Hofstra Law Review

Volume 21 | Issue 3 Article 3

1993

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I. INTRODUCTION

The word of the Supreme Court is the law of the land. From the decision of its nine appointed Justices there is no appeal and, for most disappointed suitors, no legal redress at all. The losers in a case of wide public interest might hope some day to seek a legislative remedy, but the process of legislative redress is slow, cumbersome and uncertain. When the issue turns on the meaning and application of the United States Constitution, the decision is truly final,[1] subject to modification only by constitutional amendment or by a subsequent Supreme Court.

The exercise of such awesome lawmaking power by so few non-elected public servants is a paradox in a democratic society, and the paradox is heightened when the issue is close. In a nine member court, five votes are sufficient to determine the outcome, even if four strongly dissent. In the early decades of this century, when 5-4 decisions were few and unanimity was the rule, critics of the Court often

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1. Justice Jackson's memorable comment on the Court's finality bears repeating:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

suggested that decisions by a single vote—especially when voiding a statute—were somehow illegitimate.[2] Today, Supreme Court decisions still give rise to criticism and protest and, in extreme cases, public agitation to overturn them.[3] Criticisms of such decisions are primarily substantive, however, and the procedure that gives the same legal weight to a 5-4 as to a 9-0 decision is seldom challenged.[4]

Figures from the past decade indicate how common such single-vote decisions have become. With an average of 150 cases decided by full opinion during the 1981 through 1990 Terms, the number of decisions determined by a single vote averaged 35 per Term, or 23 percent of all cases. The annual variation ranged from 28 of 120 decisions (18.5%) for the 1984 Term to 47 of 152 (31%) for the 1986 Term.[5] By contrast, from 1901 to 1910 such closely divided deci-

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2. *E.g.*, Fred A. Maynard, *Five to Four Decisions of the Supreme Court of the United States*, 54 AM. U. L. REV. 481, 506, 510-13 (1920); Lyda G. Shivers, Note, *Five to Four Decisions of the United States Supreme Court*, 2 MISS. L.J. 334 (1929). For contemporary contrary opinions, see Robert E. Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771 (1921); Thomas J. Norton, *What Damage Have Five to Four Decisions Done?*, 9 A.B.A. J. 721 (1923); Albert H. Putney, *Five to Four Constitutional Law Decisions*, 24 YALE L.J. 460 (1915); Everett P. Wheeler, *Five to Four Decisions of the Supreme Court*, 54 AM. U. L. REV. 921 (1920) (responding to the Maynard article). Many of the decisions giving rise to criticism involved important federal or state social legislation on which the country, as well as the Court, was strongly divided. *E.g.*, Newberry v. United States, 256 U.S. 232 (1921) (invalidating application of the federal Corrupt Practice Act to state primary elections); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating federal child labor law); Employers' Liab. Cases, 207 U.S. 463 (1908) (invalidating federal statute providing for railway companies' liability to injured employees); Lochner v. New York, 198 U.S. 45 (1905) (invalidating state law limiting working hours in bakeries as violating substantive due process).

3. The most obvious current illustration is the massive pro-life movement dedicated to overturning Roe v. Wade, 410 U.S. 113 (1973), which was decided by a vote of 7-2.

4. Canon 19 of the Canons of Judicial Ethics of the American Bar Association, adopted in 1924, read in part:

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

CANONS OF JUDICIAL ETHICS OF THE AMERICAN BAR ASSOCIATION Canon 19, *reprinted in* ELLIOTT E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION app. II at 564 (2d ed. 1955). In 1972 the Canons of Judicial Conduct were reduced to seven, and Canon 19 was omitted. AMERICAN BAR ASSOCIATION CODE OF JUDICIAL CONDUCT, *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1985 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 280-86 (1985).

5. The figures for decided cases are taken from the *Harvard Law Review*'s annual November surveys of the preceding Supreme Court Term. For a discussion of the method used

sions averaged just 4.8 per Term, 2.6% of all cases.[6]

A. *Studies of 5-4 Voting*

Despite the increased frequency of 5-4 voting, no systematic study of this voting pattern over an extended time period has previously been published. Early twentieth century commentaries on the subject, noted above,[7] were concerned with the wisdom or propriety of the practice (some taking one side, some the other), or with the significance of the cases so decided. A case note appearing in 1936 took a historical approach consisting of a count and a listing by name, citation, and subject matter of every case decided by a majority of one from 1791 to 1936.[8] This obviously covered an extended time period, but the brief commentary accompanying the list of cases was devoid of explanation or even description of voting patterns. Like predecessor articles, it focused on proposals to limit the Court's prerogative to overturn acts of Congress by a 5-4 vote.[9]

A few scholarly studies since that time have addressed the question of "swing voting," one aspect of 5-4 decisions. The concept of swing voting presumes a Court divided into two blocs, commonly liberal (left) and conservative (right), with one Justice who determines the outcome in close cases by voting sometimes with one bloc and sometimes with the other.[10]

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to determine the number of cases decided by a single vote, see *infra* note 22. The cut-off date for the study was the 1990 Term, and this date is reflected in all tables and charts in this Article. For the 1991 Term, the number of single-vote decisions declined to 16%.

6. During that decade the Court disposed of 183 cases per Term by full opinion, on the average. Figures for this period were obtained by manually counting the number of cases reported in the United States Reports and the Supreme Court Reporter.

7. *See supra* note 2.

8. Note, *Judgments of the Supreme Court Rendered by a Majority of One*, 24 GEO. L.J. 984 (1936) [hereinafter *Judgments*]. The note identifies ten federal statutes invalidated by such votes, nineteen federal acts sustained, thirty-two state laws invalidated, and thirty-three state laws sustained. *Id.* at 988-95. Each case citation is accompanied by a two or three line synopsis of the case holding. An additional list of 179 "Miscellaneous Judgments Rendered by a Majority of One" omits the case holdings. *Id.* at 995. A graph depicts the number of 5-4 decisions for each five-year time period, 1791-35. *Id.* at 1001; *see also* Maynard, *supra* note 2, at 513-14 (providing a partial listing of 5-4 decisions).

9. For collections of such proposals to curb the power of the Court, see Julia E. Johnsen, *Limitation of Power of Supreme Court, in* 10 THE REFERENCE SHELF no. 6, 31-57 (1935); EGBERT R. NICHOLS, CONGRESS OR THE SUPREME COURT: WHICH SHALL RULE? 445-76 (1935).

10. For variations of the swing vote concept, differing in more or less significant detail, see Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?*, 52 J. POL. 530, 532-34 (1990); William B. Schultz & Philip K. Howard, *The Myth of Swing Vot-*

The usual object of swing voting research is to determine whether a particular Justice, or any Justice, was a swing voter during the period under consideration. Thus, Schultz and Howard examined voting patterns on the Court during six recent Terms (1969-74), and concluded that swing voting "had no decisive impact on the Court's decisionmaking."[11] In a more recent and methodologically sophisticated study, Blasecki used scalogram analysis and bloc analysis to test whether Justice Powell satisfied the requirements of her pre-conceived model of a swing voter. Contrary to many press and expert portrayals of his role on the Court, she found that Justice Powell voted too consistently with a conservative bloc to be classified as a swing voter.[12] Significantly, during the period of his tenure, no one else on the Court met the model's requirements either.[13] Two earlier analyses, using more traditional evaluative techniques, concluded, respectively, that Justice Reed was not a swing voter during the 1941-46 Terms of the Court,[14] but that Justices Stewart and Clark often were swing voters for certain types of issues on the Warren Court.[15]

In addition to swing voting, a number of scholars have looked at 5-4 decisions as illustrating "minimum winning coalitions," and have applied elements of coalition theory to explain how the majority coalitions are formed or deteriorate.[16] These studies deal with such matters as the effect of opinion assignment on coalition maintenance,[17] coalition size as affected by external threats to the authority of the Court,[18] and the breakup of a minimum winning coalition

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ing: An Analysis of Voting Patterns on the Supreme Court, 50 N.Y.U. L. REV. 798, 799 n.3 (1975); *Mr. Justice Reed—Swing Man or Not?*, 1 STAN. L. REV. 714, 717 (1949) [hereinafter *Mr. Justice Reed*]; *see also* Steven Smith, *Justices Stewart and Clark: Swing Votes on the Warren Court*, 19 SANTA CLARA L. REV. 1009 (1979).

11. Schultz & Howard, *supra* note 10, at 800. The authors include 6-3, as well as 5-4 decisions within their definition of "close cases," although the former are not cases decided by a single vote. Some of their tables display 5-4 decisions separately.

12. Blasecki, *supra* note 10, at 545.

13. *Id.* at 546.

14. *See Mr. Justice Reed*, *supra* note 10, at 728-29.

15. *See* Smith, *supra* note 10, at 1025-28.

16. The seminal work on political coalitions is WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

17. *See* Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72 (1988).

18. *See* Saul Brenner, *Minimum Winning Coalitions on the U.S. Supreme Court*, 7 AM. POL. Q. 384 (1979); David W. Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court*, 16 MIDWEST J. POL. SCI. 208 (1972) [hereinafter *Policy Goals*]; David W. Rohde, *Some Clarifications Regarding a Theory of Supreme Court Coalition Formation*, 21 AM. J.

through defection of one Justice.[19] This line of research has provided modest insight into Supreme Court decision processes and will be referred to later to elucidate some of the findings of this paper.[20] It seems fair to say, however, that such inquiries have focused on very narrow slices of the subject and have left most aspects of 5-4 decisions unexplored.

B. The Method of This Study

The present study does not pretend to exhaust the subject, but it does provide data covering the entire period of the twentieth century, through the 1990 Term, which permits a comprehensive search for patterns in the practice of the Court. More specifically, the study focuses on the incidence of 5-4 decisions and the composition of majority coalitions, with special attention to ideology as an explanation of voting patterns. Part II deals with the incidence of and some of the reasons underlying trends and fluctuations in the frequency of 5-4 decisions. Part III examines patterns of majority participation.

Data for the study consists of all cases with a full written opinion decided by a single vote during the 1900 through 1990 Terms of the Supreme Court.[21] A case is treated as "decided by a single vote" if, given the number of Justices who participated in the decision, the shift of one vote from the majority to the minority coalition would have changed the outcome. Applying this criterion, we included all decisions by a vote of 5-4 or 4-3 and also cases decided by a 5-3 or 4-2 margin if the result was to reverse a lower court decision. Affirmances of lower court decisions by a vote of 5-3 or 4-2 were excluded because a shift of one vote would not change the outcome: the result would still be affirmance, by an equally divided Court (4-4, 3-3). The total number of decisions identified by applying these criteria was 1435.[22] Throughout this paper a reference to 5-4 decisions

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POL. SCI. 409 (1977).

19. *See* Saul Brenner et al., *The Defection of the Marginal Justice on the Warren Court*, 42 W. POL. Q. 409 (1989).

20. *See infra* notes 75, 79, 83.

21. Cases with per curiam, as well as signed opinions are included. A case was classified as having "a full written opinion" if the opinion stated the applicable rule of law and gave reasoning in support of the decision that was more than perfunctory. If the only rationale for the decision was a reference to the reasoning of a previous decision, the case was excluded as not meeting the "full opinion" requirement.

22. The 1435 decisions are taken from 1428 cases. Seven of the cases are included twice because they raised two distinct issues affecting the outcome of the case and the issues were resolved by different 5-4 alignments. The universe of cases was compiled by examining

also includes 5-3, 4-3, and 4-2 decisions in which the outcome would have been different if a single Justice in the majority had voted differently.

For each decision we recorded the case name, citation, date, Term of the Court, basis for review (certiorari, appeal, or other), the vote distribution (5-4, 4-3, etc.), the substantive area of the law at issue, the direction of the Court's decision (liberal, conservative, or not readily classified), and the vote of each Justice (majority or minority). In addition, we noted whether the case was civil or criminal and whether a constitutional issue was decided.[23] This information forms the basis for the analysis which follows.

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all cases with opinions reported in the United States Reports. Each case was read and coded by two (for several Terms, three) research assistants, and differences were resolved by conference with the author of this article. When the data collection was complete, the list of cases was compared with cases in the Spaeth Supreme Court database decided by a vote of 5-4, 5-3, 4-3, or 4-2. *See* Harold J. Spaeth, United States Supreme Court Judicial Data Base, 1953-88 Terms (1990) (unpublished study, on computer file at Michigan State University Department of Political Science, East Lansing). A case included in one list but not the other was re-read to determine if it fit our criteria for inclusion as a case decided by a single vote.

23. Since research for this study was confined primarily to cases decided by a single vote, it provides no systematic basis for comparing this sample of cases with the whole universe of cases decided by the Supreme Court. Comparison with data generated by Judge Easterbrook, however, indicates that 5-4 cases include a disproportionately large number of constitutional (as contrasted with statutory or common law) issues. Easterbrook read all Supreme Court cases decided by written opinion during each of nine Terms and assigned each case to a statutory, constitutional, or common law category. His figures for cases raising a constitutional law issue are presented below in comparison with our 5-4 data.

	Easterbrook			*5-4 Cases Only*		
Term	*All Cases*	*Constitutional*	*% Const.*	*All Cases*	*Constitutional*	*% Const.*
1933	158	45	28.5	7	5	71.4
1943	132	30	22.7	20	5	25.0
1953	76	18	23.7	14	7	50.0
1963	132	46	34.9	14	8	57.1
1973	167	73	43.7	32	15	46.9
1978	152	75	49.3	31	23	74.2
1981	170	70	41.2	36	21	58.3
1982	165	64	38.8	34	18	52.9
1983	166	73	44.0	33	14	42.4
All Terms			37.5			52.5

Frank H. Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 SUP. CT. REV. 389, 401-09.

II. THE INCIDENCE OF SINGLE VOTE DECISIONS, 1900-90 TERMS

Viewed in a time perspective, the most obvious characteristic of the data is the increased incidence of single-vote majorities since the turn of the century.[24] Table 1 (see Appendix) gives the number of cases decided by full opinion each Term as well as the number and percentage of decisions by a single vote margin.

Figure 1 presents the same material graphically. Figure 2, reflecting the data in Table 2 (see Appendix), provides a smoother curve by using five-year averages. Both diagrams present a picture of single vote decisions at a relatively stable, low level from 1900 to about 1930, with a modest upswing during the ensuing decade and a more pronounced upward movement beginning in 1941. The trend line for single vote decisions as a percentage of cases decided by full opinion follows a similar pattern.

A. Dissent and the Judiciary Act of 1925

One object of this study was to examine the effect of the Judiciary Act of 1925[25] (the "Judges' Bill") on the incidence of single vote decisions. This Act substituted certiorari for the writ of error as a means of invoking the Court's appellate jurisdiction in many cases where review had previously been obligatory. The immediate effect was to increase the discretionary share of the Court's docket filings from about 60% in 1925 to well over 80% in 1927 and subsequent years,[26] and to expand dramatically the proportion of cases subsequently decided by written opinion that were brought for discretionary rather than obligatory review. During the 1922 through 1925 Terms,

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24. The figures presented in *Judgments*, *supra* note 8, at 1001, show a modest trend toward more frequent single-vote majority decisions during the preceding century as well. Such decisions averaged 0.3 per Term from 1791-1820, 1.0 per Term from 1821-1850, 1.3 per Term from 1851-1880, and 3.1 per Term from 1881-1900. The dates represent calendar years rather than Terms. The gradual increase in number of such close decisions before 1900 is apparently attributable to a corresponding increase in the Court's case load. Utilizing the count of Court opinions presented in ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 137-41 tbl. 9 (1978), as a basis for calculating percentages, the proportion of single-vote decisions remained fairly constant from one period to another. The figures are as follows: 1791-1820, 1.9%; 1821-1850, 2.6%; 1851-1880, 1.1%; 1881-1900, 1.2%. The highest percentage for any five-year period was 3.8% for the calendar years 1846-1850, followed by 2.5% for the 1896-1900 period.

