationship between the justices' attributes and their voting behavior. Indeed, this could affect the rate of their dissents and concurrences and even the kinds of cases that the Court agrees to hear.

Overall, this study suggests that much further work is needed to understand the dynamics underlying the Court's agenda-setting and decisional processes. However, the study has provided a key link between the studies that have most frequently examined the Court in the post-1945 era and those yet to be done.

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