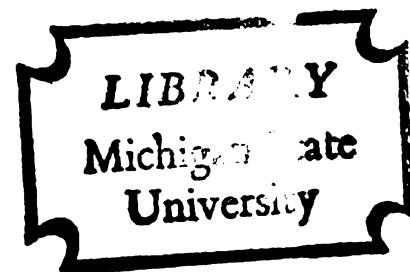


ATTITUDES AND IDEOLOGY  
ON THE  
WHITE SUPREME COURT  
1910 - 1920

Thesis for the Degree of Ph.D.  
MICHIGAN STATE UNIVERSITY  
DONALD CARL LEAVITT  
1970



This is to certify that the

thesis entitled

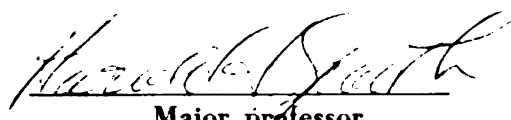
Attitudes and Ideologies on the  
White Court, 1910-1920

presented by

Donald C. Leavitt

has been accepted towards fulfillment  
of the requirements for

Ph.D. degree in Political Science

  
Major professor

Date 23 April 1970



Q127

## ABSTRACT

### ATTITUDES AND IDEOLOGY ON THE WHITE COURT, 1910-1920

By

Donald Carl Leavitt

The method used in this study was to categorize the non-unanimous cases of the 1910-1920 Supreme Court and form Guttman scales on the basis of those categories. The period was split into two halves and separately scaled for the 1910-1915 and 1916-1920 periods. The rankings of the justices were determined for each scale. This was hypothesized as measuring the judges' attitudes on this issue. The interrelationships between the scales (attitudes) was measured by a rank correlation (tau), and the resulting matrix of the relationships was factor analyzed. Thus the clustering of attitudes into attitude systems, value systems and ideologies was determined. Both R- and Q-analyses were run as well as Varimax, Quartimax, and Oblique rotations.

There appeared to be a lack of party conflict on economic and class matters on the White Court. Justices' decisions early in the period seemed based more on traditional and legal issues such as federalism, judicial power,

and the Commerce power. In the second period, the Court became polarized along a liberal-conservative continuum based on the Progressivist ideology. This ideological division is not along party lines but appears to gradually develop into a party division by the time of the Stone Court.

Multivariate analyses of the decision-making behavior of the White Court revealed that on both periods of the Court the following attitude systems were prominent: Liberal Nationalism and State Progressivism (reflecting Progressivist programs at the two levels of governmental power), Federalism, Libertarianism, General Welfare, and Laissez-fairism. In addition, the first period contained the attitude systems of Commerce Power and Judicial Restraint, and the second period contained a Darwinism attitude system. Analyses of the whole period also identified an attitude system composed of party-related issues. These attitude systems explained from 74 to 80 per cent of the variance contained within the data.

Political party-related issues on the Court coincided with traditional party differences. These were federalism, judicial power, libertarianism, general welfare, and civil rights. The Democratic "ideology" was states' rights oriented, democratic, liberty-oriented, pro-general welfare, and unsympathetic to Negro civil rights. The Republican

"ideology" was nationalistic, for judicial power, pro-government on liberty issues, for special interests (business), and sympathetic to Negro civil rights.

A majority of the decision-making behavior on the Court was related to off-Court political influences and experiences: Progressivism and political party. A Northern, Eastern, and urban environment seemed to have influenced justices to be favorable to Progressivist programs.

One-third of the Guttman scales reveals some shifting in justices' attitudes. Congruity theory appears to explain much of the shifting of attitudes between the two periods.

Thus the influence of certain reference symbols or sources on attitude change seems clear. The evidence seems overwhelming that political party as a reference symbol seems to have influenced the Republicans to be much more liberal on Liberal Nationalism in the first period than in the second. The early Republican leadership of national Progressivism and of the administrations which inputted most of the cases in Liberal Nationalism in the first period seemed to account for this. The Democratic capture of that leadership and the national government reversed this situation causing attitude change on the part of the Republicans (and Democrat White) in line with the reference symbol of party.

Similarly sociometric relationships also affected attitude change. Brandeis' persuasiveness either in terms of his personal influence or his thorough research and marshalling of evidence behind his opinions had a significant impact on White Court decision making in the second period. That influence was particularly pronounced in influencing Holmes to a much more liberal position on Progressivist issues.

In analyzing individual judge's rankings of seven values based on this study, Democratic judges significantly ranked states' rights, democracy, and liberty higher and also ranked general welfare slightly higher than Republican judges. Progressivist judges seemed to significantly support the values of equality, the general welfare, and democracy higher than non-Progressives.

ATTITUDES AND

THE WHITE S

1911

Donald

St.  
Michigan  
in partial fulfillment  
for

DOCTOR

Department

ATTITUDES AND IDEOLOGY ON  
THE WHITE SUPREME COURT  
1910-1920

By  
Donald Carl Leavitt

A THESIS

Submitted to  
Michigan State University  
in partial fulfillment of the requirements  
for the degree of

DOCTOR OF PHILOSOPHY

Department of Political Science

1970

## ACKNOWLEDGMENTS

I wish to thank Professor Harold Spaeth for his encouragement and help as well as the inspiration of his methodological and theoretical contributions in the field of judicial behavior to which this work is heavily indebted. I am also indebted to the National Institute of Mental Health for the use of grant funds (MH 15365-01) used in computer research in this study, as well as the political science department of Michigan State University who also made available additional computer time for this study. Finally, I wish to thank my wife, Donna, for the long hours spent typing the drafts and final copy of this dissertation.



## TABLE OF CONTENTS

	LIST OF TABLES	Page vi
	LIST OF FIGURES	x
Chapter		
1	THE PSYCHOLOGICAL ANALYSES OF THE WHITE COURT	1
	The Scope of this Study	1
	The Data	3
	Methodology	4
	Multidimensional Analyses	12
	Theory Underlying these Procedures	27
2	SCALOGRAM ANALYSIS OF WHITE COURT ATTITUDES	47
	Definition of Scales	47
3	ATTITUDINAL FACTORS OF THE COURT, 1910-1915	98
4	ATTITUDINAL FACTORS OF THE COURT, 1915-1920	151
5	ATTITUDE SYSTEMS OF THE 1910-1920 WHITE COURT: CONTINUITY AND CHANGE	192
	The Open System	236
6	IDEOLOGIES ON THE WHITE COURT	248
	Party Ideology	
	Traditional Party Voting Bases	258
	Party Influences on the Supreme Court	260
	Roll-call Analysis of Congress	263
	The Impact of Historical Events on Party Ideology	265
	Ideological Bases of the Parties	269
	Conclusions	274
	Progressivism	280
	Darwinism	284
	The Ideology of the Justices	287

Comparisons

1. SOCIOLOGICAL AND  
THE COURT

Ranking the  
Comparisons  
Courts  
Other Courts  
White Court  
Political  
Symbols  
Reference

2. OTHER DETERMINING  
ATTITUDES

The Analyst  
Courtship  
Individual Experiences  
the Justices  
Harlan  
Linton  
Lamar  
Murray  
Pitts  
Van Dervent  
JAY  
McKenna  
McKenna  
McKenna  
White  
Clarke  
Brandeis  
Holmes

3. CONCLUSION

APPENDIX

APPENDIX

- I Cases Used in C
- II Names of Cases
- III Cases Used in C

<u>Chapter</u>		<u>Page</u>
7	THE VALUES OF THE JUSTICES	291
	Comparisons between the Justices	318
8	SOCIOLOGICAL AND POLITICAL INFLUENCES ON THE COURT	331
	Ranking the White Court on SES	334
	Comparison of SES and Party with other Courts	336
	Other Sociological Influences on the White Court	351
	Political Socialization and Political Symbols	359
	Reference Symbols in Politics	373
9	OTHER DETERMINANTS OF INDIVIDUAL JUDGES' ATTITUDES	375
	Bloc Analysis	378
	Dogmatism	390
	Individual Experiences and Philosophies of the Justices	398
	Harlan	401
	Lurton	406
	Lamar	408
	Hughes	412
	Pitney	417
	Van Devanter	423
	Day	428
	McKenna	432
	McReynolds	440
	White	446
	Clarke	454
	Brandeis	462
	Holmes	469
10	CONCLUSION	483
	BIBLIOGRAPHY	507
	APPENDICES	
I	Cases Used in Study	521
II	Names of Cases in Appendix I	536
III	Cases Used in Scales	547

APPENDICES		Page
IV	Ranks of Justices on Scales	560
V	Non-scaled Responses for Individual Justices in Scales	565
VI	Ranks of Various Courts on Socioeconomic Status, Political Party, Economic and Libertarian Attitudes	567
VII	Reason for Classification of Justices in Ranks: Father's Socioeconomic Status and Occupation	570
VIII	Political Party and Socioeconomic Status Relationships with Attitudinal Variables	572
IX	Shifts in Ranks of Justices between the Two Periods Studied	574
X	Ranks of Justices on Background Variables	576
XI	Scale of Economic Cases on Fuller Court	579
XII	Scales of Liberty Cases on Fuller Court	580

## LIST OF TABLES

Table	Page
1 Names of Scales Common to Both Periods	48
2 Names of Scales Used in Only Party of Study	49
3 Scales Constructed and Reproduceability Criteria 1910-1915 Period	50-53
4 Variable Content of Attitudinal Factors for 1910-1915 Period	101
5 Highest Loadings of Variables Across Various Factor Analysis Solutions	103-104
6 Content of Factors Identified by Pattern Analysis	105-106
7 Fifty-Variable Varimax Solution, 1910-1915	127
8 Tests for Commonality among Variables Contained in Factors	138
9 Product Moment Correlations Between Factor Scores	138
10 White Court Justices' Average Ranks for Major Factors and Loadings on Q-Analysis, 1910-1915	146-147
11 Variable Content of Attitudinal Factors for 1916-1920 Period	159
12 Highest Loadings of Variables Across Various Factor Analysis Solutions	160-161
13 Content of Factors Identified by Pattern Analysis	162-164
14 Six Dimensional, Fifty-Variable Varimax Rotated Factor Loading Matrix, 1916- 1920 Period	173

Table		Page
15	Factor Loadings of 5-Dimensional, 41-Variable Oblique Rotation Factor Analysis, 1916-1920 Period	174
16	Tests for Commonality among Variables Contained in Factors	181
17	Product Moment Correlations Between Factor Scores	181
18	Correlations between Oblique Factor Axes from the 50-Variable, 7-Dimensional Solution	185
19	White Court Justices' Average Ranks and Factor Scores for Major Factors and Loadings on Q-Analysis, 1916-1920	186
20	Variable Content of Attitudinal Factors for Analysis of Scales for Whole Period, 1910-1920	197-198
21	Highest Loadings of Variables Across Multivariate Analysis Solutions of 1910-1920 Variables	199
22	Correlations between Oblique Factor Axes from the 49-Variable, 6-Dimensional solution, 1910-1920 Period	201
23	Tau Rank Correlations between Average Ranks for Factors in 1910-1920 Period	201
24	White Court Judges ranks on Party, Progressivism, and Socioeconomic status	202
25	Six Dimensional, Forty-nine Variable Quartimax Rotated Factor Loading Matrix, 1910-1920	210
26	Seven-Dimensional, Forty-nine Variable Varimax Rotated Factor Loading Matrix, 1910-1920	211
27	Comparative Sizes of Factors Across Time Periods	213
28	White Court Justices' Average Ranks for Major Factors and Loadings on Phi Q-Analysis for Whole Court Analysis, 1910-1920	218

Table		Page
29	Judges' Shift in Attitudes toward Liberal Nationalism	224-225
30	Tau Correlations and Significance Levels between Pairs of Corresponding Scales for Ranks of Seven Justices	239
31	Sociometric influences on Justices' Rank Shifts	244
32	Johnson (1943) Study of Senate Roll-call Party Issues: 1880-1940.	265
33	Individual Judges' Ranks on Importance of Attitude Systems to Them, 1910-1920	295-298
34	Rank Order of Values in Individual Judges' Value System for Separate Periods of the Court and for the Whole Period, Retaining Original Direction of Values in Value	303-304
35	Rank Order of Values in Individual Judges' Value Systems, All Values in Positive Direction	305
36	Relationships between SES, Party, Economic and Liberty Attitudes on Various Courts	338-339
37	Correlations of Attitude Systems with Background Variables	352
38	Shapely-Shubnik Power Indices, 1916-1920 Terms	376
39	Judges' Rate of Dissent on White Court, 1910-1920	377
40	Matrix of Phi Intercorrelations Between 11 Justices of the White Court for the 1910-1915 Period	379
41	Matrix of Phi Intercorrelations Between 9 Justices of the White Court for the 1916-1920 Period	379
42	Matrix of Phi Intercorrelations between 13 Justices of the White Court for the Whole Period, 1910-1920	381
43	Possible Measures of Dogmatism on the White Court	395

Table		Page
I	Cases Used in Study	521
II	Names of Cases in Appendix I	536
III	Cases Used in Scales	547
IV	Ranks of Justices on Scales	560
V	Non-scaled Responses for Individual Justices in Scales	565
VI	Ranks of Various Courts on Socioeconomic Status, Political Party, Economic and Libertarian Attitudes	567
VII	Reason for Classification of Justices in Ranks: Father's Socioeconomic Status and Occupation	570
VIII	Political Party and Socioeconomic Status Relationships with Attitudinal Variables	572
IX	Shifts in Ranks of Justices between the Two Periods Studied	574
X	Ranks of Justices on Background Variables	576



## LIST OF FIGURES

Figure		Page
1	Scale of Criminal Due Process Cases: 1910-1915	59
2	Scale of Criminal Due Process Cases: 1916-1920	60
3	Two-Dimensional Factor Analysis Varimax Solution of 43-Variable "Exclusive Scales"	118
4	Two-Dimensional Factor Analysis Varimax Solution of 50 Refined Scales, 1910-1915	123
5	Two-Dimensional Varimax Solution of 29- Variable Progressivism Factor, 1910-1915	129
6	Two-Dimensional Varimax Solution of 21- Variable General Libertarian Factor, 1910-1915	130
7	Two-Dimensional Varimax Solution of 22- Variable Liberal Nationalism Factor, 1910-1915	132
8	Two-Dimensional Varimax Solution of 15- Variable State Progressivism Factor, 1910-1915	133
9	Two-Dimensional Varimax Configuration of 12-Variable Libertarian Factor, 1910- 1915	135
10	Two-Dimensional Varimax Solution of 14- Variable Federalism Factor, 1910-1915	136
11	Quartimax Configuration of 2-Dimensional Solution of Exclusive 41-Variable Factor Analysis, 1916-1920 Period	166
12	Quartimax Configuration of Two-Dimensional Solution of Refined 50-Variable Factor Analysis, 1916-1920 Period	167

Figure		Page
13	Quartimax Configuration of Two-Dimensional Solution of 19-Variable Progressivism Factor, 1916-1920	176
14	Varimax Configuration of Two-Dimensional Solution of 15-Variable Autonomy Factor, 1916-1920 Period	177
15	Varimax Configuration of Two-Dimensional Solution of 16-Variable Libertarianism Factor, 1916-1920 Period	178
16	Hierarchical Relationships among Factors	183
17	Hierarchical Relationships among Factors of a Quartimax 49-Variable Factor Analysis	196
18	Principle Axis Configuration of Two-Dimensional Solution of 49-Variable Factor Analysis, 1910-1920	200
19	Hierarchy of Attitudes, Values, and Ideology	249
20	Location of Values and Attitude Systems and their Antitheses in Two-Dimensional Space, White Court, 1910-1920	255
21	Pattern Analysis of Judges' Individual Attitude Systems for Each Period of White Court	300-302
22	Graph Comparing Ranks of Attitude Systems Laissez-faire and Libertarianism for 13 Justices, 1910-1920 Period	319
23	Graph Comparing Ranks of Attitude Systems State Progressivism and Liberal Nationalism for 13 Justices, 1910-1920	319
24	Graph Comparing Ranks of Attitude Systems Federalism-Commerce Power with Libertarianism-Judicial Restraint for 13 Justices, 1910-1920	323
25	Graph Comparing Ranks of Attitude Systems Federalism-Commerce Power with Progressivism for 13 Justices, 1910-1920	323
26	Graph Comparing Attitude Systems Progressivism with Libertarianism for 13 Justices, 1910-1920	326

Figure		Page
27	Graph Comparing Ranks of Attitude Systems Darwinism and Progressivism for 13 Justices, 1910-1920	328
28	Graph Comparing Factor Scores of Attitude Systems Judicial Restraint and Liberal Nationalism for 13 Justices, 1910-1915	328
29	Blocs of Justices identified by McQuitty Pattern Analysis	382
30	Graph of Progressivism Factor Score Composite with Libertarianism-Federalism Factor Score Composite, 1910-1915 Period	387
31	Graph of Progressivism Factor Scores with Libertarianism-Federalism Factor Score Composite, 1916-1920 Period	387
32	Graph of Two-Dimensional Configuration of Factor Loadings based on Phi Correlations Locating Bloc Associations of Justices of White Court, 1916-1920 Period	392
XI	Scale of Economic Cases on Fuller Court	579
XII	Scales of Liberty Cases on Fuller Court	580

1

## CHAPTER 1

### THE PSYCHOLOGICAL ANALYSIS OF THE WHITE COURT

The Scope of this Study.--This analysis focuses on the decision making of the Supreme Court during the Chief Justiceship of Edward White<sup>1</sup> and covers the October 1910 term through the October 1920 term. Its objectives will be to (1) ascertain the dominant factors influencing Supreme Court decision making during the time period, (2) investigate the relationship between attitudes, values and ideology in that decision-making process from a psychological point of view, (3) investigate the determinants of the above factors, e.g. political party, family background, sociological or personal factors, and (4) examine the influence or impact on these attitudes and values of prevailing ideologies or philosophical frameworks of this historical period.

Hence, the study attempts to investigate relationships among concepts of psychology, political science, and political thought.

---

<sup>1</sup>It also includes three cases after Chief Justice Fuller's death but before White's elevation to that office and five cases after White died but before Taft's appointment. These cases might more properly be considered as part of the "Harlan Court" and the "McKenna Court".

It has been hypothesized that early ideological conflicts have continued throughout our history to the present time, being transmitted and applied to new political contexts and generations (Peterson, 1960). This hypothesis may be operationalized by studying Supreme Court attitudes and ideology. The nature of the transmission process and reasons for the positions of the justices might be found in political, sociological, personal, or philosophical influences. By consulting biographical data and testing the correlations between these suggested variables and the factors identified, evidence of connections may be shown. Political party and family seem particularly fruitful for examining the transmission of values and ideology.

The period from 1910 to 1921 was one where the Court greatly extended the power of the national government in particular and government in general.<sup>2</sup> It also laid the groundwork for modern day civil liberty doctrine. (Warren, II, pp. 689-756; Kelly and Harbison, 1963, chap. 22; Mason and Beaney, 1959, pp. 187, 250, 414-417, 518, 574-577; Rodell, 1955, p. 188; Link and Catton, 1967, pp. 113-117). Yet it has been neglected in terms of intensive analysis.

Furthermore, this is one of the few periods of history prior to 1932 where the Court had a close balance of party representation. It is one of the earliest periods when

---

<sup>2</sup>It must be admitted that it transferred some state power to the federal sphere, however.

popular discontent and grievances exerted a heavy influence on government to bring about genuine intervention within society, and a period when competing ideologies were actively influencing citizenry and public officials alike.

(Hofstadter, 1955a, 1955b; Link and Catton, 1967, pp. 4-30).

Hence, this period appears ideal to examine party and ideological influences on judicial decision making as well as the influence of external political influences on the Court.

In this study, scalogram analysis was applied to the nonunanimous cases analyzed, ranks for the judges on each scale determined, the resulting rank correlations between the scales then factor analyzed, the factors compared to McQuitty-type analyses and further analyzed, and Q-analyses run on the judges. The resulting factors and scales and their content of cases were then analyzed in the light of biographical data and possible historical and philosophical influences.

The Data.--Only the nonunanimous cases of the time period were used. All of these in the periods studied were included. The study was broken into two periods, comparable in terms of number of cases used and in length of time. The breaking point was the end of the October 1915 term after the death of Lamar in January 1916, the resignation of Hughes in June, and soon after the death of Lurton in July 1915, but before Brandeis and Clarke joined the Court in October 1916.<sup>3</sup> Hence, it was a natural breaking point

---

<sup>3</sup>Brandeis formally took his seat on June 5, 1916, but heard no cases in that month.

for our study.

Used in the study were 146 cases with dissents for the first period and 207 cases with dissents for the second. Cases with no dissents but concurring votes totaled 24 for the first period and 27 for the second. Finally, voting preferences were determined for cases with both concurrences and dissents or separate dissents. This was made on the basis of a judgement upon the content of the dissenting and concurring opinions. These additional voting divisions totaled nine for the first period and 41 for the second. Thus the first period included 170 cases and the second period included 234. The entire study involved 404. Total voting divisions came to 180 for the first and 275 for the second, 455 overall.

Finally, to break ties in scale ranks, voting divisions in periods previous to and following the periods studied were consulted. The October 1908 and 1909 terms were used in their entirety. These cases and others add 108 cases to our analysis to give a grand total of 512 cases and 563 voting divisions.

The cases and citations are listed in Appendices I and II.

Methodology.--The basic research design for this type of study is presented in previous studies (Spaeth, 1967; see also Spaeth, 1965; Schubert, 1965a). The underlying



1

attitudinal constructs in the data are determined by first categorizing each case on the basis of the legal and semantic content of its majority, concurring, and dissenting opinions, then the categories are tested to see if they form Guttman scales on the basis of the judges' votes for the majority decision. The original classifications are based on legal and political issues of the times previous to and contemporary with the study. No attempt was made at first to form exclusive categories, that is categories in which cases fit in only one classification.

The attempt to form scaleable categories which included all of the universe of nonunanimous cases was successful. Other objectives in constructing scales included formulating scaleable categories with as specific a content as possible and to approximate as near as possible to perfect reproducibility (a coefficient of reproducibility or C.R. of 1.00) in each category-scale. (See Figures 1 and 2 in Chapter 2 for sample scales.)

Criteria for forming scales listed in Torgerson (1958, p. 324) were used. The criteria involve (1) excluding the marginal frequencies in calculating C.R., (2) rejecting scales with a C.R. below .85, (3) refining or rejecting scales with a nonrandom pattern of errors, and (4) using at least 10 items or cases.

A nonrandom pattern of errors indicates that a second variable or dimension exists in the data. However, there is

evidence that reproduceable scales are not really unidimensional (Spaeth, 1967, pp. 11-14). Many scales in this study which had C.R.'s of above .90 were found to contain two dimensions.

If the nonrandom errors occur within the same case, the case should be dropped as belonging to another dimension. If it is the respondent or judge who makes consistent non-scale responses, a second dimension is suggested and the scale should be refined or divided into two sub-scales, each based on separate dimensions. If the scale is too small, this cannot be done. It was noted that in both periods, McKenna and Pitney both had a proportionately large number of non-scale responses. This may be due to McKenna's senility and stroke, (McDevitt, 1946, p. 228) and Pitney's attempt to justify his decisions on the New Jersey courts or follow New Jersey common law, or perhaps it was due to values which were distinct from those of the other justices. In any case it is likely that any scale would result in non-random non-scale responses for these justices.

The requirement of 10 cases or more for a scale has been attacked on the basis that there is no theoretical basis for it. (Spaeth, 1967, p. 10; Guttman, 1950, p. 79). This requirement is supported by the finding that four-item scales can have high C.R.'s by mere chance although the items are independent. Furthermore, larger scales reinforce the evidence that respondents are indeed acting consistently, that the assumption of transitivity is met (Torgerson, p.28).

Nevertheless, we are seeking specificity in the content of our scales and practical constraints exist on category refinement and size, such as limits to the number of cases decided within the time period and the retirement of judges over time (Spaeth, 1967, p. 5). Such specificity is a major advantage of our logitudinal approach (Spaeth, 1967, 11, 17) as compared to a term-by-term study (as found in Schubert, 1965a). Furthermore, we have other measures of consistency such as tie-breaking cases and comparisons between the two time periods, as well as other indicators of relationship such as case semantic content. Nonetheless, we must be ready to qualify the reliability of the ranks of the quasiscals that do not meet all criteria.

The level of C.R. which is acceptable is a debatable one. Many accept .90 or even higher as evidence of "unidimensionality" and hence scaleability. (Spaeth, 1965, p. 300; Spaeth, 1967, p. 11; Schubert, 1965a, p. 79). Even the .90 level of C.R. must be obtained after dropping the marginal items and then comparing it with the minimum marginal reproduceability for respondents ( $MMR_1$ ) which is the lower bound for C.R. We have dropped non-computable cases (that is, the marginal cases with less than two dissents or concurrences) in calculating C.R. and  $MMR_1$  (see Table 3). Each initial scale with a C.R. below .90 has been refined into two or more scales distilling out the additional dimensions.

We are left with nine scales below .90 out of a total of over 80 scales for both periods. Of these only two are below .88. In addition, we have a dozen or so quasiscals that are too small to allow the calculation of a meaningful C.R. (less than four computable cases). These quasiscals were used in parts of our analysis when they displayed discernable differences in judicial ranks on an issue of interest to our study. Furthermore, the unrefined scales (containing several attitudinal dimensions) were also used at times to locate a more generalized version of an attitude (e.g. a federalism scale measured this general attitude although it had been refined into federalism in economic matters and federalism in non-economic issues). All C.R.'s, moreover, exceed the  $MMR_1$  by at least .09, which is equivalent to Schubert's results (1965a, p. 79).

Furthermore, even high C.R. scales may be multidimensional. (Spaeth, 1967, pp. 3, 5-6, 11-14). This is supported by the theory that attitudes may be the interaction of two or more entities (Rokeach, 1968a, 1968b). Hence, speaking of a C.R. which proves unidimensionality is superfluous. All non-scaled responses may be due to additional undiscovered attitudes, so that we may refine scales indefinitely until we get perfect ones or exhaust the universe. Hence, a high C.R. may only be evidence of a more highly refined or more specific attitude.

One final point on C.R. may be made. If the universe is unidimensional, we can pick items at random and still come up with a satisfactory scale (Torgerson, 1958, p. 332). Hence, if the universe is unidimensional all subscales would be suspect. For example, studies of the Roosevelt and Hughes Courts (Pritchett, 1948; Mattingly, 1969) suggest unidimensionality and studies of the Warren Court suggest two dimensions or less (Schubert, 1965a).

Hence, a blanket, uncritical acceptance of a criteria of .90 to identify subscales, that is attitudes more specific than the underlying dimensional ideology of "liberalism", would result in constructs which may be meaningless, for example, if the cases form one large scale with a C.R. of .90. However, if no single underlying dimension is present, the requirements of C.R. might conceivably be lower. This seems to be the case in our data as subsequent analysis will reveal.

Other than the previously mentioned exceptions the Spaeth criteria (1965) were used. A liberal vote by a justice was given a plus and a conservative vote a minus. Liberal is defined as anti-business, pro-government in economic cases, pro-worker, pro-small business when in conflict with large businesses, pro-competition in monopoly cases, and pro-civil liberty (Spaeth, 1966, pp. 17-19). In some cases a liberal vote had to be inferred. Liberal directions were defined as pro-state in federalism cases and pro-minority or pro-underdog in cases involving Indians and

aliens, for example. The cases were ordered according to the number of plus votes and within these limits cases and respondents were ordered so as to reduce the non-scaled responses to a minimum. Ranks were then assigned for each judge according to the judge's last consistent positive vote. The judge with the most consistent positive votes would be given a rank of one and so on. Inconsistent negative votes are ignored except when ties occur. Non-participations occurring on the boundary between plus and minus votes would be divided evenly between plus and minus votes. If ties still occurred, cases or rank positions in the other period of the study would be used to break them. Otherwise cases used in other periods of the Court in which the tied judges cast votes were consulted. (See Appendix I). These tie-breaking cases were not used in calculating the C.R.'s, hence, we have additional support for the consistency of our ranks beyond what the C.R.'s indicate, assuming invariance of the judges' attitudes over time.

The scales underwent a lengthy step-by-step process of refining and definition. Sixteen scales were constructed for the second period. Based on these categories and others 32 scales were constructed for the first. Factor analysis and careful examination of these scales suggested more refinement until over 50 scales were obtained for both periods. Much of the refinement consisted of splitting scales into two or more specific scales. A Judicial Power quasiscale for the first period was divided into five smaller, more specific

scales. Then a process of collapsing scales into more general scales was begun to see if scaleability increased or remained high. Quasiscals were dropped. Ranks of the judges on partisanship, "Progressivism", and socio-economic status were constructed on the basis of biographical data and these were added as variables reflecting personal or ideological influences on the judges' attitudes. Hence, a 26-variable first period universe and a 29-variable second period universe were factor analyzed. Finally, exclusive scales were constructed in which cases which appeared in two or more scales were assigned to only one scale. Hence, scales in which overlap or duplication of cases was minimized were constructed. This universe of 43 scales for the first period and 41 for the second was then factor analyzed to examine and eliminate the effect of any bias which such duplication might have on the factor analysis results.

The data was divided into two time periods as mentioned above. Scales were constructed for each period and also for the total eleven-year period. Scales based on the total period contained many gaps in voting due to the fact that only 9 of the 13 judges were on the Court at one time. Hence, in these scales, one-third of the data are missing. The consequences are (1) arbitrariness in assigning ranks to judges and lower reliability of ranks so assigned, (2) highly inflated C.R.'s and (3) many missing ranks which prevent the scaling of issues which appeared in only one period or introduces additional possible error variance in the subsequent factor analysis.



Furthermore, studying both periods independently and comparing the results presents some interesting opportunities, if care is taken to construct scales with equivalent content in both periods. The reliability of the scales can be tested. We can compare the major factors of the two periods to test their validity and stability or suggest reasons for differences that appear. We can compare the ranks on equivalent scales of the justices common to both periods to see if the attitudes are stable as some authorities suggest (Spaeth, 1967, p. 2; Schubert, 1965a, pp. 228-34), and, if not, we can look for explanations of why not. This may consist of new sociometric situations as new justices join the Court or of new political situations. The first period of the study deals largely with cases arising under Republican national administrations or laws; and the second deals exclusively with cases arising during a Democratic national administration.

Multidimensional analyses.--Each scale is a construct which represents an attitude or attitudinal variable. Each variable ranks the judges on its continuum. Relationships can be determined between these constructs by correlating the ranks for the justices between each pair of variables. This gives a matrix of relationships or correlations which can be factor analyzed to reduce the data to its principal underlying constructs. The basic correlation used here is Kendall's tau rank correlation. (See Schubert, 1965a, pp. 81-82). It is superior to the rho rank correlation in testing

significance when  $N$  is very small (McNemar, 1962, p. 205) as in our case when it ranges from 9 justices to 13 in the total study.

In obtaining a Q-analysis and to compare the factors obtained from using the tau matrix for the attitudinal variables, the phi correlations were computed from the justices votes on the cases for each period and for the total study (Schubert, 1965a, pp. 49-70; McNemar, 1962, pp. 197-198). This measures the justices' tendency to vote together in dissent or in the majority as compared to their tendency to vote differently. It results in a correlation between each pair of judges.

For further comparison, product moment correlations of the judges' voting tendencies<sup>4</sup> were factor analyzed in a second type of Q-analysis (See MacRae, unpublished).

Lastly, to obtain factor scores for the justices on the resulting factors, product moment correlations between dyads of ranks for the attitudinal variables were factor analyzed.<sup>5</sup> These scores theoretically give the respondent's position on the underlying attitudinal dimension or factor, that is the projection of the respondent's spacial position on that axis. (MacRae, unpublished, pp. 4-28 to 4-35).

---

<sup>4</sup>A majority vote is given a 2, a non-participation a 1, and a dissent a 0.

<sup>5</sup>The CDC 6500 computer would only calculate factor scores using this method.

factor analysis

on structure s

Factor and

and expr

( Miller number

determining the

construct. These

the loading o

underlying facto

the, a second f

maining variand

(p. 401).

A further

projections

dimensional

Person, 19

Factor a

series with w

a new constru

the variable

with it). In

series, the

It may b

for no votes

for the just

Factor analysis of the product moment correlations is a factor structure similar to the corresponding analysis of tau.

Factor analysis can be used to simplify the data matrix and express important aspects of it in terms of a smaller number of underlying variables. It does this by determining the correlation of each variable with the major construct. These correlations are the factor loadings, that is the loading or correlation of that variable with the underlying factor. If systematic variance remains in the data, a second factor is extracted and so on until all remaining variance is random error. (Harman, 1967; Torgerson, 1958, p. 401).

A further conceptualization is that these loadings are projections of the variables on arbitrary axes in a multidimensional space occupied jointly by the variables (Torgerson, 1958, p. 402).

Factor analysis classifies the variables into categories with which they are highly correlated. The factor is a new construct which then can be defined by the content of the variables which fall within that factor (or correlate with it). If all of its content variables involve civil liberties, the factor may be defined as "civil liberty."

It may be noted that we begin with categorical data (yes or no votes) and use it to construct scales giving ranks for the justices which are considered ordinal data.

We then find rank correlations which are analyzed by factor analysis. Factor analysis is a metric procedure. How can we justify such a procedure on ordinal data?

First, since attitudes are psychological attributes with no relevant measureable physical correlate (Torgerson, 1958, p. v), we can never be sure we have an accurate yardstick to measure them by. What units can we use: items or cases? (See Schubert, 1965a, pp. 104-112). In psychology a large number of question items can be used to measure the same attitude. In judicial behavior a difference between one rank and another may be based on dozens of cases, all identical, and have less importance than two cases which have different policy implications, which may shape the economy or the nation for decades to come. (See Mendelson, 1963). In short, we can neither defend nor refute the use of a difference in rank of unity as an interval number instead of merely an ordinal one (see Kerlinger, 1964, pp. 425-428; McNemara, 1962, pp. 106, 252, 374-375). Furthermore, when we convert two nine-point ordinal scales into a tau correlation, the result is a number which could be any one of over 360,000 possibilities.<sup>6</sup> At these odds the hypothetical inequities of assumptions of interval data applied to ordinal data pale into insignificance. Furthermore, to use the monotone criterion in our scaling techniques<sup>7</sup> would be to

---

<sup>6</sup>91

<sup>7</sup>This applies ordinal relations in multivariate analysis.

waste a large proportion of the data contained within the tau correlations. (See Spaeth and Guthery, 1969.) Hence, the results from Smallest Space Analysis (Lingoes, 1965; Lingoes and Guttman, 1967) and Kruskal's M.D.S.C.A.L. (Kruskal, 1964a, 1964b) were not used to much extent in this study. These techniques cannot recover adequately geometric configurations inputted as data (Spaeth and Guthery, 1969). Therefore, it is highly questionable whether the complex attitudinal configurations among clusters of variables can be recovered without distortion by these techniques. Also Coombs' non-metric scaling technique (Coombs, 1964) was considered but rejected for its weak scaling criterion.

Another methodological problem arises in the construction of scales and their subsequent multivariate analysis. If the individual case content and voting is multidimensional, and the evidence is strong that many cases are<sup>8</sup> as will be seen subsequently, then a case will fit in two, three, or more scales. If the scaled attitudes are related, the cases will also fit in several scales, such as the power of the I.C.C., government Rate Regulation, and Discriminatory Prices and Service (see Table 1 below). If a case involves all three issues, it should fit in all three scales. However, the placing of cases in several scales may create a built-in bias, so that in factor analysis we get associations

---

<sup>8</sup>For examples of where cases chosen to measure federalism also contained other dimensions, see Sprague, 1968, pp. 5, 10-11, 157.

1

among attitudinal variables that could be due solely to similar case content. Unless we get cases that involve only one issue, this problem inevitably arises. In fact, the proportion of such "pure" cases is probably low, as the complexity of Supreme Court cases indicates and this data analysis supports.

Hence, we must keep track of such duplicates, gain assurance that they do not inordinately influence the ranks of the justices and, if this is impossible, qualify our findings accordingly.

Factor analyses were run of scales with exclusive content to eliminate the possibility of this sort of bias. The analyses resulted in no major differences. This suggests what might have been inferred from the above discussion: scales must be related in the first place or it would not be practical to have duplicates in these scales without a noticeable lowering of their reproduceability. Hence, perhaps worry over duplicates is unnecessary. They merely reaffirm what factor analysis tells us: that these scales are related.<sup>9</sup> Their placement in several scales is of little consequence to the final result.

Since a persistent criticism of factor analysis is that it divides data into artificial categories, attempts will be made to confirm the validity of these factors. The

---

<sup>9</sup>Schubert points out (1965a, pp. 26, 71) that factor analysis and cumulative scaling are in theory alternate procedures for measuring the same psychological relationship.



reality of these factors cannot be demonstrated as easily as factors which can be seen, described or demonstrated in a contrived experiment, since these are "factors of the mind." Nevertheless, if these factors persist throughout analyses of different categorizations of the data, data based on different populations of judges, analyses of samples of variables, and are furthermore present in several kinds of analyses of the same data, their correspondence to something real will be increasingly difficult to deny.<sup>10</sup>

Hence, we might increase the level of certainty to a point where their existence in reality is much more believable than the alternate hypothesis--that they have no correspondence to reality.

The factor analysis was done by C.D.C. 3600 and C.D.C. 6500 electronic computers. The mathematical theory underlying it is explained in Harman (1967), Cattell (1952, 1965), and Fructer (1954). The method used was the more "mathematically satisfying" principal axes or principal factor method (Kerlinger, 1964, p. 661; Harman, 1967, chaps. 6, 8). This method yields a mathematically unique solution unlike the centroid (*ibid.*), and yields a more complex and often more convenient representation of the set of variables. It maximizes the amount of variance extracted in each solution

---

<sup>10</sup>This approach might be somewhat analogous to the study of the electron which cannot be seen and whose movement, speed, and position cannot be predicted, but whose existence is accepted by scientists through indirect evidence.

and used an "ellipsoidal fit" for its axes (Harman, 1967, pp. 97, 100-101). It requires communalities in the diagonal, rather than unities.<sup>11</sup> The communality estimates used were the highest correlation in the row. Although more accurate estimates are suggested,<sup>12</sup> they were not available in our computer programs.

The principal axes solution may not produce factors which are psychologically meaningful. However, if the axes are "rotated" in the factor space, the configuration of points of the variables is invariant and the maximum of variance explained is not decreased. Hence, solutions showing simple structure are sought in which all the variables load as highly as possible on one of the axes or factors (Thurstone, 1947, p. 335; Harman, 1967, pp. 97-99). Hence, we may define the factor by its variable content.

We may rotate axes graphically but this may result in subjective bias. (For example see Schubert, 1962, pp. 90-106). Quartimax and varimax utilizes more objective methods of accomplishing similar results. Yet Cattell (1965, pp. 204-212) criticizes these methods by arguing that "cooperative" factors which occur in nature are suppressed by these methods. He favors a combination of methods. Harman (1967,

---

<sup>11</sup>Using unities gives us the "closed model" (Cattell, 1965) which seemed less appropriate to our theory and data.

<sup>12</sup>Harman (1967, chap. 5) recommends the use of the squared multiple correlation of the row.

pp. 304-313), however, advocates these methods, finding that both are more objective approximations to simple structure than graphical methods, choosing varimax as the best approximation. Quartimax, however, makes large values larger and small ones smaller than graphical solutions, and has a tendency to a general factor while varimax gives the most parsimonious solution and provides more stable factors. The latter conclusion is not unchallenged (Spaeth, 1967, p. 14).

This study uses principal axes and both of the mathematical approximations to simple structure, quartimax and varimax for comparative purposes (Spaeth, 1967, p. 14).

Varimax is relied on here most heavily for interpretation for the reasons suggested above by Harman. Basically, principal axes and quartimax solutions proved to be quite similar. Both were also comparative to varimax but gave higher loadings to the variables on the first factor. Yet even they indicated a large number of factors in the data (chaps. 3 and 4 below).

The above methods impose the constraint of orthogonality on the factors or axes, which carries an assumption of independence of factors. Given the theorized interdependence of attitudes (Rokeach, 1968; Spaeth, 1967, pp. 2-5), not to mention the effects of common political party and other ideological influences on the justices, this assumption seems unwarranted. Hence, oblique analyses were made of the matrices whereby the factors may be correlated or

non-orthogonal (Spaeth, 1967, pp. 14, 17). This technique does not preclude orthogonal solutions if such give a better fit to simple structure.

Some disagreement occurs on the wisdom of using oblique analysis. Cattell (1965, 1952) strongly supports its application to many problems and Harman (1967) and Kerlinger (1964, chap. 36) endorse it as maximizing the approximation to simple structure. Cattell and Dickman (1962) argue that both mental factors and "natural" factors are in reality correlated and thus orthogonality is a faulty assumption. They offer experimental evidence as support.

In opposition, Guilford (1954, pp. 470-538) argues that the correlation between factors that may be found may be due to spurious influences such as conditions of sampling, the heterogeneity of the population, or other non-psychological determinators. If factors correlate too highly (say above .40), one may be measuring the same factor axes (*ibid.*). Also this method gives rise to second or third order factors. Cattell (1965) finds this advantageous for an hierarchical analysis, but others seem to regard it as unnecessarily complicating.

In the oblique analysis of this data, the bi-quartimin solution of the general oblimin criterion will be utilized (Carroll, 1957) and will be applied to the orthogonal varimax loadings.

The question of the number of factors to be extracted and rotated seems far from settled. Cattell (1965, pp. 190, 203-204) advocates extracting as many factors as mathematics permits and sorting them into true factors, trivial true factors, and error factors. Then he would interpret the true factors. He holds that  $\frac{1}{2} n$  factors would be adequate. However, the trivial and error factors might be due to the use of incorrect communalities as well as other influences not useful to interpretation. Kaiser (1959) concludes that the algebraic criteria, psychometric criteria of reliability, and psychological criteria of meaningfulness (based on experimental evidence) all show significance of factors only when the eigenvalue is one or higher (with unities in the diagonal). He finds that statistical criteria of significance reveals far too many factors.

The evaluation of number of factors judging by psychological meaningfulness has been suggested, but this involves some subjectivity. One may arbitrarily decide that factors including only 80% (or 90%) of the variance will be extracted. (See Harman, 1967, pp. 23, 198). A further suggestion is the use of Kruskal's multidimensional scaling technique (1964a, 1964b). When stress is plotted against dimension, a sharp break in the curve should reveal where the dimensionality of the factor structure lies. Supreme Court data, however does not seem to give a sharp break.

We will use all the available methods for determining how many factors satisfactorily explain our data, especially meaningfulness or interpretability. However, the Kruskal method is not recommended to others as its results were inconclusive eventhough it used up over 60 per cent of the computer time expended in this study.

Since attitudes are theorized as being associated in a hierarchical relationship (Rokeach, 1968; Spaeth, 1967, pp. 2-5), factor analysis, which extracts factors one at a time, can be used to study this hierarchy or relatedness of factors. Oblique analysis can discover their intercorrelation, if any. Other alternatives are the McQuitty pattern analyses (1957, 1965, 1966a, 1966b). This method builds successively larger clusters of related variables. He holds that these techniques are comparable in results and approach to factor analysis (1957). My previous studies of Warren Court data partly substantiates this (Leavitt, 1968, pp. 66-70). Hence, both the validity of our factors and their hierarchical relationship can be tested by the use of these methods on our tau matrices. A refinement of pattern analysis by Leighton Price (1969) is also applied. Pattern analysis also is useful for discovering small factors which tend to become submerged in the larger factors of the factor analysis method.

The phi correlation matrix of relationships between the judges was factor analyzed and the judges' loadings

correlated with their factor scores from the factors in the other factor analyses as well as their average rankings for the variables loading on each of the main factors (one ranking for each factor). This allows us to see if the factors from the phi analysis are comparable to those in the tau analysis (see Schubert, 1962). Furthermore, the phi matrix and the Q-analysis give us data as to the existence of voting blocs on the Court and sociometric relationships between the judges.

Factor scores give the judges' ranks on the underlying attitudinal factor represented by that factor.<sup>13</sup> It is a more precise ranking than merely choosing the variables that seem to load high on the factor and averaging the justice's ranks for these variables. Scores give a weight to each variable corresponding to its association with that factor. In our data these two corresponding measures of the judge's ranks on an attitudinal factor correlated at an average of .95 by the product moment method.

Factor analysis of product moment correlations of the raw votes on the cases can give us a comparative Q-analysis for sociometric relationships as well as locate for us the judges' spatial positions in the factor space (as can the

---

<sup>13</sup>This is implicit in the factor score concept.

A factor score is merely a justice's rank on a variable multiplied by its loading on that factor and averaged over all factors. Also if the Schubert concept (1965a) is correct that a factor axis is equivalent to a cumulative scale imbedded in the factor space, additional support is given to this interpretation.

factor scores for the judges (McRae, 1968). Furthermore, if the cases are used as variables instead of the judges, presumably their position in the factor space could be located also.<sup>14</sup>

Factor scores can also be used to calculate the distance between justices in  $n$ -dimensional space by the formula  $D = (d_1^2 + d_2^2 + \dots d_n^2)^{\frac{1}{2}}$  where  $d_1$  is the difference between factor loadings for the justices for the first factor and so on.<sup>15</sup> This distance is the inverse of a correlation matrix with the unexplained and error variance left out. This may also be done for the attitudinal variables in factor space to determine which cluster they are closest to, since greater than three dimensions are difficult to represent graphically.

An additional approach will use factor analysis. This is the reanalysis of subsets of the primary data matrices which produce high positive intercorrelations (Spaeth, 1967, p. 16). In the original factor analysis of the entire universe of variables the largest factors, the first to be extracted, may have a distorting effect upon the analysis which may obscure the presence of smaller factors. These may appear in McQuitty-type analyses, for example, but if

---

<sup>14</sup>The resulting number of factors would be small, however, as little definition is extracted from the data in this way.

<sup>15</sup>This is the more general case of the two-dimensional formula given by Torgerson (1958, p. 252).



1

they only involve two or three variables and the factor is related to a larger factor it may never separate out in factor analysis. In order to recover these possible factors, the subsets of variables identified by preliminary gross factor analyses will be separately factor analyzed. If such factors are really unidimensional, evidence of this will be obtained. If such subsets contain additional factors or can be broken down into subfactors or components, such will enrich our description of the attitudinal structure. As attitudes are theorized to be hierarchically arranged, this method will help test this possibility and more precisely define such a structure if it exists.<sup>16</sup>

Possible causal factors of the attitudinal structure resulting from these studies have been researched in biographies and legal, historical, and philosophical studies of the era. Ideology and life experiences of the judges are examined as possible causal factors as suggested by Schubert (1964, chap 3) and others (ibid.). Current ideas of political socialization and opinion formation have been consulted (Dawson and Prewitt, 1969; Lipset, 1960; Lane and Sears, 1964; Campbell, et.al., 1964).

An examination of the value systems of the judges will be made from the pattern of rank positions on the attitude scales and underlying attitudinal factors. The non-scale

---

<sup>16</sup>Such a structure has been found on the Warren Court from 1957 to 1966. See Leavitt, 1968, pp. 70-91.

responses on the scales offer insights as to what factors prompt the judges to reject the major attitudinal dimension followed by the other judges in that category of cases. These may suggest values more important to the judge than the underlying dimension hypothesized. Furthermore, a judge's extremity and consistency on attitudes and attitude factors probably measure his value priorities. These variables may be measured for a factor by applying mathematical tests to a judge's ranks on one factor as compared to his ranks on each of the other factors and to the universe of his ranks on all attitudes. Although this is ordinal data these are merely comparative tests (asking on which factors is he most consistent or extreme), hence, the t-test, F-test, randomization test will be used.<sup>17</sup>

In addition, evidence of the judges' relative dogmatic behavior will be examined, since it seems to be a central attitudinal construct (Rokeach, 1960). Various indirect measures of this might include: the judge's tendencies to dissent and extremity of attitudes, his open mindedness and tolerance, and his other personal attributes. (See also Schubert, 1965a, chap. 8).

Theory Underlying these Procedures.--This study seeks to determine the major underlying factors in Supreme Court

---

<sup>17</sup>Seigel, 1956. Violating the assumptions of metric tests in analyzing this type of ordinal data may still give valid results. McNemara, 1962, pp. 106, 252, 374-75; Kerlinger, 1964, p. 428.

decision making. The judges are relatively immune to direct political sanctions. They hear the most difficult and complex cases in which "the law" and precedent do not give unchallenged answers to the problems contained therein by the very nature of their function and role (Murphy, 1964). Hence, political factors and legal rules are assumed to be less important than the judges' attitudes. The judges are chosen for this Court only after they have undergone a lifetime of legal and political socialization and thereby have well-formed values and attitudes on prevailing issues (Krislov, 1964). In fact they may have been chosen precisely because of the values they possess and the fact that their attitudes are well known (Murphy and Pritchett, 1961, chap. 3; Sorauf, 1968, p. 367). Endowed by their office with supreme authority, to what more authoritative source can they go than their own preeminent principles? These principles are their own well-formed and often well-known values and attitudes.

Judges, then are political decision makers subject to the same psychological principles as other men but removed somewhat from the political battle and permitted to elevate their attitudes and pronouncements to principles guiding our political system.<sup>18</sup> (See Spaeth, 1966, chap. 1).

---

<sup>18</sup>The question arises as to how this concept can be accepted in the light of studies of the Court "retreating" when under attack (Murphy, 1962; Leavitt, 1965) or studies purporting to show gamesmanship (Schubert, 1960) or judicial strategy in decision making (Murphy, 1964). While some of these situations are extraordinary, they are still

11

This study examines the structure of attitudes on the Court, looks for causal influences for those attitudes and possible external influences on them, and seeks to test the permanence of those attitudes over time.

The permanence of judges' values is assumed as is the "relatively enduring" quality of attitudes (Shaw and Wright, 1967, p. 3; Spaeth, 1967, p. 2; Schubert, 1965a, chap. 7). Also the definition of attitudes as hierarchical and inter-related (Rokeach, 1968a, 1968b; Spaeth, 1967, pp. 2-5) is accepted. The methods to be used are particularly appropriate for using this type of theory since, as noted, the multivariate and McQuitty techniques give a hierarchical structure.

Basically, Rokeach's definition and conception of attitudes (1968a, 1968b; see also Spaeth, 1967, p. 2) will be used, but without necessarily accepting his belief congruence theory over the Osgood and Tannenbaum (1955) congruity theory. (See also Insko, 1967.) Attitudes are oriented in terms of values (ibid., pp. 178-86). Rokeach (1968a and 1968c) holds that values transcendently guide

---

compatible with our theory. First, the number of non-scale responses (from 5 to 10 per cent of the votes) may be accounted for by these influences. Also these stimuli may be treated like the other stimuli of a case, in that threatening external influences may decrease the attractiveness of an unpopular or "activist" vote equally for all members of the Court and the same rank ordering of justices toward the issue may still hold, but simply fewer are activated to cast an unpopular vote. Thus the original rank ordering may be upset only when certain judges are particularly more susceptible to outside influences than others.

actions and judgements across objects and situations to ultimate end states. Spaeth (1967) postulates a psychological hierarchy in which several interrelated attitudes form an attitude system, several such interrelated systems form a value and several values form an ideology. Each of the concepts are structural analogues. Schubert also uses the concept that interrelated attitudes form ideologies.<sup>19</sup>

In discussing the basic theoretical framework, Spaeth (1967, pp. 2-10) will be relied on closely (and quoted from freely below).

As Spaeth points out, the three components of attitude response are the cognitive, affective, and behavioral. The focus of this study must be on behavior, the judges' votes for and against certain issue positions as revealed by the content of Supreme Court opinions. The cognitive component of attitudes will be approached inferentially from this behavior. The cognition referred to is the image or perceptual map of reality held by the individual decision maker. Thus a detailed content analysis of the judges'

---

<sup>19</sup>1967, 1965a, pp. 191-235. Schubert does not really obtain ideologies from the interrelation of attitudes in the manner of the Spaeth model, however. His method consists of passing an axis (centroid) through a bloc or cluster of justices in a phi correlation Q-analysis) and interprets their ideology from the relative position of the bloc with respect to the cumulative scales in the factor space (which are analogous to our attitude systems or attitudinal factors, which may also be derived by using our method of more precise scales using varimax (see Leavitt, 1968). See also Spaeth (1965, 1966, pp. 32-33) who uses less complex methods to arrive at concepts similar to Schubert but does not label the descriptions of the justices' positions as ideologies. These methods seem to utilize the Rokeach model.

opinions is necessary. Cognition will be determined from the attitude scales and the interrelations among these attitude variables primarily derived from factor analytic techniques. Cognition will be examined both from the collective view of the entire Court and from the view of each individual justice.

The component of affect will be examined by considering the ranking of values within each judge's attitude. Highly-ranked values should be of high affect. The value rankings will be determined by a detailed analysis of the data in which we will consider the extremity and consistency of attitude of each judge as revealed by our attitude scales and the attitude systems derived from factor analysis (see Chapter 7 below). Moreover, the non-scaled responses in the various attitude scales will be examined on the assumption that they are a result of values or attitudes more important to the judge than the main dimension of the scale. If a judge takes an extreme position on an attitude scale and has no non-scaled responses, it may logically be inferred that this attitude is of high salience to him and he is high on affect on that attitude. If he has a moderate rank on an attitude scale and has many non-scaled responses, this attitude is considered of low salience and affect to him. The non-scaled responses may give cues as to issues that are of high affect. (See Chapter 9 below.)



Notwithstanding, a functional equivalence among the three components of attitude response (cognition, affect, and behavior) will be assumed, compatibly with the limited experimental findings (Rosenberg, et.al., 1960, chap 2; Allman and Rokeach, 1967).

Attitudes will be inferred from overt behavior. A conceptual definition of attitude which focuses upon the behavioral component is most useful in operationalizing the constructs of attitude, value, and ideology. Because of its behavioral focus and because it is readily utilizable with our specific kind of data, we employ Rokeach's definition (1968b):

An attitude is a (1) relatively enduring (2) organization of interrelated beliefs which describe, evaluate, and advocate action with respect to an object or situation, (3) with each belief having cognitive, affective, and behavioral components. (4) Each one of these beliefs is a predisposition which, when suitably activated, results in some preferential response toward the attitude object or situation, or toward the maintenance or preservation of the attitude itself. (5) Since an attitude object must always be encountered within some situation about which we also have an attitude, a minimum condition for social behavior is the activation of at least two interacting attitudes, one concerning the attitude object and the other concerning the situation.

(1) The "relatively enduring" postulate of attitudes may be examined by dividing the data into two periods and constructing attitude scales in both periods of equivalent

content. If judges are consistent in rank between the two periods, evidence that attitudes do not change may be gained. If the judges' ranks on comparable attitude scales do change, inquiry may be made as to the reason. The validity of the scales may be questioned or if satisfactory explanations of influences bringing about the change can be discovered, the assumption of the "relatively enduring" postulate of attitudes in this situation may be weakened. Relevant literature thus far provides little indication of shifts in judges' attitudes (Schubert, 1965a, pp. 228-233).

(2) Attitude theorists also agree that an attitude is not a basic, irreducible element within the personality (Shaw and Wright, 1967, p. 4). More basic are beliefs (Rokeach, 1960, chap. 2).

Beliefs are considered basic irreducible elements.<sup>20</sup> Their status is "primitive"--although the existence of beliefs is postulated, it must be assumed that, given the present state of technology, their observation is futile. All human cognitions are systems of beliefs, and it is these systems which are "observable" (indirectly through inferences from behavior). Attitudes, attitude systems, values, and ideologies, along with beliefs, are conceived as structurally and functionally analogous--as isomorphic with one another (Katz, 1960; Smith, Bruner and White, 1964;

---

<sup>20</sup>That is, they are not composed of other more basic elements. This is not to hold that they are discrete entities, since they are not observable.

White, 1966). That is, several attitudes interact to form an attitude system, several attitude systems interact to form a value, and several values form an ideology. Since factor analysis, in extracting successive factors, makes a hierarchical ordering of variables possible, it is ideal for revealing such a hierarchical structure, if one exists. Moreover, McQuitty's pattern analysis and the L.A.W.S. technique similarly can result in a cumulative hierarchical structure. Hence, if the above theoretical description of psychological constructs is correct, such a structure will be revealed by these methods. The several methods can be used to check each other. Furthermore, the content of the variables will permit a definition of each construct to be made. Thus, whether the constructs can correctly be labeled as, for example, values and ideologies, can be determined from their constituent variables. Hence, if constructs can be identified plausibly as values, their existence may be confirmed and a conclusion reached as to their position in the hierarchy of the attitude-value system. Likewise, if combinations of values form constructs plausibly identified as ideologies, their existence as part of the attitude-value system of the Court may be confirmed and a conclusion reached as to their composition as far as values, attitude systems and attitudes are concerned.

It is to be admitted that a "plausible identification" is comparatively weak proof because human judgement is required. Yet few studies can avoid this weak link in their

evidence entirely.

(3) The psychological constructs (attitudes, attitude systems, values and ideologies) are composed of beliefs or interrelated belief systems. An attitude is a belief system (Spaeth, 1967; Rokeach, 1968b, pp. 4-5). Thus these constructs, like beliefs, "have cognitive, affective, and behavioral components; and, being structural analogues of one another, they are all analyzable in terms of their characteristics (e.g., degree of salience, time perspective, integration, specificity) commonly specified in the social-psychological literature (Rokeach, 1968b; Krech, et.al., 1962)." (Spaeth, 1967, p. 3.)

As Spaeth (1967, p. 3) says "if all four psychological phenomena are structural analogues, what does it mean to say of them that they are interrelated? Again, en courant theory in social psychology suggests that beliefs are functional to attitudes (belief systems), that attitudes are functional to values (beliefs and belief systems, including attitudes), and that values are functional to ideologies (beliefs, belief systems, attitudes, attitude systems, values, and value systems). By function, we follow Katz (1960), Smith, Bruner, and White (1964), and White (1966)."

(4) The responses which will be the focus of the study are the votes of the judges in the cases they decide. Operationally, the focus will be on the relationship between attitude and non-verbal behavior. (The verbal opinions



accompanying the judges' votes will be consulted for purposes of classifying the cases into attitude scales, however.)

(5) Rokeach's conception of attitude involves two interacting foci: attitude toward object (AO) and attitude toward situation (AS). Behavior is then a function of AO and AS:  $B = f(AO \times AS)$ . This model has been used in a study of Warren-Court attitudes (Spaeth and Parker, 1969). That study adds evidence that attitudes are indeed composed of at least two interacting foci, but it may be questioned whether it is necessary to constrain ourselves in calling the foci "attitude toward object" and "attitude toward situation." In concrete situations of ordinary life experiences, such concepts may be useful. But in the case of abstract notions such as constitutional and legal provisions, it is not always easy to distinguish between objects and situations. It is possible in White Court scales to define civil liberties as the situation and the various groups seeking civil liberty claims as objects (criminals, property claims, Indians, aliens). Likewise it is possible to define many scales as involving the regulation of business (the object is business) and the constitutional and legal provisions as situations (Commerce Clause, Contract Clause, Due Process Clause, state taxation). Yet the judicial power scale seems composed of component scales which include the specific issues of federal judicial power over state courts and laws (scale 65), judicial power over executive actions (61), the judicial power of lower federal courts (40), and

Supreme Court power in favor of liberal outcomes (41) and in favor of conservative outcomes (42). Is the exertion of judicial power an object or situation? Are state courts and laws, executive actions, lower federal courts, and cases favoring liberal outcomes objects or situations? It seems just as logical to call all these components legal situations as to arbitrarily define some as situations and some as objects. Similarly state regulation of business under the Commerce Clause (13) seems composed of two subcomponents, one involving taxation (34) and one involving regulation other than taxation. Which is object, the Commerce Clause or taxation and regulation? In considering these abstract issues the object-situation distinction seems arbitrary and unnecessary. It would be sufficient to say that attitudes seem composed of two interrelated foci; and not specify the nature of the foci.

The division of the cases into specific categories and the scaling of these categories have already been described. Attitude is defined operationally as a set of cumulatively scaleable items as finely drawn as the parameters of the data permit.

An attitude system is a set of interrelated attitudes. Values are defined by Spaeth (1967, p. 6) as a set of interrelated attitudes and a value is deemed equivalent to an

attitude system.<sup>21</sup> This definition seems inconsistent with that of Rokeach as noted. It neglects the transcendental nature of values. (Rokeach, 1968c, p. 16.) Furthermore, whereas our findings in Chapter 6 below (Figure 19) suggest that some attitude systems involve only one value, other attitude systems seem to involve interactions among values.

However, Spaeth's (1967, pp. 6-7) findings are accepted that "values, then are seen as dependent upon attitudes which, in turn, depend upon beliefs. Values are more cognitively complex than attitudes, as attitudes are with respect to beliefs. Because a value is a combination of several attitudes, it is not necessarily tied to any specific attitude object or situation. For this reason we hypothesize that values are less subject to change than attitudes."

Spaeth also defines an ideology as a set of inter-related values. As the most cognitively complex of the concepts, it is hypothesized as being the most stable and least susceptible to change.

---

<sup>21</sup>Spaeth's use of the term "attitude system" seems to vary somewhat (1967, p. 6). He seems to call attitudes as measured by scales equivalent to attitude systems and later equates attitude systems with values. Since 1967, he seems to have settled on a definition that they are cumulative scales with at least two subscales as components (Spaeth, 1969, p. 7). Hence, his attitude systems are composed of only a few scales. However, as I have used the term, they are composed of from four to thirteen attitudes and are identified by factor analysis. In Figure 19 below his definition would probably include only scales 11, 13, 17, 31, and 23 as attitude systems.



This paper will use the term attitude system to describe the factors identified by our multivariate analysis which are composed of interrelated attitudes.<sup>22</sup> However, judgement on the other concepts will be withheld until the explanatory value of such concepts are ascertained. Values could be conceived as entities toward which judges may be ranked as more or less favorable. However, they have been previously studied from the viewpoint of an individual's value system, that is his rank ordering of preferences for values (Rokeach, 1968c). These are not strictly analogous concepts. Furthermore, the individual compensatory model (Torgerson, 1958, pp. 352-359; Schubert, 1965a, p. 28) suggests how values may affect attitudes in a fashion which fits the Rokeach rather than the Spaeth model. Values will be examined in "an analysis of the overall pattern of order relations from all pairs of points for all distinct sets" (Spaeth, 1967, p. 6), hence, from factor scores and average ranks, as well as from the analysis of each judge's average rank and consistency within a set (such sets being determined primarily by factor analysis).

The use of the term ideology might be confusing as a psychological concept and may be objected to as having conflicting uses in political science literature. It may be conceived as an external or unifying element in influencing

---

<sup>22</sup>Campbell (1964, p. 110) calls similar entities "attitude structures."

attitudes and values, for example. Its place in explaining them will be examined also.

Attitudes will be inferred from the behavior of judges in voting on cases, rather than primarily from verbal explanations of their behavior. Such behavior has been more accurate than their verbal rationale according to several studies (Schubert, 1965c; Spaeth, 1964).

Our indicators of the judges' relevant attitudes in their decision making will be Guttman scales of their votes on cases. The Guttman scales are postulated to be indicators of a "unidimensional" attribute in the data categorized. This attribute is defined as the attitude of the justices toward the dominant issue within the category. The cases may be conceptualized as items on a questionnaire which define the favorableness of the justice toward the issue.<sup>23</sup> (Spaeth, 1967, p. 10). The dimension described is one on which the respondents hold a consistent rank. The first case will have only one justice opposing the issue. The remaining cases will be ranked accordingly in order of increasing votes against the issue. The extreme cases involving the issue, if endorsed by only one justice, will

---

<sup>23</sup>A psychologist may construct a battery of questions to measure attitudes toward taxes, for example, each question being more extreme than the preceeding. He may ask, do you oppose the abolition of taxes? Do you endorse at least a five per cent tax rate? Ten per cent? Fifteen per cent? Ninety per cent? The favorableness of the respondent to taxes would determine the point at which he would object to a higher rate and, if consistent, would answer yes to all questions involving a lower rate. Respondents may then be ranked on favorableness to taxes according to how many positive replys he gives.

allow us to rank him as highest in favor of the issue and so on, allowing the ranking of all the judges. Unanimous cases are clearly off the measureable part of the attitude continuum and cannot be tested for fit to an attitudinal dimension. Hence, they are excluded.

For each attitudinal dimension the judges are hypothesized to have an ideal point. Beyond this point they will reject any item stimuli (question or case). If the case issue falls below this point on their dimension, they will accept and vote for it. If it exceeds their ideal point they will reject it and vote negatively (Schubert, 1965a, chap. 2; Torgerson, chap. 12; Coombs, 1964, p. 23).

Non-scale responses may be explained in several ways. A judge may not perceive the case as lying on that dimension and respond instead to another. Alternatively, the data may be really multidimensional whereby a sum of two or more dimensional values determines whether the judge will endorse the stimuli (Schubert, 1965a, p. 28; Torgerson, 1958, pp. 352-359; Spaeth, 1967, pp. 12-13). If he lacks values on one dimension, his position on the other dimension may compensate for it. The judges' rankings may be similar for the two interacting dimensions, but for one or two judges the ranks may be dissimilar enough to cause non-scale responses on the Guttman scale if one of the cases is much closer to one dimension than are the remaining cases.

The compensatory model is particularly compatible with the hypothesis that an attitude contains several sub-components and that an attitude system is similarly composed of several attitudes. It may also be used to support an hypothesis that an individual attitude is determined by an interaction between several of his values. It will be relied on below in explaining the non-scale responses of the individual judges.

The scales act as indicators of constructs which we call attitudes. The correspondence of these constructs with the empirical world is through justices' votes on cases. The relationship among these constructs is determined by factor analysis and other methods and is explained by the Rokeach and Spaeth psychological models.

Mathematical measures within the constructs permit us to find the interrelationships. Care in the precision of definition of the constructs is necessary to maintain their correspondence with the empirical data (Torgerson, 1958, pp. 6-8). Finally, the attempt will be made to establish relationships between these constructs of attitudes and attitude systems to the empirical world beyond the Court. What experiences on and off the Court shaped and influenced these attitudes and the decisions of which they are composed?

Political socialization concepts attempt to account for attitude formation based on life experiences,

family, political party, and society. It studies the transmission and change of values, attitudes and ideology.

(Dawson and Prewitt, 1969). The effect of these variables on the judges' attitudes will be examined. On lower courts, party and socioeconomic status have been identified as influences on decision making (Nagel, 1961, 1962a, 1962b, 1962c), but little has been done on similar connections for the Supreme Court except for Schmidhauser (1963). This may be because they have neglected political socialization concepts. They may not have inquired as to the actual lifetime political commitment of the judges nor other family and environmental influences on them.<sup>24</sup> Furthermore, few Courts have a close balance of political party to make party voting other than futile.<sup>25</sup> The White Court is an exception.

This study seeks to draw a psychological map of the attitude structure of the White Court. The attitudes of the judges are inferred from their behavior, their votes on the cases. The scales drawn are indicators of these attitudes. Multidimensional analysis attempts to determine how these attitudes cluster together. These clusters are then studied to see if they constitute underlying constructs of the

---

<sup>24</sup>Judges who changed parties were only nominally associated with a party, or came from a family of different political party than the one they joined, all might dilute the effect of partisanship.

<sup>25</sup>Long periods of one-party dominance has accounted for this: Democratic dominance from 1800 to 1860 and Republican dominance from 1860 to 1912.



attitudinal structure of the White Court. Whether they form meaningful psychological entities is of particular interest. The hierarchical properties of the various multivariate techniques will permit a hierarchical structure of these constructs to be defined. Whether this structure makes sense in terms of the Rokeach-Spaeth model can then be determined. Can the constructs be accounted for by certain value preferences by the justices? Do the constructs have any relationship to ideology, for example Progressivism or social Darwinism? Are the constructs related to other factors such as the political party of the justices or other background characteristics of the justices? Hence, inferences that values and ideology help determine the attitude structure of the Court will be attempted and tested.

The division of the data into two parts of approximately equal time periods will allow the testing of other concepts. Of particular interest is whether the decision making of the Supreme Court is a closed system or an open one? Do the judges make decisions solely on the basis of preconceived attitudes which do not change and hence are unaffected by political and sociological influences outside of the Court? Or do outside influences have an impact? Does sociological change affect the judges? Do political events and the stands and values of political parties affect them? Do judges change their attitudes? Do new judges joining the Court affect the small-group dynamics of the Court, form new sociometric relationships, and facilitate

the formation of new voting blocs of judges? Comparing the two periods of the White Court may suggest answers to these questions.

Attempts will be made to see if judges' attitudes as measured by these indicators do show some change. Such changes will then be examined in terms of new sociometric relationships and the change of national Progressive leadership from the Republican to the Democratic party. A possible polarization of the Court or a firmer bloc structure may reflect an increasing influence by the Progressivist ideology.

Explanations will be attempted for possible value preferences and ideology inferred from the attitudinal constructs. The model of political socialization (Dawson and Prewitt, 1969) will be applied to the findings to see if the transmission of values and ideology or the rise of new ideologies can be so explained. Do certain values related to traditional party history and ideology also appear related to the party identification of the justices, for example? Is this related to parental influence? Does their class origin explain some of their attitudes? Do certain associations or influences appearing later in the judges' lives influence them to modify their attitude structure so as to accept the newer ideology, Progressivism? Does support of the newer Progressivist ideology seem related to urbanization, association with the Progressivist movement or other



ociated with changing values?

h the political socialization model,  
symbol as a transmitter of ideology  
dered (Edelman, 1964). Hence, polit-  
m, or loyalty to a leading political  
nt belonging to a justice's polit-  
dered as a possible influence on  
e with congruity theory (Osgood and  
1967). Hence, Republican judges  
sm as espoused by Wilson while  
favor it out of deference to him as

s' individual backgrounds, life  
phy from biographical data will be  
ditional explanations of their  
tructure and positions on various

## CHAPTER 2

### SCALOGRAM ANALYSIS OF WHITE COURT ATTITUDES

Definition of Scales.--The names of the scales for the study are given in Table 1. The first 46 scales or attitudinal variables have identical definitions for both periods of the Court and for the scales constructed for the total period, October 1910 term to October 1920 term. Table 2 gives the names of the scales unique to one of the periods studied. Appendix I lists the cases used in constructing the scales with the number used for identification in other tables and contains the scale in which it was classified as well as the vote of the justices. The names of the cases are given in Appendix II.

The case content of the scales are given in Appendix III. Table 3 contains the coefficient of reproduceability, the minimum marginal reproduceability, and the non-scaled responses for each scale. (See Spaeth, 1965; Schubert, 1965a, pp. 79-81; Torgerson, 1958, pp. 318-324.) Note that some of the preliminary scales fall below suggested standard in reproduceability<sup>1</sup> and consequently are less

---

<sup>1</sup>A coefficient of reproduceability of .90 or better is considered a scaleable category with evidence of unidimensionality. In our calculation of C.R., cases with fewer than two dissenting votes are excluded as they would have an

Table 1.--Names of Scales Common to Both Periods

1. First Amendment and Political Liberty
2. General Civil Liberties
3. Civil Liberties: Property
4. Criminal Due Process
5. Civil Liberties of Indians
6. Civil Liberties of Aliens
7. Labor Law
8. Workmen's Compensation: Federal-State Conflict
9. Workmen's Compensation: No Federal-State Conflict
10. State Regulation of Business Challenged Under the 14th Amendment Due Process Clause
11. State Taxation
12. State Regulation of Business Under Contract Clause
13. State Regulation of Business Under Commerce Clause
14. Conservation of Natural Resources
15. Federal Civil Rights of Negro
16. Land Claims
17. Corruption in Government and Business
18. Fiscal Claims Against the Federal Government
19. Federal Fiscal Power
20. Federal Regulation: Non-Economic
21. Federal Regulation: Economic
22. Interstate Commerce Commission
23. Governmental Rate Regulation
24. Discriminatory Pricing and Service of Business
25. General Liability
26. Liability of Insurance Companies
27. Liability of Railroads
28. Bankruptcy and Debts
29. Patent and Copyright Law
30. Antitrust Laws
31. Federal-State Conflicting Jurisdiction
32. Federal-State Conflicts: Economic Powers
33. Federal-State Conflicts: Non-Economic Powers
34. State Taxation Under Commerce Clause
35. State Regulation of Business Under Commerce Clause: Non-Taxation
36. State Taxation Under Due Process and Contract Clause
37. Corruption in Government
38. Prohibition Laws
39. Full Faith and Credit Clause
40. Judicial Power of Lower Federal Courts
41. Judicial Power of Supreme Court in Favor of Liberal Outcomes
42. Judicial Power of Supreme Court in Favor of Conservative Outcomes
43. Businesses Invoking Self-Incrimination Clause
44. Corruption in Business Relationships
45. Federal Rate Regulation
46. State Rate Regulation

Table 2.--Names of Scales Used in Only Part of StudyScales common to both periods but not total period study.

- 47. All Federal Regulation Cases
- 48. Liability of Railroads: Federal-State Conflict
- 49. State Regulation of Bankruptcy and Debts
- 50. Workmen's Compensation
- 51. Government Economic Regulation
- 52. Federal Regulation of Bankruptcy and Debts

Scales unique to second period: 1916-1920.

- 53. Private Contracts
- 54. Total Liability (Including Debts)
- 55. Property Rights Invoked Against State Law
- 56. Property Rights Invoked Against Federal Law
- 57. General Judicial Power
- 58. Conservation and Land Claims

Scales unique to first period: 1910-1915.

- 59. Liability of State Government to Suits
- 60. Eminent Domain
- 61. Judicial Power Over the Executive Branch of Government
- 62. Right to Jury Trial in Civil Cases
- 63. Anti-Federalism
- 64. Judicial Power of Federal Courts over State Courts
- 65. Federal Judicial Power Over State Laws and Courts

Table 3.--Scales Constructed and Reproduceability Criteria  
1910-1915 Period

Scale No.	Scale Name <sup>a</sup>	Total Cases Used	CR <sup>b</sup>	MMR <sub>1</sub>	NSR	Comput Cases <sup>b</sup>
1	First Amendment	2	1.000	1.000	0	1
2	Gen. Civ. Liberties	26	.930	.655	6	10
3	Civ. Liberties Property	12	.926	.650	2	3
4	Criminal	13	.961	.722	3	9
5	Civil Liberties Indians	8	.956	.633	2	5
6	Civil Liberties Alien	6	1.000	.831	0	1
7	Labor	7	.939	.718	2	4
8	Workmen Com. Federal	5	.960	.832	1	5
9	Workmen Com. Non-Federal	10	.910	.718	4	5
10	14th Amend. Due Process	17	.900	.670	9	10
11	State Tax	12	.895	.722	8	9
12	Contract	10	.961	.792	3	9
13	Commerce	12	.871	.668	9	8
14	Conservation	10	.903	.721	6	7
15	Civil Rights	8	1.000	.756	0	5
16	Land Claim	12	1.000	.705	0	5
17	Corruption	16	.900	.626	6	7
18	Fiscal Claim	12	.925	.830	4	6
19	Fiscal Power	5	.923	.745	2	3
20	Fed. Reg. Non-Economic	5	.962	.691	1	3
22	I.C.C.	16	.923	.708	4	6
23	Rates	16	.950	.832	2	4
24	Discrimination	14	.970	.767	2	6
25	General Liability	51	.861	.677	30	25
26	Liability Ins.	7	.889	.641	2	2
27	Liability R.R.	14	.886	.716	8	8
28	Bankruptcy	15	.898	.693	8	9
29	Patents	9	.937	.705	2	4
30	Antitrust	9	1.000	.803	0	4
31	Federalism	36	.866	.721	21	18
32	Federal Economic	15	.910	.673	6	8
33	Federal Non-Economic	20	.900	.769	9	10
34	State Tax Commerce	2	.945	.850	1	2
35	No Tax Commerce	10	.926	.688	4	6
36	Tax D. Process	12	.921	.728	6	9
37	Corruption Government	6	.912	.718	3	4
38	Prohibition	1	1.000	1.000	0	1
39	F.F. & C.	3	1.000	.773	0	1
40	J.P. Lower Fed. Courts	13	.949	.701	4	9
41	J.P. Liberal	9	.933	.743	3	5
42	J.P. Conservative	21	.892	.740	11	12
43	Bus. Self-Incrimination	5	1.000	.675	0	1
44	Corruption Business	10	.962	.683	1	4
45	Federal Rate	10	1.000	.816	0	3
46	State Rate	8	.917	.768	2	3
47	All Fed. Regulations	23	.896	.682	10	11
48	Liability R.R. Fed.	9	.885	.812	6	6
49	State Bankruptcy	7	.971	.742	1	3

Table 3 (cont'd.) 1910-1915 Period

Scale No.	Scale Name <sup>a</sup>	Total Cases Used	CR <sup>b</sup>	MMR <sub>1</sub>	NSR	Comput Cases <sup>b</sup>
50	Work Compensation	14	.852	.674	9	7
51	Gov. Econ. Reg.	22	.973	.758	2	9
52	Federal Bankruptcy	9	.900	.761	5	6
59	Liability State Govt.	5	.971	.818	1	4
60	Eminent Domain	9	1.000	.715	0	1
61	J.P. Executive	9	.923	.797	2	6
62	Jury Civil	18	.825	.736	20	13
63	Anti Fed.	10	.865	.833	7	6
64	J.P. State Courts	15	.892	.681	6	7
65	J. Power State Cts. Laws	35	.864	.665	21	39

Table 3.--Scales Constructed and Reproduceability Criteria  
1916-1920 Period

Scale No.	Scale Name <sup>a</sup>	Total Cases Used	CR <sup>b</sup>	MMR <sub>1</sub>	NSR	Comput Cases <sup>b</sup>
1	First Amendment	21	.967	.840	5	17
2	Gen. Civ. Liberties	34	.824	.636	25	21
3	Civ. Liberties Property	25	.868	.626	19	17
4	Criminal	9	.923	.671	4	6
5	Civil Liberties Indians	3	1.000	.923	0	0
6	Civil Liberties Alien	3	1.000	.923	0	0
7	Labor	21	.973	.790	4	17
8	Workmen Com. Federal	15	.990	.852	1	10
9	Workmen Com. Non-Federal	15	.956	.706	4	10
10	14th Amend. Due Process	15	.972	.747	2	8
11	State Tax	22	.907	.688	10	12
12	Contract	21	.944	.744	9	18
13	Commerce	31	.947	.743	8	17
14	Conservation	5	.942	.833	2	4
15	Civil Rights	2	1.000	1.000	0	2
16	Land Claim	7	.923	.701	2	3
17	Corruption	22	.933	.696	7	12
18	Fiscal Claim	20	.955	.716	4	11
19	Fiscal Power	19	.936	.710	8	14
20	Fed. Reg. Non-Economic	19	.904	.739	11	13
21	Fed. Reg. Economic	25	.951	.638	8	19
22	I.C.C.	8	.964	.607	1	3
23	Rates	33	.932	.723	14	23
24	Discrimination	6	.889	.687	4	4
25	General Liability	24	.929	.766	11	18
26	Liability Ins.	2	1.000	.889	0	2
27	Liability R.R.	19	.925	.714	8	12
28	Bankruptcy	16	.907	.667	9	11
29	Patents	15	.934	.701	4	9
30	Antitrust	11	.976	.776	2	10

Table 3 (cont'd.) 1916-1920 Period

Scale No.	Scale Name <sup>a</sup>	Total Cases Used	CR <sup>b</sup>	MMR <sub>1</sub>	NSR	Comput Cases <sup>b</sup>
31	Federalism	39	.894	.674	19	20
32	Federal Economic	14	.963	.767	3	9
33	Federal Non-Economic	22	.898	.671	10	11
34	State Tax Commerce	8	.962	.759	2	6
35	No Tax Commerce	23	.948	.744	5	11
36	Tax D. Process	15	.963	.710	2	6
37	Corruption Government	11	.981	.714	1	6
38	Prohibition	12	.911	.767	4	5
39	F.F. & C.	2	1.000	.833	0	2
40	J.P. Lower Fed. Cts.	10	.899	.721	10	10
41	J.P. Liberal	7	.914	.676	3	4
42	J.P. Conservative	13	.951	.681	4	9
43	Bus. Self-Incrimination	1	1.000	1.000	0	1
44	Corruption Business	11	.923	.680	4	6
45	Federal Rate	20	.953	.654	5	13
46	State Rate	19	.970	.744	3	11
47	All Fed. Regulations	44	.906	.668	26	32
48	Liability R. R. Fed.	13	.938	.718	5	9
49	State Bankruptcy Laws	7	.944	.714	2	4
50	Work Compensation	30	.956	.724	8	20
51	Gov. Econ. Reg.	42	.918	.709	19	27
52	Federal Bank Laws	8	.923	.684	4	6
53	Private Contracts	15	.926	.708	6	9
54	Total Liability	45	.852	.665	40	31
55	Civ. Lib. Property State	9	.886	.666	5	5
56	Civ. Lib. Property Fed.	16	.978	.704	2	11
57	General Judicial Power	14	.918	.682	8	11
58	Conservation and Land Cl.	8	.909	.706	4	5

<sup>a</sup>See Tables 1 and 2 for full name of scale.

<sup>b</sup>In the calculation of C.R., cases with fewer than two dissenting votes are excluded. The total of cases with more than one dissenting vote is referred to as "computable cases."

CR = Coefficient of Reproduceability.

MMR<sub>1</sub> = Minimal Marginal Reproduceability for respondents.

NSR = Non-scaled Responses.

Comput Cases = Computable Cases.

Table 3 (cont'd.) 1910-1920 Whole Period

Scale No.	Scale Name <sup>a</sup>	Total Cases Used	CR <sup>b</sup>	MMR <sub>1</sub>	NSR	Comput Cases <sup>b</sup>
1	First Amendment	22	.956	.870	7	18
2	Gen. Civ. Liberties	57	.855	.645	38	31
3	Civ. Liberties Property	39	.889	.637	18	18
4	Criminal	22	.922	.690	10	15
5	Civil Liberties Indians	11	.911	.752	4	5
6	Civil Liberties Aliens	9	.867	.741	2	2
7	Labor	28	.962	.775	7	21
8	Workmen Com. Federal	20	.967	.827	4	14
9	Workmen Com. Non-Federal	24	.926	.687	10	15
10	14th Amend. Due Process	36	.908	.704	14	17
11	State Tax	34	.897	.710	19	21
12	Contract	31	.935	.765	16	28
13	Commerce	42	.900	.712	22	25
14	Conservation	15	.909	.737	9	11
15	Civil Rights	8	1.000	.887	0	5
16	Land Claim	22	.938	.699	6	11
17	Corruption	38	.897	.646	18	19
18	Fiscal Claim	37	.892	.715	21	22
19	Fiscal Power	24	.912	.745	13	17
20	Fed. Reg. Non-Economic	30	.859	.718	24	21
21	Fed. Reg. Economic	44	.935	.688	15	27
22	I.C.C.	22	.914	.615	6	8
23	Rates	49	.908	.790	22	28
24	Discrimination	26	.960	.750	5	15
25	General Liability	76	.882	.708	44	43
26	Liability Ins.	10	.944	.705	2	4
27	Liability R.R.	33	.899	.680	18	20
28	Bankruptcy	31	.891	.647	19	20
29	Patents	24	.926	.720	8	13
30	Antitrust	22	.966	.777	4	14
31	Federalism	75	.878	.660	42	39
32	Federal Economic	28	.925	.698	9	14
33	Federal Non-Economic	44	.889	.706	23	23
34	State Tax Commerce	10	.944	.752	4	8
35	No Tax Commerce	33	.933	.697	10	17
36	Tax D. Process	26	.893	.738	14	15
37	Corruption Government	17	.920	.646	7	10
38	Prohibition	13	.926	.767	4	6
39	F.F. & C.	5	.963	.854	1	3
40	J.P. Lower Fed. Cts.	29	.892	.648	18	19
41	J.P. Liberal	16	.888	.711	9	9
42	J.P. Conservative	36	.875	.715	24	22
43	Bus. Self-Incrimination	5	.944	.695	1	2
44	Corruption Business	21	.923	.675	6	9
45	Federal Rate	30	.946	.669	8	18
46	State Rate	27	.933	.756	10	17



reliable as indicators than the others. Most of these were improved when split into subcomponent scales. Others met these standards when the scales for the two periods were combined.

The justices' ranks and non-scaled responses for these scales are given in Appendix IV and V, respectively. The criteria given in Spaeth (1965, 1967) were used as guidelines for the construction of these scales.

Each of the scales include a case content which seems to meet a classification defined below. Cases which did not fit the scale were dropped only after careful rereading and consideration of the judges' written opinions. Dropping cases from scales merely in order to decrease non-scaled responses might have given large improvements in reproducibility criteria but might have obscured the multidimensionality of the cases involved. Hence, if two judges used federalism as a basis of decision while the others saw economic liberalism as the issue, the case might have been dropped as being non-scalable in spite of being predominantly a measure of attitudes toward liberalism. The problem of fitting multidimensional cases into "unidimensional" scales must thus be considered. A more thorough analysis of the scales resulted in a division of some scales into subcomponents with improved reproducibility.

---

inflating effect on the C.R., Spaeth, 1965, p. 300. The  $MMR_1$  is the lower limit for the C.R. for the scale. Schubert, 1965a, p. 80; Spaeth, 1967, p. 11.



The First Amendment scale (No.1, Table 1) involves cases in which freedom of speech and press and other political freedoms were involved, such as peaceful picketing and verbal persuasion in favor of secondary boycotts. Regulation of electoral financing also was included on the grounds that, in the Progressivist view, unrestricted corrupt use of funds would deny citizens the expression of their preferences.

General Civil Liberties (No. 2, Table 1) is a classification given to a large scale composed of cases involving the fairness of government procedure or law which censures persons or groups. It involves the concept of due process in depriving persons of life, liberty, or property in a substantive as well as procedural sense, but does not include the larger category of laws regulating business challenged under this concept. It does include the subpoena of corporate books challenged under the self-incrimination and search and seizure clauses of the bill of rights. The concept of individual property rights present in the period, excluding the regulation of big business and investigation of their books, is also subsumed under this category. It does not include the category of Eminent Domain (No. 60, Table 2) nor does this group include Civil Rights (No. 15) which involves the rights of Negroes and which is clearly a separate issue as scalogram analysis reveals. Nor does it include First Amendment cases. Civil Liberties does include individual rights denied by private action. This category was further

1

refined by dividing it into five sub-categories, four of which formed scales which satisfy reproduceability criteria.

The four acceptable scales were: Civil Liberties--Property (No. 3 Table 1), Criminal Due Process (No. 4), Civil Liberties--Indian (No. 5), and Business Self-Incrimination (No. 43).

The unacceptable group was Civil Liberties--Aliens (No. 6).

These are defined below.

Civil Liberties: Property (No. 3) involved the owners of property who sought redress from government or the machinations of corporate directors or corporations using monopolistic practices. It involves legal and Constitutional safeguards to protect such property from deprivation or confiscation. It includes the rights of creditors and stockholders which were abused by corporate reorganizations and interlocking directorates, the rights of aliens to own property and pursue occupations without discrimination, wives' and children's property rights and inheritance rights, Indian rights to property and government funds as guaranteed by treaty, small businessmen's rights to do business free from government control, and under prohibition, the freedom of individuals from arbitrary seizure of legally purchased liquor and other possessions. It includes mostly small businessmen or farmers or various disadvantaged groups but also includes some larger businesses (about one-fourth of the cases).

This concept of property rights was a concern of the Progressives (Hofstadter, 1955, pp. 134-35, 172-73, 215-222, especially pp. 220-222; Mason, 1946). Populists were less concerned with governmental attacks on property, but opposed monopolistic methods of depriving individuals of economic values and property (Hofstadter, 1955, chaps 1-3; Tindall, 1966; Faulkner, 1959, p. 58). This property rights concept has also been advocated by more enlightened conservatives (Rossiter, 1962, pp. 37-38, 187), including even Justice McReynolds (Early, 1954).

Most of the "civil liberties" related scales were based on issues raised by reformers and Progressives prior to and during the period studied involving oppressed and disadvantaged minorities (Filler, 1962; Faulkner, 1959, pp. 3-9). These include the American Indian, immigrants, and the Negro. Criminal Civil Liberties (No. 4) involved generally lower-class, disadvantaged groups. Labor (No. 7), Land Claims (No. 16) and Eminent Domain (No. 60) might fall in this category. The latter two include mostly settlers being dispossessed by railroads acting under federal grants or acts of eminent domain. Those three groups include groups which are at least disadvantaged, if not actually oppressed or of a minority status, and might be included with the others. Labor was certainly a cause dear to many of the social reformers (Filler, 1962; Faulkner, 1959, pp. 3-9, 1931, chap. 3). Of the above six categories, four formed excellent scales. Only Eminent Domain and Civil Liberties-Aliens

filled t

tree is

01

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

reached

failed to form scales meeting our criteria: cases involving these issues were too few.

Civil Liberties-Criminal Procedure (No. 4) is a scale constructed to measure attitudes toward what is currently considered civil liberty in criminal due process to determine if a similar concept was present on the White Court. It includes criminal cases in which the defendant appealed the conviction mainly on procedural grounds. The first period, however, includes several cases in which more substantive grounds were used such as case 215 (see Appendix I) in which punishment was held to violate the Thirteenth Amendment, 386 and 532 where a law was challenged as being unconstitutionally vague, and 212 in which a wife sought the right to sue her husband for assault. In the latter case the wife is considered as pleading the civil liberty claim. Only this case and 129, where a corporation is claiming protection from illegal search and seizure, are not clearly criminal cases in the modern concept. The remaining content of this scale involves procedural or trial defects and clearly involves criminal due process. It includes: search and seizure, self-incrimination, jury trial, rules of evidence, cruel and unusual punishment, contempt of court, habeas corpus, extradition, the charge to the jury, double jeopardy, improper arrest and improper venue or combinations thereof. These scales are presented in Figures 1 and 2 as examples of the scalogram technique used.



[illegible]

Issue	Case Number <sup>a</sup>															Rank <sup>b</sup>
	386	310	215	251	252	269	270	348	212	242	214	229	221			
	Harlan															1
	Hughes															2
	Holmes															3
	Lurton															4
	Lamar															5
	McKenna															6
	White															7
	McReynolds															8
	Day															9
	Van Devanter															10
	Pitney															11
Vote	6/2	7/2	5/2	4/5	4/5	4/5	3/6	2/7	3/4	1/7	1/6	1/8	1/8			
Vague statute	+															
Double jeopardy	+															
13th Amendment	+															
Change of venue	+															
Change of venue	+															
Hearsay evidence	+															
Hearsay evidence	+															
Jury trial	+															
Wife's rights	+															
Double jeopardy, jury	+															
Venue	+															
Jury trial, arrest	+															
Double jeopardy	+															

Figure 1.--Scale of Criminal Due Process Cases:  
1910-1915

<sup>a</sup>See Appendix I and II for key to case numbers. + is a vote for civil liberty, - is a vote against civil liberty, N is a non-participation, and O is a non-scaled response.

<sup>b</sup>See Appendix III for tie-breaking cases.

1. The above information is to be used for the purpose of the investigation only and is not to be distributed outside the agency.

Justice	Case Number <sup>a</sup>										Rank
White	96	129	184	202	446	10	37	105	56		1
Clarke	+	⊖	+	N	⊖	+	+	+	-		2
Holmes	+	+	+	+	+	-	-	-	-		3
Brandels	+	+	+	+	+	-	-	-	-		3
McKenna	+	+	+	-	-	⊕	-	-	-		5
Van Devanter	+	+	+	-	-	-	-	-	-		6
Day	+	+	-	-	-	-	-	-	-		7
McReynolds	+	+	-	-	-	N	-	-	-		7
Pitney	-	-	-	-	-	-	-	-	-		9
Vote	8/1	7/2	6/3	2/6	3/6	3/5	2/7	1/8	1/8		
Issue											
Habeas corpus: Contempt											
Search & seizure: corporation											
Contempt: biased judge											
Search & seizure											
Trial procedure											
Self-incrimination											
Trial procedure											
Self-incrimination											
Trial defect: jury charge											

<sup>a</sup>See Appendix I and II for key to case numbers. + is a vote for civil liberty, - is a vote against, N is non-participation, O is non-scaled response.

Figure 2.--Scale of Criminal Due Process Cases: 1916-1920



Civil Liberties of Indians (No. 5) involves grievances of Indians against the white man's actions as represented by reformers of the time (Helen Jackson in Filler, 1962, pp. 184-189; Faulkner, 1959, pp. 2-4, 8). It includes suits against the federal government for lands taken from them or repayment for such lands, Indian rights to their land freeing them from threats of seizure for debts, rights to buy liquor near reservations, protection from state control or regulation, and cases involving murders of Indians by white men.

Civil Liberties of Aliens (No. 6) is a quasiscale measuring challenges to laws discriminating against aliens. These include Congressional regulation of immigration and state laws forbidding aliens to hold certain jobs, own property, or which levy discriminatory taxes on them (e.g. Chinese laundries).

Labor (No. 7) involves laws and suits involving workers. This was also a focal point of reform movements (Filler, 1962, pp. 133-184; Faulkner, 1931, pp. 76-79, 218-222). Organized labor was also active in politics and economic conflicts (Faulkner, 1931, pp. 62-79; 1959, pp. 81-91, 163-180). This scale includes labor legislation on hours and wages, child labor, "yellow-dog" contracts, strike and boycott injunctions, worker's suits to recover wages, and laws regulating contract labor or discriminating against alien labor.

Workmen's Compensation (No. 50) was scaled as a separate category. Fatigue from long hours of work and lack of

safety precautions resulted in a high rate of worker injury.<sup>2</sup> Scales of all the cases involving state and federal workmen's compensation laws and suits by workers for damages for on-the-job injuries were constructed. These workmen's compensation scales were only marginal in reproduceability. The coefficient of reproduceability was .852 for the first period and .956 for the second. The data could not be explained by one dimension. The second dimension seemed to be federalism. The scales were divided into cases involving a federal-state conflict and one not involving such a conflict. Actually several scales would explain the data best: state laws, federal laws, federal-state conflicts and Full Faith and Credit cases.

Workmen's Compensation Non-Federal (No. 9, Table 1) involves both federal (F.E.L.A.) laws and state laws which are not in conflict. It also includes cases involving challenges under the Full Faith and Credit doctrine. The first period contains only cases under federal law except for the latter. The second period involves about equal amounts of federal and state laws.

Workmen's Compensation Federal-State (No. 8) involves state laws allegedly in areas of interstate commerce or admiralty law where federal jurisdiction is claimed.

---

<sup>2</sup>Early in the century 500,000 workers were killed or maimed on the job every year. Paulkner, 1931, p. 110. Twenty-five thousand workers were killed on the job in 1913 after conditions had been considerably improved. Link and Gorton, p. 57.

for

of the

The

where

and

very

place

can

some

the

of

and

that

very

and

and

and

and

and

and

and

and

and

and

and

and

and

and

and



Mention should be made here of the other scales involving forms of "liberty." Federal Civil Rights of Negroes and other disadvantaged minorities (No. 15) was one such scale. The second period contained only two such cases, but ranks were assigned from the scale of cases for the combined periods. Only two cases of the eleven did not clearly involve Negroes. One involved vote frauds in the South in federal elections and the other (362, Traux v Balch) involved a state law against employing aliens which was challenged under the equal protection clause. The Negro cases also all invoked the concept of federal civil rights as protection from state or private discrimination.<sup>3</sup> These included segregated trains and colleges, laws involving contracts, and the convict lease system challenged under the Thirteenth Amendment. These were all concerns of reformers prior to and during the period studied (Filler, 1962, pp. 195-206).

Land Claims (No. 16) similarly might be included under the liberty concept. It involves the right of the settler, farmer or Indian to keep his land in spite of rival claims by stronger forces such as railroads, corporations, or government. Several cases also involve the withdrawal of land from industrial exploitation and retaining it as part of the public domain. Also included are cases where homestead or Indian land is protected from seizure for debt payment. This issue

---

<sup>3</sup>This was a concept resulting from the post-Civil War era which involved Southern intimidation of Negroes and Republican attempts to combat this (Lewis, 1937, chaps. 1 and 2, especially, p. 49) including the 13th, 14th and 15th Amendments and the Civil Rights Laws.

was also a concern of the times due partly to land grabbing by the "rotter barons" and due partly to the increasing awareness of the disappearance of good frontier land, (Faulkner, 1959, pp. 1-8, 48-49). It was one of the issues raised by the Populists and earlier agrarian parties (Westin, 1963, pp. 9-12).

Eminent Domain (No. 60) is a category found only in the first period. It is the weakest quasiscale in the study. It involves land claims or damages against the government. The government exercised eminent domain to take property either for its own purposes or to give it to a railroad or telegraph company.

The next four categories are based on familiar legal doctrine (Mason and Beaney, pp. 178-247, 380-453; Kelly and Harbison, 1963, chaps. 11 and 20). State Regulation of Business Challenged Under the 14th Amendment Due Process Clause (No. 10) involves no tax cases. It includes regulation of corporations and businesses, rate cases, and several labor laws. It excludes workmen's compensation laws.

State Taxation (No. 11) includes all tax cases under state law except for one case in each period in which the voting shows that state-federal relationships clearly predominate which would place them in the Commerce Clause category.

State Taxation Under Commerce Clause (No. 12) State Taxation Under Commerce Clause (No. 13) State Taxation Under Commerce Clause (No. 14) State Taxation Under Commerce Clause (No. 15)

105

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

122

123

124

125

126

127

128

129

130

131

132

133

Contract Clause (No. 12) includes state regulation of business challenged under the Contract Clause of the Constitution (Article I, Section 10). It includes almost exclusively public contracts, contracts made by a state or its agent (e.g. a municipality) with a business. Thus it covers franchises granted to business but not the regulation of private contracts such as wage and hour laws or the rates and prices of private business. It includes regulating rates of public utilities and rent control laws (cases 193, 194) and exempting life insurance benefits from creditors' claims (190). These fit well in the scales but make no difference in the ranks and could be excluded. Several tax cases are included in this category.

Commerce Clause (No. 13) involves state regulation of business challenged as under the exclusive jurisdiction of Congress under the Commerce power. It involves railroad regulation and rate-setting, and the taxation of out-of-state corporations and persons.

The above categories of State Taxation and Commerce form weak scales in terms of our criteria, suggesting that other dimensions exist. New scales were constructed to remedy this and to produce better defined categories which contained no duplicate cases. State Taxation (No. 11) and Commerce (No. 13) cases were scaled in three categories: State Taxation Under Commerce Clause (No. 34), State Regulation of Business Under Commerce Clause; Non-Taxation (No.

35), and State Taxation Under Due-Process and Contract Clauses (No. 36). The new scales had an average C.R. of .945, with .921 for the worst one, a great improvement.

Conservation (No. 14) was a further concern of the Populists, Progressives, and other reformers of the time, so it was used as the basis for a scale. Business exploitation and destruction of the vanishing public domain aroused great concern and opposition (Fenton, pp. 46-47; Faulkner, 1931, pp. 1-4; Westin, 1953, pp. 9-12). This scale includes two cases of industrial pollution, three of timber cutting, four of mining, oil and gas extraction from public lands, one of coal undermining endangering others, two regulating hunting and five cases involving in other ways the taking or using of part of the public domain. This issue is closely tied into the Land Claim issue as many conservationists proposed the withdrawal or reservation of remaining public land for future homesteaders rather than corporate exploitation (Westin, 1953, pp. 9-12). Furthermore both issues include the growing recognition of the time that American resources were indeed limited (Swisher, 1954, pp. 511-515). Hence it was not surprising that the Land Claim scale (No. 16) and the Conservation scale cases (No. 14) formed a larger, acceptably reproduceable scale (No. 52), called Conservation and Land Claims. This was done for both periods; however, the resulting scale was not used in the analysis of the first period as some refinement in attitudes would have been lost.

The following scales are interrelated and deal with the basic thrust of the Progressive movement which applied governmental solutions to the threats of large industry to traditional American values and aspirations. (See Lewis, 1937, chap. 8; Faulkner, 1931, chaps. 2 and 4.) They include numbers 17, 21-25, 27, 29-30, 37, 43, 44, and 51. These involve meeting the threats of concentrating industry, their methods, and their consequent danger to the economic and political system. These scales involve primarily national solutions to these problems.

The rapid industrialization and concentration of industry posed certain threats to the traditional American values and to the American middle class particularly (Lewis, 1937, p. 164; Link and Catton, 1967, p. 68) The values threatened were economic competition, democratic control of political institutions, and financial "honesty." Threats to the middle class included loss of control over political institutions through manipulation of foreign-born voters and bribery and corruption of public officials. It also included economic threats to the middle class as well as threats to their status (Lipset in Bell, ed., 1964, pp. 307-446). These included the destruction of small businesses and family companies by great industrial combinations, ruthless and cut-throat competition involving such monopolistic practices as discriminatory rate rebates, combinations, and price-cutting, and unethical financial practices such as stock-watering and dummy corporations (Faulkner, 1931, chap. 2). These

1920

1921

1922

1923

1924

1925

1926

1927

1928

1929

1930

1931

1932

1933

1934

1935

1936

1937

1938

1939

1940

1941

1942

1943

1944

1945

practices also threatened and disadvantaged the small stockholder and led to stock market crashes, speculation, receiverships, and bankruptcy and usually cost the stockholders dearly. Furthermore, these monopolistic practices, aided by the tariff, resulted in rising prices and a fall in real wages which economically harmed the middle and lower class consumer (Hofstadter 1955a).

The Progressivist movement had its origins in urban reform which grappled with the problem of political corruption on local levels in which businesses were involved in bribing officials to their advantage in obtaining franchises and favored positions (Hofstadter, 1955a, chap. 4; Faulkner, 1959, chaps. 2 and 4). This led to a general condemnation of "dishonest" business and corporate activities (Lewis, 1937, chap. 8; Lloyd, 1894) which had reached a frenzied peak from 1899 to 1904 (Faulkner, 1931, chap. 2). Populist origins of the Progressivist movement centered upon monopolistic practices and railroad company practices (Faulkner, 1959; Hofstadter, 1955a, pp. 3-147; Tindall, 1966).

Long run causes of the Progressivist upheaval seemed to be urbanization, industrialization, concentration of industry, corrupt public and business practices, the influx of immigrant labor from 1890-1920 (Lewis, 1937, chaps. 7 and 8), the decrease in economic competition, and rising farm prices due to the closing of the frontier (Lewis, 1937, p. 237).