25. Pub. L. No. 68-415, 43 Stat. 936 (1925).

26. *See* Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. Pol. 361, 366 fig. 2 (1988).

FIGURE 1

5-4 Decisions of the Supreme Court, 1900-90 Terms

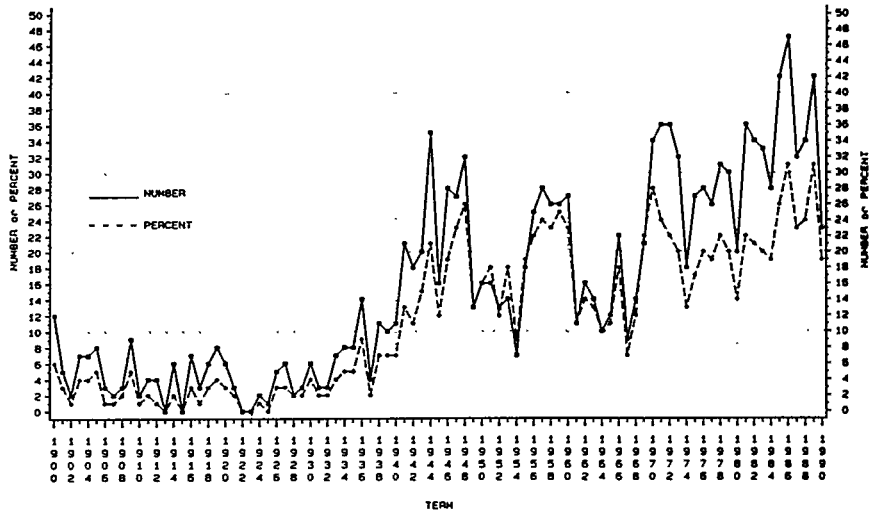
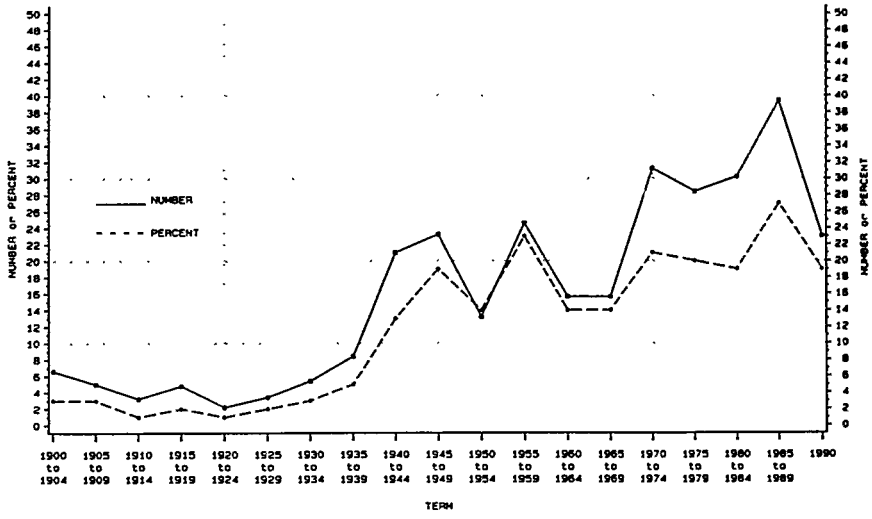


FIGURE 2

Number and Percentage of 5-4 Decisions, 1900-90 Terms



24.8% of such cases came to the Court by way of certiorari; the rest came via obligatory jurisdiction. For the 1927 through 1929 Terms, after the full effects of the Act could be felt, the discretionary review portion was 62.9%.[27]

The intended, and presumably the actual, effect of the Act was to free the Court from the obligatory hearing of many minor and less controversial cases and thus to provide the Court "greater opportunity to choose difficult and disputatious cases."[28] Faced with a larger proportion of hard cases having wide public interest, the Court might be expected to have more dissents and more narrowly divided votes. Two previous studies of the Judiciary Act of 1925, as it relates to the frequency of dissent (but not specifically to decisions by a single vote margin), have reached somewhat different conclusions on the issue.

Halpern and Vines, after a detailed examination of dissent patterns during three Terms immediately preceding and following the Act, found that one Justice (Taft) had fewer dissents after the Act took effect, three Justices (Van Devanter, McReynolds, and Sutherland) experienced no significant change, and five (Holmes, Brandeis, Butler, Sanford, and Stone) dissented more frequently than before.[29] The authors attributed this net increase in frequency of dissent to the effects of the Judiciary Act.[30]

In addition they present, in graph form, three different indicators of the level of dissent within the Court from 1800 to 1975.[31] The graphs are constructed from dissent data drawn from every tenth year in the nineteenth century (1800-1900) and every fifth year in the twentieth (1905-75). One graph gives the percentage of written opinions with at least one dissent,[32] a second shows the ratio of dissenting votes to the number of written opinions of the Court,[33] and the third depicts the number of written opinions with three or four dis-

27. The figures are from Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. Pol. Q. 471, 475 (1977). The sample included all cases decided by written opinion for the 1922-25 and 1927-29 terms, but only the first sixty-five cases of the 1929 term were included because the membership of the Court changed at that point. *Id.* at 472-73. The sampled cases were used for comparing the number of dissenting opinions before and after the Act, as well as for comparing the numbers brought by discretionary and obligatory review.

28. *Id.* at 481; *see also* Walker et al., *supra* note 26, at 364.

29. Halpern & Vines, *supra* note 27, at 477.

30. *Id.*

31. *Id.* at 476, 478, 480.

32. *Id.* at 476.

33. *Id.* at 478.

sents.[34] All three figures show relatively low level fluctuations from 1800 to 1925, with just the slightest upward trend overall. The 1925 point on the graphs appears as a significant valley from which the trend line rises steeply until 1950, when it reaches a point almost three times the height of any previous peak and resumes fluctuations at this much higher level. The authors interpret these trends as confirmation of the Judges' Bill hypothesis:

> The year 1925 stands out in all three figures as a starting point in the evolution of a new trend in dissenting votes . . . . As measured by each of the indicators increases in dissent immediately following the Act coincided with the beginning of a trend in which dissent voting increased steadily for twenty-five years. That coincidence is not accidental. The high incidence of dissent which evolved . . . was, to an extent, an outgrowth of particular provisions of the Act and the general rationale for it.[35]

The Halpern and Vines conclusion seems reasonably supported by their data. A more recent study of dissent patterns, however, has called into question the validity of the thesis that the Judges' Bill was "the beginning of a sustained upward trend in dissent."[36] Using dissenting *opinions* rather than dissenting *votes* as the unit of analysis, and including data for each year (rather than every fifth year) in constructing their tables and diagrams, Walker, Epstein, and Dixon concluded that the major upward movement in frequency of dissent began in the early 1940s, not in any earlier period.[37] Although a "slight increase in individual expression" occurred in the Terms immediately following the Act, a fact heavily relied upon by Halpern and Vines, "dissent clearly leveled off to pre-statute rates shortly thereafter and remained relatively low for another decade."[38] Walker and his co-authors recognized "that a discretionary docket may be one factor, and a necessary one at that, in maintaining high levels of conflict once such patterns are established."[39] Nevertheless, the more than fifteen-year lag between the Act (1925) and the year when dissent truly headed skyward (1941) suggests that the Act by itself was

34. *Id.* at 480.
35. *Id.* at 479-80.
36. Walker et al., *supra* note 26, at 365.
37. Use of Court opinion data was facilitated by the publication of BLAUSTEIN & MERSKY, *supra* note 24, which contains a count of all Supreme Court opinions from 1790 through the October, 1972 Term. *Id.* app. at 137-41 tbl. 9.
38. Walker et al., *supra* note 26, at 365-66.
39. *Id.* at 366.

not enough to initiate the trend.[40]

Obviously, the data utilized can make a difference in the conclusions reached, although part of the disparity between the conclusions of the two previous studies stems from interpretation of the data. The present study focuses on cases decided by a single vote; hence we may expect some difference in detail as compared with data derived from dissenting opinions or dissenting votes in all cases decided by written opinion. Our figures reflect the Walker finding that a major upsurge in dissent occurred beginning with the 1941 Term. Our figures also suggest a more modest upturn earlier, perhaps as early as the years immediately following the enactment of the Judges' Bill.

Looking at Figures 1 and 2 (and the accompanying tables), one can easily discern a much larger volume of single vote decisions in the last decades of this century than in the early ones. Where the trend actually started is more difficult to pinpoint, because so much depends on the year chosen as the starting point for analysis. Consider Figure 1, which presents numbers and percentages for each Term. If 1922 is taken as the starting point, the hypothesis of a trend beginning immediately following the enactment of the 1925 Judiciary Act appears very plausible indeed. The line fluctuates, but from the low years of 1922-25 the overall movement is discernibly upward into the late 1940s. The increased number of 5-4 decisions is particularly noticeable for the 1941 and 1944 Terms, but no one looking at the figure, using 1922-25 as a starting point, would suggest that the trend began in the 1940s. This impression is confirmed by Figure 2, which compresses the data into five-year averages. With the erratic annual fluctuations smoothed out, the curve runs steadily upward from a low in 1920-24 to a high in 1945-49, before showing any decline.

The picture tells a somewhat different story if the 1900 Term becomes the starting point. The period from 1900 through about 1935 now appears as a time of normal fluctuations, with slightly lower scores in the middle of the period and slightly higher ones at either end. By coincidence, as Table 1 indicates, the five-year percentage of single vote decisions for the 1900-04 and the 1930-34 periods is an identical 3.4%. A definite upward movement beyond the pattern of previous decades begins in the 1936 Term, and for 1935-39 the percentage of single vote decisions is 6%, nearly twice the percentage for any previous five-year period. For the 1940-44 Terms, the upward

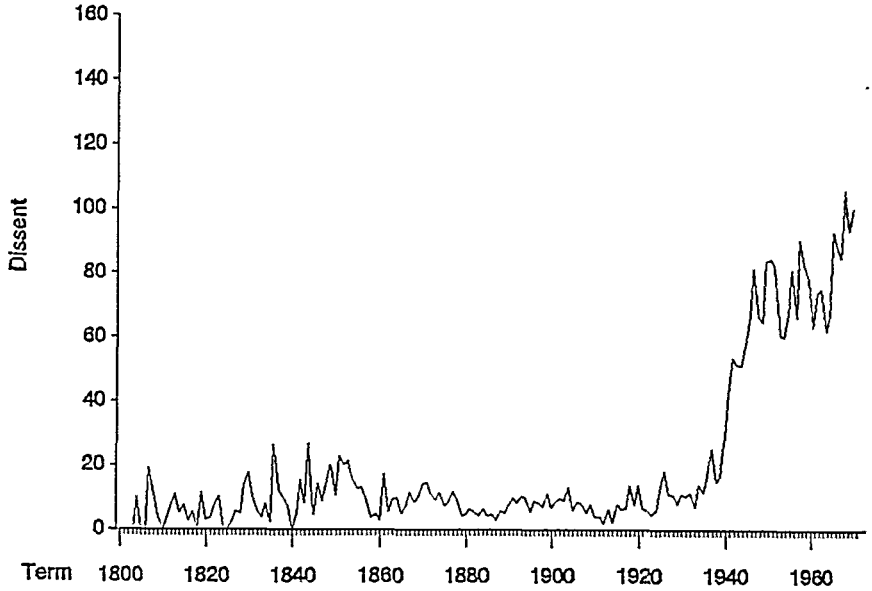
40. *Id.*

surge reaches 13.1%. This increase is of greater magnitude, but it appears as an extension and magnification of an earlier trend, not the beginning of a new one.

Walker and his associates might play one more card in the "name your starting point" game. Their figures began with 1800. When the trend line is extended that far back, using their figures, the dissent rates for two Terms, 1837 and 1845, are slightly higher (26.3%, 26.5%) than for the 1938 Term (25.2%) which is the highest rate of any Term during the 1930s. A diagram similar to theirs for the period 1800-1972 is reproduced in Figure 3.[41]

FIGURE 3

Dissent Per 100 Majority Opinions in the United States Supreme Court, 1800-1972



Viewed in this perspective, the higher scores for the late 1930s can be said to fall within the normal range for the period 1800-1940, and the significant jump in 1941 once more appears as the beginning rather than the continuation of a trend. The longer perspective does

41. The points on the diagram are calculated from figures given in BLAUSTEIN & MERSKY, *supra* note 24, app. at 137-41 tbl. 9. These are the same figures utilized by Walker et al., *supra* note 26, at 363.

not justify the same conclusions with respect to our single vote decision data, however, because no point on a graph extending back to 1800 would approach the 6% level reached during the Terms 1935 to 1939. The highest incidence for any five-year period before 1900, expressed as a percentage of all cases with written opinions, is 3.8% for the years 1846-1850. This compares with the 3.4% single vote decision rate for the 1900-04 and 1930-34 Terms.[42]

Furthermore, treating the relevant starting point as 1800 rather than 1900 is probably conceding too much to the Walker argument. All things considered, the turn of the century is a fairer starting point for analysis of the effects of the Judiciary Act of 1925 than the year 1800. The nineteenth century peaks in dissenting opinions occurred well before the Civil War, when the Court's case load was much lighter (nineteen Court opinions in 1837, forty-nine in 1845) and social and political conditions were vastly different. The last time the dissent rate approached 20% in the nineteenth century was the December 1854 Term. With the year 1900 as the starting point, even the data relied on by Walker—the rate of dissenting opinions per 100 majority opinions—suggests that the upward trend in dissent began before 1941. Table 3 (see Appendix) shows the dissent rates for five-year periods, 1901-45, calculated from the average number of Court opinions and dissenting opinions for the five Terms covered by each period. The rate expresses the number of dissents per 100 Court opinions, the figure used by Walker and associates.

The figures show a low level of dissent in every five-year period preceding the enactment of the Judges' Bill and a higher rate in every five-year period thereafter. The trend escalates markedly during the 1941-45 Terms, but on this data it is an escalation, not a commencement.

Confirmation of this pattern of dissents in the 1930s is found in Pritchett's study of the "Roosevelt Court."[43] His tabulation of disagreement on the Supreme Court, 1930-46, uses two measures of dissent: (1) the number and percentage of non-unanimous full opinions of the Court, and (2) the number of dissenting votes per full opinion of the Court. These measures rely on data somewhat different from

42. These percentages are calculated by using the number of single vote majority decisions given in *Judgments*, *supra* note 8, at 1001, and figures on the number of Court opinions listed in BLAUSTEIN & MERSKY, *supra* note 24, app. at 138-40.

43. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947 (1948).

the dissent rate measure used by Walker (ratio of dissenting opinions to Court opinions), but all of the measures relate to the same general phenomenon of Court disagreement. Pritchett's figures for the 1931 through 1945 Terms are aggregated into three five-year periods in Table 4 (see Appendix).

Pritchett's universe of cases differs slightly from Walker's because Pritchett includes full per curiam, as well as signed opinions, whereas Walker's source did not include per curiam decisions in the count of Court opinions.[44] Nevertheless, the figures are sufficiently comparable to illustrate trends, and the trend in the data is evident. Dissent increased significantly from the early 1930s to the second half of the decade, followed by a still greater increase for the ensuing five-year Term. The data clearly marks the 1940s as the continuation, not the inception, of a trend toward greater dissent on the Court.[45]

Our data on decisions by a single vote reflects the same trends. For the five Terms immediately preceding the enactment of the Judges' Bill, only 1.0% of the cases were decided by a margin of one vote. For each successive five-Term period through 1950 the percentages rose—2.0% for 1925-29 (3.1% if we omit the 1925 Term which would not have been affected much by the Act), 3.4% for 1930-34, 6.0% for 1935-39, 13.1% for 1940-44, and 18.7% for 1945-49. This is consistent with a Judges' Bill hypothesis. We assume, therefore, that the Act did lead to greater dissent on the Court than would otherwise have occurred, and that the increased dissent was reflected in a greater proportion of 5-4 decisions. The Act obviously cannot account for all subsequent trends and fluctuations in incidence of close cases, however, and other explanations of the variation will be explored below.

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44. The counts would probably differ in some small degree even if they were using the same selection criteria. Perfect inter-coder reliability is virtually impossible to achieve with something as complex as Supreme Court decisions.

45. Data comparable to Pritchett's, to my knowledge, is not available for the first three decades of the century. For the 1930 Term, Pritchett's figures show 11% non-unanimous opinions and a .27 rate of dissenting votes per Court opinion. PRITCHETT, *supra* note 43, at 25 tbl. I. Somewhat comparable data from Halpern and Vines indicates that 8.1% of full opinions during the 1922-25 Terms were non-unanimous, with a figure of 14.5% for 1927, 1928, and the first sixty-five cases of the 1929 Term. These percentages are computed from Tables 1 and 2 in Halpern & Vines, *supra* note 27, at 475. If the percentages are representative, the trend toward increased dissent would extend back to the years immediately following the Judiciary Act of 1925.

B. *The Number of Cases Decided by Written Opinion*

The Judges' Bill may have encouraged the development of divisive forces within the Court, but it cannot explain year-to-year variations or even the general shape of the curve in the ensuing decades. For that we must look to other influences. One obvious factor is the number of cases the Court chooses to decide by written opinion in a given Term. Probability has it that more 5-4 decisions will be generated from a larger pool of cases than a smaller one. Percentages need not be affected by the size of the pool, but absolute numbers will be. The general shape of the trend line from the 1940s onward broadly reflects this proposition. In particular, the number of 5-4 decisions from the 1949 through 1969 Terms is on the average noticeably lower than that for the Terms immediately preceding and following. During that intermediate period the Court decided an average of 105 cases each Term with written opinions, compared with 147 per Term for the 1939-48 period and 148 for the 1970-89 Terms. For the 1990 Term, the number of decisions declined to 120, and the single vote decisions dropped substantially.

This is not the place to explore in detail the reasons for the differences in the year-to-year caseload, but some of the influences seem obvious. The Judiciary Act of 1925 changed the nature of the Court's docket by eliminating categories of obligatory jurisdiction. One immediate result was to reduce the number of cases decided by written opinion. In the years just before the effects of the Act were felt, 1920-26, the average number of cases decided by written opinion each Term was 208; in the eight following Terms the figure dropped to 156. More recently, Congress eliminated nearly all of the Supreme Court's remaining mandatory appellate jurisdiction.[46] Once again the effect was a decrease in the number of cases decided by full opinion. From the 1985 through 1989 Terms, the Court decided an average of 147 such cases each Term. During the 1990 Term, the first to receive substantial relief through the Act, the number of cases decreased to 120.[47]

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46. The Administration of Justice Act of 1988, Pub. L. No. 100-352, 102 Stat. 662.

47. The number of cases given plenary consideration also decreased noticeably beginning with the 1947 Term and increased sharply in 1971 and subsequent years. No jurisdictional reasons for the changes have been identified. Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711 (1978), has speculated as to the explanation. With respect to the late 1940s shift, "[t]he most plausible hypothesis is that the change came about at the urging of the new

C. The 1940s Upsurge: The Chief and His Associates

One major change in the incidence of 5-4 decisions, also reflected in dissenting opinions and the number of individual dissents, is the remarkable upsurge occurring in the years after 1940. In earlier discussion of the Judiciary Act of 1925, we concluded that the upward trend began before 1941. Nevertheless, the change in the 1940s is significant. It marks the point of no return between the low dissent levels of preceding years and the high levels that have characterized the Court's behavior ever since. Why this fundamental alteration of Supreme Court norms occurred when it did is thus a matter of considerable interest. That question is addressed in detail by the Walker, Epstein, and Dixon study of dissent and concurrence on the Court.[48] Although I disagree with their conclusion that the trend toward greater dissent was initiated in 1941, I find their explanation of the 1940's upswing convincing.

The answer, apparently, lies in the personalities and background of the sitting Justices and, most importantly, in the leadership of Chief Justice Harlan F. Stone. Stone was initially appointed as an Associate Justice by Calvin Coolidge in 1925 and was elevated to the office of Chief Justice of the United States Supreme Court by Franklin Roosevelt in October 1941. His tenure as Associate Justice began at a time when the norms of consensus and institutional unity on the Court were in full force (coincidentally, the year of the Judges' Bill). When he died in office in 1946, that consensus had been replaced by new norms emphasizing free expression of individual views. Unlike his predecessors in the office of Chief Justice, Harlan Stone believed that "Justices should be free to assert their individuality—that imposed unanimity was no virtue in developing the law," and that "good law was the product of the clash of individually expressed po-

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Chief Justice, Fred M. Vinson" who believed that "'the Justices had been forced to work too hard' and that in any event the Court 'should decide only cases of high national importance or clear conflict below.'" *Id.* at 1734 (quoting Richard Kirkendall, *Fred M. Vinson*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 at 2639, 2643 (Leon Friedman & Fred L. Israel eds., 1969)). The expansion of the plenary docket in 1972, in Hellman's opinion, came about "because the Justices were unwilling to cut back on the number of civil rights cases they were deciding, but recognized that there was a need for a greater number of authoritative precedents in other areas of federal law." *Id.* at 1793.

48. *See* Walker et al., *supra* note 26.

sitions."[49] Translating belief into action, he dissented frequently himself[50] and did not attempt to impose the Court's traditional consensus norms upon the Associate Justices.[51]

The Walker study makes a strong case that Stone's leadership was the primary impetus to the Court's abrupt change of behavior, but it also takes note of other conditions that enhanced the effectiveness of his leadership style.[52] The discretionary docket stemming

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49. *Id.* at 384.

50. The following tabulation of eleven Chief Justices' dissents, reproduced *id.* at 383, is instructive in this regard. The source of the data in the table is S. Sidney Ulmer, *Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger, in* JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 50, 53 (Sheldon Goldman & Charles M. Lamb eds., 1986).

Chief Justice	*Number of Cases*	*Number of Chief Justice Dissents*	*Dissent Proportion**
Marshall	1187	7	.0058
Taney	1708	38	.0222
Chase	1109	33	.0297
Waite	2642	45	.0170
Fuller	4866	113	.0232
White	2541	39	.0153
Taft	1708	16	.0093
Hughes	2050	46	.0224
Stone	704	95	.1349
Vinson	723	90	.1244
Warren	1772	215	.1213

* Number of Chief Justice dissents divided by number of cases.

51. Chief Justice Stone apparently elevated the practice of dissent to the level of principle, as evidenced by this quote: "The right of dissent is an important one and has proved to be such in the history of the Supreme Court. I do not think it is the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting in individual cases." ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 608 (1956) (quoting Chief Justice Harlan F. Stone, H.F.S. memorandum for the court (Jan. 13, 1944)). This statement sharply contrasts with the views of William Howard Taft, Chief Justice when Stone first joined the Court. On one occasion Chief Justice Taft told Justice Clarke, "I don't approve of dissents generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way." WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 61 (1964).

52. The conclusions on the effect of Stone's leadership are well documented in the Walker, Epstein, and Dixon study. In addition, the authors carefully marshall evidence to rule out alternative explanations for the Court's sudden abandonment of traditional consensual norms. The rejected alternative explanations include the Judiciary Act of 1925, increases in the Court's caseload, the effect of selecting a sitting Justice to be chief Justice, deep ideological divisions among the Associate Justices, and associates that were unusually prone to dissent. Walker et al., *supra* note 26, at 364-78. As previously noted, these authors rejected The Judiciary Act as the initiating force or primary reason for the Court's shift toward higher dissent rates. Nevertheless, they conceded that the discretionary docket made possible by the

from the Judiciary Act of 1925 was probably a necessary precondition.[53] Even more important was the relative inexperience of the Associate Justices.[54] Black (1937), Reed (1938), Frankfurter (1939), Douglas (1939), Murphy (1940), Byrnes (1941), and Jackson (1941) were all appointed between October 1937 and October 1941. Byrnes resigned a year after his appointment and was replaced by Wiley Rutledge (1943). Only Justice Owen Roberts (1930), in addition to Stone himself, had more than four years experience on the Court when Stone assumed the mantle of Chief Justice. All but Roberts and Stone had come on the Court at a time when dissent already was higher than at any previous period in the Court's history. Moreover, all had come from professions that placed a high premium on articulation of individual views. Stone, Frankfurter, Douglas, and Rutledge had spent most of their prior careers as university professors. Black and Byrnes came directly from the United States Senate. Roberts came to the Court from the private practice of law, while Jackson, Murphy, and Reed had held high positions in the Justice Department. Of the entire group, only Justice Rutledge had ever served on an appellate court, where a "no dissent" tradition might be valued. His experience, however, was limited to three years on the United States Court of Appeals for the District of Columbia Circuit.[55]

Given the leadership style of a Chief Justice unsympathetic to the traditional consensual norms of the Court, and a group of relatively young Associate Justices not fully socialized to those norms, the setting was ripe for an outpouring of judicial individualism. That outpouring occurred, and the ensuing transformation of dissent patterns proved irreversible. Upon Stone's death, President Harry Truman appointed Fred Vinson to the post of Chief Justice with the expressed hope of bringing more unity to the Court.[56] That hope was not realized. The former expectations of consensus and cohesion had been cast off for good. The sitting associates, now released from traditional restraints on dissent and individual expression, refused to give up their new prerogatives.[57] Once out of the bottle, the genie could not

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Act, along with other conditions, may have been "necessary, if not sufficient, factors in producing the radical change in Court norms." *Id.* at 385.

53. *Id.* at 366, 385.

54. *Id.* at 373-74, 385.

55. *Id.* at 374.

56. *Id.* at 385; Kirkendall, *supra* note 47, at 2641.

57. Quite the contrary, "the Vinson Court became characterized as 'nine scorpions in a bottle.'" Walker et al., *supra* note 26, at 386 (quoting ROBERT J. STEAMER, CHIEF JUSTICE:

be induced to return.

D. The Impact of Ideological Groupings

The Judiciary Act of 1925 and the weakening of consensual norms that occurred during the Stone Court may account for the generally higher level of dissent since the 1930s, including more decisions by a single vote. These historical influences cannot account for observed fluctuations in the number of 5-4 decisions from one Term to the next, however, nor for somewhat broader swings in the trend line since 1940. While some of the variation undoubtedly stems from peculiarities in case selection, the skill of advocates, the idiosyncracies of the Justices, and similar imponderable factors, one recurring and identifiable source of variation apparent in our data is the nature of ideological alignments within the Court. Here we refer to alignment of Justices within liberal or conservative groupings on the Court, as judged by their voting.

At least since Herman Pritchett's seminal work on the "Roosevelt Court,"[58] students of the Supreme Court have used the terms "liberal" and "conservative" to characterize the behavior of the Court and its Justices.[59] For Pritchett, a liberal stance on the Court meant upholding individual rights, sustaining economic regulation through legislative and administrative action, and favoring workers and labor unions in their disputes with employers.[60]

LEADERSHIP AND THE SUPREME COURT 19 (1986)).

58. PRITCHETT, *supra* note 43.

59. *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 138 (3d ed. 1989); DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (2d ed. 1990); DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); GLENDON SCHUBERT, THE JUDICIAL MIND 6 (1965) [hereinafter JUDICIAL MIND]; GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED (1974); HAROLD J. SPAETH, SUPREME COURT POLICY MAKING 110 (1979); JOHN D. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT 3 (1968); STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM (3d ed. 1988); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). Schubert regarded Pritchett's emphasis on ideology as the most important theoretical contribution of the book. "From a theoretical point of view, the significance of his work lies in his interpretation of the Court's policies in terms of a single major attitudinal dimension: liberalism and conservatism." JUDICIAL MIND, *supra*, at 6.

60. PRITCHETT, *supra* note 44, *passim*. Despite reliance on the concepts of liberalism and conservativism to structure his analysis of Supreme Court voting behavior, Pritchett was almost apologetic about it and was reluctant to use the labels: "The terms 'liberal' and 'conservative,' though they remain the labels most generally used to distinguish between opposed complexes of preferences in matters of public policy, have largely lost any precision they may once have had in describing the substance of political attitudes. Consequently, their use

Subsequent characterizations of liberal and conservative positions have followed much the same pattern, though with variations in detail. Using more sophisticated methodological techniques, Schubert's 1964 study, *The Judicial Mind*, found that "[t]wo-thirds of the Supreme Court's dissensual decisions on the substantive merits" of cases decided during the 1946-62 Terms of the Court "raised questions to which the Justices responded on the basis of their acceptance of relatively liberal or relatively conservative ideologies."[61] Schubert identified two related but somewhat different strands of liberalism: *political liberalism*, expressed primarily in decisions on civil liberties, and *economic liberalism*, measured on scales constructed from labor-management questions, governmental regulation of business activities, and disputes between small businesses and their larger corporate competitors.[62]

The use of a liberal-conservative ideological dimension to characterize Supreme Court voting behavior has since become commonplace in academic literature, as well as in the popular press. A recent analysis by Segal and Spaeth, utilizing the categories of political and economic liberalism, presents a definition of liberal and conservative voting behavior that is particularly useful because it identifies, in a succinct way, precise categories of issues from which ideological orientations may be derived.[63] In the political liberalism category, which they equate with civil liberties issues, a liberal vote is defined as "pro-person accused or convicted of crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-Indian and anti-government in

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will be avoided so far as possible . . . ." *Id.* at 33-34. He then proceeded to use "left" to "designate the more liberal side of the Court and 'right' the conservative," but with a disclaimer that neither term was "intended to convey any fixed connotation or impute the possession of any definite set of political principles." *Id.* at 34.

