Five–Four

Dissecting Supreme Court Tightly Split Decisions

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Indiana University

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To the memory of my father, Prof. Dr. Leonidas N. Georgakopoulos, scholar, lawyer, teacher, magnificent father, and a humbling inspiration.

Nicholas

To Randall T. Shepard, Brent E. Dickson, Theodore R. Boehm, and Robert D. Rucker, my inspired and inspiring colleagues in the Rucker composition.

Frank

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Preface

I. Acknowledgements

The creation of a scholarly book is a collective endeavor, and this work is no exception. As we present this book to you, we wish to extend our sincere gratitude to a number of individuals whose valuable insights and feedback have been instrumental in shaping its final form. In alphabetical order, we extend our heartfelt thanks to: Michael Alexeev, Jim Chen, Ken Chestek, Chris Drahozal, Jason Du Mont, Lee Epstein, Josh Fischman, Kent Greenfield, William Hubbard, Max Huffman, Shi-Ling Hsu, Richard Hynes, Tanja Jacobi, Linda Kelly, Kate Litvak, Gerard Magliocca, Mike Mattioli, Richard McAdams, Murat Mungan, Jonathan Nash, Richard Posner, Manu Raghav, Eric Rasmussen, Florence Roisman, Jyorti Sarkar, Jeff Stake, George Triantafyllou, Stephen Utz, Don Verrilli, Eric Talley, and George Wright.

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We would be remiss not to thank the editorial teams of the several journals in which pieces of this book appeared as articles or chapters. The fluidity index, which has become chapter 1 and its appendix, appeared in 100:3 Judicature 34 (2016) under the care of Melissa Vaughn and Lauren Sanders and, in an earlier version, in 1 Bank of Greece Memorial Volume for Prof. L. Georgakopoulos 215 (2016) under the care of Prof. Lefteris Voglis.

The visualizations of supreme court tightly split decisions, which have become chapters 2–4 and their extensive tabular appendices, appeared in 53 Indiana L. Rev. 95 (2020) (the Indiana analysis) and on page 137 of the same volume (the United States analysis) under the editorial leadership of Matt Goldsmith with the help

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The conservative paradox and the formation of 5–4 coalitions, which is chapter 6, appeared in 48:3 DAYTON L. REV. 1 (2022) under the editorial leadership of JP Jarecki, and in the Harvard Law School 2022 conference celebrating the career of Nicholas's doctorvater Reinier Kraakman, organized by Prof. Holger Spamann.

The un-Americanism pendulum, which is chapter 7, appeared in 15 FIU L. REV. 259 (2021) under the editorial leadership of Sofia Perla.

Super-dissenters, which is chapter 8, appeared in 49 HOFSTRA L. REV. 687 (2021) under the editorial leadership of Leanne Bernhard.

The distribution of votes, which is chapter 9, appeared in 17 FIU L. REV. 117 (2022) under the editorial leadership of Karla Rivas.

The corresponding papers were also presented in several conferences and received constructive feedback from their participants, including several Midwestern Law and Economics Association annual meetings as well as the Conference on Empirical Legal Studies.

II. THE STRUCTURE OF THE BOOK

In the 1990s and 2000s, the United States Supreme Court often split 5-4 with the vote splits highly predictable: the same coalition of justices on the left, the same coalition on the right, with only a swing vote or two differentiating them. During this period, Frank Sullivan, Jr., co-author of this book, served on the Indiana Supreme Court. When his five-member court split 3-2, the votes were not as predictable; the justices did not align in rigid coalitions, their coalitions were far more fluid.

After leaving the court, Frank began teaching at the Indiana University Robert H. McKinney School of Law in 2012. Here, he discussed the differences in voting patterns between the two courts with Nicholas Georgakopoulos, the principal author of this book and a legal scholar with a quantitative flair. This book is the product of that discussion.

Nicholas set out to measure the differences between the fluidity of courts' voting coalitions in tightly split decisions. The resulting "Index of Fluidity" was the subject of a 2016 article. Recognizing that these voting coalitions were fluid, Nicholas developed a method for visualizing the coalitions in tightly split decisions that eschews the traditional linear and parliamentary illustrations. That work was the subject of three articles published in 2020.

As we measured courts' relative fluidity and illustrated their coalitions, additional detailed information about court voting behavior emerged. We categorize those applications of the basic ideas into two categories: voting behavior in tightly split decisions, and other phenomena made visible by these decisions.

This book's path starts by measuring courts' fluidity in tightly split decisions and by illustrating the coalitions and swing votes in these decisions. These are the new ways to see the work of supreme courts that Part I offers. Part II analyzes applications to closely split coalitions. Part III concludes with derivative issues.

Our approaches to the topic are, naturally, idiosyncratic. Frank served as a justice of the Indiana Supreme Court for nineteen years. He does not view supreme court justices as politicians in robes, self-promoting scoundrels, or tools of the ruling class. Frank appreciates the complexity of the endeavor and wants to reveal some of its texture, as he has tried to do in teaching his state supreme court seminar and in several publications. Nicholas, an immigrant to this country and its legal system, admires US-style legal systems, believing that their lived experience springs from the actions of their judges and, especially, their supreme court justices. He has previously written on judicial incentives but exploring the function of supreme courts from this perspective is central to Nicholas's admiration and preference for this legal system.

Some explanation on style and conventions may be helpful. We follow the style of law reviews. This means that footnotes are at the bottom of the page, and they are occasionally long, either following a thread all the way, or exploring an aside—too rarely a humorous one. Some readers may enjoy that; readers who prefer linear narration can ignore the footnotes. Citations also follow the conventions of law reviews. Our citations to periodicals and multi-volume books follow the pattern volume TITLE page (year). The author and the title of the cited article, if they apply, precede them. Thus, all the information is in the footnotes, making a bibliography unnecessary. An index is also unnecessary because we make available a searchable electronic version of the text.

III. SUMMARY AND GUIDE TO POSTERS

This book studies the level of complexity that can exist in court decisions made with a simple, bare majority. The individuals in the majority could be the same in every decision. Alternatively, a new (bare) majority may form for each decision. How can decisions be studied from the perspective of where the court that issued them lands in this range? We start by creating the "Fluidity index" that places each composition in that range in Chapter 1. Then we try to graph that complexity.

Nine folded color posters illustrating voting coalitions and their decisions are in the back of this book. Chapters 2–4 explain how the graphs at their centers arise. Here we explore these nine color posters, linking them with the book. The posters place the important coalitions of five justices and display the decisions they issue, with summaries and color-coding according to their topic or subject matter.

The nine justices of the Supreme Court can form groups of five in 126 ways. Consequently, at the center lies a circle of 126 points. Most majorities never form, leaving most dots as orphans. When a majority of five forms for only one or two decisions, we exclude it from the graph. The bond that brings these justices together, as expressed in decisions, is not strong enough. However, when majorities form to issue three or more decisions, a pizza slice emerges from their dot. The size of the slice corresponds to the number of decisions and its color to their slant, blue for liberal and red for conservative.

We construct a graph for each long-lived composition of the Court. A composition is a stable group of justices.

As we focus on 5–4 decisions, we examine compositions of nine justices, despite the Court occasionally operating with fewer justices.

Each composition of nine is shaped and defined by the last justice to be appointed, its junior justice. We name the compositions after their junior members.

For instance, Chief Justice Vinson's appointment in the summer of 1946 created the Vinson composition, which lasted until Justice Murphy's departure and Justice Clark's appointment in the summer of 1949. Vinson remained Chief Justice until September of 1953. Popular usage, focusing on the chief justice, would continue to call it the Vinson court till then, but the Vinson composition ended with Murphy's departure. The last composition for which data are available is the Barrett composition, which ended with the appointment of Justice K. Jackson at the end of June 2022.

Each composition must have produced enough decisions for the patterns to be results of systematic tendencies of some majorities of five to form, rather than randomness. We set a threshold of 50 decisions. Nine compositions exceed this threshold. The result is nine color posters: the compositions of Vinson, Stewart, Powell & Rehnquist, Stephens, O'Connor, Kennedy, Breyer, Alito, and Kagan.

We place the majority of five that produces the most conservative decisions at the far right of the circle, the three-o'clock position. At its opposite, the nine-o'clock position, goes the majority that produces the most liberal decisions. The single justice that they share is the swing vote, shown by the line connecting the majorities. In the Vinson composition, this swing vote is Frankfurter, although Frankfurter is not the ideologically median voter of that composition. This is a central finding of our project: The fact that the important swing vote often differs from the justice who is ideologically at the center of each composition shows that personal and jurisprudential considerations often outweigh ideologies.

Additional majorities that form to issue more than two decisions go around the circle, with the swing vote that connects each pair appearing similar to a diameter, connecting opposite sides of the issues for which they are swing votes. Some compositions have many majorities and swing votes, as do those of Powell & Rehnquist, Stevens, and O'Connor. Others have as few as three or four, which we see in the early and the late compositions of this era.

The point of the color posters is that they allow one to track the decisions by majority and topic. The clear leader is criminal procedure. All compositions issue many decisions about criminal procedure. Yet, we do not typically think of the Supreme Court as a court that either specializes in criminal procedure or even places significant emphasis on criminal procedure. Nevertheless, criminal procedure is heavily present in all graphs.

In color-coding each topic, each subject matter, we encounter the problem that we do not have enough colors to conveniently separate all topics. We have to group some topics together. The gray of criminal procedure also includes civil procedure and substantive criminal matters. The dollar-hued green of business decisions includes antitrust, securities, tort, bankruptcy, and tax, all business-related matters. A legend shows the correspondence of decision colors and legal topics.

One way to approach the color posters is to focus on a color that corresponds to one's interest, perhaps the light green of environmental law, the red of labor &

employment, or the lilac of First Amendment. Read those decision summaries. Follow the swing votes and read the decision summaries across from that swing vote. Do the same for other compositions. Reflect on how different 5–4 issues evolve over time.

Before turning to the individual compositions that produce enough decisions to form a graph, we present a table to show appointments to the Supreme Court and departures from it. The nine long compositions that we study are relatively rare instances of stability in a changing institution. They appear in bold.

Table P1: Appointments and Departures since 1946.

Date	Event
June 24, 1946	Appointment of C.J. Vinson
1. Vinson composition.	
July 19, 1949	Departure of Murphy
August 24, 1949	Appointment of Clark
September 10, 1949	Departure of Rutledge
October 12, 1949	Appointment of Minton
September 8, 1953	Departure of C.J. Vinson
October 5, 1953	Appointment of C.J. Warren
October 9, 1954	Departure of R. Jackson
March 28, 1955	Appointment of Harlan
October 15, 1956	Departure of Minton
October 16, 1956	Appointment of Brennan
February 25, 1957	Departure of Reed
March 25, 1957	Appointment of Whittaker
October 13, 1958	Departure of Burton
October 14, 1958	Appointment of Stewart
2. Stewart composition.	
March 31, 1962	Departure of Whittaker
April 16, 1962	Appointment of White
August 28, 1962	Departure of Frankfurter
October 1, 1962	Appointment of Goldberg
July 25, 1965	Departure of Goldberg
October 4, 1965	Appointment of Fortas
June 12, 1967	Departure of Clark
October 2, 1967	Appointment of Marshall
May 14, 1969	Departure of Fortas
June 23, 1969	Departure of C.J. Warren
June 23, 1969	Appointment of C.J. Burger (Fortas vacancy continues)
June 9, 1970	Appointment of Blackmun
September 17, 1971	Departure of Black
September 23, 1971	Departure of Harlan
January 7, 1972	Appointment of Powell & Rehnquist
3. Powell-Rehnquist composition.	
November 12, 1975	Departure of Douglas
December 19, 1975	Appointment of Stevens
4. Stevens composition.	
July 3, 1981	Departure of Stewart
September 25, 1981	Appointment of O'Connor
5. O'Connor composition.	
September 26, 1986	Departure of C.J. Burger (Rehnquist will take the Chief's position, vacating Rehnquist's seat, which will be filled by Scalia)
September 26, 1986	Appointment of Scalia
June 26, 1987	Departure of Powell
February 18, 1988	Appointment of Kennedy
6. Kennedy composition.	

July 20, 1990	Departure of Brennan
October 9, 1990	Appointment of Souter
October 1, 1991	Departure of Marshall
October 23, 1991	Appointment of Thomas
June 28, 1993	Departure of White
August 10, 1993	Appointment of Ginsburg
August 3, 1994	Departure of Blackmun
August 3, 1994	Appointment of Breyer
	7. Breyer composition, the longest.
September 3, 2005	Departure of C.J. Rehnquist
September 29, 2005	Appointment of C.J. Roberts
January 31, 2006	Departure of O'Connor
January 31, 2006	Appointment of Alito
	8. Alito composition.
June 29, 2009	Departure of Souter
August 8, 2009	Appointment of Sotomayor
June 29, 2010	Departure of Stevens
August 7, 2010	Appointment of Kagan
	9. Kagan composition.
February 13, 2016	Departure of Scalia
April 8, 2017	Appointment of Gorsuch
July 31, 2018	Departure of Kennedy
October 6, 2018	Appointment of Kavanaugh
September 18, 2020	Departure of Ginsburg
October 27, 2020	Appointment of Barrett
June 30, 2022	Departure of Breyer
June 30, 2022	Appointment of K. Jackson

Two departures are politically notable and three are notable for their effect on the Court. The politically notable departures are those of Fortas and Scalia. In both, the possibility arose of a change in the majority of the Court by party appointment. Fortas was eventually replaced by Blackmun, creating a Republican-appointed majority. Scalia was eventually replaced by Gorsuch, preventing the return to a Democratic-appointed majority. Both events were bitterly fought in the political sphere, but neither was truly momentous in terms of the Court's ideology. The Fortas departure was not momentous because Republican-appointed Brennan was and acted as a Democrat, keeping the substantive majority of the Court liberal. The true ideological change occurred with the appointments of Powell and Rehnquist. But those were not contested because they were akin to a Senatorial package deal, the southern Democrat Powell along with the Republican Rehnquist.

The Scalia departure turned out not to be momentous because the Republican-majority Senate's gambit of refusing to appoint a replacement during a Democratic President's incumbency succeeded. The next President, Trump, was a Republican. However, the Republican majority in the Senate did not have a filibuster-proof 60 votes. A few years earlier, in 2013, when the Senate had a similar Democratic majority and the Republican minority impeded presidential appointments, the Democratic majority lowered the requirement for confirmations to a simple majority, except for Supreme Court nominations. In 2017, the Republican majority trying to fill the Scalia vacancy removed the exception. All confirmations could be approved on a simple majority. The appointment of Gorsuch went forward, and the Republican-appointed majority of the Court was preserved.

This alteration to the appointments process could be significant. The appointment process shapes the Court profoundly, a fact we substantiate using an index of the

fluidity of tightly split coalitions. We compare the high fluidity of a composition of the Indiana Supreme Court with the low fluidities of the United States Supreme Court, figure P.4 (also 1.1 on page 37). We also address the appearance of politicization in the conclusion of this Preface and that of the book, Chapter 10. The appointment process for the Indiana Supreme Court is distinctively different. The Governor's selection is limited to the nominees from a nonpartisan commission; there is no legislative confirmation vote; and a vacancy is filled according to a timetable fixed by law. The Senate's switch to a simple majority alters the dynamics of appointments.

Both these events, the Fortas vacancy and the Scalia one, occurred during what we call time periods of national disunity—marked by acute conflicts between the political left and right. Chapter 9 defines "national disunity" and discusses the distribution of votes, revealing that the Court slightly avoids 4–4 splits during these contentious times, as shown in Figure P.1 (which is also Figure 9.6 on page 176).

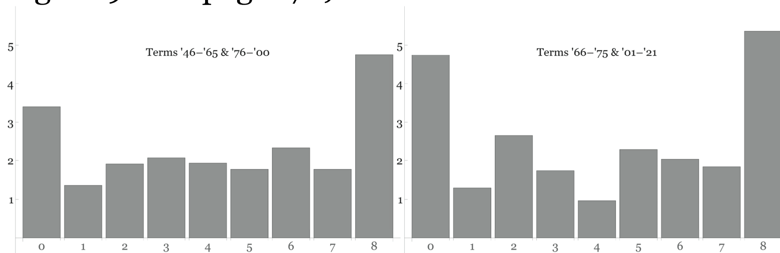


Figure P.1. Decisions with this many liberal votes per term among decisions with 8 votes, during national disunity on the right.

The left panel in Figure P.1 shows the distribution of eight-vote decisions at times other than times of national disunity, measured in decisions per term. The right panel depicts the distribution of eight-vote decisions during disunity. The horizontal axis measures liberal votes, from zero to eight. In both time periods the Court issues about two decisions each term with each number of liberal votes. But at times of disunity, the four-to-four decisions are less frequent, about one per term. We posit that the Court counters national disunity by issuing slightly fewer 4–4 decisions. Reinforcing this inference, it also turns out that the Court issues somewhat more unanimous decisions during periods of disunity, a little over ten per term. The effects, though minor, are highly unlikely to be coincidental. The Court, deliberately or not, plays a pacifying role when national political disputes intensify.

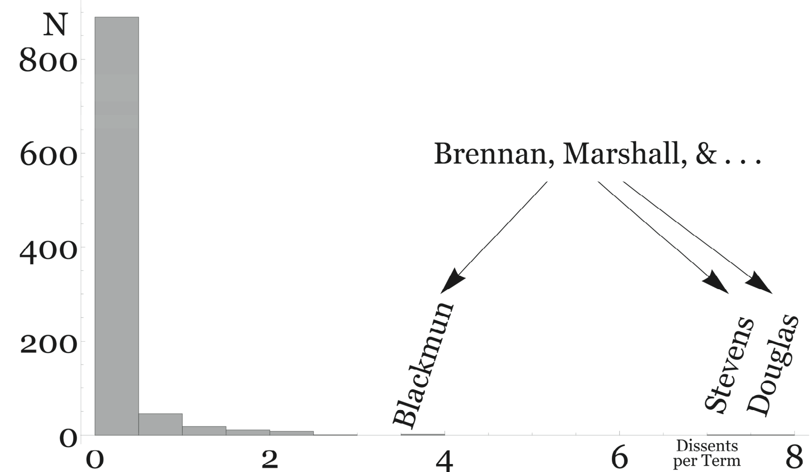


Figure P.2. Dissents-per-term by teams of three justices.

The three justice departures that are notable for the Court are Douglas, Brennan, and Marshall. Douglas was the champion of the solo liberal dissent, issuing over five per term. In contrast, several justices, such as Kagan,

never dissent alone. Douglas's departure increased the frequency of unanimous conservative decisions.

Brennan and Marshall were unusually effective at forming coalitions with other justices. Calling the three "Super-Dissenters," they take front stage in Chapter 8. The efficacy of Brennan and Marshall is visible in Figure P.2 which shows the histogram of dissents-per-term by three justices (it also appears as Figure 8.5 on page 161). Most trios rarely dissent, well under once per term. Brennan and Marshall allied with Blackmun, Stevens, or Douglas, form teams that produce up to eight dissents per term!

A. The Compositions

The sequence of appointments and departures created nine distinct compositions. Each delivered over fifty 5–4 decisions, providing insights into their majorities and swing votes which we try to reflect in the nine color fold-out posters on the back of this volume.

1. The Vinson Composition

The Vinson composition has Vinson as the Chief Justice and one of its centrist justices. The other centrists are Rutledge and, perhaps to a lesser degree, Reed. The liberal side is Black, Douglas, and Murphy. The conservative side is Burton, Frankfurter, and Jackson. But their alignment was different concerning criminal procedure.

Vinson was appointed in the summer of 1946. This composition concluded when Murphy passed away in July 1949.

Examining the decisions from each majority provides insights into the significance of the corresponding swing vote. In the Vinson composition, Frankfurter is the primary swing vote. However, despite his protestations in *Carter v. Ill.* that the Constitution "has never been perverted so as to force upon the . . . States a uniform code of criminal procedure," Frankfurter was often the fifth vote for liberal criminal procedure outcomes, rather than overall matters. Matters related to labor & employment, business, speech, and takings take liberal outcomes due to the swing votes of Vinson or Reed, who were closer to the composition's ideological center. Therefore, Frankfurter's liberal swing for criminal procedure is an intriguing deviation from the simplistic left-to-right view of justices.

The Vinson composition presents a second interesting anomaly concerning Frankfurter's role as a swing vote. A cluster of conservative criminal procedure decisions (at the two-o'clock position) appears without any swing vote connecting them to any of the other majorities. A swing vote only appears if it is only one, but this coalition differs by more than one vote from the other four that appear in the graph. Vinson with Black, Burton, Douglas, and Reed form this coalition and they are unlikely traveling companions. Douglas and Black were dedicated New Dealers. Burton was the composition's sole Republican member. Though a conservative coalition, the two primary conservative voices—Frankfurter and Jackson—were in dissent.

Juxtaposing these two criminal procedure majorities, this conservative one at two o'clock and the liberal one at nine o'clock, shows that Vinson, Burton, and Reed are the conservative members of this composition about criminal procedure, Black and Douglas are at the center,

serving as its swing votes. Frankfurter, Murphy, and Rutledge are the liberal members from the perspective of criminal procedure. Seeing Black and Douglas in a centrist role is unusual. Interestingly, Jackson dissents against both majorities.

The Vinson composition is the only one in which a specific topic, criminal procedure, results in a markedly different alignment of 5–4 coalitions compared to other topics. This phenomenon underscores the multidimensionality of justices' attitudes, which vary depending on the topic. Frankfurter, for example, may have been conservative in most matters—he is absent in the other two liberal majorities—but he was decidedly liberal on criminal procedure. His role as the main swing vote seems almost accidental, as he is not centrist about criminal procedure, where he is liberal, or any other matter, where he is conservative.

2. The Stewart Composition

A sequence of short-lived compositions follows the Vinson composition. Vinson passed away in September 1953. During the Republican primaries leading to the 1952 presidential election, Warren withdrew and directed his delegates to support Eisenhower, under the agreement that Warren would receive the next Supreme Court judgeship. This resulted in Warren becoming Chief. Eisenhower's aspiration for bipartisan appeal in his 1956 re-election campaign led to the appointment of Brennan, a Democrat. From Brennan's appointment in October 1956, Warren and Brennan, alongside Black and Douglas, formed a liberal block that significantly influenced jurisprudence. Stewart was appointed in October of 1958, despite opposition from several senators, mainly Southern Democrats who opposed the Warren court's expansion of civil rights. Their concern was primarily that Stewart was too much of a living constitutionalist rather than a textualist. Upon Stewart's appointment, the Court comprised Chief Justice Warren, Black, Douglas, and Brennan on the liberal side; Stewart and Clark in the center; and Frankfurter, Harlan, and Whittaker on the conservative side. This composition lasted until Whittaker's departure in March 1962.

Two liberal majorities appear on the graph. One, resulting from Stewart's swing vote, primarily issued decisions about criminal procedure. The other, resulting from Clark's swing vote, was mostly about business matters.

A glance at the poster for the Stewart composition shows an unusually large number of decisions that fall under the social category, which are color-coded in pink. Most are about "un-Americanism prosecutions." They appear to span several legal topics, but all address prosecutions spurred by the anti-Communism that accompanied the Cold War.

The interplay between anti-Communism and the Cold War is intricate. The Roosevelt administration, which fought World War II, strongly cared about social issues generally, including advancing the interest of workers and the disadvantaged. It was a Democratic administration and leaned left. The exigencies of World War II made allies of the Democratic Roosevelt administration, the conservative British administration of Winston Churchill, and the brutal Communist regime of Joseph Stalin in Russia. As the Axis powers were gradually defeated, friction among the allies escalated. The allied powers tried to establish post-war stability

with a sequence of agreements. A key agreement was the Yalta Conference, held in early February 1945, where distinct spheres of influence were mapped out. However, historical hindsight indicates that the reliance of the United States and the UK on this agreement worked largely to Stalin's advantage. Stalin, partly by selectively violating the agreement, succeeded in expanding the reach of Communism across Eastern Europe, China, and other parts of Asia.

From the perspective of many US conservatives, the Roosevelt and Truman administrations did not oppose Communism sufficiently, failing to thwart the ambitions of the Soviet Union and Communism. These fears seem excessive from the viewpoint of the 21st Century, given the US's victory in the Cold War, the dismantling of the Soviet Union, the broad return of its satellite states to capitalism, and communist China's adoption of free-market policies. However, this long-term outcome was far from obvious in the first few decades after WWII, when Communism initially expanded explosively, western democracies routinely elected socialist governments, and the Soviet Union was perceived as economically and technologically powerful.

By 1958, when Stewart joined the Court, the Cold War between the United States and the Soviet Union was long underway. The Korean War from 1950 to '53 had shown that the Cold War would contain smaller hot wars. The initial explosive expansion of Communism had abated. The United States, however, still viewed Communism as the Cold War enemy. The infiltration by communists and the dissemination of communist ideas were viewed as a threat and were prosecuted. History has condensed this chapter under the heading of "McCarthyism" to its peak during Joseph McCarthy's rise to prominence and his chairing of the Senate Internal Security Subcommittee from 1953 to '54. The active prosecution of Communists had begun in 1947 under President Truman with an executive order intending to ensure the loyalty of federal employees. The avoidance of communist immigration continues to the time of this writing.

The term "un-Americanism prosecutions" signifies actions against individuals accused of being Communists. Naturally, these prosecutions clash with the Bill of Rights. If being a Communist were treated the same as being a Democrat or a Republican, most of these prosecutions would have been considered unconstitutional. In the poster of the Stewart composition, the pink of decisions about social issues is mostly about un-Americanism prosecutions and dominates the output of the main conservative coalition. This majority consists of Clark, Frankfurter, Whittaker, Harlan, and Stewart and the dissenters are Warren, Black, Douglas, and Brennan. The swing vote of Stewart produces three rare liberal decisions on un-Americanism prosecutions.

Chapter 7 examines the treatment of un-Americanism prosecutions after WWII, an area where the justices' interpretation of the Bill of Rights against the fear of Communism fluctuated. The favoring of the prosecution peaked at the early phases of the Korean War, but it waned to a low around 1956. Congress's backlash against several exonerations in 1957 led some justices to reassess their views, leading to the conservative outcomes of the Stewart composition. Frankfurter's replacement by Goldberg in 1962 by President Kennedy led the Court to bring this historical chapter to an end.

This fluctuation is visible in the evolution of the number of votes for the prosecution in un-Americanism

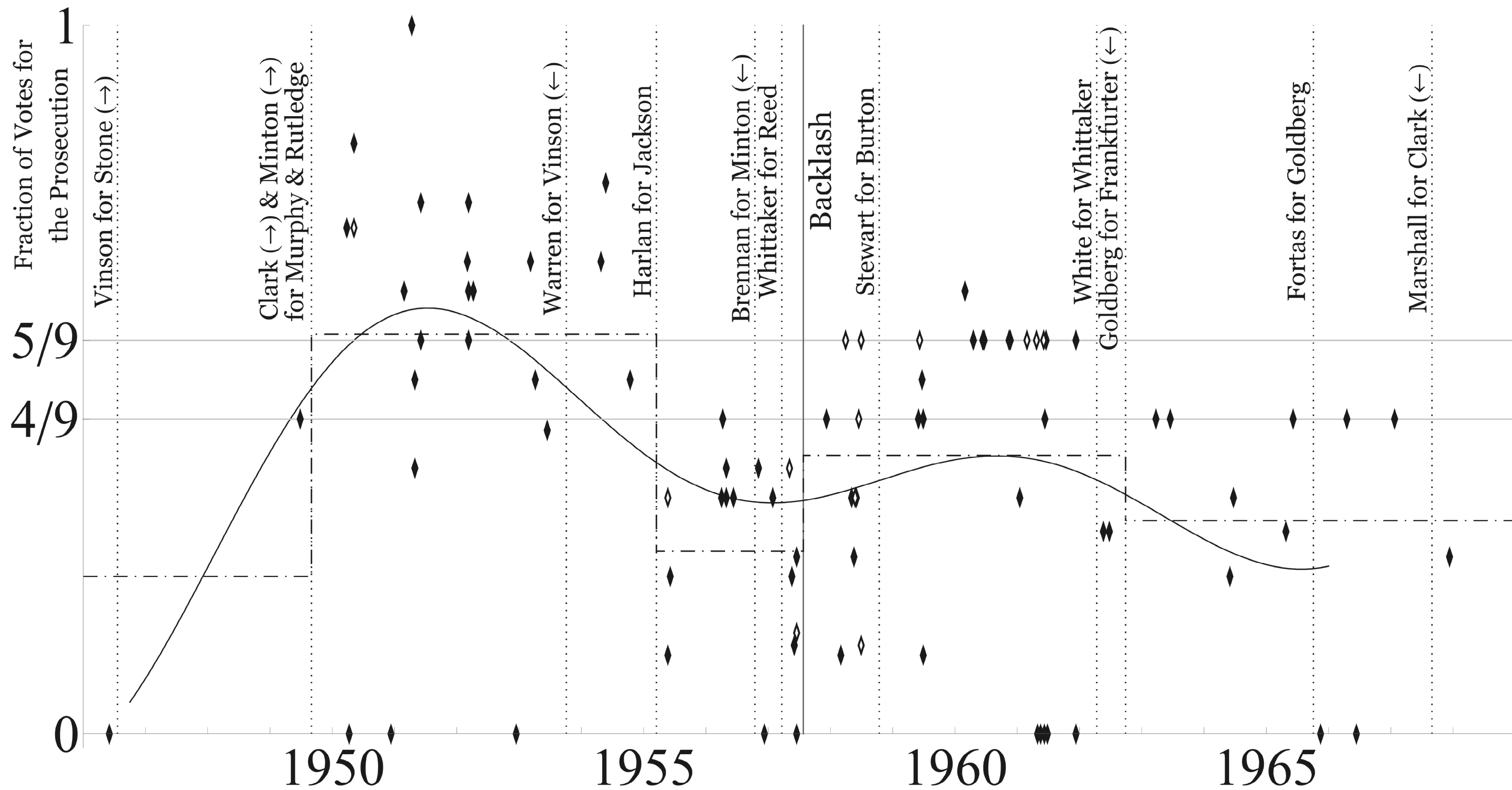


Figure P.3: The evolution of the votes for the prosecution in un-Americanism prosecutions.

prosecutions, Figure P.3 (which also appears as Figure 7.1 on page 139). The horizontal axis is time. The vertical axis represents the number of votes in favor of the prosecution. The diamonds are each decision; when two overlap, the interior becomes white; an online version of the graph offers popups with the details of the voting in each decision. Vertical dashed lines indicate important events and changes in the Court's composition. The fluctuating line explains the data much better than do the steps of the dot-dashing line. The fluctuation resembles that of a pendulum.

A caveat is necessary. This topic has the unusual additional importance that it was considered central to a national fight, the Cold War. Nevertheless, the point is that in some topics, some justices accept outside infor-

mation rather than adhering to an absolutist view of constitutional mandates.

In sum, the 5–4 decisions of the Stewart composition reveal a major and intriguing chapter of jurisprudence, un-Americanism prosecutions.

3. The Powell-Rehnquist Composition

Several brief compositions follow the Stewart composition. Democratic Presidents Kennedy and Johnson make four appointments but to just three seats. Justice White's appointment in April 1962 and Justice Marshall's appointment in October 1967 are the ones that endure. The other appointments, of Justice Goldberg in October 1962 to July 1965, and of Justice Fortas in October 1965 to May 1969, are brief. The Court transitions to a Republican-appointed majority in June 1970 with the appointment of Justice Blackmun by Republican President Nixon. This, however, includes Democrat Brennan, who was appointed in 1956 by President Eisenhower. Nixon makes a total of four appointments. Before the appointment of Blackmun, Chief Justice Burger succeeds Warren in June 1969. The summer of 1971 witnesses the departures of Justices Black and Harlan. Their replacements, Justices Powell and Rehnquist, take office on the same day, January 7, 1972. The change is profound. The Court becomes supermajority Republican appointed. Powell was a relatively conservative Southern Democrat, perhaps the concession necessary for the Senate's approval of the conservative Rehnquist.

The conservative core consists of Chief Justice Burger and Rehnquist. The centrists are Stewart, White, Blackmun, and Powell. The liberal core is Douglas, Brennan, and Marshall. This composition will last until the retirement of Douglas in November 1975.

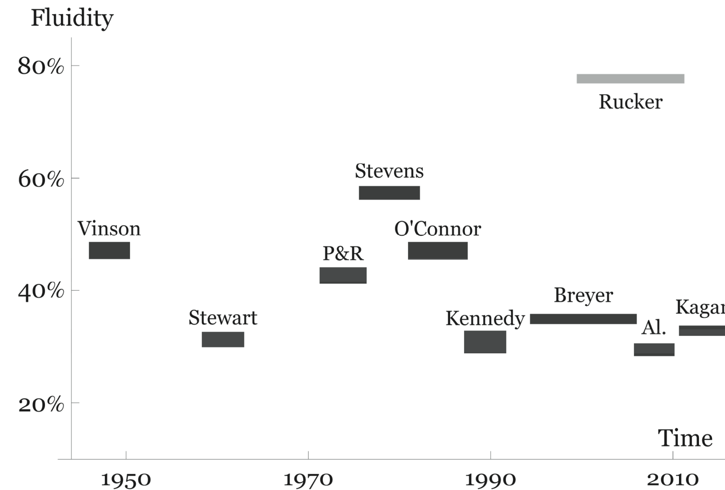


Figure P.4: U.S. Supreme Court fluidity, 1946-2014 and Indiana Supreme Court's Rucker composition fluidity (light gray). The thickness of the bars reflects the rate of output of tightly split decisions.

This composition starts an era of unusual fluidity, contrasting with the more polarized Stewart, Alito, and Kagan compositions. In the latter cases, only three or four majorities form. Conversely, in the Powell-Rehnquist composition the justices form seven majorities to issue their 5–4 decisions. The next two compositions will have even more majorities. Chapter 1 explains how we devise an index of fluidity of tight splits and the index confirms this change, Figure P.4 (which also appears as Figure 1.1 on page 37). The vertical axis measures the fluidity of the coalitions in tightly split decisions. A court in which the exact same coalition formed in every tightly split decision would have no fluidity at all; it would be completely rigid, i.e., 0%. A court in which the justices were completely randomly

distributed in all of their tightly split decisions would have perfect fluidity, i.e., 100%. From the early seventies to the late eighties the Court experiences an unusually high fluidity; with several justices serving as significant swing votes and numerous different alliances forming.

A new and distinctive topic in the conservative output of the Powell-Rehnquist composition is obscenity. Perhaps it is linked to President Nixon's opposition to pornography. Regardless of their origin, the main conservative coalition produces nine decisions upholding obscenity restrictions against free speech defenses. Until this composition, only one obscenity decision had appeared in the posters, from the main conservative majority of the Stewart composition. Obscenity will leave a trail into the next composition, appearing as one liberal and three conservative decisions in the ensuing Stevens composition.

In conclusion, the Powell-Rehnquist composition ushers an era of Republican supermajority on the Court, but one of unusual fluidity of coalitions. Unlike the prior Vinson and Stewart compositions, many majorities form and many justices are significant swing votes. A distinctive topic is obscenity.

4. The Stevens Composition

The Stevens composition sits uniquely in the middle of three consecutive compositions with over 50 tightly split decisions. A single justice changes. Douglas, the Court's most liberal member and the final New Deal representative on a Court grown increasingly conservative, is replaced by Stevens. Although Stevens is a Republican appointee, he leans moderate and comes onto the liberal side of this composition of seven Republican appointees. Replacing the alienated Douglas with the moderate Stevens has little impact from a political perspective because Stevens lands into the political center-left.

The conservative core remains Chief Justice Burger and Rehnquist. The center includes Powell, White, Stewart, and Blackmun. Stevens sits slightly to their left. The loss of Warren, Black, and Douglas, leaves Brennan and Marshall isolated at the far left of the new Stevens composition. This composition starts in December 1975 and ends with the July 1981 departure of Stewart.

The fluidity index reaches its peak during the Stevens composition. Eleven coalitions yield more than three decisions each to appear on the graph. Swing votes abound. All the justices near the center of this composition appear repeatedly as swing votes linking different majorities: White, Powell, Stewart, Blackmun, and Stevens.

The topics of the 5–4 decisions cover the waterfront. No topic dominates. The decisions broadly signify a retreat from the jurisprudence of the New Deal. Two new political battlegrounds emerge: abortion and affirmative action. Two 5–4 decisions about abortion appear, one liberal and one conservative, and two decisions about affirmative action, one liberal and one conservative (*Cnty of L.A. v. Davis* and *Bakke*).

The next few Republican appointees are not as moderate.

5. The O'Connor Composition

Again, a single justice changes from the Stevens to the O'Connor composition. Stewart is replaced by O'Connor in September 1981. The O'Connor composition ends

with Chief Justice Burger's departure in September 1986.

Later, O'Connor with Kennedy will be at the center of the Court. But that will be after the appointments of Scalia and Thomas who will outflank Rehnquist from the conservative side. At her appointment, O'Connor is the third most conservative justice after the conservative core of Chief Justice Burger and Rehnquist. Powell, White, and Blackmun form the center. Stevens is the third most liberal justice, no longer so far from Brennan and Marshall on liberal wing.

The fluidity index starts to retreat, but the O'Connor composition produces the greatest number of majorities, twelve. All five central justices appear as swing votes, including O'Connor. Only Burger and Rehnquist on the conservative side, and Brennan and Marshall on the liberal side, are consistently predictable votes.

With the O'Connor composition, we see an excellent example of how the fluidity of voting coalitions contradicts simplistic left-to-right explanations of Court voting patterns.

Chapter 5 also demonstrates this point with respect to the voting patterns on a single topic, criminal procedure, by a particularly enduring composition of the Indiana Supreme Court. The justices hold consistently different views in the many fields of legal analysis—the many dimensions of the legal system from a mathematical perspective. In the example of criminal procedure, the justices align themselves across six different dimensions. We see different attitudes about allowing searches versus requiring warrants or different attitudes about whether to control the jury versus trusting juries, and so on, to a total of six pairs of opposite views on specific attitudes about criminal procedure. Some of these attitudes relate to liberalism versus conservatism but others do not.

These attitudes about criminal procedure are visible in Figure P.5 (which also appears as Figure 5.3 on page 90). The left-most dissenters, at the nine-o'clock position, Chief Justice Shepard and Dickson, are dissenting from liberal decisions. They tend to favor few warnings and find satisfactory a low level of consents.

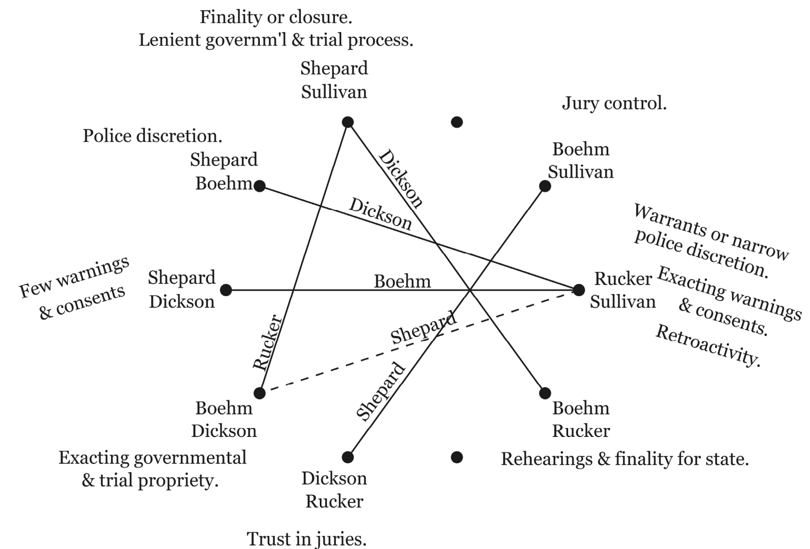


Figure P.5. The six dimensions of criminal procedure in the Rucker composition of the Indiana Supreme Court.

The opposite attitude, of exacting consents and warnings, we associate with justices Rucker and Sullivan, at the rightmost point of the graph, at three o'clock. This leaves Boehm as the swing vote on this attitude, this dimension. The justices' attitude about consents and warnings matches the liberal-to-conservative orientation of the justices. Consider, by contrast, attitudes about jury control versus trust in juries; the exactitude

of the propriety of reviewed governmental or trial processes; or about granting rehearings versus finality or closure of process. Those do not run left-to-right, despite that one can intuitively consider that they have a correspondence to liberal versus conservative judicial attitudes. Justices align differently on different dimensions.

We observed a similar pattern in the Vinson composition, with some justices aligned differently on criminal procedure compared to other matters. Frankfurter, for example, leaned left on criminal procedure but leaned right on other matters. It would be a mistake to think that the jurisprudential attitudes of nine justices could be captured in a few dimensions. The legal system's complexity mirrors the countless dimensions it contains, which evolve with precedent and emerging distinctions.

The complexity of these three compositions—Powell-Rehnquist, Stevens, and O'Connor—reflects the multi-dimensionality of the legal system, as does the complexity of all the color posters. Although we introduce the justices of each composition by arranging them in the political left-to-right space, we intend the complexity of the graphs to demonstrate that the one-dimensionality of the political alignment is a gross oversimplification. The multi-dimensionality of the legal system becomes more visible when one party dominates the court, leading to 5–4 splits that reflect disagreements within the dominant party rather than between conservatives and liberals.

The topics of the O'Connor composition continue to vary. The developing culture wars result in two more decisions about abortion—one liberal, attracting a strong O'Connor dissent, and one conservative.

6. The Kennedy Composition

The departure of Chief Justice Burger brings the elevation of Rehnquist to Chief and the appointment of Scalia, all in September 1986. Powell departs in June 1987, leaving a longer vacancy filled by Kennedy in February 1988. The Kennedy composition ends in two years, when in summer 1990 Brennan departs. followed a year later by Marshall. This concludes an era defined by Brennan and Marshall's ability to form coalitions.

From the reductionist perspective of left to right, Kennedy is indistinguishable from O'Connor—but the posters let one study the substance of how the O'Connor swing votes produce different outcomes than the Kennedy swing votes. Their position might be called center-right in this composition because their conservatism is outflanked by Rehnquist and Scalia. Justices White, Blackmun, and Stevens span the remaining center space, leaving Brennan and Marshall again at the liberal end. The graph of the coalitions, however, starts returning to a more polarized shape. The number of coalitions drops to six and the swing votes to four. Those are no longer difficult to rank. White is the leading swing vote in the Kennedy composition.

The return to a simpler, more polarized graph could be seen as a waning of the capacity of Brennan and Marshall to forge coalitions. The new appointments—Scalia, O'Connor, and Kennedy—join Rehnquist as being quite different from Brennan and Marshall. Nevertheless, four liberal coalitions of five justices form. One forms much more frequently: Brennan and Marshall with White, Blackmun, and Stevens. The predictability of this coalition is an indicator of the increasing polarization.

7. The Breyer Composition

Brennan's departure ends the Kennedy composition in the summer of 1990 and brings the appointment of Souter. Thomas replaces Marshall the summer of 1991. Ginsburg replaces White the summer of 1993. The summer of 1994, Breyer replaces Blackmun. Breyer's appointment initiates the longest composition on record, ending with Chief Justice Rehnquist's departure in September 2005.

The conservative core consists of Chief Justice Rehnquist, Thomas, and Scalia. However, Thomas and Scalia do not appear as consistent conservative votes. We do find them occasionally with majorities on the left side of the graph, perhaps when their conservative drive for small government links them to some liberals' distrust of government. The center is O'Connor and Kennedy. Souter, Breyer, Ginsburg, and Stevens form the liberal side but again, not consistently. Each occasionally appears in majorities on the right side of the graph.

The extraordinary duration of the Breyer composition may mask how polarized this composition was. Most other compositions we study last about three terms. If one were to take any three-term segment of this composition's eleven terms, the resulting graph would be more polarized. The majorities that only produce three or four decisions would likely not appear; the graphs would be dominated by the one conservative coalition and the two main liberal ones by the swing votes of either O'Connor or Kennedy. The fluidity index indeed gives a value that is comparable to the other polarized compositions.

The substance of the decisions shows that the conservative majority moves the law in new directions. The prior conservative compositions seemed to mostly undo the New Deal. In the Breyer composition we see conservative decisions countering post-WWII precedent, including integration (as does, for example, *Missouri v. Jenkins*), religion (*Rosenberger*; *Agostini*; *Zelman*), and numerous criminal procedure decisions. Two new contentious issues join the 5–4 fray with conservative outcomes: gun rights (*Lopez*; *Printz*) and voting (*Shaw*; *Abrams*; *Vera*). This composition's 5–4 decisions also evince some—perhaps inauspicious—defeats of administrative agencies before arguments of sovereign immunity (*Florida Prepaid Postsecondary*; *College Savings Bank*; *Alden*; *Kimel*; *S.C. Ports Auth.*, all from the main conservative coalition at three o'clock).

8. The Alito Composition

After the appointment of Chief Justice Roberts ends the Breyer composition, Alito replaces O'Connor immediately thereafter in January 2006. The Alito composition lasts until the summer of 2009, when Souter is replaced by Sotomayor.

Kennedy becomes the only main swing vote of the Alito composition. Roberts, Alito, Scalia, and Thomas are on the conservative side. Souter, Breyer, Ginsburg, and Stevens are on the liberal side.

The court is visibly polarized, with only four majorities appearing on the graph. A look at the substance of the decisions shows that most of the liberal 5–4 decisions are about criminal procedure. By contrast, the single conservative coalition that issues the bulk of the 5–4 decisions addresses numerous substantive issues. In other words, the liberal side almost only wins 5–4

criminal procedure issues. Most other issues that split the Court 5–4 take a conservative outcome.

9. The Kagan Composition

After Sotomayor replaces Souter, and Kagan replaces Stevens, the Court is tightly split by appointing party. The five conservative justices have been appointed by Republican presidents and the four liberal ones by Democrats. Kennedy continues in the role of the Court's primary swing vote.

The polarity of the appointing party is reflected in the poster of the Kagan composition. Only four majorities appear on the graph. Surprisingly, the fluidity index registers a slight increase. Many majorities form to issue only one or two decisions, remaining off the graph but influencing the index upwards. (The same occurred in the Vinson composition. Its index is higher than the figure would suggest.) The inference for the Kagan composition is that one of the new justices exercised a remarkable and successful effort to produce coalitions of four, echoing the effectiveness of the Brennan-Marshall team. Justice Kagan had served as a judicial clerk for Marshall.

The substantive outcomes of the Kagan composition's 5–4 decisions are not as one-sided as those of the Alito composition. Substantive outcomes as well as criminal procedure ones appear on both sides of the graph.

The Kagan composition defies one more phenomenon. We study it in Chapter 6, titled the Conservative Paradox. The phenomenon consists of the conservative leaning of 5–4 decisions. Every composition and every 15-term period produces a mix of 5–4 decisions that is more than 50% conservative, which cannot be due to chance. Other vote splits produce liberal leaning mixes of decisions, less than 50% conservative.

The explanation is that the phenomenon, despite its persistence, is coincidental. Consider the two justices next to the median justice. By accident, the one on the conservative side has tended to be ideologically closer. The analysis reveals the way that the nine justices make decisions by comparing three models of forming coalitions of five in the face of dissents of four. The model that receives support has the extreme justices act strategically and be willing to compromise in order to get the vote of the median. But a large ideological distance between the median and the next justifies a dissenting group of four.

The way that the Kagan composition defies this tendency is by producing a conservative ratio of only 51%. Most other compositions exceed 60%. The ideological distances of the Kagan composition could have certainly led to a greater conservative ratio.

B. The Ideology Mirage

The analysis of the chapter on the conservative paradox is an apt one for closing this overview of our tour of post-war 5–4 decisions. In testing the theory that ideological distances explain the conservative paradox, we divide the 5–4 decisions into two groups. In the first group, the justices are aligned by ideology. The four ideologically conservative justices cast conservative votes, the four liberal justices cast liberal votes, and the median justice determines the outcome. The second group contains the jumbled votes. The justices' votes do not follow ideology. Liberal and conservative justices vote together in both the majority and the minority.

The explanation that ideological distances from the median justice explain conservative outcomes only works in the aligned group, and the conservative paradox only appears in the aligned group. And the aligned group is a minority of the 5–4 decisions, 48%.

The majority of 5–4 decisions have jumbled votes. For them, ideology has no explanatory power. Instead of leaning conservative, they lean liberal.

The inference is that the political polarization we observe is a result of the appointment system, not judicial philosophies that are subservient to politics. The political branches appoint justices based on the agreement of their judicial philosophies with those dimensions of the legal system that the political branches consider salient. The result is justices that vote as politically expected but only in those politically salient dimensions. They do not proceed to vote as politically expected in the dimensions that were not salient for their appointment. The media that complain about politicization do not acknowledge that the justices vote on all issues based on their judicial philosophies. Politicization can be considered a mirage created by the viewer.

This conclusion also completes a circle that began when the fluidity index revealed that the Indiana Supreme Court's coalitions were so much more fluid than those of the United States Supreme Court (Figure P.4 and 1.1 on page 37). Despite that the justices are principled, supreme courts' perceived politicization depends on the selection process. Indiana's process, where appointments are constrained by the nominations of a nonpartisan commission produces different results than the federal process, where presidential nominations are subject to Senate confirmation. Having the process unconstrained by Senate filibuster, as has been the case since 2017, likely will produce yet different results.

Part I: Foundations

1. The Index of Fluidity

In June, 2001, the United States Supreme Court decided three closely-watched deportation cases by 5–4 votes: *Zadvydas v. Davis*;[1] *Calcano-Martinez v. I.N.S.*;[2] and *I.N.S. v. St. Cyr*.[3] The prospective deportees avoided deportation in all three cases; the "liberal" position, if you will, prevailed.[4] The Court at the time consisted of Chief Justice Rehnquist and, in order of seniority, Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Stevens, Souter, Ginsburg, and Breyer were in the majority in all three of these cases; Rehnquist, Scalia and Thomas were in dissent. Kennedy provided the deciding vote in *Calcano-Martinez* and *St. Cyr*; O'Connor in *Zadvydas*.

The voting coalitions in these three cases were quite—but not perfectly—frozen: Four of the five justices in the majority coalitions in all three cases were the same; three of the four justices in the dissenting coalitions were the same. *But for* O'Connor and Kennedy switching sides in *Zadvydas*, the coalitions would have been identical in all three cases.

This comports to prevailing descriptions of the Court's coalitions at the time: Stevens, Souter, Ginsburg, and Breyer were the "liberals"; Rehnquist, Scalia, and Thomas were the "conservatives"; O'Connor and Kennedy were the "swing votes."[5]

But decided the same month was the well-known *Kyllo v. United States*,[6] in which the Court held by a 5–4 vote that a warrant was required before the government could use a thermal-imaging device to scan a home for heat consistent with high-intensity lamps for marijuana growth. The liberal position also prevailed but the coalitions were quite different. The majority coalition consisted of Scalia, Souter, Thomas, Ginsburg, and Breyer; the dissenting coalition of Rehnquist, Stevens, O'Connor, and Kennedy. Two of the conservatives voted

1. *Zadvydas v. Davis*; 533 U.S. 678 (2001).
2. *Calcano-Martinez v. I.N.S.*; 533 U.S. 348 (2001).
3. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).
4. We use the term *liberal* to signify positions associated with the political left in the United States. Whereas the term *progressive* might be considered more accurate by some, we feel this usage is too recent and politically laden.
5. See, e.g., R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 4 (2002) (identifying Kennedy, O'Connor, and Souter as the primary swing votes).
6. *Kyllo v. United States*, 533 U.S. 27 (2001).

liberal, for the criminal defendant; one of the liberals and both of the swing votes voted conservative.

A year earlier, when the Court had reversed a conviction in another well-known case, *Apprendi v. New Jersey*,[7] the coalitions also did not accord to the popular description: Stevens, Scalia, Souter, Thomas, and Ginsburg were in the majority coalition; Rehnquist, O'Connor, Kennedy, and Breyer dissented. Two of the conservatives voted liberal, for the defendant; one of the liberals voted conservative. Indeed, the core of the majority coalition in *Kyllo* and *Apprendi* were Scalia, Souter, Thomas, and Ginsburg; Stevens and Breyer were the swing votes.

Also during June, 2001, the Indiana Supreme Court, the state's five-justice court of last resort, decided two criminal law cases by a divided 3–2 vote. In one case, *Segura v. State*,[8] the defendant's argument prevailed; in the other, *Sanchez v. State*,[9] the state's. But though the liberal position prevailed in the first case and the conservative in the second, the change in outcome was not a function of a swing vote. Rather, the coalitions in the two cases were completely different. The Court at the time consisted of Chief Justice Randall T. Shepard and, in order of seniority, Justices Brent E. Dickson, Frank Sullivan, Jr. (one of the co-authors), Theodore R. Boehm, and Robert D. Rucker. The majority coalition in *Segura* (where the liberal position prevailed) consisted of Dickson, Boehm, and Rucker; the minority of Shepard and Sullivan. In *Sanchez* (where the conservative position prevailed), the majority coalition consisted of Shepard, Dickson and Boehm; the minority of Sullivan and Rucker. To the extent anything can be generalized from these two cases, it is that three of the five justices—Dickson, Boehm, and Sullivan—were swing votes: Each voted with the liberal position in one of these cases and the conservative in the other.

The seven cases just discussed illustrate that the coalitions comprising the majority and minority positions can and do vary in tightly split decisions of the United States Supreme Court and state courts of last resort (referred to as state supreme courts). But how fluid or rigid are those coalitions? Were the voting coalitions in closely divided cases on the 2000-01 United States Supreme Court stable (as *Zadvydas, Calcano-Martinez,* and *St. Cyr* suggest) and the coalitions in *Apprendi* and *Kyllo* simply anomalies? Were the voting coalitions in closely divided cases on the 2001 Indiana Supreme Court as fluid as *Segura* and *Sanchez* suggest or were they in fact much less fluid? More broadly, were voting coalitions on the U.S. Supreme Court more fluid in the '50s than in the '90s? How does the U.S. Supreme Court compare to state supreme courts from this perspective? Can these comparisons be measured?

This chapter develops an index that measures the concept of fluidity in judges' voting coalitions in tightly split decisions in such supreme courts.[10] If, in one court, the same coalition of judges always votes together, in either the majority or the dissent, we would observe low fluidity due to a stable coalition. A different court, in which judges align in majority and dissent in different coalitions in each decision, would have greater fluidity;

7. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
8. *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).
9. *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001).

10. By this we mean courts consisting of an odd number of members, all of whom participate in every decision of the court. As will become evident, we do not consider decisions on which less than all of the full number of justices voted.

this court would have less stable coalitions. The index captures where each court lies in the spectrum from no fluidity whatsoever, rigid, totally stable coalitions, i.e., the same judges vote in exactly the same coalitions in every case, to absolutely fluid coalitions, where each judge votes proportionately with every other one. The index ranges from zero (0 percent fluidity) to one (100 percent fluidity).[11] For this index to be useful, the value that it produces should allow the comparison of courts of different sizes.

The index measures how a court's coalitions form in tightly split decisions, namely 5–4 decisions in a 9–member court, or 4–3 decisions in a 7–member court.[12] We know of no prior metric that can measure coalition formation in court decisions.

The construction of the index underscores the importance of focusing on the periods of time when a court has its full size and unchanging membership. Full size is necessary for the issuance of tightly split decisions in a sufficient number—two vacancies would also allow a court to produce tight splits but hardly enough in number for the index to be informative. Unchanging membership is necessary because replacing a justice produces new dynamics and new possible coalitions.

Each full and constant composition coincides with the period during which a particular justice is the court's most junior justice. The tenure of that justice determines, by definition, the period of time during which the membership of the court remains unchanged. Therefore, the junior justice's name defines the composition.

We observe that this is at odds with the popular and conventional focus on, and naming of, eras of courts by the name of the chief justice. During a single chief justice's tenure, old associate justices leave the court and new ones take their seats, frustrating the idea that the court is the same. Only during a single junior justice does the composition of the court truly not change.[13] When we refer to the "Breyer composition," for example, we refer to the period when Justice Breyer was the junior justice, from his appointment in August of 1994 to the appointment of Chief Justice Roberts in September of 2005. The junior justice, accordingly, may well be the chief justice, as was the case from the appointment of Chief Justice Roberts until that of Justice Alito in January of 2006.

The literature on judicial behavior, including coalition formation, is enormous.[14] The study of coalitions on the United States Supreme Court is not new and various perspectives or explanations have been used in analyz-

11. A concrete example of the various ways that a five-member court can form coalitions of three to issue ten decisions and the index values they correspond—from all ten coming from one majority to nine from one and one from a second one, all the way to one decision coming from each possible majority—is in the mathematical appendix to this chapter, Table 1.A.2.

12. We recognize the importance of other splits and we anticipate amplifying this work with such study in the future and to some extent in other chapters, as does chapter 8's look at dissenting capacities more broadly. Yet, the construction of the index requires us to only use tightly split decisions.

13. As will become apparent, a period of time during which there is one or more vacancies on a court does not affect this conclusion as the index is only applied to decisions made by the court when it is at full strength. At present, we have only applied the index to courts (the Supreme Courts of the United States and of Indiana) that do not permit the use of a substitute Justice when a Justice recuses or otherwise does not participate. Some important courts do employ such a practice. See, e.g., Del. Const. Art. 4, § 12 (providing for the appointment of judges from lower courts to sit in the Supreme Court temporarily in certain circumstances). Application of the index to the decisions of such courts will need to take this practice into account.

14. This literature review relies heavily on the extensive literature review in Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM & MARY L. REV. 1671 (2016).

ing it.[15] However, the dominant approach, especially recently, focuses on a division from political left to right.[16] Several scholars point out this is insufficient.[17] Fishman and Jacoby have even a concrete proposed second dimension, from pragmatism to legalism,[18] and in older data Schubert also finds two main dimensions (economic and civic liberalism) and some minor scales (that might be abbreviated as fiscal, activist, statist, and supervisory [of lower courts] attitudes).[19] We submit that an advantage of the proposed index is that the index remains agnostic with respect to direction or even the number of dimensions in the decision space.[20]

This chapter joins the above descriptive literature because it does not propose an optimal level of coalition formation, which further research might identify. The literature on judicial incentives, related to the appointment process, is also vast, and includes prior work by both of us.[21]

15. See, e.g., Glendon Schubert, *The 1960 Term of the Supreme Court: A Psychological Analysis*, 56 AM. POL. SCI. REV. 90 (1962); Glendon Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 L. & CONTEMP. PROBS. 100 (1963); L.L. Thurstone & J.W. Degan, *A Factorial Study of the Supreme Court*, 37 PROC. NAT'L ACAD. SCI. 628 (1951).

16. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998) (finding that the ideological composition of the bench influenced outcomes despite the underlying legal standard of deference to the administrative agency); Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 205 (2009) (demonstrating the tension between reaching a judge's ideal outcome and assembling a winning coalition). *See generally*, literature collected in notes 19 to 23 of Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM & MARY L. REV. 1671 (2016).

17. See Paul H. Edelman, *The Dimension of the Supreme Court*, 20 CONST. COMM. 101, 110 (2003) (skeptical that two dimensions are adequate); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides into the Sunset*, 24 CONST. COMM. 299, 300 (2007) ("The presence of unpredictable voting coalitions suggests that Supreme Court Justices' decisions may in some cases be structured along divergent or cross-cutting issue dimensions."); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1916 (2009) (objecting to the idea that "an individual judge's personal views" fit on a "left-right axis"); Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. S269 (2015) (finding a "robust two-dimensional voting structure" on the Roberts Court in criminal cases); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J. L. & POL'Y 133, 150–54 (2009) (criticizing the idea that judicial ideology has a single dimension); Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court's Many Median Justices*, 106 AM. POL. SCI. REV. 847 (2012) (finding different orderings of the justices in different issue areas, each on a single dimension); Michael Peress, *Small Chamber Ideal Point Estimation*, 17 POL. ANALYSIS 276, 285–86 (2009) (estimating the ideological locations of Supreme Court justices in two dimensions); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 501–02 (2009) (claiming that the scoring conventions of the Supreme Court Database produce the one-dimensional sorting); Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist U.S. Supreme Court*, 100 PROC. NAT'L ACAD. SCI. 7432 (2003).

18. Fischman, *supra* note 14.

19. GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974).

20. However, as we discuss in note 29 and accompanying text and also at the end of Appendix 1.A, median voter models of judicial voting (even allowing more dimensions than liberal-to-conservative) imply a constant absolute number of coalitions (equal to twice the number of dimensions) whereas the index is sensitive to the proportional usage of coalitions. Since the potential coalitions increase exponentially with court size, median voter judging would correspond to lower index values for larger courts. The data are not consistent with simplistic median voter judging, in part because, as Appendix 1.A explains, because pairs of majorities separated by a single swing vote, while existing, do not explain the bulk of the data.

21. See, e.g., Elliott Ash & W. Bentley McLeod, *The Performance of Elected Officials: Evidence from State Supreme Courts*, NBER Working Paper 22071 (2016) (merit selection produces judges who tend to be cited more); Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010) (not determinative but partisan selection produces judges who have slightly lower quality metrics). *See also* Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court around the 1986 Elections*, 13 Cornell J. L. Pub. Policy 405 (2004) (the voting patterns of California Supreme Court Justices surrounding the Rose Bird removal elections reveal different strategies, with one justice slightly catering to the electorate but others not).

I. Introducing the Index and Data

The target of the analysis is the formation of coalitions in courts of constant composition that have a number of judges that is small and odd. The United States Supreme Court or that of Canada, with nine judges are leading examples; as are others with seven, such as the Supreme Court of Australia and the courts of last resort of Arizona, California, Connecticut, Massachusetts, and New York. The index also applies to jurisdictions with five-member supreme courts, like Indiana. However, practices that produce variable membership, such as Delaware's practice of seating by designation from lower courts to its Supreme Court,[22] frustrate the application of the index.

Given the variety of sizes of courts, and the reality of split decisions, the question arises how to compare the fluidity of coalitions in voting on tightly split decisions in different courts. We propose such a measure, apply it to the United States Supreme Court for the period covered by supremecourtdatabase.org ("Database"), and to a period of the Indiana Supreme Court from 1999 to 2010 and discuss the results.

The mathematical formulas producing the index appear in Appendix 1.A, p. 187. The proposed index of fluidity of judicial coalitions begins by calculating how often each justice sides with each other justice in tightly split decisions. In other words, the springboard is a set of pairwise percentages of agreement. We derive the agreement percentage that would exist in a perfectly fluid court, one where each justice agrees the same with every other justice because the court issues the same number of tightly split decisions from every possible coalition. This is the average rate of agreement a. The next steps of calculating the index are to calculate the squared differences of each actual pairwise rate of agreement from the average rate of agreement, to take the average of the squared differences, and compute the square root s of the average squared difference.

We also derive the maximum square root r of the averaged squared differences, what would correspond to utter lack of fluidity. The index is one minus the ratio of the square root of the squared differences to the maximum square root of averaged squared differences, $1 - s / r$. If a court's tightly split decisions come from a single coalition, then the value of the index will be zero (0.0 or 0%), i.e., the voting coalitions in every tightly split decision are exactly the same. The opposite extreme is a table of justice agreement where each cell has the average value of justice agreement because each justice has agreed with every other justice equally; in this case, the s/r ratio will be zero and the index will be one (1.0 or 100%), i.e., justices ally with each other exactly proportionately. All other tables of justice agreement, where each justice agrees with each other justice at other rates, produce index values between zero and one. The value of the index approaches one as justices agree with each other more proportionately.

The index of fluidity of judicial coalitions is standardized to the size of courts and allows not only comparisons between courts of the same size, but also to courts

22. Del. Const., Art. 4 § 12 ("In case of [inability to have a] three-member panel of the Court, the Chief Justice . . . shall have the power to designate judges . . .").

of different sizes. A court of any size, as long as it has an odd number of judges, will produce a series of tightly split decisions under constant composition of the court, under the same junior justice. Those tightly split decisions, regardless of the court's size, can produce index values ranging from 0% to 100%. In every case, if the index produces the value of zero, then the court issued all tightly split decisions using a single coalition. At the opposite extreme, again regardless of the court's size, if the index takes a value of 100%, then the court issued its tightly split decisions proportionately from every possible coalition.[23] In practice, both extremes seem far-fetched. A court that has a single majority coalition issue all tightly split decisions would likely seem dysfunctional from various perspectives. Similarly, the opposite extreme of no tendency for some judges to vote together (that would be necessary for index values of very high fluidity) may contradict notions of the existence of consistency of personal judicial and legal philosophies.

The index of fluidity of judicial coalitions is sensitive to the composition of coalitions.[24] For example, consider two courts that produce their tightly split decisions mostly from two coalitions. Those coalitions can be very similar. The second majority coalition may be the minority of the first coalition with the addition of a single swing vote. Yet, the two coalitions can have greater differences, if several justices change sides. This latter case would lead to a greater value of the index of fluidity of judicial coalitions. Take the example of a nine-member court. Two coalitions of equal productivity with a single swing vote produce an index value of 12% whereas two coalitions with four switched votes, where the majority loses two votes to the minority and gains two votes from the minority, produce and index of fluidity of 34%.[25]

A limitation of the index of fluidity of judicial coalitions is that it springs from only the tightly split decisions. Other decisions, where the majority had superfluous votes, do not influence the value of the index but may hide important phenomena. The frequency of tightly split decisions may also be informative in its own merit, yet the index does not capture it. However, figure 1.1 uses the thickness of the lines marking

23. In sizable courts, frequently the court will not issue enough tightly split decisions for those to possibly be issued by every possible coalition. The court's composition changes while the number of tightly split decisions is smaller than the number of possible coalitions. This happens routinely in the United States Supreme Court where the number of possible coalitions are 126 (see Appendix 1.A, explaining the math of the index) but the court has never issued more than about thirty tightly split decisions per year (see table 1.4 and figure 1.1). Rarely will it be the case that the court will issue a number of tightly split decisions under the same Junior Justice close to 126 or a multiple of it. Despite that values of the index very near 1 are mathematically impossible even if the court was issuing its decisions proportionately from all possible coalitions, this theoretical impossibility is not a limiting factor because the court's decisions are very far from being issued proportionately by every possible coalition. As the examples will show, the tightly split decisions arise disproportionately from a handful of coalitions.

24. Indeed, as is discussed in greater detail in the appendix, this is the critical advantage of the quadratic index that we propose over a simpler linear index, which would disregard the composition of the coalitions.

25. For example, if the single swing vote is of Justice One, the first coalition could have One, Two, Three, Four, and Five as the majority. The second coalition is formed when One switches to the prior minority to form the majority One, Six, Seven, Eight, Nine. If instead of One, the votes that swing are those of Four, Five, Six, and Seven, the second majority is One, Two, Three, Six, and Seven. If each coalition issues the same number of decisions and no other decisions exist, then the index produces the values .119659 and .338562, rounded to two decimal digits in the text.

the value of the index to express the frequency of tightly split decisions.[26]

We stress that the index is standardized with respect to court size but need to explain the importance of the number of possible coalitions, which increases exponentially with the size of the court. The index runs from zero to a hundred percent as a court's coalitions go from a single dominant coalition to the opposite extreme of proportional issuance of decisions from all possible coalitions. A smaller court has a much smaller number of possible coalitions.[27] For example, a five-member court has ten possible coalitions and will produce a high index of coalition fluidity if it forms seven or eight coalitions to issue decisions proportionately. But a nine-member court has 126 possible coalitions, many possible ways that its members can ally with others.[28] In a nine-member court, the formation of seven or eight coalitions can either correspond to fairly little change between coalitions or to large changes, with correspondingly different values of the index of fluidity of coalitions.

Given the much greater range of coalitions available to members of a nine-member court, and especially if the seven or eight coalitions we observe do not differ much, the values of the fluidity index that they would produce could be much smaller than those of the five-member court. In other words, the fact that a five-member court produces its number of coalitions, say seven, under the limitation that it can only form ten coalitions, may hide variation or lack of it compared to a 9-member court that also produces seven coalitions while it can produce 126 or produces 70% of 126 coalitions. Roughly speaking, the index treats 70% of 126 as the comparable expectation of coalitions from the 9-member court, which may run against natural limits on the possible ways to disagree about legal matters of nine jurists that have significantly overlapping backgrounds (but Chapter 5's six dimensions of criminal procedure should allay such concerns).

The fact that the index implicitly scales with court size is not in harmony with median-voter models of judicial voting. Median-voter models would tend to produce similar counts of coalitions regardless of size of the court. For example, consider a one-dimensional model of judicial decisions, perhaps with the single dimension running from conservatism to liberalism governing the resolution of all disputes. In this model, the median justice separates the liberal block from the conservative block. The only disputes that give rise to tightly split decisions are those arising adjacent to the median

26. The time over which to measure the frequency of tightly split decisions is not clear. Because the court does not sit throughout the year and it tends to issue a disproportionate number of decisions on the last days of each term, both a calendar duration (i.e., from date of appointment of the Junior Justice to the date of the successor's appointment or the earlier end of the Junior Justice's term) and a decision span duration (i.e., from the date of the first tightly split decision to the date of the last one; what we use in this table) are imperfect. We use decision span duration because it produces smoother results but report the major differences that a switch to calendar duration would produce, *see* note 46, below.

27. As explained in Appendix 1.A, in equation 1.A.6, the number m of possible coalitions for tightly split decisions in a court with an odd number of judges j is j factorial divided by the product of the factorials of the integers adjacent to half j. Using this formula, a five-member court has a maximum of 10 coalitions; a seven-member court has 35; and a nine-member one has 126.

28. Without accounting for the different number of swing votes in the various coalitions, a nine-member court issuing 126 decisions can do so in almost three and a half million ways. *See* discussion accompanying figure 1.A.2 in the appendix.

justice.[29] If this model drove all judicial decisions, then, regardless of court size, the tight splits would tend to come from only two groups, either from the conservative justices plus the median justice, or from the liberal justices plus the median justice. In other words, with minor caveats a median voter model with few dimensions indicates both a limited number of coalitions and similarity between the coalitions, because each court would have one swing vote per dimension.

The tension between the index and median-voter models of judging is that, whereas the index treats all variation between coalitions the same way, median-voter models of judging determine the absolute number of coalitions in tightly split decisions. For median voter models, the size of the court is irrelevant for the expected number of coalitions. By contrast, for the index, the potential existence of more coalitions in a larger court means that increasing the size of the court without increasing the variability of coalitions produces a smaller value of the index. If, for example, adjudication was driven by a single dimension, then all courts would have two coalitions in tightly split decisions. Or, if adjudication was driven by two dimensions, then courts would tend to have four coalitions in tightly split decisions. Under the assumptions of such a median voter model, larger courts would still only have two or four coalitions and tend to produce smaller values of their fluidity index. This would be most pronounced if judging followed a one-dimensional median voter model. A fuller discussion of the relation of the index to median voter judging is at the end of Appendix 1.A.

The existence of the Supreme Court Database (supremecourtdatabase.org, "Database") allows us to apply this index to measure the fluidity of coalitions in periods when the United States Supreme Court had stable membership and issued a sufficient number of 5–4 decisions. A limiting factor is that the database only reaches back to 1946, delegating earlier decisions to a legacy database. However, for the period after 1946, the database offers the composition of every majority and dissent.

We have constructed a similar database for the Indiana Supreme Court covering the period from Nov. 19, 1999, to Sept. 30, 2010, during which there was no change in the membership of that court.

The logic of the index means that we count decisions rather than disputes. A single decision may give closure to several disputes with different party names.[30] Thus, when several disputes are listed in the database, but they all receive disposition by a single decision, we count that as a single decision.

29. Adjacent, here, means not farther than the next justice to the median or swing justice, next on either the liberal side (i.e., the most conservative of the liberal block) or on the conservative side (i.e., the most liberal of the conservative block). If a dispute arose beyond either, then it would no longer produce a tightly split decision, since it would attract both the vote of median justice and the next one. For example, in a five-member court the pivot points, in a scale from 0 to 1, where each justice changes their vote from liberal to conservative may be .1, .2, .5, .6, .7. Only disputes with characteristics from .2 to .6 produce tightly split decisions. The disputes from .2 to .5 produce a majority of the last three justices. Those from .5 to .6 produce the majority of the first three justices. A five-member court using two coalitions proportionately produces an index of .24 whereas a nine-member court produces an index of .12. A fuller discussion of examples of simple median voter judging is at the end of Appendix 1.A.

30. For example, the court's single decision in Baltimore & Ohio R. Co. v. United States, 386 U.S. 372 (1967), disposed of several identical disputes arising from objections by railroads against the approval of a merger by the Interstate Commerce Commission.

To repeat, we only count 5–4 decisions of the U.S. Supreme Court and 3–2 decisions of the Indiana Supreme Court. We only count 5–4 or 3–2 decisions even if recusals or vacancies may produce a tightly split decision of a smaller size, such as a 4–3 decision by the experience of two vacancies on the United States Supreme Court. The production of the index requires a significant number of decisions and the handful of such smaller tight splits does not allow the index to be meaningfully applied to them.

II. Three Examples

Before offering the history of the fluidity values for the United States Supreme Court, we walk over three calculations of the index.

A. The Rucker Composition of the Indiana Supreme Court

Since this composition of the Indiana Supreme Court reappears, we introduce its justices and offer their pictures from the Court's website. The Rucker Composition was formed when Justice Robert D. Rucker was appointed on November 19, 1999; it terminated on September 30, 2010, upon the departure of Justice Theodore R. Boehm.

Randall T. Shepard was the Chief Justice—indeed, the Chief Justice of Indiana from 1987 until 2012, longer than any person in state history. He graduated from Princeton University and Yale Law School. Returning to his home city of Evansville, in the Southwestern corner of Indiana, he served as the City's deputy mayor and then a trial court judge. His leadership of the state's judicial system emphasized cooperation with the other two branches of government; court reform; and increasing legal education opportunities for individuals from historically underrepresented backgrounds. He achieved significant prominence in the nation's legal community, among other things chairing the Conference of Chief Justices, the American Bar Association (ABA) Section on Legal Education and Admission to the Bar, and the ABA Commission on the Future of Legal Education. He is nationally known as well in historic preservation circles as a trustee for 11 years of the National Trust for Historic Preservation. Shepard's public persona reprises his youthful theatrical experience. He is easily enticed into elegant syncopation performing "Gary, Indiana" from "The Music Man" at national legal events.

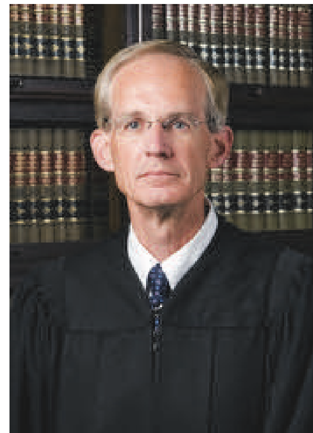
Chief Justice Shepard

Justice Brent E. Dickson joined the Court in 1986 and became its Chief Justice in 2012 following Shepard's departure. From the Gary area, near Chicago, he graduated from Purdue University and the Indiana University Robert H. McKinney School of Law, where both authors of this volume teach. His appointment to the Court followed two decades of a broad private practice in Lafayette, Indiana, and his tenure on the Court reflected that experience in both his jurisprudence and his public outreach to the bench and bar. He was, for example, an outspoken champion of civility as a professional value among lawyers and judges. He led

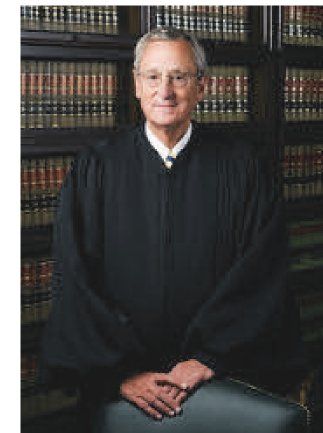
Justice Dickson

efforts on the Court to develop comprehensive rules governing knotty issues regarding public access to court records. And he is known as well for his attention to the particular challenges facing the families of judges, assisting his wife Jan Aikman Dickson in the founding and operation of the national Judicial Family Institute. Dickson had even more experience in front of a crowd than Shepard. He was the pianist for a Dixieland band called the "Salty Dogs" throughout college, during which time he proudly carried a musicians' union card.

Justice Frank Sullivan, Jr., one of the authors of this volume, joined the court in 1993. From the South Bend area, home of the University of Notre Dame, he graduated from Dartmouth College and the Indiana University Maurer School of Law. This was followed by a corporate and securities practice at Barnes & Thornburg, a large Indianapolis law firm. In 1989, he was appointed Indiana State Budget Director by Governor Evan Bayh. While on the Court, he helped lead its ambitious efforts to improve court technology in the state, notably attempting to equip every court in the state with a common case management system. He was active in the ABA, chairing its Appellate Judges Conference and helping lead its Judicial Clerkship Program, an initiative that encouraged law students from historically underrepresented backgrounds to seek judicial clerkships. Known for his long-windedness during both oral argument and court conference, Sullivan was once presented with a gift of an egg-timer by a fellow justice.

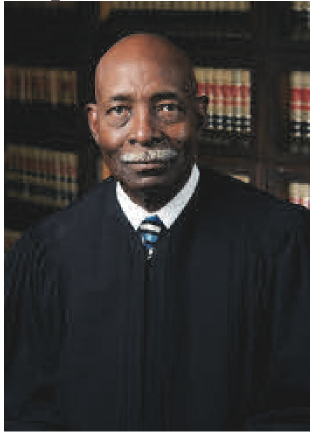

Justice Sullivan

Justice Theodore R. Boehm joined the Court in 1996. His magna cum laude Harvard Law degree, U.S. Supreme Court clerkship, distinguished law practice, and record of civic leadership made him likely the most highly qualified person ever to sit on the Court. From Indianapolis, he attended Brown University, was the leader of Baker & Daniels (now Faegre Drinker Biddle & Reath), another large Indianapolis law firm, and also held major in-house counsel assignments at General Electric and Eli Lilly. Among the originators of the drive to make Indianapolis a major sports destination, he chaired the organizing committee for the 1987 Pan-American Games which brought international attention to Indianapolis and ultimately resulted in the National Collegiate Athletic Association and many other sports organizations selecting the city for their headquarters. He brought national recognition to the Court for leading a project that compiled a remarkably comprehensive and accurate statewide jury pool list. When he retired from the Court, his clerks presented him with a doll-like depiction of himself. Boehm was quick to tell the audi-


Justice Boehm

ence that it was not a bobble-head doll; it was instead an "action figure."

Justice Robert D. Rucker joined the court in 1999. His family was part of the great migration of Blacks from the rural South to the urban North, settling in Gary. He served in the U.S. Army in Vietnam, earning a Purple Heart and Bronze Star for meritorious service. He graduated from Indiana University Northwest and the Valparaiso Law School, following which he worked both as a deputy prosecuting attorney and in private practice. Governor Evan Bayh appointed him to the Indiana Court of Appeals in 1991, that Court's first Black member. At the Supreme Court, he encountered the convention requiring the junior-most justice to vote first on each matter the Court considered. As the longest-serving junior-most justice in state history, this meant that he voted first approximately 11,000 consecutive times! Never once was he unprepared; never once asked for a pass. When he was succeeded as the junior-most justice, he only reluctantly relinquished the responsibility of voting first.



Justice Rucker

Not only did the Rucker Composition constitute the longest uninterrupted period of service by five members of the Supreme Court in state history but each of the individual justices who comprised the Rucker Composition achieved notable longevity. Of the 111 justices in state history, Dickson is the second-longest serving; Shepard the fourth; Sullivan the ninth; Rucker the 13th; and Boehm the 16th. Rucker is the longest-serving judge in state history with active service on both the Supreme Court and Court of Appeals.

As a group, three were appointed by Democratic Governors (Sullivan, Boehm, and Rucker), the other two by Republican Governors. Shepard, Sullivan, and Rucker all earned LLM degrees in a special program for appellate judges at the University of Virginia School of Law.

We close this human-interest diversion with a somewhat amusing anecdote. In January 2003, after the Supreme Court declared a bill passed by the Legislature to be unconstitutional, the Speaker of the Indiana House complained that if the "justices of the Supreme Court don't like a bill, they should run for the Legislature themselves and vote against it." The Speaker did not realize that earlier in their careers, Shepard, Boehm, and Rucker, had each run for the Indiana House of Representatives—and lost!

Returning to the quantitative pursuits, the first example of the fluidity index is derived from a database of decisions of the Indiana Supreme Court.[31] The data covers the period when Justice Rucker was its junior justice, from issuing its first 3–2 decision on Dec. 13, 1999,[32] to its last one on Oct. 5, 2010.[33] The junior justice defines the composition of the court: a new appointment

31. The data was compiled by Dimitri Georgakopoulos from Table D of the annual *Examination of the Indiana Supreme Court Docket, Dispositions, and Voting*, compiled under the direction of Kevin W. Betz (1999-2004) and Mark J. Crandley (2005-2010) and assisted by P. Jason Stephenson and other authors, and published by the Indiana Law Review in vols. 33-44 (2000-2011), respectively.

32. *Allen v. State*, 720 N.E.2d 707 (Ind. 1999).

33. *In. Dep't of State Revenue v. Belterra Resort Indiana, LLC*, 935 N.E.2d 174 (Ind. 2010).

that would change the court's composition would produce a new junior justice. Therefore, we refer to this time period as the "Rucker composition" of the Court, an approach we use throughout this book.[34] Justice Stevens has also deployed this approach in his writing.[35]

The number of 3–2 decisions in this period is 176. As this is a five-member court, we know that the number of possible three-member majority coalitions is ten. The court in this period actually does align in nine coalitions, i.e., 90 percent of the total number of possible coalitions actually form. Each of these nine coalitions produces at least six decisions.

The most frequently forming coalition consists of Shepard, Sullivan, and Boehm in the majority with Dickson and Rucker in dissent. This coalition forms in 41 tightly split decisions or 23 percent of the total.

The second most frequently occurring coalition—which formed in 29 cases (16 percent)—consists of Shepard, Sullivan, and Rucker in the majority with Dickson and Boehm in dissent.

Two other coalitions form in 25 (14 percent) cases each. The first consists of Shepard, Dickson, and Sullivan in the majority with Boehm and Rucker in dissent. The second consists of Shepard, Dickson, and Boehm in the majority with Sullivan and Rucker in dissent.

A fifth coalition consisting of Dickson, Boehm, and Rucker in the majority with Shepard and Sullivan in dissent forms in 18 cases or 10 percent of the total.

Table 1.1: The table of Justice agreement for the 3–2 decisions of the Indiana Supreme Court with Rucker as the junior Justice.

	Sh	D	Su	B	R
Shepard	–	.41	.64	.47	.26
Dickson		–	.23	.41	.45
Sullivan			–	.36	.43
Boehm				–	.35
Rucker					–

This presentation of the judicial coalitions for the Rucker court—in which 90 percent of the possible coalitions form and five coalitions account for 78 percent of the split decisions—suggests a much greater fluidity than the Breyer court, in which only 29 percent of the possible coalitions actually form and three coalitions account for 74 percent (two coalitions for 62 percent) of the tightly split decisions. The index confirms this.

To calculate the index, as the appendix explains, we begin by creating the table of justice agreement. Table 1.1 is the Rucker composition's table of justice agree-

34. The Supreme Court Database uses the term "natural court" to specify compositions of the United States Supreme Court even short of nine members. That is slightly more accurate because when the Court operates with one or more vacancies, the Database assigns new four-digit numerical codes for the new compositions despite that the court is short of its full complement. Since the term natural judge is already a legal term of art, referring to the trial judge who originally hears a dispute, and does not contain a reference to composition, we do not find it particularly apt.

35 Although developed independently, our approach grounded in the same reasoning that Justice John Paul Stevens expresses in his book, FIVE CHIEFS: "Byron White – who served as an active justice for thirty-one years—frequently observed [that] the confirmation of any new justice creates a new Court with significantly different dynamics than its predecessor. One could argue that 2010, when is Elena Kagan joined the Court as its 112th justice, marked the inauguration of the Kagan Court rather than the continuation of the Roberts Court. If so, the Court that Lewis Powell and Bill Rehnquist joined in 1972 would better be termed the Powell-Rehnquist Court than the Burger Court."

ment. Two metrics frame the calculation, the average cell value and the most extreme lack of fluidity. The square root of the averaged differences from that average becomes the numerator and the square root of the averaged squared differences of the most extreme lack of fluidity the denominator. Subtract the fraction from one. The resulting fluidity index is 78 percent.[36] This is a value greater than the fluidity observed in any composition of the United States Supreme Court since 1946.

B. The Powell-Rehnquist Composition

We next consider the decisions issued while Justices Powell and Rehnquist were the Junior Justices.[37] The court at the time consisted of Chief Justice Burger and, in order of seniority, Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist. The first 5–4 decision was issued on Feb. 22, 1972,[38] and the last 5–4 decision before the appointment of the next justice, Justice Stevens, was issued on June 30, 1976.[39] The number of 5–4 decisions in this period is 99. As this is a nine-member court, we know that the number of possible five-member coalitions is 126.[40] Rather than a broad number of coalitions each issuing one or a very small number of decisions, we observe twenty-six coalitions issue decisions, i.e., only 21 percent of the possible number of coalitions. Some coalitions issue only one or two decisions (14 coalitions issue one decision and four coalitions issue two decisions) but many decisions come from a small number of coalitions.

The most prolific coalition produces 32 decisions, 32 percent of all the tightly split decisions.[41] The Court's alignment for these cases consists of Burger, White, Blackmun, Powell, and Rehnquist in the majority and Douglas, Brennan, Stewart, and Marshall in dissent.

The second most prolific coalition, which produces 15 decisions, 15 percent, has Burger, Stewart, Blackmun, Powell, and Rehnquist in the majority, and Douglas, Brennan, White, and Marshall in dissent. Essentially, the difference from the most prolific coalition is that Stewart and White exchange positions, a difference of two swing votes. Thus, this is not a case where a constant 4–4 split exists, and one swing vote changes the minority into a majority.

The third most prolific coalition, one that produces ten decisions, 9 percent, has Justices Douglas, Brennan, Stewart, White, and Marshall in the majority, and Burger, Blackmun, Powell, and Rehnquist in the dissent. This coalition is similar to the second most prolific one, in that the four justices there in the dissent are in the majority here with Stewart joining them as the swing vote.

36. From the table we find that the Rucker composition produces a square root of differences from average agreement of $s = .1198$. Compared to the most extreme lack of fluidity, the $r = .4899$, gives a fluidity index, $f = 1 - s/r$, of $f = .78$.

37. Both Justice Powell and Justice Rehnquist were appointed on July 1, 1972. Therefore, for the purpose of applying the index they are both the most junior members of the court, defining its composition until the appointment of Justice Stevens on Dec. 19, 1975.

38. Boyd v. Dutton, 405 U.S. 1 (1972).

39. Ludwig v. Mass., 427 U.S. 618 (1976).

40. *See* note 27, above.

41. It is important to note that these counts do not drop any decisions due to atypicality of the 5–4 split. Therefore, the counts can be greater than those of Chapter 4, and they occasionally are.

The fourth and fifth most prolific coalitions produce five decisions each. One has Burger, Blackmun, Brennan, White, and Rehnquist in the majority and Douglas, Marshall, Powell, and Stewart in dissent. This is a new coalition; the one similarity with the more prolific ones is that Douglas and Marshall are on the same side. The other has Burger, White, Powell, and Rehnquist.

Table 1.2: The table of justice agreement for the 5–4 decisions of the court with Powell and Rehnquist as the junior justices.

	D.	*Br.*	*St.*	*Wh.*	*Mar.*	*Bur.*	*Bl.*	*P.*	*Rehn.*
Douglas	–	.84	.62	.39	.87	.08	.19	.21	.09
Brennan		–	.56	.46	.88	.11	.24	.15	.08
Stewart			–	.20	.68	.33	.31	.39	.36
White				–	.41	.58	.61	.47	.57
Marshall					–	.05	.17	.19	.06
Burger						–	.83	.80	.95
Blackmun							–	.63	.79
Powell								–	.83
Rehnquist									–

Again, the calculation begins with the table of justice agreement, table 1.2. The justices appear in the order that they were appointed. Squaring the differences of each cell from the average cell value of a = .4444, averaging them and taking the square root produces a value of s = .2804. Compared to the root of the average of squared differences of the most extreme lack of fluidity that a nine-member court can produce, r = .4969, and subtracting from one gives the value of the index of fluidity f = .44 or 44 percent.[42]

Having seen that the period with Powell and Rehnquist as the junior justices produces an index of fluidity of judicial coalitions of 44%, we turn to a different period of the court, when Justice Breyer was the junior justice.

C. The Breyer Composition

Justice Breyer holds the record for the longest service as the junior justice and thus produces the longest term of constant composition in the Supreme Court. The court consisted of Chief Justice Rehnquist and, in order of seniority, Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. The court produced 191 tightly split decisions from Nov. 14, 1994[43] to June 27, 2005,[44] the last tightly split decision before the next appointment, that of Chief Justice Roberts. This produces an ample number of decisions that could have, in theory, occupied the entire spectrum of the 126 possible coalitions. However, the court in this period aligns in 38 coalitions, i.e., 30 percent of the maximum. Moreover, only three produce a number of decisions greater than four.