Precipitating causes of the Progressivist upheaval seemed to be the stock market crashes of 1903 and 1907, increasing inflation and falling real wages, frenzied consolidation and trust building by the "money trusts" from 1899 to 1904, business control of public officials and the awareness that these economic effects were consequences of business activities through revelations and exposures of these monopolistic and "corrupt" business practices by legislative committees and journalists (Hofstadter, 1955a; Faulkner, 1931, chap. 5; Link and Catton, 1967).

Hence, the above influences were used as constructs for scaling attitudes on these subjects on the White Court.

As the Progressives were particularly concerned about traditional American values (their values), they condemned the new industrialists as using "unfair" or dishonest practices. Hence, much of their style seemed moralistic. Corruption or immorality in government and business was a main concern of theirs. The scale, Corruption in Government and Business (No. 17, Table 1) was constructed to measure this attitude. Although it formed an adequate scale, it was broken into number 37, Corruption in Government, and number 44, Corruption in Business Relationships, with improved reproducibility. The former includes no local level corruption except for some cases from the Philippines. It involves corruption in public office or the use of such office to benefit oneself financially, fraudulent or

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

11/10/20

dishonest dealings with the federal government, filing false reports, land frauds, and fraudulent use of the federal mails. It also includes illegal expenditures by business to control elections. In each case, government officials are involved in some context of acts of questionable ethics for private gain.

The Corruption in Business scale involves unethical or illegal dealings in private business also for private aggrandizement. This includes many of the acts condemned by Progressivist and Populist reformers. Its content includes usury, embezzlement, fraud, forgery, fraudulent contracts, interlocking directorates, lawyers charging exorbitant fees, unethical stockbrokers, neglectful bank directors, and speculators using unfair methods in cornering a market.

Business Self-Incrimination (No. 43, Table 1) is related to morality and to anti-monopolistic sentiment in that government inquiries into business transactions were to discover unethical practices and illegal monopolistic practices. Corporations often pleaded self-incrimination either for the corporate person or one of its officials. The search and seizure clause of the Fourth Amendment was sometimes invoked in conjunction with the Fifth Amendment. All of these cases were under federal jurisdiction.

I.C.C., Government Rate Regulation, Discriminatory Pricing and Service were closely connected in that they all involve governmental regulation of monopolistic corporations, principally railroads.

1

The I.C.C. scale (No. 22, Table 1) involves all cases involving the power of the Federal Interstate Commerce Commission. Governmental Rate Regulation (No. 23, Table 1) involves all cases involving state, municipal, or federal control over prices or rates or price-setting. It includes railroad rates primarily, including rates for hauling mail and street railways. The second largest group involves other semi-public utilities or "natural monopolies" such as telegraph and water rates. Also included are insurance rates, interest rates on loans, lawyer's fees and, during wartime, rent controls and price-setting for groceries and other retail items. This scale was divided into Federal Rate Regulation and State Rate Regulation (Nos. 45 and 46, respectively, Table 1), with significant improvement in reproducibility. These scales are not completely exclusive. Duplicates were used where federal rate control conflicts with state control. These cases are reversed so that in the state scale state control of rates is considered "liberal", while in the federal scale, pro-federal control is similarly considered a "liberal" vote.

Discrimination in Pricing and Service (No. 24) involves cases in which the federal government attempts to end rate rebates and other forms of discrimination, such as different rates for short and long hauls. These cases mostly involve railroads who may be controlled by the large shippers involved or who for trade advantages permit discriminatory pricing or service for their own benefit. The practices usually

aided large corporations to gain or perpetuate a monopolistic situation. Some cases involve discriminatory contracts at favorable prices obtained through interlocking directorates. With only one exception these cases involve railroads. Most of them also involve interstate commerce issues.

Liability of Railroads involves shipper suits against railroads for damages to shipped merchandise. It also includes three cases involving injury to a passenger and two involving damages to property near the railroad right-of-way. Also included are two cases involving transportation by ship and four cases involving suits against telegraphs for failure to transmit correct messages. Ships and telegraphs are included on the basis that they are similar to railroads as transportation and communication media and semi-public businesses. They also fit in the scale perfectly. However, if excluded they would make no difference in the scale ranks. Railroad cases comprise 86 per cent of the total.

Patent and Copyright Law (No. 29, Table 1) involves use of federal grants of patents and copyrights to business as well as trademark rights gained through long term usage as recognized by common law. This involves legally recognized monopoly as well as monopolistic practices, favorable trade agreements and other unfair practices resulting from such patents or trademarks. It also involves questions as to whether a patent should be granted. The dimension on which the cases are scaled is whether the decision is pro or anti-competition, a "liberal" vote was considered as pro

competition. In the first period 5/12ths of the cases involve trademarks, while the second period contains only one such case, but all the copyright cases (3 out of 14). This scale is related to monopoly, a central Progressivist concern.

Antitrust Laws (No. 30, Table 1) all involve Federal enforcement of the suits under the Sherman Antitrust Act of 1890 except for one case involving a state law and one involving the Federal Trade Commission under the Clayton Act. Either could be dropped without affecting the judges' ranks. These cases involve a miscellany of monopolistic practices, mostly price-fixing agreements, but also including informal combinations or conspiracies to gain monopolistic positions, the dissolving of large corporations holding large segments of the nation's industry, interlocking directorates, "tied" agreements, monopolistic contracts, underselling the competition, and stockholder suits to recover damages for such practices. Only one case is also found in the discriminatory practices scale, which is in the second period. This is one of the two railroad cases involved in Antitrust. Essentially this scale and Discrimination differ in the type of monopolistic practice, in that this one involves the Sherman Act and Discrimination involves the Interstate Commerce Act of 1887 and subsequent amendments. Discrimination involves chiefly railroads. Antitrust has the best scales in terms of C.R. with one perfect scale (C.R. = 1.00) and one with a C.R. of .976. This probably indicates that the

strength of the monopoly issue was as powerful on the Court as it was in the political arena. Politically it had been a national issue since the Populists, and it was a crucial issue in the 1912 election (Lewis, 1937, pp. 349-357).

It is interesting to note that the Populists and Republican Progressives focused their complaints upon monopolistic railroad practices, as in Discrimination, as well as upon formal "trusts" while the Wilson administration was concerned less with railroads and more with subtler ways of effecting monopolistic practices which had been developed to evade earlier antitrust actions: interlocking directorates, informal market compacts, and tying agreements (Faulkner, 1931, pp. 116-120; Kelly and Harbison, 1963, p. 654). Cases reaching the Court reflect this trend. Discrimination decreases in salience in the second period as only enough cases to form a quasiscale are present and the type of Anti-trust case shifts from the grosser to the more subtle type of monopolistic practice as described in Faulkner (1931).

Liability of Railroads (No. 27) was refined by picking out those cases in which the anti-railroad vote was also a pro-state vote in federal-state conflicts. Hence scale number 48, Liability of Railroads: Federal-State Conflict, resulted. An issue of the period on and off the Court was whether state laws and state courts had jurisdiction over railroads (Lewis, 1937, chap. 11). The content of many of the cases reveal that when federal jurisdiction was declared





the outcome was most often pro-carrier and anti-shipper. Furthermore, on early factor analyses, scale 27 loaded with State regulation variables. Therefore, scale 48 is an attempt to measure a states' rights dimension as well as railroad liability.

Some historians contend that a central aim of many Progressive reformers was the creation of a federal police power to meet the problems of the "new industrialism" and rectify the inadequacies of state legislation to meet problems which were national in scope (Kelly and Harbison, 1963, chap. 22, especially p. 581; see also Croly, 1963). To measure this central issue of the times, the Federal Regulations scale (No. 47) was constructed. It deals with federal regulations exclusive of taxation for revenue and aims at measuring attitudes toward this new federal "police power." It includes regulations passed under the national commerce power and tax powers. The reproduceability of these scales was marginal, but improved when divided into Economic (No. 21) and the residual Non-Economic (No. 20) categories. Naturally the former is much better in reproduceability, reflecting its greater homogeneity.

Federal Regulation: Economic (No. 21) includes all cases involving the regulation of business and labor through federal legislation in which the pro-federal vote is also "liberal", that is anti-business and pro-labor. It includes all L.C.C., Discrimination, Federal Rate Regulation, and

involving business but which do not touch a "private" federal Labor cases as well as federal laws involving the Food and Drug Act, compensation for railroad hauling of federal mail, a wartime munitions tax and the federal confiscation of a brewery. The two later cases are presumed to be regulatory rather than taxation for revenue. Federal

Workmen's Compensation cases are omitted because their effect is anti-worker when they override state laws and because they involve liability laws rather than benefits to injured workmen. Sherman Act cases were not included, since they would not scale well with the other cases of this category. Presumably relationships between competing businesses which are not semi-public in character do not tap the dominant liberal dimension on this Court. Cases from Liability of Railroads are also omitted. In these cases, courts often interpreted federal I.C.C. laws as limiting railroad liability in contrast with the avowed intent of these laws. Thus federal jurisdiction is anti-liberal. In any case "anti-business" has little meaning in these cases since one business is being sued by another. This scale (No. 21) was dropped for the first period, since it is practically identical to Government Economic Regulation (No. 51).

Federal Regulation: Non-Economic (No. 20) included all federal regulation in non-economic contexts primarily. These included narcotics laws, prohibition, the Mann Act, stealing federal mail, immigration laws, regulating expenditures in primary elections and regulating attorneys' fees in suits against the federal government. It also included some cases

involving business but which did not touch a "liberal" dimension or ran opposite to it, a pro-federal vote being anti-liberal. These involved federal bills of lading, tariffs and customs regulation, usury, and the negligence of bank directors and officers under federal jurisdiction.

Government Economic Regulation (No. 51) is quite similar to Federal Regulation: Economic (No. 21). It includes State Rate Regulation but no labor or tax cases. Like number 22 it excludes Sherman Act cases. All of the cases in number 51 involve government control or regulation of rates, prices, or fees. Two-thirds of the cases involve railroads, four-fifths involve such semi-public businesses as banks, the telegraph, and water works, while ten of the remaining thirteen involve wartime price controls. This category was determined by combining several highly correlated scales. These were I.C.C., Rate Regulation, and Discrimination. However, the reproduceability of this scale in the second period was distinctly inferior to Federal Regulation: Economic. The C.R. was .915 as compared to .951 for the latter.

The legal concept of Liability (54) was used as a basis to form a scale in which a person or corporation was sued to force the fulfillment of a responsibility or to redress an injury. The result was a poor scale which was divided into several subscales with greatly improved reproduceability. Two involved railroads: Liability of Railroads and suits for

Discriminatory Rates and Service. The others involved Liability of Insurance Companies (No. 26) and liability in Bankruptcy and Debts (No. 28). The latter was further divided into State Regulation of Bankruptcy (No. 49) Federal Regulation of Bankruptcy (No. 52).

The Insurance Company scale (No. 26) involved a beneficiary or insured person or company trying to collect from an insurance company. Most of the cases involve life insurance, but fire insurance and bonds against an employee's possible embezzlement are also included. Insurance was considered exclusively under state jurisdiction and many such businesses were investigated and proven to be guilty of shady practices and failure to live up to their obligations; thus this category seemed likely to invoke a salient and specific attitude (Pusey, 1951; Mason, 1946; Faulkner, 1931, p. 114).

The field of bankruptcy and debtor law has been a subject of Supreme Court decision making since the time of Marshall (Kelly and Harbison, 1963, pp. 281-283). Debt legislation has been a concern in various periods of American history, often tied in with the "money power" issue. This includes the Jacksonian Democrats, the Populists and agrarian parties who were concerned over heavy land mortgages and hoping for inflation, and the Bryan Democrats with similar concerns (Blau, 1955; Faulkner, 1959 and 1931; Swisher, 1954, chap. 9, p. 16).

In bankruptcy and debt proceedings, this category of cases is scaled as to the extent to which the judges favor the creditors as against the debtors or bankrupt persons.

The cases include signing over property to relatives, the exemption from creditors' claims of life insurance benefits, homesteads or Indian land, the barring of usurious interest rates, preventing exorbitant lawyer's fees from establishing valid claims on an estate, the liability of negligent bank directors for failure to make good on a bank shortage, and suits for breach of contract as part of a bankruptcy proceeding. Stockholders' rights and liabilities are also scaled here. Issues raised were: are they liable for company debts (usually under state laws) or can they recover for injury due to looting of company property by other companies taking over the management of their property? In these cases the stockholders are the indebted or bankrupt parties. Hence, debtors, land owners with property being foreclosed, and small stockholders make up most of the persons involved in this scale. In the first period the state bankrupt scale cases all involve state debtor laws and the federal scale cases all involve federal laws. In both periods the state scale (No. 49) includes all cases in which a pro-liability (anti-debtor) vote is also a pro-state vote and the federal scale (No. 52) includes all cases where a pro-liability vote is also in favor of federal jurisdiction.

Liability (No. 54) formed a poor quasiscale for the second period due to the fact that the Bankruptcy cases were

clearly out of fit with the others, resulting in a C.R. of .852. This was refined by dropping the Bankruptcy cases. The result was the General Liability scale (No. 25) with a C.R. of .929. It includes suits against railroads for damages and discrimination and suits against insurance companies. General Liability for the first period is identical to Liability (No. 54) defined above.

Scales of all railroad cases were made with cases aligned on an anti-railroad dimension. They gave a C.R. of .895 for the first period and .866 for the second. These were not used in the analysis but may reinforce the possibility that as an attitude object railroad companies were losing salience as the Progressive era wore on and federal legislation presumably relieved the problem.

Two scales were constructed to measure attitudes toward the federal government. Federal Fiscal Power (No. 19) includes all federal tax cases. These involve income, inheritance, corporate, excise, and war profit taxes as well as the tariff.

Federal Fiscal Claims (No. 20) involves suits against the federal government to recover an alleged debt or payment for services. Most cases involved businesses. Usually a contractor for the government sought payment or extra payment for work not included in the original estimate. Many cases involved railroads seeking more adequate compensation for carrying the mail. Several involve an Indian suit for

Promised funds or land owners suing for damages in a flood control project. In several cases the government is suing an individual for unauthorized use or appropriation of government funds or property. These include taking minerals from public lands and government employees using public funds. There is one taxpayer's suit to enjoin a government action in appointing a Democrat to an office. These scales exclude Land Claim cases (16).

A scale was constructed to measure the federalism or states' rights dimension. It was called Federal-State Conflicting Jurisdiction (No. 31). This issue has long been a vital issue of our political system and of our national judiciary in particular (Kelly and Harbison, 1963; Swisher, 1954; Mason and Beaney, 1959). It has been a central issue dividing our political parties from pre-Constitutional days to the Bryan era or later (Crowly, 1963; Peterson, 1960). Although books have been written purporting to describe such a dimension on the Supreme Court, attempts to scale it have often been unsuccessful (Sprague, 1968; Schubert, 1965a). It has been called merely a second or third order factor motivating Supreme Court decision making (Spaeth, 1962, 1964, and 1966, p. 26). If it is a lower order factor, we would expect to get a low C.R. and might get that only by scaling cases involving many other issues, most of which are more salient to the justices than federalism. This expectation was borne out completely.



1

This scale was constructed by using all cases in which a conflict in jurisdiction between federal and state power existed. Usually both federal and state legislation could conceivably cover the case involved. Commerce cases were included if it so met this criteria. Excluded were cases in which the federal aspect was a theoretical constitutional issue (e.g. does the Fourteenth Amendment invalidate certain state laws?). Thus the universe of cases was smaller than that of a comparable study of federalism which defined 45 such cases in the first period and 65 in the second (Sprague, 1968, p. 62). This study, by contrast, found 37 in the first period and 39 in the second. The C.R.'s for these scales were .866 for the first period and .894 for the second, suggesting multidimensionality in the voting data. A division of the cases into Federal-State Conflicts: Economic Powers (No. 32) and Non-Economic Powers (No. 33) raised the C.R.'s to .910 and .900 for the first period and .963 and .898 for the second. Again the Economic Power scales were more homogenous than the residual Non-Economic Power scales.

The basis for division of the Federal-State scale was the same basically as for Federal Regulations discussed above. In the Economic Powers scale a "liberal" vote (anti-business or pro-worker) is the same direction as a pro-state jurisdiction vote. This is the reverse of the Federal Regulation: Economic scale (No. 21) where pro-liberal was pro-federal. The Federal-State: Economic scale (No. 32) includes conflicting railroad rate and bank interest regulations, conflicting



Jurisdiction over employer liability or workmen's compensation cases (Scale No. 8), conflicts in jurisdiction over federal banks, food and drug acts, questions as to whether federal patent law or state law covers certain business infringements, and conflicting bankruptcy laws.

Federal-State Conflicts: Non-Economic (No. 33) involves cases not touching an economic liberalism dimension or where the liberal position is anti-state power (not more than three cases out of 42). These involve a miscellany of cases involving the treaty power, conservation cases where big business exploitation is not involved, a federal employee's driver's license, forged bills of lading, land claims, the civil rights of Negroes, Indians, voters, and women, other federally based liberties, eminent domain, the rights of aliens, fraudulent contracts, jurisdiction over Indian reservations, and congressional restraints on a state newly admitted to the union. The largest proportion of the cases involves prohibition. One-third of the second period scale cases are in this area. Over 40 per cent of the first period scale also involves the judicial power of federal courts over state courts and laws.

Both the Economic and Non-Economic scales for the second period include Federal Regulation cases as one-fifth of their case content. The first period scales contain a much lower proportion.

above cases revealed that they involve  
 d state laws. However, in over four-  
 it is the state law that is being  
 challenged by the existence of a fed-  
 baring state action, is not itself  
 case. Hence, the cases where the fed-  
 ctly tested were separated and sepa-  
Federalism (No. 63).

f a federalism dimension is the quasi-  
ll Faith and Credit Clause (No. 39)  
 States' rights was defined herein as  
 records, laws, and court decisions of  
 es involved the liability of insurance  
 d workmen's compensation cases, and  
 ms. Others involved stockholder lia-  
 orce, and a suit between states. Its  
 ssen the reliability of this scale.

eriod a scale on Private Contracts  
 ed to measure attitudes toward the  
 contract" concept (Kelly and Harbison,  
 4-706; Swisher, 1954, pp. 432, 520;  
 6-137), including attitudes toward the  
 ontracts in general.<sup>4</sup> Cases involving  
 a single scale, suggesting that they

---

makes it clear that the right to con-  
 y a subset of the more general liberty  
 ontracts. See Coppage v Kansas 59 L.Ed.

are closely related. The first period did not seem to contain enough cases which involved this attitude. All cases involve the strictness of enforcement of business contracts and the interference of legislation in the right to make unrestricted contracts. Liberalism is considered anti-contract and anti-liberty of contract. Three cases involve state workmen's compensation laws and one involves a labor hours law. Two involve fraudulent contract, one an insurance contract, three a contract for exorbitant lawyers' fees, and several involve business contracts with the federal government.

Prohibition Laws (No. 38) were scaled primarily for the second period, but this gave enough definition of ranks for the first period justices to include a scale in that period also. They involve both state and federal prohibition laws, regulation of interstate commerce in liquor, confiscation of a brewery as well as individual liquor supplies, taxes on liquor, prohibition on Indian reservations, the Volstead Act, and the "constitutionality" of the Prohibition amendment. The dimension tested is pro- and anti-liquor regulation.

Civil Liberties: Property (No. 3) for the second period scaled poorly (with a C.R. of .868), so it was divided into Property Rights Invoked Against State Law (No. 55) and Against Federal Law (No. 56). The C.R. improved to .886 and .978, respectively. In scale 55 a pro-property vote is



ale 56 a pro-property vote is anti-  
law category includes a District of  
 grounds that it is also a "local" law.

itical issue of long standing involved  
e Governments to a civil suit in fed-

The basis for this states' right was  
 t. The issue arose from the practice  
 corporations promising to build a  
 unty or city if it would issue bonds to  
 lp its financing. The promise of rail-  
 main unfulfilled and the corporation  
 , but the bondholders would attempt to  
 alue. Most counties would repudiate the  
 federal courts. State courts would take  
 in, 1953; Yost v Dallas County, 59 L.Ed.  
 olve county bonds, one involves a dam-  
 ate banking commission. All involve  
 r against state agencies (including  
 es or bondholders for financial remuneration.  
 of this issue decreases greatly as there  
 the second period.

d the Right to a Jury Trial in Civil  
 the first period (No. 62) in a large  
 . of .825. This scale involves suits  
 insurance companies, including workers'  
 orkmen's compensation cases). One case



in criminal civil liberties was used to give Harlan a rank on this scale. This scale measures attitudes towards how much instruction in the law a jury should be given, from a jury instructed to find no liability or a judge overruling the jury damage award to the opposite extreme of an uninstructed jury decision for damages for the plaintiff against a corporation.

Attitudes toward the judicial power of courts were scaled for both periods. Votes for judicial power included a higher court correcting a lower court, a federal court overruling a state court, a court correcting the act of an executive officer of government, a court "amending" a legislative act, and court injunctions against individuals, usually union members. The criteria for inclusion in this category was some verbal judicial statement asserting that the case involved the question of the propriety of exerting appellate review by the courts or active judicial intervention by lower courts, especially in the dissent.<sup>5</sup> This issue is a major preoccupation of Court historians of the 1886-1937 period (Paul, 1960; Mason and Beaney, 1959, chaps. 8 and 9; Lewis, 1931, chap. 2; Corwin, 1934), while present judicial studies have sought to measure such an attitude (Spaeth, 1962, 1964; Schubert, 1965a). Furthermore, in nearly every presidential election from 1892 to 1924

---

<sup>5</sup>A majority statement on which the dissenters did not take issue was not considered to be the cause of the difference in voting behavior.

criticisms appeared in party platforms to the effect that the judiciary had overstepped its legitimate bounds;<sup>6</sup> the Populists in 1892, Democrats from 1896 to 1912, and the Progressives in 1912, 1916, and 1924. (See Faulkner, 1931, 1959; Link and Catton, 1967; Mowry, 1958.) The intensity of the anti-court attack reached a peak during 1908-1912 at the start of this study (Kelly and Harbison, 1963, pp. 628-634). Hence, the salience of such an attitude as judicial activism to this period seems clear.

The gross Judicial Power categories scaled so poorly that they were not used. The first period, 46-case scale had a C.R. of .838. The second period, 21-case scale was little better with a C.R. of .848. This suggests that attitudes toward the use of judicial power were obscured by more salient issues. Suggested subdivisions of judicial power were: federal courts exerting Judicial Power Over State Laws and Courts (No. 65), Judicial Power Over the Executive Branch of Government (No. 61), the Judicial Power of Lower Federal Courts (No. 40), and judicial power over the legislature.

The scale measuring Federal Judicial Power over the States (No. 65) was only present in the first period. It was further refined by including only cases involving the Power of Federal Courts over State Courts (No. 64). Here, dropping direct challenges of state activities made little

---

<sup>6</sup>The possible exception was 1920, near the close of this study of the Court.

real difference. One-fourth of the cases in the former scale (No. 65) were also in Federal State: Non-Economic Powers and one-tenth of them were in Federal State: Economic Powers. It also included cases found both in Liability of State Government (80 per cent of that scale) and Judicial Power over the Executive Branch (44 per cent of that scale). It also included a few cases from each of the following scales: Civil Liberties: Property, Criminal Due Process, State Regulation of Business Under Due Process, State Taxation, Civil Rights, Land Claims, State Regulation of Business under Commerce, and Jury Trial.

Judicial Power over Executives (No. 61) included the power of President Taft to withdraw public land for purposes of conservation, presidential appointive powers, other federal executive discretion cases, some I.C.C. powers, and the powers of state commissions and county boards. This scale appeared only in the first period.

The Judicial Power of Lower Federal Courts (40) scaled well for both periods. It involved principally the issuance of federal injunctions and punishment for contempt, but also included the appointment of auditors for the investigation of civil cases, power to control the actions of state or federal executives, boards or commissions (as in rate cases), and the freedom of lower federal courts from Supreme Court supervision. In this period appellate jurisdiction of the Supreme Court over lower federal courts was apparently not

conceded as routinely as at present.

Judicial power over legislatures did not form a scale. Challenges to legislative acts were scaled with State Courts in number 65. Cases involving Congressional power were too few to scale.

General Judicial Power (No. 57) was a scale which included the few cases in which discretionary judicial action seemed to be the central focus of the case.

Scales measuring an attitude toward the exercise of power by the Supreme Court were only obtained when such cases were divided into one category where judicial power was exerted in favor of a "liberal" outcome and a second category where judicial power was exerted in favor of a "conservative" outcome. This reinforces a suspicion among some students of judicial behavior that judicial restraint, a nebulous concept at best, is put into practice when the issue involved is not dear to a judge's values, but seldom applied when the issue presented touches a cherished value. (See Spaeth, 1964, 1966, pp. 22-27; Schubert, 1965b, pp. 153-157; Murphy and Pritchett, 1961, pp. 627-629, 653-660). Hence, when the judges pass on the judicial power of other courts, a scalable attitude may result; however, when the judges' decisions are limited only by their own self-restraint, their value system may be the determinating factor as to when judicial power is to be exerted and when it is not. In any case, this attitude is clearly secondary to

the liberal-conservative dimension. However, Holmes, Brandeis, and Van Devanter do have a fairly consistent attitude toward the Judicial Power concept. Nevertheless, even Holmes is guilty of foregoing restraint when his cherished values are challenged, as will be seen below.

The basis for division of Judicial Power into liberal and conservative is somewhat different from the definition of division of the Federal Regulation and Federal-State cases. Here all cases are defined as either liberal or conservative in outcome. This includes "non-economic" cases as well. Economic liberalism is defined as previously. "Non-economic liberalism" favors the criminal defendant, the disadvantaged group such as the Indian, the Negro, or the alien, the small property owner over government or the large property owner, the debtor, the poorest or disadvantaged person in land claims, the public domain or small property owner in conservation cases, the small businessman over the corporation, and the government investigator over the business investigated. The judicial power of the Supreme Court was petitioned to intervene in favor of conservative outcomes twice as often as in liberal outcomes in cases where the propriety of the judicial action was questioned by part of the Supreme Court. This suggests that conservative forces were more successful in gaining judicial intervention than liberal forces. It might be explained by lack of federal power to review state cases where a federal property right was asserted and upheld by state courts. But this situation

was remedied by legislation in 1914 (see footnote) and this type of case was not noticeably more frequent in the second period.

Supreme Court Power in favor of Liberal Outcomes<sup>7</sup>

(No. 41) included cases where the Court was asked to reverse contempt convictions in criminal or First Amendment cases or overturn injunctions against rate commissions. Also the Court affirmed a judge-directed verdict in a prosecution of a businessman, upheld injunctions against railroads forbidding air pollution or ordering service for a community, upheld federal injunctions against states for violating federal rights as civil rights for Negroes and aliens, affirmed a lower court refusal to force a county to honor its bonds, and was asked to support Supreme Court jurisdiction over a lower court case where technical requirements had not been met.

Judicial Power for Conservative Outcomes (No. 42) is similar except that Supreme Court power would uphold lower court judicial power over state courts and executive officers, and injunctions in effecting conservative goals as prevention of rate regulation or enforcement of a state anti-business law. In the first period 61 per cent of the cases involve

---

<sup>7</sup>In the area of Supreme Court appellate jurisdiction over state court decisions, this issue was a subject of congressional legislation in 1914. Previously a state court finding of a violation of a federal right (e.g. the Fourteenth Amendment) upholding the property right was not subject to federal review.

liberal) state actions. The second of these. The second period involves most railroad regulation (30 per cent

of cases in several scales was noted and judicial power variables, so excluded; a lower federal court power scale and state-involved cases, and liberal cases omitting all executive and lower. The resulting scales showed little difference in subsequent factor

indicates in this period between Property Aliens (No. 6), Indians (No. 5), Labor (No. 16) and Conservation (No. 14) were Rights. Also duplicates between the and 14) were eliminated. These made rank shifts, but were factor analyzed to control bias. The problem of duplicates in the second period; however, a universe of cases was factor analyzed after as careful as possible. Duplicates among scales as was practical.

The two sets of scales (Table 3 and 4) give much insight into the change in focus of the Court studied. There were more changes in the first period. The second period

had only two-thirds as many. This issue seems to wane in salience.<sup>8</sup> First period cases deal more with federal judicial control over the states and over executive officers. The second period is more concerned with control over lower federal judges and the Progressive goal of strong executive action is less often challenged. As the Progressive movement gained momentum we see that the states are left alone in their own liberal activities more often.

The liability of states to suit also waned as an issue when the evils that caused the importance of this issue faded out (Westin, 1953). Land claims also become less important as the available unoccupied land and the Indian land was used up. Indian cases also decrease. Discrimination by railroads is less important as an issue in the second period while subtler methods of monopoly come into prominence. I.C.C. cases are also fewer, but rate cases multiply. Thus the I.C.C. is less often challenged, and governmental control over rates becomes more strict. Insurance company cases became less frequent as the exposures of their abuses faded from public consciousness. Negro Civil Rights (15) decrease as the less interested Democrats take over the federal government and justice department. Labor cases become more prominent as the political strength of labor grows and becomes allied with the new Democratic majority.

---

<sup>8</sup>Much discussion of the necessity for recall of judicial decisions by Theodore Roosevelt and other Progressives took place in 1911-1912. In 1916 this issue was largely dormant, Mowry, 1958.



its gains in labor legislation in the second period are a matter of record (Link and Catton, 1967). A deluge of First Amendment cases fall on the Court in the second period rising out of wartime repression of freedom of expression. Finally, the growing strength of the Prohibition movement in the 1916-1920 period gives enough cases for a scale in this period.

In terms of clear cut attitudes as inferred from high reproduceability (See Table 3), the first period gives better scales in Civil Liberties, Property, in Corruption in Business, and in the federal economic regulation scales such as Discrimination, Antitrust, and Federal Rate Regulation. The second period scales are uniformly better in all the state regulation and taxation scales as well as Labor and liability. In this period the reproduceability is greatly superior overall to that of the first period. This suggests that the most salient issues in the first period were property rights, business corruption, and railroad discrimination, since the former was a concern of the fading laissez-faire philosophy and the latter two were early Progressivist concerns which faded as exposure and regulation relieved the problem. Federal economic regulation was the Taft-Roosevelt solution to the problems of corporative bigness and industrial evils and was more salient to the early period covering mostly issues under the Taft administration. The increasing sharpness and greater consistency of the second period scales could be a result of the increasing polarization of issues between

economic liberals and conservatives as class politics became more important and Progressivism became stronger and more pervasive, and due to the fact that the less salient legalistic issues lost their importance to the political and judicial system.

As can be seen, the type of scales that meet our criteria and hence are workable constructs for measuring attitudes on the Court give us valuable information by themselves. Attempts were made in this chapter to explain Supreme Court decision making on both legalistic grounds and early twentieth century political issues. Yet the greatest success has been with scales involving political issues external to the Court, and less satisfactory results have been obtained with traditional legalistic issues. (See Tables 1, 2, and 3.) The traditional legalistic constitutional law concepts which gave us some success involved the Due Process Clause, the Commerce Clause, the Contract Clause, federalism, judicial power, and the Full Faith and Credit Clause. The first two scaled adequately only after delimiting and separately categorizing the cases into taxation and regulation of business. The third, Contracts, scaled only when we limited it to state and local franchises. Federalism and judicial power scaled poorly or inadequately until they were divided into specific issues mainly dealing with ideological conflicts and political issues. Full Faith and Credit formed only an inconclusive and tiny quasiscale. Other legal concepts involved general liability which was

greatly improved upon division into the specific issues involved. One of these specific issues was Bankruptcy and Debts (No. 28) which involved a political issue (debt-repudiation) as well as a legal category.

Hence, based on our scaling technique alone, a conclusion seems justified that decision making on the White Court was dominated primarily by external political issues. The cases involved those issues and the Court reacted to them in terms of those issues. Traditional legalistic considerations were only secondary. This is only a short step from a conclusion that the Court was not "insulated" from the political arena but represented an "open system," a system open to vital issues and concepts of the greater political entity. This possibility will be extensively investigated below.

## CHAPTER 3

### ACTORS OF THE COURT, 1910-1915

the White Court covers cases decided  
currences from October 1910 to June 1915.  
Justices: Justices White, Holmes, Day,  
Devanter, and Lamar for the full period,  
the first year, being replaced by Pitney  
ve years, and Justice Lurton for the  
ing replaced by McReynolds for the last  
lds and Harlan are usually found at the  
the Court on most issues, the relative  
erning them does not unduly weaken the  
. This period includes the Court under  
ion as well as the handling of cases  
r that administration. The great major-  
g the Court before the October 1915 term  
e 1913 and most of the cases of the 1915  
nd statutes passed under the previous  
ations. Hence, although the last two-  
d were under Wilson's presidency the  
th cases arising under laws of Republican  
ponsorship.

Thus this study also includes primarily periods under the earlier Progressive movement which had not yet split over issues of trusts and special interest legislation and which even under Wilson was more conservative than it became in the 1916-1920 period (Kelly and Harbison, 1963, pp. 543-569; Swisher, 1954, pp. 501-662; Link, 1954).

Factor analyses were run of the correlations between the Guttman attitude scales described in the last chapter. These scales will be referred to as "attitudinal variables." One vital question of factor analysis is: how many factors or dimensions are present?

Measures of the dimensionality of the data of the first period were taken of the 50-variable solution. The Kruskal M.D.S.C.A.L. technique showed a much greater reduction of stress at six dimensions than at seven. (At six dimensions, stress was 5.5 per cent. See Kruskal, 1964a, 1964b.) The number of eigenvalues exceeding unity totaled ten, so it may be concluded that the dimensionality of the data is ten or less. (See Kaiser, 1959.) A 43-variable solution in which all scale variables were purged of duplicates, as much as practical, indicated a maximum of nine dimensions. The fifty-variable, six-dimensional solution accounted for 66 per cent of the total variance of the data as did the 43-variable solution in six factors. The fifty-variable, four-dimensional solution accounted for 56 per cent of the variance as did a four-factor 26-variable

solution. The 50-variable solution took eight factors to explain 75 per cent of the variance, the 43-variable took nine factors. Decreasing the number of variables by combining scales does not **reduce** the dimensionality. This is contrary to normal expectations and is strong evidence that at least six dimensions or factors are required to explain the attitude dimensionality of this Court.

The Keil-Wrigley criterion is simply a practice of stopping the factoring after n number of variables have their highest loading on the smallest factor, a rule of thumb method. Charles Wrigley recommends n = 3. For the 43 "exclusive" variable solution, this method gave seven factors on both varimax and quartimax. Since quartimax tends to a general factor (Harman, 1967, p. 304), a conclusion of **seven** factors in the data is convincing.

The principal factors are given in Table 4 along with data descriptive of the factors. They are (going from the most well-defined to the least): (1) Liberal Nationalism,<sup>1</sup> (2) State Progressivism, (3) Federalism, (4) Libertarianism, (5) Commerce Powers, (6) Judicial Restraint, and (7) General Welfare. A weak but frequently reoccurring eighth factor might be named anti-government or Laissez-fairism. The criterion of psychological meaningfulness accepts as the factor total the number explainable in meaningful and

---

<sup>1</sup>A term borrowed from Kelly and Harbison, 1963, p. 22.

1

Table 4.--Variable Content of Attitudinal Factors for  
1910-1915 Period

Progressivism Factor

<u>Liberal Nationalism Factor</u>		<u>State Progressivism Factor</u>	
5. CL: Indians	28. Bankruptcy	10. Due Process	
6. CL: Aliens	29. Patents	11. State Tax	
9. WCompNonFS	30. Antitrust	12. Contract	
15. Civil Rts.	43. Business SI	20. Fed Reg: Non-Economic	
16. Land Claim	45. Fed Rate	35. Commerce: No Tax	
22. I.C.C.	46. State Rate	36. Tax: Due Process	
23. Rate Regn	47. Fed Regn	49. State Bank	
24. Discrimin	48. Lia R.R. F.S.	38. Prohibition	
25. Gen Liabil	50. Work Comp		
26. Lia Insur	51. Econ Regn		
27. Liabil R.R.	52. Fed Bank		

Federalism Factor

<u>Federalism Factor</u>		<u>Commerce Powers Factor</u>	
3. CL: Property	33. Fed: NonEcon	8. W. Comp F.S.	
5. CL: Indians	44. Corrupt: Bus	13. Commerce	
14. Conservation	49. State Bank	20. Fed Reg: No Econ	
16. Land Claim	59. Liab State	34. Commerce: St Tax	
31. Federalism	63. Anti-Federal	35. Commerce: No Tax	
32. Fed: Economic	42. JP Conserv	37. Corrupt: Govt	
29. Patents	65. JP State Ct	38. Prohibition	
		39. F.F. & C.	
		44. Corrupt: Business	
		17. Corruption	
		60. Eminent Domain	

General Libertarianism Factor

<u>Libertarianism Factor</u>		<u>Judicial Restraint Factor</u>	
1. First Amend	17. Corruption	40. JP Lower Fed Ct	
2. Civil Liber	18. Fiscal Claim	41. JP Liberal	
4. Criminal	19. Fiscal Power	42. JP Conservative	
7. Labor	37. Corrupt: Govt	59. Liability State	
16. Land Claim	38. Prohibition	61. JP Executive	
		62. Jury	
		64. JP State Courts	
		65. JP St Cts & Laws	

Laissez-faire Factor

3. CL: Property	38. Prohibition
6. CL: Aliens	43. Business SI
18. Fiscal Claim	59. Liability St
20. Fed Reg: No Econ	60. Eminent Dom
37. Corrupt: Govt	

General Welfare Factor

3. CL: Property
14. Conservation
16. Land Claims
18. Fiscal Claims
19. Fiscal Powers
20. Fed Reg: No Econ
29. Patents
37. Corruption: Govt



defensible terms. This also indicates at least a six-factor solution.

The variable content of these factors is defined in Table 4. That table includes the most usual content of variables which correlate with the factor. It was derived from nine separate analyses which utilized five methods. Most of the orthogonal factor analyses used the three rotational methods, quartimax, varimax, and non-rotated principal axes. Many of the factor analyses were run from the two-dimensional solution up to the nine-dimensional solution. Hence, this table represents over eighty different configurations of the variables. Table 5 shows how the variables loaded on the various factors on several factor analyses. Table 6 shows how they associated with the factors according to other techniques.

As one would expect the factors did not retain the same variable content on every solution. Naturally factors six to eight did not appear on any of the early solutions, that is less than four dimensions. However, some did appear as clusters in graphs of the two-dimensional solutions. Since the first few factors were so powerful, the smaller factors occasionally shifted in content or were distorted almost unrecognizably. Nevertheless, analyses of subsets of variables all showed evidence of stability when comparing the quartimax, varimax, and principal axes solutions. One possible exception was the Laissez-faire factor. Also the

# Readings of Variables Across Various or Analysis Solutions

32	26	50	50	50	43	43	43	50	50	50	50	50
6	5	4	7	5	4	7	5	4	5	7	4	6
VR	VR	VR	VR	BQ	VR	VR	BQ	VR	VR	VR	PA	QT

F				J	N	N	N	F	F	N	N	P
A		P	N	N	F	S	F	P	P	S	N	P
N	J	P	N	N	N	N	N	P	P	N	N	P
N				N	N	N	N	P	P	N	N	P
N		P	N	N								
N	P	P	N	N				P	P	N	N	P
		P	N	N	N	N	N	F	F	N	N	P
S	P	P	N	N	S	N	C	P	P	C	N	C
S	P	P	N	N								
N	P	P	N	N	N	N	N	P	P	N	N	P
N		P	N	N	N	F	N	F	P	N	N	P
				N	N	N	N	P	P	N	N	P
N		P	N	N	N	N	N	P	P	S	N	P
	P	P	N	N								
	P							P	P	S	N	P
					N	N	N	P	P	N	N	P

F	P	L	S	J	S	S	S	P	P	S	S	P
S	P	P	C	C	S	S	S	P	P	S	S	C
	P			N	S	S	S	P	P	S	S	P
G	P	P	G	N	A	N	F	C	G	F	F	F
		P	N	N	S	S	F	P	P	S	S	P

S		C	C	C	A	F	C	C	C	C	F	C
A	P	C	C	C	A	C	F	C	C	C	S	C
		C	C	C	L	C		C	C	C	S	C
	P	C	C	C	S	C	C	C	C	C	S	C
		C	C	J	S	N	C	P	L	C	L	C
		C	C	C				C	L	J	F	C

		L	J	L	L	L	L	L	L	J	L	L
J		J	P	N	J	N	F	FL	F	J	N	NL
J		F	J	L	J	L	FL	F	F	S	S	F
	L	J	J	L	J	L	L	L	J	S	S	L
F	J	F	J	P			F	L	J	S	S	L

in Oblique Rotation

Principal Axis

Factors 1 = 2 = 3. Also 1 = 2 = 3

Table 5 (cont'd.)

Variables	32	26	50	50	50	43	43	43	50	50	50	50	50
Dimensions	6	5	4	7	5	4	7	5	4	5	7	4	6
Rotation	VR	VR	VR	VR	BQ	VR	VR	BQ	VR	VR	VR	PA	QT

Federalism

3. CL: Property	A		F	G	F	A	A	F	C	C	C	F	F
14. Conservation	G	F	F	G	F	A	N	F	P	G	F	F	F
16. Land Claims	G	F	F	G	F	N	N	L	P	PG	L	N	N
31. Federalism	A		F	F	F								
32. Fed: Economic		F	F	F	F	N	F	F	F	F	F	F	F
33. Fed: Non-Econ		F	F	F	F	A	L	F	C	C	F	F	F
44. Cor: Bus.			F	C	F	N	F	C	F	F	L	L	C
49. State Bank.			F	F	F	S	F	F	F	F	F	S	F
59. Liability State			F	F	F	L	J	L	L	L	J	L	L
63. Anti-Fed.			F	F	F	N	J	F	F	F	F	F	F

Libertarianism

1. First Amend.			L	L	L	L	L	L	L	L	L	L	L
2. Civil Lib.	L	L	L	L	L								
4. Criminal	L		L	L	L	L	L	L	L	L	L	L	L
7. Labor	L	L	L	L	L	L	L	L	L	L	L	L	L
17. Corruption	L								C	C	L	A	
18. Fiscal Claims	A	L		L	L	A	A	S	C	G	F	A	A
19. Fiscal Power	L			L	L	A	A	S	C	G	L	A	A
37. Cor: Govt.			L	S	C	L	C	L	C	C	J	S	L
38. Prohibition			C	S	L	A	C	S	C	G		A	A

Progressivism	P					S	S	S	P	P	S	S	N
Party	P					N	S	N	P	P	S	N	N

See Tables 1 and 2 for full name of variable and Chapter 2 for description. The 43-variable analyses include all exclusive scales. The five rightmost analyses above include revised and refined variables. Where two factors are shown, the left most one has a slightly higher loading.

## Key to above symbols:

- P = Progressivism factor
- N = Liberal Nationalism factor
- S = State Progressivism factor
- F = Federalism factor
- C = Commerce Power factor
- L = Libertarianism factor
- J = Judicial Restraint factor
- G = General Welfare factor
- A = Anti-government or Laissez-faire factor

Rotations

VR = Varimax

QT = Quartimax

BQ = Biquartimin Oblique Rotation

PA = Unrotated Principal Axis

Note that on some factors  $P = N + S$ . Also  $L = L + J$

1

Table 6.--Content of Factors Identified by Pattern AnalysisMcQuitty Similarity Analysis<sup>a</sup>Libertarianism Factor

1. First Amendment
2. Civil Liberties
4. Criminal Due Process
7. Labor Laws
18. Fiscal Claims
19. Fiscal Powers
38. Prohibition

Liberal Nationalism Factor

6. Civ. Lib.: Aliens
9. Workmen Comp: Non FS
15. Civil Rights
20. Fed. Reg: Non-Econ.
23. Rate Regulation
24. Discrimination
25. General Liability
27. Liability of R.R.
28. Bankruptcy
29. Patents
30. Antitrust
36. State Tax: Due Process
39. F.F. & C.
43. Business Self-incrimin.
46. State Rate Regn.
47. Federal Regulation
48. Liability R.R.: Fed.-St.

Judicial Restraint Factor

26. Liability Insurance
40. Jud. Power Lower Fed. Cts.
41. Judicial Power: Liberal
61. Judicial Power: Executive
65. Jud. Power: State Courts

State Progressivism Factor

8. Workmen Compn. Fed.-State
10. Due Process
11. State Tax
13. Commerce
34. Commerce: State Tax
35. Commerce: No Tax
37. Corruption: Government

Federalism Factor

31. Federalism
32. Federal: Economic
33. Federal: Non-Economic
14. Conservation
16. Land Claims
44. Corruption: Business
49. State Bankruptcy
63. Anti-federalism

Price Hierarchical L.A.W.S.<sup>b</sup>Libertarianism Factor

1. First Amendment
2. Civil Liberties
4. Criminal Due Process
7. Labor Laws
18. Fiscal Claims
19. Fiscal Powers

Federalism Factor

31. Federalism
32. Federalism: Economic
33. Federalism: Non-Economic
63. Anti-federalism

Judicial Restraint Factor

1. First Amendment
40. Jud. Power Lower Fed. Cts.
42. Jud. Power: Conservative
59. Liability State
61. Judicial Power: Executive
65. Jud. Power: State Courts

Commerce Powers Factor

13. Commerce
25. General Liability
28. Bankruptcy
35. Commerce: No Tax
48. Liability: R.R. Fed.-St.

Table 6 (Cont'd.)Price Hierarchical L.A.W.S.<sup>b</sup>Progressivism Factor

3. Civil Liberties: Property
9. Workmen Compensation: Non Federal-State
10. Due Process
11. State Tax
12. State Contract
13. Commerce
14. Conservation
15. Civil Rights
16. Land Claims
23. Rate Regulation
24. Discrimination
25. General Liability
27. Liability Railroads
28. Bankruptcy
29. Patents
30. Antitrust
31. Federalism
35. Commerce: No Tax
36. Tax: Due Process
42. Judicial Power: Conservative
43. Business Self-incrimination
46. State Rate Regulation
47. Federal Regulation
48. Liability: Railroads Federal-State
49. State Bankruptcy

<sup>a</sup>McQuitty, 1965.<sup>b</sup>Price, 1969.

constant recurrence of these factors adds evidence as to the validity of these factors across various types of analyses and sets of variables.

Each factor was defined by analyzing the content of the variables which loaded highly on it. The variables loading highest were considered the best measures of the factor and the ones which correlated negatively with it were considered to measure the opposite of what the factor represents. Each factor is bipolar; that is, it has its negative counterpart just as liberalism has its opposite, conservatism. Since factors are based on dichotomous data, yes or no votes, and on bipolar scales, this is implied.

1. Liberal Nationalism includes primarily the regulation of big business by the national government. It involves the extension or assertion of a national police power to meet the threat of giant corporations to society as described in Kelly and Harbison (1963, chap. 21). It was a central program of Progressivists (ibid.; chap. 2 above). State Rate Regulation (46) unexpectedly loads on this factor but it also includes regulation of big business. Rate regulation seems to tap the same dimension of attitude here whether from a state or national source. The Alien scale (6) has a weak association as it involves mostly federal regulations designed to prevent immigration from lowering wage standards and working conditions. Federal Regulations: Non-economic (20) had a weak association with this factor, but

when it was refined to remove all possible economic content, this association disappeared. Civil Rights (15) alone seems to have no economic content unless one so considers the economic exploitation of Negroes in several of its cases. It does clearly involve an extension or assertion of federal power and was a concern of some Progressives as previously noted.

2. State Progressivism was another factor. It is so named because it involves the more traditional use of state police powers to regulate business as well as certain other Progressivist programs not merely local in scope. Also a ranking of these judges on their connection with Progressivism is found in the center of this cluster of variables. (See Figures 3 and 4). It is to be noted that early Progressivism was state and local in scope until these solutions to social and economic problems of the day proved inadequate or unconstitutional (Faulkner, 1931, 1959; Hofstadter, 1955, chaps. 4, 5). Labor (7) has a weak association with this factor, as does number 38, Prohibition (a Progressivist palliative to social problems). Also Progressivist programs include Conservation (14) and Federal Regulation: Non-economic (20). The former includes state actions in all but two cases. The latter includes immigration, anti-narcotics, and white slave laws. All were concerns of Progressive reformers. The Alien (6) variable has some association with this factor. The association is that Progressivism is anti-alien. This supports hypotheses that



Progressivism reflected a native-born bias. Both middle class and labor elements hoped to protect their status by opposing the influx of immigrants.

This factor involves the more traditional methods of meeting economic problems which comports with Progressive aims, it involves native-born bias and includes most of the more zealous and moralistic Progressive reforms. Many historians evaluate Progressivism as a middle-class native-born movement which hoped to salvage traditional American values, such as local government, native culture, sobriety, and moral restraint (Hofstadter, 1955; Lipset in Bell, 1964). This factor seems to represent this brand of Progressivism.

The two above factors are closely related. On many solutions they form one factor. Upon factor analysis of the subset of the variables in this Progressivism factor, however, they form two distinct factors. Patents (29), Land Claims (16), and Aliens (6) are connected to both factors. That these factors are closely related is clear from most histories that fail to distinguish between the various streams of Progressivist thought. The connection may be seen in Faulkner (1931), Hofstadter (1955), and Kelly and Harbison (1963). Progressivists fought big business because it posed certain social, economic and political threats to themselves and to traditional values (chap. 2 above). The Roosevelt-Taft progressivism was national as was the later Wilson program (Kelly and Harbison, 1963, chaps. 22-25).

3. Federalism, or states rights, formed a factor which involved supporting state jurisdiction whenever it was in conflict with federal jurisdiction. Variables involving the Commerce Clause sometimes associated with this factor, but most often split off to form a separate factor. Federalism includes largely state regulation in non-commerce areas.

This Federalism factor included Federal-State Conflicts (31), Federalism: Economic Powers (32), Federalism: Non-economic Powers (33), and Anti-Federalism (63). It also involves conflicts between state and federal courts in Judicial Power over State Courts and Laws (65) and in the scales separately involving conservative and liberal outcomes (Nos. 41 and 42) when they were revised to include only such state versus federal court conflicts. It also opposed federal patent laws in Patents (29) and favored state sovereignty in Liability of State Governments to Suits (59). Such suits were usually brought in federal courts to enforce avowed "federal rights." Civil Liberties of Indians (5) usually involved disputes between state and federal jurisdiction. Corruption in Business (44) and State Bankruptcy Laws (49) also largely involved cases of conflicting federal-state jurisdiction. Conservation (14) clearly associates with this factor. In this period, all but two of the cases involved state assertion of power in favor of conservation measures usually over federal lands granted to corporations. Land Claims (16) also weakly associates with this factor and involves similar situations with states

asserting jurisdiction.

4. Libertarianism involves the support of civil liberty claims. It is defined as the attitude system involving political and individual liberty. Modern concepts of civil liberties are central to this factor; however, this represents a broader concept suggesting that this period involved ideas of liberty which were different from those into which they eventually evolved today. Comporting to present day concepts this factor includes First Amendment and Political Freedom (1), General Civil Liberties (2), and Criminal Due Process (4). Also weakly associated are Corruption (17) and Corruption in Government (37) in which the person being sanctioned for corrupt practices is supported as a liberty claimant against government. In a similar manner, Prohibition (38) has a weak association with this factor. Land Claims (16), Labor (7), Fiscal Power (19) and Fiscal Claims (18) involve a slightly different concept of liberty. They seem to form a subcomponent of this factor which might be labeled "equalitarianism." (See chap. 2 discussion of these scales.)

Labor involves the concept of political association and action as a basic component of political liberty. It involves injunctions against picketing, speaking and distributing handbills in favor of secondary boycotts, and other forms of peaceful political economic action as well as rights to sue for wages. It includes labor-sponsored laws to free workers

from certain types of "economic bondage" (as the vernacular of the period would state it [Filler, 1962]). These included laws against payment of wages in "script" and laws against "yellow dog" contracts. Peaceful picketing has been recognized as a part of free speech, and injunctions were considered by many as violations of worker's rights.

Land Claims involves the traditional American right to own his own land in the spirit of the Homestead Act.

Many Progressives considered labor unions and democratic government as a bulwark against the political control of corporate power. Fiscal Power and Fiscal Claims might measure this conflict of corporate power versus democratic government. Hence, these variables may measure an attitude favoring the economic penalizing of the "malefactors of great wealth" for attempting to deprive the tax-paying public, via the government, of the corporation's just share of economic support either by avoiding taxation or overcharging for mail service or on other contracts with government. These variables may also measure attitudes toward a more equitable distribution of wealth which, reformers argued, would decrease corporate threats to political liberty. State Regulation of Business under the Fourteenth Amendment (10) and Liability of State Government to Suit (59), the equivalent of fiscal claims against states, also show weak associations with this factor possibly for the same reasons as above.

In solutions of low dimensionality, the factor of Judicial Restraint combines with this factor. This adds support to the interpretation of the democratic political freedom content of this Libertarian factor.

5. Commerce Powers formed the fifth factor. It supports a broad latitude for states in regulating interstate commerce. It combines with Federalism to form one factor on three and four-dimensional solutions. But it splits off on higher dimensional solutions and subsets of the Federalism-Commerce factor support the hypothesis that these are distinctly separate attitude systems. It includes all Commerce Clause variables except those in National Liberalism. In each variable a national government power versus state government power dichotomy is present. The direction of these variables is consistent, that is they are all pro-state and anti-federal. These variables include Commerce (13), Commerce: State Tax (34), Commerce: Non-tax (35), Workmen's Compensation: Federal-State Conflict (8) which involves interstate commerce, and Federal Regulation: Non-economic (20) which involves laws implemented through the national commerce power. Federalism: Economic (32) sometimes joins this factor, emphasizing the economic or commerce content of this factor involving federal-state powers. The Full Faith and Credit Clause variable (39) and Eminent Domain (60) may seem to involve the other federalism dimension. But they associate more highly with the Commerce Power attitude system. In the latter, half of the cases do involve railroads

1

and hence commerce powers, and are anti-federal in direction. Six of the eleven cases involve federal exertion of eminent domain in interstate commerce. This variable is a quasi-scale of doubtful validity, however, In Full Faith and Credit, the pro-state direction supports the privilege of a state to give less weight to the actions of other states.

6. Judicial Restraint involves opposition to judicial intervention, judicial power, or appellate review of the actions of state courts, state government, the "political" branches of government, commissions, executive officers, and labor unions.

It includes all of the judicial power variables loaded in an anti-judicial direction. This factor still occurs after we rigorously eliminate duplicates between the scales. However, since all the judicial power cases formed a composite quasiscale originally we have an independent verification that such an attitude system exists, as well as evidence that factor analysis and "cumulative scaling" are comparable techniques, as suggested by Schubert (1965a, pp. 26, 71).

Difficulties arise in explaining why this anti-judicial factor is also anti-Jury (62). One would think that an anti-judiciary attitude would be pro-jury. A close reading of these cases suggests that the Court opposed the jury decisions only because it was contrary to accepted legal principles. Hence, this factor might involve a pro-stare decisis attitude as well as anti-judicial review sentiment. The

association of the Jury variable is suspect, however, since it is a weak quasiscale. The Liability of Insurance Company variable (26) weakly loads on this factor, probably since all of its cases involve challenges to jury decisions.

This factor has some association with Federalism. A large majority of its content involves opposition to federal judicial power, and Property Rights (3) and Aliens (6) have a weak association with it. These variables load in an anti-federal and pro-liberty direction. The first involves mostly federal laws and half of the later variable involves federal actions.

The association of this factor with libertarianism seems readily explainable. When the two factors are combined, the combination represents political and personal liberty more clearly. The anti-judicial review component represents democratic political liberty unrestrained by non-democratic (i.e. judicial) influences. All "civil liberty" variables load on the combined factor except Civil Liberties of Indians (5) and Civil Rights of Negroes (15). This is mainly an anti-federal liberty which is for white men only. This more general factor will be called General Libertarianism.

7. General Welfare is a factor measuring attitudes toward the general interest of the society as opposed to special interests or individuals. It is, admittedly, a vague term. Since the factor is so small, however, it is less



stable than the preceding factors, and less easy to define. It is pro-Conservation (14), pro-Land Claim (16), anti-patent holder in Patents (29), anti-property in Property Rights (3), anti-graft in Corruption in Government (37), and pro-federal regulations in non-economic matters (20). Each of these variables involves a special interest, usually a corporation whose interests oppose the general welfare. Conservation of natural resources, the wider dissemination of inventions, a wider distribution of farm land, less corruption, and less drunkenness, drug addiction, and prostitution may be seen to benefit society in general, at least in the eyes of the reformers of the period. Fiscal Claims (18) and Fiscal Powers (19) also seem to favor the general interest of tapping corporate wealth for the economic support for the central government instead of a broader tax base in opposition to corporate interests and holders of large fortunes. This attitude system does have a documented ideological base. The slogan of "equal rights for all, special privileges for none" was used by the Democratic party often throughout its history. It was also one of the Progressives' aims to prevent corporate interests and individuals from using government for private enrichment at the expense of the society or economic system (Croly, 1963; Hofstadter, 1955).

8. Laissez-faire was a weak factor which was somewhat unstable. Yet evidence exists that it was present in our data. It involves a consistently anti-government attitude. It might validly be argued that the opposite of the

Progressivism factor represents an economic laissez faire attitude. This factor involves anti-government sentiments largely exclusive of economic conservatism content. These include an anti-government position in Eminent Domain (60), Business Self-incrimination (43), Property Rights (3), Aliens (6), Corruption in Government (37), Prohibition (38), Federal Regulations: Non-economic (20), and Fiscal Claims (18).

It can be seen that the six main factors or attitude systems may be combined into three larger factors: Progressivism, Federalism (including Commerce Powers), and General Libertarianism.

Let us now examine evidence supporting the validity of these factors and their interpretation.

Figure 3 gives the two-factor varimax configuration of the 43 "exclusive scale" variables (with cases appearing usually in only one of the scales). It explains 36 per cent of the total variance. The quartimax and principle axes solutions are practically identical to this one. The invariability of axis shift under various techniques strongly supports the psychological validity and meaningfulness of this configuration of variables and axes. What do the axes measure? Axis I seems to measure firstly partisan

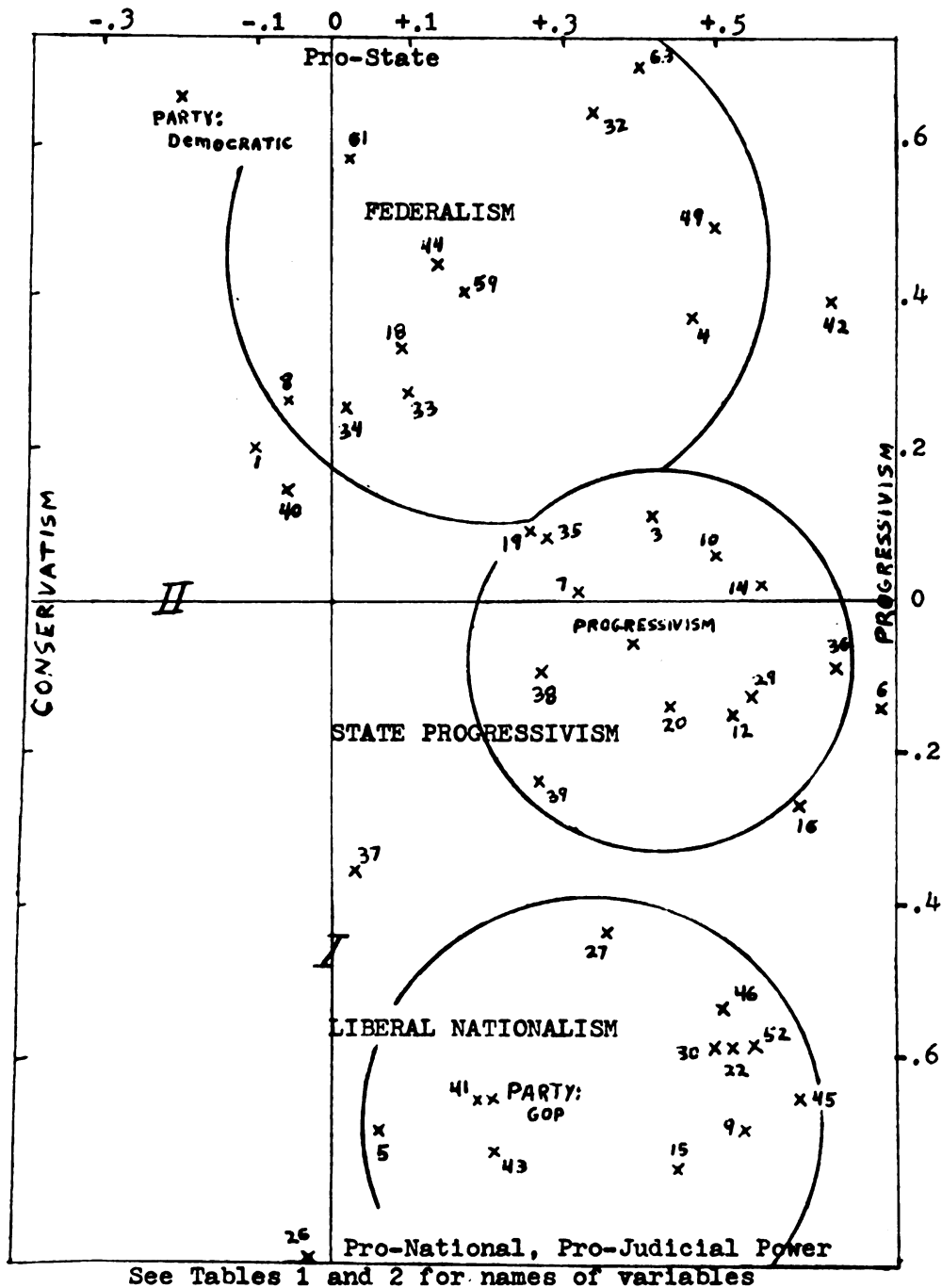


Figure 3.--Two-Dimensional Factor Analysis Varimax Solution of 43-Variable "Exclusive Scales"

attitudes.<sup>2</sup> A fifteen degree tilt of the axis would place it on the party variable. The negative end of the axis below  $-.55$  includes only variables in which federal power is being upheld except for Liability of Insurance Companies (26). So does Corruption in Government (37) at  $-.36$ . The other end of the axis includes mostly conflicts between federal and state power in which federal power is rejected in favor of state jurisdiction. All variables above  $+.38$  clearly involve this issue except for Corruption in Business (44) in which, however, the cases dominating the rankings do involve this variable. Also in Criminal Due Process (4), three-fourths of the cases oppose federal governmental authority. In addition, variables above  $+.21$  involve federal-state conflicts in which a positive vote supports the state except for Federal Fiscal Claims (18). All the variables opposing federal judicial power lie above axis II and the one upholding such power, Judicial Power: Liberal (41), lies below it. Variables not involving issues of federal power lie between  $.20$  and  $-.30$  with the exception of Federal Fiscal Power (19). Aliens (6) and Property Rights (3) involve some state regulations although most of their cases involve federal acts.

---

<sup>2</sup>The effect of partisanship on judicial attitudes will be developed in full in Chapter 6. Variables which load high on this factor represent historical divisions between the parties. These include states' rights, the rights of Negroes, and judicial power (from Jeffersonian and Jacksonian traditions). In addition, Liberal Nationalism was a Republican program, at least in the 1901-1912 period (Kelly and Harbison, 1963).

Axis II seems to measure attitudes toward economic liberalism or Progressivism. All variables to the right of +.18 involve Progressivism to varying degrees with a few exceptions. These involve most of the variables. This is true because a positive vote was defined as pro-liberal in the construction of these variables. Each variable in a liberal direction may be conceived as having a conservative counterpart to the left of the axis.<sup>3</sup> Conceivable exceptions to this liberal continuum might be Criminal Due Process (41) and Civil Rights of Negroes (15). Yet these support the claims of underprivileged and oppressed elements of the population and were concerns of certain Progressive reformers (Chap. 2 above). One may note that basically the variables involving economic liberalism are to the extreme right (right of +.50). One may question the position of Bankruptcy and Debts (48 and 52), but in this period these involved the practice of corporations of reorganizing to defraud minority stockholders and creditors or other fraudulent practices of businessmen. Chapter 2 covered the relationship of Conservation (14) and Land Claims (16) to the anti-business sentiment of Progressivism. An anti-Alien (6) attitude is compatible with Progressivism as mentioned above. Lastly, Prohibition (38) and Federal Regulation: Non-economic (20)

---

<sup>3</sup>Factor analyses containing the reversed ranks of these variables (in a conservative direction) together with these "liberal" direction variables were run, and such a configuration was obtained. This is implicit in factor analysis theory (Schubert, 1965a).

include other Progressivist programs of the times. A further validation of this axis as measuring Progressivism is the fact that a Progressivism ranking for the justices lies very close to axis II, in spite of the lack of evidence for precise rankings of the justices on such a continuum.

It can be seen consequently that Progressivism and Federalism are two predominating factors in a two-dimensional solution and that the spatial configuration of variables are functions of their relationship with those factors.

The effect of excluding duplicates from our variables seems minimal. Land Claims and Conservation move even closer together than they were when they contained duplicate cases. Land Claims moves about .50 units closer to federal powers, both it and Conservation load higher on Progressivism. Fiscal Claims is now farther from Land Claims and moves closer toward federal power. Both Judicial Power of Lower Federal Courts and Federalism-Non-economic move away from the variables with which they shared case content, toward the origin. The remaining variables do not change their relative configuration to a noticeable extent on the two-dimensional solution.

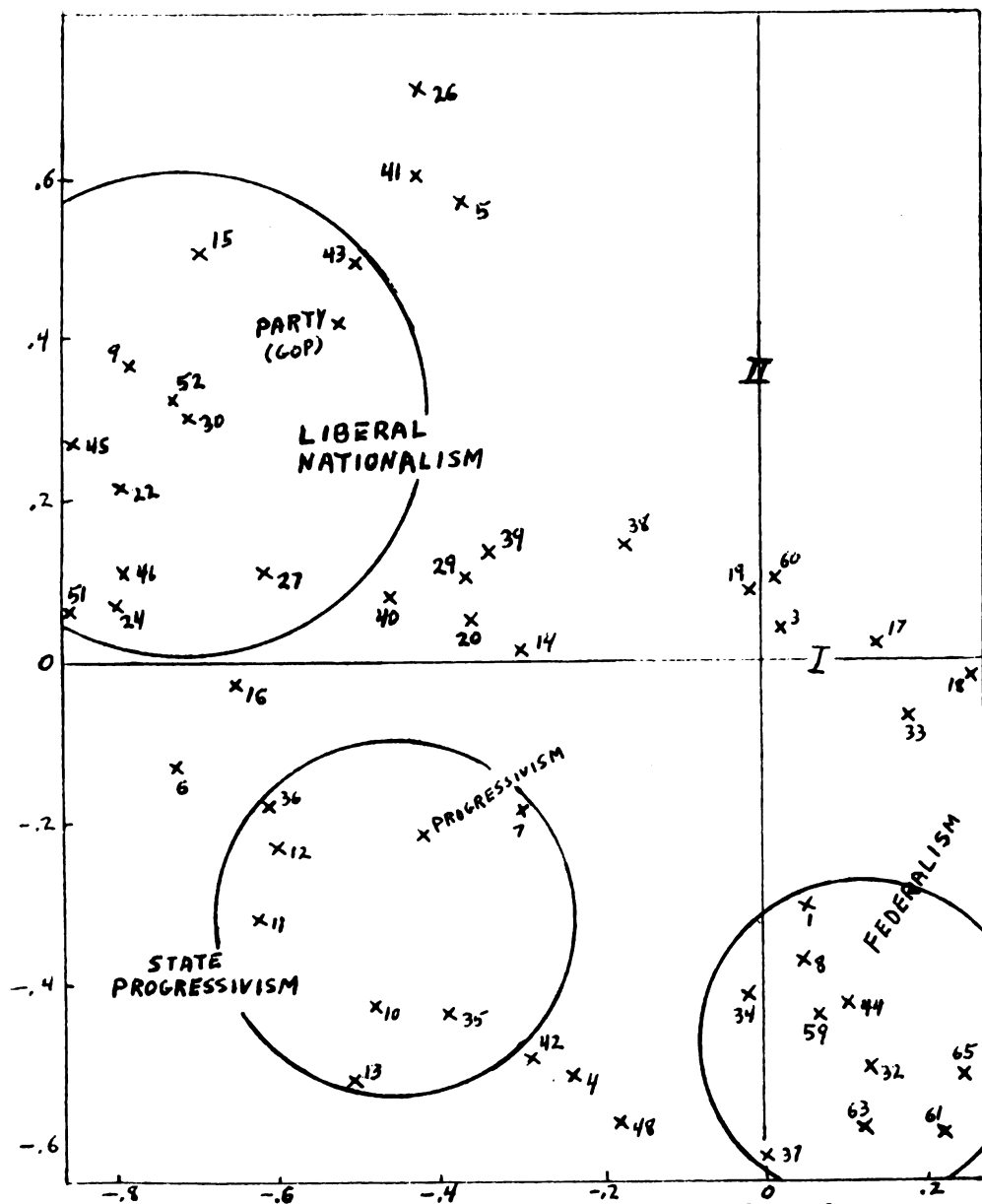
An additional check on our findings may be made by noting the clusters of variables on our two-dimensional graph. Figure 3 shows at least three clusters: one roughly equivalent to the Liberal Nationalism factor in the lower right, one equivalent to State Progressivism at the middle

loosely clustered Federalism factor at the content of each corresponds to our pre- however, points nearer to the origin are to n caution since these are explained by the ow per cent of their total variance.

to Figure 4 (containing a nonexclusive variation) shows that the centermost vari- greatest. However, the basic configura- Figure 3. This graph has some variables icates. State Tax (11) and Commerce (13), in a different classification of the same 35, and 36. These help define the atti- better, it was believed, by giving more

ogressivism cluster here splits into two ers show up even more tightly clustered. al results on Table 5 are more reliable although these figures offer some visual ta.

made after the scales were checked and to eliminate errors and unnecessary dupli- s between analyses with duplicates and little change. Property Rights (3) and Lower Courts (40) change most, but the relative position.



See Tables 1 and 2 for names of variables above.

Figure 4.--Two-Dimensional Factor Analysis Varimax  
Solution of 50 Refined Scales, 1910-1915



Comparison of Figures 3 and 4 with earlier factor analyses show little major change; however, the elimination of errors and duplicates did improve the sharpness of clusters. A smallest space analysis showed a comparable clustering of the same Liberal Nationalism, State Progressivism, Federalism, and Judicial Restraint factors with some improvement in clustering over the corresponding two-dimensional factor analysis.

An examination of Table 5 (involving only 29 variables) supports our conclusions as to the factor structure of the data. The smaller analyses obscure some factors: Commerce and Federalism in the 32-variable analysis and State Progressivism and Commerce in the 27-variable run. In the latter, the State and National variables combine to form one factor.

Oblique analysis results in some differences from the orthogonal, yet they are not major improvements. Comparable factor structure and variable content of the factors are very similar.

Our "exclusive" scale analysis showed some tendency for the Commerce and Federalism factors to obscure the State Progressivism factor by splitting it between them. This indicates that the above are related.

On all solutions of the 43-variable set there is a Liberal Nationalism factor which is essentially invariant and accounts for about 20 per cent of the variance. In all

solutions a Libertarian factor was also present which contained First Amendment (1), Criminal Due Process (4), Labor (7), and anti-Judicial Power of Federal Courts (40) accounting for eight per cent of the variance. Much of the time it also contained most of the Judicial Power factor which accounted for another eight per cent. A Federalism factor was present on the fourth, fifth, and seventh dimensional quartimax solution and the third and fifth to the ninth dimensional varimax solutions. It accounts for nine to ten per cent of the variance. On the four-dimensional varimax solution an anti-government or Laissez-faire factor occurs composed of Property Rights (3), Aliens (6), Federal Fiscal Powers (18), Federal Fiscal Claims (19), Conservation (14), Judicial Power: Conservative (42), Patents (29), Federal Regulation: Non-economic (20) and Federalism: Non-economic (32). In all cases the direction of the variable was anti-government.

On the varimax six, seven, eight and nine-dimensional solutions a Judicial Restraint factor occurs. This combines with Libertarianism on the three, four and five-dimensional solutions. A General Welfare factor is present on the eight and nine-dimensional solutions. On the eight-factor solution it is composed of Conservation (14), Fiscal Claims (18), Fiscal Powers (19), and shows a weak correlation with Land Claims (16). This is transformed on the seven-factor solution to a property rights factor containing only Property Rights (3) and contains Fiscal Claims and Fiscal Power in an

o-business direction.

r good State Progressivism factors. More-  
appears on a two-dimensional graph of the  
and also on similar graphs in the 50-  
sing both factor analysis and smallest  
ch a solution is present in the four-  
n which contains Contract (12), State  
commerce: Non-tax (35), Taxation: Due  
he biographically based Progressivism  
unts for 12 per cent of the total vari-  
ximation to this appears on the seven-  
ax and varimax. The remaining solutions  
more factors contain sizeable fractions  
, but do not contain all of the state  
s.

the 50-variable, 7-factor varimax load-  
on to the above 43-variable analysis.

our data support our findings on the  
ure as Table 6 clearly shows.

ubsets of our data proved enlightening.  
divided into the three largest factors:  
ral Libertarianism, and Federalism. Pro-  
rtarianism on the principal axes solution  
or measuring those respective attitude  
vism explained 37 per cent of the variance  
ever, the variables were ranked on the

Table 7.--Fifty-Variable Varimax Solution, 1910-1915.

ROTATED FACTOR LOADING MATRIX

	1	2	3	4	5	6	7
1	0.2435	-0.3759	-0.1811	0.4360	0.4530	-0.2684	0.3575
3	0.2796	0.3080	0.5918	0.1939	0.0463	-0.0074	0.3225
4	0.0428	0.3093	-0.0368	0.5947	0.5323	-0.1572	0.2182
5	-0.0812	-0.1724	0.2005	-0.0462	0.1917	0.0333	-0.1542
6	-0.1787	0.2277	0.1477	-0.0384	0.0337	-0.0618	0.8615
7	-0.0574	-0.0317	-0.0453	0.3069	0.5874	-0.3365	-0.2341
8	0.1819	-0.0780	-0.6758	0.0698	0.1140	-0.0285	-0.1105
9	-0.6047	-0.0519	-0.0323	-0.1110	0.0595	-0.3979	0.4457
10	-0.2040	0.1761	-0.0296	0.4498	0.2788	0.3170	0.4543
12	-0.3616	-0.1854	-0.2429	0.1193	-0.2234	0.2885	-0.4777
14	-0.2773	0.7172	0.1066	-0.2211	0.0348	-0.0398	0.0693
15	-0.6891	-0.0956	-0.1691	-0.1928	0.0750	-0.3513	-0.3714
16	-0.5222	0.2451	-0.0616	0.0952	0.4935	-0.0671	0.2789
18	0.1400	0.4684	0.3729	0.0824	0.2199	-0.3116	-0.2722
19	0.0141	0.4141	0.1518	-0.2087	0.4423	-0.4005	-0.1190
20	-0.1792	-0.0566	0.1746	0.0900	-0.4233	-0.4418	0.5022
22	-0.5769	0.0043	0.0546	-0.1184	0.3899	-0.0249	0.5667
45	-0.7147	-0.0250	-0.1519	-0.1347	0.1171	-0.2539	0.4859
46	-0.5743	-0.1826	-0.0263	0.0999	-0.0194	-0.1035	0.6623
26	-0.7079	-0.3743	-0.0663	-0.4273	-0.1426	-0.1137	-0.0009
27	-0.4253	0.0485	-0.5774	-0.4440	0.2511	-0.0419	0.2339
52	-0.0575	-0.2391	-0.1106	-0.1659	-0.0619	0.0123	0.1845
49	0.2465	0.6402	-0.2562	-0.0463	-0.0963	0.2856	0.3202
29	-0.4484	0.5755	0.1777	-0.0345	-0.2273	-0.1967	-0.1102
30	-0.6570	0.2176	-0.1461	-0.1611	-0.0230	0.0679	0.1447
32	0.3768	0.6533	-0.3215	0.0441	-0.1876	-0.3577	-0.0103
33	0.1567	0.4113	0.3960	-0.0034	-0.4040	0.1138	0.0403
34	0.1314	-0.0424	-0.3192	0.1805	0.5226	-0.3148	-0.0451

35	0.0213	-0.1090	-0.7169	-0.1422	-0.0609	-0.3804	-0.3480
36	-0.0014	0.2325	0.0169	-0.1316	0.0535	-0.1098	0.7993
37	-0.1291	0.0670	0.4312	-0.5000	-0.2734	-0.4832	0.0124
44	0.3121	0.3715	-0.4811	-0.0261	-0.5694	-0.0785	0.0577
38	-0.1422	0.1092	0.0136	0.0035	0.0107	-0.7725	0.0628
39	-0.2494	0.2491	-0.4133	-0.4689	-0.0226	-0.1443	0.0508
43	-0.0596	-0.3033	0.4352	-0.0137	0.1139	-0.2186	-0.3452
63	0.2777	0.6783	0.1230	0.3953	0.0218	0.0936	0.0307
59	0.0394	0.1761	0.2811	0.8455	0.0594	-0.0105	0.0186
61	0.2700	0.2744	-0.0726	0.5911	0.1006	0.1754	-0.1202
40	0.1766	-0.1813	-0.2490	0.6987	0.1107	-0.1290	-0.0615
41	-0.4773	-0.0772	0.2669	-0.4650	0.3475	-0.0706	0.1491
42	-0.1754	0.2745	-0.1152	0.3495	0.1321	-0.1494	-0.1415
Progr.	-0.0592	0.0097	-0.0714	0.1632	-0.1207	0.1029	0.5264
Party	0.3984	0.3555	-0.1623	0.2714	0.1744	0.0473	-0.5107
11	-0.0571	0.0034	-0.5171	-0.0772	0.1385	-0.0380	0.6252
13	-0.0485	-0.0017	-0.6550	0.1115	0.0879	0.4194	0.4784
17	0.0795	0.0240	0.0916	0.0865	-0.7725	-0.1451	0.0490
24	-0.0648	0.0000	-0.0003	0.1549	-0.1108	0.1298	-0.5542
65	-0.2728	-0.0175	-0.2419	0.5426	-0.4260	0.1340	-0.0360
51	-0.4564	-0.0390	-0.1463	-0.1198	0.1094	-0.0393	0.7191
60	0.1090	-0.0422	-0.4295	-0.6242	0.1099	0.2735	-0.0024

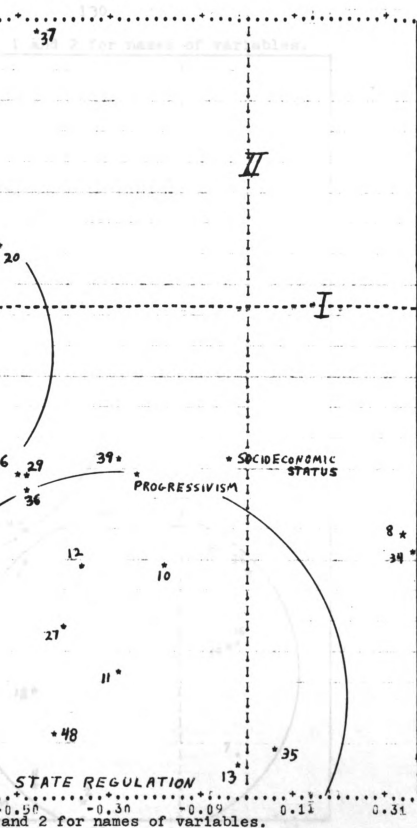
National Liberalism      Federalism      Commerce Powers      Judicial Restraint      Libertarianism      State Progress

second dimension roughly according to the proportion of cases involving federal power contained within. Figure 5 shows the varimax solution, which indicates that two dimensions are contained within: Liberal Nationalism (I) and State Progressivism (II). The variables halfway between the axes involve both federal and state powers: Bankruptcy (28), Patents (29), Aliens (6), and Rate Regulation (23). Patents involve conflicts between state law and common law involving trademarks and patents and the federal patent power. State Rates (46) seems out of place as noted previously.

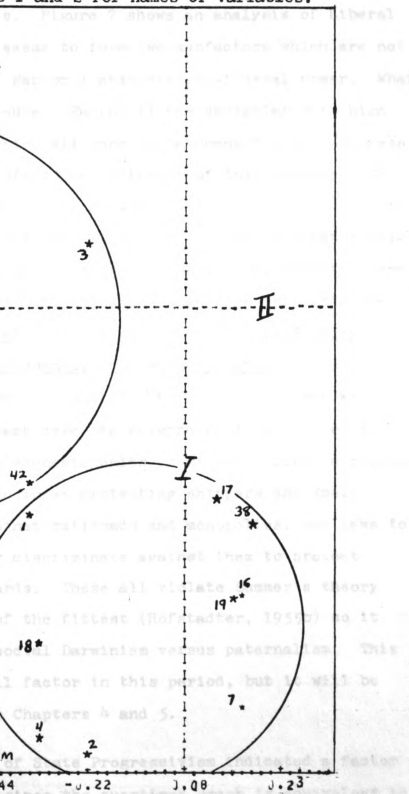
General Libertarianism gave a one-factor solution that explained 22 per cent of the variance. But as Figure 6 shows, it too showed that it was composed of two factors. One involves mainly Judicial Restraint and the other involves the more specific Libertarianism, civil liberties, and labor. It may be noted that Party loads highest on Judicial Restraint suggesting that Democrats voted against judicial power. This supports previous evidence of such a connection (Nagel, 1962).

Analysis of the Federalism factor (not shown) also gave evidence of two factors: a Commerce Power factor and a Federalism factor covering non-commerce federal-state conflicts.

These subfactor analyses were used with our other data to more carefully delineate the boundaries between these related factors.



Dimensional Varimax Solution of 29-Variable  
 Progressivism Factor, 1910-1915



Dimensional Varimax Solution of 21-Variable  
Libertarian Factor, 1910-1915

Running further analyses of each factor gave further interesting results. Figure 7 shows an analysis of Liberal Nationalism which seems to form two subfactors which are not very distinctive. Factor I measures pro-federal power. What does factor II measure? Factor II has variables with high loadings on them which all seem to be connected with bigness in business and "unfair" exploitation of that bigness. This includes suits by shippers against railroads (27, 48), suits against corporate reorganizations which seek to cheat creditors (28) and General Liability (25) which includes the same cases as the others. Also loading higher on this axis than axis I are Antitrust (30), Patents (29), Discriminatory Rates (24) and Governmental Economic Regulation (51), which includes cases from 24. What do they have in common with Aliens (6)? In each case the government is asked to intervene against large economic units or strong forces to protect weak ones. This includes protecting shippers and small economic units against railroads and monopolies, and laws to keep out aliens or discriminate against them to protect native wage standards. These all violate Summer's theory for the survival of the fittest (Hofstadter, 1955b) so it seems to involve social Darwinism versus paternalism. This seems to be a small factor in this period, but it will be discussed later in Chapters 4 and 5.

An analysis of State Progressivism indicated a factor of some stability since the quartimax graph is equivalent to the varimax rotation. Figure 8 shows that two dimensions



See Tables 1 and 2 for names of variables below.

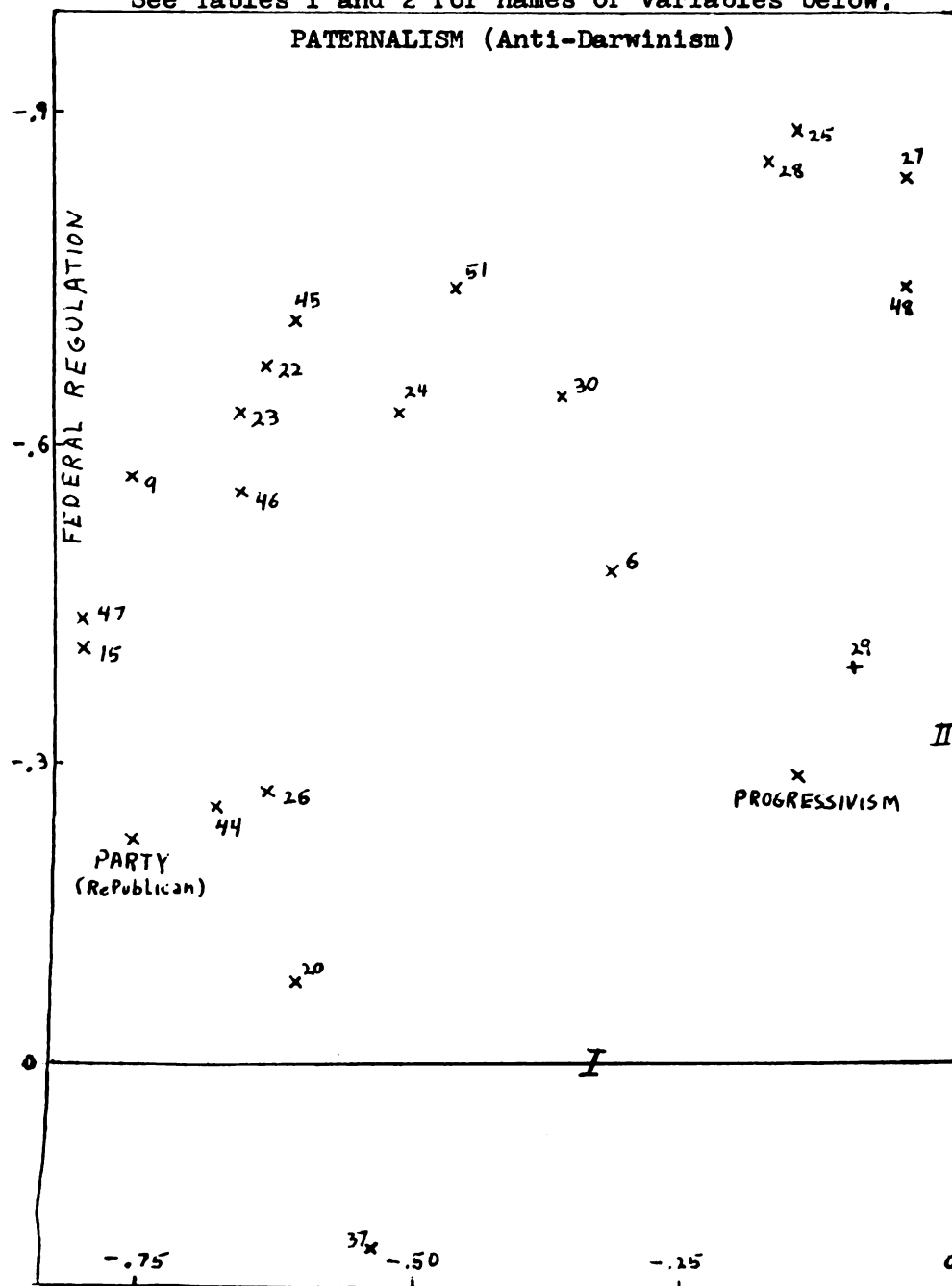
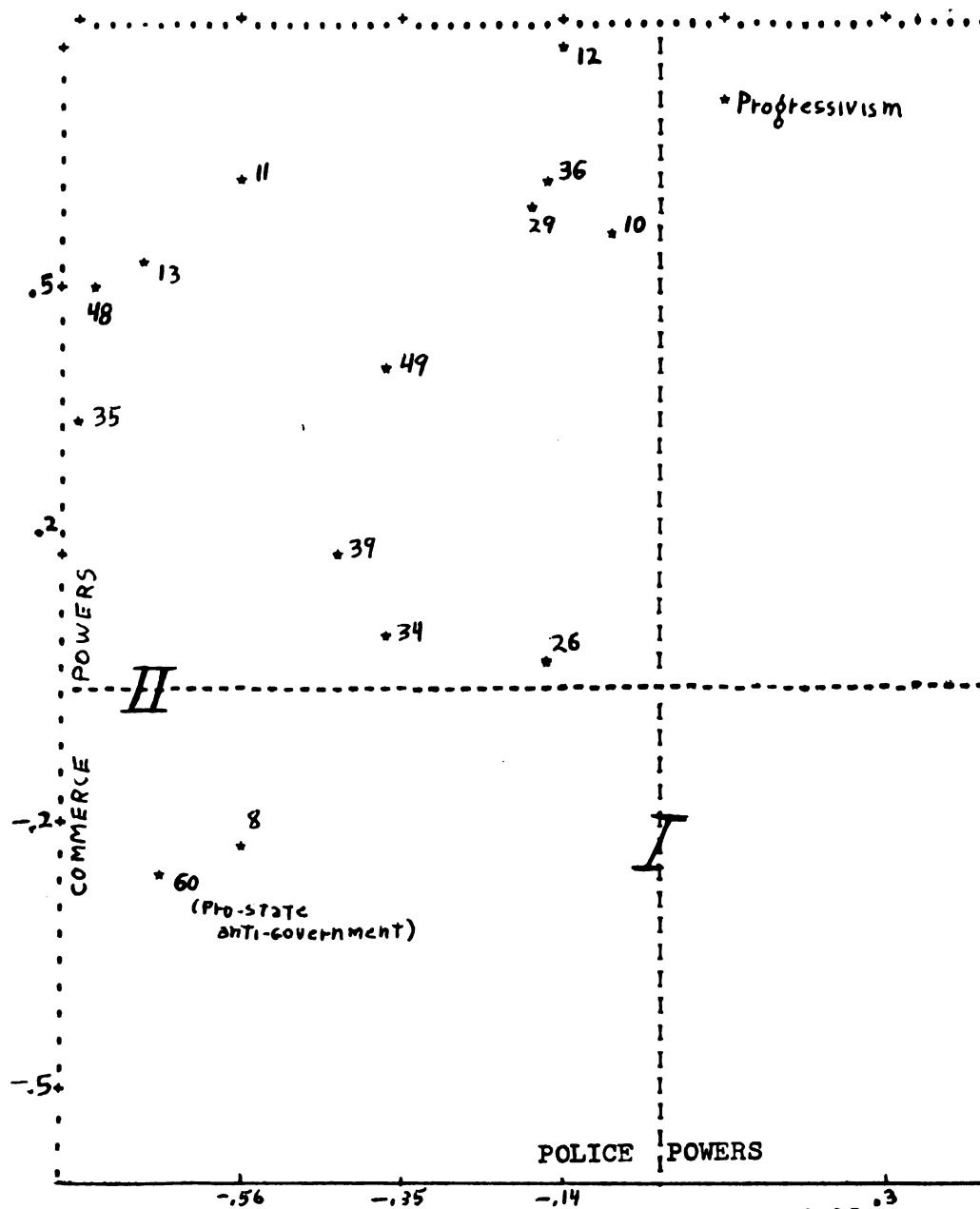


Figure 7.--Two-Dimensional Varimax Solution of 22-Variable Liberal Nationalism Factor, 1910-1915



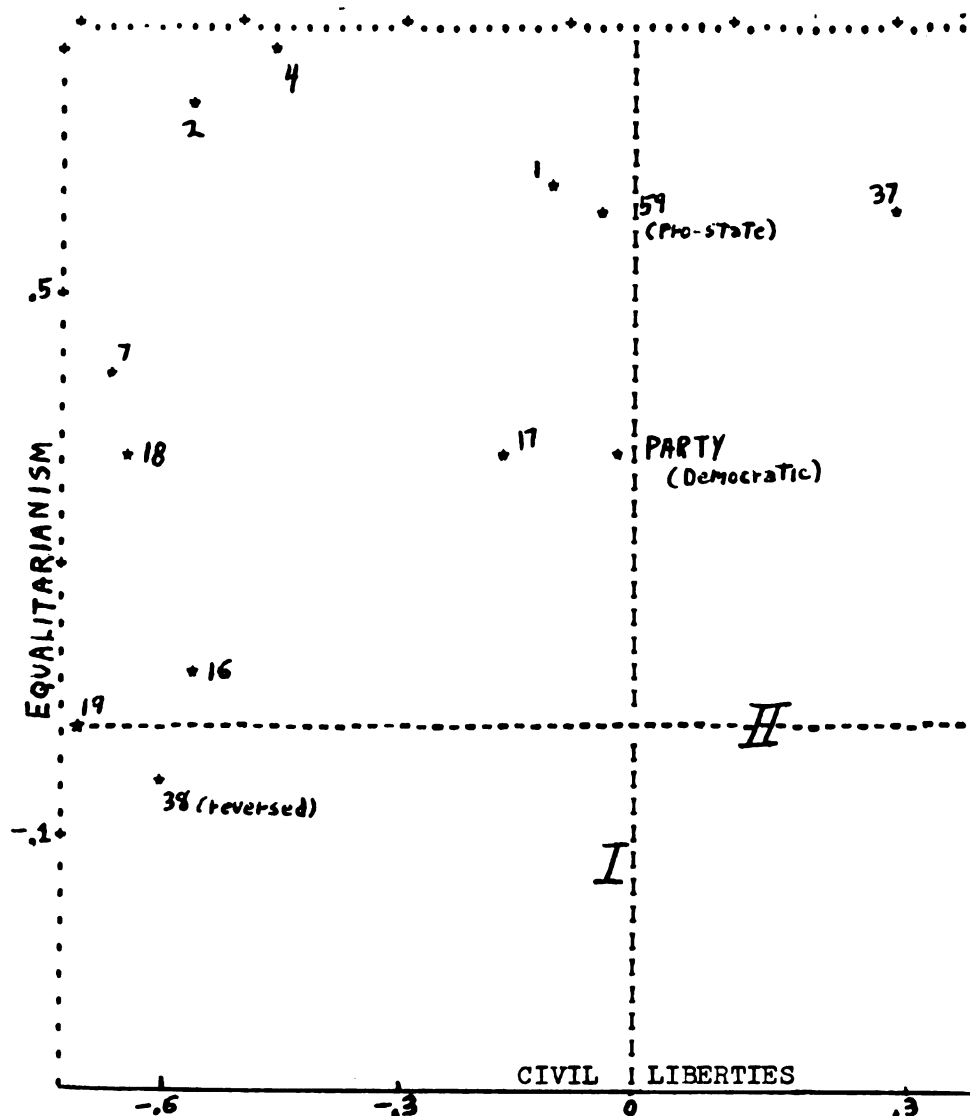
See Tables 1 and 2 for names of above variables.

Figure 8.--Two-Dimensional Varimax Solution of 15-Variable State Progressivism Factor, 1910-1915

divide the variables into those involving state police powers (axis I) and those involving a federal-state conflict over the extent of the Commerce power. Note that the Progressivism variable loads with police power which suggests that some Progressivist sentiment on the Court may have favored a narrow state commerce power but championed large state police powers.

Libertarianism showed stability also since the quartimax duplicated the varimax solution in two dimensions. Figure 9 shows that it also loaded on two separate axes on varimax. One axis represented civil liberties while the other seemed to represent an equalitarian dimension (axis II), as our definition of this factor has previously suggested. Hence, Criminal Due Process (2) which seems to advocate justice for the poor Labor (7), Fiscal Claims (18), Fiscal Power (19), and Land Claims (16) all point to a more equal distribution of wealth and resources. Prohibition (38) is less easily explained, but its position suggests that the attitude existed that, if freed from the evils of liquor, more equal opportunity will be given to the deprived classes.

Federalism also showed identical varimax and quartimax solutions. Figure 10 shows that on axis I, Federalism loads as expected. On axis II, however, a General Welfare factor is formed which is quite distinctive. Hence, support for the existence of a General Welfare factor is given. The party variable indicates that Democrats are pro-state as expected



See Tables 1 and 2 for names of above variables.

Figure 9.--Two-Dimensional Varimax Configuration of 12-Variable Libertarian Factor, 1910-1915

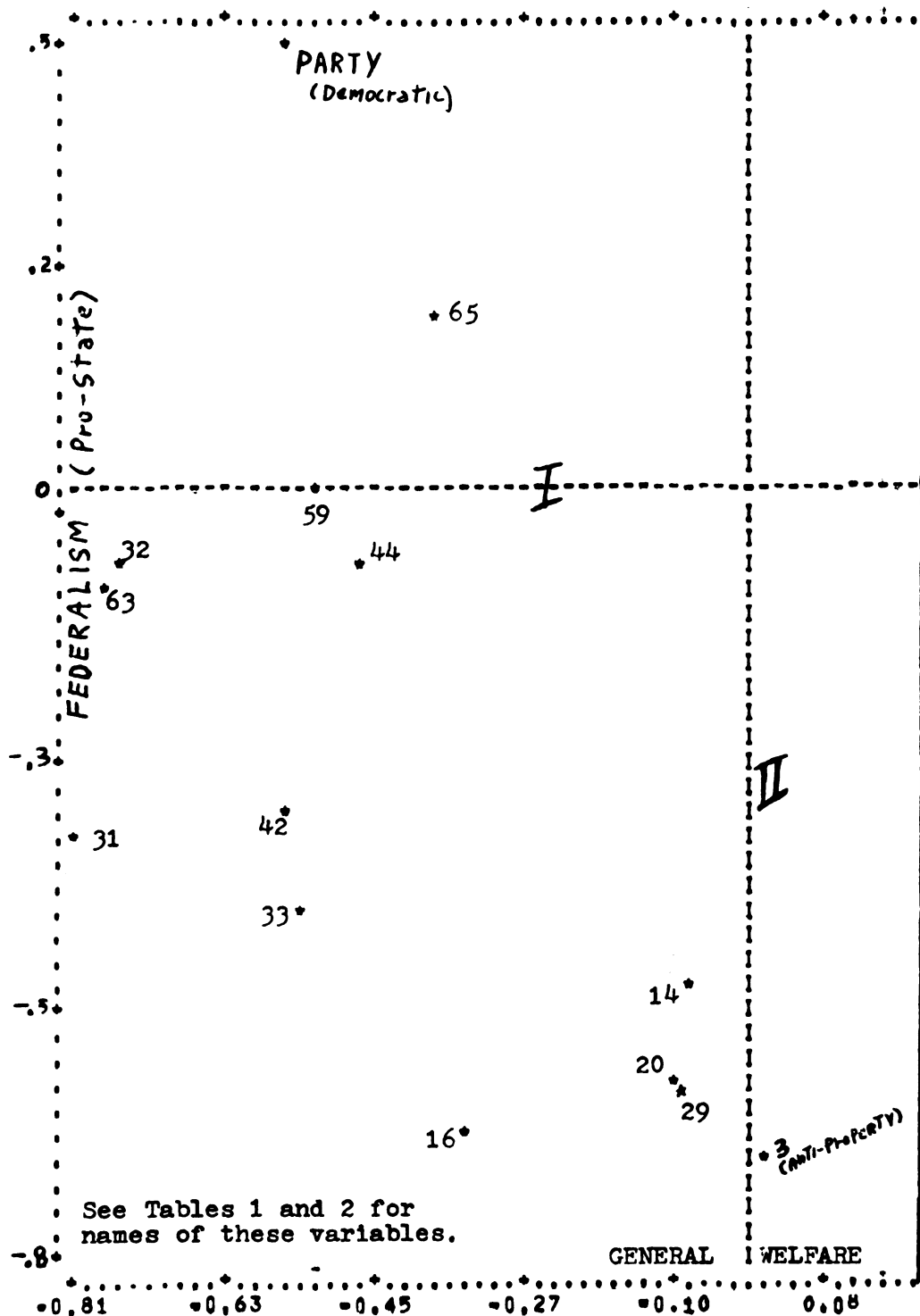


Figure 10.--Two-Dimensional Varimax Solution of 14-Variable Federalism Factor, 1910-1915

but anti-general welfare as well.

The Laissez-faire factor also shows separate dimensions: one is anti-government regulation and the other upholds claims against the government in Fiscal Claims (18), Liability: State (59), and Eminent Domain (60).

General Welfare and Judicial Restraint show identical two-dimensional solutions in quartimax, varimax, and principal axes. In each the variables cluster around one axis.

As an additional test of our factor structure, Table 8 gives some indicators of possible unidimensionality. These should be checked against the corresponding figures for the total analysis. T-Scale values are given which are the sum of the negative eigenvalues (Guthery, Spaeth, and Thomas, 1968; Torgerson, 1958, pp. 254-259). No negative eigenvalues indicate evidence of unidimensionality (Harman, 1962, pp. 142-143). A high per cent of variance on a one-dimensional factor analysis suggests few dimensions. Kendall's Coefficient of Concordance (McNemar, 1962, pp. 379-381) shows evidence of similarity among the ranks for the judges. This method can also be used for dropping misfit variables. The average tau is a further indicator of close relationships among the variables.

These figures rank the factors in order of decreasing similarity of content as follows: (1) Liberal Nationalism, (2) Commerce Power, (3) Libertarianism, (4) Judicial

For Commonality among Variables Contained  
in Factors

<u>C.</u>	<u>Signif- icance Level</u>	<u>Average Tau</u>	<u>T-Scale Negative Eigen- values</u>	<u>One Factor Percent of Variance</u>
22	.0000	.459	-1.0	51.0
26	.0000	.250	- .8	31.7
81	.0000	.262	- .6	33.7
95	.0000	.260	- .5	32.2
21	.0000	.236	- .8	29.5
88	.0006	.280	- .6	33.4
47	.0158	.335	- 0	43.0
30	.0010	.198	- .3	26.4
33	.0008	.366	- .1	66.5
02	.0000	.300	-2.3	36.6
12	.0090	.114	-2.7	22.3
46	.0000	.108	-3.4	21.0
39	.0000	.095	-9.0	21.7

's Coefficient of Concordance.

Moment Correlations Between Factor Scores

<u>ism</u>	<u>State Progres.</u>	<u>Liber tar.</u>	<u>Judicial Restr.</u>	<u>Feder- alism</u>	<u>Com. Powr.</u>	<u>Gen. Wel.</u>
	.19					
	-.22	.13				
	.03	.43	.15			
	.85	.16	.02	-.20		
	.04	.15	-.43	.61	-.35	
	.09	-.29	.23	-.51	.49	-.53

Restraint, (5) State Progressivism, (6) General Welfare, (7) Federalism, and (8) Laissez-faireism. Progressivism as a combined factor is better than all single factors except Liberal Nationalism. General Libertarianism, however, gives a low K.C.C. as does General Federalism, indicating that the components of these factors are only slightly related.

It may be noted that constructing a factor out of all the liability-related variables gives a more homogenous factor than all the others but one from our factor analysis results. This factor is, however, equivalent to the anti-Darwinist subfactor shown by Figure 7. It is a component of Liberal Nationalism which splits off to form a separate factor in the second period.

Table 8 shows that each of the groups of variables is closely related to a significant degree. It also shows that few factors account for more than a third of the total variance of the subset. This suggests that the variables are indeed complex and that several factors may account for the rankings of most of the variables.