61. JUDICIAL MIND, *supra* note 59, at 97.

62. *Id.* at 99-103, 127-29. Schubert, through use of his scaling techniques, detected a number of variations along the liberal-conservative ideological dimension. The principal ideological positions he identified were liberals, pragmatic conservatives, conservatives, and dogmatic conservatives. Theoretically, his categories could have included pragmatic liberals and dogmatic liberals as well, but in fact most of the liberal Justices were clustered at the midpoint between dogmatism and pragmatism in the space he reserved for the "liberalism" label. *Id.* at 265-66. This fractionalization of the conservatives had an important effect on voting outcomes during the period studied, the 1946-63 Terms. As Schubert explains it, although "the conservative ideology had considerably more representatives than did the liberal ideology, . . . the conservatives were divided among themselves along a second ideological dimension, while the liberals were not so divided. Hence, the liberal ideology had the more effective representation, because it received more cohesive support." *Id.*

63. Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103 (1989).

due process and privacy."[64] A liberal vote in economic cases is "pro-union, anti-business, anti-employer, pro-competition, pro-liability, pro-injured person, pro-indigent, pro-small business vis-a-vis large business, pro-debtor, pro-bankrupt, pro-environmental protection, pro-economic underdog, pro-consumer and pro-accountability in governmental corruption."[65] Conservative positions are defined as the opposite of the corresponding liberal position.

The Segal-Spaeth definitions, with modifications, are used in this study to identify liberal and conservative positions of the Court and its members. Unless otherwise indicated, however, we have included all decisions within a single liberal-conservative dimension without distinction as to political or economic liberalism. For cases not readily classified in terms of the specific Segal-Spaeth categories, we looked to the power relationships between the parties as a fall-back criterion. A vote for the underdog was classified as liberal; a vote for the more powerful party was generally treated as conservative. This did not resolve every uncertainty. Government, when opposed by a private litigant, is ordinarily the more powerful party. When government takes action against a business corporation, however, as in the enforcement of anti-trust rules, the pro-government position is likely to be the liberal position. The classification in such instances, depends on "all the facts and circumstances."

In some cases we searched for a clue in the voting alignment of the Justices. If all the known liberal members of the Court voted one way and the identifiable conservatives voted the other, we assumed that the liberal direction was the way the liberals voted. A clear liberal-conservative split of this nature was usually grounds to override a contrary determination based on the substance of the decision. Very seldom, fortunately, did all the liberals vote for what seemed to be a substantively conservative position when all the conservatives voted the other way. In the usual case with a substantively ambiguous outcome, liberal and conservative Justices could be found on both sides. When the ambiguity extended to both the substance and the voting pattern, the decision was classified as having no direction.

A liberalism score for each of the fifty-seven Justices who served between 1900 and 1990 was calculated as a percentage of liberal votes on the decisions in which each participated during that time period. These percentages are presented in Table 5 (see Appendix).

64. *Id.* at 103.
65. *Id.*

The Justices are arranged from the most liberal to the least, based on all votes having a liberal or conservative direction.[66] Two additional columns give the percentage of liberal votes on subsets of decisions relating, respectively, to civil liberties (under column "Pol") and economic questions, primarily labor-management and business regulation disputes (under column "Ec"). These correspond to the categories of political and economic liberalism used by a number of writers.[67] The percentages in the three columns are not identical, but are generally comparable for most Justices.[68] With few exceptions, the Justices showing substantial variations among the three categories served prior to 1930 or served only briefly on the Court, and thus participated in very few decisions in the sample.[69] A fourth column specifies the

66. As Baum has emphasized, using a single yardstick to measure the liberal or conservative tendencies of Justices from different Courts and time periods raises problems of comparability. A Justice from one era with a lower liberalism score than a Justice from another era may simply have been more conservative. On the other hand, the lower score may have resulted from confronting a set of cases which, factually, made the liberal cause more difficult to support. Lawrence Baum, *Comparing the Policy Positions of Supreme Court Justices from Different Periods*, 42 W. POL. Q. 509, 509-12 (1989) [hereinafter *Comparing Policy Positions*]; Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905, 905-06 (1988). Baum proposed a statistical method of controlling for this variable which takes into account the median difference in scores of Justices who served during both of the periods under consideration. In Baum's study, the differences in civil liberties support scores produced by this method for the Terms 1946-85 turned out to be modest. *Comparing Policy Positions*, *supra*, at 516-17. Such distinctions did not seem essential to the analysis of this Article; hence we chose to stay with the "uncorrected" liberalism percentages.

67. The political and economic liberties subsets are mutually exclusive; the "All" category includes all decisions assigned a liberal or conservative direction. The total universe of decisions by a single vote margin is 1435. Of these, 1391 are designated as either liberal or conservative in outcome. The political liberties subset includes 685 of the 1391 decisions dealing with first amendment speech and religion, equal protection, procedural and substantive due process, constitutional rights of criminal defendants, statutory civil rights, and Indian rights. The economic liberties subset embraces 345 decisions relating to labor-management relations and business regulation.

68. Inspection of Table 5 suggests that its classification of the decisions as liberal or conservative is generally accurate, at least by commonly accepted notions. Justices widely regarded as conservative—McReynolds, Van Devanter, Sutherland, Burger, Rehnquist, and Scalia, for example—have very low liberalism scores, while, Justices Brandeis, Cardozo, Warren, Brennan, and Marshall have very high ones. The rating of the Justices in Table 5 is also broadly comparable to ratings assigned by other scholars. *See, e.g.*, PRITCHETT, *supra* note 43, at 254, 257; JUDICIAL MIND, *supra* note 59, at 125, 145; Segal & Spaeth, *supra* note 63, at 106-07.

69. Justice Lurton, for example, participated in eleven decisions in the "All" category, two in the civil liberties column, and three in the economic liberalism column. The small sample explains his widely variant percentages, 45%, 100%, and 0%. Justice Goldberg, whose economic liberalism score appears quite low (25%), participated in only eight decisions in that sample. Justice Harlan I presents another anomaly. His overall liberalism score is 63% but his political and economic liberalism percentages are both 80%. Of the sixty 5-4 deci-

Terms during which each Justice served.[70]

In the following discussion, the overall liberalism percentage (the "All" column) is the primary basis for attributing ideological leanings to members of the Court, and for exploring the effects of ideological alignments on the incidence of 5-4 decisions. The relevant data on ideological alignments are presented in Tables 6, 7, and 8, covering the 1941 through 1990 Terms. The period before 1941 is excluded because in most years the number of 5-4 decisions was too small to support any reliable generalizations.

In the construction of Tables 6 through 8, the Justices are placed in one of three categories—liberal, moderate, or conservative. The boundaries of the categories were drawn after the distribution of percentages was inspected. Obviously, 100% would identify a knee-jerk liberal, 0% would be an incorrigible conservative, and a score of 50% would fit most definitions of a moderate. The lines had to be drawn somewhere in between; we chose 0-35% as the boundaries of conservative voting, 65-100% as the liberal range, and 36-64% as moderate. For the period after 1940, conservative judges ranged from 6% (Rehnquist) to 34% (Clark), moderates from 36% (Stewart, Byron White) to 51% (Stone), and liberals from 74% (Goldberg) to 92% (Marshall, Warren). As these figures show, the moderates and the conservatives tend to shade into each other near the 35% mark, but a 23 percentage point gap separates the lowest liberal from the highest moderate.[71]

Although Table 5 lists Justice Blackmun with an overall liberalism score of 57%, we did not classify him as moderate for the entire period of his tenure. As is well known, his ideological orientation was at first conservative but became more liberal as years passed.

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sions in which he participated, fifty-four were assigned a liberal or conservative direction, but only ten were included within the political liberalism subset and ten others under economic liberalism. This explains why he could have a higher percentage on each subset than on the aggregate of his decisions.

70. A Term is included even if a Justice served only part of the Term.

71. A somewhat more specialized method of calculating liberal, moderate, and conservative leanings of Supreme Court Justices is found in RUSSELL GALLOWAY, THE RICH AND THE POOR IN SUPREME COURT HISTORY 1790-1982 (1982). Galloway attributes a position on the ideological spectrum to each Justice who served from 1790 through the 1982 Term, the liberal position being allotted to those most willing "to assist the poor in their struggle for economic and social justice." *Id.* at 160. Throughout his book, members of the Court are classified according to the positions taken during particular Terms of the Court, so that a Justice might be treated, for example, as liberal at one time and moderate (or even conservative) at another.

Based on his voting record on 5-4 decisions, we treated him as conservative from 1970 through the 1974 Term, moderate from 1975 through the 1980 Term, and liberal since 1981.

Relying on the liberalism percentages in Table 5, Table 6 (see Appendix) gives the liberal-moderate-conservative alignment of the Court, 1941-90, with the exception of three Terms (1945, 1961, and 1969) when the Court did not have nine functioning members.[72]

The forty-seven Term period can be divided into several segments for purposes of analysis, each segment relatively homogeneous within itself but differing from adjacent segments in the relative size of the three groupings—liberal, moderate, and conservative. If voting is influenced by ideology, the highest percentage of single-vote decisions should occur when the liberal and conservative groupings are equal, or nearly equal (e.g., 5-4, 4-4), with proportionately fewer such decisions when the disparity is greater (e.g., 6-3, 7-2). If each Justice at the respective liberal and conservative poles voted his ideological direction in every case, of necessity every decision in a 5-4 court (at least every case with any ideological content) would be determined by a single vote. This would also be true in a Court with four liberals and four conservatives because the remaining (moderate) vote would create a 5-4 decision no matter how it was cast. On the same assumption of ideologically uniform voting at the poles, a Court divided 6-3 or 7-2 would never decide a case by a single vote.

The size of the moderate category also has an effect on the frequency of 5-4 decisions. As noted above, when liberal and conservative groups are equally divided at four each, with a single moderate Justice, all decisions will be 5-4 given the ideological uniformity assumption. However, if the alignment is 3-3-3 instead of 4-1-4, the theoretical possibilities are altered even though the polar groups are still equal in number. A 5-4 outcome will result whenever the moderates are divided, but the outcome will be 6-3 when they vote together. A larger group of moderates thus mitigates the effect of equality at the poles. The presence of moderates also diminishes the effect of great disparity in the polar groups if it reduces the size of the larger group to five or fewer.

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72. In 1945, Justice Jackson was absent, serving as a judge on the Nuremberg War Crimes Tribunal, and Chief Justice Stone died before the Term ended. Justice Whittaker resigned during the 1961 Term and Justice Frankfurter, because of illness, was able to participate in fewer than half of the single-vote decisions that Term. Justice Fortas resigned from the Court in May 1969; his successor was not sworn in until June 1970.

The uniformity assumption clearly is not consistent with reality: Justices classified as conservative or liberal do not always vote in accordance with those ideological preferences. By our definition, voting liberal or conservative 65% of the time is enough to fit the respective classification, and no Justice had a liberal voting percentage of 0 or 100%, though a few came close. Other factors besides ideology affect voting behavior, and not every issue has discernible ideological content. The uniformity assumption is used only to illustrate the likely effect of grouping size on the incidence of 5-4 decisions. Nevertheless, if ideology affects voting behavior, a Court with five liberals and four conservatives (or vice versa) should have a higher percentage of 5-4 decisions than a Court divided 7-2 or even 3-3-3. That is in fact what Table 7 (see Appendix) shows.

Table 7 arranges the 1941 through 1990 Terms into chronologically ordered groupings, each group embracing terms with similar liberal-conservative alignments. The first and last rows in the table are single-Term "groups." Table 7 shows, as between chronologically contiguous groupings, that the percentage of 5-4 decisions rises with polar equality and falls with polar disparity. The 1970-80 period suggests, however, that having more than one moderate Justice on the Court tends to dampen the effect of polar equality. Even though the polar groups were equal (3-3) or near equal (4-3) during this period, the flexibility flowing from the presence of two or three moderate Justices kept the percentage of 5-4 decisions somewhat lower than the figures for 1956-60 and 1981-89 when the Court had only one moderate Justice, or none.

Table 8 (see Appendix) arranges the 1941-90 Court Terms on the basis of ideological alignment without regard to chronological ordering. The first group includes Terms in which the alignment was 5-4 or 4-1-4, representing equality of polar groups and little impact of moderates. The second group, 4-2-3 and 3-3-3, represents equality at the poles but a larger number of moderates. The third group has more polar disparity, with one or two moderates, and the fourth group has the greatest disparity. Theoretically, this arrangement should result in declining percentages from top to bottom, and it does, although the difference between the third and fourth groups is minimal.

As these tables indicate, change in the relative size of ideological groupings within the Court affects in consistent ways the probability that Court decisions will be determined by a single vote. Ideological alignment obviously cannot explain all the variation, however, because percentages vary from year to year even though the same Justices

remain on the Court and the alignment remains the same. From 1981 through 1989 each Term is classified as having a 4-1-4 alignment. Yet the percentages ranged from a low of 18.5% in 1984 to a high of 30.9% in 1989.

Undoubtedly much of this variation is attributable to differences in the factual and legal merits of the cases coming before the Court. Each Term, a substantial number of cases are decided by a unanimous vote[73] and other cases would be unanimous but for a single dissent that can often be characterized as idiosyncratic.[74] Presumably, the facts and the law in these cases point so clearly in one direction as to transcend ideological differences. When the issue is closer, the posture of the facts and the law may still transcend ideological leanings for some Justices, though not for others.[75] Moreover, the ideological implications of particular facts may be different for different

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73. In recent years the number of unanimous decisions as a percentage of all decisions by full opinion has hovered around 25%. If decisions in which all concur in the judgment but not in the majority opinion are included, the figure approaches 40%. The following percentages, taken from the *Harvard Law Review*'s annual surveys of the Supreme Court are illustrative:

Term	*Joined Court Opinion*	*Unanimous Only as to Judgment*	*Total*
1978	23.9%	12.3%	36.2%
1983	26.4%	13.5%	39.9%
1988	27.3%	11.9%	39.2%
1990	29.2%	10.0%	39.2%

The Supreme Court, 1978 Term - The Statistics, 93 HARV. L. REV. 275, 277 (1979); *The Supreme Court, 1983 Term - The Statistics*, 98 HARV. L. REV. 307, 309 (1984); *The Supreme Court, 1988 Term - The Statistics*, 103 HARV. L. REV. 394, 396 (1989); *The Supreme Court, 1990 Term - The Statistics*, 105 HARV. L. REV. 419, 421 (1991).

74. For example, Justice Marshall sometimes entered a lone dissent in a case decided without argument, not because of a substantive objection, but because he believed the case deserved to be briefed and argued. *See, e.g.*, Olden v. Kentucky, 488 U.S. 227, 233-34 (1988).

75. A recent study of defections from an original minimum winning coalition on the Court concluded that ideology rather than case characteristics provided the primary explanation for the defection. The data consisted of Warren Court cases in which the original vote on the merits in conference, taken shortly after oral argument, was 5-4. Before the final vote was taken later in the Term, however, one Justice in the original majority shifted to the other side, creating a new majority. The defector was usually found to be a less competent Justice, according to the authors' appraisal of reputational data, or else "ideologically closer to one of the [original] dissenters than to any one of the other members of the ODC [original decision coalition]." Brenner et al., *supra* note 19, at 423; *see also* Saul Brenner, *Ideological Voting on the U.S. Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote*, 22 JURIMETRICS J. 287, 290 (1982) (finding that from 1946 to 1967 the Court's "final vote on the merits was more ideological than the original vote").