42. To the reader who is frustrated with the squaring and taking square roots, we should concede that we tried a simpler, linear index. It proved inadequate. The linear index produces a value of 7.19 percent, which is smaller and insufficiently distinguishable from that of the Breyer court, 7.23 percent, showing the inadequacy of the linear index.

43. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

44. McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

The most prolific coalition produces 88 decisions, or 46 percent of the total. The majority is Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. The minority is Stevens, Souter, Ginsburg, and Breyer.

The second most prolific coalition produces 32 decisions, 17 percent of the 5–4 decisions. The majority has Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Justices Rehnquist, Scalia, Kennedy, and Thomas form the minority. This alignment arises from the minority of the first coalition with the addition of O'Connor as the swing vote.

The third most prolific coalition produces 17 decisions, nine percent of the total. The majority consists of Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. The minority is Rehnquist, O'Connor, Scalia, and Thomas. This alignment arises from the minority of the first coalition being joined by Kennedy as the swing vote.

The same four liberal justices, in dissent, or with either Kennedy or O'Connor, produce the top three coalitions. By contrast, the top three coalitions of the Powell-Rehnquist composition have greater differences in their membership, and a notable number of decisions came from a fourth and different alignment of the justices.[45] The index does reflect this difference.

Again, the starting point is the production of the table of justice agreement, table 1.3. Each cell holds the percentage of agreement between the justices that corresponds to the row and column of each cell in the 5–4 decisions that the court issued with Breyer as the Junior Justice.

The index reveals the less fluid nature of the Breyer court. Squaring the differences of each cell from their average value of a = .4444, averaging them and taking the square root produces a value of s = .3279. Comparing to the root of the average of squared differences of the most extreme lack of fluidity that a 9-member court can produce, r = .4969, and subtracting from one gives the index of fluidity of judicial coalitions, $f = 1 - s/r = .34$ or 34 percent.

Table 1.3: The table of Justice agreement for the 5–4 decisions of the Breyer composition.

	R.	*St.*	*O'C*	*Sc.*	*Ken.*	*Sou.*	*Th.*	*Gin.*	*Br.*
Rehnquist	–	.06	.73	.87	.80	.08	.86	.09	.13
Stevens		–	.27	.10	.22	.89	.15	.88	.85
O'Connor			–	.64	.61	.26	.68	.24	.31
Scalia				–	.75	.14	.90	.14	.09
Kennedy					–	.20	.75	.19	.23
Souter						–	.14	.89	.85
Thomas							–	.11	.07
Ginsburg								–	.86
Breyer									–

The fluidity of the Breyer composition at 34 percent is meaningfully lower than that of the Powell-Rehnquist

45. This suggests that the Breyer composition's fluidity should be smaller than that of the Powell-Rehnquist composition. However, our initial linear index did not differentiate the two courts, see note 25, p. 36. The Breyer court's linear index of judicial coalition fluidity (7.23 percent) is virtually identical to, and even greater than, the one that the Powell-Rehnquist court produces (7.19 percent). This seems contrary to the desirable function of the index, because the Breyer composition had less fluid coalitions.

composition at 44 percent. We consider this behavior of the index accurate.

III. SUPREME COURT COALITION FLUIDITY 1946-2014

From these three examples showing how the index is calculated, we move to a presentation showing the fluidity of 5–4 coalitions of the United States Supreme Court from 1946 to 2014, the period covered by the Supreme Court Database, and 3–2 coalitions of the Indiana Supreme Court from 1999 to 2010. Table 1.4 shows the results for compositions producing over 30 decisions and figure 1.1 illustrates them.

The first column of table 1.4 holds the name of the junior justice. The second column holds the date of the first tightly split decision, in the format of month/day/year. The third column holds the date of the last decision. The fourth column presents the fluidity index value. The next column, titled N, gives the number of tightly split decisions in the period. The final column gives the number of tightly split decisions per month.[46] Thus, the first line of the table conveys that the Vinson composition issued its first 5–4 decision on November 18, 1946 and its last on June 27, 1949, its fluidity index is about 47%, and it issued 83 decisions with a 5–4 vote, at a rate of 2.6 tightly split decisions per month.

We also present periods with between 30 and 50 decisions, despite the fact that we have come to consider 50 decisions the more appropriate minimum number of decisions for a meaningful index.[47] Among the compositions that have fewer than 30 tightly split decisions are the recent ones, those of Gorsuch, Kavanaugh, and Barrett. The database does not include the Jackson composition as of this writing.

Figure 1.1 illustrates the data reported in table 1.4. The horizontal axis holds dates from early 1946 to mid-2014, the end of this calculation. Each horizontal line corresponds to one composition of the court. Each line begins at the date of the first tightly split decision issued with that composition and ends at the date of its last tightly split decision. The vertical axis measures the fluidity index. Accordingly, lines that appear higher correspond to periods of greater fluidity of coalitions, to periods when justices aligned in more different ways when issuing tightly split decisions. Lower lines correspond to periods when justices' coalitions were less fluid, to the utilization of fewer coalitions when issuing tightly split decisions. The thickness of the lines corresponds to the number of tightly split decisions issued by that composition of the court per month. Above each

46. Recall that we use the span of the time from first to last decision rather than the duration from appointment to replacement. Switching duration would reduce the frequency of tightly split decisions by the Blackmun and Scalia courts to 1.6 and 2.5 but dramatically increase that of Goldberg to 7.4. *See also* note 26, above.

47. A significant number of decisions are necessary for the court to have the opportunity of recognizing a value of the index within a range with reasonable variation. Calculating the index based on a single decision would always produce an index of zero. While 126 decisions from the 126 possible different coalitions possible in a nine-member court would be necessary to reach an index of 1, we feel that the cutoff of 50 may be reasonable given the absence of a tendency to approach large index values that we see even in the large samples, such as the Powell composition and, especially, the Breyer one. We consider the fluidity values of several of the compositions with between 30 and 50 decisions not sufficiently representative, especially considering the difference of those of Minton and Thomas from their neighbors. Fifty decisions are sufficient for a nine-member court, for example, to produce a fluidity index of 83%, which is much higher than any composition produces.

line we signal the surname of the junior justice of that period. The figure also includes the Rucker composition for comparison as a grey line. The discontinuities are due to us not reporting the index for periods with fewer than 50 decisions.[48]

Table 1.4: U.S. Supreme Court fluidity, 1946-2014, and Indiana Supreme Court fluidity, 1999-2010.

Jr. Justice	*1st Decision*	*Last*	*Fluidity*	*N*	*N/mo*
Vinson	11/18/1946	6/27/1949	47%	81	2.6
Minton	6/5/1950	5/25/1953	77%	34	0.9
Whittaker	4/8/1957	6/30/1958	30%	39	2.6
Stewart	2/24/1959	2/19/1962	31%	81	2.2
Goldberg	11/5/1962	6/7/1965	47%	41	1.3
Fortas	12/6/1965	6/12/1967	47%	41	2.2
Powell-Rq	2/22/1972	6/30/1976	43%	99	2.4
Stevens	4/26/1976	6/26/1981	57%	129	2.0
O'Connor	12/1/1981	7/7/1986	47%	147	2.6
Scalia	11/17/1986	6/26/1987	37%	44	6.0
Kennedy	4/25/1988	6/27/1990	31%	87	3.3
Thomas	4/6/1992	6/28/1993	62%	33	2.2
Breyer	11/14/1994	6/27/2005	35%	191	1.5
Alito	5/30/2006	6/29/2009	30%	69	1.8
Kagan	3/29/2011	6/29/2014	33%	80	1.5
Rucker	12/13/1999	10/5/2010	78%	176	1.4

Both the height and the thickness of the lines are significant. Compare the 5-year period of the Stevens composition to that of O'Connor. The Stevens composition produces relatively greater fluidity (illustrated by a higher line) and fewer tightly split decisions (a thinner line), than the O'Connor composition. Contrast the compositions defined by Stewart, Kennedy, Breyer, Alito, and Kagan, which produce lower fluidity.

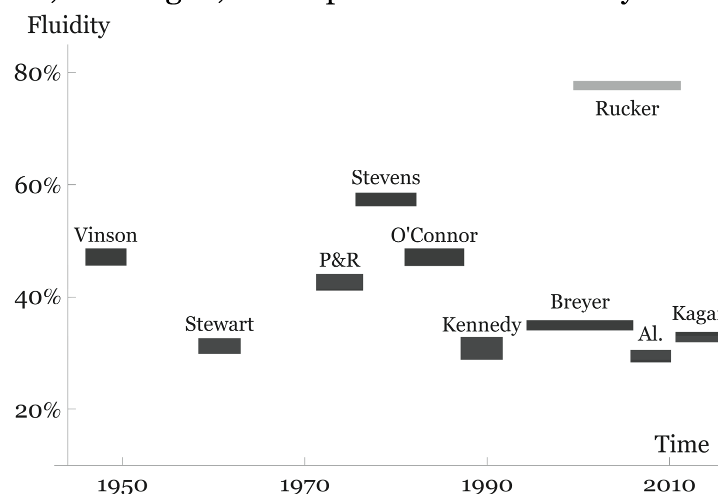


Figure 1.1: U.S. Supreme Court fluidity, 1946-2014, and Rucker composition fluidity (light gray).

48. The resulting gaps correspond to Clark, the junior justice after Vinson, with no tightly split decisions; to Minton, the immediately next composition, with 34 tightly split decisions; to Warren, Harlan, and Brennan, the Junior Justices before Whittaker, with 9, 18, and 6 decisions; to White, the one before Goldberg, with zero; to Marshall and Burger, the ones before Blackmun, with 12 and 4; to Souter, Thomas, and Ginsburg, the ones before Breyer, with 22, 32, and 13; to Roberts, the one before Alito, with 2; to Sotomayor, the one before Kagan, with 17. After Kagan come the Gorsuch, Kavanaugh, and Barrett compositions with 21, 29, and 18 five–four decisions, respectively.

IV. POLARIZATION AND THE APPOINTMENTS PROCESS

These data reveal two phenomena. First, the United States Supreme Court seems to switch to higher fluidity values from the mid-1960s to the mid-1980s. Some of the forces that contributed to it may be discernible. Chapter 8 indicates a consistent phenomenon, the unusual capacity of Brennan and Marshall, as a team, to form coalitions. Their departures in 1990 and 1991 along with other changes in the Court's composition and the surrounding environment may have contributed to the decline of fluidity.

Second, the United States Supreme Court exhibits fluidity far smaller than that exhibited by the Indiana Supreme Court. Additional research may point to more differences, but we hypothesize that the differences in judicial selection methods, political expectations, and public scrutiny help explain the dramatic variation between the index for the United States and the Indiana Supreme Court.

Consider first the method of selection of justices of the United States Supreme Court: nominated by the President but subject to Senate confirmation. Since at least the Nixon-Humphrey campaign of 1968, Republican and Democratic candidates for President have promised the appointment of Supreme Court justices whose views accord with theirs.[49] While Presidents have not always been successful in this regard—either because of the failure to secure Senate confirmation or because of post-appointment surprises from the justices themselves—history shows some success in this regard.[50] Presidents nominate justices whom they believe will tend to cast conservative/Republican or liberal/Democratic votes; to a significant degree, those justices do; and so the coalitions coalesce around the conservative and liberal positions; and are not very fluid. As an exception that demonstrates the point, consider the widespread expressions of astonishment that followed Chief Justice Roberts's vote to sustain the constitutionality of Obamacare.[51]

We offer this description as contrast to the way in which Indiana Supreme Court justices are appointed, not as a comprehensive explanation for the voting behavior of United States Supreme Court justices—although later chapters will go deeper. Justices of the Indiana Supreme Court are appointed by the state's governor but the governor's hand is constrained by having to pick from a list of three nominees presented by the Indiana Judicial Nominating Commission, a constitutional body consisting of three lawyers elected by the lawyers of the state, three non-lawyers appointed by the governor, and the incumbent chief justice, who

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49. Bob Woodward & Scott Armstrong, THE BRETHREN 10 (1979); Stanley I. Kutler, *Richard Nixon,* in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 687 (2d ed. 2005); Gary L. McDowell, *Ronald Reagan*, OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 825-826 (2d ed. 2005).

50. See, e.g., Jeffrey A. Segal, Richard J. Timpone, & Robert M. Howard, *Buyer Beware? Presidential Success through Supreme Court Appointments*, 53 POL. RES. Q. 557 (Sep. 2000) ("Presidents appear to be reasonably successful in their appointments in the short run, but justices on average appear to deviate over time . . .").

51. See, e.g., Rush Limbaugh, *Callers Frustrated with Mitch McConnell, Republicans, Tax v. Penalty Distraction, and John Roberts Selling Us Out*, THE RUSH LIMBAUGH SHOW, July 3, 2009, http:// www.rushlimbaugh.com/daily/2012/07/03/callers_frustrated_with_mitch_mcconnell_republicans_tax_v_penalty_distraction_and_john_roberts_selling_us_out [perma.cc/GV3Q-VNC2].

serves as the Commission's chair.[52] Perhaps because of this selection process, perhaps also for other reasons, Indiana has no tradition of governors campaigning for office on promises to appoint justices of a particular kind.

Indiana has had this selection process since the 1970s; 14 justices have been appointed under it. The governor does not have the freedom to select an appointee from outside the three nominees, whose views may accord better with the governor's. And our observation is that because of this, governors have focused on factors other than likely voting behavior in making their decisions. While we acknowledge that no governor has ever appointed a justice not of his own political party, we also observe that the Indiana Constitution mandates that the appointment be made "without regard to political affiliation."[53] The intermediation of the Nominating Commission appears to have severed justices' pre-appointment partisanship from an expectation that the justices' voting behavior would be in accord with the appointing Governors' expectations.[54]

As a consequence of the difference in selection process, we believe that a justice of the Indiana Supreme Court is much less likely than a justice of the United States Supreme Court to bring to the Court predictable, ideological or partisan voting behavior. Because of this, Indiana justices are much less likely to find themselves regularly aligned with any other particular members of the court. This produces much more fluid coalitions in tightly split decisions—and a much higher index of fluidity.

The index of fluidity confirms that studying tightly split decisions is fruitful. The first next step is to try to organize tight splits visually.

52. Ind. Const. Art. 7, § 9 and I.C. § 33-27-2 et seq. Once appointed, justices must stand for periodic retention votes, but no material opposition has ever been mounted.

53. Ind. Const. Art. 7, § 10.

54. The issue of Delaware's different means for limiting political polarization on its courts was reviewed by the United States Supreme Court but dismissed for lack of standing. Carney v. Adams, 592 U.S. _ (2020) (about the propriety under the First Amendment of Delaware's rule that the Governor may only appoint up to a bare majority of judges from the Governor's party and the rest from the main other party).

2. Placing Coalitions and Showing Swing Votes

A 5–4 decision from the United States Supreme Court opens the door to commenting, editorializing, scholarship, and even national soul searching. Which justice is the swing vote? How stable is this majority coalition? Which justices might swing away from it if the issue were slightly different? The scale of Themis, the ancient Greek goddess of justice, is as close to equipoise as possible, revealing a host of uncertainties and risks, bringing to the forefront numerous questions that are much more distant when more than a single vote determines the outcome.

What we have learned in Chapter 1 only heightens the intrigue because we now know that, at least on courts with high indices of fluidity, multiple coalitions produce those tightly split decisions. How many different coalitions are there? How evenly are the tightly split decisions distributed among them?

Can the answer to these questions be visualized, displaying the swing votes and the ways that tight coalitions form on a supreme court, thereby displaying their fluidity?

Beyond that, wouldn't it be interesting to juxtapose the corresponding arrangement of the justices in one subject matter, such as tort, to a different one, such as criminal procedure?

This chapter lays the foundation for illustrating swing votes and tight coalitions by arranging in a circle all possible majorities in tightly split decisions.

The next chapter builds on this foundation by graphically illustrating (a) the majority coalitions that issue tightly split decisions; (b) the swing votes between the different majorities; and (c) the decisions those majorities issue, divided in conservative and liberal.

The five-member Indiana Supreme Court as it was constituted between 1999 and 2010 provides the initial example of our approach. During this entire time, the Court's junior justice was Justice Robert D. Rucker.[1] As

1. The other members of the court were Chief Justice Randall T. Shepard and Justices Brent E. Dickson, Frank Sullivan, Jr. (the co-author), and Theodore R. Boehm, introduced in pp. 39–41. The junior justice defines a time period during which the composition of the court is unchanged. Upon the next appointment, a new junior justice defines the court's next composition.

the court's membership did not change during that nearly eleven-year period, there were a substantial number—176—tightly split decisions.[2] Our graphs illustrate many different swing votes, varied coalitions, and differentiation by decision subject matter.

Our approach differs from other attempts to illustrate the voting behavior of supreme court justices in tightly split decisions. One such approach arrays the members of a court in a parliament-like semicircle. The placement of the majorities in a circle is more instructive because a parliament-like semicircle suggests extremes that have no support in the data. A second such approach, the "median voter theorem," posits that a "median" justice's vote resolves close cases.[3] However, the visually different alignments of a supreme court's justices in different legal subject matters (*i.e.*, topics or areas of law) is markedly unlike what would appear if the median voter theorem applied.

We are not aware of any prior attempt to visualize voluminous supreme court data besides illustrations of the ideological position of justices.[4] By contrast, many have identified swing votes with even scientific rigor and many have tried to identify differential attitudes of the United States Supreme Court by legal subject matter.[5]

I. FINDING THE EXTREMES

Visualizing swing votes requires locating the output of the majorities connected by that swing vote. For

We apply our analysis only to decisions of courts at full strength. Any departures or recusals preclude further tightly split decisions (5–4 in the case of the United States Supreme Court and 3–2 in Indiana's) and therefore do not influence the analysis.

2. We offer tables of the decisions, their summaries, political slants, and subject matters in the companion electronic volume FIVE FOUR: TABLES, which we place online at nicholasgeorgakopoulos.org, the scholarship page, at this book's paragraph and at perma.cc/W6GA-T75A.

3. The median voter theorem arranges the voters, here the justices, along a single dimension, political left to right, and posits that the median voter, the voter at the center, will determine the outcome. The median voter theorem will appear repeatedly and will be rejected repeatedly throughout this volume, especially in Chapter 4, notes 20–21 (presenting the theorem and discussing its fit with each long-lived composition of the United States Supreme Court).

4. The three illustrations of ideological positions of justices that stand out are from Georgakopoulos & Fisher, Martin & Quinn, and Bailey, with additional such graphics in other publications by Bailey. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10(2) POL. ANAL. 134 (doi:10.10-93/pan/10.2.134; 2002); Michael A. Bailey, *Measuring Court Preferences, 1950–2011: Agendas, Polarity and Heterogeneity* (working paper, August 2012); Nicholas L. Georgakopoulos & Mark E. Fisher, *Exploring the Monte Carlo Analysis of Supreme Court Voting* (2022) available at https://ssrn.-com/abstract=4286744. *See also Ideological Leanings of U.S. Supreme Court Justices*, WIKIPEDIA (visited Sept. 28, 2017) [perma.cc/7LCZ-K6HM].

5. Out of a vast expanse of literature, some milestones may be Andrew D. Martin, Kevin M. Quinn, and Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C.L. Rev. 1275 (2005) (studying the voting of Justice O'Connor as the median justice) and Mark Klock, *Cooperation and Division: An Empirical Analysis of Voting Similarities and Differences During the Stable Rehnquist Court Era–1994 to 2005*, 22 Cornell J.L. & Pub. Pol'y 537 (2013) (studying details of what we term the Breyer court). Others study the voting of justices on specific subject matters, for example, Lewis M. Wasserman and James C. Hardy, *U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting in Establishment Clause Disputes Involving Public Education: 1947-2012*, 2 Brit. J. Am. Legal Stud. 111 (2013) (studying the votes about the establishment clause in school finance cases). Others have studied the effect of unexpected features of the system, such as the bias of the Republican Party toward appointing younger justices, Jonathan N. Katz and Matthew L. Spitzer, *What's Age Got to Do with It? Supreme Court Appointees and the Long Run Location of the Supreme Court Median Justice*, 46 Ariz. St. L.J. 41 (2014) (with a detailed discussion of the median justice theory and variations of it; supporting 18-year staggered terms for justices). One research method examines all coalitions to identify the median justice, Paul H. Edelman and Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. Cal. L. Rev. 63 (1996). Our approach stands in contrast to attempts to identify a single justice as the swing vote because (a) we reveal all the swing votes; and (b) several swing votes are visibly material.

example, consider two tight majorities of the Indiana Supreme Court, that of Boehm-Rucker-Sullivan and that of Shepard-Boehm-Dickson. The swing vote connecting them is that of Boehm. To display Boehm's swing vote, we must place the two majorities that it connects. A swing vote may be motivated by a myriad of considerations. Deducing these is part of what makes the examination of swing votes interesting. We cannot impose a structure a priori; that structure must arise from the data if it exists. Nevertheless, a standard is necessary to guide the placement of the majorities. Given the ubiquity in thinking about court decisions in terms of the dominant political division between right and left ("political slant" in our parlance), we start with that as our gauge. Rather than obscuring other motivations of swing votes, we find that using this gauge to arrange the majorities reveals additional motivations for swing votes. Political slant is also convenient because positions on nearly all issues can be arrayed left to right. Motivations unrelated to political concerns surely exist but we do not think that locating the majorities by political slant obscures them. For example, although textualism has recently been associated with the right, left-wing textualists exist, such as Professor Akhil Amar. Thus, justices who are textualists and lean left may ally themselves due to textualism with textualists who lean right. We will observe such instances of coalitions formed for unrelated reasons, particularly when the decisions of coalitions are organized by subject matter.[6]

That we use political slant to arrange the majorities does not mean that we consider a court like a legislature, with the far right seen as the polar opposite of the far left. Rather, the circular arrangement enables coalitions motivated by similar reasons formed by justices of differing political ideology to appear.

A well-known criminal law decision of the United States Supreme Court provides an example. In *Apprendi v. New Jersey* (a case recognizing a right to a jury determination of any fact that increases a penalty above the statutory maximum),[7] the five-justice majority consisted of liberals Stevens, Souter, and Ginsburg and conservatives Scalia and Thomas. Placing the *Apprendi* coalition in a circle makes sense; placing it in a parliamentary semicircle is problematic. The circular placement of the coalitions preserves the principle that swing votes connect opposing views on different grounds. We try to make swing votes appear as close to diameters of the circle as possible, whereas in a parliamentary arrangement of the majorities, although some swing votes would connect opposing ends of the spectrum, others

6. An Indiana example may be found in attitudes toward appellate review of criminal sentences. Unlike some members of the court who considered appellate review of sentences to impinge upon the prerogative of the court of first instance, e.g., Frye v. State, 837 N.E.2d 1012, 1015 (Ind. 2005) (Dickson, J., dissenting), and Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995) (Dickson, J., dissenting), Shepard (appointed by a Republican Governor) and Sullivan (appointed by a Democratic Governor) were both open to such requests for review but each articulated a different justification for being so. Shepard was of the view that too high a barrier to appellate review of sentences runs "the risk of impinging on another constitutional right contained in Article 7, that the Supreme Court's rules shall 'provide in all cases an absolute right to one appeal.'" Serino v. State, 798 N.E.2d 852, 856 (Ind. 2003) (quoting Ind. Const. art. I, § 18). Sullivan looked to the fact that the same constitutional amendment that authorized appellate judges to review and revise sentences was the constitutional amendment that insulated appellate judges from partisan elections and concluded that the review and revise authority is intended, at least in part, to temper decisions of trial judges whose decisions are sometimes reviewed at the ballot box.

7. 530 U.S. 466 (2000).

would connect apparently centrist factions. This would obscure differences in the latter cases.[8]

Political slant illuminates the graphs and the analysis. The assignment of a political slant to any particular decision may be debatable, inconclusive, and, for borderline cases, fundamentally subjective. We readily grant this caveat. Individuals will differ in their assignment of slant to particular decisions. Nevertheless, in the large numbers of decisions that the graphs aggregate, this concern diminishes.[9] Particular disagreements over specific cases will tend to cancel out and the graphs' assigned slants will differ little.

II. THE DATA

The Indiana data begin as the 174 decisions identified as 3–2, tightly split, decisions.[10] These are the tightly split decisions issued by the unchanged composition of the Indiana Supreme Court from 1999 to 2010, the composition defined by the junior justice being Rucker. The difficulty of generalizing from this data becomes clearer if we juxtapose those 174 decisions to the 191 tightly split decisions of the Breyer composition of the United States Supreme Court (November, 1994, to June, 2005). Of those 191 decisions, 72% (136 decisions) come from three majority coalitions that are separated by two swing votes, Kennedy and O'Connor. The minority coalition in 87 decisions of that total has Justices Breyer, Ginsburg, Souter, and Stevens. The other two groups have these justices in the majority, joined by either O'Connor in 32 decisions or Kennedy in 17 decisions.[11]

The decisions of the Indiana court do not allow such an easy identification of its swing votes. These tightly split decisions come from nine majorities (out of the possible ten for a five-member court),[12] each in significant proportions.

III. ARRANGING THE MAJORITIES

We arrange the majorities in a circle in such a way as to observe the opposition of majorities separated by a single swing vote. Guided by political slant, we produce the figure for the Indiana court essentially deterministically. Having coded the decisions as liberal or conservative ourselves by comparing the position of the majority with that of the dissent, we identified the two most

8. A vivid example of this is in the separation of sentencing from tort decisions of the Indiana court. If we had used a semicircular parliamentary figure, then one of the two would appear to be more a dispute between extremes than the other. This is obviously false. Rather, the court separated itself about tort issues in a different way than it separated itself about sentencing issues. Neither contrast is greater than the other. Rather, they are different but important contrasts that the circular arrangement preserves, whereas a parliamentary arrangement would subordinate one.

9. Indeed, in relation to Chapter 6 we conduct an audit, which shows that, despite disagreeing with the Supreme Court Database in about 5% out of 800 decisions, the totals of liberal and conservative decisions differ by only one. *See* Appendix 6.A, p. 210.

10. A listing of the Indiana tightly split decisions, a one-sentence summary, their subject matter and political slant appear in the appendix that corresponds to this chapter in the electronic companion volume, FIVE–FOUR: VOLUME OF TABLES, p. 277, available at NicholasGeorgakopoulos.org, the scholarship page, under this book's paragraph and at perma.cc/W6GA-T75A.

11. See The Breyer Composition (1994–2005), p. 77 below.

12. As explained in Chapter 1, a court with an odd number of justices j can produce tightly split coalitions in a number equal to the factorial of the number of justices divided by the product of the factorials of the integer numbers adjacent to half the court's justices: $j!/[([j+1]/2)!([j-1]/2)!]$. For the nine-member Unites States Supreme Court, the result is that it can divide in 126 ways.

contrary majorities, defined as the one that issued the highest percentage of conservative decisions and one that issued the highest percentage of liberal decisions. We place the most conservative coalition on the farthest right of the circle, at the three-o'clock position, and the most liberal coalition of the farthest left, at the nine-o'clock position. We place the next most liberal above the previously placed one, and then below it, while preserving opposition in swing votes. *Vice versa*, the next most conservative coalition we place below the most conservative one. Chapter 5, which only deals with decisions about criminal procedure, introduces the same graphic from a simpler perspective, albeit a more specific one.

One majority issues 100% conservative decisions and one 100% liberal decisions. Since these are tightly split decisions, the most liberal majority and the most conservative one must share a justice. The majority that produces only conservative decisions is Shepard, Boehm, and Dickson; Rucker with Sullivan form the dissent. The most liberal majority is Boehm, Rucker, and Sullivan; Shepard with Dickson form the dissent. The swing vote is Boehm.

Because the ideological opposition of these two coalitions is the sharpest, we consider their opposition the most salient. Accordingly, we begin the arrangement of the majorities by placing those two on opposite sides and connect them with a line marked Boehm as the swing vote that links them. We place the conservative Shepard–Boehm–Dickson majority at the (rightmost) three-o'clock position and the liberal Boehm–Rucker–Sullivan majority across it, at the nine-o'clock position. Since the possible majorities are ten, each side of the circle has five positions, two above and two below each one of these two majorities, as in figure 2.1.

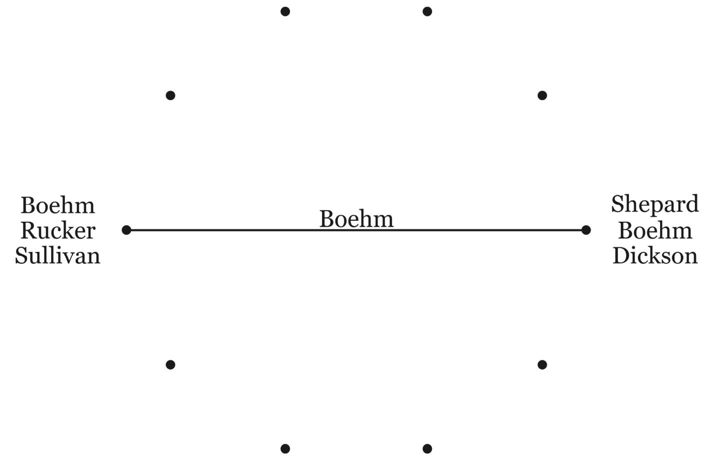

Figure 2.1. Placing the two most ideologically opposed majorities in the circle of all ten possible majorities.

As each majority has three justices, each of these two most ideologically opposed majorities that are separated by the swing vote of Boehm has two other potential swing votes. Because the objective is to illustrate the opposition between majorities that are separated by a swing vote, the majorities that result from those swing votes should also be across the circle. For example, from the majority Shepard–Boehm–Dickson, the other swing votes are Shepard and Dickson, forming the majorities Shepard–Rucker–Sullivan and Dickson–Rucker–Sullivan. We place the majority that issued the greater proportion of liberal decisions in the position above the already placed oppositional majority and the other one below it. Again, a connecting line identifies each swing vote. The result is figure 2.2.

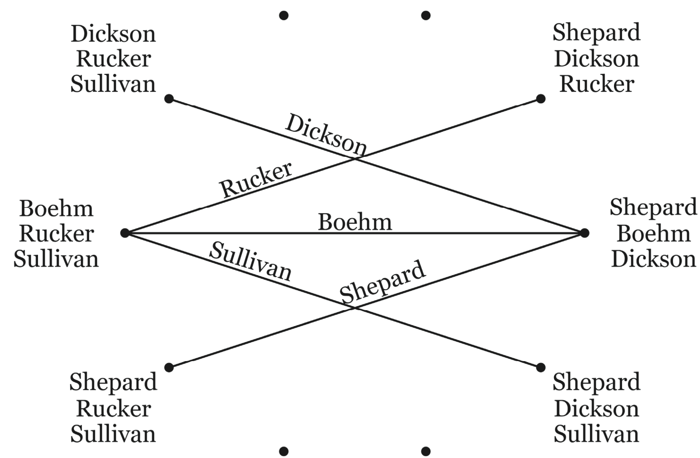

Figure 2.2. Placing the next four opposing majorities.

Four positions (points) remain without an assigned majority in figure 2.2. Three majorities that have issued decisions remain unplaced; one potential majority never formed to issue any decisions. Since we broke the tie placing the more liberal majorities above the first two, we also place the next most liberal majority, Boehm–Dickson–Rucker, upwards, at the eleven-o'clock position, the first position on the left half of the circle above those already occupied. Two of its swing votes are already placed, the swing of Dickson to Shepard–Dickson–Sullivan at the four-o'clock position, and that of Rucker to Shepard–Rucker–Sullivan at the eight-o'clock position. The remaining swing vote is Boehm and the resulting majority, Shepard–Boehm–Sullivan, still unplaced, goes to the lower end of the circle to stress opposition. A single majority that has issued decisions remains unplaced, Shepard–Boehm–Rucker. Its placement seems to be more natural at the one-o'clock position, where it shares two justices with both its neighbors. This leaves the five-o'clock position for the majority that issued no decisions, Boehm–Dickson–Sullivan, where it too shares two justices with each of its neighbors, promoting the concept that change along the perimeter of the circle is gradual. Figure 2.3 shows the result.

Interestingly, the resulting star-like diagram has symmetry. Flipping the diagram along its horizontal centrally dividing line, the line that corresponds to Boehm as the main swing vote, produces the same shape.

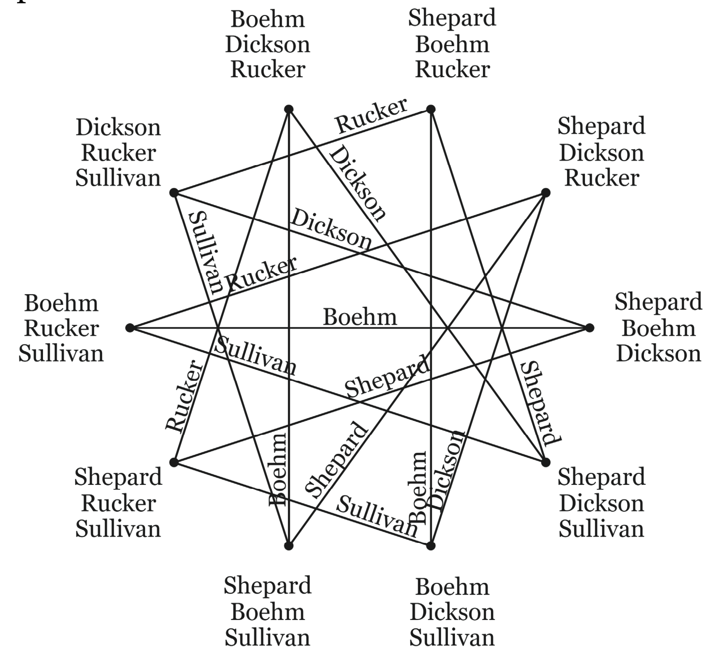

Figure 2.3. All majorities and swing votes.

The purpose of arranging the majorities is to be able to visualize the decisions. The next chapter adds the decisions and extends this construct.

3. Illustrating the Decisions

In Chapter 2, we laid the foundation for a graph to display the swing votes and the ways that tight coalitions form on a supreme court. Using the five-member Indiana Supreme Court as it was constituted from 1999 to 2010 as our example, we arranged the ten possible majorities in opposition around a circle. Each one of the ten points that corresponds to each majority is the point at which its decisions should appear. In this Chapter, we will show how the graph illustrates tightly split decisions of that Court.

I. Placing the Decisions

Figure 3.1 illustrates the 150 tightly split Indiana Supreme Court decisions that remain in the sample after we drop several that we do not consider orthodox tightly split decisions.[1]

We illustrate each decision of each majority as a small arc within the larger arc that each respective majority occupies around the circumference. As the majority that issues the greatest number of decisions issues 35 decisions, the larger arc of the circle that corresponds to that majority divided by 35 produces 35 smaller arcs, each of which corresponds to a decision.

The liberal decisions are 50, exactly one-third of the 150. We illustrate conservative decisions as red and liberal decisions as blue, separated by black lines on the outside of the circle.[2] For example, the Shepard–Dickson–Rucker majority that appears at the two-o'clock position issued two liberal decisions and seven conservative ones. Since the liberal side of the circle is toward the left (the nine-o'clock position), we gather each majority's liberal decisions on the left side.

1. Most of the dropped decisions involve concurrences rather than dissents. Some, however, we consider atypical because the two dissenting justices take positions ideologically opposite from each other, making the majority position the centrist one. A typical example is In re Fieger, 887 N.E.2d 87 (Ind. 2008) (*per curiam*). The decision is about professional responsibility and imposes a temporary ban from temporary admission to the Indiana Bar on a lawyer from a different jurisdiction. One dissent would permanently ban the offending lawyer whereas the other would exonerate him.

2. By using red for conservative and blue for liberal we follow the practice of the Republican and Democratic parties in the United States, which is the opposite to much of the world, with the UK, *e.g.*, having Labour use red and the Conservatives use blue. We lighten both the red and blue hues for readability.

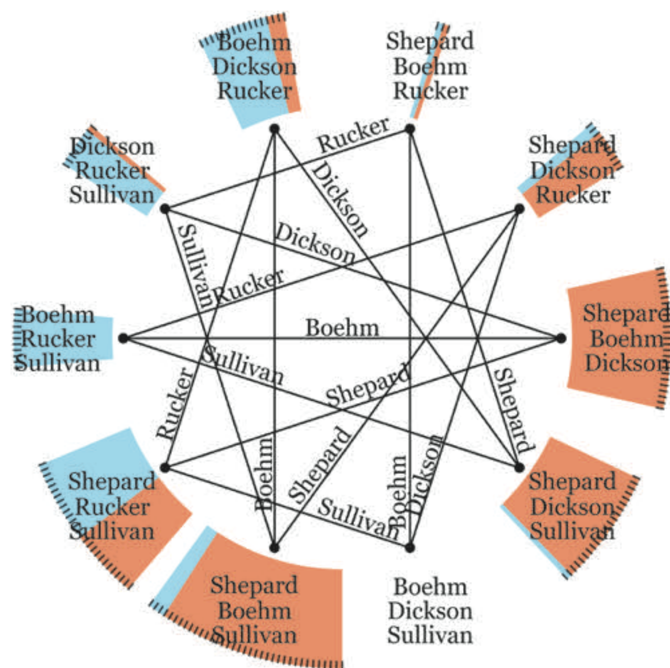

Figure 3.1. The swing votes and the 150 decisions, conservative (red) and liberal (blue), placed at their majorities.

By virtue of placing the next most liberal majority above the most liberal one and the next most conservative below the most conservative one, the figure has a slight clockwise bias compared to an ideal where the majorities adjacent to the extremes are equally less extreme or to other arrangements.[3] This arrangement proves to be quite accurate a sorting of the majorities from conservative to liberal. Generally, moving from the conservative three-o'clock position toward the liberal nine-o'clock position, either counterclockwise or clockwise, increases the proportion of liberal decisions.

This sorting of the majorities draws on the fact that each majority shares two justices with each of its neighbors. Thus, judicial outlook should tend to change gradually. This is an important advantage of the circular representation of the majorities that is lost in other arrangements, such as a parliamentary layout in a semicircle.[4]

One thing that is apparent in figure 3.1 is that multiple coalitions—all but one—produce decisions and, indeed, most majorities produce numerous decisions. A corollary to this fact is that no swing vote tends to predominate. This is in contrast to the dominant swing vote of Kennedy in compositions of the United States Supreme Court from the time of the retirement of O'Connor in 2006 to that of Kennedy in 2018. This is, of course, entirely consistent with what we saw in Chapter 1 and its discussion of fluidity.

II. USING CENTERS OF GRAVITY

Looking at figure 3.1 suggests that the tension between the majorities that issue liberal decisions and those that issue conservative ones is diagonal. Roughly speaking, liberal decisions seem to come from the upper

3. An alternative approach would be to place the next most extreme majority above the most extreme one on both sides of the circle. This design would not produce the bias, but it would erode the oppositional nature of the graph. By contrast, the method that we use preserves opposition by having the next most extreme majorities on opposite sides of the circle (rather than at the two o'clock and ten-o'clock positions that would result from placing them above the extremes). Opposition is key to observing the dimensions of the legal system, *see, e.g.,* Chapter 5, where we observe six dimensions of criminal procedure.

4. As a mathematical matter, a five-member court appears to be the largest that can retain this feature, i.e., the largest that the gradual changes of its majorities can appear in a (two-dimensional) circle.

left and conservative decisions from the lower right. In this section we produce a line that illustrates this tension and use this, the line that connects centers of gravity, to contrast how the tension materializes in different legal subject matters.

Consider the difference between a court like this composition of the Indiana Supreme Court where both liberal and conservative decisions are issued by multiple majorities, and a court with a single dominant swing vote. We can visualize this difference by weighing the centers of gravity of liberal and conservative decisions. If all the liberal decisions came from one majority, for example, the majority at nine o'clock, then the center of gravity of the liberal decisions is at that nine o'clock point. As the majorities that are sources of liberal decisions spread around the circle, the weights of the decisions at those corresponding points join the calculation of the center of gravity and move it toward the center of the circle.

A. All Decisions

The centers of gravity of the liberal and the conservative decisions are quite far from any specific majorities. Figure 3.2 illustrates the liberal and conservative centers of gravity of all tightly split decisions. The heavy blue line connects the liberal (left end point) and conservative (right end point) centers of gravity. Whereas in a court with a single dominant swing vote, that line would track the line that corresponds to that swing vote, in this court the line is much closer to connecting points that are about in the middle of each semicircle. Also, the relatively frequent formation of the conservative majorities at seven and eight o'clock, Shepard–Boehm–Sullivan and Shepard–Rucker–Sullivan, pull the right end point in that direction rather than the line appearing at the center of the graph.

We do not propose a theory about where the ideal line that connects the centers of gravity of a court should be; this depends on one's views about how gradually the change from conservative to liberal decisions coming from each majority should occur and the ideal composition of the extremes at nine and three o'clock, which perhaps ideally should not produce decisions of only one political slant.

Suppose that liberal and conservative decisions were produced by all majorities, even those at three and nine o'clock, and their mix merely changed as we moved from left to right and did so gradually. Then the line connecting the centers of gravity should be fairly short, in the center of the graph, and almost horizontal. Figure 3.6 is such an example, having a very short line connecting the centers of gravity.

If the mix of decisions at the extreme opposites, at nine and three o'clock, were of only opposing slants but the intermediate majorities produced gradually changing mixes of liberal and conservative decisions, then the ends of the line should be at about the center of each semicircle. The two small points on the central line of the figure, the line of Boehm as the central swing vote, illustrate the ends of such a line.[5]

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5. The assumptions that produce those points are that the mix of each type of decision, liberal or conservative, increases by 20% with each majority, going from 100% to zero at the two opposite sides of the graph.

The details of the decisions enable us to focus on subsets of decisions, enabling us to identify the alignment of the justices by subject matter. We will examine three broad categories and a fourth residual category. The three categories are comprised of tort, criminal procedure, and sentencing decisions.

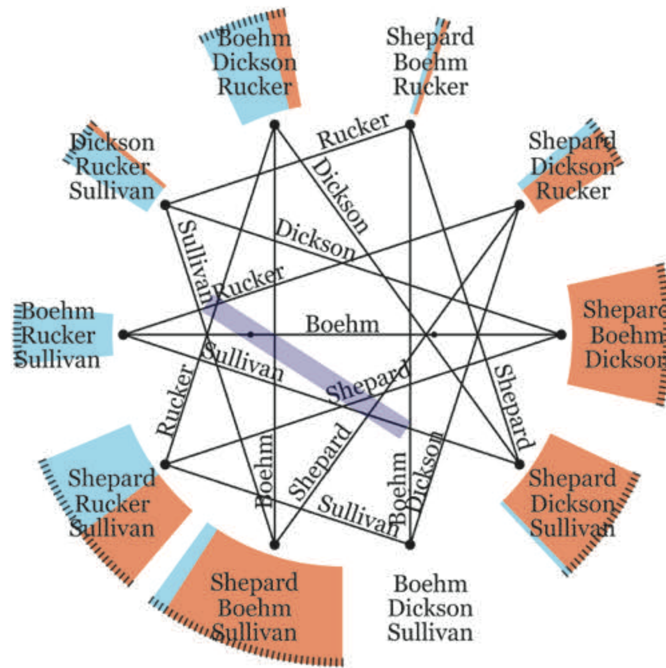

Figure 3.2. The decisions with a blue line connecting the liberal and conservative centers of gravity.

B. The Tort Decisions

Although criminal procedure decisions are extremely well represented in the court's 150 tightly split decisions, the largest category is actually comprised of decisions concerning monetary liability claims which we call "tort decisions."[6] The tort decisions are 47 or 31% of the full set of 150 decisions. Of those, 13 we consider liberal, 28% of the tort decisions. The corresponding illustration of the tort decisions of the Rucker court is figure 3.3.

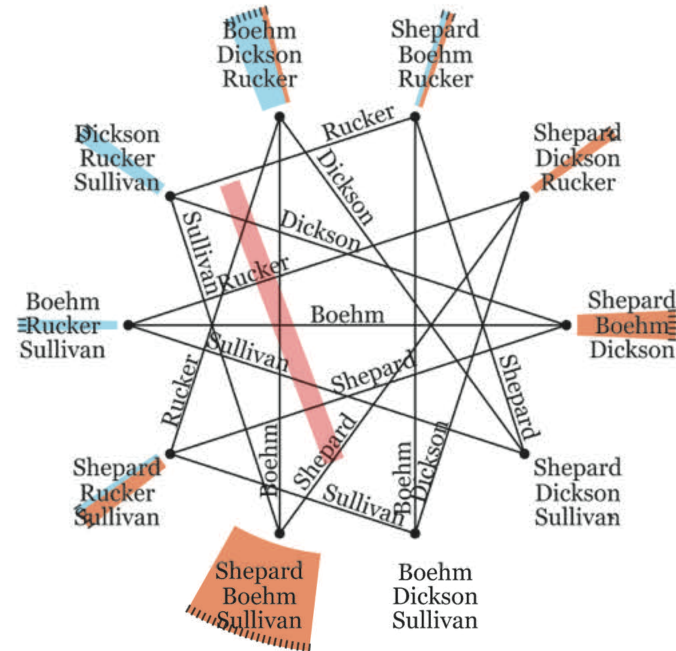

Figure 3.3. The decisions about monetary liability ("tort") and line connecting their liberal and conservative centers of gravity.

6. We use "tort" as a signifier of civil liability despite that some decisions may not use conventional tort theories of liability.

Figure 3.3 is significantly different both from the prior figure of all the decisions and especially from the subsequent figures presenting other categories. The faint, thick, red line connects the centers of gravity of the conservative and the liberal majorities and it too is quite different from that of the prior figure which presented all 150 decisions.

Once the focus of attention narrows to tort decisions, a single conservative majority appears to dominate, that of Shepard–Boehm–Sullivan at about the seven-o'clock position. The liberal decisions are few. Many of the liberal decisions come from majorities separated by one swing vote from the one above, from the majority Dickson–Rucker–Sullivan at ten o'clock from the swing of Sullivan, but mostly from the majority of Boehm–Dickson–Rucker at eleven o'clock from the swing of Boehm. Boehm appears as an important swing vote, but between two different majorities than those that appeared most opposed while the focus was on all decisions.

C. The Criminal Procedure Decisions

The next largest category is criminal procedure matters, 42 decisions or 28% of the sample of 150 decisions. Of those, we consider nine to be liberal, 21%. Figure 3.4 illustrates the criminal procedure decisions following the same methods. The faint, green, thick line connects the centers of gravity of liberal and conservative decisions.

The figure reveals a very different pattern than that of tort decisions. Unlike the tort decisions, the conservative decisions do not come from a single dominant majority. Granted, two majorities produce more than their share but do not dominate. Conservative decisions also come from majorities that were not very conservative in the overall mix of decisions, from Boehm–Dickson–Rucker at eleven o'clock, and from Shepard–Rucker–Sullivan at eight o'clock. The slope of the line connecting the centers of gravity of liberal and conservative decisions is very different from the slope of the corresponding tort line that we saw in the previous figure. The reliably conservative vote is Shepard's and the reliably liberal vote is Rucker's. The swing votes are Boehm, Dickson, and Sullivan and their ranking is unclear.

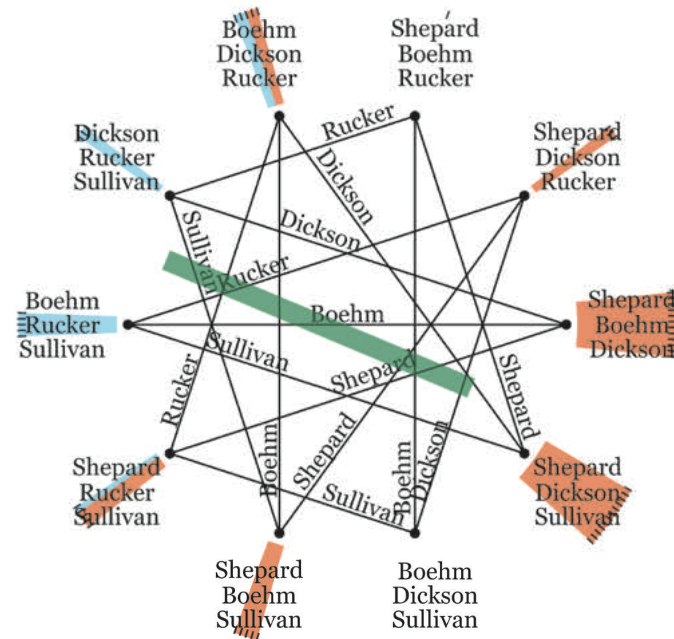

Figure 3.4. The criminal procedure decisions and line connecting their liberal and conservative centers of gravity.

Chapter 5 will further expand on these criminal procedure decisions, slightly expanding their number by including some from other areas. It will argue that they reveal six dimensions along which the justices split, identifying the swing vote that corresponds to each dimension. Whereas the line connecting centers of gravity summarizes the tension between different outcomes in criminal procedure, Chapter 5 reveals in detail how these majorities produced this tension by differing about several concepts within criminal procedure.

D. The Sentencing Decisions

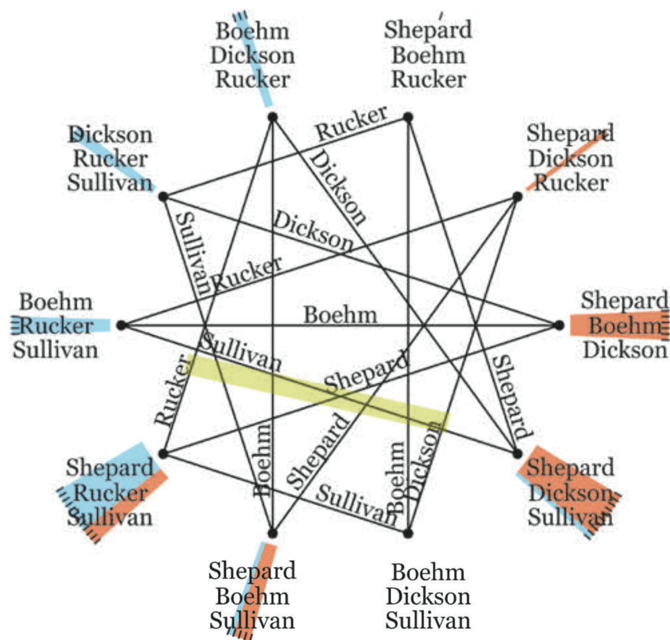

Figure 3.5. The sentencing, professional responsibility, and criminal law decisions of the Rucker court and the line connecting their centers of gravity.

The next category is comprised of a conglomeration of decisions about sentencing, sanctions against violations of professional responsibility by attorneys or judges, and criminal law. Those add up to 38 decisions, *i.e.*, 25% of the entire set of 150. Seventeen we identify as liberal, 44%. Figure 3.5 illustrates them following the same methods. The line connecting the centers of gravity is yellow.

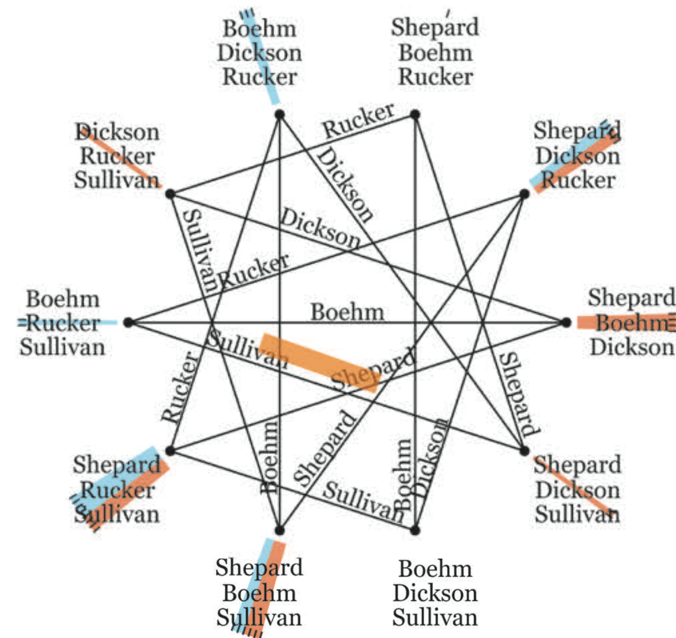

Figure 3.6. The remaining decisions of the Rucker court and the line connecting their liberal and conservative centers of gravity.

Notice that although the line connecting the centers of gravity has about the same slope as in criminal procedure, it is shorter, reflecting the fact that both the conservative and the liberal majorities of the sentencing decisions are more scattered than they were in criminal

procedure. Even more than in the prior figures, no dominant majorities and no dominant swing votes emerge. Surprisingly, the majority that forms the most often, that of Shepard–Rucker–Sullivan at the eight-o'clock position, issues both liberal and conservative decisions (in an eight-to-three ratio or 73% liberal). The same majority that appears mostly liberal here appeared mostly conservative in tort and in criminal procedure and evenly split overall.

E. The Remaining Decisions

The final category is comprised of the 24 decisions that remain outside the above three categories or 16% of the set of 150 decisions; we denominate this category as "other" decisions. By area of law, they divide into two groups of seven, two groups of four and two ungrouped decisions.

Seven decisions involve the administration of the state and the courts (three liberal).[7] Of those, four come from the majority of Shepard–Rucker–Sullivan at the eight-o'clock position, and one each from the majorities at the three-, four-, and seven-o'clock positions. Seven decisions involve real estate (two liberal).[8] Four involve family law (half liberal).[9] Four decisions regard state tax (three liberal).[10] Finally, two others did not fall into any

7. Hughes v. City of Gary, 741 N.E.2d 1168 (Ind. 2001) (denying challenge by minority of city council to majority's project; majority: Shepard-Boehm-Dickson; conservative); Linke v. Northwestern Sch. Corp., 763 N.E.2d 972 (Ind. 2002) (allowing drug testing of students in various settings; majority: Shepard-Dickson-Sullivan; conservative); Ind. State Univ. v. LaFief, 888 N.E.2d 184 (Ind. 2008) (non-reappointment of professor triggers unemployment benefits, dissent would have considered employment for term; majority: Shepard-Boehm-Sullivan; liberal); City of Gary v. Indiana Bell Tel. Co., 732 N.E.2d 149 (Ind. 2000) (allowing city to impose fees on use of its property by telecommunications company; majority: Shepard-Rucker-Sullivan; liberal); Noble County v. Rogers, 745 N.E.2d 194 (Ind. 2001) (landowner's counterclaim against county for not granting license properly barred; majority: Shepard-Rucker-Sullivan; liberal as pro-municipality); Fackler v. Powell, 839 N.E.2d 165 (Ind. 2005) (marital dissolution court retains jurisdiction to interpret mortgage assigned by the decree, dissent would assign to local court; majority: Shepard-Rucker-Sullivan; conservative for preventing forum-shopping); St. Joseph County Commissioners v. Nemeth, 929 N.E.2d 703 (Ind. 2010) (in dispute between county and probate court, approves cost-cutting renovations, denies salary increases, remands on land sale, dissent concurs in all except land sale, would affirm lower court which vacated mandate not to sell without court's consent; majority: Shepard-Rucker-Sullivan; conservative as pro-judge).

8. 600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion County, 889 N.E.2d 305 (Ind. 2008) (not requiring special permit for solid waste station at truck stop; majority: Dickson-Rucker-Sullivan; conservative); Tippecanoe Assc. II v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005) (finding unenforceable restrictive covenant to prevent lease to competitor when original lessee subleases property for different use; majority: Boehm-Dickson-Rucker; liberal); Myers v. Leedy, 915 N.E.2d 133 (Ind. 2009) (lessee retains lease despite voiding of transfer to lessor because initial transferor did not join lessor; majority: Boehm-Dickson-Rucker; liberal); Fraley v. Minger, 829 N.E.2d 476 (Ind. 2005) (denying adverse possession due to nonpayment of some taxes; majority: Shepard-Boehm-Dickson; conservative); Villas W. II of Willowridge Homeowners Ass'n v. McGlothin, 885 N.E.2d 1274 (Ind. 2008) (reversing disparate impact striking of prohibition by HOA against leasing; majority: Shepard-Boehm-Dickson; conservative); Turley v. Hyten, 772 N.E.2d 993 (Ind. 2002) (landlord keeps deposit of destructive tenant despite not complying with some notice requirements; majority: Shepard-Boehm-Sullivan; conservative); State v. Kimco of Evansville, Inc., 902 N.E.2d 206 (Ind. 2009) (reconfiguration of roads through shopping mall not a taking; majority: Shepard-Boehm-Sullivan; conservative).

9. King v S.B., 837 N.E.2d 965 (Ind. 2005) (allowing same-sex partner to seek parental rights; majority: Boehm-Rucker-Sullivan; liberal); Vadas v. Vadas 762 N.E.2d 1234 (Ind. 2002) (husband's father's house not marital property despite plans; majority: Shepard-Dickson-Rucker; conservative); Neal v. DeKalb County Div. of Family & Children, 796 N.E.2d 280 (Inc. 2003) (allowing mother to reverse termination of parental rights she had signed; majority: Shepard-Dickson-Rucker; liberal); Grant v. Hager, 868 N.E.2d 801 (Ind. 2007) (allowing payment of child support by custodial parent to noncustodial; majority: Shepard-Rucker-Sullivan; conservative).

10. Ind. Dep't of State Revenue v. Farm Credit Servs. of Mid-Am., ACA, 734 N.E.2d 551 (Ind. 2000) (federal agricultural credit association not subject to tax of long term mortgage interest but taxed on short term, dissent would tax all; majority: Shepard-Dickson-Rucker; conservative); Ind. Dep't of Revenue v.

of these groupings (one liberal).[11] The liberal decisions are 11 or 46% of the other decisions, making this subset have the highest ratio of liberal decisions. Figure 3.6 illustrates them.

The problem with Figure 3.6 is that the data are thinning out. Each majority issues a few decisions. Several majorities issue both liberal and conservative decisions. The line connecting the centers of gravity is short, reflecting the notion that the court's majorities are very fluid, do not group themselves systematically in the sense that liberal and conservative decisions come from many majorities in a way very different from the arrangement of the majorities on the basis of their overall leanings.

In sum, centers of gravity reveal two features. Their distance (the length of the line) increases with polarization. The observation that the lines corresponding to different subject matters have different slopes, shows that the justices form systematically different coalitions by subject matter.

III. CONCLUSION

The graphical representations of the tightly split decisions open several avenues for further research, some of which this volume pursues. The next chapter applies this analysis to the United States Supreme Court and observes how its patterns change over time. Chapter 5 focuses on criminal procedure decisions and identifies six visible dimensions. The focus on swing votes may also allow further elaboration of the allocation of decision authorship and the relative importance to advocates of different justices as swing votes. One could also use this analysis as a stepping stone for juxtaposing actual judging with locational models of judicial voting based on the median voter theorem, which, in a sense, chapter 5 does.[12]

This analysis, it must be said, is limited to only a small subset of appellate litigation—tightly split decisions of the state court of last resort. During the Rucker composition, such decisions amounted to only approximately 12.5% of the published decisions of the Court in civil and criminal cases; and less than 2% of all civil and criminal cases disposed of by the Court.[13] Nevertheless, the results are quite striking. There is not an even split

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Kitchin Hospitality, LLC, 907 N.E.2d 997 (Ind. 2009) (denying hotel's argument for tax exemption and reversing specialized tax court which dissent would affirm; majority: Shepard-Boehm-Sullivan; liberal); State v. Adams, 762 N.E.2d 728 (Ind. 2002) (improperly found cocaine can still be taxed; majority Shepard-Rucker-Sullivan; liberal as pro-government); Ind. Dep't of State Revenue v. Belterra Resort Ind., LLC, 935 N.E.2d 174 (Ind. 2010) (acquisition of riverboat subject to sales tax as retail transaction; majority: Shepard-Rucker-Sullivan; liberal as pro-government).

11. Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2004) (ordering special election in disputed mayoral election; majority: Shepard-Dickson-Rucker; liberal); Ind. High Sch. Athletic Assoc., Inc. v. Martin, 765 N.E.2d 1238 (Ind. 2002) (high school basketball player not allowed to play for new school but appeal did not violate injunction, dissent would have allowed athlete to play; majority: Shepard-Boehm-Sullivan; conservative).

12. The median voter theorem, discussed above in several places, will be visited again in Chapter 4, notes 20-21 (presenting the theorem and discussing its fit with each long-lived composition of the United States Supreme Court).

13. By Constitution and statute, most appeals in Indiana proceed first to the intermediate Indiana Court of Appeals, although a small number proceed directly to the Supreme Court. A party may appeal a decision of the Court of Appeals to the Supreme using a petition akin to *certiorari* called "transfer," but the Supreme Court has discretion to deny transfer in all such cases and, during the Rucker composition, did so approximately 90% of the time.

between liberal and conservative outcomes, as one might expect. The decisions skew strongly conservative; almost 80% in criminal procedure, and over 70% in tort. Chapter 6 discusses a related topic, the conservative leaning of United States Supreme Court tightly split decisions, and chapter 8 identifies Douglas and the Brennan-Marshall team—a trio that gives that chapter its title "Super-Dissenters"—as contributing to related phenomena.

This graphical sojourn over supreme court swing votes sounds an upbeat note. The Indiana Supreme Court formed nine of the ten mathematically possible majorities and most of those majorities produced both liberal and conservative decisions. The court aligned differently for matters of civil liability (what we called "tort") than on other matters, especially criminal procedure. The upbeat message is that jurisprudential considerations, rather than ideological or political leanings, mattered in the disposition of disputes that produced tight splits.

4. United States Supreme Court

This chapter applies the method of the previous chapters to the nine compositions of the United States Supreme Court after 1946 that produced over 50 tightly split decisions: the compositions of the court when it was at full strength of nine and its junior justice was Vinson, Stewart, Powell, Stevens, O'Connor, Kennedy, Breyer, Alito, and Kagan, respectively.

This look at 5–4 coalitions and swing votes primarily reveals an ebb and flow of "fluidity," the extent to which a court's tightly split decisions are issued by multiple majorities, as opposed to few majorities with a dominant swing vote. Fluidity reaches its high point during the composition defined by Stevens as the junior justice, i.e., from 1975 to 1981. Its adjacent compositions, Powell's (1972–75) and O'Connor's (1981–86), are similar. However, the recent compositions, defined by the junior justices being Alito (2006–09) and Kagan (2010–16), differ. Those appear similar to the early ones, defined by Vinson (1946–49) and Stewart (1958–62), when fluidity was lower.

The graphs of the compositions that exhibit high fluidity differ from those having low fluidity. The former have more coalitions (9 to 13), which are linked by more swing votes (in the teens), and their coalitions are closer to proportional in the number of decisions that they issue. The graphs of the coalitions with low fluidity display few coalitions (3 or 4), few swing votes (2 or 3), and even fewer, usually two, coalitions doing the lion's share of issuing decisions. Additionally, the index of fluidity (described in chapter 1 and Appendix 1.A) follows that pattern, reaching 57% for the most fluid composition of Stevens but settling at approximately 30% for the least fluid ones. The issuance of decisions with a political slant opposite to the majority of decisions of that coalition, which we call "contraslanted" decisions, again has a high during the fluid compositions (from 2.5% to 5% compared to 0 to 2% in the less fluid ones).

An example of a contraslanted decision comes from the one-o'clock position of the Stevens composition. This is a mostly conservative majority that forms somewhat rarely, issuing six decisions, five conservative and one liberal. The majority consists of Chief Justice Burger, Blackmun, Rehnquist, Stewart, and White. The dissent is Brennan, Marshall, Powell, and Stevens. The conservative decisions involve criminal matters; crimi-

nal procedure; the denial to recognize as a protected group the mentally ill, allowing a state to reduce its spending; and one about speech, where the dissent would find a right of publicity while the majority limited speech by applying copyright law.[1] The liberal decision of the same majority is about labor law: This majority refuses to grant an employer an injunction against a sympathy strike.[2] This liberal decision that comes from a majority that produces mostly conservative decisions is a contraslanted decision. The production of liberal contraslanted decisions shows, first, that the majority that united behind the interpretive principles that produced conservative decisions in the other cases also was united by interpretive principles that produced one or more liberal decisions. Second, liberal contraslanted decisions show the converse for the dissenters. The dissenters were driven to the other dissents by liberal principles but the same dissenters were driven to dissent by conservative principles. Polarization should be correlated with fewer contraslanted decisions and fluidity with more.

This analysis reveals the limitations of attempts to fit supreme court adjudication in locational models, especially the median voter theorem—that the ideologically central justice determines outcomes. The principal inconsistencies of actual adjudication with the median voter theorem are that (1) often the most active swing vote is not the justice who according to the ideological rankings is the median; (2) justices far from the median can be the second most active swing vote; and (3) the busiest swing vote changes without a change of the median justice. Justices with opposite ideologies can and do join in voting coalitions in tightly split decisions. Moreover, we offer the *Apprendi* coalition as an example—but by no means a unique example—that could not have been anticipated by a locational model.[3]

I. The Data

We have used the vote-centered database of the SupremeCourtDatabase.org to identify all 5–4 decisions, ignoring decisions where less than nine justices voted.[4] The database codes each vote on each issue in each decision. We ignore the issues that produced other than 5–4 splits. Thus, we produce a single record for each decision. The resulting tables of decisions are integrated into the posters at the back of this volume and

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1. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (no right of publicity exception to copyright); Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1 (1979) (state parole process does not violate due process); Fare v. Michael C., 442 U.S. 707 (1979) (juvenile asking for parole officer rather than lawyer waives rights); Rummel v. Estelle, 445 U.S. 263 (1980) (state three-strikes law is not cruel and unusual punishment); Schweiker v. Wilson, 450 U.S. 221 (1981) (state can reduce discretionary Medicare funding of mentally ill).

2. Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976) (no injunction against sympathy strike by union that promised not to strike).

3. *See* text accompanying notes 22–24, below. This is further discussed in the appendix to this chapter, Appendix 4.A, p. 207.

4. The supremecourtdatabase.org codes the votes of each justice on each issue of each dispute with a value from 1 to 8. A value of 1 means the justice voted with the majority, 2 that the justice dissented, 3 that the justice concurred, 4 indicates a special concurrence, 5 indicates the judgement of the court, 6 indicates dissent from a denial of *certiorari* or dissent from summary affirmation of an appeal, 7 indicates a jurisdictional dissent and 8 indicates an equally divided vote. We treat values of 1, 3, 4, and 5 as votes for the majority and values of 2, 6, and 7 as dissenting votes. We only count decisions, not disputes, i.e., when a single decision adjudicates more disputes, we only count it once.

are also available online.[5] The database codes each outcome as liberal or conservative. We verify the database's coding and, rarely, disagree with it (those disagreements become the basis for an audit of the Database's coding in chapter 6).

II. THE GRAPHS

We illustrate the swing votes for the court's compositions from 1946 to 2019 that produced more than 50 tightly split decisions. Those turn out to be its compositions defined by the junior justice being Vinson, Stewart, Powell & Rehnquist,[6] Stevens, O'Connor, Kennedy, Breyer, Alito, and Kagan. Figures 4.1 through 4.9 are the results and they form the basis for the posters at the end of this volume, which include the decisions, their summaries, political slants, and subject matters. Because the data of the United States Supreme Court do not allow as deterministic a construction as did the Indiana data in the previous chapter, our arrangement of the majorities is not fully objective.

The short tenures of compositions that produce less than 50 tightly split decisions separate most compositions. However, the compositions of Powell, Stevens, and O'Connor are in an uninterrupted sequence. This is illustrated in Table 4.1.

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5. To download PDFs of the posters go to NicholasGeorgakopoulos.org, the Scholarship page, and the paragraph about this book and perma.cc/W6GA-T75A.

6. Whereas Rehnquist was appointed on the same day as Powell and is listed as the junior justice by the Supreme Court, we name this composition of the court after Powell to avoid confusion with popular usage of the phrase "Rehnquist court" to refer to the period of Rehnquist as the Chief Justice (1986 to 2005), which comprises several different compositions of the court (from the Scalia composition to that of Breyer; six compositions with nine justices).

Table 4.1 lists new justices by order of appointment from 1946–2022. Each appointed justice, as the junior justice, defines a new composition of the court. The table has the date of appointment, the number of tightly split decisions, the dates of the earliest and the latest one, the nominating president and his party. In boldface are the rows of the justices who define compositions that issue enough, namely 50, tightly split decisions for a graph. It is these compositions that we graph.

In the graph, each decision takes the shape of a curved triangle, like a very thin pizza slice, springing from the specific point that corresponds to its majority or, to rephrase, as a thick radius of a circle with its center at that majority (in the language of geometry, a circular sector with a small central angle). The result of several decisions, i.e., several such shapes springing from a single majority, is a wider angle defining a fraction of a circle with short lines along its circumference separating the decisions of that majority. The largest such fraction of a circle is, by design, slightly less than a semicircle in each figure. A consequence is that the size of the slice that corresponds to a decision in each figure varies, depending on how many decisions the most prolific majority authored. For example, the slice corresponding to each decision is much smaller in the Breyer

Table 4.1. Appointment and duration data for compositions as defined by junior justices.

Jr. Justice	*Date Appointed*	*No of 5–4 Ops.*	*Earliest 5–4 op.*	*Latest 5–4 op.*	*Nominating President (Party)*
Vinson	**6/24/1946**	**81**	**11/1946**	**6/1949**	**Truman (D)**
Clark & Minton	8/24/1949 10/12/1949	34	6/1950	5/1953	Truman (D)
Warren	10/05/1953	9	11/1953	4/1954	Eisenhower (R)
Harlan	3/28/1955	18	6/1955	10/1956	Eisenhower (R)
Brennan	10/15/1956	6	12/1956	2/1957	Eisenhower (R)
Whittaker	3/25/1957	39	4/1957	6/1958	Eisenhower (R)
Stewart	**10/14/1958**	**84**	**2/1959**	**2/1962**	**Eisenhower (R)**
White & Goldberg	4/16/1962 10/1/1962	41	11/1962	6/1965	Kennedy (D)
Fortas	10/4/1965	41	12/1965	6/1967	Johnson (D)
Marshall	10/2/1967	11	6/1968	4/1969	Johnson (D)
Burger	6/23/1969	0	N/A	N/A	Nixon (R)
Blackmun	6/9/1970	29	12/1970	6/1971	Nixon (R)
Powell & Rehnquist	**1/7/1972 (both)**	**99**	**2/1972**	**6/1975**	**Nixon (R)**
Stevens	**12/19/1975**	**129**	**4/1976**	**6/1981**	**Ford (R)**
O'Connor	**9/25/1981**	**147**	**12/1981**	**7/1986**	**Reagan (R)**
Scalia	9/26/1986	44	11/1986	6/1987	Reagan (R)
Kennedy	**2/18/1988**	**87**	**4/1988**	**6/1990**	**Reagan (R)**
Souter	10/9/1990	22	1/1991	6/1991	Bush I (R)
Thomas	10/23/1991	33	4/1992	6/1993	Bush I (R)
Ginsburg	8/10/1993	13	12/1993	6/1994	Clinton (D)
Breyer	**8/03/1994**	**191**	**11/1994**	**6/2005**	**Clinton (D)**
Roberts	9/29/2005	2	1/2006	1/2006	Bush II (R)
Alito	**1/31/2006**	**69**	**5/2006**	**6/2009**	**Bush II (R)**
Sotomayor	8/8/2009	17	1/2010	6/2010	Obama (D)
Kagan	**8/7/2010**	**80**	**3/2011**	**6/2015**	**Obama (D)**
Gorsuch	4/8/2017	21	4/2017	6/2018	Trump (R)
Kavanaugh	10/6/2018	29	11/2018	7/2020	Trump (R)
Barrett	10/27/20	18	11/2020	6/2022	Trump (R)
K. Jackson	6/30/2022	N/A			Biden (D)

Note: When the table identifies two justices as the junior justices, they either are appointed on the same day, as are Powell and Rehnquist, or no 5–4 decisions appear under the first appointed justice's composition, as is the case with Clark and White.

composition, where the most prolific majority issued 87 decisions, compared to the Stevens composition, where the most prolific majority issued 20 decisions. The legend of each figure has the total number of 5–4 decisions being illustrated and the output of the most prolific majority. The posters in the back of the book, also available online, list the 5–4 decisions by majority, but again only majorities authoring more than two decisions.[7]

We also display the slice corresponding to each decision as either blue or red, depending on its political slant being liberal or conservative. Our coding mostly agrees with that of the Database. The few disagreements are due to placing emphasis on different levels of the outcome. We usually focus on the outcome that is most material to the parties but that may differ from the nature of the outcome on a more abstract level. For example, a liberal outcome for the parties, such as the upholding of a local tax from a taxpayer challenge (liberal because it is pro-government), may be the result of a conservative policy—on a more abstract level, such as recognizing the powers of state and local authorities vis-à-vis the federal government, which is conservative. The disagreements with the Database also form the basis for a later audit of the Database.[8]

The figures let us see the consistent members of the conservative and the liberal coalitions, the swing votes, and which of the swing votes are dominant in the sense of connecting majorities that issue a disproportionately great number of decisions. Also interesting is the changing number of coalitions into which the court splits. We discuss each court composition in turn.

A. The Vinson Composition (1946–49)

The first composition, defined by the appointment of Chief Justice Vinson as the junior justice on June 24, 1946, by Democratic President Truman, consists entirely of justices appointed by Democrat presidents. President F.D. Roosevelt appointed all other justices. Nevertheless, tightly split decisions still arise. A conservative core group of justices is difficult to identify. The liberal side has as its core Black, Douglas, and Murphy.

The graph has three coalitions issuing 100% liberal decisions, at the eight o'clock, nine o'clock, and ten-o'clock positions. By the short lines along the outside of each arc separating the decisions, we see them issue, respectively, three, seven, and five decisions. On the conservative side, the graph displays two active coalitions, at two o'clock issuing three decisions and at three o'clock issuing 32 decisions. The number of decisions of the most prolific coalition of each graph drives the size of the arc that corresponds to one decision for that graph. The most prolific coalition turns out to always be a conservative one and is usually at three o'clock. Its output is set to be 5% less than a semicircle. The unoccupied dots in the circle correspond to majorities that never formed or only formed to issue one or two decisions, which we do not display. The total number of points in the circle, 126, corresponds to the number of

7. PDFs of the posters are available online at nicholasgeorgakopoulos.org, the Scholarship page, under the entry corresponding to this book, or at perma.cc/W6GA-T75A.

8. *See* Appendix 6.A, p. 210.

five-member majorities that are possible in a nine-member court. The lines connecting the majorities, akin to diameters of the circle of dots, are the swing votes. Only one vote changes when two majorities are connected by a line. The line bears the name of the swing vote. The main swing vote is the one departing the most prolific coalition to form the most prolific one connected to that one, which is usually the second most prolific coalition overall (but not in the Powell and Stevens graphs, where that distinction goes to a second conservative coalition). Here the main swing vote is Frankfurter.

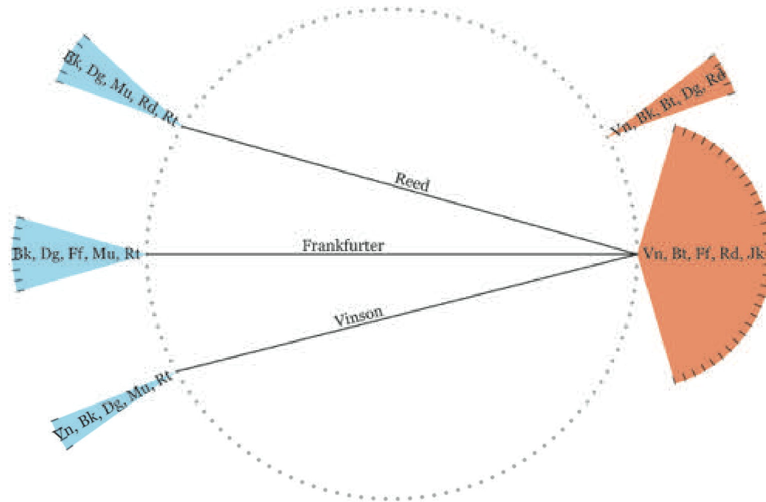

Figure 4.1. The swing votes of the 5-4 majorities of the Vinson composition of C.J. Vinson (Vi) and Black (Bk), Burton (Bt), Douglas (D), Frankfurter (Ff), Jackson (Jk), Murphy (Mu), Reed (Rd), and Rutledge (Rt), all Democrat appointees, as they result from 51 decisions dating from 11/18/1946 to 6/27/1949 that were issued by majorities issuing more than two decisions and where the most prolific majority authored 32 decisions (63% of the decisions appearing in the graph).

Compared to the compositions defined by Powell and later, the number of majorities that do not appear on the graph is high for the Vinson composition (as it is for the next composition, defined by Stewart). The swing vote away from the main conservative majority that produces the majority that authors the greatest number of liberal decisions is that of Frankfurter. Despite that Frankfurter is the most active swing vote, the ideological rankings of the justices[9] do not place Frankfurter as the median justice. Rather, from the perspective of ideology the median justice is Reed or Vinson. According to the ideological rankings, Frankfurter is the second most conservative justice.[10]

The second swing vote is that of Reed, to a majority that authors five decisions. According to the ideological rankings, Reed is the fourth most conservative justice.

The importance of Frankfurter's swing vote given how far the ideological rankings place him from the median is particularly interesting. An analogous phenomenon appears during the Alito and Kagan compositions, when the second most active swing votes are, respectively, the justice rated as second most conservative (Scalia) and the one rated as the most conservative

9. Political science scholars have developed quantitative scorings of the justices' ideology on the single left-to-right dimension that seems popularly prevalent. While granting the many caveats this deserves, the ideological rankings identify the median voter. Whereas for later compositions a third competing ranking exist, the Vinson composition's members are only ranked by Martin & Quinn, *see* note 4, *supra* p. 52, and Nicholas L. Georgakopoulos & Mark E. Fisher, *Exploring the Monte Carlo Analysis of Supreme Court Voting* (2022) available at https://ssrn.com/abstract=4286744. Reed is the median justice per Martin & Quinn, and Vinson per Georgakopoulos & Fisher.

10. Frankfurter's importance also appears in Chapter 7, on un-Americanism prosecutions.

(Thomas). An approach based on the median voter theorem resting on the ideological ranking of the justices cannot explain how a justice who is not near the median can have an impactful role as a swing vote.

The main (conservative) coalition also experiences the swing vote of Vinson, to form a majority that authors four decisions. Vinson's ideological ranking places him near the median. Therefore, the importance of Vinson's swing vote is not surprising from the perspective of an approach that rests on the median voter. What is surprising is that his is neither the first nor the second swing vote in rank of relevance.

B. The Stewart Composition (1958–62)

Several judicial appointments separate the next composition that issues enough 5–4 decisions for a meaningful graph, that of Stewart, from that of Vinson. The departed justices are Burton, Jackson, Murphy, Reed, Rutledge, and Vinson.

The new justices are Brennan, Clark, Harlan, Stewart, Warren, and Whittaker. The continuing justices are Black, Douglas, and Frankfurter. Clark was appointed by Democratic President Truman. All other new members of the court are Republican President Eisenhower's appointees, giving the court a Republican-appointed majority, a feature that remains in all subsequent compositions that we study (the Court briefly becomes majority Democrat-appointed during the Johnson administration). The Stewart court is also tightly split by appointment, with just five of its members being Republican appointees. This phenomenon will only reappear among the compositions that we study during the Kagan composition, the last one.

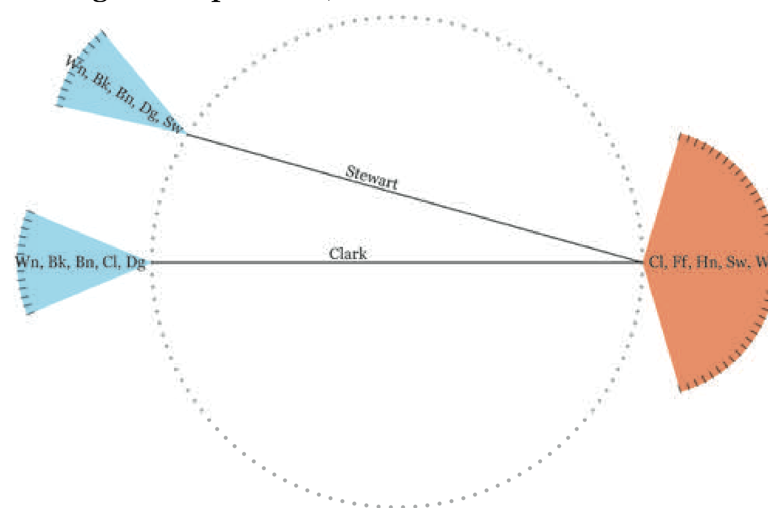

Figure 4.2. The swing votes of the 5-4 majorities of the Stewart composition of C.J. Warren (Wn) and Black (Bk), Brennan (Bn), Clark (Cl), Douglas (D), Frankfurter (Ff), Harlan (Hn), Stewart (Sw), and Whittaker (Wk)—five Republican appointees, four Democrat—as they result from 61 decisions dating from 12/8/1958 to 4/19/1962 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 39 decisions (64% of the decisions appearing in the graph).

The Stewart composition also presents an interesting and unique problem in the categorization of its several decisions related to "un-American" committee activity.[11]

11. The Stewart composition issues several decisions related to individuals accused of membership in the Communist Party who had refused to cooperate with committees akin to the House Un-American Activities Committee that historical accounts tend to categorize as McCarthyism (and on which the analysis of Chapter 7 elaborates). The individuals targeted by these measures objected on various grounds founded on the Bill of Rights, mostly the rights of free association and free speech, the right against self-incrimination, and due process. The United States Supreme Court's 5–4 decisions of the Stewart composition never vindicated the corresponding rights despite that the

The court splits 5–4 conservative, with Black, Brennan, Douglas, and Warren in the dissent. Of those, Black and Douglas were Democratic appointees; Brennan and Warren were Republican. This tight split, therefore, does not correspond to a difference between parties. The solitary liberal decision on this matter reveals Stewart as the swing vote (but in a curious manner[12]).

The graph reveals the importance of these un-Americanism decisions. Chapter 7 pursues this lead in a qualitative and quantitative analysis. It shows the justices modulating their stances depending on public opinion and permanently changing their interpretations of the Bill of Rights in response to events.

The ideological rankings of justices place Black and Douglas as the by far most liberal members of this court and identify the median justices as Clark (as do Georgakopoulos & Fisher), Frankfurter, Stewart, and Brennan (as does Bailey) or Clark and Stewart (as do Martin and Quinn). The focus on 5–4 majorities reveals Clark as the most frequent swing vote, closely followed by Stewart, without Frankfurter or Brennan appearing as active swing votes.

The Stewart composition also reveals a polarization that is greater even than the next most intense ones, those of the compositions defined by Alito and Kagan more than 40 years later. The figure of the 5–4 majorities and their swing votes has only three majorities because only three majorities issue more than two decisions. The corresponding figures for the Alito and Kagan compositions have four majorities. All other compositions produce a graph with more majorities, and significantly more in the cases of the compositions defined by Stevens, and O'Connor, where eleven, and twelve, respectively, majorities appear.

C. The Powell Composition (1972–75)

The composition defined by the unusual same-day appointment of Rehnquist and Powell ("Powell composition"[13]) is also removed from the prior one, of

dissenters were quite vocal. However one reacts to this chapter of history and Constitutional interpretation, it presents a categorization problem. Clearly, these decisions should not be categorized separately according to the resulting legal subject matter, so as to scatter them in subject matters such as criminal procedure, administrative law, and professional responsibility. Rather, these decisions belong in a single group. We place these decisions in the broader category of decisions related to social impact. In subsequent compositions that we graph, this category will have decisions about desegregation, abortion, and gay rights. In the earlier composition of Vinson, we only place in this category one decision about conscientious objectors.

12. In *Deutch v. United States*, 367 U.S. 421 (1961), Stewart joins the dissenters to form a majority to reverse a conviction for refusing to identify other communists on the grounds that the questions were not pertinent to the committee's charge. The greater ideals of civil rights do not reach the surface. Nor can one argue that the *Deutch* opinion corresponds to a change in Stewart's position. Although the decision, appearing in 1961, comes late in this composition, decisions of the opposite slant appear before and after it. Rather than corresponding to a change in the interpretation of the underlying civil rights, the difference appears to stem from the human details of the way this committee conducted its prosecution, such as calling the same witness for the second time, forcing his appearance in the Southern summer, and interrupting the witness's vacation. Rather than Stewart taking the position that the committee overreached substantively, it seems more plausible that his swing vote is due to an overreach that may be called procedural. As a result, the swing of Stewart's vote does not fit in a model of the underlying rights but in a model of the procedures that a committee on un-American Activities (or, in more general terms, a victor of exigency over fundamental rights) may use to press its advantage.

13. We name this composition after Powell. Rehnquist is considered the junior of the two. However, if we named this composition after Rehnquist, then confusion could arise from the colloquial use of "Rehnquist court" to refer to the years that the court had Rehnquist as its Chief Justice.

Stewart, by several appointments. The continuing justices are Brennan, Douglas, and Stewart.

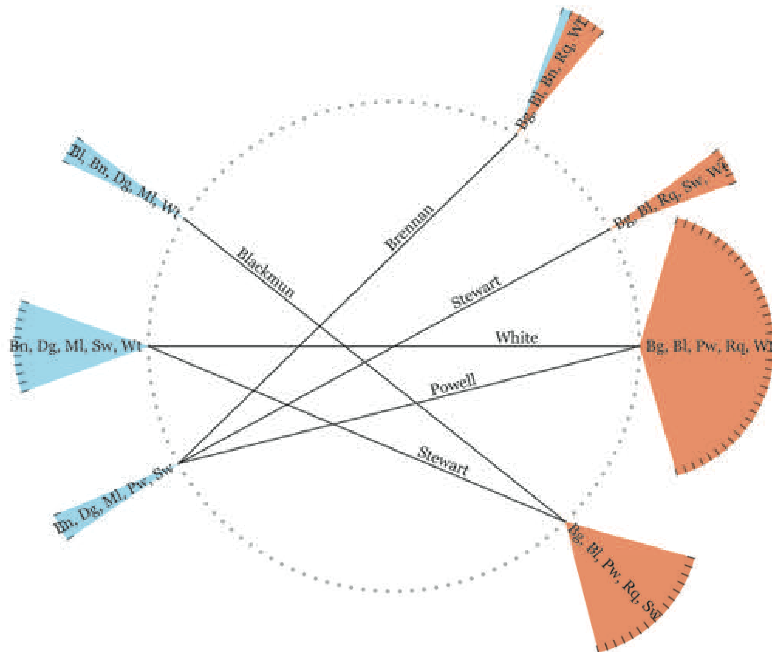

Figure 4.3. The swing votes of the 5-4 majorities of the Powell composition of C.J. Burger (Bg), and Blackmun (Bl), Brennan (Bn), Douglas (D), Marshall (M), Powell (P), Rehnquist (Rq), Stewart (Sw), and White (Wt)—six Republican appointees and three Democrat—as they result from 77 decisions dating from 3/22/1972 to 6/30/1975 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 37 decisions (48% of the decisions appearing in the graph).

In the Powell composition, Burger, Blackmun, and Rehnquist are in all the conservative coalitions. On the other side, Brennan, Douglas, and Marshall are in all the liberal coalitions. The swing vote away from the main conservative majority that produces the majority that authors the greatest number of liberal decisions is that of White, an appointee of Democratic President Kennedy. The swing vote of White forms the main liberal coalition at the nine-o'clock position, which authors ten decisions. The main liberal coalition also experiences the swing vote of Stewart, a Republican appointee, producing the second most productive conservative coalition, at the four-o'clock position, which authors 16 decisions.

Of interest is that Brennan, a stalwart in the liberal block, was appointed by Republican President Eisenhower even though Brennan was a Democrat.[14] The Democratic appointees are Douglas (by Roosevelt), White (by Kennedy), and Marshall (by Johnson).

The analyses of ideological leaning place White as the median justice and Stewart to his immediate left in this composition.[15] This is a composition where the median justice according to the ideological rankings is also the main swing vote. The next most active swing votes, Powell and Stewart, are also near the ideological median, making this a composition that is not very far from the expectations of a median voter vision.

D. The Stevens Composition (1975–81)

The Stevens composition is the result of the appointment of Stevens by Republican President Ford to replace Douglas. The majorities are much more fluid, leaving smaller liberal and conservative cores. The conservative core is down to Burger and Rehnquist. The liberal core is down to Brennan and Marshall.

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14. *See, e.g.*, Seth Stern & Stephen Wermiel, JUSTICE BRENNAN: LIBERAL CHAMPION 79 (2010).

15. *See* note 4, above.