It may be noted that several factors involve Federalism. The division between Liberal Nationalism and State Progressivism is based on different ideas of the appropriate governmental units to solve problems. Still an additional unstable ill-defined factor arranges variables on a pro-state, anti-federal dimension. Hence, in this period the issues of federalism may supersede in importance even the



economic liberalism issue which is herein expressed in terms of Progressivist ideology. All the traditional questions of federalism arise. How much power should the state possess? Which should have more power in economic regulation? Which in non-commerce areas? The Judicial Restraint factor adds still another traditional question of proper governmental relations.

A note should be added on why Civil Liberties: Indians (5) alone of all the liberty-related variables does not associate with General Libertarianism. This happens because it involves a high ratio of voting divisions where a white man murders an Indian and hence the Indian and white man's civil liberties are directly conflicting.

Furthermore, it should be noted that the Corruption variables (17, 37, 44) associate with Libertarianism on a federalism factor rather than with Progressivism. This suggests that these variables do not tap the dimension of moralism implicit in Progressivism as intended.

A hierarchical analysis of our data gives conflicting results. Almost invariably State Progressivism combines with Liberal Nationalism to form Progressivism. Sometimes Commerce or Laissez-faire also joins Progressivism. Sometimes Federalism and Judicial Restraint combine. Usually Libertarianism and Judicial Restraint combine, but occasionally Commerce Power joins Libertarianism and the combined factor then joins either Commerce Power or Federalism while

the other federalism factor combines with Progressivism.

The two primary factors are Progressivism and often General Libertarianism but sometimes Federalism.

Another way of determining relationships among the factors is studying their intercorrelations. While these factors are theoretically uncorrelated (but not necessarily independent) this can be done in three ways. First, oblique analyses may give correlated factors. Secondly, we may construct the average ranks of the justices on each factor or attitude system simply by averaging the ranks for all constituent variables of the factor, and correlate these ranks. Third, we may calculate the factor scores for each factor and correlate these. Since the latter scores use factor analytic techniques to more precisely extract common variance, leaving out variance due to other factors, and provides interval data; it was relied on most heavily (see Table 9). The product moment correlations between the ranks and scores average above .95, so they are comparable measures.

Oblique analysis showed few high correlations between factors. It showed between a .11 and a .37 correlation (tilt of the axes) between Judicial Restraint and Commerce Power. This is not consistent with Table 8, which shows no correlation. A correlation between Federalism and Commerce of -.20 to -.45 from oblique analysis is verified by Table 8, however. The fact that the relationship is negative is difficult to explain, but may be due to a desire by some justices

to give the national government economic powers in areas where states cannot cope with the problems, such as regulation of large corporations, while in less crucial matters to preserve state sovereignty. This was essentially the early Wilsonian program (Kelly and Harbison, 1963).

Other notable relationships from the Table 9 correlations between factor scores include the following:<sup>4</sup> Liberal Nationalism and State Progressivism are highly correlated as expected since they form one factor, Progressivism. Commerce Power correlates highest with State Progressivism, but also correlates with Liberal Nationalism, Libertarianism, Federalism, General Welfare, and Laissez-faire. Hence, it is related to each of these. State Commerce Power seems closely connected to State Progressivism and is related to Liberal Nationalism as well. It is positively related to Libertarianism, reflecting an anti-federal content in that factor. It is pro-Laissez-faire and anti-General Welfare, reflecting a general attitude of preferring smaller government rather than central power, and no government at all when possible.

Libertarianism is not as closely related to Judicial Restraint as other evidence would suggest. But it is positively related to everything but Laissez-faire. Its high

---

<sup>4</sup>In the Table 9 factors, Liberalism, pro-state, pro-liberty and pro-General Welfare are all positive in direction. But in Laissez-faire, anti-government is positively directed and pro-government is negative.

relationship to Federalism suggests that it is anti-federal in non-economic matters, which comports with its variable case content.

Judicial Restraint is strongly negatively correlated with Liberal Nationalism ( $-.72$ ) and negatively also with General Welfare, but correlates positively with Laissez-faire and Federalism. This affirms its anti-federal government character.

Federalism is positively correlated with Libertarianism and General Welfare, but negatively with Laissez-faire. It is weakly related to the other factors. Hence, it seems unrelated to factors with an economic content but includes support of local government especially in non-economic matters.

General Welfare correlates with Liberal Nationalism and Federalism but is opposite in direction to Laissez-faire and Commerce Powers. Its case content is mostly non-economic as may be recalled (see Table 4, p. 101).

Laissez-faire shows negative correlations with most pro-government factors as Liberal Nationalism, General Welfare, and Federalism. It shows a pro-state bias because it is unrelated to State Progressivism but positively correlated with Judicial Restraint and Commerce Powers.

Analysis of the loadings, the variables that often partly associate with several different factors, the variables that fluctuate from one factor to another upon

successively factoring out more dimensions, and the relationships between the factors themselves all seem to point to a conclusion that the factors are indeed related. The conclusion offers itself that either some factors are a result of interactions between values or perhaps (as the nature of the data suggests) interactions between different justices of different philosophies or both. It may be suggested, then, that our attitude systems may be due to different combinations of interacting values such as the end states of equality (Progressivism seemed to have more equality as one of its goals), altruism, liberty, and state sovereignty. Liberal Nationalism is clearly pro-equality and anti-states' rights. State Progressivism is pro-equality and pro-states' rights. Judicial Restraint may be pro-state and pro-liberty.

Libertarianism may be pro-equality and pro-liberty. Federalism may be pro-state and pro-altruistic. Commerce Powers may be merely pro-state, but may favor a limit to federal economic powers. Laissez-faire may be anti-equality and pro-liberty. General Welfare may reflect merely altruism. The content of the variables of these factors as well as their interrelationships lend support to these interpretations.

Factor analyses were run of the phi correlations between the justices as well as of product moment correlations

of the justice's raw votes.<sup>5</sup> These will be referred to as the phi analysis and raw data analysis, respectively. The results are given in Table 10.

These analyses utilize the justices as variables in a Q-analysis and load them on factors which should be comparable to our R-analysis (response analysis) of the scales, since we are analyzing the same basic data. The resulting factor loadings give each judge a loading on the new factors. Since we already have factor scores for the justices from the R-analysis as well as their average ranks on the factors (see Table 9), and also have their ranks on all of the variables, we can compare the phi and raw data factors and locations of the justices in that factor space with the factor scores, factors, and variables from the R-analysis. This was done by correlating the judges' loadings with the factor scores and ranks using the product moment method. The variables that correlate with a phi factor will define the content of that factor (just as factor loadings do in a factor analysis) and the judges who load highly on that factor indicate which judges' values most influenced that factor.

The factors from the raw data replicated our R-analysis quite nicely. Principal axis number 1 (P1) correlated with Liberal Nationalism at .77, a significance level of .001. It also correlated with the same variables which loaded on

---

<sup>5</sup>See Chap. 1 above. This correlation differs from phi in that no distinction is made between justices dissenting together and joining a majority opinion. It is essentially an interagreement correlation which is determined by the percent of total cases in which two justices "agreed."

Table 10.--White Court Justices' Average Ranks for Major Factors and Loadings on Q-Analysis, 1910-1915

<u>Ranks</u>	Lib- eral Nat.	St. Pro- gres.	Lib tar ism.	Jud. Res.	Fed.	Com. Pow.	Gen. Wel.	Lai- sez Far.	Gen. Lib- tar ism.	Pro- gres siv ism	
Holmes	7	4	4½	5	6	6	8	7	3	7	6
Pitney	1	1	11	9½	5	4½	3	8½	10	1	1
White	9	11	7	4	7	10	10	8½	5	10	10
McReynolds	10	9	9	1	1	8	4	4	8	4	11
Day	4	5	6	9½	9	7	2	6	9	9	5
VanDevanter	6	10	10	8	10	9	11	5	11	11	7
McKenna	5	3	8	6	11	1	8	1	7	6	4
Hughes	3	2	2	3	3	4½	6	10	1	3	3
Lamar	8	6	3	7	8	2	5	2	6	5	8
Lurton	11	7	4½	2	4	3	8	3	2	2	9
Harlan	2	8	1	11	2	11	1	11	4	8	2

See Table 7 for full names of factors.

Raw Data Q-Analysis Loadings

	P1	P2	P3	Q1	Q2	Q3	Q4
Holmes	.52	-.33	-.06	.59	.01	-.17	.00
Pitney	-.52	-.14	.08	-.36	-.39	.08	.11
White	.35	.42	-.12	.05	.56	-.10	-.02
McReynolds	.00	-.01	-.38	-.08	.06	-.46	.11
Day	-.15	.13	.37	-.13	.00	.40	.07
VanDevanter	.22	.41	.23	.00	.46	.23	.10
McKenna	-.03	.19	-.17	-.11	.07	.07	-.51
Hughes	.01	-.27	.15	.17	-.22	.07	.13
Lamar	.16	.04	.29	.14	.12	.21	.19
Lurton	.44	-.24	.23	.53	.01	.15	.03
Harlan	-.20	.08	.18	-.21	.00	.08	.32

P = Principal Axes

Q = Quartimax

Quartimax loadings are identical to the varimax.

---

-Analysis Loadings

<u>P2</u>	<u>Q1</u>	<u>Q2</u>	<u>Q3</u>	<u>Q4</u>	<u>Q5</u>
.22	.02	.23	.01	.45	-.22
.27	-.66	-.03	.01	.02	.07
-.28	.46	.03	-.19	.07	.45
.08	-.08	-.13	.54	.22	-.16
.06	.13	.13	.03	-.67	-.08
.14	.04	.02	.54	-.11	-.02
-.67	.05	-.77	-.03	-.11	-.12
.02	-.13	.03	-.03	-.05	.43
.34	-.16	.24	.30	.06	.07
.30	-.60	.04	.00	.09	.06
.31	.38	.59	-.15	-.35	-.27

---

e

e

ism

onalism

straint



liberal Nationalism factor.<sup>6</sup> It is equivalent varimax and quartimax (Q1) factors. Quartimax loadings were identical in all Q-factors and Lurton load in an anti-Liberalism Pitney is pro-liberal. This roughly corresponds to ranks on that factor (Table 9). It may represent a pro-state attitude system or correlates with State Progressivism (.62), Federalism (.52), all in a pro-state direction. It also correlates highly with the varimax factors. White and Van Devanter were pro-federal, being strongly pro-federal as the factor P4 loadings indicate. The factor P4 loadings indicate independence with Judicial Restraint at a weak level. The justices loading on this, as one might expect, are McReynolds, being pro-restraint, and showing activist attitudes.

represents a pro-state attitude system or correlates with State Progressivism (.62), Federalism (.52), all in a pro-state direction.

It also correlates highly with the varimax factors. White and Van Devanter were pro-federal, being strongly pro-federal as the factor P4 loadings indicate. The factor P4 loadings indicate independence with Judicial Restraint at a weak level.

The justices loading on this, as one might expect, are McReynolds, being pro-restraint, and showing activist attitudes.

max loadings are quite similar, but Q2 has more rights and more national liberalism varimax loadings. This is a general Progressivism factor. White and

---

le had to correlate at better than a significance level of .10 to justify a finding of such a rela-

Van Devanter are still conservative, and Pitney shows up as being pro-liberal. A fourth factor, Q4, shows a complex factor, being pro-state in Federalism (correlating .66), pro-federal in Commerce Powers (.52), and pro-Laissez-faire in general (.61). Its variable content adds evidence to the existence of a Laissez-faire factor. Harlan favors national commerce powers, state power in Federalism, and is anti-Laissez-faire or pro-government. McKenna is his opposite on all counts.

Analysis of our phi factors gives less obvious but similar results. P1 and Q1 are pro-states' rights factors. P1 correlates .55 with Commerce Power and .46 with Judicial Restraint. Q1 correlates .52 with State Progressivism and .54 with Commerce Power. Pitney, Lurton, McReynolds, and McKenna are pro-state and White, Harlan, and Dar are pro-federal.

P2 is another Laissez-faire factor but also correlates with Federalism. McKenna and White are pro-Laissez-faire and pro-federal while Lamar, Lurton, Harlan and Pitney are pro-state and pro-government.

Q2 is similar to the raw data Q4 factor, Laissez-faire. Q3 combines the attitude systems of Liberal Nationalism (.45), State Progressivism (.47), and Libertarianism (.44) suggesting that it might be termed Equalitarianism (see Schubert, 1965a, p. 200) since it includes both

political and economic equality. We also found a subcomponent of Libertarianism to be describable in these terms. McReynolds and Van Devanter are the most anti-Equalitarian justices.

Q4 is Liberal Nationalism. Harlan and Day are liberals and Holmes is conservative. Q5 is similar to judicial Restraint as was the raw data Q3, except that in Q5 White and Hughes are pro-restraint while Harlan is an activist. McReynolds and Day do not load high on this factor.

Hence, both of the Q-analyses add evidence to our findings of attitudinal systems of Liberal Nationalism, Judicial Restraint, Progressivism, and Laissez-faire, and suggest the existence of composite factors of States' Rights and Equalitarianism. The latter two composites may be the result of underlying values within the data. Federalism, Commerce Powers, General Welfare, and State Progressivism do not form separate factors, but our other evidence seems adequate to prove their validity as well.

Although this method is an improvement on a technique of Schubert (1965a, chap. 7), its utility may be questioned because the spatial arrangement of the justices exerts a powerful influence on the placement of the axes which, since it is based on so few points (the judges), may be misleading.

The attitudinal structure of the second period of the White Court will now be examined for similarities and differences with this period.

## CHAPTER 4

### ATTITUDINAL FACTORS OF THE COURT, 1916-1921

This period covers cases with dissents or concurrences decided from October 1916 to June 1921.

This Court includes nine justices who sat for the full period. Chief Justice White, who died a few weeks before the end of the October 1920 term, provides a mild exception to this. Justices Brandeis and Clarke joined the Court before the start of the period, but decided their first cases in the October 1916 term as replacements for Hughes and Lurton. Besides White, the judges who remained on this Court were: Holmes, Pitney, McReynolds, Day, Van Devanter, and McKenna.

The time period covers roughly Wilson's second term and, in contrast to the first period, the cases deal with acts and policy of the Wilson administration. If some cases dealt with Republican-sponsored laws such as the Hepburn Act or Sherman Act, it was at least the Democratic implementation and interpretation of these acts. Hence, if any party identification occurred in this period the Democrats would identify with federal actions and the Republicans with opposition to them. Several specific cases in which this

occurred will be discussed in later chapters. The party division on the Court was evenly divided. White, Brandeis,<sup>1</sup> Clarke, and McReynolds were Democrats appointed by Democratic presidents. Holmes seems essentially apolitical. The rest were former Republican politicians. Whereas Lurton and Lamar, who were Democrats appointed by Taft, may have felt some political loyalty conflicts, no such conflicting loyalties are apparent in this period.

By all the measures of dimensionality tested, the second period has significantly fewer dimensions than the first. It is possible that the fewer number of justices in this period (22 per cent less) reduces the complexity of the data enough to account for this finding. Evidence indicates, however, that the attitude structure of the second period is less complex than the first period to a greater extent than may be explained by the smaller number of justices involved.

As Table 3 shows, period two has the significantly higher average C.R. of .934 as compared to .907 for the first period. The number of justices should not lower the C.R. More justices would have an inflating effect, if any. Furthermore, when Table 8 is compared to Table 16, the total 50-variable analysis for the second period is seen to have

---

<sup>1</sup>Brandeis registered as a Republican at times, but until 1912 he was loyal to neither party. He had considered running for office as a Democrat, however. After 1911 (or earlier) his identification with Wilson and the Democrats seems complete. See Mason, 1946.

a Kendall's Coefficient of Concordance which is 125 per cent higher than the first period, an average tau which is 133 per cent higher, a first dimensional explanation of variance which is 72 per cent higher, and a T-scale score which is only two-thirds of the corresponding first period score. All of these figures exceed normal expectations of less complexity in the data due solely to having two fewer respondents in the analysis. Furthermore, the other corresponding measures of Tables 8 and 16 indicate that the fewer number of factors in the second period offer a more complete explanation of the data than is true of the first period.

The second period was indicated by the Kruskal technique to have at least six dimensions in the 50-variable analysis. The stress was reduced to 4.5 per cent at six dimensions (compared to 5.5 per cent in the first period data: see chap. 3 above). The eigenvalue method suggested a maximum of nine dimensions in the 50-variable analysis and seven dimensions in a 41-variable analysis which was purged of duplicate cases between scales. The 50-variable, 6-dimension solution accounted for 75 per cent of the variance while the 41-variable, 6-dimensional solution accounted for a similar 74.3 per cent of the variance. At four dimensions the 50-variable solution accounted for 64 per cent of the variance while a 29-variable analysis composed of combined scales accounted for 68 per cent. This higher figure is much less than one would expect for a 40 per cent reduction in the number of variables, so a conclusion of six

attitudinal dimensions is strongly supported by most indicators.<sup>2</sup> The Keil-Wrigley criterion also indicated six dimensions in the 41-variable varimax analysis but suggested only three in a quartimax analysis. The six dimensions defined below can also be explained in terms of three principal factors.

This period also contains a much more clear as well as a more simplified factor structure than the first period. Part of this could be due to the strength of the scales resulting from a Court composed of nine judges setting for the full period. This does not leave any "gaps" in our scales as in the first period where 11 judges were ranked but only nine judges voted in any case (and often only 8). More cases are available, the rankings are based on more cases per scale, and it was unnecessary to face the alternatives of either inferring ranks or remaining content with ties. Lastly, few tie-breaking cases from other time periods of the Court are necessary. Such cases based on assumption of invariance of attitudes, could contain errors due to influences external to the Court, different sociometric relationships, or changes in attitudes due to aging.

Beyond all these considerations, the second period contains fewer attitude systems and simpler components of

---

<sup>2</sup>A preliminary 20-variable analysis of the second period cases, omitting those with concurrences only, indicated at least five dimensions.





de systems or factors in the order of their  
 1) State Progressivism, (2) Libertarianism,  
 nationalism, (4) Federalism, (5) Darwinism,  
 re, and as in the first period a marginal  
 laissez-faire or anti-government.

Progressivism and Liberal Nationalism combine  
 factor, Progressivism, as in the first

Progressivism is much larger and firmer here  
 period. It contains all the state regula-  
 variables including all the Commerce vari-  
-economic (32), Conservation (14), Land  
Rate Regulation (46), and Workmen's  
-Federal-State Conflict (9) which in this  
 largely state laws in contrast to the cor-  
 le in the first period.

Libertarianism is comparable to the first period  
 anism. It also includes some judicial  
 and is defined the same as in the first  
 civil liberty variables except the Indian  
 associated with it including Business:  
n (43), but Land Claims (16) is only mar-  
 d with it but is opposite in direction.  
 erty direction is in opposition to the

civil rights of Negroes. In addition Private Contracts (53) and Bankruptcy (28) associate with this factor. It is anti-liberty of contract and pro-debtor in these cases. This is consistent with the equalitarian and pro-labor content of this factor. Property Rights (56) threatened by state government loads on this factor but not Property Rights (55) threatened by the federal government. However, most of the First Amendment (1) and Aliens (6) cases and all of the Criminal (4) and judicial power variables are anti-federal power. This suggests that this factor contains an anti-federal power. This suggests that this factor contains an anti-federal element which accounts for the directionality of the Civil Rights variable in which the disadvantaged rights claimant seeks federal protection against state actions. This factor also combines with Federalism on many analyses, supporting the anti-federal element of this factor.

3. Liberal Nationalism seems to have lost those variables which were suggested to be part of a Social Darwinism sub-factor in the first period. It now contains all federal regulations except the Antitrust (30) and Discrimination (24) variables. In addition it contains Corruption in Government (37) and Corruption in Business (44). Here both scales contain mostly cases involving the federal government. The latter scale contained mostly state cases in the first period. Prohibition now loads with this factor in contrast to the first period where it loaded with State Progressivism or Commerce Powers. In this period, in contrast, Prohibition

involved federal laws and enforcement and, hence, clearly involved federal powers.

4. Federalism is quite similar to the first period factor. It does not involve Conservation and Land Claims but does contain Workmen's Compensation; Federal-State Conflict (8) and Civil Rights (15). The latter does involve a federal-state conflict as previously mentioned.

5. Social Darwinism has previously been described in the last chapter. It involves favoring the larger economic unit or dominant force against the smaller and weaker. It opposes any "artificial" or paternalistic intervention by courts or government into this social struggle. This includes trust regulation (29), 30), and (24) as well as liability variables (25), (26), and (27), and (48). In addition it includes opposition to federal protection of Indians (5) and Negroes (15) from state or local oppression by more powerful white forces. Lastly, it upholds state rights to slight records and laws of other states under the Full Faith and Credit Clause (39) and opposes state taxation of interstate corporations (34). It opposes judicial intervention into the political struggle in 41 and 57. The opposing viewpoint to Darwinism might be termed "Paternalism."

Darwinism and Federalism associate closely and seem to form a larger factor called Autonomy. This attitude system favors smallness in both economic and political units since it favors antitrust actions, small businesses in liability

cases, and state regulation opposed to federal power. The obverse attitude system admires the efficiency or strength of large business units, federal power, and the dominant race.

6. General Welfare is similar to the first period factor and includes support of Conservation (14), Land Claims (16), opposes business in Patents (29) and federal Fiscal Claims (18), and opposes corruption in all forms.

7. Laissez-faire is also similar to the first period factor and is equally weak. It also shifts greatly in variable content.

Other factors emerge but are not repeated in other analyses. These include a liability factor, a judicial power factor, a factor favoring federal jurisdiction in support of liberty such as in Civil Rights (15) and Indian rights (5) and a factor supporting the rights of property and creditors including variables 3, 28, 49, 52, 55, and 56. The evidence verifying the existence of these factors is too scanty to warrant much confidence in them.

Table 11 gives the most common variable content of these factors. Table 12 shows the highest variable loadings on the above defined factors in eleven analyses and Table 13 shows the results from pattern analysis. As can be seen the factors are quite similar between different methods, different rotations, and analyses using different numbers of variables. Only General Welfare and Laissez-faire fail to

Table 11.--Variable Content of Attitudinal Factors for  
1916-1920 Period

Progressivism Factor

Liberal Nationalism Factor

- 17. Corruption
- 20. Fed. Reg: Non-economic
- 21. Fed. Reg: Economic
- 22. I.C.C.
- 23. Rate Regulation
- 37. Corruption: Govt.
- 38. Prohibition
- 44. Corruption: Business
- 45. Federal Rates
- 47. Federal Regulation
- 51. Economic Regulation
- 56. CL Property: Federal

State Progressivism Factor

- 9. Work. Comp: Non-Fed.-State
- 10. Due Process
- 11. State Tax
- 12. Contract
- 13. Commerce
- 14. Conservation
- 16. Land Claims
- 19. Fiscal Powers
- 32. Federalism: Economic
- 34. Commerce: State Tax
- 35. Commerce: No Tax
- 36. State Tax: Due Process
- 46. State Rates

Autonomy Factor

Darwinism Factor

- 5. CL Indians
- 15. Civil Rts.
- 24. Discrimin.
- 25. Gen. Lia.
- 26. Lia. Ins
- 27. Lia. R.R.
- 30. Antitrust
- 39. F.F. & C.
- 41. Jud.Pow.Lib.
- 43. Bus. S.Incr.
- 48. Lia.R.R.F-S
- 54. Total Lia.
- 57. Gen. J.Pow.

Federalism Factor

- 8. Work. Compen: Fed-St.
- 15. Civil Rights
- 29. Patents
- 31. Federalism
- 32. Federal: Economic
- 33. Federal: Non-economic

Libertarianism Factor

- 1. First Amendment
- 2. Civil Liberty
- 3. C.L. Property
- 4. Criminal Due Process
- 6. Civil Liberty Aliens
- 7. Labor
- 15. Civil Rights
- 18. Fiscal Claims
- 28. Bankruptcy
- 40. J.P. Lower Fed. Courts
- 42. J.P. Conservative
- 43. Business Self-inc.
- 49. State Bankruptcy
- 52. Fed. Bankruptcy
- 53. Private Contract
- 55. C.L. Property State
- 57. General Judicial Power

General Welfare Factor

- 17. Corruption
- 14. Conservation
- 16. Land Claims
- 18. Fiscal Claims
- 29. Patents
- 37. Corruption: Govt.
- 44. Corruption: Bus.

Laissez-faire Factor

- 3. Civil Liberties: Prop.
- 6. Civil Liberties: Aliens
- 18. Fiscal Claims
- 20. Fed. Reg: Non-economic
- 37. Corruption: Govt.
- 38. Prohibition

See Tables 1 and 2 for full names of scales.

Table 12.--Highest Loadings of Variables Across Various  
Factor Analysis Solutions

Variables	44	29	50	50	50	41	41	41	50	50	50
Dimensions	5	5	4	6	7	4	6	6	4	6	5
Rotations	VR	VR	VR	VR	BQ	VR	VR	BQ	VR	VR	BQ

State Progressivism

9. W. Comp. Non FS	P	A	P	P	P	S	S	SD	PD	S	P
10. Due Process	P	P	P	P	P	S	S	S	P	S	P
11. State Tax	P	P	P	P	P	S			P	S	P
12. Contract	P	P	P	P	P	S	S	S	P	S	P
13. Commerce	P	P	P	P	P				P	S	P
14. Conservation	P		P	P	P	S	S	S	LP	S	P
16. Land Claim	P		P	P	P	S	S	S	LP	S	PD
19. Fiscal Power	P	P	P	P	P	S	S	S	P	S	P
34. Com: St. Tax	P		A	P	P	S	S	S	P	S	P
35. Com: No Tax	P		P	P	P	S	S	S	P	S	P
36. Tax D.P.	P		P	P	P	S	S	S	P	S	P
46. State Rate		P	P	P	P	S	S	S	P	S	P
58. Cons.-L.Claim	P										

Liberal Nationalism

17. Corruption	P	P	P	NP	N	NS	N	N	P	NG	P
20. Fed. Reg. Non-econ.			P	P	P	SN	NS	NS	P	SN	P
21. Fed. Reg. Economic	P		P	P	F				P	N	P
22. I.C.C.	P		P	P	P	N	N	N	PD	DN	P
23. Rate	P		P	P	P						
37. Cor: Govt.	F		P	P	GN	SN	N	N	P	NG	P
38. Prohibition		N	P	N	N	N	N	N	Z	N	Z
44. Cor: Bus.	P	P	P	NP	N	NS	N	N	P	N	P
45. Fed. Rate			P	NP	N	N	N	N	P	N	P
47. Fed. Regn.	P	NP									
51. Econ. Regn.		P									
56. CL Prop. Fed.						N	N	N	Z	N	Z

Darwinism

5. CL Indian				L	N	D	D	D	DZ	D	ZD
24. Discrimination	D		A	PD	PD	SD	D	D	PD	D	P
25. Gen. Lia.	D	D	A	D	D				D	D	D
26. Lia. Ins.	D		A	D	D	D	D	D	D	D	DP
27. Lia. R.R.	D		A	D	D	D	D	D	D	D	DP
30. Antitrust	D	P	A	ND	D	D	D	D	DZ	D	PZ
39. FP & C	D		A	D	D	D	D	D	D	D	PD
41. J.P. Liberal		N		L	G	N	DG	G	D	D	D
43. Business SI	D		L	DF	DF	N	D	D	D	D	D
48. Lia. R.R. FS			A	D	D						
54. Total Lia.			A	D	D						
57. General JP			L	D					D	D	D

Table 12 (cont'd.)

Variables	44	29	50	50	50	41	41	41	50	50	50
Dimensions	5	5	4	6	7	4	6	6	4	6	5
Rotation	VR	VR	VR	VR	BQ	VR	VR	BQ	VR	VR	QT

Federalism

8. Work Comp. FS	P		A	F	F	S	F	F	P	F	FP
15. Civil Rights	D	FL	L	DF	F	L	FD	FD	D	FD	FD
29. Patents	F	F	A	F	G	D	G	GF	Z	G	Z
31. Federalism	F		A	F	F				P	F	F
32. Fed: Econ.	F	F	P	F	F	S	F	F	P	F	FP
33. Fed: Non-economic	F	F	A	F	F	D	F	F	P	F	F

Libertarianism

1. First Amendment	L	L	L	L	L	L	L	L	L	L	L
2. Gen. Civil Lib.	L		L	L	L						
3. CL Property	L	FL	L	L	L				LZ	G	ZL
4. Criminal	L	L	L	L	L	L	L	L	L	L	L
6. CL Aliens	L		L	L	L	L	GL	LG	ZL	G	ZL
7. Labor	L	L	L	L	L	L	L	L	L	L	LP
19. Fiscal Claim	L	L	L	L	L	L	L	L	L	L	LP
28. Bankruptcy	L	L	L	L	L				L	L	LP
40. JP Low Fed Ct	L	L	L	DL	L						
42. JP Conservative	L	L	L	L	L	L	L	L	L	L	PL
43. Business SI											
49. State Bank						L	L	L	L	L	PL
52. Fed. Bank						L	L	L	L	L	L
53. Private Contract	L		L	L	L				L	L	PL
50. Workmen Compen.		P									
55. CL Prop. St.						D	G	GD	Z	G	Z

Progressivism

Party	P					S	S	S	P	S	P
	FL	L	FL	L	L	FL	FL	ZL	FL	FL	

See Tables 1 and 2 for full name of variable and Chapter 2 for description. The 41-variable analyses include all exclusive scales. The three rightmost analyses above include revised and refined variables. Where two factors are shown, the leftmost one has a slightly higher loading.

## Key to above symbols:

P = Progressivism factor

N = Liberal Nationalism factor

S = State Progressivism factor

F = Federalism factor

L = Libertarian factor

D = Darwinism factor

A = Autonomy factor

G = General Welfare factor

Z = Laissez-faire factor

## Rotations

VR = Varimax

QT = Quartimax

BQ = Biquartimin Oblique Rotation

Note that on some factors  $P = N + S$ . Also  $A = F + D$ .

Table 13.--Content of Factors Identified by Pattern AnalysisMcQuitty Hierarchical Syndrome Analysis<sup>a</sup>Progressivism Factor

- 8. Work Compensation: Federal-State
- 9. Work Compensation: Non-Federal-State
- 10. Due Process
- 11. State Tax
- 12. Contract
- 13. Commerce
- 14. Conservation
- 16. Land Claim
- 17. Corruption
- 19. Fiscal Power
- 20. Federal Regulation: Non-economic
- 21. Federal Regulation: Economic
- 22. I.C.C.
- 23. Rate Regulation
- 32. Federal: Economic
- 35. Commerce: No Tax
- 36. State Tax: Due Process
- 37. Corruption: Government
- 39. F.F. & C.
- 44. Corruption: Business
- 45. Federal Rates
- 46. State Rates

Libertarianism Factor

- 1. First Amendment
- 2. Civil Liberties
- 3. Civ. Lib. Property
- 4. Criminal Due Process
- 6. Civ. Lib. Aliens
- 7. Labor
- 18. Fiscal Claims
- 28. Bankruptcy
- 42. J. Power Conservative
- 53. Private Contracts  
Party

Darwinism Factor

- 24. Discrimination
- 25. General Liability
- 27. Liability Railroad
- 30. Antitrust
- 34. Commerce: State Tax
- 48. Liability R.R. PS
- 54. Total Liability

Federalism Factor

- 29. Patents
- 31. Federalism
- 33. Federal: Non-economic



Table 13 (cont'd.)McQuitty Similarity Analysis<sup>b</sup>Progressivism Factor

- 9. Workmen Compensation: Non-Federal-State
- 10. Due Process
- 11. State Tax
- 12. Contract
- 13. Commerce
- 14. Conservation
- 16. Land Claim
- 17. Corruption
- 19. Fiscal Power
- 20. Federal Regulation: Non-economic
- 22. I.C.C.
- 23. Rate Regulation
- 35. Commerce: No Tax
- 36. State Tax: Due Process
- 37. Corruption: Government
- 44. Corruption: Business
- 45. Federal Rates
- 46. State Rates

Libertarianism Factor

- 1. First Amendment
- 2. Civil Liberties
- 3. Civil Liberties: Property
- 4. Criminal Due Process
- 6. Civil Liberties Aliens
- 7. Labor
- 15. Civil Rights
- 18. Fiscal Claims
- 28. Bankruptcy
- 40. Judicial Pow. Low Fed. Cts.
- 42. Judicial Pow.: Conservative
- 43. Business Self-incrimination
- 53. Private Contracts

Darwinism Factor

- 24. Discrimination
- 25. General Liability
- 26. Liability Insurance
- 27. Liability Railroads
- 30. Antitrust
- 34. Commerce: State Tax
- 39. F. F. & C.
- 48. Liability R.R. FS
- 54. Total Liability

Federalism Factor

- 8. Workmen Compensation: Federal-State
- 21. Federal Regulation: Economic
- 31. Federalism
- 32. Federal: Economic
- 33. Federal: Non-economic

Table 13. (cont'd.)

Price Hierarchical L. A. W. S<sup>c</sup>Progressivism Factor

- 8. Workmen Compensation: Federal-State
- 11. State Tax
- 12. Contract
- 13. Commerce
- 14. Conservation
- 16. Land Claim
- 17. Corruption
- 19. Fiscal Power
- 20. Federal Regulation: Non-economic
- 21. Federal Regulation: Economic
- 22. I. C. C.
- 23. Rate Setting
- 32. Federalism: Economic
- 35. Commerce: No Tax
- 36. State Tax: Due Process
- 37. Corruption: Government
- 44. Corruption: Business
- 45. Federal Rates
- 46. State Rates

Libertarianism Factor

- 1. First Amendment
- 2. Civil Liberties
- 3. Civ. Lib. Property
- 7. Labor
- 9. Work. Comp: Non FS
- 10. Due Process
- 11. State Tax
- 14. Conservation
- 18. Fiscal Claims
- 19. Fiscal Power
- 20. Fed. Reg.: Non-econ.
- 23. Rate Regulation
- 36. State Tax: Due Process
- 42. J. Power: Conservative
- 40. J. Power: Low.Fed.Cts.
- 53. Private Contracts
- 46. State Rates
- 57. General Judicial Power

See Tables 1 and 2 for  
full names of scales.

Liberal Nationalism

- 11. State Tax
- 17. Corruption
- 19. Fiscal Power
- 20. Federal Reg.: Non-econ.
- 23. Rate Regulation
- 37. Corruption: Government
- 44. Corruption: Business
- 45. Federal Rates

Darwinism Factor

- 24. Discrimination
- 25. General Liability
- 26. Liability Insurance
- 27. Liability Railroads
- 30. Antitrust
- 48. Liability R.R. FS
- 54. Total Liability

Federalism Factor

- 8. Work. Compens: Fed.-St.
- 21. Federal Reg.: Economic
- 31. Federalism
- 32. Federal: Economic
- 33. Federal: Non-economic

<sup>a</sup>McQuitty, 1966a.<sup>b</sup>McQuitty, 1965.<sup>c</sup>Price, 1969.

up with a stable variable content.

is the 41-variable, two-dimensional quartimax variables with a minimum of duplicate cases. and with Figure 12, the 50-variable quartimax well as Figures 3 and 4 which show the vari- -1915 period. The similarities are quite second period clusters are much tighter well-defined factors as the other evidence Liberal Nationalism in the first period loses and becomes Darwinism on the second period Progressivism is better defined and larger in . The third major cluster (in Figures 3 and ralism variables and shows up as Libertarian- period. The major axis (I) still measures in the first period. This is shown by the liberal variables appearing on the extreme the graph and variables unrelated to Progressivism are near the center of the graph. a variable also affirms this interpretation Axis I in both Figures 11 and 12. is located in a different position from the first period graphs only because here ition in direction.

Progressivism cluster can be much more satis- as Progressivism here than was possible in study. The corruption variables (17, 37, 44)

See Tables 1 and 2 for names of variables below.

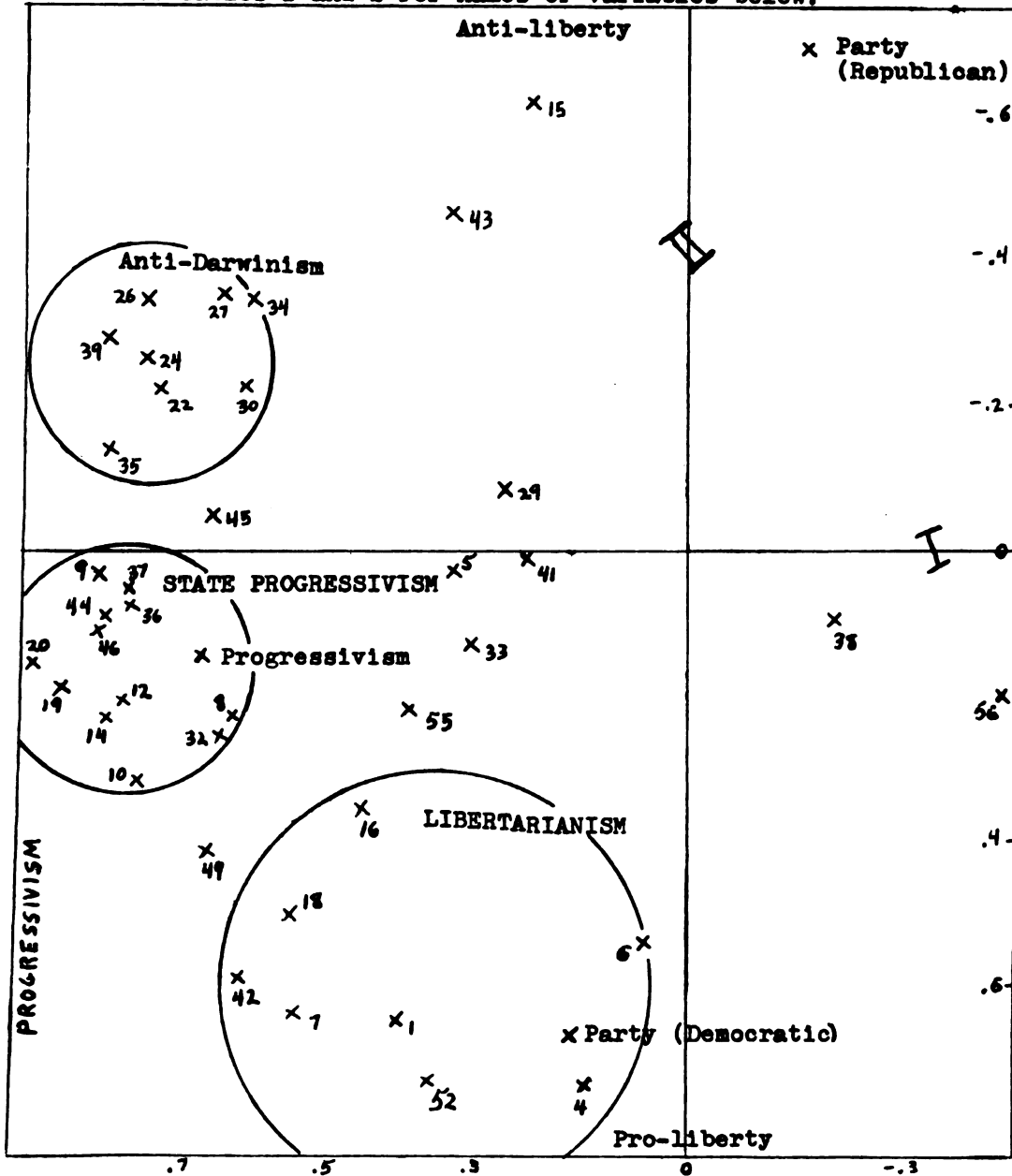


Figure 11.--Quartimax Configuration of 2-Dimensional Solution of Exclusive 41-Variable Factor Analysis, 1916-1920 Period

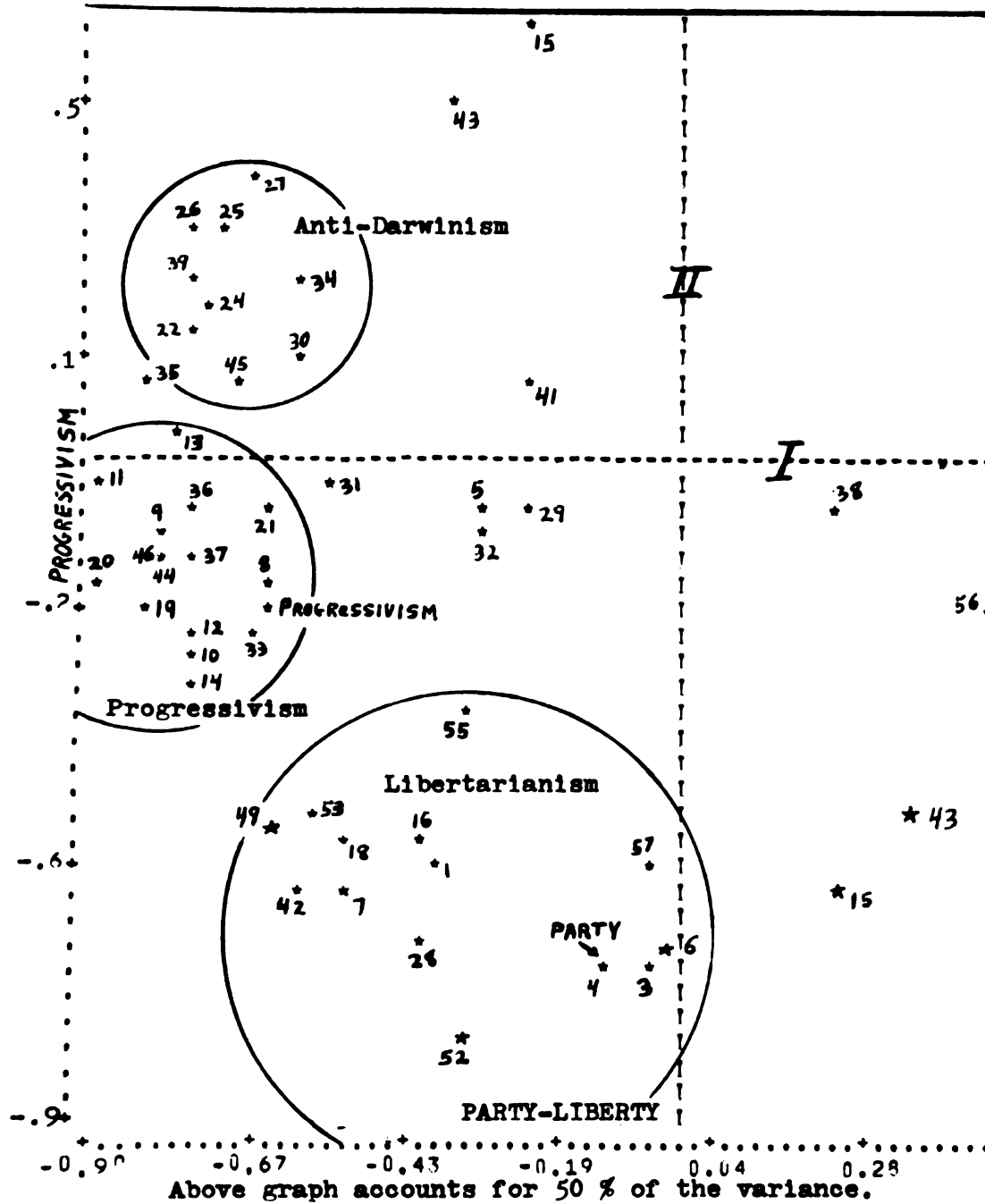


Figure 12.--Quartimax Configuration of Two-Dimensional Solution of Refined 50-Variable Factor Analysis, 1916-1920 Period



are located in the center of State Progressivism as would be expected from the Progressivist moral condemnation of such activities. Furthermore, both workmen's compensation variables (8, 9) are located there as well as Fiscal Power (19) which contains largely federal income and corporate tax cases which was a central Progressive proposal. Conservation (14) also loads here. The Darwinism cluster (here in an anti-Darwinist, anti-big business direction) also conceivably could be part of a larger cluster including State Progressivism. This would constitute a Progressivism factor which would be quite similar to the first period Progressivism.

Also of note is the fact that variables in Libertarianism which contain an economic content and may reflect an equalitarianism attitude are located quite close to State Progressivism and load fairly high on the Progressivist axis (I). They include State Bankruptcy (49), Land Claims (16), Fiscal Claims (18), Judicial Power: Conservative (42), Private Contracts (53), and Labor (7).

The major difference between the first and second period two-dimensional graphs is that axis II as well as the third cluster seems to measure different attitude systems. In the first period, axis II and the third cluster represents Federalism. In the second period, axis II and the third cluster represents Libertarianism. This difference may be due solely to the size of the factor. Hence, in the second period since Federalism is a less important factor, it does not

emerge until the fourth or fifth factor is extracted. In the first period Federalism is the second largest factor and emerges in the two-dimensional solution. If the reader will visualize a five-dimensional space consisting of five axes, a plane can be passed through the space so that any two axes will determine a two-dimensional configuration of points. Hence, the difference between the first and second period graphs is not necessarily due to a difference between the factors but to their general size and importance.

Thus in Figures 11 and 12, Indians (5) and the Federalism variables (31, 32, 33) are not on axis II as they are in Figures 3 and 4 of the first period.

Axis II may show some slight evidence of measuring Federalism since Civil Rights (15), Antitrust (30), Discrimination (24), I.C.C. (22), and Federal Rate (45) are above the axis while most state regulation variables and many variables which are anti-federal in direction (1, 4, 6, 42, 52) are below the axis. However, this is seen on careful examination to be part of a more general pro-liberty concept. Libertarianism by definition is pro-liberty. The Darwinism factor (which is pro-government and anti-Darwinist in direction in Figures 11 and 12) also involves a pro-liberty concept. It involves the concept that freedom from restraint in the economic and social struggle preserves the best interest of the society. It is in the proper position to confirm the liberty content of this axis. Business: Self-incrimination



1

(43) is also anti-liberty (of corporations) in direction in these graphs. The Civil Rights variable (15) may seem to contradict the liberty interpretation of this axis, however, while it is pro-Negro it is anti-liberty in terms of the rights of the white population to settle their own local affairs and is anti-Darwinist and paternalistic. Hence, axis II is pro-liberty, pro-Darwinism, and may be anti-federal in the sense that federal power threatens individual and local liberty or democracy.

A significant finding is that in both periods the primary axis represents Progressivism and the secondary axis coincides with political party (on all types of rotation and non-rotation). However, in the first period, party seems to influence attitudes toward Civil Rights (15) and Federalism, while in the second period it influences Civil Rights and Libertarianism. It associates with both of these factors in both periods.

Two-dimensional graphs of a 44-variable analysis and an earlier 50-variable analysis also gave quite similar configurations and clusters to the above and allowed the same interpretation of the axes as above. A two-dimensional smallest space analysis also gave the same approximate clusters with the addition of a Federalism cluster.

Ample evidence exists that the Table 11 factors are stable. Progressivism was found on an early 50-variable study on the two-factor through the six-factor solutions for both

varimax and oblique analysis, on a refined 50-variable analysis on the four- and five-factor varimax and all quartimax solutions, and on all quartimax solutions of the 41-variable study. It was present in all pattern analysis studies. On a 29-variable analysis, a 50-variable oblique analysis, a 41-variable varimax, and the 50-variable quartimax, Progressivism combined with Libertarianism to form an equalitarian factor.

State Progressivism was found on all other solutions including the exclusive 41-variable varimax solutions from the four-factor through the eight factor solutions as well as the refined 50-variable varimax six- and seven-factor solutions.

Liberal Nationalism was present on the Price L. A. W. S. analysis, the seven-factor 50-variable oblique, the six- and seven-factor refined 50-variable varimax solutions and the 41-variable varimax solutions from the four- to the eight-factor solutions.

Libertarianism was present on all studies of two factors or more. However, on several quartimax solutions it lost the variables with an economic content (7, 18, 28, 53) and seemed to represent purely civil liberties.

Autonomy, in which both Federalism and Darwinism combined, was found on the early 50-variable study only. It was present on the three- and four-factor varimax, the five-factor

quartimax, and the three-factor oblique solutions.

Darwinism was present on all other solutions of three factors or more and was seen to be the third largest factor after State Progressivism and Libertarianism. Federalism was present on most five-factor varimax solutions and all six-factor varimax and oblique solutions as well as many quartimax solutions.

General Welfare shifted in content but was present on the 41-variable varimax rotations of the five- to the eight-factor solutions and the refined 50-variable varimax six- and seven-factor solutions.

Laissez-faire was present on the 41-variable, three-factor varimax solution and the refined 50-variable quartimax solution from the three-factor to the seven-factor solutions.

The per cent of variance explained by these factors is as follows: State Progressivism 18-22 per cent, Libertarianism 16-19 per cent, Darwinism 13-14 per cent, Liberal Nationalism 9-13 per cent, Federalism 8-10 per cent, General Welfare 9 per cent, and Laissez-faire 8 per cent. These factors explain a minimum total of 81 per cent of the variance of the data.

Table 14 shows the factor loadings of the varimax rotation of a six-factor refined 50-variable factor analysis showing all of the above factors except Laissez-faire.

Table 15 shows the five-dimensional factor loadings of the

Table 14.--Six-Dimensional, Fifty-Variable Varimax  
ROTATED FACTOR LOADING MATRIX, 1916-1920 Period.

	1	2	3	4	5	6
1.	+0.1798	+0.7906	-0.1346	-0.2262	-0.1724	0.1072
55.	-0.1119	-0.1283	-0.2379	-0.0816	-0.0208	-0.7626
56.	0.0920	0.0817	0.1571	0.0805	0.6508	-0.1427
4.	0.1720	-0.7784	0.1046	-0.0721	-0.0747	-0.2011
5.	-0.0142	-0.1959	-0.5909	-0.0816	0.3606	-0.2910
6.	-0.1013	0.3449	0.0435	0.2011	-0.3050	0.6807
7.	-0.2146	-0.8568	-0.1417	-0.2253	0.0413	-0.0327
8.	-0.2634	-0.3432	-0.2849	-0.7073	-0.0313	0.0566
9.	-0.5295	-0.3875	-0.4937	-0.0558	-0.1388	-0.1531
10.	-0.4327	-0.6451	-0.3612	-0.3252	-0.0284	0.0985
12.	-0.7329	-0.3178	-0.0617	-0.1545	-0.1746	-0.1251
34.	-0.7173	0.3102	-0.2716	-0.2105	0.0943	-0.1213
35.	-0.7768	-0.1133	-0.2508	-0.0110	-0.3682	-0.0233
36.	-0.6952	-0.3908	-0.1841	-0.1614	-0.2130	0.2373
15.	-0.2278	0.2292	-0.4981	0.5047	-0.1890	0.1634
14.	-0.5734	-0.4342	-0.2899	-0.1303	-0.1906	-0.3016
16.	-0.6766	-0.2342	0.2227	-0.0277	0.1059	-0.4174
18.	-0.1571	-0.6622	-0.1244	-0.0721	-0.3248	-0.3450
19.	-0.5958	-0.4405	-0.3383	-0.3531	-0.1106	-0.0405
45.	-0.2830	-0.2197	-0.2160	-0.2797	-0.7522	0.0758
46.	-0.8141	-0.3554	-0.1210	-0.0889	-0.2345	0.0903
22.	-0.4584	-0.1076	-0.4215	-0.0612	-0.5134	-0.0544
24.	-0.5687	0.0341	-0.5839	-0.2968	0.0521	-0.0668
26.	-0.2940	-0.0673	-0.8220	-0.0602	-0.2289	-0.1790
27.	-0.4084	0.0187	-0.6887	-0.2546	0.0270	0.1695
20.	-0.5670	-0.4449	-0.3488	-0.3036	-0.3521	-0.0867
29.	-0.2060	0.3064	-0.0589	-0.2732	-0.0544	-0.5809
30.	-0.4058	0.1323	-0.5471	-0.2273	0.2005	-0.3207
32.	-0.3831	-0.2477	-0.0832	-0.6860	-0.2757	-0.1293
33.	-0.1030	0.0731	-0.0937	-0.8108	0.0948	-0.1675
52.	0.3212	0.6255	-0.2703	0.0792	0.0022	0.3168
49.	0.3553	0.6412	0.2779	-0.1199	0.1322	-0.4081
37.	-0.4288	-0.1617	-0.2723	-0.3117	-0.4636	-0.4264
44.	-0.3713	-0.3194	-0.3244	-0.2627	-0.5543	-0.2410
38.	0.0238	0.0549	-0.0960	-0.1223	0.6293	-0.0224
39.	-0.3554	-0.0417	-0.7681	-0.1275	-0.1335	-0.2440
43.	0.0467	0.1079	-0.6536	0.0241	-0.2082	0.0504
41.	-0.0177	-0.2547	-0.3649	-0.3545	0.0983	0.2544
42.	-0.4538	-0.7872	-0.0207	-0.0213	-0.0882	-0.1412
Prog.	-0.8180	-0.1802	-0.0265	-0.2092	0.1105	-0.1701
Party	0.0201	-0.3441	0.1876	-0.5597	0.2183	-0.4880
3.	0.0140	-0.2992	0.1897	-0.1014	0.1249	-0.2785
11.	-0.6263	-0.3876	-0.3700	-0.2785	-0.3000	0.0448
13.	-0.8139	-0.0267	-0.1626	-0.0511	-0.3453	-0.1178
21.	-0.2892	-0.2304	-0.1124	-0.6164	-0.4554	0.0750
28.	-0.4043	-0.5515	0.0404	0.1583	0.0200	-0.5692
25.	-0.1010	-0.1504	-0.8357	-0.1110	-0.2072	-0.0061
53.	-0.2558	-0.5702	-0.2717	0.0911	-0.3265	-0.5218
31.	-0.2385	0.0305	-0.1840	-0.7791	-0.2064	-0.1932
57.	-0.3602	-0.2283	0.5576	-0.1116	0.0383	-0.1956
	State Progress.	Libertar- ianism	Darwin- ism	Liberal National.	Federal- ism	General Welfare

See Tables 1 and 2 for names of variables.

Table 15.--Factor Loadings of 5-Dimensional, 41-Variable  
Oblique Rotation Factor Analysis, 1916-1920 Period.

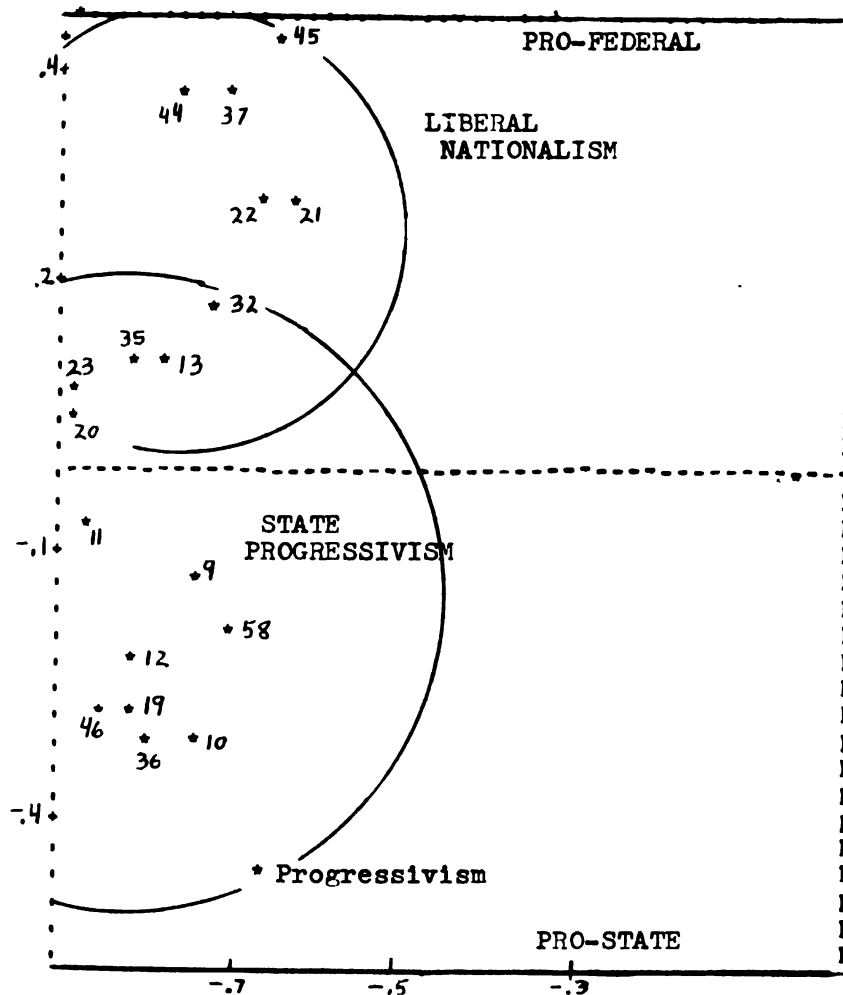
	<u>Factors</u>				
	1	2	3	4	5
	Libertar- ianism	State Progress.	Darwin- ism	Liberal National.	Federal- ism
1	.8643*	.2160	-.2105	.1681	-.2002 First Am.
2	.2537	-.2381	.4450*	.0589	.7164* CLPropSt
3	-.0722	.0595	-.0847	-.9363*	-.0424 CLPropFed
4	.9680*	-.2511	-.0844	.1344	.0282 Criminal
5	.2351	-.2014	.8149*	-.4145	.1212 CL Indian
6	-.5290*	.3761	-.2468	.2977	-.5012 CL Alien
7	.8554*	.1946	.1042	-.0594	-.1712 Labor
8	.3195	.4192*	.1450	.1516	.3503 WComp FS
9	.3035	.4043*	.4617	.0890	-.0710 WCompNoFS
10	.5622*	.4338*	.2405	.0121	-.1503 D.Process
12	.1790	.7541*	-.1425	.1339	.0732 Contract
34	-.5087	.6889*	.1750	-.0712	.2403 ComStTax
35	-.0207	.6605*	.1096	.3280	-.0621 ComNoTax
36	.2186	.7341*	-.0121	.1542	-.2515 Tax D.P.
15	-.3741	.0946	.6104*	.1333	-.5055*Civil Rts
14	.3906	.4674*	.2567	.0607	.0803 Conservn
16	.2267	.7274*	-.3067	-.2289	.2247 IdClaims
18	.7693*	.0156	.0993	.3738	.1728 F.Claims
19	.3032	.5630*	.1898	.0934	.0561 F.Power
45	.1759	.1584	.0730	.8234*	.1345 Fed Rate
46	.1715	.7750*	-.0899	.1605	-.1510 St. Rate
22	.0227	.3163	.3699	.5480*	-.0000 I.C.C.
24	-.2160	.5128*	.4831*	-.0787	.1486 Discrim.
26	-.0001	.0075	.8078*	.2371	.0983 Lia.Ins.
27	-.2050	.4370	.6280*	-.0862	-.1113 Lia.R.R.
20	.3552	.4228*	.2022	.3470*	.1103 FRegNoEc
29	-.4263	.1027	.0465	.1364	.9060*Patents
30	-.2510	.3274	.5518*	-.2244	.3512 AntiTrust
32	.2231	.4070	-.0666	.3456	.5091*Fed:Econ
33	-.1688	.2430	-.0846	-.0025	.8522*Fed:NoEc
52	-.7729*	-.2799	.3204	-.0045	-.1037 Bank Fed
49	-.7277*	-.1224	-.3560	-.0961	.0391 Bank St.
37	.1054	.2177	.1517	.5445*	.5506*Cor:Govt
44	.2556	.1870	.1832	.6330*	.3414 Cor:Bus.
38	-.0951	.1516	.1324	-.9731*	-.0669 Prohibn.
39	-.0296	.0689	.7809*	.1373	.1878 F.F.& C.
43	-.1982	-.2326	.8312*	.3875	-.0725 Bus.S.I.
41	.4647*	.1464	.6364*	-.2015	-.5650 JP:Lib.
42	.7769*	.3410	.0107	.0370	-.1892 JP:Cons.
Progr.	.0072	.8671*	.1445	-.1938	.0647
Party	.4717*	-.0288	-.1847	-.1660	.6306*
SUM	4.8617	11.1442	7.8674	2.7903	3.7731
CUM SD	7.5786	6.8582	5.7770	4.9113	4.7360

\*Highest Loadings for variable. See Tables 1 and 2 for full names of variables.

exclusive 41-variable factor analysis using oblique analysis. Oblique analysis shows few changes from orthogonal but seems to form factors which are more easily interpretable and has higher loadings for more variables. The judicial power variables are more clearly associated with Libertarianism in Table 15 for example.

Further evidence exists of the validity of these factors. Figure 13 shows the 19-variable, two-dimensional quartimax rotation of the Progressivist factor. It suggests two distinct clusters: one involving almost exclusively state regulations and the other largely federal concerns. This supports evidence that both a State Progressivism factor and a Liberal Nationalism factor exist in the second period as well as the first. The Commerce (13, 35) and Federalism: Economic (32) variables are slightly out of place as they are involved in a weak separate Commerce Power factor akin to the first period factor. This also shows up on a separate analysis of State Progressivism. They are related to Darwinism as well since they involve regulation of large corporations. Rate Regulation (23) is midway between the two major clusters as would be expected, since it involves both state and federal regulation. The principal axes solution is identical to Figure 13, but the varimax loads state and federal variables on separate axes.

Figure 14 shows an analysis of the Autonomy factor. It is clearly divided into two tight clusters: one involving



See Tables 1 and 2 for names of above variables.

Figure 13.--Quartimax Configuration of Two-Dimensional Solution of 19-Variable Progressivism Factor, 1916-1920



1

1

See Tables 1 and 2 for names of variables below.

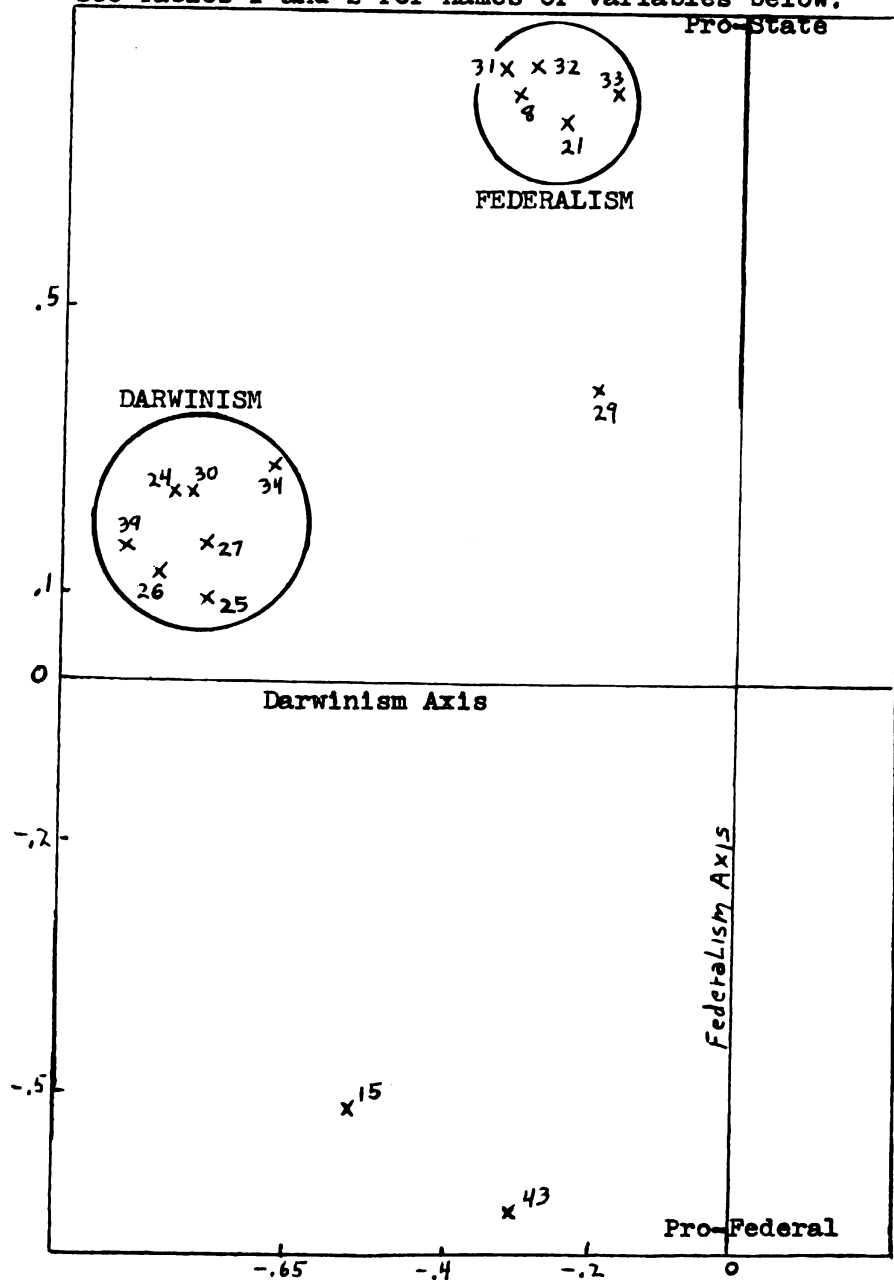


Figure 14.--Varimax Configuration of Two-Dimensional Solution of 15-Variable Autonomy Factor, 1916-1920 Period

Darwinism, the other involving Federalism. Patents (29), Civil Rights (15) and Business: Self-incrimination (43) are related to both factors. The former is anti-federal and the latter two are pro-federal and hence opposite in direction to the Federalism cluster. All three are marginally related to Darwinism, however. Civil Rights involves a racial superiority concept and the other two involve control of monopolies through weakening patent rights and investigating monopolistic practices. A third sub-factor in Autonomy (not shown here) involves solely the control of monopolies.

Figure 15 shows the varimax rotation of a 16-variable Libertarianism factor. It is of particular interest because it clearly shows two subcomponents of Libertarianism quite similar to that found in the first period General Libertarianism factor (Figures 6 and 9 above). Axis I and the left hand cluster seem to represent an equalitarian and economic aspect of Libertarianism. The obviously economic related variables (as discussed in Chapter 3) are Fiscal Claims (18), Private Contracts (53), Labor (7), Judicial Power: Conservative (42), and Bankruptcy (28). First Amendment (1) also has an economic content since it involves free speech for radicals such as socialists and anarchists who attack the economic system, the illegal use of funds in primary elections, and unions using speech and association rights in aid of secondary boycotts. Criminal Due Process (4) also involves many cases of lower class defendants who are disadvantaged economically. Property Rights Threatened by States (55)

See Tables 1 and 2 for names of variables below.

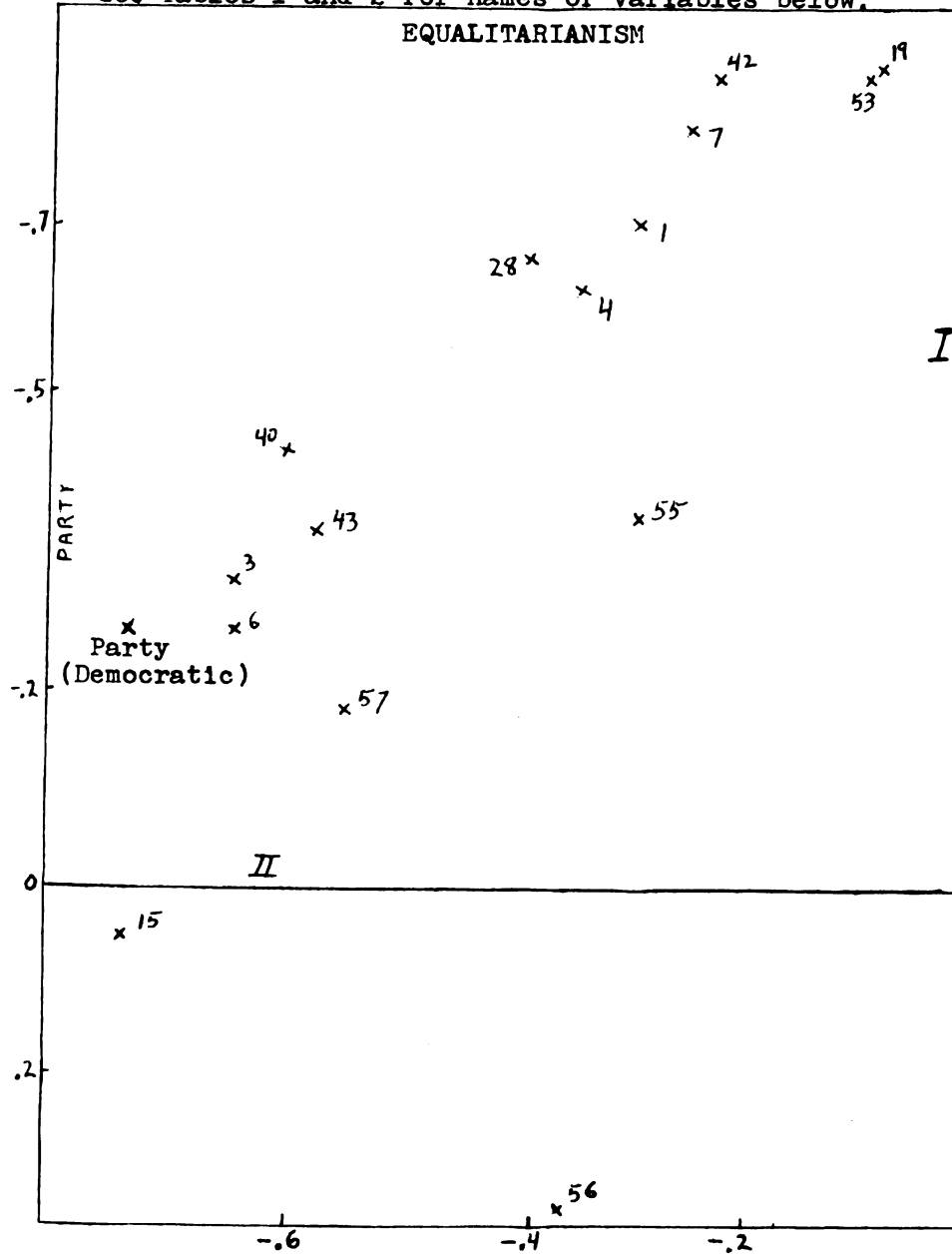


Figure 15.--Varimax Configuration of Two-Dimensional Solution of 16-Variable Libertarianism Factor, 1916-1920 Period

mainly involves small property owners against government (homesteaders, Indians, and minority stockholders). Property Rights Threatened by the Federal Government (56), however, contains largely cases where the property owners are large corporations, monopolies, and banks. Hence, this variable is opposite to equalitarianism on this axis while the state variable is related to equalitarianism.

The second axis and lower cluster are quite similar to the first period Judicial Restraint factor. It seems to represent party-influenced variables since party loads high on this axis and is close to it. The liberty variables here favor business rather than the poorer classes: property rights (3) and corporations (43). Other party-related issues already noted are the Judicial Power variables (40 and 57) and Civil Rights of Negroes (15), an issue dividing the parties from the Civil War to this period. The Democratic party support of Aliens (6) here and in the first period could be related to the grass roots voter base of the two parties in the North if one would accept a hypothesis that Democratic support was composed of new immigrants and Republican support was mainly nativist and Anglo-Saxon (Lipset, 1959).

In Figure 15 configuration of variables is greatly substantiated by the position of these same variables in Figures 11 and 12 of the larger universe of variables. They suggest that Land Claims (16) is part of the equalitarian

subfactor.<sup>3</sup> This comports with previous suggestions that it would logically fit within this concept.

On the quartimax and principal axes two-dimensional graphs of Libertarianism all variables loaded high on the main axis except Federal Property Rights (55). The variables in the quartimax and principal axes two-dimensional analyses of Liberal Nationalism and State Progressivism also all loaded high on the main axis. In the former a weak second factor of corruption showed up. On the latter the second factor was state commerce powers.

Table 16 shows measures of the internal relatedness of the variables contained within each factor and also how well a hypothesis of unidimensionality of each of the factors is satisfied. It is clear that the variables of each factor are relatively homogenous and that each factor explains a high per cent of variance of its content of variables. The exception to this is Laissez-faire which shows evidence of less commonality than the total universe of variables (shown at the bottom of the table). Thus we would be likely to get a more homogenous set of variables by picking them at random from the 50-variable set (but only by taking care that we would not reverse any of the variables). In any event it would be safer to accept only factors which resulted in a significant improvement in the Table 15 criteria over the

---

<sup>3</sup>A two-dimensional analysis of the Libertarian factor from the exclusive 41-variable analysis confirmed this.

Table 16.--Tests for Commonality among Variables Contained in Factors

<u>Factor Name and Total Variables</u>	<u>K.C.C.</u>	<u>Significance Level</u>	<u>Average Tau</u>	<u>T-Scale Negative Eigen-values</u>	<u>One Factor per cent of Variance</u>
<u>State Progressivism (13)</u>	.795	.0000	.631	- .1	65.3
<u>Libertarianism (16)</u>	.491	.0000	.366	- .6	42.3
<u>Liberal Nationalism (10)</u>	.805	.0000	.632	- .1	66.3
<u>Social Darwinism (8)</u>	.735	.0000	.555	- .1	47.3
<u>Federalism (8)</u>	.473	.0000	.320	- .1	41.3
<u>General Welfare (9)</u>	.636	.0000	.477	- .05	53.2
<u>Laissez-faire (7)</u>	.248	.0847	.100	- .1	35.0
<u>Liability (8)</u>	.380	.0020	.226	- .3	63.8
<u>Progressivism (19)</u>	.780	.0000	.625	- .3	64.2
<u>Autonomy (15)</u>	.480	.0000	.333	- .6	42.0
<u>All Scales (50)</u>	.313	.0000	.233	-6.4	37.4

K.C.C. is Kendall's Coefficient of Concordance.

Table 17.--Product Moment Correlations Between Factor Scores

	<u>State Progressivism</u>	<u>Liberal Nationalism</u>	<u>Libertarianism</u>	<u>Darwinism</u>	<u>Federalism</u>	<u>General Welfare</u>
<u>Liberal Nationalism</u>	.96					
<u>Libertarianism</u>	.58	.54				
<u>Darwinism</u>	.67	.69	.11			
<u>Federalism</u>	.61	.65	.47	.25		
<u>General Welfare</u>	.87	.93	.58	.80	.59	
<u>Laissez-faire</u>	-.58	-.64	.17	-.26	-.21	-.38

total 50-variable set. All the remaining factors do satisfy this requirement. The evidence of homogeneity of variables within these factors is particularly striking when we compare Table 16 to the comparable figures of Table 8 for the first period.

The close interrelationships between these factors is emphasized by Table 17. The factor scores for each factor are highly correlated. Correlations between average ranks of the variables within a factor showed results similar to Table 16. In factor analysis Liberal Nationalism and State Progressivism combine to form Progressivism. Libertarianism usually does not combine with another factor. Federalism then either combines with Darwinism to form Autonomy<sup>4</sup> or directly joins Progressivism while Darwinism joins the combined factor on a lower dimensional solution. (See Figure 16.) Federalism includes cases involving state regulation of business and workmen's compensation and hence is related to Progressivism, while anti-Darwinism contains Progressivist ideas of controlling big business.

---

<sup>4</sup>The stability of the Autonomy factor and the hypothesized relationship between Federalism and anti-Darwinism is questionable. Table 17 shows a low correlation. This may be explained by the fact that the factor scores on which they are based are from a two-dimensional orthogonal varimax solution of the Autonomy variables only. The orthogonality requirement should obscure such a correlation. The tau rank correlation between the average ranks for the Federalism and the anti-Darwinist factor is .40. Correlations between the corresponding oblique factor axes are .28 (Table 18) for 50 variables and .37 for 41 variables.

On many analyses, furthermore, the Autonomy factor does not form, as mentioned above.



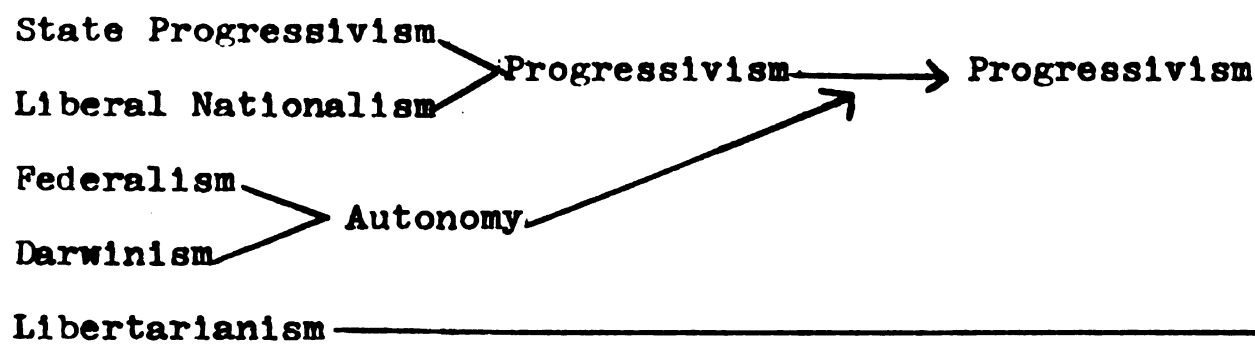


Figure 16.--Hierarchical Relationships among Factors.

This hierarchy does not always develop, however. Federalism, a relatively weak factor, may split up between factors or may even join Libertarianism. Libertarianism and federalism both have anti-government aspects, as has been mentioned. Occasionally Liberal Nationalism does not form a factor but stays in Progressivism. The extremely high correlations between it and State Progressivism suggests a weakening of the distinction between state and national programs in this period.

Table 17 shows that most factors are highly inter-related<sup>5</sup> (except for Laissez-faire), hence that a quite simplified attitude structure exists. Liberal Nationalism, State Progressivism, and General Welfare are barely distinguishable. Likewise Federalism correlates highly with all

---

<sup>5</sup>In Tables 17 and 18 Progressivism, liberalism, pro-liberty, and pro-General Welfare are positively directed. In Federalism pro-state is positive, the Darwinist position is negative, and Laissez-faire (anti-government) has a positive direction.

variables. Libertarianism is less highly correlated but also correlates with all but Darwinism. Laissez-faire weakly correlates with all the other factors since it is anti-government and most of the other factors are pro-government except Libertarianism which shows a low positive correlation with Laissez-faire. Laissez-faire correlates negatively quite highly with the Progressivism factors and General Welfare all of which involve government action. Darwinism includes largely economic conflicts between business units, and Federalism involves choices between competing government units. Hence, they show only low correlations with Laissez-faire.

Correlations between oblique factor axes verify these findings as Table 18 shows. The 41-variable oblique axes show a similar pattern of correlations except that Darwinism shows quite high correlations with State Progressivism (.48) and Federalism (.37). This supports evidence that anti-Darwinism is related to Progressivism and forms a larger Autonomy factor with Federalism.

The foregoing factor structure seems satisfactorily supported by the evidence and corroborated by various methods. Now let us examine the factor structure resulting from Q-analyses of interagreement correlations of the "raw" voting data and of phi correlations of the case voting.

Table 19 gives the average ranks of factors from our previous R-analysis, the judges' factor scores, and the loadings of the justices in our Q-analysis of phi correlations.

Table 18.--Correlations between Oblique Factor Axes from the  
50-variable, 7-dimensional solution

	<u>State Progressivism</u>	<u>Liber- tarianism</u>	<u>Darwinism</u>	<u>Feder- alism</u>
Libertarianism	.40			
Darwinism	.39	-.03		
Federalism	.42	.46	.28	
Liberal Nationalism	.34	-.06	.06	.00

Factors from the analysis of the two types of correlations were so similar that they could be called identical. Each raw data factor had a phi factor counterpart with which it correlated between .99 and 1.00 by the product moment method. Hence, we present only the phi analysis in Table 19 and in our discussion keeping in mind that these results were exactly duplicated by using the other correlational matrix. The phi factors accounted for a larger proportion of the variance, however. The five-factor solution explained 37 per cent of the variance as against 29 per cent for the other method.

The above similarities in the two Q-analyses along with the clear-cut associations of these factors with our previously described R-analysis factors reinforces our findings that the factor structure of this period is simplified and well defined, especially in consideration of equivalent comparisons between Q-analysis and R-analysis at the end of the last chapter.

**Table 19.--White Court Justices' Average Ranks and Factor Scores for Major Factors and Loadings on Q-Analysis, 1916-1920**

<u>Ranks</u>	<u>Lib. Nat.</u>	<u>State Progr</u>	<u>Lib-tar.</u>	<u>Dar-win.</u>	<u>Federal</u>	<u>Gen. Wel.</u>	<u>Lais faire</u>	<u>Pro-gres</u>	<u>Auto nom.</u>
Holmes	4	4	4	9	4	6	7	4	8
Brandeis	1	1	2	3	2	2	8	1	3
Pitney	2	3	9	1	3	3	9	3	1
White	6	7	3	8	5	5	5	6	7
McReynolds	9	9	5	7	6	7	1	9	6
Day	5	5	6	4	7	4	6	5	4
Clarke	3	2	1	2	1	1	4	2	2
VanDevanter	8	8	8	6	9	9	3	8	9
McKenna	7	6	7	5	8	8	2	7	5

<u>Factor Scores</u>	<u>Lib. Nat.</u>	<u>St. Prog</u>	<u>Lib-tar.</u>	<u>Dar-win.</u>	<u>Fede ral.</u>	<u>Gen. Wel.</u>	<u>Lais faire</u>	<u>Pro-gres</u>	<u>Aut onom.</u>
Holmes	.3	.5	.8	-1.5	.7	-.5	-.9	.5	-.8
Brandeis	1.4	1.6	1.3	.9	1.0	1.1	-.4	1.5	1.3
Pitney	1.2	.7	-1.5	1.3	.8	1.0	-2.1	.8	1.5
White	-.3	-.9	.8	-.7	0	.1	1.0	-.6	-.6
McReynolds	-1.6	-1.5	-.9	-1.0	.4	-1.4	1.6	-1.6	-.6
Day	0	.1	0	.6	-1.4	.2	.1	0	-.3
Clarke	1.1	1.3	1.6	1.2	1.1	1.7	.4	1.4	1.5
VanDevanter	-1.2	-1.0	-1.0	.8	-1.5	-1.3	-.1	-1.0	-1.5
McKenna	-.9	-.8	-1.0	0	-1.0	-1.0	.3	-1.0	-.5

See Table 11 for full names of factors.

**Phi Correlation Q-Analysis Loadings**

	<u>P1</u>	<u>P2</u>	<u>P3</u>	<u>V1</u>	<u>V2</u>	<u>V3</u>	<u>V4</u>	<u>V5</u>
Holmes	.36	-.50	-.31	.08	.02	.05	.07	.68
Brandeis	.68	-.15	-.15	.42	-.15	.10	.27	.48
Pitney	.10	.46	.00	.08	-.46	-.08	.03	-.20
White	-.28	-.25	.14	-.16	.40	.08	-.06	-.10
McReynolds	-.65	-.12	.03	-.59	.23	.00	-.09	-.24
Day	-.06	.39	-.40	.00	-.17	-.54	.07	-.09
Clarke	.57	.19	.11	.64	-.11	.00	.07	.04
VanDevanter	-.52	.00	-.42	-.48	.09	-.43	-.17	.02
McKenna	-.25	-.03	.11	-.09	.06	.03	-.47	-.07

P1 = V1 = Progressivism  
V4 = Progressivism  
P2 = Darwinism  
P3 = V3 = Federalism

V2 = Laissez-faire  
V5 = Libertarianism

P = Principal Axes Factor  
V = Varimax Rotation Factor

Comparisons of the various rotations of the Q-analysis also gave comparable factors. Thus the same factor structure in general emerged from the quartimax, varimax, and principal axes rotations.

Factor 1 on all three rotations was the Progressivism factor. Its loadings correlated with the State Progressivism factor scores at .97, with Liberal Nationalism at .92, with Progressivism at .96, and with General Welfare at .82.<sup>6</sup> It also correlated with the ranks of all of our Progressivism variables (Table 11) as well as the economic variables of Libertarianism (Fiscal Claims (18), Labor (7), and Bankruptcy [28, 49, 52]) which suggests that the broader name of equalitarianism could be given to this factor. This factor also correlated with our ranking of the justices according to their association with Progressivism at .77.

On this factor Brandeis and Clarke rank high positively and Holmes has a lower positive loading. McReynolds and Van Devanter have high negative loadings. White and McKenna have less extreme negative loadings. These loadings show the positions of the justices toward this ideology.

The fourth varimax factor was also related to Progressivism but correlations with the factor scores and variables were lower. It correlated .71 with the Progressivism factor and did not correlate with any Libertarianism variables.

<sup>6</sup>These are all product moment correlations.



This probably shows the great strength of Progressivism on the Court in that it shows up on two factors.<sup>7</sup> On this factor Brandeis has a high positive loading and McKenna has a high negative (conservative) loading.

The second principal axes factor (P2) is clearly Darwinism, a finding supported by a .74 correlation with its factor scores. This interpretation is supported by correlations of the P1 factor with all the variables contained within Darwinism as shown by Table 11. This factor adds First Amendment (1) and Criminal Due Process (4). It is easy to see how First Amendment rights would be supported by a Darwinist who believed in a "free market place" struggle of ideas (as Holmes had enunciated), while opposing the state in criminal cases might comport with the support of freedom from restraint implicit in Darwinism.

Holmes has the highest pro-Darwinism loading by far while White is less strongly pro-Darwinist. The anti-Darwinist judges are Pitney and Day with high positive loadings.

Factor V2, the second varimax factor, could be Darwinism as it shows a .82 correlation with it, but it also correlates somewhat with Progressivism (.63) and seems to contain both Darwinism and Progressivism variables judging by its

---

<sup>7</sup>Cattell (1965) has discussed the matter of a strong influence underlying the data showing up on more than one factor.

correlations with those variables. However, it correlates .77 with the Laissez-faire factor, so it probably measures Laissez-faire or perhaps both anti-government philosophies.

Pitney has a high negative loading suggesting that he is pro-government, a position reinforced by his consistent extreme pro-government rank in Libertarian variables. White is highly loaded in an anti-government direction, which is also supported by his anti-government position on civil liberty scales. McReynolds is also anti-government but less strongly than White.

The third factor (P3 and V3) is clearly Federalism as evidenced by a .75 correlation between V3 and the Federalism factor scores and high correlations between both the P3 and V3 loadings and the Table 11 Federalism variable ranks (and no other variables). Party correlates .70 with the V3 factor. Day and Van Devanter have high pro-national loadings.

The fifth varimax factor (V5) and the second quartimax seems to be Libertarianism as judged by their high correlations (.59 and .52) with that factor which was higher than with any other. V5 also correlated .54 with State Progressivism. It correlates with all of the Libertarian variables of Table 11 plus four State Progressivism variables (10, 12, 36, and 46) with lower correlations, however. As to be expected Holmes and Brandeis load highly in a pro-liberty direction which corroborates historical evaluations of these



judges (Mason, 1946). Pitney and McReynolds have low anti-liberty (negative) loadings.

These Q-analyses allow us to position the judges on the factors as do the factor scores. They also clearly affirm the existence of the Progressivism, Libertarianism, Darwinism, and Federalism factors and support findings of a Laissez-faire factor. A General Welfare factor was not found nor were separate State and National Progressivism factors. These three factors seem too closely associated (Table 17) to be separated by a small nine-variable Q-analysis.

These factors can be accounted for by an interpretation of them in terms of combinations of values as could the Chapter 3 factors (see Table 17). Thus, Liberal Nationalism may be pro-equality and pro-national. State Progressivism may be pro-equality and pro-state. Libertarianism is pro-equality and pro-liberty. Federalism may be pro-state and pro-altruism, and General Welfare may be only pro-altruism. Laissez-faire may be anti-equality and pro-liberty while Darwinism may be anti-equality, pro-liberty, and anti-altruism. Table 17 shows high correlations of Darwinism with both Progressivism factors (equality) and General Welfare (altruism), but Laissez-faire correlates highly only with Progressivism. Both are philosophies of the wealthy classes and are anti-equality, but only Darwinism specifically says that altruism is hopelessly devoid of meaning. (See Howe, 1961, p. 124; Hofstadter, 1955b.)

In the next chapter, a comparison of the attitudinal structure of the two periods will be made and reasons for the differences will be discussed, especially the increasing simplicity of the decision making in the second period. The structure of the whole period will also be examined by factor analyses.



## CHAPTER 5

### ATTITUDE SYSTEMS OF THE 1910-1920 WHITE COURT: CONTINUITY AND CHANGE

In this chapter we will compare and summarize the findings covering the attitude structure of the two periods. It would appear that the attitude systems of the two periods are quite similar. It is the differences that are of interest, however, in permitting explanations of just why they occurred and what influences caused them. In comparing the two periods, the results of a study of scales covering the whole period will also be reported.

The variables which were common to both periods of the Court were used to construct scales or variables covering the entire period from October 1910 to June 1921. Variables which were constructed from identical criteria in both periods were combined for the whole period. Some scales had no counterpart in the other time period. Nonetheless, some were used as the basis for a scale ranking all 13 justices by utilizing the few cases which were available in the other period. Thus 46 scales were so constructed (see Table 1 above). Some scales had poor C.R.'s; however, the usefulness of a comparison of the whole period with the two halves was felt to justify using these quasiscals. Some justices may

have shifted in attitude<sup>1</sup> perhaps as a reaction to the political situation or new socioeconomic relationships on the Court, or due to aging. If so, the validity of the attitude had been established by the original one-period scale, and the increase in non-scaled responses due to these effects would be due not to other dimensions of attitudes but to these social and political factors.

Another consideration in explaining lack of correspondence between the two periods is the effect of secondary influences within a scale or set of cases. Corruption in Business (43) for example involved largely state cases in one period but federal cases in the second. Similar influences may be present within a scale's case content which may make similar variables different enough to associate with different factors.

To the 46-scale variables were added three variables constructed by ranking the judges from biographical data on (1) political party, (2) association with Progressivism, and (3) socioeconomic status. The evidence supporting these ranks is given in a later chapter.

The 49-variable analysis data seemed to contain the same number of dimensions as the first period: between six and ten. The eigenvalue method indicated a maximum of ten.

---

<sup>1</sup>Assuming that the scales and scale ranks are valid and comparable. This question will be discussed below.

1

Ten factors were necessary to explain 75.4 per cent of the variance of the data. The Kruskal method gave the relatively largest reduction in stress (from 9 per cent to 6.6 per cent) at six dimensions. Seven dimensions resulted in 5.5 per cent stress (see Kruskal, 1964a, 1964b). The Keil-Wrigley criteria gave six factors for the quartimax rotation and seven factors for the varimax.

The factor structure revealed by the first and second period analyses was in general supported by the whole period analysis. The only factors present in previous analyses but not present in this one were Judicial Restraint and Laissez-faire. Judicial Restraint remained within the Libertarian factor as it did in the second period. Laissez-faire was a nebulous marginal factor in both periods, so its disappearance is not surprising. Furthermore, since the Progressivism factors are largely pro-government, Laissez-faire might be expected to appear as merely the anti-Progressivist attitude and not an independent factor.

This analysis using twice the number of cases and a larger set of justices (13 for the whole period) than either single period seems to show an improvement in the stability of the factors as well as fewer anomalies within the factor content. Hence, more variables seem to fit in factors which support the interpretation given them than was true of the previous analyses.

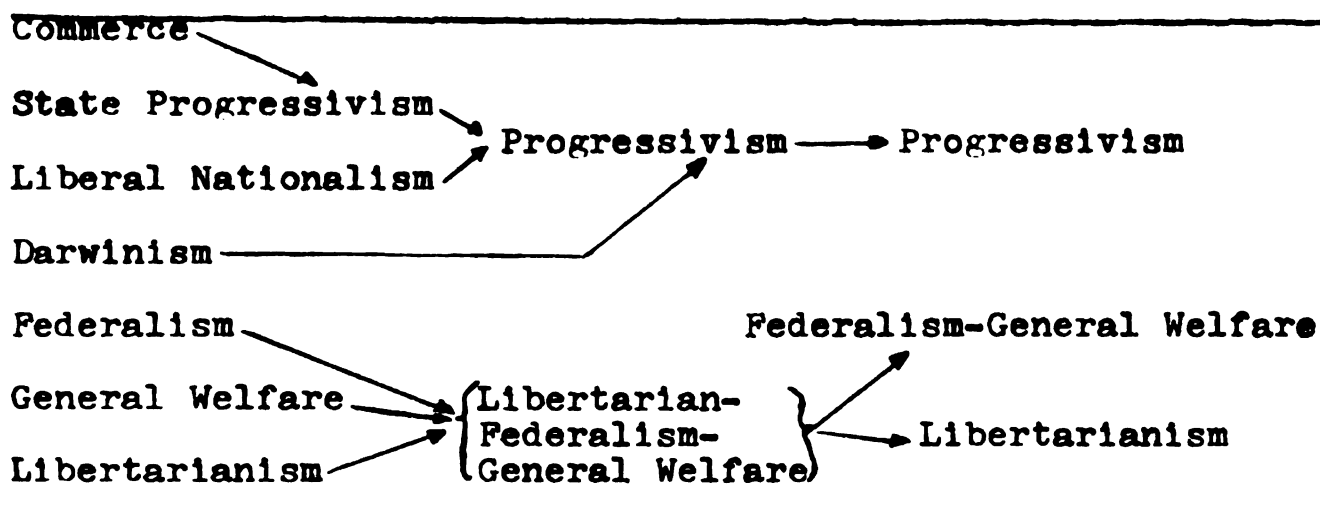
It offers, in addition a new factor which was only marginally present in the second period: a party factor in which those variables that divide members of the two political parties are highly loaded.

Hence, as Table 20 and Table 21 show, the eight factors present in this analysis are: (1) Liberal Nationalism, (2) State Progressivism, (3) Darwinism, (4) Libertarianism, (5) Federalism, (6) Commerce Powers, (7) General Welfare, and (8) Political Party.

The various types of rotations give different hierarchical relationships among the factors. On the oblique two-dimensional solution, Darwinism forms one factor and the remaining factors form the other factor, probably representing equalitarianism. (See Schubert, 1965a, chap 7.) On varimax, Darwinism and Liberal Nationalism make up one factor and the other factor is similar to the oblique equalitarianism. On quartimax (Figure 17), Libertarianism and a large Progressivism factor are the factors in a two-dimensional analysis (see also Figure 18).

Figure 17 is generally compatible with the hierarchical relationships of those of the individual periods. Table 22 and Table 23 show correlations between the factors which also verify this hierarchy. Federalism is here more related to the Progressivism factors than in period one but less so than period two. (See Tables 9 and 17 above.) This is also true of Libertarianism. State Progressivism and Liberal





**Figure 17.--Hierarchical Relationships among Factors of a  
Quartimax 49-variable Factor Analysis**

Nationalism are less closely related here than in either of the two periods, however. Darwinism is also correlated lower with these two factors.<sup>2</sup> The difference is probably due to judges shifting in attitudes in these attitude systems between the two periods which affects the intercorrelations between these factors as will be shown.

Basically the Table 23 relationships are midway between the first period and the second period relationships except that most of the correlations are lower because the data is more complex than either period. This is true because this data includes thirteen justices while the individual periods contained 11 and 9 justices, respectively. All the correlations between the Progressivism factors and the non-Progressivism factors are lower than would be expected,

---

<sup>2</sup>This is not due to the fact that Tables 9 and 17 are based on product moment correlations while Table 23 is based on tau correlations.

1

**Table 20.-- Variable Content of Attitudinal Factors for  
Analysis of Scales for Whole Period, 1910-1920**

**Progressivism Factor**

**Liberal Nationalism Factor**

- 9. Workmen Comp: Non-FS
- 15. Civil Rights
- 20. Fed. Reg.: Non-economic
- 21. Fed. Reg: Economic
- 22. I.C.C.
- 23. Rate Regulation
- 24. Discrimination
- 30. Antitrust
- 43. Business Self-inc.
- 45. Federal Rates
- 46. State Rates

**State Progressivism Factor**

- 8. Workmen Comp: Fed.-State
- 10. Due Process
- 11. State Tax
- 12. Contract
- 13. Commerce
- 34. Commerce: State Tax
- 35. Commerce: No Tax
- 36. State Tax: Due Process  
Progressivism

**Federalism Factor**

**Federalism Factor**

- 14. Conservation
- 16. Land Claims
- 31. Federalism
- 32. Federal: Economic
- 33. Federal: Non-economic

**Commerce Powers Factor**

- 8. Workmen Comp: Fed.-State
- 13. Commerce
- 34. Commerce: State Tax
- 35. Commerce: No Tax
- 27. Liability Railroads
- 38. Prohibition
- 44. Corruption: Business
- 39. F. F. & C.

**Darwinism Factor**

- 5. CL: Indians
- 15. Civil Rights
- 17. Corruption
- 24. Discrimination
- 25. General Liability
- 26. Liability: Insurance
- 27. Liability: Railroads
- 29. Patents
- 30. Antitrust
- 37. Corruption: Government
- 38. Prohibition
- 39. F. F. & C.
- 41. J. Power: Liberal
- 43. Business: Self-inc.
- 44. Corruption: Business  
Socioeconomic Status

**Libertarianism Factor**

- 1. First Amendment
- 2. Civil Liberties
- 3. CL: Property
- 4. Criminal Due Process
- 6. CL: Aliens
- 7. Labor
- 18. Fiscal Claims
- 19. Fiscal Power
- 28. Bankruptcy
- 40. J. Power: Lower Fed. Cts.  
Political Party



Table 20 (cont'd.)

---

Federalism Factor	
<u>Party Factor</u>	<u>General Welfare Factor</u>
3. CL: Property	14. Conservation
6. CL: Aliens	16. Land Claims
15. Civil Rights	17. Corruption
28. Bankruptcy	19. Fiscal Power
38. Prohibition	29. Patents
40. J. Power: Lower Fed. Cts.	37. Corruption: Government
Political Party	38. Prohibition
	44. Corruption: Business

---

See Table 1 for full names of scales.

however. The correlation between Federalism and Libertarianism is as high as in either individual period.

These relationships suggest that the relationship between Federalism and Libertarianism is a stable one which exists in both periods and the total study, but the judges' attitudes toward Liberal Nationalism shifted in response to the change of control of the national government from one party to the other.

Our study involved the construction of three variables based on sociological and political influences on the justices based on the judges lives previous to appointment to the Court. Most of these are discussed in Chapter 8 below but political party, Progressivism and socioeconomic status were used in the factor analyses along with the attitude variables. The judges' ranks on these are given in Table 24 and supporting evidence in Chapter 8 and this chapter, below.



Table 21.--Highest Loadings of Variables Across Multivariate Analysis Solutions of 1910-1920 Variables

Variables	49	49	49	49	49		49	49	49	49	49
Dimensions	6	6	7				6	6	7		
Rotation	QT	BQ	VR	HA	SA		QT	BQ	VR	HA	SA
<u>Liberal Nationalism</u>						<u>Federalism</u>					
9. WCompNonFS	P	N	N	D	N	31. Federalism	F	F	F	FS	F
15. Civil Rts	P	NF	NR	D	R	32. Fed: Econ.	F	F	FS	CS	F
20. FReg:No-Ec	P	N	N	N	N	33. Fed:No Ec.	F	F	F	FS	F
21. FReg:Lib.	P	N	N	N	N	<u>Political Party</u>					
22. I.C.C.	P	N	N	N	N	3. CLProperty	L	N	R	R	R
23. Rates	P	N	N	N	N	6. CL Aliens	L	N	R	R	R
24. Discrimin	P	N	N	D	N	28. Bankrupt	L	ND	R	R	R
43. Bus: S.I.	P	N	N	D	N	Party	L	NF	RN	R	R
45. Fed.Rate	P	N	N	N	N	<u>General Welfare</u>					
46. St. Rate	P	N	N	N	N	14. Conservn	P		G	FS	F
<u>State Progressivism</u>						16. LandClaim	P	F	G	FS	F
8. WComp:F-S	P	S	S	CS	F	17. Corruptn	GP	D	G	DG	G
10. Due Proc.	P	LS	LS	L		19. Fis.Power	F	L	GL	CS	F
11. State Tax	P	S	S	CS	S	37. Cor: Govt	GP	D	G	DG	G
12. Contract	P	S	S	S	S	38. Prohibitn	C	D	G	R	
13. Commerce	PC	S	S	CS	S	44. Cor: Bus.	GP	DS	GS	CS	G
34. Com:StTax	PC	S	S	CS	S	<u>Darwinism</u>					
35. Com:NoTax	PC	S	S	S	S	4. CL:Indian	D	D	D		
36. Tax: D.P.	P	S	S	S	S	25. Gen.Lia.	PD	N	D	D	N
Progressivism	P	S	NS	S	S	26. Lia.Ins.	D	D	D	D	
<u>Libertarianism</u>						27. Lia.R.R.	CP	S	SD	C	S
1. First Am.	L	L	L	L	L	29. Patents	D	D	PG	DG	G
2. Civil Lib	L	L	L	L	L	30. Antitrust	D	ND	DN	D	N
4. Criminal	L	L	L	L	L	39. F.F.& C.	G	SD	SD	CS	G
7. Labor	L	L	L	L	L	40. J.P.:Lib	D		D	D	
18. Fis.Claim	F	L	L	FS		Socioeconomic	C	S	D	R	
40. JPLowFdCt	L	L	R	L							
42. JPConserv	P	L	L	L							

Note that P = N + S

See Table 1 for full name of variable and Chapter 2 for description. When two factors are shown, the leftmost one has a slightly higher loading.