Justices.[76] For instance, Justice Thurgood Marshall voted very consistently in favor of defendants in criminal cases brought before the Court. Yet he occasionally made exceptions, usually when the defendant was accused of a white collar crime.[77] We would classify such a vote as conservative because it disfavors the criminally accused. But, to Justice Marshall, the distinction between violent crime and white collar crime may have appeared quite consistent with his own ideological system. The differential scores for economic and political liberalism, noted in Table 5 and in the writings of other scholars,[78] suggest that issue-specific and fact-specific ideological orientations characterize most members of the Court to some degree.[79]

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76. The implications may also vary at different periods in the life of a Court. Craig R. Ducat & Robert L. Dudley, *Dimensions Underlying Economic Policymaking in the Early and Later Burger Courts*, 49 J. POL. 521, 534 (1987), examined voting behavior in nonunanimous economic cases during three early and three later Terms of the Burger Court. A factor analysis showed the earlier period to be best explained by a dimension labeled economic liberalism-conservatism, but for the later period this dimension was secondary to the Court's regard for federalism.

77. *E.g.*, Doe v. United States, 487 U.S. 201 (1988) (Marshall, J., joining the majority opinion affirming a consent directive despite petitioner's claim that it violated his Fifth Amendment privilege against self-incrimination).

78. *See, e.g.*, PRITCHETT, *supra* note 43, at 254, 257; JUDICIAL MIND, *supra* note 59, at 125, 145; Segal & Spaeth, *supra* note 63, at 104, 106-07 (noted in tables 1 through 5).

79. ROHDE & SPAETH, *supra* note 59, at 195-203, posit "threat" and "non-threat" situations as another variable affecting the frequency of 5-4 decisions. They assume a tendency toward minimum winning coalitions in the Court's decisionmaking, the usual minimum being five in a nine member Court. The theory is "that the writer of the majority opinion *will* make bargains until a minimum winning coalition is attained and will then refuse other bargains, thus excluding other members." *Id.* at 200. When the Court is threatened by external forces, however, the members will tend to close ranks and form larger than minimum winning coalitions. A threat to the Court's *power* may come from congressional attempts to limit the jurisdiction of the Court or change its personnel (as by impeachment or court packing); a threat to the Court's *authority*, as in desegregation cases, may exist if serious resistance to the Court's mandate is anticipated. *Id.* at 195. Their data, drawn from 636 civil liberties cases decided between 1953 and 1969, showed minimum winning coalitions (5-4) in roughly 40% of the cases involving non-threat situations but only in 23% of the threat situations. *Id.* at 199 tbl. 9.1. They focused, however, on *opinion* coalitions (five Justices joining the majority opinion), rather than *decision* coalitions. The "threat" variable was initially elaborated in *Policy Goals*, *supra* note 18, at 212-16. For critiques of this theory, see Brenner, *supra* note 18, at 385; Saul Brenner & Theodore S. Arrington, *Some Effects of Ideology and Threat upon the Size of Opinion Coalitions on the United States Supreme Court*, 8 J. POL. SCI. 49, 55-58 (1980); Micheal W. Giles, *Equivalent Versus Minimum Winning Opinion Coalition Size: A Test of Two Hypotheses*, 21 AM. J. POL. SCI. 405, 406-08 (1977); *see also* C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981). Tate presents evidence that voting behavior of Justices can be substantially explained by reference to personal characteristics (such as party identification, the appointing president, prestige of prelaw education, elective office, appointment region, judicial experience, and

Some of the variation from year to year may also be attributable to leadership, personality, and other factors affecting interpersonal relations among members of the Court. As discussed above, Chief Justice Stone's leadership in a Court composed of relatively young, inexperienced, activist Justices helped transform dissent and the 5-4 decision from occasional phenomena to regular, frequent, and expected behavior on the Court.[80] This study does not systematically explore the effects of interpersonal relationships upon Court decision making, but scholarly literature on the subject supports the assumption that such influences are significant.[81]

III. WHO VOTES WITH THE MAJORITY IN SINGLE VOTE DECISIONS

Another objective of the study was to determine who votes with the majority in single vote decisions. A simple answer to this question is found in Table 9 (see Appendix), which lists the fifty-seven Justices who served during the 1900-90 Terms in order of the frequency with which they voted with the majority. The number of decisions in which each participated is also given.

A. Ideology and Majority Agreement

Table 9, taken in connection with the liberalism scores in Table 5, again points to ideology as an important determinant of Supreme Court voting patterns. Affinity with the dominant ideological coalition, liberal or conservative, obviously contributes to frequent voting with the majority.[82] When neither the liberal nor the conservative wing

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prosecutorial experience) that indicate ideological orientation. *Id.* at 358-61; *see also* Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280-81 (1988) (concluding that a combination of case characteristics and personal attributes is a successful predictor of voting behavior).

80. *See supra* notes 48-55 and accompanying text.

81. *See, e.g.*, BAUM, *supra* note 59, at 149-58; David J. Danelski, *Causes and Consequences of Conflict and Its Resolution in the Supreme Court*, *in* JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS, *supra* note 50, at 21, and sources cited therein.

82. For a detailed analysis of how changes in Court personnel can affect majority participation rates of those at the ideological extremes, see Edward V. Heck, *Changing Voting Patterns in the Burger Court: The Impact of Personnel Change*, 17 SAN DIEGO L. REV. 1021 (1980) [hereinafter *Voting Patterns in the Burger Court*]; *see also* Edward V. Heck, *Changing Voting Patterns in the Warren and Burger Courts*, *in* JUDICIAL CONFLICT AND CONSENSUS: BEHAVORIAL STUDIES OF AMERICAN APPELLATE COURTS, *supra* note 50, at 68 (concluding that majority participation is heavily influenced by the ideological makeup of the Court).

claims a majority of the Justices, the role of moderate voters becomes more important because no winning coalition of five can be formed without participation of at least one moderate.[83] Of course, the lack of a majority in either polar group does not guarantee that all moderates will score high in majority agreement. If the number of moderates on the Court exceeds five, moderates will necessarily be found on the losing as well as the winning side of every 5-4 decision. Although other influences undoubtedly are present, most of the high and low majority agreement scores in Table 9 can be accounted for by reference to the ideological composition of the Court, at least for those Justices who served after 1930.

For the period before 1930, the data is much less conclusive. Taft and Moody, both from this period, stand at the top of the list; but each participated in so few single vote decisions (seven for Moody, nineteen for Taft) that any explanation of either their liberalism rating (40% for Moody, 47% for Taft) or their majority agreement must be highly tentative. For the most part, the same data limitations apply to all members of the Court whose tenure did not extend beyond the first three decades of the century. Dissent in any form was minimal, unanimity was the rule, and conservative and liberal blocs were not much in evidence.

Given the paucity of 5-4 decisions and the predominance of moderates before 1930, it is not surprising that the impact of ideology before 1930 is hard to detect from these data. Of the eighteen Justices on the list who did not serve at any time beyond the 1929 Term, four were liberals by my rating (Gray, Shiras, Pitney, Clarke), one was conservative (Peckham), and the others scored as moderates (Harlan, Fuller, Brewer, Brown, Edward White, McKenna, Holmes, Day, Moody, Lurton, Lamar, Taft, and Sanford). From 1900 through 1915, between six and eight of the Justices were classified as moder-

83. This corresponds with Heck's findings based on an analysis of voting in all cases decided on the merits by full opinion, unanimous and nonunanimous, plus per curiam decisions evoking a dissent on the merits, from the 1953 through 1980 Terms:

> It seems safe to conclude that when there is a large, cohesive bloc within the Court, the Justice most frequently in the majority will be a member of the largest bloc. Of course, the caveat that there is not always a large, cohesive bloc within the Court must be entered, a condition that sometimes allows a "swing voter" associated with no bloc on a divided Court (Clark in 1958-62 or White in 1969-72) to occupy the Court's center of gravity.

Edward V. Heck, *Changing Voting Patterns in the Warren and Burger Courts*, *in* JUDICIAL CONFLICT AND CONSENSUS: BEHAVORIAL STUDIES OF AMERICAN APPELLATE COURTS, *supra* note 50, at 83.

ates, and from 1916 to 1929 there were four moderate Justices.[84] At no time did either liberal or conservative Justices constitute a majority of the Court. In this situation, moderates should have been able to control the outcome of 5-4 decisions, and six pre-1930 moderates (Taft, Moody, Day, Brown, Harlan, and Sanford) are among the top twenty in Table 9. The pre-1930 moderates also have a higher median majority agreement score (60%) than the five Justices at the ideological extremes (46%). On the other hand, the anchor man on the list is a pre-1930 moderate (Lamar), and three others are in the bottom twenty (Fuller, Lurton, and McKenna).

After 1930, conservative and liberal blocs become more of a factor, and the ideological link with majority agreement percentages becomes clearer. Goldberg (74% liberal), ranking third after Taft and Moody, served just three Terms at a time when liberal Justices had a 5-2 advantage over conservatives. Justice Vinson, in fourth place, was a conservative (19% liberal voting) who served three Terms when conservatives had a 5-4 advantage, and four Terms when the advantage was 7-2. Justices Kennedy (18%), Powell (26%), Scalia (19%), Burger (10%), and Rehnquist (6% liberal), all in the top fifteen, and Justice O'Connor (18% liberal, ranked 17th in majority agreement) served most of their tenure through 1990 on a Court nominally split 3-3-3 or 4-1-4. On its face, this alignment might have been a recipe for high majority agreement ratings among the moderates rather than among the conservatives. When the Court was divided 3-3-3, however, two of the three moderates were Stewart and White, each of whom had liberalism scores of 36%, just a point above the break

84. A study by Roger Handberg, Jr., *Decision-Making in a Natural Court, 1916-1921*, 4 AM. POL. Q. 357 (1976), permits comparison with Supreme Court voting on a wider range of issues during the 1916-20 Terms. Of 1218 "formally decided cases" during that period, 261 were non-unanimous and, of these, 229 were scalable along the dimensions of political liberalism (28) or economic liberalism (201). *Id.* at 363-64. The percentage of liberal votes for each of the Justices derived from Handberg's data may be compared with the percentage based on 5-4 votes only, for the same time period. For each Justice the first percentage figure in the parenthesis is from Handberg, the second from our 5-4 data: Clarke (85%, 93%), Brandeis (78%, 100%), Holmes (64%, 70%), Pitney (54%, 60%), Day (49%, 60%), E. White (44%, 24%), McKenna (42%, 30%), Van Devanter (34%, 0%), and McReynolds (26%, 4%). Based on voting for those six Terms only, using the 65% and 35% thresholds for liberal and conservative voting, Handberg's data shows two liberals, two conservatives, and five moderates. *Id.* at 365. Using 5-4 data for the same six Terms, three Justices appear as liberals, four as conservatives, and two as moderates. A comparison of the two percentage figures for each Justice provides support for the proposition that 5-4 decisions are likely to have a higher ideological content than cases decided by larger majorities. The liberal Justices tend to vote more liberally, and the conservative Justices more conservatively, on the 5-4 decisions.

between moderates and conservatives.[85] They were clearly right-leaning moderates who tipped the balance in that direction. From 1981 onward, the single moderate was Justice White with his continuing conservative tilt. During those years, Justice White was in an ideal position to vote frequently with the majority. He had the benefit of his conservative affinity, as well as his role as a marginal moderate more willing than the others on the right to join a liberal coalition. For that ten-year period, his majority agreement percentage was 70.7. His score for the entire period of his tenure on the Court is somewhat lower (65.6%) because of his conservative voting during his early years on the Warren Court when a liberal coalition predominated.[86]

Cardozo (93% liberal) may seem an anomaly near the top of the list because he served 1931-37 when, in the first five of those Terms, the Court had a conservative majority (Van Devanter, McReynolds, Sutherland, Butler, and Roberts). The explanation is in the small number of single vote decisions between 1931 and 1935. Cardozo cast fifteen of his thirty-one majority votes during his last two Terms. In 1936, a liberal majority was possible because Justice Roberts voted as a liberal on twelve of fourteen 5-4 decisions during that Term (the previous Term he cast conservative votes on six of eight decisions), and in 1937, Justice Van Devanter (5% liberal) was replaced by Justice Black (85% liberal). Two years with a liberal majority was sufficient to place Justice Cardozo tenth on the majority agreement list overall.

At the bottom of the table, the low scores are, for the most part, associated with Justices who voted conservatively during a number of Terms when the Court had a liberal complexion (Butler, Sutherland, and McReynolds) or, more commonly, liberal voters on a conservative Court (Marshall, Clarke, Brennan, Stevens, Douglas, Rutledge, Murphy, and Black). A few moderates score near 50% or below, but all of them are from the pre-1915 Terms when most Justices were classified as moderate. Among the Justices below 50%, one (Peckham) was a pre-1915 conservative; two (Lamar and Fuller) were pre-1915 moderates; three (Butler, Sutherland, and McReynolds) were Roosevelt era staunch conservatives; one (Clarke) was an extreme liberal (92%) at a time, 1916-21, when most other Justices were moderate or conserva-

85. The third was Justice Blackmun, then in his moderate period on the Court.

86. Justice Powell had a slightly higher agreement score than Justice White, 71.3%, for the six Terms he served during that period (1981-86).

tive; one (Rutledge) was a liberal who seldom was able to vote with the majority in 5-4 cases during his last three years on the conservative Vinson Court; and four (Marshall, Brennan, Stevens, and Douglas) scored low because of service on the conservative Burger and Rehnquist Courts. Brennan and Douglas rank somewhat higher than Marshall because of their earlier experience on courts where liberals predominated. Justice Blackmun, now among the liberals, has a higher agreement score than his fellow liberals on the Rehnquist Court because he voted with the conservative majority early in his Supreme Court career and took a moderate position in an evenly divided Court from 1975 to 1980.

B. Fluidity in Majority Coalitions

Discussion of ideological groupings is not intended to suggest that voting blocs on the Court are rigidly defined. They are not. No majority agreement score reaches the extremes of 0 or 100%, and anything in between indicates that crossover voting has occurred. Some issues, too, are so ideologically neutral that ideology is essentially irrelevant to the voting pattern. During any given Term, the single vote decisions are a product of many different winning coalitions. During the 1990 Term, the twenty-three 5-4 decisions were formed by fifteen different majorities. The coalition of Kennedy, O'Connor, Rehnquist, Scalia, and Souter, the most frequent grouping, accounted for just four of those decisions. Ten of the twenty-three involved majorities that occurred only once. This shows considerable fluidity in the alignments.[87] Moreover, despite a conservative predominance on the Court of five to three (and one moderate), all decisions did not have the same ideological direction: thirteen were con-

87. Use of the term "fluidity" with respect to Supreme Court voting is not entirely original. The term was used in Saul Brenner, *Fluidity on the Supreme Court: 1956-1967*, 26 AM. J. POL. SCI. 388 (1982) and Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526 (1980), to refer to vote switching by one or more Justices between the original vote on the merits of a case in conference and the final vote before the decision was handed down. Information on the original vote, which is taken in secret, became available when the docket books of Justice Harold Burton and Justice Tom Clark became available to the public. *See also* Timothy M. Hagle & Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 W. POL. Q. 119 (1991); J. Woodford Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968). S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 319, 322 (Stephen C. Halpern & Charles M. Lamb eds., 1982), finds "issue fluidity" when the Court grants full review, then decides an issue not raised by any party.

servative and nine were liberal.