Strikingly, unlike all other compositions of the United States Supreme Court that we study, the Stevens court reveals no dominant conservative or liberal coalitions and, therefore, no dominant swing votes. Powell, who used to be somewhat consistently in the conservative coalitions of the prior composition, is now often a swing vote. Whereas the likely explanation is that the new composition of the court produces divisions in a more conservative way, so that Powell finds himself more often at the center of the court, the replacement of the very leftmost member of the court, Douglas, by a centrist conservative, Stevens, did not change the median justice, because Stevens was more liberal than the median (and indeed appears in four of the coalitions that issue only liberal decisions but in only one coservative). Therefore, White's loss of the main swing vote position refutes the expectations of the median voter theorem.

Indeed, the ideological scorings of the justices continue to place White as the median justice. The ideological scoring of Georgakopoulos & Fisher puts Stewart imperceptibly to his left and Powell to his right. The other scorings place White between Blackmun to his left and Powell to his right, except for the last segment of this composition, when they move White to Powell's right. Whereas White does appear as an active swing vote, his vote does not swing away from the busiest coalition. Powell's should likely be viewed as the most active swing vote, because it is a swing vote of the three largest conservative coalitions and all but the largest liberal coalitions.

The Stevens composition, therefore, is in tension with the median voter theorem in two ways: in the change of its swing vote from the prior composition despite the lack of change of the median justice, and in the fact that its median justice, White, is not the busiest swing vote.

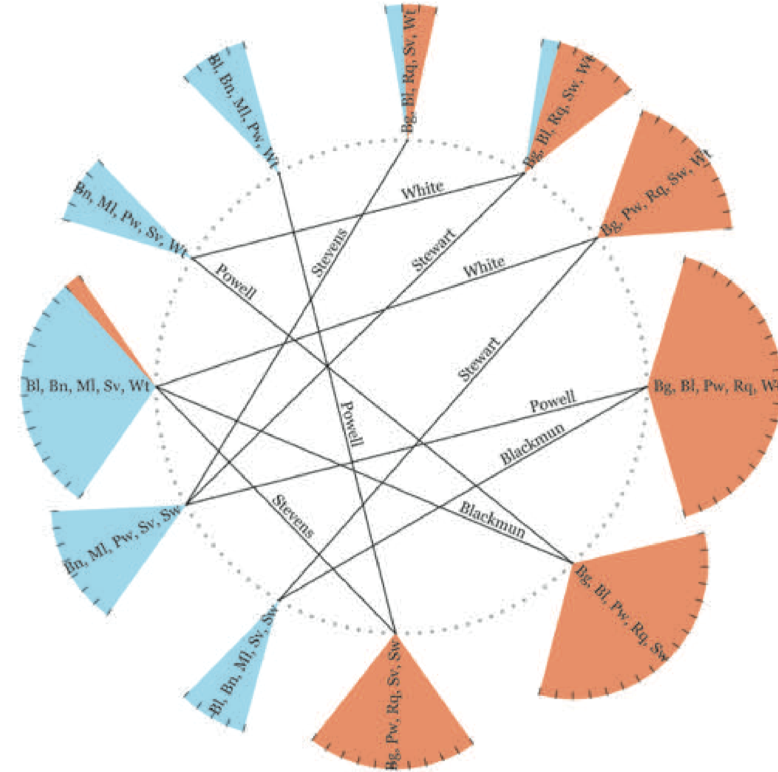

Figure 4.4. The swing votes of the 5–4 majorities of the Stevens composition of C.J. Burger (Bg) and Blackmun (Bl), Brennan (Bn), Marshall (Ml), Powell (Pw), Rehnquist (Rq), Stevens (Sv), Stewart (Sw), and White (Wt)—seven Republican appointees and two Democrat—as they result from 98 decisions dating from 4/26/1976 to 6/26/1981 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 20 decisions (20% of the decisions appearing in the graph).

E. The O'Connor Composition (1981–86)

The O'Connor composition is the result of the appointment of O'Connor by Republican President Reagan to replace Stewart. The conservative core remains Burger and Rehnquist. The liberal core remains Brennan and Marshall.

Figure 4.5. The swing votes of the 5–4 majorities of the O'Connor composition of C.J. Burger (Bg), and Blackmun (Bl), Brennan (Bn), Marshall (M), O'Connor (O'C), Powell (P), Rehnquist (Rq), Stevens (Sv), and White (Wt)—seven Republican appointees and two Democrat—as they result from 124 decisions dating from 12/2/1981 to 7/7/1986 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 44 decisions (35% of the decisions appearing in the graph).

The most prolific coalition is the conservative one at three o'clock, which issues 44 decisions. The main swing vote of White produces the liberal most productive coalition, at the nine-o'clock position, which authors 20 decisions. The second swing vote, that of Powell, produces the liberal majority coalition at the ten-o'clock position, which authors 16 decisions. One more notable swing vote is that of Stevens from the main liberal coalition to form the second most active conservative coalition at the four-o'clock position, which authors ten decisions.

The ideological ranking by Georgakopoulos & Fisher places White as the median justice with Powell to his right and Blackmun to his left. The other ideological rankings of the justices place White and then Powell as the median justices of the O'Connor composition. That they are also its main swing votes corresponds to the expectations of the median voter theorem, despite that the multitude of the coalitions does not.

F. The Kennedy Composition (1988–1990)

The Kennedy composition is separated by one appointment from the O'Connor composition. The Chief Justice is now Rehnquist. Justice Scalia was nominated by Republican President Reagan and appointed on September 26, 1986. The departed justice was Chief Justice Burger. The Scalia composition, however, produces too few tightly split decisions for a meaningful graphic. Justice Kennedy was also nominated by President Reagan and appointed on February 18, 1988, replacing Powell. The court produces 71 tightly split decisions with

this composition. The conservative core of the court are Rehnquist and Scalia. The liberal core are Blackmun, Brennan, and Marshall. White is the primary swing vote away from the main conservative coalition. Kennedy and O'Connor tie as its secondary swing votes. From the main liberal coalition, after White, the only swing vote is Stevens. A majority that issues a few liberal decisions (Blackmun, Brennan, Kennedy, Marshall, and Scalia) is not connected with a swing vote to any of the majorities that appear on the graph, a phenomenon that also arises in the Breyer and Alito compositions.

The conservative core joined by Kennedy and O'Connor constitutes the most productive coalition, the conservative coalition at the three-o'clock position. It issues 47 decisions. The dominant swing vote is White, producing the liberal majority at nine o'clock that authors 11 decisions, followed by Kennedy and O'Connor, whose swing votes produce the liberal majorities at the ten-o'clock position and the eight-o'clock position that author four and three decisions, respectively. Stevens, the secondary swing from the main liberal coalition, produces the second conservative coalition authoring three decisions and consisting of Rehnquist, Kennedy, O'Connor, Scalia, and Stevens.

The Kennedy composition, in having seven appointees of Republican presidents, shares that characteristic with the preceding compositions of Stevens and O'Connor. Nevertheless, the resulting graphic is quite different. Whereas in the prior two compositions that had seven Republican appointees, the court split to produce many different 5–4 coalitions, that is no longer the case. The Kennedy graph displays only six coalitions, whereas the graphs for Stevens and O'Connor displayed 11 and 13 coalitions. Moreover, only two of the Kennedy graph's coalitions predominate, whereas in the Stevens and the O'Connor graphs several of the coalitions issued similar and significant numbers of decisions.

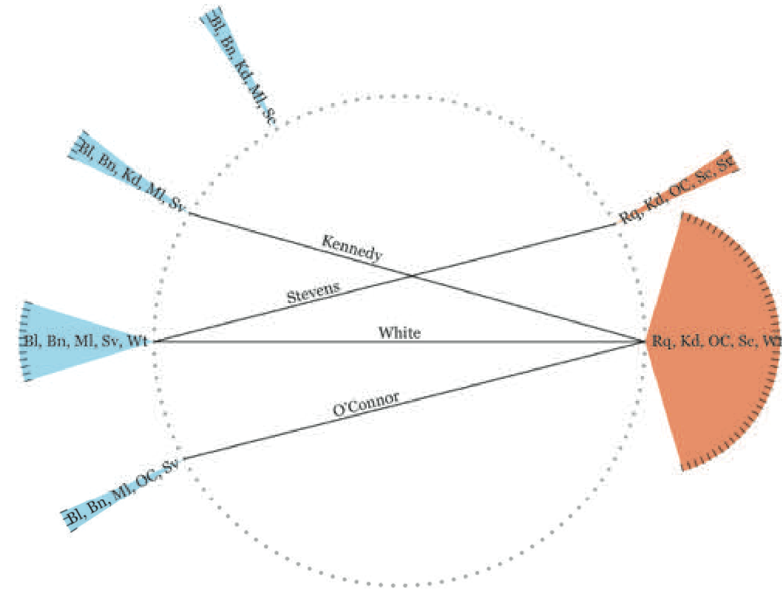

Figure 4.6. The swing votes of the 5–4 majorities of the Kennedy composition consisting of C.J. Rehnquist (Rq) and Justices Blackmun (Bl), Brennan (Bn), Kennedy (Kd), Marshall (Ml), O'Connor (OC), Scalia (Sc), Stevens (Sv), and White (Wt)—seven Republican appointees and two Democrat—as they result from 71 decisions dating from 4/25/1988 to 6/27/1990 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 47 decisions (66% of the decisions appearing in the graph).

A comparable difference between the Kennedy and the two prior compositions relates to the Brennan–Marshall team's unusual ability to create dissenting groups which will be discussed further in in chapter 8. The relevant group for these graphs is that of four dissenters. Despite the continued presence of Brennan

and Marshall in the Kennedy composition, their ability to create dissenting teams of four is much reduced compared to the prior compositions. The intervening changes of the Court, namely the appointments of Scalia and Kennedy as well as, perhaps, the elevation of Rehnquist to Chief Justice, may have created a different environment that prevented Brennan and Marshall from being as effective.

G. The Breyer Composition (1994–2005)

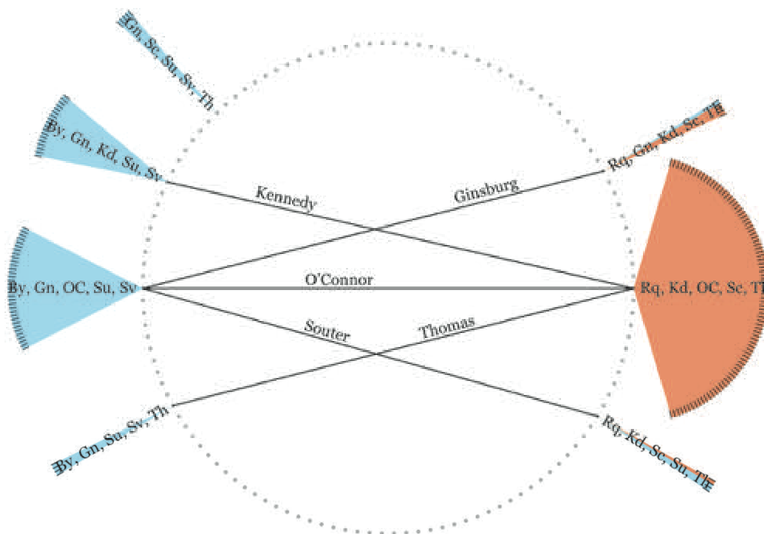

Figure 4.7. The swing votes of the 5–4 majorities of the Breyer composition of C.J. Rehnquist (Rq), Breyer (By), Ginsburg (Gn), Kennedy (Kd), O'Connor (OC), Scalia (Sc), Souter (Su), Stevens (Sv), and Thomas (Th)—seven Republican appointees and two Democrat—as they result from 152 decisions dating from 11/14/1994 to 6/27/2005 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 87 decisions (57% of the decisions appearing in the graph).

The Breyer composition is separated from Kennedy's by several appointments. Souter and Thomas are appointed by Republican President G.H.W. Bush, replacing Brennan and Marshall, respectively. Ginsburg and Breyer are appointed by Democratic President Clinton, replacing White and Blackmun, repectively, and are the court's only Democratic appointees. The liberal core is Ginsburg, Souter, and Stevens. The conservative core is Rehnquist, Scalia, and Thomas.

The conservative core joined by Kennedy and O'Connor constitutes the most productive coalition, the conservative coalition at the three-o'clock position that authors 87 decisions. The dominant swing vote is O'Connor, producing the liberal majority at nine o'clock that authors 32 decisions, followed by Kennedy, whose swing vote produces the liberal majority at the ten-o'clock position that authors 17 decisions. Ginsburg, Stevens, and Souter are rare swing votes away from the liberal coalition.

H. The Alito Composition (2006–09)

The composition of the Alito court results from the departure of O'Connor and Rehnquist and their replacement by Alito and Roberts, appointed by Republican President G.W. Bush.

The Alito court, similar to the next composition that we study, that of Kagan, presents strikingly few coali-

tions that form to produce three or more decisions, only four.[16]

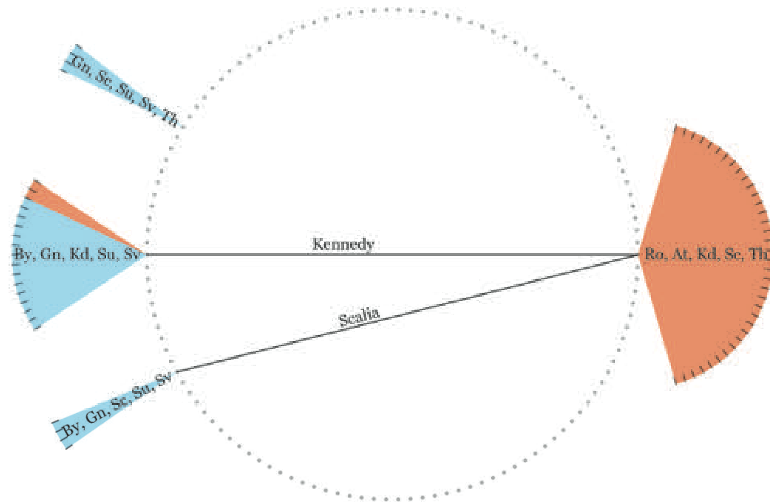

Figure 4.8. The swing votes of the 5–4 majorities of the Alito composition of C.J. Roberts (Ro) and Alito (At), Breyer (By), Ginsburg (Gn), Kennedy (Kd), Scalia (Sc), Souter (Su), Stevens (Sv), and Thomas (Th)—seven Republican appointees and two Democrat—as they result from 57 decisions dating from 5/30/2006 to 6/29/2009 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 35 decisions (61% of the decisions appearing in the graph).

The dominant conservative majority at the three-o'clock position, produces 35 decisions and consists of Roberts, Alito, Kennedy, Scalia, and Thomas. The swing vote of Kennedy produces the dominant liberal majority at the nine-o'clock position, which authors 16 decisions and consists of Breyer, Ginsburg, Kennedy, Souter, and Stevens. The other swing vote from the dominant conservative majority, Scalia, produces a majority that authors only three decisions, all liberal, and consists of Breyer, Ginsburg, Scalia, Souter, and Stevens. This appears at the eight-o'clock position. One more liberal majority appears, formed by pulling both Scalia and Thomas from the conservative block, while the liberal majority loses Breyer to the conservative side. No single swing vote connects it with any of the prior majorities. It appears at the ten-o'clock position and issues three liberal decisions.

Despite the apparent lack of fluidity of the Alito composition, two contraslanted decisions appear, two barely conservative decisions from the main liberal majority.[17] The next and last composition of the Supreme Court that we study, the Kagan court, has no contraslanted decisions.[18]

16. We drop one 5–4 decision as not being a truly tightly split decision; a merely apparent 5–4 split appears in Clark v. Ariz., 548 U.S. 735 (2006). One of the dissents, that of Breyer, actually agrees with the majority's interpretation but dissents for a remand instead of a reversal.

17. Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007) (holding that bankruptcy courts have the authority to block abusive attempts to convert a chapter 7 filing into a chapter 13 proceeding; the dissent would allow no such discretion) and League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (a redistricting plurality).

Outside the majorities illustrated in the graphic, a single majority issues decisions with both conservative and liberal slants. The majority of Alito, Breyer, Ginsburg, Kennedy, and Stevens issues one liberal decision and one conservative one.

The liberal decision lets states deviate from the letter of the statute and ignore small school districts when following the statutory algorithm for equalizing per-pupil expenditures. Zuni Pub. Sch. Distr. No. 89 v. Dept. of Educ., 550 U.S. 81 (2007).

The conservative decision allows states to assign to judges rather than juries the determination of the facts that trigger consecutive rather than concurrent running of sentences, an exception to *Apprendi*. Oregon v. Ice, 555 U.S. 160 (2009).

18. The Kagan composition, like the Alito one, has a single majority that issues one decision of each slant. The majority that issues one decision of each slant on the Alito court is Alito, Breyer, Ginsburg, Kennedy, and Stevens. On the Kagan court it is Roberts, Alito, Breyer, Scalia, and Thomas. That coalition

I. The Kagan Composition (2010–16)

The Kagan composition results from the departure of Stevens and Souter and their replacement by Kagan and Sotomayor by Democratic President Obama. The Kagan composition has the greatest number of Democratic appointees of any of the courts we study after the appointment of Stewart in 1958 tipped the court to majority Republican, with four: Breyer, Ginsburg, Kagan, and Sotomayor.[19] (The Kagan composition ended with the death of Scalia in February 2016.)

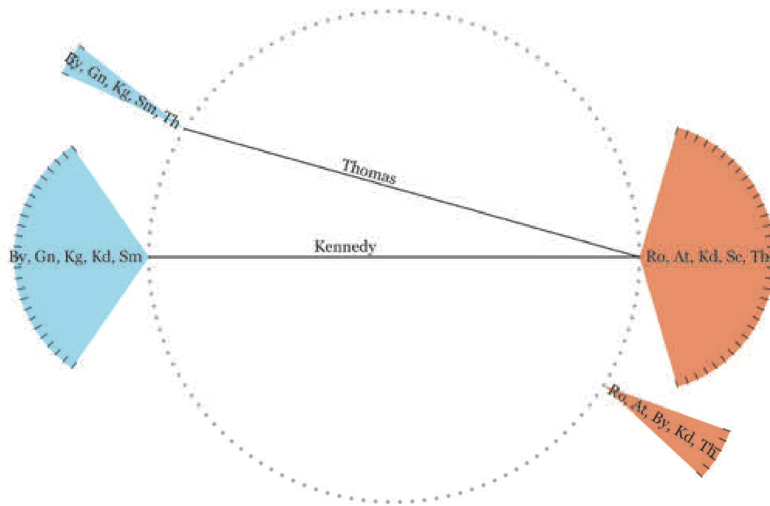

Figure 4.9. The swing votes of the 5–4 majorities of the Kagan composition of C.J. Roberts (Ro) and Alito (At), Breyer (By), Ginsburg (Gn), Kagan (Kg), Kennedy (Kd), Scalia (Sc), Sotomayor (Sm), and Thomas (Th)—five Republican appointees and four Democrat—as they result from 64 decisions dating from 3/29/2011 to 6/29/2015 that were issued by majorities issuing more than two decisions and where the most prolific majority authors 32 decisions (50% of the decisions appearing in the graph).

The Kagan composition has few tight majorities issuing more than two decisions. As in the case of the Alito composition, only four majorities produce more than two decisions and appear on the graph.

The dominant conservative majority at the three-o'clock position, produces 32 decisions and consists of Roberts, Alito, Kennedy, Scalia, and Thomas. The swing vote of Kennedy produces the dominant liberal majority at the nine-o'clock position, which authors 24 decisions and consists of Breyer, Ginsburg, Kagan, Kennedy, and Sotomayor.

The other swing vote from the dominant conservative majority, that of Thomas, produces a liberal majority that authors only three decisions and consists of Breyer, Ginsburg, Kagan, Sotomayor, and Thomas. A conservative majority of a quite different composition, so that no single swing vote connects it with any of the prior majorities, appears at the four-o'clock position and issues five decisions. This majority takes the vote of Breyer from the liberal group but loses the vote of Scalia from the conservative group. It consists of Roberts, Alito, Breyer, Kennedy, and Thomas. Roberts is not a swing vote connected any two majorities during the Kagan composition.

could have arisen in the Alito court. Yet, it did not. If it arose in the Alito court, the dissenters would have been Ginsburg, Kennedy, Souter, and Stevens. The actual dissenters on the Kagan court were Ginsburg, Kagan, Kennedy, and Sotomayor.

19. In compositions that are too brief for this study, the Court became majority Democrat-appointed after appointments by Presidents Kennedy and Johnson. The appointment of Blackmun by President Nixon tipped the Court back to being majority Republican-appointed, which has continued to this writing.

III. The Ebb and Flow of Fluidity

The primary phenomenon that this 1946–2016 graphical exploration across 5–4 coalitions, their decisions, and the swing votes connecting them, reveals is an increase and then a decrease in what we call fluidity: the extent to which a court's tightly split decisions are issued by multiple majorities. High fluidity occurs in a court where justices coalesce in different ways to form many 5–4 coalitions, where each coalition issues a number of decisions similar to that of the other coalitions, and many swing votes connect those coalitions. Low fluidity corresponds to a court that forms few coalitions, where even fewer coalitions dominate the issuance of decisions, and few swing votes exist. Whereas making a consequentialist argument in favor of high or low fluidity must remain a future project, high fluidity seems to correspond to a truer collective nature of making decisions, as opposed to a court with a single swing vote, where a significant fraction of decisions depend on a single vote.

The graphs reveal that in the 1946 to 2016 period that we study, fluidity tended to gradually increase, reached its maximum during the Stevens composition (1975-81) and then tended to gradually decrease. This phenomenon is in part visible in the graphs. The graphs corresponding to high fluidity—the compositions defined by Powell ('72–'75), Stevens ('75–'81), and O'Connor ('81–'86)—show that several coalitions issue decisions (7 to 12), that the number of decisions each coalition issues is closer to proportional, while also having a multitude of swing votes (6 to 13; justices can appear more than once, being swing votes between different coalitions). The graphs of the compositions defined by Vinson ('46–'49), Stewart ('58–'62), Alito ('06–'09), or Kagan ('10–'16), illustrate the opposite extreme. Those have few coalitions (3 or 4), one or two coalitions dominate the issuance of decisions, and have few swing votes (2 or 3) and, in the case of the Alito and Kagan compositions, with a single swing vote dominating, that of Kennedy.

Table 4.2 collects metrics related to fluidity. The first three rows have the junior justice who defines the composition of the court, the calendar years of that composition, and the political composition of the court by appointing party, i.e., the number of justices appointed by presidents of each party. The Vinson composition is entirely nominated by Democrat presidents and the only one with a majority of Democratic appointees. Next, Stewart's composition is tightly split by party, which only arises again at the last composition we study, Kagan's.

The next two rows have, in row 4, the number of 5–4 coalitions that form in total and, in row 5, the number of 5–4 coalitions that appear on the graph (by issuing more than two decisions). Row 6 has the percentage that the coalitions that appear on the graph are as a fraction of the total number of coalitions formed.

Row 7 has the number of decisions issued by the most prolific coalition and row 8 that number as a fraction of the total number of decisions that appear on the graph, an imprecise metric but one that is high when fluidity is low because the busiest coalition issues many decisions, and which is low when fluidity is high, reflecting the fact that each coalition issues close to a proportional number of decisions. This follows the expected pattern. It is lowest during the Stevens composition and high during

the compositions that have low fluidity, taking its highest value during the Stewart composition.

Row 9 has the number of swing votes that appear on the graph, again following the pattern by being high during the Powell, Stewart, and O'Connor compositions and low during the Vinson, Stewart, Alito, and Kagan ones.

In row 10 appears the index of fluidity of Chapter 1. We see it take its highest value during the Stevens composition and hover among its lows at the compositions of Stewart, Alito, and Kagan.

A phenomenon that is not immediately related to the above understanding of fluidity, is in harmony with the same pattern. We have mentioned that most coalitions only issue decisions of one political slant, either only conservative or only liberal decisions. We call "contraslanted" those decisions that have a political slant opposite to that of the majority of decisions of the coalition that issues them. The number of contraslanted decisions, in row 11, hovers at very low levels, not allowing confident conclusions. Nevertheless, their percentage, in row 12, follows the pattern. The percentage of contraslanted decisions is higher during the compositions with great fluidity, ranging from 2.6% to 4.9%. It is at its lows during the compositions with low fluidity, being zero in three compositions (Vinson's, Stewart's, and Kagan's) and 1.8% during Alito's. Dearth of contraslanted decisions should appear during environments of more intense differences between members of the court. Abundance of contraslanted decisions, by contrast, should appear when the members of the court have more common interpretive foundations and are less separated about the political aspects of adjudication. A composition with high fluidity should also be less politically polarized. Therefore, it should also be more likely to issue contraslanted decisions.

We return to the potential relevance of the political composition of the court by appointing party for fluidity. One can easily formulate a theory that a court dominated by a single party will tend to produce more fluidity. Justices appointed by the same party should tend to have similarities in their world views. Those similarities, in turn, should tend to differ from the world views of justices appointed by the other party. Thus, we should expect that a composition that is closely divided by appointing party will tend to be less fluid. The tendency will exist, in issues that split the court 5–4, for the justices of the one party to find themselves in agreement and to find that they disagree with the justices of the other party. By contrast, if most of the justices are from the same party, what will split the court 5–4 will no longer tend to be issues that split the parties. Rather, the court will split 5–4 on issues that divide justices on issues *other* than those that split the parties. One can expect that those divisions will be less predictable; that they would produce more fluid coalitions, splitting 5–4 in many ways rather than being tightly split by appointing party.

Logical as this hypothesis may be, it has limited purchase in the data. Granted, the most fluid compositions that we see are dominated by one party. The compositions defined by Powell, Stevens, and O'Connor are dominated by Republican appointees, and conform to the hypothesis. Moreover, some of the least fluid compositions are also tightly split by appointing party, to wit, the compositions defined by Stewart and Kagan correspond to 5–4 splits by appointing party.

Table 4.2. Metrics Related to Fluidity.

1.	*Composition/Junior Justice*	*Vinson*	*Stewart*	*Powell*	*Stevens*	*O'Connor*	*Kennedy*	*Breyer*	*Alito*	*Kagan*
2.	*Calendar Duration*	Jun'46–Aug'49	Oct'58–Mar'62	Jan'72–Nov'75	Dec'75–Sep'81	Sep'81–Sep'86	Feb'88–Sep'90	Aug'94–Sep'05	Jan'06–Aug'09	Aug'10–Feb'16
3.	*Appointing Parties, R-D*	0-9	5-4	6-3	7-2	7-2	7-2	7-2	7-2	5-4
4.	*Total coalitions*	28	18	23	33	33	19	38	14	16
5.	*Coalitions on graph*	5	3	7	11	13	6	7	4	4
6.	*Coal'n % on graph*	18%	17%	30%	33%	39%	32%	18%	29%	25%
7.	*Most opinions by coalition*	32	39	37	20	44	47	87	35	32
8.	*Most as % of graph*	63%	64%	48%	20%	35%	66%	58%	61%	50%
9.	*Swing votes on graph*	3	2	6	11	13	4	5	2	2
10.	*Fluidity index*	47%	31%	43%	57%	47%	31%	35%	29%	33%
11.	*Contraslanted*	0	0	1	4	5	0	2	2	0
12.	*Contraslanted % of graph*	0%	0%	1%	4%	4%	0%	1%	4%	0%

However, the Kennedy, Breyer, and Alito compositions contradict the hypothesis that dominance by one party produces fluidity. Even the Vinson composition had no Republican appointees but, from some perspectives, also little fluidity. Similarly, the Kennedy, Breyer, and Alito compositions had two Democratic appointees, as did the Stevens and O'Connor compositions. Nevertheless, Kennedy's composition departed from the fluidity displayed by the compositions of Stevens and O'Connor. Additional concerns, either at appointing time or during the tenure of the justices, may influence the court's fluidity in ways that the division by appointing party is too facile to capture. Perhaps the Reagan presidency ushered a new form of conservatism. Its appointees, O'Connor, Scalia, and Kennedy, may have been unlike the prior Republican appointees in ways that initiated a reduction of fluidity despite the appearance of continuity in the appointing party. We leave such speculation to others.

In sum, the chapter's contribution is to observe an ebb and flow of fluidity. The phenomenon is supported by numerous additional metrics and, in turn, supports our index of fluidity of chapter 1 by being consistent with it. However, these changes of fluidity are not amenable to simple analysis. Rather, fluidity appears as an important attribute of supreme courts that needs better understanding and is amply worthy of further analysis. To some extent, chapter 8 on super dissenters will show that to a significant extent, the fluidity of the Powell, Stevens, and O'Connor compositions correlates with the extraordinary ability of the Brennan-Marshall dissenting team to form coalitions.

IV. DISTINGUISHING THE GRAPHS FROM THE MEDIAN VOTER THEOREM AND OTHER LOCATIONAL MODELS

The graphical and geometric nature of the graphs have major advantages over both the median voter theorem and other locational models.

The median voter theorem takes a one-dimensional view of voting, from left to right. It posits that in an environment dominated by two parties, the party that obtains the vote of the median voter wins the elections. Effectively, voters are aligned in that one dimension. The central voter, the median, breaks any tie, and the party that obtains that vote gets the majority.[20]

Applying this model to adjudication is straightforward. One simply arranges the justices on a single dimension, from left to right. The model suggests that the median justice's vote would resolve the tightly split cases that we study here. Indeed, political scientists armed with big data computational methods have produced liberal-to-conservative ideological scorings of justices.[21]

If the ideological positions of each judge were one-dimensional, precise, and expressed with exactitude, then the median voter theorem would become a deterministic model that is utterly inconsistent with the data. Only two coalitions would exist in every composition of the court and the median justice would be the only swing vote.

A simplistic way to give additional complexity to the median voter theorem would merely add some randomness. The vote on each case would take additional uncertainty, perhaps corresponding to each judge's perception of each case being different, colored by various circumstances. This would allow judges to appear to have swapped positions, if, for example, a more liberal judge perceives a dispute as deserving a less liberal outcome while the next less liberal judge perceives it as deserving a more liberal one. In that version of the model, the outcomes would depend on the size of the variation that the added randomness would allow. If little variation existed, the model might lead to merely the occasional other swing vote, besides the true median. If a lot of variation were added, the model could produce several different coalitions and swing votes. The latter outcome seems unrealistic, and the data does not conform to the notion of many random coalitions. The former would imply that the occasional second swing vote would be adjacent to the median. However, occasionally the second swing votes we see are far from

20. The median voter theorem tracks its ancestry to Harold Hotelling, *Stability in Competition*, 39 Economic J. 41–57 (1929). For contemporary support *see* Rafael Di Tella, Randy Kotti, Caroline Le Pennec, & Vincent Pons, *Keep Your Enemies Closer: Strategic Platform Adjustments During U.S. and French Elections*, NBER WORKING PAPER SERIES, working paper 31503 (2023) (finding evidence that political candidates' positions move toward those of their opponent).

21. The three illustrations of ideological positions of justices that stand out are from Georgakopoulos & Fisher, Martin & Quinn, and from Bailey. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10(2) POL. ANAL. 134 (doi:10.1093/pan/10.2.134; 2002); Michael A. Bailey, *Measuring Court Preferences, 1950–2011: Agendas, Polarity and Heterogeneity* (working paper, August 2012); Nicholas L. Georgakopoulos & Mark E. Fisher, *Exploring the Monte Carlo Analysis of Supreme Court Voting* (2022) available at https://ssrn.com/abstract=4286744. *See also Ideological Leanings of U.S. Supreme Court Justices* (Wikipedia entry, visited Sept. 28, 2017, archived at https://perma.cc/7LCZ-K6HM).

the median, as was the case with Scalia and Thomas in recent compositions, and Frankfurter during the composition defined by Vinson. Therefore, the data are incompatible with the simple locational model of the medial voter theorem, either in a version of accurate locations or one with added randomness. Intuitively, we would not expect the justices to perceive disputes with error. Therefore, we are not surprised that this attempt to salvage the median voter theorem fails. Rather, we see the legal system as vastly multidimensional, as documented in Chapter 5 on the six dimensions of criminal procedure and further supported by Chapter 6, where we see that ideological scores are highly explanatory only in those decisions in which justices align by ideology, while ideology has no explanatory power in the decisions where justices align in ways that are surprising for their ideologies.

Table 4.3 collects information comparing the ideological ranking of justices and the swing votes of each composition. Row 2 has the median justice according to the three leading ideological rankings of the justices (but only the first two, by Georgakopoulos and Fisher and by Martin and Quinn, reach Vinson's composition). Row 3 has the actual main swing vote, i.e., the vote that connects the busiest coalition to the next one linked by a swing vote. Whereas the main swing vote is included as one of the median voters in many of the potential comparisons, true absolute agreement only exists for four of the nine compositions we study. In other words, the three ideological rankings and the main swing vote are only identified correctly and exclusively in four compositions, Powell's, Kennedy's, Alito's, and Kagan's. The point is that ideology does not explain who are the most important swing votes.

Row 7 has the secondary swing vote, i.e., the one connecting the busiest coalition to the second most prolific linked coalition. Row 8 has the ideological ranking of that justice by the three ideological rankings. In two compositions, Alito's, and Kagan's, the secondary swing vote has an ideological ranking far from the median. All ideological rankings place Thomas at the conservative extreme of the Kagan composition and Scalia as the second most conservative member of the Alito composition. The tie of Kennedy and O'Connor as secondary swing votes during the Kennedy composition complicates their ranking, but O'Connor also appears as the second most conservative justice for a period of that composition but only according to the ideological ranking of Bailey. Whereas the median voter theorem would argue that the secondary swing vote should be adjacent to the median, that repeatedly fails to occur. Not rarely, the Supreme Court has had its secondary swing vote be far from the median.

A related problem with the median voter theorem comes from comparing the Powell composition to that of Stevens. The membership of the court changed by a single member, by the replacement of Douglas by Stevens. Douglas was by far the most liberal member of the court. Stevens, despite being the nominee of Republican President Ford, was not very conservative. Stevens appears on the liberal side of that court of seven republican appointees. For evaluating the median voter theorem, the point is that the replacement of far-left Douglas with the moderate Stevens did not change the median justice. Nevertheless, in a direct contradiction of

Table 4.3. Ideological Ranking and Swing Votes.

1.	*Composition*	*Vinson*	*Stewart*	*Powell*	*Stevens*	*O'Conor*	*Kennedy*	*Breyer*	*Alito*	*Kagan*
2.	*Median per G&F/ M&Q/B*	Vinson/Reed, Frankf., Burton	Stewart/Clark, Stewart/Frankf., Stewart, Brennan	White	Stewart/White, Stew., Blackm./ White, Stewart,	White/ White, Powell	White	Kennedy/ Kenn., O'Connor/ O'Connor	Kennedy	Kennedy
3.	*Main swing vote*	Frankf.	Clark	White	Powell	White	White	O'Connor	Kennedy	Kennedy
4.	*Swing to decisions*	7	11	10	7	20	12	31	15	23
5.	*Main sw as % of graph*	13%	18%	10%	7%	16%	16%	20%	27%	36%
6.	*As % of most active*	21%	28%	27%	37%	43%	26%	36%	43%	70%
7.	*Secondary swing vote*	Reed	Stewart	Powell	Blackm.	Powell	K., O'C.	Kennedy	Scalia	Thomas
8.	*Rank per G&F/ M&Q/B*	6/7-9	5/4/3-5	4	6/3/3,4,6	4/4-5/ 3-5	3,4/3,4/ 2,3,4	5/5,4/4	2/2/3	1
9.	*Swing to decisions*	4	10	3	3	16	4	18	3	3
10.	*Secondary sw as % of main*	57%	90%	30%	43%	80%	33%	58%	20%	13%

the median voter theorem, when Stevens replaces Douglas, the main swing vote changes from White to Powell.

Granted, the one-dimensional nature of the median voter theorem is simplistic, making its rejection by the data unremarkable. However, this data reveals a phenomenon that shows that even locational models with many dimensions cannot be durable. Despite that an ideal model with many dimensions could capture nuance, it could still not account for the creation of new dimensions. Adjudication by supreme courts, however, often creates new dimensions, adding new tests or elements for a legal conclusion, or removing them by overruling such precedent. An illustration of a creation of a new test, i.e., a new dimension from the perspective of locational modelling, in criminal procedure arises in the *Apprendi* line of cases in this data.

The *Apprendi* decision is about criminal procedure, interpreting due process and the right to a jury trial in the context of sentencing enhancements. Sentencing enhancements increase criminal penalties in specific circumstances. In the example of *Apprendi*'s facts, the penalty increased due to racial animus in the commission of the crime. The *Apprendi* line of decisions holds that facts which increase the maximum sentence must be found by the jury beyond a reasonable doubt. Even if a fact is not an element of the crime, if this fact triggers

an increase of the maximum penalty, then *Apprendi* requires it to be treated the same way that elements of the crime are. In a trial, the jury must establish this fact beyond reasonable doubt. The majority that produced *Apprendi* appears at the eleven-o'clock position of the Breyer graph and has the additional feature that this majority only formed to issue the *Apprendi* line of decisions and one unrelated decision on tort liability.[22] Moreover, this majority has no swing votes linking it with the others of the graph. It draws two votes from the conservative side of the court, Scalia and Thomas. Also, it fails to draw Breyer's vote from the liberal side of the court.

Suppose that a locational model of criminal procedure had been created before the first of the *Apprendi* decisions were issued, i.e., before *Jones*. This model completely described criminal procedure and each justice's attitudes about every aspect of it. The model would be a perfect description of criminal procedure and would perfectly predict every vote of every justice on every criminal procedure issue. Despite its completeness, however, this model of criminal procedure would use prior precedent to answer the question whether penalty enhancements should be found by juries beyond reasonable doubt, to wit, not the *Apprendi* holding.[23] Moreover, the justices' other positions on criminal procedure did not foretell their position on this issue. Not only this was a unique coalition but it was also unforeseeable for the reasons discussed in Appendix 4.A, p. 199, including that Thomas had voted against a similar issue. In other words, this complete model of criminal procedure would be rendered obsolete by the *Apprendi* line of cases because they created a new dimension in criminal procedure. The fact that this new dimension involved a coalition that had not formed for any other issue of criminal procedure underscores its novelty and that it could not have been predicted by the previously correct model.[24]

V. Conclusion

Fluidity is an important attribute of adjudication by supreme courts. Our graphical presentation of the coalitions and the swing votes in tightly split decisions of Supreme Court compositions allowed not only a quantitative approach to fluidity but also a visual one. We hope this opens avenues for further research.

We submit that this analysis refutes the possibility of having locational models of either the level of generality of the median voter theorem or of the level of complete specificity that would account for every interpretation. The median voter theorem fails because (a) the most active swing vote is often not the median-by-ideology justice; (b) the second most active swing vote is often far from the ideological median; and (c) the pattern of coalitions does not conform to the predictions of the median voter theorem, which would call for two domi-

22. See Appendix 4.A, notes 1–5 and accompanying text.

23. *See, e.g.,* McMillan v. Pennsylvania, 477 U.S. 79 (1986) (upholding sentencing guidance with aggravating fact not found by jury).

24. In Appendix 4.A we pursue the information contained in the swing votes connecting the *Apprendi* coalition to the coalitions issuing one or two decisions and which, therefore, do not appear on the graph. Only one helps explain a likely change in Justice Thomas, again underlining the novelty and unpredictability of the *Apprendi* line of cases.

nant coalitions plus additional coalitions due to noise. A locational model of complete specificity is refuted by the creation of new and unexpected coalitions (and dimensions), as exemplified by the *Apprendi* coalition. This rejection of the extremes leaves open the possibility that an intermediate level of generality may successfully describe a court's work and chapter 5 does so for criminal procedure in the composition of the Indiana Supreme Court defined by Rucker.

This overview of Supreme Court adjudication since 1946 also invites reflections about the efficiency of the common law and exposes a paradox about plaintiffs' victory rate. The claim about the efficiency of the common law rests on the notion that ineffective interpretations would attract litigation, which would lead to their alteration.[25] This overview, rather than supporting this efficiency, offers two counterexamples.

First, one might think that support for this efficiency might appear in the persistence of the litigation about Un-American Activities Committees that appears in the Stewart composition. To the extent the results of that litigation were not in harmony with straightforward understandings of the first amendment, their repeated litigation—despite repeated 5–4 losses—supports the premise that some outcomes (arguably inefficient ones) will attract litigation. However, the persistence of the litigation without a change of outcome during that composition does not support the conclusion that the repeated litigation will change the law. When chapter 7 focuses on un-Americanism cases, it reveals that the restoration of the supremacy of the Bill of Rights came from a change in the composition of the Court, namely the replacement of Frankfurter by Goldberg.

The second counterexample comes from the predominance of criminal procedure in all compositions. In the Vinson composition, we see the Court stating that the Constitution must not be interpreted so as to dictate to the states their criminal procedure.[26] By today's standards that is a quaint anachronism. Federal criminal procedure dominates that of the states, despite efforts by the legislature to limit the involvement of the federal judiciary, for example by limiting *habeas corpus* jurisdiction.[27] The argument that this outcome—the subsuming of state criminal procedure by federal Constitutional interpretation—is efficient, seems quite difficult to make. More likely, this is an expression of a different mechanism, that what attracts litigation is not inefficient interpretations about criminal procedure but every conviction with a colorable Constitutional argument. The result, then, would not be a more efficient criminal procedure law but, at least, a more federalized criminal procedure.

Turning to expected rates of victory, it is striking that in all compositions—from the all-Democratic-appointee Vinson composition, to the heavily-Republican-appointee compositions of the seventies and eighties—the outcomes skew conservative and the rate of conservative outcomes is almost constant. Since the Court, through

25. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 98-99 (1972); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, *passim* (1979). *Se generally* D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. 795, *passim* (2020) (with further citations).

26. Carter v. Illinois, 329 U.S. 173 (1946) ("[T]he Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure.")

27. See, e.g., Anti-Terrorism and Effective Death Penalty Act of 1996; Prison Litigation Reform Act of 1996 (both imposing procedural requirements designed to limit litigation).

the process of granting *certiorari*, determines its own docket, any tilt—be it liberal or conservative—will not reflect the decisions of plaintiffs and defendants but the process of granting *certiorari*. A process that selected disputes for being on the cusp of a divided court, should tend to produce outcomes that would be more evenly split. Chapter 6 will pursue further this paradox and show that ideology explains the phenomenon but only in those cases where the justices align by ideology.

Part II: Applications to Tightly Split Decisions

In Chapter 1, we saw that the coalitions that produce courts' tightly split decisions can vary greatly in their fluidity, which we measured using an Index of Fluidity. In Chapters 2–4, we saw that courts' tightly split decisions could be visualized and then illustrated the coalitions and swing votes of the Indiana Supreme Court during the Rucker Composition and of the United States Supreme Court over the last seven decades. In this Part II (Chapters 5 and 6), we will use courts' tightly split decisions as a touchstone for examining courts' voting behavior in greater detail, examining particular tightly split decisions much more granularly by drilling down to tease out additional lessons on voting behavior. In Part III (Chapters 7, 8, and 9), by contrast, we will build out from tightly split decisions and discover additional phenomena.

5. Six Dimensions of Criminal Procedure

In chapters 3 and 4, we examined the voting patterns of compositions of the United States and Indiana Supreme Courts in tightly split (5-4 and 3-2, respectively) decisions. This examination consisted of calculating the "fluidity" of the majority coalitions in such decisions and illustrating on circular graphs the majority and minority coalitions, together with the "swing" justice who produced the majority.

Our analysis showed inadequacies of locational models of adjudication by supreme courts.

The median voter theorem, which aligns justices from conservative to liberal, fails to account for the actual voting patterns observed in several respects. In the Indiana Supreme Court, no swing vote predominated, i.e., there was simply no median justice. In the United States Supreme Court, the median justice was often not the key swing vote and justices far from the median were sometimes significant swing votes (table 4.3, p. 76).

Our analysis is also at odds with a complete model of each justice's attitudes about every rule. Rather, we showed that courts create new interpretations—new geometrical dimensions—that no model can anticipate. For example, when a supreme court decides a case by distinguishing precedent on a new ground, such as that the searched data was in a smartphone, then a model ignoring smartphones, that would have been correct until the issuance of that decision, becomes inadequate; the decision adds a new dimension, searches of smartphones.

In this Chapter, we deploy an intermediate level of generality. With some caveats, our locational model describes voting patterns in criminal procedure cases. Six categories of cases, which we call "dimensions," appear. They account for 75% of all criminal procedure decisions. This so-called "signal-to-noise ratio" of 3:1, suggests that it is appropriate to describe a court's work at this level of generality through a locational model for a legal subject matter. We call "tendencies" the voting patterns we see of justices to arrange themselves along these dimensions. For example, when Shepard and Sullivan repeatedly dissent arguing that they disagree with the majority that grants the defendant more process, we interpret that as a tendency for finality or closure of judicial process.

This research continues the line of literature that describes dimensions of supreme court adjudication primarily focused on the United States Supreme Court.[1] Our approach is less formal in that the categorization of the decisions into dimensions is less mechanical or mathematical. To some extent, it resembles some older efforts but has the benefit of identifying additional dimensions.[2]

I. THE DATA

The foundation of the analysis is again decisions issued by the Indiana Supreme Court with two defining characteristics. They are tightly split decisions; 3–2 given the court's size of five. They were issued over a decade (1999 to 2010) during which the court's composition remained constant, defined by Justice Rucker being the junior justice. Chapters 2 and 3 created a method for visualizing the entirety of the decisions as well as subsets comprised of specific subject matter. This chapter uses the criminal procedure subset to explore the voting patterns that the justices displayed.

Criminal procedure, as procedural rather than substantive, is a subject that does not have an overarching consequentialist principle. We think this leaves more room for relatively subjective bases for the justices' voting compared to the other subjects with large numbers of decisions, such as criminal law, sentencing, or monetary liability.

The decisions identified as primarily about criminal procedure in chapter 3 do not remain alone. Rather, if any decision's minority position could be seen as a vote about criminal procedure, it joins the sample. Of the 176 tightly split decisions of the Indiana Supreme Court during the Rucker composition, 62 involved questions of Criminal Procedure, listed in Appendix 5.A, in the electronic supplement, p. 283.[3] And of those 62, the dissents in about 75% fit with the tendencies that we infer from the votes along six "dimensions" or categories of criminal procedure issues: finality; requisite consents and warnings; governmental and trial bias; warrant requirement; trust in juries; and retroactivity of defenses.

To observe the tendencies that the data reveal about the respective justices, the analysis focuses on the minority. Because Indiana's is a five-member court, the minority in tight splits has two justices. Aggregating the tendencies of two justices is much simpler than those of the three-justice majority. A joint dissent combines two

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1. Quantitative efforts to do so include Tom Clark, The Supreme Court: An Analytic History of Constitutional Decision Making (2019); Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 Cornell L. Rev. 1513 (2019); and Joshua B. Fischman, *Do the Justices Vote Like Policymakers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. Legal St. 269–93 (2015). Closely related albeit not explicitly about identifying several dimensions are Lee Epstein & Tonja Jacobi, *Super Medians*, 61 Stanf. L. Rev. 37 (2008); Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. Legal Analysis 441-58 (2009); and Paul H. Edelman and Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. Cal. L. Rev. 63 (1996).

2. See, e.g., Glendon Schubert, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974) (identifying two dimensions and three "minor scales").

3. The supplemental FIVE FOUR: TABLES volume is available from nicholasgeorgakopoulos.org in the scholarship page, under the paragraph corresponding to this book and at perma.cc/W6GA-T75A. This number of decisions is greater than the 42 decisions that chapter 3 categorized as primarily about criminal procedure. The enlargement of the sample comes mostly from criminal law and sentencing.

views of the law, two interpretive approaches, whereas the majority combines three. Therefore, tendencies will tend to be more visible in minorities of two than in the corresponding majorities of three.

II. The Intermediate Level of Locational Models

The intermediate level of abstraction, which we explore here, focuses on tendencies or general attitudes. We recognize that it would be impossible or futile to try to account for every rule, and focus on a slightly higher level of generality. Consider a concrete example from the data. The justices' general attitudes differ about the level of warnings or consents to which a defendant is entitled. Justices who are less exacting tend to allow police and prosecutorial activity under warnings or consents that other justices consider inadequate. This attitude is general in the sense that it should tend to influence the voting of justices in the application of several rules. Exactitude about consents and warnings would imply favoring, for example, that a lessee cannot consent on behalf of the landlord to a search of the premises;[4] that a defendant have specific knowledge that the reason for the revocation of the driver's license is the defendant's status as a habitual traffic violator before imposing criminal consequences;[5] and that a defendant have had clear knowledge of a sexual partner's age before upholding a conviction for sexual misconduct with a minor.[6]

This level of generality does not dictate what the actual rules are. That is, saying that some justices tend to be exacting about warnings and consents is different than saying that the same justices favor a specific change about, for example, the law of *Mirandazing* arrestees. The latter has full detail; it is an attempt to place the justices in an axis of a locational model of judging about specific rules. Moreover, that level of modelling employs legal concepts which are subject to normative analysis, arguments about the consequences of *Miranda* warnings. The former, by contrast, is a description of the justices' voting tendencies, which is removed from legal analysis. Even the justice who is the most exacting about consents and warnings, would not vote to reverse a conviction on *Miranda* grounds where no possible *Miranda* defect existed. Granted, one can still make normative arguments that criminal procedure should reflect a different level of warnings and consents. That is closer to a general statement rather than an argument about a specific rule of criminal procedure. A locational model of law, to have any accuracy, would consist of specific legal rules, not general tendencies.

This intermediate level of generality or specificity shares a lack of informativeness that the median voter theorem displays. Consider the example of being on the right of the median voter in the Vinson composition, as were Frankfurter and Jackson. All members of that composition were appointed by Democratic Presidents

4. The example comes from the majority in Halsema v. State, 823 N.E.2d 668 (Ind. 2005).

5. The example comes from the dissent in State v. Jackson, 889 N.E.2d 819 (Ind. 2008).

6. The example comes from our broad interpretation of the dissent in Staton v. State, 853 N.E.2d 470 (Ind. 2006), *see* text accompanying note 35.

Roosevelt and Truman. This appearance of conservativeness of Frankfurter and Jackson does not mean that they would agree with a conservative interpretation by the five conservative justices of the Alito composition, who were appointees of Republican presidents, starting with Reagan. By the same token, being on the side of exactitude in consents and warnings in the Vinson composition would have likely corresponded to different interpretations than the same tendency in the Alito composition. The tendencies that appear in voting patterns are relative. Tendencies are relative to the circumstances of each composition.

We also readily acknowledge the caveat that this analysis is an after-the-fact, descriptive one, that may well not appear in other courts composed of different justices, encountering different disputes, in different socioeconomic or institutional circumstances. These specific justices revealed divisions as to these tendencies in criminal procedure. Other justices on other courts may well exhibit different tendencies in criminal procedure, subject to the limitation that the tendencies in criminal procedure may be finite.

The five-member size of this court may also influence the analysis. The tendencies of these dissenters are a combination of the views of only two justices. Larger courts would likely differ. Perhaps a greater number of dissenters in tight splits would mean that dissenting coalitions need to be less specific in order to form or less specificity is necessary to describe their leaning. If so, tendencies of the generality that appear in the Indiana court may not appear in larger courts; rather, tendencies that are even more abstract and general would. In the United Sates Supreme Court this occasionally occurs.[7] However, in rare dissenting coalitions of the United States Supreme Court tendencies of even greater specificity appear.[8]

7. The United States Supreme Court forms very few coalitions to issue tightly split decisions. The most prolific of those have the polarity of liberal against conservative, a higher level of generality, indeed. In the less frequent coalitions, however, some tendencies do appear. From our study of the long-lived compositions from 1946 to 2016 of the United States Supreme Court we observe three. (a) The dissenting coalition of Frankfurter, Murphy, Rutledge, and Jackson forms to dissent in three decisions about criminal procedure during the composition defined by the appointment of Vinson, i.e., from 1946 to 1949. The dissenters argue (1) that a search exceeded the warrant's description, and (2) that merchants' records should not be used to incriminate them. To group these into a single tendency we need to raise the level of generality to something akin to "narrow construction of government's Fourth Amendment search authority." *See* Harris v. United States, 331 U.S. 145 (1947) (search of home incident to arrest); Shapiro v. United States, 335 U.S. 1 (1948) (merchant's records are public and subject to search because defendant is required by statute to keep them); United States v. Hoffman, 335 U.S. 77 (1948) (Companion case to *Shapiro*). (b) In the composition defined by O'Connor, 1981-86, the dissenting coalition of Brennan, O'Connor, Rehnquist, and Stevens can be grouped under a general heading of lenity; *see* Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983) (dissent: plea to probation is not conviction preventing right to ship firearms); Dixson v. United States, 465 U.S. 482 (1984) (private administrators of public housing are within federal anti-bribery statute definition of public official; dissent: violating rule of lenity); United States v. Yermian, 468 U.S. 63 (1984) (proof of actual knowledge of federal agency jurisdiction not necessary for conviction of false statement to federal agency; dissent would require actual knowledge). (c) In the composition defined by Kagan, 2010–16, the dissenting coalition of Ginsburg, Kagan, Scalia, Sotomayor forms to issue three criminal procedure dissents which seem to have the common tendency of having a high hurdle against use of evidence of guilt; *see* Williams v. Ill., 132 S. Ct. 2221 (2012) (DNA expert testimony admissible without cross-examination; dissent: violates right to confrontation); Md. v. King, 133 S. Ct. 1958 (2013) (Buccal swab DNA evidence collected from arrestee admissible despite no relation of crime to arrest; dissenters would find it a suspicionless search); Navarette v. Cal., 134 S. Ct. 1683 (2014) (anonymous 911 call gave sufficient grounds for stop and search of truck; dissenters would require corroboration).

8. From our study of the long-lived compositions from 1946 to 2016 we discern three such coalitions. (a) During the composition defined by Rehnquist and Powell, i.e., 1972–75, the dissenting coalition of Brennan, Douglas, Marshall, and Powell consider that free speech rights override prison administration interests; *see* Pell v. Procunier, 417 U.S. 817 (1974) (Calif.'s

A conventional statistical test (the chi-squared test) clearly rejects randomness as the source of the observed arrangement of the decisions in the tendencies expressed with several decisions but perhaps not in those that have the fewest decisions.[9] Nevertheless, a specific statistical test of this type of analysis should be developed.

III. Re-Introducing and Adapting the Graph

In this Chapter we fit the six dimensions that we observe on to the graphic of chapters 2 and 3 that illustrates all the decisions by a tightly split court. We created that graph by placing the ten possible majorities around a circle and used the hours positions to identify the location of each majority. The majority that issued the greatest proportion of conservative decisions went to the right, at the three-o'clock position. The one with the greatest fraction of liberal decisions went to the left, at the nine-o'clock position. Successively less conservative and less liberal majorities were placed adjacent to those starting clockwise. The second most conservative majority went to the three-o'clock position; the third to the two-o'clock position. The second most liberal majority went to the ten-o'clock position and the third at the eight-o'clock position. The result preserved the oppositional nature of swing votes separating the majorities. A side benefit was that change from conservative to liberal occurred gradually, on both the top and the bottom semicircles of the resulting graph.

Because here we focus on the dissenters, we reverse the right-to-left orientation of the graph. At the point where was the most conservative majority, will be the most liberal dissenters. We should expect the conservative positions to appear on the left and the liberal ones on the right side of the graph.[10]

prohibition against journalists' requests to interview specific inmates is proper); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (fed. prohibition against journalists' requests to interview specific inmates is proper). (b) During the composition defined by Breyer, i.e., 1994–2005, the dissenting coalition of Rehnquist, Breyer, Kennedy, and O'Connor allow the court to find aggravators rather than the jury, i.e., oppose *Apprendi*; *see* Jones v. United States, 526 U.S. 227 (1999) (aggravators are elements of the crime to be considered by the jury); Apprendi v. N.J., 530 U.S. 466 (2000) (aggravating facts must be found beyond a reasonable doubt by the jury); Blakely v. Wash., 542 U.S. 296 (2004) (applies *Apprendi* to states); United States v. Booker, 543 U.S. 220 (2005) (opinion of Stevens, joined by Scalia, Souter, Thomas, and Ginsburg applies *Apprendi* to federal crimes). (c) During the composition defined by Kagan, i.e., 2010–16, the coalition of Roberts, Alito, Kennedy, and Scalia opposes applying *Apprendi* to sentence minimums; *see* Alleyne v. United States, 133 S. Ct. 2151 (2013) (factors increasing mandatory minimum are elements of crime that need beyond reasonable doubt proof to jury). These coalitions with very specific tendencies may be probability aberrations: because nine justices can form coalitions of four in many ways, rarely coalitions may form that have a very specific focus.

9. The least populated tendency is about police discretion, with three decisions, one with a minority for discretion and two with minorities for warrants. A chi test against the proposition that those would appear randomly, one from each of three minorities, cannot be tested due to the smallness of the sample. Note that a specialized statistical test should give credit to the polarity that appears in those three decisions, i.e., to the fact that they reveal an alignment of the justices about the issue, rather than coming from minorities that would have their justices be taking contradictory positions. At the opposite extreme, the tendency expressed in the largest number of decisions is about procedural closure, with four decisions from a minority for closure and 15 from one against. Compared to a random sprinkling of 19 decisions on the ten possible minorities, the chi test resoundingly rejects the randomness of those coming from only two minorities as having a probability much less than one in a trillion.

10. In all dimensions that have one end on the left side and one on the right side of the graph, the left-side one does correspond to the conservative position and *vice versa*. One of the dimensions identified here has both ends on one half of the figure. The dimension about the propriety of governmental process runs

Start by only observing a single dimension: finality. Here the tendency to vote to close review available to the defendant is juxtaposed to the tendency to vote to grant rehearings to the defendant and close review available to the state, Figure 5.1. Closure of process available to the defendant is the more conservative of these choices and it indeed appears on the left half of the graph, at the eleven-o'clock position. The justices who dissent saying that they would have closed review available to the defendant are Shepard and Sullivan.

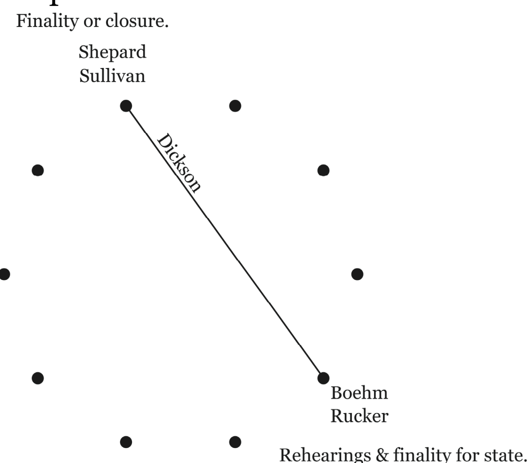

Figure 5.1. The dimension about finality or closure.

The pair of dissenters who exhibit the opposite tendency, who dissent and would grant more rehearings to the defendant or deny additional review to the state, are Boehm and Rucker. They appear at the four-o'clock position of the graph. The fifth member of the court is Dickson, and he is the swing vote on finality. His name is on the line connecting the eleven-o'clock position to the four-o'clock position.

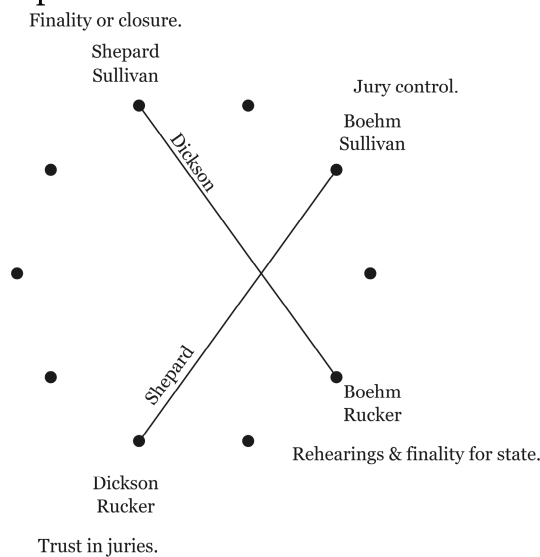

Figure 5.2. The dimensions about finality and juries.

The graphical representation of the resulting juxtaposition appears in Figure 5.1. The circle of ten points corresponds to all the possible 3–2 divisions of the court. Each point corresponds to a specific majority of three and a specific pair of dissenters. From each majority any of its three members can join the dissenters becoming a swing vote and creating a new majority. Of all the lines that correspond to various swing votes, the figure shows only one, the one relevant to finality or procedural closure. Again, this dimension runs from the eleven-o'clock position, where the dissenters are Shepard and Sullivan, to the four-o'clock position, where

from eleven o'clock to eight o'clock. The exacting attitude, at eight o'clock, would correspond to the less conservative position of the pair.

the dissenters are Boehm and Rucker. The former are for finality and the latter are for rehearings. The line connecting these opposite extremes has as its label the swing vote on these issues, Dickson.

Continue building the graph by adding a second dimension, about the discretion of juries. Dickson and Rucker, at the seven-o'clock position, dissent stating that they would defer to the jury. Label that tendency "trust in juries." The opposite tendency is "control of juries." Boehm and Sullivan, who appear at the two-o'clock position, dissent stating that they would have controlled the jury. Shepard is the swing vote about juries. Adding this second dimension produces Figure 5.2.[11]

IV. The Discernible Tendencies

Adding all the dimensions that we observe produces Figure 5.3. We observe five pairs of opposite tendencies producing five dimensions, which are the five solid lines of the graph. The additional tendency we observe, in favor of retroactivity of defenses, does not produce an opposite side. In other words, we do not find a dissent of two justices stating that they would not have applied a defense retroactively. Of the three potential swing votes to the dissenting team that favors retroactivity (at three o'clock), two already appear as solid lines because they are occupied by two of the five prior dimensions. The third possible swing vote appears as a dashing line. Any of the three could have produced the opposite side of the retroactivity dimension, if the court had produced a few tight splits with dissents against retroactivity.[12]

Figure 5.3 leaves two points unoccupied, the point at one o'clock and that at five o'clock. The point at five o'clock is actually entirely unoccupied by decisions, even outside criminal procedure. It corresponds to the majority of Boehm, Dickson, and Sullivan with Shepard and Rucker as dissenters. The point at one o'clock—Boehm, Rucker, Shepard in the majority and Dickson with Sullivan in dissent—did produce a few decisions, two of which were about criminal procedure. However, the dissenters argued separately, in different directions, with the result that the cases were dropped for lack of common ground among the dissenters.

Figure 5.3 also omits the swing votes that are unrelated to dimensions that we observed. Further analysis may reveal additional tendencies and dimensions; or the swings between separate specific coalitions may be informative in various ways, including for assessing the misfit dissents, which we discuss in the fifth section of this Chapter (p. 98). Because we consider all swing votes relevant, we also offer a fuller image, which includes all possible swing votes, Figure 5.4. (That is equivalent to Figure 2.3 with the change that the focus here is on the dissenters.)

11. If those two dimensions completely described criminal procedure tendencies of these justices, then we could place the justices in a two-dimensional coordinate system. But we find six dimensions. From this perspective, a minor contribution of this analysis is that the proposed graphical representation manages to display more dimensions than a coordinate system.

12. This statement needs a caveat. It is conceivable that atypical coalitions may occur—what we discuss in Part IV as misfit dissents and consider to be noise. Therefore, dissents from two justices against retroactivity could arise from coalitions not linked by a swing vote to the coalition producing the dissents in favor of retroactivity. For example, it is conceivable that one of Rucker or Sullivan might have formed a dissenting team with one of Shepard, Boehm, or Dickson, and argued that they would not have applied a defense retroactively. In the other dimensions, of which we see both tendencies, this does happen, albeit rarely—see note 65 and accompanying text, *infra*.

The court forms eight coalitions to issue 3–2 decisions about criminal procedure. We discern eleven tendencies. Two dissenting pairs represent more than one tendency. Shepard and Sullivan, at eleven o'clock, represent two tendencies: finality; and lenience toward governmental and trial process. Rucker and Sullivan, at three o'clock, represent three tendencies: the need for warrants (little police discretion); the exacting standard for consents and warnings; and the retroactivity of defenses.

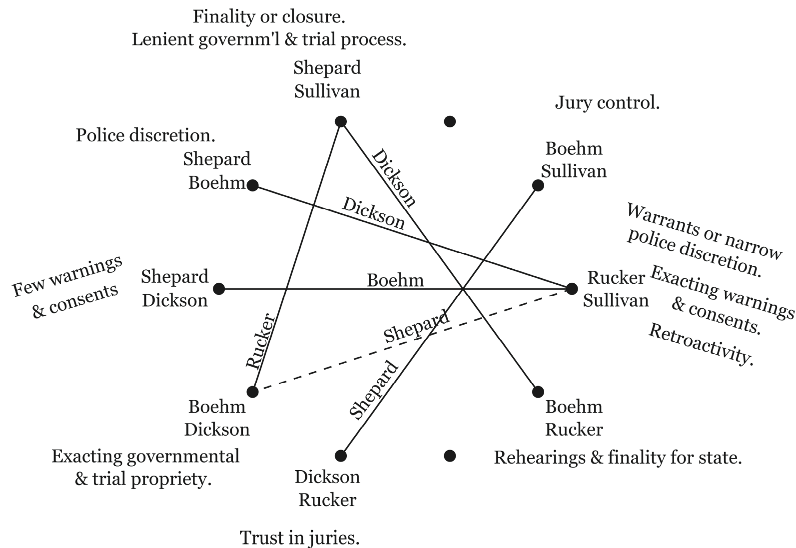

Figure 5.3. The observed dimensions of criminal procedure.

In all, the dimensions we see are: (a) finality, i.e., expediency and closure of process (as opposed to more hearings in favor of the defendant and finality against the state); (b) the need for warnings to the defendant or consents from the defendant; (c) the propriety of governmental and trial process in the sense of not being biased against the defendant; (d) police discretion (as opposed to the need for warrants); (e) the reliance or trust in juries (as opposed to their control); and (f) retroactivity. In terms of locational model geometry, these are the six dimensions of criminal procedure that we discern from the decisions.

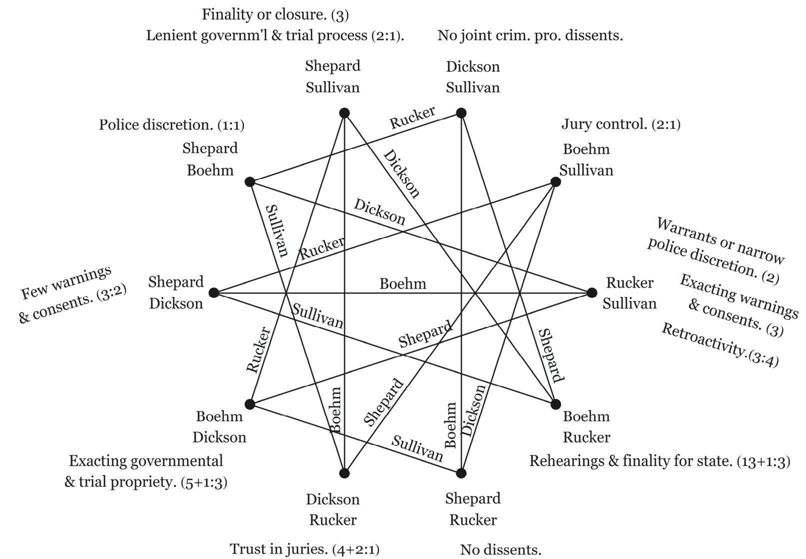

Figure 5.4: The circle of all possible dissenting teams and their tendencies about criminal procedure.

Next to each point, figure 5.4 has the two justices of the minority. Outside those names are the tendencies which they exhibit about criminal procedure. In parentheses, next, the number of corresponding cases appears and, after a colon, the number of decisions that do not fit that tendency, the misfit dissents that constitute what is referred to in social science as "noise." If this minority has more than one tendency, then this misfit count appears in the last tendency, as is the case at the eleven-o'clock and the three-o'clock positions. If some additional cases can, by inference rather than directly, be

seen as part of a tendency, those appear as a second summed number (after a plus sign, before the colon). For example, the tendency for rehearings in favor of the defendant and for closure for the state, which appears at the four-o'clock position, has 13 cases where it finds a direct expression and one where it appears by inference.

A summary description comes from going down the right side of the graph, from the two-o'clock position to the four-o'clock position and then by touching the one dimension not so described by going to the eleven-o'clock position. At two o'clock, Boehm and Sullivan exhibit the tendency to favor control of the jury by the court. The opposite tendency, labelled trust in juries, appears at the seven-o'clock position, Dickson and Rucker. The line connecting those two points has the name of the corresponding swing vote about jury latitude, Shepard.

At the three-o'clock position appear the three tendencies of Rucker and Sullivan. Exactitude about warrants (which we interpret to be the narrow view of police discretion) finds its opposite at the ten-o'clock position, where Shepard and Boehm favor police discretion. The swing vote about police discretion versus warrants is Dickson. The second tendency of Rucker and Sullivan, the exacting standard for warnings and consents has its opposite at the nine-o'clock position, where Shepard and Dickson tend to acquiesce to the lack of warnings and consents. Boehm is the swing vote about warnings and consents. The third tendency of Rucker and Sullivan, in favor of retroactivity of defenses, does not have its opposite tendency appear, not revealing which of the three members of the corresponding majority would be the swing vote about retroactivity of defenses.

At the four-o'clock position, Boehm and Rucker, exhibit the tendency to favor more process and rehearings for the defendant while favoring procedural closure for the state. The opposite tendency, for procedural closure against the defendant, appears at the eleven-o'clock position by Shepard and Sullivan. Shepard and Sullivan also exhibit the tendency of lenience toward governmental and trial process or bias. Its opposite appears at the eight-o'clock position by Boehm and Dickson, with Rucker being the swing vote on the propriety of governmental and trial process.[13]

We turn to showing how each tendency and its opposite appear in the decisions.

A. Finality or Closure

The primary attitude about criminal procedure that we discern may be called finality, i.e., favoring expedient process and procedural closure (in contrast to granting more hearings, allowing the raising of more and new arguments, or requiring the trial court to grant more procedural requests of the defense). The view favoring procedural expediency or closure appears in the dissents of Shepard and Sullivan. In *Jiosa v. State*,[14] the majority finds reversible error in the trial court's refusal to allow the victim's mother to testify in favor of a child

13. Considering exactitude against bias to be the liberal position of this dimension, finding Boehm and Dickson at the left and conservative side of the graph seems notable. However, Boehm and Dickson's exactitude is not biased in favor of the defendant, they also produce dissents favoring exactitude to the state's advantage. An example of favoring the state is this coalition's dissent in Guyton v. State, 771 N.E.2d 1141 (Ind. 2002), where they make the point that for double jeopardy to attach the defendant must show "reasonable, not speculative or remote," possibility that the jury used the same evidentiary facts. Thus, the near-vertical placement of this dimension seems apt.

14. 755 N.E.2d 605 (Ind. 2001).

molestation defendant. Shepard and Sullivan find that the trial court's denial was proper. That propriety was, in part, supported by the violation of the court's order sequestering the witnesses. In *Timberlake v. State*,[15] the majority grants a stay of execution pending the reevaluation of the insanity standard by the United States Supreme Court. Shepard and Sullivan, dissenting, would not grant the stay in part because in their view, the defendant would not have met the revised insanity standard. In *Newton v. State*, Shepard and Sullivan write separate concurrences stressing that the defendant had no right to a late appeal.[16] Not surprisingly, finality appears as a tendency of these dissenters outside the criminal context (and, therefore, not included in these counts). In *Cavinder Elevators v. Hall,* they would have held that the expiration of a court's thirty-day deadline to rule on a motion should have been closure of the case, triggering the time period for appeal.[17]

The Shepard–Sullivan coalition appears at the eleven-o'clock position of our graph.

The opposite attitude, favoring additional procedural steps in favor of the defendant while limiting the state's procedural latitude, appears in 15 dissents of Justices Boehm and Rucker. This busy alignment of the court issues in total 18 tightly split decisions about criminal procedure. The minority favors expanded procedural protections for the defendant generally in *Zimmerman v. State*,[18] and *Helsley v. State*;[19] they would grant reconsideration in *Lambert v. State*;[20] they would allow a request for a DNA test in *Williams v. State*,[21] and the right to cross-examine the DNA technician in *Pendergrass v. State*;[22] nor would these dissenters accept as a matter of law that a defendant could not challenge a guilty plea in *Norriss v. State*.[23] Similarly, they favor ineffective assistance of counsel arguments in *Daniels v. State*[24] and *Azania v. State*.[25] In *Stroud v. State*, they point out that, in the ordered resentencing, the trial court can override the death recommendation of the jury.[26] As a corollary of these examples of procedural deference to the defendant, this team would curtail the state's procedure. They would limit the state's right to appeal in *Hardley v. State*;[27] not allow the state to seek

15. 859 N.E.2d 1209 (Ind. 2007).
16. 894 N.E.2d 192 (Ind. 2008).
17. 726 N.E.2d 285 (Ind. 2000).
18. 750 N.E.2d 337 (Ind. 2001) (prisoner's administrative complaint against removal of visitations due to a positive drug test where the majority finds no right of review; the dissent would grant more rights based on the statutory text).
19. 809 N.E.2d 292 (Ind. 2004) (upholding double murder conviction for no errors; dissent would give greater procedural protections to the defendant).
20. 825 N.E.2d 1261 (Ind. 2005) (denying petition for leave for second postconviction relief; dissent would grant reconsideration with strong doubts about the applicability of the death penalty).
21. 793 N.E.2d 1019 (Ind. 2003) (third review of death sentence, errors not recognized; dissent would allow DNA test).
22. 913 N.E.2d 703 (Ind. 2009) (affirming child molestation conviction, errors about DNA testimony were harmless; dissent would grant right to cross-examine DNA technician).
23. 896 N.E.2d 1149 (Ind. 2008) (a claim of newly discovered evidence did not allow the defendant to challenge plea of guilty; minority concurs but not as a matter of law).
24. 793 N.E.2d 1019 (Ind. 2003) (upholding murder conviction and rejecting ineffective assistance of counsel claim).
25. 738 N.E.2d 248 (Ind. 2000) (different dissenting decisions, both turning on ineffective assistance but about different actions of counsel).
26. 809 N.E.2d 274 (Ind. 2004).
27. 905 N.E.2d 399 (Ind. 2009) (allowing state to appeal concurrent nature of sentences for theft; dissent would preclude state's appeal if not raised at trial).

a greater penalty on appeal in *McCullough v. State*;[28] limit the state's right to impose the death penalty in a new review of *State v. Azania*;[29] and remand for trial upon suspicion of police lies in *Williams v. Tharp*.[30] We can, by inference, add to the tendency to oppose the state's procedural latitude, the willingness to affirm as not clearly erroneous the trial court's finding of defendant's retardation in *State v. McManus*.[31]

This coalition of the court with Boehm and Rucker on the minority appears at the four-o'clock position of our graph.

In conclusion, Shepard and Sullivan lean in favor of finality, *i.e.,* expediency of procedure and closure to the defendant's disadvantage, whereas Boehm and Rucker tend to favor additional procedure for the defendant while curtailing the state's requests for more process, whereas Dickson is the swing vote on the expediency of process.

B. Need for Defendant's Consents and Warnings

A low threshold for warning defendants or obtaining their consent (for example, for searches) comes from dissents by Shepard and Dickson. In *Haselma v. State*,[32] where the majority finds that a lessee could not consent to a search that led to a conviction of the lessor, the dissent would have found that consent sufficient. In *Sellmer v. State*,[33] where the majority found that one anonymous call did not provide reasonable suspicion for the drug-producing search of a car and that the corresponding warning was inadequate, the dissent would affirm the conviction. In *Hopper v. State*,[34] where the majority required more warnings for the validity of a plea bargain, the dissent would not have required heightened warnings. The common theme of these Shepard–Dickson dissents is that warnings to, or consents by the defendant were not required. In our graphical depiction of the decisions of the court, this group appears at the nine-o'clock position.

The team that tends to favor exacting warnings and consents are Sullivan and Rucker, who also exhibit two other tendencies. In *Staton v. State*,[35] where the majority affirms a conviction of sexual misconduct with a minor, this dissenting coalition would exonerate for weak proof of age. Whereas lack of clarity regarded the age of both participants and the court focused on the age of the defendant, who was the adult participant, we can infer that they would also have required stronger evidence of notice to the defendant that the minor was underage. In *Jackson v. State*,[36] the same dissenters concluded that the defendant did not properly waive his right to counsel at trial, i.e., that the defendant's consent

28. 900 N.E.2d 745 (Ind. 2009) (allowing state to pursue heavier sentence in reaction to defendant's appeal; dissent would not allow state to pursue heavier sentences).
29. 875 N.E.2d 701 (Ind. 2007).
30. 914 N.E.2d 756 (Ind. 2009) (giving qualified immunity from defamation to witness statements to the police; dissent would remand to trial due to evidence of lies).
31. 868 N.E.2d 778 (Ind. 2007) (not reversing death sentence on retardation claim, errors harmless; dissent would affirm trial court's retardation finding as not clearly erroneous).
32. 823 N.E.2d 668 (Ind. 2005).
33. 842 N.E.2d 358 (Ind. 2006).
34. 934 N.E.2d 1086 (Ind. 2010).
35. 853 N.E.2d 470 (Ind. 2006).
36. 868 N.E.2d 494 (Ind. 2007).

to the process was inadequate. In *State v. Jackson*,[37] the majority affirmed a habitual traffic offender conviction without requiring specific knowledge of the reason for the revocation of the defendant's driver's license. The dissent of Sullivan and Rucker would have required proof of specific knowledge, i.e., required a stronger warning to the defendant. This coalition appears at the three-o'clock position of our graph.

These three decisions where the dissent shows a tendency in favor of exacting warnings and consents are a minority of the dissents produced by this coalition. This does not, however, weaken the conclusion that Shepard and Dickson tended not to require exacting warnings and consents, Sullivan and Rucker tended to require them with more exactitude, leaving Boehm as the swing justice in the tendency about warnings and consents.

C. Governmental and Trial Bias

The third tendency we discern regards the lenience versus exactitude demanded from the government's and especially the lower courts' procedure. The exacting attitude, which sets a high bar against any bias, actual or apparent, is displayed in dissents by Boehm and Dickson. For example, in *Randolph v. State*,[38] the majority finds no mistrial. An officer testified that the officer looked for the defendant's picture in a state database without success. The defense objected that the jury could draw the inference that the defendant had a prior criminal record. The trial court told the defense that the court was willing to admonish the jury, to give "any kind of admonition you like or none if you'd like that." The defense did not ask for one. The defense argued that its mistrial motion should have been granted. The majority held that the jury may well have drawn the inference that the defendant had no criminal record and that the court's advice to the defense about the court's willingness to admonish the jury meant that the defense waived the issue. Boehm and Dickson dissented, pointing out that "refusal to accept an admonition waives the issue only if the admonition would cure the problem."

The same dissenting coalition would grant greater procedural protections to the defense about the defense's right to object in *Miller v. State*.[39] More attenuated but still related to governmental process is the dissent's position in *Oman v. State*.[40] An employer-mandated drug test of a firefighter involved in an accident while driving a firetruck resulted in a conviction for driving under the influence. The dissent would have required some confidentiality of the test, which could be seen as protecting the defendant procedurally from the state.

Close to scrutinizing trial propriety is the same minority's dissent in *Guyton v. State*.[41] The defense argued that double jeopardy had attached with respect to a lesser included offense because the defendant had shown a "reasonable, not speculative or remote," possibility that the jury used the same evidentiary facts to convict for both offenses. Similarly, in *Pennycuff v. State* this dissenting team would reverse due to prejudi-

37. 889 N.E.2d 819 (Ind. 2008).
38. 755 N.E.2d 572 (Ind. 2001).
39. 753 N.E.2d 1284 (Ind. 2001).
40. 737 N.E.2d 1131 (Ind. 2000).
41. 771 N.E.2d 1141 (Ind. 2002).

cial evidence (which can also be considered to fit the tendency for jury control—if that were considered its primary tendency, then it would become a "misfit" dissent).[42]

The same minority's position in *Wallace v. State* can also be considered to be about trial propriety, albeit by inference.[43] The majority finds that child molestation prosecutions were time-barred. The minority states that the limitations are waivable and required an objection. Although in *Guyton* and *Wallace* this minority's position did not favor the defendant, the dissents nevertheless fit the theme of trial process propriety.

This coalition of Boehm and Dickson appears at the eight-o'clock position of the graph.

The opposite tendency, being lenient toward governmental and trial process, appears in dissents by Shepard and Sullivan, at 11 o'clock in the graph. In *Holly v. State*,[44] the majority rejects a warrantless search of a car. The majority, granting that the expired license of the driver would be grounds for a reasonable suspicion, holds that the fact that the license was for the opposite sex, removes reasonableness and invalidates the search. The dissent of Shepard and Sullivan argues that the police's proper conduct, asking for the license, should not have negative consequences for the police.[45] In *Baugh v. State*,[46] Shepard and Sullivan concur in an upholding of a conviction but point out that the defendant waived the right to cross-examine an expert.

The distinction of this attitude of lenience toward governmental and trial process is not so clearly distinguishable from the tendency of the same minority to favor finality or closure. We consider *Jiosa v. State*[47] to be an example where Shepard and Sullivan exhibit a tendency favoring finality. The majority considered reversible error the trial court's prohibition against the testimony of the mother of the victim in favor of the defendant because she violated an order sequestering the witnesses. However, the same position can be seen as lenience toward the trial court's procedural choice to so punish the violation of the sequestration order, which is an expression of this minority's other tendency.

This coalition appears at the eleven-o'clock position of the figure.

In sum, Boehm and Dickson have the tendency to demand exactitude from governmental and trial process, while Shepard and Sullivan are lenient toward the government's and the trial courts' procedural choices. Rucker is the swing vote about governmental and trial propriety.

A caveat regarding this conclusion arises from the existence of one dissent, by Rucker and Sullivan, who appear at three o'clock on the figure. In *French v. State*,[48] Rucker and Sullivan would reverse a habitual offender finding because the defendant appeared in prison orange to the jury, which is an expression of the tendency for unbiased process. Because, in *French*, Sullivan switches to favoring exacting process, the

42. 750 N.E.2d 354 (Ind. 2001).
43. 753 N.E.2d 568 (Ind. 2001).
44. 918 N.E.2d 323 (Ind. 2009).
45. This also makes clear that *Holly* should not be categorized in the police discretion versus warrants tendency. The key fact was that the police asked for the driver's license, making *Holly* about process, as opposed to the minority taking a position about discretion of the police.
46. 933 N.E.2d 1277 (Ind. 2010).
47. 755 N.E.2d 605 (Ind. 2001).
48. 778 N.E.2d 816 (Ind. 2002).

inference that Shepard is likely more lenient about process than Sullivan may be validly drawn. Similarly, the appearance of Rucker (rather than Boehm or Dickson, the polar justices for exacting process) on the side of exacting process in *French*, suggests that the differences between Boehm and Dickson from Rucker, the swing vote, may be unusually small, so that both Boehm and Dickson find themselves on the lenient side in *French*.

D. Police Discretion versus Warrants

The issue of police discretion rarely appears. This contradicts our expectation that, because criminal procedure could be seen mostly as a means to deter the police from excessively intrusive conduct, attitudes about police discretion would be central. Rather, perhaps this suggests that the Court was sensitive not to burden the police with new training as a result of the evolution of criminal procedure.

The view that the actions of the police were appropriate appears in a single dissent by Shepard and Boehm. In *State v. Bulington*,[49] the majority held that the store clerk's testimony that the defendant bought a few boxes of antihistamines was not grounds for a reasonable suspicion justifying a warrantless search. Shepard and Boehm would have let the testimony support a search, by inference trusting the police's conclusion. The coalition appears at the ten-o'clock position of our original graph and only forms for two decisions.

The opposite tendency, the tendency not to give discretion to the police, appears by inference as the requirement for warrants in two of the many dissents by Rucker and Sullivan, at the graph's three o'clock. In *Query v. State*,[50] they dissent against the majority's upholding of a cocaine-yielding search. They would require a new warrant upon the finding, before the execution of the initial warrant, that the suspect white dust was innocent. In *State v. Hobbs*,[51] where again the majority upholds a search, Sullivan and Rucker would jettison the automobile exception to the warrant requirement and require a warrant. This coalition appears at the three-o'clock position in our graph.

These three decisions on the tendencies about granting discretion to the police versus requiring a warrant, show that Shepard and Boehm favor police discretion, whereas Sullivan and Rucker tend to require warrants, leaving Dickson as the swing vote about police discretion.

E. Trust in Juries

The favoring of jury independence and the view that juries can operate properly with limited supervision is captured by the minority coalition of Justices Dickson and Rucker. In *Hollowell v. State*,[52] the dissent invoked the well-established power of Indiana juries not to find the aggravating factor of the defendant being a habitual offender. In *Springer v. State*,[53] a recklessness conviction, the majority does not require an instruction to the jury about the lesser negligence option whereas the

49. 802 N.E.2d 435 (Ind. 2004) (Sullivan, J.).
50. 745 N.E.2d 769 (Ind. 2001).
51. 933 N.E.2d 1281 (Ind. 2010).
52. 753 N.E.2d 612 (Ind. 2001) (Sullivan, J.).
53. 798 N.E.2d 431 (Ind. 2003) (Sullivan, J.).

minority would have the jury draw its own inferences. In *Walden v. State*,[54] the majority holds that explaining to the jury the consequences of not finding the defendant a habitual offender was unnecessary; Dickson and Rucker would allow the instruction with an eye to enabling jury nullification. Slightly less directly on point is *Love v. State*.[55] The majority allowed a statement to reach the jury that the jury could have construed as explaining why, although the defendant tested negative for a sexually transmitted disease, he still could have infected the victim. The minority would not have allowed the statement to reach the jury because it was speculative but found the error harmless in view of the voluminous other evidence of guilt. The desire to exclude the statement can be about jury control but considering the error harmless is an expression of trust in the jury.

An analogy exists in many civil cases such as *Holcomb v. Walter's Dimmick Petroleum, Inc.*,[56] where the same majority affirms summary judgement in favor of a gas station who reported non-paying motorists to the police, when the gas station became a defendant in defamation and false imprisonment. The same minority team favors a full trial. Although these cases are ostensibly about summary judgement standards, not jury independence, the full trial would have included the right to a jury and the favoring of a trial is congruent with the idea of trusting the trier of fact, be that jury or court.[57]

The opposite attitude appears as a preference for controlling the information that the jury receives, which appears in a dissent by Justices Boehm and Sullivan. In *Bostick v. State*,[58] the majority finds incriminating statements admissible whereas the dissent would not admit them. This coalition is at the two-o'clock position of the graph.[59]

The swing vote between these two coalitions is Chief Justice Shepard. The conclusion is that tight disputes about trusting juries turned on Shepard's vote, with Dickson and Rucker favoring more independence and discretion for juries, whereas Boehm and Sullivan favored greater control of juries.

F. Retroactivity of Defenses

The busy minority of Rucker and Sullivan also has three dissents favoring retroactivity of defenses, i.e., granting defendants relief on the basis of court rulings or other developments in law following the dates of their convictions. In *Bowles v. State*,[60] *Belvedere v. State*,[61] and *Membres v. State*,[62] Rucker and Sullivan favor the retroactive application of interpretations favoring the

54. 895 N.E.2d 1182 (Ind. 2008) (Sullivan, J.).
55. 798 N.E.2d 806 (Ind. 2002) (Sullivan, J.).
56. 858 N.E.2d 103 (Ind. 2006) (Sullivan, J.).
57. *See also* Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 56 IND. L.R. 669, 710 (2023) (discussing recent developments in summary judgment law).
58. 773 N.E.2d 266 (Ind. 2002).
59. The same alignment of the justices issues one more decision on criminal procedure, Saylor v. State, 765 N.E.2d 535 (Ind. 2002). *Saylor* turns on the interpretation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires aggravating factors to be found by the jury beyond a reasonable doubt, as it applies to the Indiana death penalty statute. The majority finds the statute not to violate *Apprendi*. Sullivan's position was subsequentially adopted by the Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002), and Saylor's death sentence was vacated, albeit on somewhat different grounds, Saylor v. State, 808 N.E.2d 646 (Ind. 2004). An *Apprendi* concern also arises in Rucker's concurrence in State v. Barker, 809 N.E.2d 312 (Ind. 2004); *cf* note 63 and accompanying text.
60. 891 N.E.2d 30 (Ind. 2008).
61. 889 N.E.2d 286 (Ind. 2008).
62. 889 N.E.2d 265 (Ind. 2008).

defendants that would have suppressed evidence used against them. This favoring of retroactivity is the third tendency demonstrated by this minority, which appears at the three-o'clock position of the graph. However, the opposite tendency, objecting to retroactivity, does not appear. Thus, we cannot know which of the three majority members and potential swing votes of that coalition, Shepard, Boehm, or Dickson, is the swing vote on retroactivity.

V. MISFIT DISSENTS

This analysis fits into these six dimensions of criminal procedure 45 of the tightly split criminal procedure decisions of this court out of the 60 relevant ones in the database. The resulting "signal to noise ratio," explained at the outset of this Chapter, of 45 to 15, three to one, contains different types of "noise."