Key to above Symbols

P = Progressivism Factor  
 N = Liberal Nationalism  
 S = State Progressivism  
 F = Federalism Factor  
 C = Commerce Power  
 L = Libertarianism  
 G = General Welfare  
 SA = Similarity Analysis  
 (McQuitty, 1965)

D = Darwinism Factor  
 R = Party Factor  
 VR = Varimax Factor Analysis  
 QT = Quartimax Factor Analysis  
 BQ = Biquartimin Oblique  
 Factor Analysis  
 HA = Hierarchical Syndrome  
 Analysis (McQuitty, 1966a)

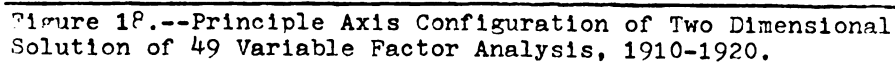




Table 22.--Correlations between Oblique Factor Axes from the  
49- variable, 6- imensional solution, 1910-1920 period

	<u>Liberal</u> <u>Nationalism</u>	<u>State</u> <u>Progressivism</u>	<u>Libertar-</u> <u>ianism</u>	<u>Anti-Dar-</u> <u>winism</u>
State Progressivism	.20			
Libertarianism	.23	.33		
Anti-Darwinism	.12	.20	.37	
Federalism	.02	.26	.23	.03

Table 23.--Tau Rank Correlations between average Ranks for  
Factors in 1910-1920 period

	<u>Liberal</u> <u>Nationalism</u>	<u>State</u> <u>Progressivism</u>	<u>Libertar-</u> <u>ianism</u>	<u>Anti-</u> <u>Darwinism</u>	<u>Feder-</u> <u>alism</u>
State Progressivism	.59				
Libertarianism	.33	.28			
Anti-Darwinism	.44	.49	.13		
Federalism	.31	.21	.46	.26	
General Welfare	.41	.31	.36	.51	.59

Table 24.--White Court Judges ranks on Party, Progressivism, and Socioeconomic status

	<u>Party</u>	<u>Progressivism</u>	<u>Socioeconomic Status</u>
Clarke	1	1 $\frac{1}{2}$ *	3
Lurton	2 $\frac{1}{2}$ *	11 $\frac{1}{2}$ *	5
Lamar	2 $\frac{1}{2}$ *	11 $\frac{1}{2}$ *	10
McReynolds	4	7	11
Brandeis	5	1 $\frac{1}{2}$ *	2
White	6	13	12
Holmes	7	4	13
McKenna	8	10	1
Harlan	9	9	8
Hughes	10	3	4
Day	12*	5	7
Pitney	12*	6	9
Van Devanter	12*	8	6

\*Indicates tied ranks.

These variables are ranked consistent with an hypothesized relationship to liberalism with 1 being most liberal. Hence, 1 is Democratic, pro-Progressivist, and lower socioeconomic status while 13 is most Republican, anti-Progressivist and highest class.

The defense of the party ranks is as follows: Clarke (1) was from a two-party state and was more likely to be a representative Democrat than the Southern Democrats. McReynolds (4) bolted his party in 1896 as a "gold Democrat" and was hence less loyal to his party than Lurton and Lamar (2 $\frac{1}{2}$ ). Brandeis (5) occasionally supported Republican Progressives prior to 1912 (Mason, 1946). White (6) was from a one-party area and was the son of a politically active Whig who had been elected Governor by that party. Holmes (7) was a Republican voter but stayed out of politics. McKenna (8) was an active Republican politician but his father was an Irish Catholic Democrat. McKenna's partisanship was purely opportunistic (McDevitt, 1946).

The great importance of traditional family party on a person's attitudes in his early years while basic beliefs are being formed is substantiated by Dawson and Prewitt (1969). Harlan (9) was not always a Republican but had been a Whig, Democrat, and Unionist (1860). Hughes (10) exhibited a more marked independence of Republican politicians than the other Republicans.

Rankings of the judges on their association with the Progressivist movement are more subjective. Brandeis and Clarke (1 $\frac{1}{2}$ ) were very active in Progressivist and reform movements. Hughes (3) was early identified with Progressivism but in the 1916 election seemed aloof from their leaders. (Pusey, 1961.) Holmes (4) was not a Progressive but had many friends active in the movement (Brandeis) and had a reputation for Progressivism (Murphy and Pritchett, 1961). Day's (5) background and political experience was typical of a moderate (McLean, 1946). As Roosevelt's choice he may be suspected of moderate Progressivism. Pitney's position (6) is questionable as little is written on him. McReynolds (7) was no Progressivist but was an anti-trust prosecutor for the Justice Department under Taft and Wilson. Van Devanter (8) was a stalwart Republican but as a Taft appointee may have been a moderate. He was young enough to have learned some Progressive ideas. Harlan (9) was a product of the pre-Progressive era. However, family influence goes both ways (Lane and Sears, 1964), and his sons were probably involved in Progressivism as evidenced

by the appointment of one of them to the I.C.C. The remaining judges mostly received their off-Court experience from pre-Progressivist times and places. However, McKenna seemed to have some experience with Western anti-railroad popular sentiment (McDevitt, 1946) while White was most remote of all from Progressivism being appointed during Cleveland's administration.

Socioeconomic status is a more nebulous concept using various measures to reflect class outlook as family income and past social status, ethnic and religious status, and generations born in America. It is discussed in Chapter 8.

The loadings of these background variables are given in preceding chapters and the resulting factor classification is consistent with expected attitudinal associations. Hence, the Progressivism variable associates with the Progressivism factors and Party associates with Federalism and Civil Rights (15). Socioeconomic status associates mainly with Darwinism.

Now let us examine the two-dimensional configuration of points from the principal axes factor analysis of the variables in Figure 18. Comparison may be made to Figures 3, 4, 11, and 12 for graphs of other periods.

Duncan MacRae (1968; unpublished) in factor analyses of Congressional-role-call voting was able to achieve a two-dimensional configuration in which party represents

one axis and "liberalism" the other. He does this by rotating the axis so that the congressional organization votes along pure party lines falls on the party axis. We have in Figure 18 achieved essentially the same result without rotating the axes at all. In the 43-variable exclusive first-period graphs, all three methods (varimax, quartimax, and principal axes) gave this configuration. In the second-period study, several methods gave Progressivism as one of the two major axes, others gave Party as one. The two variables were too closely associated to fit an orthogonal graph since Progressivism and Party seemed associated in that period. Democrat Wilson was the Progressivist national leader in that period as we have noted.

In the total-period study both quartimax and the principal axes solution showed a configuration with the two main axes located almost precisely on the Party and Progressivism variables (Figure 18). If unrotated axes are particularly psychologically meaningful as viewed by some authorities (Schubert, 1965a), then the Party and Progressivism influences were dominant in White Court decision making. These axes represent 44 per cent of the data variance or about three-fifths of the variance accounted for by interpretable factors. In any event Figure 18 indicates that these two influences are the two largest influences on the White Court during 1910-1920.



Axis I seems to represent Progressivism on one end and conservatism on the other. Since the Progressivism variable is nearly right on that axis, the axis may be considered to represent "pure" Progressivism, which is a measure of the judges' off-Court association with Progressivist ideas. Most variables reinforce such an interpretation, all that load highly on Axis I involve economic liberalism or Progressivism. Those that load low on the axis (to the right of -.5 have little relationship to Progressivism or liberalism such as the judicial power variables (40, 41), Civil Rights (15), Bankruptcy (28), Prohibition (38), federalism (31, 32, 33), and civil liberties (1-6). These by contrast load highly on the Party axis (II) except for Prohibition (38), Labor (7), Fiscal Powers (19) and Business Rights (43) load on both axes. Both Progressives and Democrats supported Labor's rights and income taxes as historians note (Link and Catton, 1967). Democrats view Business Rights (43) as part of the civil liberty concept, while Progressives see government investigative powers as necessary for regulation in the public good.

It may be asked whether Axis I and the main factor in all our analyses is really Progressivism or something else. Could it be modern liberalism, pro-government or equalitarianism? Variables loading high on this axis include the liability variables (25, 26, 27) which involve suits between businesses and are not pro-government, so Axis I is not pro-government. Among the variables loading highest on this

axis is Federal Regulations: Non-economic (20) which involves Progressivist programs clearly not equalitarian nor part of modern liberalism such as the white slave, narcotics, and prohibition laws as well as immigrant restriction laws. Further variables involving Corruption (17, 37) and Conservation (14) seem unconnected to modern liberalism or equalitarianism but were included among Progressivist programs. They do, however, impede greater inequity in the distribution of wealth so may represent equalitarianism with a progressivist flavor. The opposing or anti-Progressivist view seems consistent with the Laissez-faire philosophy. It opposes intervention in all matters and advocates permitting self-interest and bigness in business to prevail unhampered. It also has some anti-equalitarian aspects of course.

The second axis loads precisely on the Party variable so it should represent "pure" party as MacRae (1968) and other analysts (Cattell, 1952) interpret axes. Libertarianism, Federalism, and other traditional party-involved issues load on this axis such as civil rights (15), debt-repudiation (28), judicial power (40, 41), and the income tax (19). The party axis may also represent such dichotomies as pro- and anti-liberty as well as its logical opposite pro- and anti-government since the liberty variables, if reversed, would be pro-government and the variables above Axis I are mostly pro-federal power. As part of the pro-government attitude Axis II also measures the federalism issue; the lowest clusters are anti-government, the middle one is





pro-state and the top two are pro-federal (the topmost being anti-Darwinist or paternalistic). Hence, Axis II represents a cluster of several attitude-system axes which are related and may constitute an ideology. Axis I also contains a similar combination of related axes<sup>3</sup> or attitude-systems: State Progressivism, Liberal Nationalism, and Paternalism (anti-Darwinism). This may also constitute an ideology.

If the axes do represent the underlying influences hypothesized, then the position of the variables on the graph may be explained as invoking varying degrees of these two influences. For example, Civil Rights (15) would be explained as 40 per cent party and 20 per cent Progressivism with the rest error variance or unexplained factors.

Socioeconomic Status associates very little with most attitudes. However, it does load and correlate with Darwinism. Lower-class judges are anti-Darwinist and anti-big business as their class background would lead one to expect. Also it seems much easier for a person of wealth and a distinguished family to believe that natural selection justifies his position than for a lower-class person to accept the idea that his family and friends (and himself) were poor because they were inferior. His experiences and identity with them may lead him to reject such a philosophy.

---

<sup>3</sup>One may conceive of each cluster as an axis passing through its center to avoid thinking in terms of n-dimensional spatial configurations. See Schubert, 1965a.

Tables 25 and 26 give typical loadings for the 49-variable, whole Court factor analysis: the six-factor quartimax and the seven-factor varimax. They may be compared with Table 21 above. Table 25, giving quartimax, shows a general Progressivism factor composed of both State Progressivism and Liberal Nationalism but contains a Commerce Power factor and a small Federalism factor. It includes a Darwinist factor and a Libertarian factor. The Libertarian factor is particularly interesting. It contains some Judicial Power variables but practically no economic variables (except 7: Labor). It is one of the few times that this factor contained only civil liberty variables separate from an economic content.

Varimax in Table 26 split Progressivism into its state and national constituents, but had no Commerce Power factor. Darwinism, Federalism, and General Welfare also are separate factors.<sup>4</sup> Libertarianism appears with some of its usual economic content (variables 10, 18 and 19). A new factor, Party, appears.

The principal characteristics of the party factor are that the party rank variable loads higher on it and that it contains variables associated with party conflict in historic studies, roll-call analysis (Johnson, 1943; Turner,

---

<sup>4</sup>The comparisons between the quartimax and varimax results are easily explained by characteristics of the rotational methods; quartimax will form a general factor if one can be formed and varimax tends to split the data among as many factors as possible.

Table 25.--Six Dimensional, Forty-nine Variable Quartimax  
ROTATED FACTOR LOADING MATRIX, 1910-1920.

	1	2	3	4	5	6
1	-0.3751	-0.0182	0.0086	-0.1955	-0.7312	0.0242
2	-0.3103	-0.3067	-0.0769	0.2223	-0.6863	-0.0775
3	0.2509	0.2988	0.2490	0.1452	-0.5252	0.1461
4	-0.3312	-0.4498	-0.0903	-0.0472	-0.6008	-0.1647
5	-0.2867	0.0710	0.0443	0.8091	-0.1617	-0.0597
6	-0.3592	-0.0995	-0.2010	-0.1440	0.5209	-0.4861
7	-0.4556	-0.1834	-0.0276	0.1511	-0.6725	0.0966
8	-0.3011	-0.1461	0.2516	-0.1890	-0.3695	0.4276
9	-0.6978	0.0029	-0.0638	0.4683	-0.0495	0.0384
10	-0.6896	-0.2785	0.1874	0.1340	-0.2734	-0.1254
11	-0.7519	-0.0287	0.3916	-0.2458	-0.1631	0.1435
12	-0.6745	-0.1966	0.1403	-0.0828	0.0587	0.3026
13	-0.6449	0.0989	0.5622	-0.2404	-0.1376	0.0834
14	-0.4590	-0.4188	-0.0024	0.3650	-0.1090	0.3050
15	-0.5166	0.2225	-0.2585	0.3723	0.2600	-0.1653
16	-0.5769	-0.4538	-0.1136	0.1143	-0.1192	0.2361
17	-0.5463	-0.1956	-0.2252	0.1859	0.0016	0.6110
18	-0.2566	-0.5631	-0.2711	-0.1083	-0.3104	0.1277
19	-0.4225	-0.4779	0.0372	-0.0114	-0.2893	0.3870
20	-0.8591	-0.0218	-0.1449	0.0660	-0.0536	0.1003
21	-0.7980	0.0835	-0.1280	-0.0674	-0.0626	-0.0998
22	-0.8768	0.0209	-0.1808	0.2372	0.0419	-0.0858
23	-0.9059	-0.0152	-0.1200	0.0684	-0.3525	-0.0046
24	-0.7201	-0.0214	0.1315	0.3603	0.0690	-0.1766
25	-0.6308	-0.1536	0.2964	0.4581	0.0548	-0.1728
26	-0.4862	0.3410	0.1291	0.5617	0.0448	0.3366
27	-0.5225	-0.0458	0.5988	0.2154	0.0215	0.1347
28	-0.0678	-0.0026	0.0394	0.2277	0.4446	-0.4771
29	-0.2087	-0.3372	-0.1805	0.4277	0.1816	0.1480
30	-0.4812	-0.1186	0.1884	0.5825	0.1188	0.1157
31	-0.3274	-0.7893	0.1163	-0.0012	-0.0457	0.0566
32	-0.3891	-0.5766	0.0758	-0.3364	-0.1565	0.4204
33	-0.2677	-0.6924	0.0211	0.0321	0.0851	-0.1036
34	-0.5809	0.1060	0.5568	-0.0777	-0.1563	0.1303
35	-0.6023	-0.0321	0.3968	-0.3405	0.1419	0.3042
36	-0.7261	-0.1936	0.1627	-0.2147	-0.0261	0.1080
37	-0.4645	-0.0094	-0.2704	0.2133	0.1057	0.5662
38	0.1956	0.0226	0.5790	0.0446	0.0179	-0.0859
39	-0.4464	-0.0056	0.3390	0.1516	0.0469	0.5418
40	-0.2346	0.0471	-0.0990	-0.2596	-0.5882	0.0158
41	-0.1637	0.0115	0.1531	0.5611	0.0851	-0.0687
42	-0.5406	-0.4186	-0.1777	0.0018	-0.3541	-0.1280
43	-0.6820	0.1183	-0.0721	0.3971	0.1424	-0.2320
44	-0.4136	-0.0036	0.0620	-0.2272	-0.1418	0.6299
45	-0.6097	-0.0201	-0.2296	0.1184	-0.0768	-0.0267
46	-0.6842	-0.0188	-0.0668	0.0102	-0.3024	-0.0338
Party	0.2520	-0.3940	0.2723	-0.0042	-0.4847	0.3435
Progress	-0.5932	-0.0106	0.1526	-0.1795	-0.0462	0.0727
US	-0.1510	0.0004	0.5165	0.2661	-0.0083	0.0352

Progress- Federalism Commerce Darwin- Libertar- Corrup-  
sivism + Gen.Wel. Powers ism ianism tion

See Table 1 for names of variables numbered above.



Table 26.--Seven-Dimensional, Forty-nine Variable Varimax  
ROTATED FACTOR LOADING MATRIX, 1910-1920.

	1	2	3	4	5	6	7
1	-0.1832	-0.6779	0.2789	-0.1427	-0.1904	0.0108	0.3113
2	-0.2104	-0.7453	-0.0298	0.1588	0.1068	0.0250	0.2715
3	0.1290	-0.0456	-0.0123	0.1123	-0.2581	-0.1304	0.6517
4	-0.0678	-0.8672	0.0957	0.0120	0.1346	-0.0073	0.0018
5	-0.4466	-0.1066	-0.2029	0.6840	0.0470	0.0440	0.2238
6	-0.2900	0.0293	0.0452	-0.0376	0.0598	-0.1653	-0.7041
7	-0.2704	-0.7065	0.1566	0.1433	-0.0085	0.1706	0.3025
8	-0.0447	-0.2322	0.4656	-0.1318	0.1541	0.2606	0.4199
9	-0.6335	-0.2128	0.1165	0.4304	0.0477	0.2587	-0.0435
10	-0.3870	-0.5443	0.3999	0.2868	0.1930	0.0145	-0.0721
11	-0.3506	-0.2534	0.7935	0.0155	0.0373	0.0973	0.0393
12	-0.3787	-0.1423	0.5410	0.0447	0.2119	0.3748	-0.0831
13	-0.2705	-0.1529	0.8624	0.1021	-0.0636	-0.0451	0.0680
14	-0.1786	-0.3696	0.1482	0.3958	0.2927	0.4700	-0.0153
15	-0.5365	-0.0140	-0.0634	0.3792	-0.2413	0.1590	-0.4290
16	-0.2828	-0.4340	0.2121	0.1164	0.3301	0.4413	-0.0944
17	-0.3140	-0.1579	0.1727	0.1092	0.1497	0.7796	0.0320
18	0.0686	-0.6845	0.0355	-0.0844	0.2219	0.3469	-0.1661
19	-0.0605	-0.4721	0.3184	0.0384	0.3203	0.4452	0.1215
20	-0.7693	-0.1944	0.2952	-0.0288	0.1534	0.2948	-0.0187
21	-0.7855	-0.1580	0.2849	-0.1583	0.0833	0.0651	-0.0434
22	-0.7299	-0.2490	0.1912	0.2315	-0.0083	0.2203	-0.2718
23	-0.7194	-0.3131	0.3492	0.0917	0.0219	0.2477	-0.1906
24	-0.7435	-0.0135	0.2290	0.2260	0.2944	-0.0058	0.0190
25	-0.5313	-0.1181	0.2747	0.5310	0.3089	-0.0641	-0.0547
26	-0.5327	0.2091	0.1558	0.5062	-0.1082	0.3442	0.2648
27	-0.1723	-0.0597	0.6370	0.5244	0.1161	0.0542	0.0385
28	-0.2560	0.2842	-0.1473	0.2005	0.2078	-0.3541	-0.3531
29	-0.2922	0.0491	-0.2168	0.2019	0.4897	0.3078	0.0002
30	-0.5027	0.0959	0.1060	0.4973	0.3830	0.1754	0.1446
31	-0.0514	-0.3837	0.2155	0.0054	0.7628	0.1426	-0.0577
32	0.0521	-0.3735	0.4734	-0.2317	0.3918	0.4308	0.0224
33	-0.1478	-0.2164	0.0604	-0.0413	0.7566	0.0181	-0.1322
34	-0.3138	-0.0566	0.7274	0.1513	0.0371	-0.0380	0.2401
35	-0.1107	-0.0287	0.8305	0.0109	-0.0032	0.2536	-0.1666
36	-0.3147	-0.3096	0.6171	0.0055	0.1085	0.2112	-0.2052
37	-0.3071	-0.0355	0.0837	0.1160	0.0838	0.7442	-0.0231
38	0.2036	0.2284	0.2420	0.1933	0.1527	-0.3651	0.2478
39	-0.1783	0.0670	0.5221	0.3113	0.0692	0.4583	0.1719
40	-0.2986	-0.3593	0.1023	-0.4164	-0.0280	-0.0599	0.4500
41	-0.0890	-0.0843	-0.0194	0.6897	-0.0803	0.0437	-0.1457
42	-0.3586	-0.6459	0.1755	-0.0361	0.2617	0.0938	-0.0763
43	-0.7154	-0.0818	0.0796	0.3724	0.0049	0.0218	-0.2376
44	-0.0892	-0.1061	0.4902	-0.1425	-0.0477	0.5484	0.1084
45	-0.7428	-0.2844	0.1784	0.0294	0.0714	0.2327	-0.1189
46	-0.7419	-0.2148	0.3743	0.0073	0.1149	0.1724	-0.1491
Party	0.3957	-0.2882	0.0917	-0.0131	0.3217	0.1022	0.5551
Progress	-0.4466	-0.0490	0.4662	-0.1411	0.1590	0.0674	0.0667
SES	0.0427	-0.0131	0.3575	0.5301	-0.0051	-0.0744	0.0617
	Liberal National.	Libertar- ianism	State Progress.	Darwin- ism	Federal- ism	General Welfare	Party

See Table 1 for names of variables numbered above.

1951), or on the basis of our earlier findings. These include (3) Civil Liberties: Property, (6) Civil Liberties: Aliens (Turner, 1951), (28) Bankruptcy (Johnson, 1943) in Table 26. Other analyses suggest the addition of (15) Civil Rights (Turner, 1951; Johnson, 1943), (38) Prohibition (Johnson, 1943), and (4) Judicial Power: Lower Federal Courts (Nagel, 1962). On these issues the Democrats are pro-liberty, pro-alien, pro-debtor, anti-Negro, anti-prohibition, and anti-judicial power.

The two separate periods of the White Court contained many variables which were constructed with similar criteria in each period so that comparisons could be made between the two periods. The factors in each period were also defined similarly so that six factors are present in both periods. Hence, we may now compare the variables and factors in both periods to check their validity and examine and offer explanations for changes. Also the multivariate analysis of the entire period is a further source of comparison and verification.

Table 27 shows the relative sizes of the factors across the various analyses. All factors found in either of the two periods are also found in the whole period study except Laissez-faire and Judicial Restraint. The former was a marginal factor which is probably the reverse of Progressivism and is likely submerged in that factor in the total analysis. Judicial Restraint was reduced from five to three

Table 27.--Comparative Sizes of Factors Across Time Periods

	<u>Per cent Variance Explained</u>			<u>No of Variables</u>		
	<u>1</u>	<u>2</u>	<u>W</u>	<u>1</u>	<u>2</u>	<u>W</u>
Liberal Nationalism	19	10	16	22	12	11
State Progressivism	8	19	13	8	13	9
Progressivism	27	29	29	30	25	30
Libertarianism	17	17	11	18	17	12
Federalism	10	8	6	14	6	5
Commerce Power	8		6	11		8
General Federalism	18	8	12	24	6	13
Darwinism		12	8½		13	16
General Welfare	7	8	8	8	7	8
Laissez-faire	5	6		9	6	
Political Party			6			7
Judicial Restraint	9			8		
Total <sup>a</sup>	74	80	74	58	58	49

1 = 1910-1915 Period

2 = 1916-1920 Period

W = Whole Period

<sup>a</sup>Variables in the column total reflect the fact that some variables are in several factors.



variables in the second period and whole period study; hence it may have become too small to measure independently.

Other changes between factors include the decrease in variance of the federalism factors. Commerce Power disappears in the second period, largely merging with State Progressivism.<sup>5</sup> Federalism likewise becomes smaller. This suggests that the traditional states' rights issue was becoming outmoded or discarded in favor of the newer ideological schism, Progressivism. Our previous analysis indicated that the second period became much simpler in structure, reflecting a growing polarization between a liberalism and conservatism into which the division eventually evolved.<sup>6</sup> The issues of conservation, land claims,

---

<sup>5</sup>Commerce Power variables which merged with State Progressivism in the second period include (13) Commerce, and (34) Commerce; State Tax. Corruption in Business (44) goes to Liberal Nationalism and General Welfare since it involves mostly national laws in the second period rather than state. Full Faith and Credit (39) becomes part of Darwinism since it involves the right of states to handle their own affairs. Workmen's Compensation; Federal-State Conflict (8) now merges with the remaining Federalism variables. These reflect the growing ideological polarization of the Court.

<sup>6</sup>The results of Sprague, 1968 reinforce these findings. His study of bloc voting indicates more polarization on the Court in his 1930-1959 period than in the previous period, 1889 to 1929. This suggests that by the last period ideological polarization had occurred. Also he finds that the federalism variable becomes "contaminated" by economic liberalism as the C.R. of the federalism scales is low. See also Mattingly (1969) who finds sharp polarization on the Hughes Court. Schubert (unpublished, pp. 100-102) finds a single liberal-conservative dimension in the Taft through the Roosevelt Courts. Since this was not true of the 1910-1915 period, we may conclude that this polarization occurred in the 1916-1920 period.

property rights, Indian rights and corruption all join the Progressivism factor in the second period. Judicial Power variables furthermore become part of libertarian or Darwinist issues.

While the Commerce Power issue merged with Progressivism, a new factor split off, Darwinism. This factor was still highly related to Progressivism as the Table 17 correlations indicate. Darwinism split off from Liberal Nationalism<sup>7</sup> and added some Judicial Power variables (41, 57). This development may have been prompted by the split in the Progressivist movement between the Taft-Wilson position and the Theodore Roosevelt position over whether trusts should be preserved under government regulation or broken up to restore the virtues and advantages of competition. This split was widely debated in the 1912 election and thereafter (Mowry, 1958).

Examples of shifts in variables due to the ideological polarization of the Court include (14) Conservation and (16) Land Claims which become disassociated with Federalism as in the first period and in the second period merge with State Progressivism as it is part of the Progressivist ideology. This may account for (19) Fiscal Power moving from Libertarianism to Progressivism. It involved mostly income and

---

<sup>7</sup>Darwinism variables which split off from Liberal Nationalism include nine variables. They are: (5) Civil Liberties of Indians, (15) Civil Rights, (24) Discrimination (25) General Liability, (26) Liability: Insurance, (27) and (48) Liability: Railroads, (30) Antitrust, and (43) Business: Self-incrimination.

corporate taxation.

The distinction between the two Progressivism factors in both periods was so slight that several variables switched from one to the other between the two periods. Hence (19) Federal Fiscal Powers loads on the state factor in the second period, while (46) State Rates loads on the federal factor in the first. Likewise (20) Federal Regulation: Non-economic loads on the state factor the first period. This may be due to chance variation placing variables in the "wrong" category.

The movement of (9) Workmen's Compensation-Non-Federal-State Conflict to the state factor reflects the changing content of that variable: it contained mostly federal cases in the first period and mostly state cases in the second. Likewise (38) Prohibition contained mostly state laws in the first period and loaded with State Progressivism but contained all federal cases in the second period and loaded with Liberal Nationalism. This is also true of (37) Corruption in Government.

The growing simplicity of ideology in the second period also accounts for many variables which logically seemed to fit in Libertarianism in the first period but loaded instead with Liberal Nationalism and Federalism. These probably tapped the states' rights dimension in the first period. When this dimension became less salient they all moved into Libertarianism. They include: (3) Civil

Liberties: Property, (6) Civil Liberties Aliens, (15) Civil Rights of Negroes, (43) Business: Self-incrimination, and the bankruptcy (debtor) variables (28, 49, and 52). All of these (except 43) are also in the Party factor in the whole Court analysis. Hence, a growing ideological split along party lines also occurred in the second period, centering around the Libertarian factor.

An analysis of phi correlations and "raw" interagreement correlations did not reaffirm the previously defined factor structure as clearly as did the corresponding comparisons for period one and period two.<sup>8</sup>

Nevertheless the factor structure of the Q-analyses roughly corresponded with the R-analysis factors (see Table 28). In each analysis principal axis loadings were equivalent to varimax and quartimax loadings, but the phi analysis gave slightly different results from the raw data analysis.

The first factor on all six analyses (all rotations) was Progressivism, explaining 10.1 per cent of the variance. Phi varimax I (PVI) for example correlated .72 with Progressivism, .71 with State Progressivism, .55 with Liberal Nationalism, .49 with Equalitarianism, .45 with Libertarianism, and -.36 with Laissez-faire. On this factor Clarke,

---

<sup>8</sup>The reason may be due to the fact that factor scores for the identified factors were not used but rather average ranks were compared with the ranks of the justices on the phi factor loadings and "raw data" factor loadings. The resulting tau correlations wasted much of the refinement of the data.

Table 28.-- White Court Justices' Average Ranks for Major Factors and Loadings on Phi Q-Analysis for Whole Court Analysis, 1910-1920

Ranks	Lib. Nat.	State Prog- ress,	Lib- tar- ian,	Dar- win- ism	Fed- eral- ism	Judi- cal Restr.	Equal- itari- anism	Gen. Wel- fare
Holmes	7	5	6	12	8	5½	7	11
Brandeis	1	1	3	3	2	4	2	3
Pitney	2	3	13	1	7	12	11	4
White	9	12	8	13	9	5½	4½	10
McReynolds	12	13	12	9	3	1	13	6
Day	6	7	9	7	11	11	9	5
Clarke	4	2	2	2	1	7	1	1
VanDevanter	10	11	11	11	13	9	12	13
McKenna	8	6	10	4	12	10	10	12
Hughes	5	4	4	8	5	3	8	8
Lamar	11	8	5	5	10	8	4½	7
Lurton	13	9	7	10	6	2	3	9
Harlan	3	10	1	6	4	13	6	2

Phi Correlation Q-Analysis Varimax Loadings

	PV1	PV2	PV3	PV4	PV5	PV6	PV7
Holmes	-.12	.02	-.53	.09	-.15	.05	.45
Brandeis	-.47	-.15	-.08	.06	.00	-.07	.52
Pitney	-.09	.01	.42	.04	-.20	-.27	-.01
White	.19	.11	-.02	.13	.05	-.55	-.03
McReynolds	.58	-.05	-.02	.11	.00	.09	-.31
Day	-.01	-.09	.13	-.67	-.03	-.10	-.03
Clarke	-.66	-.04	-.02	-.03	-.03	-.07	.00
VanDevanter	.50	.07	-.07	-.31	-.02	.17	-.02
McKenna	.07	.76	.07	.01	.09	.03	-.08
Hughes	-.01	-.03	-.03	-.02	-.51	-.03	.03
Lamar	.05	-.21	-.17	-.17	-.17	.26	-.02
Lurton	.02	-.02	-.63	.12	-.09	-.04	.01
Harlan	.01	-.57	.30	-.38	.32	-.22	-.08

PP1 = PV1 = RP1 = RV1 = Progressivism  
 PV2 = Libertarianism-Federalism-General Welfare  
 PV3 = RV3 = RP3 = Darwinism  
 PV4 = RV4 = Political Party  
 PV6 = RV2 = Liberal Nationalism  
 PV7 = Commerce Power      RP2 = Judicial Restraint

2nd P = Principal Axes Factor  
 V = Varimax Rotation Factor  
 1st P = Phi Correlation  
 R = Raw Data Correlation

Brandeis, and Holmes loaded highly positive and McReynolds, Van Devanter and White loaded highly negative going from the most to the least extreme.

Another factor, PV2, was a composite of General Welfare (.59), Federalism (.44), and Libertarianism (.41), explaining 7.7 per cent of the variance. Harlan loaded highly positive and McKenna loaded highly negative. Note that Figures 17 and 18 also indicate that the second factor is a composite of these three attitude factors. Hence, finding this factor is consistent with our previous factor analyses.

PV3, RP2, and RV3<sup>9</sup> seemed to represent Darwinism, accounting for 7.8 per cent of the variance. Holmes and Lurton were highly pro-Darwinism and Pitney and Harlan were anti-Darwinist.

PV4 and RV4 correlated with Party (.34 and .44) and other variables of the Party factor, suggesting that it represented that factor. Day, Van Devanter and Harlan showed up as highly partisan Republicans. It accounted for 6 per cent of the variance.

PV6 and RV2 correlated with Liberal Nationalism at .52 and .31 with White being highly conservative.

PV7 represented the Commerce Power factor as it correlated .51 with the Commerce variable (13). It represented

---

<sup>9</sup>RP2 and RV3 refer to "raw data" analysis (R) of principal axes (RP2) and varimax (RV3).

4.5 per cent of the variance. Holmes and Brandeis were highly liberal while McReynolds was highly conservative.

PV5 correlated with no attitude factors but it may be significant that it correlated with enough background variables to suggest that it might represent dogmatism. It correlated with age (.36), religion (.31), socioeconomic status (.26), and years on the Supreme Court (.26). The older, senior judges who were of low status were high on this factor. They also opposed the rights of Indians and voted to punish corruption in business. This suggests a narrow, punitive disposition, but this hypothesis is not borne out by comparison with other civil liberty variables. Hughes would be highly non-dogmatic while Harlan would be dogmatic if this factor measures this dimension.

Comparison with our first and second period Q-analysis reveals that only in the whole period was no Laissez-faire factor found. Libertarianism by itself was not found in either the first nor whole period Q-analysis. Evidence of both Federalism and Progressivism was, however, found in all three studies, reaffirming the importance of these factors. Progressivism was clearly the most significant and stable factor in all three studies. The connection of Libertarianism with Federalism or economic variables may account for its failure to appear as a separate factor on two out of three Q-analyses.

Strong evidence thus exists for the invariance of at least five factors: Liberal Nationalism, State Progressivism, Libertarianism, Federalism, and General Welfare. How can the differences in factor structure between the two periods be accounted for in the light of the supposed invariance in attitudes across time?

Political scientists have suggested that voters and legislators take positions on political programs according to reference symbols (Key, 1964, pp. 63-64). Voters who identify with a party or an ideology such as liberalism will often support programs associated with that symbol (Campbell, 1964). Legislators will often vote along factional lines, being either for the governor's program or against it (Jewell, 1962, chap. 3). Congress will react for or against a president's program in terms of their approval or disapproval of him (Edelman, 1964; Crotty, et.al, 1966, pp. 499-513; see also Sorauf, 1968, pp. 342-343, 348-350).

Psychologists present essentially this same concept in the attitude theory of "congruity" (Osgood and Tannenbaum, 1955; Insko, 1967) in which a person shifts for or against a statement (or issue) in proportion to its association with a personal reference symbol. Hence, a Republican often exhibits an automatic bias against a program advocated by a Democratic president and a favorable bias toward a program favored by a Republican leader whom he admires.



The evidence indicates that many changes in the factor and attitude structure between the two periods is explainable in terms of congruity theory and that the White Court judges shifted in attitude as a reaction to national party leadership.

Why were the intercorrelations between Liberal Nationalism, State Progressivism, and anti-Darwinism lower in the whole study than in either individual period? Part of the answer lies in the increasing complexity of the data due to having more justices. Thus we expect more factors and ones which are less related. However, Federalism and Libertarianism remain highly intercorrelated. Much of the explanation, however, seems to be related to considerations dealing solely with Progressivism. The most important reason for this anomaly is that the change in party control of the national government shifted the judge's attitudes toward Liberal Nationalism. The same considerations also explain the change in structure of Progressivism from the first period to the second, that is the splitting off of anti-Darwinism from Liberal Nationalism and the increase in correlation between the Liberal Nationalism residue and State Progressivism.

In the second period case context, the national leader of Progressivism was no longer a Republican like Theodore

Roosevelt or Taft<sup>10</sup> and was instead the Democrat, Wilson. Hence, the Republican judges no longer felt an allegiance to a Republican Progressivist administration nor felt identified with such a national program. Instead the Court was faced with a Democratic national Progressivist administration which evoked the traditional enmity of the Republicans and the sympathy of the Democrats. Several methods indicate that in general the partisan Republicans supported Liberal Nationalism in the first period while Democrats opposed it. In the second period no such relationship exists. Our party variable correlates .70 with the average ranks of Liberal Nationalism in the first period (Republicans were more liberal), but only .16 in the second period (Democrats now being liberal).<sup>11</sup>

When the average ranks of the Liberal Nationalism factors for the two periods are compared for only the seven judges incumbent in both periods, it is found that three of the four partisan Republicans (with Pitney the exception) shifted one or two ranks against Liberal Nationalism while Holmes and White shifted favorably towards Liberal Nationalism (Table 29 below). Pitney and McReynolds did not change.

---

<sup>10</sup>Taft originally wore the mantle of the leader of Progressivism although Roosevelt and others charged that he had betrayed their cause. Nonetheless, he approved and took credit for many Progressivist programs, more of which were passed under his administration than under Roosevelt (Kelly and Harbison, 1963; Mowry, 1958).

<sup>11</sup>A scale of Liberal Nationalism cases in the October 1908-1909 terms of the Fuller Court also correlates .55 with party, Republicans being more liberal.

Table 29.--Judges' Shift in Attitudes toward Liberal  
Nationalism

Changes in Attitudes of Seven Judges  
Common to both periods of the Court

<u>Judge</u>	<u>Party</u>	<u>Change in Rank</u>
Holmes	Independent Republican	+ 3
Pitney	Republican	0
Day	Republican	- 1
Van Devanter	Republican	- 2
McKenna	Republican	- 2
White	Democrat	+ 2
McReynolds	Democrat	0

+ indicates shift to liberalism from 1st to 2nd period.

Significance of Judges' Ranks on Liberal  
Nationalism as tested by t-test compared  
to average ranks of entire universe of  
ranks on all scales

First Period, 1910-1915

<u>Judge</u>	<u>Party</u>	<u>Significance</u>	<u>Direction</u>
Holmes	Indep. Rep.	.003	Conservative
Pitney	Republican	.0000	Liberal
Day	Republican	.002	Liberal
Van Devanter	Republican	.058	Liberal
McKenna	Republican	.016	Liberal
Hughes	Republican	.200 N.S.	Liberal
Harlan	Republican	.0000	Liberal
White	Democrat	.069 N.S.	Conservative
McReynolds	Democrat	.0000	Conservative
Lamar	Democrat	.005	Conservative
Lurton	Democrat	.0000	Conservative

Table 29 (cont'd.)

Second Period, 1916-1920


---

<u>Judge</u>	<u>Party</u>	<u>Significance</u>	<u>Direction</u>
Holmes	Indep. Rep.	.013	Liberal
Pitney	Republican	.0000	Liberal
Day	Republican	N.S.	
Van Devanter	Republican	.001	Conservative
McKenna	Republican	.0003	Conservative
Brandeis	Democrat	.0008	Liberal
White	Democrat	N.S.	
McReynolds	Democrat	.0000	Conservative
Clarke	Democrat	N.S.	

---

Tests of consistency of attitude toward this attitude system by an F-test of variance of ranks on this factor as compared with total variance of all judge's ranks showed all judges to be consistent in attitude toward this factor (at a significance of .03) except Holmes and Lamar in the first period and Day in the second period.

Analysis of the constituent Liberal Nationalist variables shows a similar pattern. Holmes is considered an independent whose association with the Republican party was purely nominal.<sup>12</sup> He never ran for office or campaigned for his party as did all the other judges of the White Court. His shift is probably due to the influence of Brandeis as will be shown below.

If we treat each factor as a group of its constituent variables and separately analyze the ranks of each justice for each group or factor we can compare the average ranks of each judge between any two factors by a t-test (McNemar, 1962).<sup>13</sup> This permits the testing of whether a judge differs significantly in attitude toward Progressivist programs when on a state rather than a national level (Liberal Nationalism). It will also tell us whether he is more favorable (in rank) to state or national powers.<sup>14</sup>

---

<sup>12</sup>Holmes attempted to maintain an attitude of independence from Theodore Roosevelt's influence as a judge. This resulted in a personal attack on him by Roosevelt. See Howe, 1961. See also Frankfurter, 1961, p. 18. Also see p. 64 for White's admission that Roosevelt had a tremendous influence on the Court.

<sup>13</sup>On the appropriateness of such a test see Chap. 1 above. These tests are used only for comparative purposes.

<sup>14</sup>Thus we may conceive of the attitude system of Progressivism being composed of two subcomponents, an attitude toward object and an attitude toward situation. (See Rokeach, 1969; Spaeth and Parker, 1969). Thus the object is the Progressivist program and the attitude towards it is examined in two separate situations: (1) at the state level and (2) at the national level. We may also conceive of these factors as the interaction of values. Equalitarianism is a value common to both factors. The other governmental values, federal power and states' rights, may be instrumental values.

As expected, in the first period those judges significantly more favorable to state Progressivist legislation than federal (as judged by a .05 error level of significance) were Democrats except for Holmes. They included McReynolds and Lurton. Those significantly more favorable to federal legislation were all Republicans except for White. They included Day, Van Devanter, and Harlan.

In the second period, Lurton and Harlan were replaced. The new justices, Brandeis and Clarke, saw no significant difference between state and national programs. Furthermore, McReynolds became less anti-federal and Day and Van Devanter became slightly pro-state (but not significantly). In fact, few on the Court retained any significant discrimination in their attitude to Progressivism whether at the state or national level (as measured by the t-test) except Pitney and White, both more pro-national than pro-state.

Consequently, Republicans no longer gave particular support to national programs out of partisan identification with them, and the Democrats, traditionally anti-national, no longer retained a significant opposition to national Progressivist programs. McReynolds and White are still anti-Progressive but oppose national programs no more than state ones.

Comparisons of average ranks for the two Progressivist factors and the mean of ranks of constituent variables for both periods reinforce the above findings.

Hence, the second period is more simple in structure because party and federalism influences on the Progressivism factor decrease due to the Democratic dominance of the national government and the Wilsonian championing of Progressivism.

Next we note that Darwinism (or anti-Darwinism) in the second period has split off from Liberal Nationalism. The total number of variables and per cent of variance explained by these two factors in the second period is equivalent to the first period Liberal Nationalism.

Anti-Darwinism represents principally a bias against big business rather than the support of federal regulation of such. Some of its variables do involve such federal regulation, however, such as Antitrust (30) and Discrimination (24).

For the first period, the variables that were in Darwinism in the second period were compared with the Liberal Nationalism ranks. Only Lamar and Lurton showed any significant differences in attitudes toward Liberal Nationalism and anti-Darwinism. Both were more opposed to Liberal Nationalism than to anti-Darwinism. They may have been influenced both by traditional Democratic opposition to the national government and by more contemporary Southern populist and rural antagonism to big business. Hughes was slightly more favorable to Liberal Nationalism than to anti-Darwinism. Perhaps he was influenced to support his

party's national programs, but he was also less antagonistic to big business as a consequence of his corporate law practice in New York.

In the second period these justices are not on the Court, but the justices that remained shift greatly in attitude so that seven of the nine now reacted significantly differently to the two attitude systems (at a .06 or lower error level of significance).

There is some shifting of attitudes on Darwinism. Among the seven judges incumbent during both periods, White shifts three ranks against big business, while Holmes and McReynolds shift two ranks in favor of big business or Darwinism. White probably shifts as he does on Liberal Nationalism because he identified with the Wilsonian Democratic antitrust policy. McReynolds did not so identify, obviously. This could be a socio-psychological reaction to the position of Clarke and Brandeis, both of whom he hated (Early, 1954). It could be due to a general shift to conservatism which he exhibited between the two periods.<sup>15</sup> Lastly, it could be part of a process of transition from the role of trust-buster to that of a judge independent of political influences.

Holmes' shift seems to be caused by a reversion to his preferred attitudes, since he was basically Darwinist in

---

<sup>15</sup>This shift could be illusory. His ranks in the first period were based on a small number of cases (all in the 1915 term.)



philosophy (Howe, 1961; Lerner, 1954). In the first period, other influences probably led him to act more liberally than he really was. It may have been a reluctant attachment to the political policies of Theodore Roosevelt and Taft reinforced by Republican judges on the Court, especially Hughes, which led him to withhold dissents in the hopeless cases of a 7-2 vote against him. It might have been due to the influence of Lurton with whom he was closely associated as indicated by phi correlations. Lurton was more biased against big business.

When we examine the judges who differentiate between Liberal Nationalism and anti-Darwinism in the second period, the reasons for the separation of Darwinism becomes clear. It is again related to party. None of the judges who were significantly more favorable towards Liberal Nationalism than anti-Darwinism were partisan Republicans. They include Brandeis and White, Democrats, and Holmes, the independent Republican. Those who were less favorable to Liberal Nationalism than anti-Darwinism were all regular Republicans except for McReynolds. They include Day, Van Devanter, and McKenna. McReynolds was consistently pro-states' rights and anti-national, which explains his position.

We may expect attitudes toward big business (Darwinism) to remain fairly stable,<sup>16</sup> but attitudes toward a national program of legislation may change as the party control of

---

<sup>16</sup>This attitude system seems related to the basic socio-economic status of the judges' family rather than party.

the government changes, as we have seen. Hence, Darwinism and Liberal Nationalism form separate factors as the anti-big business attitude becomes disassociated from attitudes toward national power which shift due to the turnover in party control of the national government. Van Devanter and Day shift most, both of them being much more anti-Darwinist than pro-Liberal Nationalism in the second period than they were in the first.

Party does not correlate highly with Liberal Nationalism in the second period (.16), however, since traditional Democratic opposition to national power still has its effect.

A clearer picture of the shifts of the justices toward the Liberal Nationalism factor may be seen in Table 29. Clearly political party is the dominant factor prompting this change; and it appears to be a reaction to the turnover of control of the national government and leadership of national Progressivist programs from the Republican to the Democratic party. All Republicans shift negatively toward Liberal Nationalism from the first period (Republican administration) to the second (Democratic administration) except for Holmes (an independent Republican) and Pitney. Pitney is the most extreme liberal in both periods and exhibits no change. Obviously his commitment to this factor is so deep that a change in parties does not affect it. Democrat White changes favorably to National Liberalism while McReynolds does not shift. McReynolds is consistently

opposed to Liberal Nationalism and likewise the depth of his opposition transcends party considerations. Holmes acts like a Democrat due to his close relationship with Brandeis who joined the Court in the second period.

When we examine (in Table 29) whether judges are consistently more liberal on this issue than their average rank on all issues, our findings are confirmed. In the first period all Republicans are more liberal on Liberal Nationalism than their position on other issues. All Democrats and Holmes are more conservative.

In the second period no clear pattern exists. This situation occurs because Republican commitments to the support of national power and Democratic commitments to states' rights is an interferring variable and partly counteracts a reversal of position as the party controlling the national government changes.

Hence, Pitney and McReynolds retain their first period positions as the extremity of their views would lead us to expect. Otherwise the remaining Republicans and Democrats either follow the expected pattern or show no preference toward Liberal Nationalism: Republicans Van Devanter and McKenna now are conservative while Brandeis and Holmes are liberal. Clarke is now the extreme liberal on most issues so he can hardly be "more liberal" on this one.

Both Federalism and Libertarianism change very little between the two periods. Both are significantly correlated with party (a tau of .32 and .37, respectively), and changes in the national administration had little effect on them. However, party correlates higher with them in the second period (.65) than in the first period (.31 and .49, respectively). This sharpening of party lines on these issues probably are due to a larger Democratic bloc of judges who were all appointed by Democrats, hence had fewer loyalty conflicts and were more representative of the party (including some non-Southern judges).

Commerce Power is a factor on the first period but not in the second. In the second period it becomes part of State Progressivism. The judges who in the first period have significantly different attitudes toward the two issues are Lamar and Harlan (.004 and .007 significant levels<sup>17</sup> on the t-test). Lamar following his party and region supports state commerce powers. Harlan, following his party and supporting his party's administration, upholds federal commerce power. White shows a less marked distinction to differentiate between the two factors (.02 significance), favoring state commerce powers over federal. In the second period with his party supporting a national Progressivist program, White no longer makes such a distinction.

---

<sup>17</sup>These figures refer to the chance of an erroneous conclusion that the relationship is significant.

Commerce Power seems to be an anachronism in the first period, important to the older judges who were fighting traditional legal battles which had become outmoded. When these judges (Lamar and Harlan) left the Court and White conformed to group perceptions of these issues in the second period, Commerce Power as a separate issue faded from view.<sup>18</sup> It became merged with issues of Progressivism and state power generally.

Judicial Restraint as a factor seems to suffer the same fate as Commerce Power. In the first period, eight of eleven judges show a consistent attitude toward this issue (according to a F-test of the Judicial Restraint variance as opposed to the variance of each judge's ranks on all scales) and have average ranks on this issue significantly different from their average ranks for the entire sample (a t-test of better than .005 significance). In the second period only three of nine judges show similar consistency and significant rank differences on this issue. The first period includes Holmes, White, McReynolds, and Hughes as pro-restraint judges and Pitney, Day, Van Devanter and Lamar as pro-Judicial Power judges. In the second period only Holmes and Pitney retain their views on this issue to a significant degree. McKenna then became marginally pro-judicial power<sup>19</sup>

---

<sup>18</sup>It still remains as a separate scale or attitude but not a separate attitude system.

<sup>19</sup>McKenna's shift might be due to a long-time association with the judiciary and separation from the political process, a hardening of the judicial arteries.

while White greatly decreased his opposition to it. Brandeis also is slightly pro-restraint (.05 significance).

Hence, the weighing of this issue as of importance in the judges' decision making decreases at least by half. It is highly likely that this issue became subordinated to the then contemporary issues of Progressivism and perhaps party issues. The traditional restraint issue then became less salient than the judges' attitudes toward the newer liberal-conservatism polarization of political opinion.

A further possibility is as follows. Hughes and Lamar left the Court to be replaced by judges less concerned on this issue. McReynolds and White were pro-restraint because they opposed federal judicial power because it strengthened nationalism and because federal judges were largely Republicans. Day and Van Devanter were pro-judicial power because they were of the opposite party. When the Democrats achieved power, the position was reversed and Democrats no longer opposed federal power as strongly nor federal judges who were no longer overwhelmingly Republican (after four to eight years of Democratic rule) nor did the Republicans support them as strongly for the same reason. Hence, all four no longer consider this issue strongly.

A possible hitch to this explanation is that Hughes, a Republican, opposed judicial power while Lamar, a Democrat, supported it. However, Hughes was a Progressivist who avowed a strong faith in popular rule while Lamar not only

ift but seemed to favor power for judges  
 e and had been disapprobative of the elec-  
 e Lamar, 1926.)

se exceptions can be explained, the hypo-  
 e as becoming submerged in other issues

Thus in the second period we have fewer  
 les involving this issue as well as fewer  
 it differently than other issues. Even-  
 was raised by political leaders throughout  
 erwards and although Holmes and Brandeis  
 it, the strength of the overriding  
 ervatism issue pushed it to a minor role.

tem.--It may be appropriate to consider the  
 he light of theory of a closed attitude  
 o a judicial system open to outside  
 s the attitude structure of the two  
 milar, a conclusion seems warranted that  
 were taken into consideration by the  
 e seems as though the attitudes, attitude  
 d ideology of the justices set the para-  
 making on the Court; outside influences  
 on the decision making within those para-  
 ions of political party, association with  
 national leadership and control of the  
 early have their impact on actual deci-  
 ence symbols have their basis on the

internal psychological make-up of the Court, but their manipulation seems to be possible by outside events. Hence, the Court is clearly an "open system." Authorities which support this view are many. (See Schubert, unpublished, pp. 4, 9; Kelly and Harbison, 1963, p. 609). Arnold Paul (1960, especially p. 76) presents an interpretation of the pre-White Court period which explains most of the Court's action in terms of external political influences.

To further test this hypothesis, the corresponding pairs of scales in the two periods may be compared as to the ranks of the seven justices which were on the Court for both periods. This may also serve as a check on the validity of the scales. Hence, hopefully the seven justices should show the identical rank on each corresponding scale on the first period scale as on the second. The Criminal Due Process (4) scales for the first period, for example, should show that the seven justices rank the same as they do on the second period scale, after excluding the justices who served in only one period.<sup>20</sup>

The pairs of scales that were compared totaled 42. Of these only five showed shifts of one rank or less. (See Appendix IX.) The correlations (tau) and significances between pairs were calculated.

---

<sup>20</sup>The seven justices who served in both periods were Holmes, Pitney, White, McReynolds, Day, Van Devanter, and McKenna.



lrs did not correlate significantly.

correlate above the .068 significance level.

aspect scales, seven correlated at a signif-

worse than .360 significance, two at .191,

lly) at a .119 significance level (See Table

e above rank differences may have been due

of definition of exact ranks due to a small

cases fitting within the category). Hence,

relations and significances were correlated

ct moment method) with the number of "weak

ich were in doubt due to lack of case votes

ce not being on the Court for part of the

They were also correlated with the sum of

ach pair of scales and the product of the

in each pair of scales. None of these fac-

significantly with the weakness of scale

s, except the C.R.'s. The C.R. correlation

significance level of .072.<sup>21</sup>

y conclude that the weakness of ranks was

ause of the low scale intercorrelations,<sup>22</sup>

---

's were based on the votes of the seven jus-  
the scales containing all justices the cor-  
lation with the product of the C.R.'s was  
fificance level of .130.

ions of total shifts by individual justices  
of "weak ranks" indicated that some of  
ts were due to this factor, correlating  
t at the .003 level. This would account for

**Table 30.--Tau Correlations and Significance Levels between Pairs of Corresponding Scales for Ranks of Seven Justices**

<u>Scales<sup>a</sup></u>	<u>Tau</u>	<u>Significance</u>	<u>Scales</u>	<u>Tau</u>	<u>Signif.</u>
2. Gen.Civ.Lib.	.429	.119	27. Lia.R.R.	.683	.015
3. CL: Prop.	.138	.360	28. Bankrupt	.429	.119
4. Criminal	.390	.119	29. Patent	.667	.015
7. Labor	.751	.015	30. Antitrust	.810	.005
8. WCFS	.683	.015	31. Federal	.714	.015
9. WCN	.551	.068	32. Fed:Econ.	.600	.034
10. 14th Due Proc	.429	.119	33. Fed:No-ec	.429	.119
11. St. Tax	.905	.001	34. Com:Stax	-.067	.500
12. Contract	.143	.386	35. Com:NoTax	.200	.360
13. Commerce	.200	.360	36. Tax D.P.	.905	.001
14. Conservation	.524	.068	37. Cor Govt	.751	.015
16. Land Claim	.867	.008	40. JPLowCts	.524	.068
17. Corruption	.333	.191	41. JP Lib	.500	.068
18. Fiscal Claim	.524	.068	42. JPConser	-.143	.614
19. Fis. Power	-.048	.500	48. LiaRRFS	.683	.015
20. FReg:Non-ec	.488	.068	45. Fed.Rate	.667	.015
22. I.C.C.	.524	.068	46. St. Rate	.390	.119
23. Rate Regn	.524	.068	47. Fed.Reg.	.333	.191
24. Discrimin	.810	.005	44. Cor: Bus.	.488	.068
25. Gen. Lia.	.905	.001	50. WorkComp	.429	.119
26. Lia. Ins.	.900	.001	51. Gov.Econ.	.973	.015

<sup>a</sup>See Tables 1 and 2 above for full names of scales.  
Each correlation represents the relationship of the period 1 scale with the period 2 scale.

nor was size of case content of scales.

The low C.R.'s of some of the scales did cause some of the low intercorrelations but not to a large extent.<sup>23</sup> It only explained six per cent of the variance. Hence, a conclusion may be justified that the low intercorrelations were due to other reasons than violating proper methodological rules of scale construction. These could be due to changes in attitudes by the judges or external influences on the Court.

The possible explanations which could explain the shifts in ranks are (1) sociometric relationships resulting from old justices leaving the Court and new justices joining it and (2) the influence of political party, as previously developed, prompted by the shift in national Progressivist leadership from the Republican party to the Democratic.

First, possible sociometric relationships will be examined. Phi correlations using the justices' votes on the cases give several high correlations between justices. Positive relationships are: Holmes with Brandeis (.420), Harlan with Day (.439), and Clarke with Brandeis (.307).

---

about 20 per cent of his shifts in rank. It indicated that he was more conservative in the first period than his ranks would show.

<sup>23</sup>Seven of the sixteen "bad" scales were residual in character. That is they contained cases with a variety of issues lumped together. Four of them were split into component scales which greatly improved their reproduceability and pairwise intercorrelation. See Chapter 2 above.

Negative relationships are McReynolds with Brandeis (-.437) and McReynolds with Clarke (-.410). Harlan was only on this Court for a year, so his relationship with Day will be neglected.

According to Rokeach (1968) there are connections between social relationships and opinions. Hence, if justices are positive reference symbols they will influence one another's opinions (or attitudes) and hence voting behavior. On the other hand, negative reference symbols might cause negative reactions to the attitude positions of others.<sup>24</sup> McReynolds reputedly hated Clarke and Brandeis (Early, 1954) and this might have pushed him into taking positions contrary to their positions. Likewise Brandeis might have influenced Holmes and Clarke into taking a more liberal position than they might otherwise have taken.

Brandeis and Holmes had been lifelong friends (Mason, 1946, p. 57) and this relationship might have influenced Holmes toward his more liberal position (ibid., p. 571). But a further, more rational, explanation is possible.

Brandeis was noted for the use of sociological data in demonstrating the reasonableness and desirability of governmental regulations and actions dealing with social problems, the "Brandeis brief." It has been argued that before

---

<sup>24</sup>This is more definitely articulated in congruity theory. See Osgood and Tannenbaum, 1955. Other attitude theories support this model. See Insko, 1967.

Brandeis, the Court lived in an unreal world without knowledge of the great social problems caused by the rapid industrialization and urbanization of the nation. With the information supplied by the Brandeis type of brief, the Court for the first time "breathed the air of reality" (Warren, 1926, p. 748, quoting Frankfurter). It is clear that Brandeis continued this type of research while on the Court and gave other justices and his written opinions the benefit of such research (Mason, 1946). Hence, Brandeis might have become the White Court's conduit to the world of reality, opening their eyes to contemporary social problems.

While Brandeis might have influenced many justices, he would have particularly influenced Holmes.<sup>25</sup> Holmes combined a healthy respect for sociological facts in making his decisions with a reluctance to research and discover them (Howe, 1961, 1957, 1963; Lerner, 1954; Frankfurter, 1961). Naturally, it would be ideal to let Brandeis investigate the facts so that Holmes could benefit from them and decide cases in accordance with them.

Consequently the influence of Brandeis, Clarke, and Hughes (a possible prestigious reference source for the Republicans) on the seven justices was examined to see if their influence accounted for some of their rank shifts.

---

<sup>25</sup>Taft complained that Brandeis had such control over Holmes that this situation gave Brandeis two votes instead of one. Brandeis also had an influence on Taft when he joined the Court. Pringle, 1939, pp. 969-970.

The scale of ranks was considered as similar to a Likert scale. An extreme rank might indicate extreme intensity of opinion. A large difference in ranks between two justices would indicate a large difference in position. For favorable reference sources, the difference in ranks would decrease; that is the individual would shift toward the favored reference source. For unfavorable reference sources the difference in ranks would increase. A source with an extreme rank would exert more influence on a justice's attitude than a less extreme rank. (See Osgood and Tannenbaum, 1955; Insko, 1967.)

An index of the extremity of the ranks of Brandeis was correlated with the seven judges' shifts in position. Clarke's and Hughes' extremity of ranks were likewise tested. If Brandeis' rank was 1 for a scale he was given the most extreme rank and so forth. The ranks of these three justices were almost all more liberal than the average for the Court.

Table 31 shows that indeed Brandeis influenced Holmes and Day to shift in a liberal direction but had a negative influence on Republican McKenna and Democrat McReynolds who disliked him.<sup>26</sup> Furthermore, Clarke was a negative reference source to McReynolds and White but had a positive liberalizing influence on McKenna. The former may have been repelled by Clarke's liberal position whereas McKenna,

---

<sup>26</sup>Possibly because he was Jewish. Early, 1954.

Table 31.--Sociometric influences on Justices' Rank Shifts

<u>Judge Influ- enced</u>	<u>Refer- ence Source</u>	<u>Direc- tion of Reference</u>	<u>Direc- tion Influenced</u>	<u>Tau Correla- tion</u>	<u>Signif- icance Level</u>
Holmes	Brandeis	Positive	Liberal	.278	.039
Day	Brandeis	Positive	Liberal	.398	.005
McReynolds	Brandeis	Negative	Conservative	-.217	.102
McKenna	Brandeis	Negative	Conservative	-.288	.034
McKenna	Clarke	Positive	Liberal	.512	.000
McReynolds	Clarke	Negative	Conservative	-.389	.009
White	Clarke	Negative	Conservative	-.280	.038
McKenna	Hughes	Positive	Liberal	.268	.045
Pitney	Hughes	Positive	Liberal	.209	.095

similarly an anti-prohibitionist and son of an Irish immigrant, may have found common ground with Clarke.

Furthermore, Hughes had influenced fellow Republicans McKenna and Pitney positively in a liberal direction in the first period while he was on the Court.

Other evidence validates the finding that Brandeis profoundly influenced Holmes after he joined the Court including the high phi correlation and high loadings on the same factor on Q-analyses.

Hence, when we examine party influences, Holmes is placed with the Democrats since (1) he was influenced by Brandeis, (2) he was purely a nominal Republican, and (3)

previous evidence above (Table 29) showed that he behaved like the Democrats.

A breakdown of rank shifts was made between the two partisan groups: (1) Republicans Pitney, Van Devanter, McKenna, and Day, and (2) independent Holmes and Democrats White and McReynolds. This division resulted in a product moment correlation of .147 between "party" and rank shifts at a highly significant level of .008. Clearly the Republican group shifted negatively in a conservative direction and the other group shifted positively in a liberal direction in the second period.

Thus rank shifts are explained by these two factors, (1) sociometric influences and (2) political party, as our hypothesis suggested.

The rank shifts of the justices are given as follows: Holmes shifts in a liberal direction more than any other justice except White. He shifts to liberalism on 54 per cent of the scales and shifts conservatively on 20 per cent.<sup>27</sup> On total rank shifts he shifts 81 per cent in a liberal direction and only 19 per cent conservatively. His conservative shifts are largely associated with Darwinism.

White also shifts towards liberalism on 54 per cent of the scales and toward conservatism on 20 per cent.

---

<sup>27</sup>See Chapter 2 above for the definition of conservative and liberal.



fts 81 per cent of his total rank shift in a  
n.

does not shift very much but he shifts con-  
per cent) more than he shifts to liberalism  
His total rank shifts are 82 per cent con-  
er. He does not shift on Liberal National-

to liberalism (41 per cent) more than to  
per cent). Pitney does not shift very much  
to liberalism (23 per cent) than to conser-  
ent). Van Devanter shifts more to conser-  
ent) than to liberalism (27 per cent).

ost radically towards conservatism (54 per  
es towards liberalism (27 per cent). Both  
vely largely on Liberal Nationalism, but  
omes more anti-states' rights and pro-  
nt. McKenna becomes more states' rights  
e favorable to Libertarianism in the second  
nder the influence of Clarke who ranks  
n these issues.

have seen that two factors upset the notion  
a stable closed system: external political  
sociometric relationships. Furthermore,  
to shift positions on attitudes for undis-  
which may further question the hypothesis of  
f attitudes over time.

The attitude structure of the two periods studies are quite similar but differences can be attributed to the change in party control of the national government and the Progressivist movement. Further, a growing polarization of Court opinion along liberal-conservative lines occurs along with the discarding of outmoded concepts such as Federalism, Judicial Power issues, and Commerce Power other than in the above ideological context. Party and Progressivism were clearly the dominant ideological forces on the Court.

Next we shall examine the values and ideologies which shaped the White Court's attitude structure.

## CHAPTER 6

### IDEOLOGIES ON THE WHITE COURT

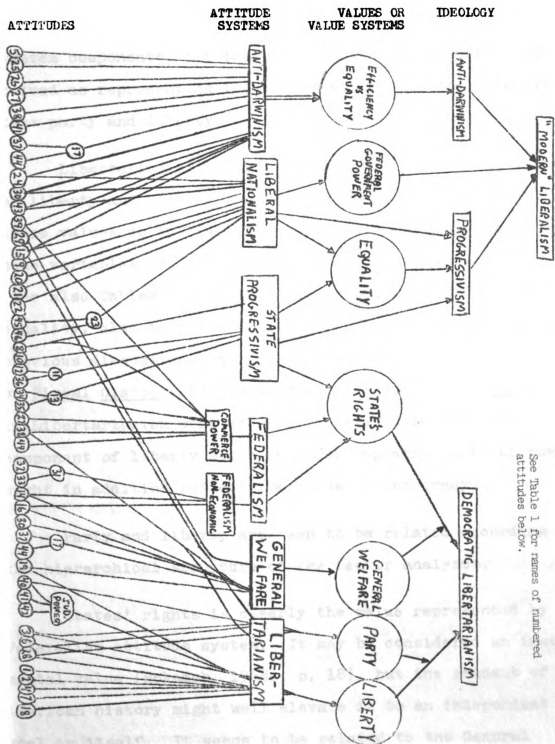
This chapter will describe the general attitude structure of the Court and its relationship to values and ideology. The influence of these ideologies on the Court decision making will then be discussed. Chapter 7 will examine the value systems of the individual justices.

Figure 19 gives a graphical representation of the attitude structure of the Court for the entire period, 1910-1920. It is based primarily on the factor analyses of the whole period and the results of the preceding three chapters. The attitudes and attitude systems are based on Tables 20 and 21 (primarily the former). Several lower-level attitude systems are scales composed of two or more subcomponent attitudes such as Corruption (17), Commerce (13), State Taxation (11), Federalism (31), Rate Regulation (23), and Judicial Power.

The higher level attitude systems are based on seven factors. However, Federalism is seen to be composed of two

---

<sup>1</sup>Not shown is that Bankruptcy (28), General Civil Liberties (2), and liability also are lower level attitude systems composed of component scales.



See Table 1 for names of numbered attitudes below.

Figure 19.—Hierarchy of Attitudes, Values, and Ideology

components: (1) Commerce Power and (2) Federalism involving non-Commerce Clause variables. Libertarianism combines Party and Libertarianism. It appears this way in the second period analysis. It may be conceived as having two attitude system components, but these components may be better conceived as representing two values within the attitude system: party and liberty.

Libertarianism then is composed of interacting values of liberty and party (or party loyalty). The fact that these values do interact is seen on the graph in that the same variables (3, 6, 28, and 40) load on both factors. (See also Tables 20 and 21.) Not shown is that the value, equality, also is probably part of this attitude system as previous discussions have noted. For example, the inclusion of Fiscal Claims (18) Fiscal Powers (19), and Bankruptcy (28) in Libertarianism were seen to be related to equality. The component of liberty which includes opposing judicial power might in addition reflect the value of democracy.

Party and liberty are seen to be related according to the hierarchical structure of the factor analyses.

States' rights is clearly the value represented by the Federalism attitude system. It may be considered an instrumental value (Rokeach, 1968c, p. 18), but the student of American history might well elevate it to an independent goal in itself. It seems to be related to the General Welfare value (see Figure 17). This suggests that it is an

instrumental value in assuring the promotion of the general welfare as the Jeffersonian and Jacksonian ideology would affirm (Peterson, 1960). The composite of states' rights and general welfare is a value system that is in turn related to the party-liberty value (according to the factor analysis hierarchy of Figure 17). Figure 18 also confirms these relationships. This suggests that the liberty value is a party-oriented value with the Democrats supporting liberty in the Jeffersonian tradition (Peterson, 1960) and the Republicans less attached to that value.<sup>2</sup> The states' rights - general welfare - liberty-party composite (see Figure 17) then would seem to represent an ideology whereby support of states' rights is related to the Democratic party (Jeffersonian and Jacksonian states' rights ideology according to Peterson, 1960). Party and states' rights also further the general welfare principle in line with the traditional Democratic slogan, "Equal rights for all, special privilege for none" (Croly, 1963). This principle was often invoked against the Hamiltonian program of aids to business, the Whig American system and internal improvements (to aid business and commerce), and Republican aids to business and industry (Croly, 1963; Van Deusen, 1959). States' rights, furthermore, is traditionally related to liberties. Its

---

<sup>2</sup>This position of the Republicans would comport with that party's record in the Civil War, reconstruction, the various "force bills" in the subsequent period (Lewis, 1937) as well as that party's greater support of World War I repressive measures in the states and nation (Link, 1954).



basic Jeffersonian rationale was to use the more popular responsive state government as a shield against possible national tyranny (Peterson, 1960; Dumbauld, 1955), and was later used by Southerners<sup>3</sup> to oppose a recurrence of Civil War oppression of white southerners (Lewis, 1937).

Another aspect of the liberty value is the likelihood that Democrats on the Court are anti-government in the laissez-faire tradition. Party correlates .29 (tau) with the Laissez-faire attitude system<sup>4</sup> for the 1910-1920 period.

The anti-Darwinism attitude system is directly tied to an anti-Darwinism ideology. This ideology also seems dichotomous. The pro-Darwinist philosophy is supported by a well-defined ideology (Sumner, 1963; Hofstadter, 1955b). The anti-Darwinist view is paternalistic and supports governmental intervention in favor of the weaker business units and to restore competition. It also supports minority racial groups from oppression by government such as Indians and Negroes. Furthermore, Paternalism would also seem to support judicial safeguards of business from governmental intervention. Thus Paternalism would support small business from big business as well as supporting judicial power in favor of business and minorities as opposed to what is

---

<sup>3</sup>In the famous words of John C. Calhoun: "The Union--next to our liberty the most dear..." (Van Deusen, 1959, p. 45). This indicated an inseparable connection between "liberty" and states' rights.

<sup>4</sup>Constructed from the Laissez-faire attitude systems in each of the respective time periods.



perceived as governmental oppression.

The value systems implicit in this attitude system and ideological conflict seem to be an interaction between the values of equality and efficiency.<sup>5</sup> Paternalism would support efforts to improve equality: the chances of small business to survive in competition with big corporations or against discrimination by government, and the rights of Negroes and Indians against majority discrimination. Darwinism is usually supported by the value of efficiency (Link, 1954, pp. 20-40). Big business units should be allowed to grow big because they are more efficient, supposedly the principal reason why they have grown big and prospered. Thus this efficiency contributes to the general prosperity of all and to the stability of the economic system. Furthermore, majority rule should be allowed to prevail over business rights and minorities since it will inevitably win out in the end and any interference will only delay this inevitable process. Hence, the efficient working of the process whereby the majority demonstrates its strength and superiority requires that interference should be discouraged.

Progressivism is divided into two attitude systems. Both allow government intervention in the interests of equality (see Hofstadter, 1955b, pp. 129, 138), to which end all

---

<sup>5</sup>Lipset (1963) finds that much of American history involves a similar conflict between the values of equality and achievement.

of the component variables seem to lead.<sup>6</sup> The national component involves as well the instrumental value of the power of the national government, and the state component involves the value of states' rights or state governmental powers. Progressivism is also a well-articulated ideology (Hofstadter, 1955a; Croly, 1963).

Anti-Darwinism and Progressivism seem related according to our factor analyses (see Figures 17 and 18). Wilsonian Progressivism seemed to combine these ideologies. Furthermore, these combined ideologies might well describe "modern liberalism" or what the Progressivist ideology eventually evolved into (Hofstadter, 1955a). Modern liberalism is anti-big business and protective of the rights of racial minorities such as Negroes and Indians as well as sympathetic to government at all levels bringing about greater equality.<sup>7</sup> Modern conservatism similarly seems to combine elements of Darwinism, anti-government, and anti-equalitarianism (Rossiter, 1962).

Figure 20 is based on Figure 18. It shows the interrelationships in a two-dimensional space of the attitude systems and values for the whole period, 1910-1920. Studies

---

<sup>6</sup>The possible exception is (20) Federal Regulation: Non-economic which includes moral reform issues of Progressivism such as prohibition, prostitution, and drug addiction. While clearly related to federal governmental powers, it is tied to equality only under the supposition that alcoholism and the other vices impede equal opportunities for the poor.

<sup>7</sup>It is also not above using the courts to achieve these ends.

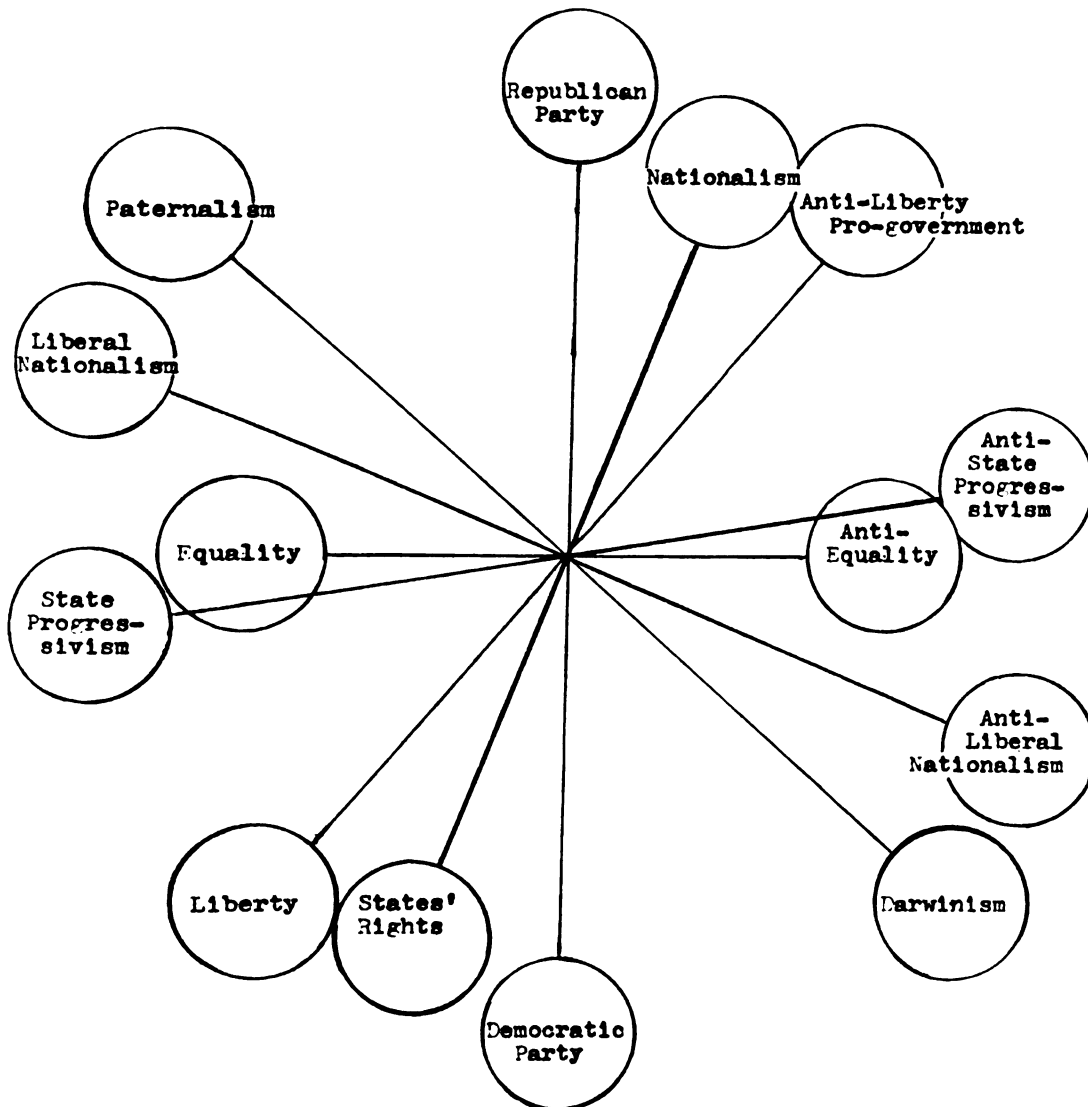


Figure 20.--Location of Values and Attitude Systems and their Antitheses in Two-Dimensional Space, White Court, 1910-1920

of factor analysis have shown that each variable and each cluster of variables has its counterpart on the opposite side of a two-dimensional graph which is the antithesis or opposite of the original concept. Hence, each attitude system has its opposite in Figure 20. The equality value is derived from the sum of the vectors of Paternalism, Liberal Nationalism, State Progressivism, and Libertarianism (liberty), all of which have some variables involving the concept of equality. States' rights is based on the location of the Federalism variable as well as the relative location of the national and state Progressivism variables. Figure 20 basically supports the Figure 19 graph of relationships between attitude systems and values.

#### Party Ideology

The two dominant influences on this Court are Party and Progressivism (Chapter 5 above). Since one of the ideologies identified, Democratic Libertarianism, is a party-related ideology, let us examine party as an ideology in history as well as on the White Court.

Sorauf (1968, p. 351, chap. 16) says that an "inarticulate ideology" divided the two parties throughout history. Let us examine the philosophy of the two parties and their historical divisions to see if they have presented consistent differences on various issues and if these issues also divide the White Court along party lines with enough regularity to identify party ideologies.

What are the party-related issues on the White Court? Democrats seem to be pro-liberty, pro-general welfare, and pro-states' rights. Republicans seem to be anti-liberty, pro-special interest, and pro-national power. On other party issues Democrats are anti-Negro civil rights, anti-prohibition, anti-judicial power, pro-debtor, pro-alien and for the civil liberties of small property owners. The Republicans take opposite stands, being pro-Negro, pro-nativist, pro-creditor, and pro-judicial power.

Democrats are also significantly more liberal<sup>8</sup> (at the .10 level of significance on (1) First Amendment, workmen's compensation, (19) Federal Fiscal Powers, and are for the rights of businessmen invoking the Self-incrimination Clause (43).

In the first half, Democrats are conservative on many progressivist variables but are for the federal government in Fiscal Claims (18). In the second half they are for civil liberties in Criminal Due Process (4) and for Labor (7).

To determine whether party does represent an "inarticulate ideology" which would explain the party ideology on the Court, Democratic Libertarianism, several sources of evidence of such an ideology will be examined. Alliances of voting groups with the parties will be examined.

---

<sup>8</sup>The level chosen (.10) is on the high side of the range chosen by statisticians which varies from .01 to .10. See McNemar, 1962, pp. 63-69. This level is chosen to suggest possible relationships rather than offer firm evidence that they exist.

Comparisons of party influences on other Courts will be examined. Roll-call analyses of Democratic and Republican congressmen will be consulted. The impact of historical events will be considered. Ideological traditions and bases of the parties will also aid our study.

Traditional Party Voting Bases.--Some political scientists argue that the major party division of the electorate may have been relatively stable throughout our history. Certain groups have tended to vote Democratic and others have supported the Federalist, Whig, and Republican parties (Lipset, 1960, p. 292; Sorauf, 1968, chap. 6; Flanigan, 1968; Donald Stokes in Crotty, et.al. [eds.], 1966, pp. 335-347; Lipset, 1963). The continuity of group voting behavior will be emphasized here rather than the discontinuities. Such traditional voting alliances would surely help shape the "inarticulate ideology" which, according to Sorauf, typifies the two major parties.

Support exists for a finding that the Democratic Party has traditionally enlisted the support of immigrant groups, particularly newer immigrants, the lower class, workers and labor unions, Catholics, and the South (since 1860). The Republicans on the other hand have enlisted the support of nativist elements, business, upper and middle class elements, protestants, and Negroes (until 1932 or so).

The debate over the Alien and Sedition Laws suggest an early basis for a nativist-immigrant division between the

Federalist and Jeffersonian parties as well as support for such a division. (See Lipset, 1960, p. 292.) Jacksonian Democrats also had strong immigrant support while the Whigs were nativist (Van Deusen, 1959, pp. 16, 168; Lipset, 1960, p. 292). The Republican party after the Civil War was strongly nativist (Samuel Hays in Chambers and Burnham [eds.], 1967, p. 158). The Wilson administration saw action limiting immigration which divided the two parties, Wilson and the Democrats favoring immigration and Republicans limiting it (Grimes, 1967, pp. 138-139; Link and Catton, 1967, p. 131). The nativist Klu Klux Klan was associated with the Republican Party in many Northern states in the Twenties (Fenton, 1966). The Democrats in the Twentieth Century were particularly closely associated with the newer immigrant groups (Turner, 1951; see also Fenton, 1966; Lipset, 1960).

Support exists that the Democratic party has traditionally been supported by the lower class while the Federalists, Whigs, and Republicans have obtained their principal support from business and the upper and middle class (Lipset, 1960, p. 292; Sorauf, 1968, pp. 141-147). Jacksonian Democrats had labor support (Van Deusen, 1959, p. 29; Blau, 1955). Bryanism appealed to the "discontented and the disadvantaged" (Sorauf, 1968, p. 141). Wilson had the "warm support of labor" (Swisher, 1954, pp. 577, 648-651) and secured the passage of much legislation favorable to labor and labor unions (ibid., pp. 573-581; Link, 1968).

The alliance of Democrats with the labor unions and disadvantaged since 1932 is widely acknowledged (Fenton, 1966; Lipset, 1960). Democratic opposition to the tariff was often defended as in the interest of lowering prices for the lower classes and lessening profits for big business (Link and Catton, 1967; Croly, 1963).

Traditional voting bases of the two parties might form a basis for party ideologies. Democratic ideology would include support of the disadvantaged (Libertarianism), aliens, lower classes (Federal Income Tax), and labor. Republican ideology would oppose those claims. In addition, since the Democrats have had the support of Southern whites and the Republicans have had Negro support, a further basis for differing ideology presents itself. Thus the South supports states' rights as opposed to federal power, because it assures them control of their Negro problem. It also upholds civil liberties against federal power because extension of federal power threatens their autonomous handling of Negroes. The Negro support of the Republican party may have led them to take an opposing position: favoring civil rights for Negroes and favoring federal power to break down states' rights and aid oppressed Negroes and liberate them politically to make political inroads in the South (and among Negroes in the North).

Party Influences on the Supreme Court.--Evidence exists that Democrats on the Fuller Court also supported the rights





of aliens and immigrants (Warren, II, 1926, p. 696). Historical studies of the Court also show this, and also indicate that Democrats have supported judicial restraint while the Republicans have supported judicial review from 1789 to 1961 (Nagel, 1962c). This may be explained in terms of traditional ideological conflicts whereby Democrats oppose the federal judicial power and the opposing party upholds it, or it may be due to the fact that for most of our history (1864-1936) the federal courts have been largely staffed by Republicans. Furthermore, Democratic judges were found to be pro-tax power and pro-civil liberty (Nagel, 1962c).

Sprague (1968) finds that Supreme Court judges appointed by Democrats were pro-state, pro-tax, and pro-regulation of business while Republicans took opposing positions according to a study that covered the period 1889-1959. He also found urban Democrats to be more pro-civil liberty than urban Republicans.

My studies of the effect of party from the Taney Court to the Warren Court<sup>9</sup> is developed more in detail in Chapter 8.

On the Taney Court, Democrats are anti-business and Whigs and Federalists are pro-business (a tau rank correlation of .69).<sup>10</sup> Anti-business and pro-labor scales on the

---

<sup>9</sup>These studies omit the period 1859 to 1907.

<sup>10</sup>These are based on the business regulation scales of Schmidhauser, 1961, and Spaeth (unpublished).

Stone, Vinson, and Warren Courts showed Democratic judges to be positively correlated with anti-business and pro-labor attitudes at taus of .51, .60, and .54, respectively. Similar scales (called E-Scales by Spaeth, 1966) on the Fuller (Appendix XI) and White Courts showed no relationship. On the Taft and Hughes Courts (1921-1938), Democrats correlated only .10 with a federal economic regulation scale and .23 with a scale containing rate-setting cases.<sup>11</sup> Hence, the Taney Court relationships may be based on an agrarian-industrial conflict rather than modern class-based conflicts. The period 1908-1938 may be devoid of party based liberal-conservative conflicts at least on the Court; after 1938 party does dominate such conflicts, however (Chap. 8 below).

The civil liberty issue also shows a relationship with party. Jeffersonian-oriented Democratic laissez-faire judges may have not favored governmental programs which aided the disadvantaged but may have instead favored the disadvantaged in cases where they were threatened by government as in civil liberty cases.

On the Taney Court a tau correlation of .62 was found between a civil liberty scale<sup>12</sup> and party. However, the Democrats are here anti-liberty. This scale contains many Negro civil liberty and slavery cases, issues on which the

---

<sup>11</sup>Based on the scales of Danelski, 1964.

<sup>12</sup>Based on Spaeth, unpublished.

Democrats have not been libertarian. The Fuller Court showed a .31 correlation with a civil liberty scale with Democrats favoring liberties. The Stone and Warren Courts show tau correlations of .29 and .46 between party and civil liberties, Democrats being libertarian.<sup>13</sup> The Vinson Court (1946-1952) shows no such relationship, nor does the Taft-Hughes Court. The White Court does show such a relationship as was noted above. Sprague (1968) finds no clear relationship of party with civil liberties from his 1889-1959 study.

It is possible that the Taft-Hughes Court contained several Republican-appointed Democrats which were atypical of their party and that the Vinson Court had other interfering influences on it to upset a potential relationship as did the slavery issue on the Taney Court. Nevertheless, this relationship is not clear-cut.

A scale measuring attitudes toward the civil rights of Negroes on the Fuller Court (October 1908 and 1909 terms) also showed party to be a strong influence (with a tau correlation of .57). This reinforces findings on the Taney Court (above) and both periods of the White Court (tau correlations of .65 and .61) that Democrats were anti-Negro rights and their opponents were pro Negro.

Roll-call Analysis of Congress.--Two analyses of roll-call votes will be considered. The Turner (1951) study

---

<sup>13</sup>See also Nagel, 1961 for lower court Democratic support of civil liberties.

involves four selected terms since 1920. The Johnson (1943) study covers the U.S. Senate from 1880 to 1940. Turner finds sharp consistent cleavages between the parties on tariffs, governmental action (rather than private), social and labor legislation, and farm legislation. Democrats consistently supported low tariffs, the government, legislation for labor and the lower class, and farmers. Moderate consistent cleavages were found on governmental regulation of business, Negro civil rights, and immigration, with the Democrats supporting business regulation and the immigrant while the Republicans favored the Negro. A further, but less consistent, cleavage finds Republicans favoring business claims against government.

On three 1921 roll-calls, the Democrats clearly supported states' rights with the Republicans opposed. Democrats also always favored higher taxes. No party differences were found on issues of Indian rights and prohibition.

The above is consistent with our findings of party issues on the White Court except that the White Court shows no party division over governmental regulation of business.

The Johnson (1943) study indicated a similar party split over issues. The issues calling forth a party vote is given in Table 32.

On the Table 32 party votes, the Democrats favored lower tariffs possibly out of an anti-business,

Table 32.--Johnson (1943) Study of Senate Roll-call Party  
Issues: 1880-1940

<u>Issue</u>	<u>% of Partisan Votes</u>	<u>Issue</u>	<u>% of Partisan Votes</u>
Tariff	95	Agriculture	46
Currency Laws	73	General Labor Laws	40
Money and Bankruptcy	59	Regulation of Business:	
Governmental Operation	57	Pre-New Deal	27
War and Defence		New Deal	75
Taxation	64	Civil Service and	
Peace-time Taxation	44	Public Welfare	27
Regulation of Trans- port and Communication	45		

pro-lower-class stance. They favored the debtor in currency and banking laws just as they did in the White Court bankruptcy scales. They also favored taxation, the government and labor as they did on scales 18, 19, and 7. They favored regulation of business and transportation. Democrats also favored the "public welfare" as they likewise support General Welfare on the White Court. All issues except business regulation are similarly party issues on the White Court.

The Impact of Historical Events on Party Ideology.--

Past positions of partisans while in office or campaigning for office might well shape the ideologies of the two parties.

A key event in the history of the two major parties was the Civil War and reconstruction (Fenton, 1966). The Republicans favored centralized government, especially

national legislation to protect the Negro, a potential source of voting support. This national legislation seemed contrary to civil liberty ideals. The Civil War and military control of the South involved the extension of national power, the arrest of critics, state officials, and private citizens who discriminated against Negroes. This clearly violated individual liberty as well as states' rights in the eyes of Democrats. The "Enforcement Laws" and "Force Bills" suggested autocracy rather than a democracy (Warren, II, 1926, pp. 611-618, 650; Lewis, 1937). Hence, Democrats hastened to embrace private liberty and states' rights as ideological values (in the spirit of Jefferson) while Republicans opposed these values in favor of national and governmental power and justice for the Negro.<sup>14</sup>

Republicans also championed national power as did the Whigs for internal improvements and aids to developing business such as the tariff and subsidies. The Democrats in accordance with tradition and states' rights continued to oppose them.<sup>15</sup>

Republicans, through control of the federal judiciary, continued to increase federal power over that of the states

---

<sup>14</sup>On the White Court, Democrats support liberty even when threatened by state governments rather than national. For example, they support (55) Property Rights Threatened by State Government even more than (56) Property Rights Threatened by the National Government.

<sup>15</sup>Jacksonian and Jeffersonian Democrats had also taken such a stance against similar Whig and Federalist nationalist programs.

(Warren, II, 1926, p. 684) so that the party division over the judicial power was intermingled with party differences over states' rights.<sup>16</sup> The issue of regulation of immigration also affected the states' rights issue as Congress had the exclusive power to regulate it. Hence, a pro-immigrant stance by the Democrats was reinforced by an anti-national position.

Bryan attacked the use of judicial power. Later Taft denounced proposals to recall judges. This continued a debate through party platforms on the issue of judicial power (Westin, 1953, p. 32; Kelly and Harbison, 1963, p. 638; see chap. 2 above).

The Democrats under Wilson continued to oppose immigration restriction (Link, 1947, p. 266; Link, 1954, p. 60; Grimes, 1967, pp. 138-139) as had Democrats in the 1890's (Faulkner, 1959, pp. 125-127).

Tariffs, as a manipulation of national power, continued to divide the two parties. Wilson also was reputed to be a states' rights man and at first was strongly against centralized power (Link and Catton, 1967, p. 134; Kelly and Harbison, 1963, p. 652; Link, 1954, p. 59; Lewis, 1937, pp. 362, 430).

---

<sup>16</sup>Continuing the Jeffersonian and Jacksonian clash with the Federalist and Whigs over the use of judicial power.



Democrats also may have opposed the tariff as imposing a hardship on labor. Bryan also campaigned for the disadvantaged. Democratic platforms of 1908 and 1912 endorsed labor demands (Link, 1954, p. 58). Wilson also supported labor with various laws which labor desired such as the Clayton Act and the Adamson Act (Link and Catton, 1967, p. 185; Link, 1954).

Democrats had passed the original income tax under Cleveland. Under Wilson they continued to support higher taxes, including the taxation of war profits (Link and Catton, 1967, pp. 186-202).

Democrats had generally favored liberty during and after the Civil War and while out of power on the federal level. Wilson during his administration emphasized the liberty concept, criticizing unlibertarian measures and actions in the nation and in his administration (Swisher, 1954, pp. 614-624), although he was tolerant of some totalitarian measures.<sup>17</sup> He emphasized this libertarian value by terming his program the "New Freedom." He also opposed prohibition (ibid., p. 622). He wished to promote the freedom of the individual in opposition to the domination of business interests and wealth. He continued the Jeffersonian-Jacksonian attack on the "private monetary power" of banks (Kelly and Harbison, 1963, pp. 652, 657).

---

<sup>17</sup>No real wartime censorship was instituted, however, unlike foreign nations during wartime. See Paxson, 1939, p. 47.

Thus he followed the traditional pro-debtor stance of his party.

In the 1890's Republican platforms were denouncing outrages against the Negroes in the South (Faulkner, 1959, p. 128). When the Wilson administration took power, an anti-Negro bias within the administration was evident (Link and Catton, 1967).

The Federalist-Whig-Republican bias towards favoritism for business was contrasted with Democratic opposition to such programs, favoring equal rights for all and a general welfare concept (Croly, 1963). Wilson championed the community regulation of property according to the requirements of public welfare (Link, 1954). His party also was found to favor the abolition of special interest legislation (Link, 1947, p. 241) including high tariff rates.

Hence, the political events in the history of our party system would seem to mold and reinforce party ideologies quite compatible with those found on the White Court.

Ideological Bases of the Parties.--Peterson hypothesizes that the two-party system in this nation is underlaid with the original ideological clash of the Jeffersonian and Hamiltonian ideologies. An examination of these philosophies and how they evolved into Jacksonianism, Bryanism, and the New Freedom as opposed to Whiggery and Republicanism might explain the party ideologies as found on the White

Court.

Jeffersonian Democracy seemed rooted in democracy and liberty. It favored giving vent to the popular will, whereas the Federalists favored restraining and controlling it (Dumbauld, ed., 1955; Peterson, 1960, pp. 1-88). Jacksonianism carried these democratic principles to their fruition whereas the Whigs identified with the Hamiltonian view (Peterson, 1960, especially p. 104; Blau, ed., 1955). The Republicans continued to support the use of force and judicial safeguards to control local abuses of democratic prerogatives on such issues as Negro rights and state debt repudiation (Warren, II, 1926; Lewis, 1937; Westin, 1953). Bryan and Wilson Democracy wished to preserve democracy from the control of big business and the "money interests." (Croly, 1963; Link, 1954, p. 19; Swisher, 1954, p. 569).

Hence, democracy as a value seems more firmly imbedded in Democratic ideology whereas restraint of democracy through judicial review and other means seems to be part of the Hamiltonian-Republican tradition (See Croly, 1963). The party division over judicial power versus judicial restraint in the face of democratically decided policies has already been discussed.<sup>18</sup> The Jeffersonians, Jacksonians,

---

<sup>18</sup>Judicial power seems directly antithetical to democracy, since it is used largely to correct the decisions of democratic-elected branches of government, that is the legislative and the executive branches. The support of judicial power over democratically-arrived-at decisions seems to involve an anti-democratic value. Similarly an opposition to judicial power implies a support of the democratic

Populists, and Bryan Democrats all specifically opposed the use of judicial power (Dumbauld, ed. 1955; Peterson, 1960; Westin, 1953).

Another value of the Jeffersonian ideology is equality. This value, except for Negro equality, has also been a tradition of the Democratic party (Dumbauld, ed., 1955). It was emphasized even more by the Jacksonians (Blau, ed., 1955; Van Deusen, 1959, pp. 197-198; Peterson, 1960, especially pp. 75-76). Populism and Bryanism also emphasized "the common man" in their ideology. (See Croly, 1963; Peterson, 1960.) Wilson furthermore enunciated the concept of the New Freedom in which government would protect the small and weak from the rich and powerful (Swisher, 1954, p. 569; Link, 1954, p. 19). His program led to greater economic equality (Link and Catton, 1967; Link, 1954). Hamiltonianism openly championed aristocratic virtues and special privilege. The Whigs also favored special interests rather than equality (Van Deusen, 1959, p. 122). The Republican party also adopted this tendency to aid business and special interests (Peterson, 1960, Croly, 1963; see also Lipset, 1960, 1963).

Closely connected to the equality concept is that of general welfare. Special privilege for the wealthy and business interests would logically detract from equal rights

---

branches of government and their decisions. Hence, an opposition to judicial power seems to involve a high rating of democracy as a value. See Frankfurter, 1961.

and the general welfare. It would undermine economic equality and equality of opportunity. However, tariffs, profits from patent monopolies, taxes for subsidies, and land taken from the public domain would all come from the general public and hence could be the antithesis of a concept of general welfare.

Croly (1963, pp. 44-77, 100-117, 148-151, 182-183) shows how the Democrats from Jefferson to Bryan opposed special privileges for the wealthy while the Federalists, Whigs, and Republicans championed them. Jefferson's opposition to the national government was based on fears that it would be undemocratic, oppressive to liberty, and would uphold special privilege for the wealthy (Dumbauld, ed., 1955). Wilson's ideology and program was specifically aimed against those special privileges as found in the national as well as local government (Swisher, 1954, p. 569).

The traditional stand of the Democrats for states' rights, strict construction of federal power, and opposition to national actions is well documented (Croly, 1963; Peterson, 1960; Kelly and Harbison, 1963). Jefferson and Calhoun enunciated the states' rights doctrine (Dumbauld, ed., 1955; Peterson, 1960). The Jacksonians opposed the extension of federal programs (Van Deusen, 1959). Even Wilson's original concepts were aimed at ending federal privileges as well as centralization in the banking structure and other areas (Link, 1954). Federalists, Whigs, and

Republicans, however, embraced the Hamiltonian concept of a strong central government and national programs (Croly, 1963; Peterson, 1960).

The defence of liberty is a concept rooted in Jeffersonianism. Jefferson's ideology was centered around First Amendment and political liberties but the concept contained more general concepts of civil liberties as well. Jefferson's Declaration of Independence and the writings of the antifederalists and Jefferson Republicans who worked to obtain the adoption of the Bill of Rights reinforce this conclusion (Dumbauld, ed., 1955; Peterson, 1960; Kenyon, 1965). The Jeffersonians' fear of possible oppression by the national government prompted them to favor a position of narrow construction of national powers. Calhoun continued this states' rights espousal in the name of liberty, although his concept of liberty was different (Peterson, 1960). The later Jacksonians favored such illibertarian proposals as fugitive slave laws. However, other Jacksonians secured the repeal of laws imprisoning debtors (Kelly and Harbison, 1963, pp. 325-327; Van Deusen, 1959). Laissez-faire Democrats used the Jeffersonian liberty concept to oppose governmental regulation of business (Peterson, 1960; McCloskey, 1951). Post-Civil War Democrats, as previously noted, took up the cause of liberty against federal power partly as a consequence of oppressive reconstruction measures. Finally, the Populists and the Bryan and Wilson movements held that great wealth



threatened to destroy traditional American liberties (Holftadter, 1955a). These liberties included political and First Amendment freedom. However, it is clear that although the concept of liberty was embraced fairly consistently by Democrats, its content and meaning was not always the same. Nevertheless, it seems probable that Democratic ideology reinforced by political events since the Civil War included liberty in the context of individual rights, as a laissez-faire predisposition, and as a states' rights concept.<sup>19</sup>

Conclusions.--The values upheld by Democratic ideology seem to include democracy, equality, the general welfare, states' rights, and liberty. These values seem to cluster and reinforce one another. However, it is probable that the laissez-faire concept of liberty served to contradict the value of equality when active governmental action is proposed to uphold equality (as Croly points out, 1963). Hence, equality does not seem to be a value associated with the Democratic ideology in Figure 19. However, when equality is associated with General Welfare as against special privilege, it does become part of the Democratic ideology. These include Patents (29), Corruption (17), Conservation (14), Land Claims (16) and Federal Fiscal Powers (19). Most of these do not include non-traditional uses of governmental

---

<sup>19</sup>That these three components are related to the Democratic concept of liberty is suggested by the fact that the corresponding attitude systems all correlate with the Party variable on the White Court.



powers and hence would not conflict with laissez-faire concept of liberty. Also when equality is associated with liberty as in the Libertarianism attitude system, the variables are also part of the Democratic ideology. These may include issues where the equality value is reinforced by an anti-government or liberty value. Thus First Amendment (1), Civil Liberties: Property (3),<sup>20</sup> General Civil Liberties (2) Civil Liberties of Aliens (6), and Criminal Due Process (4) all load with the party ideology. Likewise issues concerned with private financial claims rather than government regulating, but also touching an equality value are part of the party ideology. These include Bankruptcy<sup>21</sup> (28) and Fiscal Claims (18).

Consequently, voting alliances, political events, and traditional ideology all reinforce the conclusion that the following values shown in Figure 19 are part of a Democratic party ideology: states' rights, general welfare, and liberty with the Judicial Restraint attitude system suggesting the additional value of democracy. The Republican ideology would emphasize nationalism, special interests (the trickle down theory), and illibertarianism (or pro-government). Its

---

<sup>20</sup> See Kelly and Harbison (1963, 324) citing Jacksonian ideology as supporting the rights of "private property, honestly acquired."

<sup>21</sup> Jacksonianism ideology supported an improved status for debtors particularly (Kelly and Harbison, 1963, pp. 325-327; Westin, 1953, p. 39). The latter develops this ideological strain in Populism and Bryanism. Bryan's silver coinage plank was aimed at inflating currency to help debtors.

emphasis on judicial restraint might indicate a "republican" tendency toward limits on democratic rule.

Federalism as an issue on the Court seems to decrease in importance as equality increases.<sup>22</sup> Similarly outside the Court, Wilson's administration moved from a states' rights stance to the acceptance of federal power to redress the grievances of those who desired more equality. Eventually Wilson's program became much more nationalistic than had previous Republican administrations. The Democrats on the 1916-1920 Court, except for McReynolds, seemed thus more ready to accept the extension of national power than had Democrats previously on the Court. White became more favorable to Liberal Nationalism as did Holmes, possibly influenced by Brandeis. Brandeis was more favorable to it than other issues and Clarke showed no discrimination against it (see Table 29).

The embrace of national power by the Wilson administration may well have marked the beginning of the end of states' rights as a value of the Democratic ideology. In addition national wartime powers were expanded so greatly and the pervasiveness of the Prohibition Amendment so eroded state jurisdiction that states' rights itself as a live issue may have been permanently destroyed (Kelly and Harbison, 1963, pp. 662-665; Rhode Island vs Palmer, 64 L.Ed. 946).

---

<sup>22</sup>Sprague (1968, p. 61) finds no voting blocs in his federalism cases in the 1916-1920 period.

Why then did Progressivism loom larger in the second period as an issue polarizing the Court? The decrease of Federalism as a separate issue accounted for part of this. However, previous to the appointment of Clarke and Brandeis, there may have been no effective core of support for the Progressivist position. Hence, other issues gained in relative importance. Brandeis and Clarke, when they joined the Court, were the most extreme justices favoring Progressivism (out of all 13 justices on the Court for the full 1910-1920 period). They supplied an extreme left core of support for Progressivism which Pitney and Holmes joined.<sup>23</sup> Hence, a large bloc of support for Progressivism and the equality value was formed. This bloc of support succeeded in polarizing the Court on the issues involving Progressivism and equality.

Finally, it may be asked why the value of equality, if part of the Democratic ideology, did not show any relationship to party. A traditional Democratic laissez-faire<sup>24</sup> and pro-liberty attitude is one possibility. Two other hypotheses suggest themselves.

Most of the Democratic justices had received appointments from Republicans. This casts doubt on a conclusion

---

<sup>23</sup>Hughes, Pitney, and Holmes seemed only lukewarm in their support of Progressivism in the 1910-1915 period. This is based on a comparison of the majority opinions which they voted for in the first period with majority opinions in the 1916-1920 period.

<sup>24</sup>Laissez-faire correlates .29 with party in the 1910-1920 period.

that they were typical of the Democratic party and hence adhered to a typical Democratic ideology. Indeed, it is more likely that they were quite like Republicans in philosophy. This is especially true with appointments by a President like Taft. He carefully considered the philosophies of his appointees (McHargue in Murphy and Pritchett, 1961, pp. 83-92). Moreover, once on the Court, these justices may have felt more loyalty to their benefactor than to their party.<sup>25</sup>

Lamar and Lurton were appointed to the Court by Taft. McReynolds received his initial appointment to the Justice Department from Republicans and White was appointed Chief Justice by Taft.

A further possibility is that a party ideology arises out of competition for office. If no interparty competition occurs, no division of politicians along ideological lines can occur. Thus the one-party South would produce Democrats of all ideological stripes including a conservative wing which would be Republican if it had a chance for success in obtaining office under that party. Tennessee, Georgia, and Louisiana produced Lurton, McReynolds, Lamar, and White who thus might not be true Democratic ideologists. Only in the North, then, are we likely to find persons who adhere to their party's ideology.

---

<sup>25</sup>For findings supporting these suggestions on judicial politics see Nagel, 1964. Constant socializing by Taft among the Supreme Court justices lends credibility to the idea that he intended to exert this influence after his appointments. See Lamar, 1926.

true that some issues, particularly those influencing the Civil War, are party issues for both Northern Democrats. These involve liberty, civil rights, and economic rights. The general welfare versus special interests would also prompt a non-industrial South to support special privileges. But on equality of opportunity judges might have been atypical in attitude regarding party divisions.