The 1990 Term had more fluidity of alignment in the single vote decisions than has been characteristic of recent Terms. In 1989, twenty of forty-two decisions were decided by a Kennedy-O'Connor-Rehnquist-Scalia-White coalition; and in 1988, nineteen of thirty-four cases, 56% of the total, were decided by the same five votes. Even so, fourteen different winning coalitions were represented in the 1989 cases and ten in 1988. Sometimes the alignments are more consistent than others, but the overall pattern always shows a good deal of fluidity and flexibility.

A simple measure of alignment fluidity can be formed by treating the number of different majority coalitions as a percentage of the total number of 5-4 decisions. Complete fluidity would be indicated by 100%, a figure obtained when the number of decisions and the number of different coalitions are equal. As the number of different coalitions decreases, so does the percentage or fluidity score. Fluidity percentages for each Term, 1900-90, are given in Table 10 (see Appendix).

Inspection of Table 10 shows that 5-4 decisions were few, and fluidity consistently high from 1900 through the 1932 Term. More than half of the Terms during this period had 100% fluidity, that is, no majority coalition consisting of the same five Justices decided more than one such case, and all but six Terms were above 80%. After the 1932 Term, 100% fluidity was never again achieved.

When the fluidity percentages for Terms since 1932 are examined carefully, a generally consistent set of relationships appears. First, fluidity tends to be lowest when the ideological alignment on the Court is 5-4 or 4-1-4; that is, near equality in the polar groups and no more than one moderate. Second, fluidity is highest when one polar group has more than five members. Third, fluidity is at intermediate levels when no polar group is larger than five and the number of moderates is two or more.

The explanation for this judicial behavior is necessarily speculative. I have previously suggested that some issues have a more marked ideological content than others.[88] When a highly ideological

88. *See supra* text accompanying notes 73-79. Constitutional issues apparently have more ideological content than non-constitutional questions. A disproportionately large number of constitutional questions are decided by a single vote. *See supra* note 23. Apparently, also, Justices tend to vote according to their ideology more frequently on constitutional than non-constitutional questions. Of the sixteen Justices classified as liberal by virtue of a 65% liberalism score or higher, fourteen voted more consistently liberal on constitutional questions than

issue arises, liberals are likely to vote one way and conservatives another. If the alignment on the Court is 5-4, a decision by a single vote will probably occur. If, however, the Court membership is six and three, or seven and two, the issues with a high ideological profile will be resolved by a vote of six to three or seven to two. Thus, when one coalition has six or seven members, there should be fewer 5-4 decisions than when the Court alignment is five to four.[89]

There will still be 5-4 decisions on some issues, however, where the ideological content is not sufficiently strong to keep all members of the dominant group in line. When such issues arise, the likelihood of forming ad hoc coalitions that cut across ideological lines increases. One Justice will cross on one type of issue, another Justice will cross over on a different issue, and so on. Ideologically ambiguous issues undoubtedly are addressed every Term, whatever the composition of the Court may be. But when the issues on which the polar groups tend to be most cohesive are no longer decided by a 5-4 vote, the fluidity percentage should be higher. A possible further contribution to high fluidity when one polar group has a large majority is fragmentation within the dominant group as ideological imperatives become less pressing and individuality takes freer rein.

The intermediate scores occurring when approximately equal polar groups are balanced by two or more moderates can be explained on similar principles. Unlike the situation of the 6-3 or 7-2 Court, issues with a strong ideological pull will still remain in the calculation. But, with the outcome depending on the votes of two or more moderates, not all cases will be decided by a 5-4 vote. Some will however, and voting patterns that result are likely to be more consistent and repetitive than voting alignments on issues that are ideologically ambiguous. Some moderates will have conservative leanings while others may have a more liberal orientation. These orientations, although not strong enough to place them in either polar group, should nevertheless give some degree of consistency to their voting

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on statutory and common law questions. At the other end of the spectrum, the tendency for conservatives to vote more consistently conservative when constitutional issues were at stake is not so pronounced. Thirteen of twenty-three were more conservative on constitutional questions; ten were not.

89. This point has already been noted in my discussion of the incidence of 5-4 decisions. *See supra* notes 72-81 and accompanying text. Data subsequently available from the 1991 Term conforms to the pattern. The addition of Justice Thomas to the Court in 1991 increased the number of conservatives from five to six, and the number of 5-4 decisions fell from 23 during the previous Term to 17.

pattern on close questions.

Whether or not the foregoing explanation provides an adequate rationale for the postulated relationship between majority coalition fluidity and ideological alignments on the Court, the data in Table 10 quite clearly reflects the existence of such a relationship. Some of the consistency is masked by year to year fluctuations resulting from other influences, but it becomes apparent when a number of consecutive Terms having the same or similar ideological alignments are grouped for purposes of analysis. This is done in Table 11 (see Appendix) for the period from 1933 through 1990, omitting several Terms (1938, 1940, 1945, 1956, and 1961) when changes in Court personnel during the Term resulted in unusually high fluidity because of the increased number of possible combinations.

General conformity to the expected relationship is apparent for every grouping from 1941 through 1990. The first grouping (1933-37, and 1939) does not, on its face, fit the anticipated pattern because such low fluidity (43.1%) is characteristic of alignment patterns having equal, or near equal, polar groups and no more than a single moderate. Table 11 shows the first period with alignments of 2-2-5 and 3-2-4. Such an alignment is more consistent with an intermediate fluidity score, perhaps in the range of 50% to 60%. This apparent inconsistency is resolved by looking at how the members of the Court actually voted during those Terms. The ideological alignment in Table 11 is based on the percentage of liberal votes cast by each Justice on single vote decisions during the aggregate of all Terms served.[90] This is generally an appropriate way of assigning ideological labels because, during most Terms, most Justices voted consistently with their labels. During the 1930s, however, some Justices did not regularly vote in accordance with their full-tenure averages. As a result, the voting was much more polarized. Using actual voting as a basis for calculation, the alignment was 4-1-4 for the 1933 Term, 5-0-4 for 1934, 4-0-5 for 1935, 5-0-4 for 1936 and 1937, and 6-0-3 for 1939.[91] Every Term, except 1939, had the kind of alignment that

90. As noted above, Justice Blackmun is an exception. He is treated as a conservative from 1970-74, a moderate from 1975-80, and a liberal thereafter.

91. Justices Hughes, Stone and, to some extent, Roberts had marked changes in their voting orientation that could justify treating them as liberal during a portion of their careers on the Court and conservative for the remainder. For Hughes, the break came between the 1937 and 1938 Terms. Prior to 1938, his voting in 5-4 decisions was 81.8% liberal; for 1938-40 it was 13.8% (overall 61%). For Stone, the break was between 1939 and 1940. His record 1924-39 was 90.2% liberal; for 1940-45 it was 19.2% (overall 51%). The switch for

breeds low fluidity, and that is what Table 11 shows (43.1%).

The other chronological groupings demonstrate a reasonably good fit with the rule that predicts low fluidity for an evenly-divided Court, high fluidity when one pole heavily predominates, and intermediate levels for other configurations. Fluidity increased in 1941 (61.9%) as the Court became less polarized, then decreased with renewed polarization of the Court from 1941-48 (51.9%). The fluidity percentage reached its highest level during 1949-52 (87.9%) when the conservative group had a majority of seven, then dropped to 67.5% during 1953-55 when Earl Warren's replacement of Chief Justice Fred Vinson changed the alignment to six and three.[92]

Fluidity reached its lowest point (35.1%) with the Court's return to high polarization (Brennan replaced Reed) from 1957-60. A 5-2-2 alignment from 1962-66 (Goldberg and Byron White arrived and Frankfurter and Whittaker departed) increased fluidity to 63.5%, and the figure was still higher (73.9%) during the 1967 and 1968 Terms when Thurgood Marshall succeeded Tom Clark to create a liberal majority of six. Fluidity decreased in the 1969-74 period (53.4%), when neither polar group had a majority,[93] and remained close to the same level (56.2%) with an evenly divided 3-3-3 Court (Stevens replaced Douglas and Blackmun became a moderate). Fluidity dropped again (40.5%) with the return to a 4-1-4 Court in 1981

Roberts was not so drastic, but nevertheless was significant. From 1930 through 1936, he voted 66% liberal; from 1937 through 1944, 15.4% (overall 30%). Roberts vacillated in the mid-1930s. During the 1934-36 Terms, his liberal percentages were, respectively, 75%, 25%, 86%, and 0%.

Justice Stone's turn to the right coincided quite closely with Justice Brandeis' retirement from the Court. During their joint tenure on the Court, the two voted identically in 93% of all 5-4 decisions (Brandeis voted 98% liberal). Cardozo, who retired a year earlier, had 96% agreement with Brandeis, 98% agreement with Stone, and an overall liberal percentage of 93%.

92. This alignment was maintained when Harlan replaced Jackson in 1954. Both voted less than 30% liberal on 5-4 decisions, overall and during these Terms.

93. Chief Justice Warren and Justice Fortas left near the end of the 1968 Term. Chief Justice Warren Burger joined the Court for the 1969 Term, but the Fortas vacancy was not filled by Justice Blackmun until June 1970. The death of Justice Black and Justice Harlan's retirement after the 1970 Term created vacancies that were filled by Justices Rehnquist and Powell in January, 1972. These changes created three different natural courts with structurally similar alignments during the six-Term period, 1969-74. "Natural court" in this context refers to a period in which the Court experienced no personnel change. For a discussion of the concept, see, e.g., SPRAGUE, *supra* note 59, at 6-7; Handberg, *supra* note 84, at 358; *Voting Patterns in the Burger Court*, *supra* note 82, at 1038; Harold J. Spaeth & Michael F. Altfeld, *Measuring Power on the Supreme Court: An Alternative to the Power Index*, 26 JURIMETRICS J. 48, 55 (1985).

(O'Connor replaced Stewart, Blackmun became a liberal). The percentage rose to an intermediate level (65.2%) in the 1990 Term, reflecting a conservative advantage gained through Justice Souter's replacement of Justice Brennan.[94]

The literature on the "freshman Justice" suggests one additional source of variation in the fluidity of majority coalitions over time. In a seminal study published in 1958, Eloise C. Snyder found that Justices newly appointed to the Court tended at first to vote with a pivotal or centrist group and only later to become allied with a liberal or conservative bloc.[95] She suggested that this freshman effect might be attributable to a new Justice's initial ideological flexibility, lack of self-assurance in the new task, and the sense of not yet being part of an in-group on the Court.[96]

Snyder's findings, however, must be contrasted with studies of voting behavior during more recent Terms of the Court. While her conclusions about the behavior of freshman Justices prior to 1953 have not been seriously controverted, empirical data from 1953 and subsequent Terms indicates that freshman Justices very quickly gravitate toward one of the polar blocs.[97]

Assuming that the empirical findings of the earlier as well as the later studies are accurate,[98] one would expect somewhat greater coalition fluidity in the years before 1953 when new Justices were slow to join polar blocs, than during the Terms since then, when the fresh-

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94. When the addition of Justice Clarence Thomas increased the conservative majority from five to six during the 1991 Term, fluidity further increased to 70.6%, based on twelve different coalitions for seventeen single-vote decisions. This fluidity follows the anticipated pattern.

95. Eloise C. Snyder, *The Supreme Court as a Small Group*, 36 SOC. FORCES 232 (1958).

96. *Id.* at 237-38.

97. *See* Edward V. Heck & Melinda G. Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. POL. 852, 857-58 (1981); Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6 (1990); Thea F. Rubin & Albert P. Melone, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 JUDICATURE 98 (1988); John M. Scheb, II & Lee W. Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 JUDICATURE 9 (1985).

98. Heck and Hall entertained the possibility that methodological differences might account for the difference in observed behavior of freshman Justices but concluded that, probably, "the best explanation for differing conclusions is simply that the times have changed." Heck & Hall, *supra* note 97, at 859. In particular, they observed that "presidents may have appointed Justices with well-established attitudes and policy preferences, thereby reducing the importance of group influences on freshman voting behavior and on the Court's decisional process." *Id.* at 859-60. This observation appears highly convincing in light of recent Supreme Court appointments.

man effect was less evident. Whether attributable to the diminishing freshman effect or not, my data show this to be true. For the Terms 1933 through 1952 the average fluidity was 58.3%; from 1953 through the 1990 Term it was 48.2%. The difference is not great, ten percentage points, and may not be related to the voting of freshman Justices. Nevertheless, it is consistent with what other scholars have observed in the decline of the freshman effect in recent decades.

C. Paired Agreement and Disagreement on 5-4 Decisions

Another measure of polarization and fluidity on the Court is the relative frequency with which each Justice votes with every other Justice. If Justices A and B vote together on every issue, but neither ever votes with Justice F, the voting will be highly polarized with respect to those three Justices. If the same five Justices always vote in the majority in 5-4 decisions and the other four are always in the minority, the whole Court will be completely polarized. The result would be a pattern of sixteen paired agreements (100%) and twenty paired total disagreements (0%).[99] At the other extreme, in a situation of complete fluidity, every member of the Court would vote half the time with each of the others. The extreme of polarization was reached in 1925, when Justices Brandeis, Holmes, Sanford, Stone, and Taft voted in the majority on the only two 5-4 decisions that Term, and Justices Butler, McReynolds, Sutherland, and Van Devanter voted in the minority. The extreme of fluidity has never occurred.

Between the extremes of absolute polarization and fluidity, nearly every Term produces very high levels of agreement and disagreement between pairs of Justices, some Terms more than others. A Court with many Justices paired at high and low levels of agreement should be regarded as polarized, while few pairs at either extreme would indicate more fluidity. Since absolute agreement or disagreement seldom occurs, even between pairs of Justices, this analysis uses

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99. Graphically, the outcome could look like this:

A								
100	B							
100	100	C						
100	100	100	D					
100	100	100	100	E				
0	0	0	0	0	F			
0	0	0	0	0	100	G		
0	0	0	0	0	100	100	H	
0	0	0	0	0	100	100	100	I

thresholds of 70% and 30% as indicators of high and low agreement.[100] With these thresholds, the extreme of polarization would occur if every pair of Justices scored above 69% or below 31%. Complete fluidity would be attained if no pair reached these extremes. From 1933 to 1990 the extreme of polarization was reached once, in the 1936 Term, when Justices Brandeis, Cardozo, Hughes, Roberts, and Stone had paired agreements averaging 94.2%; Justices Butler, McReynolds, Sutherland, and Van Devanter agreed 100%; and, as between members of these two coalitions, the average paired agreement was 4.4%. No Term reached complete fluidity by these standards, but 1950 came close. In a Court composed of Justices Black, Burton, Clark, Douglas, Frankfurter, Jackson, Minton, Reed, and Vinson, no two Justices agreed at the 70% level (Vinson and Clark, both Truman appointees, were 69%), and only four pairs agreed less than 30% (Black-Clark, Black-Minton, Black-Reed, Douglas-Minton).[101]

The number of paired agreements and disagreements has varied substantially from Term to Term, and the variation is related to the ideological alignment of the Court. This relationship is apparent in Table 12 (see Appendix), where Court Terms are once again grouped according to ideological alignment of the Justices. For each period, the table presents the average number of pairs per Term that are 70% and above or 30% and below, and a combined total with a percentage column for the combined figure. The combined figure is probably the best measure because high and low agreement are both elements of polarization, or lack of fluidity. The time period is the same as in Table 11, 1933-90, and the Terms are similarly grouped. Four Terms—1938, 1945, 1956, and 1969—are omitted from the calculation in Table 12 due to lack of comparability. Because the Court had eight or ten, rather than nine, members during those Terms, the number of pairings was either greater or less than thirty-six.