One type of noise is decisions that do not fit in any of the dimensions we identify. They may be seeds of unidentified dimensions that might have become apparent if the court had produced more decisions. An example may be a dimension about requiring aggravating factors to be determined by a jury beyond a reasonable doubt (according to *Apprendi*).[63]

A second type of noise comes from decisions that are an expression of a dimension we identify but come from an atypical minority, i.e., the formation of a minority of two that does not correspond to either of the pairs that usually take the two opposite positions about this dimension.

One dissent falls into this category. It was discussed in the dimension to which it corresponds above and is mentioned again here.[64] *French v. State* has the dissenters exhibit the tendency against biased process by considering that the defendant's appearance before the jury in prison orange was grounds to reverse the finding of habitual offender.[65]

VI. CONCLUSION

The search for tendencies in this court's criminal procedure decisions revealed some order, perhaps more than expected. The 3:1 signal-to-noise ratio is not unacceptably low—neither is it strikingly high. Rather, it justifies further research on judicial voting patterns as a means to describe a court's work. Further research could interact this type of analysis with the more mechanical and less subjective ways to explore dimensions, either through the use of text analysis,[66] or mathe-

63. Boehm and Sullivan (at two o'clock) would apply *Apprendi* more strictly than the majority in Saylor v. State, 765 N.E.2d 535 (Ind. 2002) (Rucker, J.). Rucker, however, concurs separately and expresses a more exacting adherence to *Apprendi* than the majority's in State v. Barker, 809 N.E.2d 312 (Ind. 2004) (Dickson, J.). Frustrating to taking these two opinions as a nascent *Apprendi* tendency is the fact that Rucker's positions are opposite, finding compliance with *Apprendi* in *Saylor* but stressing exactitude in *Barker*.

64. This makes this analysis slightly different than its precursor publication, where we identified four misfit dissents. As explained in the audit of Appendix 6.A, the large number of the decisions mitigates disagreements in few cases or changes of interpretation, as in these three cases. The major point, of recognizing these dimensions, is not influenced.

65. 778 N.E.2d 816 (Ind. 2002).

66. Professor Clark uses text analysis software to group decisions into dimensions in TOM CLARK, THE SUPREME COURT: AN ANALYTIC HISTORY OF CONSTITUTIONAL DECISION MAKING (2019).

matical methods for identifying dimensions.[67] The number of dimensions each produces holds further interest and merits further research. The six dimensions seen here in criminal procedure would imply far too many dimensions to be useful as a general description of a court's work. However, the analysis suggests that alternative approaches that offer too few dimensions may risk an excessive sacrifice of accuracy for generality.

Prediction is a different matter, however, and can only occur on the margin. We are able to see these tendencies by using the closely split decisions of over ten years of this court's output. Very few tendencies, which appear in numerous occasions, could have been visible from a shorter term, such as this court's first eight years, so as to form the basis for predictions for the last two years. Several tendencies, however, appear in so few decisions that they may well not have been visible in a shorter period. Not only would no related predictions be formed, but the noisier environment could have produced false predictions.

We can only hope that compositions occur again that have the characteristics to continue this type of research. The longevity of this composition and the fluidity with which coalitions were formed seem instrumental. Even if a court composition had a similar duration, if it only formed into a handful of coalitions to issue tightly split decisions, then much of the variability that we see may have been obscured.

67. Professor Fischman uses multidimensional scaling to identify two dimensions in Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513 (2019); and Joshua B. Fischman, *Do the Justices Vote Like Policymakers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL ST. 269–93 (2015).

6. The Conservative Paradox and the Formation of 5–4 Coalitions

There is a curiosity in the graphs of chapters 3 and 4: the tightly split decisions always have a conservative tilt. Liberal and conservative decisions neither balance out nor fluctuate with the court's composition—in which case they might have skewed liberal in the all-Democratic-appointed Vinson composition and conservative in the recent ones that have Republican-appointed majorities. Rather, this tilt existed when the Court was dominated by appointees of Democratic presidents immediately after WWII as well as when its majority became Republican appointed. This "conservative paradox" appears in all long-lived compositions of the Court and all 15-term periods.

This is more surprising still when we consider that in the Database as a whole (covering 1946 through 2021), all decisions (not just 5-4 decisions) are approximately equal in terms of ideological slant: the entire database holds 9,160 decisions for which the conservative ratio is 49 percent.[1]

To repeat, the conservative paradox cannot be explained by the political circumstances of appointments because it spans liberal and conservative administrations. Statistically, the paradox is explained by the ideological proximity of the median justice to the next liberal, and conservative, justice. Nevertheless, this explanation only comes from 5–4 decisions in which the justices align by ideology, which are a narrow minority (48%) of all 5–4 decisions. In the majority of 5–4 decisions, where the justices do not align by ideology, this explanation fails (plus no conservative paradox appears). If justices placed political considerations above their legal interpretation, then the explanation would retain power in the unaligned decisions. Therefore, the justices must be placing their legal interpretive principles above ideology in their voting, at least in decisions in which they do not align by ideology. That ideology explains strongly the minority of 5–4 decisions in which the justices do align by ideology is,

1. The overall data has 4,381 conservative decisions and 4,578 liberal ones, for a conservative ratio of 49 percent. The entire database holds 9,160 decisions, with 201 not coded as liberal or conservative.

then, no paradox. It is merely the consequence of the political process for the appointment of the justices.

After a brief review of the literature, the first section of this Chapter describes the data, the Supreme Court Database's assignment of political slant and the Martin & Quinn database of judicial ideology. The second section presents the finding of the conservative paradox. The third section shows how the ideological location of the median justice explains the paradox in aligned decisions but not in unaligned ones. The fourth section draws the inference that the most plausible interpretation is that justices mostly follow their personal legal philosophies but are selected on the basis of their philosophies' agreement with the appointing political forces in the salient dimensions.

The average outcome of judicial decisions has occupied significant attention. The discussion initially focused on private litigation in civil law matters, founded on what has come to be known as the Priest-Klein hypothesis.[2] The Priest-Klein hypothesis takes a victory rate form and a settlement rate form. In its victory rate interpretation, the hypothesis reasons that plaintiffs facing low probability of success will tend not to bring suit and defendants facing high probability of defeat will tend to concede liability rather than expend funds on losing litigation. Therefore, the litigated disputes will tend to be ones in which the outcome is approximately equally uncertain for both parties. This implies a rate of plaintiffs' success of about 50 percent. This version of the Priest-Klein hypothesis fits best disputes about issues that are not divisible, such as the pursuit of an injunction, because other matters are subject to the possibility of a settlement that mirrors the probability of success.

The settlement rate interpretation of the hypothesis applies to the amount of the judgement or other disputes amenable to a settlement for a fraction of the value in dispute. If plaintiffs and defendants agree on their probabilities of success, then they will tend to settle for the probability-adjusted amount, rather than incur the risk and expenditure of trial. For example, consider a plaintiff who claims $100,000 with a 30 percent chance of success opposite a defendant who also sees the plaintiff's chances of success at about 30 percent. They will tend to reach a settlement at $30,000. The result is that the disputes that will end up litigated are those where the plaintiffs tend to have a more optimistic view of their chances of success than defendants' estimate. This may also indicate that the observed rate of plaintiffs' success may tend to be around 50 percent. Both forms of the Priest-Klein hypothesis are subject to several assumptions. Empirical investigations into rates of success have tended to indicate that the assumptions do not reflect reality perfectly and the observed victory rates deviate from the 50 percent implied by the hypo-

2. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

thesis.[3] Fischman provides an extensive analysis of the settings and detailed review of the literature.[4]

Supreme court litigation presents a setting quite different than what the Priest-Klein hypothesis envisions. Much of the litigation is not private but about criminal or public law matters. One subject to a criminal penalty will make a very different cost-benefit analysis than an appellant in civil litigation. A governmental entity in a dispute about authority or interpretation will similarly have settlement motives that would differ from those of private litigants.

Even the minority of disputes that do correspond to private litigation, like other matters, are subject to the discretionary review pursuant to the grant of a writ of *certiorari*. To a large extent, success rates in supreme court litigation may flow mostly from the operation of grants of *certiorari* rather than private settlement incentives. Again, various theories have been promulgated and tested. Black & Owens view supreme courts as supervisors and discipliners of lower courts.[5] Others examine the persistence in petitioning for *certiorari* of different actors in the legal and political scene.[6] The role of unanimous decisions has also received attention.[7] The visualizations of chapter 4 also the illustrate political slant of decisions, but again without a focus on their departure from even other than a note of it. On a related note, Chapter 9 studies the distribution of votes and discusses the "settling the law" possible motivation for unanimity.[8]

In sum, Priest-Klein provides a single hypothesis against which private litigation is gauged. But supreme court adjudication has numerous hypotheses surrounding it, with no claim or consensus about any one playing a primary role. Notably absent is any theory from which we should expect a bias in the outcomes, especially by vote split, either supporting or contradicting the phenomenon presented here, that tight splits are disproportionately conservative.

3. *See, e.g.*, Peter Siegelman & John Donohue, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest/Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995) (win rates in employment disputes are sensitive to the business cycle); Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH L. REV. 319 (1991) (finding, e.g., different patterns in personal injury from commercial litigation).

4. Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, *passim* (2019). A related reminiscence from his days as Indiana Budget Director that Frank wishes to share involves a dormant commerce clause challenge to a state intangibles tax, which the state won at the Indiana Supreme Court, Indiana Dep't of State Revenue v. Felix, 571 N.E.2d 287 (Ind. 1991). The plaintiffs sought *certiorari* to the United States Supreme Court and the consensus was that it was likely to be granted and Indiana would lose on the merits. Despite its victory, Indiana settled. A few years later North Carolina lost on the merits the same issue, Fulton Corp. v. Faulkner, 516 U.S. 325 (1996).

5. Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RESCH. Q. 385 (2012).

6. *See, e.g.*, H.W. Perry, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1994); Gregory A. Caldera and John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 A. POL. SCI. REV. 1109 (1988); Gregory A. Caldera and John R. Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?* 52 J. POL. 782 (1990); Gregory A. Caldera, John R. Wright, Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755 (2004); Ryan J. Owens and David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

7. Lee Epstein, William M. Landes, and Richard A. Posner, THE BEHAVIOR OF FEDERAL JUDGES 149, chapter 3 (2013); Lee Epstein, William M. Landes, and Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NORTHWESTERN U.L. REV. 699 (2012).

8. *See* p. 174.

I. THE SUPREME COURT DATABASE AND IDEOLOGICAL SCORES

Our analysis rests on two databases, the by-now familiar Supreme Court Database ("Database") and the database of Ideological Ideal Point Estimates of the justices (their "Ideology") as computed by Martin & Quinn. The analysis uses the former for the justices' votes, the cases' outcomes, and their ideological slant (liberal or conservative). The latter provides estimates of the relative ideological positions of the justices.

The Supreme Court Database holds the data surrounding each decision of the United States Supreme Court and divides into the modern database, from the 1946 term onwards and the legacy dataset, up to the 1945 term. The database tracks numerous aspects of each decision. The relevant ones for our analysis are the justices' votes and an ideological coding of the decision and the votes.

The ideological coding by the Database is somewhat contested. Legal scholars instinctively recognize that some fraction of decisions occupy a grey area, where informed and neutral observers may disagree whether an outcome is liberal or conservative. Indeed, one set of scholars who used the Database's ideological slants dropped altogether some legal topics that seemed too far into that grey area. Our analysis offers three measures that should provide comfort to readers about the Database's assignment of ideological slant. In Appendix 6.A, p. 202, we perform an audit of the Database's ideological assignments against the manual assignment of slants to 800 decisions in Chapter 4. Whereas we disagree with about five percent of the Database's assignments of slant, our overall count does not differ. In other words, we disagree in an equal number of cases that the Database considers liberal and that the Database considers conservative. Accordingly, we find no bias in the Database. By extension, despite that informed and neutral observers will disagree with a small fraction of its assignments of slants, we have no reason to expect that they will disagree with the overall counts. This also counters the suggestion that the Database should assign slants to fewer cases, avoiding the grey area.[9]

The second validation of the Database's assignment of slants comes in the right panel of Table 6.2 and Appendix 6.B. Lee Epstein, William Landes, and Richard Posner subject the Database's ideological assignment of slants to a review of a hundred decisions read by Judge Posner and drop a set of decisions about a set of legal topics due to concerns over the accuracy of the Database's assignment of slants there.[10] The Appendix compares that approach to using the Database's count of slants in the two compositions that this dropping of topics changes the most against the premise of the conservative paradox. In other words, the compositions that have more than sixty 5–4 decisions display the conservative paradox, a ratio of conservative decisions greater than fifty percent according to the Database's

9. Professor Carolyn Shapiro has suggested that the decisions in the grey area should not receive an assignment of political slant. Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MISSOURI L. REV. 75, *passim* (2010).

10. Lee Epstein, William M. Landes, and Richard A. Posner, THE BEHAVIOR OF FEDERAL JUDGES 149-151 (2013).

slants. The Appendix compares that to the conservative ratio calculated after the dropping of the same topics that Epstein, Landes, & Posner drop (the "EL&P filtering"). The two compositions that change the most in the direction of a reduced conservative ratio are those defined by the appointments of Stevens and O'Connor. Appendix 6.B discusses the thirteen dropped decisions, determines their ideological slant, and compares the resulting conservative ratio to that of the Database and of the Epstein, Landes, & Posner method. In both compositions, the conservative ratio from the Database is more accurate than the conservative ratio according to the Epstein, Landes, & Posner filtering. Despite that the filtering removes some decisions with clearly false slant, it removes many more decisions with accurate slant and that is the reason for the Database's greater accuracy. This confirms the notion that the database is not biased and shows that the large number of assignments by the Database produces accuracy and renders irrelevant disagreements about few cases. Moreover, this audit confirms the existence of the conservative paradox.

The third validation of the use of the Martin & Quinn Ideologies comes in Appendix 6.C, p. 213. The Appendix explores whether the ideological distance between the justices adjacent to the median justice explains the fraction of 5–4 decisions where the justices align by ideology. This ideological distance extremely strongly explains the fraction of decisions in which the justices align by ideology. Therefore, readers should take even more comfort that Martin & Quinn ideology relates to 5–4 decisions fairly accurately.

The ideology database is the work of Martin and Quinn, two political science professors. The input to their analysis is all decisions that are not unanimous. The output, the ideological scores, come from the times that each justice has sided with others, without regard to whether the result is liberal or conservative, but the scale is interpreted as aligning the justices from liberal to conservative. Thus, the justice who is most likely to dissent even alone from conservative decisions will tend to have the most liberal score, and *vice versa*.

Quantifying the ideology of justices has a long bibliography. Several simpler assignments of ideology to justices exist, but they have little accuracy.[11] And some do criticize the Martin & Quinn method and offer more sophisticated or more multidimensional estimates.[12] These multidimensional scorings agree with this book's analysis that the reductionism of the one-dimensional view of judges as liberal or conservative is simplistic. However, the additional sophistication of other one-dimensional scorings does not benefit the analysis of the conservative paradox. For example, Bailey's calculation of ideological ideal points has the alleged advantage of greater consistency across time. But that is irrelevant for this analysis because all the comparisons made here

11. Joshua B. Fischman and David S. Law, *What is Judicial Ideology, and how Should We Measure It?,* 29 Wash. U. J. L. & Pol'y 169, *passim* (2009) (hereinafter "*Ideology?*"; reviewing literature).

12. Fischman & Law, *Ideology?* 169-172; Ward Fasnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. COLLOQUY 143 (2007) available at http://www.law.northwestern.edu/lawreview/colloquy/2007/11/; Michael A. Bailey, *Measuring Court Preferences, 1950–2011: Agendas, Polarity and Heterogeneity* (working paper, August 2012). One of the co-authors of this volume has adapted the method of Martin & Quinn to produce a set of metrics that are more accurate and appealing to the legal community, Nicholas L. Georgakopoulos & Mark E. Fisher, *Exploring the Monte Carlo Analysis of Supreme Court Voting* (2022) available at https://ssrn.com/abstract=4286744.

regard the difference between justices that make decisions at the same time, the same term. Therefore, no advantage is lost by using the Martin & Quinn estimates of ideology rather than the Bailey ones.[13]

A critique of using estimates of ideology that arise from how justices decide is their circularity. Using the Martin & Quinn ideologies to find a general theory of how justices vote has the circularity that the ideologies were calculated from the justices' voting. The problem does not arise here because the analysis only deals with 5–4 decisions, which are less than a quarter of all non-unanimous decisions, which generate the Martin & Quinn ideologies.[14] Critics of Martin & Quinn concede the point that partial overlaps are unlikely to create a problem, which is stressed by Martin & Quinn.[15]

II. THE CONSERVATIVENESS OF TIGHT SPLITS

The conservative paradox is that 5–4 decisions should be expected to be about 50% conservative, yet lean consistently conservative, being 58 percent conservative rather than even. From a statistical perspective, the paradox is confirmed by the calculation of the probability that this would appear by chance while the true underlying forces would produce an even division of decisions. That probability is infinitesimal, less than zero followed by a decimal point and nine zeros before a non-zero digit.

Table 6.1. Conservative Ratio of 5–4 Decisions (All compositions; 1946-2021).

	5-4 Votes	*Even Hypoth.*
Conservative	805	692
Liberal	578	692
Conservative Ratio	58%	50%
P-Value		0.0000001%

Table 6.1 shows the liberal and conservative counts of all 5–4 splits from the 1946 term to the 2021 term, the percentage of conservative decisions (the "conservative ratio"), and the probability that such a deviation from 50–50 can appear by chance, what the statisticians call p-value, calculated according to the chi-squared test. Five–four decisions lean pronouncedly conservative, 58

13. We are also not reporting the results according to the Georgakopoulos & Fisher ideological scorings to avoid the appearance of a conflict of interests; the results are trivially different.

14. Five-to-four decisions coded with a political slant number 1,373. The remaining non-unanimous decisions with a slant number 3,024. This makes the 5–4 decisions 31 percent of the input into the Martin & Quinn calculation. However, the Martin & Quinn algorithm excludes the shadow docket. Excluding the shadow docket leaves 1,220 five-to-four decisions. However, this analysis only uses those to which the Database assigns a slant, which leaves 1,216 decisions that overlap in this analysis and that of Martin & Quinn. The overlapping decisions are under 28 percent of the total number of decisions and under 26 percent of the decisions entering the Martin & Quinn algorithm from the modern database, which according to my calculation is 4,695.

15. Granted, the ideal solution would be to compute the ideologies from the set of decisions that do not include 5–4 decisions, which would remove the circularity entirely. No easy way to do so exists. Moreover, when the analysis compares three hypotheses of coalition formation, the one that assumes strategic action has the greatest explanatory power. By contrast, the computation of ideologies assumes non-strategic voting. This difference argues that the analysis is not replicating or springing from the computation of ideologies. Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimates Be Used as Explanatory Variables?* 2–3 (Oct. 3, 2005), http://mqscores.wustl.edu/media/resnote.pdf.

percent, with confidence much greater than 99.99 percent that this is not due to chance.

The conservative paradox exists not merely in the overall data but in every sizable portion of the data. The next sections of this Chapter examine partitions by Court composition and by aggregations of terms.

A. Long-Lived Compositions

When seeking to assess specific compositions, the problem arises that some compositions are brief and produce few tightly split decisions. How many tightly split decisions should a composition produce for us to have some confidence that its result comes from the forces that shape tight splits and is not a random divergence? A subsample size limit resolves the issue. No composition produces a number of tight splits between 45 and 65, leaving that range as a natural place for the break. Setting the limit at 45 to 65 produces Table 6.2.

Each row corresponds to a composition that produced a sufficient number of decisions, named for its junior justice, the last justice to be appointed who defines the composition. The second and third columns have the count of tightly split decisions and the percentage conservative. The remaining columns, four to six, compare the results under the Epstein, Landes, & Posner ("EL&P") filtering, showing the (reduced) count of tightly split decisions, their percentage conservative, and the difference of that percentage from the unfiltered result of column three. For example, the Vinson composition produces 79 tightly split decisions, 61 percent of which are conservative; 77 tightly split decisions survive the EL&P filtering, and they again are 61 percent conservative. Before rounding to that same 61 percent, the filtered conservative ratio was 0.3 percent greater than the unfiltered one.

Table 6.2. The Conservative Ratio of Long-Lived Compositions' Tight Splits.

			With EL&P Filtering		
Comp'n	*5–4 w slant*	*Cons. Ratio*	*5–4 w slant*	*Cons. Ratio*	*Diff.*
Vinson	79	61%	77	61%	0.3%
Stewart	81	59%	80	60%	0.7%
Powell & Rehnquist	98	70%	92	72%	1.3%
Stevens	129	61%	121	60%	-1.7%
O'Connor	147	56%	142	54%	-1.6%
Kennedy	87	67%	86	67%	0.8%
Breyer	191	60%	186	60%	0.5%
Alito	69	67%	67	67%	0.5%
Kagan	79	51%	73	51%	0.1%

All compositions of Table 6.2 produce a mix of tightly split decisions that leans conservative. Only the Kagan composition has as low a conservative ratio as 51 percent. The rest are over 56 percent, and three compositions are at 67 percent and above, Powell & Rehnquist, Kennedy, and Alito.

The comparison with the EL&P filtering shows that the filtering makes little difference. The last column's differences are small and go in both directions, reinforcing the audit's conclusion that differences will tend to be unbiased. The maximum change is the drop of the ratio of the Stevens composition by 1.7 percent

after a filtering of eight out of its 129 decisions. Appendix 6.B, p. 205, performs a mini audit of the Epstein, Landes, & Posner filtering by reviewing the filtered decisions of the two compositions that change the most in the opposite direction of the conservative paradox and finds that the filtered numbers are less accurate.[16]

Underlying Table 6.2 are vast differences of the composition of the Court. The Vinson composition was entirely appointed by Democratic presidents, FDR and Truman, and contained one Republican, Burton, appointed in a bipartisanship gesture by Truman. The compositions defined by Stevens and O'Connor had the opposite mix, having a supermajority of seven Republican appointees. Observing the conservative ratio not vary in the face of opposite party control—and the widely varying makeups of the nine compositions on other criteria as well—is striking.

B. Periodic Aggregations

Moving from the focus on specific compositions to aggregating periods of terms produces the same result. Aggregating periods of 15 terms produces little variation in tightly split decisions, as the first column of Table 6.3 shows.

Table 6.3 presents the conservative ratio by fifteen term periods in the first column and by three-term periods in the remaining columns. Taking, as an example, the exceptional second row, it shows that in the fifteen-term period from the 1961 to the 1975 term, the conservative ratio was 53 percent, while the 1961 to 1963 terms had a conservative ratio of 33 percent, from 1964 to 1966 again 33 percent, from 1967 to 1969 36 percent, from 1970 to 1972 66 percent, and from 1973 to 1975 68 percent. The row is exceptional in that it holds the only three-term periods with conservative ratio that leans liberal, those from 1961 to 1969. All fifteen-term periods, and all other three-term periods display the conservative paradox.

To reprise, the conservative paradox consists of the observation that since the 1946 term, the overall data and every long-lived composition of the Court, every fifteen-term period, and most three-term periods, have a conservative ratio that leans conservative. One would expect 5–4 decisions to be about even, as is the overall data.[17] However, they display the conservative paradox.

16. After the loss of eight decisions that the Stevens composition experiences, the next two compositions that lose the greatest number of decisions are those of (i) Rehnquist & Powell and (ii) Kagan. Each loses six decisions from the filtering but their resulting conservative ratio increases. The compositions of O'Connor and Breyer are next, losing five decisions each to the filtering. Breyer's change is small and upward. O'Connor's conservative ratio drops by 1.6 percent to 54 percent. The mini audit of Appendix 6.B reviews the eight decisions of the Stevens composition and the five decisions of the O'Connor composition that the filtering removes. The mini audit concludes that the unfiltered conservative ratios are more accurate. What drives the greater accuracy of the unfiltered data is not their precision. Again, precision is not meaningful because reasonable observers will differ on their interpretation of decisions and their slant. Indeed, the filtering correctly removes from the count a falsely coded decision in each composition, but the filtered results are still less accurate. The source of the precision is the larger number of decisions and the absence of bias. The filtering only correctly removes few decisions (two from the Stevens composition and one or none from the O'Connor composition) that have a false or ambiguous slant but falsely removes many more that have correct and clear slants. The unfiltered results are more accurate despite that the filtering removes ambiguous and falsely coded decisions.

17. The overall data has 4,381 conservative decisions and 4,578 liberal ones, for a conservative ratio of 49 percent. The entire database holds 9,160 decisions, with 201 not coded as liberal or conservative.

Table 6.3. Conservative Ratio, 15-Term and 3-Term Periods.

	Entire Period	*Terms to +2*	*Terms +3 to +5*	*Terms +6 to +8*	*Terms +9 to +11*	*Terms +12 to +14*
'46-'60	58%	61%	70%	53%	52%	58%
'61-'75	53%	33%	33%	36%	66%	68%
'76-'90	61%	59%	51%	60%	65%	65%
'91-'05	60%	61%	67%	63%	56%	56%
'06-'20	57%	66%	51%	54%	70%	49%
'21	36%	36%	N/A	N/A	N/A	N/A

C. Failed Explanations

In pursuing explanations for the conservative paradox, the three likely suspects are a structural issue in the selection of cases, a bias of appointments by Presidents of one party, and the effect of Senate confirmation.

The structure of hearing cases contains no bias. The Supreme Court has discretionary jurisdiction over almost all of its docket, meaning it is free to select or decline petitions seeking review of lower court decisions. The Court denies or dismisses most petitions invoking its jurisdiction and only accepts for briefing and oral argument those disputes that garner four votes for review.[18] The granting of review is called a *writ of certiorari*. There is nothing apparent that sheds any light on the conservative paradox. That is, cases that will ultimately be decided 5-4 are subject to the same selection procedures as those that will be decided by super-majorities, and no reason exists to suspect that those ending 5–4 would tend to produce a different result.

The paradox also defies the explanation that it may be related to the party of the President appointing the justices. The conservative paradox was present in the terms from 1946 to 1955, when initially all and subsequently a majority of the members of the Court were appointed by Democratic Presidents, F.D. Roosevelt and Truman. The conservative paradox did not increase when the majority of the members of the Court became Republican-appointed.

A more nuanced version of the political explanation would also look at the composition of the Senates that confirm presidential nominations. The suspicion is that one party's nominations are constrained to be more centrist due to opposite party Senate control. Thus, if Democratic Presidents were more often constrained by Senates with Republican majorities than the opposite, then Democratic appointees could tend to be more centrist. Plausibly this may have produced the conserva-

18. Curiously, perhaps, this norm, known as the "rule of four," is an informal one. Justice Brennan explains the rule of four as a desirable anti-majoritarian feature:

> A minority of the Justices has the power to grant a petition for *certiorari* over the objection of five Justices. The reason for this "antimajoritarianism" is evident: in the context of a preliminary 5-to-4 vote to deny, 5 give the 4 an opportunity to change at least one mind. Accordingly, when four vote to grant *certiorari* in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting *certiorari* will nonetheless vote to stay; this is so that the "Rule of Four" will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits.

See Straight v. Wainright, 476 U.S. 1132 at 1134-35 (1986) (Brennan, J., dissenting). *See also* Hamilton v. Texas, 498 U.S. 908 (1990).

tive paradox because the centrist Democratic appointees might have leaned conservative more often that the Republican appointees, who would be presumed to be more extreme due to their unconstrained appointment.

The opposite is true. In all the appointments by Democratic Presidents since 1946, never has a President's nominee for the Supreme Court been confirmed by a Senate with a Republican majority. By contrast, several of the appointments by Republican Presidents had to overcome Democratic Senate control. Thus, several Republican-appointed justices have had to win the support of Democratic-majority Senates. If opposite-party Senates were to account for a bias due to producing centrist appointments, then a liberal paradox would appear. Only conservative justices have been appointed under a potential Senate constraint to be centrist and, if they acted according to this claim, then they would occasionally lean liberal.

In sum, political expectations do not explain the conservative paradox and no theoretical reason exists to expect a deviation from an even split between liberal and conservative decisions in 5-4 cases. Rather, the analysis suggests that the explanation must lie in the way that coalitions form. Professors Jacobi and Sag have addressed the way coalitions form connected to ideology by comparing them to nuanced scoring of case outcomes in one dimension.[19] However, by virtue of restricting the analysis here to 5–4 decisions, our analysis can explore alternative ways that 5–4 decisions form that could not be explored in the context that Jacobi and Sag explore. The setting here also allows a more detailed look at how 5–4 coalitions form. Moreover, the analysis here shows the multidimensionality of decisions, which suggests that analyses that rest on one dimension, such as Jacobi and Sag's, could benefit by including more dimensions.

III. Coalition Formation and Ideology

The cause of the conservative paradox must lie in the mechanism of coalition formation in 5–4 decisions. Combining the Supreme Court database with the Martin & Quinn ideologies allows us to test three theories of 5–4 coalition formation.

A. *Forming Coalitions According to Ideology*

Three explanations of coalition formation that can be tested may be called cohesion; choice of sides; and vying for the median. They correspond to three different explanations of how the ideologically median justice takes sides in 5–4 decisions.

1. Cohesion

The idea that the median justice joins the side that is more ideologically cohesive means that the side with the justices whose views are more dispersed would find it more difficult to coalesce behind a single interpretive approach. If this mechanism is the primary one, then similarity of views leads to easier coalitions.

The quantification of ideologies allows the calculation of this view of cohesion. Cohesion is the opposite of

19. Tonja Jacobi and Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, *passim* (2009); *see also* Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 2 J. LEGAL ANALYSIS 411, 413 (2009).

ideological dispersion. Of the various metrics of dispersion the most frequently used is standard deviation. If coalitions are driven by cohesion, then coalitions will become more likely as standard deviation is smaller when measured on the ideologies of the five justices on one side compared to the standard deviation of the five justices on the other side. An adequate metric is a fraction with the liberal standard deviation in the numerator and the sum of the standard deviations in the denominator. This fraction can range, in theory, from near zero to near one. It is near zero when the liberal dispersion is very small while the conservative dispersion is large. It is near one when the liberal dispersion is large and the conservative dispersion very small. The conflation of the two standard deviations into a single metric means that the operative dimension is their relative rather than absolute size. The intuition is that the side that has half the standard deviation of the other will be equally more likely to form a coalition when the standard deviations are small as when they are large. This corresponds to the idea that the greater cohesion depends on a comparison to the cohesion of the other side. While that is intuitive here, the subsequent metrics, which are based on distances, are not conflated into a single fraction, because absolute ideological distances likely retain importance.

If coalitions were formed on the basis of cohesion, then one should expect more liberal decisions when this fraction is small and fewer when it is large. *Vice versa* for conservative decisions.

2. Choice of Sides

The second hypothesis posits that the four more extreme justices on each side shape their view first. The result is that the two sides present to the median justice a choice of two alternative interpretations for the median to join one. If one side's consensus is ideologically distant from the median justice, while the other side's consensus is not, then the median justice would tend to side with the latter, the side to which the median is ideologically closer. This hypothesis contains a fundamental implausibility. Its starting point is a pre-existing fracture between the two sides. While such a polarization may exist in some issues for some specific compositions, the notion that it would be the baseline for adjudication is unlikely.

The analysis translates this view of choice of sides to, first, a calculation of the average ideology of the four justices on each side and, second, the measurement of the distance of the median justice to each average. If the median's choice of sides drives the forming of coalitions, then when one side has an average ideology that is far from the median's ideology, but the other side has an average ideology that is close to the median's, then the median will tend to side with the latter. The median will tend to choose the side that has the average ideology that is closer to that of the median. The metrics are the two distances.

If coalitions were formed on the basis of the median's choice between the sides' consensus, then one should expect a greater distance to one side to reduce the tendency for the median to choose that side.

3. Vying for the Median

The idea behind forming coalitions by vying for the median is that each side competes to attract the vote of the median justice so as to advance that side's interpretive preferences. Effectively, justices recognize that if they insist on extreme interpretive positions, then the median will side with the opposite group, and the resulting precedent will be more disagreeable than if the median sided with a more moderate proposal from their own side. The extreme justices on each side abandon their more extreme views and are, in effect, represented by the justice who is closest to the median on their side. The two justices next to the median effectively bear the responsibility of proposing interpretations that will appeal more to the median than the interpretations proposed by the other side. Thus, unlike the prior two hypotheses where ideological positions are passive, the hypothesis that coalitions are formed by vying for the median is dynamic: the justices act strategically. The potential for strategic action is the appeal of this hypothesis.

Frank recalls instances of this dynamic unfolding in a case in which a juvenile court judge had ordered a public school to re-admit a student who had been expelled for criminal misconduct. The school appealed, arguing that a pupil discipline statute precluded the judge's action. Two justices favored the judge; two others favored the school. The fifth justice who would cast the deciding vote was often conservative on criminal justice issues and the student had committed a serious crime. But that justice also trusted the decisions of judges more than government bureaucrats. Those who favored the juvenile court judge's decision secured the deciding justice's vote on that basis.

The analytical weakness of this hypothesis is that, at the limit, both sides will meet at the median's position, and the decision would become unanimous. Two features of the reality of judging intervene to often prevent this, although Frank recalls this happening at his Court: the two sides would start fairly far apart and, occasionally, after some discussion they would become unanimous. First, interpretive positions are finite and do not change in a continuum. Second, ideological distance continues to be important in the decision of the losing faction to register its opposition in the form of a dissent.

The finite nature of interpretive positions means that if the three justices in the middle of the Court propose three different interpretations, an infinite number of interpretations ideologically between those does not exist. Therefore, the two sides cannot keep successively proposing interpretations that are slightly more appealing to the median justice. Take as an example the propriety of a search that produces evidence of criminal guilt. The position of the median justice may be that the search was improper, but it was harmless error. The position of the next liberal justice may be that the search was improper, triggered the exclusionary principle, and, therefore, should exclude all subsequently acquired evidence. The position of the next conservative justice is that the search was proper. The liberals can try to obtain the median justice's vote by proposing an interpretation that the search was improper without triggering the exclusionary principle, remanding for a new trial. But no additional interpretive positions may exist between this and the median justice's position (of harmless error). The conservative side could propose an interpretation that such searches are generally proper but specific aspects of this one made it improper while still consti-

tuting harmless error and again no additional interpretations closer to that of the median justice may arise. Short of accepting the median justice's interpretation, neither side may be able to offer an interpretation that is any closer to the median's than those to attract the vote of the median.

Distance is also important for the mere existence of a dissent. This importance of distance relates to the alternative where both sides adopt the interpretation of the median justice, and the decision becomes unanimous. In principle, a divided decision has negative consequences, small as they may be, for the Court and the dissenting justices. At the very least, a dissenting decision involves writing that decision. More importantly, a divided decision reveals that the Court is not united, and that legal reasoning does not necessarily produce the majority's result. Greater ideological distance from the next justice on one side means that the negative consequences of revealing dissension, whatever they may be, may more easily become justified for the dissenters. Some level of triviality exists so that when the difference between the dissent's last position and that of the majority is that small or smaller, then the dissenters choose not to dissent, and the Court's decision becomes unanimous. Additional concerns and caveats may be numerous but are not important in the interpretation of the results. Greater ideological distance makes dissenting more likely.

The view that coalitions depend on the distance from the median to the next justice on each side corresponds to those two ideological metrics. A small distance would mean that the median justice tends to join that side more often, whereas a large distance would be more likely to lead the four justices of that side to dissent.

B. Comparing the Hypotheses

The comparison of the power of the hypotheses from a statistical perspective lies in the strength with which they explain whether decisions are liberal or conservative. In other words, if a relation appears that one of the sets of distances tends to correlate with a result of more or fewer conservative decisions, how confident can the reader be that this relation is not attributable to chance, and how strong is that relation? Statistical tests report the probability that the observed relation between an input variable and an outcome is due to chance, calling it the p-value.[20] The strength of the relation lies in the amount of change that the variables bring. However, to comprehend a pattern we need to see it in a graph. The four examples that constitute "Anscombe's quartet" demonstrate this: Four sets of data produce the same regression coefficients, but a glance at their graphs reveals four very different patterns.[21] Accordingly, a graphical display of the relation must show how these metrics influence the production of conservative decisions.

20. *See, e.g.*, P-Value, THE CONCISE ENCYCLOPEDIA OF STATISTICS 434 (2008) https://doi-org.proxy.ulib.uits.iu.edu/10.1007/978-0-387-32833-1_330; P-Value, Wikipedia, https://en.wikipedia.org/-wiki/P-value.

21. Francis J. Anscombe, *Graphs in Statistical Analysis*, 27 AM. STATISTICIAN 17 (1973); *Anscombe's Quartet*, WIKIPEDIA, https://en.wikipedia.org/wiki/Anscombe%27s_quartet (visited Oct. 25, 2021) [perma.cc/6RM7-8S8D].

1. Two Refinements

While the relations are apparent in the raw data, two refinements increase their intensity. Moreover, the refinements are revealing about the Court's operation. The first refinement consists of separating the decisions made during the first year after the appointment of a justice from the subsequent-year decisions. The second considers separately the decisions in which the justices align by ideology, that is, where the four conservative justices cast conservative votes and the four liberals cast liberal votes. The other category holds the cases where the voting is mixed.

a. First or Subsequent Year?

If the justices act strategically in granting *certiorari*, then first year decisions should be different. The very first few cases may have the new justice help decide disputes to which the Court granted *certiorari* under its old composition, with the new justice's predecessor. In other disputes *certiorari* may have been granted without the knowledge of who the new justice may be. Even in disputes that received *certiorari* after the appointment of the new justice, that decision was made while the other justices only had a passing knowledge of the attitudes and the thinking of the new justice.

Subsequent-year decisions would follow more delicate decisions about *certiorari*. The new justice is no longer new; the docket for the most part has no cases inherited from the prior composition. The justice's colleagues and the bar have some understanding of the thinking process of the new justice. The bar may make different decisions about seeking *certiorari* about some disputes, fellow justices may vote for *certiorari* with a slightly clearer understanding of the new justice's thinking, and in the justices' deliberations arguments can be cast that address more accurately the new justice's concerns.

In other words, first-year decisions are made without deep knowledge of how one ninth of the Court thinks, sometimes with even no knowledge of how one ninth of the Court may think. To the extent that decisions are the result of the confluence of several strategies of litigants and fellow justices, the first-year decisions would reflect a weaker reaction to those strategies.

In a quantitative expedition like this, the question then arises how precisely to define first year decisions. The study considers as first year decisions those issued within the calendar year that follows the first 5–4 decision that includes the new justice. In part, the new justice's attitudes in 5–4 decisions may only be displayed in 5–4 decisions. This means that the learning processes of the bar and fellow justices only begin after 5–4 decisions start appearing. Also, the data revealed that some justices have a remarkably large number of recusals in their first few months, such as Justices Clark, Whittaker, and Kagan (Clark and Kagan were, respectively, Attorney General and Solicitor General before their appointments, producing many recusals, in all cases involving the United States as a litigant that they had overseen). This choice increases the number of 5–4 decisions that are considered first-year decisions and may dilute the effects of the selection process on the conclusions because it includes relatively more decisions pursuant to grants of *certiorari* that were made while the new justice was known.

b. Aligned or Non-Party-line?

Whether a decision has the justices aligned by ideology goes to the heart of the multidimensionality of judging that the one-dimensionality of seeing justices as liberal or conservative hides.

The deceptive interpretation of multidimensionality through one-dimensional signals is apparent in a light-and-shadow example. Consider that the one-dimensional signal is the shadow that a person casts on the south wall of a room. The room is lit by a lamp at the northwest corner. As long as the person stays near the wall and moves parallel to the south wall, the shadow moves in the same direction as the person. When the person moves east, so does the shadow. However, the shadow also moves east when the person moves north. Even more deceptively, the person may move north-northwest and the shadow can move east. The shadow misrepresents movements in the other dimension (north-south), obscures movements toward the light, and reverses movements in a direction only slightly more northward than toward the light.

The multidimensionality of the legal system is extreme (and obvious to whomever spent a few years learning the law). Each subject matter opens an array of dimensions along which jurists can hold different interpretations. Chapter 5 is a perfect example. Chapter 5 studies the tightly split, criminal procedure decisions of a particularly long-lived composition of the Indiana Supreme Court and reveals six dimensions. In other words, the justices aligned differently in a consistent way on six different aspects of deciding cases on criminal procedure matters, in the sense that in one dimension some justices would take consistently the conservative side but in other dimensions different justices would be the consistently conservative ones. Some of these dimensions agreed with the justices' liberal-to-conservative alignment, as did attitudes about retroactivity of defenses or the need for the police to obtain a warrant. Others produced coalitions that were equally consistent but transcended the liberal-to-conservative alignment, as did the dimensions depending on trust of juries or exactitude about governmental process.

The extreme of the multidimensionality of the legal system is apparent in the attempt to systematize it in the West key-number system. Each decision receives dozens of assignments in this system. The assignments (key numbers) increase with time, as new decisions produce more distinctions on the older precedent as well as statutes and regulations increase in number and other reasons.[22]

The point is that adjudicated cases would depend on the attitudes of the justices along numerous dimensions. Some may agree with political alignments, akin to running parallel to them. In 5–4 decisions that turn on those attitudes, the liberal justices would tend to vote the opposite way from the conservative justices. Other attitudes would bear little relation to political align-

22. For example, the 1912 guide to the West key-number system the guide summarizes the all the top levels of the key number system in four pages; Torts has 15 entries, from Assault and Battery to Trover and Conversion and Waste, whereas in 2006 the West key-number system was reported to have over 109 thousand entries, over 90 thousand of which "postable." *Cf.* WEST PUBLISHING, INC., DESCRIPTIVE-WORD INDEX TO DECENNIAL AND ALL KEY-NUMBER DIGESTS, p. xxx-xxxvii (1912), *Daniel Dabney, The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 L. LIBR. J. 229, 236 (2007) (reporting counts of West's proprietary database).

ments, such as trust in juries. In 5–4 decisions that turn on such issues, we should not be surprised to see justices mixing their voting coalitions. The justices' politics, their Martin & Quinn ideological scores, should have greater explanatory power in the former.

However, the shorthand "party-line" is not strictly accurate. In most compositions of the Supreme Court through this era, one party had appointed more than five justices, initially the Democratic party and later the Republican party. When one party has appointed more than five justices, then 5–4 votes cannot be party-line in the sense of four members of the Court voting according to one party's preferences and five according to the other's. Justices appointed by the same party are on both sides of the 5–4 split. Rather, party-line or aligned voting signifies ideological alignment in the sense that the four justices on each side of the court vote together, with the conservative four voting for the conservative outcome and *vice versa*. To side-step the issue, this Article only uses the negative form, non-party-line, to signify that the justices are not in ideological alignment.[23]

Applying these two refinements to the data turns out to be revealing. First-year decisions have some differences from subsequent ones. Decisions where the justices align by ideology are different from those in which they do not. The patterns appear in the numbers the statistics produce, and in the graphs that reveal them.

2. Numbers

Turning to the statistics, to capture the relation between binary outcomes, such as liberal versus conservative, and input variables, such as the metrics of coalition formation, the appropriate regressions fit a cumulative probability function to the data. The transition from one state to the other of the outcome corresponds to the transition of the cumulative probability function from zero to one. The objective is to estimate how the input variables influence the transition from the region of one outcome to the region with the other outcome. For example, if some values of the input variables correlate with few conservative decisions and other values correlate with many conservative decisions, where must the probability density function be placed to best describe this transition? The logit regression does so with the logistic distribution and the probit regression does so with the normal distribution. The analysis uses the probit regression.

However, neither the logit nor the probit regression offers a measurement of the fraction of the variation in the outcome that the inputs explain. Linear regressions offer such a measure with the "r-squared" statistic. Because this metric is useful in assessing the power of each regression, the analysis also conducts linear regressions that clone the probit ones. Linear regressions capture the relation between the amount of change that an outcome variable tends to have for a change of an input variable. By considering that the outcome variable is the fraction of decisions that are conservative for each term

23. This can still not be accurate because the order within the appointees of the party that has appointed more than five justices matters and can produce the non-party-line designation. For example, while the Court has more than five Republican appointees, the justices may align by party but if a liberal Republican appointee casts a conservative vote in a 5–4 decision, this analysis considers this a non-party-line vote.

Table 6.4. Hypotheses on Forming Coalitions.

Specification	*Cohesion*		*Choice of Sides*		*Vying for Median*	
	Estimates	*P-Values*	*Estimates*	*P-Values*	*Estimates*	*P-Values*
Constant	0.15	36%	-0.22	28%	0.24	0%
Ratio of St. Devs	0.10	68%				
Distance to Liberal Average			0.20	0%		
Distance to Conservative Avg			-0.04	55%		
Distance to next Liberal Justice					0.12	2%
Distance to Next Conservative J.					-0.40	0%
Explained Variation (R^2)	0%		12%		15%	
Explained Variation, 1st yr	1%		12%		29%	
Explained Variation, Aligned only					36%	
Explained Variation, 1st Yr. Aligned only					51%	
Explained Variation, Non-Aligned					12%	
Explained Variation, 1st Yr. Non-Aligned					9%	

Note: The estimates and p-values of the three probit regressions discussed in the text. The values for explained variation (adjusted R^2) result from linear regressions that clone the probit ones.

of compositions of the Court, the analysis produces linear regressions that match the corresponding probit regressions (and the graphs will also demonstrate their equivalence despite that a linear regression in a binary setting has the possibility to be deceptive).[24] Through the linear clones of the probit regressions, metrics become available for the fraction of the variation of the conservative ratio that each hypothesis explains.

Table 6.4 presents the resulting metrics for the three hypotheses. The table offers three panels of two columns each under the three headings that correspond to the three hypotheses, cohesion, choice of sides, and vying for the median. The left column of

24. The deceptiveness comes from trying to fit a sloping straight line to two sets of points that only take two values in their vertical coordinate. For example, suppose that values of the input variable, the horizontal coordinate, that are above two almost always result in successes and under minus two almost always in failures. Two data sets, one with values of the input variable between minus three and three, and the other with values between minus ten and ten, would produce different linear regressions, both deceptive. The linear regressions in the present analysis are accurate because the range of the input variables are akin to having a smaller range than between minus two and two. The result is that the data reside in the middle and sloping part of the cumulative distribution function of the normal distribution. The linear regression superimposes to it its straight line. The differences between the two in the range of the sample are small. Note that the inputs into the probits are the individual decisions. The inputs into the linear clones are the conservative ratio of each term of each composition, weighted by the number of decisions in each.

each pair of columns has the estimates for the statistics described by the row headings. The right column of each pair of columns has the p-values, the probability that the effect of the corresponding estimate is truly zero and can have this value by chance. The first row, the constant of each regression, has no importance for the interpretation of the numbers.

The metric used for the cohesion hypothesis has a positive coefficient, .1. This has the expected sign in the sense that as the dispersion of the liberal five justice's ideology increases, the conservative ratio also increases. However, this .1 value is not different than zero with confidence that this is not due to chance because its p-value is 68 percent—it can easily arise by chance. Moreover, the cohesion model explains none of the variation in the conservative ratio because it has an r-squared of zero.

The choice-of-sides model also produces coefficients of the expected sign. When the distance from the liberal average increases, the conservative ratio increases with a coefficient of .2. When the distance from the conservative average increases, the conservative ratio decreases but with a very small coefficient of .04. Of the two, only the former can be said to be different than zero with confidence that this is not due to chance; the distance from the conservative average may be due to chance with an about 50 percent probability (with a p-value of .55). The choice-of-sides model explains about twelve percent of the variation in the conservative ratio through the r-squared of the linear regression that clones the probit.

The metrics that correspond to vying for the median explain fifteen percent of the variation of the conservative ratio and the influences of both distances are very unlikely to be due to chance, with their p-values being two percent and well under one percent.

The row Explained Variation, 1st Yr. displays the percentage of the variation in the conservative ratio that each model explains when only first-year decisions are considered. The first two models do not change significantly. The last model acts differently. The model of vying for the median sees its impact nearly double, to 29 percent.

The subsequent rows show the variation of the conservative ratio that different combinations of justice alignment and first year status produces. The strongest reaction comes from first-year decisions where the justices are aligned, where vying for the median explains 51 percent of the variation in the conservative ratio. By contrast, the non-party-line decisions have the model perform about equally poorly whether considering only first-year decisions or all decisions.

These statistical regressions rank the three hypotheses. The cohesion hypothesis receives no validation; the choice-of-sides hypothesis seems to receive a little support; and the vying-for-the-median hypothesis receives the most support. In fact, the latter has more than double the explanatory power than that of the next contender when confined to first-year decisions. Since the distances of the choice-of-sides hypothesis are to a limited degree correlated with those of vying for the median, it is reasonable to conclude that its weak positive evaluation is a spillover from that of vying for the median. The numbers show that a pattern exists insofar as these effects are extremely unlikely to arise by chance (because they have low p-values) and have some effect (because they explain some fraction of the obser-

ved variation). To assess the pattern, however, one needs to see it.

3. Figures

A figure that graphically represents these concepts needs to convey the relation between the conservative ratio of the composition in question, and the distance of the median justice from the next justice on each side. First, the conservative ratio of each composition is presented on the vertical axis. Second, the distance between the composition's median justice and the next justice on each side is presented as the location of a post on the figure's floor. The floor is also marked by a diagonal line. The post is to the left of the diagonal if the distance between the median justice and the next liberal justice is greater than the distance between the median justice and the next conservative justice; and to the right of the diagonal if the distance between the median justice and the next conservative justice is greater than the distance between the median justice and the next liberal justice. The height of the post is the composition's conservative ratio. Any compositions that would have an equal distance from the median to the justices on either side would land exactly on the diagonal.

The conservative ratio of each composition aggregates the terms of that composition. If the conservative ratio of each term were presented separately, then the figure would become chaotic. By aggregating the conservative ratio of each composition into a single point, the graph gains clarity. That single point captures the conservative ratio produced over the life of each composition, e.g., the conservative ratio used for the Breyer composition will be the conservative ratio for the life of the Breyer composition. However, since Martin & Quinn ideological scores change each term, each post's location on the floor represents the weighted average distances of each term of the life of the composition. The average is weighted by the number of decisions issued each term.

To see a simplified version of a graph that will fast become complex, consider only two compositions, first, that defined by the appointment of Justice Gorsuch and, second, that defined by the appointment of Justice Barrett. Both lasted two terms. The ideology estimates, as computed by Martin & Quinn, differ by term. For the graph, as described in the preceding paragraph, the conservative ratio is that produced over all terms of each of the two compositions, the ideology coordinates are averaged by the weight of the decisions issued each term.[25]

The composition defined by the appointment of Gorsuch lasted from the appointment of Gorsuch on April 8, 2017, during the 2016 term, until the appointment of Kavanaugh before the start of 2018 term. The ideological scores of the justices according to Martin & Quinn range from about −3.5 for Sotomayor on the extreme liberal side to about 3.5 for Thomas on the conservative extreme. The ideologically median justice was Kennedy. The next justice on the conservative side of Kennedy was Roberts, at a very small distance, .3 in the 2016 term when this composition issued three 5–4 decisions and .01 in the 2017 term when it issued seventeen

25. Again, this aggregation only simplifies the graph. The probit regression considers each decision separately. Its linear clone takes as inputs the conservative ratios produced each term of each composition, weighed by the number of 5–4 decisions.

5–4 decisions. The latter term weighs more heavily in calculating the weighted average distance, which becomes .07. The next justice on the liberal side of Kennedy was Breyer in the 2016 term and Kagan in the 2017 term. Their weight leans on the latter because seventeen 5–4 decisions were issued in the 2017 term but only three during the 2016 term. That weighted average distance is 1.92. Because the distance between the median justice and the next liberal justice (1.92) is greater than the distance between the median justice and the next conservative justice (0.7), the post for the Gorsuch composition is placed to the left of the diagonal on the floor. According to the regression, the probability of a 5–4 decision being conservative during the Gorsuch composition is 67 percent in the 2016 term and 71 the next. The actual conservative ratio of tight splits is 64 percent and this is represented by the height of the post.

Compare that representation of the Gorsuch composition to the example of the composition defined by the appointment of Barrett before the start of the 2020 term. The median justice is Kavanaugh. The next conservative justice is Gorsuch, at a small distance. The next liberal justice is Roberts at an even smaller distance. Because the distance between the median and next liberal justice is smaller than the next conservative, intuition suggests that liberal 5–4 decisions are more likely than conservative ones. Indeed, the actual conservative ratio is 35%.

The mathematical inner workings of the regression correspond to the relative ease of forming a coalition of five. Consider the ease in the 2017 term, during the Gorsuch composition, of the four conservatives obtaining Kennedy's vote with Roberts as the conservative closest to Kennedy, as opposed to the four liberals obtaining Kennedy's vote with Kagan as the liberal closest to Kennedy—but not nearly as close as Gorsuch. Compare that to the ease of four liberals with Roberts as the liberal closest to Kavanaugh obtaining Kavanaugh's vote in the 2020 term—the Barrett composition—as opposed to the four conservatives with Barrett as the conservative closest to Kavanaugh (but not nearly as close as Roberts).

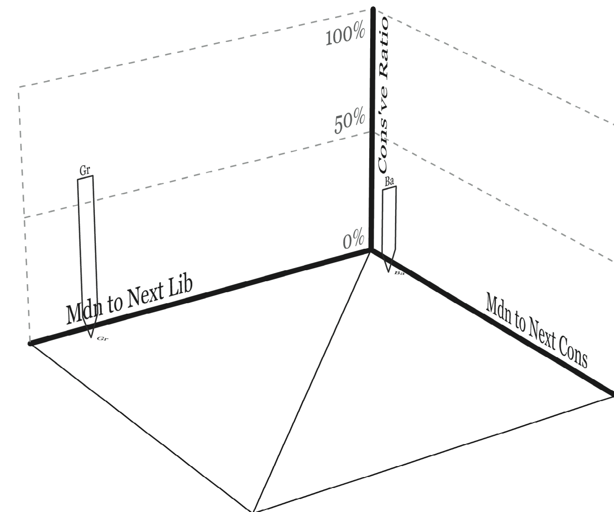

Figure 6.1. The conservative ratios and distances from the mean to the next justices on each side, Barrett and Gorsuch compositions.

The intuition behind the regression is that the conservatives would tend to get the median justice's vote more often after the appointment of Gorsuch and that the liberals would get the median vote more often after the appointment of Barrett. Granted, the true interactions between the justices are vastly more complex than the metric of the ideological distance of the median to the next. The regression, nevertheless, produces statistical confidence that these distances matter, and ex-

plains more than an eighth of the variation of the conservative ratio. When the data includes first-year decisions only, the power of the regression doubles to explain about a quarter of the variation in the conservative ratio, and it doubles again to over half, when only considering first-year decisions in which the justices align by ideology.

The simplified graph only has these two compositions, those defined by the appointments of Gorsuch and Barrett. Figure 6.1 has the two posts corresponding to those two compositions marked "Gr" and "Ba," respectively. The post corresponding to Gorsuch captures the notion that the median justice during that composition, Kennedy, was fairly far in ideological terms from the next liberal justice, Kagan, and closer to the next conservative justice, Chief Justice Roberts. As noted, the height of the post corresponds to the conservative ratio of the Gorsuch composition, 64 percent. The composition defined by the appointment of Barrett has the opposite characteristics. Its median justice, Kavanaugh, was close to the next liberal justice, Roberts, but not as close to the next conservative justice, Barrett, and its conservative ratio leaned liberal at 33 percent.

In this visual representation, the phenomenon that larger distances from the median to the next liberal justice than to the next conservative justice correspond to greater conservative ratios should appear as tall posts on the left side of the figure. Vice versa, the phenomenon of low conservative ratios when the next conservative justice was far from the median, and while the next liberal wasn't, should appear as short posts on the right of the figure, continuing the pattern these two posts start.

Figure 6.2 presents all the posts aggregating every composition since 1946 and the expected conservative ratio according to the regression.[26] The abbreviation at the foot and the head of each post corresponds to the name of the junior justice who defines the composition.[27] As expected, the conservative ratios on the left side tend to be greater than those on the right.

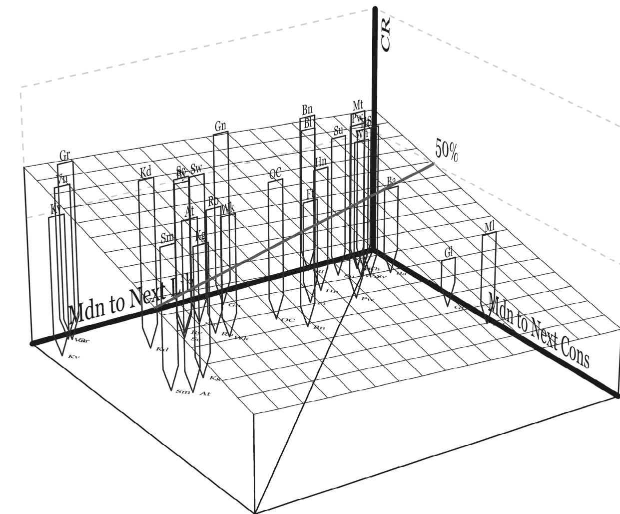

Figure 6.2. The surface of the predicted conservative ratio and the actual conservative ratios per composition plotted against the ideological distances of the median justice from the next conservative, and liberal, justice.

26. Rotating, animated versions of these figures exist at my site, under scholarship also at perma.cc/W6GA-T75A.

27. The abbreviations, in alphabetical order, are Alito into At, Barrett into Ba, Blackmun into Bl, Brennan into Bn, Breyer into By, Fortas into Ft, Ginsburg into Gn, Goldberg into Gl, Gorsuch into Gr, Harlan into Hn, Kagan into Kg, Kavanaugh into Kv, Kennedy into Kd, Marshall into Ml, Minton into Mt, O'Connor into OC, Powell & Rehnquist into Pw, Roberts into Ro, Scalia into Sc, Sotomayor into Sm, Souter into Su, Stevens into Sv, Stewart into Sw, Thomas into Th, Vinson into Vn, Warren into Wn, and Whittaker into Wk.

The height of the sloping surface corresponds to the predicted conservative ratio according to the probit regression, represented as CR on the vertical axis. The vertical axis runs from zero to one or 100% and the back walls are scored at 50% and 100% in light dashing lines. On the surface that corresponds to the predicted conservative ratio lies a heavy gray line that marks the 50% height, i.e., where the expected conservative ratio is 50%.

The highest point of the plotted surface, the predicted conservative ratio, is at the left-hand corner, the corner that corresponds to a small distance from the median to the next conservative justice and a great distance to the next liberal justice. The lowest point is at the right-hand corner, the corner that corresponds to a small distance from the median to the next conservative justice and a large distance to the next conservative justice. The liberal side is much more likely to be joined by the median justice in the latter case than in the former one.

Relatively few posts lie to the right of the diagonal, to the side that corresponds to a greater distance to the next conservative justice. Significantly to the right of the diagonal lie only three compositions, Barrett's, Goldberg's, and Marshall's. They all have a conservative ratio that leans liberal, i.e., below 50%. Most posts lie on its left, corresponding to greater distances to the next liberal justice than the next conservative one. In other words, after most appointments, the median justice was closer ideologically to the next conservative justice than to the next liberal justice. This shows that the conservative paradox is largely explained by the location of the median justice. Because after most appointments the median justice was ideologically closer to the next conservative justice, the conservative ratio has tended to lean conservative.

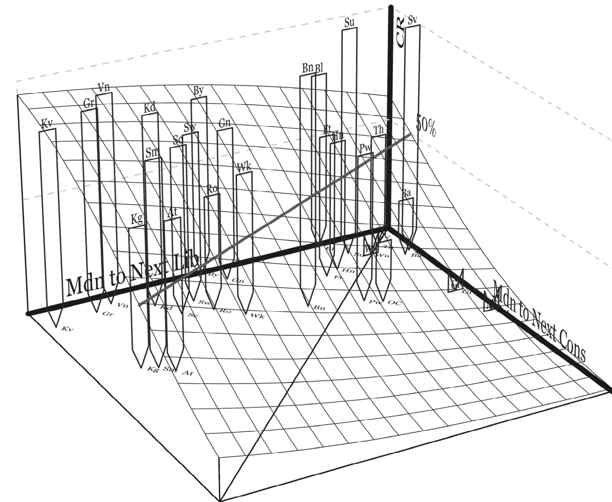

Figure 6.3. The conservative ratio of compositions' first-year decisions where the justices aligned by ideology.

After the two refinements discussed above, i.e., when the data is reduced to (i) the first-year decisions in which (ii) the justices align by ideology, the relation becomes much more pronounced. The distances influence much more strongly the conservative ratio, as Figure 6.3 shows. The compositions at the right corner, those of Barrett, Goldberg, and Marshall, produce zero conservative first-year decisions with their justices aligned by ideology. Vice versa, the compositions at the left corner, Kavanaugh, Gorsuch, and Vinson, produce very high conservative ratios when they issue decisions with their justices aligned by ideology during their first year. The resulting probit surface in Figure 6.3, which predicts the conservative ratio, changes much more pro-

nouncedly from low values at the right corner to high values at the left one than did the one of Figure 6.2.

By contrast, the decisions in which the justices do not align by ideology—our shorthand “non-party-line decisions”—tell a very different story, Figure 6.4. The left corner does not tend to have taller posts than the right. The conservative paradox does not even arise. Their conservative ratio is 48 percent (47 percent in only first-year decisions). The effect of the location of the ideologically median justice cannot be distinguished from chance and has virtually no explanatory power.[28] Moreover, those decisions are the majority of the sample, 52 percent of all 5–4 decisions and 55 percent of first-year 5–4 decisions.[29] The distinction between aligned and non-party-line voting as well as the power of ideological scoring is also confirmed by the predictive power of the distance between the justices adjacent to the median with respect to the fraction of decisions in which the justices align by ideology, which Appendix 6.C explains.

The decisions of the first year should reasonably be expected to present a slightly more direct expression of the justices’ positions. Because the justices do not yet know well the reasoning of the new justice, actions leading up to the consideration of a dispute and especially the votes about grants of *certiorari* are more inaccurate and less customized to the new justice’s thinking. Therefore, unexpected attitudes of the new justice are more likely to appear, whereas in later years, actions leading to a *certiorari* petition and the vote about granting *certiorari* more accurately account for the new justice’s thinking with the result that the votes of all justices are more filtered through the strategies surrounding the bringing of a dispute and the granting of *certiorari*.

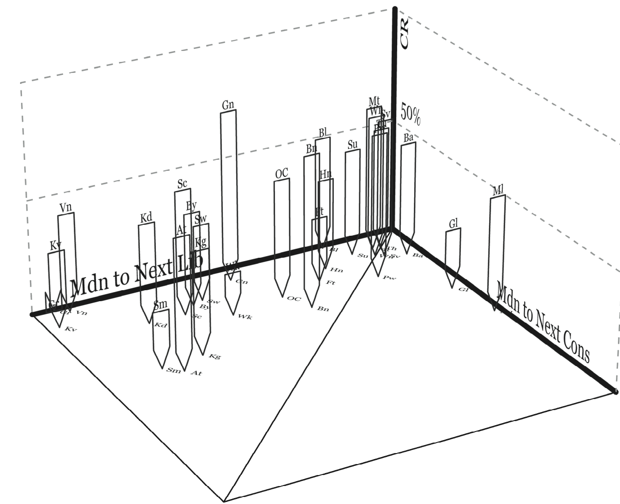

Figure 6.4. The conservative ratio of compositions’ decisions where the justices did not align by ideology, i.e., non-party-line decisions.

As an example of how knowing the justices shapes argumentation consider the oral argument by ex-Solicitor-General Donald Verrilli, Jr., in *Financial Oversight Board v. Aurelius Investment*.[30] The insolvency of Puerto Rico led Congress to appoint the Board to

28. The p-values of the probit regressions for all-year decisions are under 1 percent and 30 percent (first year 8 percent and 34 percent) for, respectively, the effect of the distance to the next liberal justice and that to the next conservative one. The corresponding r-squared values of the explained fraction of the variation of the conservative ratio are 12 percent and, for first-year decisions, nine percent.

29. The number of 5–4 decisions where the justices align by ideology is 668 and that in which they do not align is 715. The corresponding counts of first year decisions are 234 and 278.

30. *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, 590 U.S. _ (2020) (“Financial Oversight Board v. Aurelius Investment” or “FOMBPR v. Aurelius”).

rehabilitate the territory's finances. The investment fund Aurelius sought to invalidate all actions of the Board with the argument that the Board members were improperly appointed: The Board members were principal officers of the United States; principal officers must be appointed pursuant to the appointments clause by the President with the "advice and consent" of the Senate, i.e., its approval.[31] The Oversight Board was appointed by statute, not that process. The main answer of Mr. Verrilli was that the Board was a component of the government of a territory and Congress can appoint territorial officers.[32]

An auxiliarry foundation for the authority of the Board could be the authority of Congress over bankruptcy in Article I.[33] Granted, Article I jurisdiction may be seen as entirely irrelevant to the Appointments Clause. However, insolvency has an inescapable pragmatic dimension, illustrated, e.g., in the critique of Crysler's reorganization by Professors David Skeel and Mark Roe,[34] or the Supreme Court's grant to the legislature of time to cure the procedural improprieties of the Bankruptcy Code.[35] The grounds for the appointment of the Board was the insolvency of Puerto Rico and having the Appointments Clause prevent Puerto Rico's financial salvation could be considered to give form more power than it should be due.

Whatever the merits of the argument resting on bankruptcy jurisdiction may be, Mr. Verrilli did not make it. His rejection of it was related to his knowledge that several of the justices favored states' rights strongly and arguing that Congress had a broad power on account of a clause that went beyond the territories, as bankruptcy jurisdiction does, would not appeal to those justices.[36] In a Court with a majority of justices who favored states' rights strongly, explicitly making this argument risked alienating those justices in a way that overcame any benefit the argument may have as an auxiliary one for other justices.

Justice Elena Kagan reached this crux by referring to insolvency and asking "Why [given the national concerns over insolvency] shouldn't we think that Congress, in enacting this piece of legislation, was not thinking about it in a broad national lens [rather than a territorial one]?"[37] The straightforward answer that Congress may

31. CONSTITUTION Art. II, Sec. 2 ("[The President] . . . with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States").

32. *FOMBPR v. Aurelius* transcript at 6 lines 6-7 ("[the statute] sets up an entity within the territorial government").

33. CONSTITUTION Art. I, Sec. 8 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies").

34. Mark J. Roe and David Skeel, *Assessing the Chrysler Bankruptcy*, 108 Mich. L. Rev. 727, *passim* (2010) (raising a multiplicity of issues with a process that gave secured creditors a fractional payment but let unsecured claims become creditors of the new Chrysler under FIAT's control; yet, in pragmatic terms, the doctrinally faulty process was a success in revitalizing the failed enterprise, restoring its productivity and avoiding numerous social and economic issues that would follow from a closure of Chrysler plants in the middle of a major recession).

35. In *Marathon Oil* the Supreme Court held that the system of bankruptcy judges with 15-year tenure failed to provide litigants with a judge of the independence to which Article III of the Constitution entitled them. Yet, instead of invalidating that part of the statutory scheme, the Supreme Court gave Congress time to pass a new and complying statute. *See* N. Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 88 (June 28, 1982) ("However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.").

36. Granted, other justices, but a minority, may have had the opposite predilection: favor laying the groundwork for Congressional jurisdiction over states according to the bankruptcy clause, with an eye to facilitating Congress to later address the insolvency of a state.

37. Transcript at 14 lines 12-15.

have that authority under the bankruptcy clause would produce exactly the danger of alienating the justices who favored states' rights. Mr. Verrilli's answer evaded the danger. His answer opened by objecting to the conflating the intent of individual legislators with that of the legislature.[38] He continued by pointing to language in the statute that was specific to Puerto-Rico.[39]

An advocate who did not know the justices might have considered that mentioning the bankruptcy power would be a better answer because it would provide an additional foundation of the Board's authority, however weak. Mr. Verrilli, knowing the justices he faced, saw the argument as disadvantageous. The bankruptcy clause as a source of congressional authority for an insolvency-resolving intervention could wait until the now unlikely eventuality that Congress addresses the insolvency of a state without following the appointments clause.

The point, however, is that the knowledge of how the justices think in the many dimensions of legal reasoning shapes surrounding behaviors, including (a) advocates' decisions about petitions and choice of arguments, and (b) justice colleagues' decisions about granting *certiorari* and argument between justices. First-year decisions miss this knowledge for one ninth of the Court.

In sum, of the three explanations for the conservative paradox, the model of vying for the median, which turns on the distances of the next justice on each side from the median, has more explanatory power than its contestants. But its explanatory power is strictly limited to decisions where the justices align by ideology. (Its explanatory power is the greatest when considering only first-year decisions in which the justices align by ideology.) Decisions in which the justices do not align by ideology are not explained by the model and do not exhibit the conservative paradox.

IV. Inference about Principles

The conservative paradox is explained by the ideological distances of the median justice to the next justice on each side. When the justices align by ideology, then the side with a justice closer to the median is more likely to obtain the median's vote. In most compositions, the next conservative justice has been ideologically closer to the median than the next liberal justice. This explanation is powerful, however, only in those decisions in which the justices align by ideology. Non-party-line decisions are not explained by the median's location, and do not display the conservative paradox. These two phenomena open several questions. Here, we engage our key inference about judging and political leaning.

A naïve interpretation of these phenomena is that judges are political in some dimensions of adjudication and principled in others. But that judges have two or more ways in which they make decisions is implausible. First, if one believes in these two modes of adjudication, one must explain why judges seem to be more political in their first year than in subsequent years. And having a second mode of adjudication is no limit under this

38. *Id.* at 14 lines 16-19 ("First, I think what matters is what Congress did, not what the motivations of individual legislat[or]s were in moving forward with what Congress did.")

39. *Id.* at 14 lines 20 *et seq.* ("Second, the best evidence of what Congress did is the statute itself, where it made a choice to create an entity in Puerto Rico and it instructed it to act on behalf of Puerto Rico. . . .")

reasoning; judges might use even more modes of adjudication, refuting any constancy of principle. This contradicts basic concepts of legal reasoning.

The implausibility of judges alternating the way in which they make decisions comes primarily from the function of law and adherence to precedent. The very essence of law requires constancy and, in a judge, that constancy is not only one of interpretive positions but also of method. Furthermore, evidence indicates that judges do display such constancy in their various interpretive positions. Court-watchers and litigators spend significant effort to know the details of each justice's philosophy.[40] In the same vein, the study of the dimensions of criminal procedure of Chapter 5 showed that the justices of that composition of the Indiana Supreme Court maintained relatively constant attitudes about six different dimensions of criminal procedure, some congruent with their political attitudes and some not. In order for one to believe that justices are political in some dimensions of adjudication, one must believe that the entire legal profession's focus on the legal attitudes of the justices is misplaced and that the persistent phenomena where the justices display consistency of views are illusions that the justices readily sacrifice to political expediency.

An alternative view that seems much more sound is that justices employ a single method of adjudication in all matters, voting and taking positions according to their interpretive principles or legal philosophies. The justices' legal philosophies lead the justices to fairly specific attitudes in the numerous dimensions of legal reasoning and adjudication. That some of those positions appear political and others principled is the result of the appointment process. In the appointment process, the political branches select jurists for appointment to the Supreme Court depending on the agreement of their legal philosophies with the political positions of the appointing Presidents. However, the appointing Presidents do not and cannot vet candidates on every dimension of their legal philosophies. Rather, the political system focuses on the set of candidates' attitudes that politicians consider important, what we might call the politically salient dimensions of adjudication.

The result is that when a case turns on politically salient matters, then justices align by their attitudes that the political appointment process used, and the decision appears political. When a case turns on a matter that is not politically salient, then the justices' attitudes do not correlate with their appointing parties and political leanings. Then, the decision appears unexplainable by

40. Books and law review articles focus on the thinking of specific justices. The magnitude of the investment appears in a Westlaw search for articles with titles including the phrase "justice *name*" with *name* being replaced by the justices appointed since 1970, i.e., from the appointment of Justice Blackmun. Imperfect as this search is, it produces 1,020 articles. The imperfections include that the search also returns speeches of the justices, retrospectives, and articles that have epigraphs by the justices; the search corresponding to Justice Thomas also captures articles about other justices with that first name; however, first, those reflect the same focus on individual justices, second, even if those are most of the 78 articles that the "Thomas" search produces, they do not alter the conclusion that legal analysis is interested in the thinking of individual justices. The front-runner by far, due to being the median justice for a long time, is Justice Kennedy with 111 articles, with titles such as *Justice Kennedy's Democratic Dystopia*; *The 'Super Median;'* or *Justice Kennedy and Environmental Waters Cases*. Indeed, the lawyers for gay marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015) acknowledge not only that "[they] had written [their] briefs for Justice Kennedy" but also that during the oral argument "every question that every justice asked was designed to sway Justice Kennedy." *See* Mary Dieter, *How to Argue before the Supreme Court*, https://www.depauw.edu/stories/details/how-to-argue-before-the-supreme-court/ (visited 1/11/20220) [perma.cc/P64R-U7L7].

politics and is, therefore, denominated "principled." But all decisions are principled in that the justices follow their own interpretive principles and legal philosophies rather than deciding in the way that is politically appealing to their appointing party.[41] Calling new interpretations by the Court political when they are in the political dimensions and surprising when they are in the non-political ones is simply an error of perception.[42] New interpretations may arise in any dimension of legal reasoning and no reason exists to think that they are produced by two (or more) different methods.

Legal philosophies do not even have a political leaning that is inherent or constant. Consider two examples. Two dimensions of judging that reflect accurately political leaning are attitudes about federal power and breadth of constitutional interpretation. In the former, conservative politics asks for judges to have a narrow view of federal powers and an expansive view of states' rights.[43] In the latter, conservative politics asks for narrow constitutional interpretation that does not expand federal rights and disapproves of taking interpretive liberties with the constitutional text.[44] Expanding the federal power and taking interpretive freedoms with the Constitution are seen as not being conservative.

Compare this political interpretation of these two legal attitudes to those existing around the *Lochner* era at the turn of the previous century.[45] *Lochner* produced a conservative outcome, invalidating state legislation that the court held interfered with "the right of the individual to his personal liberty, or to enter into those

41. This is neither to deny (1) that some jurists may approach law after selecting a political leaning and may have a bias in favor of attitudes that agree with their political leaning nor (2) that justices' attitudes are informed by events and may fluctuate. (1) For example, conservative legal students in the early twentieth century might have found broad interpretation and expansive federal powers appealing, just as conservative students in the late twentieth century might have found them unappealing, *see infra*, notes 43–44. Furthermore, perhaps their attitude on such matters might change more easily if the parties' positions change. However, even such jurists, would tend to select their attitudes about non-politically salient dimensions based on their personal legal philosophies. (2) The fluctuation of attitudes in reaction to events is most visible in the study of un-Americanism prosecutions after the Second World War, a period when the primacy of the Bill of Rights fluctuated depending on the fear of Communism, *see* Chapter 7 (showing the fluctuation of the number of votes un-Americanism prosecutions received).

42. Compare, for example, the commentary on the Court's recent decisions about Indian affairs in *McGirt v. Oklahoma*, 591 U.S. _ (2021) to any decision on a politically salient issue. The former is treated as news with no accusations of political motivation while the latter are branded political.

43. *See, e.g.,* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEXAS L. REV. 1081, 1092 (1985) (discussing the "conservative appeal to federalist principles" that favor states' rights); Cato Institute, CATO HANDBOOK FOR POLICYMAKERS 141 et seq. (8th ed. 2017) (establishing returning authority to the states as a central approach for conservative policymakers); Earl M. Maltz, *Faint-Hearted Federalism: The Role of State Autonomy in Conservative Constitutional Jurisprudence*, 72 S.C.L. REV. 55, *passim* (2020) (discussing the conservative promotion of states' rights).

44. *See, e.g.,* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 625-29 (1994) (describing conservative jurisprudence as resting on originalism and judicial restraint); Richard H. Fallon Jr., *Are Originalist Constitutional Theories Principled, or are They Rationalizations for Conservatism*, 34 HARV. J. L. & PUB. POL'Y 5, *passim* (2011) (proceeding from the premise that modern conservatism argues for originalism); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J. L. & PUB. POL'Y 137, *passim* (2011) (arguing that conservative legal scholars should no longer be originalists); Keith E. Whittington, *Is Originalism Too Conservative*, 34 HARV. J. L. & PUB. POL'Y 29, *passim* (2011); Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, *passim* (2011) (discussing conservative originalism); Cato Institute, CATO HANDBOOK FOR POLICYMAKERS 154 *et seq.* (8th ed. 2017) (on "Returning Power Wrongly Taken from the States and the People").

45. Lochner v. New York, 198 U.S. 45, 56 (1905) (invalidating a New York law, which set maximum working hours for bakers, as unconstitutional; the five-judge majority held that such a law violated the Fourteenth Amendment's Due Process Clause as constituting an "unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor. . .").

contracts in relation to labor." But in reaching this conservative outcome, the majority violated both of today's tenets of conservative politics just identified. It gave an expansive interpretation of the Constitution—the Due Process clause—and a narrow concept of states' rights—not respecting the legislative outcome of New York. In these two dimensions, opposite legal attitudes advance conservative politics at those different times. The political arena determines the political leaning of legal attitudes.

That some legal attitudes may be strongly associated with political leanings does not give the political leanings legal salience. An advocate arguing before a supreme court with a strong conservative majority must still make legal arguments to persuade the justices, not political ones. The advocate would never argue that conservativeness dictates the outcome the advocate promotes. A legal argument must lead to the outcome.

V. CONCLUSION

This Chapter explored the paradox that almost without exception since the 1946 term the United States Supreme Court's 5–4 decisions have leaned conservative. No structural or political explanation had power. We then imported the justices' ideology estimates and tested three hypotheses about the formation of 5–4 divisions. Our research produced the most support for the hypothesis of vying for the median. It turns on the ideological distance between the median and the next justice on each side. The intuition on which it rests is that the more extreme justices on each side realize that insisting on their position would cost them the majority and produce an even less desirable outcome than if they compromised and tried to appeal to the median justice. Effectively, the weight of each side falls on the justice closest to the median; a small distance to the median makes getting the median's vote easy; a large distance justifies dissenting. The conclusion becomes increasingly strong as the sample narrows to only first-year decisions and to only decisions with the justices aligned by ideology. Then, the distances explain over half the variation of the conservative ratio between coalitions. At the opposite side, decisions with the justices not in party-line votes neither present the conservative paradox nor give these distances explanatory power.

The implication is that justices vote consistently according to their principles in the many dimensions of the legal system. However, because justices are selected according to their positions in the few legal dimensions that the political branches consider salient, outcomes appear political in the politically salient matters but principled in the rest. Adjudication does not occur in the political space with conservative or liberal arguments. Adjudication occurs in the legal space with arguments crafted for each of the many dimensions of the legal system, both those that have political salience and those that do not.

Part III: Applications Beyond Tight Splits

Part II looked at implications of the methods of Part I for tightly split decisions, with Chapter 5 seeing six dimensions in criminal procedure, and Chapter 6 explaining that 5–4 coalitions form on the basis of distances on either side of the median justice.

This Part expands the breadth of the implications. The next chapter comes from pulling on a thread of the Stewart composition (Figure 4.2, p. 62). Many of its 5–4 decisions involved un-Americanism prosecutions. It turns out that the evolution of un-Americanism prosecutions reveals a sensitivity of the justices to public opinion. Chapter 8 identifies different dissenting strategies. The extremes—Douglas's rate of five solo dissents annually compared to Kagan never having dissented alone—show how important individuals are. Chapter 9 finds some additional likely sensitivity to national affairs that appears when we study the distribution of votes. Chapter 10 closes the book: these new methods reveal much and open the way for much more to be revealed.

7. Social Issues: The Un-Americanism Pendulum

Topics over which the justices divide 5–4 with frequency are likely of national importance. During Stewart's composition, the Court often split 5–4 on cases related to prosecutions for "un-American activities." A more panoramic look into this chapter of history provides insights into the Court's role in the nation's political life. Interestingly, from today's viewpoint, the decisions of the Stewart composition predominantly supported the prosecution. Over the longer period, however, the Court's position repeatedly shifted between favoring prosecutions and upholding the primacy of the Bill of Rights. This oscillation indicates a sensitivity of the Court to the people's will rather than the text produced by the legislative and constitutional drafters.

By "un-Americanism prosecution" we mean any action that produces any negative consequence and has its origin in any collective body that seeks to avert subversive influence. One of the most active collective bodies was the House Un-American Activities Committee (but the spotlight of history is on Wisconsin Republican Senator Joseph McCarthy's excesses during his chairmanship of the Internal Security Subcommittee of the Senate Committee on Government Operations in 1953 until his censure by the Senate in December 1954[1]). State legislatures created similar committees, as did professional organizations, such as bar associations that were in control of licensing their members, but also bodies in industries that did not require licensing, notably in the entertainment industry.[2] The negative consequences they produced ranged from revocation of security clearances,[3] dismissal from employment,[4] requirement of loyalty oaths,[5] denial of a license to

1. *See, generally,* Joseph McCarthy, ENCYCLOPAEDIA BRITANNICA (2019) available at https://www.britannica.com/biography/Joseph-McCarthy [perma.cc/4GT4-8RZ5]; Joseph McCarthy, THE OXFORD COMPANION TO UNITED STATES HISTORY (Paul S. Boyer, ed., 2004) (available at https://www.oxfordreference.com/view/10.1093/acref/9780195082098.001.0001/acref-978-0195082098-e-0965 [perma.cc/9TNN-R5LA]).

2. *See, e.g.,* Wilson v. Loew's, Inc., text accompanying note 182 (p. 252). References to pages 225 and later refer to Appendix 7.C, which discusses each case in detail).

3. *See, e.g., Greene*, text accompanying note 222 (p. 258).

4. *See, e.g., Lovett*, text accompanying note 5 (p. 225).

5. *See, e.g., Garner*, text accompanying note 20 (p. 228); *Gerende,* text accompanying note 26 (p. 228); *Updegraff*, text accompanying note 77 (p. 237).

practice a profession,[6] deportation[7] and denaturalization,[8] as well as criminal conviction, either directly for membership in subversive organizations,[9] or indirectly, for refusing to answer questions or produce documents,[10] or for perjury.[11]

More specifically, besides resisting Congressional inquiries, four additional categories of un-Americanism prosecutions appear. (1) The Taft-Hartley Act of 1947 (enacted over Truman's veto) imposed criminal penalties on members of the Communist Party who took leadership positions in labor unions. A set of cases challenged such prosecutions until, in 1965, *US v. Brown* held the prohibition unconstitutional.[12] (2) By executive order, Truman and Eisenhower prohibited the government employment of communists.[13] A set of cases challenging such dismissals ceased in the late 1950s. (3) The Alien Registration Act of 1940 (Smith Act),[14] the Internal Security Act of 1950,[15] and the Communist Control Act of 1954[16] outlawed the Communist Party, membership in it, and subversive activities. A set of prosecutions pursuant to these statutes were maintained until *Yates* in 1957.[17] (4) The Nationality Act of 1940 strengthened the prohibition of the naturalization of communists and required their deportation.[18] A set of cases challenged deportations and denaturalizations. The result is 117 decisions.[19] Aggregation of all these proceedings is necessary to see the overall picture.

The first section of this Chapter summarizes the attitudes of the justices; the full case-by-case analysis is in Appendix 7.A, p. 217. The second section sets forth the quantitative aggregation, revealing the pendulum. The third section shows that the reaction to the backlash was a permanent change for five members of the Court. The conclusion speculates about the long-term consequences of different judicial strategies.

I. AN OVERVIEW, LARGELY THROUGH THE EYES OF JUSTICE JACKSON

The Supreme Court's post-WWII decisions on un-Americanism matters span from 1946 to 1967 and cover

6. *See, e.g., Barsky*, text accompanying note 96 (p. 240; physician); *Konigsberg I*, note 143 (p. 247); *Konigsberg II*, note 248 (p. 261); *Anastaplo*, note 250 (p. 261; bar admissions).

7. *See, e.g., Harisiades*, text accompanying note 81 (p. 238); *Spector*, note 88 (p. 239); *Galvan*, note 104 (p. 241); *Sentner*, note 150 (p. 248); *Rowoldt*, note 184 (p. 253); *Bonetti*, note 195 (p. 254); *Niukkanen*, note 231 (p. 259); Kimm v. Rosenberg, note 232 (p. 259).

8. *See, e.g., Bridges*, text accompanying note 93 (p. 240); *Zucca*, note 131 (p. 245); *Brown-1958*, note 187 (p. 253); *Nowak* and *Maisenberg*, note 193 (p. 254); *Polites*, note 239 (p. 260).

9. *See, e.g., Dennis II*, text accompanying note 56 (p. 234); *Yates I*, note 162 (p. 250).

10. *See, e.g., Bryan* and *Fleischman*, note 27 (p. 229), and many more.

11. *See, e.g., Christoffel*, text accompanying note 9 (p. 226).

12. United States v. Brown, 381 U.S. 437 (1965) ("*US v. Brown*"), see text accompanying note 323 (p. 270).

13. Truman issued Executive Order 9835 in March 1947. It was replaced by Eisenhower's corresponding Executive Order 10450, of 1953, and both were repealed in part by Carter and in full by Clinton. Eisenhower's order also prohibited the employment of loyal individuals who might be subject to extortion due to their lifestyle, which included homosexuality.

14. 54 Stat. 670.

15. 64 Stat. 987 (also enacted over the veto of President Truman).

16. 68 Stat. 775.

17. *See* text accompanying note 162 (p. 250).

18. 54 Stat. 1163.

19. The list of primary un-Americanism decisions has a hundred and one, Appendix 7.C. The omitted decisions are sixteen, collected in notes 31–33. Not included in this enumeration is *Shelton*, *see* note 230 (p. 259).

at least five legal topics.[20] The Court changed its attitude four times about their treatment. No summarizing can do justice to this chapter of legal history. Indeed, a detailed history of the cases already exists in the form of a book of 265 pages, 90 of which are endnotes, with copious references to the justices' own notes, made available posthumously.[21] However, we believe that the visual and quantitative aggregations presented in the second section of this Chapter offer fair overviews of this vast and varied landscape.

The goal is to show the big picture, akin to revealing the shape of a forest or a coast. Understanding each decision is akin to observing each tree or pebble. Yet, the trees make the forest and the pebbles the coastline. The texture of the decisions is revealing and Appendix 7.A tries to show that texture through the justices' own words. This summary reveals the tensions.

The Supreme Court started its October 1946 term with the world recovering from the maelstrom of WWII. The opposition of the United States to Nazism had rendered Soviet Communists temporary allies. The end of WWII brought back opposition to Communism and started the Cold War. And the Court's composition was about to change. Four Truman appointees brought with them the sense of opposition to Soviet Communism that may not have been as pronounced for the rest of the Court, who were appointees of F.D. Roosevelt. Two of Roosevelt's appointees became pivotal, Jackson and Frankfurter.

Jackson becomes the chief prosecutor of Nazi war criminals in Nuremberg where he got a front-seat view of the Soviet expansion in Eastern Europe. He brings that experience to his concurrence that favors the prosecution in *Dennis II*:

> Communist technique in the overturn of a free government was disclosed by the *coup d'etat* in which they seized power in Czechoslovakia. There the Communist Party during its preparatory stage claimed and received protection for its freedoms of speech, press, and assembly. Pretending to be but another political party, it eventually was conceded participation in government, where it entrenched reliable members chiefly in control of police and information services. When the government faced a foreign and domestic crisis, the Communist Party had established a leverage strong enough to threaten civil war. In a period of confusion the Communist plan unfolded and the underground organization came to the surface throughout the country in the form chiefly of labor 'action committees.' Communist officers of the unions took over transportation and allowed only persons with party permits to travel. Communist printers took over the newspapers and radio and put out only party-approved versions of events. Possession was taken of telegraph and telephone systems and communications were cut off

20. *See* text accompanying notes 1–18. Un-Americanism prosecutions also occurred before WWII. Those are outside the scope of this analysis, for which the Cold War is central.

21. ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS (U. Ill. P., 2015). Although this chapter also produces a database of about one hundred decisions (Appendix 7.C, p. 299, in the electronic supplement FIVE–FOUR: TABLES lists them with the vote of each justice), the overlap is imperfect. The primary differences are due to the present database starting earlier, ending later, and excluding espionage, bail, and private dispute decisions. For a listing of the decisions that do not join the database of primary un-Americanism decisions, *see* notes 31–33 and accompanying text.

> wherever directed by party heads. Communist unions took over the factories, and in the cities a partisan distribution of food was managed by the Communist organization. A virtually bloodless abdication by the elected government admitted the Communists to power, whereupon they instituted a reign of oppression and terror, and ruthlessly denied to all others the freedoms which had sheltered their conspiracy.[22]

In detail that is almost tedious, Jackson recounts how Communist infiltration eventually resulted in the overthrow of that government.