On this hypothesis the attitude scale ranks for the period were correlated with the party variable for the Southern justices (who had all received their education from Republicans). It did not show significant correlation between party and Liberal Nationalism nor Darwinism. However, party did correlate significantly (at the .05 level of .08) with six of the eight variables of Progressivism. The average correlation of all eight variables with party was .44. In addition, party correlated .44 with State Progressivism (46) and .26 with Antitrust (30). The correlation of party with the other attitude systems was not significant.

Both Liberal Nationalism and Darwinism involved the same powers in achieving equality, a conclusion

---

table 24 above. The variable measuring association with Progressivism showed only a correlation of .35 with the Southern justices, probably not large enough to confirm the results of this test. This Progressivism variable showed a greater association with State Progressivism than with Antitrust (without Southerners).

seems warranted that omitting the Southern justices (appointed to office by Republicans) shows that party indeed is associated with the equality value but that this association is influenced and weakened by the states' rights value.

### Progressivism

As Table 20 shows, Progressivism involves both workmen's compensation variables (8 and 9), Civil Rights (15), all federal regulations (20, 21), the I.C.C. (22), all rate regulation variables (23, 45, 46), business discrimination and antitrust action (24, 25), examination of the books of corporations (43), state taxation (11, 34, 36), and state regulation of business (12, 13, 35). All except Civil Rights and Federal Regulation: Non-economic (20) involve governmental regulation of business. Marginally related to Progressivism are Conservation (14), Land Claims (16), and corruption (17, 37, 44). Of these only Corruption in Government (37) does not include governmental regulation of business. Furthermore, this attitude system is exclusive. There are no variables that involve direct governmental regulation of business which do not load on this attitude system. Some variables involving private suits between individuals and businesses do not load on this attitude system, but they do not involve direct government regulation.

Hence, the Progressivist ideology would seem to support governmental regulation and power. Its antithesis would oppose such power, favoring a laissez-faire ideology.

Progressivism supports measures to bring equality. Its antithesis would oppose equality. Progressivism seems anti-business. Its antithesis would be pro-business.

The equality concept is implicit in the Civil Rights variable (15) favoring more equality for Negroes.

Federal Regulations: Non-economic (20) would involve a pro-government value. It is also tied in with the moralist vein of the Puritan ethic<sup>27</sup> in Progressivist thought, since it involves the regulation of liquor, prostitution, and drug addiction. Similarly the corruption variables (17, 37, 44) involve a moral outlook.

Conservation (14) and Land Claims (16) involve a common well-known issue of the Progressives: business exploitation of the public domain.

Lastly, some association exists between Progressivism and Aliens (6), particularly in the 1910-1915 period which would reinforce conclusions that the Progressives were nativist-oriented and anti-immigrant (Grimes, 1967; Hofstadter, 1955a).

Table 23 in Chapter 5 above shows the relationships of the Progressivism attitude systems with other attitude systems. The combined Progressivism attitude system (or ideology) correlated highly with Anti-Darwinism (a tau of .53), General Welfare (.50), and Libertarianism (.45). It

---

<sup>27</sup>See Grimes, 1967. The moral values of temperance, restraint, chastity, and honesty seem to be central to this ethic.

correlated negatively with Laissez-faire (-.35). Hence, a relationship of Progressivism with certain values of the other attitude systems can be discerned. The correlations then may be accounted for by the likelihood that correlated attitude systems involve the same values. Progressivism is pro-government since it negatively correlated with Laissez-faire. It also contains equality as Anti-Darwinism and Libertarianism contain equality as part of their content. Furthermore, Progressivism seems to be related to the General Welfare concept of value.

The above components of Progressivism are easily supported by references to its theoreticians and historical studies of political thought.

Herbert Croly (1963) in articulating Progressivist thought argued for equality and the general welfare as goals (or values) of the movement. He particularly emphasized the active use of government to obtain these goals arguing that democratic officials must be given the power to govern effectively.

Others recognized this pro-governmental aspect of Progressivism which cut across party lines (Hofstadter, 1955a; Kelly and Harbison, 1963; McCloskey, 1951; Link and Catton, 1967). It then seems to be a reaction against Laissez-fairism (McCloskey, 1951) as well as a reaction against social Darwinism (Hofstadter, 1955b). This also explains the above correlations of Progressivism with Laissez-faire



Anti-Darwinism. The increasing emphasis on national legislation was also a reaction to the ineffectiveness of state Progressivist programs (Lewis, 1937; Croly, 1963; Link and Catton, 1967, p. 68).

Other authorities recognize the value of equality as a key goal of Progressivism (Hofstadter, 1955a, 1955b; Grimes, 1967). Its goals were to reverse the trend resulting in newly accumulated great concentrations of wealth as well as to restore traditional political equality threatened by such wealth. The populist ideology was drawn on as a source of ideology (Hofstadter, 1955a). The difference was that the middle class now joined this drive for equality out of status anxiety.<sup>28</sup> Hence, both the lower classes and middle classes sought equality and control of big business (Hofstadter, 1955a, 1955b; Lewis, 1937; Link and Catton, 1967, p. 68). Both Populism and the middle class added a nativist bias which opposed alien immigrant values which threatened traditional native values (Link and Catton, 1967, pp. 6-12; Grimes, 1967).

The strong bias against big business and newly acquired corporate and industrial wealth of Progressivism is also well-documented (Link and Catton, 1967, p. 5; Hofstadter, 1955a; Croly, 1963; Filler, 1962). This corroborates our finding of an anti-business element in the

---

<sup>28</sup>This helps explain why Progressivism was not specifically sympathetic to the needs of Labor (Link and Catton, 1967, p. 68). Thus, Labor is not in the Progressivism attitude system.

White Court Progressivism ideology. It also explains the general welfare content of Progressivism as opposing special favors for business which were paid for by the public (Link and Catton, 1967, p. 69).

The strain of Progressivism which was contributed by the Puritan ethic included moral outrage against the deterioration of traditional morality in American life, business and government. This element of Progressivism has also been discussed by authorities (Hofstadter, 1955b; Grimes, 1967).

Hence, the Progressivist ideology on the White Court was quite similar to that described by historians.

#### Darwinism

Table 20 and Figure 19 show the Darwinism ideology to be composed of five components based on its variable content. Considering it in the pro-Darwinist direction, it involves: (1) protecting big business and trusts from governmental regulation of monopolistic practices or dissolution into smaller economic units. This includes variables 24, 29, 30, and 43. (2) Favoring big business in suits against them by small business or individuals. This includes variables 24, 25, 26, and 27. (3) Upholding majority oppression of minority races such as Indians and Negroes. (4) Upholding democratic institutions over judicial or constitutional control or restraint of those institutions including variables 39, 41, and (marginally) 40. (5) Protecting the right of individuals or businesses to benefit financially in morally

questionable or illegal dealings. This includes variables 17, 37, 43, and 44 and revolves around "corrupt" practices.

The corrupt practices are tied to corporate monopolistic practices which were also attacked as ethically questionable by Progressives (Hofstadter, 1955a). Both the monopolistic practices and the preferment of big businesses over small suggests a positive value for large economic units. The oppression of minority races and the championing of democratic institutions over judicial rule both involve the superiority of the value of majority rule. All the components of Darwinism uphold strength or power over the weak, disadvantaged or exploited. It suggests the inevitability of the strong unit or group prevailing over the weak and favors the efficient, unimpeded functioning of this process.

The antithesis of this ideology is paternalistic. It favors the imposition of some constitutional, judicial or governmental safeguard in favor of protecting the weak and disadvantaged from the strong. Its goal seems to be greater equality and competition in the interest of equality of opportunity or the general welfare (as in monopoly regulation and corruption).

The former concepts are implicit in the ideology of social Darwinism as revealed by its proponents (Sumner, 1963; Hofstadter, 1955b), and the latter concepts of paternalism were presented by several proponents of Progressivism.

Sumner's ethical standard was based on economic prosperity and power. The greatest amount of prosperity and social progress would result if natural laws of economics and society were allowed to prevail. This required that the big economic units would be allowed to grow and dominate without governmental interference or restraint (McCloskey, 1951, pp. 26-56; Sumner, 1963, chaps. 4, 9, 10). Holmes accepted the inevitability of this process and the validity of Sumner's thesis. He extended it to democratic majority rule and argued that such rule was inevitable and in the interests of society. (See Howe, 1961; Lerner, 1954; Rogat, 1964; Hofstadter, 1955b; Mason, 1946, p. 555.) This latter interpretation was different from that of Sumner who favored constitutional and judicial protection of the unfettered economic process (McCloskey, 1951; Sumner, 1963). The fact that Holmes' and not Sumner's interpretation of Darwinism was dominant on the White Court is probably accounted for by the fact that Holmes and not Sumner was on the Court to influence the other justices.

The anti-Darwinist view was based on a growing realization that monopolistic practices resulted in exploitation and manipulation rather than efficiency and prosperity, fear of the resulting concentration of wealth and its impact on the status of the middle class and democracy, moral outrage at unethical business practices,<sup>29</sup> and Darwinism's

---

<sup>29</sup>The Puritan ethic and the social gospel contributed elements of political thought on this issue (Hofstadter, 1955b).

undermining of the traditional American value of equality (Hofstadter, 1955a, 1955b; Faulkner, 1931; Veblen, 1953).

The Darwinist issue divided the Progressivist movement, especially by 1912. Roosevelt's New Nationalism concept accepted the inevitability and desirability of trusts. He merely wanted to break up the "bad" trusts and regulate the large corporations that did not stifle competition or impede efficiency. Wilson and Brandeis opposed all trusts. They believed that bigness in itself was an evil and that competition would result in a maximum of economic efficiency as well as a minimum of consumer exploitation. Furthermore, trusts were a threat to democracy. Taft took the Wilson view apparently and opposed all trusts (See Swisher, 1954, p. 592; Kelly and Harbison, 1963, p. 651; Link, 1954; Link and Catton, 1967, pp. 113-114, 131-133).

Roosevelt was also a Darwinist in other matters similar to the Holmes version of Darwinism. He believed that native stocks were superior to the immigrant poor, that a racial war with the Indians was inevitable and would exterminate that race. He was an imperialist. He also campaigned to limit judicial review in the 1912 election (Hofstadter, 1955b, pp. 162-175). This school of thought seemed to be held by a significant portion of Americans (ibid.).

#### The Ideology of the Justices

The judges' values will be discussed fully in Chapter 7. An attempt will be made here to locate the judges within



the ideologies described above.

The location of justices on axes associated with attitude systems (Tables 10, 19, and 28) as Schubert (1965a) had done was attempted but this method seemed to lack precision as the axes seem to correspond only roughly with the actual attitude systems. This method was then supplemented with the judges' factor scores, average ranks and consistency and extremity of ranks (see Chapter 7 below) on the various attitude systems.

This analysis suggested the following ideological positions of the justices. Progressives included Brandeis, Clarke, Pitney, Harlan and Hughes. Holmes was a Progressive only in the second period.<sup>30</sup> Anti-Progressives were McReynolds, Lamar, Van Devanter, and White. McKenna seemed to be a Progressive in the first period, but became an anti-Progressive in the second period.<sup>31</sup> McReynolds, Lamar, and McKenna also were Laissez-fairists judging by our Laissez-faire attitude system. Harlan and Pitney had a strong pro-government bias towards that system.

Holmes, White, Van Devanter, and McReynolds were Darwinists. Pitney, Day, Clarke, Brandeis, Lamar, and

<sup>30</sup>Doubtlessly due to the influence of Brandeis.

<sup>31</sup>McKenna's growing conservatism may be accounted for by aging and the deterioration of his mental facilities (McDevitt, 1946). The judges not mentioned above were neutral and took no extreme or consistent position.

McKenna were anti-Darwinists.

Most judges were not consistent toward the attitude systems within the Democratic Libertarianism ideology. Only Clarke and Brandeis were consistently Democratic within that ideology on Libertarianism, Federalism, and General Welfare. Only Van Devanter was consistently Republican toward all three issues. He was anti-liberty, nationalistic, and pro-special interests.

In addition to the above, on Libertarianism, Harlan, Hughes, Lamar, Holmes, and White were pro-liberty. Pitney and McReynolds were anti-liberty.

On Federalism, McReynolds, and Lurton were pro-state while McKenna and Day were nationalistic. On General Welfare, Pitney, Harlan, and Day were for the general welfare while McKenna and McReynolds were for special interests.

On the attitude system measuring party issues, Day, Van Devanter, and Harlan were extremely partisan. All were pro-Republican of course. On Judicial Restraint, Holmes, Hughes, McReynolds, and Brandeis all opposed judicial power while Van Devanter, Lamar, and Pitney consistently favored it. McKenna favored judicial power in the second period only.

It can be seen that Brandeis and Clarke are alike in their ideological pattern, both Progressive, Democratic Libertarian, and anti-Darwinism. However, each of the other



justices have unique ideological configurations. Their values and philosophies will be considered in Chapters 7 and 9 below.

## CHAPTER 7

### THE VALUES OF THE JUSTICES

Psychologists hold that values underly and shape attitudes. Rokeach (1968a, p. 16; 1968c) argues that "values transcendently guide actions and judgements across specific objects and situations" and that they develop and maintain attitudes. Furthermore, a person's attitudes will be oriented in terms of his values (Insko, 1967, p. 184).

In the last chapter it was concluded that values indeed did interact to shape attitudes and attitude systems for the Court as a whole. Further, these values seemed to be related to and implicit in the major ideologies determining the White Court's decision making. Now the value systems of the individual justices will be examined to see which values were dominant in each justice's philosophy and, if possible, to rank order each judge's scale of values.<sup>1</sup>

To examine the judges' values, the ranks of each judge on all the attitude scales will be used as the body of data. These ranks will be divided into the categories identified

---

<sup>1</sup>Since a value system implies a rank-ordering of values, Rokeach, 1968c, p. 17.

by factor analysis. These categories were referred to as attitude systems or factors. The judge's consistency and extremity of rank<sup>2</sup> for each attitude system will be determined. Several methods of analyzing the data may be used: (1) a t-test significance of difference of average rank may be tested between each pair of categories or attitude systems, (2) the relative significance of the average rank on each attitude system may be compared with the judge's overall average rank on all the other scales by a t-test, which would indicate that the judge saw a particular attitude system significantly different than the rest of the scales, (3) the relative consistency of a judge's reaction to a particular attitude system may be tested by an F-test comparing his variance of ranks within an attitude system with his variance on all other ranks, (4) the judge's average rank on each attitude system may be compared with his average ranks on each of the other attitude systems, to see on which attitude systems he took the most extreme positions, (5) his factor scores on each attitude system may be compared, (6) the judge's high loadings on Q-analysis factors of the phi correlations may be consulted, and (7) individual extreme ranks on certain scales may be examined for a possible pattern indicating value rankings. Hence,

---

<sup>2</sup>That is did the judge consistently rank, for example, 4 on all scales within an attitude system? For the extremity of a judge's ranks on an attitude system, it may be asked whether the judge ranked highest (or lowest) on all scales within a particular attitude system.

values will be inferred from the judge's behavior within attitude systems.

It seems logical to conclude that the attitude system on which a judge takes his most extreme position or average rank is the attitude system which is most salient or important to that judge.<sup>3</sup> It most likely involves a value or values which are dearest to that judge. Hence, it will be assumed that the extremity and consistency of the judge's position on the various attitude systems will indicate the importance of these attitude systems to him and the relative ranking of values of the justice corresponding to the attitude systems can also be inferred by this method. Hence, in the first period, Holmes has his most extreme average rank on judicial power (being against the use of that power), hence it might be inferred that this issue is the most important to him of any on the Court, and consequently the value of democracy implicit in this issue is Holmes' most highly revered value in this period.

The variable content of each attitude system is defined in Tables 4 and 11.<sup>4</sup> Each of the above methods of

---

<sup>3</sup>Applying this assumption would be analogous to the use of Likert scales if the position of an individual is compared on various attitude scales. In this case, however, the individual's score is determined by the positions of the other justices as well as his own attitude.

<sup>4</sup>The Judicial Power category was composed of variables 40, 41, 42, 61, and 65 in the first period and variables 40, 41, 42, and 57 in the second. It was constructed to obtain a better measure of a democracy value since Judicial Restraint was contaminated with a states' rights component.

analyzing the judge's bias towards the attitude systems allows us to rank roughly the importance of the various attitude systems to the individual judge. It may be conceived of as having several observers judge a phenomena and rank order the phenomena according to some criteria. Instead of human observers, different statistical measures will be used. Each would be an imperfect measuring device judging the judge's rank order of the importance of these attitude systems. A composite index composed of these measures could then hope to achieve a more accurate ranking. From these rankings, the judges' values can be inferred. Such an index was created out of measures one to five. Table 33 gives the individual's rank order of the attitude systems using measures one to five above and the composite index. The composite index then measures the uniqueness or distinctiveness of the attitude system in the judge's value system (1, pairs), his consistency towards it (3, F-test), and the extremity of his reaction to it (2, t-test; 4, average rank; and 5, factor scores). The directions given are positive for a liberal position (anti-business, pro-government, pro-liberty, pro-state, anti-judicial power, and pro-general welfare) and negative for a conservative position.

In addition the relationships between each pair of attitude systems may give some insight into the value system of each judge. The t-test significances between average ranks for each pair of attitude systems were used to

---

Darwinism in the first period is composed of variables 24, 25, 26, 27, 48, and 59.



Table 33.--Individual Judges' Ranks on Importance of Attitude  
Systems to Them, 1910-1920

Whole Period Composite Rank	First Period						Second Period					
	Pair	t- Test	F- Test	Ave. Rank	Fact. Score	Com- pos- ite	Pair	t- Test	F- Test	Ave. Rank	Fact. Score	Com- pos- ite
<b>Holmes</b>												
Darwinism -	- 1-	*3-	3-	2-	2-	2-	1-	*1-	*3-	1-	1-	1-
Judicial Power +	3+	*1+	*1+	1+	1+	1+	3+	*2+	*5+	2+	2+	2+
St. Progressive +	7+	5+	4+	5+	5+	4+	5+	*4+	4+	4+	5+	5+
Laissez-faire 0	2-	*2-	7-	4-	6-	3-	6+	*5+	*2+	6+	8+	6+
Progressivism +	4-	6-	9-	7-	7-	7-	4+	*3+	*1+	6+	6+	3+
Laissez-faire +	5+	9+	5+	7+	8+	8+	2+	*6+	6+	3+	2+	4+
Judic. Restraint +	6+	7+	6+	6+	4+	6+						
Libertarianism +	8+	*4+	10+	3+	3+	5+	7+	7+	9+	5+	3+	7+
Federalism +	9+	8+	2+	9+	9+	9+	9+	8+	8+	7+	4+	8+
Commerce Power +	11+	10+	11+	8+	1+	10+						
Gen. Welfare +	10	11	8	10	7-	11	8+	9+	7+	8+	7+	9+
<b>Pitney</b>												
Laissez-faire +	4+	*3+	*3+	2+	2+	3+	2+	*1+	*2+	1+	4+	1+
Progressivism +	2+	*1+	*1+			1+	1+	*6+	*1+		6+	3+
Darwinism +	3+	*2+	*2+	1+	3+	2+	3+	*4+	*5+	4+	3+	4+
Libertarianism -	1-	*4-	7-	4-	5-	4-	4-	*2-	*4-	2-	2-	2-
St. Progressive +	7+	*6+	*4+	3+	1+	5+	8+	7+	*3+	7+	8+	7+
Jud. Restraint -	5-	*5-	*5-	7-	6-	6-						
Judicial Power -	9-	*7-	9-	6-		8-	6-	*3-	6-	3-		5-
Gen. Welfare +	6+	*8+	6+	5+	4+	7+	5+	9+	7+	8+	5+	8+
Laissez-faire +	11+	9+	10+	10+	8+	11+	9+	*5+	8+	5+	1+	6+
Federalism +	10+	10+	8+	8+	9+	9+	7+	8+	9+	6+	7+	9+
Commerce Power +	8+	11+	11+	9+	7+	10+						
<b>White</b>												
St. Progressive -	1-	*1-	*1-	1-	1-	1-	2-	*3-	*1-	2-	2-	1-
Progressivism -	4-	*3-	*2-			2-	4-	*6-	*2-		5-	4-
Jud. Restraint +	3+	*2+	6+	5+	5+	3+						
Darwinism -	7-	7-	8-	2-	3-	7-	3-	*2-	6-	1-	4-	2-
Commerce Power -	9-	*5-	*4-	3-	2-	5-						
Judicial Power +	2+	*4+	7+	6+		4+	9+	*4+	*4+	5+		5+
Liberal Nat. -	8-	6-	*3-	4-	4-	5-	5-	8-	*3-	6-	6-	6-
Libertarianism +	6-	8-	10-	10-	9-	9-	1+	*1+	8+	3+	3+	3+
Federalism -	5-	11-	*5-	7-	6-	8-	7+	7+	*5	8	8	9
Gen. Welfare 0	10-	10-	9-	8-	8-	10-	6+	*5+	7+	4+	7+	7+
Laissez-faire +	11+	9+	11+	9+	7+	11+	8+	9+	9+	7+	1+	8+
<b>McReynolds</b>												
Liberal Nat. -	9-	*2-	*1-	2-	3-	3-	3-	*1-	*2-	1-	2-	1-
Jud. Restraint +	4+	*3+	*3+	3+	1+	2+						
Progressivism -	1-	*6-	6-			4-	4-	*2-	*1-		3-	2-
Darwinism -	6-	*4-	*2-	4-	6-	5-	2-	8-	*6-	5-	6-	6-
Laissez-faire -	7-	8-	8-	7-	9-	8-	1-	*3-	*4-	4-	1-	3-
Judicial Power +	3+	*1+	5+	1+		1+	8+	7+	9+	8+		9+
Federalism +	2+	*5+	*4+	5+	7+	6+	5+	*6+	7+	6+	8+	7+
St. Progressive -	5-	10-	11-	9-	4-	9-	6-	*5-	*3-	3-	4-	4-
Gen. Welfare 0	8+	9+	9+	10+	8+	11+	9-	*4-	*5-	2-	5-	5-
Libertarianism -	10-	7-	10-	6-	2-	7-	7-	9-	8-	7-	7-	8-
Commerce Power -	11-	11-	7-	8-	5-	10-						

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000



Table 33 (Cont.d.)

Whole Period Composite Rank	Pair	<u>First Period</u>					Com- pos- ite	<u>Second Period</u>					Com- pos- ite
		t- Test	F- Test	Ave. Rank	F <sup>o</sup> t. Score	t- Test		F- Test	Ave. Rank	Fact. Score			
Day													
Darwinism	+	3+	*3+	4+	2+	7+	3+	2+	*2+	2+	2+	2+	1+
Judicial Power0	1-	*1-	*3-	1-			1-	6+	3+	7+	3+		4+
Jud. Restraint	-	2-	*4-	9-	5-	2-	4-						
Federalism	-	5-	*5-	11-	6-	3-	7-	1-	*1-	9-	1-	1-	2-
Liberal Nat.	+	4+	*2+	*1+	4+	6+	2+	4-	9-	6-	7-	6-	9-
Gen. Welfare	+	9+	7+	8+	3+	1+	6+	9+	5+	5+	4+	3+	5+
Progressivism	+	7+	6+	*2+			5+	7	6	4		8	8
St. Progressive0	8-	8-	6-	9-	8-	9-	9-	5+	4+	3+	5+	4+	3+
Laissez-faire	-	11-	9-	5-	7-	5-	8-	8-	8-	*1-	8-	5-	6-
Libertarianism0	6+	11+	7+	8+	9-	10+	11-	3-	7-	8-	6-	7	7-
Commerce Power-	10-	10-	10-	10-	4-								
VanDevanter													
Judicial Power-	2-	*1-	*1-	1-		1-		6-	7-	*4-	4-		5-
Federalism	-	9-	7-	9-	5-	1-	5-	4-	*1-	*3-	1-	1-	1-
Liberal Nat.	-	4-	5+	5+	9-	8-	6-	2-	*2-	*1-	3-	3-	2-
St. Progressive-	3-	*2-	*3-	2-	3-	2-	2-	7-	6-	*6-	5-	6-	6-
Libertarianism-	5-	*4-	*2-	3-	5-	3-	3-	3-	8-	8-	7-	5-	8-
Commerce Power-	7-	6-	4-	4-	6-	4-							
Gen. Welfare	-	11-	9-	11-	7-	2-	9-	8-	*3-	*5-	2-	2-	3-
Laissez-faire	-	1-	*3-	8-	10-	9-	7-	1-	*4-	9-	8-	8-	7-
Jud. Restraint	-	6-	10-	7-	6-	7-	8-						
Progressivism	-	8-	11-	6-			11-	5-	*5-	*2-		4-	4-
Darwinism	-	10-	8	10-	8-	4-	10-	9-	9-	7-	6-	7-	9-
McKenna													
Gen. Welfare	-	2-	*1-	*4-	1-	3-	1-	2-	*1-	*3-	1-	2-	1-
Progressivism 0	1+	*6+	*1+			2+		1-	*2-	*2-		3-	2-
Commerce Power+	3+	*2+	*6+	2+	1+	3+							
Liberal Nat.	0	7+	*7+	*2+	6+	7+	6+	6-	*3-	*1-	3-	5-	3-
Federalism	-	5-	*3-	*3-	3-	4-	4-	7-	*8-	6-	5-	4-	6-
Darwinism	+	4+	*4+	*5+	5+	6+	5+	3+	*4+	8+	8+	8+	7+
Laissez-faire	-	11-	*5-	8-	4-	2-	7-	4-	*6-	9-	7-	7-	9-
St. Progressive0	8+	8+	9+	7+	5+	8+	8+	8-	*5-	*5-	4-	6-	5-
Libertarianism-	6-	9-	11-	10-	8-	9-	9-	5-	*9-	*4-	6-	1-	4-
Judicial Power0	10+	10+	7+	9+		10+		9-	*7-	7-	2-		8-
Jud. Restraint	+	9+	11+	10+	8+	9+	11+						

Table 33 (Cont'd.)

First Period

Composite Rank	Pair	t- Test	F- Test	Ave. Rank	Fact. Score	Com- pos- ite
<b>Hughes</b>						
Judicial Power	+ 1+	*1+	*3+	1+		1+
Progressivism	+ 3+	*4+	*1+			2+
St. Progressive	+ 4+	*2+	*5+	2+	1+	3+
Libertarianism	+ 7+	*3+	*4+	3+	3+	4+
Liberal Nat.	+ 8+	8+	*2+	5+	5+	5+
Jud. Restraint	+ 11+	7+	7+	4+	2+	6+
Gen. Welfare	- 2-	*6-	11-	7-	6-	7-
Laissez-faire	+ 5+	*5+	9+	10+	7+	8+
Commerce Power	+ 9+	10+	8+	8+	4+	9+
Darwinism	+ 6+	9+	6+	9+	9+	10+
Federalism	+ 10+	11+	10+	6+	8+	11+
<b>Lamar</b>						
Judicial Power	- 1-	*2-	2-	1-		1-
Commerce Power	+ 2+	*3+	3+	2+	4+	2+
Progressivism	- 4-	*1-	7-			3-
Liberal Nat.	- 7-	*4-	5-	4-	3-	4-
Darwinism	+ 3+	*6+	*1+	6+	7+	5+
Laissez-faire	- 6-	*5-	10-	3-	1-	6-
Libertarianism	+ 5+	*7+	6+	5+	2+	7+
St. Progressive	- 9-	9-	9-	9-	5-	8-
Gen. Welfare	- 11-	10-	4-	7-	8-	9-
Federalism	- 10-	8-	8-	8-	9-	10-
Jud. Restraint	0 8	11	11	10	6-	11
<b>Lurton</b>						
Liberal Nat.	- 1-	*1-	*1-	1-	2-	1-
Commerce Power	+ 4+	*3+	*2+	2+	6+	2+
Progressivism	- 2-	*2-	7-			3-
Darwinism	- 3-	*5-	4-	4-	5-	4-
Federalism	+ 6+	*4+	8+	3+	3+	5+
Judicial Power	+ 7+	6+	5+	5+		6+
Libertarianism	+ 8+	8+	3+	7+	7+	7+
Jud. Restraint	+ 10+	7+	10+	6+	1+	8+
St. Progressive	+ 9+	10+	6+	9+	9+	9+
Gen. Welfare	- 5-	11-	9-	10-	8-	10-
Laissez-faire	- 11-	9-	11-	8-	4-	11-

Table 33 (Cont'd.)

<u>First Period</u>							
Composite Rank	Pair	t- Test	P- Test	Ave. Rank	Fact. Score	Compos- ite	
Harlan							
Laissez-faire	+ 1+	*2+	*2+	2+	1+	1+	
Liberal Nat.	+ 2+	*1+	*1+	1+	6+	2+	
Progressivism	+ 3+	*4+	*3+			3+	
General Welfare	+ 8+	*3+	*5+	3+	4+	4+	
Jud. Restraint	- 4-	*5-	9-	6-	3-	5-	
Libertarianism	+ 7+	*7+	*6+	4+	5+	6+	
Commerce Power	- 5-	*6-	*4-	7-	8-	7-	
Federalism	+ 10+	*8+	8+	5+	2+	8+	
St. Progressive	+ 6-	10+	7+	10+	9	9+	
Judicial Power	- 9-	9-	10-	8-		10-	
Darwinism	+ 11+	11+	11+	9+	7+	11+	
<u>Second Period</u>							
Brandeis							
St. Progressive	+ 2+	*1+	*1+	1+	1+	1+	
Progressivism	+ 3+	*2+	*2+		2+	2+	
Liberal Nat.	+ 4+	*4+	*3+	2+	3+	3+	
Libertarianism	+ 6+	7+	5+	5+	4+	4+	
Judicial Power	+ 8+	*5+	7+	3+		5+	
Gen. Welfare	+ 9+	6+	6+	4+	5+	6+	
Darwinism	+ 7+	8+	*4+	6+	7+	7+	
Federalism	+ 5+	9+	9+	7+	6+	8+	
Laissez-faire	+ 1-	*3-	8-	8+	8+	9+	
Clarke							
Gen. Welfare	+ 1+	*1+	*3+	1+	1+	1+	
St. Progressive	+ 5+	4+	*1+	2+	4+	2+	
Progressivism	+ 4+	6+	*2+		3+	3+	
Libertarianism	+ 9+	5+	6+	3+	2+	4+	
Judicial Power	+ 3+	2-	9-	7+		5+	
Laissez-faire	- 2-	3-	8-	8	8-	6-	
Federalism	+ 7+	8+	4+	4+	6+	7+	
Darwinism	+ 8+	9+	5+	5+	5+	8+	
Liberal Nat.	+ 6+	7+	7+	6+	7+	9+	

\*Indicates that attitude system is significantly different from ranks of justice on scales not in attitude system at a significance level of .05 or better.

See beginning of Chapter 7 for criteria used in above ranking of attitude systems by various methods.



construct a McQuitty type of pattern analysis of the value systems. The results of this are given in Figure 21.<sup>5</sup> The rank orders of the judges' values resulting from the analysis of Table 33 and Figure 21 is given in Tables 34<sup>6</sup> and 35.<sup>7</sup>

First, the shifts within the judge's attitude make-up from one period to another will be considered. Several explanations may be made for such apparent changes. Apparent changes may be due to inaccuracy in the data and imprecision of the measures, while the judges' attitudes and values remain constant. Changes may be due to certain

---

<sup>5</sup>These patterns were derived in the following way. T-test significances of rank averages between attitude systems were obtained. If the significance contains error probabilities of .50 or greater, arrows are drawn between the respective attitude systems. The hypothesis suggested is that the judge perceives little difference between the attitude systems and thus they are related in his mind. A double arrow indicates that it is the highest intercorrelation for both of the attitude systems.

<sup>6</sup>Values are derived from salience of attitude systems in the following manner. Anti-Judicial Power indicates a democratic value. If this is most salient to the judge, democracy is ranked first. Darwinism locates the efficiency value, General Welfare locates the general welfare value, Libertarianism the liberty value. States' rights or nationalism is determined by the direction and location of Federalism and Commerce Power and the relative preference for Liberal Nationalism over State Progressivism. Equality is derived from the average of positions of Liberal Nationalism, State Progressivism, and Progressivism. However, since Darwinism and Libertarianism also may contain elements of equality, they also are considered.

<sup>7</sup>The values in Table 34 are all given a positive direction. A judge who is first in anti-equality in Table 34 should rank the positive value of equality last. He is thus ranked last on equality in Table 35.

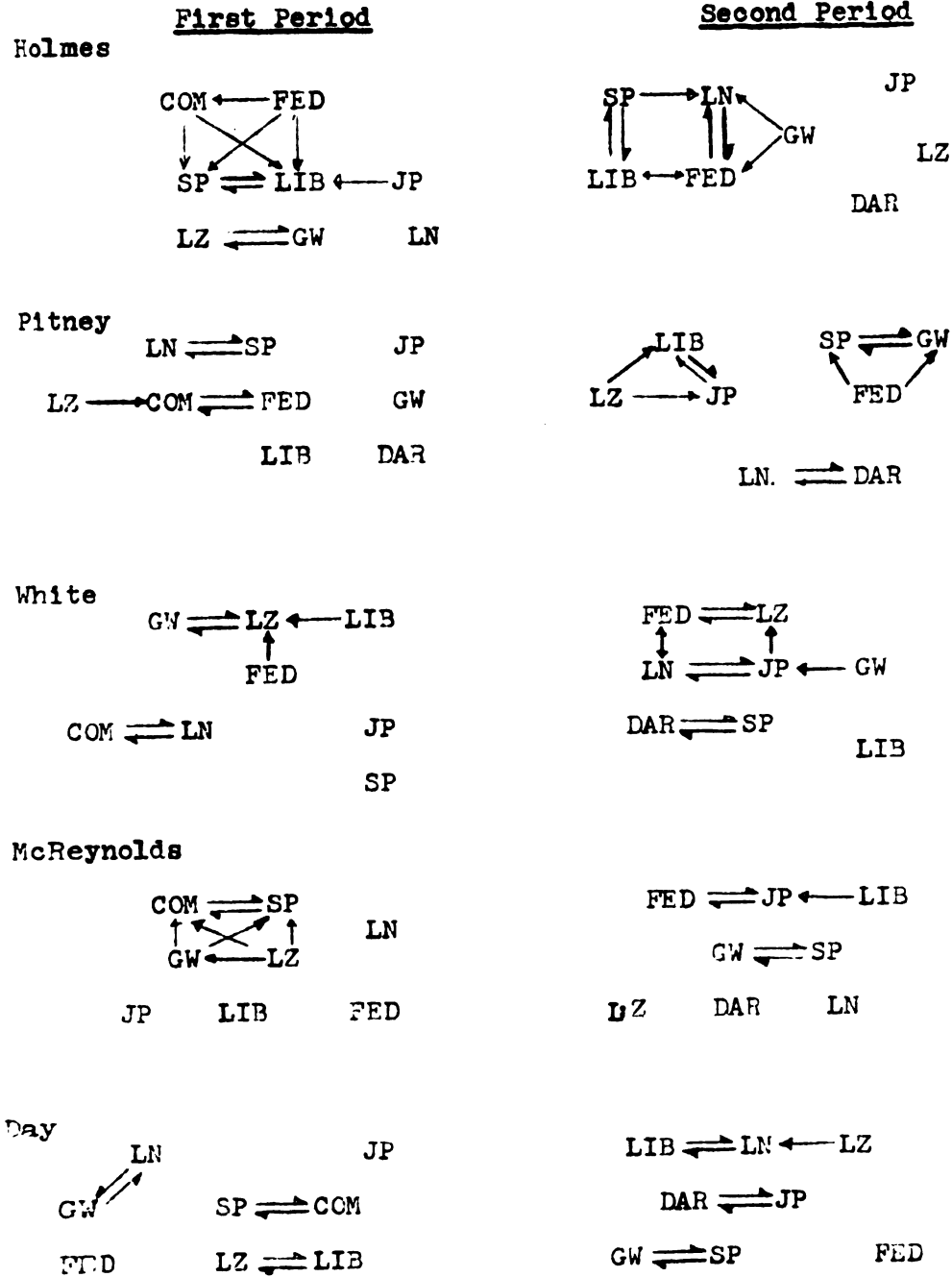


Figure 21.--Pattern Analysis of Judges' Individual Attitude Systems for Each Period of White Court



Figure 21. (Cont'd.)

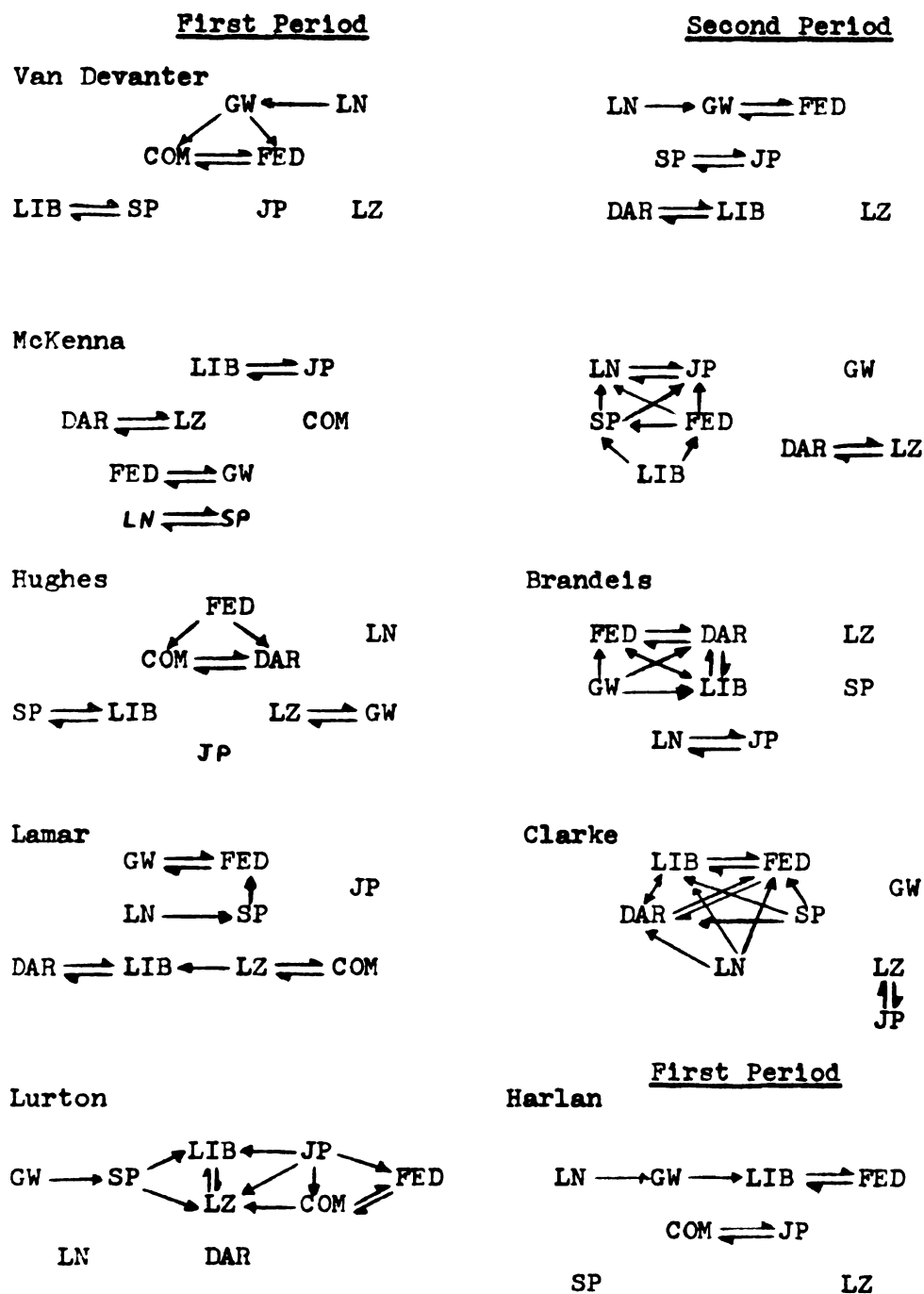




Figure 21 (cont'd.)

---

LN = Liberal Nationalism	JP = Judicial Power
SP = State Progressivism	GW = General Welfare
LIB = Libertarianism	LZ = Laissez-faire
FED = Federalism	
DAR = Darwinism	
COM = Commerce Power	

⇐ = Highest correlation for both attitude systems

→ = High correlation between attitude systems, .40 or more

Table 34.--Rank Order of Values in Individual Judges' Value System for Separate Periods of the Court and for the Whole Period, Retaining Original Direction of Values in Value System

First Period	Second Period	Whole Period
<u>Holmes</u>		
1. Democracy	1. Efficiency	1. Efficiency
2. Efficiency	2. Democracy	2. Democracy
3. Liberty	3. Pro-government	3. Equality
4. States' Rights	4. Equality	4. Pro-government
5. Anti-equality	5. Liberty	5. Liberty
6. Pro-government	6. States' Rights	6. States' Rights
7. General Welfare	7. General Welfare	7. General Welfare
<u>Pitney</u>		
1. Equality	1. Equality	1. Equality
2. Anti-liberty	2. Anti-liberty	2. Anti-liberty
3. Anti-democracy	3. Anti-democracy	3. Anti-democracy
4. General Welfare	4. Pro-government	4. Pro-government
5. States' Rights	5. General Welfare	5. General Welfare
6. Pro-government	6. States' Rights	6. States' Rights
7. Efficiency	7. Efficiency	7. Efficiency
<u>White</u>		
1. Anti-equality	1. Anti-equality	1. Anti-equality
2. Democracy	2. Efficiency	2. Efficiency
3. Efficiency	3. Liberty	3. Democracy
4. Nationalism	4. Democracy	4. Nationalism
5. Anti-liberty	5. General Welfare	5. Liberty
6. Anti-Gen. Wel.	6. Pro-government	6. Pro-government
7. Pro-government	7. Nationalism	7. General Welfare
<u>McReynolds</u>		
1. Democracy	1. Anti-equality	1. Anti-equality
2. Anti-equality	2. Anti-government	2. Efficiency
3. Efficiency	3. Anti-Gen. Wel.	3. Anti-government
4. States' Rights	4. Efficiency	4. Democracy
5. Anti-liberty	5. States' Rights	5. States' Rights
6. Anti-government	6. Anti-liberty	6. General Welfare
7. General Welfare	7. Democracy	7. Anti-liberty
<u>Day</u>		
1. Anti-democracy	1. Equality	1. Equality
2. Equality	2. Nationalism	2. Nationalism
3. General Welfare	3. Democracy	3. General Welfare
4. Nationalism	4. General Welfare	4. Anti-government
5. Anti-government	5. Anti-government	5. Liberty
6. Liberty	6. Anti-liberty	6. Democracy
7. Efficiency	7. Efficiency	7. Efficiency

ont'd.)

Period	Second Period	Whole Period
Democracy	1. Nationalism	1. Anti-democracy
Liberty	2. Anti-equality	2. Nationalism
Efficiency	3. Anti-Gen. Wel.	3. Anti-equality
Equality	4. Anti-democracy	4. Anti-liberty
Government	5. Anti-government	5. Anti-Gen. Wel.
Gen. Wel.	6. Anti-liberty	6. Anti-government
Efficiency	7. Efficiency	7. Efficiency
Gen. Wel.	1. Anti-Gen. Wel.	1. Anti-Gen. Wel.
Equality	2. Anti-equality	2. Nationalism
Liberty	3. Anti-liberty	3. Anti-government
Government	4. Nationalism	4. Anti-liberty
Democracy	5. Anti-democracy	5. Democracy
Efficiency	6. Anti-government	6. Equality
Equality	7. Efficiency	7. Efficiency

ing judges sat in only one period.

	<u>Lamar</u>	<u>Lurton</u>
	1. Anti-democracy	1. States' Rights
	2. States' Rights	2. Anti-equality
	3. Anti-equality	3. Efficiency
Gen. Wel.	4. Liberty	4. Democracy
Government	5. Anti-government	5. Liberty
Rights	6. Anti-Gen. Wel.	6. Anti-Gen. Wel.
Efficiency	7. Efficiency	7. Anti-government
	<u>Brandeis</u>	<u>Clarke</u>
Government	1. Equality	1. General Welfare
Welfare	2. Liberty	2. Equality
Efficiency	3. Democracy	3. Liberty
Equality	4. General Welfare	4. Democracy
Liberty	5. States' Rights	5. States' Rights
Democracy	6. Pro-government	6. Pro-government
Efficiency	7. Efficiency	7. Efficiency



Table 35.--Rank Order of Values in Individual Judges' Value Systems, All Values in Positive Direction

<u>Holmes</u>	<u>Pitney</u>	<u>White</u>
1. Efficiency	1. Equality	1. Efficiency
2. Democracy	2. Pro-government	2. Democracy
3. Equality	3. General Welfare	3. Nationalism
4. Pro-government	4. States' Rights	4. Liberty
5. Liberty	5. Democracy	5. Pro-government
6. States' Rights	6. Liberty	6. General Welfare
7. General Welfare	7. Efficiency	7. Equality
<u>McReynolds</u>	<u>Day</u>	<u>Van Devanter</u>
1. Efficiency	1. Equality	1. Nationalism
2. Democracy	2. Nationalism	2. Efficiency
3. States' Rights	3. General Welfare	3. Pro-government
4. General Welfare	4. Liberty	4. General Welfare
5. Liberty	5. Democracy	5. Liberty
6. Pro-government	6. Pro-government	6. Equality
7. Equality	7. Efficiency	7. Democracy
<u>McKenna</u>	<u>Hughes</u>	<u>Lamar</u>
1. Nationalism	1. Democracy	1. States' Rights
2. Democracy	2. Equality	2. Liberty
3. Equality	3. Liberty	3. General Welfare
4. Liberty	4. Pro-government	4. Pro-government
5. Pro-government	5. States' Rights	5. Efficiency
6. Efficiency	6. Efficiency	6. Equality
7. General Welfare	7. General Welfare	7. Democracy
<u>Lurton</u>	<u>Brandeis</u>	<u>Clarke</u>
1. States' Rights	1. Equality	1. General Welfare
2. Efficiency	2. Liberty	2. Equality
3. Democracy	3. Democracy	3. Liberty
4. Liberty	4. General Welfare	4. Democracy
5. Pro-government	5. States' Rights	5. States' Rights
6. General Welfare	6. Pro-government	6. Pro-government
7. Equality	7. Efficiency	7. Efficiency
<u>Harlan</u>		
1. Pro-government		
2. Equality		
3. General Welfare		
4. Liberty		
5. Nationalism		
6. Efficiency		
7. Democracy		

social or political pressure which influenced the judges' behavior in voting in certain cases but left the attitudes and values unchanged. Changes may be due to real changes within the judges' psychology actually shifting the importance of certain attitudes and values within their value system. Due to their central nature, values should be stable, yet judges by their very role should be open to the impact of new sociological and political information (Murphy, 1964; Murphy and Pritchett, 1961). Their great responsibility as the final arbitrator of our political system might well make them very introspective as to their value system.

Rokeach (1968c) holds that changes in value systems are possible and likely to be due to inconsistent relationships between elements of a value-attitude system. Several influences that might cause change in value-systems are a drive toward consistency with self-esteem and a drive toward consistency with logic or reality. Specific causes of value-system change could be inconsistencies within the system and cognitions about significant others. Hence, a person may be exposed to information about states of inconsistency already existing within his value-system. He may receive new information from credible sources which is inconsistent with information already represented within his value-attitude system (Rokeach, 1968c, p. 22). The latter situation might well describe the reasons for changes in attitudes discussed in Chapter 5: the influence of Brandeis on Holmes



and others, and the impact of a presidential party leader on a judge's value-attitude system.

Most of the minor variations in the rankings of the salience of attitude systems and values shown in Tables 33 and 34 and Figure 21 is probably due to the imprecision of our measures. Other, more striking changes may be due to the influences noted above.

Holmes changes from period 1 to period 2 (Table 33) in that he was conservative (negative) on Liberal Nationalism and became liberal (positive) on that issue. Similarly, he changes from being anti-equality to pro-equality. He also becomes more strongly pro-government. Brandeis' influence may account for this. It may also be noted that his value-system is inconsistent in the first period since he is strongly anti-equality in Liberal Nationalism but strongly pro-equality in State Progressivism. His high regard for democracy (anti-judicial power) may account for the latter attitude but is not consistent with the former. Figure 21 shows that most of his positions on attitude systems involving equality and states' rights cluster together. This suggests that equality is a central value, but in the first period it does not include Liberal Nationalism. His position on all of these attitude systems is quite similar. Laissez-faire, Darwinism, and Judicial Power attitude systems are clearly distinctive and hence salient to Holmes. He is most liberal in both periods on Judicial Power, being



against the use of that power. He is most conservative on Darwinism in both periods.

Table 35 shows that Holmes' most central value is efficiency (from Darwinism). Democracy is second, based on his opposition to judicial power. Equality and pro-government are also important to him as is liberty. He favors state powers over federal but is less concerned about the value of states' rights.

Pitney shows no major changes in his value-system between periods. In the second period, he appears slightly more pro-government and more favorable to judicial power. These are, in the latter period, closely related to each other and to his pro-government position on Libertarianism. It suggests an element of authoritarianism in his psychology. The first period shows him to have six basic elements in his value-attitude system (Figure 21): Progressivism, states' rights, judicial power, general welfare, anti-Darwinism, and anti-libertarianism. In the second period he has three elements: the authoritarianism noted, State Progressivism, and Liberal Nationalism-anti-Darwinism. Pitney is most liberal on Darwinism with Liberal Nationalism a close second. He is most conservative on Libertarianism and secondly for the use of judicial power. He is also most strongly against corruption in the first period. He is strongest on the Court for the creditor and the plaintiff in liability cases.



His highest value is equality with pro-government a close second. He also rates general welfare and states' rights highly. He is negative on democracy, liberty and efficiency, however.

White is fairly stable in his value-system between the two periods. Darwinism becomes much more salient in the second period, however. He changes from conservative to liberal on Libertarianism and General Welfare. Since these are party-related issues, it is likely that he was so influenced by the new members of the Democratic party on the Court, Brandeis and Clarke who rate these values highly. He is most liberal in both periods on Libertarianism. He is also quite liberal on judicial power in both periods, being against the use of that power. He is most conservative on Darwinism and State Progressivism. He is also strongly in favor of prohibition.

White ranks efficiency highest on his value scale with democracy second. All Democrats rank democracy highly positively except Lamar. White also ranks nationalism high, being the only Democrat to be against states' rights. He is also pro-liberty and pro-government. He ranks general welfare low and is strongly anti-equality.

McReynolds is quite like White in his value system, except that McReynolds is strongly pro-states' rights. His major shift is that in the second period he becomes much less anti-judicial power. It is most salient to him in the

first period and least salient in the second. Apparently he had discovered the utility of the judicial power in curbing the excesses of Progressivist legislation.

Figure 21 shows that in the first period McReynolds reacted similarly to Commerce, State Progressivism, General Welfare, and Laissez-faire. He saw the other attitude systems as distinctive entities, however: he was most conservative on Liberal Nationalism (which strongly invoked his states' rights position). Then comes Darwinism, Judicial Power, Libertarianism, and Federalism. The second period shows a similar pattern except that Federalism, Judicial Power and Libertarianism form a cluster. He was most liberal in both periods on Judicial Power and Federalism (favoring states' rights). He was also strongly anti-prohibition.

McReynolds sees only efficiency, democracy, and states' rights as positive values (in that order). He is strongly opposed to equality and governmental power. He also rates liberty and general welfare low on his value scale.

Day shows a few inconsistencies between the first and the second period. He is liberal on Liberal Nationalism in the first period, but conservative in the second. The effect of the change in administrations from Republican to Democratic probably explains this. He is conservative on State Progressivism and Libertarianism in the first period but liberal in the second. The influence of Brandeis could

explain this change. Federalism becomes much more salient in the second period and Day becomes an extreme nationalist. However, Day is most extreme on Federalism in both periods. He is strongly pro-judicial power in both periods. He is also quite liberal on Conservation (14), Land Claims (16), Civil Liberties of Indians (5), and Civil Rights (15).

The inconsistencies make Day's value system difficult to analyze. He was considered a "weak" member of the Court by Taft (Pringle, 1939) and may have been particularly susceptible to external influence.

On his scale of values, he ranks equality highest and nationalism second. General Welfare, liberty and democracy are weak values for Day. He rates governmental power and efficiency lowest of all, being negative towards these values.

McKenna similarly shows marked inconsistencies in his reaction to the attitude systems. He changes from a strong liberal to a strong conservative on Liberal Nationalism. State Progressivism, and Judicial Power. This may be accounted for by the change in national administration and leadership of Progressivism from the Republicans to the Democrats. It could be accounted for by the deterioration of his mental facilities, as noted, or his growing senility.

McKenna saw no difference between State Progressivism and Liberal Nationalism in either period of the White Court

(Figure 21). In the second period, he is consistently conservative on all attitude systems except Darwinism, Laissez-faire, and General Welfare. The large cluster of attitude systems probably represents an anti-equality value. McKenna sees anti-Darwinism similar to Laissez-faire. Hence, his opposition to big business is related to his opposition to big government.

He is most liberal on Civil Liberties of Indians (5) being the most liberal member of the Court on this issue. He is third on the Court in opposition to prohibition. He is lowest on the Court in opposition to corruption and also seems favorable to business interests in Conservation (14) and Land Claims (16). His changes between period one and period two are quite striking in Civil Liberties: Property (3), Commerce (13), and Contract Clause (12). Where he appears to change from quite liberal to the most conservative member of the Court.<sup>8</sup> He does remain consistently anti-railroad on Liability of Railroads (27) in both periods.

McKenna's highest value is nationalism. His other values are democracy, equality, liberty, and pro-government towards which he is slightly negative. He is strongly negative toward efficiency (Darwinism) and general welfare.

Van Devanter is consistently conservative and nationalistic on all issues and values. He changes as does Day in

---

<sup>8</sup>His rank change is almost as striking in Rate Regulation (23).

the second period becoming more strongly conservative on Liberal Nationalism but more liberal on State Progressivism. He is also more liberal on Libertarianism. The partisan change in control of the national administration most likely accounts for his positions on Liberal Nationalism, and the influence of Brandeis may account for his relative liberalism on State Progressivism and Libertarianism. Van Devanter also became more extremely nationalistic as did Day.

Van Devanter's value system (from Figure 21) shows little distinctiveness on his reaction to most attitude systems in the first period. He was moderately conservative on anti-equality on most issues but more strongly conservative on Judicial Power, State Progressivism, and Libertarianism. In the second period his reaction to the various attitude systems is much more distinctive. He is most extreme on Federalism in this period. He is most liberal on Civil Rights (15).

Van Devanter's strongest positive value is nationalism. He is moderately positive on efficiency. He is moderate on pro-government, general welfare, and liberty but is negative toward these values. He is strongly negative toward democracy and equality as a typical conservative.

Hughes' value system (Figure 21) seems composed of four parts: (1) a system involving equality including the Progressivism variables plus Libertarianism, (2) a federalism system, (3) a system composed of pro-government and General





Welfare, and (4) anti-Judicial Power. Hughes' most liberal stance is on the Judicial Power variable. He is quite liberal on all civil liberty variables (1, 2, 3, 4, 5) including Civil Rights (15) except for the liberty variable involving Aliens (6). He is highly pro-government on all Progressivism variables, both state and national. He seems highly moralistic as his biography and strongly religious upbringing would seem to confirm. He is strong in support of Prohibition (38) and the morality-involved Federal Regulation: Non-economic (20). He also strongly opposes Corruption in Business (44) but not Corruption in Government (37).

Hughes ranks democracy highest and equality second. This is quite in line with his well-documented Progressivist philosophy (Pusey, 1951). Liberty ranks third on his value scale with pro-government fourth. States' rights ranks fifth. He also is more liberal on State Progressivism than Liberal Nationalism. He rates efficiency and general welfare negatively.

Harlan is somewhat similar to Hughes. He ranks the pro-government value highest, with equality only second. General Welfare is third and liberty is only fourth. He is a nationalist as reputed (Paul, 1960). He does rank as a states' rights man in Federalism probably due to support of some of its general welfare variables. He is nationalistic on Commerce Power, however and is clearly more favorable to Liberal Nationalism than State Progressivism in Table 33.



He seems to rank efficiency and democracy negatively. He supports the use of judicial power. His high rank on judicial power is due to his support of the national judicial power over the states.

He is most liberal of all justices in the first period on variables involving civil liberties including Civil Rights (15) as his biographers will attest (Clarke, 1915). He is not sympathetic, however, to the claims of aliens. He is the second most liberal justice on Liberal Nationalism and Labor (7).

Lamar is, like Lurton, a strong states' rights man. He values liberty highly also, in second place. He is moderately negative to general welfare, pro-government, and efficiency. He is quite negative towards equality and democracy. He was reported to be disdainful towards the democratic process (Lamar, 1926).

The structure of his value system is fairly simple. It has three components. One combines Commerce, Laissez-faire, Libertarianism and Darwinism. It seems to represent an anti-national, anti-government, and anti-big business sentiment. Hence, he is a true laissez-fairest opposing dangers to individual liberty from all sources. He is most liberal on the Libertarian, Commerce, and Darwinism variables. His second component is anti-equality in which he opposes the general welfare and Progressivism, all related to equality. His third component includes the advocacy of

Judicial Power, presumably to protect liberty and states' rights values. He is most extreme on this issue. Lamar supports national income taxation but opposes state taxes. He is for prohibition.

Lurton is similarly a states' rights laissez-fairest in the Jeffersonian tradition. He is the strongest states' rights man on the Court. He even supports State Progressivism moderately although he seems to rank equality lowest of all seven values. He ranks efficiency second, being a Darwinist. Democracy ranks third and liberty fourth. He is slightly negative towards government and the general welfare.

His value system is very simple and is composed of two elements. One is Liberal Nationalism, being extremely conservative and anti-national power. He is most extreme on this issue. The other component consists of all the other attitude systems in which he is anti-equality and pro-states' rights. He is most liberal on Criminal Due Process (4), Fiscal Claims (18), Fiscal Powers (19), and Prohibition (38), being against it.

Brandeis is liberal on all attitude systems. His value system according to Figure 21 seems to have four components. (1) He is most extreme towards Liberal Nationalism and Judicial Power, opposing the latter. (2) He is less extreme on State Progressivism. (3) A component was found involving what was called Autonomy in Chapter 3. It

involves pro-states' rights, General Welfare, Libertarianism, and anti-Darwinism. In it he opposes bigness in and oppression by government and business. He also opposes aids to business interests in General Welfare. He is more moderate on these issues. (4) He is least liberal on Laissez-faire, perhaps retaining a Jeffersonian fear of governmental action. He is most extreme on First Amendment (1), State Tax (11), Commerce (13), Federal Regulation: Economic (21), and Rate Regulation (23). He favored Prohibition (38).

Brandeis supports equality strongest. His second value seems to be liberty. Democracy is third. His lack of consistency towards judicial power drops the democracy variable lower on the scale. He accepts the use of judicial power in support of liberal goals. Brandeis is also favorable to general welfare (4th) and states' rights (5th). Pro-government is sixth. Brandeis is only slightly favorable to governmental power. Since he is an anti-Darwinist, efficiency is last. However, Brandeis believed large corporations to be inefficient so that this value may not be accurately placed in his value system.

Clarke's value system was quite similar to Brandeis'. His scale of values differs from Brandeis' scale principally in that Clarke seems to rank general welfare as his primary value. He is neutral towards governmental power, being significantly less liberal on this issue than the others. This suggests a laissez-faire element in his psychology

which may be related to his high value of liberty.

Clarke is second to Brandeis in his support of the Progressivism variables but is first on Libertarianism. He is most extreme in support of labor-involved issues (7, 8, 9, 53), Contract Clause (12), Due Process (10), federal taxes and claims (19, 18), Discrimination (24), and Antitrust (30). He is strongly anti-corruption (17, 37) but is against Prohibition (38). His views suggest support of lower-class interests and goals.

Clarke's value system from Figure 21 seems simple. He is most liberal on the General Welfare component and least liberal on Laissez-faire-Judicial Power. He dislikes governmental power as much as he does judicial power. The rest of the attitude systems form a third component, all related to equality.

Comparisons between the Justices.--The relation of the value of liberty with the pro-government value might reveal which of the justices oppose government power out of a value of individual liberty. This value system would typify the traditional laissez-faire libertarian. Lurton and Lamar fit this description, rating liberty positively and government negatively. (See Tables 34 and 35 and Figure 22.) Surprisingly, Clarke and Brandeis also fit this description somewhat. These then include four of the six Democrats on the Court adding evidence that this is an ideological component of Democratic Libertarianism. Day moderately fits into this

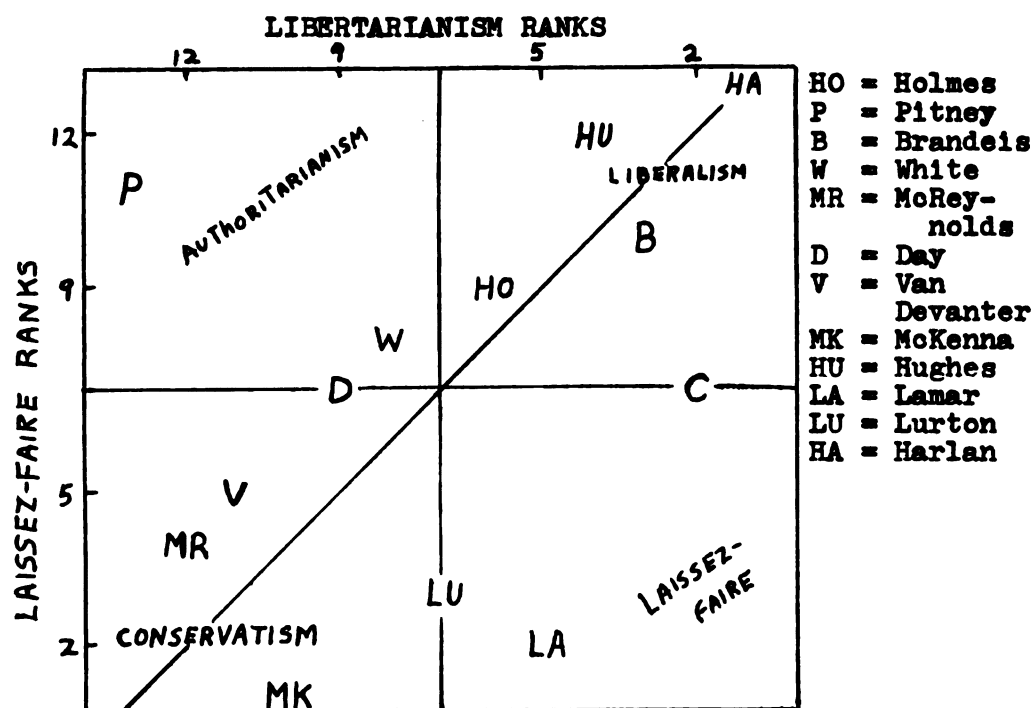


Figure 22.--Graph Comparing Ranks of Attitude Systems Laissez-faire and Libertarianism for 13 Justices, 1910-1920 Period

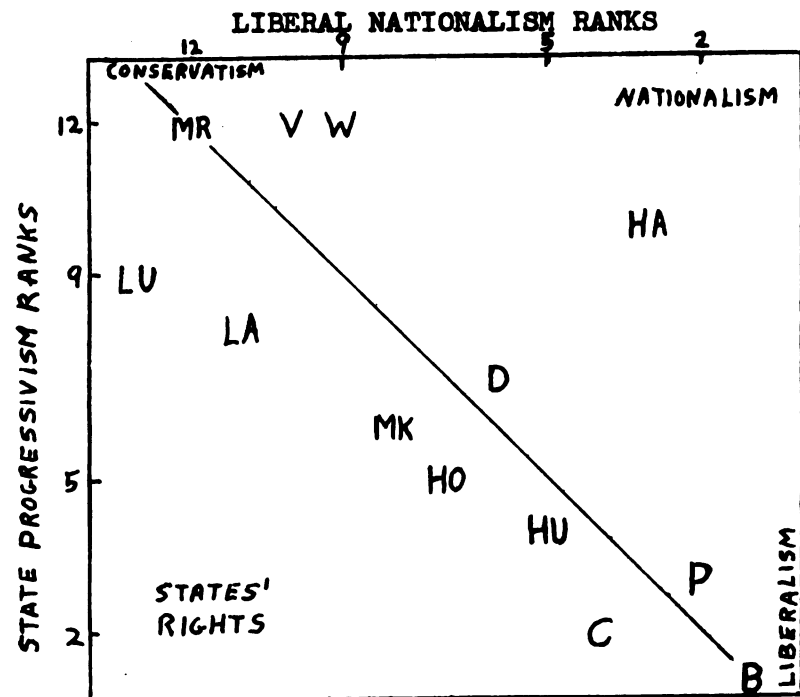


Figure 23.--Graph Comparing Ranks of Attitude Systems State Progressivism and Liberal Nationalism for 13 Justices, 1910-1920

category being slightly pro-liberty and anti-government. Pitney alone is an authoritarian, being both pro-government and anti-liberty. The conservatives, Van Devanter, McReynolds, and McKenna are not laissez-fairists. They oppose government and liberty alike.<sup>9</sup> They seem primarily anti-equality and Darwinist. Holmes, White, Hughes, and Harlan are both pro-government and pro-liberty.

What values are associated with political party? Omitting Holmes, six justices are Republicans and six are Democrats.

States' rights most clearly differentiates Democrats from Republicans. The Democrats are five to one for states' rights, and the Republicans are four to two for nationalism. The Republican nationalists are more extreme on that value (averaging 2.2) than the states' rights Republicans are on states' rights (4.5). Holmes acts like a Democrat, being mildly pro-state.

The pro-government value also divides Democrats from Republicans. The Democrats are anti-government (5.3) while the Republicans are pro-government (3.7).<sup>10</sup> This is consistent with a pro-liberty laissez-faire Democratic position.

<sup>9</sup>McKenna is, however, anti-government and slightly sympathetic to liberty. But his position in Figure 22 suggests that such a relationship is a weak one.

<sup>10</sup>Significant at better than the .02 level.



Holmes tends to the Democratic side.

The Democrats value democracy higher (averaging 3.5) than Republicans (4.5)<sup>11</sup> as predicted. Holmes acts Democratic. Democrats also value liberty higher (3.3) than Republicans (4.3) as predicted. Holmes ranks liberty as low as Republicans do (5) but it is a strongly positive value for him. Only Harlan and Hughes among Republicans also value liberty positively. Republicans rank equality higher but Democrats rank general welfare higher (4.0 to 4.5). Southern Democrats consistently ranked equality lower than all other judges (6.7 to 3.1).

How did Progressives differ from non-Progressives? To determine this it must be decided which judges are Progressives and which are not. Clarke, Brandeis, and Hughes are generally accepted as Progressives without much dispute (Warner, 1959; Mason, 1946; Pusey, 1951). Most of the older justices seem to be neither associated with the Progressivist movement nor sympathetic to the Progressivist variables except possibly Harlan. Furthermore, Van Devanter seems untainted with sympathy to or association with Progressivism. Hence, Van Devanter, White, McKenna, Lamar, and Lurton were considered clearly non-Progressives.

On this basis certain differences toward values appear between Progressives and non-Progressives. Clearly

---

<sup>11</sup>Significant at the .08 level.

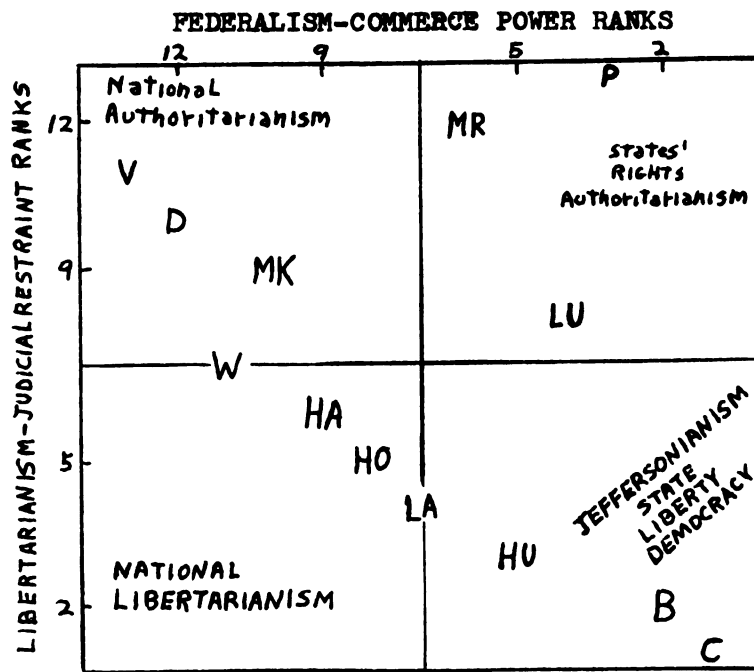
Progressives value equality significantly higher (1.7) than non-Progressives (5.8), as predicted. Clearly non-Progressives value efficiency more (3.2) than Progressives (6.7),<sup>12</sup> that is they are largely Darwinists. Also Progressives value the concept of general welfare (4.0) more than non-Progressives (5.2). This adds weight to the hypothesis that they were more considerate of the public interest (Winter, 1969; Banfield and Wilson, 1963). Progressives also valued Democracy higher as a group (2.7) than non-Progressives (4.2).<sup>13</sup> This is consistent with the Progressive goal of revitalizing the democratic system and returning control of that system to the people (Hofstadter, 1955a). Progressives were not, however, more favorable to governmental power than non-Progressives (4.7 to 4.4).

Figure 23 shows graphically how the justices differ in their attitudes to state as compared to federal programs involving Progressivism. It adds to previous findings that Lurton, Lamar, and Clarke favor state power more than national and hence are states' righters while Harlan and White are strong nationalists.

Figure 24 shows the strong relationship between the values of liberty and democracy on one hand and states'

<sup>12</sup>Significant to the .004 level.

<sup>13</sup>This is not significant, however, with an error level of .15. This difference is not significant primarily because non-Progressivist Democrats also valued democracy highly. This is also true of the General Welfare value.



See Figure 22 for key to symbols for judges' names.

Figure 24.--Graph Comparing Ranks of Attitude Systems Federalism-Commerce Power with Libertarianism-Judicial Restraint for 13 Justices, 1910-1920

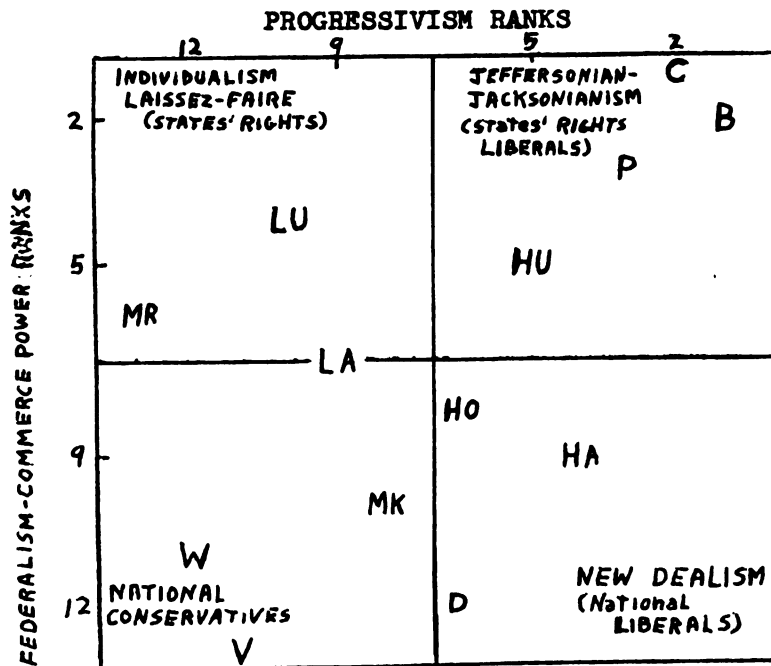


Figure 25.--Graph Comparing Ranks of Attitude Systems Federalism-Commerce Power with Progressivism for 13 Justices, 1910-1920

rights on the other. The horizontal axis gives the ranks of the judges on the combined Federalism-Commerce Power attitude system. The vertical axis shows their ranks on a combined Libertarian-Judicial Restraint attitude system. Clearly most states' rights judges are also pro-liberty and pro-democracy. Their ideology comports with Jeffersonianism and suggests that their political thought represents that heritage. These justices include Clarke, Brandeis, Hughes, and Lamar. Nationalists view liberty and democracy values less dearly suggesting a Hamiltonian heritage (Van Devanter, Day, McKenna, and White). The latter are Republicans except for White, whose father was an active Whig politician. All these logically would follow Hamiltonianism if indeed Republicanism and Whiggism represents the extension of that heritage. (See Croly, 1963; Peterson, 1960.)

Pitney and McReynolds represent a states' rights authoritarianism. Their positions may not be as much ideological as personal. Pitney's career was as a state judge whose ideology was Republican. McReynolds' party and geographic background may have inclined him towards states' rights but his personality suggests authoritarianism. (See Chapter 9 below.)

Figure 25 compares the justices' ranks on Federalism-Commerce Power with the Progressivism attitude system.

---

Progressive Democrats rank both of these values highest and non-Progressive Republicans rank these values lowest with the other groups being more moderate.

It may be considered to relate states' rights with the equality value. Clarke, Brandeis, Pitney, and Hughes seem to follow the Jeffersonian-Jacksonian ideology in that they value both equality and states' rights highly, White Van Devanter, McKenna, and Day represent Hamiltonian national conservatism. McReynolds, Lurton, and perhaps Lamar seem to represent individualism or laissez-fairism. They oppose efforts by government to impose equality on the social system and probably only accept state power because it "governs least" and hence "governs best." The lower right corner of the graph probably represents New Dealism and Harlan is closest to this position. He accepts and prefers national power when it is exerted in favor of equality.

In Figure 26 Progressivism is compared with Libertarianism in hopes of comparing the judges who rank negatively and positively on equality and liberty. Rokeach (1968c) holds that those who value both liberty and equality highly are democrats, socialists, and humanitarians. This would describe Brandeis, Clarke, Harlan, Hughes, and Holmes. He would call rightists or conservatives those who value liberty but not equality. This includes Lamar and Lurton. This is a position I would prefer to label "laissez-faire."

Spaeth (1966, p. 32) and Schubert (1965a, chap. 7; 1962) have constructed graphical representations of judges' attitudinal positions on the Warren Court with criteria similar to the Figure 26 representation. Their

In this graph as in previous analyses, Progressivism ranks are considered to be equivalent to ranks on the value of equality and Libertarianism ranks are considered equivalent to ranks on the value of liberty. See Figure 22 for key to symbols for judges' names.

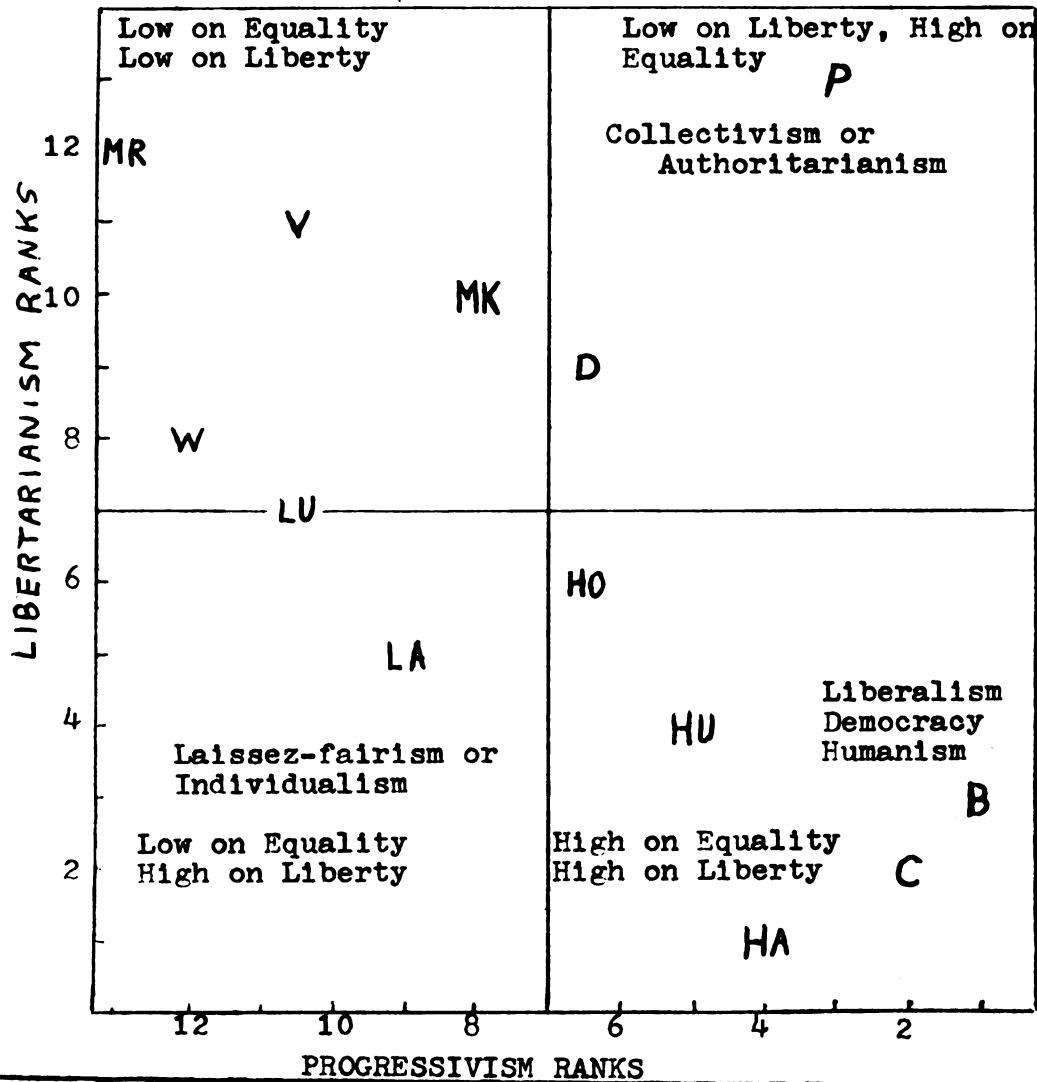


Figure 26.--Graph Comparing Attitude Systems Progressivism with Libertarianism for 13 Justices, 1910-1920

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

ons differ from the Rokeach model in that Spaeth  
 call the low-equality, high-liberty position an  
 attitude. The low-equality, low-liberty posi-  
 ed the conservative position by both, while  
 s such a position as typical of Fascism. Rokeach  
 high-equality, low-liberty position as typical  
 . Spaeth would call it authoritarianism and  
 ld call it collectivism.

is closest to the authoritarian-collectivism  
 nose who value both equality and liberty low,  
 tives, include McReynolds, Van Devanter, and  
 nna. To typify this position as Fascistic would  
 be accurate as these justices may well rank  
 equality higher than a true Fascist would.  
 , it is of interest that on both the White and  
 s the bulk of the conservative judges were found  
 quality and low-liberty position. This suggests  
 n the line of conservative thought or personal-  
 not a laissez-fairist position in the sence of  
 quality only because to be pro-equality would  
 o-government and hence anti-liberty position.  
 ntrast, a position that opposes liberty as much  
 a position valuing law and order highly.

27 compares Progressivism with Darwinism and,  
 , would differentiate between the Wilson or non-  
 ogressives and the Roosevelt or Darwinist





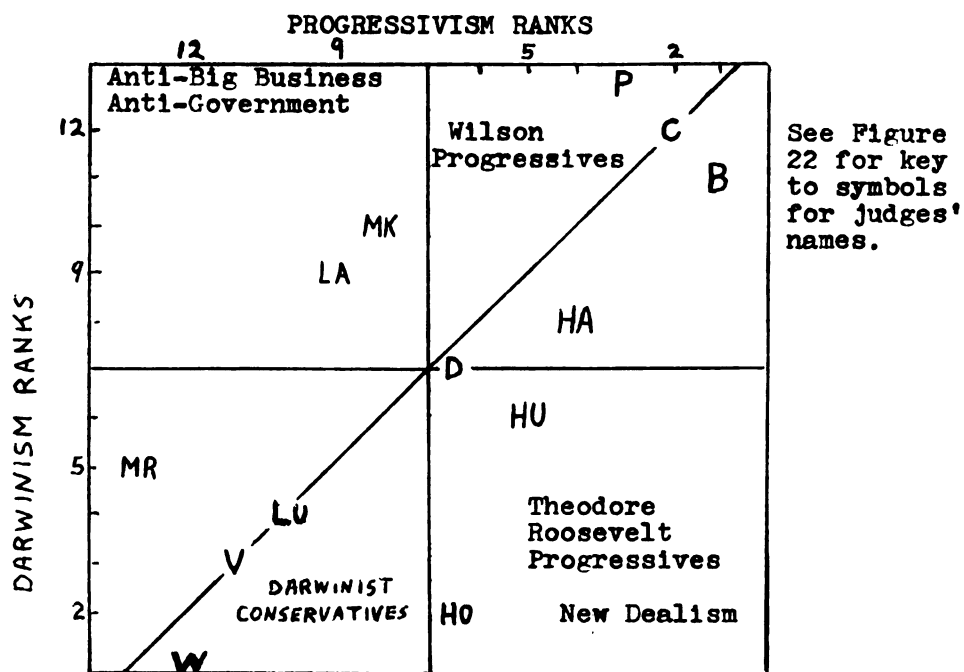


Figure 27.--Graph Comparing Ranks of Attitude Systems Darwinism and Progressivism for 13 Justices, 1910-1920

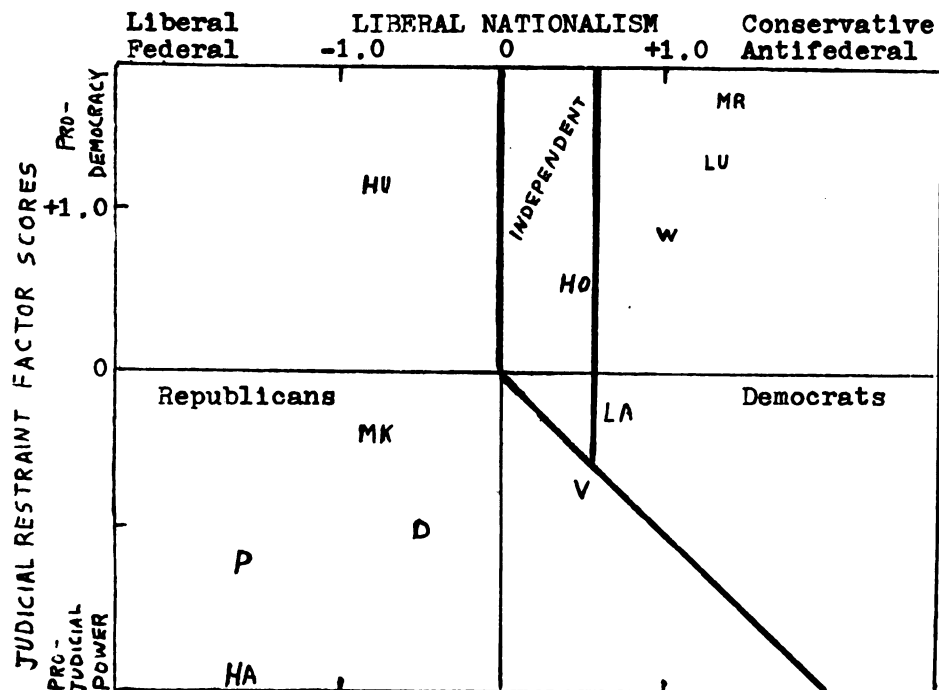


Figure 28.--Graph Comparing Factor Scores of Attitude Systems Judicial Restraint and Liberal Nationalism for 13 Justices, 1910-1915

Progressives. Holmes is the only Darwinist Progressive, demonstrating an affinity for the 1912 Theodore Roosevelt view (Mowry, 1958). Lamar and McKenna are anti-Darwinist conservatives showing a true laissez-fairist conservatism which opposes control of the economy by both government and big corporations. McReynolds, White, Van Devanter, and perhaps Lurton are Darwinist conservatives, opposing equality while supporting survival of the fittest. Lurton, it may be recalled, was also placed among the laissez-fairists in Figure 22.

Figure 28 compares Liberal Nationalism with Judicial Restraint in the first period. It clearly shows a division of the partisans on the Court based on factor scores. All Democrats are anti-judicial power and anti-Liberal Nationalism. Republicans also generally cluster together. Pitney, McKenna, and Day are pro-Liberal Nationalism and pro-judicial power. Van Devanter differs by being slightly conservative on Liberal Nationalism while Hughes is clearly anti-judicial power. Here Holmes' attitudes are quite similar to the Democrats as previously noted.

An examination has been made of the individual judges' values and how they are related to ideology. Clarke, Brandeis, and Hughes would then seem to represent the ideology of Jeffersonianism-Jacksonianism. They are also Progressives. Lamar is more of a Jeffersonian laissez-fairist. Van Devanter, Day, McKenna, and White seem to be



Hamiltonians. McReynolds and Lurton seem to be extreme individualists, and Harlan seems to have been a "modern" liberal.

Holmes appears to be foremost a Darwinist. He is in the middle of the Court on everything else but democracy. He is positive, however, toward the values of Jeffersonian-Jacksonianism: equality, democracy, liberty, and states' rights. He is probably best described as a Progressive of the New Nationalist variety.

Pitney does not fit into any of the traditionalist molds of thought. He seems to react according to his life experiences and personality and might be termed an authoritarian Progressive.

The next chapters will examine the judges' backgrounds and examine causal influences on how party, class, and other factors accounted for the judges' attitudes and ideology.

## CHAPTER 8

### SOCIOLOGICAL AND POLITICAL INFLUENCES ON THE COURT

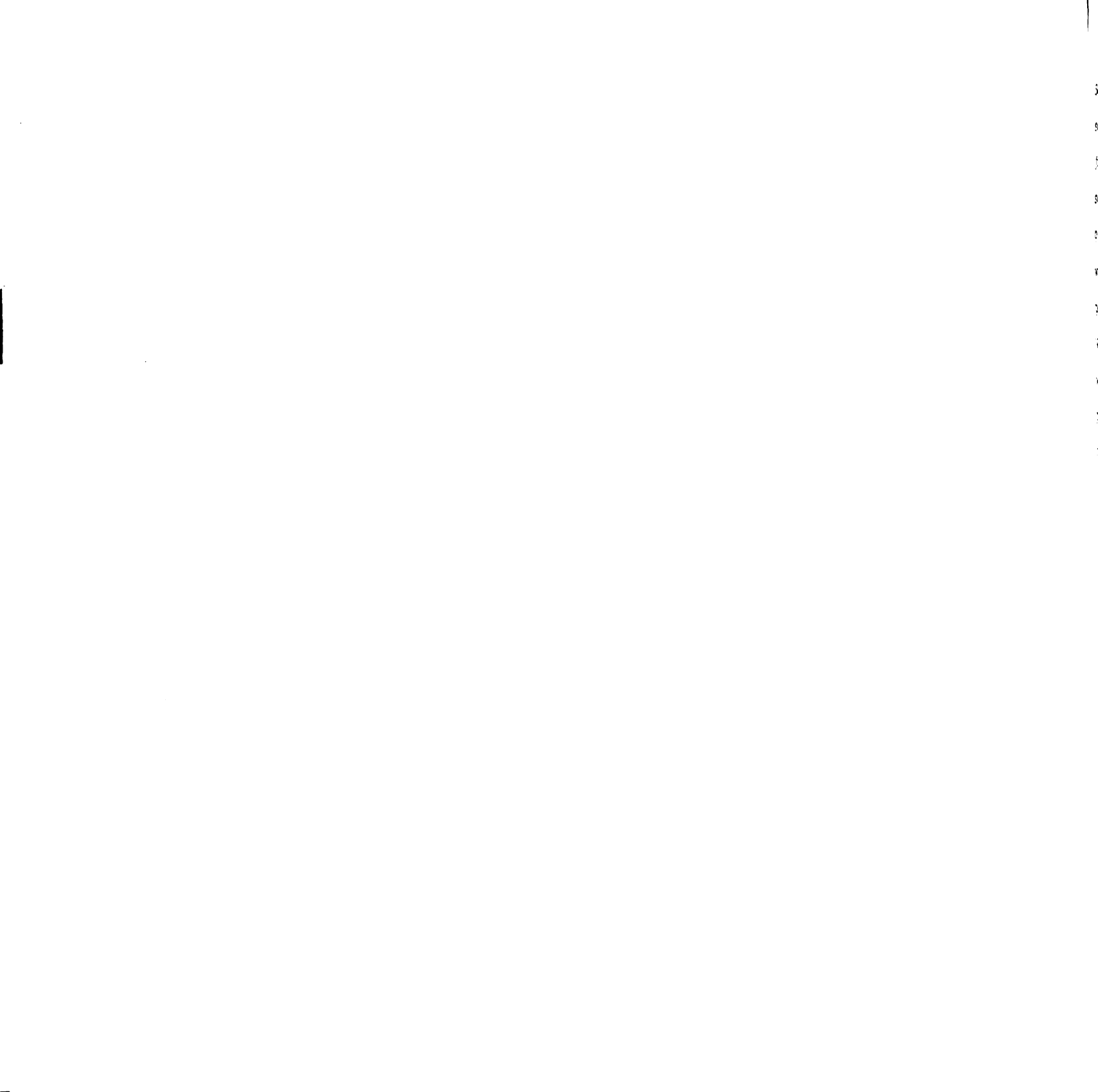
This chapter will attempt to find certain influences in the background of the justices which accounted for their attitudes and ideology. It will examine the influence of political party and class on various periods of the Supreme Court including the Warren Court. The influence of party will be examined in the light of the concept of political socialization. The transmission of party ideology through this process and the emergence of Progressivism through sociological influences will be examined. Other background influences will be examined for their impact on the attitudes involved in Supreme Court decision making. The influence of symbolism on the Court will also be discussed.

Since attitudes have been characterized as "learned sets or dispositions to respond" in a preferential manner, (Hollander and Hunt, 1963, p. 335; also see Rokeach, 1968, p. 112) a relevant question may be to inquire as to what life experiences shaped the attitudes of the judges. Several studies have suggested generalizations as to what background variables may affect judges' actions. Political

party has been established as a dominant influence (Nagel, 1961; Ulmer and Schubert in Schubert, 1964, pp. 273-286; Schmidhauser, 1963, pp. 486-504). Other studies suggest other variables. Nagel finds several sociological variables that influence attitudes without reaching a definite conclusion as to the underlying mechanism which ties underlying experiences or background to specific attitudes. He suggests that an identification of the judge with less privileged groups occurs to shape his behavior. In criminal cases, Nagel (1962a, 1962b) finds that judges with lower status backgrounds (religion, ancestry, low-tuition colleges) consistently favor the criminal. Nagel (1961) also finds significant relationships between party and economic cases as well as criminal cases (but not free speech cases).

Our data may be used to test certain of the judges' characteristics against their attitudes.

Political party may socialize the judges towards certain predispositions as may socioeconomic status. Many of Nagel's background variables mentioned above can be summarized in such a status variable. It may be assumed that economic status, religion, and ancestry all contribute to the status ranking of an individual. Such a variable must be subjective, however, and not precisely measurable. All Supreme Court justices, moreover, have achieved a high status in life. However, since political socialization has been found to occur early in life, we may accept





Schmidhauser's advice (in Schubert, 1964, p. 208) that the socioeconomic status of the father is a good cue to the judge's socioeconomic outlook. A further cue to political socialization might logically be inferred from the father's political party<sup>1</sup> as well as the judge's lifelong association with a particular party. For example Frankfurter changed parties and thus might be considered an independent.<sup>2</sup> Byron White's identification with the Democratic party might be weakened due to his father's association with the Republican party. Lastly, the community in which the judge grew up might logically have an impact on his party identification. Justice Robert Jackson grew up in a heavily Republican community (Schubert, 1965c), while Warren grew up in a Progressivist Republican environment (Current Biography, 1953).

The socioeconomic status ranking given Table 24 may be challenged on its subjectivity. It was made on the basis of the judge's biographies, and took into account the economic status and occupational status of the father during the

---

<sup>1</sup>For findings that political party identification occurs early in life see Campbell, 1964, chap. 6 and pp. 122-123. For findings that party identification shapes ideology see ibid. chaps. 7, 8, and 9 and pp. 122-123. For findings that both class and party identification occur at an early age (school age) where the influence of the parent is greatest see Lane and Sears, 1964, pp. 19-22. For a description of family and other influences on party identification and political attitudes, see ibid., chaps. 3 and 4. The discussion of these influences generally comports with the discussion below.

<sup>2</sup>Schmidhauser's data bank lists him as Republican yet he was closely associated with F.D.R.

early years of the justice as well as religion (Jewish and Catholic religions were assumed to result in lower status), and immigrant status. Tau rank correlations were computed with the attitude scales. Democratic party identification and low status were given small number scale ranks.

Ranking the White Court Judges on SES.--The SES ranking for the White Court justices (Table 24) is determined by the class and prestige of their fathers and is justified as follows: McKenna was ranked lowest on SES (1) since his father was a baker. His father was the nearest to a manual worker of any judge's father on the Court. In addition, his father was an Irish immigrant, a Catholic, and a migrant to a small California town. (See McDevitt, 1946, p. 14.) Joseph McKenna was orphaned, moreover, at age 15.

Brandeis' (2) father was a Jewish immigrant from Prague, started out as a grocer and became a moderately wealthy grain merchant (Mason, 1946).

Clarke is ranked third. His father was also an Irish immigrant who became a lawyer and was active in local Democratic politics (Warner, 1959). Hughes (4) was the son of an immigrant Welshman who was described by Pusey (1951) as a poor immigrant who became a clergyman with a meagre income.<sup>3</sup> Lurton's (5) father was a physician and clergyman.

---

<sup>3</sup>He made \$600 annually. Later in 1866 this was raised to \$1,200. Ibid.

His parents were Civil War refugees. Lurton was a private in the Confederate army (59 L.Ed. 1505).

Van Devanter's (6) father was a successful small town Indiana lawyer (Pearson and Allen, 1937, p. 188). Day (7) represents a long line of prominent lawyers and judges (Roelafs, 1950). His father was Chief Justice of the Ohio Supreme Court (National Cyclopedia 32:22), but seemed only moderately wealthy.

Harlan's (8) father was a "distinguished and honored" lawyer, a Whig Congressman, and a Kentucky secretary of state (56 L.Ed. 1273). Pitney's (9) father was also a prominent lawyer and judge, who helped found a bank. He was also Vice Chancellor of New Jersey and was from a distinguished family (National Cyclopedia 15:61).

Lamar (10) was descended from a wealthy plantation owner, banker, and stockholder from whom he inherited a fortune. His father was a clergyman and author (Lamar, 1926, pp. 8-22). McReynolds (11) also came from an upper-class family of professional men who were close to the "plantation aristocracy" (Early, 1954, p. 6). His father, a surgeon, was moderately wealthy (*ibid.*, p. 28) and owned a plantation (Pearson and Allen, 1937, p. 240).

White (12) was also from a distinguished and wealthy family. His grandfather was a judge and his father was a Whig governor of Louisiana and a judge (National Cyclopedia

21:3). His father owned a large sugar plantation and was a prominent figure in Louisiana politics (Klinkhamer, 1943, pp. 5-14).

Holmes (13) was descended from a prominent New England aristocracy. His family was probably the most prominent among the White Court judges. He was a grandson of a nationally known Massachusetts judge and a historian. His father was an eminent physician, essayist, and poet, also nationally prominent (National Cyclopaedia 27:1; Howe, 1957).

Hence, based on immigrant status, religion, prestige, and wealth, the above ranking of the judges seems tenable.

Comparison of SES and Party with other Courts.--It may be of interest to examine the effect of class (SES) and party on attitudes in other periods of the Supreme Court. Some of the results of party has been given in Chapter 6 above.

Ranks of judges on E-scales (Business and Labor Cases) and C-scales (Civil Liberties) have been made by Schubert, Spaeth, Pritchett, and myself for previous periods of the Warren, Vinson, Stone, White, and Taney Courts.<sup>4</sup>

---

<sup>4</sup>It is admitted that these scales have been defined somewhat differently by the persons who ranked the judges. Furthermore, the case content of the scales varies somewhat from one Court to another. Nevertheless, a comparison of rankings of similar periods by different authorities shows little difference concerning these relationships. The question may be raised whether the case content is comparable between different periods. However, if these gross scales



Biographical data was consulted to rank these judges by party and SES. The results of these rankings are found in Appendix VI and the resulting relationships given in Table 36. One should note that SES ranks are less reliable as one goes back in time.

As can be seen from Table 36, in every case but one, party is a better predictor of the judges' attitudes toward economic issues, and SES a better predictor of attitudes toward civil liberty issues. The exception is the White Court where party seems significantly correlated with Libertarianism (at a .066 significance level). It may also be noted that post-New Deal Courts had justices whose party correlates with class status whereas in the White and Taney Courts no such relationship existed. This suggests that party ideology is influenced by members of the lower class moving into the Democratic party and that the party-economic liberalism relationship is a recent one, starting since World War I or the New Deal. The Taney Court relationship

---

measure broad attitudinal dimensions such as economic liberalism and civil libertarianism which are found among other political elites (McCloskey in Crotty, et. al., 1966, pp. 155-223; McRae, 1968) as well as among the voting public (Lane and Sears, 1964, pp. 62-63; Campbell, 1964; Flanigan, 1968; Lipset, 1960; also see Schubert, 1965a), then comparatively minor differences in case content should not significantly interfere with the measurement of these general attitudinal dimensions.

The Taney Court, however, is so remote in time as to raise a real question as to the meaning of liberalism and libertarianism in that time period. This is discussed elsewhere. This may be true to a lesser extent of the White Court and is also discussed in detail elsewhere.

Table 36.--Relationships between SES, Party, Economic, and Liberty attitudes on various Courts

Tau Correlations<sup>a</sup>

	<u>SES</u>	<u>Party</u>	<u>Party vs SES</u>
Taney Court: Economic (1846-1858) Civil Liberty	-.31 .34	.69 -.62	-.23
White Court Economic (1910-1920) Libertarianism	.24 .05	-.09 .32	+.08
Stone Court Economic (1941-1946) Civil Liberty	.22 .56	.51 .29	.51
Vinson Court Economic (1946-1952) Civil Liberty	.37 .31	.60 .03	.44
Warren Court Economic (1958-1966) Civil Liberty	.41 .70	.54 .46	.48
21 Justices Economic (1941-1966) Civil Liberty	.43 .42	.59 .23	.58

Kendall's Coefficient of concordance and probability levels of significance for w and for tau.

Economic Equality vs Party

	<u>w</u>	<u>Signif. of w</u>	<u>Signif. of tau</u>
Taney Court (Schmidhauser Ranks) <sup>a</sup>	.91	(.05)	.003
Taney Court (Spaeth Ranks) <sup>a</sup>	.86	(.07)	.01
White Court (1916-1920: Labor cases only)	.68	(.20)	.20
Stone Court	.82	(.09)	.02
Vinson Court	.88	(.06)	.01
Warren Court (53-57) <sup>b</sup>	.76	(.10)	.02
Warren Court (58-66)	.80	(.09)	.02
21 justices (1941-1966)	.87	(.02)	.002
19 justices ranked by straight party membership (omit Stone, Roberts)	.77	(.07)	.006

Table 36 (cont'd.)

SES vs Civil Libertarianism

	<u>w</u>	Signif. <u>of w</u>	Signif. <u>of tau</u>
Taney Court (Spaeth Ranks) <sup>a</sup>	.70	(.11)	.15
White Court (omitting Holmes)	.74	(.16)	.16
Stone Court	.75	(.12)	.03
Stone Court (true SES of justice)	.86	(.06)	.004
Vinson Court	.64	(.23)	.18
Vinson Court (true SES of justice)	.83	(.07)	.03
Warren Court	.93	(.04)	.001
21 justices	.76	(.06)	.01
19 justices (ranked by Schubert 1967, p. 28) omitting Stone, Roberts	.73	(.09)	.05

<sup>a</sup>See Appendix VI and VII for ranks and evidence in support of them. Note that the tau correlations which result from tied ranks (especially due to party) can have a maximum value of less than 1.0.

<sup>b</sup>Based on Spaeth in Schubert (1963), p. 82.



of party with economic liberalism may be a spurious one or may reflect an alliance of industrial areas with the Whigs and agricultural areas with Democrats.<sup>5</sup>

An alternative explanation may be a temporary and accidental reversal of the long standing class and political relationships, which Lipset (1960, chap. 9) postulates, one that took place near the turn of the century. It may have involved infiltration and temporary control of the Democratic party by corporate wealth represented by Cleveland (who appointed White and McReynolds). White's attitudes may have been implanted in him by his politically active Whig father while McReynold's conservative background and corporate law experience may have proved more influential than his party's ideology.

The Fuller Court (October 1908 and 1909 terms) shows no relationship between an E-scale and party. Neither does the White Court.

The Taft and Hughes Courts (1921-1938) show only a weak correlation between party and a scale involving rate-setting cases (tau of .23). However, the Court contained McReynolds and several Republican-appointed Democrats

---

<sup>5</sup>Ideology is tied more closely to party than to regional influences. Party is more of an influence than region (Northeast versus South) or parental agricultural occupation. A rural-urban division helps explain the judges' attitudes as well. On the Taney Court, degree of ruralness of birthplace correlates .57 with attitude on the E-scale. Farm-raised judges opposed business interests, a fact which supports the above hypothesis.

(Butler, Sanford, and Cardozo). Hence, conservative Democrats may have been appointed who were quite unrepresentative of their party and more like Republicans in ideology than their own party.

Nevertheless, Table 36 seems to lend evidence to a conclusion that economic liberalism involving government regulation was associated with the ideology of political party only since 1936. (See also the roll-call analyses of Chapter 6 and Table 32 above.)

Table 36 shows that on the White Court labor union cases are related to party but at a non-significant level. They are related significantly, however, on the Warren Court (Appendix VIII). The content of the economic attitude ideology of the Democratic party may have changed. The Taney Court may involve anti-industrial (opposed to agricultural) interests. The Progressivist era Democrats may have been for private and group action to support economic equality (many opposed the idea of government taking sides), while today government action is the standby of the Democratic party.

The Taney Court relationship of party to economic issues holds up whether one prefers the Spaeth (1966) ranking of the justices or the Schmidhauser (1963) one on economic attitudes. However, in achieving the high correlation it was necessary to rank the justices on Democratic party identification. Taney and Grier, for example, were

Federalists until the party disbanded. Being practical politicians, they threw in with the only remaining party, the Democratic. Hence, they should be considered at least partly Hamiltonian in outlook. Democrats who always were Democrats may be classified differently from them as I have done (see Appendices VI and VII).