The relationships between ideological alignment and fluidity are much the same as those shown in Table 11 where the dependent

100. *Cf.* Heck & Hall, *supra* note 97, at 856 (performing an analysis using an average inter-agreement of 70% as the basis for identifying a cohesive voting bloc on the Supreme Court).

101. In this study, paired agreements are used as a measure of fluidity and polarization—nothing is implied as to influence relationships among Justices voting often together. For studies that use paired agreement scores as a basis for estimating who influences whom, see Harold J. Spaeth & Michael F. Altfeld, *Influence Relationships Within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 W. POL. Q. 70 (1985); Spaeth & Altfeld, *supra* note 93.

variable was the percentage of differing majority coalitions rather than paired agreement scores. The highest numbers and percentages, and consequently the greatest polarization, are found during the 1933-39, 1942-48, 1957-61, and 1981-89 Terms when the alignments were 4-1-4, 4-0-5, and 5-0-4, the periods of sharpest ideological cleavage. The Alignment column in Table 12 shows 2-2-5 and 3-2-4 alignments for the 1930s based on the voting record of the Justices over their entire tenure on the Court. But, as explained above, the actual voting alignments during the 1930s were 4-1-4, 5-0-4, or 4-0-5. The polarization percentage for these four periods combined is 80.4%. During the three periods when one ideological group had six or seven members, 1949-52, 1953-55, and 1967-68, the extreme paired agreements combine at a much lower 42.3%.[102] The intermediate percentages once more are reserved for alignments of 5-1-3, 4-2-3, and 5-2-2. The combined percentage for periods in this category, 1940-41, 1962-66, 1970-74, and 1990, is 60.7%. The greatest fluidity, or least polarization, as measured by the paired agreement indicator, is found during the 1975-80 Terms when the Court consisted of three conservatives, three liberals, and three moderates, and paired agreement at the extremes constituted only 38.9% of all pairs. This is the one significant deviation from the majority coalition fluidity figures in Table 11. In that table, the 1975-80 period had an intermediate score of 56.2%. For some reason, the three moderates had a greater moderating influence on extremes of paired voting than on the fluidity of majority coalitions.

D. And What About Swing Voting?

A swing voter on the Court is almost by definition identified with moderate voting, given the assumption that the swing voter tips the balance by voting sometimes with a liberal and sometimes with a conservative coalition. If the swing voter must be a moderate voter, there are few candidates for the swing voter designation since 1933 because there have been few Justices who have voted consistently within the moderate range (36% to 64%) as I have defined it. Only four Justices have a nominal fit based on their overall voting on 5-4 decisions. Of these, two are close to the margin between moderate and conservative (Stewart and White, each with a 36% liberal voting

102. Again, the 1991 data fit the pattern. With the addition of a sixth conservative, Justice Thomas, the extreme paired agreements dropped to 13 of 36, 38.9%.

record). Justice Blackmun, at 57%, voted consistently within the moderate range (43.2% liberal) only during the 1975-80 Terms. For five Terms prior to 1975 he voted as a conservative (19.2%), and since 1980 he has been a liberal (80.7%) on single vote decisions. The remaining nominal moderate, Justice Stone, has a 51% overall record, but, in fact, his career is divided into two periods, one liberal and one conservative. From 1924 through 1939, he was 90.2% liberal (89.3% for the 1933-39 Terms); but thereafter, 1940-45, his liberalism rating was only 19.2%. Therefore, if a swing voter must vote consistently within the moderate range, there have been no "swing voters" on the Court since 5-4 decisions became common.

This realization, however, does not dispose of the swing voting concept. A Justice may engage in swing voting on some issues or during some Terms, even if he or she is not a consistent swing voter. Our data does not permit any conclusions about issue-based swing voting, but it does permit some observations about swing voting on a Term by Term basis. Table 13 (see Appendix) lists, in chronological order, each Justice voting within the moderate range on single vote decisions during one or more Terms from 1933 through 1990. A total of nineteen different Justices of the thirty-nine who served during that fifty-eight-year period played the moderate role at least one Term. The right-hand column of the table gives the liberal voting percentage for the aggregate of all Terms in which the Justices voted as moderates. If swing voting consists of distributing votes with some even-handedness among liberal and conservative positions, a good deal of swing voting has occurred.

Most definitions of swing voting assume an additional element, the swing voter who provides the necessary vote to form a winning coalition. A Justice who votes with a losing coalition, conservative or liberal, is usually not designated as a swing voter. This follows because the vote is not crucial; the group loses with or without him. A careful look at Term by Term majority agreement scores for Justices voting within the moderate range indicates that moderates do not always pick the winning side. Of thirty-four Terms in which at least one Justice had a moderate voting record, a moderate had the highest majority agreement percentage (or tied for highest) in just fifteen. In the other nineteen Terms, the high score went to a member of the dominant polar group, liberal or conservative. In some Terms, moderates were at both ends of the majority agreement spectrum. Taking the most extreme case, 1949, six Justices had moderate voting scores. Of these Justices, Burton, Clark, and Vinson had the three highest

majority agreement percentages (100%, 85%, and 83%, respectively); two other "moderates" during that Term, Frankfurter and Jackson, were at the bottom with 25% each; and Minton was near the middle with 67%. Again, in the 1983 Term, Justice White scored highest with 78% agreement; and Blackmun, moderate that Term, was tied with Brennan for lowest at 39%.[103]

These figures may provide some support for the existence of swing voters on the Court, but not much. If the Court has a majority of either liberals or conservatives, the moderate is not in a position to cast the deciding vote, unless a member of the dominant coalition defects. Opportunities for swing voting in such situations are limited. During Terms when neither polar group has a majority, there is greater scope for the moderate swing voter. The moderate will not become a swing voter, however, unless he or she provides a fifth vote for the winning coalition. The record is clear that this is not the inevitable destiny of the moderate.

During the Terms when conservatives or liberals have a clear majority, voting with the dominant polar group is sufficient to have a high majority agreement score. In practice, when five or more Justices have a conservative (or a liberal) voting percentage in a given Term, the remaining Justices generally cluster around the opposite pole with no one voting in the moderate range during that Term. From 1933 through 1990, one group or the other had a clear majority thirty of the fifty-eight Terms. In twenty-four of the thirty Terms, no Justice voted within the moderate range.

The preceding discussion suggests that no member of the Court, past or present, can be regarded as a consistent swing voter, although Justices Clark, Frankfurter, and White come somewhat closer to the model than others. Even if there are no swing voters, however, nearly every Term sees a modest amount of swing voting when a liberal Justice crosses over to create a 5-4 majority in a conservative cause, or a conservative Justice provides the fifth vote to sustain a liberal position. Moreover, the crossover votes usually determine which Justice finishes the Term with the highest majority agreement score on

103. Table 13 shows 19 Justices voting within the moderate range for a collective total of 67 Terms. In just 15 of the 67 did a Justice with a moderate voting record that Term have the highest majority agreement percentage for the Term: Roberts (1933); Frankfurter (1940, 1953, and 1955); Jackson (1941); Douglas (1945); Clark (1949, 1956, and 1959); Black (1966); White (1971, 1982, and 1983); and Blackmun (1977 and 1978). Some of these Justices had the top scores for other Terms as well, but not when voting as moderates for that particular Term.

single-vote decisions. When a conservative coalition is dominant, conservatives as a group have the highest agreement percentages. This has been characteristic of the Burger and Rehnquist Courts. The same is true of liberal courts, almost by definition. But the Justice who scores highest is usually one who has crossed over more often than his ideological compatriots to create a majority on the other side. In forty-three of the fifty-eight Terms, the Justice with the highest percentage was either a moderate who had voted frequently with majorities on both sides of the aisle or a member of the dominant ideological group who had crossed over to the other side more often than others of the group.[104]

This brief examination of swing voting speaks primarily to the quantitative aspects of the subject and to aggregate patterns. Certainly, much remains to be discovered from detailed analysis of the voting behavior of individual Justices and the search for swing voting patterns within particular issue areas. That, of course, is another study.

IV. CONCLUSION

The 5-4 decisions of the United States Supreme Court highlight the essentially political nature of the body. The ideal of nine jurists collectively resolving disputes according to the dictates of the law and the Constitution is superseded by an image of nine Justices voting individual preferences in situations where substantive rules seem to provide little guidance. Both the ideal and the image are caricatures—the unanimous decisions tending toward one extreme and the 5-4 decisions toward the other—but each reflects elements of the complex underlying reality of Supreme Court decisionmaking.

Until well into this century, unanimity was the dominant image. Published dissent was limited to a small fraction of decided cases, with 5-4 decisions still less frequent. This frequency does not necessarily portray a Court governed more by principle than by personal preference, but rather a Court that valued the image of consensus more than the public expression of dissent.[105] For the past half-cen-

104. Justices who participated in less than half of the 5-4 decisions during any Term were not counted for purposes of determining who had the highest percentage that Term.

105. That consensual norm is illustrated in a message once sent by Justice Butler to Justice Stone stating the former's intention to acquiesce in the majority's decision even though Butler had cast an opposing vote in conference:

> I voted to reverse. While this [vote for the record] sustains your conclusion to affirm, I still think reversal would be better. But I shall in silence acquiesce. Dissents seldom aid in the right development or statement of the law. They often do

tury, a different norm has prevailed. The Judiciary Act of 1925 opened the door to a modest expansion of dissent in the 1930s, which in turn provided a setting for Chief Justice Stone to usher in a new era of individual self-expression on the Court. Internal divisions, largely submerged in the earlier period, came to light. Whether or not the Court has become more "political," its politics have become more public.

This study has dealt with decisions at the highly politicized end of the spectrum: cases decided by a single vote. In explaining the voting patterns of the Court and its individual members in the 5-4 decisions, the study has accorded a substantial role to ideology. This was not an unexpected finding. Ideology, defined primarily in terms of liberal and conservative leanings of the Justices, has been identified as a significant correlate of judicial voting behavior since the first empirical studies of the Supreme Court were undertaken.[106] If ideology has impact anywhere, the impact surely should be felt in 5-4 decisions where the constraints imposed by legal rules are least in evidence. As anticipated, ideology proved a useful concept in understanding the 5-4 decision data. In predictable ways, it has been shown to affect the frequency of 5-4 decisions, the voting agreement of individual Justices with the majority, the fluidity or rigidity of majority coalitions, and the incidence of swing voting.

Other influences have helped to shape the Court's behavior as well, including the effects of jurisdictional statutes and the leadership of the Chief Justice. Other possible influences—such as differences in the kinds of cases coming before the Court, background and personal characteristics of the Justices, interpersonal relationships among the Justices, and changes in the political and social milieu of the Court—have been left largely untouched in this analysis. Much remains to be learned, but, as the data gathered for this study makes clear, 5-4 decisions of the Court provide a fruitful field for inquiry.

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harm. For myself I say: "lead us not into temptation."
David J. Danelski, The Influence of the Chief Justice in the Decisional Process of the Supreme Court, paper presented at the 1960 American Political Science Association Meeting in New York City (Sept. 9, 1960), *quoted in* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 224 (5th ed. 1986).

106. *See* PRITCHETT, *supra* note 43; JUDICIAL MIND, *supra* note 59.

APPENDIX

TABLE 1

5-4 Decisions as a Percentage of Cases Decided by Full Opinion, 1900-90 Terms

Term	*All Cases*	*5-4 Cases*	*% 5-4*	*Term*	*All Cases*	*5-4 Cases*	*% 5-4*
1900	194	12	6.2	1933	158	7	4.4
1901	179	5	2.8	1934	156	8	5.1
1902	211	2	0.9	1935	160	8	5.0
1903	198	7	3.5	1936	162	14	8.6
1904	193	7	3.6	1937	170	4	2.4
1905	157	8	5.1	1938	149	11	7.4
1906	201	3	1.5	1939	141	10	7.1
1907	173	2	1.2	1940	169	11	6.5
1908	180	3	1.7	1941	162	21	13.0
1909	178	9	5.1	1942	171	18	10.5
1910	164	2	1.2	1943	137	20	14.6
1911	239	4	1.7	1944	163	35	21.5
1912	280	4	1.4	1945	137	16	11.7
1913	284	0	0.0	1946	144	28	19.4
1914	256	6	2.3	1947	118	27	22.9
1915	247	0	0.0	1948	124	32	25.8
1916	216	7	3.2	1949	98	13	13.3
1917	213	3	1.4	1950	98	16	16.3
1918	229	6	2.6	1951	90	16	17.8
1919	179	8	4.5	1952	110	13	11.8
1920	204	6	2.9	1953	78	14	17.9
1921	178	3	1.7	1954	82	7	8.5
1922	225	0	0.0	1955	94	18	19.1
1923	211	0	0.0	1956	115	25	21.7
1924	232	2	0.9	1957	119	28	23.5
1925	209	1	0.5	1958	112	26	23.2
1926	199	5	2.5	1959	105	26	24.8
1927	175	6	3.4	1960	118	27	22.9
1928	129	2	1.6	1961	96	11	11.5
1929	134	3	2.2	1962	117	16	13.7
1930	166	6	3.6	1963	111	14	12.6
1931	150	3	2.0	1964	101	10	9.9
1932	168	3	1.8	1965	107	12	11.2

TABLE 1—Continued

5-4 Decisions as a Percentage of Cases Decided by Full Opinion, 1900-90 Terms

Term	*All Cases*	*5-4 Cases*	*% 5-4*	*Term*	*All Cases*	*5-4 Cases*	*% 5-4*
1966	119	22	18.5	1979	149	30	20.1
1967	127	9	7.1	1980	138	20	14.5
1968	120	14	11.7	1981	167	36	21.6
1969	94	21	22.3	1982	162	34	21.0
1970	122	34	27.9	1983	163	33	20.2
1971	151	36	23.8	1984	151	28	18.5
1972	164	36	22.0	1985	159	42	26.4
1973	157	32	20.4	1986	152	47	30.9
1974	137	18	13.1	1987	142	32	22.5
1975	159	27	17.0	1988	143	34	23.8
1976	142	28	19.7	1989	137	42	30.7
1977	135	26	19.3	1990	121	23	19.2
1978	138	31	22.5				

TABLE 2

5-4 Decisions as a Percentage of Cases Decided by Full Opinion, 1900-90 Terms, Expressed as 5-Term Averages

Terms	*Cases Per Term*	*5-4 Decisions Per Term*	*% 5-4*
1900-04	195.0	6.6	3.4
1905-09	177.8	5.0	2.8
1910-14	244.6	3.2	1.3
1915-19	216.8	4.8	2.2
1920-24	210.0	2.2	1.0
1925-29	169.2	3.4	2.0
1930-34	159.6	5.4	3.4
1935-39	156.4	8.4	6.0
1940-44	160.4	21.0	13.1
1945-49	124.2	23.2	18.7
1950-54	91.6	13.2	14.4
1955-59	109.0	24.6	22.6
1960-64	108.6	15.6	14.4
1965-69	113.4	15.6	13.8
1970-74	146.2	31.2	21.3
1975-79	144.6	28.4	19.6
1980-84	156.2	30.2	19.3
1985-89	146.6	39.4	26.9
1990	120.0	23.0	19.0