Jackson is a liberal justice who often joins the conservative ones in placing the fear of Communism above the Bill of Rights.[23] In a case outside the un-Americanism setting, Jackson warns against the absolutist view of Black and Douglas, who insist on the primacy of the Bill of Rights, accusing them of turning the Bill of Rights into a "suicide pact."[24] Elsewhere, Jackson writes for the Court while embracing as his premise that armed conflict is required "to stem the tide of Communism:"

> [The Constitution] does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien.[25]

Jackson's position reaches the substance and resolves it against the Bill of Rights on consequentialist grounds, the Cold War against Soviet Communism.[26]

Frankfurter's judicial philosophy is one of restraint. Frankfurter often argues that the Court should not reach the constitutional merits of a dispute because the other branches of government have the authority to resolve the issue. The role of the judiciary in Frankfurter's analysis is much more circumscribed. Where Jackson affirmatively deploys the Court in the war against Communism, Frankfurter's concurrence acknowledges that the legislature's actions may be odious, but the Court cannot override them. "[T]he place to resist unwise or cruel legislation . . . is the Congress, not this Court."[27]

The four Truman appointees (Burton, Vinson, Minton, and Clark), plus Reed, who was the one Roosevelt appointee who voted just as much for the prosecution, plus Jackson, and Frankfurter, were seven votes (against Black and Douglas).[28] Any five could make the

22. *Dennis II*, 341 U.S. at 566 (footnote omitted).

23. The ranking of the justices by how often they voted for the prosecution is in Table 7.1, below. The conservative justices are the four Truman appointees (Burton, Vinson, Clark, and Minton) and Reed, an FDR appointee. Burton, however, votes less for the prosecution than Jackson does, 61% to Jackson's 73%. For one more quote vividly illustrating the concern about communist subversion see note 244 (p. 260). That comes from a 1961 majority opinion for the Court by Stewart, long after Jackson's departure.

24. *Terminiello*, 337 U.S. at 36 (Jackson, J. dissenting), *see also* note 252 (p. 261) and accompanying text. Frankfurter also wrote against Black and Douglas's "dogmatic preference" for the Bill of Rights, for example in *Dennis*, *see* note 62 (p. 235) and accompanying text.

25. Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952); *see also* note 82 (p. 238) and accompanying text.

26. Jackson's concurrence in *Douds*, upholding the obligation of labor unions to provide affidavits that no officer is a member of the Communist Party, is similarly framed in terms of that party's unique and subversive nature, *see* note 40 (p. 231) and accompanying text.

27. *Harisiades*, 342 U.S. at 597–98; *see also* note 85 (p. 239) and accompanying text.

28. *See* table 7.1, p. 138, below.

prosecution victorious and did. Then, Vinson was replaced by Warren in 1953 and Jackson passed away on October 9, 1954, to be replaced by Harlan on March 17, 1955. That began a brief period of idealism about the Bill of Rights during which the Court favored the accused in un-Americanism prosecutions. But those exonerations led to a legislative backlash in the summer of 1957. Congress reversed one decision and was poised to exclude several issues from the jurisdiction of the Supreme Court.[29] After the backlash, five of the justices, including Frankfurter, increased their voting for the prosecution, affirming convictions in several 5–4 decisions.[30] In September 1962, Goldberg, who would never vote for the prosecution, replaced the retired Frankfurter, who after the backlash often did so. Thereafter, the accused win every un-Americanism case, albeit often 5–4, and this historical chapter closes.

The next section of this Chapter shows that this period of un-Americanism prosecutions divides itself into four eras. The last Truman appointment, of Minton in October 1949, initiates an era we name for its herald, Jackson. The departure of Jackson in October 1954 and the appointment of his replacement, Harlan, in March 1955 begins what we call the Premature Idealism Era, which lasts till the legislative backlash of July 1957. The Backlash Era lasts until Goldberg's appointment in September 1962, starting the Post-Frankfurter Era and marking the end of un-Americanism convictions.

II. Aggregating and Visualizing

The Court's treatment of un-Americanism prosecutions was complex and varied. The results are difficult to discern but we believe they can be comprehended by aggregating and visualizing the large number of cases and votes.

The quantitative analysis rests on the primary decisions about un-Americanism prosecutions. In the narrative of Appendix 7.A the secondary cases that are not counted here are identified and described. Essentially they are the espionage cases,[31] the single-justice and domestic cases about bail,[32] and the private liability

29. The statute to overrule *Jencks* passed the House 351–17, *see* note 170 (p. 251) accompanying text. Appendix 7.A.C, p. 225, discusses the backlash in detail; for the justices' voting changes *see* table 7.2 and accompanying text.

30. Whereas the text will use temporal language (here "after") due to convention, causal language (here "because of") would be perfectly appropriate. Philosophy of science has many competing understandings of causation, one of which is temporal sequence. Regardless which theory of causation one adopts, the legislative backlash caused the change in the voting of the five conservative justices as Subchapter III (p. 152) shows.

31. They are *Shaughnessy*, 338 U.S. 537 (1950); *Rosenberg*, 346 U.S. 273 (1953); and *Ullmann*, 350 U.S. 422 (1956). The government wins all. Two additional cases appear closer to national security than un-Americanism and are also not included, Heikkila v. Barber, 345 U.S. 229 (1953) (deportation challenge); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (indefinite detention for deportation of alien about whom the attorney general will not say why the alien is not admissible even in camera). They are also discussed above, text accompanying note 80 (p. 238), also discussing *Shaughnessy*). One more deportation case, *Witcovich*, is similarly excluded, *see* note 151 (p. 248) and accompanying text.

32. Williamson v. United States, 1950 WL 42366 (September 25, 1950) (single-justice bail, *see* note 53, p. 233); Stack v. Boyle, 342 U.S. 1 (1951) (domestic bail, *see* note 54, p. 233); Yanish v. Barber, 73 S.Ct. 1105 (1953) (single-justice foreign, *see* note 107, p. 242); Steinberg v. United States, 76 S.Ct. 822 (1956) (single-justice domestic, *see* note 127, p. 245). The individuals win all. The one foreign, entire-court case is included, Carlson v. Landon, 342 U.S. 524 (1952) (*see* note 87, p. 239; the government wins due to fear of the defendants' spreading communism, which suggests that this government victory may have been influenced by the red scare and, therefore, is properly in the database).

cases.[33] Espionage cases are atypical because they involve national security directly (rather than fear of communist infiltration or subversion). Single-justice bail cases are atypical because they do not involve the entire Court. Domestic bail cases differ because the considerations for bail are different than those for conviction. Private liability cases are atypical because the reaction to one private party's effort to impose liability on another is quite different than the response to a state-initiated administrative or criminal prosecution. Generally speaking, espionage cases tend to result in prosecution victories, bail cases in defendant victories, and private liability cases in no liability, with no relation to the level of fear of communism. The predictability of their outcomes justifies their exclusion. Including them would not alter materially the analysis but would add noise. The other side of the same phenomenon is the realization that, in the remaining cases, outcomes fluctuated with no change in the law; what changed was the intensity of anti-communism.

The resulting sample consists of 100 decisions, from *Lovett* in 1946 to *Robel* in 1967, listed in the Appendix 7.C, in the electronic supplement, p. 291.[34] All nine justices cast votes in 64 cases, eight in 27, seven in 10, and six in 2. The revolving composition of the Court included twenty justices including Marshall although he did not participate in the one case decided during his tenure, *Robel*. Table 7.1 orders the justices from the one voting the most in favor of the prosecution (Vinson with 86.4%), to those voting the least (a six-way tie at zero that includes the pre-Truman Murphy and Rutledge, as well as the post-Truman Democrats Goldberg, Fortas, Marshall, and Brennan, a Republican-appointed Democrat).

Table 7.1: Justices' Voting Record.

Justice	*Active*	*Voting Record*
Vinson	6/46–9/53	86.4%
Minton	10/49–10/56	84.4%
Reed	1/38–2/57	84.2%
Clark	8/49–6/67	80.2%
Jackson	7/41–10/54	72.7%
Whittaker	3/57–3/62	70.5%
White	4/62–6/93	70.0%
Harlan	3/55–9/71	60.8%
Burton	9/45–10/58	59.3%
Stewart	10/58–7/81	57.9%
Frankfurter	1/39–8/62	39.1%
Warren	10/53–6/69	2.7%
Douglas	4/39–11/75	2.1%
Black	8/37–9/71	1.0%
Murphy	2/40–7/49	0.0%
Rutledge	2/43–9/49	0.0%
Brennan	10/56–7/90	0.0%
Goldberg	9/62–7/65	0.0%
Fortas	10/65–5/69	0.0%
Marshall	8/67–10/91	0.0%

33. Tenney v. Brandhove, 342 U.S. 843 (1951) (*see* note 75, p. 237); Collins v. Hardyman, 341 U.S. 651 (1951) (see note 76, p. 237); Black v. Cutter Labs, 351 U.S. 292 (1956) (*see* note 133, p. 246); Amalgamated Meat Cutters and Butcher Workmen of America AFL-CIO v. N.L.R.B., 352 U.S. 153, 77 S.Ct. 159, 1 L.Ed.2d 207 (1956) (*see* note 140, p. 247); Wilson v. Loew's, Inc., 355 U.S. 597 (1958) (*see* note 182, p. 252). Wheeldin v. Wheeler, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (*see* note 310, p. 268). They all result in no liability, which appears as favoring un-Americanism prosecutions in the first three and *Wilson*.

34. The electronic supplement FIVE–FOUR: TABLES is available at nicholasgeorgakopoulos.org under Scholarship and the paragraph corresponding to this book and at perma.cc/W6GA-T75A.

The first column holds the last name of each Justice. The second column holds the dates that they were active on the Court, from the month and year of their appointment to the month and year of their departure. The third column holds the voting record of each justice in terms of percentage of votes cast against the individual (and in favor of the prosecution, government, or state) rounded to one decimal point. The first line, for example, shows that Vinson was active from June 1946 to September 1953 and voted 86.4% for the prosecution in un-Americanism decisions.

This ranking of the Justices makes some interesting revelations. (1) Jackson, the example of a jurist who subordinates the Bill of Rights to the fear of Communism, is fifth. Vinson, Minton, Reed, and Clark have stronger anti-Communist voting records than Jackson. (2) Warren, Douglas, and Black, the persistent votes for the accused, do not have perfect records, having cast some votes against the accused in the Jackson Era. Warren cast two before his change of heart. Douglas cast two, and Black cast one, in *Gerende*. (3) Frankfurter, who is seen as having defected from the pro-accused coalition after the legislative backlash of the summer of 1957, still has the next most liberal voting record. (4) Stewart and Harlan, who are seen as conservatives and were appointees of Republican President Eisenhower, vote for the prosecution quite a bit less than White or Jackson, both appointees of Democratic Presidents, respectively, Kennedy and Roosevelt.

A. A Summary View: The Pendulum

Visualize the Court's treatment of un-Americanism prosecutions on a graph where each decision is placed depending on the date of its issuance along the horizontal axis and the fraction of votes for the prosecution on the vertical axis. The result, figure 7.1, shows the ebb and flow of the fraction of votes in favor of the prosecution.[35] The horizontal axis holds time, the date of each decision. The vertical axis holds the fraction of the votes cast that were in favor of the prosecution, the government, or the state. Unanimity for the individual corresponds to zero and unanimity for the prosecution, which only occurs once, corresponds to one. Two horizontal lines mark the tight splits, 4/9ths and 5/9ths. Because the fraction is the result of dividing by the actual votes cast, not all values are in ninths. For example, four even splits appear.[36]

Each black diamond is one decision. When two decisions with the same voting fractions were issued on the same day, they appear as a diamond with a white center. Three decisions with the same date and vote do not occur. The unanimous against the prosecution four decisions of the early summer 1961 are too close in time to

35. A dynamic version of the figure, where popups with case names, citation, and the voting appear when hovering over each point, appears at my website under the entry corresponding to this book, also reachable from perma.cc/W6GA-T75A.

36. The even splits are *Bailey*, *see* note 44 (p. 232); *Isserman I*, *see* note 71 (p. 237); *Isserman II*, *see* note 74 (p. 237); and *Raley*, *see* note 221 (p. 257).

be distinguishable; their separation in time is increased for the purpose of the figure.[37]

Vertical lines indicate the appointment of new justices and the legislative backlash against the Court in the summer of 1957 (the former are dotted; the latter is solid). Of the several attempted legislative actions of that summer,[38] the one displayed is the introduction of the Jenner bill, the most sweeping one although a different one was ultimately enacted. Each line that corresponds to the appointment of a justice also identifies the justice who was replaced. This text that identifies judicial replacements has in some instances a left or right arrow in a parenthesis. A right arrow identifies appointments that replace a justice who does not tend to vote for the prosecution with one who does and *vice versa* for a left arrow.

Order comes from two aggregations. The first is the step-like dot-dashing line, which assumes that each period had a constant fraction of votes for the prosecution.[39] The second is a solid wave-like line, which is the result of trying to fit a pendulum equation to the data. Its ebb and flow matches the eras. Both show the increased siding with the prosecution of the Jackson and Backlash Eras, and the opposite stance of the first two un-Americanism cases, the Premature Idealism, and Post-Frankfurter Eras.

B. Four Eras

From a statistical perspective, the proposition that these four eras produce different average voting fractions on the Supreme Court is testable by the linear regression that uses dummy variables corresponding to the eras, the step-like dash-dotted line of Figure 7.1. Dummy variables identify the periods: that before the appointment of Clark and Minton which only holds two cases; the Jackson Era; the Premature Idealism Era (which is set as the regression's constant); the Backlash Era; and the Post-Frankfurter Era. The fraction of votes for the government is higher in the Jackson Era and the Backlash Era than in the Premature Idealism Era with statistical confidence of 99.99% and 98%, respectively. However, this regression is not particularly powerful in describing the data. The regression only explains 20% to 24% of the variation of the voting.[40]

Much more explanatory power lies in the non-linear regression that rests on the equation that describes the motion of the pendulum.[41] This produces the solid fluctuating line of Figure 7.1. This regression explains 80% to 81% of the variation in the voting.[42]

37. The four are *Slagle*, *see* note 253 (p. 262); *Louisiana v. NAACP*, *see* note 254 (p. 262); *Noto*, see note 260 (p. 262); and *Communist Party v. Catherwood*, *see* note 261 (p. 262). The dates of the first and last are moved forward and back, respectively, by 15 days; the dates of the middle two are similarly moved by four days. This only influences the figure. The analysis uses the actual dates.

38. See text accompanying notes 170–175 (pp. 251–252).

39. It is the result of a regression using dummy variables that correspond to the eras of different un-Americanism attitudes.

40. The dummy regression's R^2 is .236 and adjusted R^2 is .204.

41. The pendulum equation is a product of time, a trigonometric sine of time, and Euler's constant raised to a power that is a function of time.

42. The nonlinear regression's R^2 is .806, adjusted R^2 is .796. The full statistics of these two regressions are in Appendix 7.B, Tables 7.B.1 and 7.B.2, in the electronic supplement FIVE–FOUR: TABLES, available at nicholasgeorgakopoulos.org and perma.cc/W6GA-T75A.

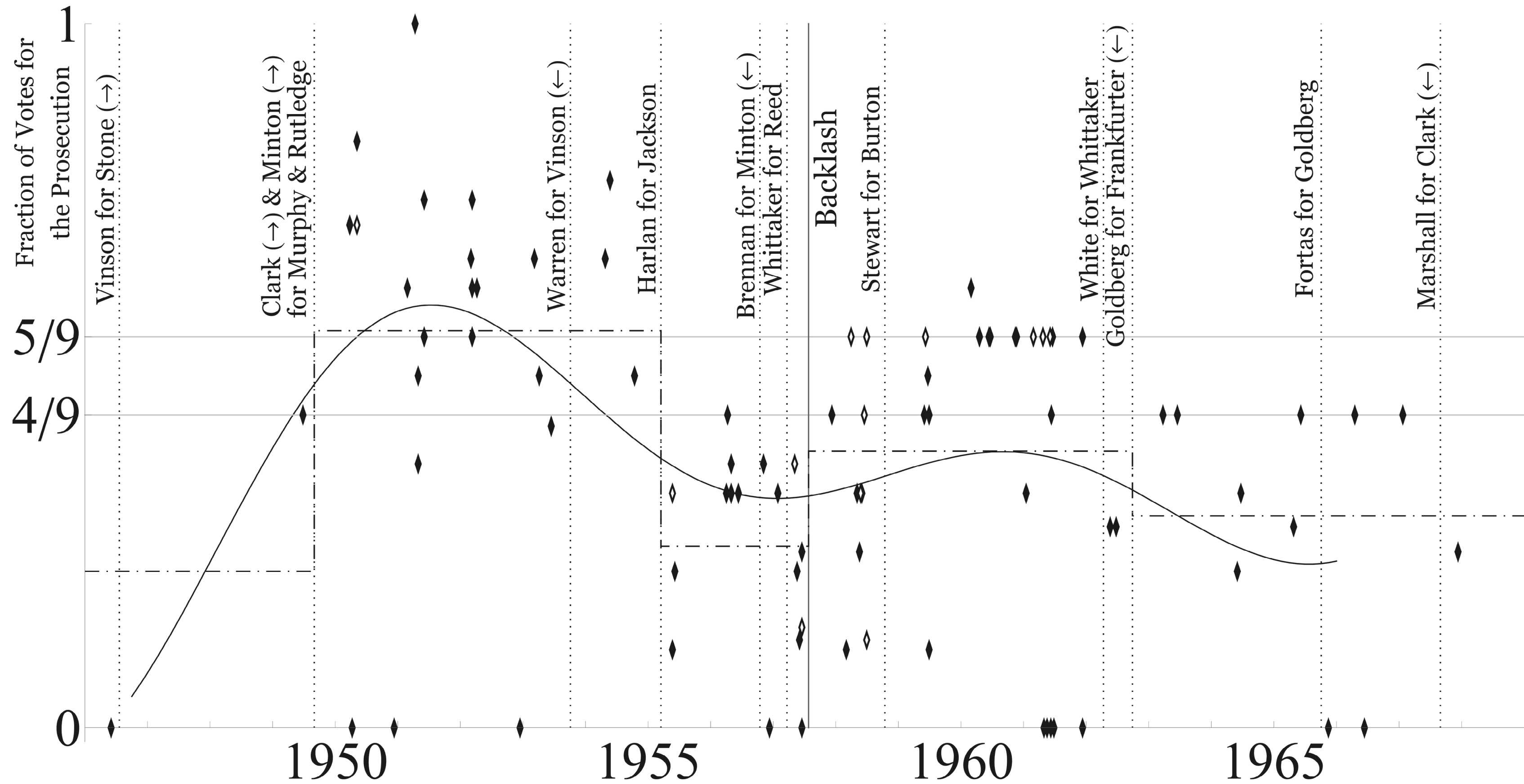

Figure 7.1: The fraction of votes for the prosecution in the primary un-Americanism decisions.

The difference between the two concepts, the sharp steps juxtaposed to the pendulum's gradual transitions, is that the changes of the voting are not as sharp as suggested by the time markers that separate the periods. For example, after the appointment of Warren and before the appointment of Harlan, from October1953 to March 1955, the Court only decided two un-Americanism cases, rather than continuing the pace of the earlier years when voting for the prosecution had reached its peak. In part, this slowdown is due to the gap between the death of Jackson on October 9, 1954, and Harlan's appointment on March 17, 1955, a period during which the Court only issued one un-Americanism decision, *Isserman II*, splitting 3–3 without Jackson, Clark, or

Warren.[43] The close look at the Court's activity reveals that in this transitional period the Court also postponed deciding a case, ordering the reargument of *Emspak* in June 1954.[44]

Similarly, the transition is softened in the start of the Backlash Era, where the voting is quite mixed, a little less in favor of the prosecution than after the appointment of Stewart. The next transition also is softened by the Court's voting in favor of the accused in a few cases before the end of this era, before the appointment of Goldberg.

1. The Jackson Era

The first era, the Jackson Era, starts with the appointment of Clark and Minton in August and September 1949.[45] Jackson died on October 9, 1954. Harlan was appointed in March 1955 to replace him. Jackson's express primacy of protection against Communist infiltration over the Bill of Rights defines this era and it is the only era when un-Americanism prosecutions garner seven or more votes. The Court during this period has several justices who see Soviet Communism as a significant threat, a threat that justifies the subordination of the Bill of Rights, the position exemplified by Jackson. Five of the justices with the voting records most in favor of the prosecution were on this composition of the Court: Vinson, Minton, Reed, Clark, and Jackson, with voting rates, respectively, of 86%, 84%, 84%, 80%, and 73% in favor of the prosecution. Burton is next with 59%.

The Court decided 24 un-Americanism cases during the Jackson Era. The prosecution was victorious in 16 or 67%. The average fraction of justices voting for the prosecution was 57%. This era includes the only unanimous outcome in favor of the government, *Gerende*.[46]

Calculating the rate of the Court's output over time is complicated by the fact that the Court tends to operate in terms, issuing a disproportionate number of decisions near the end of each term. The Jackson Era lasted a little over six terms. Only one decision was issued early in the 1954-55 term, *Isserman II*, after Jackson's death. The remaining 23 decisions over six terms indicate a rate of slightly under four un-Americanism decisions per term.

2. The Premature Idealism Era

The Premature Idealism Era, lasts from the replacement of Jackson by Harlan in March 1955 until the legislative backlash of the summer of 1957.[47] This era is

43. *See* note 74 (p. 237) and accompanying text.

44. Emspak v. United States, 347 U.S. 1006 (June 7, 1954) (*per curiam*, ordering reargument); LICHTMAN, at 68. The reargument changed the outcome. After the initial hearing on *Emspak*, the Court was poised to rule for the prosecution 6–3, with Warren and Jackson in the majority for the government. The draft opinion would have ruled broadly in favor of the government. Black moved for reargument, a motion which carried. In the interim, Jackson died, and Warren changed attitudes about un-Americanism prosecutions. Jackson's replacement, Harlan, sided with the government, so the death of Jackson may have less importance than it appears to have. Nevertheless, Black, Douglas, Warren, Frankfurter, Clark, and Burton, opposed the prosecution, *see* text accompanying note 109 (p. 242).

45. The appearance that we deviate in this chapter from naming compositions by their junior justices is false because here we are not naming compositions but eras during which the composition of the Court changed but its un-Americanism decisions had an overarching pattern, here best exemplified by Jackson's vocal opinions.

46. *Per curiam*; *see* text accompanying note 26 (p. 228).

47. Among the several legislative reactions, the defining one may be the submission of the Jenner bill on July 26, 1957, in the Senate, which would have stripped jurisdiction over five types of un-Americanism disputes from the Supreme Court. A different bill passed but the Jenner bill would have been the most sweeping. *See* note 173 (p. 251) and accompanying text.

defined by the primacy that Warren, Black, and Douglas give to the Bill of Rights (as does Brennan, who joins the Court only at the end of this era). The replacement of Jackson by Harlan has a pronounced effect because in this era Harlan votes for the accused individuals. That changes in the next era.

The Court decides 20 cases during this era. The prosecution is victorious in none.[48] The average fraction of justices voting for the prosecution is 26%. The era comprises three terms, making the Court's rate of output just under seven un-Americanism decisions per term.

3. The Backlash Era

The Backlash Era starts in in the summer of 1957 and lasts until the appointment of Justice Goldberg on September 28, 1962, by President Kennedy. The Backlash Era sees a pronounced shift of the Court to favoring the government in un-Americanism prosecutions. However, Warren, Black, Douglas, and Brennan never vote against any individual accused of un-Americanism. The Court produces wins for the government with five votes against those four.[49]

The Court decides 44 cases during the Backlash Era. The prosecution is victorious in 20 or 45%. The average fraction of justices voting for the prosecution is 39%. Treating this era as comprising five terms, the Court's output would be slightly over 8.5 un-Americanism decisions per term, the greatest rate of output compared to other eras.

One may counter that the voting might have changed later upon the appointment of Stewart rather than upon the backlash. This is untenable for several reasons. The explanatory power of the dummy regression would drop.[50] The voting of the period before Stewart's appointment is closer to that after it, rather than to that before the backlash.[51] The applicable statistical test differentiates both the latter periods from the Premature Idealism Era.[52] Stewart actually voted less for the government than his predecessor, Burton, had come to vote after the backlash.[53] The period between the backlash and Stewart's appointment has convictions that would not have occurred in the Premature Idealism Era. The several exonerations that the period between the backlash and Stewart's appointment also had are not inconsistent with the period after Stewart's appoint-

48. Note, however, that *Black v Cutter Labs*, *see* note 133 (p. 246)—which was excluded for being between private parties, where the Court uniformly refused to interfere—can be considered a case in which the individual accused of communist sympathies loses, slightly weakening the pro-individual nature of the Premature Idealism Era.

49. The result is a clustering of decisions at the 5/9ths line of Figure 1. The one case which seems to correspond to a majority greater than five out of nine is *Nelson-LA*, in which Warren does not participate, *see* note 226 (p. 258) and accompanying text. The five-to-three vote produces the slightly larger fraction.

50. If the appointment of Stewart is set as the dividing line, then the explanatory power of the dummy-variable regression drops to 18.7% and 21.9% (adjusted R-squared and R-squared) from the 20.4% to 23.6%.

51. Compare the rate of voting for the government in three periods, the Premature Idealism Era, the transitional period until the appointment of Stewart, and the remainder of the Backlash Era (starting from the appointment of Stewart). The first is 26%, the second 37%, and the third 41%. Granted, Stewart's appointment slightly increases the rate of voting for the government, but by a mere 4%. The larger leap follows the backlash, which leads to a change of 11% (from 26% to 37%), a change almost triple what Stewart brings. One of these three periods is unlike the others: the Premature Idealism Era. The other two belong together as the Backlash Era.

52. The t-test against the Premature Idealism Era gives statistical confidence that the transitional period is different of 96% and that the period after Stewart is, of 99%. The two latter periods are indistinguishable from the perspective of the t-test.

53. See Table 7.2. Burton after the backlash voted 71% for the government. During the Backlash Era Stewart voted 61% for the government.

ment. Their slightly greater frequency before Stewart's appointment is part of the gradual nature of the transitions that make the pendulum motion have greater explanatory power than the step process.

4. The Post-Frankfurter Era

In the final era, the Post-Frankfurter Era, the Kennedy and Johnson appointees (after White; i.e., Goldberg, replaced by Fortas, and Marshall, who replaced Clark) turn the Court against prosecutions and the historical chapter of un-Americanism prosecutions closes.

The Court decides eleven cases during this era. The prosecution wins none. The average fraction of justices voting for the prosecution is 30%.

The Court's actual rate of output is uncertain. Because this is the final era, its ending point is unclear. At the earliest, it is the last un-Americanism case in this database but much later dates are plausible. Perhaps its end is the end of the Cold War, perhaps the final collapse of the Soviet Union or some earlier date, such as a date when the Cold War is seen to reach a stalemate. Therefore, establishing the rate of output of the Court cannot be precise. Based on the last case in this sequence, this era would have a duration of six terms, as a minimum. If so, the Court's output appears to be at a maximum a little short of two cases per term, quite a bit less than any prior era, suggesting that the end of un-Americanism prosecutions was at least also a result of the lower courts not producing cases that the Supreme Court would review.

C. Gradual Transitions

The gradual nature of the transitions is a novel phenomenon that deserves further research and explanation. The 1955 decision to reargue *Emspak* is a good example of our lack of understanding of the corresponding dynamics. It could well be an accident—a majority draft opinion with excessive breadth which led to a loss of votes and a switch of the outcome.[54] Yet, would this have happened two years earlier? Perhaps two years earlier, at the peak of the Jackson Era, the surrounding forces in favor of un-Americanism convictions would have made the draft opinion not seem overbroad or would have countered any efforts at additional deliberation that the minority would have made, such as Black's motion for reargument, which perhaps only carried because the fervor against un-Americanism was ebbing.

Even the beginning of un-Americanism prosecutions holds expressions of gradualism. Consider Clark, a Truman appointee and one who strongly favored the government. Clark's impact on un-Americanism decisions is subdued by the fact that, likely due to the conflict of having served as Truman's Attorney General, he does not participate in eighteen cases, most of them early in his tenure. Whittaker presents a similar phenomenon, not participating in several cases early in his tenure, although he did not have a position in the Eisenhower administration.

The role of the two hot wars in this evolution also needs to be understood better. The Korean War—June 25, 1950, to July 27, 1953—partially overlaps with the peak of the pro-government attitude of the Jackson Era.

54. *See* notes 106 & 109 and accompanying text (p. 234).

It seems intuitive that the war may have contributed to the pro-government sentiment. However, the ramping up of convictions occurred before the war and the ebbing occurs before the war ends. Therefore, more plausible is that both the war and the stance of the Supreme Court stem from the same forces, rather than that the war influenced the Court. But when considering the ebbing of convictions before the war's end, the question arises as to whether the war diminished social pressures opposing Communism and a politically sensitive set of justices reacted accordingly. The Vietnam War's gradual escalation might frustrate efforts to understand why its impact differed.

Puzzling is also the gradual change surrounding the replacement of Burton with Stewart. Their voting records are virtually identical. Yet, Stewart's appointment ends a transitional period where the Court was not voting quite as much for the government and ushers in the period of peak convictions of that era. The study of the votes, partitioned by era in Table 7.2, shows that Burton voted more for the prosecution during the Backlash Era than he had previously. Actually, Burton exceeds Stewart, voting 71% for the prosecution during the Backlash Era compared to Stewart's 61%, which means that, all else equal, the replacement of Burton by Stewart should not have increased voting for the government. Nevertheless, before the appointment of Stewart the Court produces a slightly more mixed set of outcomes. During Stewart's confirmation, the Senate expressed some un-Americanism sentiment.[55] Might some other justices have been influenced by this to vote slightly more for the prosecution after Stewart's appointment? It is consistent with the notion that some of the justices were sensitive to the shifting political sentiment.

Similarly puzzling is the softening of the transition into the Post-Frankfurter Era before it begins with the appointment of Goldberg. Nothing explains the few exonerations that seem to produce this softening, the unanimous siding with the individual in *Cramp*, and the 5–2 votes for the individuals in *Russell* and *Silber*.[56] Yet, Black's dissent in *Killian* foretells the reversal in *Douds*.[57]

Despite this gradual prelude, the end of un-Americanism prosecutions is not gradual. The end does not come from the conservatives gradually voting any less for convictions but from the abrupt replacement of Frankfurter by Goldberg. One more uncompromising

55. The minority report of the Senate Judiciary Committee was opposed "because it is evident from the hearings that Justice Stewart thinks the Supreme Court has the power to legislate and to amend the Constitution of the United States." *Nomination of Potter Stewart, Minority Views* at 10, in Roy M. Jacobstein, J. Myron, Compilers Mersky, Supreme Court of the U.S. Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee. During the hearing several of the Court's decisions during the Premature Idealism Era came under attack. *Nomination of Potter Stewart to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 86th Cong. Vol. 2, 71–146 (1959) (Senator Ervin at p. 83 refers to *Nelson*; at p. 84 to *Yates*; p. 85 to *Koenigsberg*; at p. 86 to *Watkins*; at p. 88 to *Slochower*; at p. 90 to *Sweezy*; Senator Ervin's stressing of original intent and opposition to judicial activism spans from page 75 to page 130, taking up most of that day of the hearings). Despite that these attacks were phrased as anti-communist ones, the true motivation likely was an anti-integration one because only Southern senators voted against confirmation. *See* GovTrack, Nomination of Potter Stewart as Assoc. Justice of Supreme Court, (https://www.govtrack.us/congress/votes/86-1959/s58 [perma.cc/WJ4M-8EKA]).

56. *See, Cramp*, note 286, p. 265, below, and accompanying text; *Russell*, note 294, p. 266, below, and accompanying text; *Silber*, note 299, p. 267, below, and accompanying text.

57. *See* note 289, p. 265, below. *Douds* was reversed by *Brown*, *see* note 323, p. 270, and accompanying text.

liberal joins Warren, Black, Douglas, and Brennan. The resulting unshakable majority of five closes this historical chapter. The judicial sensitivity to political undercurrents that drove prior transitions is irrelevant at this final step, not coincidentally upon the departure of Frankfurter with his judicial modesty and political sensitivity.

III. BACKLASH: DURESS OR LAW?

A closer look at the voting of individual justices around the Backlash Era reveals additional texture about their conduct and the interaction between Congress and the Court.

Table 7.2 collects the voting of each justice who served on the Court during the Backlash Era as well as either before or after it. The ten justices who meet this criterion are arranged by appointment date at the rows of the table. The columns of the table come in three groups, corresponding to the three periods of time, before, during, and after the Backlash Era. Each group has three columns. The left column headed "For Gov't" gives the number of votes each justice cast for the government in un-Americanism prosecutions over that period of time. The middle column headed "For Indiv." gives the number of votes cast by each justice for the individuals accused of un-Americanism during that period. The last column headed "Rate" gives the rate of voting for the government of the corresponding justice in the corresponding period as a percentage, rounded.[58]

Compare, first, the rates of voting for the government before the Backlash Era to those during it. Notice how, other than Warren, Black, Douglas, and Brennan, the rate of voting for the government increases. Whittaker's goes from zero to 74%.[59] Frankfurter's goes from 17% to 63%, more than tripling. Harlan's goes from 32% to 68%, more than doubling. Even the two justices who were already frequent dissenters in favor of the government, Clark and Burton, have their rates of voting for the government increase, Clark from 67% to 89% (a 33% increase) and Burton from 56% to 71% (a 28% increase). For five members of the Court, the legislative backlash led to increased voting for the government. Frankfurter's change was by far the most pronounced.[60]

58. Both Figure 7.1 and Table 7.2 offer a percentage of voting for the government, with an important difference, however. In the case of Figure 7.1, the percentage is of the justices voting in each case. In Table 7.2, it is the percentage of votes that each justice cast.

59. Granted, Whittaker's zero is less meaningful than the other justices' pre-Backlash rates because it is an expression of only two votes: that in the unanimous *Service*, *see* text accompanying note 160, p. 250, below, and that in the *per curiam*, 7–2 *Sentner*, *see* text accompanying note 150, p. 248, below. The dissenters in *Sentner* were Clark and Burton. Using a locational concept of the arrangement of the justices, this voting record suggests that Whittaker must have been to the left of Burton who voted for the government 59% before the backlash. The fact that Whittaker votes 74% for the government during the Backlash Era whereas Burton votes for the government 71% allows us to infer that Whittaker not only did change significantly but also moved so far as to position himself likely to the right of Burton even after accounting for Burton's increased voting for the government.

60. Frankfurter's change in voting is also the one that produces the greatest statistical confidence in the change when subjected to the chi-squared test, over 99.9% confidence. The other changes have small samples (as does Whittaker's) and smaller changes (as do Harlan, Clark, and Burton's) so that each individual judge's change might be the result of chance. But not of all five changing at the same time. When the chi-squared test is applied to all five justices, then it makes clear that the voting of these justices did change with 99.9% statistical significance.

Table 7.2: Voting Around the Backlash Era.

	Pre-Backlash			*Backlash*			*Post-Backlash*		
	For Gov't	*For Indiv.*	*Rate*	*For Gov't*	*For Indiv.*	*Rate*	*For Gov't*	*For Indiv.*	*Rate*
Black	1	45	2%	0	44	0%	0	10	0%
Frankfurter	8	38	17%	26	15	63%	Not on Court		
Douglas	2	40	5%	0	44	0%	0	11	0%
Burton	25	20	55%	10	4	71%	Not on Court		
Clark	18	9	67%	39	5	89%	8	2	80%
Warren	2	20	9%	0	41	0%	0	11	0%
Harlan	6	13	32	30	14	68%	9	2	82%
Brennan	0	9	0%	0	44	0%	0	11	0%
Whittaker	0	2	0%	31	11	74%	Not on Court		
Stewart	Not on Court			17	11	61%	5	5	50%

Second, compare the rate of voting for the government during the Backlash Era to the post-Backlash Era. Clark and Stewart slightly reduce their rate of voting for the government, Clark from 89% to 80% and Stewart from 61% to 50%. Harlan, however, increases the rate of voting for the government from 68% to 82%. Not on table 2 is the first JFK appointee, White, whose rate of voting for the government is 70% over ten cases. White replaced Whittaker, meaning that the voting rate for that seat hardly changed from Whittaker's 74% to White's 70%. Nor is on the Table JFK's second appointee, Goldberg, who never votes for the government in the six votes that he casts. Goldberg replaced Frankfurter, whose rate of voting for the government during the Backlash Era was 63%. The conservative voting of the seats of Clark, Harlan, Stewart, and White continues unchanged as does the liberal voting of Black, Douglas, Warren, and Brennan. The outcomes of the cases changed because Goldberg replaced Frankfurter rather than because any justices changed voting patterns (unlike the reaction to the backlash). For the four conservative members of the Court the end of the Backlash Era does not come with any reduction of the subordinating the Bill of Rights to the fear of Communism, as their dissents emphasize.[61]

Related is the rate of output of un-Americanism cases by the Court during the Backlash Era. The output of 8.5 cases per term is the greatest seen. Granted, this rate of output is only marginally higher than that of the immediately preceding era, when the Court issued slightly under seven un-Americanism decisions per term. If the Court wanted to resist the legislative backlash, the Court could have easily slowed down the processing of cases. Neither the rate of output nor the actual handling of the cases suggests an effort to delay. Rather, the backlash

61. *See, e.g.,* Harlan and White's separate dissents in *Gibson* stressing the fear of communist infiltration of the NAACP, notes 305–309, Appendix 7.A, pp. 268–268; White's dissent in *Yellin* discussing in detail methods of infiltration of unions by educated youth, note 315, p. 269; Clark's support for the revocation the communists' passports in *Aptheker*, note 318, p. 269; Clark's frustration at the undermining of the nation's self-preservation capacity in *Keyishian*, note 333, p. 270.

persuaded the non-liberal justices to vote differently, akin to it being binding legislation.

In evaluating the Court's reaction to the backlash of the summer of 1957, turn next to the Senate elections of 1958. The Democratic Party gained the largest swing in the history of the Senate.[62] Senator Jenner, the author and namesake of the most significant bill in the legislative backlash, retired and was replaced by moderate Democrat Vance Hartke.[63] This leftward shift of the Senate explains why the postponed legislation faded.[64] However, it also reduced the threat under which the Court operated in un-Americanism prosecutions. If the Court's move to favor the government in reaction to the backlash was under duress, then the new composition of the Senate should mean that the threat had abated, and the Court could have returned to its practice during the Premature Idealism period of not subordinating the Bill of Rights to the fear of Communism.

That the Court's output increases, that the Court does not return to idealism after the 1958 Senate elections, along with the fact that four seats continue to subordinate the Bill of Rights to the fear of Communism after the end of the Backlash Era, suggests that the change due to the backlash was not one under the duress of legislative reprisals. The change was permanent, and the Court did not resist it.

The Court's reaction fits much better a theory that the Court's majority interpreted the backlash as an expression of the national will. When the justices were weighing the fear of Communism against the Bill of Rights before the summer of 1957, the justices were aware that they were making subjective evaluations. The backlash informed the Court that an overwhelming majority of the House and a majority of the Senate saw the Cold War and Communism as a major threat that justified subordinating the Bill of Rights to the fear of Communism.[65] The message was that Communism was not just one more ideology in the contest of ideas subject to the First Amendment but an instrument of the Cold War adversary. Having received this expression of the national will, the majority of the justices proceeded to revise their positions as a matter of law, permanently. The majority that was so shaped by this expression of the national will proceeded to take the government's side with greater frequency, without that stopping when the threat of legislative reprisals abated.

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62. The 1958 election is noteworthy to the authors of this volume because it saw the election to Congress of the first American of Greek descent, John Brademas, later Majority Whip and NYU President, for whom Frank would eventually work before going to law school and whom Frank considers his great mentor in life. For the electoral results, *see, e.g.,* Mid-Term Revolution (available at https://www.senate.gov/artandhistory/history/minute/Mid_term-_Revolution.htm, visited 3/2/2020, [perma.cc/JN37-8GVL]); *Democrats Sweep 1958 Elections*, CONGRESSIONAL QUARTERLY ALMANAC ONLINE, available at https://library.cqpress.com/cqalmanac/document.php?id=cqal58-1340275 [perma.cc/EUP8-F83L]); 1958 United States Senate Elections, WIKIPEDIA (available at https://en.wikipedia.org/wiki/1958_United_States_Senate_elections, visited 3/2/2020, [perma.cc/5GE7-8QQU]).

63. *See, e.g.,* Notable Alumni: Rupert Vance Hartke, INDIANA UNIVERSITY (available at https://www.repository.law.indiana.edu/notablealumni/21/, visited on 3/2/2020, [perma.cc/4SCE-XQLZ]); Vance Hartke, WIKIPEDIA (available at https://en.wikipedia.org/wiki/Vance_Hartke, visited on 3/2/2020 [perma.cc/J4L3-MKTC]).

64. *See, e.g.,* LICHTMAN 174 (but Lichtman concludes that Frankfurter failed to recognize that the more liberal senate would have allowed Frankfurter to return to his pre-backlash stance; this is in contrast to the conclusion here that Frankfurter's side of the Court treated the 1957 backlash as a revelation of the national will, which permanently changed their interpretation).

65. For the voting *see* notes 176-177 and accompanying text in Appendix 7.A, p. 252.

IV. CONCLUSION

This conclusion is the one place in the book where Nicholas and Frank part ways. We agree that the Court's stance regarding un-Americanism cases fluctuated with the fear of communism. Congress's largely failed backlash had a measurable effect on five justices (the "Frankfurter majority"), most importantly their most liberal member, Frankfurter. Following the overwhelming victory of the Democrats in the next election, the Frankfurter majority continued to vote in favor of the prosecution.

For Nicholas, the background research for assessing this issue concedes that the justices are slightly deferential to the Executive during wars.[66] The mechanism of that deference is unclear: do the justices accommodate the public desire to wage the war or are the justices swept up in the war spirit, asks one researcher.[67] This chapter is a case study that advances understanding its expression in this one quasi-war. The facts suggest that at least five of the justices interpreted the legislative backlash as either (1) informing them that the polity believed that the Cold War should be treated as a war by the Court or (2) instructing them to defer more to the Executive. As a result of either premise, these justices deferred more to the Executive. However, the evidence does not support either of the paths posited above. The justices neither followed the polls (in which case they would have voted against the prosecution after the next elections) nor were swept up by war spirit (which never seemed to infect them). Rather, the Frankfurter majority responded to Congress, to the expression of the will of the polity through its constitutionally mediated mechanism of the people's representatives.

For Nicholas, from the perspective that the backlash constituted an expression of the national will through the Constitutional channel of both chambers of Congress that expressed the backlash, the position of the four liberal justices, who never voted to affirm a conviction after 1954, while deservedly celebrated for its championing of the Bill of Rights, may also be questioned. While the nation was intent on fighting the Cold War, their idealism undermined that desire on a practical level (however it may have helped in the war of ideas by demonstrating the liberty values of the United States). Their absolutism did not detract from the deepening anti-intellectual sentiment of the political right.[68] It may

66. *See, e.g.,* Lee Epstein, Daniel E. Ho, Gary King, and Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases,* 80 NYULR 1 (2005) ("our analyses demonstrate that when crises threaten the nation's security, the justices are substantially more likely to curtail rights and liberties than when peace prevails"); William G. Howell & Faisal Z. Ahmed, *Voting for the President: The Supreme Court During War*, 30 J.L. ECON. & ORG. 39, 411 (2014) ("We find that Justices are roughly 8 percentage points more likely to side with the president during major wars . . . than during peace. On statutory cases, however, Justices are 15 percentage points more likely to side with the president during peace than war, whereas on constitutional cases, Justices are no more or less likely to do so." We see the opposite happening in this study of the Cold War, which Howell & Ahmed do not consider a major war: The justices favor the Executive in constitutional interpretation).

67. Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WIL. & M.L. REV. 2017, 2067-68 ("The existing quantitative studies could be read to support th[e] view [that justices are deferential to majority views to preserve the Court's legitimacy], but they are equally consistent with another mechanism: that 'the people' includes the Justices. On this account, the Justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinion of other members of the public.").

68. Anti-intellectualism and in particular its anti-elitist branch have a long and intensifying history associated with conservatism in the United States. *See, e.g.*, Matthew Motta, *The Dynamics and Political Implications of Anti-Intellectualism in the United States*, 46 AM. POLITICS RES. 465, 466, 469 (2018)

have even laid the foundation for the disrespect for legal process by today's political right.[69]

Nicholas accepts that judges must oppose the popular whim when the law is against it. However, situations arise where the popular will takes the form of constitutionally endorsed change of the law. In such a case, a judge's resistance is more difficult to evaluate. Resistance against the popular will also appears in other courts. A notable example is what is known as the Rose Bird incident of the California Supreme Court. That court defied the constitutionally endorsed expression of the popular will that favored the death penalty.[70] When the California electorate passed, by voter mandate, a statute imposing the death penalty, the court held it unconstitutional. In reaction, the electorate amended the Constitution by referendum. The court still would not impose the death penalty. In the 1986 unopposed retention elections, the voters removed justices who were not imposing the death penalty.[71] By contrast, Warren, Black, Douglas, and Brennan (the "Warren minority") had life tenure, which protected them against such a removal. This does not mean, however, that their defiance of the constitutionally expressed will of the polity had no lasting consequence on the electorate, which deserves further research.

In Nicholas's eyes, the reputation of Frankfurter as a justice is related. Today's consensus is that his judicial modesty is uninspiring.[72] The championing of liberty by Warren, Black, Douglas, and Brennan is seen as exemplifying good judging. This conclusion has the benefit of hindsight. The United States survived the Cold War and continues to produce a free society and a productive economy. We cannot know how the balance of these three concerns would have unfolded if either Frank-

(at 466: "[R]ecent research (e.g., Gauchat, 2012) suggests that anti-intellectual attitude endorsement has been growing in the mass public for decades, especially on the ideological right." At 469: "ideological conservatives' levels of trust in the scientific community have decreased gradually since the early 1990s"; collecting further citations). Granted, at that time the Warren minority could expect the electorate to follow the path that the European electorate has, which has not produced similar levels of anti-intellectualism. All these assessments are *ex post*.

69. Prominent Republican politicians have found themselves in significant legal troubles. If the Republican base respected legal process, one may expect these politicians' popularity to drop in response to their prosecutions. Instead, their popularity has grown. *See, e.g.,* Dahlia Lithwick, *Alabama Double-Dares SCOTUS Over Voting Maps*, AMICUS PODCAST (Sep 9, 2023) (Mark Elias: "Now violating court orders, breaking criminal laws, makes you more popular, right? So, if you're an Alabama legislator, of course you're defying the court order.") available at https://slate.com/transcripts/YWVmVUk4YoN1SERWOHZhcEd-YZ3ZCcDNkRHlYR1FkSTYrK25zUDgrMmFxVTo= [perma.cc/P7W8-RRJV].

70. Granted, the United States Supreme Court could have found the death penalty unconstitutional while the Bird Court resisted its imposition, validating those justice's opposition to the popular will. Two constitutional forces then, the popular referenda of the people of California and the interpretation of the Constitution by the United States Supreme Court, would meet at the razor's edge, making this analysis an *ex post* one. The only constitutionally sanctioned expression of the polity that materialized was that of the voters of California. Therefore, the evaluation of the Bird incident has this *ex post* nature. Nevertheless, despite this assessment being *ex post*, the resistance to the imposition of the death penalty turned out to contradict the constitutionally expressed will of the polity through California's referenda.

71. *See*, Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court around the 1986 Elections*, 13 CORNELL J. L. PUB. POLICY 405, *passim* (2004).

72. *See, e.g.,* James F. Simon, EISENHOWER VS. WARREN 177 (on the expectation that Frankfurter would lead the liberal wing of the Court whereas he practiced restraint); H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 5 (1981) ("When [Frankfurter] was appointed to the Court, many expected his long-time commitment to civil liberties to translate into judicial philosophy; instead, Frankfurter demonstrated an austere commitment to judicial self-restraint."); NOAH FELDMAN, SCORPIONS 186 (2010) (""[T]he repudiation [of Frankfurter's pro-flag-salute decision in *Minersville School District v. Gobitis*] would mark decisively Frankfurter's fall from grace as a liberal leader on the Court. . . . Black and Douglas learned the lesson that following Frankfurter was no guarantee of liberal approbation. His constitutional subtlety had badly failed to anticipate actual reaction on the ground—and that did not make for a winning political strategy.").

furter had decided to look good for posterity and ignored the legislative backlash (joining the other four liberals), or if he had turned even more strongly in favor of prosecutions in un-Americanism matters, perhaps overruling the hampering of prosecutions by *Yates* (perhaps weakening the political right's anti-intellectualism and disrespect for legal process). Whether we like it or not, the location of today's American society is a result of Frankfurter's course.

For Nicholas, a further issue regards the path-specific nature of the US-style socioeconomic freedom. It comes from a past of anti-Communist labor legislation, institutionalized loyalty oaths, and blacklisting. These origins are influential in the power of labor and the texture of much socioeconomic activity, especially learning and entertainment. A country which imitates the freedoms of the United States expecting to also produce a similar economic and social environment may get unexpected results. It may be no surprise that some countries that copy the freedoms of the United States find themselves with labor strife, sociopolitical disequilibria, or a more statist political discourse. Was the flourishing of the last forty years won by the legal sacrifices that the Cold War induced?

Frank's disagreement starts with Nicholas's major premise in this conclusion that the Frankfurter majority treated the backlash legislation as an "expression of the national will through the Constitutional channel of both chambers of Congress." Frank has no quarrel with this proposition as a characterization of the effect of legislative action in the American Constitutional order—although considers making it beyond the scope of his contribution to this book.

From this major premise, Nicholas undertakes to "evaluate" what he deems the Warren minority's "defiance of the constitutionally expressed will of the polity" and the Frankfurter majority's support thereof. Nicholas never explicitly concludes that the Warren minority was "wrong" or that the Frankfurter majority was right to vote the way they did but that is his unmistakable implication from his negative characterization of their votes (e.g., "defiance," "undermined" the Cold War effort, "decided to look good for posterity"); from the unfavorable consequences that he attributes to its (and Chief Justice Rose Bird's) votes (e.g., "deepening anti-intellectual sentiment," "laid the foundation for the disrespect for legal process"); and from the favorable consequences that he attributes to the Frankfurter majority's votes (e.g., "produce a free society and a productive economy," "the flourishing of the last forty years").

At bottom, Frank understands Nicholas's position to be that "def[ying] the constitutionally expressed will of the polity" constitutes a violation of the judicial duty to follow the law. Frank believes Nicholas's position to be incorrect. As a matter of first principles, legislative enactments are sometimes illegal and when they are, it is the province and duty of the judiciary to say what the law is. Emphatically its duty.[73] Beyond that, Frank also

73. Frank believes that observers of the Rucker composition would characterize him to have been the most deferential member of that court to the enactments of the popularly-elected members of the General Assembly. *See, e.g.*, Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty., 849 N.E.2d 1131, 1139 (Ind. 2006) (Sullivan, J., dissenting); Mun. City of S. Bend v. Kimsey, 781 N.E.2d 683, 697 (Ind. 2003) (Sullivan, J., dissenting); State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1044 (Ind. 1998) (Sullivan, J., concurring and dissenting). The problem of judges reviewing the legality of decisions of the political branches is often referred to as the "counter-majoritarian difficulty" and Frank discusses his approach to

believes that expressing his opinion on whether the justices in the Frankfurter majority and Warren minority were right or wrong to vote the way they did in the un-Americanism to be beyond the scope of his contribution to this book—and something that neither he nor Nicholas have done anywhere else herein.

We disagree about the implications of the case study of this chapter. However, and more importantly for this project, we agree that, like all other chapters, this one reveals much more complexity in 5–4 decisions than popularly recognized. While some quantification was necessary to see the behavior of the United States Supreme Court in this field, the essence that appears is that individual justices' interpretive attitudes are central to the way that supreme courts work.

resolving cases that implicate it in Frank Sullivan, Jr., *What I've Learned about Judging*, 48 VALP. L. REV. 195, 207-211 (2013). (The expression "counter-majoritarian difficulty" was coined in Alexander Bickel, THE LEAST DANGEROUS BRANCH 16, 1962).

8. The Super-Dissenters

This chapter connects three patterns in Supreme Court adjudication to three "super-dissenters": Justices William Douglas, William Brennan, and Thurgood Marshall. Following the retirement of these three justices, the decisions of the Court changed in three distinct ways.

First, the Court's unanimous decisions change in their political slant. In the mid-1970s unanimous decisions become evenly split in their slant. From 1946, they had been decidedly liberal. This chapter shows that the departure of Douglas from the Court contributed to that change. Douglas stood out in his willingness to dissent, especially from conservative decisions, even alone.

Second, unanimous decisions also change in their frequency. From 1946, they constituted less than 35% of the Court's decisions but beginning with the 1990 term they come to hover around 45%.[1] Brennan and Marshall left the Court in 1989 and 1991.[2]

Third, the number of majority coalitions in tightly split (5-4) decisions has a window of increase. From 1946 (and again in the 2000s-2010s) 5-4 decisions came from only three or four primary coalitions. But in the 1970s and 1980s, they came from many different majorities. Brennan and Marshall stood out as members of dissenting groups, including groups of four in the face of majorities of five.

This chapter does not claim that the departures from the Court of these three justices are sufficient to explain the entire magnitude of these three patterns. Rather, against the background of the vast complexity of historical and political change in which the Court as an institution operates, this chapter merely offers evidence that the departure of Douglas and the departures of Brennan and Marshall had quantifiable consequences that plausibly explain a large part of the changes. No alternative explanation, be it contributing or competing, has been offered or is discernible.[3]

1. In all instances, this chapter's analysis focuses on decisions with nine votes. Absences and recusals do produce decisions with fewer votes. However, the full dynamics of the interaction between all members of the Court is only expressed in decisions with nine votes, rather than the exceptional instances of decisions with fewer votes.

2. *See* note 11, infra.

3. One of the phenomena discussed here was also the object of a study by Professors Epstein, Landes, and Judge Posner, who identified the increasing

Before examining in detail the role of the three super-dissenters in producing these three patterns, we make three additional observations about unanimous decisions.

The published decisions of the Court, follow in time grants of review, writs of *certiorari*, which turn on the votes of four justices.[4] If one presumes that the Court will find it necessary only to hear close disputes, then one should expect a relative rarity in unanimous decisions. However, unanimous decisions are quite frequent.

On the other hand, to the extent that the law is a system of logic, evaluating claims as true and false, unanimous decisions should be the norm, not the exception.[5] Political science research also identifies the disciplining of lower courts as a role of supreme courts, which also makes unanimous decisions plausible.[6] The next Chapter also discusses "settling" the law as a driver of unanimous decisions.

Finally, when looking farther into the past than the 1946 start of the main Supreme Court Database ("Database"), it appears that both changes that unanimous decisions undergo are partial returns to a steady state that existed until about 1932.

I. THE THREE PATTERNS

Unanimous decisions stop having a liberal predominance in the 1976 term.[7] In the 1990 term, unanimous decisions jump from a frequency of 33 percent to 44 percent. In the 1970s and 1980s the number of different 5–4 coalitions was much higher than the less fluid, more polarized 5–4 coalitions of both the previous and subsequent eras. The following sections document these patterns.

A. The End of the Liberal Predominance in Unanimous Decisions

Seen from either the perspective of 3-term periods or the longer-term one of 15-term periods, unanimous

frequency of unanimous decisions. They did not offer explanations for it. Epstein and Walker also identify the beginning of the increase in dissenting decisions and point out that it comes too late to be attributed to the increased discretion in selecting cases that came in 1925. The thinking is that the Court's discretion about which cases to hear let the Court to choose to hear the less clear and more ambiguous disputes, with the result of more dissents. Yet, the increase in dissents does not arrive for several years after that point. Corley, Steigerwalt, and Ward study the departure from consensus-driven adjudication with the New Deal and this study complements their findings by identifying elements of a partial return toward consensus. *See* Lee Epstein, William M. Landes, and Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NORTHWESTERN U.L. REV. 699 (2012); LEE J. EPSTEIN AND THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 160 (4th Ed., 2001); PAMELA C. CORLEY, AMY STEIGERWALT, AND ARTEMUS WARD, THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT (2013).

4. Justice Brennan explains this "rule of four" as a desirable anti-majoritarian feature:

> A minority of the Justices has the power to grant a petition for *certiorari* over the objection of five Justices. The reason for this "antimajoritarianism" is evident: in the context of a preliminary 5-to-4 vote to deny, 5 give the 4 an opportunity to change at least one mind.

See Straight v. Wainright, 476 U.S. 1132 at 1134-35 (1986) (Brennan, J., dissenting). *See also* Hamilton v. Texas, 498 U.S. 908 (1990).

5. However, Supreme Court justices may apply normative logic, not descriptive, in which case propositions may not be truth-valued and any hope for certainty disappears. *See*, Nicholas L. Georgakopoulos, PRINCIPLES AND METHODS OF LAW AND ECONOMICS 11-19 (2005).

6. Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RESCH. Q. 385 (2012).

7. Always discussing decisions with nine votes, see note 1.

decisions did lean strongly liberal until the 1975 term and are approximately evenly divided between liberal and conservative thereafter.

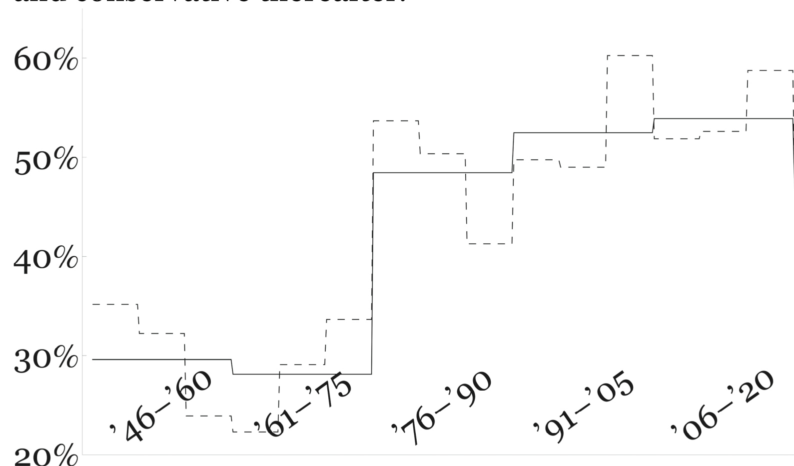

Figure 8.1. The percentage of unanimous decisions that are conservative.

Figure 8.1 graphs the conservative ratio of unanimous decisions in 15-term periods, the solid line, and in 5-term periods, the dashing line. Although the 5-term values fluctuate, until the 1975 term they do hover around 28%, where the steadiness of the 15-term values stays. From the 1976 term, the values fluctuate around 50%, an even split of conservative and liberal unanimous decisions.

A statistical test shows that observing such a change by chance is extraordinarily improbable, much less than one in a trillion.[8] Moreover, it is clear that this is not a gradual change but a sudden one and the only other significant change is Douglas's departure in the 1975 term.[9]

B. The Increase in Frequency of Unanimous Decisions

The other pattern that unanimous decisions present is a change in their frequency.

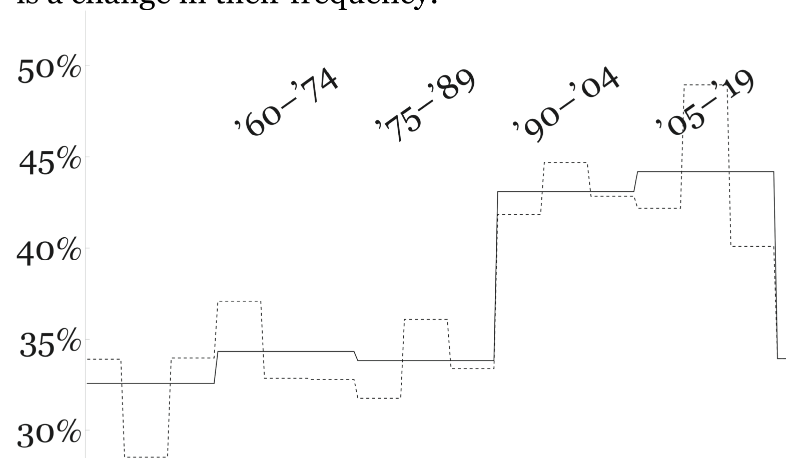

Figure 8.2. The percentage of decisions that are unanimous.

Figure 8.2 follows the patterns of Figure 8.1. Figure 8.2 shows the fraction of decisions with nine votes that are unanimous, aggregating them in the same two durations. The solid line aggregates fifteen terms per period and the dashing line aggregates five terms per period, as did Figure 8.1. The 1990 term is set to

8. The chi-squared test juxtaposes the 276 conservative and 684 liberal unanimous decisions up to the 1975 term compared to the 823 conservative and 786 liberal from the 1976 term to the 2021 term to the null hypothesis of proportionality. The resulting p-value, the probability of observing this change by chance, is a number with twenty-seven zeros after the decimal point.

9. Running two probit regressions on either side of the change, i.e., one with the data from the terms from 1946 to 1975 and one with the data from the terms from 1976 to 2019, does not reveal two trends. Douglas retired on November 12, 1975, *see* United States Supreme Court, Justices 1789 to Present, available at https://www.supremecourt.gov/about/members_text.aspx (Nov. 11, 2020) [perma.cc/Z7H9-7ZTX].

separate fifteen-term periods. Both lines support the conclusion that the change occurred in the 1990 term. Statistical confidence that a change did occur in the 1990 term is again extraordinarily great.[10] Justice Brennan retired from the Court at the end of the 1989 term (on July 20, 1990) and Justice Marshall immediately before the beginning of the 1991 term (on October 2, 1991).[11] Therefore, the 1990 term was the first one without both.

C. The Complexity of Coalitions in 5–4 Decisions

The difference of the complexity in the formation of coalitions of the seventies and eighties from those that came before and after is visible in two approaches, the index of fluidity and the visualizations of coalitions and swing votes.

The index, the subject of Chapter 1 and discussed throughout this book, measures where a court's usage of tightly split coalitions lies on a range. One extreme is where all tightly split decisions come from a single coalition, an unchanging group of five justices against the same four dissenters. The opposite extreme is where every possible coalition forms to issue a proportional number of decisions, i.e., decisions come from all possible coalitions, with each coalition issuing the same number of decisions. The former extreme, which corresponds to an index value of zero, we consider the utter lack of fluidity in the formation of coalitions. The latter extreme, which corresponds to an index value of one or a hundred percent, we consider to correspond to the ultimate display of flexibility and fluidity in the formation of coalitions.

The compositions defined by the appointments of Powell and Rehnquist, of Stevens, and of O'Connor have fluidity index values of 43, 57, and 45 percent. Those defined by Breyer, Alito, and Kagan have fluidity index values of 34, 25, and 29 percent. More generally, a reasonable interpretation of the image that the index gives is that it rises after the departure of Douglas and drops as O'Connor, Scalia, Kennedy, Souter, and Thomas, in that sequence, replace Stewart, Burger, Powell, Brennan, and Marshall (see also Figure 1.1 on page 37). The present analysis does not speak on whether some of the new justices, perhaps O'Connor, Scalia, and Kennedy, brought a different kind of conservatism to the Court, which may have reduced the way in which justices formed coalitions; that is one of the plausible explanations but beside the point here. The point is that the departure of Brennan and Marshall had a quantifiable effect. Coalitions, as measured by the fluidity index, were more varied before their departure.

The visualizations of coalitions and swing votes in the graphs of the corresponding compositions yield similar conclusions. Consider Figures 4.1 to 4.9 (pages 61 to 70). Notice how few swing votes and non-minor coalitions the earliest and latest compositions have. The compositions of Vinson and Stewart, on the early side, and of

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10. The chi-squared test juxtaposes the 1568 unanimous to 3,085 split-vote decisions up to the 1989 term compared to the 1001 unanimous and 1,322 split-vote ones from the 1990 term the 2021 term to the null hypothesis of constant proportional numbers of 1,714 to 2,939, and 855 to 1,468, respectively (rounded). The probability that the change arose by chance starts with thirteen zeros after the decimal point.

11. *See* United States Supreme Court, Justices 1789 to Present, available at https://www.supremecourt.gov/about/members_text.aspx (Nov. 11, 2020) [perma.cc/Z7H9-7ZTX].

Alito and Kagan, on the late side, have three to five coalitions and two to four swing votes. Contrast the graphs corresponding to the compositions of Powell through O'Connor. Each composition has seven to twelve coalitions and eight to twelve swing votes showing a much greater complexity in terms of coalition formation and swing vote relevance.

Although this chapter's thesis does not depend necessarily on observing the number of different majority coalitions formed during Breyer's composition, its relatively large number is a function of its unusual duration. Breyer's coalition lasted eleven terms. Its coalitions at two o'clock, four, eight, and eleven o'clock, would have remained minor if the Breyer composition only lasted about three terms, like the others.[12] Coalitions which otherwise would have remained minor, issue more decisions due to the composition's longevity. Therefore, they appear in the graph while they would not appear if the composition had lasted two or three terms, like the other long-lived compositions. The consequence of a coalition's appearance is that its swing votes also appear. If Breyer's composition had the shorter duration of the others, it would only have three non-minor coalitions, those at three, nine, and ten o'clock, and two swing votes, presenting an image similar to that of the Stewart composition.

The point is that some force produced additional complexity in the 1970s and 1980s. A contributing cause to this complexity was the unusual ability of Brennan and Marshall, as a team, to forge minority coalitions, often coalitions of four in the face of a conservative majority of justices.

II. Extraordinary Dissenters

Three justices' attitudes about dissenting are related to the above patterns: those of Douglas, Brennan, and Marshall. All three were emphatically liberal and did not have a restrained view of their role as members of the Supreme Court. Douglas departed the Court on November 1975, during the 1975 term.[13] Brennan departed before the 1990 term, in July of 1990.[14] Marshall departed in early October 1991, before the 1991 term.[15] They were the leftmost justices on the Court, by quite a difference according to the ideological rankings.[16] At-

12. Indeed, four coalitions and three swing votes are only due to the duration of this composition. The coalition at two o'clock has decisions issued in 1995, 1996, 1998, and 2005, meaning that it would not appear in any three-term window. Same for the coalition at four o'clock, the decisions of which issue in 1997, 2001, and 2005. Same for the coalition at eight o'clock, with decisions issued in 1998, 2002, and 2004. Same for the coalition at eleven o'clock (the *Apprendi* coalition), whose decisions issue in 1999, 2000, 2003, and 2004. Therefore, Breyer's composition, adjusted for its longevity, should be considered analogous to having three coalitions and three swing votes. The decisions per coalition are listed in poster corresponding to the Breyer composition in the back of this book.

13. *See* note 9, *supra*.

14. *See* note 11, *supra*.

15. *See* note 11, *supra*.

16. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10(2) POL. ANAL. 134 (doi:10.1093/pan/10.2.134; 2002); Michael A. Bailey, *Measuring Court Preferences, 1950–2011: Agendas, Polarity and Heterogeneity* (working paper, August 2012); Nicholas L. Georgakopoulos & Mark E. Fisher, *Exploring the Monte Carlo Analysis of Supreme Court Voting* (2022) available at https://ssrn.com/abstract=4286744. *See also Ideological Leanings of U.S. Supreme Court Justices* (Wikipedia entry, visited Sept. 28, 2017, archived at https://perma.cc/7LCZ-K6HM).

tempts to quantify judicial activism also place them as the most activist.[17]

William O. Douglas came close to being F.D. Roosevelt's Vice President instead of Truman and close to running for the Democratic national presidential election two more times. Douglas was the object of several impeachment attempts. He was not seen as a collegial figure on the Supreme Court.[18]

William J. Brennan, Jr., was a Democrat appointed by Republican President Eisenhower as a bipartisan move near the expiration of Eisenhower's first term. After Republican President Nixon's appointments made the Court more conservative, Brennan would be the only strongly liberal member of the Court along with Marshall. Brennan is seen as an enormously influential justice.[19] To some extent, that influence overlaps with the patterns identified here, the unusual ability of Brennan and Marshall to forge coalitions.

Thurgood Marshall was the leader of the legal fight to end racial discrimination and a legendary figure in the integration of American society. His judicial attitude, however, was not one of strict adherence to formalities. His quote "You do what you think is right and let the law catch up" captures the spirit of all three of these justices' view of their role.[20] This is the opposite judicial stance to the classic phrase from the confirmation hearings of Chief Justice Roberts that the justices "just call balls and strikes."[21] The rankings of justices by how frequently they dissent in different groupings are about to reveal different patterns about the dissenting of Douglas, Brennan, and Marshall.

A. Lone Buccaneering: Douglas

The almost disdainful demeanor ascribed of Douglas toward the Court is confirmed by his topping the list of solo dissenters by a large margin. Table 8.1 lists the solo dissents in decisions with nine votes, sorted by the number of dissents per term each justice produced. The first column holds the number of solo dissents by this justice in the Database in decisions that have nine votes. The next two columns hold the terms of this justice in the database (several justices, including Douglas but neither Brennan nor Marshall, were on the Court before the 1946 term when the Database begins), and the resulting number of terms on the Database. Dividing the number of dissents by the justice's number of terms gives the final column, the number of dissents per term. The mean value of dissents per term is 0.94 with a standard deviation of 1.22. The median is 0.5. One standard deviation above the mean is 2.15 and two standard deviations above the mean is 3.4. Douglas, Harlan, and Stevens are the justices whose dissents per term exceed the mean by more than two standard deviations.

17. Frank B. Cross Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1781, Table 3 (2007) (creating metric of judicial activism and placing Douglas, Brennan, and Marshall at the top of the resulting rankings in different order depending on specification).

18. Richard A. Posner, *The Anti-Hero*, THE NEW REPUBLIC, Feb. 24, 2003, at 27.

19. Patricia Brennan, *Seven Justices, on Camera*, Washington Post, Oct. 6, 1996, p. Y06, available at https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/brennan/brennan1.htm [perma.cc/ K34G-W7P8] (quoting Justice Scalia).

20. Deborah L. Rhode, *Letting the Law Catch Up*, 44 STANFORD L. REV. 1259 (1992).

21. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of then-nominee Chief Justice John Roberts).

Douglas leads the list with over five solo dissents per term. By contrast, Marshall and Brennan do not stand out. Both are within one standard deviation from the mean. Brennan dissents alone with a well below average frequency. Marshall is fourth on this list with less than two solo dissents per term. Marshall is indistinguishable from Rehnquist and Black (at this level of precision to one decimal place). This set of peers can be called forceful but, unlike Douglas, they are all integral components of their Courts. If one could place the justices on the range from team players to lone buccaneers, they would be quite different from Douglas, who would be near the lone buccaneering extreme.

Table 8.1. Solo Dissents Per Term.

Justice	*Solo Dissents*	*Terms In DB*	*N. of Terms*	*Dissents per Term*
Douglas	*153*	*1946-75*	*30*	*5.10*
Harlan	83	1954-70	17	4.88
Stevens	138	1975-09	35	3.94
Marshall	*46*	*1967-90*	*24*	*1.92*
Powell	64	1971-04	34	1.88
Black	47	1946-70	25	1.88
Jackson	12	1946-53	8	1.50
Frankfurter	23	1946-61	16	1.44
Sotomayor	16	2009-21	13	1.23
Thomas	32	1991-21	31	1.03
Whittaker	6	1956-61	6	1.00
Rutledge	3	1946-48	3	1.00
Stewart	22	1958-80	23	0.96
Blackmun	23	1969-93	25	0.92
White	25	1961-92	32	0.78
Gorsuch	4	2016-21	6	0.67
Murphy	2	1946-48	3	0.67
Alito	10	2005-21	17	0.59
Reed	6	1946-56	11	0.55
Fortas	2	1965-68	4	0.50
Clark	8	1949-66	18	0.44
Scalia	13	1986-15	30	0.43
Rehnquist	6	1971-86	16	0.38
Breyer	10	1994-21	28	0.36
Ginsburg	9	1993-19	27	0.33
Brennan	*11*	*1956-89*	*34*	*0.32*
Burton	4	1946-58	13	0.31
Burger	5	1969-85	17	0.29
Minton	2	1949-56	8	0.25
Souter	4	1990-08	19	0.21
O'Connor	4	1981-05	25	0.16
Kennedy	4	1987-17	31	0.13
Warren	1	1953-68	16	0.06
Roberts	1	2005-21	17	0.06
Barrett	0	2020-21	2	0.00
Kavanaugh	0	2018-21	4	0.00
Kagan	0	2009-21	13	0.00
Goldberg	0	1962-64	3	0.00

To appreciate how far from the norm Douglas's solo dissenting lies, observe the histogram of solo dissenting, Figure 8.3. The height of each column reflects the number of justices producing the number of solo dissents per term in the interval corresponding to the horizontal axis.

The vast majority of the justices, 30 out of the 38 justices that served from the 1946 term to the 2021 one, produce one or fewer dissents per term (this group

includes Brennan with 0.3). Note that this includes five justices who never dissent alone, a group that includes Chief Justice Vinson and, but for a single solo dissent, would have also included Chief Justice Roberts. Never dissenting alone is a strategy that must not be overlooked. Nine justices produce a number of dissents per term that is between one and two (this group includes Marshall with 1.9). No justice produces between two and three dissents per term. Only three justices produce more than three dissents per term: Stevens occupies the space from three to four, with 3.9 solo dissents per term. Harlan occupies the space from four to five but is still short of Douglas. Douglas produces over five solo dissents per term.

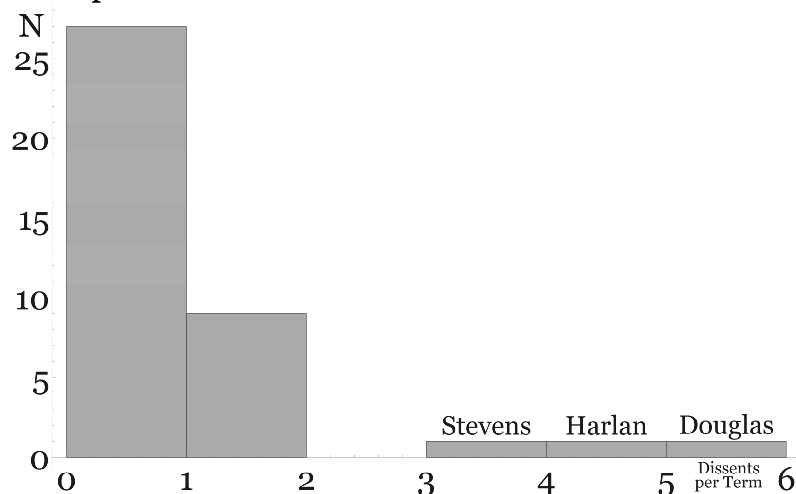

Figure 8.3. Histogram of solo dissents per term, i.e., how many (N) justices issue this many solo dissents per term.

Despite his being such an extraordinary solo dissenter, Douglas's solo dissents cannot quite flip the mix of unanimous decisions and their statistics.[22] Consider (with appropriate caveats) a counterfactual of what the counts might have been if Douglas behaved like the median justice. If Douglas dissented with the median frequency over his thirty terms on the Database, then he would have about fifteen solo dissents rather than 153. Douglas had about 138 more solo dissents than if he had dissented solo with the median frequency. Even if all 138 of the missing unanimous decisions were conservative, those are not quite enough for the 276 conservative unanimous nine-vote decisions to reach the number that would make them equal to the 684 liberal unanimous decisions of the period. Moreover, a negative adjustment is necessary. Douglas also took solo dissents from decisions that the Database codes as liberal. Indeed, in forty-two of Douglas's solo dissents, the Database codes the majority as liberal and the Database does not give a slant to three more. Thus, Douglas's departure in the 1975 term taken in isolation, is not enough to flip the conclusion that unanimous decisions up to the 1975 term had a liberal bias. However, Douglas's departure went a long way in that direction and future research should identify with greater precision additional forces that produced that change.

Whereas the solo dissents of Douglas seem meaningful, the solo dissents of Brennan and Marshall seem unlikely to have a significant impact. This changes when attention turns to dissents by teams of two or more justices.

22. See note 8 and accompanying text.

B. Dissent Playmaking: Brennan and Marshall

Brennan and Marshall appear to be a team with unusual capacities not only acting in tandem, but mostly, in combining with other justices. Table 8.2 lists the most frequently forming teams of two dissenters.

The number of teams of two dissenters that actually form is 155. Given the instances of teams of two justices whose tenures overlap on the Court, the possible teams of two that could have issued dissents are 270. In other words, an additional 115 teams of two dissenters could have formed (because those two justices served concurrently) but did not. Yet, because the listing of solo dissents showed that issuing no dissents is a strategy that should not be ignored, the silent teams must not be ignored here either.

The statistics, therefore, take two forms, one on the notional number of dissents, including the teams that did not form as zeros; and one on the observed statistics, which ignore the teams that did not form.

The notional mean number of dissents per term is 0.27 and the median 0.08 while the observed ones are 0.49 and 0.29; population notional standard deviation is 0.55 and the observed one is 0.65; one standard deviation above the mean in the notional counting corresponds to 0.81 dissents per term; two to 1.35 (counting the observed, 1.13 and 1.78). The table holds the 23 teams that dissent with a frequency of more than one standard deviation above the mean according to the notional statistics. The first twelve are over two standard deviations above the mean. The leading team is Brennan and Marshall, producing five dissents per term, 114 dissents for the 23 terms during which they served together. The next most active duo is more than two standard deviations behind. No other coalition of Brennan and another justice appears but one of Marshall does, with Stevens, producing a little more than one dissent per term (in italics).

Table 8.2. Top Dissenting Duos.

Two-Justice Team	*Dissents*	*Terms*	*N. of Terms*	*Dissents per Term*
Brennan & Marshall	*114*	*1967-89*	*23*	*4.96*
Black & Douglas	89	1946-70	25	3.56
Harlan & Stewart	36	1958-70	13	2.77
Scalia & Thomas	57	1991-15	25	2.28
Clark & Harlan	28	1954-66	13	2.15
Stevens & Sotomayor	2	2009	1	2.00
Frankfurter & Jackson	15	1946-53	8	1.88
Burger & Powell	25	1971-85	15	1.67
Stevens & Breyer	25	1994-09	16	1.56
Blackmun & Stevens	29	1975-93	19	1.53
Harlan & Burger	3	1969-70	2	1.50
Stevens & Ginsburg	25	1993-09	17	1.47
Thomas & Alito	22	2005-21	17	1.29
Douglas & Fortas	5	1965-68	4	1.25
Frankfurter & Harlan	10	1954-61	8	1.25
Stewart & Powell	12	1971-80	10	1.20
Marshall & Stevens	*17*	*1975-90*	*16*	*1.06*
Murphy & Rutledge	3	1946-48	3	1.00
Black & Goldberg	3	1962-64	3	1.00
Blackmun & Souter	4	1990-93	4	1.00
Ginsburg & Sotomayor	10	2009-19	11	0.91

Thomas & Gorsuch	5	2016-21	6	0.83
White & Powell	18	1971-92	22	0.82

Again, the extreme lead of Brennan and Marshall as a dissenting duo over all others is visible in a histogram. Figure 8.4 is the distribution of notional dissents by teams of two justices. Two hundred thirty teams of two produce fewer than half a dissent per term (119 of those produce none). Only three teams of two justices issue more than two and a half dissents per term. Harlan and Stewart appear alone in the interval corresponding to 2.5 to three dissents per term. After a gap, Black and Douglas appear at the 3.5 to four interval. One more gap is necessary to reach Brennan and Marshall at the interval just short of five dissents per term.

The next question is how frequently Brennan and Marshall joined one or two other justices in dissent.

Table 8.3 lists the most frequently forming teams of three dissenters. The number of teams of three dissenters that actually form is 306. Given the instances of teams of three justices whose tenures overlap on the Court, the possible teams of three that could have issued dissents by three justices are 855. In other words, an additional 549 teams of three dissenters could have formed (because those three justices served concurrently) but did not.

The statistics, again, take two forms, one based on the notional number of dissents, including the teams that did not form as issuing zero dissents, and the observed statistics, which ignore the teams that did not form. The notional mean number of dissents per term is 0.16 and the median 0; the observed mean is 0.48 and median 0.25. Population notional standard deviation is 0.50 (observed 0.77); one standard deviation above the mean corresponds to 0.66 (observed 1.26) dissents per term; two to 1.17 (observed 2.03).

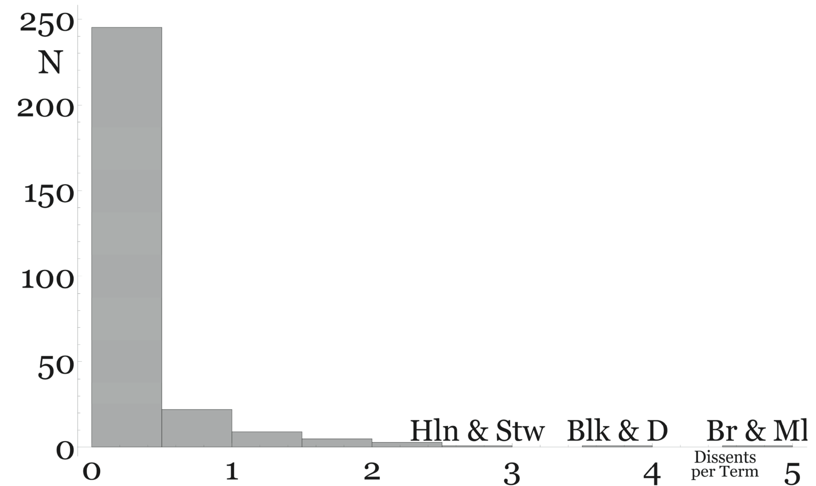

Figure 8.4. Histogram of dissents by two justices, i.e., how many teams of two justices issue this many dissents per term.

The table holds the twenty-nine teams that dissent with a frequency of more than two standard deviations greater than the mean according to the notional statistics. The top three dissenting teams include Brennan and Marshall. The third members are Douglas, Stevens, and Blackmun, producing 7.6, 7.0, and 3.7 dissents per term. Brennan and Marshall appear again, with White, farther down the table with 1.3 dissents per term (in italics). This value is still over two standard deviations above the mean but only according to the notional statistics.

Table 8.3. Top Dissenting Trios.

Three-Justice Team	*Dssts*	*Terms*	*N. of Terms*	*D. p. Term*
Douglas, Brennan, & Marshall	*68*	*1967-75*	*9*	*7.56*
Brennan, Marshall, & Stevens	*105*	*1975-89*	*15*	*7.00*
Brennan, Marshall, & Blackmun	*78*	*1969-89*	*21*	*3.71*
Frankfurter, Harlan, & Whittaker	21	1956-61	6	3.50
Harlan, Stewart, & Goldberg	8	1962-64	3	2.67
Powell, Scalia, & Thomas	34	1991-04	14	2.43
Black, Douglas, & Warren	36	1953-68	16	2.25
Thomas, Alito, & Gorsuch	13	2016-21	6	2.17
Blackmun, Stevens, & Ginsburg	2	1993	1	2.00
Black, Murphy, & Rutledge	6	1946-48	3	2.00
Black, Douglas, & Fortas	8	1965-68	4	2.00
Frankfurter, Burton, & Harlan	10	1954-58	5	2.00
Clark, Harlan, & Stewart	18	1958-66	9	2.00
Breyer, Sotomayor, & Kagan	24	2009-21	13	1.85
Black, Harlan, & White	18	1961-70	10	1.80
Frankfurter, Harlan, & Stewart	7	1958-61	4	1.75
Stevens, Souter, & Ginsburg	27	1993-08	16	1.69
Black, Douglas, & Murphy	5	1946-48	3	1.67
Douglas, Murphy, & Rutledge	5	1946-48	3	1.67
Burton, Clark, & Whittaker	5	1956-58	3	1.67
Black, Douglas, & Goldberg	5	1962-64	3	1.67
Rehnquist, Powell, & O'Connor	10	1981-86	6	1.67
Burger, Powell, & O'Connor	8	1981-85	5	1.60
Black, Burger, & Blackmun	3	1969-70	2	1.50
Brennan, White, & Marshall	*30*	*1967-89*	*23*	*1.30*
Harlan, Stewart, & White	13	1961-70	10	1.30
Blackmun, Stevens, & Souter	5	1990-93	4	1.25
Burger, Blackmun, & Powell	18	1971-85	15	1.20
White, Burger, & Powell	18	1971-85	15	1.20

Again, the unusual frequency of the dissenting trios that include Brennan and Marshall is visible in a histogram, Figure 8.5. Most trios produce fewer than half a dissent per term. All other frequencies are a very small fraction of that. The most frequently dissenting trios that include Brennan and Marshall are distant outliers.

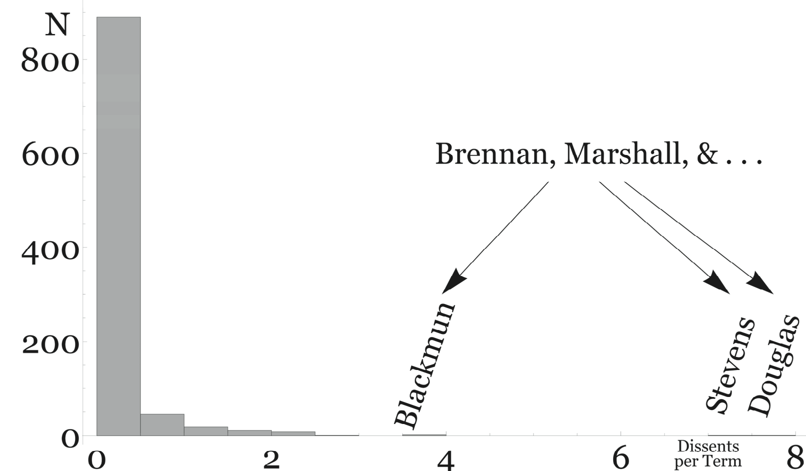

Figure 8.5. The histogram of dissents by three justices, i.e., how many teams of three justices issue this many dissents per term.

Turning the attention to teams of four brings an additional consideration. If justices' voting behavior truly depended upon their alignment from political left to political right, then the composition of dissenting teams of four would depend on the Court's composition. They would only change upon the appointment of a new justice. The ability of Brennan and Marshall would be constrained to a single coalition in each composition. Instead, Brennan and Marshall join in many different minorities of four, despite the composition.

Brennan and Marshall would tend to be members of the liberal sides of tight splits, in majorities of five when they would garner a fifth vote, else in minorities of four dissenters. Moreover, a dissent of four has a less discretionary nature because the mere addition of a fifth justice would make it a majority. The notion that a dissent of four is one vote away from being a majority opinion gives it significant additional weight and importance. By comparison, a solo dissent can be seen as having much less weight and importance because it is so far from becoming a majority decision. A solo dissenter can usually stay silent with little loss. It is probably no accident that chief justices appear near the bottom of the list of solo dissenters (Table 8.1).

Table 8.4. Top Dissenting Teams of Four Lasting over 3 Terms.

Four-Justice Team	*Dssts*	*Terms*	*N. of Terms*	*D. p. Term*
Stevens, Souter, Ginsburg, & Breyer	124	1994-08	15	8.27
Brennan, Marshall, Blackmun, & Stevens	*118*	*1975-89*	*15*	*7.87*
Ginsburg, Breyer, Sotomayor, & Kagan	61	2009-19	11	5.55
Black, Douglas, Warren, & Brennan	58	1956-68	13	4.46
Douglas, Brennan, Stewart, & Marshall	*39*	*1967-75*	*9*	*4.33*
Clark, Harlan, Stewart, & White	25	1961-66	6	4.17
Burger, Rehnquist, Powell, & O'Connor	20	1981-85	5	4.00
Scalia, Thomas, Roberts, & Alito	43	2005-15	11	3.91
Brennan, Stewart, Marshall, & Stevens	*20*	*1975-80*	*6*	*3.33*
White, Burger, Powell, & O'Connor	16	1981-85	5	3.20
Frankfurter, Harlan, Whittaker, & Stewart	12	1958-61	4	3.00
Douglas, Warren, Brennan, & Fortas	11	1965-68	4	2.75
Powell, Scalia, Kennedy, & Thomas	33	1991-04	14	2.36
Douglas, Brennan, White, & Marshall	*19*	*1967-75*	*9*	*2.11*
Frankfurter, Clark, Harlan, & Whittaker	11	1956-61	6	1.83
Stewart, Burger, Rehnquist, & Powell	18	1971-80	10	1.80
Black, Douglas, Brennan, & Marshall	*7*	*1967-70*	*4*	*1.75*
White, Powell, O'Connor, & Scalia	11	1986-92	7	1.57
Powell, O'Connor, Scalia, & Thomas	22	1991-04	14	1.57
Thomas, Roberts, Alito, & Kavanaugh	6	2018-21	4	1.50
Brennan, White, Marshall, & Stevens	*21*	*1975-89*	*15*	*1.40*

However, if a team of four stays silent, that jeopardizes the possibility that its position will become a majority either by persuading a fifth justice or upon a subsequent appointment of a justice who may join them. Subject to such caveats that 5–4 splits likely involve different dynamics than other splits, Brennan and Marshall again are members of some of the most frequently dissenting coalitions of four justices.