Considering the relationship of civil libertarian attitudes with SES, we see a weak relationship on the Taney Court. Doubtlessly sectional and party attitudes on slavery distorted this issue. Table 36 indicates that party identification was an influence ( $-.62$  tau). The Whigs and Federalists were pro-libertarian. The slavery content of the civil liberty scale probably accounts for much of this.

On the Stone and Vinson Courts, Justices Murphy and Rutledge are slightly out of line and Vinson is clearly out of line with the SES hypothesis. Here also we may surmise correctional factors. Most judges are of high SES themselves, but receive their outlook through parental identification (Katz in Hollander and Hunt, 1963, pp. 344-348; Lane and Sears, 1964, pp. 20-21). Murphy and Rutledge, however, were only marginally middle class--Murphy experienced factory work personally while Rutledge was a lowly teacher and seems to have experienced periods of poverty. Thus, first hand experience with low status may be stronger than a transmission process of experiencing it through parents. If we then rate these justices lowest in SES (labeled "true

SES") we get highly significant correlations.

Lastly, Vinson and Goldberg do not seem as libertarian as their status suggests. Both, however, lost their fathers before school age. Hence, if the justices are given the underdog-sympathizing attitude by their father, perhaps by identifying with him, this process did not take place since their fathers had no opportunity to influence their attitude.

One remaining corrective factor might be suggested by the deviations from the hypotheses. Reed, Minton, Vinson, and Catron were more conservative in civil liberties than their low SES status would indicate, while Roberts, Stewart, Warren, Harlan, and Holmes were more liberal. One explanation might be that the former are from rural backgrounds while the latter are from big city environments. A rural background has been identified as being related to narrowness of mind, homogeneity of population, and hence intolerance while urbanity contributes to broadness and tolerance through experience with new ideas and heterogeneous social groups. (For example, see Stouffer, 1955.) Urban or rural background could be a distorting factor in the above cases. Whether urban or rural background is related to the relative economic conservatism of Butler, Minton, and Jackson and the liberalism of Warren is less clear. It is conceivable that the individualist ideology and Jacksonian distaste for governmental "interference" operates here. Black and Rutledge do not show any such moderating effect on economic

issues in spite of their rural backgrounds.

Why do the individual's party and parental class identification play such a dominating influence in a majority of Supreme Court decisions? As Daniel Katz points out, the centrality of an attitude is related to how important it is to an individual's self-concept. These attitudes are probably "value expressive" and give clarity to one's self-image. The formation of the basic outlines of these attitudes takes place through the socialization process during the formative years through parental influence although later group membership modifies or reinforces them (Hollander and Hunt, 1963, pp. 344-348).

A summary of the above findings is that political party identification or association is a major determinant of attitudes on economic issues and background; SES is a major determinant of attitudes on civil liberty attitudes. Party may have an independent effect on libertarian attitudes. SES has an indirect effect on economic issues perhaps by influencing the choice of party.

The economic attitude relationship seems to operate as follows: political party reinforces secondary or primary group influences on ideology. This occurs primarily through early (childhood) socialization. It may be weakened by (1) parents of a different party than the individual chooses (Byron White and Edward White), (2) a community dominated by a different party (Jackson), (3) associates which belong to

a different party, with such as a corporation lawyer may work (Jackson, Butler, McReynolds), (4) a change in allegiance or membership from one political party to another due to opportunism or other reasons (Frankfurter, Taney, Grier), and (5) original choice of political party for opportunistic reasons rather than ideology (Warren, Reed). (See Dawson and Prewitt, 1969.)

The libertarian attitude seems related to SES through identification with underdog individuals or groups resulting from parental identification or personal life experiences.<sup>6</sup> Whether this would still occur if the individual did not achieve spectacular upward mobility is not answered by this study. This phenomena seems also to be a process of group socialization with the family, especially the father, a prime molder or symbol of identification. An early death of the father seems to reduce this influence (Goldberg, Vinson, Byrnes). A maternal influence either may not occur through lack of identification or female conservatism may modify it. (See Lipset, 1960.) Rural influences may decrease a libertarian outlook while an urban background increases it.

---

<sup>6</sup>An alternative explanation may be suggested by a study of British middle and lower-class school children which found middle-class children to show a more rigid value system and an attitude that "infringement of rules required punishment" (Himmelweit in Hollander and Hunt, 1963, p. 134). Hence, a lower-class upbringing might influence justices to take a less severe attitude toward criminal defendants and to be lower in "dogmatism." Thus when the judge himself is free of lower-class status strains (by being appointed to the Court), no lower-class authoritarianism occurs. Instead he identifies with the underdog civil liberty claimant.

Further evidence in favor of the above proposition may be that prior to 1937 few really lower-class individuals were appointed to the Court and simultaneously very little support for libertarian safeguards in criminal cases was developed. Recently a higher proportion of Supreme Court judges have been of lower SES than in the past. At the same time civil liberties have been rapidly expanded. This may neglect broader societal and educational trends, but does support a connection of the above. This may suggest that a political system such as ours needs an influx of officials with a "common touch" with experience and insights into lower-class problems and outlooks--hence, a governing elite with "open boundaries" to enable it to cope with and react to the social environment and channel the aspirations of the masses.

Finally, this relationship weakens the hypothesis that civil liberties are the inspiration and pillar of the upper class, as it does the idea that the lower classes are basically authoritarian. A century of upper-class dominance of the Court (Schmidhauser, 1959) had seen few libertarian advances (prior to 1940). Authoritarian tendencies in the lower class, as in all classes, may be related merely to economic insecurity, status strains, and poor mental health and may be decreased by alleviation of these strains and increasing education as perhaps has occurred in the cases of these justices.

Data for the relationship between SES and civil liberties is scant for the 1858-1909 and 1922-1941 periods and should be studied further. However, on the White Court no such relationship occurs. However, it is of interest that party is related to civil liberties on the Fuller Court (tau of .31), on the White Court (a tau of .32), but not on the Taft-Hughes Court (which contained Republican-appointed Democrats).

On the Warren Court SES seems related to civil liberties through a motive of equalizing justice for all classes and to eliminate a gap between "poor man's justice" and "rich man's justice." Scales which seem to measure this concept correlate particularly high with SES (see Leavitt, 1968, p. 115-A). A second possibility is that those of low SES possess an anti-government bias. This is one way to interpret the liberty-SES relationship as well as an SES-laissez-faire relationship present on the White Court (discussed further below). These relationships might be related to a suspicion of governmental power and a feeling of powerlessness on the part of lower-class individuals. This anti-government concept is present in Jeffersonianism and in modern studies of lower-class attitudes (Lane and Sears, 1964).

Although the liberty-SES relationship is not continuous, it does appear with some consistency. It may well be tied closely to a Jeffersonian-Democratic ideology which





emphasizes states' rights, equality, individual liberty, and laissez-faire. These issues often involve federal power, they provide equality for underdog or disadvantaged elements of the community, they directly protect individual liberty, and they are consistent with an anti-government bias. The latter bias may preclude support of active governmental programs for equality (Croly, 1963), but not equality under the law as in civil liberty cases.

Hence, the Democratic party ideology seems to value both equality and liberty. However, since the Civil War the principal democratic value appeared to be liberty, but during the 1910-1936 period it became less important than equality, which now predominates as a Democratic value. The value of democracy (anti-judicial power) seems also to have been a dominant Democratic value.

On the White Court, SES seems only related to Darwinism, among the attitude systems, with a tau correlation of .36 (at a significance level of .04). SES correlates with (5) Civil Liberties of Indians (.34), (11) State Tax (.31), (25) General Liability (.27), (26) Liability of Insurance Companies (.29), (27) Liability of Railroads (.44), and (30) Antitrust (.35).

What accounts for the Darwinism-SES relationship? It seems likely that the lower class would tend to reject an ideology which holds that they, their friends, and family were biologically inferior as indicated by their lower-class

status. On the other hand, these justices descended from upper-class families could easily accept an ideology that rationalizes their position in society by holding that they possess status and wealth because they are biologically superior and that society is benefited by keeping them in their superior status.

Since SES is correlated with Darwinism alone among the attitude systems involving equality (not with Progressivism), it reinforces findings that Progressivism was primarily a middle-class movement. Hence, lower-class members of the Court seem to find no particular appeal in Progressivist programs. Lower-class members support the claims of Indians, another underdog group, as well as opposing (38) Prohibition (tau of .42) and supporting (41) Judicial Power in Liberal Outcomes (tau of .38). Thus it may be suggested that prohibition was a solution to social ills which the middle class sought to impose on the lower class with the active opposition of the lower class.

The support of lower-class justices of Judicial Power in Liberal Outcomes (41) corresponds to a similar correlation on the Warren Court of judicial activism in favor of liberal and libertarian aims with a tau of .70 (see Appendix VIII and Leavitt, 1968).

A marginally significant correlation (.26 at a .11 level of significance) is found between SES and Laissez-faire on the White Court. This suggests a lack of trust

concerning governmental power implicit in Jeffersonianism (Dumbauld, ed., 1955) by the lower class. It might account for the lack of correlation between Progressivism and SES. It also might be related to a feeling of powerlessness found present in the lower class (Lane and Sears, 1964), and the knowledge that the upper classes have always had more success in controlling the government and shaping it to their benefit. This could account for the anti-government stance of lower-class justices on civil liberties in various periods of the Court's history.

A further consideration concerning our SES ranks on the White Court is that the ranks do not represent a broad spectrum of American classes. The lowest class parental influence, that on McKenna, was that of a baker who probably was above average in class in Nineteenth Century America. The rest of the judges had successful lawyers, merchants, clergy, and other professional men for fathers. The eight judges from (2) Brandeis to (9) Harlan have only slightly different backgrounds, the four highest-class justices seem to be from uniformly wealthy backgrounds. Hence, any class influences which might have developed may not have occurred due to the absence of any real distinguishable class differences on the Court. Other Courts were more representative of the various classes (see Appendix VII), and show relationships between class and civil liberties.



Other Sociological Influences on the White Court.--A

number of other possible influences on the justices were considered. These included geographical and urban background, age, life experiences, religion, party of appointment, and others. Biographical data were used to rank the judges on these sociological variables and the rankings were then correlated (using tau) with the average ranks on the attitude systems as well as the individual attitude variables. The resulting ranks are found in Appendix X. Some of the more significant relationships are found in Table 37. Some twenty-two variables were thus constructed. Relationships between background variables and attitudinal variables were postulated as indicating some causal influence of the former on the latter. Since the off-Court experiences of the judges came first, it may be inferred that these experiences established a bias on certain issues on the White Court on which they made decisions. Identifying with certain peer groups or social groups, especially early in a person's life, has been known to influence him to accept the attitudes of his group (Dawson and Prewitt, 1969).

The relationship of party with the attitude systems given in Table 37 has already been noted. The "party activism" variable is the party variable given in Table 24 and measures the relative identification of the judges with one party as opposed to the other major party. As can be seen, Democrats are pro-Libertarianism, pro-states' rights, pro-judicial restraint, pro-general welfare, and tend to

Table 37.--Correlations of Attitude Systems with Background Variables

<u>Birthplace</u>	<u>Progres- sivism</u>	<u>State Progres- sivism</u>	<u>Liberal Nationalism</u>
North-South Continuum	.35	.42	.35
East-West Continuum	.38	.52	.23
Urban-Rural Continuum	.35	.51	.27
Association with Progressivist Movement	.56	.55	.49
Immigrant Status of Parents	.46	.57	.38
Experience: State or Federal Official	.38	.26	.31
Prestige of College Attended	.35	.38	.33

---

	<u>Party Appointed By</u>	<u>Party Activism</u>	<u>Association with Progressivist Movement</u>
Libertarianism	.13	.32	
Federalism	-.53	-.37	
Judicial Restraint	.40	.41	
General Welfare	.34	.18	.34
Laissez-faire		.29	-.31

---

	<u>Socioeconomic Status</u>	<u>Paternal Orphant</u>	The party variable is Democratic party.
Darwinism	.36		
Laissez-faire	.26	.40	

---

	<u>Judicial Experience</u>
Civil Liberties	-.45

---

Darwinism seems significantly related to living in the West, high socioeconomic status, high status religion, native-born parents, and a law professorship. All except the first indicates high status.

The above correlations are tau rank correlations.

Significance is roughly equivalent to the following:

correlation of .27 is significant at the .10 level

correlation of .34 is significant at the .05 level

correlation of .47 is significant at the .01 level

See Appendix X for judges' ranks on background variables.

be Laissez-fairist in attitude. The Republicans take opposing positions.

The relative association of the justices with the Progressivist movement (Table 24) has already been explained and, as expected, Progressives tended to support both Progressivism attitude systems. In addition they support General Welfare and are pro-government according to the Laissez-faire attitude system. The causal connection of these relationships is obvious. If a justice worked for Progressivism before he reached the Court, he would be expected to continue to support such programs on the Court. This may be considered to add validity to this method of causal inference from background variables.

Other significant relationships are seen. Northern judges tended to support Progressivism while Southerners opposed it. Eastern judges supported it while Westerners opposed it. Urban judges supported Progressivism while rural judges opposed it. A further explanation of these relationships will be suggested later. It is worthy of note, however, that the North, East, and urban areas were where the problems of industrialism and urbanization were most acute. These problems, some authorities hold, helped bring about the Progressivist movement (Faulkner, 1931).

Judges who were sons of immigrants also tended to support Progressivism (tau of .46) and Libertarianism as well



(.34). They particularly supported (1) First Amendment freedoms (.48) and (7) Labor (.49), as well as (5) the rights of aliens at a low correlation (.22) of questionable significance (.16). The latter relationship is readily explained by an identification of some of the judges with immigrants. The nativist judges were naturally less sympathetic. Immigrants were quite active in forming unions and Socialist parties and were the defendants in many First Amendment and Labor cases. Hence, either an identification with the defendants occurred or a class consciousness may have influenced some judges to support lower-class liberties and aims. Nativists on the Court were by contrast unsympathetic.

The lower status which the immigrant sons on the Court may have experienced may have influenced them to support the equality value implicit in Progressivism, a manifestation of class consciousness. On the other hand, perhaps these judges may have been freer of the American bias against governmental intervention in favor of equality in contrast to the nativist judges.

Former state officials on the Court were more active in support of Progressivism than former federal officials, perhaps because their personal acquaintanceship with state Progressives influenced them to be more openminded to their programs. It is to be expected, moreover, that state officials would tend to support state Progressivist programs.



Graduates of higher prestige colleges also supported Progressivism, again possibly because their college peer groups were more favorable to Progressivist ideas.

It is of interest that on the 1958-1967 Warren Court the above relationships of urbanization, Eastern, and Southern influences with economic liberalism are dissimilar to those on the White Court. Urban justices on the Warren Court tended to be conservative while Southerners were more liberal.

Darwinism seems related to several variables which probably measure the relative social status of the judge. High status religion, high socioeconomic status, native-born parents, a law professorship all seem to influence judges to support Darwinism while low status leads to opposition to Darwinism. Living in the West was a pro-Darwinist influence, possibly because the more rugged life and more competitive life styles in the West made a Darwinist philosophy more appropriate (see McCloskey, 1951).

Judges orphaned early in life showed a tendency to be anti-government on Laissez-faire. Since parental influence is a prime factor in promoting respect for and trust in government (Lane in Crotty, et. al., 1966; Dawson and Prewitt, 1969), the absence of such an influence could encourage an anti-government bias. On the Warren Court orphaned judges also tended to be anti-government in civil liberty categories.

Other relationships between background variables and attitudes were noted on the White Court. Judges with longer tenure on the Supreme Court were against State Progressivism (a tau of  $-.34$ ), possibly since their off-Court experience predated the Progressivist movement. They were also opposed to (30) Antitrust action ( $-.34$ ). They were opposed to the General Welfare ( $-.37$ ). They were pro-Darwinist ( $.34$ ), having demonstrated their ability to survive and reach high status. They were nationalistic ( $-.39$ ) on Federalism as would be expected from being national judges for so long. Also as might be expected, they opposed Judicial Restraint ( $-.25$ ), having become accustomed to exercising the supreme judicial power. Judges with longer judicial experience on other courts also opposed Judicial Restraint ( $-.27$ ) for perhaps the same reason, accepting the legitimacy of their own judicial role.

Law professors were, by contrast, for Judicial Restraint ( $.36$ ) perhaps out of a deeper understanding of the proper judicial role.

State judges, state officials, and graduates of high prestige colleges tended alike to be pro-government on Laissez-fairism. These attitudes are probably related to their support of Progressivism for the reasons mentioned previously.

Classifying the justices according to the President who appointed them gives some interesting results. The

Wilson appointees were all pro-states' rights while the Republican appointees were primarily nationalistic. The Wilson appointees were also pro-General Welfare, while the earlier appointees, McKenna, White, and Harlan were mostly anti-General Welfare. The Taft and Roosevelt appointees were moderate on this issue. Three of the Taft appointees were the most anti-Labor justices, but Hughes and Lamar were exceptions to this generalization.

Northern judges tended to be slightly pro-national on (31 the Federalism variable (.25). Western judges were also more nationalist than Easterners on the Federalism attitude system (.41), probably due to the need of the West for federal help in developing the area. Judges living in rural areas tended to be pro-state (.31 with Federalism, .54 with Commerce, [13]), while urban judges were nationalistic. Rural life undoubtedly leads to a more parochial outlook than the cosmopolitan city. Rural dwellers, however, were not found to be anti-civil liberty in contrast to the finding of Sprague (1968).

Contrary to expectations, judges who experienced more elections to office were not favorable to Judicial Restraint. In fact they tended to oppose it (-.35). Attorney Generals were not significantly opposed to civil liberties nor more supportive of antitrust prosecutions.

Judges with the longest lower court judicial experience were significantly anti-Civil Liberties (2) at a tau

correlation of  $-.45$ . They may have become accustomed to a role of upholder of law and order on lower courts and were thus not sympathetic to liberty claims. In contrast older judges supported (4) Criminal Due Process liberty claims (.34) as did former law professors (.33). Northerners tended to be unsympathetic to (6) the liberty claims of aliens (.32).

Those supporting First Amendment liberties (1) included those of higher status religions (.31), older judges (.45), and former state officers (.34). Former Attorney Generals were opposed to such liberty claims, however ( $-.35$ ).

As would be expected on Civil Rights (15), Northerners supported Negro rights (.36) with Southerners opposed.

State officers tended to support (14) Conservation (.39), (18) Federal Fiscal Claims (.46), and (19) Federal Fiscal Powers (.44).

Prohibition (38) seemed to be almost a unique variable. It was only weakly related to other attitude systems and most important background variables. Even the drinking habits of the judges seemed only weakly related to it. For example McReynolds, a non-drinker, opposed it and Harlan, a drinker, supported it. Variables related to prohibition are as follows: Westerners were against it, Easterners for it. Southerners supported prohibition, but Northerners

tended to oppose it (.31). Wilson-appointed judges opposed it. Judges who had faced election tended to favor it (.29), judges with more years on the Court favored it (.31), and state officials favored it (.46). Rural judges tended also to support prohibition (.30), which supports other findings that prohibition was most strongly supported by rural dwellers (Grimes, 1967). Religion as a factor on the Court does not show congruence with findings that prohibition was a Protestant cause (ibid.). Protestants on the Court are more anti-prohibition than Catholics and Jews.

The above relationships must be taken with the acknowledgement that the sample is small (only 13 judges). However, correlations of about .34 are significant at the .05 level but those above .27 involve a .10 probability of being due to chance factors.

Political Socialization and Political Symbols.--Central to a person's attitude system are certain reference symbols around which political values and attitudes are arranged. These reference symbols may include political party, liberalism, laissez-faire, or Progressivism. The reference symbols are centrally located often because they may have been learned early in life, perhaps during childhood, and hence form part of a person's basic self-identification. Only later in life when the individual gains more sophisticated political knowledge and applies these symbols to specific issues and situations does the





attitude system become filled in with specific values, attitudes and beliefs. (See Rokeach, 1968a, 1968c; Edelman, 1964; Dawson and Prewitt, 1969.)

These reference symbols may well be the psychologist's and behavioralist's equivalent to the political philosopher's concept of ideology. (See Campbell, 1964.)

Of these reference symbols, political party is the earliest and thus most influential shaper of attitudes, having been learned in childhood. It directs future changes in opinion. Class identification also occurs in these years. Issues and ideology become influences only later, during the teens (Dawson and Prewitt, 1969, pp. 48-57).

Dawson and Prewitt (1969, p. 131) points out that "reactions to specific political events and adjustments to political changes...group identifications and the general social and political values acquired during early socializing experiences." Political positions "on specific policy issues tend to be based upon identification with liberal, conservative, socialist, capitalist...and other political symbols." Perhaps the most appropriate concept of ideology for our study, then, would be to consider it as a reference symbol. (See also Edelman, 1964; Key, 1964, pp. 63-64.) The liberal position or symbol (as conceived of in modern terms) seems very weak as such a symbol in the 1860-1900 period. It consisted mainly of a vague anti-industrialism until the Populist movement emerged (Rossiter, 1962; Croly,

1963; Peterson, 1960). Conservatism was, however, a strong reference symbol, having appropriated much of the Jeffersonian and democratic base of political thought (Rossiter, 1962). Hence, Populism and later Progressivism (borrowing much from Populism) emerged as reference symbols in the 1884-1912 period (see Faulkner, 1931, 1959; Hofstadter, 1955a).

Lastly, social Darwinism was formulated to bolster conservative thought, being more appropriate than Laissez-faire as a rationale for the new corporate economic structure, and perhaps better justifying the use by industry of governmental aid and support (Rossiter, 1962; Hofstadter, 1955b; McCloskey, 1951).

Progressivism itself borrowed from various sources of political thought. From Jacksonianism and perhaps even the conservative creed it championed equality of opportunity (Croly, 1963). From Jeffersonianism and Jacksonianism as well as the general democratic creed it championed closer popular control over government in opposition to machine rule and corporate control (see Grimes, 1964, p. 102). The same line of thought supported its opposition to special interests using government for its own benefit, which was further supported by Populism and Bryan Democracy. Hamiltonianism gave to Progressivism an acceptance of positive governmental intervention to support its aims and to its Liberal Nationalist proponents the use of the national government for such purposes (Croly, 1963). The religious



"social gospel" impetus probably provided from Protestant thought the moralistic fervor against corruption, drink, and immorality associated with poverty and corporate abuses as well as providing its strong humanistic bent. Progressivism was such a composite of political strains of thought that it seemed to arise as a radically new reference symbol or ideology eventhough it was offered as a movement to restore traditional values. Its "liberal" basis of thought had been dormant for so long and the other strands of thought were so transformed by new conditions that it seems more of a discontinuity resulting from social change than a continuation of previous ideology. (See Hofstadter, 1955a; Faulkner, 1959.) Its continuity with present-day economic liberalism has been supported, however (Hofstadter, 1955a), and economic liberalism is today the most potent of political symbols. (Campbell, 1964, chap. 8; Lane and Sears, 1964, pp. 62-63; Lipset, 1959.)

Hence, Progressivism seemed to be the reference symbol in this period for what would now be called economic liberalism. It probably shaped citizen reaction to political events just as what is now known as "liberalism" does today. In fact it probably shaped modern liberalism after undergoing certain transformations (accepting government as a positive force to favor depressed groups and accepting nationalism as a primary instrumental value).

Factors causing discontinuity of values are found to include complexity, heterogeneity, geographical and social mobility and social change (Dawson and Prewitt, 1969, chap. 6). This finding suggests several hypotheses for the emergence of the Progressivist and reformist movements of the 1890-1920 periods both on and off the Court as will be seen. (See also Hays in Chambers and Burnham, 1967, pp. 152-181.)

We note that justices whose fathers were not native born are most friendly to labor and generally most favorable to Progressivist programs. This comports to historical findings that the influx of immigrants contributed a major motive force of labor and urban socialist movements (Gusfield, 1968). These persons were not steeped in the Jacksonian and Jeffersonian democratic ideals whereby democracy and equality were closely associated with anti-government and anti-national ideals (Link and Catton, 1967). Hence, the change in our political outlook which took place in those years may have been an exogenous process in which non-native values were introduced into our political democratic culture. A line of political thought was developed which was not committed to Laissez-faire. Many of the Progressivist programs, moreover, were based on foreign social legislation (Faulkner, 1931, p. 332).

Complexity, heterogeneity, and urbanization were more characteristic of the East than of the South and West. They were also more characteristic of urban areas than small town

or rural areas. This helps explain the finding that Eastern and urban justices were more receptive to Progressivism (in general) as well as to Liberal Nationalism.

The South, where more traditional values were preserved (Early, 1954), was most conservative of all, clinging to the Jeffersonian laissez-faire tradition. The effect of Western life on the justices seems to bring a support of national government (as opposed to state) as well as a more laissez-faire-individualistic outlook.

Better education brings a stronger sense of duty to participate in the political system, a greater sense of political efficacy and more political activity (Dawson and Prewitt, 1969). Since the growth of our public educational system was great in the period previous to the Progressive period (except in the South), it could have been a factor in facilitating the growth of Progressivism.

Progressivism was not restricted to party but cut across party lines (Mowry, 1958). This is supported by this study of White Court justices. It may have been prompted by a fear that something more radical would have occurred if the Progressivist programs were not adopted (Mowry, 1958, p. 214).

It seems clear that Progressivism was a reaction to the social and economic evils brought about by the rapid industrialization and urbanization of the nation, the immigrant invasion of our cities, and business exploitation

(Faulkner, 1931; Lewis, 1937, pp. 233-239; see Chap. 2 above). Furthermore, inflation and the weakening of the status of the middle class also added to the growth of Progressivism (Swisher, 1954, pp. 529-530). Hence, control of these evils was particularly desired by Eastern and urban elements of the population (Kelly and Harbison, 1963, pp. 615-616). Consequently, judges on the White Court from these areas were particularly strong in support of Progressivism. Most judges, furthermore, as we have seen were either middle class or of middle-class professional parents (only McKenna, White, and Holmes might not fit this category). Hence, as their peers and network of acquaintances (significant others) became convinced of the desirability or necessity of Progressivist programs the justices also supported a significant number of them (Swisher, 1954). They seemed to do so as a direct relation according to whether they themselves were associated with the Progressivist movement, from urban and Eastern backgrounds, and involved in state government (where the Progressive programs were first implemented [Link and Catton, 1967, p. 70]). (See Table 37.)

The argument has been made that it was Theodore Roosevelt who awakened the Progressive movement by supplying to it publicity and moral fervor (Mowry, 1958). This would help explain why Republican judges in the first period support Progressivism variables to a much greater extent than do Democratic judges.

Although Jeffersonianism was originally rooted in spiritual and humanitarian values, McCloskey (1951) argues that its values had been transformed by the late Nineteenth Century so that in the name of liberty it was used as a defense of economic laissez-fairism. In the Progressivist era this transvaluation of traditional American values became recognized and a quest for the traditional values was begun (McCloskey, 1951; Hofstadter, 1955a).

The line of political thought from Jeffersonianism and Jacksonianism to Progressivism has been noted by authorities both from an analysis of the content of their ideas and values as well as a consideration of the people engaged in both movements.

Populists included many Jacksonians and Jeffersonians (including Jefferson Davis). Progressivism later adopted most of the Populist program. Many citizens who were part of the Jacksonian generation were active in Populism (Hofstadter, 1955a, p. 102). Hence, the direct effect of former ideological values is seen. Furthermore, the direct effect of the parental transmission of values may be discerned. Clarke's father was impressed by Jacksonianism (Warner, 1959), and hence passed it on to his son who applied it to the new conditions. Clarke thus became a Progressivist. The ideological appeal of Jacksonian equalitarianism to immigrants as well as the Democratic party's political appeal for their support no doubt succeeded in





capturing immigrants and imbuing them with Jacksonian values. This may well explain why three of the four sons of immigrants on the Court were Progressives as well as identified as Jeffersonian-Jacksonians in philosophy.

Certain values of Jacksonianism and Jeffersonianism are also values of Progressivism as Chapter 7 has shown. Hence, equality, democracy, general welfare, and states' rights are all values of the former as well as Progressivism (as Chapters 6 and 7 have indicated). These values distinguish Progressives from non-Progressives on the White Court and two-dimensional graphs place known Progressives in positions logically appropriate to Jacksonians.<sup>7</sup> Furthermore, except for states' rights these values were articulated as Progressivist goals (as well as Jacksonian ones).

Progressivism was equalitarian, a value obtained from Jacksonianism. In the Jeffersonian-Jacksonian tradition, Progressivism was anti-bigness and opposed to the powerful both in business and in government (anti-national). It opposed the concept of an elite (Mowry, 1958, p. 145).

Croly (1963) indicated that Progressive aims were similar to those of the Jeffersonians and Jacksonians as far as equality, democracy, and the general welfare were concerned. However, he indicated that Progressivism should adopt the Hamiltonian instrumental values of governmental action and nationalism in achieving their goals.

Based on historical findings and our study of the White Court, another reference symbol would be political party. Party, as compared to Progressivism in this period, would be a more conservative, traditional force. As a reference symbol, it seems to have been given definition and meaning by traditional ideology and past historical events. Its content, as suggested by our analyses, is (for Democrats) pro-states' rights, anti-judicial power (pro-democracy), pro-liberty, anti-government, pro-debtor or soft money, pro-labor, anti-Negro, and pro-alien. On these issues the Republican position is pro-national government, pro-judicial power, pro-sound money, and anti-debt repudiation, pro-Negro civil rights, anti-liberty, anti-alien (or pro-nativist), and anti-labor.

Hence, party provided for the White Court justices a reference symbol for states' rights, based on Jeffersonian democratic ideals. Jeffersonianism claimed that only local government produces true democracy (Dumbauld, ed., 1955; Peterson, 1960). Furthermore, the Civil War conflict over states' rights reaffirmed this Democratic states' rights value. Party also influenced Democrats to maintain liberty and anti-government sentiments from Jeffersonianism and the experiences of Civil War oppression (Peterson, 1960). Equalitarianism as a value was enunciated by the Jeffersonians and strongly asserted by the Jacksonians (Grimes, 1964, pp. 103-104; Peterson, 1960). Populism (which merged into the Democratic party), Bryan Democracy, the lower-class



voting base of the Democratic party and the above ideologies led the Democratic party to espouse the democracy ideal: state government supported by popular rule as opposed to judicial power.

Hence, these values were absorbed into the reference symbol of the Democratic party and were transmitted as values associated with that party.

If party and party ideology are transmitted primarily through political learning within the family, it would be a conservative force in politics. Such a conclusion is not contradicted by our study. But if Progressivism was on the other hand really a discontinuity in politics, from where did it arise? It was couched in traditionalist terms and promised a return to or preservation of traditional values, so certain traditional values passed on by family learning supported it.

Yet, basically, it seemed to be a discontinuity, breaking with traditional concepts, and arose where tradition was greatly weakened. Its three most dedicated supporters were sons of immigrants (Clarke, Brandeis, and Hughes), and hence, might not have been imbued with traditional values. These three and the two other justices also supportive of Progressivism<sup>8</sup> were products of large eastern cities where tradition was less strong than in rural areas and social change was greatest. Hence, peer

---

<sup>8</sup>Holmes and Pitney.

group influence, which is a source of discontinuity, probably operated here. New ideas generated by heterogeneity in peer groups and environment and ferment from social changes had the greatest opportunity to make their impact felt and quite obviously did so on these judges as it may have on Progressives in general. The non-Progressives, on the other hand, were mainly products of traditional, homogeneous, or rural environments. These include White, Lamar, Lurton, Van Devanter, McReynolds, and McKenna. Day falls in the middle, both in terms of support of Progressivist programs and his environment. He was a resident of a small Ohio town. Harlan is the exception. He adjusted his philosophy to the changing environment and to changing events. He lived in Washington for over 30 years and had ample time to become attuned to changing events. His character allowed his learning process to continue throughout his life, possibly influenced by his sons who were probably Progressives since one eventually became a member of the I.C.C. (Clark, 1915).

The process of political socialization in transmitting values and generating a new ideology seems adequate in explaining how the White Court judges arrived at their values and ideologies. The reference symbol of party was transmitted to the judges by means of parental influence. Many of the values and attitudes associated with party were also transmitted along with that symbol. New peer groups, new influences, and new social conditions modified their

value systems. However, these changes occurred in the context of party values and attitudes. The judges' reactions to events reflected institutional and group identifications in generating the social and political values acquired during early socialization experiences (as Dawson and Prewitt, 1969, pp. 129-131 describe the process). The judges' peer groups before joining the Court (at least) were influential in generating these changes since where such influences were most likely to occur were also the places where most support of Progressivism did occur. These places were in the East and urban areas, politics on the state level, and within the Progressivist movement. From origins and life experiences in places of greatest complexity of ideas, heterogeneity, and where social and geographical mobility was greatest, the judges were most likely to have adopted Progressivist views. Furthermore, judicial reactions to Progressivism seemed tied to their association with political party and party leaders. Hence, when Theodore Roosevelt and the Republicans were championing Progressivist programs, Republican judges were likewise supporting them on the Court. When the Progressivist leadership fell to Wilson this situation changed radically and Democrats began to embrace Progressivism and to support national powers. Thus a trend was begun which culminated in the Democratic New Deal. It is to be noted, moreover, that the same values which Progressives held dear were also basic values of the Democratic party such as democracy, the general welfare, states' rights, and perhaps

even equality. Hence, it may have been inevitable that as Progressivism became modern liberalism, it found a permanent home in the Democratic party.

In the last half of the White Court, the polarization of the judges' voting on Progressivism became marked. It may be asked whether a "liberalism" reference symbol was present on the Court during the previous 70 years or so. It was noted that on the Taney Court a liberal-conservatism division occurred probably out of agrarian versus commercial-industrial sectional differences. This reference symbol seemed to have faded by the latter part of the Fuller Court. It may be suggested that since party influence failed to be a guide on economic and class matters, judges made their decisions without a liberalism reference symbol but decided opinions on the basis of other reference points and issues such as federalism and other legalistic issues such as the tax power, the police power, the Commerce power, substantive Due Process, the Contract Clause, judicial restraint, the common law, and so forth (see Paul, 1960). Hence, in the first period of the White Court these traditional concepts seem much more important than in the second period. Commerce Power and Judicial Restraint fail to appear as separate factors in the second period and Federalism decreases in importance. The second period is more easily explained in terms of fewer factors and the importance of the Progressivism reference symbol is greatly enhanced.



Reference Symbols in Politics.--Edelman (1964, p. 121) writes that words which a group uses can be taken as an index of group norms and conceptual framework. This may be applied to political party as a group. Hence from the Republican party comes a reference symbol such as the "New Nationalism." This value of nationalism is found throughout the history of the Republican party (prior to 1920). On the White Court, Republicans fairly consistently support nationalism and in the first period, Republican judges firmly support Liberal Nationalism.

From the Democratic party comes the concept of Wilson's "New Freedom." Liberty seems to have been a traditional value of Democrats. Furthermore, Democratic judges on the Court value liberty higher than Republicans and support Libertarianism quite strongly.

The very name of the Democratic party seems to imply a more sympathetic commitment to and valuing of the democratic process. Party ideology seems more firmly committed to this value and the Democratic judges on the White Court (and in other periods of the Court as well) fairly consistently value democracy higher than Republicans do in Democratic opposition to judicial power over more democratically arrived at decisions.

Edelman (1964, p. 172) also argues that mass publics respond to conspicuous political symbols rather than facts. Such symbols include conspicuous events. Hence, this might

explain why Progressivism saw its greatest upsurge after Theodore Roosevelt's publicity and support (Mowry, 1958). Changes in a mass response involve efforts to find a new perceptual outlook with more meaning (Edelman, 1964, p. 174). Thus Progressivism might have been a revitalization movement (Wallace, 1956), synthesizing old values into a new ideology. Old myths and symbols such as Laissez-faire or social Darwinism failed to indicate to the public how to shape policy, nor did they give reassuring symbols. These symbols became inadequate. Progressivism, then, as an ideology and reference symbol, successfully explained political and social events and allowed the public to control them. Hence, it was adopted as a permanent part of our myth symbolism. The success of the movement on the state level led the groups supporting it to seek even more control on the national level.<sup>9</sup>

The influence of party and the Progressivist movement and their part in the transmission and transformation of political values seems adequately explained by the principles of political socialization and symbolism. Finally, an examination of bloc voting on the Court and the individual judges' life experiences and philosophies and their effect on the judges' decision making will be made in the next chapter.

---

<sup>9</sup>Comporting with Edelman's finding that successful groups seek more advantages at a higher level of government (1964, chap. 8).

## CHAPTER 9

### OTHER DETERMINANTS OF INDIVIDUAL JUDGE'S ATTITUDES

This chapter will attempt to determine the individual judge's attitude-value system from characteristics peculiar to that judge: his life experiences, his ideosyncracies, and his philosophy. It will also seek to define the judge's unique psychology and attitude-value system.

Firstly, additional analyses will be made of other collective factors in the Court's decision-making. These include the bloc structure of the Court's voting in the periods studied, sociometric relationships, and the relative dogmatism among the justices, using Rokeach's (1960) concept of this basic psychological dimension.

Ulmer (1961) studied the effect of the turnover of judicial personnel on the Supreme Court so far as its effect on the power relationships on the Court was concerned.<sup>1</sup> When corrected for the number of justices appointed per year, the White Court had the least "stable" power relationships of the 70-year period (from 1888 to 1958) except for the Stone Court.<sup>2</sup> The justices' philosophies did not "fit" when compared to

---

<sup>1</sup>Based on Shapely-Shubik power indices.

<sup>2</sup>The data is taken directly from Ulmer's table (1961, p. 174). was divided by the number of justices replaced during the period to reach the above conclusion. This instability in power relationships indicates a significant difference in the attitudes of new justices as compared to the justices replaced. Ibid., pp. 174-181.

judges they replaced. This may be explained by the fact that all of the members of the Court appointed under White's Chief Judgeship were appointed by "Progressive" presidents: Roosevelt, Taft, or Wilson. (See Kelly and Harbison, 1963). Hence this suggests that the new justices represented a discontinuity with previous values and ideology, and that the Progressivist movement and the influences of a changing society did have an impact on the Court through new appointments.

Shapely-Shubik power indices for the second period of the White Court show that Day was the most powerful man on the Court with White second (see Table 38), but the difference between the two is not statistically significant. This might indicate that Day was the social leader

---

Table 38.--Shapely-Shubik Power Indices, 1916-1920 Terms.

Day	.1278	McReynolds	.1106#
White	.1265#	Pitney	.1096#
Van Devanter	.1200	Brandeis	.1019
McKenna	.1129	Clarke	.0901
Holmes	.1127		

#indicates that the figure is not significantly different from the figure immediately above it in the column.

---

of the Court (as McLean, 1946, p. 66 indicates). White might be considered a task leader of the Court, based on the powers which he exerted as Chief Justice. Day was clearly not a task leader according to Taft's negative evaluation of his ability (Pringle, 1939) and our previous findings that he was influenced in his decisions by various other justices.

Day's high power rating might be based on his position as a moderate judge, intermediate between the conservative and liberal blocs

(see below). White, however, appears as a member of the conservative bloc so his high power status is particularly impressive. Van Devanter's position as third in power seems partly a result of his disposition to avoid dissenting even when he disagreed with the majority. (See Pearson and Allen, 1937, p. 186.)

A second possible indication of power on the Court might be the judge's tendency to dissent. Table 39 gives the judge's rate of dissent in all cases of the 1910-1920 period where a dissent was registered.

---

Table 39.—Judge's Rate of Dissent on White Court, 1910-1920

White	.149	Hughes	.248
Day	.157	McReynolds	.262
Lamar	.161	Brandeis	.305
Van Devanter	.174	Pitney	.309
Holmes	.188	Clarke	.397
Lurton	.216	Harlan	.571
McKenna	.248		

---

Table 39 shows that for the entire period of the White Court, White dissented least often. He dissented in only 14.9 per cent of the non-unanimous cases. This suggests that he was the most powerful member of the Court. Day is second in Table 39, reaffirming the finding that he was a powerful and centrist justice. Lamar is third and Van Devanter fourth. Van Devanter's tendency to suppress his dissents was reinforced by an affliction called "neurotic pen" by Pearson and Allen (1937, p. 186). He found it difficult to express himself in writing in either a dissenting or majority role. He wrote fewer than two per cent of the majority opinions in the 1930-1935 period.

Holmes does not seem to be a great dissenter on the White Court, being fifth among thirteen judges in a disposition not to dissent. The liberal justices show the greatest tendency to dissent: Harlan, Clarke, Pitney, and Brandeis in that order. This accentuates the fact that in most cases the conservative side won, leaving the liberals to dissent. In the relatively liberal second period of the White Court, for example, 57 per cent of the non-unanimous cases represented conservative victories. Harlan in his last year on the Court dissented in 57 per cent of the non-unanimous cases. His rate of dissent was much higher than the second most frequent dissenter's rate, Clarke, who dissented 40 per cent of the time.

Bloc Analysis. -- The closeness of association of the justices was analyzed for bloc voting and sociometric relationships among the justices. The type of interagreement index used was a phi correlation between each pair of justices (Schubert, 1965a). It measures how often each pair of justices voted together in the majority or in dissent compared to how often they disagreed. Table 40 shows the interagreement matrix for the entire period of the White Court.

The first period shows only a weak bloc structure. A weak conservative bloc consists of White, Van Devanter and Lamar with McReynolds a marginal fourth member. Only the correlation between White and Van Devanter is very high (.29).

A second bloc is composed of Hughes, Holmes, and Lurton. Their intercorrelations are even lower than the first bloc except for the Holmes-Lurton association (.37). Their level of agreement is low. It is

Table 40.--Matrix of Phi Intercorrelations Between 11 Justices of the White Court for the 1910-1915 Period.

	Hu	Ho	Lu	Pi	Day	Ha	McK	McR	La	VD	Wt
Hughes	1.00	.12	-.01	.10	.08	-.22	-.12	-.06	.09	-.11	-.08
Holmes	.12	1.00	.37	-.36	-.15	-.34	-.10	-.12	.07	-.10	.04
Lurton	-.01	.37	1.00	-.25	-.13	-.35	-.16	x	.08	.03	-.05
Pitney	.10	-.36	-.25	1.00	-.08	x	-.16	-.15	-.14	-.04	-.28
Day	.08	-.15	-.13	-.08	1.00	.44	.03	-.27	.07	.09	-.13
Harlan	-.22	-.34	-.35	x	.44	1.00	-.51	x	x	x	-.32
McKenna	-.12	-.10	-.16	-.16	.03	-.51	1.00	-.23	-.20	-.03	.00
McReynolds	-.06	-.12	x	-.15	-.27	x	-.23	1.00	.05	-.09	.10
Lamar	.09	.07	.08	-.14	.07	x	-.20	.05	1.00	.18	.07
VanDevanter	-.11	-.10	.03	-.04	.09	x	-.03	-.09	.18	1.00	.29
White	-.08	.04	-.05	-.28	-.13	-.32	.00	.10	.07	.29	1.00

x indicates that the justices did not sit together.

Table 41.--Matrix of Phi Intercorrelations Between 9 Justices of the White Court for the 1916-1920 Period.

	Ho	Br	Ck	Pi	Day	McK	Wt	McR	VD
Holmes	1.00	.42	.08	-.23	-.15	-.08	-.07	-.20	.01
Brandeis	.42	1.00	.31	.03	-.03	-.22	-.16	-.45	-.33
Clarke	.08	.31	1.00	.07	.05	-.09	-.19	-.41	-.36
Pitney	-.23	.03	.07	1.00	.13	-.04	-.20	-.14	-.03
Day	-.15	-.03	.05	.13	1.00	-.07	-.12	-.05	.28
McKenna	-.08	-.22	-.09	-.04	-.07	1.00	.07	.10	.14
White	-.07	-.16	-.19	-.20	-.12	.07	1.00	.17	.11
McReynolds	-.20	-.45	-.41	-.14	-.05	.10	.17	1.00	.33
VanDevanter	.01	-.33	-.36	-.03	.28	.14	.11	.33	1.00

likely due to agreement on the issues of Libertarianism, State Progressivism, and Commerce Power. This bloc was liberal in the sense of supporting state powers and liberty claims on those issues.

Harlan and Day form the strongest bloc on the Court (at .44), but their position is not aligned with either of the other blocs.

One might conclude that little bloc voting occurred in this period and that only three dyads of justices exhibited themselves in voting: Harlan-Day, Holmes-Lurton, and Van Devanter-White. Only the latter dyad seemed to involve the liberal-conservative dimension implicit in the Progressivism attitude system.

The impact of personal friendships on voting correlations does not seem particularly impressive. Lamar, McKenna, and White seem to have formed a friendship group (Lamar, 1926). White shows only low positive correlations with the others and McKenna has a negative correlation with Lamar. Harlan and Day were apparently friends since Day recommended Harlan for the Chief Justiceship in 1910 (Klinkhamer, 1943), if so, it did seem to result in close voting habits since their correlation is highest on the Court in the first period (.44).

Another method of defining blocs of justices in McQuitty's linkage analysis (Ulmer, 1961, pp. 248-251). Figure 29 shows the bloc structure so derived from the Table 40, 41, and 42 matrices. The double arrow indicates a primary linkage, and single arrows indicate secondary relationships.



Table 42.--Matrix of Phi Intercorrelations Between 13 Justices of the White Court for the Whole Period, 1910-1920.

	Ho	Br	Hu	Ck	Pi	Day	Ha	Lu	La	McK	McR	Wt	VD
Holmes	1.00	.42	.14	.08	-.28	-.15	-.34	.37	.07	-.09	-.18	-.03	-.01
Brandeis	.42	1.00	x	.31	.02	-.04	x	x	x	-.22	-.44	-.16	-.32
Hughes	.14	x	1.00	x	.06	.10	-.22	-.01	.09	-.12	.02	-.09	-.08
Clarke	.08	.31	x	1.00	.07	.05	x	x	x	-.09	.41	-.19	-.36
Pitney	-.28	.02	.06	.07	1.00	.05	x	-.25	-.14	-.08	-.15	-.23	-.04
Day	-.15	-.04	.10	.05	.05	1.00	.44	-.13	.07	-.03	-.10	-.13	.20
Harlan	-.34	x	.22	x	x	.44	1.00	-.35	x	-.51	x	-.32	x
Lurton	.37	x	-.01	x	-.25	-.13	-.35	1.00	.08	-.16	x	-.05	.03
Lamar	.07	x	.09	x	-.14	.07	x	.08	1.00	-.20	.05	.07	.18
McKenna	-.09	-.22	-.12	-.09	-.08	-.03	-.51	-.16	-.20	1.00	.04	.04	.07
McReynolds	-.18	.44	.02	.41	-.15	-.10	x	x	.05	.04	1.00	.16	.26
White	-.03	-.16	-.09	-.19	-.23	-.13	-.32	-.05	.07	.04	.16	1.00	.17
Van Devanter	-.01	-.32	-.08	-.36	-.04	.20	x	.03	.18	.07	.26	.17	1.00

x indicates that the justices did not sit together.

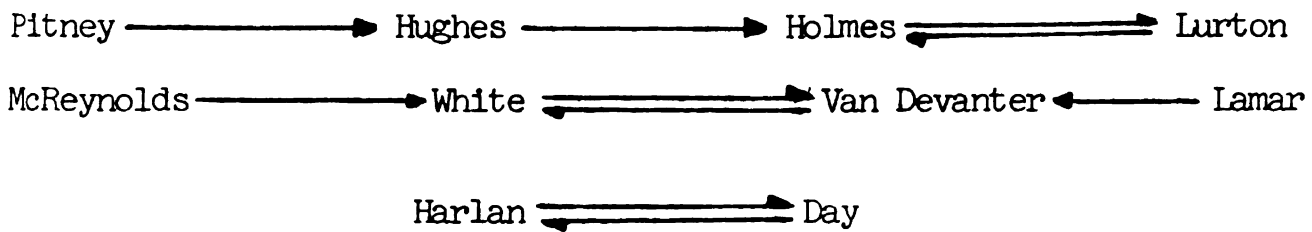
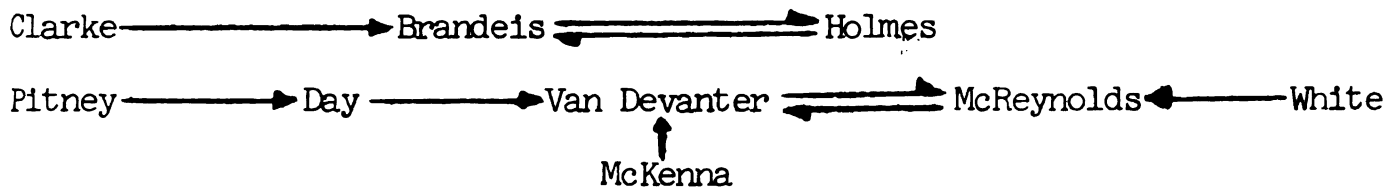
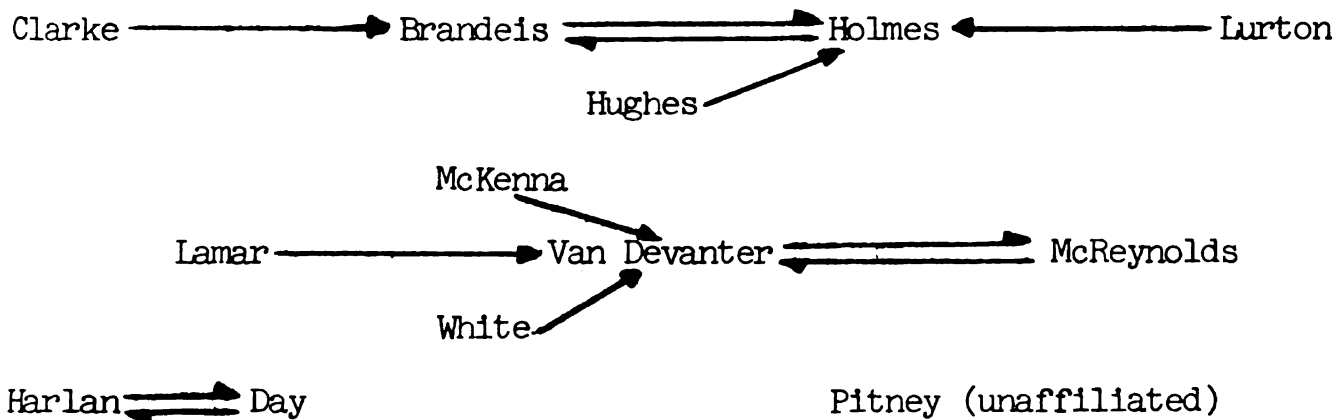
First PeriodSecond PeriodWhole Period

Figure 29. — Blocs of Justices identified by McQuitty Pattern Analysis.

The linkage analysis for the first period generally reaffirms our previous conclusions on bloc structure except that Pitney is now added to the Holmes bloc. Holmes is also identified as the central figure of this bloc since he has the most arrows directed towards him. Hence, he might be said to dominate this bloc.<sup>3</sup> White and Van Devanter share the domination of the conservative bloc.

Table 41 shows the second period bloc structure. In comparison with the first period matrix of Table 40, the second period shows much stronger bloc voting. The intercorrelations between the conservative bloc of Van Devanter, McReynolds, White, and McKenna are higher than the conservative bloc in Table 40. The liberal bloc clearly contains Holmes, Brandeis, and Clarke, Pitney and Day also seem associated with this bloc although they do not show positive correlations with Holmes probably because they differ from Holmes on Darwinism issues. The intercorrelations between these bloc members seem much higher than the intercorrelations between the Holmes bloc members in the first period. Furthermore the correlations between each of the members of the conservative bloc and each of the members of the liberal bloc are in Table 41 mostly highly negative. This indicates that the members of each bloc not only vote alike but vote differently from the members of the other bloc. Day, however, seems to show a positive correlation with Van Devanter of the conservative bloc due to their agreement on Federalism issues.

---

3. The arrow points to the justice who dominates, it originates from the justice who is dominated (Ulmer, 1961, pp. 248-251).

4. Sprague (1968) did a bloc analysis of the 1916-1920 Period federalism cases (p.88). He seems to find a nationalist bloc composed of Day, Van Devanter, and Holmes and a states' rights bloc composed of Pitney, Clarke, and Brandeis. These conclusions are substantiated by our analysis except that Holmes does not seem to be an obvious nationalist. Sprague correctly identifies Van Devanter, McKenna, and White as nationalists and Pitney, Clarke, and Brandeis as states' rights supporters. He does not identify McReynolds as pro-state since he cast so many anti-state votes in dissent. This indicated an anti-government bias by McReynolds, however, according to our data. Sprague does not separate cases which involve a clear conflict between state and federal powers from those which merely attack state power as part of an anti-government or conservative dimension.

Tables 40 and 41 then show that the essentially non-bloc voting of the first period was transformed in the second period into a situation involving bloc voting. This affirms previous conclusions that in the second period the Court became polarized along the issues of Progressivism. The bloc voting is not nearly as polarized as on the Warren Court, however. (See Shubert, 1965a.)

Particularly high associations are found between Brandeis and Holmes (.42) as well as Brandeis and Clarke (.31). The latter two judges were both Wilson Progressives while the strong sociometric relationship between Holmes and Brandeis has been mentioned. Van Devanter and McReynolds show the highest association in the conservative bloc (.33). Both consistently oppose Progressivism.

McQuitty linkage analysis also shows two blocs. The only difference from the structure inferred from the previous analysis is that Pitney and Day marginally associate with the conservative bloc rather than with the liberal bloc. This suggests that Pitney and Day form a centrist voting bloc.

Brandeis seems to dominate the liberal bloc as would be expected from his persuasiveness and mastery of sociological facts. Van Devanter seems to dominate the conservative bloc. His influence and persuasiveness may be inferred from findings by Danelski (in Murphy and Pritchett, 1961) that he was a task leader on the Taft Court.

Table 42 shows the matrix for all thirteen justices on the White Court. It contains some empty cells since some justices did not serve at

the same time. It shows only a weak bloc structure. It suggests, however, that a five-member conservative bloc consisted of Van Devanter, White, McReynolds, McKenna, and Lamar. A liberal bloc is composed of Holmes, Hughes, Brandeis, and Clarke, Pitney, Day and Harlan seem to be marginal members of this bloc. The voting blocs seem tied to Progressivism issues since the liberal bloc members rank from one to seven on the Progressivism attitude system while the conservative members rank eight to thirteen on Progressivism.

Since the liberal bloc outnumbers the conservative bloc seven to five, it might be asked whether the liberal side dominated the White Court? This is illusory, since the liberal bloc contributed only four members to the Court in the first period at any one time. It did contribute five members to the relatively liberal Court in the second period but Pitney and Day were only marginally associated with the liberal bloc in that period.

Linkage analysis shows basically the same bloc structure. The conservative bloc is identical. The liberal bloc adds Lurton (based on an isolated association with Holmes) but omits Pitney, Harlan and Day. Pitney seems unaffiliated with any bloc. Harlan and Day form an isolated bloc. Holmes seems to dominate the liberal bloc while Van Devanter dominates the conservative bloc.

In essence, attempts to find a structure of bloc voting on a court will flounder unless a court is polarized on a single attitudinal dimension. Sprague (1968) has been unable to find a bloc structure in a

universe of "federalism" cases primarily because so many other attitudinal dimensions are also present. Probably in a universe of voting data, evidence of a bloc structure is found only if, by chance, the majority of cases involve the same attitudinal dimension. For example, in the Pritchett (1948, 1954) and Schubert (1960, 1965a) studies of the Supreme Court, a bloc structure may be seen because the great majority of cases involve either economic liberalism or civil liberties and the judges react similarly toward both types of cases. In the White Court data, the question of what voting blocs are present on the Court must be preceded by the question, on what attitudinal dimension is a bloc structure being sought? Each dimension would have its own unique "bloc" structure. On each dimension, judges will make different voting alliances with other like-minded judges on that particular attitude system.

A better way to examine bloc voting might be to examine the closeness of the judges' positions on the largest or major attitude systems in each of the two periods. The major attitude system in both periods seems to be Progressivism. Libertarianism and Federalism also seem to be major dimensions in both periods. Figure 24 suggests, moreover, that most of the judges react similarly towards both attitude systems. This is probably true because these attitude systems are both related to political party, as noted previously. Pitney, McReynolds, and, to an extent, Lurton seem to react differently towards these two attitude systems, however. Nonetheless, it might be useful to combine Libertarianism and Federalism into one dimension and graph the composite with Progressivism to indicate the bloc structure of the justices on these major attitudinal dimensions.

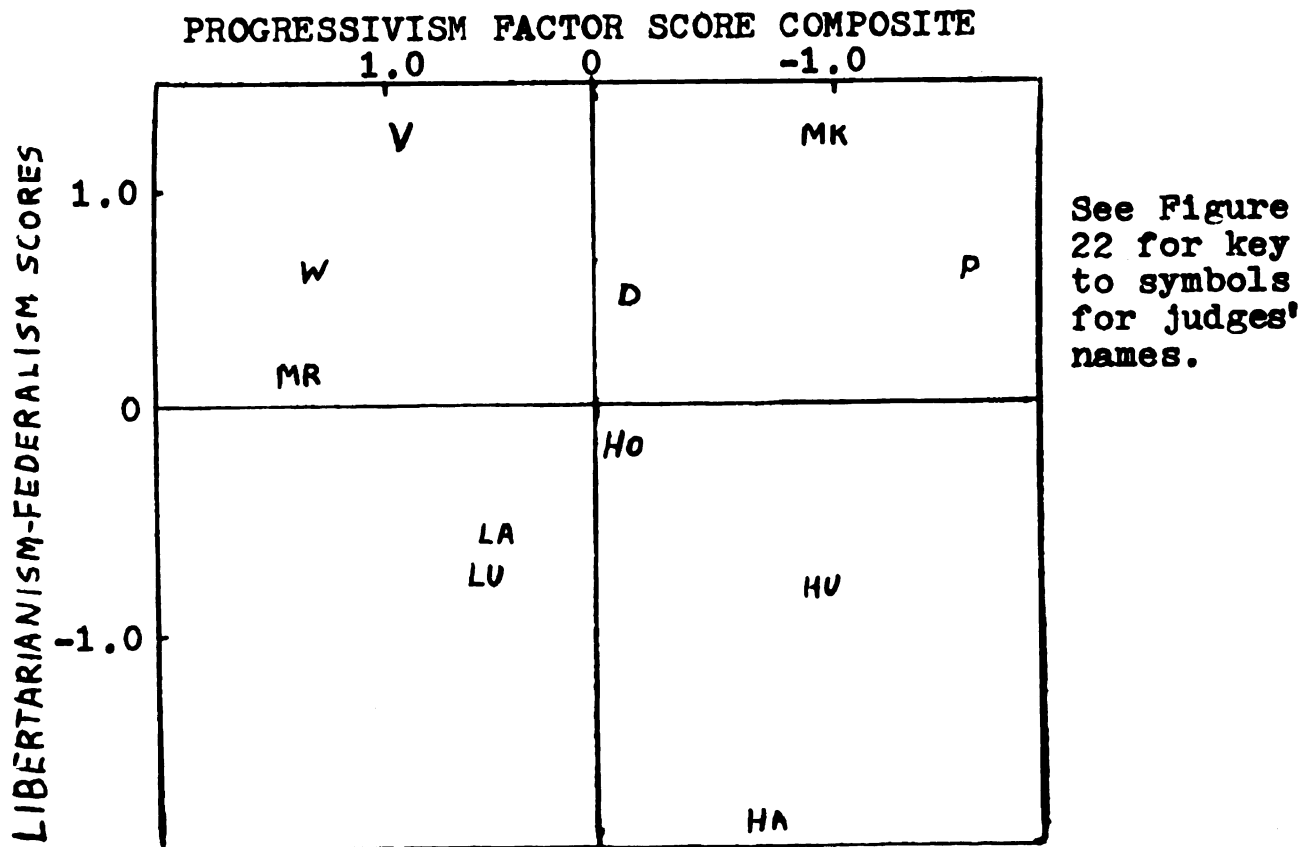


Figure 30.--Graph of Progressivism Factor Score Composite with Libertarianism-Federalism Factor Score Composite, 1910-1915 Period

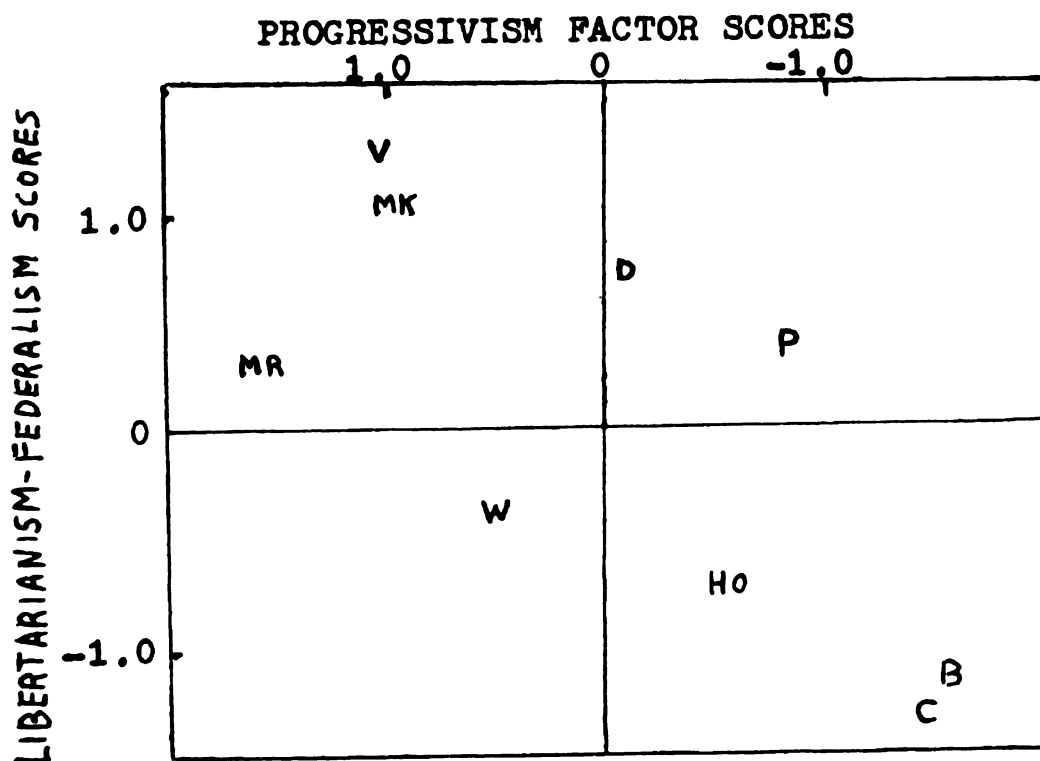


Figure 31.--Graph of Progressivism Factor Scores with Libertarianism-Federalism Factor Score Composite, 1916-1920 Period

Since a comparison of ranks results in a lower order metric scale than factor scores (which involve interval data), factor scores were used to graph the relative positions of the judges on these major attitudinal dimensions in Figures 30 and 31.

Figure 26 (in chapter 7) shows a graph of ranks comparing Progressivism with Libertarianism alone. It may be taken as a rough indication of the bloc structure of the White Court for the whole period. It shows both similarities to and differences from the Figure 29 bloc structure of the White Court using linkage techniques. The differences are not surprising considering the low phi intercorrelations between the justices of Table 40 and the previously noted absence of an overall bloc structure in the first period of the White Court. Figure 26 can be considered to give more accurate indications of closeness of position between the justices based on real attitudinal dimensions rather than a chance mix of cases which the entire universe of cases would give. Figure 26 shows that the position of Clarke, Brandeis, and Harlan are quite similar and are all liberal. Hughes and Holmes are close to each other and to the above liberal bloc of Figure 29 for the whole Court; however, Figure 29 has Lurton as a member of the liberal bloc but that bloc does not include Harlan. The true positions of these justices is clouded by the fact that Harlan and Lurton were not members of the Court simultaneously with Clarke and Brandeis and hence no correlations are possible between these two sets of justices. Figure 26 also shows a conservative bloc composed of McReynolds, Van Devanter, McKenna, White and Lurton. This affirms Figure 29 in that McReynolds, Van Devanter, and White formed such a bloc. Day and Lamar are mid-way between blocs. Pitney belongs to





the liberal bloc on Progressivism issues but belongs to the conservative bloc on Libertarianism.<sup>5</sup>

In the sense that bloc analysis is related to sociometric analysis, attention to the body of justices that sat together on the same Court is more appropriate.

Let us consider the separate periods of the White Court. Figure 30 shows the closeness of the judges' positions involving Progressivism and Libertarianism-Federalism in the first period. It verifies the Figure 29 finding that McReynolds, White, and Van Devanter form a conservative bloc on these issues. It also shows a centrist bloc of Day, Holmes, Lamar, and Lurton. Hughes and Harlan form a loose liberal bloc. McKenna and Pitney form a bloc which votes with the conservative bloc on Libertarianism-Federalism but supports the liberal bloc on Progressivism.

The first period bloc structure suggested by Figure 29 is probably less accurate than that revealed by Figure 30 since the phi intercorrelations of Table 40 are quite low except for the conservative bloc which is consistent with the Figure 30 configuration.

The Harlan-Day bloc seems to evidence itself only on such issues as State Progressivism, Commerce Powers, General Welfare, and Judicial Restraint. These dimensions are largely absent from Figure 30.

The strong Holmes-Lurton voting bloc evidences itself on the issues of Liberal Nationalism (especially Darwinism), Libertarianism, General Welfare, and Commerce Power. They voted similarly on these attitude systems.

---

<sup>5</sup>The usual type of bloc analysis would, of course, obscure Pitney's relationships to these two blocs.

Pitney and Day. Evidence of the low dimensionality necessary for a bloc structure is given by the fact that the two-dimensional configuration of Figure 32 explains 43 per cent of the variance in the data.

Dogmatism. -- Since dogmatism is hypothesized as a major psychological dimension involving the arrangement of a person's attitude-value system (Rokeach, 1960), a consideration of this dimension was made. An attempt was made to rank the justices on relative dogmatism. Precise measures of this dimension are impossible since we obviously cannot disinter the justices in order to submit them to dogmatism scale questions. Nevertheless, it might be asked what the characteristics of dogmatism are and whether any of our scales might measure this psychological frame of mind.

It might be suggested that support of civil liberties and oppressed groups might indicate the type of tolerance and openmindedness that is the antithesis of dogmatism.<sup>6</sup> A second characteristic of dogmatism might be a moral dimension. The dogmatist might be intolerant of violations of morality and support government action to impose moral standards on individuals (Rokeach, 1960). Thus we might measure this tendency by means of the scales of Corruption (17), Prohibition (38), and Federal Regulation: Non-economic (20), which involved cases with issues involving prohibition, prostitution and drug addiction.

A composite scale was constructed by averaging the ranks of all thirteen judges on the above "morality" scales plus all civil liberty scales (1 to 6). In addition, the farmer in Land Claims (17), the worker in Labor

---

<sup>6</sup>Dogmatists are reputed to be less sympathetic to civil liberties (Rokeach, 1960) and to ethnic minorities (Rokeach in Hollander and Hunt, 1963)

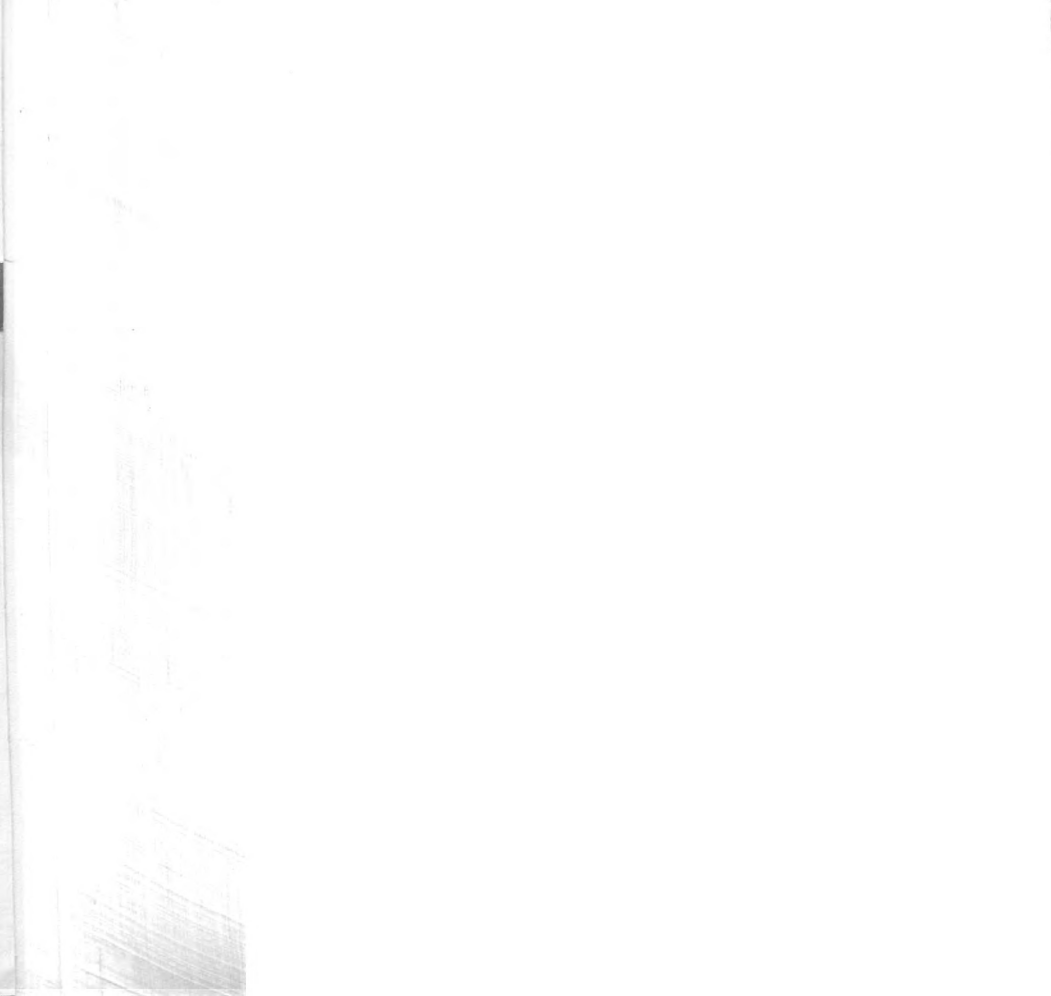


Figure 31 generally reaffirms the much clearer bloc structure of the 1916-1920 period. A liberal bloc consists of Brandeis, Clarke, and Holmes. A conservative bloc consists of McReynolds, McKenna, and Van Devanter. White is also in this bloc but weakens somewhat his allegiance to it on Liberal Nationalism, Federalism, and particularly Libertarianism. These are issues on which party identification might well influence him to weaken his association with this bloc. Previous findings also suggest that this indeed happened. White is a much firmer member of this bloc on the Darwinism issues, however. Day and Pitney form a weak third bloc which, as previously found in the first period, supports the liberals on Progressivism and the conservatives on Libertarianism-Federalism. This characteristic of Day and Pitney might well be explained by a conclusion that they were Republican Progressives, supporting their fellow partisans (Van Devanter and McKenna) on the Libertarianism-Federalism issues which seem to involve party values while breaking with their fellow Republicans to support the Progressivist ideology.

The findings of factor analysis of the phi correlation matrix might shed light on the bloc structure of the Court. A two-dimensional factor analysis of the first period matrix revealed no discernable bloc structure. Moreover, it only explained 23 per cent of the variance of the data. This contributes support to a conclusion that a one or two-dimensional bloc structure did not exist in this period of the Court.

Figure 32 shows the configuration of the two-dimensional factor loadings from phi correlations of the 207 cases in the second period. It reveals a three-bloc structure similar to our previous findings. A liberal bloc consists of Holmes, Brandeis, and Clarke, a conservative bloc includes White, McReynolds, Van Devanter, and McKenna, and a centrist bloc includes

Below factor analysis based on 207 cases.  
LOADINGS ON SECOND FACTOR

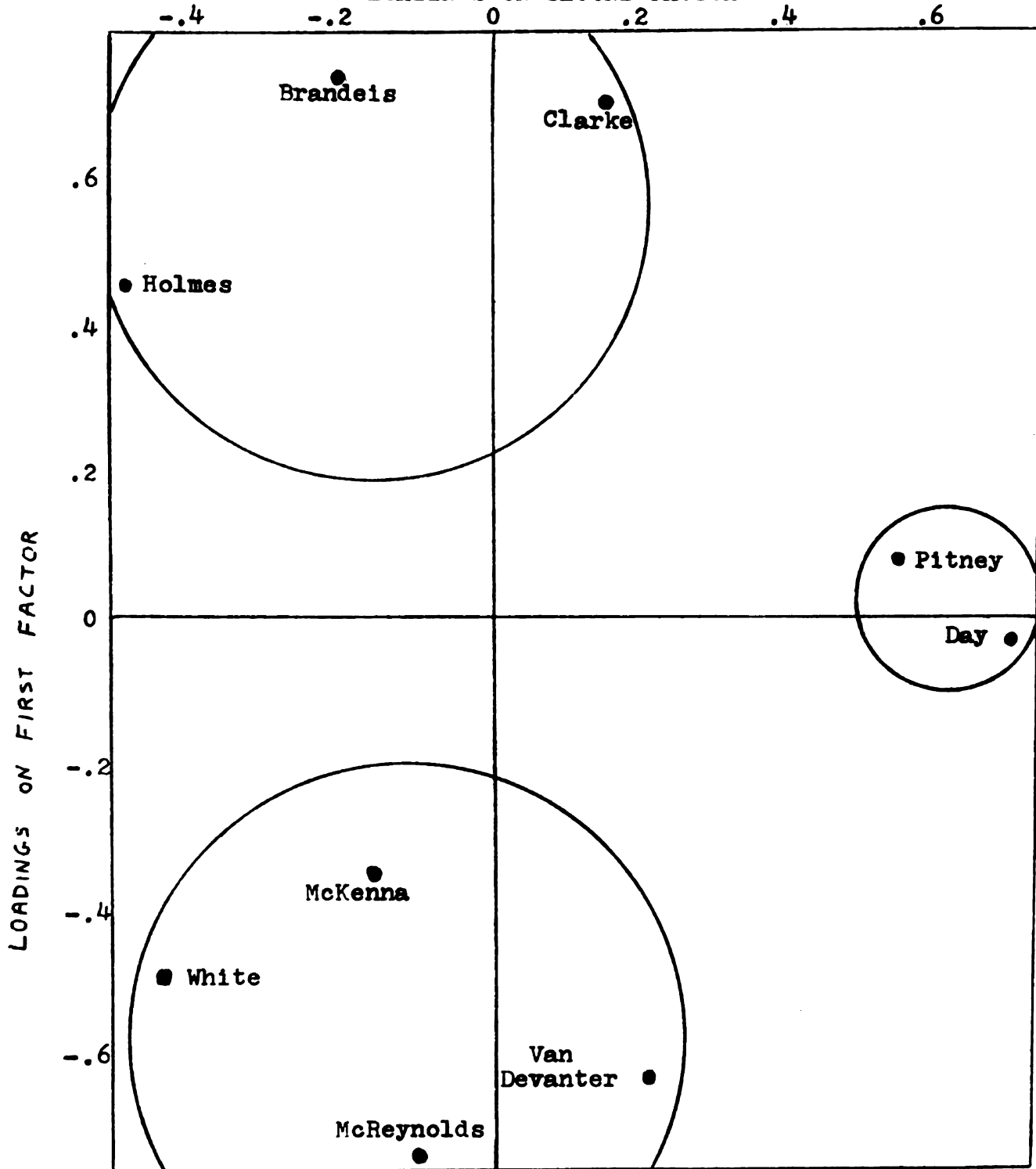


Figure 32.--Graph of Two Dimensional Configuration of Factor Loadings Based on Phi Correlations Locating Bloc Associations of Justices of White Court, 1916-1920 Period

<sup>7</sup>(7), and the Negro in Civil Rights (15) were considered oppressed or disadvantaged groups and it was concluded that the corresponding scales might also measure the dogmatism-tolerance dimension.

It is to be noted that some judges did not react the same to the liberty as to the morality scales. Harlan was extremely intolerant on morality scales. This is also true of Hughes, Brandeis, and Clarke to a lesser extent. McReynolds, Lurton, Van Devanter, and McKenna, however, are intolerant on civil liberties but tolerant on morality issues. Considered separately the morality component ranks correlate negatively with the average liberty rank (at a tau of  $-.36$ ).

Other scales might conceivably measure dogmatism. The judicial power scales might measure a self-righteous attitude on the part of the justices. It might measure a belief that judges in general and the Supreme Court in particular were the only right-minded individuals capable of guiding government into proper channels.<sup>8</sup> Hence, this could measure opinionation, a concept close to dogmatism.

Support of the government in the Laissez-faire attitude system might indicate authoritarian tendencies implicit in dogmatism (Rokeach, 1960).

A tendency to dissent might measure either opinionation, a strong feeling that one is right no matter what the majority decides.<sup>9</sup> It could

<sup>7</sup>Unions were a new political force contending for recognition and legitimacy as a political influence with resulting sporadic outbreaks of violence in its struggle, much like the modern civil rights movement.

<sup>8</sup>Dogmatists tend to defer more to authoritative figures, which would be other judges. See Rokeach in Hollander and Hunt, 1963.

<sup>9</sup>Dogmatists are reputed to be less compromising than others. See Rokeach in Hollander and Hunt, 1963, p. 166.

also measure extremity of attitude, a further component of dogmatism. The problem with this measure is that the liberals on the Court were usually in the minority and it might really measure the relative liberalism of the justice rather than dogmatism. A direct measure of extremity of opinion was constructed out of the scales for the full period of the White Court. A middle rank was given a zero value and larger scores were assigned to ranks in either extremity, whether in a liberal or a conservative direction. Hence, justices at the top as well as the bottom of each scale were given maximum extremity scores. The average extremity score for each justice was thus computed, and judges were ranked on their tendency to take an extreme position on scales.

The judges' rankings on the above measures are given in Table 43. First, it may be noted that the various measures are not interrelated. The highest intercorrelations are the "dogmatism ranks" (liberty plus morality) with Laissez-faire (tau of .17) and Judicial Power with Extremity (tau of .23). These are rather low correlations for indices that purportedly measure a similar concept. However, the morality component of "dogmatism" does correlate .59 with the Laissez-faire attitude system<sup>10</sup> and .25 with the extremity index.

---

<sup>10</sup>Primarily because both the Laissez-faire attitude system and the morality scale contain some of the same variables. It might well be that Laissez-faire and Libertarianism measure attitude systems which are in reality components of a deeper psychological construct, which Rokeach would call dogmatism.



Table 43. -- Possible Measures of Dogmatism on the White Court

	<u>Dogma tism Index</u>	<u>Liberty Compon- ent</u>	<u>Moral Com- ponent</u>	<u>Judi- cial Power</u>	<u>Laissez faire</u>	<u>Dis- sent Rate</u>	<u>Extrem- ity Index</u>
Clarke	1	1	8-1/2	8	6	12	12
McKenna	2	7	2	9	1	7	4
Lamar	3	4	5	12	2	3	6
Harlan	4	2	13	10	13	13	13
Brandeis	5	5	11-1/2	1	10	10	9
Hughes	6	3	8-1/2	2	12	8	3
Lurton	7	10	3	6	3	6	7
White	8	6	10	5	8	1	5
Holmes	9-1/2	9	6	3	6	5	1
Day	9-1/2	8	7	7	7	2	2
Van DeVanter	11	11	4	13	5	4	8
McReynolds	12	13	1	4	4	9	11
Pitney	13	12	11-1/2	11	11	11	10

In the above rankings of the justices, a large rank should indicate dogmatism, a small rank should indicate non-dogmatism.

Of the Table 43 measures, the Laissez-faire and dissent index seem least useful as a measure of dogmatism. The dissent index seems to be contaminated as such a measure since it also measures the relative liberalism of the justices. Reliance will be made primarily on the dogmatism index of Table 43 in rating the dogmatism of the judges.

Pitney seems to be a prime candidate for the most dogmatic justice since he ranks at the extreme dogmatic end of the dogmatism index and in addition is consistently high on all Table 43 indices.

McReynolds seems to be the second most dogmatic justice. His biographer (Early, 1954) clearly paints a picture of a dogmatic personality as do other sources.<sup>11</sup> He is anti-government, but only slightly moreso

<sup>11</sup>Pearson and Allen (1937, p. 222) call him "scrooge". Taft called him a grouch (Pringle, 1939).

than most conservatives. He is anti-judicial power but is much more tolerant of it when it supports conservative outcomes. His rate of dissent is much higher than would be expected of a conservative during conservative domination of the Court. One anomaly is that he seems more tolerant on moral issues than any other justice. This characteristic could be due to his extreme individualism and aversion to governmental power, being fourth on *Laissez-faire*.

Van Devanter shows up as next in dogmatism and is also most supportive of judicial power. He is moderately high on the extremity index.

Harlan presents contradictions in the assessment of his relative dogmatism. He is opposite to McReynolds on most counts. He is anti-dogmatic only on the liberty component of the dogmatism index. On judicial power he is tenth and would be even more supportive of that power except that he opposes it when it supports conservative outcomes. He is the most dogmatic of the justices (13th) in intolerance of immorality, support of government measures, rate of dissent (almost twice that of the nearest justice), and the extremity index. Although he is the second most extreme justice in support of liberty, it might be asked whether he was not in fact dogmatic in his defence of liberty. The data represents Harlan's last year on the Court, just before his death at the age of 78. If advancing age and dogmatism are related, one would expect him to exhibit dogmatic tendencies.

Compartmentalization is known as one characteristic of the dogmatist (Rokeach, 1960). He often holds beliefs or attitudes inconsistent with other attitudes within his attitude-value system. One way of measuring

this characteristic for the justices might be to examine each judge's non-scaled responses (or inconsistencies) on the attitude scales of the White Court. Rating each judge's inconsistencies as a proportion of cases on which he voted, Harlan is found to have the highest inconsistency rating. Pitney is second. Both of these judges appear likely to be dogmatists on the basis of other measures. McReynolds, also a probable dogmatist, is likewise high on this measure, being sixth on the Court in rate of inconsistencies.

Judges which appear low in dogmatism include Clarke, McKenna, Lamar, Brandeis, and Hughes. Lamar is uniformly nondogmatic on these indices except in support of the judicial power. McKenna is likewise strongly non-dogmatic, being particularly tolerant on moral issues. Clarke, Brandeis and Hughes are somewhat intolerant on moral issues as was characteristic of the Progressivist ideology and also supported government action. Brandeis and Clarke also show high rates of dissent and high extremity ranks, which are due to a particularly high support of Progressivist issues.

Holmes was probably fairly non-dogmatic. He was tolerant on moral issues, strongly opposed to the assertion of judicial power, and had the lowest score on extremism on the White Court. It is to be noted, however, that his reputation of a champion of civil liberties seems overrated, according to our measures, based on his performance on the White Court. Only on First Amendment issues is he outstandingly libertarian.

It has been noted that Libertarianism which involved liberty for the white race is clearly related to party, with Democrats supporting

liberty. A second, more striking, relationship may be here noted when we examine the two scales involving the rights ( or liberties of the colored races. These include the Civil Rights of Negroes (15) and the Civil Liberties of Indians (5). A composite index of the two variables ranks the six partisan Republicans as most sympathetic to the colored races and the six Democrats as least sympathetic to their claims. Only Holmes, as usual, does not fit this generalization. As a nominal Republican he votes as do the Democrats. The same overall results are discovered when the ranks of the Civil Rights of Negroes (15) alone are examined.

#### Individual Experiences and Philosophies of the Justices

Here the biographies of the justices will be examined for clues as to their attitude-value systems. Their experiences, ideosyncracies and philosophies will be examined to investigate their possible influences on the judge's attitudes and voting behavior while on the White Court. Evidence on their values and attitudes will also be examined by studying the pattern of their nonscaled responses on the attitude scales constructed from our data.

Non-scaled responses (or NSR's) in a scale, discussed in Chapter One above, suggest that another attitudinal dimension exists in the cases scaled. This is especially true if the NSR's are not random. For an individual justice an NSR probably indicates a second attitude which dominates the major attitude measured by the scale in that case (or item). Thus, a study of a judge's NSR's can give clues as to the arrangement and salience of the major attitudes and values within that judge's attitude

value system. Moreover, the validity of the scales and their explanatory power in accounting for a larger proportion of the judge's votes may be increased if the NSR's can be accounted for by this method.

The NSR's can be explained in several ways. (1) an overriding and more salient value or attitude also present in the case may so dominate the major attitude of the scale that the judge responds to the attitude more salient to him, causing an NSR. The other judges do not share with him his view of the salience of the non-scaled attitude and so respond to the major attitude of the scale. Usually additional evidence affirms this situation. The judge often responds to the more salient attitude in a very consistent and extreme manner on the scale constructed to measure it. The case should fit in this second scale without an NSR for that judge.

(2) The case may contain two issues both of which are moderately salient to the judge. The two issues have a cumulative effect which prompts the judge to respond to the case in a more extreme fashion than he would if the case only contained one of the issues. This results in NSR's in both scales for the judge involved. This type of reaction is described by Rokeach's (1968a) belief congruence theory. (Also see Insko, 1967.)

(3) The case may involve two issues. Some judges perceive the case in terms of the first issue and others in terms of the second. The case then fits into two scales, that measuring the first issue attitude and that measuring the second. Each scale may contain NSR's due to the fact that at least some judges perceive the issue of the case to be the issue of the other scale. Differences in perception between the judges

thus inevitably cause NSR's through differences in how to classify the case.

The judges differ widely in their rate of non-scaled responses, suggesting that the judges differ in their relative differentiation or compartmentalization of the issues. Harlan has the highest rate followed by Pitney, McKenna, Lurton, Hughes, McReynolds, White, Lamar, Clarke, Holmes, Brandeis, and Day in that order. Van Devanter has by far the fewest NSR's or "inconsistencies" of any of the White Court judges. Several hypotheses seem to have explanatory value in accounting for the widely differing rates of consistency or NSR's. The one explanation mentioned is their relative dogmatism which might result in compartmentalization of attitudes and consequent behavior. This could explain the high rates of Harlan, Pitney, and McReynolds and the low rates of Clarke, Brandeis, Lamar, and Holmes.

A further explanation could be the need of some justices to remain consistent with or to justify their previous decisions on lower courts. Thus Pitney and Lurton who spent 27 and 12 years respectively on lower courts are second and fourth in their rates of NSR's. Holmes had 20 years on the Massachusetts court and is higher in relative rate of NSR than one would suppose from his reputed open-mindedness and non-dogmatism and well-thought-out philosophy. McKenna's high rate of NSR's could be accounted for by six years on lower courts.

A final explanation could be the mental health or senility of the judge. Harlan's high rate at age 77 in the term preceding his death could be accounted for by these factors. Similarly the second, third, and fourth

highest judges in rate of NSR's (Pitney, McKenna, and Lurton) were reputed to have problems of senility, health, and mental deterioration while on the White Court.

Harlan.-- Harlan's total of ten NSR's can largely be explained by his extreme support of civil liberties, civil rights, and various disadvantaged groups as well as a belief in the sanctity of contracts which dominated his attitudes in cases involving other issues.

Harlan had three NSR's in Civil Liberties Property (3) which involved issues much more salient to him than the ordinary property rights claims because this involved a Land Claims (16) issue, small property owners against railroad companies. That he valued equality highly in general has been shown. He particularly supported the small land owner in Land Claims. He was the most extreme justice on the Court on this issue indicating the great salience of equality to him.

One of his few anti-Civil Liberty (4) votes was an NSR. It was case number 525 which involved a federal tax on liquor. Harlan was strongly for Prohibition (38) and for Federal tax powers (19) two issues which combined to overcome his usual high regard for liberty. The liberty claim was a weak one in his eyes. A claim that to register for a federal stamp to sell liquor in a prohibitionist state violated the Self-incrimination Clause. A rare anti-labor vote (7) in a case involving "yellow dog" contracts was probably due to Harlan's belief in the sanctity of contracts which was indicated by his quite conservative stance in Contract Clause cases (12). This also accounted for Harlan's NSR in State Rate Setting (46) where he voted against state power where a contract was involved.

Harlan upheld the power of state government fairly consistently. One exception was an NSR in a case involving oppression of the Negro, involving a central concern of his. Harlan was the most extremely libertarian justice on Civil Rights (15). Harlan was also quite vehement in punishing corruption in government but this issue was less salient to him than proper procedure in criminal cases which accounted for an NSR in the Corruption scale (37). A civil liberty claim was also probably the cause of an NSR for Harlan in Judicial Power:State Courts (65).

## 12

Let us now consider biographical data for enlightenment as to Harlan's philosophy and for a comparison with our behavioral findings to see if it contradicts or reinforces those findings. Basically most of the biographical information on Harlan corresponds with our conclusions on Harlan's values and ideology.

Harlan's father was an active lawyer and Whig politician, who was one of the Whig leaders in Congress. He later was elected secretary of the state of Kentucky. Justice Harlan worked in a mercantile house for five years before studying for the law. He became a country lawyer and was elected a county judge in 1858. Father and son were both slave holders and "southern gentlemen". They were not abolitionists, but opposed secession, and joined the Constitutional Union Party in 1860. Justice Harlan became a Colonel in the Union army. He was a critic of Lincoln in 1863 but won the attorney generalship of Kentucky on the Union ticket in 1864. He was an opponent of the Thirteenth Amendment although he and his father had set their slaves free. This opinion may be due to loyalty

---

<sup>12</sup>Clark, 1915. Dictionary of American Biography, VIII, pp. 269-272. Paul, 1960. 56 L.Ed. 1273-1285. Beth, 1955.



to his region and slave-owning friends. Thereafter, he firmly supported the civil rights of Negroes, however, embracing the Republican party ideology.

Harlan was a leader of conservative Republicans and ran twice for governor unsuccessfully. He was instrumental in gaining the Republican Presidential nomination for Hayes in 1876. He declined Hayes' offer on the Attorney Generalship but accepted a Supreme Court appointment as a political pay-off in 1877.

Harlan's biographies confirm our findings that he was a strong nationalist, pro-civil rights and pro-liberty. His law experiences consisted of many cases in which he represented "human interests" and the rights of individuals (56 L.Ed. 1273). Harlan may have carried this role of protector of human interests with him to the Supreme Court. The effect of being socialized politically within the Whig party may have had some influence on Harlan. It may be recalled that Whigs on the Taney Court also supported liberty claims.

Harlan has been characterized as despising oppression and sympathizing with the weak and defenseless (56 L.Ed. 1273). He consistently dissented in favor of Negro civil rights throughout his judicial career. He also defended the rights of aliens, including Chinese immigrants, and Indians (Clark, 1915)<sup>13</sup>. His strong support of civil liberties included strong support of the right to a jury trial (Clark, 1915, p. 61). He would have incorporated the first eight amendments of the Bill of Rights into the Fourteenth Amendment. To Harlan they were "sacred elements of

---

<sup>13</sup>See 176 US 581, 163 US 573 for civil rights cases and 120 US 678, 124 US 621, and 112 US 94 for his support of the other colored races.

liberty" (*ibid.*, p. 173). Moreover, Harlan wished to extend Constitutional liberties and jury trial liberties to unincorporated territories. (Also see Beth, 1955.)

Harlan's views on federalism seem to have confused his biographers. This is probably due to the lack of precise techniques to measure his opinions by biographers, a characteristic generally true of most biographies consulted in this study. Harlan was a strong nationalist, supporting broad federal powers, but upheld state power when no conflict with national power existed (as correctly stated by Paul, 1960, pp. 180, 203). Harlan narrowly construed state powers over commerce but broadly construed national power in this area. However, he firmly protected contracts from impairment by state or city governments (Clar, 1915). This conclusion is supported by our scales and analysis of NSR's above. Clark also notes that Harlan supported prohibition. His conclusion that Harlan supported the jurisdiction of state courts over federal is directly contradicted by scale 65 which places Harlan as the most nationalistic judge on the White Court. Moreover, conclusions that Harlan was anti-judicial power (*ibid.* p. 196) is not upheld by our scales which place him as slightly favorable to judicial power. Such a position on judicial power and his strong nationalistic stance is likely due to his early political socialization in the principles of the Whig party and those of John Marshall (56 L.Ed. 1285), as well as his later association with the nationalistic Republican party.

Harlan was characterized as a leading sympathizer with the Progressive point of view (Paul, 1960, p. 180). He took an early liberal stand

in Pollock v Farmers' Loan and Trust (39 L.Ed. 1108) which previewed his later liberalism. The consequent severe attack by the conservative press may have reinforced his liberal stance in subsequent cases. Republican espousal of Progressivism under Roosevelt may have served to reinforce this tendency on the basis of party loyalty. Finally, his son's service on the I.C.C. may have indicated a further influence on Harlan, the influence of more liberal younger members of his family. (See Dawson and Prewitt, 1969.) Further factors in Harlan's liberalism was an opposition to a "power void" in economic matters whereby no government could legislate. He was strongly pro-government. He was nationalistic and, hence, strongly supported Liberal Nationalist programs. Lastly, his sympathy for the oppressed, as evidenced in civil liberty cases, may have extended to economic matters. He reportedly feared an adverse effect on individualism by the increasing concentration of industry. These combined factors may have overcome Harlan's reputed early pre-Court conservatism.

Biographers tend to dispel the notion that Harlan was dogmatic. He was characterized as holding no hard feelings or malice in his frequent disagreements on the Court and having a "generosity of spirit". He was noted for his many dissents throughout his career, however. <sup>14</sup> Perhaps the strong moral element noted in his attitude pattern was due to the rural protestantism typical of Harlan's rural environment rather than a personal dogmatism.

Little evidence seems to exist to contradict our basic findings that Harlan was a "modern liberal (Beth, 1955, p. 1099) who was pro-government,

---

<sup>14</sup>No justice on any Court exceeded Harlan's lifetime total of dissents. Beth, 1955.

pro-equality, pro-general welfare, pro-liberal, nationalistic and anti-Darwinist in his value system.

Lurton. -- In the scales of the White Court, Lurton's votes contained a large proportion of NSR's. Most may be simply explained, however. The ranking of his values show him to be pro-states' rights, anti-equality (or conservative), a Darwinist, and anti-judicial power. These four dominant values explain almost all of his NSR's. Thus, case number 248 in scales number five and sixteen seemed due to his anti-judicial power attitude as did cases 257 and 260 in scale number nine. This attitude overrode the subordinate issues. Likewise his high regard for states' rights overcame his conservatism to account for NSR's in case 317 and 239 in scale number 37 and case 239 in scale number 24. His NSR's in cases 248 and 249 in Judicial Power Over State Courts (65) disappear when this scale is divided into separate scales involving liberal and conservative outcomes. Thus he supports federal judicial power over the states when it serves a conservative cause but supports the state when it does not. Hence his conservative outlook dominates states' rights in cases involving state judicial power rather than substantive state powers. His NSR in case 250 in scale 65 and his NSR in case 215 in Criminal Due Process (4) may be accounted for by the fact that they involve the civil rights of Negroes which involve both states' rights and the traditional Southern anti-Negro look. His NSR in case 243 of scale number 32 involves a Darwinist issue on which he was particularly conservative.

Little is written on Lurton's life. His father was a physician and druggist in Newport, Kentucky. Lurton quit college at the outbreak

of the Civil War, took his family South and joined the confederate army as a private. He was captured, but escaped and joined Morgan's raiders. He was recaptured, became ill near the point of death, and was paroled at Lincoln's request. Lurton worked in Tennessee politics against the repudiation of state debts. He served an appointed three-year term as state chancellor of Tennessee, was elected to the state supreme court, serving seven years, and was appointed by Cleveland to the federal circuit court of appeals, where he served for 17 years. Taft elevated him to the Supreme Court.

It may be noted that Lurton remained a staunch states' rights man in spite of his 17 years as a federal circuit judge. His 25 years in local law practice and state politics seemed to have the predominating influence over him. He did, however, favor federal courts when they conflicted with state court decisions, suggesting a quite natural tendency to sympathize with lower court federal judges consistent with his experience.

Lurton was reputed to be committed to representative government (59 L.Ed. 1508) which may account for his opposition to judicial power. He was also considered to be a protector of individual liberty. He supported both the rights of persons and property (59 L.Ed. 1509). This evaluation is consistent both with our findings that he was a libertarian (his fifth value was liberty) and a conservative (his second value was anti-equality). He defended the rights of property as "essential to human liberty and progress". This conservatism seemed to be related to his rural birth and background. Lurton was considered an expert on equity jurisprudence, and an avid follower of the old common law. He also

was an expert on admiralty and patent law. The Patent scale (29) ranks him eleventh as pro-patent and anti-competition. His principal opinions were in the areas of antitrust, tax powers, and railroad regulations. He was conservative in antitrust matters but relatively liberal on tax powers (sixth on the Court) and railroad regulation (sixth on the Court on scale 27). Lurton was particularly severe in limiting the powers of the national government except in tax matters.

When Roosevelt considered the appointment of Lurton to the Supreme Court he felt that Lurton's opinions were satisfactory on the "negro questions, on the power of the federal government, on "corporations" (antitrust), and on labor. Our data seem to indicate that Roosevelt was wrong on all four counts as Lurton turned out to be tied for the most conservative White Court justice on Civil Rights (15), the most conservative justice on Liberal Nationalism, and second only to Holmes in opposition to antitrust legislation. Lurton was the fourth most conservative justice on labor. Hence, Roosevelt's information on Lurton seemed to be quite faulty. (See Lodge, 1925, II, pp. 228-231.)

Basically, Lurton seemed to be an extreme individualist (like McReynolds) as well as a supporter of states' rights, anti-equality (conservatism), Darwinism, democracy, and liberty. He was also strongly anti-government.

Lamar. — Lamar's pattern of NSR's is not simply explained. He seemed impressed by minor legalistic issues. His major values were pro-judicial power and states' rights. These issues sporadically take on greater values in specific cases. In NSR's in Civil Rights (15) and in

scale 33 in case 355 he supported states' rights when state officials were threatened by a federal law regulating national elections. Other NSR's involve support of the use of judicial power by the federal courts (case 277 in scale 9, case 346 in scales 61 and 35, case 347 in scale 40) and support of the judicial power of state courts in case 278 in scale 32. Lamar seems selective in which cases he favors judicial power, but no clear pattern emerges. For example an NSR in case 308 in scale 65 involves a liberal outcome which apparently he does not deem worthy of the exertion of judicial power since he was quite conservative.

He was an anti-Darwinist which may explain an NSR in a patent monopoly case, number 243 in scales 65 and 42, in which he declined to support judicial power where such power would result in an anti-Darwinist outcome.

His attitude favorable to civil liberties explains most of his remaining NSR's. In cases 251 and 252 in scale 42, he refused to vote for judicial power when it would violate criminal procedural liberties. An NSR in case 333 in Labor (7), was due to his votes in cases 240 and 452 against laws discriminating against alien-operated businesses. In Criminal Due Process (4), an NSR arises because he valued liberty for whites in case 242 higher than liberty for colored races (Indians and Negroes) in cases 269, 270 and 348.

An NSR in case 358 in scale 42, was probably due to the fact that the case involved Wilson's power to appoint a Democrat to a federal post. Political party dominated the outcome of this case and Lamar supported his party.

Lamar's background was that of a wealthy Southern aristocrat. He inherited a large fortune from his grandfather who was a wealthy plantation-owner, banker, and investor. His father was a distinguished minister in Augusta, Georgia and authored religious books. His mother died when Lamar was only seven, and his family were refugees from Sherman's march on Georgia. His early adult years, like White's, were spent witnessing the military oppression of the South. This firsthand experience with civil war and reputed reconstruction tyranny led Lamar to see the need for upholding Constitutional guarantees of individual freedom according to Chief Justice White (60 L.Ed. 1254). Hence, Lamar sought to "preserve the rights of all by protecting the rights of each," leading to a high ranking of liberty in his value system.

Lamar's rural birth and upbringing may account for his states' rights stance and conservative views, but he spent most of his later life in a city, Augusta. A Southern regional influence on both issues is also likely.

His law practice was varied and he had railroads and corporations for clients as well as criminals and many injured railroad passengers suing railroads. This gives possible explanations for his moderate support for liberties in criminal cases, workers in workmen's compensation cases and shippers in railroad liability cases, that is sympathy for his former clients. It also helps explain his overall conservatism in most cases involving business as does his own background of wealth.

Lamar was elected to the Georgia legislature for two terms (1886-1889) serving on the railroad, judiciary and banking committees. He was appointed and then elected to the state Supreme Court (1902-1905).



Apparently his experience with elections soured him as he refused to run again. He disliked electoral politics and opposed the election of judges. By contrast he "loved the law for its own sake, for the truth and justice it represents" (Lamar, 1926, p. 115). This suggests a picture of a judge who would uphold judicial power over decisions arrived at by more democratic branches of government, and thus helps explain his pro-judicial power and anti-democratic stance on this issue.

He was an expert on the law code and was appointed to a commission to codify the laws of Georgia. While on the state court he favored civil liberty in criminal cases (Lamar, 1926, pp. 122-128).

15

Taft appointed Lamar to the Supreme Court in 1910. Lamar's admiration of Chinese friends among the diplomatic corps (ibid., p. 217) may have prompted his opposition to a law discriminating against Chinese. Southern justices usually voted against the claims of colored races. Lamar was, next to White, the most liberal Southerner on Negro civil rights as well. He was very sympathetic to Labor on the Supreme Court and was an anti-Darwinist.

Lamar was a very religious, ethical and moral person (ibid., p. 105) as to be expected of the son of a minister. This may help explain his support of prohibition.

It may be concluded that Lamar seems correctly categorized as a Jeffersonian laissez-fairist whose values were pro-judicial power, states' rights, conservatism (anti-equality), liberty and laissez-faire in that order.

---

<sup>15</sup>Taft apparently hoped to break the solid south politically by his appointments of Lamar, Lurton, and White to Chief Justiceship (Pringle, 1939).

Hughes. -- Hughes' pattern of NSR's can be explained by the probability that his basic values dominated issues of lesser importance to him in specific cases. These values as Chapter 7 shows were Progressivism, anti-judicial power (democracy) and liberty. He also supported the exertion of governmental power in favor of special interests (especially business).