TABLE 3[107]

Dissent Rates, 1901-45, Aggregated by Five-Term Periods

Terms	*Court Opinions*	*Dissents*	*Dissent Rate*
1901-05	962	89	.09
1906-10	905	63	.07
1911-15	1278	35	.03
1916-20	1013	82	.08
1921-25	1048	73	.07
1926-30	807	97	.12
1931-35	778	99	.13
1936-40	744	125	.17
1941-45	711	321	.45

TABLE 4[108]

Disagreement on the Supreme Court, 1921-45 Terms

	Court Opinions	*Non-Unanimous Opinions*		*Dissenting Votes*	
Terms	*Per Term*	*Per Term*	*%*	*Per Term*	*Per Opinion*
1931-35	163.6	25.6	16	64.6	0.39
1936-40	158.2	43.2	27	97.6	0.62
1941-45	154.0	77.0	50	186.2	1.21

107. BLAUSTEIN & MERSKY, *supra* note 24, app. at 139-40.
108. PRITCHETT, *supra* note 43, at 25 tbl. I.

TABLE 5

Liberalism Scores of Supreme Court Justices in 5-4 Decisions, 1900-90

	% Liberal			Terms		% Liberal			Terms
Justice	*All*	*Pol*	*Ec*	*Served*	*Justice*	*All*	*Pol*	*Ec*	*Served*
Brandeis	98	97	97	1916-38	Brewer	41	44	56	1900-09
Clarke	94	100	94	1916-21	Moody	40	-	100	1906-09
Cardozo	93	89	95	1931-37	Brown	36	14	29	1900-09
Marshall	92	97	88	1967-90	Stewart	36	40	26	1958-80
Warren	92	94	95	1953-68	White, B.	36	29	52	1962-90
Brennan	90	96	82	1956-89	White, E.	36	23	41	1900-20
Murphy	89	96	91	1939-48	Clark	34	12	59	1949-66
Rutledge	87	92	84	1942-48	Peckham	33	57	22	1900-09
Douglas	86	93	81	1938-74	Jackson	31	33	27	1941-53
Black	85	73	94	1937-70	Roberts	30	50	22	1930-44
Shiras	78	-	67	1900-02	Frankfurter	28	34	16	1938-61
Fortas	75	80	50	1965-68	Minton	28	10	48	1949-55
Goldberg	74	100	25	1962-64	Reed	27	14	31	1938-56
Stevens	74	80	66	1975-90	Byrnes	26	25	8	1941
Pitney	66	62	65	1911-21	Powell	26	26	25	1971-86
Gray	65	-	33	1900-01	Burton	21	15	23	1945-57
Holmes	64	77	66	1902-29	Scalia	19	16	14	1986-90
Fuller	63	80	60	1900-09	Vinson	19	7	26	1946-52
Harlan	63	80	80	1900-10	Kennedy	18	12	25	1987-90
Hughes	61	68	60	1909-14, 1929-40	O'Connor	18	16	19	1981-90
					Harlan	15	11	19	1954-70
Lamar	60	100	67	1911-14	Souter	14	14	0	1990
Blackmun	57	58	56	1970-90	Burger	10	6	19	1969-85
Sanford	54	67	50	1924-28	Whittaker	7	8	4	1956-61
Stone	51	70	44	1924-45	McReynolds	6	2	4	1914-40
Day	49	57	59	1902-21	Rehnquist	6	3	14	1971-90
McKenna	47	30	37	1900-24	Butler	5	11	0	1924-48
Taft	47	0	60	1921-28	Van Devanter	5	0	7	1911-36
Lurton	45	100	-	1909-12	Sutherland	4	8	0	1924-35

TABLE 6

Ideological Alignment of the Court, 1941-90

Term	*Liberal*	*Moderate*	*Conserv.*	*Term*	*Liberal*	*Moderate*	*Conserv.*
1941	3	1	5	1967	6	2	1
1942	4	1	4	1968	6	2	1
1943	4	1	4	1970	4	2	3
1944	4	1	4	1971	3	2	4
1946	4	0	5	1972	3	2	4
1947	4	0	5	1973	3	2	4
1948	4	0	5	1974	3	2	4
1949	2	0	7	1975	3	3	3
1950	2	0	7	1976	3	3	3
1951	2	0	7	1977	3	3	3
1952	2	0	7	1978	3	3	3
1953	3	0	6	1979	3	3	3
1954	3	0	6	1980	3	3	3
1955	3	0	6	1981	4	1	4
1956	4	0	5	1982	4	1	4
1957	4	0	5	1983	4	1	4
1958	4	1	4	1984	4	1	4
1959	4	1	4	1985	4	1	4
1960	4	1	4	1986	4	1	4
1962	5	2	2	1987	4	1	4
1963	5	2	2	1988	4	1	4
1964	5	2	2	1989	4	1	4
1965	5	2	2	1990	3	1	5
1966	5	2	2				

TABLE 7

5-4 Decisions as a Percentage of All Decided Cases, 1941-90, Classified by Term and Ideological Alignment

Term	*Liberal, Moderate, Conserv.*	*% 5-4 Decisions*
1941	5-1-3	13.0
1942-44, 46-48	4-1-4, 5-0-4	18.7
1949-55	7-0-2, 6-0-3	14.9
1956-60	4-1-4, 5-0-4	23.2
1962-68	5-2-2, 6-2-1	12.1
1970-80	4-2-3, 3-3-3	20.0
1981-89	4-1-4	23.8
1990	5-1-3	19.2

TABLE 8

5-4 Decisions as a Percentage of All Decided Cases, 1941-90, Classified by Ideological Alignment

Liberal, Moderate, Conserv.	*Number of Terms*	*% 5-4 Decisions*
5-0-4, 4-1-4	20	22.1
4-2-3, 3-3-3	11	20.0
5-1-3, 5-2-2	7	14.1
6-0-3, 6-2-1, 7-0-2	9	13.4

TABLE 9

Percentage Frequency of Majority Voting in Single Vote Decisions by Members of the U.S. Supreme Court, 1900-90 Terms

Justice	*Terms Served*	*Number of Decisions*	*% Majority*
William H. Taft	1921-29	19	89.5
William H. Moody	1906-09	4	85.7
Arthur J. Goldberg	1962-64	40	77.5
Anthony M. Kennedy	1987-90	114	71.1
Fred M. Vinson	1946-52	143	70.6
Lewis F. Powell, Jr.	1971-86	470	68.7
Tom C. Clark	1949-66	297	68.4
William R. Day	1902-21	88	67.0
Antonin Scalia	1986-90	175	66.9
Benjamin N. Cardozo	1931-37	47	66.0
Henry B. Brown	1900-05	55	65.9
Warren E. Burger	1969-85	511	65.9
William H. Rehnquist	1972-90	617	65.6
Byron R. White	1962-90	775	65.6
John M. Harlan	1900-10	60	65.0
Horace Gray	1900-01	17	64.7
Sandra Day O'Connor	1981-90	347	64.6
Stanley F. Reed	1938-56	330	63.0
Edward T. Sanford	1922-28	16	62.5
Harold H. Burton	1945-57	253	60.9
Charles E. Hughes	1909-15, 1929-40	102	60.8
Charles E. Whittaker	1956-61	120	60.8
Robert H. Jackson	1941-53	231	60.2
Felix Frankfurter	1938-61	456	60.1
David J. Brewer	1900-09	55	60.0
Earl Warren	1953-68	277	59.9
Harlan F. Stone	1924-45	198	59.1
David H. Souter	1990	22	59.1
Willis Van Devanter	1910-36	114	58.8
Edward D. White	1900-20	102	58.8
Sherman Minton	1949-55	94	58.5
Owen J. Roberts	1930-44	172	58.1
Harry A. Blackmun	1970-90	661	57.8

TABLE 9—Continued

Percentage Frequency of Majority Voting in Single Vote Decisions by Members of the U.S. Supreme Court, 1900-90 Terms

Justice	*Terms Served*	*Number of Decisions*	*% Majority*
Mahlon Pitney	1911-21	46	56.5
Oliver W. Holmes	1902-29	115	54.8
John M. Harlan	1954-70	307	54.4
Abe Fortas	1965-68	48	54.2
Joseph McKenna	1900-24	108	53.7
Potter Stewart	1958-80	518	53.5
James F. Byrnes	1941	21	52.4
Louis D. Brandeis	1916-38	104	51.9
Hugo L. Black	1927-70	615	51.5
Frank Murphy	1939-48	204	51.5
Horace H. Lurton	1909-13	12	50.0
George Shiras	1900-02	18	50.0
Wiley B. Rutledge	1942-48	169	49.1
William O. Douglas	1938-74	717	47.1
John Paul Stevens	1975-90	499	46.9
Rufus W. Peckham	1900-09	50	46.0
James C. McReynolds	1914-40	130	44.6
William J. Brennan, Jr.	1956-89	893	44.6
George Sutherland	1922-35	71	43.7
Melville W. Fuller	1900-09	58	43.1
John H. Clarke	1916-21	33	42.4
Thurgood Marshall	1967-90	691	40.7
Pierce Butler	1922-38	81	39.5
Lucius Q. C. Lamar	1910-15	14	35.7

TABLE 10

Coalition Fluidity: The Number of Different Majority Coalitions as a Percentage of the Total Number of Single Vote Decisions, 1900-90

Term	*Coalitions*	*Decisions*	*% Fluidity*	*Term*	*Coalitions*	*Decisions*	*% Fluidity*
1900	9	12	83.3	1934	3	8	37.5
1901	5	5	100.0	1935	3	8	37.5
1902	2	2	100.0	1936	5	14	35.7
1903	6	7	85.7	1937	2	4	50.0
1904	6	7	85.7	1938	8	11	72.7
1905	7	8	87.5	1939	5	10	50.0
1906	3	3	100.0	1940	8	11	72.7
1907	2	2	100.0	1941	13	21	61.9
1908	3	3	100.0	1942	10	18	55.6
1909	6	9	66.7	1943	13	20	65.0
1910	2	2	100.0	1944	16	35	45.7
1911	3	4	75.0	1945	13	16	81.3
1912	4	4	100.0	1946	14	28	50.0
1913	-	-	-	1947	13	27	48.1
1914	4	6	66.7	1948	17	32	53.1
1915	-	-	-	1949	11	13	84.6
1916	6	7	85.7	1950	15	16	93.8
1917	3	3	100.0	1951	14	16	87.5
1918	3	6	50.0	1952	11	13	84.6
1919	8	8	100.0	1953	12	14	85.7
1920	5	6	83.3	1954	5	7	71.4
1921	3	3	100.0	1955	10	19	55.6
1922	-	-	-	1956	15	25	60.0
1923	-	-	-	1957	8	28	28.6
1924	2	2	100.0	1958	10	26	38.5
1925	1	1	100.0	1959	6	26	23.1
1926	5	5	100.0	1960	10	17	37.0
1927	6	6	100.0	1961	8	11	71.7
1928	2	2	100.0	1962	7	16	43.8
1929	2	3	66.7	1963	11	14	78.6
1930	3	6	50.0	1964	8	10	80.0
1931	3	3	100.0	1965	9	12	75.0
1932	3	3	100.0	1966	12	22	54.5
1933	4	7	57.1	1967	7	9	77.8

TABLE 10—Continued

Coalition Fluidity: The Number of Different Majority Coalitions as a Percentage of the Total Number of Single Vote Decisions, 1900-90

Term	*Coalitions*	*Decisions*	*% Fluidity*	*Term*	*Coalitions*	*Decisions*	*% Fluidity*
1968	10	14	71.4	1980	13	20	65.0
1969	15	21	71.4	1981	17	36	47.2
1970	19	34	55.9	1982	17	34	50.0
1971	19	36	52.8	1983	15	33	45.5
1972	15	36	41.7	1984	15	28	53.6
1973	13	32	40.6	1985	17	42	40.5
1974	9	18	50.0	1986	15	47	31.9
1975	14	27	51.9	1987	19	32	59.4
1976	12	28	42.9	1988	10	34	29.4
1977	20	26	76.9	1989	14	42	33.3
1978	13	31	41.9	1990	15	23	65.2
1979	19	30	63.3				

TABLE 11

Ideological Alignment and Majority Coalition Fluidity, 1933-90

Terms	*Alignment (Liberal, Moderate, Conserv.)*	*% Fluidity*
1933-39*	2-2-5, 3-2-4	43.1
1941	3-1-5	61.9
1942-48**	4-1-4, 5-0-4	51.9
1949-52	2-0-7	87.9
1953-55	3-0-6	67.5
1957-60	4-0-5, 4-1-4	35.1
1962-66	5-2-2	63.5
1967-68	6-2-1	73.9
1969-74	4-2-2, 4-2-3, 3-2-4	53.4
1975-80	3-3-3	56.2
1981-89	4-1-4	40.5
1990	3-1-5	65.2

* 1938 Term excluded
** 1945 Term excluded

TABLE 12

The Relationship of Ideological Alignment to Very High and Very Low Levels of Agreement Between Pairs of Justices, 1933-90

		Number of Pairs Per Term with High/Low Agreement			*Number as a % of 36*
Term	*Ideological Alignment Liberal-Moderate-Conserv.*	*70-100%*	*0-30%*	*Combined*	*Possible Pairs*
1933-39*	2-2-5, 3-2-4	14.8	18.7	33.5	93.1
1940-41	3-2-4, 3-1-5	7.5	12.0	19.5	54.2
1942-48**	4-1-4, 5-0-4	9.5	16.0	25.5	70.8
1949-52	2-0-7	3.3	7.3	10.6	29.4
1953-55	2-0-6	8.0	12.3	20.3	56.4
1957-61	4-0-5, 4-1-4	12.0	18.2	30.2	83.9
1962-66	5-2-2	8.4	14.2	22.6	62.8
1967-68	6-2-1	7.0	10.0	17.0	47.2
1970-74	4-2-3, 3-2-4	8.4	14.0	22.4	62.2
1975-80	3-3-3	4.8	9.2	14.0	38.9
1981-89	4-1-4	11.0	16.6	27.6	76.7
1990	3-1-5	5.0	15.0	20.0	55.6

* 1938 Term excluded
** 1945 Term excluded

TABLE 13

Justices Voting Within the Moderate Range (36%-64%)
During Any Term, 1933-90

Justice	*Terms*	*% Liberal*
Roberts	1933	50.0
Frankfurter	1940,45,49,50,53,54,55	41.9
Reed	1941	57.9
Jackson	1941,49,50,52	45.1
Stone	1942	41.2
Douglas	1945	53.3
Burton	1949,50,51,52	42.6
Clark	1949,50,52,56,59,63	42.1
Minton	1949,53,54	40.0
Vinson	1949	40.0
Warren	1953	50.0
Black	1964,66,67,68	47.3
Fortas	1967,68	60.0
White	1967,69,71,73,74,75,76,77,78,79,81,82,83,90	50.5
Harlan	1969	45.0
Stewart	1973,75,76,77,79	48.6
Blackmun	1975,77,78,79,80,83	48.8
Stevens	1975,77,80,87	61.5
Powell	1977	45.8