Table 8.4 lists the most frequently forming teams of four dissenters. The number of teams of four dissenters

that actually form is 335. Given the instances of teams of four justices whose service overlap on the Court, the possible teams of four that could have issued dissents are 1,631. In other words, an additional 1,296 teams of four dissenters could have formed (because those four justices served concurrently) but did not.

The statistics, again, take two forms, one on the notional number of dissents, including the teams that did not form as producing zero dissents, and the observed statistics, which ignore the teams that did not form.

The notional mean number of dissents per term is 0.11 (observed is 0.61) and the median 0 (observed is 0.25); its population standard deviation is 0.58 (observed is 1.22); one standard deviation above the mean corresponds to 0.70 (observed is 1.83) dissents per term; two to 1.28 (observed is 3.05). The table holds the teams that dissent with a frequency of more than two standard deviations greater than the mean according to the notional statistics and lasted more than three terms. Brennan and Marshall appear in six (in italics) of the twenty-one teams. Their teams produce from 1.4 to 7.9 dissents per term. Brennan also appears without Marshall in two teams of four that formed before Marshall's appointment. If the table were to be extended to include teams dissenting more than one standard deviation above the mean, Brennan and Marshall would appear in four more teams together.

C. Dissent-Aversion or Policy Overlap?

Interpreting the frequencies of dissents of more than one justice has the uncertainty of not knowing how the other dissenters would have behaved without the one being studied. For example, from the pattern of Brennan's dissents, one may infer an aversion for dissenting alone, which was amply overcome when dissenting with others, which very often included Marshall. Marshall, however, may have had less of an aversion for solo dissents. Therefore, one might conclude that the departure of Brennan would have less of an effect for unanimous decisions than the departure of Marshall. Brennan without Marshall would not break unanimity as much as Marshall would without Brennan. *Vice versa*, if the two justices share values on several aspects of legal analysis, then they would rarely dissent separately regardless of their attitudes about dissenting alone. Expand this analysis to include additional justices and the reasoning becomes exponentially more complex.

Restricting this inquiry only to the context of Brennan and Marshall allows some further investigating, which unfortunately proves fruitless due to the small number of relevant decisions.

First, from the frequency of Marshall's solo dissents, one might infer that Marshall did not have a strong aversion to dissenting alone. Moreover, Marshall's aversion appears less intense than Brennan's, since Brennan did not dissent alone nearly as frequently (0.32 dissents per term for Brennan compared to 1.92 for Marshall, *see* table 8.1). To test this hypothesis, we searched for opportunities for the two to dissent alone without the other. One arises from recusals and the other arises from Marshall's remaining on the Court for one more term after Brennan's departure. Before the appointment of Marshall, Brennan never dissented alone.

The Database allows the comparison of solo dissents while Marshall was recused but Brennan participated and those while Brennan was recused but Marshall

participated. However, the number of decisions is too small to draw conclusions let alone with any confidence. Of the thirty solo dissents that arise while Marshall was recused and Brennan participated (twenty-one are 7–1 and nine are 6–1), four have Brennan as the solo dissenter.[23] Four solo dissents arise while Brennan is recused and Marshall participates but none have Marshall as a solo dissenter (curiously, all have Rehnquist as the solo dissenter, all in 7–1 votes). This might suggest that an overlap of the policy preferences of Brennan and Marshall may have some additional weight compared to Brennan's particular aversion to solo dissents as explanations for the frequency of their joint dissents accompanied by Brennan's rare solo dissenting.

After Brennan departed the Court in the summer of 1990, if Marshall truly did not have much of an aversion to solo dissents, then one may expect to see Marshall dissent alone more than previously. Yet, only one decision with a solo dissent by Marshall arises that term, and that with only eight votes, 7–1.[24] Compare Marshall's rate of 1.9 solo dissents per term for cases with nine votes. Thus, rather than a particular disregard of lone dissents, the scant evidence of these two queries lends some credence to the notion that the joint dissenting of Brennan and Marshall was more a result of policy overlap rather than either's aversion to solo dissenting.

III. CONCLUSION

The two changes in the unanimous decisions, the elimination of their liberal bias and the increase of their frequency, and the change in the complexity of coalitions in 5–4 decisions, seem plausibly related to two changes in the Court's composition: the first to the departure of Douglas and the latter to the departures of Marshall and Brennan. Douglas was a prodigious lone dissenter.[25] Marshall and Brennan were a prodigious team of two. The effects of the three were extraordinary; they were truly super-dissenters.

23. Calif. v. Green, 399 U.S. 149 (1970); Francis v. Henderson, 425 U.S. 536 (1976); O'Bannon v. Town Court Nursing Ctr, 447 U.S. 773 (1980); United States v. Frady, 456 U.S.152 (1982).

24. Jay v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (without the participation of Justice Souter).

25. An additional avenue for further research opens from a curiosity related to Douglas's frequent solo dissenting until the 1975 term. One would expect that the missing unanimous conservative decisions would appear as unusually many eight to one conservative decisions, but that is not the case. The presence of Douglas is associated with a paucity of unanimous conservative decisions but the natural expectation of finding more eight-to-one decisions does not materialize. Which suggests that other paths to conservative eight-to-one decisions produce unusually few such decisions. Perhaps part of the explanation of this paradox is likely that if the lone dissenter would have been Brennan or Marshall, then the Court's decision would not end up as an eight-to-one decision, in part due to their capacity to form coalitions.

9. Vote Distributions

At bottom, everything discussed in this volume is a function of the distribution of votes on the Supreme Court. Despite the importance of individuals visible throughout this volume and especially in the Super-Dissenter chapter, the general distribution of votes informs us.

The vote distribution of the justices of the Supreme Court reveals three phenomena to be discussed in this Chapter: an outlier distribution produced by one composition of the Court, the surprising frequency of unanimous decisions, and the intensity with which the Court avoids 4–4 decisions. In particular, the intensity with which the Court avoids 4–4 splits and the strength of the drive to produce unanimous decisions seem sensitive to national disunity. At times of greater disunity, 1965 to 1975 and since 2001, the Court avoids 4–4 splits more intensely and has a greater fraction of its decisions be unanimous.

The first part of this Chapter superimposes on the actual distribution of votes a similar theoretical distribution with no bias but significant correlation. The second part explores the three phenomena that the distribution reveals: the outlier Goldberg composition, the preference for unanimity, and the aversion toward equal splits.

I. The Distribution of Votes

In Chapter 6, we audited the Database's assignment of political slant to Supreme Court decisions to assure ourselves of confidence in those determinations. Our next step is to see the histogram of votes.

The first phenomenon that the distribution of votes presents is that it does not match a distribution of votes where the justices cast votes perfectly independently—if votes were uncorrelated akin to the way separate coin tosses are, then 8–1 splits should be much less likely and 5–4 splits much more likely, as the dashing line in Figure 9.1 shows. Rather, if one justice votes in a certain direction, then other justices' votes have a slightly greater probability of being cast the same way. This is not unreasonable. The justices' common legal background and their shared social, economic, and political understandings make some correlation reasonable.

From a mathematical perspective, this makes the distribution that describes independent coin tosses, the binomial distribution, inappropriate as an approximation of the distribution of votes. Rather, the appropriate distribution must be one where the outcome of the first uncertain event, one justice's vote in our setting, is related to the probability of subsequent ones.

Mathematicians have devised a distribution that does this: the beta binomial distribution. Compare the definitions of the two distributions as drawing balls of two different colors from an urn. For both distributions, the details of the distribution are defined by the initial number of the two colors of balls.[1] The binomial distribution describes the blind selection of a ball, with the selected ball being placed back in the urn. Thus, the probability does not change after each draw. In the beta binomial distribution, each ball that is drawn gets replaced by two balls of that color. Drawing a second ball of the same color becomes more likely, producing some level of correlation. The correlation is stronger if the urn starts with few balls than if it starts with many. This mathematical abstraction corresponds to the phenomenon that, say in a labor dispute, one justice's vote is based on circumstances and reasoning that are likely to lead other justices to also cast votes in the same direction.

Tentatively accepting the beta binomial distribution as potentially appropriate, the next issue is estimating its parameters, the degree of correlation, which translates into the initial number of balls.

The distribution of votes has a feature that complicates this task, the unusually high frequency of unanimous decisions. If each vote were truly random, then unanimous decisions should likely be the most rare. In fact, they are the most frequent. Three tentative explanations among several may be (1) that some outcomes are dictated by legal reasoning; (2) that some decisions may not deal with issues likely to split the Court, for example, they may correct a clearly unacceptable lower court decision;[2] and (3) that justices may disagree with an outcome but refrain from dissenting, as has been shown to be the case in appellate decisions.[3] As far as the distribution of votes is concerned, unanimous decisions come from additional processes than do decisions with vote splits.

Accordingly, the distribution of votes must be derived from only the decisions in which the vote is split. The task becomes to find the specifications of the correlated distribution that make it come closest to the frequency

1. In the case of the binomial distribution, the number of balls is irrelevant but their proportion is determinative. Its mathematical expression uses the probability of drawing the target color. The beta binomial does depend on the initial number of balls rather than only their proportions. Those two numbers of balls are the parameters that the distribution takes as inputs α and β in its mathematical form, $Bb(\alpha, \beta, N)$, where N is the number of draws. When α and β are large, the correlation is small, since the additional ball does not change the probabilities much, and *vice versa*. When those are not integers then the visualization of the distribution as the selection of balls from an urn fails and the appropriate visualization becomes a spinning disk with two colors along its circumference that have the parameters' lengths. After each spin, the wheel changes circumference by the same principle, extending by one unit the color that was the last spin's outcome.

2. *See* Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RESCH. Q. 385 (2012) and note 16, *infra*, and accompanying text.

3. *See* Richard A. Posner, HOW JUDGES THINK 32-34 (2008); Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781 (2011) (showing that accounting for an aversion to dissenting improves estimation significantly). See also note 17, *infra*, and accompanying text.

of decisions with one up to eight liberal votes, excluding the unanimous ones (which would have zero or nine liberal votes) despite that the distribution also produces values for unanimous outcomes.

A further restriction comes from the fact the distribution of votes is not biased, with minor caveats.[4] In other words, decisions with a specific number of liberal votes are about as frequent as decisions with that many conservative votes. Moreover, no theory exists that any bias should exist. Therefore, the search for parameters is constrained to produce a symmetrical distribution, one in which liberal decisions are as likely as conservative ones.

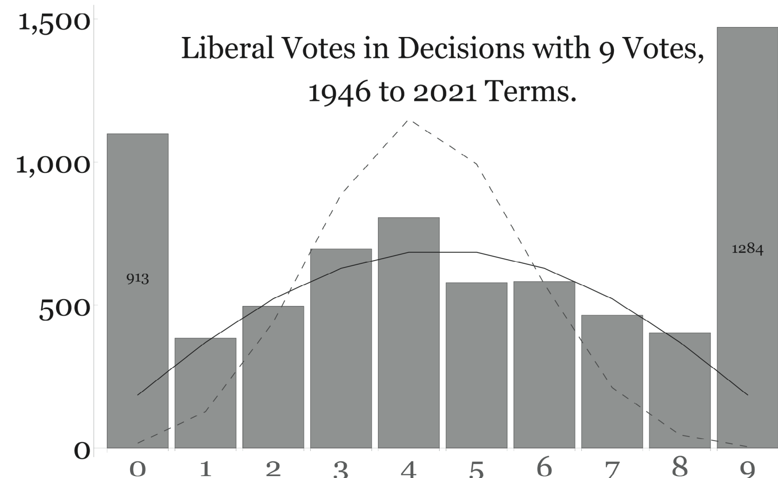

Figure 9.1. The histogram of votes and the best fitting correlated and uncorrelated distributions. The unanimous columns also carry the number of excess unanimous decisions. The horizontal axis measures the number of liberal votes in each decision. The vertical axis measures the number of decisions with this many liberal votes.

We seek coefficients that will yield a distribution which produces probabilities from one up to eight liberal votes out of nine votes. Those probabilities, each as a fraction of the total probability of producing a decision with one to eight liberal votes, are as close as possible to the fraction of non-unanimous decisions that have that many liberal votes.[5]

Figure 9.1 offers the histogram of votes in the database in the order of the number of liberal votes, from zero liberal votes in the case of unanimous conservative decisions, to nine liberal votes in the case of unanimous liberal decisions.

Two distributions are superimposed on the histogram. The dashing line is the best fitting uncorrelated (binomial) distribution, which does not fit the data at all; it is also not constrained to be symmetrical. If votes were not correlated, then the middle distributions—with four dissenters—should be much more frequent and the extremes much rarer. The solid line is the best fitting correlated (beta binomial) distribution. Whereas this explains over 70 percent of the variation in the counts, the uncorrelated distribution explains none. Merely taking the average of the counts of each vote split would

4. The caveats are the conservative paradox (Chapter 6) that 5–4 decisions have, and the discrepancies caused by the extraordinary dissenters, Douglas and the Brennan-Marshall team (Chapter 8).

5. The minimization of the difference between the actual and the derived distribution is by minimizing squared differences. The result is a beta-binomial distribution that produces a correlation of 18 percent and has coefficients of $\alpha = \beta = 2.27$. Because the search here is for a symmetrical distribution, those two coefficients are constrained to be equal. In analogy to the visualizations that correspond to the beta binomial distribution, the coefficients correspond to the number of balls of each color in the urn or the length of each arc in the spinning circle before the first draw or spin.

form a better guess than the one the uncorrelated binomial distribution produces![6]

The primary point of the figure is the strikingly good fit of the beta binomial distribution to the data. Two deviations from symmetry appear, the disproportionately many unanimous decisions that are liberal and the lack of symmetry between decisions with four liberal votes and those with five. Both issues were addressed previously: The discrepancy in the unanimous decisions is partly due to some extraordinary dissenting activity, the Super Dissenters of Chapter 8: the extraordinary willingness of Justice Douglas to dissent alone and the extraordinary ability of Justices Brennan and Marshall to form coalitions of three or four dissenters. The discrepancy between liberal and conservative 5–4 decisions is due to the conservative paradox of chapter 6: the rarity of the median justice being ideologically closer to the next liberal justice.

The distribution of votes reveals several additional phenomena. When applied to the distribution of decisions with eight votes, it shows the intensity with which the Court avoids even splits, i.e., 4–4 decisions. Compared with the frequency of unanimous decisions, it reveals the strength of the aversion to dissenting.[7] Finally, when compared to the distributions of specific compositions, it reveals one composition as an outlier, the one defined by the appointment of Justice Goldberg. The next parts address these issues in reverse order.

II. THE GOLDBERG DISTRIBUTION

The distribution produced by the composition defined by the appointment of Justice Goldberg is very different from the rest.

To study the distribution of the votes of different compositions of the Court, a threshold is necessary to have enough decisions with nine votes for their distribution to be meaningful. Setting that threshold at 300 separates nine compositions as having a sufficient number of decisions for examination. Those are the compositions defined by the appointments of Vinson, Stewart, Goldberg, Powell and Rehnquist (who were

6. This seeks to express the concept of how much of the variation in the outcomes the predictions of the two distributions explain, the metric statistics calls r-squared. The baseline is the average number of decisions with one to eight liberal votes. That uninformed guess is closer to accurate than the guess informed by the uncorrelated binomial distribution. The beta binomial distribution produces much better guesses. Summing the squared differences of the guesses produced by the beta binomial distribution from the actual number of decisions with each number of votes, dividing it with the sum of the squared differences of their average from each vote count, and subtracting that ratio from one produces the r-squared metric of goodness of fit. It is over 75%. This means that the differences of the actual counts from the beta binomial are much smaller than their differences from their average whereas the differences from the binomial are greater than those from their average.

7. Several explanations exist for the aversion to dissenting; the term does not seek to disaggregate or discriminate between them. For example, dissenting may be costly in terms of effort and collegiality, or it may undermine the courts' legitimacy, it surrenders the opportunity to negotiate with the majority a more limited holding, or it may come from group dynamics. Note that group influence short of what would produce unanimity, would produce correlation between votes, which is evident in the data but fluctuating in intensity. *See,* Lee Epstein, William M. Landes, and Richard A. Posner*, Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101-37 (2011) (cost of effort and collegiality); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASHINGTON L. REV. 133-50 (1990) (dissents undermine legitimacy); Fischman, note 3, *supra*, at 787 (lost opportunity to negotiate narrower holding); Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006; Brookings Institution Press) (group dynamics or polarization).

appointed on the same day), Stevens, O'Connor, Kennedy, Breyer, and Kagan.

All compositions except that of Goldberg produce roughly symmetrical distributions of votes. While they do not match perfectly the overall correlated distribution of votes, their differences are plausible expressions of the differences in the justices that the overall distribution averages out. If the correlated distribution were to be fit to each composition, then their resulting correlations between votes would range from six percent for the Kagan composition to 19 percent for the Stevens composition. The Kagan composition is closest to the votes not being correlated.[8]

Figures 9.2 and 9.3 show the distributions by composition, for the nine compositions being examined. The vertical axis is adjusted to be the same in all graphs so that the columns that correspond to the counts of each number of votes are comparable. The composition defined by the appointment of Justice Breyer is excluded from this scaling because it has unusually many decisions due to its extraordinary duration of eleven terms.

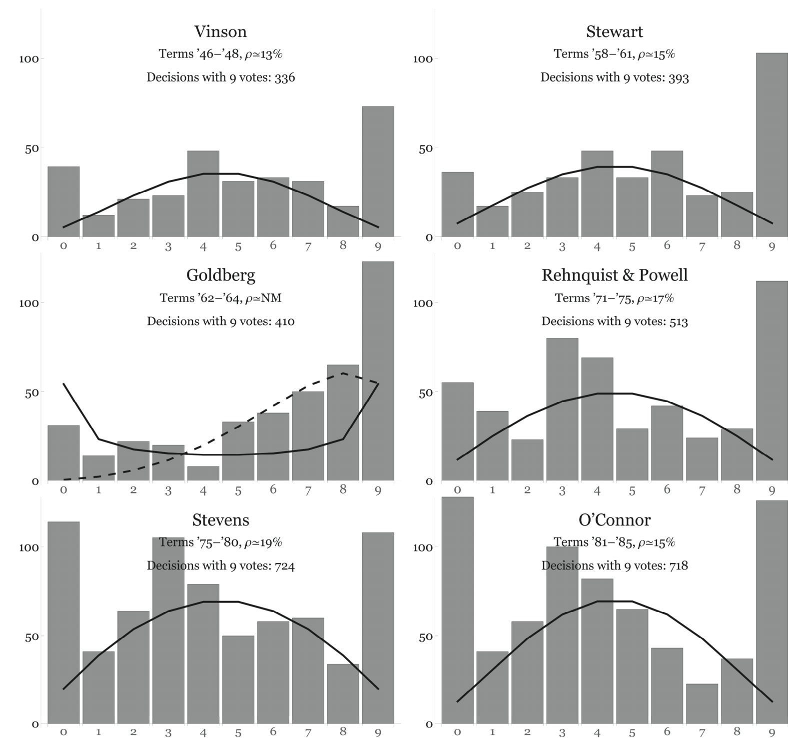

Figure 9.2. Distributions by composition, first panel.

8. The Kagan composition and those that follow it that include both Justice Kagan and Chief Justice Roberts may well appear to have distributions that produce few 8–1 decisions. Both justices are somewhat unusual in very rarely dissenting alone. The result should be somewhat fewer (perhaps about one ninth fewer) than expected decisions with one or eight liberal votes, because one leans liberal, Kagan, and one leans conservative, Roberts. This effect, however, is not nearly as pronounced as if they were, respectively, the Court's most liberal and the most conservative members. As of this writing, Kagan has never dissented alone and Chief Justice Roberts, after managing to avoid dissenting alone for fifteen years, has dissented alone once in Uzuegbunam v. Preczewski, 592 U.S. _, 141 S. Ct. 792 (2021). For the sake of comparison, at the opposite extreme may be Sotomayor, on the liberal side, and Alito, on the conservative, with 14 and 11 solo dissents, respectively.

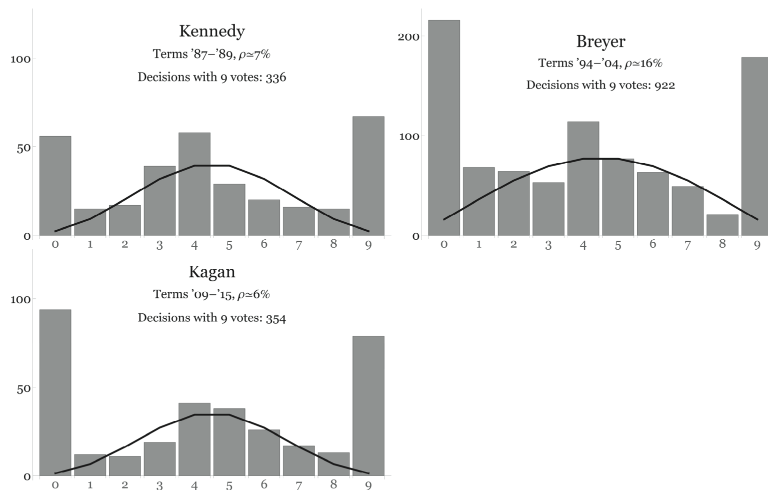

Figure 9.3. Distributions by composition, second panel.

Each figure also shows the best fitting correlated distribution as a black line and the corresponding correlation in each title; for example, the correlated distribution that fits best the distribution of the Vinson composition has a correlation of about 13 percent and the title of that graph is the name of Vinson and has under it the range of its terms, followed by the Greek letter rho, which conventionally stands for correlation, followed by the sign signifying approximate equality, and the corresponding percentage of the correlation that the correlated distribution implies, rounded to drop decimal points. A third line shows the number of decisions with nine votes. Notice how, despite their differences, all graphs are roughly symmetrical and their deviations from the correlated distribution are not particularly large—except Goldberg's.[9]

The distribution of the Goldberg composition is at the second row, left column of the Figure 9.2. It is visibly an outlier because it is far from symmetrical. Also, the best fitting symmetrical correlated distribution, the black line, fails to approximate the distribution well. Estimating a correlated distribution without constraining it to be symmetrical produces the dashing line. It approximates the distribution quite well, but the uniqueness of its lack of symmetry casts doubts on its being an accurate description of that composition's dynamics. Therefore, the graph marks its correlation as not meaningful.[10]

Arthur Goldberg was a Chicago labor lawyer. In his capacity as chief counsel for the association of unions CIO, he assisted the merger with the AFL, which had split away from the CIO some decades earlier.[11] President Kennedy appointed him Secretary of Labor. After Justice Frankfurter retired the summer of 1962, Goldberg became Kennedy's second, after Justice White, appointment to the Supreme Court and joined the Court on October 1, 1962. On the Court, Goldberg joined Black, Douglas, Brennan, and Warren to form a majority of five justices who cast liberal votes with some consistency. The other four justices were Clark, Harlan, Stewart, and White. The Martin & Quinn estimates of the justices'

9. In terms of measuring the variation that the correlated distribution explains in each case, the variation ranges from 78 percent in the Kagan composition to 21 percent in the Rehnquist and Powell one, if we ignore the 12 percent of Goldberg's. The average explanatory power is 46 percent or 50 percent if we ignore Goldberg with a standard deviation, respectively, of 20 or 17 percent.

10. The correlations according to those two estimations are 55 percent according to the symmetrical correlated distribution and 14 percent according to the unconstrained one. Their explanatory power is, respectively, 12 and 74 percent.

11. *See* Carl Soderstrom, Robert Soderstrom, Chris Stevens, & Andrew Burt, 3 FORTY GAVELS: THE LIFE OF REUBEN SODERSTROM AND THE ILLINOIS AFL-CIO 95-96 (2018).

ideology place Douglas at the far left of this composition. Black, Warren, Brennan, and Goldberg are densely packed in the middle of that composition's spectrum, with Goldberg as the median. Harlan is the most conservative but with a difference smaller than that of Douglas. Stewart and Clark are ideologically very close and not so far from Harlan; White is the conservative next to the median.[12] Notable decisions of the Goldberg composition include *Escobedo*[13] and *Gideon v. Wainright*.[14] The Goldberg composition ends with Goldberg's resignation on June 26, 1965, pursuant to President Johnson's plea for Goldberg to become ambassador to the United Nations. Goldberg accepted mostly because of the importance Goldberg placed on trying to end the Vietnam war; Johnson's plea included the argument that Goldberg had a unique negotiating ability to do so.[15] The Supreme Court issued 475 decisions with this composition. Of those, 410 have nine votes.

The cause of the uniquely asymmetrical distribution of the votes of the Goldberg composition is unclear. All the other compositions produce distributions that are roughly symmetrical even though the variation among the individual justices, their legal philosophies, and their socioeconomic outlooks arguably had been and would be both greater and smaller at other times than they were in the Goldberg composition. The search for an explanation would need to explore plausible causes, such as why this composition uniquely granted *certiorari* to disputes that would disproportionately tend to produce liberal outcomes or why the conservative justices were so systematically unable to attract one or more from the Court's liberal wing to form majorities in only that composition. Further confounding is the fact that several of the justices were already on the Court during the Stewart composition and would be on the Court during the Powell composition, both of which, to repeat, show symmetrical distributions. Perhaps Goldberg's negotiating ability, for which he was renowned both as a labor lawyer and as a diplomat, is the key.

III. Unanimous and Split-Vote Decisions

In this section, we explore the tensions between unanimous and split-vote decisions. Unanimous decisions are the most frequent that the Supreme Court issues. Yet, the distribution of the non-unanimous decisions indicates that unanimous decisions should be the rarest. Figure 9.1 reports on the columns that correspond to unanimous decisions the difference between (a) the small expected number of unanimous decisions according to the correlated distribution of the split votes and (b) the actual number of unanimous decisions. The unanimous conservative decisions are about 913 more than the best fitting correlated distribution would produce. The unanimous liberal decisions are about 1,284 more.

12. The numerical values that the Martin & Quinn algorithm assigns to the justices does not correspond to any meaningful scale but the values may indicate the spacing. Douglas receives scores of about -6.5, Black, Black, Warren, Brennan, and Goldberg at in the range from -1.7 to -0.7. White is at about -0.25. Clark and Stewart range from 0 to 0.36; and Harlan is at about 2.5.

13. Escobedo v. Illinois, 378 U.S. 478 (1964) (5–4 decision authored by Goldberg granting criminal suspects a right to counsel under the Sixth Amendment).

14. 372 U.S. 335 (1963) (unanimously recognizing the right to an attorney).

15. *See*, David Stebenne, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 347-48.

Clearly, unanimous decisions are different and very plausibly so. From the perspective of law, applying the law to facts appears deterministic. Conduct either fits a rule or not. From that perspective, all outcomes ought to be unanimous. Granted, the Supreme Court reviews the interpretation of the law where this answer is subject to disagreement, i.e., the Court reviews what shape the rule should take, how it should be interpreted. But again, it is possible that logic supports one interpretation, producing unanimity. Theory and evidence offer additional reasons for unanimous decisions.

First, some scholars have suggested that review by the Supreme Court also serves the function of disciplining or correcting lower courts that have produced outcomes far from where the justices are from an interpretive perspective.[16] Perhaps then, some decisions perform this disciplining function, and would tend to be unanimous.

Second, the evidence from panels of appellate courts indicates that dissents appear much less frequently than the differences between members of the court would indicate, in other words that an aversion to dissenting exists.[17] Then, many unanimous decisions would have had a split vote *but for* the aversion to dissenting. Such an aversion may be explained in part by Justice Brandeis's famous aphorism about *stare decisis*: "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."[18]

As noted in Chapter 1, Sullivan, one of the authors, served on the Indiana Supreme Court for almost 19 years. By the end of his judicial career, he had come to the conclusion that while Brandeis's observation did not always apply, it sometimes did. People need to know what the rules of law are by which they are to organize their affairs—for example, whether they need to buy insurance—and that what the actual rules are is not nearly as important as whether they are clearly established. In such situations, he concluded that dissent is of little utility and some detriment. Once a rule is established and reliance interests set in, the likelihood of abandoning that precedent is slight and the advisability of doing so questionable. Dissent in such a circumstance only undermines the clarity of the rule. In cases where he concluded that it was more important that the applicable rule of law be settled than that it be settled correctly, and where no other justice shared his view of what the rule should be, he threw his lot in with the majority and made the opinion unanimous.

Based upon the foregoing, the surprisingly high number of unanimous decisions may be explained by the two phenomena of "disciplining"[19] and "settling (whether or not settling right)."[20] Said differently, in

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16. Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RESCH. Q. 385 (2012), note 2, *supra*.

17. *See* Posner; Fischman; note 3, *supra*. *See also* note 7, *supra*.

18. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), overruled in part by Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).

19. As examples of "disciplining" we offer Garland v. Dai, 141 S. CT. 1669 (2021) (unanimously rejecting the Ninth Circuit's ruling that in immigration disputes, in the absence of an explicit adverse credibility determination by an immigration judge or the Board of Immigration Appeals, a reviewing court must treat a petitioning non-citizen's testimony as credible and true), and United States v. Palomar-Santiago, 141 S. CT. 1615 (2021) (unanimously rejecting a Ninth Circuit interpretation facilitating a non-citizen's collateral review of removal proceedings).

20. As "settling" examples, we offer AMG Capital Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021) (holding that the FTC cannot obtain monetary relief in proceedings under the judicial review section of that statute despite

addition to those unanimous decisions where the justices have voted to grant *certiorari* based on the importance of the issue presented, the number of unanimous decisions rises above the expected because it also includes cases where the justices voted to grant *certiorari* in order to exert "discipline" or to "settle." We have not attempted to code unanimous decisions as the products of grants based upon importance, disciplining, or settling and, indeed, we acknowledge below that more than one of these motivations to grant may be at play in any single case.

The prior evidence of the Court's disciplining function comes from individual justices' votes about granting *certiorari*, not from decisions, and does not explore the degree to which disciplining decisions are unanimous. Perfectly consistent with that evidence is having some justices vote for *certiorari* for reasons of discipline or settling while others may vote for *certiorari* on importance of the underlying issues.[21]

The issue that the disciplining and settling functions of the Court raise is whether they are in fact really distinct from the other cases in which the Court grants *certiorari*. If the disputes that received disciplining and settling *certiorari* were materially different than those of importance *certiorari*, then one can imagine that the decisions that split the Court are mostly those that arise after a grant of *certiorari* based on importance: those that are at the fulcrum of the Court's interpretive attitudes. The disputes giving rise to discipline and settling *certiorari* could lie far from the Court's interpretive center and could tend to produce unanimous decisions. If we were to visualize this phenomenon in a single dimension of judging, such as trust of juries or ideology, it could be thought as producing a distribution of cases with three peaks, one at the court's center, corresponding to the importance grants of *certiorari*, and one on each side of the Court, outside its range of ideology, corresponding to discipline and settling grants of *certiorari*.[22]

If the unanimous decisions were disproportionately disciplining or settling decisions, then they should differ from the split-vote decisions in corresponding ways. For example, one might think that more disagreement would exist among lower-court judges in disputes with important issues than in disputes in which the lower courts produce decisions that will lead to disciplining or settling review by the Supreme Court. Then, split-vote decisions should tend to have more traces of disagreement among the judges below. The Database happens to track whether the decision below had a dissent and whether a conflict existed between courts below, either federal or state. Using these as proxies for disagreement

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that the FTC had been using that section more often than the administrative review section of the FTCA), and *Greer v. United States*, 141 S. CT. 2090 (2021) (making difficult the retroactive application of new *mens rea* standard for felony in possession of a firearm).

21. Justices, of course, are sensitive to their colleagues' views and if they can predict that the outcome would be inimical to their views may well vote against *certiorari* to avoid review despite that they disagree with the outcome of the lower court. See, e.g., Richard L. Revesz and Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PENN L. REV. 1067 n. 146 (1988) (discussing "defensive denials" of *certiorari*, with a citation to an anonymous justice's quote).

22. We hasten to add that this is a mere illustration; chapter 6 showed that justices only appear to vote by ideology in some cases whereas they most plausibly actually vote according to their interpretive attitudes. The political branches, who appointed the justices, selected them due to the agreement of some of those interpretive attitudes with the issues that the appointing political actors considered salient, which produces the illusion of ideological voting in those dimensions.

produces this phenomenon but it is weak and unclear. Disagreement below is indeed more rare in unanimous decisions than in split-vote decisions. However, the difference is small. Disagreement below appears in about 39 percent of unanimous decisions whereas in about 43 percent of split vote decisions. Despite the small difference, it is extraordinarily unlikely to be due to chance.[23]

The existence of disagreement below lacks clarity because it does not behave as expected when compared to the Court's avoidance of 4–4 decisions, which will be discussed in the next section. The Court's avoidance of 4–4 decisions does not correlate with less disagreement below.[24]

The small size of the difference and the unclear nature of the function of disagreement below may be interpreted as an indication that disciplining and settling unanimity may be quite rare. Rather, disciplining and settling may mostly appear as an attribute of individual justices' votes. Disciplining may be more in line with the notion that some justices may view the decision being reviewed as clearly wrong but some others as raising an issue that simply needs settling one way or another, or an important issue, and a mix of justices may exist in decisions with all vote splits from any of these perspectives. Only some unanimous decisions may have a greater (and varying) proportion of justices that view the lower decision as clearly wrong or clearly in need of settling. In other words, disciplining and settling may in fact not be strongly related to unanimity. Rather, one could fairly infer that courts that issue decisions that may be subject to Supreme Court review are quite sensitive to the justices' interpretive views.

If so, many unanimous decisions arise from the same circumstances that produce decisions with split votes. This would suggest that a significant fraction of the additional unanimous decisions is not different from those with split votes and the aversion to dissenting that scholars have seen in appellate courts also appears in the Supreme Court.

IV. AVERSION TO EQUAL SPLITS

This final section of this Chapter explores the intensity of the Court's aversion to equal splits.

A comparison of the frequencies of votes in decisions with eight votes reveals a dip in middle splits. Having the best fitting correlated distribution from 9-vote decisions allows us to estimate the intensity with which the Court seeks to avoid 4–4 decisions.

23. The chi-squared statistical test gives the probability that this difference can be due to chance as 0.0003. Among unanimous decisions, 1,365 have disagreement below and 2,105 do not. Split vote decisions with disagreement below are 2,427 and those without are 3,198.

24. If disagreement below was correlated with the issue being likely to divide the Court, especially 4–4, then when the Court operates with eight votes and avoids divisive issues, one should expect to see less disagreement below in decisions with eight votes that are not unanimous. However, in 8-vote decisions, disagreement below exists about 42 percent of the time in both unanimous and non-unanimous decisions. Granted, the avoidance of divisive issues may involve entirely different forces. However, this suggests that disagreement below may not function as expected and casts suspicions on its use. Something different happens with disagreement below in unanimous decisions but it is quite unclear. One could consider that a "settling" motivation overtakes in some of the cases where 4–4 splits are avoided, in the sense that some justices, given the times of national disunity which drive the avoidance of 4–4 splits, decides not to vote for a tie and concedes to "settle" the law.

Figure 9.4 shows the frequencies of each number of liberal votes in decisions with eight votes. Two scalings of the correlated distribution estimated above appear as dark lines. The solid line places the distribution so that it fits the frequencies of splits with one or two dissenting votes. The dashing line places the distribution so that it fits the number of expected unanimous decisions that fit the distribution, given the fraction of unanimous decisions that fall beyond the expected number of unanimous decisions according to the correlated distribution. Scaling the distribution to fit decisions with one, two, or three dissenters would produce estimates between the above two and is, therefore, omitted.

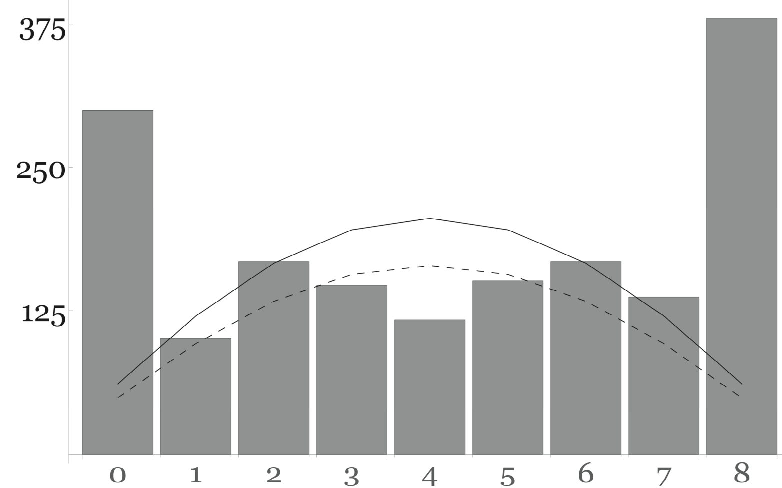

Figure 9.4. The frequencies of the number of liberal votes in decisions with 8 votes.

Visible in the figure is that 4–4 splits are not nearly as frequent as the two vote distributions suggest they should be. The actual number of 4–4 decisions is 116. Both the distributions shown by the solid line (which fits the frequencies of splits with one or two dissenting votes) and by the dashing line (which fits the number of expected unanimous decisions) are quite significantly higher. Thus, one could consider that the Court avoided producing 4–4 splits in dozens of decisions. However, over the three-quarter century that the Database covers, this impact can fairly be summarized as being in the neighborhood of only one missing 4–4 split per term.

The phenomenon of the missing 4–4 splits takes a different color when it is traced across time. Examining figures analogous to Figure 9.4 but produced from subsets of terms reveals that the missing 4–4 splits are absent mostly in the subsets of terms from 1966 to 1975 and from 2001 onwards, illustrated in the left hand and right hand panels, respectively, of Figure 9.5. Each of the two panels in Figure 9.5 follows the patterns of Figure 9.4, showing the number of eight-vote decisions with each possible count of liberal votes, from zero to eight. In each panel, the nine-vote decisions of the same period determined the shape of the correlated distribution of the votes. That forms the basis for the distributions displayed on the graph, the solid line scaled to decisions with one or two dissenting votes and the dashing line scaled to the fraction of unanimous decisions that the distribution should be expected to explain. In both panels, the scaling according to decisions with one to three dissenters would fall between the displayed lines and is omitted.

Estimating the correlated vote distribution from each period's nine-vote decisions produces a distribution with unusually strong correlation in '66 to '75 and one with unusually weak correlation in '01 to '21. The correlation of the former is about 26 percent and the latter about 9, while the overall distribution indicated a correlation of about 18 percent. As a result, the 1966 to

1975 decisions with nine votes indicate a fairly flat correlated distribution. Those from 2001 to 2021 indicate an unusually peaked one. The difference between the distributions that correspond to the two periods is greater than appears from the graph because each graph uses different scaling.[25]

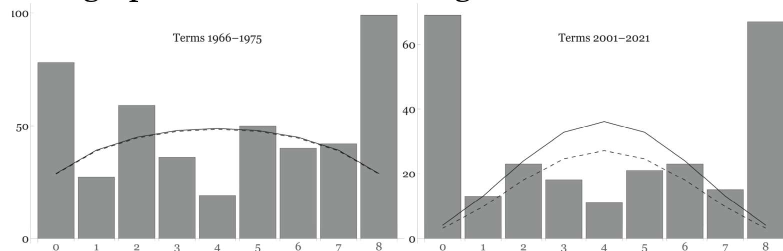

Figure 9.5. Subsets of terms containing the paucity of middle splits in eight-vote decisions.

Translated to expectations about the middle splits in eight-vote decisions, the former period does demonstrate a significant number of missing 4–4 splits but one cannot say with confidence that splits with three dissenters are unusually few. An excess of decisions with five liberal votes appears, instead. The second period also displays a significant absence of 4–4 splits but probably also of splits with three dissenters, which are fewer than decisions with two dissenters and significantly fewer than their expected range according to the correlated distribution.

The approximation of the number of missing even splits compares their actual number to the range one might expect on the basis of the correlated distribution of votes. In the 1966 to 75 period, the actual number of 4–4 decisions is nineteen. Its range should be around 45. In the 2001 to 2020 period, the actual number of 4–4 decisions is ten while it would be expected to range around 30. In terms of per term output, the former period may be considered to be missing well over two 4–4 decisions per term. The latter may be considered to be missing about two 4–4 decisions per term. Compared to the overall rate of missing about one 4–4 decision per term over the entire period of terms 1946 to 2020, the shortfall of 4–4 splits from the number expected is more than doubled in the subperiods of the 1966–1975 and 2001–2021 terms.

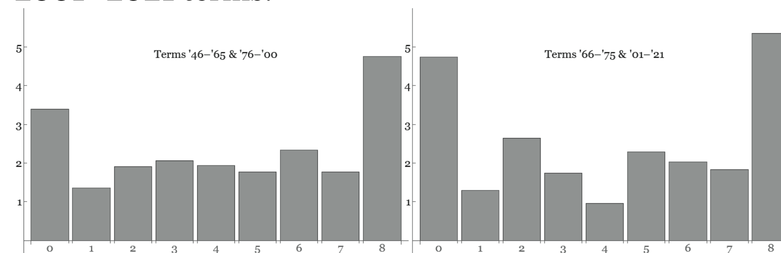

Figure 9.6. Comparing the distribution of eight-vote decisions; the counts are per term.

Figure 9.6 makes the comparison of these two periods (right hand panel) to the remaining terms (left hand panel). The remaining terms do not have a visible absence of 4–4 decisions; all splits appear in about two decisions per term. The absence of 4–4 decisions is focused on the terms from 1966 to 1975 and 2001 to 2021 when the Court only produces about one 4–4 decision per term.

25. A graph that compares the two distributions is available at nicholasgeorgakopoulos.org under this book's entry in the scholarship page and at perma.cc/A24Y-JJ7Y.

The assessment of the paucity of even splits in the later period needs to take into account the inferred policy of the Court to avoid divisive cases during the unusually long time that the Court only had eight members after the death of Justice Scalia in February of 2016 until the appointment of Justice Gorsuch in April 2017.[26] That some of the Court's aversion to even splits in this period corresponded to having only eight members, should arguably lead one to view the rarity of even splits as partially explained from that attitude and then consider the balance of the paucity of even splits over the period of the 2001 to 2020 terms slightly less intense than it appears. Compared to a sand pit, the depth of the sand pit is less surprising if someone also intentionally took sand from there. The paucity of splits due to other forces is less pronounced because the Court may have intentionally avoided reviewing matters that would tend to split it evenly while it only had eight members. However, this is not visible in the numbers; excluding the period after Scalia's death does not materially change the percentage of 4–4 decisions.[27] But it does make the missing decisions with three dissenters disappear.[28] This suggests that any effort to avoid contentious issues mostly produced a reduction of decisions with three dissenters, whereas the background level of avoiding 4–4 splits already had its full impact and any additional avoidance of contentious issues did not influence 4–4 splits.

The statistical test of whether this paucity of 4–4 decisions can appear by chance is the chi-squared test. The probability of observing this few 4–4 decisions during these periods is extraordinarily small; the confidence that something different was at work is greater than 99.99 percent.[29] By contrast, the rarity of eight-vote decisions with three dissenters can easily be due to chance.[30]

The historical periods to which the two subsets belong are, at first blush, quite different. The defining event in the 1966 to 1975 period was the Vietnam war, a major but local skirmish at the peak, perhaps, of hostilities in the greater period of the Cold War. This was also a period of extreme racial unrest with the

26. *See, e.g.,* Ariane de Vogue, *Down a justice, John Roberts looks to find compromise, avoid 4-4 ties*, CNN (May 10, 206) available at https://www.cnn.com/2016/05/10/politics/john-roberts-supreme-court-tie/index.html (visited 3/9/2022) [perma.cc/2NKG-PELP].

27. The percentage of eight-vote decisions that are 4–4 outside the terms from 2001 to 2020 is about 7.4 percent. Their percentage in the terms from 2001 to 2020 is 3.8 percent. Excluding the period that Scalia's seat was vacant makes that percentage 3.9. The Court's effort to avoid equal splits while Scalia's seat was vacant did not have a material impact.

28. The percentage of eight-vote decisions with three dissenters outside the 2001 to 2020 terms is 18.35 percent. Inside these terms, that percentage drops to 15.41 percent. However, if the period that Scalia's seat was vacant is excluded, then that percentage only drops to 17.49 percent.

29. The chi-squared test compares the number of other decisions with eight votes to the number of 4–4 decisions across the two periods. During these two periods the Court issued 29 decisions that were 4 to 4 and 691 decisions with eight votes that had other splits, making 4–4 decisions about 4 percent of all decisions with eight votes. During the other terms, outside those periods, the Court issued 87 decisions that were 4 to 4 and 887 decisions with eight votes that had other splits, making 4–4 decisions about nine percent of all decisions with eight votes. The probability of observing this difference by chance is 0.008 percent producing confidence greater than 99.99 percent that a different mechanism was at work during those periods.

30. In the 2001 to 2010 terms, the Court issued 41 eight-vote decisions with three dissenters and 225 decisions with eight votes and other divisions, making decisions with three dissenters about 15 percent. Outside this period, eight-vote decisions with three dissenters are 262 and with other divisions 1,166, making decisions with three dissenters about 18 percent. Despite this difference in the percentages, these numbers can arise by chance with about 25 percent probability. Dropping the 4–4 decisions reduces this figure to about 16 percent, still far from statistical confidence.

assassination of Dr. Martin Luther King in 1968 and major riots in Black sections of many cities including Los Angeles (1965), Detroit and Newark (1967), and Washington, D.C. (1968). In the Supreme Court it was a period of major events. Justice Fortas resigned in 1969 over allegations of financial impropriety, after, allegations of excessive communication with President Johnson, a close professional acquaintance, led to the successful filibuster of Johnson's attempt to elevate Fortas to Chief Justice.[31] The election of Richard Nixon to the Presidency in 1968 produced four appointments, Burger in 1969, Blackmun in 1970 (after two earlier Nixon nominees were rejected by the Senate), and Powell and Rehnquist on the same day in 1972. The appointment of Blackmun produced a Court with a majority appointed by Republican Presidents, which has continued without interruption to the time of this writing.

The period from 2001 to 2020 included the Iraq and Afghanistan wars but those did not have a similar centrality for the nation's life as the Vietnam war. However, an intense polarization of political views seemed to exist between liberals and conservatives that may be considered to have some similarities to the culture wars of the late sixties and early seventies. Racial tensions surfaced over police killings of Blacks in several cities, including Ferguson, Mo. (2014) and Louisville and Minneapolis (2020). Where the earlier era had demonstrations against the Vietnam war, the recent period eventually had ones about the Black Lives Matter movement juxtaposed by the devolution of a Republican political rally into an incursion into the Capitol on January 6th, 2021, in an attempt to alter the outcome of the presidential election.

While no direct causes appear for the rarity of 4–4 splits during those periods, the concurrent incidence of national disunity during the same periods is difficult to ignore. Chapter 7 showed that in un-Americanism prosecutions during the Cold War, the Court seemed sensitive to the national feeling of a threat from Communism, allowing national defense to produce exceptions to the Bill of Rights. Just as the Court or, more accurately, some justices were sensitive to the nation's predicament in un-Americanism cases from a national defense perspective, the infrequency of 4–4 decisions likely reflects the sensitivity of some justices to feelings of national disunity. Perhaps, intentionally or unintentionally, the degree to which some justices seek to avoid the apparent polarization of 4–4 decisions depends on the degree to which national disunity exists.[32]

One may seek confirmation of the Court's effort to counter national disunity in the strength of the justices' desire to present a unanimous decision. In the same sense in which avoiding 4–4 splits avoids fanning the flames of division, producing unanimous decisions fosters unity. Indeed, outside these periods of disunity, only about 37 percent of the Court's decisions are unanimous. During the periods of disunity about 40

31. *See, e.g.,* Gerard Magliocca, *The Legacy of Chief Justice Fortas*, 18 GREEN BAG 2D 261, 265-67 (2015) (Fortas accepted a $20,000 payment from the foundation of a financier who was under criminal prosecution, and arguably deceived the Senate during his confirmation hearings for Chief about the degree of his advising President Johnson, with further citations).

32. Moreover, if one were to interpret the reduced correlation of the distribution of votes from 2001 to 2020 as stemming in part from reduced cohesion between the members of the Court, then the avoidance of 4–4 decisions may be considered somewhat stronger than it appears in the 2001 to 2020 terms.

percent of the Court's decisions are unanimous. The probability of observing such a difference by chance is about one tenth of one percent, meaning the confidence that the Court was acting differently at times of disunity is about 99.9 percent.[33]

V. CONCLUSION

The distribution of the justices' votes is quite interesting. All compositions produce symmetrical distributions, except the one defined by the liberal and perhaps extraordinary negotiator Goldberg. Unanimity seems surprisingly frequent but is consistent with appellate courts' aversion to dissenting. Equal splits seem to be avoided with greater intensity during times of national disunity, when unanimity also becomes more frequent.

In sum, these phenomena surrounding the distribution of the justices' votes are consistent with a Court that is sensitive to its role as the judicious curator of the national legal system rather than an arena for political strife.

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33. This is the result of applying the chi-squared test to the number of decisions in the four categories: The number of unanimous decisions during these periods of disunity is 1292. Non-unanimous decisions during period of disunity are 1904. Unanimous decisions outside these periods of disunity are 2178. Non-unanimous decisions outside disunity are 3721. In terms of percentages, outside these periods of national disunity, unanimous decisions are about 37 percent of all decisions. In these periods of disunity, unanimous decisions are about 40 percent of all decisions. These counts include decisions with any number of votes, not only nine.

10. In Closing

This book started with Frank's perception that the fluidity of voting coalitions of judges in tightly split decisions differed among compositions of appellate courts of last resort. That is, in some courts, the coalition of judges in the majority was frequently different from decision to decision—the majority coalitions were fluid; in others, the coalition of judges in the majority was frequently the same—the majority coalitions were fixed. The majorities of compositions that display fluidity are formed by forces that vary more than in compositions with low fluidity. To some extent in this book we explore those forces.

We began by testing this hypothesis on the tightly split decisions of two compositions: the 3–2 decisions of the Indiana Supreme Court from 1999–2010 (the "Rucker composition" for Justice Robert D. Rucker who was the junior-most justice of the Court for that period); and the 5–4 decisions of the United States Supreme Court from 1994–2005 (the "Breyer composition" for Justice Stephen G. Breyer). We found that the fluidity of these two compositions did differ, with different coalitions of the Rucker composition forming far more often to produce majorities than coalitions of the Breyer composition. Our "Fluidity Index" measures the difference in fluidity among compositions, with an Index of 0% signifying that the majority coalition was exactly the same in every tightly split decision; and an Index of 100% signifying that each possible majority coalition formed an equal number of times. The Fluidity Index is 78% for the Rucker composition and 34% for the Breyer composition.

This book also contains a fluidity analysis of all of the other compositions of the United States Supreme Court beginning with the Vinson composition from 1946-49. Nine of these compositions, including the Breyer composition, produced more than 50 tightly split decisions during their respective tenures and are given particular attention.

At this point, Nicholas had the insight that the voting coalitions in tightly split decisions could be visualized by positioning the coalitions to the left or right of a circle of points depending on their liberal or conservative nature, with swing votes connecting the coalitions in near-diametrical lines. The resulting visualizations for compositions with high fluidity (such as the Stevens composition from 1979-81) are very different than those for

compositions with lower fluidity (such as the Kagan composition from 2010-16). The visualizations for compositions of the United States Supreme Court that produced more than 50 tightly split decisions, together with a listing of those decisions, are set forth on the posters accompanying this volume.

With some collaboration from Frank, Nicholas then applied these foundations—the measurements of fluidity and circular visualizations—to the courts' tightly split decisions, dissecting them to tease out additional lessons on voting behavior. This investigation first scrutinized six dimensions in the criminal procedure decisions of the Rucker composition of the Indiana Supreme Court; and then, second, what we deem a "paradox," namely, that tightly split decisions of the United States Supreme Court always have a conservative tilt, whether the Court was dominated by appointees of Democratic presidents immediately after World War II, or later by Republican appointees.

Again with some collaboration from Frank, Nicholas also used these foundations in analyses beyond tightly split decisions to observe additional phenomena. This further investigation scrutinized the voting coalitions in decisions adjudicating un-Americanism prosecutions in the 1940s and 1950s; changes in voting coalitions linked to the departures of justices we deem "super-dissenters," Justice William O. Douglas and the combination of Justices William J. Brennan, Jr., and Justice Thurgood Marshall; and the Court's effort to avoid even splits.

Primarily due to Nicholas's vision and effort, the analysis in this volume occupies a sparsely populated span between the text-only approach of law and the mathematical perspective of political science, the latter often inscrutable to lawyers. To the extent that our findings are interesting, we commend this space for future research. Legal analysis would gain much by accepting slightly more quantification—the quantification in this volume is certainly far from the sophistication that true quantitative research deploys. And we respectfully suggest that some of the analysis by political scientists can be enriched by being more attuned to the intricacies of the legal system. While neither lawyers nor political scientists seem altogether comfortable in this middle space of light quantification, we hope this volume convinces otherwise.

At bottom, we have been examining judicial behavior and the place of judging in the American polity. We began with and maintain great admiration for the United States legal system and the good fortune it has bestowed on us. Every judge, at every level of adjudication, is more important in the United States than in other legal systems. The United States and State supreme courts occupy by design the pinnacle of this legal edifice. They helm the branch of government that stewards the law, and in doing so they often find themselves sharply divided.

The study and quantification and visualization of these sharp divisions caused us emphatically to reject the caricature of judges on the United States and State supreme courts as politicians in robes, disguising as judicial acts policy judgments entrusted by our constitutional order to the political branches. Our rejection of this characterization—lobbed at courts and judges from both left and right—is grounded in our findings, particularly as to fluidity. Our posters well illustrate that, in the crucible of making tightly split decisions, justices

often do not align by political slant, nor do their political attitudes always have predictive power.

Beyond fluidity, our analysis has repeatedly demonstrated that, to the extent politicization seems to exist, it explains only a few dimensions of legal analysis that were politically salient at the time of a justice's appointment, and only to the extent that politics drove that appointment. Law is not politics—it only gives that appearance from a vantage point that the gauges this analysis provided consistently falsified.

While we conclude that justices do not subordinate their legal principles and impartial adjudication to politicization, we acknowledge that different courts or compositions present different degrees of politicization. That is, while justices' votes follow their respective interpretive principles (as opposed to being swayed by politics), the justices, nevertheless, are selected for how their interpretive principles match the political preferences of the appointing politicians.

We conclude, therefore, that the appearance of politicization depends on the selection process. In our analysis we contrast Indiana's selection system to the federal system. In Indiana, the Governor is constrained to select a nominee from a panel that a nonpartisan committee selects, with subsequent unopposed popular "retention" elections at first two and thereafter ten-year intervals. The President nominates subject to Senate confirmation. The importance of the size of the senatorial majority has been underscored by the 2017 switch from a filibuster-proof 60 votes to simple majority. We also consider important that in Indiana, the timetable for filling vacancies is constitutionally mandated. Primarily because of these differences in judicial selection systems, we expect the Indiana Supreme Court to continue to appear less politicized that the United States Supreme Court.

Courts exist to adjudicate disputes, not to create law or policy. Indeed, requirements for "case or controversy," "standing," "ripeness," and the like exist to keep courts within their adjudication lane. But the process of adjudication inevitably creates law and so those who seek to shape the legal system inevitably seek to influence the process of adjudication.

If those who seek change can influence the appointment of judges, legal and interpretive change may very well follow. But even if so, the operation of both the federal and Indiana judicial selection systems discussed in this book is gradual. We saw, for example, more than a decade elapse in the Rucker and Breyer compositions during which there was no change whatsoever in the membership of those respective courts.

It may be too that legal and interpretive change can track popular consensus. Many of the Court's un-Americanism decisions discussed here and other events in our judicial history suggest that supreme courts are sometimes attentive to assessments from outside the judicial branch and, perhaps, sometimes properly so.

The question of whether the American legal system is appropriately responsive to the popular will shall be judged by history. From our perspective, sometimes the law and proven facts will accord to the popular will and sometimes not. And, of course, for cases that put the scale of Themis, the goddess of justice, in equipoise, different judges reach different decisions as to what the law and proven facts demand—well illustrated by the fluidity of the voting coalitions in the tightly split decisions examined in this book.

While both the left and the right desire judges who, well, agree with them, even the most strident partisans, should they be hauled into court with their liberty or nearest and dearest interests at stake, want judges who will decide cases based on the law and proven facts and without reference to extraneous influences. We believe that this book demonstrates and illustrates justices in tightly split decisions doing their best to decide based on the law and proven facts and without reference to extraneous influences—and are heartened thereby.

Part IV: Appendices that Offer Analysis

Appendix 1.A: Measuring Fluidity: Index Math

Chapters 3 and 4 showed compositions of supreme courts of different sizes differing in their tendencies to split tightly in few ways with predictable swing votes versus producing several coalitions and having various swing votes. The index standardizes this analysis. An index, the fluidity index, captures the placement of each actual composition on the possible range from a single coalition issuing all decisions to perfectly proportional issuance of decisions from every possible coalition.

I. Table of Justice Agreement and Its Average

We initially developed a linear index to measure fluidity but discovered that it had an important drawback.[1] Consider two separate time periods in which the court's membership differed but during each of which the membership did not change, i.e., separate compositions marking the tenures of two different Junior Justices. Suppose that court issued sporadic 5–4 decisions from several coalitions but that three coalitions were particularly prolific in each composition. In one composition of the court, assume the three prolific coalitions have very similar composition, one with a defined set of dissenters and the other two having those dissenters in the majority with one of two swing votes.[2] In the other composition, the three prolific coalitions differ more. The linear index would produce almost the same value for these two compositions but the second composition exhibits greater fluidity. This

1. The linear index treats as the extremes (a) the issuance of decisions proportionately from every possible coalition and (b) the issuance of all decisions from a single coalition. The linear index reflects the actual dispersion of coalitions issuing decisions in that range. Two courts that used equally only three coalitions to issue all decisions would produce the same value of the linear index regardless of the composition of the three coalitions. Thus, the linear index ignores how different those coalitions are, whereas the index that we propose does account for such differences. The math of the quadratic index is the product of Dimitri Georgakopoulos.

2. As shown in Chapter 1, The Breyer Composition, p. 44, this is the case of the Breyer composition, where the most prolific coalition has the liberal justices in the minority and the next two coalitions are the same justices in the majority, joined by either Justice Kennedy or Justice O'Connor.

problem is resolved by switching to a quadratic index of fluidity, which rests on a comparison table already used to study the voting of judges, what SCOTUSblog calls the "Table of Justice Agreement-5-4 Decisions."[3] The main text offers three actual tables of justice agreement, Tables 1.1–1.3. Each Justice corresponds to a row and a column, and each intersecting cell holds the fraction of tightly split decisions in which the intersecting Justices vote together.

Table 1.A.1: The table of Justice agreement in the case of extreme disagreement in 3–2 decisions of a five-member court.

	One, J.	Two, J.	Three, J.	Four, J.	Five, J.
One, J.	-	1	1	0	0
Two, J.		-	1	0	0
Three, J.			-	0	0
Four, J.				-	1
Five, J.					-

Our first step in creating the quadratic index of fluidity is to calculate the average rate of justice agreement of a court with zero or 100% fluidity. Table 1.A.1 presents the table of Justice agreement that exists for a court with zero fluidity, i.e., where the voting coalitions in every tightly split decision are exactly the same. In a five-member court, a single 3–2 alignment would issue all decisions. Suppose the Justices have names One through Five. Justices One, Two, and Three always vote together in the majority, and Justices Four and Five always dissent together. The resulting table would have ones in the extremes and zeros in a two by three region on the top right, as illustrated in table 1.A.1.

In Table 1.A.1, the average comes from dividing the four ones by the ten cells of the table, producing the average of 0.4. The process of doing that, however, is generalizable. The six zeros form a region of two columns by three rows. By repositioning the separate areas of ones, i.e., by moving the fourth row of the fifth column to the second row of the second column, the four ones form a region of two columns by two rows. The pattern holds for larger courts with an odd number of justices. That is, after such repositioning, the table of extreme disagreement for a court with an odd number of j members will have zeros in a region of $(j-1)/2$ columns by $(j+1)/2$ rows and ones in a square region with sides $(j-1)/2$. The result, a, of averaging those simplifies to

$$a = \frac{j-1}{2j} \quad . \qquad (1.A.1)$$

Notice that this is also the value of each cell in the case of a court with utter fluidity. In a court with 100% fluidity the members agree proportionately with every other member in its tightly split decisions. Therefore, each justice will have agreed on average with every other member of the court, $(j-1)/j$, in every two decisions (divide by 2) because half the other justices will be in tightly split disagreement. The corresponding values of the average cell value a for five-, seven-, and nine-member courts are .4, .4286, and .4444. Call a the average rate of agreement.

3. See, e.g., SCOTUSblog stat pack October Term 2014 at 28-30, available at scotusblog.com (last visited Oct. 27, 2015). In the main text we offer three such Tables of Justice Agreement, Table 1.1, Table 1.2, and Table 1.3, pages 42–45.

II. The Maximum Square Root of Averaged Squared Differences

To continue with our derivation of the quadratic index of fluidity, we return to Table 1.A.1, the table of justice agreement in the case of extreme disagreement. For each cell in the table, we calculate the difference of its value from the average rate of agreement a and square those differences. We then take the average of the squared differences and obtain the square root of this average. That is the maximum that the root of the average of squared differences can reach, call it r.

Here are the details on calculating r. We start from the fact that we know that the number of cells containing ones is $[(j - 1) / 2]^2$. Therefore this must be multiplied by their squared difference from the average, $(1 - a)^2$. We know the number of cells containing zeros is $[(j - 1) / 2] [(j + 1) / 2]$. That must be multiplied by $(0 - a)^2$. The sum of the two forms the numerator, the maximum sum of squares. Divide by the number of cells, $j (j - 1) / 2$, computed according to the explanation to equation 1.A.3, below. The square root of that fraction is the root of the maximum sum of squares r, which after substituting a from equation (1) simplifies to

$$r = \frac{\sqrt{(j + 1) (j - 1)}}{2 j} \quad . \qquad (1.A.2)$$

The corresponding values of the root of the maximum sum of squared differences r for five-, seven-, and nine-member courts are .4898, .4948, and .4969. Since these values indicate the least fluid coalitions that a court can possibly have, the index should have a value of zero in those cases.

III. Index of Fluidity of Judicial Coalitions

We then take the root s of the average of the squared differences of the actual table of justice agreement and express it as a fraction of the maximum, r, and subtract it from one to find the index of fluidity of judicial coalitions. This index takes a value of zero for courts that only have a single coalition for all their tightly split decisions and, therefore, have zero fluidity. The index takes a value of one for courts where the members agree proportionately with every other member in all their tightly split decisions, i.e., where every possible coalition does form and each issues the same number of decisions.[4]

More formally, the calculation of the quadratic index of fluidity of judicial coalitions has the following steps:

1. Form the table of Justice agreement, a table where each cell k holds the fraction g_k of tightly split decisions when two justices agree. To observe the simplification of the number of cells in the table of justice agreement do a simple transposition. Transpose the single cell of the last row to the blank cell at the first column of the first row. Continue by transposing the penultimate row (which has two cells), immediately below, filling out the second row. Continue until the triangular shape of the table of justice agreement becomes a rectangle. The

4. Worth noting is the fact that the index would not work if we were not limiting our focus to tightly split decisions, such as 5–4 decisions in 9-member courts. Only tightly split courts produce results comparable to the maximum root of average squared disagreement rates r. A unanimous court, for example, would have ones in every cell and produce a value greater than this maximum.

rectangle has width of j columns and height $(j-1)/2$ rows. Accordingly, the number q of cells of the table of Justice agreement is

$$q = j\,(j-1)/2 \quad . \qquad (1.A.3)$$

The number of cells q of the table of Justice agreement for five-, seven-, and nine-member courts is 10, 21, and 36.

2. For each cell k of the table of justice agreement calculate the squared difference from a, the average rate of agreement, known from equation (1.A.1), $a = (j-1)/2j$.

3. Take the square root s of the average of the squared differences, i.e.,

$$s = \sqrt{\frac{\sum_{k=1}^{q} (g_k - a)^2}{q}} \quad . \qquad (1.A.4)$$

The division by q facilitates the textual exposition by letting us refer to s as the square root of the averaged squared differences (instead of their sum) but plays no functional role. It cancels out in the ratio with r. As recognizing that s and the s/r ratio are Euclidian distances helps, and Euclidian distance does not include this division, we will disregard it when explaining that understanding of the index.

4. Take the ratio of the root of averaged squared differences s to its maximum r as calculated in equation (2) and subtract it from one to obtain the index of fluidity of judicial coalitions f:

$$f = 1 - \frac{s}{r} \quad . \qquad (1.A.5)$$

In geometrical terms, we calculate Euclidian distances. The number of cells q in the table of justice agreement establish a q-dimensional space, illustrated simplified as 3-dimensional in figure 1.A.1. If coalition usage is exactly proportional, perfectly fluid, the court is in the Cartesian position $(a_1, a_2, \ldots a_q)$ in that space, where all $a_i = a$. The court's actual usage of coalitions places it at point $(g_1, g_2, \ldots, g_q)$.

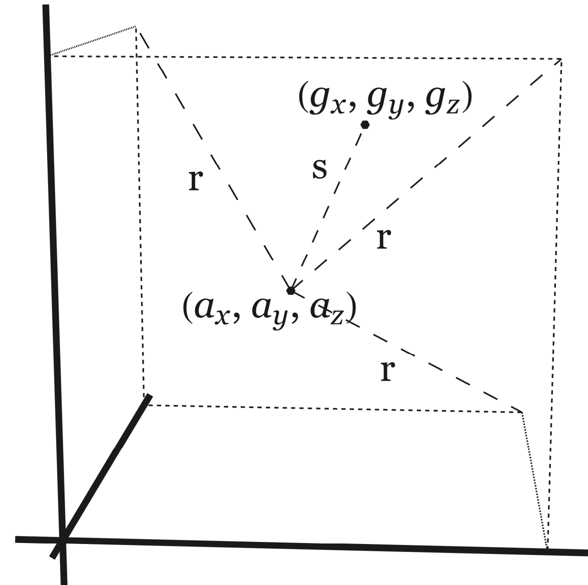

Figure 1.A.1: Illustration of the concept of the index as a Euclidian distance in the simplification of three dimensions.

The Euclidian distance of the court's actual usage of coalitions from the point of proportional usage, is $s = [(a_1\text{-}g_1)^2 + \ldots + (a_q\text{-}g_q)^2]^{1/2}$ (ignoring the immaterial division by q). The value r is the distance of proportional usage of coalitions to any of the (corner) extremes of utter lack of fluidity. The index compares the court's actual distance from proportional usage of coalitions in

that space to the distance from the extremes of utter lack of fluidity.

We defend the use of this index of fluidity of judicial coalitions against a claim that a simpler, linear index would be adequate. The most compelling rejection of the linear index came from our discussion in Chapter 1 of the application of the index to the Breyer and the Powell-Rehnquist compositions. But some further discussion of the linear index and a comparison provides a fuller explanation. Therefore, we close this Appendix with some examples that apply the index to courts of different sizes especially in juxtaposition with median voter models of judicial voting with different numbers of dimensions.

IV. Comparison to the Linear Index

The computation of the linear index is simpler because it does not require the creation of the table of justice agreement. One merely has to count the number of decisions issued by each coalition, sort those numbers in diminishing order, weigh each by the appropriate coefficient, and then sum to obtain the linear index.

The process for obtaining the linear index f_L of the fluidity of judicial coalitions of a court with an odd number of judges j from a sample of n split decisions comes from the following steps:

1. Count the number of decisions that each coalition produces. Call c_0 the number of decisions that the coalition that produces the greatest number of decisions produces. Call c_1 the number of decisions that the next most productive coalition produces; c_2 the number that the third most productive coalition produces, and so on.

2. Calculate the possible number of majority coalitions, the number m of coalitions that a court with an odd number j of judges can form. The derivation of the formula starts with the factorial, which gives the number of ways a group can be placed in order. For simplicity, consider a 5-member court. For a group of 5 (or j), five (or j) elements can take the first position, four the second, and so on, so that the product $5 \times 4 \times 3 \times 2 \times 1$ (or $j!$) gives the number of ways five elements can be ordered. Since for tightly split decisions we are only dealing with coalitions of 3 members, we divide by 2! (or $((j-1)/2)!$) to eliminate groups of length four and five. The result is the number of ways three members of a group of five can be ordered. Because order does not matter in coalitions, we also divide that result by the number of ways a group of three (or $(j+1)/2$) can be ordered, 3 factorial or $3 \times 2 \times 1$:

$$m = \frac{j!}{\left(\frac{j+1}{2}\right)!\left(\frac{j-1}{2}\right)!} \quad . \qquad (1.A.6)$$

3. Calculate the linear index f_L of fluidity of judicial coalitions

$$f_L = \sum_{i=1}^{m-1} \frac{2\, c_i\, i}{(m-1)\, n} \quad . \qquad (1.A.7)$$

In other words, put the number of split decisions that each coalition produces in decreasing order, count the second and smaller groups, and sum the ratios of the product of (a) the number of decisions in each group c_i and (b) twice the order i of that group; divided by the product of (a) $m-1$, one less than the number of

possible majority coalitions *m*, and (b) the total number of decisions *n*.

The relation of the quadratic index to the linear index reveals the additional detail that the quadratic index produces. We begin by considering all the possible ways that a court can form coalitions, *m*. Utter fluidity (fluidity of 100%) means that the maximum number of coalitions form, and the same number of decisions comes from each coalition. Suppose each coalition produces one decision. Consider all the ways that this number of total decisions can be produced, from most concentrated, i.e., all decisions coming from a single coalition, to this most fluid production of one decision from each coalition.

Using the example of a 5-member court, the possible number of coalitions *m* is 10. The extreme of fluidity is one decision from each of the ten possible coalitions. The opposite extreme is that of a single coalition producing all ten decisions.[5] Table 1.A.2 offers the (abbreviated) list of the possible coalition usage combinations with which a 5-member court can produce 10 decisions. The listing begins with the most concentrated extreme of all 10 decisions coming from a single coalition. The next row corresponds to 9 decisions coming from one coalition and 1 decision coming from a second coalition. The opposite extreme of utter fluidity is at the last row, where each coalition issues one decision.

Each row of table 1.A.2 consists of a particular usage of coalitions by a 5-member court that issues ten decisions. The first ten cells on each row correspond to the number of decisions issued by each possible coalition, in descending order, as for the production of the linear index. All decisions may come from a single coalition, as in row 1. Row 7 corresponds to the idea that one coalition produces 7 decisions, and three different coalitions produce one decision each. The last row corresponds to the most fluid usage of coalitions, with each of the ten possible coalitions producing one decision. The unabridged table has 42 rows.

The last two columns of the table hold the corresponding index values. The penultimate column has the value of the linear index that corresponds to each row, f_L. The last column has the range of values that the (quadratic) index f can take.

Table 1.A.2: Coalition usage by a seven-member court issuing 10 decisions and index values.

Decisions coming from each of 10 Coalitions						f_L	Range of f
10						0.0	0.0
9	1					.02	.08–.12
8	2					.04	.14–.23
8	1	1				.07	.16–.24
7	3					.07	.19–.31
7	2	1				.09	.23–.35
7	1	1	1			.13	.24–.36
6	4					.09	.23–.37
…							
2	2	2	2	1	1	.46	.67–.80

5. The range of possibilities arises from the mathematical process of partitioning ten into its integer components. In this sense, table 1.A.2 offers the (abbreviated) list of partitions of ten.

2	2	2	1	1	1	1				.53	.73–.82
2	2	1	1	1	1	1	1			.64	.80–.84
2	1	1	1	1	1	1	1	1		.8	.84–.87
1	1	1	1	1	1	1	1	1	1	1.0	1.0

Whereas each row of table 1.A.2 corresponds to a single value of the linear index, it corresponds to multiple values of the quadratic index, depending on how many swing votes can exist in the composition of different coalitions. For example, the second row of the table indicates the formation of two 3–2 voting coalitions in a 5-member court, the first issuing 9 decisions and the second issuing 1. The linear index, because it does not involve the detail of composition of coalitions, produces the same value regardless which justices form the second majority. However, the second majority can arise from either a single swing vote or two swing votes. Two majorities can arise from a single swing vote if, say, from the majority of Justices One, Two, and Three, we have Justice One join Four and Five to form the second majority of One, Four, and Five. Two majorities can also arise from two swing votes if, say, from the same first majority, Justices One and Four change their votes to form the second majority of Two, Three, and Four (with One and Five in the minority). The quadratic index produces different values because the composition of the coalitions changes more in the second case than in the first.

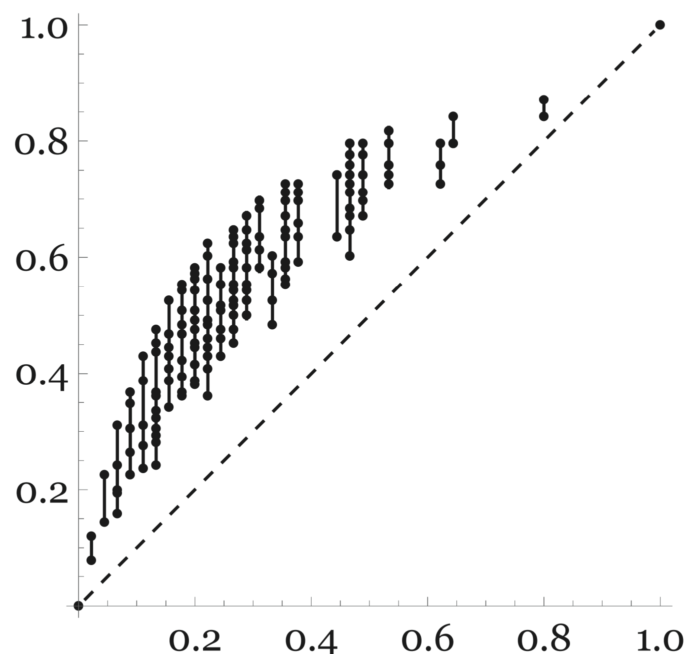

Figure 1.A.2: Five-member court, quadratic (vertical) to linear (horizontal) fluidity index correspondence.

Figure 1.A.2 illustrates the correspondence of the quadratic index to the linear index.[6] The dashing line is merely the diagonal, to help the reading of the graph. Each point corresponds to a coalition usage. The horizontal (or x-) coordinate of the points corresponds to linear values of the index. The vertical (or y-) coordinate corresponds to quadratic values of the index. The phenomenon that multiple values of the quadratic index correspond to one value of the linear index appears by connecting the values that arise from different coalitions that fit on the same row of table 1.A.2

6. An interactive version of this figure, with popups showing the underlying coalitions, exists in www.nicholasgeorgakopoulos.org, under scholarship, in the paragraph corresponding to this book and at perma.cc/W6GA-T75A.

with a vertical line. Only in the extremes of values of 0 or 1 does the value of the linear index correspond to only a single value of the quadratic index. All intermediate forms of coalition usage (i.e., all rows of table 1.A.2 other than the first and the last) can give rise to several quadratic index values corresponding to one value of the linear index. Accordingly, the figure has 46 vertical lines, as many as are the other rows of table 1.A.2. However, because some rows share a value of the linear index, as do rows 4 and 5, or rows 6 and 8, the figure has some lines overlap.

The attempt to observe such detail in larger courts stumbles on complexity. A 7-member court has 35 possible coalitions (*m*=35). The corresponding table for a 7-member court, i.e., the possible ways that its coalitions can produce 35 decisions, has 14,883 rows. The graph corresponding to figure 1.A.2 for a 7-member court would have that many vertical lines (no overlapping lines in that case). A 9-member court has *m*=126 possible coalitions and would produce 3,457,027 rows.

V. THE INDEX AND MEDIAN VOTER MODELS OF JUDGING

As discussed in Chapter 1, text accompanying note 29, median voter models of judging with a small number of dimensions are in some tension with the index. Median voter models would lead to a small and fixed number of coalitions, actually two coalitions per dimension in the model. A model where only a political left-to-right dimension determines judicial voting would produce only two tightly split coalitions. This would hold for all court sizes. Regardless of the size of the court, when justices align from left to right, the median justice separates the left-voting block from the right-voting block and tightly split decisions only come from either block plus the median justice. Adding a second dimension to the median voter model changes the number of voting blocks and, perhaps, the number of justices that are the swing votes. Thus, if the first dimension is from social liberalism to conservatism and the second dimension from economic liberalism ("laissez-faireism") to economic interventionism, the court's tightly split decisions will likely reveal four groupings of judges. The median justice from the perspective of social liberalism will separate the block of social liberals from conservatives and the median laissez-faireist judge will separate the laissez-faireist block from the interventionist block. The same pattern holds for additional dimensions. In each dimension, the median judge separates that dimension's voting blocks.

Returning to the one-dimensional model, as the court adjudicates disputes, the justices ascertain the amount of conservatism on which the dispute turns and vote accordingly. If the conservatism value of the dispute produces a unanimous decision or any split that does not produce a tightly split decision, then that decision is irrelevant to the index. However, if the conservatism value of the dispute is such that the conservative block cannot attract the vote of the median justice, then a tightly split decision will arise, with the liberal block plus the median justice in the majority and the conservative block in the minority. The median justice will see disputes with slightly smaller conservatism values as justifying a vote switch, whereas no justice of the liberal

block would change yet their vote. The result will be some tightly split decisions where the majority is the conservative block plus the median justice and the minority is the liberal block.

If the division from liberalism to conservatism explained all of judicial voting, then these two coalitions would issue all tightly split decisions. The size of the court would not matter. Courts of any size would always issue all their tightly split decisions from only two coalitions. In a five-member court, the liberal and the conservative blocks would each hold two judges. In a 7-member court they would each hold three judges. In a 9-member court they would each hold four judges. This median voter model produces only two coalitions for tightly split decisions regardless of court size. Because Chapter 5 observes six dimensions in only the criminal procedure decisions of one composition of the Indiana Supreme Court, the number of dimensions that a realistic median-voter model should have is large. Against this background, the analysis here, about concerns over median voter models with a small number of dimensions, is academic: Chapter 5 shows that median voter models need many dimensions to be realistic.

Because the index, however, also depends on available but unused coalitions, a 5-member court experiencing two coalitions with a single swing vote will have a greater index of fluidity than larger courts. A 5-member court will have an index of fluidity of .24, a 7-member court one of .16, and a 9-member court would have an index of .12 if both coalitions issued the same number of decisions. The proportion of decisions from the two coalitions will depend on the distribution of disputes and on the location of the justices adjacent to the median justice in each dimension. Table 1.A.3 presents a summary of the models discussed here.

Table 1.A.3: Index values for some median voter models.

Median Voter Model Scenario	*5-j Ct*	*7-j Ct*	*9-j Ct*
Single dimension, one swing vote	.24	.16	.12
Single dimension, two swing votes	.39	.28	.22
Single dimension, three swing votes	–	.35	.30
Single dimension, four swing votes		–	.34
Two dimensions	.53	.45	.42
Two dimensions, one steady block, n. 7	.34	.23	.17
Two dimensions, single swing vote, n. 8	.59	.43	.43
Same with less variation in 9-ct blocks, n. 9			.34
Three dimensions, full variation, n. 10	.69	.51	.48
Same with extra var'n for 9-ct, n. 11			.53

The low value of the index is a result of the median voter model which implies a single swing vote. More swing votes would produce a higher index of fluidity. For example, start with a 9-member court and the coalition of Justices One, Two, Three, Four, and Five as the base for comparison. A single swing vote may be the swing of One into the erstwhile minority to form the majority of One, Six Seven, Eight, and Nine. A court using only those two coalitions proportionately would produce an index value of .12 (.16 for a 7-member court; .24 for a 5-member one). However, the court could experience two swing votes. For example, One can vote with the minority but Six can also swing to vote for the majority, forming the new majority coalition of Six, Two, Three, Four, and Five. Now, the index value becomes .22 (.28 for a 7-member court; .39 for a 5-member one). If the court experienced as a third swing vote, a swing of Two

to the other side, the resulting majority would be One, Two, Seven, Eight, and Nine, giving an index value of .3 (.35 for a 7-member court; again .39 for a 5-member one). A fourth swing vote, for example of Seven to join the initial majority, would produce the majority of Six, Seven, Three, Four, and Five. This would correspond to an index value of .34, more than double the value of the index for a 7-member court with a single swing vote, which we saw is .16. In all the above examples, the court is issuing an equal number of decisions from both coalitions and no other tightly split decisions.

Proceed again to a simple model of two dimensions, e.g., one from social liberalism to conservatism and one from economic laissez-faireism to interventionism. A median voter model would again assume that judges change their votes as the conservativeness and interventionism of a dispute passes each justice's threshold. Notably absent from such a simplistic model is either a relation between those dimensions and a capacity of justices to compromise between their values. Disputes are only adjudicated on one of the two dimensions, essentially. The result is that every court has two voting blocks and a median justice for each dimension.

Start by trying to have the 5-member court reach the most variation. A liberal voting block and a conservative block arise, divided by a median conservative justice. A liberal and a conservative justice can form the laissez-faireist block. If the interventionist block takes the remaining liberal justice, then the median interventionist justice must be the remaining conservative justice, leaving the median conservative justice as the other member of the interventionist block. (The same amount of variation would also result from the interventionist block having the median conservative justice and the remaining member of the conservative block, leaving the remaining member of the liberal block to take the role of the median interventionist justice.) Place in the liberal block justices One and Two. Justice Three is the median conservative justice. The conservative block are justices Four and Five. The laissez-faireist block are justices One and Four. The interventionist block are justices Two and Three, leaving Five as the swing vote on interventionism. A 5-member court that uses these four coalitions equally produces an index of .53.

A 7-member court can have One, Two, and Three as the liberal block, and Five, Six, and Seven as the conservative block with Four as the median conservative justice. The laissez-faireist block can be One, Two, and Five. The interventionist block can be Three, Four, and Six, leaving Seven as the median interventionist justice. A 7-member court that uses these four coalitions equally produces an index of .45.

A 9-member court can have One, Two, Three, and Four as the liberal block; Six, Seven, Eight, and Nine as the conservative block leaving Five as the median-conservative justice. The laissez-faireist block can be One, Two, Six, and Seven. The interventionist block can be Three, Four, Five, and Eight, with Nine being the median-interventionist justice. A 9-member court that produces decisions equally from these four coalitions has an index of .42.

The above transition from .53 to .45 and .42 as court size increases in the two-dimensional median voter model assumes full variation in the roles. To observe a reduction in variation, consider that the justices comprising the conservative block are also the ones compris-

ing the laissez-faireist block.[7] One of the liberal block is the median justice for the laissez-faireism to interventionist dimension. Then the three courts produce values of .34, .23, and .17. The reduced variation has a greater impact on the index for a larger court because it binds four justices who could have formed coalitions many different ways and could have produced much more variation.

A different reduction in variation would be to let the swing vote be the same in both directions, maintaining the different composition of the voting blocks.[8] The three courts produce values of .59, .43, and .43. But the 9-member court can experience a further slight reduction in variation. The voting block for the second dimension can have two justices from each block in the first dimension. Variation drops if each voting block for the second dimension takes three justices from one block of the first dimension.[9] Then its index drops to .34.

Finally, the median voter model can have three dimensions. The full variation that the courts of different sizes could experience would produce index values of .69, .51, and .48.[10] However, the 9-member court could produce additional variation within the limitations of the median voter model.[11] The result would be an index of .53, greater than that of the 7-member court.

Table 1.A.3 presents these correspondences of the index to median voter models. The left column describes the model. The remaining three columns present the corresponding value of the index. The values for a 5-member court are in the column headed 5-j Ct. The columns headed 7-j Ct and 9-j Ct have the index for 7- and 9-member courts. We contend that the variations of coalitions and the index values we present suggest a much thicker explanation for judicial coalition formation than simple median voter models give.

The present volume repeatedly rejects median voter models of judging—chapters 2 to 4 show too many active swing votes who are occasionally far from the ideological center; chapter 5 shows that merely in criminal proce-

7. The conservative and laissez-faireist justices are, in the 5-member court, 4 and 5; in the 7-member court 5, 6 and 7; in the 9-member court, 6, 7, 8, and 9. In all courts the swing vote in conservatism is 1 and the swing vote in interventionism is 2. The resulting majorities are 1, 2, 3 (liberal); 1, 4, 5 (conservative); 1, 2, 3 (interventionist) and 2, 4, 5 (laissez-faireist) in the 5-member court; 1, 2, 3, 4 (liberal); 1, 5, 6, 7 (conservative); 1, 2, 3, 4 (interventionist); and 2, 5, 6, 7 (laissez-faireist) in the 7-member court; and 1, 2, 3, 4, 5 (liberal); 1, 6, 7, 8, 9 (conservative); 1, 2, 3, 4, 5 (interventionist); and 2, 6, 7, 8, 9 (laissez-faireist) in the 9-member court. Each issues the same number of decisions.

8. The swing vote comes from the justice with the median number, 3 in the 5-member court, 4 in the 7-member court, and 5 in the 9-member court. The blocks change in each direction. The resulting majorities can be 1, 2, 3 (liberal); 3, 4, 5 (conservative); 1, 3, 4 (interventionist) and 2, 3, 5 (laissez-faireist) in the 5-member court; 1, 2, 3, 4 (liberal); 4, 5, 6, 7 (conservative); 1, 3, 4, 5 (interventionist); and 2, 4, 6, 7 (laissez-faireist) in the 7-member court; and 1, 2, 3, 4, 5 (liberal); 5, 6, 7, 8, 9 (conservative); 1, 2, 5, 6, 7 (interventionist); and 3, 4, 5, 8, 9 (laissez-faireist) in the 9-member court. Each issues the same number of decisions.

9. The coalitions of the 9-member court are 1, 2, 3, 4, 5 (liberal); 5, 6, 7, 8, 9 (conservative); 1, 2, 3, 5, 6 (interventionist); and 4, 5, 7, 8, 9 (laissez-faireist).

10. For the purpose of conversation have the third dimension run from pragmatism to literalism. In all courts, the swing conservatism vote is 1, the swing interventionism vote is 2, and the swing literalism vote is 3. The blocks change in each direction. The resulting majorities can be 1, 2, 3 (liberal); 1, 4, 5 (conservative); 1, 2, 4, (interventionist); 2, 3, 5 (laissez-faireist); 2, 3, 4 (literalist); 1, 3, 5 (pragmatist) for the 5-member court; 1, 2, 3, 4 (liberal); 1, 5, 6, 7 (conservative); 1, 2, 4, 6 (interventionist); 2, 3, 5, 7 (laissez-faireist); 2, 3, 4, 6 (literalist); and 1, 3, 5, 7 (pragmatist) for the 7-member court. For the 9-member court the majorities can be 1, 2, 3, 4, 5 (liberal); 1, 6, 7, 8, 9 (conservative); 1, 2, 4, 6, 8 (interventionist); 2, 3, 5, 7, 9 (laissez-faireist); 2, 3, 4, 6, 8 (literalist); and 1, 3, 5, 7, 9 (pragmatist).

11. For the 9-member court the majorities can be 1, 2, 3, 4, 5 (liberal); 1, 6, 7, 8, 9 (conservative); 1, 2, 3, 6, 7 (interventionist); 2, 4, 5, 8, 9 (laissez-faireist); 2, 3, 6, 8, 9 (literalist); and 1, 3, 4, 5, 7 (pragmatist).

dure, at least six dimensions are identifiable in that Court; chapter 7 shows that even a fairly narrowly defined topic, un-Americanism prosecutions, produce a rich environment of evolving interpretations and changing alignments of the justices. The first and fundamental contradiction between median voter models and actual court behavior stems from the fact that we do not observe the single-swing-vote phenomena that median voter models lead us to expect. For example, in the Powell-Rehnquist composition, we saw that two of the most prolific majority coalitions on the United States Supreme Court differed by two swing votes. The top coalition was Blackmun, Burger, Powell, Rehnquist, and White in the majority and Brennan, Douglas, Marshall, and Stewart in dissent. While the third most prolific coalition arises from the swing vote of Stewart, the other most prolific coalitions do not conform to a median voter model, separable by a single swing vote from another prolific coalition. The second most prolific coalition was Blackmun, Burger, Powell, Rehnquist, and Stewart in the majority, and Brennan, Douglas, Marshall, and White in the dissent. The fourth has Blackmun, Brennan, Burger, Rehnquist, and White in the majority and Douglas, Marshall, Powell, and Stewart in dissent. While two coalitions that conform to the predictions of a median voter model do exist, the other coalitions contradict it.

If a simple median voter model applied, then it would be quite unlikely that neither of these coalitions has an opposite coalition that stems from a single swing vote that has a significant number of decisions. Rather, these double swing coalitions along with the existence of numerous coalitions that only issue one tightly split decision could be interpreted to defy median voter models, or at least median voter models with a small number of dimensions (indeed, Chapter 5 finds six dimensions in only the criminal procedure decisions of the Rucker composition of the Indiana Supreme Court). Justices balance the various aspects (or dimensions) of each dispute in ways that are not compatible with simple median voter models. The index gains validity, especially when comparing courts of different sizes, as simple median voter models of adjudication are falsified.