His Progressivist ideology explains the following NSR's. In case 386 in scales 4, 6, and 31, he ignored a civil liberty claim in order to support federal narcotics regulation, a Progressivist program. In cases 265 and 266 in Liability of Railroads (27), Progressivism prompted Hughes to oppose limited liability for shippers, opposing the interests of railroads. In case 233 in scale 35, he supported the federal Pure Food and Drug Act particularly strongly. In case 317 in scale 32 he did not support state jurisdiction as he normally did, because he even more strongly supported the power of the I.C.C. In case 234 in scale 40 he favored the use of judicial power as an exception to his normal behavior, because he supported the right to investigate corporate books. This comports with the Progressivist ideology to expose wrongdoing by publicity and is particularly compatible with Hughes' Progressivist career which was launched by investigations into corrupt business practices in insurance.

Hughes' consistent opposition to the use of judicial power led to an NSR in case 224 in Patents (29). His strong support of civil liberties resulted in NSR's in case 348 in scales 33 and 65 and case 240 in scale 36.

Hughes strongly upheld the use of governmental power in aiding special interests, especially business. This is indicated by his high support of government in Eminent Domain (60) a scale on which Hughes is second. NRS's caused by this strong attitude include case 359 in Conservation (16) which also involved a land claim which was supposedly granted by Congress, cases 289, 290, and 291 in scales 3 and 14 in which Hughes supported the power of Congress to grant lands to railroads under eminent domain powers, and case 256 in scale 18.

An NSR in case 338 in Corruption:Business (44) was probably due to the fact that the case involved an alleged attempt to defraud creditors of a private estate rather than a corporation. Hughes seemed to oppose corporate corruption much more strongly than unethical practices by individuals.

Hughes' father was a "poor immigrant" minister from Wales who settled in a small New York town. He preached abolition and prohibition and brought Hughes up in a strongly religious and moral atmosphere (Pusey, 1951, I). This apparently had a lifelong influence on him as his attitudes on and off the Court have a strong moral cast, being for prohibition, against corruption, and for other moral objectives in Federal Regulation: Non-Economic (20). Hughes' political experiences were also couched in strong moral terms which included his exposure of insurance company corruption, political influence and corruption as well as the whole thrust of his Progressivist principles. Hence, a low-class status and morality influenced his later liberalism, libertarianism, and moral activism both in his pre-Court and Court behavior.

Hughes was a child prodigy who received his elementary education at home which intens<sup>e</sup>ified the parental influence. His early law practice included several underdog clients in civil cases. In one case he helped expose business financial corruption. In another case he supported stockholders against financial promoters. He joined a social reform club, worked for racial and religious equality, and protested against intolerance (Pusey, 1951, I, pp. 68-69). He was active in the Legal Aid Society, evidencing a sympathy for those deprived of civil liberties in criminal cases which he demonstrated later on the White Court. He alternated between teaching law and practicing it for several years. Hughes seemed possessed by a drive for hard work. He appeared to be an overachiever, a person driven by feelings of inferiority deriving from a lower-class status than his peers and a general feeling of social inferiority. His beard was one means of overcoming this feeling of inferiority. (See Pusey, 1951, I, pp. 95-120). He was chosen to be counsel of a state legislative committee investigating the gas utility monopoly in New York City and later aided a similar committee investigating corruption and bribery in the insurance business. He achieved much favorable publicity from his exposure of corruption in these investigations. Picked as a reform gubernatorial candidate, he won two terms, much to the consternation of party bosses. On the Supreme Court, Hughes continued to vote to punish corruption and support investigations of business records.

As governor, he acted as a better government enthusiast and tribune of the people rather than a collaborator with party leaders. His independence and support of Progressivism made him a popular state and national figure, being frequently mentioned as presidential caliber. He



supported the setting of utility and railroad rates by commission, child labor laws, women's hours laws, and workmen's compensation laws. He also sponsored other pro-labor legislation, conservation, and anti-gambling laws (being consistently moralistic). He also advocated more effective regulation of railroads and improvement of the Sherman Antitrust Law. He opposed class legislation, however, and opposed the national income tax amendment, arguing that it would undermine states' rights (Pusey, 1951, I, pp. 201-253). These opinions were consistently followed by Hughes on the White Court on which he was strongly liberal (Progressivist), pro-labor and pro-states' rights. His support of the right of Socialists to hold state assembly seats previewed a support of First Amendment rights on the White Court.

Taft nominated Hughes to the Supreme Court to avoid his possible competition for the presidency and to increase public confidence in the Court. On the White Court, Hughes was uniformly liberal on all categories, quite consistent with his Progressivist ideas and attitudes while governor. Thus he was for both state and national Progressivist programs and was pro-labor and pro-liberty. Having stated a profound faith in the people and democratic values while in politics, he thus was particularly extreme in opposition to judicial power, being second only to Brandeis in supporting democracy as a value. He was less extreme in general in supporting states' rights, however. He was moderately conservative in support of Darwinism, being sixth in support of this ideology as well as in opposition to anti-trust regulation. His business association with large corporations may have led him to a moderate approval of their contribution to the economy. Basically, Hughes was most like Brandeis and

Clarke in being a Jeffersonian-Jacksonian in ideology.

Several of Pusey's (1951) evaluations of Hughes seem contradicted by our data. He holds that Hughes was a supporter of immigrants yet he is only ninth in sympathy with the claims of aliens (scale 5). Pusey holds that Hughes supported federal jurisdiction when in conflict with state powers (ibid., I, p. 303). Yet Hughes seems clearly state-oriented both on the Federalism attitude system where he is fifth out of thirteen judges and on the Commerce Power attitude system where he is tied for fourth out of eleven judges. He did uphold federal power whenever possible, but upheld state powers even more often. He granted power to either level of government whenever it chose to exercise it. When federal courts conflicted with state courts and laws he firmly sided with states' rights, being second only to McReynolds in this respect (scale 65). Pusey holds that Hughes opposed prohibition and personally indulged in social drinking. However, he was tied for third in support of prohibition in scale 38 on the White Court. This suggests the dominant influence of his parental training.

After leaving the Court, Hughes represented business in an attack on the wartime Lever Act. His position seemed to undermine national Commerce powers but he based it on the civil liberty issue.

Pusey holds that Hughes influenced Holmes and White on the White Court. Table 40 shows a slight positive correlation between these judges but hardly suggest a major influence.

Pitney. — Pitney was called "unpredictably discordant" by Rodell (1955). His unaffiliated bloc position and 90 NSR's, highest on the Court, seem to verify this evaluation. This seems to suggest a high level of compartmentalization of his attitudes resulting in highly specific and ideosyncratic views. However, most of his NSR's can be explained in terms of his dominant values. His most extreme positions seem to be pro-Progressivism, anti-Darwinism, anti-liberty and pro-judicial power. Furthermore, he is pro-government, and pro-states' rights.

His anti-Darwinism seems based on a pro-liability position. He seemed to consistently favor the plaintiff in suits against business or government, supported business claims against government, supported the claims of workers against companies for job-related injuries, and supported creditors in suits against debtors, bankrupts, and stockholders of indebted corporations. He also supported suits for damages due to monopolistic and discriminatory business practices. However, in Fiscal Claims (18) he tended to support the claims of small businessmen (especially lawyers) more often than those of big businessmen. This seems to account for an NSR in case 416, for example. As the son of a banker, Pitney might have been expected to have been socialized to support the payment of debts and financial claims. He seems to consistently support such financial responsibility.

Pitney's dominant pro-liability, anti-Darwinist position seems to account for the following NSR's: case 316 in scale 10, case 390 in scale 44 and case 350 in scale 32 (which fit in scale 27), case 3 in scales 24



and 42 and case 25 in scale 53 (which fit in scale 27), cases 52 and 136 in scale 20 and case 159 in scales 20 and 44 (which all fit in scale 28).

Several NSR's seem influenced by his strong support of Progressivism including cases 341 and 342 in scale 10 which are related to his support of state rate regulation (scale 46), and case 340 in scale 18, related to his support of conservation.

Pitney also strongly supports the use of judicial power, being third on the Court in support of that power after Van Devanter and Lamar. On the issues of Darwinism and Federalism, Pitney supports smallness as opposed to largeness in terms of economic units and governmental units. This tendency is also apparent in his judicial power attitude. He supports lower court judges most strongly, especially federal judges. He is the most extreme and consistent justice in supporting the power of federal judges on the lower courts (scale 40) and the power of judges over executive officials (scale 61). He favors judicial power in general in scale 57. He favored federal judicial power over state laws (being fourth out of 11 judges), but when it was a choice of federal judicial power as opposed to state courts (scale 64), he favored state courts, being third highest in favoring state courts. Similarly he supported lower federal courts when they conflicted with the exercise of Supreme Court powers in numerous cases. Moreover, Pitney supported lower court anti-labor injunctions consistently and lower court convictions in criminal cases without exception. In addition, he supported lower court judges in their discretion in charging juries or reversing jury decisions. His

sympathy with lower court judges<sup>16</sup> may well be explained by his long experience as a lower court (state) judge which led him to defer to their decisions and protect the exercise of their powers and prerogatives. However, Holmes and Lurton who had even more experience as lower court judges did not share Pitney's parochial support of judges in any of the above situations except that they also supported judges in conflict with jury decisions (scale 62).

Pitney's NSR's which may be accounted for by supporting judges over jury decisions include case 331 in scale 9, cases 272 and 352 in scale 26, and case 384 in scales 32, 42 and 65. NSR's which may be due to supporting state courts in the face of federal court power include case 384 in scales 32, 42 and 65, case 265 in scales 42 and 65, and case 68 in scale 42. NSR's which are probably due to Pitney's support of lower federal court powers include case 380 in scale 27, cases 338 and 335 in scales 65 and 41, case 267 in scale 3, case 268 in scale 42, case 8 in scales 12 and 8, case 177 in scale 22, case 185 in scale 33, cases 96 and 184 in scale 41, and case 208 in scale 53. In case 307 in scale 36, an NSR seems due to a support of judicial power in general. In addition, the NSR in case 97 in scale 29 results in limiting the power of the Supreme Court and thus enlarging lower court powers.

Pitney strongly supported the conviction of criminals by lower courts even in the face of civil liberty claims which resulted in NSR's in cases 269 and 270 in scale 33 and cases 96 and 184 in scale 41. Similarly Pitney strongly supported convictions for corruption (scales 37 and 44)

---

<sup>16</sup>His support of I.C.C. powers could derive from perceiving them as a quasi-judicial and authoritative body.

and violation of prohibition laws (scale 38). This might be due to support of lower court judges or due to the morality aspect involved in these issues (as in Progressivism generally). These issues overcame other issues such as states' rights for Pitney causing NSR's in case 121 in scales 46, 47, and 28 case 160 in scale 18, case 136 in scale 20 (involving the corruption issue) and cases 449, 86, and 165 in scale 33 (involving the prohibition issue).

Pitney, as a state judge and politician for almost all of his pre-Court political career, carried states' rights convictions to the Supreme Court. This issue dominated many lesser issues in Pitney's decisions. This resulted in NSR's in case 347 in scale 60, case 382 in scales 18 and 41, case 385 in scale 18, case 317 in scales 22, 24, and 47, case 343 in scale 65 (which fits better for him in scale 36), case 452 in scale 42, case 147 in scale 14, cases 103 and 104 in scales 20, 35, and 44, cases 113 and 117 in scale 35, case 68 in scale 42, and case 72 in scale 28. Practically all of the above cases fit without an NSR in one of the federalism scales (32 or 33). In addition other NSR's seem due to the states rights variable. Case 20 in scale 7 indicates that Pitney supported state powers in legislating on wage and hour laws but not federal powers. Likewise in cases 155 and 156 in scale 9, he opposes F.E.L.A workmen's compensation claims but otherwise he support claims under state programs.

At least one issue completely predominates Pitney's pro-state bias (in addition to the prohibition cases noted above). That issue is the party-related Negro Civil Rights issue (scale 15) which results in NSR's

in cases 145 and 146 in scale 33.

Pitney differentiates between state power, which he supports, and municipal powers, which he does not. He shows a narrow view of city powers to tax and abrogate contracts which seems to result in NRS's in case 363 in scale 36, case 32 in scale 12 and case 140 in scales 12 and 40.

Pitney generally supported the claims of shippers against carriers for damages but not when the time limit specified by federal law had run out. This technicality seems to cause NSR's for him in cases 88, 94, 107, and 443 in scale 27. He also seemed less sympathetic than other judges to humane considerations in damage cases such as an injury to a child (case 71) and a delay in shipping a casket (case 379) in this scale.

Other NSR's result from his perception of the issue of a case differing from other judges. Case 287 is seen as a NSR in scale 46 but not in scale 35, while case 445 is seen as not belonging in case 47 but fitting in scale 18 instead. Thus all of Pitney's NSR's seem accounted for by the above explanations except for two cases.

Pitney was descended from a prominent New Jersey family. He was the son of a prominent lawyer, judge, and banker. During a seven year law practice he was active in Republican politics. He became the leader of his party in his section of the state and chaired the 1895 state party convention. He served two terms in Congress from 1895 to 1898. He was elected to the state senate in 1898 where he became its president. In 1901 he was appointed to the state supreme court. In 1908 he was appointed state

Chancellor, a position he held until elevated to the national Court in 1912 by Taft (National Cyclopedia, XV, p. 61).

On the state courts, he rendered many opinions against civil liberty claimants and labor interests, including rulings against peaceful picketing. His reputation as an anti-labor judge caused no problems with Taft but did prompt bitter opposition by labor in a confirmation battle in the Senate. He was confirmed by a 50 to 20 vote. Pitney had ruled favorable to labor in workmen's compensation cases, however.

Rodell (1955) claims that Pitney had a compulsion to have the national Court approve his lower court decisions. His consistent support of the plaintiff in liability cases was held to be due to his following the punitive New Jersey common law in those issues. This may be true to an extent but our data suggests that this is part of a larger anti-business, Progressivist stance by Pitney.

Pitney is uniformly liberal except for his anti-civil liberty and anti-labor attitudes. However, he also supported prohibition and judicial power. He opposed the federal government, however, in Fiscal Claims (18). This issue seems related to his position on liability. He felt that both national government and state government (scale 59) should pay off questionable debts to claimants.

Pitney seemed to support highly the value of equality. However his Progressivism seems more motivated by middle-class values than a true equalitarianism. A disinterest in civil liberty and labor claims seems to rule out support for lower-class interests. He seemed to support middle-class interests against the upper class. Hence, he appeared to be a middle-class Progressive.

One characteristic pervades all of Pitney's attitudes and values. He was pro-government. In the Progressivist attitude systems and General Welfare, he sided with the government. In liberty issues he also supported the government. He supported judicial power which suggests an authoritarian outlook (rather than a democratic one.) He was also pro-government on the laissez-faire attitude system, being the third most extreme justice in this regard. Hence, his whole attitude-value system seemed dominated by a pro-government, authoritarian stance. Pitney, then, seems correctly categorized as an authoritarian Progressivist.

The reason behind his authoritarianism is unknown as no biography is available for him. A close and faithful following of his father's footsteps, patterning his career after his father, and stepping into his father's law practice suggests a personality in which authority is paramount. It is to be remembered that on all the Table 43 measures of dogmatism, he ranked uniformly high in dogmatic tendencies.

Pitney's middle-class background likely resulted in a middle-class outlook. His eastern, urban environment probably influenced his Progressivism. His lower court judicial experience encouraged his consistent support of lower court judicial power as he identified himself with that role. That role probably encouraged him to support respectable law and order concerns rather than civil liberty and labor claims. His thirty odd years in state politics most likely influenced him to support state powers over federal powers. Pitney's experiences seem to have strongly influenced his attitudes.

Van Devanter. --He has the lowest rate of NSR's by far of any White Court justice. He has less than half as many "inconsistencies" as Day,



the second most consistent judge. He has 18 NSR's, of which 17 are readily explainable. His most highly ranked values are judicial power (anti-democracy) and nationalism. One-third of his NSR's are explained in terms of one or both of these values dominating issues less salient to Van Devanter. Case 269 in scale 4 both involves nationalism and sympathy for Indians either of which could account for the NSR. Likewise, case 351 in scale 14 involves both nationalism and judicial power. Other NSR's apparently caused by his strong nationalism include cases 350 and 52<sup>17</sup> in scale 28, case 9 in scale 38, and case 51 in scales 20, 35, and 38. The latter two cases involve Van Devanter's opinion that Congress could delegate to the states the power to outlaw the interstate shipping of liquor. In case 147 (Missouri v Holland) in scale 33, an NSR seems to involve a pro-state vote. In actuality federalism is probably not as important to him in this case as is his anti-conservation stance.

The other NSR's are due to differences in perception between Van Devanter and his brethren in which his votes are perfectly consistent when classified in the proper category. Thus, case 63 in scales 18 and 53 show NSR's but do not do so in scale 28, case 10 causes an NSR in scale 20 but does not when viewed as part of Criminal Due Process (4), case 24 shows an NSR in scale 42, but not in scale 9 (Workmen's Compensation : No Federal-State Conflict), and the NSR in case 35 in scale 53 is not present in scale 18 (Fiscal Claims). Case 127 in Civil Liberties : Property (3) is not a NSR in Prohibition (38) and moreover involves the confiscation of a private business (a brewery) which would clearly violate a conservative's conscience. A tie-breaking case (number 606) in Civil Rights (15) gives

---

<sup>17</sup>Case 52 involves a federal bankruptcy act.



him an NSR, but this case involves a Negro's right to vote in a Democratic primary, hardly a cause calculated to interest an old Republican like Van Devanter.

In the one unexplainable NSR, Van Devanter supports federal taxation of corporations (case 44 in scale 19) while opposing war taxes and taxing individual incomes.

Van Devanter was the son of a successful small-town lawyer in central Indiana. After practicing law there for three years he moved to the booming territory of Wyoming in 1884 where chances for personal success were much better. Wyoming was a wild territory where land-grabbing settlers often fought Indians for land (Pearson and Allen, 1937, p. 188), and railroads (especially the Union Pacific) and cattle interests were exploiting open and public lands for huge profits. Van Devanter made good use of his opportunity in defending these exploiting business interests in the courts. He was a friend of wealthy cattle ranchers and later became general counsel for the Union Pacific. He defended its employees against charges of murder in railroad land-grabbing schemes (*ibid.*) and fought suits for personal injury and property damages by railroads. Van Devanter grew wealthy by aiding corporations and business in unethical practices. Hence, he might be expected to oppose Progressivist aims to curb these same excesses. He did consistently oppose Progressivism while on the Supreme Court. Van Devanter consistently opposed Conservation (14)<sup>18</sup> and smaller land owners in Land Claims (16) being the most extreme justice on the General Welfare attitude system by supporting special

---

<sup>18</sup>This contradicts Kelly and Harbison (1963, p. 687) who claim he was a liberal on conservation.

interests and opposing the general welfare. He was the third most conservative justice on Progressivism (after McReynolds and White), exhibiting the procorporation bias which so well rewarded him while in private practice.<sup>19</sup> He is tied for the most pro-business judge in the second period of the White Court.

From 1887 to 1888 Van Devanter was city attorney for Cheyenne, Wyoming. He was a member of the territorial legislature for a year. From 1889-1890 he was an appointed member of the Wyoming Supreme Court (territorial) becoming Chief Justice. He was active in the Republican party becoming chairman of the state committee and a member of the national committee. From 1897 to 1903 he was Assistant Attorney General of the United States assigned to the Department of the Interior. He was in charge of the public lands where he was unfriendly to Indian interests but kind to his former clients engaged in exploitation. From 1903 to 1910, he was a Roosevelt-appointed federal circuit judge. In 1910 Taft elevated him to the Supreme Court for reasons of geographic balance on the Court as well as his general attitudes. His railroad and cattle baron connections were influential in his advancement.

Van Devanter's reported support of Indian rights while on the Court (Kelly and Harbison, 1963, p. 687; Pearson and Allen, 1937, p. 191) does not seem borne out by our data on the White Court as he is ninth out of thirteen judges in support of Indian rights. He was called a prohibitionist but this seems contradicted by his position of fifth judge in opposition to prohibition (scale 38).

---

19. See National Cyclopedia; Meyers, 1925; Pearson and Allen, 1937; Murphy, 1964; McHargue in Murphy and Pritchett, 1960, pp. 88-89.

He had a keen legal mind and was a task leader of the Court under Taft (Murphy, 1964, p. 88), so he must have been an influential justice. He was reputed to be afflicted with "neurotic pen" in that he was often unable to express himself in writing. This accounted for the fact that he authored very few majority opinions on the Court, frequently dissented without a written opinion, and often suppressed his dissents for this reason (Pearson and Allen, 1937, p. 186). This may make his attitudes seem more moderate than they actually were. Only three justices dissented less frequently than Van Devanter.

As Lerner (1954) points out, Van Devanter was not always reactionary. In the first period of the White Court, he was fairly liberal (6th of 11) on Liberal Nationalism. Otherwise he was consistently conservative. His highest value was pro-judicial power, which may be accounted for by his predominant experience as a judge (10 years) rather than an elected official which led him to maintain harmony with his former judicial role. He was secondly a strong nationalist. As a Westerner, he was quite likely to support federal power just as most Westerners looked to federal help in developing and exploiting the West. His Darwinism probably developed out of the severe competition in the west from which he emerged as presumably one of the fittest. His law practice experiences probably convinced him that life was a Darwinist struggle with the strong taking what they can get.

In being a nationalist and conservative, he seemed to be a Hamiltonian in philosophy quite like McKenna, White, and Day.

Day. -- Day is relatively consistent in terms of our scales. He has the second lowest rate of NSR's. Most of his NSR's can be explained in terms of three basic factors: extreme nationalism, foreign power considerations, and a narrow view of city powers.

Day was a national officeholder for seven of the eleven years that he held public office. He was in addition a Republican and the Secretary of State of his country. These reinforced his nationalist tendencies which were third among nationalist-minded White Court judges. Nationalism could explain his NSR's in case 308 in scale 28 and case 397 in scale 27.

Day's experience as Secretary of State may have led him to differentiated views on foreign policy matters which caused some NSR's. Thus cases 132, 133, and 134 in Fiscal Powers (scale 19) involved discriminatory federal taxation of wartime munitions company profits (which might have impeded war production), while case 15 involved an issue of flexibility in setting tariff rates. Case 246 in scale 36 involved the power of an island possession, Puerto Rico, to tax a government contracted offshore dredge. These all involve issues with foreign policy implications.

Cases with NSR's in which Day questioned broad powers of municipalities to abrogate contracts include 280 in scale 60, 263 and 16 in scale 12, and 279 in scales 12 and 65.

In case 282 in scale 3, Day's sympathy for Indian rights seemed to result in an NSR. An NSR in case 184 in scales 40 and 1 seems related to his support of judicial power.

His Progressivist sympathy seems to cause an NSR in case 233 in scale 20 where he supports a state pure food and drug act which fits better for Day in scale 35. Likewise an NSR in case 349 in scale 22 is related to his strong support of the power to investigate businesses and fits better in scale 43 for Day. Other NSR's seem related to Day's different perception of the issue of the case. Case 340 in scales 14 and 16 belongs to the Fiscal Claim issue (scale 18). Case 359 in scales 14, 18, and 32 fits better for Day in scale 16. Case 307 in scales 42 and 65 fits better in scale 36. Case 71 in scale 27 is seen to involve the issue of scale 9 since it involves a personal injury rather than property damage. The NSR in case 421 in scales 1 and 20 is most likely due to party considerations since the charges of exceeding legal political campaign expenditure limits is leveled against a fellow Republican senatorial candidate.

Day was descended from a long line of prominent lawyers and judges. His grandfather was on the Ohio supreme court. His father was a small-town lawyer and Chief Justice of that court. Day's law practice consisted mainly of such clients as small businesses and local railroads such as the Wheeling and Lake Erie Railroad. He defended railroads from suits for personal injuries and property damages. He was unfamiliar with the evils of big business or industrialism.

He was elected judge of the court of common pleas after being nominated by both parties. He served from 1886 to 1889. Harrison appointed him to the federal district court in 1889, but he soon resigned for reasons of health. He became legal counsel and political advisor to McKinley

from 1889-1898. In 1898 he became Secretary of State. From 1899 to 1903 he was on the federal court of appeals. In 1903 Roosevelt elevated him to the Supreme Court.

Day is characterized by Rodell (1955) as motivated by personal decency and noblesse oblige. He was a typical **Midwestener** suspicious of Eastern economic power. He held convictions contemporary with his time period. His political and social thinking reflected the Ohio business community of his time (McLean, 1946, p. 24). Hence, Day's moderate support of Progressivism seemed to be a product of his social and political environment, a small-town and middle-class Progressivism. His support of labor and civil liberty claims was low as would be expected from one so little acquainted with lower-class problems and interests. On most issues and most close cases Day cast the deciding vote, being the most moderate justice and least in the extremity of his attitudes, next to Holmes (Table 43). Similarly, next to White, he was the least likely to be in a dissenting role.

On antitrust issues Roosevelt considered Day's pre-Court opinions as "right" (McLean, 1946, p. 55), which seemed to be a correct evaluation as Day was fifth out of thirteen judges in upholding such legislation. Roosevelt was generally pleased with Day's Supreme Court decisions. Roelofs (1950) considered Day liberal on I.C.C. powers. Day was only moderately so, being sixth out of thirteen for such powers on the White Court. Roelofs also held that Day supported federal police powers and taxation. However, on the former issues Day was moderately conservative, being eighth in support of federal regulation but sixth in support of Liberal Nationalism. He was moderately conservative in support of taxation as

well, being eighth in support of state taxation and ninth in support of federal taxation. Roelofs (1950, p. 50) also holds that Day opposed the exercises of judicial power, but he was actually in the center of the White Court on this issue.

McLean (1946) holds that Day was the "social leader" of the Court and National Cyclopedia (XXXII, p. 22) holds that he was a judge of great learning who was expert in matters such as corporation taxes, bankruptcy, patents, and contracts. However, Taft believed Day to be a weak member of the Court (Pringle, 1939) and our data suggested that he was influenced by other justices in his behavior. It is likely that his influence derived from his position as the swing vote in so many cases rather than personal skills.

McLean is clearly incorrect in stating that Day narrowly construed national powers and broadly construed state powers. All indicators show that Day was a strong nationalist. He was third out of thirteen judges in support of nationalism on the Federalism attitude system. He supports workmen's compensation claims when federalism questions are not at issue . but does not when federalism is raised as an issue undermining the claim (compare scales 8 and 9). The nationalist influence on his NSR's has been noted.

Day's nationalism may be explained by his Republicanism, his experience in world affairs as Secretary of State, and his lifelong experience in national affairs rather than state politics. Thus he spent six years in a national office and nine years as McKinley's advisor in Congressional and national politics. He spent only three years in a state office.





His primary values, Progressivism (equality) and nationalism, can thus be explained in terms of his experiences. His moderate Progressivism and nationalism seem to place him as a Hamiltonian with liberal tendencies.

McKenna. -- He has been called by Rodell (1955) a "sporadic spokesman" against property interests. He was certainly sporadic. He clearly shifts from a liberal on Progressivism to a conservative in the second period (under Wilson's presidency). His total of NSR's indicates much sporadicism. The scales show 83 NSR's for McKenna, second highest on the Court. It has been recorded that McKenna's thinking late in his career (which includes the White Court as he retired in 1924) was slow and confused (McDevitt, 1964; Pringle, 1939). This may account in part for McKenna's apparent in-  
20  
consistencies.

A large majority of McKenna's NSR's seem to be a result of perceiving cases to be properly in one category while other justices see them in different categories. For example, case 112 is seen by McKenna as being a State Taxation: Due Process (36) case while most other justices saw it as a Commerce: Taxation (34) case. Moreover, McKenna seemed to attach relatively little significance to the judicial power issue, deciding these cases on the more substantive issues involved, such as Progressivism. This resul-  
21  
ted in many NSR's in the judicial power categories.

---

<sup>20</sup>Pusey (1951, I) says he had difficulty making up his mind.

<sup>21</sup>NSR's caused by a different perception of the issues included in the case by McKenna are as follows: case 367 in scale 9 fits more appropriately for McKenna in Jury (962). Case 333 in scale 10 fits in scale 7 with no NSR for McKenna, involving "yellow-dog" contracts. Case 332 in scale 32 belongs in scale 8 in McKenna's eyes. Case 376 in scales 32, 65, and 42 fits best for McKenna in scale 8. Cases 251 and 252 in scale 37 belongs instead in scale 4 in McKenna's perception. Case 380 in scales 65 and 42, he perceives as in scale 27. Case 213 in scale 65, he sees as more

MC

his part

the second

remide

2019

242

22

in case

27 2012

523

1-231

1

1

- 325

—

1

19

1-44

11

1

...



2

3

1. **Introduction**  
 2. **Methodology**  
 3. **Results**  
 4. **Discussion**  
 5. **Conclusion**

1

3.



McKenna also has certain ideosyncracies which reveal themselves in his pattern of NSR's. He is biased toward a protection of Indians (being the second most sympathetic judge over the whole period). This issue overrides most other issues in various scales resulting in NSR's in case 282 in scales 14 and 16, case 318 in scale 33, case 56 in scale 4, case 62 in scale 18, and case 56 in scale 38. On the other hand, McKenna was only lukewarm in support of Negro Civil Rights (15), resulting in an NSR in case 537 in scale 4. He seemed prejudiced against Chinese aliens both as revealed by his political career (McDevitt, 1946) and as evidenced by votes against Chinese in all cases involving them. Those votes, resulting in NSR's, include cases 240 and 452 in scale 3 and case 386 in scale 19.

McKenna seems contradictory in voting on federal-state conflicts. In case 319 in scales 22 and 35 he votes for state jurisdiction against a federal act. Likewise in a Prohibition (38) case, numbers 165 and 449, he is pro-state. However, in a tax case (number 335 in scales 36, 40, 41, 59, 61, and 65) and in rate regulation cases (388 in scales 10 and 46; 46 in scales 22, 24, 32, and 35; 317 in scale 35), he consistently favors federal power over the states. Federalism here may be less important than the other issues involved. However, he supports conservation actions only when taken by the state, but not similar federal action.

---

properly in scale 12. Case 347 in scale 65, he sees as scale 60. Case 530 in scale 41, he sees as belonging in scale 14. Case 38 in scale 7 and case 184 in scale 40, he sees as more properly in scale 1. Case 64 in scale 16, he sees as scale 14. Case 195 in scale 36, he sees as scale 34. Cases 55 and 421 in scale 37, he sees as scale 20. Case 136 in scale 44, he sees as scale 28. Case 88 in scale 42, he sees as scale 27. Case 127 in scale 38, he sees as scale 3. Case 438 in First Amendment (1) also involves monopolistic tendencies of a press organization, and McKenna seems to vote in that case as if the dominant issue were monopoly, voting for more competition. Thus, McKenna seemed to disregard the judicial power issues and concentrate on substantive issues, particularly preferring to consider liberty issues (scales 1, 3, and 4).



In Patent (29) cases, several NSR's are found for McKenna. He strongly supported most patent rights, but not the rights of trademarks (causing NSR's in cases 373 and 375), nor agreements to fix prices as a result of patent rights (causing NSR's in cases 58, 435, and 436).

He tended to support wartime measures, especially federal taxation and tariffs, but no other federal tax laws. This caused an NSR in case 210 in scale 19.

McKenna has an NSR in case 357 (in scales 40 and 61), already mentioned as bring about a party vote. Other of his NSR's seem to defy explanation. He supports the civil liberties of labor leaders in cases 612 and 613 in scale 4 causing NSR's while failing to support labor's interests in case 637 (Lockner v New York) and case 427 (Wilson v New) both of which involve wage and hour laws and also result in NSR's. He supports the Mann Act in case 336 but weakens it in case 10. Both votes are NSR's. He seems to reverse his own position in quite similar cases, for example, cases 343 and 111, which involve the same state and same principle revolving around the Contract Clause. It is possible that Clarke influenced McKenna to a liberal position in case 111. Influence by other judges could explain his votes where scales cannot. Clearly, his positions

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

do seem "confused".

McKenna was the son of lower-class Irish Catholic immigrants. His father was a baker and a Democrat. His early Philadelphia environment was charged with race prejudice and religious bigotry. His family moved to California when he was twelve and settled in a small Irish Catholic community. The social center of the town was an Irish saloon (McDevill, 1946). It was an environment which no doubt influenced McKenna's latter opposition on the Court to prohibition (he was third on the Court in such opposition.)

His father died when he was 15 and he was forced to help support his family in the bakeshop. His elementary school, high school, and college training were in Catholic schools.

When McKenna entered politics at 22, most local offices, the state and the nation were controlled by Republicans, so he opportunistically abandoned his father's party and became a Republican. On the White Court on most party-related issues as Civil Rights (15), Libertarianism, the rights of aliens (4), and Bankruptcy (28), McKenna is the least regular Republican (next to Holmes). He votes like a marginal Democrat on these issues. This is probably due to his early parental political socialization in Democratic values. One party-related issue on which McKenna votes similarly to other Republicans is Federalism. Here regional influences are probably dominant. Just as Van Devanter's nationalism seemed related

to the Westerner's need for federal help in developing the area, so McKenna's outlook seemed similarly motivated. Moreover, like Van Devanter and Day, McKenna's political career is mostly nationalist-oriented, unlike Pitney.

McKenna's career as a rural attorney was brief and undistinguished. He was primarily a politician and office-seeker. He was elected county district attorney at age 22 in 1866 and served until 1870. He was elected to the state legislature in 1875. He unsuccessfully ran for the House speakership in 1876. He unsuccessfully ran three times for Congressman from 1876 to 1880, but finally won in 1884. He served in Congress from 1885 to 1892. He was appointed a federal circuit judge by Harrison in 1892 and served until 1897 when his former Congressional friend, McKinley, appointed him to the Attorney Generalship.

Thus McKenna served in state office for only six years but served in national office for fifteen years. Furthermore, he unsuccessfully ran for federal office during a six year period. Hence, it is not surprising that on the White Court he was a strong nationalist. Party, region, and office-orientation combined to influence him toward nationalism.

McKenna was by far the White Court justice most thoroughly grounded in politics both in terms of serving in elected office and running for office. One might conclude that he would be more liberal and more likely to oppose judicial power. It is true that in the first period of the White



Court, he was relatively liberal on Progressivism (fourth) and moderately opposed to judicial power (sixth). However, as he grew farther away in time from his political career he apparently grew more conservative. In the second period, he became conservative on Progressivism (seventh) and less opposed to judicial power (seventh of nine justices).<sup>22</sup> Moreover, he did take on the role of a lower court justice for six years, and could be considered to have been influenced by that role.

McKenna's political environment in California was one in which graft and corruption were commonplace and acceptable. His career in the legislature coincided with the wholesale bribery of that body by railroads. In campaigning, he defended such activities saying that there may be wisdom in bearing the ills of corruption and spoils (McDevitt, 1946, p. 37). There is evidence that he accepted the necessity of using political office to obtain special favors for his constituents and interests that supported him. Hence, he sponsored bills for certain government payments for constituents, tax favors and exemptions, constituents claims against the federal government, government land grants to railroads in his district, the taxation of oleomargarine (which was competitive with certain of his constituents), and more funds for a navy base in his district. His vote against the I.C.C. was cast because he felt it would hurt the railroads in his district

---

22. McDevitt, 1946, p. 126 says that McKenna declared his belief in the competence of law-making bodies. It seems that he was not consistent in upholding them, however, according to these findings.

(McDevitt, 1946). Hence, his political experience led him to accept as part of the political game the logrolling, use of political influence for special favors, and corruption which so infuriated Progressives. Hence, when on the court, he often refused to chastise such activities. He was the White Court justice most favorable to Corruption in Government (37) and Corruption (17) in general. He supported business claims against the national government in Fiscal Claims (18). Furthermore, he is second only to Van Devanter in sanctioning the granting of privileges to special interests in the General Welfare attitude system including Patents, (29), and Conservation, (14). Clearly both his and Van Devanter's regional environment saw the widespread occurrence of business exploitation and both benefited from defending it in their pre-Court careers.

McKenna served in the House on the powerful Ways and Means Committee with McKinley. Although his tenure on the federal circuit court was criticized for mediocrity, his friendship with McKinley aided him in his appointment to the Supreme Court.

While serving as an Attorney General, McKenna took a special interest in the proper care of federal prisoners and introduced several reforms. This humanitarianism was also evidenced after his appointment to the Court in the support of Criminal Due Process (4), Labor (7), and workers in workmen's compensation cases. Although he was not sympathetic to aliens (particularly Chinese) while in Congress, on the circuit court, or as Attorney General, while on the White Court he moderately supported the rights of aliens (scale 6), being sixth out of twelve judges.

Also while Attorney General, McKenna threatened the Union Pacific with federal governmental foreclosure for debt and thus forced it to pay the full amount on federal liens. This does not suggest a person who was a tool of the railroads as Myers (1925) charges. McKenna's vote against the I.C.C. and help to railroads while a Congressman seems to be misleading. As state legislator he introduced bills to regulate the railroads (McDevitt, 1946, p. 31). On the White Court he consistently upheld carriers' suits against railroads and in the first period took anti-railroad positions in workmen's compensation cases, the I.C.C. (22), Rate Regulation (23), and Discrimination (24). In the second half of the White Court, however, he became conservative in most cases. McKenna had a paralytic stroke in 1915 and became increasingly senile thereafter. He became slow, confused, and indecisive. Whether his health problems resulted in his increasing conservatism is a purely speculative question, however. The political party factor may have been the dominant influence.

McDevitt (1946, pp. 130-132) correctly states that McKenna supported pro-labor legislation while on the Court. He was seventh of thirteen judges in that regard. He also holds that McKenna was "moderate" on Contract Clause cases (p. 112). This is incorrect. He was the second most conservative justice on the White Court on scale 12.

McDevitt (1946, p. 182) correctly states that McKenna was national-minded, but holds that this was also true of his position on state laws involving the Commerce Clause. The latter is not true since he was fourth of thirteen justices upholding such state legislation. McDevitt (p. 183) also suggests that he was illiberal on First Amendment cases, yet he was fifth of twelve judges, and showed support of this as well as other liberty claims.

McKenna is characterized as holding that economic and social changes demanded and justified new governmental exercises of power but that property owners should be protected as they are entitled to the fruits of their labor. McKenna felt that protecting civil liberties was the most important job of the Court (McDevitt, 1946). These conclusions are not contradicted by our data, except that they show that McKenna became very conservative on Progressivism cases after 1915.

McKenna is also held to regard precedent as sacrosanct (ibid., p. 202). He is also characterized as having no legal philosophy (Dictionary of American Biography, XII, p. 87).

His values are anti-general welfare (deriving from his experiences as a politician), nationalism, laissez-faire (perhaps deriving from his father's Jacksonian Democratic tendencies), moderately pro-liberty and pro-labor. His valuing of equality (Progressivism) and democracy (judicial power) shifted during his tenure on the Court, so they are difficult to evaluate. He was quite anti-Darwinist, however. This seems likely to derive from his low-class status in the manner described in Chapter 8. His pro-labor stance may be similarly derived from his class status. His libertarianism could be a result of his father's political party, a basic humanitarianism, or possibly also a result of his class status. Basically, his overall conservatism and nationalism seem to place McKenna as a Hamiltonian in philosophy.

McReynolds. -- Justice James McReynolds has a high rate of NSR's which would likely be even greater except that he votes in so few cases in the first period. This reinforces a characterization of his personality as dogmatic and compartmentalized.

His NSR's are largely explainable in terms of a pro-Darwinist, pro-business attitude, an anti-judicial power attitude (pro-democracy) and a pro-states' rights stance.

His strong pro-business and Darwinist view shows up in many of his NSR's in which he supports business, particularly big corporations and banks, and the wealthy. In case 121 in scale 45, an NSR results from a pro-bank vote. He supports the property rights of big business much more fervently in scale 3 than those of small property owners. In case 457, an NSR results from his support of J. P. Morgan. NSR's in case 406 in scales 3, 28, 30, and 44 and case 109 in scales 3, 28, and 44 resulted from supporting majority stockholders and corporation directors rather than minority stockholders. In case 424 in scale 19 he opposed an excess profits corporation tax. In cases 52 and 136 in scale 20 he supported banks against debtors. In case 110 in scale 28 and 44 he refused to punish bank officials for negligence. In an NSR in case 200 in scale 27 he sympathized with a railroad's attempt to fight state supervision. In cases 155 and 156 in scale 9, NSR's result from his opposition to the more severe state workmen's compensation laws, whereas he supported many claims under federal law. He takes this position in spite of his otherwise preferment for state rather than federal jurisdiction.

McReynolds' strong support of states' rights seemed to result in NSR's in case 365 in scale 5 where he narrowly construed Congressional power, case 345 in scale 22, case 185 in scale 40, case 338 in scales 28 and 40, and case 8 in scale 42. His strong opposition to judicial power, especially federal, seemed to result in NSR's in case 378 in scale 10, case 380 in scale 27, case 338 in scale 28, cases 343 and 344 in scale 36, and case



381 in scale 42. An NSR in case 165 in scale 33 is also due to a judicial-restraint position since he declined to make a sweeping decision as to the meaning of the Eighteenth Amendment. He preferred to wait for a case by case determination of its meaning.

McReynold's extreme illibertarian position on First Amendment freedoms seemed to lead to an NSR in case 407 in scale 40. One of his few liberal views included a firm opposition to prohibition which seemed to result in NSR's in cases 182 and 400 in scales 3, 33, and 38. In these cases the effect of his anti-prohibition, pro-state, and pro-property rights attitudes seemed to mutually reinforce each other to cause the NSR's.

Other NSR's seem to result from McReynolds' differences in perception of the real issue of the case. Thus, case 376 in scale 65 was seen to belong in scale 8, case 433 in scale 12 seemed to fit better in scale 46 for him, case 64 in scale 32 fits better in scale 14, case 140 in scale 40 fits better in scale 12, case 171 in scale 40 fits better in scale 3, and case 25 in scale 53 fits better in scale 27. Several cases in judicial power scales seemed to result in NSR's if they involved Progressivism or pro-business issues and appeared dominated by the latter issues, in McReynolds' decisions.

McReynolds' strongly conservative views which were pro-property and pro-business, Darwinist, individualistic, and pro-states' rights seemed to be implanted in him by his autocratic and dogmatic father and reinforced by his conservative rural Southern environment. This is consistent with concepts of political socialization (Dawson and Prewitt, 1969).

His father was a surgeon and plantation owner, who was uncompromising and narrowminded, a pattern followed by the justice. The father was a

states' rights Democrat. He, too, was apparently a Darwinist as he believed in "natural selection". He strongly supported the rights of private property and felt the state's obligation was to protect it. He opposed such "socialistic" ideas as free public schools (Early, 1954, pp. 26-30). McReynolds' mother influenced him towards a religious and moralistic fervor.

These influences cast McReynolds into a strongly conservative mold. They were reinforced, moreover, by a network of environmental and social influences of a similar character. This environment was small-town, aristocratic, and conservative, heavily influenced by traditionalism, provincialism and isolation. The dominant ideas were those of the "plantation aristocracy" in their antebellum purity. They included individualism, self-help, a weakened respect for political authority, laissez-faire, and Jeffersonian ideas of localism, states' rights and strict Constitutional construction. These influences permeated McReynolds' philosophy at least until he left the South at age 41 (Early, 1954, pp. 1-18).

McReynolds moved to an urban environment. But his 1907 to 1912 New York environment was the field of corporation law in which his natural conservatism was reinforced by serving and being regarded by large corporations who fought governmental and Progressivist controls. His only liberal tendencies were during 1903 to 1907 as Assistant Attorney General and 1913 to 1914 as Wilson's Attorney General. In these periods he prosecuted anti-trust law violations. This was consistent with his conservatism in controlling trusts and economic concentration to restore healthy "natural competition" to make the economy secure for individualism.

---

23. This was his position when he ran for Congress in 1896 as a Gold Democrat. Early, 1954, p. 51



His Vanderbilt training also reinforced his laissez-fairist tendencies. During his early Nashville law practice (1885-1903), he profited from real estate and banking ventures. In Tennessee politics, he favored trust regulation, a sound currency, economy in government, tariff reduction, the protection of private property, and strict construction of the Constitution. He refused to support Bryan in 1896 and bolted the party to run unsuccessfully for Congress as a Gold Democrat. He was reputedly skeptical of the representative process. During the first period of the White Court, none the less, he strongly opposed judicial power in favor of the democratic process. This may have been caused by his anti-federal tendencies, however.

McReynolds was appointed to the Supreme Court by Wilson on the strength of his liberal views in opposition to monopolies. McReynolds had been a vigorous prosecutor of antitrust cases under Roosevelt and Wilson. He was fairly liberal on Antitrust (sixth out of thirteen justices), but his overall conservatism made Wilson sadly regret his appointment. Kelly and Harbison (1963, p. 687) say that McReynolds "gradually became more conservative". It is true that he was slightly more liberal in the first period than the second, but he was the most conservative justice on Progressivism in both periods. The chief difference is that, in the first period, he was less ready to support judicial power over the other branches of government.

McReynolds believed strongly in natural competition and the small merchant and manufacturer so he was willing to oppose monopolistic practices but not big business per se (Link, 1947, pp. 116-117; Early, 1954, pp. 319-330; Pearson and Allen, 1937, pp. 228-230).

Early (1954, p. 113) correctly holds that McReynolds was against the judicial power of the federal government, felt that the Court should rigidly define boundaries between state and federal jurisdiction (p. 127), and wanted to preserve existing state powers (pp. 188, 369) although he wished to restrict both federal and state power. McReynolds was slightly less restrictive of state regulation of business (State Progressivism).

McReynolds wanted a literal (strict) interpretation of the Constitution. Emergencies did not increase powers. Actually he decided cases on the basis of what he thought government ought to do, and felt that individualism and laissez-faire were the very foundation of our political system (Early, 1954, pp. 402-404). He opposed taxation, child labor laws, price-fixing, and unions because they inhibited national economic laws. Hence, he was a Darwinist as well as a laissez-fairist. He believed in the sacredness of contracts. He put property rights above general social interests. He had no pity for the poor. In his view economic regulation merely undermined self-reliance. The rights of property were not subject to legislative whims (Rodell, 1955; Early, 1954, p. 142).

McReynolds was a legal technician, adhered to precedents, and defended the "niceties of legal procedure" (Early, 1954, p. 113).

Evidence of dogmatism in McReynolds' personality is ample. Taft called him a "grouch" (Pringle, 1939). He was also called "Scrooge" and an anti-semite (Early, 1954, p. 84). He could not get along with his fellow workers in the justice department or on the White Court (Pearson and Allen, 1937, p. 222). He constantly criticized his fellow justices, especially Clarke (Murphy, 1964). His attitudes were compartmentalized (Early, pp. 166-167) and opinionated. He refused to allow off-Court influences to

affect his behavior (ibid.). He was hostile to those who disagreed with him. He insisted on the validity of his own beliefs to the point that he raised them to constitutional imperatives. He was also irritable and socially withdrawn. It has already been noted that he was high on several other measures of dogmatism.

It may be concluded that McReynolds was very conservative (anti-equality), a Darwinist and laissez-fairist. These characteristics seem to result from his early political environment. Similarly he was states' rights oriented probably also as a result of his early environment. He was anti-liberty both from a lack of sympathy with underprivileged elements and his high dogmatism, characteristics which permeated his entire attitude-value system. Like Lurton he seemed to be an extreme individualist in philosophy.

White. — Chief Justice Edward Douglas White was strongly anti-Progressivism, anti-judicial power, and nationalistic. He was pro-government in non-economic and non-civil liberty matters. These characteristics explain most of White's NSR's.

His nationalism not only led White to support national jurisdiction over states' rights but also seems a factor in his support on necessary emergency wartime powers. White was a firmly committed supporter of the war effort. (See Howe, 1961; Klinkhamer, 1943). Support of Wilson, his fellow Democrat, may have been a further factor in that behavior.

NSR's explained by support of wartime measures may have included case 127 in scale 3 involving the wartime confiscation of a brewery (reinforced by his support of prohibition) and his support of wartime anti-free speech measures as in case 446 in scale 4 and case 402 in scale 33.

A further free speech NSR was case 174 in scale 1 which seemed to result from the support of national actions but a denial of state power to legislate in free speech matters. Hence, nationalism also helps account for that NSR.

Nationalism seems to account for many of White's NSR's including case 397 in scale 27, case 42 in scale 9, case 317 in scale 22, and case 532 in scale 4. In many cases his nationalistic sentiments predominated over his anti-judicial power views. He was thus placed in the position of supporting federal judicial power (resulting in NSR's in these scales) because of a conviction that national jurisdiction was preferred. This includes NRS's in cases 243 and 53 in scale 42, case 306 in scales 42 and 65 and case 307 in scale 65, and case 535 in scale 3. In case 20 in scales 7 and 53, NSR's seem related to White's denial of state powers to pass on wage and hour laws while supporting national power to do so. Similarly White supported national regulation of aliens but opposed state laws to discriminate against them, causing an NSR in case 297 in scales 3, 14, and 33. He did, however, uphold a state law discriminating against Chinese aliens suggesting a prejudice against all colored peoples. (See scales 5 and 15 for evidence of a bias against Negroes and Indians.)

White's opposition to judicial power (and support of democracy) seemed to result in NSR's in non-judicial power scales such as cases 328, 329, and 330 in scale 10, case 213 in scales 12 and 46, case 396 in scales 10, 36, 40 and 42, and case 34 in scale 34.

Numerous NSR's seem related to White's opposition to Progressivist programs and an anti-equalitarian attitude, or involve a different

perception of the issue involved in the case from other justices. NSR's involving Progressivism include cases 72 and 298 in scale 3 which fit better in scale 28 for White, case 253 in scale 16 which fits better in scales 28 and 10, case 292 in scale 19 in which White is pro-business case 233 in scale 35 in which White opposes a federal pure food and drug act (fitting in scale 20), case 339 in scale 61 which fits better in scale 22, case 405 in scales 9 and 53 which fits better in scale 10, case 112 in scale 36 which White perceives as involving the Commerce Clause (scale 35, see 63 L.Ed. 1131), case 157 in scale 22 which fits in scale 27, and case 65 in scale 53 which fits better for White in scale 35.

Cases 244 in scale 22 and 129 in scales 3 and 4 have NSR's which seem to result from White's support of national investigations of corporate books (scale 43). His NSR in case 326 in scales 10, 26, and 65 seems related to his readiness to overturn jury decisions. White was the most anti-jury justice on the Court (see scale 62). His NSR in case 48 in scale 36 seems related to a narrow view of municipal powers to tax. His NSR's in case 79 in scales 18, 29, and 37 seem related to a pro-government stance. White's NSR in case 422 in scale 20 appears to be part of a party vote condemning a Republican senatorial candidate. Case 450 in scale 33 is probably an NSR resulting from his strong support of prohibition.

If McReynolds' extreme conservatism and general attitude-value system can be laid to his early social and political environment, the same can be said with equal force with respect to White's environment and views. Their environments were quite similar and their views were quite similar. They differ only on states' rights, libertarianism, and laissez-faire. White was a nationalist, pro-liberty, and pro-government in contrast to McReynolds.



Differences in social and political environments seem to adequately explain these differences.

White came from the same Southern aristocratic planter-class environment as McReynolds, except that White was directly descended from wealthy aristocratic planters and represented the views of that class twenty years earlier than McReynolds: that is the pre-Civil War, wartime and reconstruction experiences of that class and the South in general. White was thus second only to McReynolds in conservatism on Progressivist issues. White was more of a Darwinist than McReynolds, being the most extreme Darwinist on the Court. Being a nationalist, he was slightly less conservative on Liberal Nationalism, being only ninth of thirteen justices on that attitude system.

White was fifth of thirteen justices in support on nationalism. His nationalism is due to three mutually reinforcing influences. His family and ancestors were nationalist-oriented, the political party orientation of his family was nationalist, and the economic self-interest of his family and White himself was tied to national protection.

In terms of ambition theory, White's family consistently sought federal office and were thus nationally oriented. White's grandfather was a diplomat and federal district court judge. White's father was a three-term Congressman. White, himself, asked as a reward for his political activity only the United States Senatorship of his state.

Politically, White's family chose the nationalist parties. His grandfather was a strong Federalist in North Carolina. His father was an active Whig in Louisiana. White of course was forced for political reasons

to join the Louisiana Democratic party, but in the Senate aligned himself with the nationalist wing of his party.

White and his father had sound reasons, other than ideology, for being nationalist-minded. Their sugar plantations were dependent on the national tariff for their profitability. His father consistently supported tariffs in Congress although it cost him his chances for reelection. The junior White consistently worked for high tariffs while in the Senate. Their calculations of their own self-interest were not wrong for duty-free sugar eventually almost destroyed the value of his plantations, cutting<sup>24</sup> them to 30 per cent of their former value.

Later on the Supreme Court, he supported national powers necessary to our national interest or useful for the future. He upheld the vigorous prosecution of the war and ruled that the Constitution must follow the flag. He upheld numerous emergency powers when important to the war effort, being caught up in the national patriotic fervor. As a Senator, he also had been impressed with the need for the national government to exercise its numerous powers (Klinkhamer, 1943, p. 73).

It weems clear that White had been socialized politically by his politically active family in Federalist and Whig principles, which accounts for his conservatism and nationalism. Basically, his philosophy was Hamiltonian, consistent with those political parties. His father was a judge of the city of New Orleans and was elected a Whig governor of Louisiana in 1835 in addition to his Congressional officeholding during his

---

<sup>24</sup> White sold his holdings for \$100,000 of which he had left only \$58,000 at his death. Klinkhamer, 1943, pp. 442-443. See also ibid. for support of biographical data on White and his family.



career. His family was also active in religion, education and the defence of slavery in his state. Their holdings in slaves were large.

White's family was Irish and Catholic. He lived in a predominantly Catholic town, a semi-rural environment, and attended Catholic schools. He did not go to college, a fact that must have later proven embarrassing when he presided over a Supreme Court composed entirely of associate<sup>25</sup> judges who were college graduates.

White's "education" came as a private in the Confederate army when he saw active service, was captured, and later paroled. He was eventually trained in Roman law in Louisiana. He was active in the Democratic party and was elected to the Louisiana senate in 1875. He was quite interested in the honest conduct and purity of elections in this reconstructionist era. He served on committees such as the judiciary, claims, finance, banks, reform, and charitable institutions. It is of interest that some of these concerns were reflected in his attitudes on the White Court. He was quite concerned with First Amendment freedoms (1), being fourth of<sup>26</sup> twelve judges in support of such freedoms (his most liberal attitude), while often upholding convictions for corruption in government and business (scales 17, 37, and 44). This indicated an interest in reform.

---

<sup>25</sup> Why White never achieved much of a leadership role as Chief Justice may be considered here. It could have been this education gap. But it is more likely due to jealousy among associate justices over one of their number elevated to the high post. See Klinkhamer, 1943. His position as a member of the minority party and as a former Confederate may have weakened his influence somewhat.

<sup>26</sup> In line with the influence of family ideology on White, his grandfather had urged that the federal Constitution contain provisions protecting trial by jury and freedom of the press. This traditional family respect for liberty may have been a component in White's libertarianism. Klinkhamer, 1943, p. 5.

As part of his family's nobless oblige outlook he seemed interested in charity and, while on the Court, supported moderately the claims of Labor (7), on which he was eighth, and Criminal Due Process (4) on which he was ninth. His position on Libertarianism was quite liberal in contrast with his other opinions.<sup>27</sup> Liberty was his fourth ranked value.

His shattering experience as a Civil War veteran, seeing the sufferings of his homeland and the near-destruction of his country seemed to have profoundly influenced his views for Libertarianism. The reconstruction era revealed to him the worst evils of tyranny. He vowed to uphold and perpetuate the great guarantees of individual freedom "so that the freedom of all might not pass away forever," and believed that we cannot preserve freedom by destroying principles essential to it (New Republic, June 1, 1921, p. 6). White, like Lurton, may have gained an insight to the plight of the underdog civil liberty claimant out of his experience as a prisoner of war.<sup>28</sup> The reinforcing influence of Southern Civil War and reconstruction experiences on the original Jeffersonian libertarian philosophy has been discussed in Chapter 6 above. It is interesting that all Southern justices who lived through that era valued liberty highly except for McReynolds who was born after the Civil War era and did not

---

27. There is evidence that White suppressed some pro-liberty votes (Howe, 1961). Although sympathetic with these claims, he feared reactions against the Court if he upheld them or preferred to avoid dissent if his vote would make no difference. See Klinkhamer, 1943, p. 232.

28. Perhaps he who has been deprived of his personal liberty values liberty most highly. If so, would it follow that all judges who hold power over the freedom of others should be required to serve some time in a prison so as to understand the meaning of the deprivation of liberty?

experience it firsthand.

White's moderate liberalism on Labor (7) has been discussed approvingly by Myers (1925) who felt that White alone on the Court had not been a "corporation Lawyer." He also noted White's Senate support of federal legislation to improve safety conditions for workers.

In Louisiana politics, White worked for an anti-lottery and anti-corruption faction and was appointed to the state supreme court for two years (1879-1880). His faction lost but was restored to power in 1889, whereupon White received his reward of the national Senatorship. When in the Senate, he championed the federal income tax which favorably impressed Cleveland, whose first two nominees to this Supreme Court seat were rejected by the Senate. The naming of White in 1894 ensured the likelihood that Senatorial courtesy would prevail in his affirmation. Besides, White's opposition to Cleveland's tariff reduction measures was a thorn in his flesh. White was appointed before he could harm Cleveland's legislation significantly. In 1910, Taft so approved of White's Hamiltonian philosophy that he elevated him to the Chief Justiceship (Klinkhamer, 1943).

White's career on the Court was distinguished by a dissent in <sup>29</sup>Pollock (158 US 601) and in Lochner v New York (198 US 45). He gained the respect of Progressives by these two dissents (Klinkhamer, 1943, p. 50). However, he tended to circumscribe the powers of the I.C.G. and the scope of the Sherman Act (in restraining labor as well as business). Our scales, however, show White to be conservative on federal tax powers (tenth on the Court) as well as antitrust (thirteenth) and the I.C.C. (ninth).

---

<sup>29</sup>He based his dissent on precedent and tradition Klinkhamer, 1943, p. 161.

There seems to be doubt among more traditional writers that White was a nationalist. Paul (1960, p. 205) holds that he was a states' rights man and Klinkhamer (1943) is not sure. On the White Court, our scales show him to be clearly a nationalist, however.

White's position on General Welfare can be explained in terms of his own and family self-interest. He benefited from special interest legislation (the tariff) and hence approved of business benefiting from similar governmental help. Moreover, his support of government on the Laissez-faire attitude system seems related to this situation. Government was seen as traditionally a friendly source of aid and a benefactor. Furthermore, his nationalism seems connected to support of governmental powers (except when promoting Progressivist programs).

Klinkhamer (1943) agrees that he was against judicial power over the democratic branches and adds that he was constantly concerned with the off-Court political consequences of the Supreme Court's decisions. His contributions to law included defining new boundaries within which national and state governments might act, extending the national Commerce power, requiring Congress to clearly define Congressional grants of power to commissions, and preparing the way for a broad interpretation of the Due Process Clause in liberty cases (238 US 347). Overall White's values seemed to be conservatism, Darwinism, democracy, nationalism, liberty, and pro-government as our Chapter 7 analysis suggests. Consequently, he seemed to be a Hamiltonian in philosophy.

Clarke. — John Hussein Clarke's attitudes seemed dominated by a General Welfare value, Progressivism, and Libertarianism. The General Welfare value involves opposition to the use of government to help enrich



business and corporations and grant them special privileges. It, like Progressivism, involves an anti-business bias. That General Welfare and Progressivism dominate Clarke's decision making points to a central element, that Clarke's was strongly anti-business. A large number of his NSR's are related to this powerful element of Clarke's psychology. NSR's in cases 110 and 135 in scale 28, and case 25 in scales 28 and 53 seem largely a result of an anti-business orientation which condemned unethical business methods. The condemnation of similar fraudulent methods results in an NSR in case 202 in scale <sup>30</sup>4. Although civil liberties and small property-owners' rights usually gained Clarke's sympathy, a case involving a small businessman failed to do so resulting in NSR's in cases 171 and 401 in scales 3 and 40. Likewise, an anti-business bias seemed to result in NSR's in case 121 in scale 45 involving usury by a bank, in case 88 in scale 40 involving a suit against a railroad, in case 177 in scale 41 involving monopolistic discrimination by a railroad, and in case 81 in scale 41 involving the unsavory monopolistic business practice of an interlocking directorate. The last three instances prompted Clarke to unusual levels of support of the use of judicial power.

Clarke's next favored element was Libertarianism. He consistently upheld liberty, fairness in procedure, and evidenced sympathy for the individual.

Even in Civil Liberty: Property (3) he was foremost on the Court for fair procedure. This fairness extended to normally despised (by Clarke) business and the wealthy, resulting in NSR's in cases 418, 419, 420 in scale 19 (involving taxation of increased valuation of stock), and an NSR

---

30. Clarke was the most extreme justice in condemning Business Corruption in scale 44.

in case 136 in scale 44 where he decided not to punish bank directors for negligence in an embezzlement case. Clarke's support for fair procedure also resulted in NSR's in case 10 in scales 20 and 35.

Clarke's concern for First Amendment liberties was eclipsed by a concern for states' rights. This resulted in an NSR in case 403 in scale 1 where he declined to find the First Amendment binding on state powers. He likewise upheld state power over federal in case 113, resulting in NSR's in scales 22, 32, and 35. However, he denied the states' power to tax an agency of the federal government, a federal land bank. This involved an important Democratic program which a loyal Wilson supporter could hardly permit to be weakened.

One of Clarke's most deeply felt convictions was an opposition to prohibition which prompted him to be the most extreme justice on this issue and overrode in importance his attitudes on other issues, resulting in NSR's in case 86 in scales 20 and 35, and cases 148 and 448 in scale 33.

Finally, his NSR in case 161 in scales 19 and 42 in which he supported the exemption of judges from income taxes might have been prompted by economic self-interest or at least an understanding of the financial sacrifice many lawyers undertake in giving up private practices for the bench.

It is much easier to account for the conservatism of aristocratic, wealthy judges with corporate law practices than judges of wealth and connections who were liberal. Among the latter are Clarke, Brandeis, and Holmes. Clarke and Brandeis seem to derive their liberalism from several

sources. Their families were, like McKenna and Hughes, of non-aristocratic and non-prosperous origins. They all had fathers who were immigrants and had to struggle for their place in society and business. Thus, the justices were most likely socialized politically so as to sympathize with the underdog and underprivileged classes.<sup>31</sup> Clarke and Brandeis were Northern Democrats and thus socialized in the principles of Jacksonian equalitarianism. They had political experiences in geographic areas where an ideological schism between the political parties existed. Lastly, they became aware of the social problems of urbanization and industrialization because they were politically aware of these problems and were exposed to those problems first hand. It has been noted that urbanization was related to Progressivism on the White Court (Chapter 8 above). Clarke lived in industrialized Youngstown and Cleveland and Brandeis lived in Louisville.<sup>32</sup>

Clarke's father was an Irish immigrant who obtained some prominence as a small-town Ohio lawyer. He immigrated during the Jacksonian era (1832), became a Democrat, and strongly embraced Jacksonian principles (which he apparently passed on to his son). He was active in politics

---

<sup>31</sup>It is interesting to note that Van Devanter and McKenna were self-made men and acquired wealth or power on their own. They were upwardly mobile. Clarke and Brandeis were not so much upwardly mobile as their fathers had already established a middle-class status. Hence, it may be possible that upward mobility with consequence status strains and insecurity (see Lipset in Bell, 1964) may be a conservative influence as in the cases of McKenna and Van Devanter. Clarke and Brandeis (and to a lesser extent Hughes) may have been liberal because the upward mobility occurred on the part of their fathers and hence they were not subject to this status insecurity (which might have been a conservative influence). However, they were probably socialized by their fathers in sympathy with underprivileged classes to give them a status-strain-free liberalism.

<sup>32</sup>In Louisville he had witnessed a bitter railroad strike.



and became a prosecuting attorney and a city judge.

Justice Clarke had been committed to civil liberties as early as high school (Warner, 1959). Basically, his early views and positions in politics as a moderate Progressive Democrat are consistent with his views on the White Court and indicate what his values and attitudes were.

Clarke owned a Youngstown newspaper and actively supported civil reform, electoral reform, tax reform, more equality distributed income, municipal ownership of city railways and utilities, and lower railroad fares. He attacked the powers of corporate wealth. These views are consistent with Clarke's attitudes on the White Court, including his extreme anti-corruption position in scales 37 and 44 and his rank as second only to Brandeis on Progressivism.

Clarke also opposed monopolies and tariffs, supported civil service reform, and wrote editorials in favor of states' rights. He supported ballot reform, wanted to democratize government, and opposed libel laws as a violation of free press.

Thus as a justice he was the most extreme justice for states' rights, and was third in favor of First Amendment liberties (1). His experience as a newspaper publisher probably reinforced his understanding of the necessity of protecting free speech and a free press. He was also the most extreme justice in opposing monopolistic practices (scale 24 and 30). He

---

<sup>33</sup>See Warner, 1959 for biographical material on Justice Clarke below.

<sup>34</sup>Warner (1959, p. 88) is not correct in assessing Clarke as a "nationalist". Although Clarke strongly supported Liberal Nationalism (he was fourth on that issue), he was even stronger in support of States Progressivism (second). When it came to a choice between conflicting jurisdiction, Clarke consistently supported state power.

opposed special privileges for business (as did Ohio Progressives in general) and thus his most highly rated value is General Welfare (which specifically limits such special privileges).

During the 1896 Bryan campaign, Clarke showed his conservatism and "class prejudice" by opposing Bryan and supporting "Gold Democrats" (Warner, 1959). Clarke was basically a Cleveland Democrat, attacking corruption and supporting humanitarianism and the well-being of labor.

His law practice was primarily in the service of corporations, railroads, and wealthy clients both in Youngstown and Cleveland, but he did not let this influence his political views. He was general counsel for the New York, Chicago, and St. Louis Railroad and the Nickle Plate Railroad. In most workmen's compensation cases, he preferred to settle the claims out of court when possible.

Clarke favored a uniform rate for all shippers and opposed rebates. He fought the discriminatory taxing of railroads as a lawyer, and later on the Court was more conservative than usual on state tax powers. He favored unions as a bulwark against monopolies and corporate power. He supported compulsory workmen's compensation acts and wage and hour laws. He was the most pro-labor justice on the White Court, showing a definite sympathy for the lower class. (He was second only to Harlan on Libertarianism). He was the most liberal justice on workmen's compensation cases (scales 8 and 9).

Clarke received his party's nomination to the U.S. Senatorship in 1903 but lost to Mark Hanna. Clarke represented the moderate wing of

De

a

n

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

+

Democratic Progressives. In 1914 on McReynolds' recommendation, Wilson appointed Clarke as a federal district judge. Wilson was satisfied with his progressivism for he elevated him to the Supreme Court in 1916.

Clarke was a "wet" on prohibition and drank liquor personally. On the high Court, he became the most extreme anti-prohibition justice. Although on this issue McReynolds agreed with Clarke, his personal antipathy to Clarke led him to disassociate himself from Clarke's dissents.

Clarke, as a district court judge, had taken great pride in naturalization proceedings, either in remembrance of his father's origins or in sympathy for the immigrants' underdog status. Thus when on the Supreme Court, he was most extreme in supporting the rights of aliens, including Chinese aliens. His defence of Indian rights placed him third on scale 5. Moreover, he and Brandeis were the most libertarian of the Democrats in supporting the civil rights of Negroes (scale 15).<sup>35</sup> His second rank on Libertarianism affirms this humanitarian support of underprivileged and oppressed groups.

Clarke also believed that the property rights of the rich must be protected so as to protect also the rights of the poor (Warner, 1959, p. 69). Hence, Clarke is also the most extreme protector of Civil Liberties Property Rights (3). But he believed that the poor should receive their fair share of comfort.

Clarke's views supported the Brandeis and Cardozo principle of sociological jurisprudence (as did McKenna, Day, and Pitney to a lesser extent). He sought social justice and social welfare in his decisions and

---

<sup>35</sup>Although these claims violated Clarke's and Brandeis' strong states' rights positions.

believed in evolutionary progress. He chose these values rather than the application of the common law and precedents. Evidence exists that he was "open-minded," that he continually reevaluated his ideas in light of new information and new events (Warner, 1959).

Clarke preferred a strict interpretation of franchise grants (which resulted in his position as the most extremely liberal justice on Contract Clause cases, scale 12). He construed patent rights narrowly as only required to promote the progress of science rather than the privileged rights of the inventor (placing him third on Patents, scale 29).

His position on the First Amendment (scale 1) was only third in support of its liberties due to his support of Wilson's war effort and a dislike of radicals and advocates of unlawful methods (Lerner, 1954; Warner, 1959, p. 94).

Although Clarke was a moderate Progressive off-court he was one of the most liberal justices on the White Court. McReynolds' constant criticism became so intolerable that Clarke resigned in 1922 (Murphy, 1964). He lived until 1945. His presence on the Hughes Court could have averted the Court-packing battle as he later endorsed most of the New Deal.

Clarke's liberalism seems related to his parent's low-status background, his urban experience and environment and his Democratic philosophy. His father had been a Jacksonian. Clarke often in pre-Court statements referred to basic "Jeffersonian truths" as supportive of Democratic Progressive programs (Warner, 1959, p. 22). Hence, he was a Progressive in : philosophy, based on Jeffersonian-Jacksonian ideology. His values were General Welfare, equality, liberty, democracy, and states' rights in that order, and he was slightly laissez-fairist and strongly anti-Darwinist.

Brandeis. — Justice Louis D. Brandeis has very few votes not explained by the scales. Only Day and Van Devanter have lower rates of NSR's. Half of Brandeis' NSR's, furthermore, result from the same series of cases.

Brandeis' main values are equality (Progressivism), liberty, democracy, general welfare, and states' rights. He is relatively consistent and extreme on these issues and shows few NSR's on these issues. Most of his NSR's involve the upholding of necessary and temporary wartime powers. He would be expected to support these powers as a loyal Wilson appointee and Democrat. Moreover, as a confidant of Wilson on the bench, he probably had a hand in formulating some of these programs. They include wartime price controls which result in NSR's in cases 408 to 415 inclusive in scales 3 and 45. An NSR in case 127 in scale 3 upholds wartime prohibition.

His three NSR's in Antitrust (30) in cases 139, 192, and 601 involved price fixing among companies which he approved because they gave small businessmen a chance to survive in competition against big business (Lerner, 1954, P.x1; Mason, 1946; Murphy, 1964, pp. 148-150). He apparently valued smallness in business over competition.

His NSR in case 394 in scale 21 is explained by his preference for state power in rate-setting over national and does not show up as an NSR in State Rate Regulation (46). Similarly case 118 in scale 46 is an NSR because he saw this case as more properly a Contract Clause (12) case, and case 85 in scale 32 was seen as properly a Commerce power case (13). He was reputed as attempting to be fair to business and railroads in rate-setting cases (Mason, 1946) rather than punitive as Clarke seemed to be. This may explain NSR's in rate-setting cases such as 183 in scales 32 and

35 and case 123 in scale 18.

Brandeis was somewhat anti-government in cases not touching the liberal dimension which may explain an NSR in case 393 in scales 3 and 18 where he upheld a land claim in the Philippines against the federal government. A case involving states' rights resulted in an NSR. Case 209 in scale 9 involved Brandeis' opposition to federal judicial power over state courts.

Brandeis has much in common with Clarke in terms of his political and social environment (as noted in the discussion of Clarke) and particularly with respect to their attitude-value systems. Both were sons of immigrants who were self-made men; both lived in the Midwest in urban environments and became politically active in the Democrat party.<sup>36</sup>

Both Clarke and Brandeis were Progressives with their philosophy rooted in Jeffersonian-Jacksonian Democracy (see Pearson and Allen, 1937, p. 163). Clarke does not seem particularly more "liberal" than Brandeis. He is much more extreme on the General Welfare attitude system (opposed to special interests in Conservation, 14, Land Claims, 16, and Patents, 29, and more punitive in condemning corruption, scales 37 and 44), otherwise their rankings of values are identical. Their attitudes, and value structure as revealed in Figure 21 are quite similar, indicating the same underlying liberalism. Clarke is slightly more liberal on Libertarianism, in supporting liberty and labor interests more strongly, on Darwinism, and in supporting states' rights. He seems more sympathetic to lower-class interests. Brandeis is more liberal on Progressivist issues and more opposed to

---

<sup>36</sup>See Mason, 1946, for biographical data on Brandeis below.

judicial power. Brandeis is the most extreme justice on both issues.

Brandeis came from a family of Prague Jews who were fairly well educated and cultured. His father started out as a grocery store clerk, eventually owned his own store, and later became a grain and produce merchant. He must have undergone status deprivation as an immigrant and a Jew, and there is evidence that Brandeis himself later felt somewhat isolated from middle-class society (Mason, 1946, p. 93). Hence, it may be concluded that Brandeis was politically socialized by a family that was of low status. It may be suggested that he was also influenced by European socialistic ideas prevalent in the former country of his family. He was also apparently influenced by his mother's generous and humanitarian impulses (ibid.).

Politically, his father was a Republican and an abolitionist in  
<sup>37</sup>Kentucky. Brandeis originally was a Republican. He left the party in 1884 over issues of corruption and called himself a Democrat in 1905. However, he supported Progressives of both parties.  
<sup>38</sup>He clearly aligned himself with Wilsonian Democracy in 1912 (Mason, 1946). Hence, Democratic inclinations seemed to predominate in his philosophy.

Brandeis became a millionaire by successfully defending large corporations, railroads, and the wealthy in his Boston law practice. He successfully exploited his Harvard connections to achieve his wealth. He had been

---

<sup>37</sup>It is of interest to note that of the eight most libertarian justices, five, including Brandeis, were born in the South. The only Southern non-libertarian judge was McReynolds whose dogmatic personality precluded a libertarian outlook. The only non-Southern libertarians were Clarke, Holmes, and Hughes. It may be possible that Southern views of individualism and antagonism to government were an important regional socializing influence in favor of libertarian ideals.

<sup>38</sup>He had been offered several nominations to public office by the Democratic party in Massachusetts.



COUITS

attid

aire

can

put

for

to

at

a

f

counsel for the New Haven Railroad and the United Shoe Company.

His political activities and concerns presaged his later liberal attitudes and opinions on the Supreme Court. Although he was a millionaire, he used his wealth to become a "peoples' attorney" defending popular causes, and fighting monopoly and exploitation. He mediated labor disputes, was counsel for shippers before the I.C.C. and later was counsel for the commission, represented states in defending Progressive legislation from attacks on their constitutionalism, brought suits against monopolies and attacked them in articles, defended the National Consumers League, and fought substandard factory conditions, hours and wages. He fought for liquor regulation, municipal reform, and civil service reform.

Brandeis was interested in the care of paupers and methods of fighting unemployment as a solution to poverty among workers. He opposed corruption in politics and business exploitation of natural resources. He favored civil service reform. He feared that democracy was threatened by capitalism and corporations and their excesses and injustice. He favored unions and collective bargaining as a bulwark against both socialism and corporations. He opposed governmental ownership of industry but supported economic experimentation and social reform. He felt that he could not stand aloof from the social problems of his day.

Brandeis exposed the life insurance business as an unprincipled "racket" and worked his whole life to combat its abuses. He worked for and demanded that corporations open their books to public scrutiny to expose their financial shenanigans, their inefficiency and unsound practices. He fought attempts by utilities to gain excessively profitable franchises

through bribery of public officials which would cheat the public. He also fought attempts by the New York and New Haven Railroad to establish a railroad monopoly in New England.

Brandeis also opposed monopoly because he felt that many corporations had become too big to be efficiently managed. He used information from their own records to prove this, concluding that only regulated competition would result in a maximum of efficiency. Monopolies grew only because of the aggrandizement and thirst for power of their owners. Interlocking directorates and other methods merely milked the public of unwarranted profits. He opposed cut-throat competition, however, arguing that this destroyed small, competitive units. For this reason, it is seen that Brandeis was fairly moderate (third) on the Antitrust scale (30).

Brandeis saw the monopoly issue as the crucial issue of the 1912 election. He criticized the Progressivist party as approving monopolies as part of an inevitable and beneficial trend, and hence supported Wilson.

Brandeis helped implement much of the Progressivist program on the state and local level in Massachusetts and Boston. He favored local solutions to the social problems which concerned him (Swisher, 1954). He had opposed the growth of federal power, until he saw that state solutions were not adequate. Hence, his position was consistent with the findings that he was states' rights oriented. (He was ranked second on the Federalism attitude system in favor of state power.) His state-orientation might well be explained in terms of the fact that his experience in public affairs was primarily at the state level and he did not become involved in national politics until 1911. His inherent opposition to centralization in economic

and governmental matters seemed crucial to his position and seems likely due to his libertarian and individualist outlook which was grounded in Jeffersonianism.

Brandeis became one of Wilson's key advisors early in his administration and continued in that capacity after joining the Court. He is reputed to have been the chief architect of Wilson's New Freedom (Swisher, 1954, pp. 563-567). In advising Wilson, he helped create the F.T. C. and the Federal Reserve System. He helped write the Clayton Act, and planned the enlargement of the I.C.C. Having helped implement these programs, it is entirely logical that he would (and did) help legitimize them by voting to uphold Progressive programs on the White Court.

Wilson reputedly wanted Brandeis as his Attorney General but backed out when confronted by personal opposition to Brandeis for being too liberal and having made too many enemies in his role as "peoples" attorney. Nevertheless, he appointed Brandeis to the Supreme Court in spite of a second outcry of opposition. Brandeis was confirmed by a close vote, strictly on party lines.

The fact that Brandeis was such a central figure of the Wilson administration may well have made him an influential figure on the White Court. He was already a close friend of Holmes. That friendship had lasted since 1879. Holmes praised his "great work with high motives," and his "accuracy of detail" (Howe, 1961, p. 191). Brandeis was also friendly with Clarke and White (Mason, 1946, p. 629).

Brandeis had already perfected the technique of using research into data on social problems to persuade the public, courts, and commissions to

make more intelligent decisions on policy matters. Before joining the Court, he had used sociological data to persuade the Court to take judicial cognizance of things beyond law and logic. He used the same technique after joining it, marshalling evidence to support his opinions. He used the dissent as an educational device to enforce and illuminate the law. The persuasiveness of his methods with other justices has been documented (Mason, 1946, pp. 245-253, 517-518, 628-629). This technique as a contribution to Supreme Court policy making has had an impact which far outlasted his tenure on the Court.

Brandeis was basically opposed to the use of judicial power. He was the most extreme justice in opposing that power. He reputedly had great faith in public opinion. He opposed the use of the injunction in labor disputes because, he argued, it undermined public confidence in the courts. He also strongly argued against rendering advisory opinions or deciding more in a case than was necessary. (See Ashwander v T.V.A. 297 US 288, 345.) He would presume the constitutionality of a law if it were necessary to achieve a permissible end. This position seems based on a basic adherence to traditional democratic values and hence a dislike of authoritarian decision making.

Nonetheless, Brandeis seemed to accept the quasi-legislative capacity of the Court, particularly when it came to endorsing programs which he personally supported (Kelly and Harbison, 1963, p. 688). He, too, read his own economic views into the Constitution (Mason, 1946).

Brandeis felt that individual rights were far superior to property rights. In First Amendment issues, he with Holmes, helped lay the groundwork for a preferred status for the key democratic freedoms of speech and

press. Mason (1946, p. 578) is correct when he holds that Brandeis was even more protective of free speech than Holmes. His separate dissents were clearly more extreme in defence on those rights (see 65 L.Ed. 705) and he dissented more often (see 65 L.Ed. 287 and 63 L.Ed. 211).

Brandeis may have been more protective of small business than he opposed to big business (see cases 139, 192, 601 and 171). His father had been a small businessman who had suffered business reverses and many Jews are also small businessmen. Hence, he may have been particularly sympathetic to their plight. His insistence on the value of small business units and competition and his opposition to the "curse of bigness" may well have been related to this sympathy. Moreover, he seemed to value smallness over competition in the several antitrust cases mentioned above.

Basically Brandeis seems to be a Progressive in philosophy valuing highly equality, liberty, democracy, General Welfare, and states' rights in that order.

Holmes. -- Oliver Wendell Holmes' main values are Darwinism, democracy (anti-judicial power), equality, liberty and states' rights. However, the dominant reasons for his NSR's in the scales seem to be civil liberties, states' rights, and to a lesser extent anti-judicial power and civil rights. Civil liberties claims were clearly of high priority for Holmes. Such cases seemed inevitably to cause NSR's where they involved other, secondary issues and also appeared in other scales. Examples are: case 532 in scale 37, cases 369 and 370 in scale 33, case 171 in scale 40, and case 537 in scales 41 and 65. Moreover, case 211 in scale 35 might be considered a First Amendment case for Holmes as it involves state regulation of communications (telegraph companies).

Holmes' support of states' rights also seemed to dominate his behavior, causing NSR's in several scales. These include case 318 (involving prohibition) in scale 5, case 561 in scale 7, case 334 in scales 7 and 10 (involving labor), case 350 in scale 28, case 80 in scales 3, 16, 28 and 33, and case 185 in scales 20 and 41. Case 9 in scales 33 and 38 results in NSR's which also seemed to be caused by a states' rights issue. Holmes seemed to feel that Congress did not have the power to delegate power to the states to regulate interstate commerce.

Holmes' attitudes on labor seemed to predominate over other issues, causing NSR's. Thus case 311 in scale 10 involved the upholding of a state labor safety law and case 334 in scales 7 and 10 involved two issues particularly salient to Holmes, labor and states' rights. Case 334 (Coppage v Kansas) involved a state law forbidding "yellow dog" contracts in which he upheld the law.

Civil Rights (15) seemed a dominant issue for Holmes. It might be thought to be motivated by the states' rights issue. But in a federalism scale (33) these cases appear as NSR's. Thus, Holmes seemed to be anti-Negro in line with his Darwinist philosophy. Consequently, civil rights explains NSR's in cases 215, 250, and 324 in scale 33 as well as one in case 215 in scale 4, case 250 in scale 65, and case 561 in scale 7. It appears that this Darwinism predominated over his civil liberty (scale 4) and labor (scale 7) attitudes. His one pro-Negro vote was a concurrence opposing state insistence on segregation in a private college (case 571 in scale 15).

Holmes' anti-judicial power attitude appears to cause NSR's in case 347 in scale 33 and case 185 in scale 20. He did seem susceptible to





humane considerations in his voting. NSR's result from his distinguishing personal injury claims from property damage claims in case 366 in scales 9 and 27 and case 379 in scale 27. He found personal injury claims more appealing.

He seemed to have a narrower conception of state commerce power to tax out-of-state property than other judges. Thus NSR's in case 111 in scale 12 and case 112 in scale 36 do not appear as NSR's for Holmes in scale 35. Similarly case 187 in scale 46 appears to Holmes to involve a commerce issue (scale 34). Other NSR's seem due to a different perception of the issue of the case than other judges. Case 556 in scale 35 fits better for Holmes in scale 46, case 186 in scale 10 fits in scale 26, and case 421 in scales 20 and 1 fits better for Holmes in scale 37.

Darwinism (efficiency) was not only Holmes dearest value, it was his predominating ideology.<sup>39</sup> It appears to lay the foundation for his second value, democracy or anti-judicial power, which in turn helps explain his support of Progressivism (or equality) and states' rights. Moreover, Darwinism shaped his views on the rights of Negroes (scale 15), Indians (5), and Aliens (6), as well as First Amendment liberties (1), Labor (7), antitrust issues (scales 22, 24, 29, and 30), liability issues (25, 26, and 27), and General Welfare issues. His tenderminded libertarian position on Criminal Due Process liberties (4) seems somewhat incongruous with his Darwinism and suggests an element of humanitarianism in his personality. His position on civil liberty seemed one on which he was not detached and one which was "worth fighting for" (Howe, 1961, p. 25).

---

<sup>39</sup>See Howe, 1957, 1961, 1963; Mason, 1946; Frankfurter, 1961; Lerner, 1954; Rogat, 1964.

Hence, if Holmes' Darwinist outlook could be explained, a central element of his philosophy can be accounted for.

Holmes' was basically a philosopher. The strong intellectual element in his family and his life prompted him to construct a carefully formulated philosophy with a relentless drive for logical consistency. He had the most carefully thoughtout philosophy of any justice on the White Court. His drive for consistency required that he fit all elements of his experience, knowledge, and basic beliefs into one integrated whole. Epistemology and metaphysics were also required to round out his philosophy. All evidence had to fit in his philosophical framework. None could be omitted. No compartmentalization was tolerated. The only logical framework that could fit these requirements for Holmes was Darwinism. Darwinism explained his personal experiences, suggested an epistemology, and explained the natural laws of the universe for Holmes. It also incorporated a basic fatalism and Malthusian outlook by Holmes into his logical framework.

What personal experiences may have suggested Darwinism as an explanatory ideology? Several times during the Civil War experiences of his early life,<sup>40</sup> he had the unique experience of seeing his war comrades decimated while he survived. He also survived three near-fatal wounds. How could he account for such shattering experiences? The explanation must have suggested itself that was both fatalistic and Darwinist. He survived because he was "the fittest,"<sup>41</sup> that he was destined for great

---

<sup>40</sup>Holmes was 20 at the time.

<sup>41</sup>In later years, he held that war was a mechanism of natural selection. Howe, 1961, I, pp. 43-44

things. Holmes must have wondered why his family and himself had such intellectual ability. Again the answer may have suggested itself: they were "the fittest" and therefore deserved such prestige and deference. His family was aristocratic (National Cyclopedia, XXVII, p. 2), and Holmes needed to find a rationale to justify their superior outlook. Also influential on Holmes' thought was his grandfather, Charles Jackson, who believed in natural law. Holmes' philosophy also needed such natural laws and the laws he selected were Darwinist (Howe, 1957, p. 181). These natural laws made change and evaluation inevitable (Frankfurter, 1961, especially p. 153).

42

Holmes fatalism has been documented. He is reported to have stood up in a battlefield with bullets whizzing around (Howe, 1957, pp. 102-103), which illustrated his detached and fatalistic outlook.

His view of epistemology was also related to evolution. We learn from experience so that both ideas and organizations evolve to a higher and more progressive state. All components of society are so evolving. This includes the evolution of our race, our ideas, law, as well as economic and political institutions. The role of a judge is to facilitate this process or at least not impede it. Hence, we must look to the future and make possible the logical culmination of evolutionary processes. Hence, political institutions should not impede the growth of large economic units nor stifle the evolution of ideas and the victory of superior ideas. Nor should judges stifle and restrict the democratic process in its

---

<sup>42</sup>Holmes said "whatever happens is best as it is in accordance with a general law". Howe, 1951, p. 110. He also said "I see the inevitable everywhere". Rogat, 1964.

evol

cras

atic

pro

of

law

rac

as

to

the

re

evolutionary function. They should allow institutions to evolve into ones better suited to our experience and progress, and permit experimentation to take place so that progressive ideas and methods of solving our problems will be allowed to prove themselves superior to inferior ones.

Holmes' ideas on race were clearly Darwinist. He at times approved of war as a process of natural selection. He approved state eugenics laws (Howe, 1961). He felt that the Germans were a naturally superior race, but that orientals were inferior (Howe, 1961, I, p. 224; II, p. 4). He apparently approved of legislation discriminating against a minority (presumably inferior) race. Thus, he was unsympathetic to Negro Civil Rights (scale 15), Indian rights (5) and the rights of Aliens (6). A racist, Darwinist view explains these positions.

There appeared to be three basic elements of Holmes' Darwinism as revealed in his Supreme Court decisions. These involved his attitude toward trusts, that toward free speech and press, and his antipathy to judicial power. Of these the element on which he appeared most extreme was his position on trusts and their economic regulation.

On the Darwinism attitude system (half of which component variables involve economic issues), Holmes was the second most conservative judge. It was Holmes' most highly ranked attitude system in terms of his extremity of position. Holmes is also the most extremely conservative justice on the White Court on antitrust (30).

Holmes favored bigness in economic units. On this issue, he allowed his personal bias to overcome his usual deference to the decisions of more democratic branches of government. On this issue he split sharply with

Brandeis who felt that monopolies were inefficient and that competition and small economic units promoted economic efficiency.

Holmes felt that free competition was a necessary part of economic life and that freedom included the right to combine economic units if it was necessary for survival. This was as true for labor combining into unions as it was for business. He was unsympathetic to governmental interference with this economic struggle of the "fittest". He felt that monopolies avoided the wastes of competition in advertising and the duplication of facilities, and that they would result in the greatest return for American labor. Since monopolies and big business were winning the battle for competition, they had proved that their form of organization was the most efficient. Thus government must not intervene in favor of less efficient forms. Furthermore, the increasing might and scope of combinations was leading to the "organization of the world", an inevitable and beneficial result and a sign of progress.<sup>43</sup>

Holmes, then, also supported private interests in obtaining special benefits from government or the public domain. This explains his position as the third most conservative justice on the General Welfare attitude system. They were entitled to these benefits because they were powerful (having proved so by seizing them), and the facilitation of these process helped these interests move to their inevitable position of dominance.

Holmes' firm convictions supporting free speech and free press were also derived from his Darwinism. Only if the struggle of ideas were left

---

<sup>43</sup>See Lerner, 1959, pp. 109, 219; Mason, 1946, p. 575; Howe, 1961, p. 124; Swisher, 1954, pp. 516-528; Rogat, 1964, pp. 246-247.

unstifled could the most progressive ideas win in the struggle of the market place. Hence, again the most beneficial forms would evolve into a progressive, enlightened world of ideas. Truth would prevail only in a Darwinian struggle of ideas (Kelly and Harbison, 1963, pp. 673-676).

As a skeptic, he felt that one cannot know absolute truth. Hence, one cannot be so sure of ones own ideas that he can stifle opposing ideas (Frankfurter, 1961). He had felt his own convictions crumble under the impact of reality (Howe, p. 285). He had undergone the pangs of his own self-doubt and from them forged the conviction that no one can be so sure of his own position that he can deny others their right of self-expression. The fervor and duty that the dogmatist applies to his own convictions, Holmes applied to the cause of keeping the channels of ideas open.

It is of interest that Holmes in his college days witnessed the unorthodox and maligned opinion-holders of those days, the abolitionists, being threatened by mobs. This intimidation to prevent their ideas and conscience from being expressed was quite distasteful to Holmes, so that he personally helped protect them from the mobs. Yet their ideas eventually predominated after a war which Holmes helped fight (Howe, 1957).

It is also of interest that Holmes was disillusioned by the horrors of war. After witnessing the deaths of his comrades in three bloody battles, in one of which he saw his charges being blown apart by artillery, and after undergoing three near-fatal wounds, he finally made a "separate  
44  
peace" and left behind the horrors of war in 1863 (Howe, 1957). When he expressed his disillusionment, he was accused of a lack of patriotism. He may well have sympathized with the doubts of the 1917-1918 pacifists on the

---

<sup>44</sup> His commission had expired, but he failed to request a new one.

desirability of war.

During Holmes' Civil War experiences, he was not an abolitionist and had many doubts as to the cause for which he had undergone much hardship. Yet his sense of duty impelled him to go on (Howe, 1957). This characteristic permeated Holmes behavior on the issue of judicial power. He had many doubts as to the efficacy and wisdom of the Progressivist programs he had to pass on, but he felt that his duty lay in allowing the democratic branches to exert power and he firmly followed that duty (except in anti-trust related issues noted above.)

Although Holmes felt that governmental actions interfered with the "natural laws" of Darwinism, it was not up to the Courts to set things ~~right~~ <sup>45</sup> right. These actions must be given the chance to prove themselves to be error or wisdom. The Darwinist struggle must also permit these government actions and laws to evolve to the best forms through the democratic process. Holmes again suffered self-doubt as to his own ideas on the subject. He had lived in an Eastern urban environment where Progressives constantly challenged his ideas. Brandeis, on the Court, marshalled much evidence to contradict his ideas. Hence, he felt that as Courts lack the fact-finding facilities that legislatures do, judges must bow to their decisions (Mason, 1946, p. 555), and let "the crowd" have what they want. (Also see Howe, 1961, II.)

Holmes felt that judges' decisions should reflect the dominant power in society and that this would facilitate the Darwinism process (Howe, 1963, p. 58; Rogat, 1964, p. 254). They should enforce the wishes of society.

---

<sup>45</sup> Holmes' attitude on prohibition also seems to reflect this deference to public wishes. He opposed it personally, but since the public wanted it, he voted to uphold prohibition. National Cyclopedia, XXVII, 2.



of pub

of the

charge

A

result

revolu

I

allow

tution

needs

in fir

the

leg

and

the

the

the

the

the

the

the

the

the

the

the

the

If public needs result in legislation, judges should permit the expression of these needs (Lerner, 1959, p. 136). Judges and the law must recognize change, again to permit the evolution of the law to occur.(Frankfurter, 1961).

Any intransigence on the part of the courts, moreover, might, at best, result in public loss of respect for the courts and, at worst, result in revolution (Pearson and Allen, 1937, p. 73).

Past law was an organic growth from experience. Judges tended to allow limits on their personal experience to become limits on the Constitution. The answer was to broaden their outlook to prepare for future needs. Holmes, like White, wanted a nation adequate to its great tasks.

Holmes' contribution to law was considerable. He hoped to make law an intelligible science (Howe, 1963, p. 20). His mind was ~~dominated~~ by the scientific point of view; he was a positivist and a pragmatist. Mere legal forms and useless tradition was to be discarded if they did not contribute to the organic evolution of the law. The law profession should reject the myth of certainty in the law and realize that the courts are making policy. They should then consider the real implication of their decisions. His discovery that judges' decisions are subjective has profoundly influenced the study of judicial behavior, which has validated his ideas on the subject.

Holmes was chosen for the Supreme Court by Roosevelt on the basis of his pro-labor rulings (Murphy and Pritchett, 1961, p. 81). His labor views were also based on Darwinism. Labor may participate in the economic struggle by whatever means available, by combination or peaceful picketing. They represent power and the courts must give expression to power



(Howe, 1961, II, p. 45; Lerner, 1954, p. 109).

Holmes seemed moderately sympathetic to states' rights. This seems somewhat incongruent with his political party and Darwinism. As a Republican and Civil War veteran, he might be expected to be a strong nationalist. But party ideology seemed to have little or no impact on Holmes whose basic philosophy was shaped by more profound concerns. Darwinism might conceivably call for the support of the most efficient form of government, a centralized one. Nevertheless, Holmes appeared to support the rights of the states to experiment and hence participate in the evolution of political ideas (Rodell, 1955). He was also supportive of the right of the democratic branches to exert power, avoiding gaps of power where no government could legislate. Hence, he supported state powers. Holmes clearly, however, supported State Progressivism more strongly than Liberal Nationalism.

Personal influences affected Holmes' outlook on states' rights. His grandfather, while a Federalist, was something of a "states' rights" Federalist. His faction saw themselves as Massachusetts citizens first, Americans second, and had participated in the Hartford convention heresy. His ambition was state centered, not national, and he saw the federal government as the power center for Jacksonian, not New England's, goals (Howe, 1957, pp. 180-181).

Holmes himself seemed also primarily state-oriented. He had spent 20 years on the Massachusetts supreme court, being a state official longer than any member of the White Court. It would be logical to assume that he thus would continue a states' rights outlook and orientation.

In liability and patent cases, Holmes was able to assert his ideas his ideas about protecting property rights. In line with his Darwinism, he consistently favored the large property owner against the small. He consistently supported the rights of the inventor in patent cases and the defendant in liability cases. He had hoped to minimize uncertainty in liability cases by reducing the role of the jury (Howe, 1963, II, p. 250). He insisted on conclusive proof of fault or negligence. He attempted to formulate a common law concept, but in reality substituted the "harsh" rules of Massachusetts which he had followed in that state court<sup>46</sup> (Lerner, 1954, p. 203).

Holmes had reputedly influenced White, McKenna, Pitney, Clarke, and Brandeis to the view that since a federal common law did not exist, they must find the appropriate common law of the state (including legislation), and apply that to the case at hand (ibid.).

Holmes reacted with great consistency to the component variables in the attitude systems of Darwinism and Judicial Power. But he did not do so in Libertarianism, suggesting that he did not perceive this as a framework within which to organize his attitudes. This explains his relatively low ranking of liberty as a value. He did not include the constituent economic variables as properly part of Libertarianism nor the variables involving the rights of aliens or the colored races. He did, however, react to First Amendment (1), Criminal Due Process (4) and Labor (7) in a consistently libertarian fashion. Since scales 1 and 7 are related to Darwinism, how can his attitude to scale 4 involving due process in criminal trials be accounted for? It may be that he felt that

---

<sup>46</sup>Compare with Pitney's position who followed the soft rules of New Jersey.

the law was evolving towards the greater protection of individual rights and desired to hasten the process. He considered these ideas of liberty as "more civilized" and admired the tradition of English law in these matters (Howe, 1961, I, II; Frankfurter, 1961). He favored removing the concept of vengeance from criminal law and retaining only the concept that it should guide conduct by defining rules that should not be violated. Hence, clearly defined criminal laws must be upheld to increase the predictability of the law and equally scrupulous adherence to due process must be followed (Howe, 1963).

In civil liberties, Holmes seemed to allow highly valued personal ideas to influence his behavior, betraying a humanitarianism behind his skepticism (see Swisher, 1954, p. 509). In certain personal injury cases and workmen's compensation cases, a similar humanitarianism seems present in his behavior. His conservatism in general seems due to a Malthusian outlook that nothing can help the lot of the common man<sup>47</sup> (Mason, 1946, p. 574; Howe, 1957, p. 63; 1961, p. 124).

Holmes applied his Darwinist outlook to his own life. He had to prove to himself that he was one of the Darwinist elect, hence, he was ruthless in his ambition for intellectual eminence (Howe, 1963, p. 49). He had to prove himself in scholarly pursuits as a counterpoise to the distinction of wealth (*ibid.*, p. 258). He became withdrawn and isolated himself from his family and friends. He published several articles and works of distinction on law after studying its origins and history.

---

<sup>47</sup>Another element in his Darwinism may have been the need to account for this dismal outlook coupled with the slight prospect of improving man's lot through evolutionary progress.

In his few years in law practice he represented railroads, banks, commercial and mercantile interests, often in the admiralty courts. He represented no workers or criminals, was involved in no large social or political issues, and showed no social conscience. He, instead, sympathized with and respected his prominent, wealthy clients (Howe, 1963, pp. 107-119). He fit well the description of a conservative, detached scholar. An aristocratic outlook and values seemed to predominate. He taught for a year at Harvard, and was appointed to the Massachusetts supreme court in 1883 where he spent 20 years, having been made chief justice in 1899.

Holmes' grandfather had been a quite conservative Federalist . His father was not a reformer, but became an abolitionist during the Civil War. Holmes himself appeared to be a lifelong Republican, having voted for Lincoln and consistently supported Republicans from Hughes to Hoover (Rodell, 1955). He did not participate in politics, however, and clearly formulated his philosophy without regard to party principles.

Holmes, then appeared to be a Darwinist and constructed from that ideology a strong democratic and anti-judicial power philosophy. He also firmly embraced civil liberties and free speech as values. He was moderate on most other issues. However, and seemed to be close to the position of the New Nationalist brand of Progressivism, although an element of conservatism and support of state powers is present.

His aristocratic, upper-class background influenced by his intellectual urban environment seems to help account for his philosophy, although Holmes seems the least affected of any justice by his environment.

## CHAPTER 10

### CONCLUSION

In considering the trend of opinions and attitudes of the Supreme Court, most observers see the 1910-1920 White Court as a brief liberal<sup>1</sup> interlude between two conservative periods of Court History.

There is evidence that the actual original liberalizing influence on the Court was Theodore Roosevelt's appointments. He replaced Shiras with Day, Gray with Holmes and the conservative Brown with the liberal Moody. Taft's appointments were not noticeably more liberal in general than the justices whom they replaced, however. Thus, the liberal Harlan was replaced by Pitney who was similarly liberal. Fuller was replaced by a more conservative Van Devanter. Lurton replaced an equally conservative Peckham. The liberal Moody was replaced by a conservative Lamar and<sup>2</sup> the quite conservative Brewer was replaced by a very liberal Hughes. The total effect of Taft's appointments seemed to leave the Court as he found it ideologically. A liberal trend on the part of public opinion may have influenced the Court during Taft's administration, however.

---

<sup>1</sup>Rodell, 1955, p. 188. Spaeth, 1966, p. 10 typifies the White Court as a "respite" from the "the doctrines of laissez-faire."

<sup>2</sup>Ideological positions of justices are based on a scale of economic cases of the October 1908 and 1909 terms. See Appendix XI. Also see Paul, 1960.





Wilson's appointments added strength to the liberal bloc. McReynolds seemed more conservative than Lurton but Clarke was even more liberal than Hughes. The quite liberal Brandeis replaced the conservative Lamar. Unfortunately several Republican judges became more conservative as Wilson rather than a Republican was the national Progressivist leader.<sup>3</sup> This included McKenna, Day, and Van Devanter. However, Holmes became more liberal under Brandeis' influence to partly counter this trend.

If we divide cases in the various periods into liberal and conservative outcomes according to our Chapter 2 definitions of this continuum (including civil liberty and civil rights claims as liberal outcomes when they are upheld by this Court), a rough measure of the trend of liberalism of the Court may be determined. During the October 1908-1909 terms, liberal outcomes made up 46 per cent of the cases defined on the liberal-conservative dimension. In the first period of the White Court (1910-1915), 46.4 per cent of the outcomes were liberal and in the second period (1916-1920) 42.6 per cent of the outcome were liberal. The first period of the White Court seems not significantly more liberal than the latter part of the Fuller Court. The loss of Republican support for Progressivism may have led to a more conservative second period; however, it is likely that the wartime Wilson measures far exceeded the exertions of power ruled on in the first period of the White Court. The second period cases seem seem to be more extreme stimuli than those of the first period. Hence, the liberalism of the 1908-1920 period seems fairly constant. In 1922-1923

---

<sup>3</sup>During the second period of the White Court, when most inputs were no longer cases arising under the Taft administration but those arising under Wilson's administration.

when Sutherland, Butler, and Sanford replaced Clarke, Day and Pitney, the conservative control of the Court became pronounced as three more conservative men were added to the Court. They replaced two of the three most liberal justices on the White Court, Day being the fifth most liberal justice.

Wilson's appointments, however, seemed to have quite an impact on the Court in the area of supporting state powers in conflict with federal and in denying power to the courts over elected branches of government. All three of his appointments seemed committed to these objectives. Roosevelt's appointments were much more nationally-oriented while Taft's appointments generally upheld judicial power.