Appendix 4.A: The Swing Votes of the *Apprendi* Majority Offer no Inferences

The main text, text accompanying note 22, p. 77, explained how the *Apprendi* line of cases shows that adjudication by supreme courts can create new unanticipated dimensions that render obsolete even a previously accurate multi-dimensional locational model of law. This appendix buttresses this conclusion by showing that exploring the swing votes from the *Apprendi* coalition does not reveal an ability to forecast *Apprendi* and its line.

The *Apprendi* majority appears at the eleven-o'clock position of the Breyer court and issues five decisions. The majority is Ginsburg, Scalia, Souter, Stevens, and Thomas.

Four of the five decisions that this majority produces are in the *Apprendi* line, that aggravating factors of sentences must be proven beyond reasonable doubt to the jury. Those are, first, a precursor to *Apprendi*,[1] *Apprendi* itself,[2] and two applications of the principles of *Apprendi* to state courts,[3] and federal courts.[4] The fifth decision is unrelated, about asbestosis claimants under the Federal Employers Liability Act where the dissent would limit damages.[5] Thus, the political slant of all five decisions is liberal, the *Apprendi* group for impeding criminal liability and the last one for facilitating civil liability.

Going back to the list of the majorities of the Breyer court that authored up to two decisions and, therefore, are not on the graph, reveals three majorities that connect to the *Apprendi* majority by one swing vote.

The swing vote of Scalia produces the majority of Rehnquist, Breyer, Kennedy, O'Connor, and Scalia, which authors two decisions. One is a tort dispute, where the court absolves from liability a car manufac-

1. Jones v. United States, 526 U.S. 227 (1999).
2. Apprendi v. New Jersey, 530 U.S. 466 (2000).
3. Blakely v. Washington, 538 U.S. 135 (2004).
4. United States v. Booker, 543 U.S. 220 (2005) (we treat as *Booker*'s primary holding the invalidation of the sentencing guidelines on the *Apprendi* reasoning; the secondary holding, that the guidelines continue as advisory, we find not as momentous).
5. Norfolk & Western Railway Company v. Ayers, 538 U.S. 135 (2003).

turer.[6] The other one, *Harris*, is a criminal procedure dispute, and appears contrary to *Apprendi*.[7] However, the majority decision clarifies that *Apprendi* applies to aggravating factors that increase the penalty beyond the statutory maximum of the crime found by the jury, whereas *Harris* involves an increase of the minimum penalty. Thus, the juxtaposition of *Harris* explains exactly where Scalia's vote changes but on this very narrow issue without helping predict that this swing would come. The *Harris* issue also underscores the unsystematic nature of the *Apprendi* majority by the return of the same issue during the Kagan court. This time Scalia did not join Thomas; Breyer switched sides; and the new Democratic appointees, Kagan and Sotomayor, joined. Thus, Breyer, Ginsburg, Kagan, Sotomayor, and Thomas form a majority that holds that enhancements to minimum criminal penalties do require proof beyond reasonable doubt to the jury.[8] It also contradicts the possibility that a locational model of criminal procedure could be accurate. If it accurately predicted *Apprendi* and *Harris*, then it would fail to predict the reversal of *Harris*.

The swing vote of Thomas away from the *Apprendi* majority produces the majority of Rehnquist, Breyer, Kennedy, O'Connor, and Thomas, which also authors two conservative decisions, both on criminal procedure. The first, *Almendarez-Torres*, is contrary to *Apprendi* and is about deported aliens who reenter the United States.[9] While the reentry increases the criminal penalty very significantly, from two to twenty years' maximum incarceration, the court does not consider it an element of the offense, letting it escape the type of scrutiny that *Apprendi* would impose, over a dissent by Scalia to that exact point. The other decision of the same majority is about double jeopardy in the context of California's three-strikes law and allows the three-strikes trial to establish the prior offense.[10] However, these two decisions predate both *Apprendi* and its precursor, *Jones*, which makes the contradiction of the vote of Thomas less acute. Apparently, Thomas's view on the *Apprendi* issue changed between the time he voted on *Almendarez-Torres* and the time he voted in *Jones*, something that no locational model could predict.

The third majority that is separated by one swing vote from the *Apprendi* majority arises from the swing vote of Souter. The dispute is unrelated to criminal procedure and therefore offers no insight into the fulcrum point of the vote of Souter in the *Apprendi* line of cases.[11]

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6. Geier v. Am. Honda Motor Co, Inc., 529 U.S. 861 (2000) (no manufacturer liability for absence of side airbags; explicitly disapproving this one pro-tort-liability opinion of co-author Sullivan, who consistently opposed tort liability).

7. Harris v. United States, 536 U.S. 545 (2002) (aggravating factor of brandishing gun allowed to be found by judge).

8. At the ten-o'clock position of the graph for the Kagan composition, the majority of Breyer, Ginsburg, Kagan, Sotomayor, and Thomas, which produces only three decisions, also expands on *Apprendi* by requiring its treatment to enhancements of minimum penalties. *See* Alleyne v. United States, 133 S.Ct. 2151 (2013).

9. Almendarez-Torres v. United States, 523 U.S. 224 (1998).

10. Monge v. Calif., 524 U.S. 721 (1998).

11. The resulting majority is Rehnquist, Breyer, Kennedy, O'Connor, and Souter, which authors a single decision, American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). The legal subject matter of *Garamendi* is not easy to categorize. California passed a statute requiring insurance companies that did business in Europe during World War II to disclose to its insurance commissioner details about their life insurance policies on Holocaust victims, about which the President of the United States had entered into an agreement with Germany. The court invalidated the statute as being in conflict with the President's authority to conduct foreign affairs. The result can be considered conservative for precluding liability and liberal for not granting the state the right it sought.

It certainly would not help predict his swing to the *Apprendi* majority.

In sum, despite our probing of potential swing votes, we find no hints that a locational model could predict the formation of the *Apprendi* majority.

Appendix 6.A: Audit Against 800 Manually Coded Decisions

To provide some comfort about the absence of a bias in the coding of the political leaning of decisions by the Supreme Court Database, we resort to our work on Chapter 4. In the context of studying 5–4 coalitions, we assign political slant manually to tightly split decisions issued by non-minor coalitions during long-lived compositions of the Court. A composition is long-lived if it issued over 50 tightly split decisions. The long-lived compositions are those of Vinson (from the 1946 term to the 1948 one), Stewart (terms 1958–1961), Powell and Rehnquist (appointed on the same day, terms 1971–1975), Stevens (terms 1975–1980), O'Connor (terms 1981–1985), Kennedy (terms 1987–1989), Breyer (terms 1991–2004), Alito (terms 2005–2008), and Kagan (from the 2009 term to the 2015 one, which encompasses the February 2016 date of Justice Scalia's death). Each composition issues tightly split decisions from various majority coalitions of five justices. A coalition is not minor if it issued three or more decisions. In other words, we assigned political slant to every 5–4 decision, when its majority of five justices issued three or more decisions while being part of any of the compositions that issued more than fifty 5–4 decisions: 800 decisions in total.

Table 6.A.4 presents the results of this audit. The first column has the junior justice who defines the composition. The second column has the number of decisions reviewed.[1] In the rare cases of disagreement with the Database's slant, slightly over five percent of the time, either the third column presents the number of disagreements where the Database assigned a

1. This number of reviewed decisions is slightly greater than the number of decisions that appear in the graphs of that publication due to some coalitions turning out to be minor due to dropped decisions, after we had already assigned slant to the others. Those assignments of slant are used for this audit. For example, in the composition defined by Stevens as the junior justice, the majority coalition of Blackmun, Brennan, Marshall, Stewart, and White issued three decisions. One of the three we drop because it has two dissents that are so different that they may be considered to be on either political side of the majority (*Concerned Citizens of Southern Oh., Inc. v. Pine Creek Conservancy Distr*., 429 U.S. 651 [1977]). The surviving two decisions make the majority minor and it does not appear in those graphs. Nevertheless, the slants of the other two decisions of that coalition remain coded and this audit uses them. In the example's case, our graph for the Stevens composition displays 98 decisions but we coded 100 and this audit uses all 100. Also, our prior analysis assigns slant to decisions that the Database codes with indeterminate slant or leaves without a slant.

conservative slant, or the fourth column presents the number of disagreements where the Database assigned a liberal slant. For example, the first row indicates that during the composition defined by the junior justice being Vinson, the court issued 52 tightly split decisions from majorities that issued three or more decisions. We disagree with none of those of the 52 that the Database codes as conservative. We disagree with one of those that the Database codes as liberal.

Table 6.A.4. Audit of Political Slant.

Composition	*Reviewed*	*DB cons*	*DB lib*
Vinson	52	0	1
Stewart	81	0	0
Powell & Rehnquist	78	2	2
Stevens	101	3	1
O'Connor	123	6	5
Kennedy	73	0	1
Breyer	159	6	5
Alito	69	0	0
Kagan	64	3	6
Total	800	20	21

Note: Audit of 5–4 decisions of long-lived compositions, number of decisions reviewed, and disagreements where the Database coded the decision conservative and liberal.

An example of a disagreement is *San Diego Gas & Electric v. City of San Diego*.[2] A municipality changed the zoning of a large parcel of land, preventing the owner's planned development. The owner sought compensation arguing that the change was a regulatory taking. The Court dismissed. The dismissal meant that the municipality did not have to pay compensation to the owner whose plans for the land were frustrated by the changed zoning. The Database codes this as a takings issue,[3] and a conservative result. Some readers would agree with the Database that this is a conservative result, likely either from the perspective of federalism, that the local authorities are allowed to act, or from the perspective that federal (takings) law was not expanded to cover this setting. We both consider more salient the result for business activity. Municipalities were empowered against owners of land to prevent the planned use of the land. Therefore, we see it as a liberal result.

The disagreement is neither unassailable nor unreasonable. Perhaps scholars focused on federalism or takings would see those aspects as more important, whereas we both teach business law courses, which may produce a slight bias to place more importance on the consequence of the decision for business.

How different readers could interpret political slant differently is also apparent in the discussion of the decisions of the Stevens and the O'Connor compositions that the Epstein, Landes, and Posner filtering drops.[4] Especially poignant are two, *NLRB v. Int'l Longshoremen's Assn. AFL-CIO*[5] of the Stevens composition and *New York v. Uplinger*[6] of the O'Connor composition. The Database and our assessment differ about the slant of those two cases. The Database codes both as conservative and we consider both liberal. We think the

2. 450 U.S. 621 (1981).
3. The Database codes the dispute as issue 40070, which the data guide describes as "due process: takings clause, or other non-constitutional governmental taking of property."
4. *See infra*, text accompanying notes 1–13.
5. 447 U.S. 490 (1980).
6. 467 U.S. 246 (1984).

Database is making an obvious error in *Longshoremen*. The union wins. That is liberal and we do not understand from which perspective the Database codes it as conservative.

Uplinger is more complex. The ostensible issue in *Uplinger* is the constitutionality of a loitering statute, which the New York courts invalidated in connection with their simultaneous invalidation of the criminal prohibition of homosexual sodomy as a matter of interpreting the Constitution of New York. The police used the loitering statute to target the same individuals as the criminal sodomy that was decriminalized. The United States Supreme Court did not grant *certiorari* to the sodomy issue but heard the loitering one. Then, the Court dismissed for *certiorari* improvidently granted. The dismissal restored the outcome in the New York courts, namely the invalidation of the loitering prohibition. We concluded that this was a liberal outcome, because the pro-gay-rights result obtained. The Database codes it as conservative, but an explanation is not apparent. Perhaps the Database editors consider the case conservative from a federalism perspective, that federal law did not encroach into this loitering corner of state law.

Although confidence in co-author Sullivan's political sensitivity, after having served about four years as State Budget Director and two decades on the Indiana Supreme Court,[7] should be high, the point is not that this audit used the objectively correct slants because the perception of political slant is fundamentally subjective for the borderline cases. Rather, the point is that this alternative, but admittedly also subjective, assignment of slants does not reveal a bias. Different jurists' audits would likely disagree over the slant of slightly different subsets of decisions. The claim is that no reasons appear for thinking that any disagreement is biased. The disagreements of this audit could not have been more evenly distributed, 20 with conservative assignments, and 21 with liberal assignments, as the bottom line of the Table shows.

Debatable as some assignments of political slant are, compared to our reading of 800 cases, the Database assignments do not appear to have a bias. Therefore, whether a reader has confidence in the Database's assignment or in our assignments with Sullivan, the statistical analysis will not tend to mislead. More generally, although many readers will disagree with some assignments of political slant, if those readers assigned slants, then their experience could parallel ours: their assigned slants could come very close to the counts of the Database despite disagreeing over some decisions. Confidence in the likelihood of this will increase as more scholars subject the database to additional audits. Habilitating the database's investment in assigning political slants is not trivial.

7. See *Hon. Frank Sullivan Jr.*, at https://www.in.gov/courts/supreme/justices/frank-sullivan/ [perma.cc/C94F-SYTH]; *Justices of the Indiana Supreme Court* p. 109 at https://www.in.gov/courts/supreme/files/justice-bios.pdf [perma.cc/YRS9-VVR7] (both last visited Aug. 2, 2021).

Appendix 6.B: The Thirteen Filtered Decisions of the Stevens and O'Connor Compositions

This appendix reviews the eight cases that are filtered from the Stevens composition and the five that are filtered from the O'Connor one by the correction of Epstein, Landes, & Posner. The Epstein, Landes, and Posner correction changes to unspecified the political slant of cases that the Supreme Court Database codes as belonging to a set of issues.

Table 6.B.1: Cases of the Stevens Composition Dropped by the Epstein, Landes, & Posner Filtering.

Decision, US citation, year	*Dbse Slant*	*Our Slant*	*Audit recom'n*
Alfred Dunhill of London v. Cuba, 425 U.S. 682 (1976)	Lib'l	N/A	Drop
Concerned Citizens of Southern Ohio, Inc., v. Pine Creek Conservancy Distr., 429 U.S. 651 (1977)	Cons've	N/A	Drop
Trainor v. Hernandez, 431 U.S. 434 (1977)	Cons've	Cons've	Cons've
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	Cons've	N/A	Cons've
ABC Inc. v. Writers Guild, 437 U.S. 411 (1978)	Cons've	Cons've	Cons've
Moore v. Sims, 442 U.S. 415 (1979)	Cons've	Cons've	Cons've
NLRB v. Int'l Longshoremen's Ass'n AFL-CIO, 447 U.S. 490 (1980)	Cons've	Liberal	Liberal
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981)	Cons've	N/A	Cons've

Table 6.B.1 has the eight cases dropped from the Stevens composition. The first column holds the citation to the decision. The second column holds the political slant that the Database assigns. The third and fourth columns hold the slant assigned in Chapter 4 and the action recommended by this audit. For example, the first row shows that *Alfred Dunhill* was coded liberal by the Database, that it was not included in the Chapter 4 coding (because it came from a majority that did not produce three or more decisions), and that this audit

recommends that it should be dropped. The paragraphs after the table discuss each decision in turn.

The case of *Alfred Dunhill of London, Inc. v. Cuba*[1] was an indirect result of Cuba's nationalization of cigar manufacturing facilities. Dunhill imported cigars before and after expropriation. The Cuban previous owners of the facilities, who had fled to the United States, sought the payments that Dunhill made to intermediaries for the new Cuban regime. Cuba intervened and the lower courts accepted Cuba's argument that the expropriation of facilities located in Cuba was covered by the act of state doctrine and was not reviewable by US courts. However, some of Dunhill's payments corresponded to cigars made before the expropriation. For the amounts corresponding to the latter, the Cuban erstwhile owners won in district court. The Court of Appeals sided with Cuba and treated those amounts as expropriated as well. The Supreme Court disagreed in an opinion by White. The unusual dissenting coalition of Brennan, Stewart, Marshall, and Blackmun took the position that once Dunhill paid, the funds were in Cuba and were covered by the act of state treatment of Cuba's expropriation of the manufacturers' accounts receivable, despite that if the funds had not been paid, then the US-centric nature of the contract would have excluded it from Cuba's act-of-state sphere. In the context of chapter 4 we do not code *Dunhill* because it was authored by a coalition that did not author three or more decisions (the other decision this coalition authors is *Young v. Amer. Mini Theaters*, 427 U.S. 50, 1976). The Database assigns *Dunhill* issue 90490 ("judicial administration: Act of State doctrine" adding "Note: jurisdiction of the federal courts or of the Supreme Court") and codes it as liberal. If the result is seen from the perspective of property location, as the dissent does, then the dissent would be seen as the conservative one, refusing to take jurisdiction. If the result is seen as vindicating property rights of expropriated owners, then the majority would be seen as conservative. If the result is seen as one where US courts take jurisdiction over property abroad, then it takes the liberal slant that the Database assigned. Reasonable interpreters can differ. Someone following the spirit of Professor Shapiro's doubts and refusing to assign slant, could not be faulted. The removal of the case by the Epstein, Landes, & Posner filtering, therefore, is perfectly reasonable.

The Court issued a brief *per curiam* opinion in *Concerned Citizens of Southern Ohio, Inc., v. Pine Creek Conservancy Distr.*[2] Ohio created a regime of review of Ohio's creation of multi-county conservancy districts for flood control and similar issues. The creation of the districts would be reviewed by courts composed of judges of each county. Citizens attacked this regime as unconstitutional for violating judicial independence (the judges were paid extra for their work on such courts), one-person-one-vote principles (the number of judges from each county was not proportional to its population), and takings law (related to trusting counties to weigh the taking). The court below considered the matter foreclosed by the upholding of the same statute in *Orr v. Allen*.[3] The majority's opinion stated that the challenges to the statute in *Orr v. Alen*

1. 425 U.S. 682 (1976).
2. 429 U.S. 651 (1977).
3. 248 U.S. 35 (1918), *aff'g* 245 F. 486 (W.D. Ohio 1917).

were different and remanded for full consideration of the new arguments. Chief Justice Burger would not remand, would rather give full consideration to the case, but did not write a dissent. The dissent by Rehnquist with Powell and Stevens observes that the lower court did fully consider these arguments and appropriately dismissed them. In the context of chapter 4 we drop the case because Burger's position to grant a full hearing is not in harmony with the other three dissenters' position for dismissing. Indeed, the former should be seen as liberal for taking jurisdiction and the latter as conservative for respecting the state's arrangement. The Database codes the disposition as conservative under issue 90200. (A civil procedure category of "no merits: miscellaneous" with "Note: use only if the syllabus or the summary holding specifies one of the following bases." Not further explained). The political slant of the decision depends on which alternative one considers in interpreting the decision. If the alternative is a full hearing, then the remand appears to merely delay matters without a clear political slant but perhaps with a liberal bend for prolonging judicial involvement. If the alternative is the dismissal for which the three-member dissent argued, then the remand appears liberal. A reader even weakly subscribing to the spirit of Shapiro's doubts would refuse to assign a slant to the case. Dropping the case can hardly be faulted.

Takings issues surface in *Trainor v. Hernandez*,[4] under the guise of the seizure of fraudulently obtained welfare payments. The Court considered the resorting to federal courts inappropriate while state remedies for the taking existed. The dissenters (Stewart, Brennan, Marshall, and Stevens) would side with the recipients of the payments and find the state process inappropriate. Clearly, the dissenters took the liberal position and the majority took the conservative one (both from a federalism perspective and from a takings one). So agrees our coding for chapter 4. Dropping the case is not appropriate.

A famous first amendment case allowing corporate political spending joins this list in *First National Bank of Boston v. Bellotti*.[5] The majority found the campaign spending limitations violative of corporations' free speech rights, clearly the conservative result. The unusual group of dissenters was split. White with Brennan and Marshall took squarely the position that campaign spending limits on corporations are appropriate, the liberal position. Rehnquist dissented separately to argue that the number of states over a long span of time that had limited corporate campaign spending deserved special deference. Rehnquist's is a conservative position from the federalism perspective. Because this 5–4 alignment produced no other decisions, in the context of chapter 4 we do not code the case. However, the outcome is clearly conservative and the case should not be dropped.

A labor dispute was at the center of *ABC Inc. v. Writers Guild*.[6] The dispute involved a union's disciplining of members who only did work covered by the collective bargaining agreement (writing for shows) as an adjunct to their main duties, which were supervisory, because they were directors, producers, or held other

4. 431 U.S. 434 (1977).
5. 435 U.S. 765 (1978)
6. Amer. Broadcasting Co., Inc. v. Writers Guild, 437 U.S. 411 (1978).

such positions. These member directors or producers continued to work (but without writing for shows) during a strike. The union penalized them. The Supreme Court ruled against the union, which is the clearly conservative result. No reason to drop the case appears.

Federal abstention from state processes reviewing child custody was the focus of *Moore v. Sims*.[7] The state, suspecting child abuse, had summarily taken custody of the children. The parents tried to raise *habeas corpus* arguments in federal court. The Supreme Court held that the federal courts should abstain while the state custody process was under review. The result is clearly conservative. Our chapter 4 coding agrees. Granted, from a child custody perspective, one could argue that the outcome is liberal, in that state intervention was allowed. Most readers should agree that this is not the most salient aspect of the case. The case should not be dropped.

Even the one decision where the database disagrees with our chapter 4 coding does not indicate that it was correctly dropped by the Epstein, Landes, & Posner filtering. Rather, *NLRB v. Int'l Longshoremen Ass'n AFL-CIO* is clearly liberal. The issue stemmed from the new technology of containers and their handling by longshoremen. The NLRB had ruled that some aspects of the work were outside the collective bargaining agreement, letting employers turn to non-union labor for them. The Supreme Court, in an opinion by Marshall joined by Brennan, White, Blackmun, and Powell, sided with the union. The dissent by Burger with Stewart, Rehnquist, and Stevens, sees the original interpretation by the NLRB, which only excluded from the collective bargaining agreement the work of loading and unloading containers far from the pier (as parts of the activity of trucking the containers, for example) as correct. The database categorizes the issue as 70020, "union antitrust: legality of anticompetitive union activity," which is not further defined. Issues 70040 ("National Labor Relations Act" and issue 70210 ("miscellaneous union") are alternatives that the Database did not choose but a reader may consider more apt. Most readers would agree that the decision is liberal, the Database's coding of it as conservative is false, and that no reason to drop the case exists.

Last is *Rosewell v. LaSalle National Bank*.[8] Taxpayers argued that the state's process for contesting tax payments violated federal due process due to the slowness of the state process and, therefore, the state was not entitled to the usual statutory deference. The Supreme Court sided with the state, which is the clearly conservative result from a federalism perspective. In the context of chapter 4 we do not code the case because it came from a unique coalition. Granted, if a reader focused on the tax consequences of the case, that the taxpayers do not get to challenge a tax, one could argue that the outcome is liberal. However, that level of analysis seems less salient. More readers would likely agree that *Rosewell* is conservative and no reason to drop the case appears.

The conclusion of this audit of the eight decisions that the Epstein, Landes, & Posner filtering drops is that two decisions should indeed be dropped but the rest should not. The dropped cases are coded by the database one liberal and one conservative. No reason to drop the

7. 442 U.S. 415 (1979).

8. 450 U.S. 503 (1981).

remaining cases appears but one seems falsely coded by the Database as conservative. Instead of 7–1 conservative to liberal, these cases should be counted as 5–1. The 1.7 percent decrease of the conservative ratio of the Stevens composition by the Epstein, Landes, & Posner filtering is excessive. The best estimate of the conservative ratio of the Stevens composition should be recalibrated from 61.24% (79 out of 129) to 60.63% (77 out of 127), or unchanged at 61% after rounding.

Turning to the 5–4 decisions of the O'Connor composition that the Epstein, Landes, and Posner filtering drops, those are five. They appear in table 6.B.2 and are all coded as conservative by the Database.

Table 6.B.2: Cases of the O'Connor Composition Dropped by the Epstein, Landes, & Posner Filtering.

Decision, US citation, year	*Dbse Slant*	*Our Slant*	*Audit recom'n*
Fair Ass'mt v. McNary, 454 U.S. 100 (1981)	Cons've	N/A	Cons've
Bowen v. USPS, 459 U.S. 212 (1982)	Cons've	N/A	Cons've
NY v. Uplinger, 467 U.S. 246 (1984)	Cons've	Liberal	Drop or Liberal
Pattern Maker's League . . . v. NLRB, 473 U.S. 95 (1985)	Cons've	Cons've	Cons've
Posadas de P.R. Ass'ts v. Tourism Co of PR, 478 U.S. 328 (1986)	Cons've	Cons've	Cons've

Taxation is at the center of *Fair Assessment in Real Estate Association, Inc. v. McNary*.[9] Taxpayers complained in the federal courts alleging the impropriety of state taxes. The Supreme Court refused to allow the federal courts to intervene. From a federalism perspective the result is conservative, the state's result stands. From a taxation perspective the result is liberal, a tax stands. Most jurists should agree that the more salient aspect is the former and the decision is a conservative one. In the context of chapter 4 we do not assign slant because this majority coalition only issued one more decision (*NY v. Quarles*, 467 U.S. 649, 1984).

The apportionment of damages to a union for falsely refusing to help a member against a false termination from employment was the issue in *Bowen v. United States Postal Service*.[10] The trial found that the Postal Service terminated Bowen's employment falsely and that his union aggravated the harm by not taking the case to arbitration. The Court of Appeals held that the union did not have liability, only the employer could owe back wages. The Supreme Court reversed, restoring the apportionment of liability so that it would also burden the union. This is a decision to the disadvantage of unions and, therefore, clearly conservative. In the context of chapter 4 we do not code the decision because this majority coalition issued no other decisions.

A New York loitering statute was the issue in *NY v. Uplinger*.[11] The Supreme Court considered that the analysis of the New York courts depended on their analysis of the statute on consensual sodomy. The New York courts considered the two statutes linked and when they held the sodomy statute to violate the New York constitution, the loitering statute became pointless and also improper. The United States Supreme Court, hav-

9. 454 U.S. 100 (1981).
10. 459 U.S. 212 (1982).
11. 467 U.S. 246 (1984).

ing refused to hear the sodomy issue, dismissed the case, letting the New York result invalidating the statute stand. The database codes the result as conservative with issue number 90150 ("No merits: writ improvidently granted"), perhaps under a federalism reasoning, that the state result stands. We code it as liberal because the result aligns with gay rights. The majority are Blackmun, Brennan, Marshall, Powell, and Stevens. White writes for the minority joined by Burger, Rehnquist and O'Connor that the Court should reach the merits. This minority would be unlikely to align themselves with gay rights, reinforcing the notion that the outcome is liberal. A reader following the spirit of Shapiro would likely consider that the case should be dropped. However, most readers would likely agree that the outcome was liberal despite the curiosity of the refusal to decide.

A union's fining of members who resigned during a strike (in order to resume work) was considered inappropriate by the National Labor Relations Board and that decision was under review in *Pattern Makers' League of North America, AFL-CIO v. N.L.R.B.*[12] The Supreme Court sided with the NLRB producing the clearly conservative result. Our chapter 4 coding agrees.

The freedom of commercial speech was at issue in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico.*[13] Puerto Rico prohibited Casinos from advertising. The casino challenged the prohibition as a violation of its right to free speech. The majority, Burger, White, Powell, Rehnquist, and O'Connor, considered that the prohibition did not violate the constitution. Brennan, Marshall, Blackmun, and Stevens considered the prohibition improper. Both the Database and our chapter 4 coding consider the result conservative from a free speech perspective. Although one could consider the result liberal from a regulation perspective, most readers should agree that the salient point is that of free speech and find the result conservative.

In sum, the five decisions that the Epstein, Landes, and Posner filtering drops should either count as four conservative and one liberal or four conservative and one dropped, depending on one's stance on *Uplinger*. The conservative ratio of the O'Connor composition, from 56 percent conservative for 82 conservative out of 147 decisions, becomes either 81 out of 147 conservative and 55 percent conservative, or 81 out of 146 and unchanged at 55 percent after rounding. The Epstein, Landes, and Posner filtering would have changed it to 54% conservative. After this mini audit, both the unadjusted figure of 56 percent and the 54 percent of the Epstein, Landes, and Posner adjustment appear equally accurate. If the comparison were based on unrounded results, the filtered figure is .5423 and the unfiltered one .5578, whereas the mini audit suggests .551 or .554. The unfiltered result differs by less from the audited results than the filtered results do (.7% and .3% rather than .9% and 1.3%). Therefore, again, the unfiltered estimate is more accurate.

In all, the position of this analysis that the disagreements with the Database are likely to be unbiased and do not deserve correction is vindicated. Especially important for this implication is the fact that the EL&P filtering did drop falsely coded cases, but the unfiltered results are more accurate nevertheless. The reason for relying on the Database's unfiltered results, again, is not

12. 473 U.S. 95 (1985).

13. 478 U.S. 328 (1986).

their accuracy but their unbiasedness. Accuracy, due to subjectivity, is unattainable and pointless. Unbiasedness, due to the large number of decisions, can be relied upon with the caveat that small disagreements will exist.

Appendix 6.C: Fraction Aligned

If the premise of the analysis of Chapter 6 that ideological scores have some accuracy is correct, then the striking difference between the accuracy of distance as an explanation of the conservative ratio in those decisions where the justices align by ideology and its lack of explanatory power in the remaining decisions has an implication about the mix of decisions. Each composition produces a mix of decisions, those in which justices align by ideology, and those in which they do not; those in which the legal issues split the justices in a way that correlates highly with ideology, and those in which the legal issues have little relation to ideology. That the median's ideological location was predictive of the likely outcome—the conservative ratio—in the former group, suggests that, if the same dynamics are in operation, the distance between the justices adjacent to the median should be related to the fraction of 5–4 decisions that have the justices align by ideology. Moreover, the strength of the relation between the ideological distance and the fraction of decisions with aligned justices supports the framework of the analysis in Chapter 6. The premise of the analysis—that ideological scores have some accuracy—is validated.

Imagine a composition in which the justices next to the median are very close in terms of ideology. How often will that composition split 5–4 on matters that correlate strongly with ideology compared to a composition that has significant ideological space separating the two justices next to the median? The small ideological differences of the former suggest that, as disputes vary on matters correlated to ideology, all three middle justices will relatively often change sides together. The result is relatively fewer 5–4 decisions by ideology.[1] When the justices next to the median have much ideological ground separating them, more disputes would tend to fall into that middle ground. The two justices next to the median would tend to take opposite positions and the dispute would produce a 5–4 split. Therefore, more ideological ground between the

1. One may jump to the conclusion that more decisions will be 6–3 but yet more justices may also switch sides and instead produce more decisions of stronger majorities.

justices next to the median should tend to produce more 5–4 disputes. The frequency of 5–4 decisions should increase with the ideological distance between the justices next to the median.

This dynamic would not have an effect on the disputes that correlate weakly with ideology. Consider trust in juries as an example of an area in which judicial attitudes have a weak correlation with political alignment. Some judges may require that the court supervise and guide juries closely. Other judges may grant juries latitude and accept jury decisions more easily. For disputes in which trust in juries is dispositive, the ideological distance between the justices next to the median has little relevance. Changes in the ideological distance between the justices next to the median would tend not to influence the frequency of such 5–4 decisions.

The phenomenon at issue is again binary: does a 5–4 decision have the justices aligned by ideology? The above theory posits that the probability of observing 5–4 decisions with the justices aligned by ideology should increase as the distance between the justices next to the median increases. An appropriate statistical test for this relation is, again, the probit regression. The explanatory variable is ideological distance between the justices next to the median according to the Martin & Quinn metric. The outcome variable is whether decisions have ideologically aligned justices.

Running this probit regression produces extraordinary confidence in the statement that the probability that a 5–4 decision has the justices align by ideology increases with the ideological distance between the justices next to the median. The probability that the data can arise simply by chance, without an underlying relation, is a number that starts with twenty-five zeros after the decimal point. The corresponding percentage value of statistical confidence is ninety-nine followed by twenty-five nines after the decimal point. The distance between the justices next to the median increases the probability that a first-year 5–4 decision has the justices align ideologically.

The relation is visible in Figure 6.C.1. The horizontal axis holds the ideological distance between the justices next to the median in the units used by Martin & Quinn (the Figure's maximum is about 2.8). The vertical axis corresponds to the fraction of 5–4 decisions where the justices align by ideology, from zero to one. Each point corresponds to a new composition of the Supreme Court, defined by its junior justice. The junior justices are abbreviated as in Figures 6.2 and 6.3. Again, compositions that last more than one term appear at the average of their distances, weighted by the number of decisions issued each term.

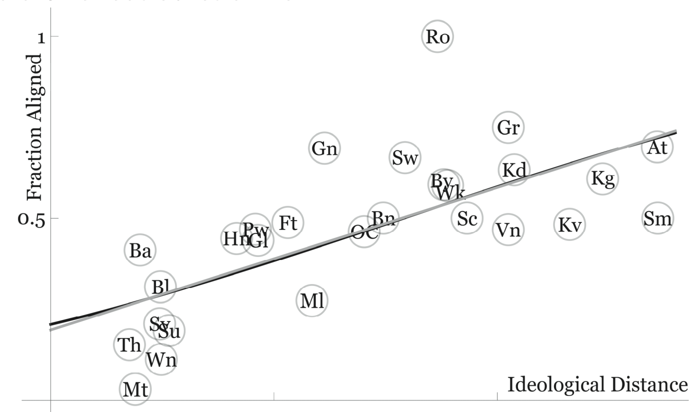

Figure 6.C.1. The fraction of 5–4 decisions where the justices align ideologically against ideological distance between the justices adjacent to the median.

Take as examples the compositions of Warren (from his appointment on October 5, 1953, to the departure of Robert Jackson on October 9, 1954, and the appointment of the next justice, Harlan, on March 28, 1955) and Roberts (from his appointment on September 29, 2005, to the appointment of the next justice, Alito, on January 31, 2006). They abbreviate to "Wn" and "Ro." The point corresponding to Warren is at the lower left. The distance between the justices next to the median was unusually small after the appointment of Warren. The ideological distance between Jackson and Frankfurter (Clark was the median), is about 0.5 according to Martin & Quinn. That composition had nine tightly split decisions.[2] The justices aligned ideologically in one of those nine.[3] By contrast, in the—admittedly only two—tightly split decisions while the junior justice was Chief Justice Roberts, the justices aligned ideologically in both.[4] The distance between the justices next to the median after the appointment of Roberts is a little above average. The distance between Breyer and Kennedy (O'Connor is the median) is over 1.7 per Martin & Quinn.

The black solid line is the probability of a decision in which the justices align by ideology according to the probit regression. The regression predicts about a quarter of the decisions would be aligned in the Warren composition. About half of the decisions are predicted to have ideologically aligned justices in the Roberts composition.

In light gray, the Figure also presents the linear regression that clones the probit (and is barely distinguishable) in order to obtain the fraction of the variation of aligned decisions that the regression explains, its "adjusted r-squared." The linear regression that clones the probit seeks to explain how the fraction of decisions that have the justices align ideologically responds to the ideological distance between the justices next to the median (whereas the probit estimates the probability that a decision has aligned justices given those distances). To clone the probit, each term of each composition is weighed by the number of 5–4 decisions issued, because the probit takes as input each decision, not each term. As a result, Warren's data, for example, receive more weight than Roberts's. If the data for the linear regression were not weighed then the line would be a little steeper, in part due to the increased impact of the Roberts composition in the calculation.

Table 6.C1 presents the results of the probit regression and the adjusted r-squared of the linear clone. Because the results of the probit regression pass through the normal distribution, they are not directly interpretable.[5] But the p-value, the probability of observing these results if the relation did not truly exist, is telling.

2. *See generally* Arkansas v. Texas, 346 U.S. 368 (1953); United States v. Five Gambling Devices, 346 U.S. 441 (1953); United States v. Morgan, 346 U.S. 502 (1954); Irvine v. California, 347 U.S. 128 (1954); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Miller Bros. Co. v. Maryland, 347 US. 340 (1954); Ry. Express Agency, Inc., v. Virginia, 347 U.S. 359 (1954); United States v. Dixon, 347 U.S. 381 (1954); Md. Casualty Co. v. Cushing, 347 U.S. 409 (1954).

3. *See Accardi*, 347 U.S. at 270.

4. *See* Brown v. Sanders, 546 U.S. 212, 242 (2006); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 393 (2006).

5. Of course, due to the arbitrary units of the Martin & Quinn ideological ratings, the coefficients of the linear regression are not readily interpretable either. The linear regression indicates that the aligned ratio increases by about 20% per M&Q unit of ideology.

Distance between the justices adjacent to the median increases the probability that a 5–4 decision has the justices align by ideology. If that relation did not truly exist, the probability that the observed data could arise by chance is a number that begins with twenty-five zeros after the decimal point, strikingly small. From the adjusted r-squared we learn that the regression explains 56% of the variation in percentage of decisions that are aligned, a fairly high percentage in social science research.

Table 6.C1. Distance and Ideological Alignment.

	Estimate	*P-Value*
Constant (probit)	-0.814	7E-24
Distance (probit)	0.52	5E-26
Adj R Squared (linear clone)	56%	

Note: Regressions of whether the justices align ideologically in 5-4 decisions against the ideological distance between the justices next to median.

Because the chapter used the separation between first-year and subsequent decisions, a related disclaimer is in order. That separation has no bearing on this analysis about the fraction of 5–4 decisions that have the justices align ideologically. The relation of the ideological distance between the justices next to the median to the fraction of party-line decisions does not separate first-year decisions. Indeed, upon splitting the sample into first-year and subsequent year decisions, no difference appears in the impact of distance on the fraction of decisions in which the justices are aligned by ideology.

The point is the support of the premise of the analysis of Chapter 6. Both these looks at the Court's operation in the production of 5–4 decisions are highly responsive to the Martin & Quinn ideology scores, which means that these scores cannot be entirely false.

Appendix 7.A: Un-Americanism Case by Case

Observe the unabated fear of Communism through the conservative justices' own words. Contrast the uncompromising primacy that the liberal justices place on the Bill of Rights to the pragmatism of the other justices.

A. Truman Appointees and Jackson's Fear of Communism

The House Un-American Activities Committee was established in 1938 to counter both Nazi and Soviet infiltration concerns.[1] The first notable un-Americanism prosecution against alleged communist sympathizers came in 1943. On February 1st, Representative Dies, Democrat from Texas, the chairman of the Committee, denounced 39 senior federal employees as communist sympathizers on the floor of the House of Representatives.[2] The House proceeded to investigate them and crafted an appropriations bill that prohibited the continued payment of their salaries.[3] Despite the disagreement of the Senate and the opposition of President Roosevelt, the bill was eventually signed into law.[4] Three of the employees challenged its validity, supported by the Solicitor General; Congress appointed special counsel to take the opposing view. The challenge reached the Supreme Court in 1946 in *Lovett*.[5] The Court unanimously invalidated the non-payment of the salaries. The six-member majority, in an opinion authored by Hugo Black, considered the appropriations bill tantamount to

1. United States v. Lovett, 328 U.S. 303, 308 (citing H.R. 1282, 83 Cong. Rec. 7568–7587).
2. *Id.*
3. *Id.*
4. *Lovett*, 328 U.S. 312–13 ("The Senate Appropriation Committee eliminated Section 304 and its action was sustained by the Senate. 89 Cong. Rec. 5024. After the first conference report which left the matter still in disagreement the Senate voted 69 to 0 against the conference report which left Section 304 in the bill. The House however insisted on the amendment and indicated that it would not approve any appropriation bill without Section 304. Finally[,] after the fifth conference report showed that the House would not yield the Senate adopted Section 304. When the President signed the bill he stated: 'The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.'")
5. United States v. Lovett, 328 U.S. 303 (1946).

a bill of attainder, prohibited by Article I.[6] The concurring opinion of Felix Frankfurter, joined by Stanley F. Reed, espoused constitutional avoidance. The majority treated the law as imposing a penalty of firing the employees, which turned the law into a bill of attainder. Frankfurter advocated restraint vociferously.[7] The mere prohibition of the payment of salary, read narrowly, was no punishment triggering attainder but allowed the payment of compensation for the employees' continued services (as unpaid contractual obligations of the government, which the claimants had pursued below in the Court of Claims).[8]

In 1949, in *Christoffel*, because a congressional committee did not have quorum, the Court exonerated a defendant convicted of perjury before it.[9] In contrast to *Lovett*'s unanimity, the Court split 5–4. Jackson's dissent argued that precedent allowed Congress to set its own rules explicitly or implicitly and Congress's implicit rule was that, after quorum was established by the presence of a majority of the members of a body, the body could take evidence without a majority present, and that nothing about the conviction was unfair.[10]

President Truman made four appointments to the Court. Before the first case of the sample, Republican Burton was appointed in a bipartisanship gesture in September 1945, placing him outside the sample period. Before the second case, *Christoffel*, Treasury Secretary Vinson was appointed Chief Justice, replacing Stone, in

6. Constitution, Article I, Section 9, Paragraph 3 ("No Bill of Attainder or ex post facto Law shall be passed"). United States v. Lovett, 328 U.S. at 313-14 ("The [challenged provision]'s language as well as the circumstances of its passage . . . show that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency. Any other interpretation of the Section would completely frustrate the purpose of all who sponsored Section 304, which clearly was to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job. What was challenged therefore is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work" [citations omitted]). Justice Jackson did not participate in the decision.

7. *Lovett*, 328 U.S. at 319–20 ("It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. . . . And so 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' This admonition was uttered by Mr. Justice Holmes in one of his earliest opinions and it needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements. Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint. The scrupulous observance, with some deviations, of the professed limits of this Court's power to strike down legislation has been, perhaps, the one quality the great judges of the Court have had in common. Particularly when congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason. The inclusion of § 304 in the Appropriation Bill undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. . . . [These practices have] the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.")

8. *Lovett*, 328 U.S. at 330 ("[I]t merely prevented the ordinary disbursal of money to pay respondents' salaries. It did not cut off the obligation of the Government to pay for services rendered and the respondents are, therefore, entitled to recover the judgment which they obtained from the Court of Claims.")

9. Christoffel v. United States, 338 U.S. 84 (1949) (reversing a perjury conviction of a communist who denied being one before the House of Representatives Committee on Education and Labor). The court split 5–4, with a dissent by Jackson, joined by Chief Justice Vinson, Reed, and Burton.

10. *Christoffel*, 338 U.S. at 95 ("We do not think we should devise a new rule for this particular case to extend aid to one who did not raise his objection when it could be met and who has been prejudiced by absence of a quorum only if we assume that, although he told a falsehood to eleven Congressmen, he would have been honest if two more had been present.")

June 1946. In August 1949, Attorney General Clark was appointed to replace Murphy. In October 1949, Minton was appointed to replace Rutledge. All three replaced justices had only cast votes for the individuals in un-Americanism cases, however small the sample may be (one vote in Stone's case, and two votes in the others). Vinson, Clark, and Minton would turn out to be some of the justices voting most often for the prosecution, respectively 86%, 81%, and 85%.[11] Truman's appointments likely moved the Court strongly in favor of un-Americanism prosecutions. Yet, the transition was not entirely abrupt. Already in *Christoffel*, the Court had moved from its unanimity of *Lovett* to a 5–4 split.

The year 1950 brought several disputes about un-Americanism prosecutions to the Supreme Court.[12] *Dennis I* involved the trial of the General Secretary of the Communist Party for not complying with a Congressional subpoena.[13] At trial in the District of Columbia, the defendant attempted to exclude for cause from the jury all government employees and, having been denied, challenged his conviction by a jury that included seven government employees. The majority opinion, adhering to precedent that only allowed government employees to be excused for cause if they had actual bias, upheld the conviction.[14] Both Black and Frankfurter dissented, writing separately that the political atmosphere about disloyalty was so intense that government employees should be excused as a class from such trials. Frankfurter focused on the political atmosphere's influence on jurors.[15] Black made a broader attack on the political climate itself.[16] Clark and Douglas did not participate.

The logical implication of *Dennis I* was to permit defendants to question jurors who were government employees to ascertain any actual bias. That questioning was denied in *Morford* and the Court reversed with a brief *per curiam* opinion unanimously without Clark's participation.[17] *Morford* is one of the opinions contrib-

11. *See* table 7.1, Part III above, and accompanying text.

12. *Dennis I*, *Morford*, *Bryan*, and *Fleischman* were decided in 1950.

13. Dennis v. United States, 339 U.S. 162 (1950) ("*Dennis I*").

14. Dennis v. United States, 339 U.S. 162 at 523 (1950) ("*Dennis I*") ("[P]etitioner's contentions amount to this: Since he is a Communist, in view of all the surrounding circumstances an exception must be carved out of the rule laid down in the statute, and construed in *Wood* and *Frazier*, that there is no implied bias by reason of Government employment. Thus[,] the rule would apply to any one but a Communist tried for contempt of a congressional committee, but not to a Communist. We think the rule in *Wood* and *Frazier* [requiring actual bias] should be uniformly applied.")

15. *Dennis I*, 339 U.S. at 525–26 ("There is a pervasiveness of atmosphere in Washington whereby forces are released in relation to jurors who may be deemed supporters of an accused under a cloud of disloyalty that are emotionally different from those which come into play in relation to jurors dealing with offenses which in their implications do not touch the security of the nation. . . . [I]t is asking more of human nature in ordinary government employees than history warrants to ask them to exercise that 'uncommon portion of fortitude' which the Founders of this nation thought judges could exercise only if given a life tenure. . . . A government employee ought not to be asked whether he would feel free to decide against the Government in cases that to the common understanding involve disloyalty to this country.") (Frankfurter, J., dissenting).

16. *Dennis I*, 339 U.S. at 529 ("Probably at no period of the nation's history has the 'loyalty' of government employees been subjected to such constant scrutiny and investigation by so many government agents and secret informers. And for the past few years press and radio have been crowded with charges by responsible officials and others that the writings, friendships, or associations of some government employee have branded him 'disloyal.' Government employees have good reason to fear that an honest vote to acquit a Communist or any one else accused of 'subversive' beliefs, however flimsy the prosecution's evidence, might be considered a 'disloyal' act which could easily cost them their job. That vote alone would in all probability evoke clamorous demands that he be publicly investigated or discharged outright; at the very least it would result in whisperings, suspicions, and a blemished reputation.") (Black, J., dissenting).

17. Morford v. United States, 339 U.S. 258 (1950).

uting to the gradual nature of the transition into the coming era of a greater rate of convictions.

In *Blau*, Justice Black wrote for a unanimous Court, without Clark's participation.[18] The opinion vindicated a Communist Party employee's right to remain silent in the face of a prosecution under the Smith Act for advocating the overthrow of the government. In contrast to *Blau*, the next year, in 1951, the Court, splitting 5–3, upheld the contempt conviction of the treasurer of the Communist Party in *Rogers*.[19] The Court distinguished *Blau*. *Blau* involved a blanket assertion of the privilege against self-incrimination in favor of the defendant or others. However, in *Rogers*, the defendant, after having admitted being the treasurer of the Communist Party, asserted the privilege, expressly intending to prevent subjecting others to questioning and prosecution. The majority held that the treasurer's initial answer was a waiver of the right. In dissent, Black, with Frankfurter and Douglas, argued that answering the subsequent questions could subject the treasurer to additional criminal consequences. Therefore, the privilege should apply and its waiver should not be interpreted broadly.

The purge of communist sympathizers from municipal employment, effectuated through loyalty oaths, reached the Court in 1951 in *Garner*.[20] The California legislature amended the Charter of the City of Los Angeles prohibiting the employment of individuals who advocated the violent overthrow of the government or were members of organizations that did. The city required oaths and affidavits from its employees. Some refused, were dismissed, and their challenges reached the Court. The Court split 5–4 in favor of the government. In an opinion by Clark, the majority found the regulations reasonable,[21] and not a bill of attainder.[22] Frankfurter's partial concurrence agreed that the state has a right not to employ those who seek to overthrow its government[23] but found the oath overbroad.[24] Justice Burton also concurred in part but found the oath inappropriate because it left "no room for a change of heart."[25] The dissents of Douglas and Black stated that the majority's distinction of *Lovett* was false—losing employment was punishment even if made through a general rule rather than the singling out of individuals as in *Lovett*. All the opinions distinguished a *per curiam* unanimous affirmance of loyalty oaths in Maryland, *Gerende*.[26] The Maryland statute was acceptable even to Black and Douglas because it was limited to current belief and intent to overthrow the government. Albeit

18. Blau v. United States, 340 U.S. 159 (1950).
19. Rogers v. United States, 340 U.S. 367 (1951).
20. Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716 (1951).
21. *Garner*, 341 U.S. at 720-21 ("[T]he Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States.")
22. *Garner*, 341 U.S. at 722 ("We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.")
23. *Garner*, 341 U.S. at 725 ("No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor.")
24. *Garner*, 341 U.S. at 726 ("The vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government.")
25. *Garner*, 341 U.S. at 729.
26. Gerende v. Board of Sup'rs of Elections of Baltimore City, 341 U.S. 56 (1951).

per curiam, *Gerende* stands out as the only unanimous decision of the Court in favor of the state on un-Americanism matters.

The prosecution of one organization, the Joint Anti-Fascist Refugee Committee, produced three decisions. Two were issued on the same day in 1950, *Bryan* and *Fleischman*.[27] The third, *Joint Anti-Fascist Refugee Committee v. McGrath*,[28] was issued a year later, in 1951. The first two regarded compliance with congressional subpoenas. *McGrath* was about the propriety of being included by the Attorney General in a list of communist organizations.

The organization sought to support fighters against Franco in Spain and had received prominent support.[29] Congress sought the list of members of the organization and subpoenaed its entire executive board. Only the organization's secretary, Bryan, had actual possession of the list. Yet, all members of the executive board were convicted for not complying with the subpoena.

The *Fleischman* decision applied to the members of the executive board who did not have possession of the list. The decision engaged two issues, the defenses of lack of quorum and that only the secretary, who had actual possession of the list, violated the subpoena; that the remaining members of the board could not unilaterally comply and produce the list.

The issue of lack of quorum was the primary issue in *Bryan* and applied to the House Committee on Un-American Activities. When the defendants appeared before the committee, and the committee demanded compliance with the subpoena, not enough members of the committee were present for it to have a quorum, raising again the issues of *Christoffel*. Nevertheless, the *Fleischman* and *Bryan* decisions held that any related objection had been waived because the defendants raised it for the first time during the trial. The decision distinguished *Christoffel* by interpreting that the text of the statute about perjury, which required a "competent tribunal," implied the requirement of a quorum.[30]

Interestingly, *Christoffel* was a 5–4 decision.[31] The majority was Black, Clark, Douglas, Frankfurter, and Murphy, who authored the majority opinion. Jackson's

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27. United States v. Bryan, 339 U.S. 323 (1950); United States v. Fleischman, 339 U.S. 349 (1950). From the same group also spring the later decision in Joint Anti-Fascist Refugee Committee v. McGrath, *see* note 28 and accompanying text, as well as *Basky*, *see* note 96 and accompanying text, below.

28. 341 U.S. 123 (1951) ("*McGrath*").

29. National sponsors included Leonard Bernstein, Rita Hayworth, Langston Hughes, Albert Einstein, Eugene O'Neill, and Orson Welles. *See* Joint Anti-Fascist Refugee Committee, WIKIPEDIA (available at https://en.wikipedia.org/wiki/Joint_Anti-Fascist_Refugee_Committee, visited 3/2/2020 [perma.cc/4NX4-U4FU]).

30. *Bryan*, 339 U.S. at 329 ("The *Christoffel* case is inapposite. For that decision, which involved a prosecution for perjury before a congressional committee, rests in part upon the proposition that the applicable perjury statute requires that a 'competent tribunal' be present when the false statement is made. There is no such requirement in R.S. § 102. It does not contemplate some affirmative act which is made punishable only if performed before a competent tribunal, but an intentional failure to testify or produce papers, however the contumacy is manifested.")

31. Jackson's concurrence in *Bryan*, 339 US at 344-45, analogizes the presence of only eight justices at the announcement of *Christoffel* with the absence of a quorum in a congressional committee ("It is ironic that this interference with legislative procedures was promulgated by exercise within the Court of the very right of absentee participation denied to Congressmen. Examination of our journal on the day *Christoffel* was handed down shows only eight Justices present and that four Justices dissented in that case. . . . I want to make it clear that I am not . . . suggesting the slightest irregularity in what was done. I have no doubt that authorization to include the absent Justice was given; and I know that to vote and be counted in absentia has been sanctioned by practice and was without objection by anyone. It is the fact that it is strictly regular and customary, according to our unwritten practice, to count as present for purposes of Court action one physically absent that makes the denial of a comparable practice in Congress so anomalous.").

dissent was joined by Chief Justice Vinson, Burton, and Reed. Douglas and Clark, members of that tight majority, did not participate in *Bryan* and *Fleischman*. Black and Frankfurter dissented in *Fleischman* and *Bryan* and opposed the un-Americanism prosecutions. The new appointee, Minton, joined the majority in *Fleischman* and *Bryan* to be the fifth vote in support of un-Americanism prosecutions. Un-Americanism prosecutions produce a tight split of the Court, highly dependent on the Court's composition. Murphy appears as the swing vote between *Christoffel* and *Bryan*/*Fleischman*. The two members who did not participate were almost polar opposites on this matter. Douglas would very rarely vote in favor of un-Americanism prosecutions whereas Clark would often side with the prosecution, as Table 7.1 reveals.

The *Fleischman* majority also rejected the idea that only the secretary violated the order to produce the list. Quoting precedent about corporate boards, the Court held that each had to use the powers of membership on the board to comply: vote to instruct the secretary to deliver the list or to remove the secretary.[32]

Black and Frankfurter in *Fleischman* wrote parallel dissenting opinions and Frankfurter also joined Black's opinion. Black's opinion looked closely at the section under which Fleischman's crime was charged. By its text, it only criminalized the failure to answer or to produce documents. The failure to cause action by a collective body to deliver documents, according to Black, was something different. The Committee may have had the power to issue orders to achieve that but did not.[33] Frankfurter's dissent underscores the same fault.[34] Similarly, in *Bryan*, Black, joined by Frankfurter, pointed to the text of the criminal provision alleged to be violated. It only penalized perjury, not the non-production of documents. Moreover, the right not to incriminate oneself, which the defendant had exercised, was firmly established.[35]

In 1950 the Court also decided the constitutionality of requiring labor unions to provide annual affidavits that no officer was a member of the Communist Party,

32. *Fleischman* at 356-57 ("When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order. It may be that the efforts of one member of the board will avail nothing. If he does all he can, he will not be punished because of the recalcitrance of others. But to hold that, because compliance with an order directed to the directors of a corporation or other organization requires common action by several persons, no one of them is individually responsible for the failure of the organization to comply, is effectually to remove such organizations beyond the reach of legislative and judicial commands." [citations omitted])

33. *Fleischman* at 366 ("A command to produce is not a command to get others to produce or assist in producing. Of course Congress, like a court, has broad powers to supplement its subpoena with other commands requiring the witness to take specific affirmative steps reasonably calculated to remove obstacles to production. But even though disobedience of such supplementary orders can be punished at the bar of Congress as contempt, Jurney v. MacCracken, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802, it does not come within the limited scope of R.S. § 102." Black, J. dissenting).

34. *Fleischman* at 381 ("It may well be that the House committee should have asked respondent to try to have convened a meeting of the executive board with a view to asking the custodian of the records to produce them. Such a procedure is suggested by what was done in Wilson v. United States, 221 U.S. 361, 370-371, 31 S.Ct. 538, 540, 55 L.Ed. 771, Ann.Cas.1912D, 558. Had respondent refused she would have subjected herself to a contempt proceeding for disobedience of a command of the committee. But this is not such a proceeding. As to the offense for which she was prosecuted, I agree with Judge Edgerton that an acquittal should have been directed." Frankfurter, J., dissenting).

35. *Bryan* at 346-47.

Douds.[36] Vinson wrote for the Court upholding the requirement as justified to avert politically motivated strikes and not considering it a bill of attainder. Frankfurter's concurrence notes the sharp division of world opinion,[37] recognizes the expansive powers of the legislature,[38] and only slightly moves from the Court's position.[39] Jackson's concurrence recognizes that requiring labor leaders to forswear allegiance to the Democratic or the Republican Party would be improper but argues that the Communist Party's foreign allegiance and belief in the overthrow of the government justify the different treatment.[40] Black dissents alone. Douglas, Clark, and Minton did not participate.

The subpoenaing of the executive board of the Joint Anti-Fascist Refugee Committee was related to its being listed as a subversive organization by the Attorney General pursuant to a more general effort to ensure that the rolls of public employees did not contain subversive individuals. Essentially, as the administration of President Truman was being attacked from the political right for having allowed the infiltration of communists in the ranks of the civil service,[41] it sought to defend itself (a) by identifying communists and fascists and removing them from public employment and (b) by showing that the administration had established that the remaining employees were not subversive. Executive Order 9835 established a process to verify the loyalty of all employees in the executive branch, where loyalty meant not being a communist or fascist. If an employee's loyalty raised doubts, the employee received a hearing before a loyalty review board without various protections that a full trial would have afforded (and which would prove fatal for the scheme when the court would review its substance in *Peters v. Hobby* in 1955, *see* text accompanying note 115 below). Because World War II effectively defeated fascism, the predominant target became communism. Also, the same executive order authorized the Attorney General to create a list of organizations "de-

36. American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382 (1950). A related issue will arise in *Killian*, *see* note 285 and accompanying text, below. In 1965, *Brown* will hold the prohibition against Communists holding union officerships unconstitutional, *see* note 323 and accompanying text.

37. *Douds*, 339 U.S. at 415 ("[T]he conflict of political ideas now dividing the world more pervasively than any since this nation was founded. . .").

38. *Douds*, 339 U.S. at 416–17 ("The central problem presented by the enactment now challenged is the power of Congress, as part of its comprehensive scheme for industrial peace, to keep Communists out of controlling positions in labor unions as a condition to utilizing the opportunities afforded by the National Labor Relations Act. . . Wrapped up in this problem are two great concerns of our democratic society—the right of association for economic and social betterment and the right of association for political purposes. . . . It is one thing to forbid heretical political thought merely as heretical thought. It is quite a different thing for Congress to restrict attempts to bring about another scheme of society, not through appeal to reason and the use of the ballot as democracy has been pursued throughout our history, but through an associated effort to disrupt industry.")

39. *Douds*, 339 U.S. at 421-22 ("If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of § 9(h) to be restricted to disavowal of actual membership in the Communist Party. . . But what Congress has written does not permit such a gloss nor deletion of what it has written. . . . I cannot deem it within the righful authority of Congress to probe into decisions that involve only an argumentative demostration of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country.")

40. *Douds*, 339 U.S. at 423 ("There are, however, contradictions between what meets the eye and what is covertly done which, in my view of the issues, provide a rational basis upon which Congress reasonably could have concluded that the Communist Party is something different, in fact, from any other substantial party we have known, and hence may constitutionally be treated as something different in law." Footnote omitted).

41. The speech of congressman Dies that led to *Lovett* was an example, *see* note 2, *supra*.

signate[d] as totalitarian, fascist, communist or subversive. . ."[42]

Two lines of litigation against this scheme reached the Supreme Court. (a) Three organizations challenged their designation as subversive in *Joint Anti-Fascist Refugee Committee v. McGrath*.[43] (b) A terminated employee challenged the process of review before the loyalty review boards in *Bailey v. Richardson*.[44] The Supreme Court issued both decisions on the same day, April 30, 1951.

Justice Clark, who had been Truman's Attorney General and presumably led the drafting of the Executive Order establishing loyalty review boards, recused himself from all related cases. The rest of the Court was sharply divided.

The Court split evenly in *Bailey*,[45] resulting in a one-sentence affirmance of the decision below. The three–judge panel of the D.C. Circuit Court of Appeals upheld the firing of the employee 2–1. The majority saw employment in the executive branch as being an at-will relation at the discretion of the President, treating disloyalty as any other lack of fitness that would allow termination, to be determined at the discretion of the President.[46] The majority of the Circuit Court decision distinguished *Lovett* as prohibiting only permanent bars from public employment, rather than dismissals, the at-will nature of which was supported by ample precedent and established practices of dismissals for political affiliation.[47] The dissenting Circuit Court judge believed that, given that the employee's position was not sensitive, *Lovett* should apply. Therefore, the employee should receive a trial and her dismissal violated the freedoms of speech and assembly. Effectively, the split in the lower court mirrored the split in the Supreme Court; the even split with the recusal of the likely author of the Executive Order establishing Loyalty Boards shows the attitudes of the Justices about this issue.

The three organizations, which challenged their designation as subversive, were the Joint Anti-Fascist Refugee Committee; the National Council of American-Soviet Friendship, Inc.; and the International Workers Order, Inc. The Attorney General responded by moving to dismiss for failure to state a claim. The procedural posture of the motion to dismiss (before a trial to determine the facts) meant that the non-moving party's allegations were taken as true, namely that the organizations were charitable rather than subversive. That was dispositive for the narrowest plurality opinion.[48] The

42. *McGrath* at 625 (quoting Executive Order 9835). The loyalty review boards were abolished by a superseding order of President Eisenhower in 1953,

43. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S.123 (1951).

44. 341 U.S. 918 (1951) (One-sentence affirmance by evenly split court).

45. Bailey v. Richardson, 341 U.S. 918 (1951).

46. Bailey v. Richardson, 182 F.2d 46, 51 (1950) ("All such employees hold office at the pleasure of the appointing authority. . ."; at 58: "[E]xecutive offices are held at the will of the appointing authority, not for life or for fixed terms.").

47. *Bailey* at 55-56 ("The Court [in *Lovett*] held permanent proscription from Government service to be such 'punishment', but it did not, as we read the case, hold mere dismissal from Government service to be punishment in that sense. It had held in the *Myers* case, and iterated in the *Humphrey* case, that the dismissal of an executive official performing purely executive duties is an executive function." Citations omitted; the opinion continues to discuss at length the precedent establishing the employment-at-will nature of executive employees.)

48. *McGrath* at 126 ("For the reasons hereinafter stated, we conclude that, if the allegations of the complaints are taken as true (as they must be on the motions to dismiss), the Executive Order does not authorize the Attorney General to furnish the Loyalty Review Board with a list containing such a designation as he gave to each of these organizations without other justification. Under such circumstances his own admissions render his designations patently arbitrary because they are contrary to the alleged and uncontroverted facts constituting the entire record before us.")

court's reaction was splintered, with five different opinions against dismissal and one dissenting opinion joined by the three Justices who favored dismissal. Jackson's opinion describes the range of views:

> It is unfortunate that this Court should flounder in wordy disagreement . . . The extravagance of some of the views expressed and the intemperance of their statement may create a suspicion that the decision of the case does not rise above the political controversy that engendered it. . . . Mr. Justice BLACK['s concurrence] would have us hold that listing by the Attorney General of organizations alleged to be subversive is the equivalent of a bill of attainder for treason after the fashion of those of the Stuart kings, while Mr. Justice REED['s dissent] contends, in substance, that the designation is a mere press release without legal consequences.[49]

Jackson's description omits the concurrence of Frankfurter and that of Douglas although perhaps justifiably for being within this range from treason to press release. The designation of the organizations as communist without a hearing violated their right of due process, agreed Frankfurter,[50] Douglas (who also proceeds to write about *Bailey*),[51] and Jackson.[52]

Bail issues arose in 1950-51 in *Williamson* and *Stack v. Boyle*. In *Williamson*,[53] Justice Jackson does not terminate bail for some of the defendants of *Dennis II*, allowing them to avoid jail while the petition for *certiorari* and adjudication were pending. Because *Williamson* is a domestic bail case, it is not included in the primary un-Americanism decisions.

In *Stack*,[54] the prosecutions targeted officials and members of the Communist Party in California. The defendants' bail was set significantly higher than bail for defendants charged with other offenses having similar penalties.[55] The defendants attacked their bail as an Eighth Amendment violation and with *habeas corpus* petitions. The Court pointed out that the correct procedural step was to appeal the denial of the reduction of bail, vacated the judgements below, and remanded for the District Court to establish bail correctly. Dissenting, Jackson, joined by Frankfurter, reviewed the complex web of rules surrounding review of bail and concluded that the appropriate Circuit Justice, in this case Douglas, had authority to set bail. *Stack*, being a domestic bail

49. *McGrath* at 183.

50. *McGrath* at 173-74 ("The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. Nor does he obtain immunity on the ground that designation is not an 'adjudication' or a 'regulation' in the conventional use of those terms. Due process is not confined in its scope . . . Due process is perhaps the most majestic concept in our whole constitutional system. . . . Therefore the petitioners did set forth causes of action which the District Court should have entertained.")

51. *McGrath* at 182-83 ("Of course, no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship.")

52. ("I would reverse the decisions for lack of due process in denying a hearing at any stage.")

53. Williamson v. United States, 1950 WL 42366 (September 25, 1950).

54. 342 U.S. 1 (1951).

55. *Stack*, 342 U.S. at 5 ("Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than $10,000. It is not denied that bail for each petitioner has been fixed in a sum[, actually $50,000,] much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case.")

case, is also not included in the database of the primary un-Americanism decisions.

The court engaged the conflict between the political freedom of the First Amendment and the banning of the Communist Party in *Dennis II*, decided in 1951.[56] Whereas *Dennis I* was about contempt of Congress prosecuted in Washington, DC, *Dennis II* was about conspiring to overthrow the government, a violation of the Smith Act, which led to convictions in the Southern District of New York, affirmed by the Second Circuit in an opinion by Learned Hand. The questions before the Supreme Court were the validity of the statute under the First Amendment and the issue of its potential vagueness.[57] The Court produced three concurring opinions—none commanding a majority—and two dissents. The plurality was by Chief Justice Vinson joined by Reed, Burton, and Minton. Frankfurter and Jackson wrote the other two concurring opinions. Black and Douglas wrote dissents. Clark did not participate.

Vinson's plurality opinion began by pointing out that the lower courts established (in a voluminous record, with great detail) that "the general goal of the Party, was, during the period in question, to achieve a successful overthrow of the existing order by force and violence."[58] The opinion proceeds to accept that the government may protect itself against revolution. The issue was "whether the means which [the government] has employed conflict with the First and Fifth Amendments to the Constitution."[59] Turning to the inviolability of freedom of speech, the plurality notes

> that both the majority of the Court and the dissenters in particular cases have recognized that [freedom of speech] is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.[60]

The plurality clarified that the clear and present danger necessary for limiting speech existed:

> Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances.
>
> Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. . . . [T]here was

56. Dennis v. United States, 341 U.S. 494 (1951) ("*Dennis II*"). A year earlier, Jackson as circuit Justice continued bail for some of the same defendants, Williamson v. United States, [unreported] 1950 WL 42366. The Court also issued an decision on civil liability of a state committee on un-American activities in Tenney v. Brandhove, 341 U.S. 367 (1951). Frankfurter wrote for the majority that no liability attaches pursuant to an allegedly politically motivated investigation. Black concurs to note that liability should arise more easily and Douglas dissents. Whether to categorize *Tenney* as an un-Americanism prosecution is not clear but since it regards private liability it does not belong in the set of primary un-Americanism decisions.

57. *Dennis II* at 495 ("We granted *certiorari*, 340 U.S. 863, 71 S.Ct. 91, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.")

58. *Dennis II* 341 U.S. at 498.

59. *Dennis II* 341 U.S. at 501.

60. *Dennis II* 341 U.S. at 503.

> a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger.[61]

In other words, the foreign success of communist revolutions indicated that the danger was sufficient to justify limitations on free speech. The rest of the opinion disposed of the other possible defects of the convictions.

Frankfurter opposed Black and Douglas's primacy of the Bill of Rights and was not persuaded by this Hand formula:

> This conflict of interests [between free speech and security] cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict.[62]

Rather than have the courts resolve the conflict between free speech and security, Frankfurter presents an exhaustive review of precedent to support his position that the balancing between free speech and security belongs to the legislature:

> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.[63]

Essentially, Frankfurter limits the courts' role to verifying that the legislature has a rational basis for limiting speech.

Jackson's concurrence recounted the international success of communist subversions, with the Czechoslovakia quote of the main text.[64] He proceeded to stress that conspiracy to commit illegal acts can be prohibited validly with no regard to any limitations this may impose on speech.[65]

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61. *Dennis II* 341 U.S. at 510-11, citation omitted.
62. *Dennis II* 341 U.S. at 519.
63. *Dennis II* 341 U.S. at 525.
64. *Dennis II* 341 U.S. at 566 (text quoted above, *see* text accompanying note 22).
65. *Dennis II* 341 U.S. at 572 ("What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy. With due respect to my colleagues, they seem to me to discuss anything under the sun except the law of conspiracy. One of the dissenting opinions even appears to chide me for 'invoking the law of conspiracy.' As that is the case before us, it may be more amazing that its reversal can be proposed without even considering the law of conspiracy.¶ The Constitution does not make conspiracy a civil right. The Court has never before done so and I think it should not do so now. Conspiracies of labor unions, trade associations, and news agencies have been condemned,

Black's dissent took the opposite view, that this conviction was for speech alone.[66] Douglas's dissent similarly pointed out that this conspiracy pursued not violent acts but political action.[67] For Douglas, the jury should have assessed whether the defendants' activities constituted "clear and present danger."[68] Moreover, Douglas thought the weakness of communism in the United States was a result of the superior circumstances of the United States, including its economic success, literacy, and established democratic traditions.[69]

The three directions that the members of the Court took in *Dennis II* could have augured frequent victories for the prosecution, but victories waned. The three directions were Jackson's subordination of the Bill of Rights to the fight against communism, Black and Douglas's primacy of the Bill of Rights, and Frankfurter's acceptance of the legislature's weighing, which was consistently anti-communist. If this division persisted in other cases, then the prosecution would win with some regularity. However, the Court's support for the prosecution would diminish from this high point.

The trial of the leaders of the Communist Party in New York also produced contempt convictions of their lawyers. Reviewing the contempt convictions, the Supreme Court also divided, with Black, Frankfurter, and Douglas opposing the summary imposition of the penalty in *Sacher I*.[70] One of the lawyers was also disbarred, and the following year the Court also dis-

although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization.")

66. *Dennis II* 341 U.S. at 579 ("These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.")

67. *Dennis II* 341 U.S. at 581 ("If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial.")

68. *Dennis II* 341 U.S. at 587 ("I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury.")

69. *Dennis II* 341 U.S. at 588-89 ("If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogey-man; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it. ¶ How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.")

70. Sacher v. United States, 343 U.S.1 (1952).

barred him from the Supreme Court Bar, in *Isserman I*.[71] The Court split 4–4, with Clark not participating, resulting in disbarment. Vinson wrote for the Court, noting that Isserman had also not disclosed a conviction and suspension from practice in his original application.[72] Jackson, with Black, Frankfurter, and Douglas, wrote that the Court did not ask about past convictions and that Isserman's incarceration produced sufficient deterrence.[73] The rule would be amended and when the case would come back for review a year later, after Jackson's death, the Court would again tie but, due to the amended text, the result would be the opposite.[74]

Next, in *Tenney*, Frankfurter writes for the court in favor of legislative immunity from liability for the political consequences of a state un-American activities committee.[75] Because *Tenney* is about liability, rather than sanctions for un-Americanism, it is not included in the primary cases about un-Americanism, as is not its sister case, *Collins*.[76]

In *Updegraff* the court is unanimous in striking down state imposition of loyalty oaths on university professors. The court's two erstwhile law professors, Frankfurter joined by Douglas, concur, underscoring the importance of academic freedom.[77] Black, joined by Douglas, also concurs for free speech, lest it only exist for the "cringing and the craven."[78]

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71. In re Isserman, 345 U.S. 286, 73 S.Ct. 676, 97 L.Ed. 1013 (Apr. 6, 1953) ("*Isserman I*").

72. *Isserman I*, 345 U.S. at 290 ("It may be noted, however, that the files in the office of our Clerk show that the respondent did not disclose this conviction and suspension from practice in his application for admission to our bar, so that we did not sanction that conduct in granting him admission. The order of the Court placed the burden upon respondent to show good cause why he should not be disbarred. In our judgment, he has failed to meet this test.")

73. *Isserman I*, 345 U.S. at 294 ("If the purpose of disciplinary proceedings be correction of the delinquent, the courts defeat the purpose by ruining him whom they would reform. If the purpose be to deter others, disbarment is belated and superfluous, for what lawyer would not find deterrent enough in the jail sentence, the two-year suspension from the bar of the United States District Court, and the disapproval of his profession? If the disbarment rests, not on these specific proven offenses, but on atmospheric considerations of general undesirability and Communistic leanings or affiliation, these have not been charged and he has had no chance to meet them. We cannot take judicial notice of them. On the occasions when Isserman has been before this Court, or before an individual Justice, his conduct has been unexceptionable and his professional ability considerable.")

74. In re Isserman, 348 U.S. 1, 75 S.Ct. 6, 99 L.Ed. 3 (Oct. 14, 1954) ("*Isserman II*") (3–3 tie with Warren and Clark not participating).

75. Tenney v. Brandhove, 342 U.S. 843 (1951).

76. Collins v. Hardyman, 341 U.S. 651 (1951).

77. Wieman v. Updegraff, 344 U.S. 183, 198-99 (1952) ("To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.")

78. *Updegraff*, 344 U.S. at 192-93 ("History indicates that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few individuals and organizations of power and

At the same time, in *Adler*,[79] the Court upholds 6–3 state laws that enable the dismissal of communist sympathizers from public service. Black, Frankfurter, and Douglas dissent.

The same year, 1952, also brings some decisions that are more vaguely related to the struggle against communism. However, these decisions are not necessarily related to un-Americanism prosecutions and, therefore, do not belong in the primary un-Americanism decisions.[80]

The propriety of the deportation of long-resident aliens for past membership in the Communist Party arose in *Harisiades*.[81] The aliens retained their communist beliefs despite expulsion from the party. The Court splits 6–2 in favor of the government with Clark not participating. Three were the challenges to the deportations, that they violated Due Process, the First Amendment, and were *ex post facto* punishment. Jackson writes for the majority that national defense precludes a due process attack on deportations.[82] For the proposition that the deportations are not improper reactions to protected First Amendment rights because advocacy of violent overthrow of the government is not protected speech, Jackson points to *Dennis II*.[83] Finally, Jackson underlines that the prohibition against joining organizations that advocate the violent overthrow of the government was long in existence; and that punishing past membership was an appropriate reaction to the Communist Party's expulsion of all its alien members *en masse* to protect them from deportation.[84]

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influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. . . . Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.")

79. Adler v. Bd of Educ. of City of N.Y., 342 U.S. 485 (1952).

80. The nearby decisions that are not discussed because they more likely are about espionage than un-Americanism are United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (exclusion of spouse); Heikkila v. Barber, 345 U.S. 229 (1953) (deportation challenge procedure); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (indefinite detention for deportation of alien about whom the attorney general will not say why the alien is not admissible even in camera).

81. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

82. *Harisiades*, 342 U.S. at 591 ("[T]he Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien.")

83. *Harisiades*, 342 U.S. at 592 ("True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist Governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately. We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two. Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable.")

84. *Harisiades*, 342 U.S. at 593–94 ("During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow . . . by force and violence. . . There can be no contention that [these aliens] were not adequately forewarned. . . [Granted, In *Kessler* t]he Court concluded that . . . only contemporaneous membership would authorize deportation. The reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership. The reaction of Congress was that the Court had misunderstood its legislation. In the Act here before us it supplied unmistakable language that past violators of its prohibitions continued to be deportable in spite of resignation or expulsion from the party. It regarded the

Frankfurter's concurrence expresses his judicial restraint, regretting that "immigration laws have been crude and cruel, . . . may have reflected xenophobia in general or anti-Semitism or anti-Catholicism." Nevertheless, they are not reviewable.[85] Douglas's dissent, joined by Black, argues that the United States either forever banished ex-Communists or punished them for their erstwhile beliefs, and either

> is foreign to our philosophy. We repudiate our traditions of tolerance and our articles of faith based upon the Bill of Rights when we bow to them by sustaining an Act of Congress which has them as a foundation.[86]

Carlson v. Landon[87] regarded the right to bail of aliens under deportation. Bail had been denied because they were members of the Communist Party with the argument that their expected indoctrination activities were against the public interest. The Court, in an opinion by Reed, upheld the denial of bail 5–4, with Black, Frankfurter, Douglas, and Burton writing separate dissents.

The application of immigration laws in an un-Americanism setting also arose in *Spector*, where the Court favored the government 5–3.[88] Clark did not participate. *Spector* is also unusual in featuring Douglas as the author of an opinion favoring the state in an un-Americanism setting. An alien under a deportation order for advocating to overthrow the government failed to depart within six months, a felony. The District Court dismissed, considering the statute vague. The Court reversed, not finding vagueness. Black dissented because the alien could not know what documents would be needed to gain admission to travel to his country of choice. Jackson also dissented, with Frankfurter, arguing that the inability of the alien to challenge in court the deportation order was improper, and that the world struggle against communism frustrated deportation, creating an unfair burden on the alien.[89] Jackson's concern about the international expansion of communism, which usually led Jackson to favor the government, here makes Jackson favor the individual.

The summer of 1953 brought to the Court the notorious case of the Rosenbergs' death penalty for giving nuclear secrets to the Soviet Union. After Douglas granted a stay of execution, the Court summarily reviewed and affirmed the judgement 6–3.[90] Because this was a prosecution for espionage, not un-Americanism,

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fact that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles or practice of representative government or else was unwilling to abide by them.")

85. *Harisiades*, 342 U.S. at 597, 597–98 ("In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.")

86. *Harisiades*, 342 U.S. at 598.

87. 342 U.S. 524 (1952).

88. United States v. Spector, 343 U.S. 169, 72 S.Ct. 591, 96 L.Ed. 863 (1952).

89. at a79–80 ("A deportation policy can be successful only to the extent that some other state is willing to receive those we expel. But, except selected individuals who can do us more harm abroad than here, what Communist power will cooperate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped off to some other part of the world.")

90. Rosenberg v. United States, 346 U.S. 273, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953).

it does not belong in this dataset. Notable is the public outcry against Douglas for granting the stay, which led to a movement to impeach him.[91]

This period closed with *Orloff*[92] and *Bridges*.[93] In *Orloff*, a medical doctor was drafted into the army and given the rank of Captain due to education and occupation—he was above the age of being drafted otherwise. When he refused a loyalty oath and would not answer questions about membership in the Communist Party, he was demoted and assigned to lesser duties. The Court, in an opinion by Jackson, upheld the military's exercise of discretion. Black, Frankfurter, and Douglas dissented, in opinions by Black and Frankfurter arguing that the drafting of doctors above the general draft age rested on their being commissioned officers and exercising medical duties.

Bridges was about fraud in the procurement of naturalization by a conspiracy to lie about no membership in the Communist Party. While Clark and Jackson do not participate, the Court decides 4–3 and favors the individuals by holding that the statute of limitations had lapsed. The dissent of Reed with Vinson and Minton argued that, according to the statutory language, the wartime suspension of the limitations period applied, and the prosecution was still timely.

While un-Americanism prosecutions were facing this reaction in the Supreme Court, the Presidency changed parties. President Eisenhower took office and made the first appointment to the Court by a Republican President since F.D. Roosevelt took office, the appointment of Earl Warren as Chief Justice in October of 1953.[94] Warren replaced Chief Justice Vinson, who had mostly voted in favor of the prosecution in un-Americanism disputes. Warren arrived at the Court with an anti-Communist past. Warren had prosecuted the conviction of Communists for crimes committed in an effort to infiltrate unions.[95] Indeed, Warren did cast his first votes in un-Americanism cases for the prosecution, but he soon changed.

In *Barsky* the issue was the validity of a six-month revocation of the license to practice medicine due to a contempt conviction for failing to comply with a subpoena of the House Committee on Un-American Activities.[96] The majority opinion, by Justice Burton, accepted that the state had the discretion to determine licensing conditions and was reasonable in its review and decisions. Black and Douglas dissented, writing

91. The House proposed impeachment of Douglas within hours of his action, eliciting cheering in the chamber. The impeachment was referred to committee and, the sentence against the Rosenbergs having been carried out, faded. LICHTMAN 62–63.

92. Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

93. Bridges v. United States, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557 (June 15, 1953).

94. While this was the first appointment by a Republican President, it was not the first appointment of a Republican. Justice Burton, appointed by Truman in September 1945, was a member of the Republican Party and often sided with the prosecution in un-Americanism disputes, *see* Table 7.1, above.

95. James F. Simon reports that Warren's most publicized case from Warren's years as a prosecutor was the trial for the 1936 murder of the chief engineer of the freighter *Los Lobos*, a plot linked in Warren's mind with communist influence in West Coast maritime unions, for which Warren, who otherwise supported labor, faced labor protests and picketing. When three of the four murderers were paroled by the Democratic Governor and likely electoral opponent of Warren, Warren lashed out that their parole was a political move due to their being "powerful communistic radicals." James F. Simon, EISENHOWER V. WARREN 10–11.

96. Barsky v. Board of Regents of University of State of New York, 347 U.S. 442 (1954). This prosecution springs from the same prosecution of the Joint Anti-Fascist Refugee Committee as *Bryan* and *Fleischman*, note 27 and accompanying text, above.

separate opinions joining each other. Black's premise was that all this activity sprang from an illegal bill of attainder.[97] Perhaps Black should have stressed more the precedent of *Lovett*,[98] which also rested on the reasoning that the legislative firing of employees for their political beliefs was a bill of attainder. In hindsight, the reasoning that rests on the prohibition against bills of attainder has the appeal that it would also be one of the final utterances of the Court about un-Americanism prosecutions, in *Brown* in 1965, *see* note 323 and accompanying text, below.

Moreover, Black believed (as did Frankfurter) that, even if New York were to hold that people who associated with communists should have their medical licenses suspended, that would be an improper deprivation.[99] Douglas's dissent stressed the importance of work and the primacy of the Bill of Rights.[100] Douglas closed by mourning the national "neurosis."[101] Frankfurter dissented for similar reasons. Frankfurter would find error in the process that New York followed.[102] He also considered the decision to revoke a medical license for events entirely unrelated to the practice of medicine violative of due process.[103]

The Court revisits the propriety of alien deportation for membership in the Communist Party in *Galvan*.[104] The Court's 7–2 majority, under Frankfurter's pen, reluctantly adheres to the Congressional mandate that

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97. *Barsky* 347 U.S. at 460 ("The Grievance Committee made a formal finding of fact that the Refugee Committee had been listed as subversive. This Court, however, has held that the Attorney General's list was unlawful, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624. My view was and is that the list was the equivalent of a bill of attainder which the Constitution expressly forbids. The Regents' own reviewing Committee on Discipline recognized the illegality of the list and advised the Regents that no weight should be given to it. This reviewing committee also recommended that the Regents not accept the Grievance Committee's recommendation of a six months' suspension but instead give no suspension at all.")

98. *See* notes 5–6 and accompanying text, *supra*. Also on attainder rested Black's reasoning in the dissents in *Douds*, *see* text accompanying note 36, *supra*, and in *McGrath*, *see* text accompanying note 28, *supra*.

99. *Barsky* 347 U.S. at 463 ("Of course it may be possible that the Regents thought that every doctor who refuses to testify before a congressional committee should be suspended from practice. But so far as we know the suspension may rest on the Board's unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents' action, would indicate that in New York a doctor's right to practice rests on no more than the will of the Regents." [footnote omitted])

100. *Barsky* 347 U.S. at 667 ("If, for the same reason, New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat, it does a man little good to stay alive and free and propertied, if he cannot work.")

101. *Barsky* 347 U.S. at 474 ("When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us.")

102. *Barsky* 347 U.S. at 469 ("[T]he highest court of the State of New York tells us, in effect, 'Yes, it may be that the Regents arbitrarily deprived a doctor of his license to practice medicine, but the courts of New York can do nothing about it.' Such a rule of law, by denying all relief from arbitrary action, implicitly sanctions it; and deprivation of interests that are part of a man's liberty and property, when based on such arbitrary grounds, contravenes the Due Process Clause of the Fourteenth Amendment.")

103. *Barsky* 347 U.S. at 470 ("It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is red-headed or because he was divorced, except for a calling, if such there be, for which red-headedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids.")

104. Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954).

mere past membership is sufficient for deportation.[105] Black and Douglas dissent.

Noteworthy is that the newly appointed Warren sided with the prosecution in both *Barsky* and *Galvan*. After siding with the government one more time but only in conference in *Emspak* (before the Court decided to order a rehearing), Warren would have a change of heart.[106] In the reargued *Emspak* and all subsequent un-Americanism cases, Warren would side with the individuals. Add the replacement of Jackson with the initially pro-defendant Harlan, and the future arrival of strongly pro-defendant Brennan, and the balance on the Court changes. The era that saw the Court siding with the prosecution the most often was ending. An era of idealism was about to begin.

B. Premature Idealism: To Red Monday

A bail issue produced a one-member decision from Douglas, sitting as Circuit Justice, in *Yanish v. Barber*.[107] An alien was subject to summary deportation for being a member of the Communist Party. As a condition of being re-released on bail, the alien was required to not associate with Communists. Justice Douglas finds the resulting consequences unrelated to ensuring the defendant's appearance at trial,[108] and grants bail. Because this is a one-member bail case, it is not included in the primary un-Americanism decisions.

After Eisenhower makes one more appointment, of John Marshall Harlan II to replace Robert H. Jackson, the Court issues three decisions related to un-Americanism prosecutions on May 23, 1955: *Emspak*,[109] *Quinn*,[110] and *Bart*.[111] In all three, witnesses refused to answer questions by the Committee on Un-American Activities of the House of Representatives or its one-member subcommittee (presumably designed to avoid the problems with quorum that *Fleischman*, *Bryan*, and *Christoffel* had raised[112]). The defendants vaguely invoked their First and Fifth Amendment rights. The Court held those objections sufficient to defeat the subsequent convictions of the defendants for refusing to answer.

In all three, Warren writes for the Court exonerating the refusal to answer questions of a Congressional

105. *Galvan*, 347 U.S. at 532 ("[We] must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional.")

106. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION 68 & n. 17 (2012) (from conference notes the vote appears 6–3 with Black, Frankfurter, and Douglas dissenting; Warren assigned the opinion to Reed whose draft opinion exceeded the Fifth Amendment issue, entering First Amendment; Black moved for reargument; only Reed and Minton opposed it). *See also* notes 109 (*Emspak*), *infra*, and 44, *supra* (the reargument of *Emspak* contributes to the gradual nature of the transition to the next era, the Premature Idealism Era).

107. 73 S.Ct. 1105 (1953).

108. *Yanish* at 1108 ("The function of bail in situations such as the instant one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other. . . . It is not apparent how at least some of the conditions attached to the bond serve those ends. Specifically, it is not obvious how the requirement that the alien given up his job with the Communist paper provides security for his appearance in case the Immigration and Naturalization Service can effect his deportation to Russia. . . . Condition (e), which would prevent the applicant 'from associating with any person, knowing or having reasonable ground to believe' that such person is a Communist, would, taken literally, prevent him from living with his Communist wife or going to a movie with his Communist son or seeing his Communist legal adviser or being treated by his Communist doctor. How that prohibition would do service in the tradition of Anglo-Saxon bail or how it would further the program of deportation which Congress has designed is not apparent.")

109. Emspak v. United States, 349 U.S. 190 (1955).

110. Quinn v. United States, 349 U.S. 155 (1955).

111. Bart v. United States, 349 U.S. 219 (1955).

112. *See* text accompanying notes 9 and 27.

committee. The two first Eisenhower appointees, Warren and Harlan, did not completely agree in these un-Americanism prosecutions. Harlan partially concurs in one (*Quinn*) and dissents in two (*Emspak* and *Bart*). Harlan's concurrence in *Quinn* refers to his dissent in *Emspak*. Harlan disagrees with the Court when the majority finds that the refusal to answer did not have the requisite criminal intent, because the defendant relied on counsel's advice about the defendant's rights.[113] Harlan clearly states in his dissent in *Emspak* that the subcommittee had sufficiently demonstrated that the defendant's objections were not accepted and his answers were expected.[114] The dissenters are, in *Emspak* and *Bart*, Reed, Minton, and Harlan, and in *Quinn*, Reed alone.

A week later, June 6, 1955, the Court, again in an opinion by Warren for a split Court, found against practices of the Loyalty Review Boards in *Peters v. Hobby*.[115] A Yale Medical School professor had occasional employment reviewing grants for the Department of Health, Education, and Welfare. The work did not touch confidential or classified matters. The Executive Order on Loyalty Review Boards had been amended in 1951 to lead to dismissal not on a finding of reasonable grounds for disloyalty but if mere "reasonable doubt as to" an employee's loyalty existed.[116] The professor succeeded in a loyalty review using the old standard. Upon the amendment of the standard, however, the board reviewed the professor's case on its own initiative and remanded it for a hearing. The board notified the professor of certain charges which the professor answered under oath, including a denial that he had ever been a member of the Communist Party. A hearing followed in New Haven, during which the professor was the only one presenting information and was not allowed to cross-examine the sources of the board's information. The professor was subsequently notified that the board had found no reasonable doubt about his loyalty.

A year later, the board notified the professor that it would conduct a 'post-audit' of the determination and held a new hearing. Again, only the professor presented evidence, and could not cross-examine the five informants against him, only one of whose identities was known to the board, and whose statements were not all under oath. This time, the board concluded that a reasonable doubt about the professor's loyalty did exist, and notified the Secretary of Health, Education, and Welfare as well as the professor, informing him that he had been barred from government service for three years.

The Court split 7–2, with a dissent by Reed with Burton. Warren's majority opinion recognized that constitutional issues may exist in this process but decided in the professor's favor based on the board's violations of the executive order, which did not authorize *sua sponte* reviews.[117] Black's concurrence would have the

113. *Quinn*, 349 U.S. at 166 ("In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.")
114. *Emspak* 349 U.S. at 214-15 ("the record shows that Emspak was clearly apprised that, despite his objections, the Committee wanted answers").
115. Peters v. Hobby, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129 (1955).
116. *Peters*, 349 U.S. at 334 (referring to the amended standard per Executive Order 10241, which replaced E.O. 9835, seen above, *see* text accompanying note 42).
117. *Peters*, 349 U.S. at 339–40 ("The authority thus conferred on the Loyalty Review Board was limited to 'cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department

Court reach the constitutional issues and doubts the validity of the scheme of loyalty review.[118] Reed's dissent, joined by Burton, would have found that the Executive Order was followed properly without reaching the constitutional issues. Douglas's concurrence conceded Reed's point that the board followed established practice and had proper authority. Therefore, Douglas would reach the constitutional issues and find the process inadequate.[119] Douglas rebutted the idea that the fear of subversive activities trumped due process.[120]

A year later, the same composition of the Court decided *Nelson*.[121] A state prosecution using anti-sedition legislation led to a 20-year sentence of a member of the Communist Party. Both the Pennsylvania Supreme Court and the United States Supreme Court held the state prohibition to be superseded by the federal Smith Act, exonerating the defendant. Reed with Burton and Minton dissented, writing that the federal anti-sedition legislation was not intended to supersede state legislation and prosecutions.[122] *Nelson* would be one of the holdings that several legislative initiatives would seek to overturn in the summer of 1957 in the backlash against the Supreme Court's resisting un-Americanism prosecutions.[123]

The same year brought to the Court *Communist Party of the United States v. Subversive Activities Control Board*.[124] A 1950 statute, likely reacting to the concerns that led to *Joint Anti-Fascist Refugee Committee v. McGrath*,[125] set a process for designating organizations as communist-action and established an administrative agency that would make the determination. The Communist Party of the United States was promptly designated a communist-action organization, which it challenged. As the challenge reached the Su-

or agency . . .' And, even as to these cases, the Loyalty Review Board was denied any power to undertake review on its own motion; only the employee recommended for dismissal, or his department or agency, could refer such a case to the Loyalty Review Board. In petitioner's case, the Board failed to respect either of these limitations. Petitioner had been twice cleared by the Agency Board and hence did not fall in the category of 'persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency.' Moreover, petitioner's case was never referred to the Loyalty Review Board by petitioner or the Agency. Instead, the Loyalty Review Board, acting solely on its own motion, undertook to 'hold a hearing and reach its own decision.'")

118. *Peters*, 349 U.S. at 350 ("But I wish it distinctly understood that I have grave doubt as to whether the Presidential Order has been authorized by any Act of Congress. That order and others associated with it embody a broad, far-reaching espionage program over government employees. These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here.")

119. *Peters*, 349 U.S. at 350–51 (The professor "was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles.")

120. *Peters*, 349 U.S. at 352 ("Those who see the force of this position counter by saying that the Government's sources of information must be protected, if the campaign against subversives is to be successful. The answer is plain. If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty,' they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise.")

121. Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956).

122. *Nelson*, 350 U.S. at 515 ("We cannot agree that the federal criminal sanctions against sedition directed at the United States are of such a pervasive character as to indicate an intention to void state action.")

123. *See* text accompanying notes 170–175, below.

124. 351 U.S. 115 (1956) ("*Communist Party I*" and, on the tables and graphs, "*CPUSA I*").

125. *See* text accompanying note 28, above.

preme Court, it had two grounds. First, it was an attack on the entire propriety of the scheme of designating an entity as a communist-action one, with the consequences this entailed. Second, the Communist Party alleged that three of the many witnesses used against it in the administrative agency's proceeding had later perjury convictions making their testimony suspect. The majority based the decision on narrow grounds, avoided the constitutional issues, and remanded for reconsideration without the tainted witnesses. The dissent of Clark, with Reed and Minton, considered remand pointless because the primary issues were not even challenged and the tainted witnesses were uncontroverted and secondary, decried the avoidance of the important issues, which preserved uncertainty six years after the passage of the statute.[126]

Douglas issued one more decision reducing bail on an un-Americanism prosecution in 1956, *Steinberg*.[127] The search incident to the arrest should have been done pursuant to a warrant; Douglas, therefore, made a large reduction of bail. Being a single-justice decision, this is not included in the primary un-Americanism decisions.

Under the same composition, in *Slochower*, the Court reaffirmed its *Updegraff* position in finding that the rule of New York City, which produced the automatic dismissal of a college professor who invoked the Fifth Amendment was improper.[128] The court split 5–4 in favor of the professor, holding that a section of the Charter of the City of New York that mandated the termination of employees who invoked the privilege against self-incrimination was unconstitutional as applied. Clark with Black, Douglas, Frankfurter, and Warren were in the majority. Two dissenting opinions came from Reed, with Burton and Minton,[129] and from Harlan.[130]

The Court also upheld the dismissal of a denaturalization in *Zucca*.[131] The government alleged that Zucca obtained citizenship by lying that he had not been a member of the Communist Party. The Court by a 5–3 majority upheld the District Court's reading of the statute that required the United States Attorney to file

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126. *Communist Party I*, 351 U.S. at 130 ("The Communist Party makes no claim that the Government knowingly used false testimony, and it is far too realistic to contend that the Board's action will be any different on remand. The only purpose of this procedural maneuver is to gain additional time. . . This proceeding has dragged out for many years now, and the function of the Board remains suspended and the congressional purpose frustrated to a most critical time in world history. Ironically enough, we are returning the case to a Board whose very existence is challenged on constitutional grounds. We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so. The constitutional questions are fairly presented here for our decision. If all or any part of the Act is unconstitutional, it should be declared so on the record before us. If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress.")

127. Steinberg v. United States, 76 S.Ct. 822, 100 L.Ed. 1526 (1956) (not in the US Reporter).

128. Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551 (1956) (the professor was questioned by the Internal Security subcommittee of the Judiciary Committee of the United States Senate).

129. *Slochower*, 350 U.S. at 561 ("We assert the contrary—the city does have reasonable ground to require its employees either to give evidence regarding facts of official conduct within their knowledge or to give up the positions they hold.") (Reed, J, dissenting).

130. *Slochower*, 350 U.S. at 566 ("In effect, what New York has done is to say that it will not employ teachers who refuse to cooperate with public authorities when asked questions relating to official conduct. Does such a statute bear a reasonable relation to New York's interest in ensuring the qualifications of its teachers? The majority seems to decide that it does not. This Court has already held, however, that a State may properly make knowing membership in an organization dedicated to the overthrow of the Government by force a ground for disqualification from public school teaching.") (Harlan, J., dissenting).

131. United States v. Zucca, 351 U.S. 91, 76 S.Ct. 671, 100 L.Ed. 964 (Apr. 30, 1956).

an affidavit of good cause. Clark, joined by Minton and Reed, dissented.[132] Harlan did not participate.

In *Black v. Cutter Labs*,[133] an employee who was elected to union officership had falsified her employment record, was a member of the Communist Party, and was dismissed from employment. The arbitration board held that her dismissal was improper because the justifications for the dismissal were stale for having been known for two years and the true motive was her union activity. The Supreme Court of California reversed, considering her dismissal proper. Clark's majority opinion for a 6–3 Court found that the California Supreme Court had stated adequate state grounds that her dismissal was for just cause under state law, and avoided the constitutional claims. The dissent of Douglas, joined by Warren and Black, found no adequate state ground but a violation of the First and Fourteenth Amendments. Because *Black* is between private parties, it is not included as a primary un-Americanism decision. If it were, it would have been the only decision during this era against the individual accused of communist sympathies.

The Court invalidated the employment termination of a federal employee in a non-sensitive position for disloyalty and association with communists, in *Cole v. Young*.[134] Harlan wrote for the 6–3 majority. As in *Zucca*, Clark, joined by Minton and Reed, dissented.[135]

In late 1956, Eisenhower appointed Democrat William Brennan to replace Minton. This appointment replaced Minton's occasional vote in favor of un-Americanism prosecutions with a reliable vote against them. On the world stage, however, Soviet Communism faced two significant adverse developments. The new leader of the Soviet Union, Nikita Khrushchev, made a speech critical of Stalin's purges in February.[136] But that did not mean an end to violence. The same Fall, the Soviet Union would invade Hungary to suppress its uprising.[137] The oppressive nature of Soviet communism was becoming difficult to deny, slightly weakening its support in the West. (The Berlin Wall would not be built until 1961 and the creation of non-Soviet-aligned Eurocommunism would only come after the Prague Spring of 1968.[138])

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132. Zucca, 351 U.S. at 100-01 ("The Court's ruling today seriously obstructs the Government in filing denaturalization proceedings in this type of case. It reverses a long line of cases in the lower federal courts and disregards a consistent administrative practice of over thirty years standing, a period which includes two recodifications of the immigration laws. Furthermore, the identical point on which the case today is decided was present in two earlier cases where it apparently was not considered important enough to be presented to this Court.")

133. 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188, 38 L.R.R.M. (BNA) 2160, 30 Lab.Cas. ¶70,002 (June 4, 1956).

134. 351 U.S. 536 (June 11, 1956).

135. *Cole* 351 U.S. at 879-80 ("[T]he Court's order has stricken down the most effective weapon against subversive activity available to the Government. It is not realistic to say that the Government can be protected merely by applying the Act to sensitive jobs. One never knows just which job is sensitive. The janitor might prove to be in as important a spot securitywise as the top employee in the building.")

136. *See, generally,* Kruschev's Secret Speech, ENCYCLOPAEDIA BRITANNICA (2019) (available at https://www.britannica.com/event/Khrushchevs-secret-speech [perma.cc/4D7C-UW2N]); text of speech available at https://digitalarchive.wilsoncenter.org/document/115995.pdf?v=3c22b71b65bcb-be9fdfadead9419c995, visited 3/2/2020 [perma.cc/E8WS-L88F].

137. *See, generally,* Hungarian Revolution, INT'L ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 2ND EDITION 523 (William A. Darity, Jr., ed., 2008); Hungarian Revolution (1956), ENCYCLOPAEDIA BRITANNICA (available at https://www.britannica.com/event/Hungarian-Revolution-1956 [perma.cc/ZV88-7495]).

138. *See also* notes 340–341 and accompanying text.

Without Brennan's participation, the Court split 5–3 in *Mesarosh*.[139] The Solicitor General acknowledged that Mazzei, a witness used in the conviction for violating the Smith Act, had repeatedly perjured himself in subsequent trials but assured the Court that he had no reason to doubt Mazzei's testimony in this one. The Court granted a new trial. The dissent of Harlan with Frankfurter and Burton would have remanded and allowed the District Court to decide whether a new trial was necessary.

The Court unanimously opposed an attempt to render unions noncompliant for false affidavits of no communist affiliation in *Leedom* and *Amalgamated Meat Cutters*.[140]The employers sought to use the false affidavits as a means of avoiding their collective bargaining obligations. This private motivation makes these cases somewhat atypical. The support of the NLRB in *Leedom* renders it sufficiently governmental to include in the primary un-Americanism cases. *Amalgamated Meat Cutters* remains exclusively privately motivated and, therefore, is not in the database.

The last un-Americanism case before the appointment of Whittaker was *Gold*.[141] The Court, with a short *per curiam* opinion, orders the retrial of a labor leader accused of filing a false affidavit of no affiliation with the Communist Party. Reed, Burton, and Clark dissented. Reed's joint dissent would find that the presumption of influence upon the jurors was rebutted. Clark rued that the Court refused to address important issues.

President Eisenhower nominated Whittaker to replace Reed. Whittaker was appointed in March of 1957. This change in the Court's composition had little effect on its stance on un-Americanism prosecutions. Reed and Whittaker displayed similar pro-government attitudes, voting in favor of the government in, respectively, 87% and 70% of the primary decisions.[142] However, Whittaker's record may have only changed to favor the prosecution after the legislative backlash of the summer of 1957.

On May 6, 1957, the Court reached decision about two states that denied admission to the practice of law for two applicants who were previously associated with the Communist Party. The states lost with Whittaker not participating.

Konigsberg I[143] brought to this composition of the Supreme Court the question of the propriety of the denial to admit to the Bar an applicant who had refused to answer questions about membership in the Communist Party. The Committee of Bar Examiners refused admission to the Bar because the applicant had not demonstrated good moral character and he failed to show that he did not advocate the overthrow of the government by violent methods. The California Supreme Court had affirmed the refusal of admission to the bar 4–3. The Supreme Court, in an opinion by Black,

139. Mesarosh v. United States, 352 U.S. 1 (1956). The dissent of Harlan with Frankfurter and Burton appears at 352 U.S. 862.
140. Leedom v. N.L.R.B., 352 U.S. 145, 77 S.Ct. 154, 1 L.Ed.2d 201 (Dec. 10, 1956); Amalgamated Meat Cutters and Butcher Workmen of America AFL-CIO v. N.L.R.B., 352 U.S. 153, 77 S.Ct. 159, 1 L.Ed.2d 207 (Dec. 10, 1956).
141. 352 U.S. 985, 77 S.Ct. 378, 1 L.Ed.2d 360, 39 L.R.R.M. (BNA) 2345, 31 Lab.Cas. ¶70,470 (Jan. 28, 1957).
142. See table 7.1, below.
143. Konigsberg v. State Bar of Calif., 353 U.S. 252 (1957) ("*Konigsberg I*").

without addressing the constitutional issues,[144] found a lack of reasonable basis for the findings.[145] Frankfurter wrote a dissent, as did Harlan, joined by Clark. Frankfurter's dissent focused on the jurisdiction of the Court; he would have remanded for the California Supreme Court to state if it passed on a federal due process claim. Harlan's dissent agreed that the Court did not have jurisdiction and argued that the Court's rational basis review made no sense.[146]

Unlike the individual judgment that California gave to its applicant, New Mexico was more absolute to a similarly placed applicant in *Schware*.[147] The same majority in an opinion again written by Black found that the evidence of membership in the Communist Party 15 years before could not support the finding that the applicant did not have a good moral character. Frankfurter's concurrence, joined by Clark and Harlan, envisioned a more limited role for the Supreme Court in intervening on the states' determination of eligibility for the bar.[148] However, in absence of an individualized weighing of this applicant's past, this applicant's due process rights were violated.[149]

Two weeks later came a little-noticed *per curiam* opinion, *Sentner*.[150] The Court followed its recent prece-

144. *Konigsberg I*, 353 U.S. at 261-62 ("If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. We do not mean to intimate any view on that problem here. . .").

145. *Konigsberg I*, 353 U.S. at 273 ("[W]e are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government.")

146. *Konigsberg I*, 353 U.S. at 311-12 ("For me it would at least be more understandable if the Court were to hold that the Committee's questions called for matter privileged under the First and Fourteenth Amendments. But the Court carefully avoids doing so. . . . [W]e, on the basis of a bare printed record and with no opportunity to hear and observe the applicant, are in no such position as the State Bar Committee was to determine whether in fact the applicant was sincere and has a good moral character. Even were we not so disadvantaged, to make such a determination is not our function in reviewing state judgments under the Constitution. Moreover, resolution of this factual question is wholly irrelevant to the case before us, since it seems to me altogether beyond question that a State may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area. The opinion of the Court does not really question this; it solves the problem by denying that it exists. But what the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.")

147. Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232 (1957).

148. *Schware*, 353 U.S. at 249 ("We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession.")

149. *Schware*, 353 U.S. at 251 ("This brings me to the inference that the court drew from petitioner's early, pre-1940 affiliations. To hold, as the court did, that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted. History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of communism during the depression era, only to have their eyes later opened to reality. Such experiences no doubt may disclose a woolly mind or naive notions regarding the problems of society. But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came to their senses and their sense of responsibility 'questionable characters.' Since the Supreme Court of New Mexico as a matter of law took a contrary view of such a situation in denying petitioner's application, it denied him due process of law.")

150. Barton v. Sentner, 353 U.S. 963, 77 S.Ct. 1047 (Mem), 1 L.Ed.2d 901 (May 20, 1957).

dent of *Witcovich*,[151] but Burton and Clark dissented, finding that the Court was expanding *Witcovich* in a way that hampered the deportation of subversives. Because *Witcovich* does not necessarily involve un-Americanism nor mentions it, *Witcovich* is not included in the primary un-Americanism decisions, but *Sentner* is.

On June 3rd, 1957, the Court again sided with the individual in *Jencks*.[152] The president of a labor union had been convicted of filing a false affidavit of no membership in the Communist Party. FBI informants testified at trial but their written reports were not made available to the defense for possible impeachment. The Court's plurality opinion for four justices by Brennan (Whittaker did not participate) held this violative of due process. Clark's lone dissent bristles at the idea that confidential FBI reports had to be made available to the defense, when even the defense did not ask.[153] The concurrence of Burton with Harlan also took the position that the main opinion went too far in requiring access to the reports by the defense. *Jencks* was one of the Court's liberal holdings that Congress sought to reverse and the only one where Congress was successful.[154]

Next, the Court would issue four exonerating decisions on the same day, June 17, 1957. The anti-Communist press called it "Red Monday."[155]

A New Hampshire un-Americanism prosecution arose in *Sweezy*.[156] The Court failed to produce a majority coalition and resolved the dispute by plurality. Chief Justice Warren's opinion, joined by Black, Douglas, and Brennan, held paramount the academic freedom and the freedom of association of the college professor who refused to answer questions and found inappropriate the delegation of legislative power to the Attorney General of NH. The concurrence of Frankfurter, joined by Harlan, balanced the investigative interests of the legislature against academic freedom and found in favor of academic freedom in those circumstances.[157] Clark dissented, joined by Burton. The dissenters, as did Frankfurter, did not think the Supreme Court could intervene in how a state legislature chose to delegate its power and considered that the Court's decision prevented New Hampshire from enforcing its own laws.[158] Again, Whittaker did not participate.

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151. United States v. Wittcovich, 353 U.S. 194, 77 S.Ct. 779, 1 L.Ed.2d 765 (Apr. 29, 1957).
152. Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957).
153. Jencks, 353 U.S. at 681–82 ("Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.")
154. *See* note 170 and accompanying text.
155. Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop on Communism in Late 1950s*, 43 HOFSTRA L. REV. 207 (2014); *June 17, 1957, 'Red Monday': Supreme Court Limits Anti-Communist Measures*, TODAY IN CIVIL LIBERTIES HISTORY, https://todayinclh.com/?event=red-monday-supreme-court-limits-anti-communist-measures [perma.cc/ E667-DT8J] (visited October 5, 2019).
156. Sweezy v. State of N.H., 354 U.S. 234 (1957).
157. *Sweezy*, 354 U.S. at 261 ("When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.")
158. *Sweezy*, 354 U.S. at 269 ("The short of it is that the Court blocks New Hampshire's effort to enforce its law. I had thought that in Commonwealth of Pennsylvania v. Nelson we had left open for legitimate state control any subversive activity leveled against the interest of the State." Citation omitted).

The second decision of the same day was *Watkins*.[159] In *Watkins* the refusal to answer questions was directed to a subcommittee of the federal House Un-American Activities Committee. The witness answered questions about his own activities and about current members of the Communist Party but refused to identify persons who, the witness believed, were no longer associated with the Communist Party. His refusal to answer led to his conviction for contempt of Congress. The opinion by Chief Justice Warren discussed the English tradition of the unlimited supremacy of the parliament, contrasted it to the domestic variation of subjecting the legislature to the courts, and stressed the precedent recognizing the privilege against self-incrimination. The opinion turned to the difficulties of first amendment limits on congressional power, and ended by finding the questions about association that far back in time outside the powers of the subcommittee and reversed. Frankfurter's concurrence clarified that acquiescence of Congress to the committee's exceeding its authority did not expand the committee's authority. Clark dissented with a broad attack on the majority's reasoning, arguing that the scope and exercise of the committee's powers were reasonable.

Third was the termination of a foreign service employee pursuant to a loyalty review, *Service*.[160] The employee had been accused of a leak but the grand jury refused to indict him and the employee had subsequently overcome several loyalty investigations until in December 1951, upon a *sua sponte* appeal, the Loyalty Review Board expressed reasonable doubt about his loyalty and, without independent review by his ultimate superior, the Secretary of State, his employment was terminated. The Court, without Clark's participation, in an opinion by Harlan, unanimously held the dismissal wrongful, referring to *Peters*.[161]

The fourth and last Red Monday decision may have been the most striking, *Yates I*.[162] Fourteen organizers of the Communist Party in California had been convicted in a jury trial of violating the Smith Act, "conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit."[163] Brennan and Whittaker did not participate in the decision. Harlan wrote for the Court, acquitting five of the defendants and ordering the retrial of nine on the basis of a narrow reading of the statute's term "organizing"[164] and on the necessity that the jury instructions include

159. Watkins v. United States, 354 U.S. 178 (1957). Burton and Whittaker did not participate.

160. Service v. Dulles, 354 U.S. 363 (1957).

161. *See* text accompanying note 115, above.

162. Yates v. United States, 354 U.S. 298 (1957).

163. *Yates*, 354 U.S. at 300.

164. *Yates*, 354 U.S. at 308 ("While it is understandable that Congress should have wished to supplement the general provisions of the Smith Act by a special provision directed at the activities of those responsible for creating a new organization of the proscribed type, such as was the situation involved in the *Dennis* case, we find nothing which suggests that the 'organizing' provision was intended to reach beyond this, that is, to embrace the activities of those concerned with carrying on the affairs of an already existing organization. Such activities were already amply covered by other provisions of the Act. . .")

incitement.[165] Burton's concurrence disagreed with the Court's treatment of "organizing." Black concurred in part, joined by Douglas, arguing that all defendants should have been acquitted and the Court's interpretation allowed the Smith Act to trump freedom of speech,[166] closing with a flourish for free speech.[167] Clark dissented alone, arguing against the positions that the majority took.[168]

These four decisions—*Sweezy, Watkins*, *Service*, and *Yates I*—represent the high-water mark of opposition to un-Americanism prosecutions by the Supreme Court during this Red Scare era. Even after 1962, the Post-Frankfurter Era, when individuals win all the cases, the Court is more divided.

*C. Backlash: Anti-*Jencks *Legislation and the Jenner Bill*

Congress was strongly opposed to the Court's refusal to have the fear of Communism trump the Bill of Rights. Southern legislators had the additional and pernicious reason to oppose the Court because of its efforts at racial integration.[169] When the FBI joined the anti-Court chorus by stating that *Jencks* would lead it to not prosecute (rather than having its confidential sources revealed per *Jencks*), the reaction was swift. In less than a month, both houses of Congress had passed legislation (the House by 351–17) restricting the disclosure of confidential information. President Eisenhower signed it into law on September 2, 1957.[170]

The reaction of Congress to other decisions did not have similar Administration support but was almost as strong. Even from the prior year, *Nelson*'s overruling of state prosecutions due to federal preemption led to an anti-preemption bill, H.R. 3. The invalidation of a public employee's firing in *Cole*[171] led both houses to pass legislation facilitating terminations for subversion.[172] The strongest reaction came in the form of the Jenner Bill, which would remove jurisdiction from the Court

165. *Yates*, 354 U.S. at 321-22 ("The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*.")

166. *Yates*, 354 U.S. at 340 ("Under the Court's approach, defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act. I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.")

167. *Yates*, 354 U.S. at 344 ("The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.")

168. *Yates*, 354 U.S. at 346 ("I agree with the Court of Appeals, the District Court, and the jury that the evidence showed guilt beyond a reasonable doubt. It paralleled that in *Dennis* and *Flynn* and was equally as strong. In any event, this Court should not acquit anyone here." Footnote omitted).

169. The Court had already started issuing desegregation decisions. Generally speaking, ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY ERA REPRESSION (2012) provides an extremely detailed discussion of the cases and the legislative reaction at 105–08 and 122-26.

170. *Id.* 107 and n. 75 to chapter 7; 103 Cong. Rec. 10984-85; Pub. L. 85–269, 71 Stat. 595 (Sep. 2, 1957), 18 U.S.C. § 3500.

171. *See supra*, note 134 and accompanying text.

172. LICHTMAN at 107, n. 80.

over five anti-Communism matters.[173] Legislation was also proposed to restore an easy-to-meet definition of "organizing" (reversing *Yates*[174]) and facilitating the withholding of passports.[175]

In contrast to the swift passage of the anti-*Jencks* legislation, the other bills were delayed and weakened by amendments. Still, they passed the House by overwhelmingly wide margins.[176] Some were also poised to pass the Senate—a motion to table the anti-*Nelson* H.R. 3 failed 46–39.[177] Last-minute, masterful maneuvering and persuading by Lyndon B. Johnson as Senate Majority Leader in August 1958 prevented its passage by one vote. The others stalled in different parliamentary twists. The 1958 election produced a more liberal Senate that did not resurrect them.[178]

The Court was not at all oblivious to the legislative reaction. Frankfurter, who was particularly mindful of the Court's authority, expressed his concern to Brennan in a letter.[179] Indeed, others have argued that the reaction to Red Monday induced the Court, and especially Frankfurter, to a more conservative stance.[180] Whereas Frankfurter does seem to have changed, he was not alone. Burton, Clark, Whittaker, and Harlan also changed.[181] Warren, Black, Douglas, and Brennan would continue to insist on the primacy of the Bill of Rights but they would often be in the minority.

Wilson v. Loew's, Inc.[182] is atypical in being about civil liability (and, therefore, does not join the primary cases about un-Americanism). *Wilson* sprung from motion picture artists—writers, actors, and others—invoking their privilege against self-incrimination or refusing to appear before the House Un-American Activities Committee. Producers and distributors agreed not to employ them. Twenty-three artists sought damages and an injunction against this "blacklisting" in the California courts. Their complaint was dismissed, the dismissal was affirmed on appeal, and the United States Supreme Court granted *certiorari*. However, after the Court heard argument, the Court dismissed for *certiorari* improvidently granted without an opinion, with a single sentence explaining that "the judgment rest[ed]

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173. The Jenner Bill, S. 2646, 85th Cong. (2d Sess., July 26, 1957), would strip the Court of jurisdiction over litigation stemming from (1) Congressional investigations and contempt; (2) terminations from governmental employment; (3) state subversive activity prosecutions; (4) terminations and disciplining of teachers; and (5) bar admissions. *See also*, Jenner Attacks Court, N. Y. TIMES, p. 6, col. 6 (July 29, 1957) (reporting Jenner's comments and submission of bill on July 26).

174. *See supra*, text accompanying note 162.

175. *See* LICHTMAN 125, n 80 to ch. 8.

176. The anti-*Nelson* H.R. 3 received a 241–155 vote. The one reversing *Cole v. Young* received 298–46. The one reversing *Yates* did not even get a roll-call vote, as did not the passport-withholding bill. *See* LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION 123-24.

177. LICHTMAN 124.

178. LICHTMAN 127; *see also* note 62 and accompanying text.

179. Frankfurter rued to Brennan, who authored *Jencks*, that Frankfurter should have written a concurrence demonstrating how narrow the holding was, as he had done in *Watkins* and *Sweezy*. LICHTMAN 107 (quoting an Aug. 29, 1957, letter from the Brennan papers, Box I:3, Jencks file 3 of 3).

180. Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop on Communism in Late 1950s*, 43 HOFSTRA L. REV. 207, 227 (2014) ("Justice Frankfurter's desertion of the position taken by the Supreme Court's liberal Justices was the main reason for the Court's 'flip-flop' from Red Monday to *Barenblatt* and *Uphaus*. An advocate of judicial restraint, Justice Frankfurter reined in the expansion of civil liberties protections, and showed deference to the power of Congress in order to dodge legislation introduced by anti-Communist legislators that would have stripped the Court of its appellate jurisdiction.")

181. *See* table 7.1 and accompanying text.

182. 355 U.S. 597 (1958).

on an adequate state ground." Douglas dissented alone.[183]

The Court still resisted the government in a deportation *habeas corpus* setting in *Rowoldt*.[184] Frankfurter wrote for a 5–4 Court allowing the alien to remain but on essentially the same facts as *Galvan*.[185] Harlan's dissent found *Galvan* indistinguishable.

In a *per curiam* decision, over Clark's dissent, the Court favored individual soldiers who received less than honorable discharges in *Harmon*.[186] The Court held that the Secretary of the Army exceeded his statutory authority when he took into account activities of the soldiers before their induction into the army. Clark's dissent argued that just as civilians employed by the government received employment decisions for conduct before their employment, so could soldiers.

The Court's new severity against un-Americanism defendants before the appointment of Stewart was revealed in *Brown-1958*[187] and *Green*,[188] each decided 5–4 on March 31, 1958.

In a denaturalization proceeding, the defendant chose to testify in *Brown-1958*. After she had testified on direct examination that she had not been a member of the Communist Party, she invoked the privilege against self-incrimination against similar questions on cross-examination. The trial court required the defendant to answer as a consequence of the defendant's position in direct examination. The Supreme Court affirmed the conviction 5–4 with two dissenting opinions, Black's, joined by Warren and Douglas, and Brennan's. Black saw the Court improperly extending to a civil proceeding a rule that applies to a criminal one. Brennan agreed and also considered the punishment excessive.

In *Green*, two of the convicted defendants of *Dennis* failed to appear for their incarceration for four and a half years. The district court imposed a contempt conviction of three years, which the Supreme Court upheld. Warren, Black, Douglas, and Brennan dissented.

Whereas *Wilson*, *Brown-1958*, and *Green* had the Court support un-Americanism prosecutions, the criminal contempt conviction of defendants of *Yates I* gave rise to *Yates II*.[189] The Court by a 6–3 majority reduced their sentence to time served. Clark, with Burton and Whittaker, dissented.

On May 19, 1958, the Court issued a *per curiam* decision on a *certiorari* petition, without oral argument, *Sacher II*.[190] The Court split 6–2 against an un-Americanism prosecution that drew a concurrence and a dissent. The defendant, a lawyer for defendants associated with the Communist Party, did not answer questions of a Senate subcommittee. The Court reversed and instructed the dismissal of the charges because the questions were not pertinent to the subcommittee's

183. *Wilson* at 599 ("I can see no difference where the 'right to work' is denied because of race and where, as here, because the citizen has exercised Fifth Amendment rights. To draw such a line is to discriminate against the assertion of a particular federal constitutional right. That a State may not do consistently with the Equal Protection Clause of the Fourteenth Amendment.")

184. Rowoldt v. Perfetto, 355 U.S. 115, 78 S.Ct. 180, 2 L.Ed.2d 140 (Dec. 9, 1957).

185. *See* note 104 and accompanying text, *supra*.

186. Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (March 3, 1958).

187. Brown v. United States, 356 U.S. 148 (1958) ("*Brown-1958*").

188. Green v. United States, 356 U.S.165 (1958).

189. Yates v. United States, 356 U.S. 363 (1958).

190. Sacher v. United States, 356 U.S. 576, 78 S.Ct. 842, 2 L.Ed.2d 987 (1958).

inquiry. Clark with Whittaker dissented, arguing that the questions were pertinent and the Court should hear oral argument, especially in view of the defendant's legal sophistication.[191] Harlan's concurrence pointed out that pertinency turned on the record and was vague as evinced from the various interpretations received: oral argument would be pointless.[192] Burton did not participate.

Still in 1958, the Court resisted un-Americanism prosecutions in *Nowak*, *Bonetti*, *Kent*, *Dayton*, and *Speiser* and their companion cases.

Denaturalization due to Communist Party membership was the issue in *Nowak* (and a sister case, *Maisenberg*).[193] Harlan wrote for a 6–3 Court reversing the lower courts' denaturalizations. The allegedly fraudulent answers were to a question whether the applicants were members of an organization that believed in anarchy or the violent overthrow of the government. Their denial while being members of the Communist Party and while the government's burden in the denaturalization setting was very high was seen by the majority as potentially innocent.[194] Burton with Clark and Whittaker dissented, finding the question proper.

The Court reversed the deportation of an alien 6–3 in *Bonetti*.[195] The alien had entered the United States in 1923, was a member of the Communist Party from 1932 to 1936, and went to fight in the Spanish Civil War in 1937. In 1938 he returned as a quota immigrant. In 1951 the United States sought to deport him, for past communist affiliation. Whittaker wrote for the majority that the date of the alien's admission was 1938. Because the alien had not been a member of the Communist Party since then, he was not deportable. Clark's dissent, with Frankfurter and Harlan, found the holding contrary to precedent.

In *Kent* the Court would split 5–4 for individuals who had been denied passports due to communist sympathies and who intended to travel to communist conferences.[196] Clark dissented with Burton, Harlan, and Whittaker.[197] Douglas wrote for the majority that included Warren, Black, Brennan, and Frankfurter, finding an implied freedom to travel, which could only be

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191. *Sacher*, 356 U.S. at 580 ("Petitioner is a seasoned lawyer with trial experience. Both questions and answers may go afield in the examination of a witness—a truism to every trial practitioner—but that fact cannot license a witness' refusal to answer questions which are relevant.")

192. *Sacher*, 356 U.S. at 578 ("For my part, it is abundantly evident that the pertinency of none of the three questions involved can be regarded as undisputably clear, as indeed is evidenced by the different interpretations of the record advanced by the members of this Court and of the Court of Appeals who have considered this issue.")

193. Nowak v. United States, 356 U.S. 660, 78 S.Ct. 955, 2 L.Ed.2d 1048 (May 26, 1958). With the same reasoning, the court also disposed of Maisenberg v. United States, 356 U.S. 670, 78 S.Ct. 960, 2 L.Ed.2d 1056 (May 26, 1958).

194. *Nowak*, 356 U.S. at 664 ("We think that Nowak could reasonably have interpreted Question 28 as a two-pronged inquiry relating simply to anarchy. Its first part refers solely to anarchy. Its second part, which is in direct series with the first, begins with 'anarchy,' and then refers to 'overthrow.' It is true that the two terms are used in the disjunctive, but, having regard to the maxim *ejusdem generis*, we do not think that the Government's burden can be satisfied simply by parsing the second sentence of the question according to strict rules of syntax. For the two references to 'anarchy' make it not implausible to read the question in its totality as inquiring solely about anarchy.")

195. Bonetti v. Rogers, 356 U.S. 691, 78 S.Ct. 976, 2 L.Ed.2d 1087 (June 2, 1958).

196. Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (June 16, 1958).

197. *Kent*, 357 U.S. at 143 ("[W]hile distinguishing away the Secretary's passport denials in wartime, the majority makes no attempt to distinguish the Secretary's practice during periods when there has been no official state of war but when nevertheless a presidential proclamation of national emergency has been in effect, the very situation which has prevailed since the end of World War II. Throughout that time, as I have pointed out, the Secretary refused passports to those 'whose purpose in traveling abroad was believed to be to subvert the interest of the United States.'")

restricted expressly in times of peace.[198] This would be one of the Court's holdings that Congress would seek to undo in the coming legislative backlash.

The issue was similar in *Dayton*.[199] A physicist was refused a passport despite disclaiming any communist sympathies or affiliations. According to the Secretary of State, Dulles, the physicist had connections to the Rosenberg espionage ring and his contrary testimony was not credible. Dulles also took the position that the physicist's proposed work at a research institute in India with a physicist who had renounced his US citizenship would be disadvantageous to the United States. The Supreme Court followed *Kent* with the same 5–4 vote. Note, with the benefit of hindsight, that India did not develop its nuclear weapon capacity until much later, the late seventies.[200]

Speiser v. Randall[201] and its companion, *First Unitarian*,[202] were, unusually, about taxation. Both disputes turned on California's conditioning tax exemptions on loyalty oaths. In *Speiser*,

> [t]he appellants [we]re honorably discharged veterans of World War II who claimed [a] veterans' property-tax exemption provided by . . . the California Constitution. . . . The form [which the applicants had to file annually] was revised in 1954 to add an oath by the applicant: 'I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities.' Each refused to subscribe the oath and struck it from the form which he executed and filed for the tax year 1954–1955. Each contended that the exaction of the oath as a condition of obtaining a tax exemption was forbidden by the Federal Constitution.[203]

The United States Supreme Court sided with the taxpayers with Clark dissenting. Warren did not participate. Douglas with Black wrote an additional concurrence in *First Unitarian* underscoring its religious belief denying the state the power to compel any oath about belief. Clark's dissent pointed out the lower courts found no such tenet and that, even if held, it would not be religious in nature.

The Court would support firing state and local employees for not answering un-Americanism questions in *Beilan* and *Lerner*.[204] Pennsylvania had a provision about teacher competency in its Public School Code and one about loyalty of its employees in the

198. *Kent*, 357 U.S. at 129 ("[T]he right of exit [from the country] is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." Citations omitted.)

199. Dayton v. Dulles, 357 U.S. 144, 78 S.Ct. 1127, 2 L.Ed.2d 1221 (

200. *See, generally,* The Spread of Nuclear Weapons, ENCYCLOPAEDIA BRITANNICA (2019) (available at https://www.britannica.com/technology/nuclear-weapon/The-spread-of-nuclear-weapons [perma.cc/UR26-HWSF] (moreover, India's advances in the 1950s and 1960s primarily took advantage of Eisenhower's Atoms for Peace program).

201. 357 U.S. 513 (June 30, 1958).

202. First Unitarian Church of Los Angeles v. Cty of Los Angeles, 357 U.S. 545, 78 S.Ct. 1350, 2 L.Ed.2d 1484 (June 30, 1958).

203. *Speiser*, 357 U.S. at 514-15.

204. Beilan v. Bd of Ed. of Philad., 357 U.S. 399 (June 30, 1958). The Court with the same reasoning also disposed of Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423, involving the dismissal of a New York subway conductor under similar circumstances.

Pennsylvania Loyalty Act. Beilan, who had been a teacher for 22 years, refused to answer questions in 1952 about being active in a communist association in 1944 and was discharged. A 5–4 majority sided with the Pennsylvania authorities.[205] Frankfurter concurred while hedging that the Fourteenth Amendment did not require a review of the wisdom of state decisions.[206] Warren, Black, Douglas, and Brennan dissented. *Lerner*, with the same votes and opinions, was about a New York City rule and a subway conductor who was fired for refusing to answer questions.

When Eisenhower appointed Stewart in 1958 to replace Burton the Court's majority became Republican appointed. (Upon the appointment of White in April 1962 the majority would again become Democrat appointed. Upon the appointment of Blackmun in June 1970, the majority would revert to Republican appointed and remain so to the date of this writing.) Warren, Black, Douglas, and Brennan, continued to be the persistent dissenters. The impact of Stewart's appointment, however, was not central to the change in the outcomes.[207]

Indeed, the first decision of the Stewart composition, *Vitarelli*,[208] favored the individual. An educator holding a doctor's degree from Columbia University, who was appointed in 1952 by the Department of the Interior as an Education and Training Specialist the Trust Territory of the Pacific Islands, was dismissed for sympathetic association with individuals with sympathetic association with the Communist Party—a two-step link. Since he was not in a sensitive position, *Cole* precluded this dismissal.[209] The Secretary of Education, however, sent a second dismissal notice with no explanation. The 5–4 majority by Harlan, with Black, Douglas, Brennan, and Warren, reinstated Vitarelli, treating the second dismissal as a repackaging of the first, illegal one. Frankfurter wrote, joined by Clark, Whittaker, and Stewart, that the second dismissal was proper. To Frankfurter, the majority's disregard of the second notice "attributes to governmental action the empty meaning of confetti throwing."[210]

After nodding in the direction of the individual in *Vitarelli*, the Stewart composition starts reversing the precedent of the idealist period that preceded it. The Court used *Barenblatt*[211] to revise its interpretation of *Watkins*,[212] as it would revise its treatment of *Nelson* and *Sweezy* in *Uphaus*.[213] Whereas *Watkins* excused refusing to testify before the House Un-American Activities Committee, *Barenblatt* upheld a conviction for refusing to testify despite that it was related to higher

205. *Beilan*, 357 U.S. at 408 ("[T]he Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa. at page 91, 125 A.2d at page 331. This interpretation is not inconsistent with the Federal Constitution.")

206. *Beilan*, 357 U.S. at 411 ("I am not charged with administering . . . the school system of Pennsylvania. The Fourteenth Amendment does not check foolishness or unwisdom in such administration. The good sense and right standards of public administration in those States must be relied upon for that, and ultimately the electorate.")

207. See text accompanying notes 50–53, above.

208. Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (June 1, 1959).

209. *See* note 134, above, and accompanying text.

210. *Vitarelli*, 359 U.S. at 549.

211. Barenblatt v. United States, 354 U.S. 930 (June 8, 1959).

212. *See* text accompanying note 159.

213. *See* text accompanying note 216.

education.[214] Academic freedom retreated before the fear of communist activities. Black dissented, joined by Warren and Douglas, on the primacy of free association and the prohibition of any bill of attainder. Brennan's dissent attacked exposure for exposure's sake.

The New Hampshire issues of *Sweezey*[215] return in *Uphaus v. Wyman*.[216] The plurality of *Sweezy* considered that academic freedom allowed a college professor not to answer the loyalty questions of the attorney general, acting as a legislative committee. The plurality also considered inappropriate the delegation to the attorney general of powers of the legislature. However, the concurrence and the dissent disagreed and deferred to the state's legislature. The target of the probe in *Uphaus* resisted a subpoena by relying on *Nelson*'s holding[217] to argue that the federal Smith Act superseded similar efforts by the state of New Hampshire and that the subpoenas violated free association. Justice Clark wrote for the new composition of the Court pointing out that, contrary to *Sweezy*, no issue of academic freedom arose. The majority interpreted *Nelson* narrowly, vindicating state prosecutions.[218] Rather, Clark stressed that New Hampshire had valid grounds for its investigation of disloyalty.[219]

Uphaus joined *Barenblatt*, decided on the same day, to show the Court's pivot on un-Americanism. Brennan authored the strongly worded and long dissent, joined by Warren, Black, and Douglas. Brennan saw the investigation as motivated merely by a desire to expose.[220] Black and Douglas underlined the primacy of free association and that the laws against subversives are prohibited bills of attainder.

In *Raley*,[221] the Court split evenly with Stewart not participating. At issue were the contempt convictions of

214. Near the end of the Jackson Era academic freedom had been on the winning side in *Updegraff*, *see* note 77 and accompanying text, above (invalidating the imposition of loyalty oaths on university professors).

215. *See* text accompanying note 156, above.

216. 360 U.S. 72 (1959).

217. *See* text accompanying notes 121-122,

218. *Uphaus*, 360 U.S. at 78 ("All [*Nelson*] proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows *a fortiori*.")

219. *Uphaus*, 360 U.S. at 79 ("Certainly the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings."; at 79–80: "The Attorney General sought to learn if subversive persons were in the State because of the legislative determination that such persons, statutorily defined with a view toward the Communist Party, posed a serious threat to the security of the State. The investigation was, therefore, undertaken in the interest of self-preservation, 'the ultimate value of any society,'" (citing *Dennis*); at 81 "And the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy of persons who, at least to the extent of the guest registration statute, made public at the inception the association they now wish to keep private.")

220. *Uphaus*, 360 U.S. at 82 ("The Court holds today that the constitutionally protected rights of speech and assembly of appellant and those whom he may represent are to be subordinated to New Hampshire's legislative investigation because, as applied in the demands made on him, the investigation is rationally connected with a discernible legislative purpose. With due respect for my Brothers' views, I do not agree that a showing of any requisite legislative purpose or other state interest that constitutionally can subordinate appellant's rights is to be found in this record. Exposure purely for the sake of exposure is not such a valid subordinating purpose." At 105-06 "The Attorney General had World Fellowship's speaker list and had already made publication of it. . . He had considerable other data about World Fellowship, Inc., which he had already published. What reason has been demonstrated, in terms of a legislative inquiry, for going into the matter in further depth? Outside of the fact that it might afford some further evidence as to the existence of 'subversive persons' within the State, which I have endeavored to show was not in itself a matter related to any legislative function except self-contained investigation and exposure themselves, the relevance of further detail is not demonstrated. But its damaging effect on the persons to be named in the guest list is obvious.")

221. Raley v. Ohio 360 U.S. 423 (June 22, 1959).

four defendants who invoked the privilege against self-incrimination before an Ohio legislative committee charged with investigating un-American activities. The Court had previously summarily vacated their convictions and remanded for the state courts to follow *Sweezy* and *Watkins*. This time, the Court reversed the conviction of three who had invoked the privilege against self-incrimination only to substantive questions but, by an equally divided Court, affirmed the conviction of the fourth, who invoked the privilege in refusing to state his home address. The Court was still allowing the refusal to answer questions but in a more limited way even when Stewart was not participating.

In *Greene*[222] the Court sided with a senior aeronautical engineer of a defense contractor. The contractor was notified that it would lose its government contracts because this senior manager would lose his security clearance. The majority remanded with the reasoning that the process of the removal of the security clearance was inadequate. Clark dissented, almost mockingly.[223]

The Court reviewed a one-year suspension of a defense counsel in a Smith Act trial, *In re Sawyer*.[224] Brennan wrote for a three-judge plurality that the attorney's free speech rights to criticize the state of the law and trial practice defeated the prosecution. Black concurred. Frankfurter dissented with Clark, Harlan, and Whittaker. Frankfurter argued that Brennan's interpretation of the violations was unreasonably narrow; the attorney actually accused the judge of conducting an unfair trial, several rounds of review had agreed, and the punishment was fair. Stewart, the swing vote on un-Americanism issues at this time, agreed with Frankfurter that counsel's free speech rights are limited.[225] However, Stewart concurred with Brennan because the lawyer's speech did not interfere with the conduct of the trial.

The Court returned to favoring the prosecution in *Nelson v. County of Los Angeles* ("*Nelson-LA*").[226] Two employees of the county refused to answer questions before a subcommittee of the House Un-American Activities Committee. One was a long-term employee and one a temporary employee. Both were dismissed and their dismissal was sustained by the California courts, including a 4–3 split over denial of review by the California Supreme Court. The United States Supreme Court affirmed the dismissal of the long-term employee by an equally divided Court, without issuing an opinion (Warren did not participate). The dismissal of the temporary employee split the Court 5–3, with Black,

222. Greene v. McElroy, 360 U.S. 474 (June 29, 1959).

223. *Greene*, 360 U.S. at 511 ("Surely one does not have a constitutional right to have access to the Government's military secrets. But the Court says that because of the refusal to grant Greene further access, he has lost his position as vice president and general manager, a chief executive officer, of ERCO, whose business was devoted wholly to defense contracts with the United States, and that his training in aeronautical engineering, together with the facts that ERCO engages solely in government work and that the Government is the country's largest airplane customer, has in some unaccountable fashion parlayed his employment with ERCO into 'a constitutional right.' What for anyone else would be considered a privilege at best has for Greene been enshrouded in constitutional protection. This sleight of hand is too much for me." Omitted is a footnote where Clark answers Harlan's characterization in Harlan's concurrence of Clark's language as colorful).

224. 360 U.S. 622 (June 29, 1959).

225. *Sawyer*, 360 U.S. at 646-47 ("Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. For example, I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline.")

226. 362 U.S. 1 (Feb. 29, 1960).

Douglas, and Brennan dissenting. Clark, who until 1957 often dissented alone, now wrote the majority opinion and distinguished *Slochower*.[227] There, the statute penalized the privilege against self-incrimination, whereas this was a case of mere insubordination.[228] The dissent of Brennan argued the distinction was non-existent and *Slochower* should have been followed.[229] Black's dissent stressed the primacy of the Bill of Rights.

Four more cases were decided in 1960.[230] In the 5–4 *per curiam* decision of *Niukkanen*, the Court upheld a deportation for membership in the Communist Party over a dissent by Douglas with Warren, Black, and Brennan.[231] *Kimm v. Rosenberg*,[232] was also a 5–4 *per curiam* decision with the same alignment. The issue was the deportation process of an alien. The statute provided that discretion existed to allow the alien to self-deport only if the alien could show his good moral character and show he was not a communist. The alien refused to answer questions about his membership in the Communist Party, invoking the privilege against self-incrimination. He was considered to have failed to show his good moral character. Douglas's dissent against penalizing the use of a constitutional right was joined by Warren and Black.[233] Brennan's dissent, joined by Warren and Douglas, argued that the result of the statutory scheme in this instance became improper. If the government sought to remove an alien because of Communist Party membership, then the government would bear the burden of that proof. Here, where the removal was for a different reason, it was improper that the burden shifted to the alien to prove that he was not a communist.[234]

Continuing the favoring of the government, *Flemming* upholds the termination of social security benefits of a deported alien for membership in the Communist Party.[235] The Court splits in the same 5–4 way, with Black, Douglas, Warren, and Brennan dissenting.

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227. *See* text accompanying note 128, above.
228. *Nelson-LA*, 361 U.S. at 7 ("But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing.")
229. *Nelson-LA*, 361 U.S. at 16 ("[T]his Court did not reverse the judgment of New York's highest court because it had disrespected Slochower's state tenure rights, but because it had sanctioned administrative action taken expressly on an unconstitutionally arbitrary basis. So here California could have summarily discharged Globe, and that would have been an end to the matter; without more appearing, its action would be taken to rest on a permissible judgment by his superiors as to his fitness. But if it chooses expressly to bottom his discharge on a basis—like that of an automatic, unparticularized reaction to a plea of self-incrimination—which cannot by itself be sustained constitutionally, it cannot escape its constitutional obligations . . .").
230. Not included for not focusing on subversive activities, is Shelton v. Tucker, 364 U.S. 479 (1960). Unlike *Adler*, supra, text accompanying note 79, where the state required teachers and professors to list the subversive organizations to which they belonged, the state in *Shelton* required teachers and professors to list all the organizations to which they belonged, paid dues or made gifts in the last five years. A tightly split Court vindicated the teachers with an opinion by Stewart. Frankfurter, Clark, Harlan, and Whittaker wrote two dissenting opinions.
231. 362 U.S. 390 (Apr. 18, 1960).
232. 363 U.S. 405 (1960).
233. *Kimm*, 363 U.S. at 411 ("The Court in terms does not, and cannot, rest its decision on the ground that by invoking the Fifth Amendment the petitioner gave evidence of bad moral character. Yet the effect of its decision is precisely the same.")
234. *Kimm*, 363 U.S. at 414 ("I would think it perfectly plain that such a regulation, as applied in this case, would be contrary to the statutory scheme, properly and responsibly construed. In the first place, as I have noted, it turns around the ordinary rules as to the burden of proof as to which party shall show 'deportability.' It requires the alien to prove a negative—that he never was a Communist since he entered the country—when no one has said or intimated that he was." Footnote omitted.)
235. Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (June 20, 1960).

McPhaul[236] upholds a conviction. The secretary of an organization designated as communist was subpoenaed to produce the organization's documents to the House Un-American Activities Committee and refused, invoking the privilege against self-incrimination. Douglas's dissent, joined by Warren, Black, and Brennan, argues that a predicate for the conviction should be a showing that the witness could produce the documents.[237] The majority had allowed the inference from the accused's silence; if he did not have access to the documents, he could have said so either to the committee or at trial.[238]

The year 1960 closes with an upholding of a denaturalization in *Polites*.[239] However, the Court did not quite reverse *Nowak* and *Maisenberg*.[240] Rather, the procedural posture was that the alien sought to use them to void his waiver of his appeal. The Court, in an opinion by Stewart, did not allow it. The usual dissenters, under Brennan's authorship, would have allowed the courts to effectuate *Nowak* and *Maisenberg* to prevent court rulings from becoming "instruments of wrong."[241]

In early 1961, in *Travis* the Court would allow a question of venue to reverse a Colorado conviction of a labor leader filing a false affidavit of not being a communist.[242] Harlan's dissent, with Clark and Frankfurter, argued that the government had a choice of venues; Colorado venue was appropriate despite that the crime was not completed until the affidavit reached Washington, D.C.

The Court would return to a streak of decisions favoring the government. Two decisions arrived on February 27, 1961. Both were about convictions following refusals to answer questions of the House Un-American Activities Committee. Both affirmed the sentences 5–4. Both were written by Stewart.

In *Wilkinson*[243] the defense argued that the lower courts' adherence to *Barenblatt* was error, the committee lacked power, the questions were not pertinent to its legislative activity, and they violated defendant's right of free association. Stewart's majority opinion adhered to *Barenblatt*, finding that the committee's power was appropriate, the questions pertinent, and the danger that communist activities posed justified the incursion into the Bill of Rights.[244] Warren, Black, Douglas, and Brennan write three emphatic dissenting opinions.

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236. McPhaul v. United States, 364 U.S. 372 (1960).

237. *McPhaul*,364 U.S. at 387 ("If Congress desires to have the judiciary adjudge a man guilty for failure to produce documents, the prosecution should be required to prove that the man whom we send to prison had the power to produce them.")

238. *McPhaul*,364 U.S. at 380 ("Inasmuch as petitioner neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce any evidence at his contempt trial of his inability to produce them, we hold that the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time of the subpoena was served upon him.")

239. Polites v. United States, 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173, 3 Fed.R.Serv.2d 1021 (Nov. 21, 1960).

240. *See* text accompanying notes 193–194, *supra*.

241. *Polites*, 364 U.S. at 440.

242. Travis v. United States, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (Jan. 16, 1961).

243. 365 U.S. 399 (1961).

244. *Wilkinson*, 365 U.S. at 414-15 ("As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest. 'To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II . . . .' 360 U.S. at pages 128–129, 79 S.Ct. at page

The second decision of the same day was *Braden*.[245] The majority referred to *Wilkinson* but the distinguishing feature of the facts of *Braden* was that the defendant, Carl Braden, had been active in racial integration efforts in the South, which in other instances overcame un-Americanism concerns.[246] The Court noted that his efforts and speech with respect to integration activities were not an issue. Despite the legitimate nature of those activities, before the House Un-American Activities Committee his membership in the Communist Party justified his questioning and his prosecution upon refusing to answer.[247] Black and Douglas wrote two dissenting opinions, joined by each other.

On April 24, the Court would issue two more 5–4 decisions against candidates for the bar who refused to answer questions about membership in the Communist Party. *Konigsberg II*[248] undid *Konigsberg I*.[249] Harlan, Clark, and Frankfurter had dissented, siding with the state originally. This time they were joined by Stewart and Whittaker to make a majority against the usual dissenters. The same majority also affirmed a denial of an Ohio bar admission in *In re Anastaplo*.[250]

In essence, *Wilkinson*, *Braden*, *Konigsberg II*, and *Anastaplo* solidify the message of *Barenblatt* and *Uphaus*. The treatment of un-Americanism prosecutions had changed. Likely due to the legislative backlash (text accompanying notes 155–180, pp. 241–244), starting in the summer of 1957, the justices who occasionally favored un-Americanism prosecutions became much more firm in that stance. Clark, who earlier would often dissent alone in favor of the state, would now often be in the majority. Warren, Black, Douglas, and Brennan did not change, but the Court moved away from the primacy that these justices placed on the Bill of Rights and toward a pragmatism of fear of Communism. Granted, these majorities did not refer to Jackson's dissent in *Terminiello*.[251] Reading between the lines, however, one can see a paraphrasing of Jackson's warning:

> This Court has gone far toward accepting the doctrine that civil liberty means the [investigations of communist activity] are impairments of the liberty of the citizen. . . . There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert

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1094. ¶The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened at the time to be engaged, but in the manipulation and infiltration of activities and organizations by persons advocating overthrow of the Government. 'The strict requirements of a prosecution under the Smith Act . . . are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step.'")

245. Braden v. United States, 365 U.S. 431 (1961).

246. *See, e.g.*, Louisiana v. NAACP, note 254 and accompanying text, and *Dombrowski*, note 320 and accompanying text.

247. *Braden*, 365 U.S. at 435 ("But *Barenblatt* did not confine congressional committee investigation to overt criminal activity. . . Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected activity. Communist infiltration and propaganda in [the South], which were the subjects of the subcommittee investigation here, are surely as much within its pervasive authority as Communist activity in educational institutions. The subcommittee had reason to believe that the petitioner was a member of the Communist Party, and that he had been actively engaged in propaganda efforts. It was making a legislative inquiry into Communist Party propaganda activities in the southern States. Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts in that region was surely not constitutionally beyond the reach of the subcommittee's inquiry.")

248. Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (Apr. 24, 1961).

249. *See* text accompanying note 143, *supra*.

250. 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (Apr. 24, 1961).

251. Terminiello v. City of Chicago, 337 U.S. 1 (1949).

the constitutional Bill of Rights into a suicide pact.[252]

This majority accepted Jackson's 1949 warning against a "doctrinaire" idealism, so paraphrased. The Bill of Rights retreated, allowing more investigations into communist activity.

The new attitude in favor of un-Americanism prosecutions knew exceptions. In *Slagle v. Ohio*[253] the defendants, who had refused to answer questions of an Ohio Un-American Activities committee, argued that their due process rights were violated because the committee did not expressly reject their objections. The Court sided with the individuals, producing a unanimous decision against the prosecution. Frankfurter did not participate.

Un-Americanism prosecutions gave way to racial integration efforts in *Louisiana v. NAACP*.[254] Two Louisiana statutes created the issue. One required all non-trading organizations to provide an annual affidavit that no officer or member of their board or of any of their affiliates nationally was a member of any subversive organization. The second required each organization to submit annually a list of its members. NAACP's listed members had experienced "economic reprisals."[255] The Court, under Douglas's pen, unanimously sided with the NAACP.[256]

On June 5, 1961, the Court issued its three long-pending decisions on the application of anti-communist legislation to the Communist Party and some of its members.[257] The Court split 5–4 in favor of the prosecution in two, *Scales*[258] and *Communist Party II*.[259] In the third, *Noto*,[260] the court unanimously sided with the defendant. A week later would come *Catherwood*, and *Deutch*.[261] In *Catherwood* the Court sided unanimously against a negative tax consequence imposed on the Communist Party. In *Deutch*, Stewart would side with Warren, Black, Douglas, and Brennan and produce a tightly split exoneration for an un-Americanism defendant.

Communist Party II resulted from the efforts of Congress to treat organizations as subversive, while meeting the standard that the Court established in *Joint Anti-Fascist Refugee Cmtee v. McGrath*.[262] The Court had previously remanded the same dispute without

252. *Terminiello*, 337 U.S. at 36 (Jakson, J. dissenting).
253. 366 U.S. 259, 81 S.Ct. 1076, 6 L.Ed.2d 277, 16 O.O.2d 440 (1961) (The absence of a dissent here, as in *Noto*, text accompanying note 260, below, can be considered an expression of a more pliant nature that conservatism seemed to have on the Court until the mid-seventies).
254. 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301.
255. Louisiana v. NAACP, 366 U.S. at 296.
256. Louisiana v. NAACP, 366 U.S. at 297 ("At one extreme is criminal conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights. These lines mark the area in which the present controversy lies, as the District Court rightly observed.")
257. The length of the pendency is apparent from a bail issue of *Noto* that arose in November 1955, Noto v. United States, 76 S.Ct. 255 (1955). The initial grant of *certiorari* in Scales v. United States dated from March, 1956. On February 5, 1960, the Court sets argument for October 10, 1960 with Clark dissenting against the delay.
258. Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961).
259. Communist Party of the United States of America v. Subversive Activities Ctrl. Bd., 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961).
260. Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).
261. Communist Party v. Catherwood, 367 U.S. 389, 81 S.Ct. 1465, 6 L.Ed.2d 919 (June 12, 1961) ("*Catherwood*"); Deutch v. United States, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963 (June 12, 1961) ("*Deutch*").
262. *See* text accompanying note 28, above.

reaching the substance.[263] The dispute was clearly important for the Court. It heard two days of oral argument, and the opinion is a very detailed one, by Frankfurter, spanning 111 pages in the U.S. Reporter. Including the four dissents, the decision occupies 198 pages.

The majority opinion disposes of some procedural objections and several constitutional claims. The registration required of the Communist Party was not a bill of attainder because the statute merely imposed a registration obligation on entities engaged in the described type of conduct.[264] The registration, as a regulation of freedom of association and speech, was justified by the danger of communism as an international revolutionary movement.[265]

Warren's dissent also covered a broad array of topics. The procedural imperfections should have led to a remand. The statute should have been held unconstitutional because it punished speech that did not incite action.[266]

Black's dissent argued that the statute was unconstitutional as a bill of attainder and antithetical to the freedoms that are central to the American ideals and the efforts to spread them.[267]

Douglas accepted the dangers of communism and that the procedural imperfections did not justify a remand. Nevertheless, he dissented because registration was an impermissible interference with freedom of association and because it constituted self-incrimination of the officers of the Communist Party.[268]

Brennan's dissent, joined by Warren, conceded that registration may be appropriately demanded from the party but said the same registration violated the privilege against self-incrimination of its officers.[269]

The juxtaposition of *Scales*[270] and *Noto*[271] shows where exactly this majority placed the line for proper prosecutions against advocating the overthrow of the government. The defendant in *Scales* played an active organizing role in the party. The evidence showed training about specific revolutionary tactics of attack

263. *See* text accompanying note 124.
264. *Communist Party II*, 367 U.S. at 86 ("The Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage.")
265. *Communist Party II*, 367 U.S. at 88-89 ("The Communist Party would have us hold that the First Amendment prohibits Congress from requiring the registration and filing of information, including membership lists, by organizations substantially dominated or controlled by the foreign powers controlling the world Communist movement and which operate primarily to advance the objectives of that movement: the overthrow of existing government by any means necessary and the establishment in its place of a Communist totalitarian dictatorship. We cannot find such a prohibition in the First Amendment. So to find would make a travesty of that Amendment and the great ends for the well-being of our democracy that it serves.") (citations omitted).
266. *Communist Party II*, 367 U.S. at 132 ("[T]he Court should hold that the Board cannot require a group to register as a Communist-action organization unless it first finds that the organization is engaged in advocacy aimed at inciting action.")
267. *Communist Party II*, 367 U.S. at 148 ("Now, when this country is trying to spread the high ideals of democracy all over the world—ideals that are revolutionary in many countries—seems to be a particularly inappropriate time to stifle First Amendment freedoms in this Country. The same arguments that are used to justify the outlawry of Communist ideas here could be used to justify an outlawry of the ideas of democracy in other countries.")
268. *Communist Party II*, 367 U.S. at 190 ("[T]he Fifth Amendment bars Congress from requiring full disclosure by one Act and by another Act making the facts admitted or disclosed under compulsion the ingredients of a crime.")
269. *Communist Party II*, 367 U.S. at 201 ("If the admission both of officership status and knowledge of Party activities cannot be compelled in oral testimony in a criminal proceeding, I do not see how compulsion in writing in a registration statement makes a difference for constitutional purposes.")
270. Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961).
271. Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

and retreat,[272] pledges to fight and kill,[273] plans for arming the population and disarming it afterward to preserve the victory of the revolution.[274] The Court rejected the defense's First Amendment arguments.[275] Black's and Douglas's dissents stressed the First Amendment. Brennan's dissent, joined by Warren and Douglas, made a statutory argument.

In *Noto*,[276] the unanimous exoneration for membership in the Communist Party turned on the distinction between advocacy of action to overthrow the government compared to conspiring to organize future action to then advocate overthrow. Witnesses testified that the defendant intended to recruit and organize among labor in basic industries in order for the Party to later be able to organize strikes that would paralyze the economy. Harlan's majority opinion considered this to be insufficient to find present advocacy.[277] Black's concurrence bemoans the implicit message of the majority that the government must redouble its domestic spying and would rather stand on the First Amendment, as would Douglas.[278]

In *Catherwood* the issue arose over the tax interpretation of a federal statute stripping all benefits from the Communist Party. [279] The argument was that the Communist Party lost a tax benefit, raising one of the taxes that it paid as an employer from 1% to 3%. The Court

272. *Scales*, 367 U.S. at 242 ("'In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution.'")

273. *Scales*, 367 U.S. at 243 ("[T]he students were required by the instructor to take a pledge: 'The pledge was each of us are Communists or members of the Party and each of us have a responsibility and we must carry out our responsibility and work for the interests of the Party and its recipients and carry out the full will of the Party even though it meant to fight and to kill, we must carry out the demands of the Party and all of them.'")

274. *Scales*, 367 U.S. at 240 ("'Q. Do I understand, Mr. Moreau (sic) that during this period of revolution the people, that is, the masses of the people, would be carrying guns? A. Yes, sir. 'Q. And after the revolution do I understand that the Party would go around and collect these guns and take them away from the people? A. Yes, sir; take them away from those that helped them overthrow the capitalist system in order to assure the revolution itself.'")

275. *Scales*, 367 U.S. at 228–29 ("It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.")

276. Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

277. *Noto*, 367 U.S. at 298 ("The 'industrial concentration' program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. The most that can be said is that the evidence as to that program might justify an inference that the leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of sabotage were presently advocated; and it is present advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause.")

278. *Noto*, 367 U.S. at 302 ("I cannot join an opinion which implies that the existence of liberty is dependent upon the efficiency of the Government's informers. I prefer to rest my concurrence in the judgment reversing petitioner's conviction on what I regard as the more solid ground that the First Amendment forbids the Government to abridge the rights of freedom of speech, press and assembly.") The unanimity of the Court in *Noto*, as in *Slagle* (text accompanying note 253) above, may be an example of the pliant conservatism that appeared to be the practice of the conservative wing of the Court before 1975.

279. Communist Party v. Catherwood, 367 U.S. 389, 81 S.Ct. 1465, 6 L.Ed.2d 919 (June 12, 1961) ("*Catherwood*") (the provision at issue of the Communist Control Act of 1954 read "The Communist Party of the United States, or any successors . . ., whose object or purpose is to overthrow the Government . . . by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States.")

unanimously restored the normal employer tax treatment.

With *Deutch*,[280] the Court returned to the issue of refusing to answer questions before Congress and sided with the individual. Stewart's opinion turns on the pertinency of the questions without subscribing to the primacy of the Bill of Rights.[281] Harlan's dissent, joined by Frankfurter, would consider that the pertinency issue had been answered adequately by the government. Whittaker's dissent, joined by Clark, finds the questions "clearly pertinent."[282]

C&RW Union would let the Court favor the government once again, albeit with the usual 5–4 split.[283] The Naval Gun Factory's cafeteria was operated by a unionized business. The contract with the government prohibited the employment of communists in this facility where highly classified weapons were produced. An employee's identification badge was summarily seized by the commander of the facility for communist sympathies, prohibiting entry in the facility. The union and the employee tried to rely on the inadequate process found for stripping security clearance in *Greene*.[284] The Court held that the commander had appropriate authority and no additional process was due. Brennan's dissent would have required more process.

The last two decisions issued in 1961, *Killian*[285] and *Cramp*,[286] come from the next term, swiftly decided. In *Killian*, the issue was the conviction of a member of the Communist Party for supplying a false affidavit in his role as a senior member of a labor union.[287] The Court remanded, in an decision by Whittaker, considering that conviction could be made properly and the First Amendment was not implicated because membership was not made into a crime.[288] The four dissenters disagreed with the premise that this setting was less deserving of First Amendment protection than a criminal prosecution for membership in the Communist party. Black,[289] Doug-

280. Deutch v. United States, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963 (1961).

281. *Deutch*, 367 U.S. at 470 ("Yet the questions which the petitioner was convicted of refusing to answer obviously had nothing to do with the Albany area or with Communist infiltration into labor unions.")

282. *Deutch*, 367 U.S. at 475 ("[N]ot only did petitioner fail to complain of any uncertainty about the subject under inquiry, or object that the questions put to him were not pertinent to the inquiry, but, moreover, at least three of the questions he refused to answer were, on their face, clearly pertinent to the inquiry as a matter of law.")

283. Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (June 19, 1961) ("*C&RW Union*").

284. *See* text accompanying note 222, *supra*.

285. Killian v. United States, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961).

286. Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (Dec. 11, 1961).

287. *Cf. Douds*, text accompanying note 36, above, and *Brown*, text accompanying note 323, below.

288. *Killian*, 368 U.S. at 254 ("[P]etitioner was not charged with criminality for being a member of or affiliated with the Communist Party, nor with participating in any criminal activities of or for the Communist Party, but only, with having made and submitted to the Government an affidavit falsely swearing that he was not a member of or affiliated with the Communist Party in violation of 18 U.S.C. § 1001, 18 U.S.C.A. § 1001. It would be strange doctrine, indeed, to say that membership in the Communist Party—when, as here, a lawful status—cannot be proved by evidence of lawful acts and statements, but only by evidence of unlawful acts and statements.")

289. *Killian*, 368 U.S. at 260 ("I would overrule the decision in *Douds* and order this prosecution dismissed. As I said there, 'Whether religious, political, or both, test oaths are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise.'" Citation omitted).

las,[290] and Brennan[291] wrote separately; Warren and Black joined Douglas's dissent.

Cramp featured a public-school teacher who refused a loyalty oath mandated by Florida law. Stewart wrote for the unanimous Court in favor of the teacher. The propriety of the requirement of an oath followed from *Adler*.[292] However, this oath failed for vagueness.[293]

After having taken office in January of 1961, President Kennedy appointed White to replace Whittaker in April 1962. Their voting on un-Americanism prosecutions was similar. The year 1961 would also bring the construction of the Berlin Wall, a visible and tangible testament to the illiberal nature of the Soviet Bloc, likely weakening Soviet Communism in the war of ideas.

Soon thereafter, the Court issued a defeat for un-Americanism prosecutions in *Russell*,[294] six prosecutions of journalists for refusing to answer questions of congressional subcommittees.[295] The indictments stated that the questions were pertinent to the inquiry but did not identify the subject under inquiry.[296] Stewart's majority opinion recounted that the subject had been identified differently and in contradicting ways at different steps in the process.[297] The Court reversed and ordered the dismissal of the indictments because of their

290. *Killian*, 368 U.S. at 266 ("In light of the *Scales* decision and the prior decision in Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356, it is difficult to see why, if membership is to be punished, a different standard should be applied here from that applied in the Smith Act. The constitutional overtones are as pronounced here as they were in *Yates* and *Scales*.")

291. Brennan recognized that *Douds* meant that political strikes were a legitimate concern of Congress, *Killian*, 368 U.S. at 268 ("Congress could validly impute to the Communist Party an institutional predilection for political strikes, and could reasonably act on the assumption that members of the Party or its affiliates would partake of that predisposition."). Nevertheless, Brennan concludes that more than mere membership was necessary.

292. *See* text accompanying note 79, *supra*.

293. *Cramp*, 368 U.S. at 286 ("The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement. Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid,' or 'support,' or 'advice,' or 'counsel' or 'influence' to the Communist Party. What do these phrases mean? In the not too distant past Communist Party candidates appeared regularly and legally on the ballot in many state and local elections. Elsewhere the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party?")

294. Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

295. Two defendants refused to answer questions of the House Un-American Activities Committee. Four defendants refused before the Internal Security Subcommittee of the Senate Judiciary Committee.

296. *Russell*, 369 U.S. at 768 ("At every stage in the ensuing criminal proceeding [defendant] Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.")

297. *Russell*, 369 U.S. at 767 ("It was said that the hearings were 'not . . . an attack upon the free press,' that the investigation was of 'such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press.' It was also said that 'We are simply investigating communism wherever we find it.' In dealing with a witness who testified shortly before Price, *counsel for the subcommittee emphatically denied that it was the subcommittee's purpose 'to investigate Communist infiltration of the press* and other forms of communication.' But when Price was called to testify before the subcommittee no one offered even to attempt to inform him of what subject the subcommittee did have under inquiry. *At the trial the Government took the position that the subject under inquiry had been Communist activities generally*. The district judge before whom the case was tried found that 'the questions put were pertinent to the matter under inquiry' without indicating what he thought the subject under inquiry was. The Court of Appeals, in affirming the conviction, likewise omitted to state what it thought the subject under inquiry had been. *In this Court the Government contends that the subject under inquiry at the time the petitioner was called to testify was 'Communist activity in news media.'*" Emphasis added).

inadequacy. Clark and Harlan dissented separately, with Clark also joining Harlan. Both argued that the Court departed from a century of practice and established precedent and Clark underscored that the Court could have so decided in *Sacher*, rather than deciding that case on the much weaker issue of pertinency.[298] Frankfurter and White did not participate in all six and Brennan did not participate in one. Thus, the four votes of Warren, Black, Douglas, and Brennan, would have been sufficient for five exonerations without Stewart's vote, whereas the sixth, in which Brennan did not participate, would be a tie if Stewart voted with Clark and Harlan, upholding the conviction below. We will not know how strongly Stewart was influenced, if at all, by the fact that the defendants were journalists, raising a First Amendment issue that was indirect and involved the freedom of the press. The issue was indirect in the sense that it did not involve freedom of association threatened by the questioning from the subcommittees. Freedom of the press was threatened by journalists' fear of un-Americanism prosecutions. Following the precedent of *Russell*, the Court also ordered summary dismissal of *Silber*,[299] with the same dissenters and the same composition, i.e., White and Frankfurter not participating.

D. After Frankfurter: The End of Un-Americanism Prosecutions

President Kennedy next appointed Arthur Goldberg who in October of 1962 replaced Frankfurter. A reliable vote against un-Americanism prosecutions replaced an occasional vote for them, leaving the Court strongly against them. The government would win no more un-Americanism cases.

The new Justices, White and Goldberg, displayed their attitudes about un-Americanism prosecutions in 1963, in *Gibson*.[300] Goldberg wrote for the majority in a 5–4 split. Harlan was joined by Clark, Stewart, and White in a dissent, with White also writing separately an emphatic dissent. A Florida congressional committee sought from the president of the Miami chapter of the NAACP to answer whether 14 names of suspected communists were on its membership list.[301] Goldberg's majority opinion stressed the weakness of the claim that despite its manifest efforts to avoid subversive influence, the NAACP presented a valid target for such an investigation.[302] Black's concurrence would have found

298. *See* text accompanying note 190, above.

299. Silber v. United States, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962).

300. Gibson v. Fla. Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963).

301. By not seeking the entire list, the committee avoided being governed by established contrary precedent, *cf. Louisiana v. NAACP*, text accompanying note 254, above.

302. *Gibson*, 372 U.S. at 555–56 ("Without any indication of present subversive infiltration in, or influence on, the Miami branch of the N.A.A.C.P., and without any reasonable, demonstrated factual basis to believe that such infiltration or influence existed in the past, or was actively attempted or sought in the present—in short without any showing of a meaningful relationship between the N.A.A.C.P., Miami branch, and subversives or subversive or other illegal activities—we are asked to find the compelling and subordinating state interest which must exist if essential freedoms are to be curtailed or inhibited. This we cannot do. The respondent Committee has laid no adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for disclosure of its membership; the Committee has neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N.A.A.C.P. or the pursuit of its activities or the minimal associational ties

a direct violation of freedom of association,[303] as would Douglas's.[304] Harlan's dissent argued that the majority's refusal to allow investigation due to lack of proof of nexus to fear of communist infiltration was self-contradictory.[305] The very concern of the NAACP over communist infiltration laid it to rest.[306] The limited use of the list as a memory aid to the witness was proper.[307] White's dissent stressed the fear of communist infiltration.[308] Using anti-communist language, White argued that the majority left the government powerless.[309]

Still in 1963 the Court engaged a damages action against an investigator for the House Un-American Activities Committee in *Wheeldin v. Wheeler*.[310] The plaintiff alleged that the investigator was given signed blank subpoenas on one of which the investigator maliciously filled in plaintiff's name, causing him harm. The Court split 6–3. Douglas wrote for the majority against liability.[311] Brennan's dissent, joined by Warren and Black, would remand, arguing that the lower court's decision did not rest on an implied right of action but found immunity, yet immunity would not cover actions

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of the 14 asserted Communists. The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the respondent.")

303. *Gibson*, 372 U.S. at 559 ("In my view the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, Socialists or anti-Socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular. I have expressed these views in many other cases and I adhere to them now. Since, as I believe, the National Association for the Advancement of Colored People and its members have a constitutional right to choose their own associates, I cannot understand by what constitutional authority Florida can compel answers to questions which abridge that right. Accordingly, I would reverse here on the ground that there has been a direct abridgment of the right of association of the National Association for the Advancement of Colored People and its members." Footnote omitted).

304. *Gibson*, 372 U.S. at 565 ("In my view, government is not only powerless to legislate with respect to membership in a lawful organization; it is also precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, regardless of the legislative purpose sought to be served.")

305. *Gibson*, 372 U.S. at 581 ("For unless 'nexus' requires an investigating agency to prove in advance the very things it is trying to find out, I do not understand how it can be said that the information preliminarily developed by the Committee's investigator was not sufficient to satisfy, under any reasonable test, the requirement of 'nexus.'")

306. *Gibson*, 372 U.S. at 581 ("It hardly meets the point at issue to suggest, as the Court does, that the resolution only serves to show that the Miami Branch was in fact free of any Communist influences—unless self-investigation is deemed constitutionally to block official inquiry." Internal citation omitted).

307. *Gibson*, 372 U.S. at 582 ("Given the willingness of the petitioner to testify from recollection as to individual memberships in the local branch of the N.A.A.C.P., the germaneness of the membership records to the subject matter of the Committee's investigation, and the limited purpose for which their use was sought—as an aid to refreshing the witness' recollection, . . .—this case of course bears no resemblance whatever to [the precedent barring production of entire membership lists].")

308. *Gibson*, 372 U.S. at 583 ("Although one of the classic and recurring activities of the Communist Party is the infiltration and subversion of other organizations, either openly or in a clandestine manner, the Court holds that even where a legislature has evidence that a legitimate organization is under assault and even though that organization is itself sounding open and public alarm, an investigating committee is nevertheless forbidden to compel the organization or its members to reveal the fact, or not, of membership in that organization of named Communists assigned to the infiltrating task.")

309. *Gibson*, 372 U.S. at 585 ("The net effect of the Court's decision is, of course, to insulate from effective legislative inquiry and preventive legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by dutybound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence.")

310. 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963). Because the issue is private liability, the decision in not included in the database of primary decisions.

311. *Wheeldin*, 373 U.S. at 651 ("[I]t is difficult for us to see how the present statute, which only grants power to issue subpoenas, implies a cause of action for abuse of that power.")

clearly beyond the employee's authority.[312] Because *Wheeldin* is about liability, it is not included in the database of primary un-Americanism decisions.

Later in the same year, the Court split 5–4 against an un-Americanism prosecution in *Yellin*.[313] The defendant was convicted of contempt of Congress for refusing to answer questions of the House Un-American Activities Committee. Warren's majority opinion practiced constitutional avoidance and exonerated because the Committee did not properly follow its own rules about granting a request for testimony in a closed session.[314] The dissent of White, with Clark, Harlan, and Stewart, started by describing the testimony about communist infiltration of unions by educated youth who would hide their background,[315] and that the defendant refused to answer questions about his college attendance before he sought employment in the steel industry.[316] The dissent argued that, during his testimony, the defendant did not seek to testify in a closed session and the Committee did not violate its rules by not granting one.

The Court issued two decisions against the prosecution in 1964. In *Baggett v. Bullitt*,[317] the Court revisited oaths of loyalty by university professors and ruled against the oaths 8–2 in an opinion by White that would find that statute improperly vague. Clark dissented, joined by Harlan.

Aptheker[318] presented the Court one of the consequences of being a member of a communist-action organization, the revocation of the passports of the senior members of the Communist Party. The Court decided 6–3 for the unconstitutionality of the statutory provision revoking the passports. The dissent of Clark, with Harlan and White, found the limitation reasonably related to national security.

In 1965, the Court vacated the order to register as a communist-front organization directed to the Abraham Lincoln Brigade,[319] formed to fight in the Spanish Civil War. The Court dismissed with a *per curiam* decision on the stale record. A dissent by Douglas, joined by Black and Harlan, would have reached the merits. We may guess that the three would not have taken the same side if the merits had been reached.

Still in 1965, the Court encountered one more interaction of a black organization with an un-Ameri-

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312. *Wheeldin*, 373 U.S. at 653 ("In this Court, the Solicitor General of the United States, appearing as counsel for the respondent, candidly admits that the Court of Appeals misapplied *Barr v. Matteo*. In that case we upheld the governmental-officer immunity in respect of 'action . . . taken . . . within the outer perimeter of petitioner's line of duty.' It has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed 'manifestly or palpably beyond his authority.'" Citation omitted).

313. Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963).

314. *Yellin*, 374 U.S. at 111 ("However, because of the view we take of the Committee's action, which was at variance with its rules, we do not reach the constitutional questions raised." Footnote omitted).

315. *Yellin*, 374 U.S. at 126-27 ("The first witness, an organizer and high official in the Communist Party from 1930 to 1950, testified that the Party had begun a policy of infiltrating into basic industry, that Party 'colonizers' were sent to coordinate Party work in these industries, including the steel industry, and that these collonizers were mainly young men from colleges and universities. These colonizers, he continued, would misrepresent their backgrounds in applying for jobs and would conceal their educational qualifications so as to gain jobs alongside other less-educated workers without casting suspicion on their motives.")

316. *Yellin*, 374 U.S. at 128 ("[The defendant] was then asked to state his formal education and whether he was a student at the College of the City of New York, which he refused to do. . .")

317. 377 U.S. 360 (1964)

318. Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964).

319. Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Bd., 380 U.S. 513, 85 S.Ct. 1153, 14 L.Ed.2d 46 (1965).

canism prosecution in the South. *Dombrowski v. Pfister*[320] involved Louisiana's allegation that a civil rights organization was a subversive one. The Court split 5–2, Black and Stewart not participating. In an opinion by Brennan the majority considered the statute void for vagueness referring to *Baggett*,[321] and ordered the grant to the defendants of an injunction against state prosecution. Harlan's dissent, with Clark, argued for restraint of the federal judiciary's involvement in state processes and would remand for monitoring and protection by the federal district court.[322]

After the two void-for-vagueness holdings in *Baggett* and *Dombrowski*, the five-member majority of the Court would further hamper un-Americanism prosecutions with *US v. Brown*,[323] still in 1965. Chief Justice Warren writes for the Court, holding that the prohibition against communists holding officer positions in labor unions is a bill of attainder, thus vindicating Black's persistent theme that had first been expressed in the very first un-Americanism decision reviewed here, *Lovett*.[324] The dissent is by White, with Clark, Harlan, and Stewart.

After the appointment of Justice Abe Fortas to replace Goldberg in October 1965, the Court issued a unanimous rejection of the registration obligation of members of the Communist Party in *Albertson v. Subversive Activities Control Bd*.[325] The obligation to register violated the privilege against self-incrimination. Clark's concurrence pointed out that this was known from the time that he so advised in 1948 as Attorney General.[326]

The age of un-Americanism prosecutions was coming to an end. The Court still had to address occasional issues as they would arise. In *Elfbrandt v. Russell*,[327] the Court invalidated an Arizona loyalty oath, albeit still divided 5–4. The Court would be unanimous, however, in *Gojack*,[328] in rejecting the renewed contempt prosecution of one of the defendants of *Russell*.[329] Black would have used the opportunity to reverse *Barenblatt*.[330] Two years later, the Court's five member majority would invalidate New York's laws against the public employment of subversives in *Keyishian v. Bd. of Regents of Univ. of State of NY*.[331] Clark authored a frustrated dissent, which Harlan, Stewart, and White joined. According to Clark, the majority sweepingly

320. 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).
321. *See* text accompanying note 317, above.
322. *Dombrowski*, 380 U.S. at 502 ("While I consider that abstention was called for, I think the District Court erred in dismissing the action. It should have retained jurisdiction for the purpose of affording appellants appropriate relief in the event that the state prosecution did not go forward in a prompt and *bona fide* manner.")
323. United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965) ("*US v. Brown*").
324. *See* text accompanying note 5, above.
325. 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965).
326. *Albertson*, 382 U.S. at 85 ("[I]t was then pointed out that the 'measure might be held . . . even to compel self-incrimination.' This view was expressed in a letter over my signature as Attorney General. . ."; footnote omitted).
327. 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966).
328. Gojack v. United States, 384 U.S. 702, 86 S.Ct. 1689, 16 L.Ed.2d 870 (1965).
329. *See* text accompanying note 294, above.
330. *See* text accompanying note 211, above.
331. 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

overruled precedent[332] and undermined the nation's self-preservation.[333]

President Johnson would appoint Thurgood Marshall to replace Clark in August of 1967. Without Marshall's participation, the Court would split 6–2 in deciding *Robel*.[334] An employee was a member of the Communist Party in a facility of a defense contractor. By virtue of the prohibition against a member of the Communist Party working in the defense industry, he was criminally prosecuted. The district court exonerated him on the basis that he was a passive member. The Supreme Court expanded the reasoning and exonerated him because the prohibition violated freedom of association.[335] Harlan joined White's dissent.[336] No more un-Americanism prosecutions would reach the Supreme Court.

The next year the Soviet Union would forcibly suppress a reformist uprising in Czechoslovakia, in what history has come to call the Prague Spring of 1968.[337] This joined Khrushchev's 1956 recognition of Stalin's crimes,[338] the violent suppression of the Hungarian revolution of 1956,[339] and the building of the Berlin Wall in 1961.[340] The result was a fading of the allure of Soviet Communism. From the spring of 1968, the pro-Soviet unity of communist parties broke. In some Western democracies, communist parties split into Soviet and Eurocommunist parties. In others (including the United States) they maintained the soviet orthodoxy, while

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332. *Keyishian*, 385 U.S. at 622 ("It is clear that the Feinberg Law, in which this Court found 'no constitutional infirmity' in 1952, has been given its death blow today. Just as the majority here finds that there 'can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion' there can also be no doubt that 'the be-all and end-all' of New York's effort is here. And, regardless of its correctness, neither New York nor the several States that have followed the teaching of *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little.")

333. *Keyishian*, 385 U.S. at 628–29 ("I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence or other unlawful means; or to have willfully and deliberately printed, published, etc., any book or paper that so advocated and to have personally advocated such doctrine himself; or to have willfully and deliberately become a member of an organization that advocates such doctrine, is *prima facie* disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is 'Yes'!")

334. United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

335. *Robel*, 389 U.S. at 262 ("We cannot agree with the District Court that § 5(a)(1)(D) can be saved from constitutional infirmity by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. . . . It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment.")

336. *Robel*, 389 U.S. at 282–83 ("The constitutional right found to override the public interest in national security defined by Congress is the right of association, here the right of appellee Robel to remain a member of the Communist Party after being notified of its adjudication as a Communist-action organization. Nothing in the Constitution requires this result. The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to assemble, and to petition for redress of grievances.")

337. *See* Encyclopedia Britannica, Prague Spring https://www.britannica.com/event/Prague-Spring [perma.cc/PC4K-T6MQ]; Wikipedia, Prague Spring, https://en.wikipedia.org/wiki/Prague_Spring [perma.cc/4RSA-JT53].

338. *See* text accompanying note 136, above.

339. *See* text accompanying note 137, above.

340. *See, generally,* Thomas Lindenberger, *Berlin Wall*, EUROPE SINCE 1914: ENCYCLOPEDIA OF THE AGE OF WAR AND RECONSTRUCTION 354 (John Merriman and Jay Winter, eds. 2006); Berlin Wall, ENCYCLOPAEDIA BRITANNICA (2019) (available at https://www.britannica.com/topic/Berlin-Wall [perma.cc/CLN8-HHJ3]).

often (but not in the United States) in a few more years a Eurocommunist offshoot would arise.[341] In a sense, while the United States was losing the hot war against communism in Vietnam as well as injuring itself in the ideological war as the advocate for freedom by supporting right-leaning dictatorships, perhaps the Prague Spring lost the ideological war for the Soviet Union. Still far in the future was the end of the Cold War.

In sum, this Appendix discussed each un-Americanism case. Their multitude and their variation defy narrative explanation that reveals the Court's tendencies. Those are only visible in the aggregation of Figure 7.1.

341. *See, generally,* Eurocommunism, ENCYCLOPAEDIA BRITANNICA (2019) (available at https://www.britannica.com/topic/Eurocommunism [perma.cc/5CHM-ZX4H]); Gus Hall Obituary, THE GUARDIAN (Oct. 17, 200) (on the soviet orthodoxy of the Communist Party of the United States) (available at https://www.theguardian.com/news/2000/oct/18/guardianobituaries3 [perma.cc/B33T-2BR7]).

This book is set in the Georgia font, which is argued to be less mechanical because it allows readers to distinguish different numbers more easily.
See Christian Turner & Joe Miller, *There is not Really a Best Font*, ORAL ARGUMENT PODCAST episode 34 with Matthew Butterick
available at oralargument.org/34 [perma.cc/2ZXP-AJNZ].
Printing by Acutrack.

The concluding chapter 10 starts on page 181.
The volume with additional data FIVE–FOUR: TABLES is available from nicholasgeorgakopoulos.org and perma.cc/W6GA-T75A.