The White Court held few national actions unconstitutional. One law so invalidated was the Child Labor Act in the case Hammer v Dagenhart (62 L.Ed. 1101). After the 1912 election there was little criticism of the Supreme Court. Some criticism was directed at the aforementioned case, but the entire 1898-1921 period was one of "low frequency" in efforts to curb the Court. Only six Court-curbing bills were introduced during the period (Nagel in Becker, 1969, p. 36).

The 1916 Income Tax Law involving stock dividends was invalidated (64 L.Ed. 521). Also the Lever Food Control Act was found unconstitutional three days before it was to expire (U.S. v Cohen Grocery, 65 L.Ed. 516). These seemed to be of minor importance as impediments to national policy-making.

Warren (1926, pp. 744-746; 1913) and Mowry (1958) found that it was conservative state courts that were placing shackles on state powers during

this period, not the Supreme Court. The latter was a bulwark of the state police power, a liberal force, and increasingly alive to the new conditions and needs of the nation (Warren, 1926). Link and Catton (1967, p. 113) found that the Supreme Court evidenced willingness to carry out the mandate of the Sherman Act and other national legislation but that it was undermined by administrative subversion.<sup>4</sup> Moreover, it accomodated "constitutional doctrine to most Progressive regulatory concepts by 1917." (Ibid., p. 115).

The White Court extended national powers over state jurisdiction in Commerce areas, and extended the powers of all levels of government to solve social and economic problems. It closed the gap between federal and state powers so that rather than leaving areas where neither government could legislate, it left areas where both had power, such as the regulation of business and prohibition. Thus it contributed to the national federal power, especially through the Commerce Clause, which included a federal police power, increased taxation and regulatory powers, and permissiveness toward state power used for the general welfare. The Court validated many prohibition laws, and upheld income tax cases, wartime control of railroads and utilities, and the federal regulation of railroad employee wages and hours, food and meat standards, narcotics, and white slavery. It also approved federal treaty power supremacy, the Bills of Lading Act, expionage and selective service acts, and anti-monopoly powers. In short it validated most of the Progressivist program and prepared the way for necessary national powers for America to compete in the Twentieth Century world.

---

<sup>4</sup>Lower federal courts were also a conservative restraining influence on national actions, Paul, 1960.

Specific acts validated included the Volstead Act, the Farm-Loan Act of 1916, the Migratory Bird Treaty, the Mann-<sup>k</sup>Elkins Act, the Border Inspection Acts, the U.S. Shipping Board Act, the Adamson Act of 1916, the Car Service Act of 1917, narcotics regulation acts, the White Slave Act, and the Clayton Act (Warren, 1926). The White Court had shifted in emphasis "from legal justice to social justice" (ibid.).

Hence, national laws were legitimized which protected shippers and consumers and regulated the hours and wages of workers in interstate commerce. National wartime regulation of railroads was upheld as well as rent control. Thus federal powers to wage war and to mobilize the economy and nation were generally upheld. Hence, national power was greatly strengthened, providing the groundwork for future international and national crises such as the more complete national mobilization necessitated by World War II, and the emergencies resulting from the depression, (Hofstadter, 1955, P. 306).

The landmark case of Bunting v Oregon, 61 L.Ed. 830, not only upheld state powers to regulate hours of labor but also illustrates the influence of Holmes and Brandeis on Court decision making. In that case McKenna compared the laws regulating hours of labor in other countries (not unlike a typical Brandeis brief in which he took judicial notice of available economic and political information), and then he concluded that a reasonable man might find justification for such regulation (which was Holmes' test when considering the validity of new legislation). These methods of testing the validity of new legislation not only influenced the White Court but affected the outlook of other Courts as well.

Although government power to regulate economic and social conditions was validated here, it was soon to be reversed on the Taft Court. Yet in a more real sense it was a permanent victory. The Taft and Hughes Courts committed a "self-inflicted wound" which the public forced the Court to reverse, causing great damage to the conservative cause (Mason, 1958). Moreover, subsequent Courts had the precedents ready to validate such regulatory social legislation.

The Populist movement had died of frustration since its programs were invalidated by the courts. The Progressivist program was similarly being tested by the White Court, but its program was upheld. As mentioned above about 45 per cent of the business regulation laws were upheld, state and national. The Court also validated its key programs; the income tax, protection of the consumer, the upholding of the I.C.C. and federal police powers, support of many of labor's objectives, and the upholding of both state and federal regulation of hours and wages of labor.

It also upheld the antitrust laws, although narrowed in scope, and federal control and regulation of railroads. Furthermore, Progressivist regulation of immoral practices were upheld in the areas of white slavery, narcotics control, and the prosecution of public officials who profited from their government positions. The effect of this may have been to take the wind out of Progressivism, since its program was validated. But the success of Progressivism probably gave hope to future social causes, culminating finally in the New Deal.

The rights of labor to picket peacefully and to strike were upheld in several cases, making possible the strengthening of the labor movement.

The White Court also laid the groundwork for present civil liberty doctrine, although much of it was in dissent.

Whereas few politicians of the times were defending the rights of the Negro, the White Court held that it was involuntary servitude to force Negroes to work out contracts for labor under conditions of peonage enforced by state authorities (55 L. Ed. 191). The Court also held that segregated railroad cars in the South violated Negro rights (59 L.Ed. 169)<sup>5</sup>. Lynch law was a common occurrence in the South, but Holmes and Hughes in dissent decried this practice in intimidating a jury trial (59 L.Ed. 969)<sup>6</sup>. The Court also upheld federal power to prevent vote frauds by state officials (59 L.Ed. 1355).

Harlan in Twining v New Jersey (211 US 78) laid down the doctrine that the Fourteenth Amendment had incorporated the Bill of Rights into the Due Process Clause which was binding on the states.

The White Court upheld the Search and Seizure Clause of the Sixth Amendment, holding that such evidence unlawfully seized cannot be used in court against a corporation (Silverthorne v US, 64 L.Ed. 319). Arbitrary contempt of court convictions were overturned (63 L.Ed. 656, 65 L.Ed. 481). The requirement was laid down that in a criminal law, a clear, unambiguous and ascertainable standard of guilt must be defined to satisfy standards of Due Process (U.S. v Cohen Grocery, 65 L.Ed. 516). In addition,

<sup>5</sup>However, it held that an injunction could not be issued.

<sup>6</sup>Also see 53 L.Ed. 1041 where the Fuller Court punished a sheriff who contributed to a lynching.

First Amendment rights were protected when it was held that injunctions against speech and press were limited in terms of period of application (58 L.Ed. 1115).

Other efforts to protect civil liberties were expressed in dissent. These included efforts to protect the right against self-incrimination (63 L.Ed. 983), to protect against excessive bail (63 L.Ed. 877), to prevent double jeopardy (55 L.Ed. 489, 56 L.Ed. 500), to protect a defendant's right to have a jury trial in the district where the crime was committed (56 L.Ed. 1114, 56 L.Ed. 1136), and to protect the right to due process in a jury trial (61 L.Ed. 1242, 55 L.Ed. 753).

Even less successful initially were efforts by the Court to protect free speech and free press in the face of the wartime patriotic fervor of the public. This fervor also apparently overcame several justices as Clarke and White deserted these liberties in most cases.

Eloquent dissents in First Amendment areas were sent down in many cases involving the Espionage and Sedition Acts. These dissents included both free speech and free press (62 L.Ed. 1186, 63 L.Ed. 1154, 63 L.Ed. 1173, 64 L.Ed. 542, 65 L.Ed. 704). Challenges were also made to the state power to regulate these freedoms (65 L.Ed. 287). The Court bowed to public opinion in the abuses of these freedoms but Holmes' words supporting the free market place of ideas as vital to democracy had a far-reaching impact which is not forgotten up to the present time. Prior to the White Court, this area of Constitutional liberty had been almost completely neglected. Yet Holmes' and Brandeis' ideas inspired later judges, American ideas and elites to make these ideals a living reality. As Mason and



Beaney (1959, p. 583) point out "the national government's behavior during World War II was exemplary," and Holmes' words were often cited during the Supreme Court's McCarthy era struggles. Thus these dissenting ideas were taken up by Stone, Cardozo, Frankfurter, Douglas, and Black and written into law.

Studies of the Taney Court indicate that party identification was related to a liberal-conservative ideology, probably based on an agrarian versus urban political base. Paul (1960) finds little evidence that party divided Supreme Court judges along the lines of any such ideology in the 1880's and 1890's. It is likely that political parties failed to polarize political decision makers along ideological lines from the Taney to the White Court.

On the Fuller and White Courts no clear party division over liberal-conservative issues involving Progressivism seemed to occur. It is true that on the issues of Liberal Nationalism on the 1908-1909 Fuller Court and the 1910-1915 White Court, Republicans are liberal and Democrats are conservative. However, this seems related to the fact that Republican administrations had championed Liberal Nationalism and that party identification transferred support of those administrations among the justices to support of their actions in cases coming before the Supreme Court. The traditional nationalism of Republicans and the states' rights stance of the Democrats also helps explain this behavior. Such a relationship with Liberal Nationalism faded in the 1916-1920 White Court as such cases then represented actions of the Democratic Wilson administration.

It is likely that without a party ideology, party influences, and party conflict on economic and class matters to guide judges in the

1860-1920 period, they decided cases on the basis of other reference points and issues such as traditional legal concepts. This seems to agree both with Paul (1960) and the findings in Chapters 2 and 5 above that certain legal issues were much more salient to judges in the first period of the White Court than the second. These issues involve federalism, the Commerce power, judicial power, the tax power, police powers, substantive due process, and the Contract Clause,<sup>7</sup> as well as personal attitudes toward trusts, railroads, insurance companies, liability, the common law, and so forth. Many of these issues seemed unrelated to or differentiated from the Progressivist ideology in many judges' minds. These attitudes shifted according to contemporary political conflicts such as which party dominated the national government.

During the White Court, these legalistic issues faded in salience as the Commerce Power and the Judicial Restraint attitude systems disappear in the second period and Federalism becomes a much smaller factor in decision making in that period.<sup>8</sup> Progressivism looms as a much larger and more important factor in decision making in the second period. Hence, the White Court became polarized along a liberal-conservative ideology involving Progressivism; and a clear bloc structure emerged along these lines. Progressivism involved a higher proportion on variables and variance in the second period, as the decision making became obviously less complex.<sup>9</sup>

---

<sup>7</sup> The judges' attitudes toward these concepts were important in their decisions but this is not meant to imply that the abstract doctrines were objectively applied.

<sup>8</sup> Sprague (1968, p. 61) finds no bloc structure in federalism cases in the 1916-1920 period. Several older, more traditionalist judges left the Court in the 1910-1916 period, it may be noted.

<sup>9</sup> The attitude system ranks for the second period showed much higher intercorrelations as well.

Such a trend toward the polarization of the Supreme Court apparently continued through the Taft and Hughes Courts. During the Hughes Court almost all attitudes were polarized along a liberal-conservative dimension (Mattingly, 1969). Furthermore this increasing ideological polarization of the Court became increasingly related to political party. Thus on the Taft-Hughes Courts a weak correlation of liberalism with the Democratic party appeared. This became more pronounced on the Stone, Vinson, and Warren Courts where a clear-cut association is seen (Table 36 above) as the liberal-conservative ideology coincided roughly with political party positions.

During both periods of the White Court political party consistently influenced decisions in several issue areas. These issues coincided with traditional party differences both on the Court and off. They are federalism, judicial power, libertarianism, general welfare, and civil rights. The Democratic "ideology" was states' rights oriented, democratic, liberty-oriented, pro-general welfare, and unsympathetic to Negro civil rights. The Republican "ideology" was nationalistic, for judicial power, pro-government on liberty issues, for special interests (business), and sympathetic to Negro civil rights.

The movement of the Wilson administration to an affirmation of the of the need for national power seemed to influence Democratic judges on the Court to affirm its programs, thus seeming to reduce the federalism issue to an issue no longer salient to the Court or as a difference between the political parties.

Multivariate analyses of the decision-making behavior of the White Court revealed that on both periods of the Court the following attitude

systems were prominent: Liberal Nationalism and State Progressivism (reflecting Progressivist programs at the two levels of governmental power), Federalism, Libertairanism, General Welfare, and Laissez-fairism. In addition, the first period contained the attitude systems of Commerce Power and Judicial Restraint, and the second period contained a Darwinism attitude system. Analyses of the whole period also identified an attitude system composed of party-related issues. These attitude systems explains from 74 to 80 per cent of the variance contained within the data.

These attitude systems appeared to have somewhat complex relationships with values and value systems (Figure 19). Thus both Progressivism attitude systems involved the common value of equality as did the Darwinism attitude system. Darwinism involved an interaction between the values of equality and efficiency and reflected an ideology by itself: social Darwinism. The Progressivism attitude systems were related in that they reflected a common Progressivist ideology. This ideology was divided somewhat over the value of states' rights. Progressivism and anti-Darwinism were in turn related to an ideology representing what has evolved into modern liberalism. The attitude systems of Federalism and Commerce Power in turn were tied to the states' rights value which also accounted for the split over Progressivism. The General Welfare attitude system seemed to contain only general welfare as a value (altruism). Libertarianism contained two components representing separate values: liberty and political party. The four values (states' rights, general welfare, liberty and party) were related to a "party ideology". They all represented values which seemed to divide our major political parties.

Probably due to the dichotomous nature of our data (each vote represented a choice between two alternatives and each scale represented a bipolar attitude), each of the attitude systems, values, and ideologies were also dichotomous. The equality value, for example, included both an anti-equality and a pro-equality pole. Judges rated equality as highly valued, low valued or indifferent.

The Darwinist ideology includes both a Darwinist viewpoint as well as its antithesis, anti-Darwinism or Paternalism. The Progressivist ideology also has its opposite, anti-Progressivism, traditionalism or conservatism. The party ideology has its opposites, the Republican ideology and the Democratic ideology.

It seems clear that a large majority of the decision-making behavior of the White Court justices is influenced by two major political factors related to off-Court influences and experiences: Progressivism and political party.

Studies of the background of the judges showed that their party identification was connected to party ideology, that is their attitudes on states' rights, the General Welfare, and Libertarianism. Hence, the conclusion seems logical that their attitudes on these issues were influenced by their party identification.

Likewise their pre-Court association with the Progressivist movement influenced their attitudes toward Progressivist issues. The lack of such association resulted in opposition to Progressivism. Furthermore, the judges' paternal socioeconomic status seemed to influence their

attitudes on Darwinism. The high status (proven "fittest") judges embrace Darwinism while those of low-status background seem skeptical of that ideology.

Other background influences on the judges seemed to affect their relative liberalism on Progressivist issues. Thus, a Northern, Eastern and urban birthplace and early environment seem to result in more Progressivist attitudes by the justices. Also an immigrant status of their parents and their experience in state office holding seeded likewise to result in more liberal attitudes. Pre-Court experience and familiarity with the problems of urbanization and industrialism and grass roots politics seemed to create sympathy for Progressivist programs. Basically, the attitudes of the justices seem explainable in terms of current concepts of early life political socialization.

Background characteristics and pre-Court experiences of judges seemed to explain much of their attitudes on the White Court. Thus judges who were Republican were more nationalistic, judges with more experience in state politics or who were mainly state-oriented were more sympathetic to states' rights. Westerners were more nationalist-minded but those with rural backgrounds were state-oriented.

Judges with more lower court judicial experience and those with longer Supreme Court tenure were more favorably disposed to the exercise of judicial power and more likely to uphold the actions of judges in conflict with the democratic branches of government. Former lower court judges also tended to support lower court convictions in the face of civil liberty claims, showing sympathy with their former pre-Court roles.

Democrats with low status parents from an urban environment (who happened to live in the North) were favorable to Progressivism. Democrats of high status families (all from Southern environments) were conservative. Republicans varied little in their liberalism on Progressivist issues on the basis of parental status. However, urban Republicans were liberal on Progressivism and rural Republicans were conservative.

The stability of the attitudes of the judges between the two periods of the White Court does not seem impressive. Their attitudes did apparently change somewhat and there was even some shifting in their value priorities. However, the bulk of their attitudes appeared to change little.

Congruity theory appears to explain much of the shifting of attitudes between the two periods.

Thus the influence of certain reference symbol or sources on attitude change seems clear. The evidence seems overwhelming that political party as a reference symbol seems to have influenced the Republicans to be much more liberal on Liberal Nationalism in the first period than in the second. The early Republican leadership of national Progressivism and of the administrations which inputted most of the cases in Liberal Nationalism in the first period seemed to account for this. The Democratic capture of that leadership and the national government reversed this situation causing attitude change on the part of the Republicans (and Democrat White) in line with the reference symbol of party.

Similarly sociometric relationships also affected attitude change. Brandeis' persuasiveness either in terms of his personal influence or his thorough research and marshalling of evidence behind his opinions had a significant impact on White Court decision making in the second period. That influence was particularly pronounced in influencing Holmes to a much more liberal position on Progressivist issues.<sup>10</sup>

The differences between our two major parties on various issues and values were examined as to the history of alliances of voting blocs with the parties, party influences on other Courts, roll-call analyses of congressmen, the impact of historical events, and ideological traditions and bases of the two parties. It was concluded that traditionally the Democrats seemed to value more highly democracy, equality, the general welfare, states' rights, and liberty. For the latter three values, this coincides with party-related values and issues on the White Court. Moreover, in analyzing individual judge's rankings of seven values based on this study, Democratic judges significantly ranked states' rights, democracy, and liberty higher and also ranked general welfare slightly higher than Republican judges.<sup>11</sup> On the White Court as on studies of the Supreme Court in general, Democrats clearly opposed judicial power (and endorsed democracy) more than Republicans who supported the use of judicial power (Nagel, 1962c).

---

<sup>10</sup>Day also may have been influenced somewhat.

<sup>11</sup>Omitting Holmes from the comparison. He was only nominally a Republican



Democrats also seemed traditionally anti-government and again individual Democratic judges significantly rank pro-government as a value lower than Republicans.

This leaves the question of why the value of equality does not differentiate Democrats from Republicans on the White Court. Apparently Democrats on the Taney, Stone, Vinson, and Warren Courts valued equality (economic liberalism) significantly more highly than Republicans. Several factors seem to explain the absence of this relationship on the White Court. First, the influence of the value of laissez-faire or anti-government (and liberty) seems to cancel out any tendency to support equality by White Court Democrats. Second, four of the six Democrats received major governmental posts from Republicans which casts doubt on their party representativeness. Third, these four Democrats were from the one-party South where traditional ideological divisions on party lines could not occur. When only Northern justices are considered Democrats clearly favored equality over Republicans.

Studies of various Supreme Courts in history seem to show that to a great extent political party identification has been correlated with attitudes on economic liberalism (Democrats being more liberal) and socioeconomic status correlates with attitudes on civil liberties (low status judges being sympathetic to liberty). These relationships are clearly not found on the White Court. The fact that the White Court did not represent a very broad class spectrum and that most Democratic judges may have been unrepresentative of their party may account for the lack of such relationships.

Progressivism, as an ideology, seemed to support the values of equality, general welfare, and pro-government. Judges who were Progressives in pre-Court politics significantly valued equality, the general welfare, and democracy (but not pro-government)<sup>12</sup> higher than non-Progressive.

Progressivism seemed to show some of the same values as Jeffersonian-Jacksonian Democracy, specifically equality, democracy, the general welfare, and to a large extent states' rights (gradually many Progressives became national oriented, however). Hence, it may have been inevitable that progressivism evolved into a liberalism that became associated with the Democratic party. Basically, however, Progressivism seemed to be a force for change during the period of the White Court (emerging from the heterogeneous elements of our society), while political party, being transmitted primarily through political learning within the family, seemed to be a conservative force in politics.

The Darwinist ideology on the Court seemed to call for the support of big business and large economic units, upholding majority oppression of minority races, protecting the right to profit from ethically questionable dealings, and upholding democratic institutions over judicial or Constitutional restraints. It seems significantly shaped by Holmes' views on Darwinism.

Political party and Progressivism had an impact in transmitting and shaping values. They seemed to act as political symbols affecting

---

<sup>12</sup> A ranking of judges according to pre-Court association with the Progressivist movement correlated with their ranking on the Laissez-faire attitude system, however. Progressives were pro-government.

reactions to their content in terms of a positive or negative reaction to those concepts as symbols.

Studies of power indices and rates of dissent showed that Day and White were powerful figures on the White Court while the liberals were much less powerful in forming successful majorities.

The first period of the White Court showed little bloc voting but the second period showed a liberal bloc composed of Clarke, Brandeis, and Holmes, a conservative bloc of White, Van Devanter, McReynolds, and McKenna, and a central bloc of Pitney and Day.

Measures of dogmatism seemed to indicate that Pitney and McReynolds were highly dogmatic.

In characterizing the judges on the various ideologies and values, the following positions were noted. Progressivist judges included Brandeis, Clarke, Pitney, Harlan and Hughes. Anti-Progressives included McReynolds, Lamar, Van Devanter, and White. McReynolds, Lamar, and McKenna were laissez-fairists, while Harlan and Pitney were strongly pro-government. Holmes, White, Van Devanter, and McReynolds were Darwinists, while Pitney, Day, Clarke, Brandeis, Lamar, and McKenna were anti-Darwinist. On Federalism, Clarke, Brandeis, McReynolds, and Lurton were pro-state, while Van Devanter, McKenna, and Day were nationalistic. On Libertarianism, Harlan, Hughes, Lamar, Holmes, Clarke, Brandeis and White were pro-liberty, while Pitney and McReynolds were anti-liberty. The general welfare value showed Clarke, Brandeis, Pitney, Harlan, and Day to be for the general welfare, but McKenna and McReynolds were favorable to special interests. On the judicial power issue, Brandeis, Holmes, Hughes, and McReynolds opposed judicial power, but Van Devanter, Lamar, and Pitney consistently

avored it.

Otherwise Clarke, Brandeis, and Hughes seemed to be Progressives following the Jeffersonian-Jacksonian ideology. Lamar was a laissez-fairist. McReynolds and Lurton seemed to be extreme individualists. Harlan seems best described as a "modern" liberal, being for both equality and national power while also being anti-Darwinist. Van Devanter, Day, McKenna, and White appeared to be Hamiltonians, somewhat conservative, but for national power. Day was, however, a moderate Progressive. Pitney was characterized as being a strongly pro-government and authoritarian Progressivist.

Holmes had a clearly thought-out philosophy of which the central concept was Darwinism as described in the above discussion of that ideology. He was also a Progressive of the New Nationalist variety.

Let us now turn to an evaluation of the techniques used in this study. Sprague (1968, p. 5) notes that the undimensional hypothesis necessary for bloc analysis of Court data leaves much unaccounted for. The data contained in this study amply illustrate this point. When the data contains many basic dimensions of attitudes, bloc analysis tells us little and one must resort to techniques of multidimensional analysis. Bloc analysis is merely a less sophisticated method of determining justices' ranks on the major dimension. If one is fortunate enough to find a undimensional Court, it may be useful; otherwise it obscures and ignores the less prominent dimensions. A much better method would be to examine "blocs" or ranks of justices on the major attitudinal dimensions. This can be done by either determining the factor scores of each justice on each

dimension or obtaining the average ranks of the justices from the ranks on the constituent variables of each dimension.

It was also noted that the method of making "cumulative scales" or large scales composed of smaller scales which touch related issues (such as all judicial power scales) with lower C.R.'s (i.e. a quasicale), is quite analogous to the method of factor analyzing the smaller scales. In using both methods, comparable results can be obtained.

Moreover, the problem of using the same case in several scales was found not to be a serious one. Indeed, the evidence is strong that certain cases involve several issues or attitudes. Some justices decide on the basis of one issue while others make a different issue the basis of their decision. Hence, many cases "belong" in two or more scales. In any case the use of exclusive scales gave approximately the same attitudinal structure as the use of scales using cases in several different scales.

Moreover, the use of the same cases in several scales was useful in showing which attitudes were more salient to which justices. The scaling technique which measures the major dimension of the constituent cases also results in NSR's. The NSR's allow one to discern which attitudes are more salient to a judge. It permits one to study the pattern of NSR's for a judge for ideosyncracies in his attitude-value system. Hence, the affect of attitudes for individual justices can be studied. A further useful technique in studying affect was to rank each judge on his extremity and consistency towards the several attitude systems and thereby discern his ranking of values which were related to those attitude systems.

The technique of splitting the data into two time periods for comparison proved particularly useful. It helped support the validity of the scales. It cast some doubt on the "relatively enduring" quality of these attitudes. Some changes were apparent and the technique permitted the determination of the causes of these changes. Thus both off-Court political influences and new sociometric relationships due to a shift in judicial personnel accounted for shifts in attitudes. Basically, however, most judges' attitudes were stable and enduring.

The multivariate techniques employed were quite useful. The factors identified did form meaningful psychological entities. Some factors fluctuated slightly in variable content but were fairly stable. Quartimax and varimax gave slightly different results. Quartimax did show a tendency to form a general factor and gave fewer factors. Oblique analysis, on the other hand, gave results which were not particularly more satisfactory than orthogonal methods.

The Spaeth-Rokeach model proved quite useful to the study, factor analysis, McQuitty pattern analysis, and L.A.W.S. were well suited to the model as they permitted a hierarchical arrangement of the psychological constructs. The interpretation on these constructs fit approximately the description of the components of the model. The model encouraged a search for measures of affect as well as fitting the description of the cognitive-behavioral components of attitude structure.

Based on our data, however, attitude systems (identified by multivariate analysis) are not apparently equivalent to values. Values orient attitudes, clearly, but seem to interact with more complexity. Ideologies

do seem composed of sets of interrelated values (and attitude systems) as postulated.

The question was raised as to what the interacting foci that produce an attitude were. In some cases they may be attitude toward object and attitude toward situation. They could be composed of several beliefs. It is also possible that that they could be composed of interacting values. Since Rokeach (1968a) holds that values transcendently guide actions and judgements, the extent to which a justice perceives an issue to involve a value or conflicting values may affect his reaction to that issue.<sup>13</sup>

Concepts of political socialization proved useful in discussing possible causes of judges' attitudes. Congruity theory seemed helpful in explaining why judges appeared to shift in attitude as the reaction to a reference source or symbol.

Finally, this study seems to reinforce previous findings (Schubert, 1965a; Spaeth, 1966, 1967) that the judges' attitudes and ideology are the most important factor in explaining their decision making. These attitudes are heavily influenced by the judge's background and pre-Court experience. Legalistic influences and precedent seem of minor impact. However, far from the Court being a "closed system," this study indicates that it is open to external influences. Decision-making behavior does change as a reaction to political events and external influences.

---

<sup>13</sup>A judge may highly value democracy (anti-judicial power) and have a low value for equality. Hence, these two values may interact to produce his attitude on a state law regulating business, for example.

Political party and the Progressivist movement as reference symbols apparently did affect judges' decisions. New judges joining the Court do affect the small group dynamics of the Court, producing change. Current ideology and political influences are input as new judges join the Court in turn affecting the behavior of judges still on the Court. In short, the Court is apparently not insulated from the political system, but represents a system open to vital issues and concepts of the greater political entity.



## BIBLIOGRAPHY

## BIBLIOGRAPHY

- Adrian, Charles. State and Local Governments. New York: McGraw-Hill, 1967.
- Allman, J. and Rokeach, M., "A Note on the Use of Paper-Pencil Items to Probe Cognitive and Affective Processes," Educational and Psychological Measurement, XXVII (1967), 127-133.
- Baggaley, Andrew. Intermediate Correlational Methods. New York: Wiley, 1965.
- Banfield, Edward and Wilson, James. City Politics. New York: Random House, 1963.
- Barbar, James. Honorable Eighty Eight. New York: Vantage Press, 1967.
- Becker, Theodore (Ed.). The Impact of Supreme Court Decisions. New York: Oxford University Press, 1969.
- Bell, Daniel (Ed.). The Radical Right. Garden City, New York: Doubleday, 1964.
- Beth, Loren, "Justice Harlan and the Uses of Dissent," American Political Science Review, IL (1955), 1085-1104.
- Blau, Joseph (Ed.). Social Theories of Jacksonian Democracy. New York: Liberal Arts Press, 1955.
- Binkley, Wilfred. American Political Parties--Their Natural History. New York: Knopf, 1963.
- Cahn, Edward (Ed.). Supreme Court and Supreme Law. Bloomington, Indiana: Indiana University Press, 1949.
- Camilleri, Santo F., "Theory, Probability, and Induction in Social Research," American Sociological Review, XXVII (1962), 170-177.

- Campbell, Angus; Converse, P. E.; Miller, W.E.; Stokes, D.  
The American Voter. New York: Wiley, 1964.
- Cattell, Raymond. Factor Analysis. New York: Harper, 1952.
- Cattell, Raymond, "Factor Analysis: An Introduction to Essentials," Biometrics, XXI (1965), 190-215, 405-435.
- Cattell, Raymond and Dickman, "A Dynamic Model of Physical Influences Demonstrating the Necessity of Oblique Simple Structure," Psychological Bulletin, LIX (1962).
- Carroll, J., "Biquartimin Criterion for Rotation to Oblique Simple Structure in Factor Analysis," Science, CXXVI (1957), 1114-1115.
- Chambers, William and Burnham, Walter (Eds.). American Party Systems. New York: Oxford University Press, 1967.
- Clark, Floyd B., "Constitutional Doctrines of Justice Harlan," Johns Hopkins University Studies in Historical and Political Science, XXXII (1915) No. 9.
- Coombs, Clyde. A Theory of Data. New York: Wiley, 1964.
- Corwin, E. S. Court Over Constitution. Princeton, New Jersey: Princeton University Press, 1938.
- Corwin, E. S. The Commerce Power vs States' Rights. Princeton, New Jersey: Princeton University Press, 1936.
- Corwin, E. S. Twilight of the Supreme Court. New Haven, Connecticut: Yale University Press, 1934.
- Croly, Herbert. The Promise of American Life. New York: E. P. Dutton, 1963.
- Crotty, William; Freeman, Donald; Gatlin, Douglas.  
Political Parties and Political Behavior. Boston: Allyn and Bacon, 1966.
- Current Biography. New York: H. W. Wilson Co.
- Current, Richard and Williams, T. H., and Freidel, F.  
American History. New York: Knopf, 1961.
- Dahl, Robert, "Decision Making in a Democracy: The Supreme Court as a National Policy Maker," Journal of Public Law, (1958), 279-295.

- Danielski, David. A Supreme Court Justice Is Appointed. New York: Random House, 1964.
- Dawson, Richard and Prewitt, Kenneth. Political Socialization. Boston: Little Brown, 1969.
- Dictionary of American Biography. New York: Scribner, 1958-1964.
- Dumbauld, Edward (Ed.). The Political Writings of Thomas Jefferson. New York: Bobbs-Merrill, 1955.
- Early, Stephen, Jr. Justice Clark McReynolds and the Judicial Process, (University of Virginia, Ph.D. Dissertation, 1954).
- Edelman, Murray. The Symbolic Uses of Politics. Urbana, Illinois: University of Illinois Press, 1964.
- Ewing, C. A. The Judges of the Supreme Court, 1789-1937. Minneapolis: University of Minneapolis Press, 1938.
- Faulkner, Harold. Politics, Reform and Expansion, 1890-1900. New York: Harper and Row, 1959.
- Faulkner, H. V. Quest for Social Justice, 1898-1914. New York: McMillan, 1931.
- Fenton, John. Midwest Politics. New York: Holt, Rinehart, 1966.
- Filler, Louis (Ed.). Late Nineteenth-Century American Liberalism. Indianapolis: Bobbs-Merrill Co., 1962.
- Flanigan, William. Political Behavior of the American Electorate. Boston: Allyn and Bacon, 1968.
- Frankfurter, Felix. Mr. Justice Holmes and the Supreme Court. Cambridge: Belknap, 1961.
- Fried, A. The Jeffersonian and Hamiltonian Traditions in American Politics. Garden City, New York: Doubleday, 1968.
- Fruchter, Benjamin. Introduction to Factor Analysis (Chapters 5, 9). New York: Van Nostrand, 1954.
- Grimes, Alan. Equality in America. New York: Oxford, 1964.
- . The Puritan Ethic and Woman Suffrage. New York: Oxford University Press, 1967.

Grossman, Joel, "Social Backgrounds and Judicial Decision Making," Harvard Law Review, 1966.

Guilford, Joy. Psychometric Methods. New York: McGraw-Hill, 1954.

Gusfield, Joseph, "The Study of Social Movements," International Encyclopedia of the Social Sciences. New York: Crowell, Collier and MacMillan, 1968.

Guthery, S. B.; Spaeth, H. J.; and Thomas, S., "Fascale, A Fortran IV Multidimensional Scaling and Factor Analysis Program," Behavioral Science, XIII (1968), 426.

Guttman, Louis, "A New Approach to Factor Analysis," in Lazarsfeld (Ed.), Mathematical Thinking in the Social Sciences. New York: Columbia University Press, 1954, 258-348.

———. "The Principal Components of Scalable Attitudes," in Lazarsfeld (Ed.), Mathematical Thinking in the Social Sciences. New York: Columbia University Press, 1954.

———. Chapters 2, 3, 6, 8, and 9 in Stouffer, et. al. Measurement and Prediction. Princeton, New Jersey: Princeton University Press, 1950.

Harman, Harry. Modern Factor Analysis. Chicago: University of Chicago Press, 1967.

Harris, C. and Kaiser, H., "Oblique Factor Analytic Solutions by Orthogonal Transformations," Psychometrika, XXIX (1964).

Hofstadter, Richard. The Age of Reform from Bryan to F.D.R. Boston: Beacon Press, 1955a

———. Social Darwinism in American Thought. Boston: Beacon Press, 1955b.

Hollander, E. P. and Hunt, Raymond. Current Perspectives in Social Psychology. New York: Oxford University Press, 1963.

Howe, M. D. Holmes-Pollock Letters. Cambridge: Belknap, 1961.

———. Justice Oliver Wendell Holmes. Cambridge: Belknap Press of Harvard University, I, 1957, II, 1963.



- In Memoriam, Horace Harmon Lurton, 59 L.Ed. 1505-1527.
- In Memoriam, Joseph Rucker Lamar, 60 L. Ed. 1242-1259.
- In Memoriam, John Marshall Harlan, 56 L. Ed. 1273-1293.
- Insko, Chester. Theories of Attitude Change. New York: Appleton Century Crofts, 1967.
- Jewell, Malcolm. The State Legislature. New York: Random House, 1962.
- Johnson, John R., Jr. The Extent and Consistency of Party Voting in the U.S. Senate. Ph.D. Dissertation, University of Chicago, 1943.
- "Justice John Clarke," Mississippi Valley Historical Review, XXXVI (June 1949), 27-50.
- "Justice White," Nation (May 3, 1917), 528-529.
- "Justice White," New Republic (June 1, 1921), 68.
- Kaiser, H., "The Application of Electronic Computers to Factor Analysis," Education and Psychological Measurement, XIX (1959).
- Katz, Daniel, "The Functional Approach to the Study of Attitudes," Public Opinion Quarterly, XXIV (1960), 163-204.
- \_\_\_\_\_. The Social Psychology of Organizations. New York: Wiley, 1966.
- Kelly, Alfred and Harbison, Winfred. The American Constitution, Its Origins and Development. New York: W. W. Norton and Company, 1963.
- Kenyon, Cecelia (Ed.). The Anti-federalists. Indianapolis: Bobbs-Merrill, 1965.
- Kerlinger, Fred. Foundations of Behavioral Research. New York: Holt, Rinehart, 1964.
- Key, V. O. Public Opinion and American Democracy. New York: Knopf, 1964.
- Klinkhamer, Marie. Edward Douglas White, Chief Justice of the United States. Washington, D. C.: Catholic University of American Press, 1943.
- Krech, D. et. al. Individual in Society. New York: McGraw-Hill, 1962.

- Krislov, Samuel. The Supreme Court in the Political Process. New York: MacMillan, 1965.
- Kruskal, J. B., "Multidimensional Scaling by Optimizing Goodness of Fit to a Nonmetric Hypothesis," Psychometrika, XXIX (March 1964a).
- , "Nonmetric Multidimensional Scaling," Psychometrika, XXIX (June, 1964b).
- Lamar, Claudia P. The Life of Joseph Rucker Lamar. New York: G. P. Putnam's Sons, 1926.
- Lane, Robert and Sears, David. Public Opinion. Englewood Cliffs, New Jersey: Prentice Hall, 1964.
- Lazarsfeld, Paul F. (Ed.). Mathematical Thinking in the Social Sciences. Glencoe, Illinois: Free Press, 1954.
- Leavitt, Donald. Attitudinal Components of the Warren Court, 1968 (Unpublished paper).
- . The Watkins Case and Its Aftermath. Chicago: Roosevelt University, M.A. Dissertation, 1965.
- Lerner, Max. The Mind and Faith of Justice Holmes. New York: Modern Library, 1954.
- Lewis, Edward R. A History of American Political Thought From the Civil War to the World War. New York: MacMillan, 1937.
- Lingoes, J. C., "An IBM 7090 Program for Guttman-Lingoes Smallest Space Analysis," Behavioral Science, XX (1965), 183-184.
- Lingoes, J. C. and Guttman, L., "Nonmetric Factor Analyses: A Rank-reducing Alternative to Linear Factor Analysis," Multivariate Behavioral Research, II (1967), 485-505.
- Link, Arthur. Wilson. Princeton, New Jersey: Princeton University Press, 1947.
- . Woodrow Wilson, A Profile. New York: Hill and Wang, 1968.
- . Woodrow Wilson and the Progressive Era. New York: Harper, 1954.
- Link, Arthur and Catton, William. American Epoch. New York: Knopf, 1967.



- Lipset, Seymour. First New Nation. New York: Basic Books, 1963.
- \_\_\_\_\_. Political Man. Garden City, New York: Doubleday, 1960.
- Lloyd, Henry. Wealth Against Commonwealth. New York: Harper and Brothers, 1894.
- Lockard, Duane. New England State Politics. Princeton: Princeton University Press, 1957.
- Lodge, Henry Cabot. Selections From the Correspondence of Theodore Roosevelt and Henry Cabot Lodge, 1894-1918. New York: Scribners, 1925.
- "Mahon Pitney," American Bar Association Journal, XI (May 1925), 322.
- Mason, A. T. Brandeis, A Free Man's Life. New York: Viking Press, 1946.
- \_\_\_\_\_. Harlan Fiske Stone. New York: Viking Press, 1956.
- \_\_\_\_\_. Supreme Court From Taft to Warren. Baton Rouge: Louisiana State University Press, 1958.
- Mason, A. T. and Beane, William. American Constitutional Law. Englewood Cliffs, New Jersey: Prentice Hall, 1959.
- Mattingly, Mary. The Hughes Court, 1931-1936: Psychological Dimensions of Decision Making. (Michigan State University, Ph.D. Dissertation, 1969).
- Mayer, George and Forster, Walter. The U. S. and the Twentieth Century. Boston: Houghton Mifflin, 1958.
- McCloskey, Robert. American Conservatism in an Age of Enterprise. Cambridge: Harvard University Press, 1951.
- McDevitt, Mathew. Joseph McKenna. Washington D. C.: Catholic University of America Press, 1946.
- McLean, Joseph. William Rufus Day. Baltimore, Maryland: Johns Hopkins University Press, 1946.
- McNemar, Quinn. Psychological Statistics. New York: Wiley, 1962.

- McQuitty, Louis L., "Elementary Linkage Analysis for Isolating Orthogonal and Oblique Types and Typal Relevances," Educational and Psychological Measurement, XVII (1957), 207-229.
- \_\_\_\_\_. "Improved Hierarchical Syndrome Analysis of Discrete and Continuous Data," Educational and Psychological Measurement, XXVI (1966a), 577-582.
- \_\_\_\_\_. "Single and Multiple Hierarchical Classification by Reciprocal Pairs and Rank Order Types," Educational and Psychological Measurement, XXV (1966b), 253-266.
- \_\_\_\_\_. "The Mutual Development of Some Theories of Types and Some Pattern Analytic Methods," 1965, (APA paper).
- McRae, Duncan. Issues and Parties in Legislative Voting: Methods of Statistical Analysis (unpublished).
- \_\_\_\_\_. Partisanship and Issues in Congressional Voting. (Paper delivered at 1968 APSA meeting).
- Mendelson, Wallace, "The Neo-Behavioral Approach to the Judicial Process: A Critique," American Political Science Review, LVII (September 1963), 593-603.
- Mowry, George. Theodore Roosevelt and the Progressive Movement. New York: Harper, 1958.
- Mowry, George and Hicks, John. The American Nation. Boston: Houghton Mifflin, 1965.
- Murphy, Walter. Congress and the Court. Chicago: University of Chicago Press, 1962.
- \_\_\_\_\_. Elements of Judicial Strategy. Chicago: University of Chicago Press, 1964.
- Murphy, Walter and Pritchett, C. Herman (Eds.). Courts, Judges, and Politics. New York: Random House, 1961.
- Myers, Gustavaus. History of the Supreme Court. Chicago: C. H. Kerr, 1912.
- Nagel, Stuart, "Ethnic Affiliations and Judicial Propensities," Journal of Politics, XXIV (1962a), 333-339.
- \_\_\_\_\_. "Judicial Backgrounds and Criminal Cases," Journal of Criminal Law, Criminology, and Police Science, LIII (1962b) 333-339.
- \_\_\_\_\_. "Political Parties and Judicial Review in American History," Journal of Public Law, XI (1962c) 328-340.

- Nagel, Stuart, "Political Party Affiliation and Judges' Decisions," American Political Science Review, CV (1961), 843-890.
- \_\_\_\_\_, "Regulatory Commissioners and Party Politics," Administrative Law Review, XVII (1964), 39-47.
- \_\_\_\_\_, "Testing Relations between Judicial Characteristics and Judicial Decision Making," Western Political Quarterly, XV (1962d), 425-438.
- National Cyclopedia of American Biography. New York: J. T. White, 1937.
- New York Times (February 9, 1941), p. 47 on William Van Devanter.
- New York Times (August 26, 1946), p. 1 on James McReynolds.
- Osgood, C. and Tannerbaum, P., "The Principle of Congruity in the Prediction of Attitude Change," Psychological Review, LXII (1955), 42-55.
- Paul, Arnold. The Conservative Crisis and the Rule of Law. Ithaca, New York: Cornell University Press, 1960.
- Paxson, F. L. America at War, 1917-1918. Boston: Houghton Mifflin, 1939.
- Pearson, Drew and Allen, Robert. Nine Old Men. Garden City, New York: Doubleday, Doran and Co., 1937.
- Peterson, Merrill. The Jeffersonian Image in the American Mind. New York: Oxford University Press, 1960.
- Press, Charles and Williams, Oliver. Democracy in the Fifty States. Rand McNally, 1966.
- Price, Leighton A. Hierarchical Clustering Based on a Criterion of Largest Average Within Cluster Similarity. Michigan State University C.I.S.S.R. Research Report, 1969.
- Pringle, Harry F. The Life and Times of William Howard Taft. New York: Farrar and Rinehart, 1939.
- Pritchett, C. Herman. Civil Liberties and the Vinson Court. Chicago: University of Chicago Press, 1954.
- \_\_\_\_\_. The Roosevelt Court. New York: MacMillan, 1948.
- Proceedings in Honor of E. D. White, 65 L.Ed. 1199.

- Pusey, Merlo. Charles Evans Hughes, I, II. New York: Columbia University Press, 1951.
- Rao, C. R. Advanced Statistical Methods in Biometric Research. New York: Wiley, 1962.
- \_\_\_\_\_, "Estimate and Tests of Significance in Factor Analysis," Psychometrika, XX (1955), 93-111.
- Rodell, Fred. Nine Men. New York: Random House, 1955.
- Roelofs, Vernon, "Justice William R. Day and Federal Regulation," Mississippi Valley Historical Review, XXXVII (June 1950), 36-60.
- Rogat, Yosal. University of Chicago Law Review, XXXI (Winter, 1964), 213-57.
- Rokeach, Milton. Beliefs, Attitudes and Values. San Francisco: Jossey-Bass, 1968a.
- \_\_\_\_\_, "The Nature of Attitudes," International Encyclopedia of the Social Sciences. New York: Cromwell, Collier and MacMillan, 1968b.
- \_\_\_\_\_. The Open and Closed Mind. New York: Basic Books, 1960.
- \_\_\_\_\_, "A Theory of Organization and Change Within Value-Attitude Systems," Journal of Social Issues, XXIV (1968c), 13-33.
- Rosenberg, M. et. al. Attitude Organization and Change. New Haven: Yale University Press, 1960.
- Rossiter, Clinton. Conservatism in America. New York: Knopf, 1962.
- Schmidhauser, John. Constitutional Law in the Political Process. Chicago: Rand McNally, 1963.
- \_\_\_\_\_, "Judicial Behavior and the Sectional Crisis of 1837-1860," Journal of Politics, XXIII (1961), 615-640.
- \_\_\_\_\_, "Justices of the Supreme Court: A Collective Portrait," Midwest Journal of Political Science, III (February 1959), 1-57.
- Schubert, Glendon. Constitutional Politics. New York: Holt, Rinehart, and Winston, 1960.
- \_\_\_\_\_. The Constitutional Polity (unpublished).

- Schubert, Glendon, "Ideologies and Attitudes, Academic and Judicial," Journal of Politics, LXI (February, 1967), 3-40.
- \_\_\_\_\_, "Jackson's Judicial Philosophy: An Exploration in Value Analysis," American Political Science Review, IL (1965c), 940-963.
- \_\_\_\_\_, (Ed.). Judicial Behavior. Chicago: Rand McNally, 1964.
- \_\_\_\_\_, (Ed.). Judicial Decision Making. New York: Free Press of Glencoe, 1963.
- \_\_\_\_\_, Judicial Mind. Evanston, Illinois: Northwestern University Press, 1965a.
- \_\_\_\_\_, Judicial Policy Making. Glenview, Illinois: Scott, Foresman, 1965b.
- \_\_\_\_\_, "The 1960 Term of the Supreme Court: A Psychological Analysis," American Political Science Review, LVI (1962), 90-107.
- \_\_\_\_\_, Quantitative Analysis of Judicial Behavior. Glencoe, Illinois: Free Press, 1959.
- Shaw, M. and Wright, J. Scales for the Measurement of Attitudes. New York: McGraw-Hill, 1967.
- Siegel, Sidney. Nonparametric Statistics for the Behavioral Sciences. New York: McGraw-Hill, 1956.
- Smith, M., Bruner, J., and White, R. Opinions and Personality. New York: Wiley, 1964.
- Snyder, Eloise C., "The Supreme Court as a Small Group," in Ulmer (ed.), Introductory Readings in Political Behavior. Chicago: Rand McNally, 1961.
- Sorauf, Frank. Party Politics in America. Boston: Little, Brown and Co., 1968.
- Spaeth, Harold J. Addendum to Renewal Proposal of Grant MH 15365-01, 1969.
- \_\_\_\_\_, "An Approach to the Study of Attitude," Midwest Journal of Political Science, V (May 1961), 165-180.
- \_\_\_\_\_, "An Analysis of Judicial Attitudes in the Labor Relations Decisions of the Warren Court," Journal of Politics, XXV (1963a), 290-311.

- Spaeth, Harold J. Decisional Behavior on the Taney Court (unpublished).
- \_\_\_\_\_, "Judicial Power as a Variable Motivating Supreme Court Behavior," Midwest Journal of Political Science, VI (February 1962), 54-82.
- \_\_\_\_\_, "The Judicial Restraint of Mr. Justice Frankfurter-- Myth or Reality," Midwest Journal of Political Science, VIII (February 1964), 22-31.
- \_\_\_\_\_. Application for Research Grant to the National Science Foundation, 1967.
- \_\_\_\_\_, "Unidimensionality and Item Invariance in Judicial Scaling," Behavioral Science, X (1965) 290-304.
- \_\_\_\_\_. The Warren Court. San Francisco: Chandler Publishing Co., 1966.
- \_\_\_\_\_, "Warren Court Attitudes Toward Business: The "B Scale" in G. Schubert (ed.) Judicial Decision Making, Free Press of Glencoe, 1963b, 79-108.
- Spaeth, Harold J. and Guthery, Scott B., "The Use and Utility of the Monotone Criterion in Multidimensional Scaling," Multivariate Behavioral Research, IV (1969), 501-515.
- Spaeth, Harold and Parker, Douglas, "Effects of Attitude Toward Situation Upon Attitude Toward Object," Journal of Psychology, LXXIII (1969), 173-182.
- Spaeth, Harold and Peterson, David J., "The Dimensionality of Civil Liberties Decision Making," (mimeo).
- Sprague, John. Voting Pattern of the U. S. Supreme Court: Cases in Federalism. Indianapolis, Ind: Bobbs-Merrill, 1968.
- Stouffer, Samuel. Communism, Conformity and Civil Liberties. Garden City, New Jersey: Doubleday, 1955.
- Swisher, Carl. American Constitutional Development. Cambridge: Houghton-Mifflin, 1954.
- Sumner, William Graham. Social Darwinism. Englewood Cliffs, New Jersey: Prentice Hall, 1963.
- Thurstone, L. L. Multiple Factor Analysis. Chicago: University of Chicago Press, 1947.

- Tiedeman, David and Rulan, Phillip, "The Multiple Discriminant Function," Harvard Educational Review, XXI, 71-89.
- Tindall, George. A Populist Reader. New York: Harper, 1966.
- Torgerson, Warren. Theory and Methods of Scaling. New York: Wiley, 1958.
- Turner, Julius. Party and Constituency: Pressures on Congress. Baltimore: Johns Hopkins Press, 1951.
- U. S. Supreme Court Reports, Volumes 210-256.
- Ulmer, Sidney. Introductory Readings in Political Behavior. Chicago: Rand McNally, 1961.
- \_\_\_\_\_, "The Analysis of Behavior Patterns on the U. S. Supreme Court," Journal of Politics, (1960) Parts I and II.
- \_\_\_\_\_, "Homeostatic Tendencies in the U. S. Supreme Court," in Ulmer, Sidney (ed.), Introductory Readings in Political Behavior. Chicago: Rand McNally, 1961.
- Van Deusen, Glyndon. The Jacksonian Era: 1828-1848. New York: Harper and Row, 1959.
- Veblen, Thorstein. Theory of the Leisure Class. New York: New American Library, 1953.
- Wallace, A., "Revitalization Movements," American Anthropologist, LXIII (1956), 264-281.
- Warren, Charles, "The Progressiveness of the U. S. Supreme Court," Columbia Law Review, XIII (December 1913), 294.
- \_\_\_\_\_. The Supreme Court in U. S. History, II. Boston: Little, Brown and Co., 1926.
- Warner, Hoyt. The Life of Mr. Justice Clarke. Cleveland: Western Reserve University Press, 1959.
- Westin, Alan, "The Supreme Court, the Populist Movement and the Campaign of 1896," Journal of Politics, XV (1953), 3-41.
- White, R., "Motivation Reconsidered: the Concept of Competence," Psychological Review, LXVI (1959), 297-334.

Who Was Who in America, 1897-1942. Chicago: Marquis

Winter, William. The Urban Polity. New York: Dodd, Mead, 1969.

Wittke, Carl, "Mr. Justice Clarke--A Supreme Court Judge in Retirement," Mississippi Valley Historical Review, XXXVI (1949), 27-50.



# APPENDIX I

## Cases Used in Study

Cases starting with October 1916 Term: White, McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke.

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
1	61: 116	12	8-1	MK		
2	61: 152	sl, 22, 24, 25, 30, 51.	5-4	P, D, C, B		
3	61: 165	21, 22, 24, 25, 27, 42, 51.	8-1	P		
4	61: 204	17, 31, 33, 44, 53.	6-3	D, V, MK		
5	61: 204	17, 31, 33, 44, 53.	6-3	D, V, MK		
6	61: 210	25, 27, 48	8-1	P		
7	61: 268	12, 23, 46, 51	7-2	B, C		
8	61: 294	12, 16, 42.	7-2	P, MK		
9	61: 326	31, 33, 38	7-2	Ho, V	MR	
10	61: 442	2, 4, 13, 33, 35	5-3	MK, W, C		
11	61: 472	10	8-1	MK		
12	61: 480	10	8-1	MR		
13	61: 493	10	8-1	MR		
14	61: 498	10	8-1	MR		
15	61: 617	19, 20	8-1	D		
16	61: 650	12	7-2	C, B	D	
17	61: 685	9	5-4	W, V, MK, MR		
18	61: 722	22, 51	6-3	MK, V, MR		
19	61: 755	7	5-4	D, P, V, MR	MK	
20	61: 830	7, 10, 53	5-3	W, V, MK		B
21	61: 866	29	6-3	Ho, V, MK		
22	61: 871	29	6-3	Ho, V, MK	MR	
23	61: 906	17, 37	8-1	MK		
24	61: 907	9, 42	7-2	V, MR		
25	61: 960	25, 27, 53	7-2	P, C		
26	61: 973	10, 23, 46, 51	8-1	MR		
27	61: 1019	24, 25, 27, 40, 48, 51, 53.	7-2	W, C		
28	61: 1045	8	7-2	B, C		
29	61: 1057	8	7-2	B, C		
30	61: 1086	8	5-4	B, C, P, Ho		
31	61: 1116	8	5-4	B, C, P, Ho		
32	61: 1117	12	7-2	MK, P		
33	61: 1160	11, 35	6-3	W, P, B		
34	61: 1181	11, 13, 34	8-1	W		
35	61: 1206	18, 53	7-2	V, MR		
36	61: 1233	31, 32	7-2	V, D		
37	61: 1242	2, 4	7-2	C, W		
38	61: 1256	1, 7	5-4	P, V, MK, MR		

## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Conour	No Vote
39	61:1280	11,36	6-3	Ho,B,C		
40	61:1291	11,36	6-3	Ho,B,C		
41	61:1309	11,36	6-3	Ho,B,C		
42	61:1321	9	8-1	W		
43	61:1325	12,23,46,51	6-3	W,MK,MR		
44	61:1333	19	6-2	W,MK		MR
45	61:1336	7	5-4	MK,B,Ho,C		
46	61:1352	13,21,22,25,31,32,35,51.	8-1	MK		
47	62:117	13,23,35,46,51.	6-3	W,MK,MR		
48	62: 145	11,36	8-1	W		
49	62: 260	1,7	6-3	B,Ho,C		
50	62: 286	1,7	6-3	B,Ho,C		
51	62: 299	13,20,31,33,35,38.	8-1	V		
52	62: 326	2,3,20,28,49.	8-1	V		
53	62: 345	25,27,48.	8-1	W		
54	62: 389	12	7-2	B,C		
55	62: 406	17,18,20,37.	7-2	V,MR		
56	62: 469	2,4,5,17,37,38.	8-1	MK		
57	62: 481	12	6-2	C,B		
58	62: 551	29	7-2	Ho,V	B	
59	62: 568	29	8-1	MK		
60	62: 574	13,35	6-3	MK,MR,W		
61	62: 649	10,12,23,46,51.	6-3	Ho,B,C		
62	62: 674	5,18	8-1	MK		
63	62: 703	18,28,52,53.	6-3	P,MR,MK		
64	62: 763	10,14,16,31,32.	7-2	MR,V		
65	62: 772	13,25,26,35,53.	5-4	B,P,D,C		
66	62: 802	12	7-2	C,B		
67	62: 866	18	8-1	MK		
68	62: 963	13,31,33,35,42.	8-1	D		
69	62: 966	7	7-2	P,C		
70	62: 968	25,29,30,51.	4-3	D,C,P	MK	B,MR
71	62:1003	9,25,27.	7-2	D,C		
72	62:1038	2,3,13,28,35,39,52,56.	6-3	C,P,B		
73	62:1101	7,21	5-4	Ho,MK,B,C		
74	62:1142	19	8-1	C		
75	62:1171	8,31,32	6-3	P,B,C	Ho	

## APPENDIX I (cont'd.)

Case No.	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote D,C
76	62:1187	1	5-2	Ho,B		
77	62:1196	29	8-1	MK		
78	62:1200	2,3,14,16,17,18,29,37,56.	6-2	MK,V		
79	62: 112	17,18,29,37,53.	7-1	W		
80	63: 148	2,3,16,28,31,33,49,55.	8-1	Ho		
81	63: 198	17,24,25,41,44,51.	8-1	C		
82	63: 200	7	5-4	Ho,B,C,MK.		
83	63: 208	7	5-4	Ho,B,C,MK.		
84	63: 211	1,30	7-1	B	Ho,MK	C
85	63: 255	31,32	6-3	D,V,B		
86	63: 337	13,20,31,33,35,38.	7-2	MR,C		
87	63: 341	10,12,23,46,51.	6-3	Ho,B,C		
88	63: 350	25,27,40,42,48.	7-2	C,MK		
89	63: 372	11,13,31,32,34.	6-3	P,B,C		
90	63: 493	19,20	5-4	W,MK,V,MR.		
91	63: 497	19,20	5-4	W,MK,V,MR.		
92	63: 536	8	8-1	C		
93	63: 543	19,28,49	7-2	D,C		
94	63: 570	25,27,48	7-2	C,K	P,B	
95	63: 602	11,13,34	6-3	P,B,C	D	
96	63: 656	2,4,41	8-1	P		
97	63: 822	29	7-2	MK,P		
98	63: 877	1,40	7-2	Ho,B		
99	63: 910	13,23,41,32,35,45,46,51.	8-1	B		
100	63: 926	13,23,41,32,35,45,46,51.	8-1	B		
101	63: 929	13,23,41,32,35,45,46,51.	8-1	B		
102	63: 934	13,23,41,32,35,45,46,51.	8-1	B		
103	63: 936	13,17,20,31,33,35,44.	8-1	P		
104	63: 941	13,17,20,31,33,35,44.	8-1	P		
105	63: 983	2,4,6	8-1	W		
106	63:1058	9	5-4	MK,W,V,MR.	Ho,B,C.	
107	63:1088	25,27,48	5-4	C,MK,B,D.		
108	63:1096	25,27,48	6-3	MK,P,C.	MR,V.	
109	63:1099	2,3,17,28,44,49,55.	7-1	MR		W

## APPENDIX I (cont'd.)

Case No <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
110	63:1113	17,28,44,52.	7-2	MR,MR		
111	63:1123	12	5-4	MK,P,B,C		
112	63:1124	11,13,34,36.	5-4	Ho,V,W,MR.		
113	63:1142	13,21,22,31, 32,35,51..	8-1	C		
114	63:1154	1	7-2	Ho,B		
115	63:1161	9	8-1	MR		
116	63:1173	1	7-2	Ho, B		
117	64: 118	13,25,27,31, 33,34,48.	8-1	P		
118	64: 121	10,12,23,46,51.	7-2	P,C		
119	64: 139	10,23,46,51.	8-1	MR		
120	64: 168	11,13,34.	7-2	MK,Ho		
121	64: 171	13,17,21,23, 25,28,31,32, 35,44,45,46, 49,51.	6-3	P,B,C		
122	64: 180	8	7-2	B,C		
123	64: 182	18,21,23,45,51.	8-1	B		
124	64: 215	11,36	8-1	MR		
125	64: 225	18,21,23,45,51.	8-1	MR		
126	64: 258	8	8-1	C		
127	64: 260	2,3,21,38,56	5-4	MR,D,V,C.		
128	64: 290	18,21,45,51	6-2	D,V	P,MK	MR
129	64: 319	2,3,4,56.	7-2	W,P		
130	64: 343	30	4-3	D,P,C		MR,B
131	64: 360	1	6-3	Ho,B,C.		
132	64: 375	19,21	7-2	D,V		
133	64: 377	19,21	7-2	D,V		
134	64: 380	19,21	7-2	D,V		
135	64: 386	28,52	6-3	MK,P,C		
136	64: 388	17,20,28,44, 45.	5-2	MK,P		V,B
137	64: 396	11,36	5-4	MK,D,V,MR.		
138	64: 445	11,36	8-1	MR		
139	64: 471	30	7-2	Ho,B		
140	64: 476	12,40,42	7-2	MR,P		
141	64: 491	29	8-1	MR		
142	64: 521	19	5-4	Ho,B,D,C		
143	64: 542	1	7-2	Ho,B		
144	64: 590	29	7-2	C,P		
145	64: 631	15,31,33	6-3	D,V,P		
146	64: 637	15,31,33	6-3	D,V,P		
147	64: 641	14,31,33	7-2	V,P		
148	64: 665	2,3,31,33,38, 55.	8-1	C		
149	64: 670	9	8-1	C		
150	64: 675	17,18,37	8-1	C		
151	64: 705	29	8-1	MR		
152	64: 735	18,53	7-2	W,C		

## APPENDIX I (cont'd)

Case No.	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
153	64: 739	11,36	8-1	MR		
154	64: 760	24,25,30,51.	6-3	W, Ho, V		
155	64: 790	9	7-2	V, P		
156	64: 794	9	7-2	V, P		
157	64: 801	21,22,25,27, 51.	8-1	W		
158	64: 834	8	5-4,	Ho, P, B, C.		
159	64: 843	17,18,20,23, 28,44,45,49, 51,53.	5-4	MR, MK, V, P.		
160	64: 857	17,18,37	7-2	P, C		
161	64: 887	19,40,42	7-2	Ho, B		
162	64: 907	8	8-1	C		
163	64: 908	10,23,40,42, 46,51.	6-3	B, Ho, C		
164	64: 919	28,42,52	6-3	MK, P, MR		
165	64: 946	31,33,38	7-2	C, MK		
166	64: 989	11,36	7-2	B, Ho		
167	64: 993	24,25,30,51	7-2	B, C	P	
168	64:1002	2,3,5,14,16,18	5-1	C		Ho B, P
169	65: 126	31,33	7-2	P, MR		
170	65: 145	7	7-2	P, MR		
171	65: 185	2,3,20,40,41,55	5-4	B, W, D, MR		
172	65: 176	21,13,35	6-3	W, MK, MR		
173	65: 276	10,14	6-3	W, V, MR		
174	65: 287	1	7-2	B, W		
175	65: 270	6	8-1	C		
176	65: 304	7,8,53	8-1	MR		
177	65: 372	21,22,23,40,41, 42,45,51.	5-4	MK, V, P, MR		
178	65: 335	9	6-3	C, D, P		
179	65: 368	17,37	8-1	C		
180	65: 322	12	6-3	W, V, MR		
181	65: 349	1,7,40,42	6-3	B, Ho, C		
182	65: 376	2,3,18,20,38,56	8-1	MR		
183	65: 389	13,31,32,35	7-2	P, C		
184	65: 481	1,2,4,40,41	6-3	D, P, MR		
185	65: 577	20,31,33,40,41	6-2	Ho, MR		B
186	65: 549	10,25,26,39	6-3	Ho, V, MR		
187	65: 539	13,23,35,46,51	5-4	D, P, B, C		
188	65: 704	1	7-2	Ho, B		
189	65: 729	9	7-2	C, D		
190	65: 857	12,28,52	8-1	C		
191	65: 837	2,3,55	7-2	W, C	MR	
192	65: 892	30	6-3	P, D, C		
193	65: 865	12,21,23,46,51	5-4	MK, W, V, MR		
194	65: 877	12,23,46,51	5-4	MK, W, V, MR		
195	65: 900	11,36	7-1	MK		C
196	65:1012	6	8-1	C		
197	65:1013	19,20	7-1	C		D
198	65: 955	8	8-1	C		
199	65: 958	8	8-1	C		

## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placen in <sup>b</sup>	Vote	Dissents	Concur	No Vote
<u>White Dies</u>						
200	65:1032	25,27	7-1	MR		W
201	65:1029	11, 13, 34	6-2	P, B		W
202	65:1048	2, 4	6-2	B, Ho		W
203	65:1094	25, 27	6-2	P, C		W
204	65:1146	7, 18	5-3	Ho, B, C		W
205	65:1135	11, 31, 32, 36	7-1	B		W
<u>Concurrences</u>						
206	64: 862	7, 21	5-4		D, V, P, MR	
207	65: 253	25, 30, 51	5-2		W, Ho	MR, B
208	61:1036	28, 52, 53	8-1		P	
209	61:1194	9	8-1		B	
210	62: 372	19	8-1		MK	
October, 1910 Term: Harlan, White, McKenna, Holmes, Day, Lurton, Hughes						
211	54:1088	13, 27, 35	6-1	Ho		
212	54:1080	2, 4	4-3	Ho, HA, HU		
213	54:1187	12, 23, 40, 46, 51, 64, 65	4-3	W, MK, HU		
214	55: 102	2, 4, 31, 33, 42, 63, 64, 65	6-1	HA		V, LA
215	55: 191	2, 4, 7, 15, 31, 33	5-2	Ho, LU		V, LA
216	55: 213	10, 12	5-2		MK, W	V, LA
217	55: 259	14, 16	7-2	HA, D		
218	55: 279	14, 16	7-2	HA, D		
219	55: 281	14, 16	7-2	HA, D		
220	55: 477	2, 3	8-1	MK		
221	55: 489	2, 4	8-1	HA		
222	55: 502	30	7-1	Ho		LU
223	64: 460	11, 36	8-1	MR		
224	55: 536	29, 40, 41, 65	8-1		HU	
225	55: 552	3, 5, 18	8-1	MK		
226	55: 619	30, 42	8-1	HA		
227	55: 663	30	8-1	HA		
228	55: 716	13, 35	6-3	Ho, LU, HU		
229	55: 753	2, 4, 17, 37, 62, 65.	8-1	HA		
230	55: 771	2, 17, 20, 37, 43, 47.	8-1	MK		
231	55: 784	2, 19, 20, 43, 47.	8-1		MK	
232	55: 810	16	8-1	HA		
233	55: 823	13, 20, 35, 47	6-3	HU, HA, D		
234	55: 842	2, 17, 40, 43, 44, 51.	8-1	HU		
235	55: 853	5, 31, 33	7-2	MK, Ho		
236	55: 890	2, 3, 16, 31, 33, 59, 60.	8-1	HA		
<u>Harlan Dies</u>						
237	56: 83	13, 22, 23, 24, 35, 45, 47, 51.	6-2	MK, HU		



## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
238	56: 171	13,22,23,24,35,45,47,51.	6-2		MK, Ho	
239	56: 263	13,23,24,31,32,35,46,51.	7-1	LU		
240	56: 350	2,3,6,7,11,36.	7-1	LA	HU	
241	56: 432	2,3,16	7-1	MK		
242	56: 500	2,4	7-1	LA		D
243	56: 645	29,31,32,42,63,64,65.	4-3	W, HU, LA		
<u>Pitney joins Court</u>						
244	56: 729	2,22,24,43,47,51	7-2	LU, LA		
245	56: 795	17,26,44	8-1	MK		
246	56: 801	18,36	6-3	D, HU, LA		
248	56: 821	2,3,5,16,31,33,64,65.	8-1	LU		
249	56: 889	18	7-2	MK, P		
250	56:1074	15,31,33,41,65.	7-2	Ho, LU		
251	56:1114	2,4,17,37,42.	5-4	Ho, LU, HU, LA		
252	56:1136	2,4,17,20,37,42,47.	5-4	Ho, LU, HU, LA		
253	57: 146	10,16,28,39,49.	7-2	W, V		
254	57: 333	30	6-3	LU, W, Ho		
255	57: 333	30	8-1	Ho		
256	57: 353	17,18,37	7-2	MK, HU		
257	57: 355	9	8-1	LU		
258	57: 417	9	8-1		Ho	
259	57: 456	9	8-1		Ho	
260	57: 586	9	8-1		LU	
261	57: 603	11,36,65	8-1		LA	
262	57: 633	12	7-2	P, HU	D	
263	57: 633	12	6-3	P, HU	D	
264	57: 642	12	7-2	P, HU		
265	57: 683	27,42,48,64,65.	7-2	P, HU		
266	57: 690	27,48	7-2	P, HU		
267	57: 750	2,3	8-1		P	
268	57: 7780	17,20,40,42,44,47	8-1	P		
269	57: 820	2,4,5,31,33,63.	5-4	Ho, LU, HU	V	
270	57: 820	2,4,5,31,33,63.	6-3	Ho, LU, HU	V	
271	57: 842	19	6-3	D, HU, LA		
272	57: 879	26,62	5-4	Ho, HU, LU, P		
273	57: 931	2,3,28,30	5-4	LU, Ho, V, W		
274	57: 953	17,28,44	8-1		Ho	
275	57: 982	60	8-1		P	
276	57:1041	29	5-4	MK, Ho, LU, V		
277	57:1125	9,62	6-3	LA, Ho, LU		
278	57:1129	8,31,32	8-1	LA		
279	57:1219	12,42	8-1	D		
280	57:1228	60	8-1	D		
281	57:1232	30	8-1	P		



## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
282	57:1299	2,3,5,14,16	7-2	MK, D		
283	57:1389	12	5-4	D, MK, HU, P		
284	57:1446	22,23,24,30,45, 47.	8-1	P		
285	57:1472	22,23,24,45,47, 51.	8-1	P		
286	57:1494	22,23,24,45,47, 51.	8-1	P		
287	57:1511	13,23,35,46,51	8-1		MK	
288	58: 127	11,13,34	6-3	W, V, P		
289	58: 179	2,3,16,42,60, 65.	5-1			Ho, LU, P
290	58: 184	2,3,16,42,60, 65.	6-1	HU		Ho, P
291	58: 189	2,3,16,42,60, 65.	6-1	HU		Ho, P
292	58: 285	19	6-3	W, MK, Ho		
293	58: 332	11,13,34	7-2	HU, V		
294	58: 343	17,28,44	8-1		P	
295	58: 356	26,62	8-1	P		
296	58: 367	26,62	8-1	P		
297	58: 539	2,3,6,14,31,33	8-1	W		
298	58: 577	2,3,28,49	7-1	W		HU
299	58: 631	27,48,62	7-2	Ho, W		
300	58: 663	29	8-1	D		
301	58: 868	27,48	8-1	P		
302	58: 901	27,48	8-1	P		
303	58: 983	10,27	7-2	Ho, LA		
304	58: 997	9,39	8-1	Ho		
305	58:1011	10,23,46,51.	5-3	LA, W, V		LU
306	58:1031	11,36,42,65.	6-3	LA, W, V	MK, P	
307	58:1031	36,42,65	4-5	LA, W, V	MK, P	
308	58:1083	17,28,31,32, 41,44,47,49, 64,65.	6-3	D, MK, V		
309	58:1088	14,16,27.	8-1	LU		
310	58:1115	1,2,4,7.	7-2	V, P		
311	58:1129	10	8-1	Ho		
312	58:1166	28,49	8-1	LU		
313	58:1171	27	8-1	MK		
314	58:1255	22,23,24,45, 47,51.	8-1	P		
315	58:1274	3,5,16,28,31, 33	8-1	D		
316	58:1284	10,30	7-2	P, MK		
317	58:1341	13,22,23,24,31, 32,35,45,46, 47,51.	7-2	P, LU		
318	58:1383	5,20,31,33,38, 47,61,63.	7-2	LU, MK		

Page	Line	Section	Year of Session	Place of Session	Vote
259	27	1906	22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000		

## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
319	58:1459	13,22,35,47	7-2	MK	W	
320	58:1459	10	8-1	MK		
321	58:1459	22,47,51	8-1	W		
322	58:1507	19,31,32	7-1	MK		W
<u>Lurton dies, McReynolds joins Court</u>						
323	59: 142	17,29,44	8-1	P		
324	59: 162	15,31,33	7-1		Ho	MR
325	59: 169	15	5-4	W, Ho, LA, MR		
326	59: 220	10,26,39,62, 64,65.	8-1		W	
327	59: 245	22,23,24,45, 47,51.	8-1		P	
328	59: 316	10,40,42,59, 61,65.	5-4	P, D, V, LA		
329	59: 329	10,40,42,59, 61,65	5-4	P, D, V, LA		
330	59: 330	10,40,42,59, 61,65	5-4	P, D, V, LA		
331	59: 392	9,62	6-3	MK, D, HU		
332	59: 415	8,31,32,62	7-2	HU, D		
333	59: 441	7,10	6-3	Ho, D, HU		
334	59: 441	7,10	8-1	Ho		
335	59: 460	11,36,40,41, 59,61,65.	7-2	MK, P		
336	59: 504	20,47	6-2	LA, D		MR
337	59: 576	27,48	8-1	P		
338	59: 583	17,28,31,33,40 41,44,49,65.	7-2	P, MR		
339	59: 616	22,47,51,61	7-1	W		MR
340	59: 673	14,16,18	5-3	D, MK, V		MR
341	59: 735	10,23,46,51	8-1	P		
342	59: 745	10,23,46	8-1	P		
343	59: 781	11,12,36,65	5-3	HU, P, MR		LA
344	59: 788	11,12,36	5-3	HU, P, MR		LA
345	59: 853	22,23,24,45, 47,51.	8-1	MR		
346	59: 939	13,31,35,42 61,63	7-1	LA		MR
347	59: 965	31,33,40,60,65	7-2	MK, LA		
348	59: 969	2,4,31,33,64, 65.	7-2	Ho, HU		
349	59:1036	2,22,43,51.	7-1		D	MR
350	59:1042	28,31,32	5-4	W, HU, LA, MR		
351	59:1054	14,41,65	6-3	HU, W, Ho		
352	59:1140	26,31,62	6-3	W, MK, D		
353	59:1177	22,23,24,45, 47,51,61.	7-1		P	MR
354	59:1184	28	7-2	D, MK		
355	59:1355	1,15,65	7-1	LA		MR
356	59:1423	10	7-2	MK, Ho		



## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
357	59:1446	18,40,61	6-3	MK,P,V		
358	59:1446	42	8-1	V		
359	59:1453	14,16,18,31,32	6-2		D,HU	MR
360	59:1471	27,62	5-4	D,MK,LA,P		
361	60: 121	26	8-1	MK		
362	60: 131	2,3,6,7,15,31, 33,41,65.	8-1	MR		
363	60: 230	11,36	7-2	P,MR		
364	60: 238	18	7-1	MK		MR
365	60: 297	2,6,31,33,63.	8-1	MR		
366	60: 310	9,27,48,62.	6-3	W,V,MR		
367	60: 317	9,62	7-2	D,P		
368	60: 384	9,62	7-2	HU,P		
<u>Lamar dies</u>						
369	60: 467	8,31,32	7-1	MK		
370	60: 505	28,30	6-2	MK,P		
371	60: 533	17,18,37	5-2	MK,Ho		MR
372	60: 579	28	6-2	W,V		
373	60: 590	22,29,51	6-2	MK,P		
374	60: 594	11,36,64,65	7-1	MR		
375	60: 629	29	6-2	W,V		
376	60: 709	8,31,32,42,62, 64,65.	6-2	HU,MK		
377	60: 713	39,31,32	7-1		Ho	
378	60: 802	10,41,64,65.	7-1	MR		
379	60: 825	27,48	6-2		MK,Ho	
380	60: 905	27,42,48,64, 65	6-2	MR,MK		
381	60: 905	42,64,65	7-1	MR		
382	60: 918	31,33,40,41, 60,63.	6-1	P		MR
383	60: 987	29,31,32	7-1	MK		
384	60:1016	8,31,32,42,62, 65.	6-2	MK,Ho		
385	60:1041	18,60	7-1		P	
386	60:1061	2,4,6,19,20,47	6-2	HU,P		
387	60:1143	17,44	6-2	P,HU		
388	60:1148	10,23,46,51.	7-1	MK		
389	60:1202	26,62	7-1	P		
390	60:1211	17,28,44,49	7-1	P		
<u>Concurrences: October 1916-1921 Terms</u>						
391	62:1087	19	7-2		B,C	
392	62:1135	11,13,34	8-1		W	
393	63: 819	2,3,16,18,56.	8-1		B	
394	63: 897	13,22,23,31,32, 35,45,46,51.	8-1		B	
395	63: 942	53	7-1		Ho	MR
396	64: 213	10,11,36,42.	8-1		W	
397	64: 502	8,25,27,31,32, 48	7-2		D,V	

## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
398	64: 558	16	8-1		B	
399	64: 104	25,27,48	8-1		P	
400	65: 151	2,3,31,33,38,56.	8-1		MR	
401	63: 185	3,55	6-3	B,W,C,	MR	
402	65: 287	1,31,33.	8-1	B	W	
403	65: 287	1	6-3	B,W	Ho	
405	65: 304	9,23	7-2	MR	W	
406	65: 425	3,17,28,30,44,49,55.	8-1		MR	
407	65: 481	1,41	8-1	MR	D,P	
408	65: 516	2,3,20,23,45,51,56.	6-2		B,P	D
409	65: 524	2,3,20,23,45,51,56.	6-2		B,P	D
410	65: 528	2,3,20,23,45,51,56.	6-2		B,P	D
411	65: 531	2,3,20,23,45,51,56.	6-2		B,P	D
412	65: 532	2,3,20,23,45,51,56.	6-2		B,P	D
413	65: 534	2,3,20,23,45,51,56.	6-2		B,P	D
414	65: 535	2,3,20,23,45,51,56.	6-2		B,P	D
415	65: 537	2,3,20,23,45,51,56.	6-2		B,P	D
416	65: 667	18	7-2		P,C	
417	65: 704	1	8-1	B	Ho	
418	65: 751	19	7-2		Ho,B	
419	65: 758	19	7-2		Ho,B	
420	65: 762	19	7-2		Ho,B	
421	65: 913	17,20,37	5-4	Ho,MR,D,V		
422	65: 913	17,20,37	5-4	B,C,W,P	MK	
423	65: 913	17,20,37	6-3	B,C,W	P,MK	
424	65: 998	19	8-1		MR	
425	61: 326	31,33,38	6-3	MK,W,C,MR		
426	61: 650	12	6-3	C,B,D		
427	61: 755	7	7-2	P,V		
428	61: 755	7	6-3	P,V,MR		
429	61: 755	7	5-4	Ho,B,C,D		
430	61: 871	29	5-4	Ho,MK,V,MR		
431	61:1086	8	6-3	B,C,P		
432	61:1256	7	6-3	P,MK,V		
433	61:1321	12,23,46,51	8-1	MR		
434	61:1336	7	6-3	B,Ho,C		
435	62: 551	29	6-3	Ho,V	B	
436	62: 968	29,30,51	3-4	D,C,P,MK		MR,B
437	62:1171	8	5-4	P,B,C	Ho	
438	63: 211	1	5-3	B	Ho,MK	C

## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
439	63: 570	25,27,48	5-4	C,MK	P,B	
440	63: 602	11,13,34	5-4	P,B,C	D	
441	63:1058	9	6-3	W,V,MR	MK	
442	63:1058	9	3-6		Ho,B,C	
443	63:1088	25,27,48	6-3	C,MK,B	D	
444	63:1096	25,27,48	7-2		MR,V	
445	64: 290	18,23,45,51	4-4	D,V	P,MK	MR
446	64: 360	1,2,4	7-2	Ho,B	C	
447	64: 521	19	7-2	C,B	Ho,D	
448	64: 946	31,33	8-1	C	W,MR,MK	
449	64: 946	31,33,38	6-3	C,MK,MR		
450	64: 946	31,33,38	8-1		W	
451	64: 993	30,31,51	6-3	B,C	P	
452	56: 350	2,3,6,7,11,31,32,36,42	6-2	LA	HU	HA
453	59: 781	11,12,36	6-2	HU,P	MR	LA
454	58:1341	22,31,32	6-3	LU,P	LA	
457	65: 837	2,3,31,32,55	6-3	W,C	MR	
458	64: 260	38	6-3	MR,D,V	C	

## Additional Cases Used but not Occuring in 1910-1920 Period under Study

October 1909 Term: Fuller, Brewer, Harlan, White, McKenna, Holmes, Day, Lurton, Moody.

501	54: 946	22,23,45,51	5-3	W,Ho,LU		Bw
502	54: 936	15	7-1	HA		Bw
503	54: 930	10,14	7-1		HA	Bw
504	54: 868	13,35	6-2	Ho,W		Bw
505	54: 832	11,36	7-1	W		Bw
506	54: 793	2,4,17,37,41,65	5-2	W,Ho		LU,Bw
507	54: 787	18,47,60	7-1	HA		Bw
508	54: 782		7-1		HA	Bw
509	54: 727	10	6-2	HA,MK		Bw
510	54: 698	13	7-1	F		Bw
511	54: 678	13,35	6-2	F,MK		Bw
512	54: 597	13	8-1	Bw		
513	54: 581	17,37	7-2		Bw,MK	
514	54: 569	17,37	7-2		Bw,MK	
515	54: 542	11,13,34	6-3	F,MK,Ho		
516	54: 536	11,13,34	6-3	F,MK,Ho		
517	54: 523	14,18	8-1	MK		
518	54: 491	2,4	8-1	HA		
519	54: 435	13,20,47,60	8-1	Bw		
520	54: 423	13,35	6-3	F,MK,Ho		
521	54: 378	11,13,34	6-3	Ho,F,MK		
522	54: 378	11,13,34	8-1	W		
523	54: 355	1,11,13,34	6-4	Ho,F,MK,Pe	W	
524	54: 311	29	8-1	MK		

## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
525	54: 307	2,2,19,38	6-3	F, Ho, MK		
526	54: 300	22,23,45,47,51	8-1	HA		
527	54: 292	23,24,45,51	7-2	HA, Bw		
528	54: 291	22,24	8-1	Bw		
529	54: 280	22,24	8-1	Bw		
530	54: 228	14,16,41,64,65	6-3	Ho, W, MK		
531	54: 208	8	6-2	D, HA		LU
532	54: 173	2,4,17,20,37,47	6-2	MK, D		LU
533	54: 139	29	7-1	MK		LU
534	54: 95		7-1	Ho		LU
535	54: 80	2,3,31,33	7-1	W		LU
536	54: 65	39	6-2	HA, Bw	Ho	LU
<u>October 1908 Term: Peckham on Court, but not Lurton</u>						
537	53: 1041	2,4,61,65	5-3	Pe, W, MK		Mo
538	53: 946		7-2	Pe, D		
539	53: 836	29	8-1	HA		
540	53: 833	18	7-2	MK, Mo		
541	53: 826	29	8-1		HA	
542	53: 765	8	8-1	MK		
543	53: 737	2,3,6,7,20,47	6-3	Ho, HA, Mo		
544	53: 729	27	8-1		Ho	
545	53: 720	7,20,47	8-1	Bw		
546	53: 695	9,31,33,39	8-1	Ho,	MK	
547	53: 693	27	7-2	Mo, Bw		
548	53: 675	18	8-1	MK		
549	53: 558	9	8-1	HA		
550	53: 530	12	7-2	W, Pe		
551	53: 486	29	5-4	Ho, Bw, W, Pe		
552	53: 486	29	8-1	Bw		
553	53: 441	10	6-3	MK, HA, Mo		
554	53: 402	59	8-1	F		
555	53: 352	13,23,24,35,46,47,51.	7-2	Mo, W	Ho	
556	53: 352	13,23,24,35,46,47,51.	6-3	Mo, W,	Ho	
557	53: 346	31	8-1	Bw		
558	53: 343	59,31	8-1	HA		
559	53: 335	59,31	8-1	HA		
560	53: 315	7	7-2	Bw, Pe		
561	53: 278	7,15	7-2	HA, D		
562	53: 253	2,22,43,51	7-1	HA		Mo
563	53: 253	22,43,51	5-3	D, HA, MK		Mo
564	53: 208		7-2	Ho, Mo		
565	53: 195	10	8-1	Bw		
566	53: 186	12	8-1	F		
567	53: 150	10,23,46	8-1	Bw		
568	53: 150	10,23,46,51	7-2		HA, F	
569	53: 150	10,23,46,51	8-1		HA	
570	53: 97	2,4,17,44	8-1	HA		



## APPENDIX I (cont'd.)

Case No. <sup>a</sup>	L.Ed. Citation	Nos. of Scales Placed in <sup>b</sup>	Vote	Dissents	Concur	No Vote
571	53: 81	15	7-2	HA,D	Ho,Mo	
572	53: 65	29	6-2	W,MK		Mo
<u>October 1909 Term</u>						
573	54:1001	19	5-3	MK,F,D		Bw
574	54: 978	13,35	7-1		F	Bw
575	54: 970	13	7-1		F	Bw
<u>October 1908 Term</u>						
576	53: 81	15	5-4	HA,D	Ho,Mo	

Cases Used for Tie-breaking in Various Other Time Periods

<u>U.S. Reports</u>						
601	257:377	30	6-3	Ho,B,MK		
602	258:451	29	7-1	MK		
603	259: 20	7,19	8-1	C		
604	264:359	29	8-1	MR		
605	263:197	2,3,6,55	7-2	MR,B		
606	286: 73	15	5-4	MR,V,Su,Bu		
607	265:1104	7	6-3	MK,V,Bu		
608	207:463	9	6-3	MoHA,MK	Ho,Pe,D	
609	208:161	7	6-2	MK,Ho		Mo
610	206:536	11,36	7-2	MK,D		
611	201: 45	43	7-2	Bw,W	HA,MK	
612	203:192	4	8-1	MK		
613	203:221	4	8-1	MK		
614	199:521	4	6-3	HA,MK,W	Ho	
615	194:338	9	5-4	W,HA,MK,F		
616	195:100	4	5-4	Ho,W,MK,Bn		
617	259:530	1	6-3	MR,V,T		
618	170:412	23,46	6-3	HA,G,Bn		
620	193:197	30	5-4	W,Ho,F,Pe	Bw	
621	197:356	28	5-4	HA,D,Bw,Bn		
623	201:562	39	5-4	HA,Bw,Ho,Bn		
624	210:230	39	5-4	D,MK,HA,W		
625	192:286	39	5-4	F,D,W,MK		
626	185:403	29	5-4	W,HA,F,Bw		
627	180:587	12	5-4	W,Bw,Pe,Bn		
628	200: 22	12	5-4	W,Ho,Bw,Pe		
629	201:506	12	5-4	W,F,MK,Bw		
630	200:226	11	5-4	MK,W,Bn,Pe		
631	173: 65	19,38	5-4	MK,W,Bn,Pe		
633	190:249	19	6-3	W,F,Pe		
636	188:445	18,60	7-2	W,HA		
637	198: 45	7	8-1	Ho	HA,W,D	

## APPENDIX I (cont'd.)

The following symbols above correspond to the names of these justices:

B = Brandeis

C = Clarke

D = Day

HA = Harlan

Ho = Holmes

HU = Hughes

LA = Lamar

LU = Lurton

MK = McKenna

MR = McReynolds

P = Pitney

V = Van Devanter

W = White

Mo = Moody

Bw = Brewer

Pe = Peckham

Bn = Brown

Su = Sutherland

Bu = Butler

F = Fuller

T = Taft

G = Gray

---

<sup>a</sup>See Appendix II for names of cases.

<sup>b</sup>See Table 1 for names of scales corresponding to these numbers.

## APPENDIX II

### Names of Cases in Appendix I

Case No.	<u>Name of Case</u>
1	Portuguese-American Bank v Welles
2	Louisville and Nashville R.R. v U.S.
3	Pennsylvania R.R. v Jacoby Co.
4	Sim v Edenborn
5	Alder v Edenborn
6	New York Central R.R. v Beaham
7	Detroit United R.R. v Michigan
8	Long Sault Co. v Call
9	Clark Distilling Co v Western Maryland R.R.
10	Caminetti v U.S.
11	Cusack Co. v Chicago
12	Hall v Geiger-Jones Co.
13	Caldwell v Sioux Falls Stock Yards
14	Merrick v N.W. Halsey and Co.
15	U.S. v Pulaski Co.
16	Owensboro v Owensboro Water Works Co.
17	Mountain Timber Co. v Washington
18	Swift and Co. v Hocking Valley R.R.
19	Wilson v New
20	Bunting v Oregon
21	Strauss v Victor Talking Machine Co.
22	Motion Picture Patents Co. v Universal Film Mfg.
23	U.S. v Davis
24	Seaboard Airline R.R. v Lorick
25	North German Lloyd v Guaranty Trust Co.
26	Van Dyke v Geary
27	Nevada-California-Oregon R.R. v Burrus
28	New York Central R.R. v Winfield
29	Erie R.R. v Winfield
30	Southern Pacific R.R. v Jensen
31	Clyde Steamship Co. v Walker
32	Sutton v New Jersey
33	Seaboard Airline R.R. v Blackwell
34	Western Oil Refining v Lipscomb
35	Illinois Surety Co. v John Davis Co.
36	First National Bank v Fellows
37	Valdez v U.S.
38	Paine Lumber Co. v Neal
39	Greene v Louisville and Inter-urban R.R.
40	Louisville and Nashville R.R. v Greene
41	Illinois Central R.R. v Greene
42	Southern R.R. v Puckett
43	Puget Sound Traction Light and Power v Reynolds
44	McCoach v Insurance of North America
45	Adams v Tanner

## APPENDIX II (cont'd.)

Case No.	<u>Name of Case</u>
46	American Express Co. v South Dakota
47	Pennsylvania R.R. v Towers
48	Fidelity and Columbia Trust Co. v Louisville
49	Hitchman Coal and Coke Co. v Mitchell
50	Eagle Glass and Mfg. Co. v Rowe
51	Seaboard Airline R.R. v North Carolina
52	Korely v Springfield Institute for Savings
53	Southern Pacific v Stewart
54	Cincinnati v Cincinnati and Hamilton Traction Co.
55	Rosen v U.S.
56	Greer v U.S.
57	Northern Ohio Traction and Light Co. v Ohio
58	Boston Store v American Graphophone
59	Marconi Wireless Telegraph v Simon
60	Gulf, Colorado and Santa Fe v Texas
61	Denver v Denver Union Water Co.
62	Lane v Morrison
63	Brogan v National Surety Co.
64	Omaechevarria v Idaho
65	New York Life Insurance v Dodge
66	Covington v South Covington and Cincinnati Street RR.
67	Bethlehem Steel v U.S.
68	York Mfg. v Colley
69	Ex Parte Abdu
70	U.S. v United Shoe Machinery Co.
71	Erie R.R. v Hilt
72	Marin v Augedahl
73	Hammer v Dagenhart
74	Southern Pacific v Lowe
75	Chelentis v Lockenbach Steamship Co.
76	Toledo Newspaper Co. v U.S.
77	Grinnell Washington Machine Co. v Johnson Co.
78	Exploration Co. v U.S.
79	Bliss v U.S.
80	Ruddy v Rossi
81	Cleveland-Cliffs Iron Co. v Artic Iron Co.
82	Sandberg v McDonald
83	Neilson v Rhine Shipping Co.
84	International News Service v A.P.
85	Hebe Co. v Shaw
86	U.S. v Hill
87	Detroit United R.R. v Detroit
88	Southern Pacific v Stewart
89	Bank of California v Richardson
90	U.S. v Doremus
91	Webb v U.S.
92	New York Central v Porter
93	Richmond v Bird
94	Baltimore and Ohio v Leach
95	Union Tank Line Co. v Wright

## APPENDIX II (cont'd.)

Case No.	<u>Name of Case</u>
96	Ex Parte Hudgings
97	Schlitz v Houston Ice
98	Berkman v U.S.
99	Dakota Telephone v South Dakota
100	Kansas v Burleson
101	Burleson v Dempcy
102	MacLead v New England Telegraph and Telephone
103	U.S. v Ferger
104	U.S. v Ferger
105	Rumely v McCarthy
106	Arizona Copper v Hammer
107	Erie R.R. v Shuart
108	Texas and Pacific R.R. v Leatherwood
109	Southern Pacific v Bogert
110	Bowerman v Hammer
111	Central Georgia R.R. v Wright
112	Maxwell v Bugbee
113	Pennsylvania R.R. v Public Service Commission
114	Stilson v U.S.
115	New York Central R.R. v Blanc
116	Abrams v U.S.
117	Postal Telegraph v Warren-Godwin Lumber
118	Los Angeles v Los Angeles Gas Co.
119	St. Louis R.R. v Williams
120	Gilligan v City of Covington
121	Evans v National Bank of Savannah
122	Peters v Veasey
123	New York, New Haven and Hartford v U.S.
124	Branson v Bush
125	St. Louis, Iron Mountain and Southern R.R. v U.S.
126	Southern Pacific v Industrial Accident Commission
127	Ruppert v Caffey
128	Northern Pacific R.R. v U.S.
129	Silverthorne v U.S.
130	U.S. v U.S. Steel
131	Schaefer v U.S.
132	Carbon Steel v Lewellyn
133	Worth Brothers v Lederer
134	Forged Steel v Lewellyn
135	South Coast Steamship Co. v Rudbach
136	Bates v Dresser
137	Fort Smith Lumber v Arkansas
138	Shaffer v Carter
139	U.S. v Schrader
140	Milwaukee Electric Co. v Wisconsin
141	Chapman v Wintroath
142	Eisner v Macomber
143	Pierce v U.S.
144	Manners v Morasco
145	South Covington and Cincinnati Street R.R. v Kentucky

Page	Name of Case
102	Ex Parte Higgins
103	Schiff v. Hohnstein Inc.
104	Sefton v. U.S.
105	Sefton Telephone v. South
106	Sefton v. Sefton
107	Sefton v. Sefton
108	Sefton v. Sefton
109	Sefton v. Sefton
110	Sefton v. Sefton
111	Sefton v. Sefton
112	Sefton v. Sefton
113	Sefton v. Sefton
114	Sefton v. Sefton
115	Sefton v. Sefton
116	Sefton v. Sefton
117	Sefton v. Sefton
118	Sefton v. Sefton
119	Sefton v. Sefton
120	Sefton v. Sefton
121	Sefton v. Sefton
122	Sefton v. Sefton
123	Sefton v. Sefton
124	Sefton v. Sefton
125	Sefton v. Sefton
126	Sefton v. Sefton
127	Sefton v. Sefton
128	Sefton v. Sefton
129	Sefton v. Sefton
130	Sefton v. Sefton
131	Sefton v. Sefton
132	Sefton v. Sefton
133	Sefton v. Sefton
134	Sefton v. Sefton
135	Sefton v. Sefton
136	Sefton v. Sefton
137	Sefton v. Sefton
138	Sefton v. Sefton
139	Sefton v. Sefton
140	Sefton v. Sefton
141	Sefton v. Sefton
142	Sefton v. Sefton
143	Sefton v. Sefton
144	Sefton v. Sefton
145	Sefton v. Sefton
146	Sefton v. Sefton
147	Sefton v. Sefton
148	Sefton v. Sefton
149	Sefton v. Sefton
150	Sefton v. Sefton
151	Sefton v. Sefton
152	Sefton v. Sefton
153	Sefton v. Sefton
154	Sefton v. Sefton
155	Sefton v. Sefton
156	Sefton v. Sefton
157	Sefton v. Sefton
158	Sefton v. Sefton
159	Sefton v. Sefton
160	Sefton v. Sefton
161	Sefton v. Sefton
162	Sefton v. Sefton
163	Sefton v. Sefton
164	Sefton v. Sefton
165	Sefton v. Sefton
166	Sefton v. Sefton
167	Sefton v. Sefton
168	Sefton v. Sefton
169	Sefton v. Sefton
170	Sefton v. Sefton
171	Sefton v. Sefton
172	Sefton v. Sefton
173	Sefton v. Sefton
174	Sefton v. Sefton
175	Sefton v. Sefton
176	Sefton v. Sefton
177	Sefton v. Sefton
178	Sefton v. Sefton
179	Sefton v. Sefton
180	Sefton v. Sefton
181	Sefton v. Sefton
182	Sefton v. Sefton
183	Sefton v. Sefton
184	Sefton v. Sefton
185	Sefton v. Sefton
186	Sefton v. Sefton
187	Sefton v. Sefton
188	Sefton v. Sefton
189	Sefton v. Sefton
190	Sefton v. Sefton
191	Sefton v. Sefton
192	Sefton v. Sefton
193	Sefton v. Sefton
194	Sefton v. Sefton
195	Sefton v. Sefton
196	Sefton v. Sefton
197	Sefton v. Sefton
198	Sefton v. Sefton
199	Sefton v. Sefton
200	Sefton v. Sefton

## APPENDIX II (cont'd.)

<u>Case No.</u>	<u>Name of Case</u>
146	Cincinnati, Covington and Erie R.R. v Kentucky
147	Missouri v Holland
148	U.S. v Simpson
149	Hull v Philadelphia and Reading R.R.
150	U.S. v Chase National Bank
151	Beckwith v Commissioner of Patents
152	U.S. v Atlantic Dredging Co.
153	Ma Guire v Trefry
154	U.S. v Reading R.R.
155	Erie R.R. v Collins
156	Erie R.R. v Szary
157	Chicago, Milwaukee & St. Paul R.R. v McCaull-Dinsmore Co.
158	Knickerbacker Ice v Stewart
159	Calhoun v Massie
160	U.S. v Mac Millan
161	Evans v Gore
162	Philadelphia and Reading R.R. v Hancock
163	Ohio Valley Water Co. v Ben Avon Borough
164	Matter of W. Peterson
165	Rhode Island v Palmer
166	Royster Co. v Virginia
167	F.T.C. v Gratz
168	Nadeau v Union Pacific
169	Johnson v Maryland
170	Niles-Bement Pond Co. v Iron Moulders Union
171	Horning v District of Columbia
172	International Bridge Co. v New York
173	Walls v Midland Carbon Co.
174	Gilbert v Minnesota
175	U.S. v Wheeler
176	Thornton v Duffy
177	Director General of Railroads v Viscose Co.
178	Southern Pacific v Berkshire
179	U.S. v Strang
180	Erie R.R. v Board of Public Utility Commissioners
181	Duplex Printing Press v Deering
182	Goldsmith-Grant Co. v U.S.
183	St. Louis and Santa Fe R.R. v Public Service Commission
184	Berger v U.S.
185	Smith v Kansas City Title and Trust Co.
186	Hartford Life Insurance v Blincoe
187	Vandalia R.R. v Schmull Co.
188	Milwaukee Social Democratic Publishing Co. v Burleson
189	Lang v New York Central R.R.
190	Bank of Minden v Clement
191	Ownbey v J. P. Morgan
192	Frey and Sons, Inc. v Cudahy Packing Co.
193	Block v Hirsh
194	Marcus Brown Holding Co. v Feldman

Case No.	Name of Case
150	Cincinnati, Covington and St.
149	Missouri v. Holland
148	U.S. v. Simpson
147	Hull v. Philadelphia and Reading
146	U.S. v. Chinese National Bank
145	Backus v. Commissioner of Health
144	U.S. v. Atlantic Petroleum
143	McQuinn v. Treacy
142	U.S. v. Reading R.R.
141	Erle R.R. v. Collins
140	Erle R.R. v. Scarly
139	Chicago, Milwaukee & St. Paul Co.
138	Knickerbocker Ice v. Knickerbocker
137	Calhoun v. Nassau
136	U.S. v. Mac Millan
135	Evans v. Gore
134	Philadelphia and Reading
133	Ohio Valley Water v. Ohio Valley
132	Matter of W. Peterson
131	Rhode Island v. Palmyra
130	Haystack Co. v. Vinton
129	R.T.C. v. Gray
128	Madison v. Union Pacific
127	Johnson v. Maryland
126	Miles-Bement Bond v. Miles-Bement
125	Hornell v. District of Columbia
124	International Bridge Co. v. International
123	Wall v. Midland Canada
122	Gilbert v. Minnesota
121	U.S. v. Wheeler
120	Thompson v. Dally
119	Director General of Railways v. Director General of Railways
118	Southern Pacific v. Southern Pacific
117	U.S. v. Strong
116	Erle R.R. v. Board of Public Health
115	Dunlap Printing Press v. Dunlap
114	Goldsmith-Grant Co. v. U.S.
113	Goldsmith-Grant Co. v. U.S.
112	San Antonio and Santa Fe R.R. v. San Antonio and Santa Fe R.R.
111	Berger v. U.S.
110	Settle v. Kansas City Title and Trust Co.
109	Wardell Little Insurance v. Wardell Little
108	Vaschalis R.R. v. Southern Co.
107	Milwaukee Social Democratic Publishing Co. v. Milwaukee
106	Lane v. New York Central R.R.
105	Bank of London v. Clement
104	Gambier v. J. F. Norton
103	Pray and Sons, Inc. v. Cudahy Packing Co.
102	Black v. Hixson
101	Marquis Brown Holding Co. v. Feldman



## APPENDIX II (cont'd.)

Case No.	<u>Name of Case</u>
195	Nickel v Nevada
196	Yee Won v White
197	U.S. v Aetna Explosives Co.
198	Philadelphia and Reading R.R. v Di Donato
199	Philadelphia and Reading R.R. v Polk
200	Michigan Central R.R. v Owen and Co.
201	Bethlehem Motors v Flynt
202	Burdeau v McDowell
203	Western Union Telegraph v Esteve Brothers
204	Harris v District of Columbia
205	Merchant's National Bank v City of Richmond
206	Ft. Smith and Western R.R. v Mills
207	U.S. v Lehigh Valley R.R.
208	Yankus v Feltenstein
209	New York Central and Hudson R.R. v Tonsellito
210	Towne v Eisner
211	Western Union v Commercial Milling Co.
212	Thompson v Thompson
213	Memphis v Cumberland Telegraph and Telephone
214	Hendrix v U.S.
215	Bailey v Alabama
216	House v Mayes
217	Weyerhaeuser v Hoyt
218	Campbell v Weyerhaeuser
219	Northern Pacific R.R. v Wass
220	Arnett v Reade
221	Gavieres v U.S.
222	Dr. Miles Medical Co. v Park and Sons
223	Travis v Yale and Town
224	Standard Paint Co. v Trinidad Asphalt Mfg.
225	Sac and Fox Indians in Iowa v Sac and Fox Indians in Oklahoma
226	Standard Oil v U.S.
227	U.S. v American Tobacco
228	West v Kansas National Gas Co.
229	Dowdell v U.S.
230	Wilson v U.S.
231	Dreier v U.S.
232	Montello Salt Co. v Utah
233	U.S. v O.A. Johnson
234	Carpenter v Winn
235	Coyle v Smith
236	Hopkins v Clemson College
237	I.C.C. v Diffenbaugh
238	Union Pacific v Updike Grain Co.
239	Southern R.R. v Reid
240	Wing v Kirkendall
241	Ker and Co. v Couden
242	Diaz v U.S.
243	Henry v Dick Co.

Case	Notes of Case
197	Wickel v. Nevada
198	Lee v. W. H. T. Co.
199	U.S. v. Astoria Explosives Co.
200	Philadelphia and Reading R.R.
201	Michigan Central R.R. v. Detroit
202	Bedford v. P. J. P.
203	Porter v. McDowell
204	Western Union Telegraph
205	Barrie v. District
206	Merchant's National Bank
207	P. Smith and Western
208	U.S. v. Lehigh Valley
209	Yankins v. P. J. P.
210	New York Central and
211	Town v. Elmer
212	Western Union v. Commercial
213	Thompson v. Thompson
214	Memphis v. Commercial
215	Hedrick v. U.S.
216	Reilly v. Alabama
217	House v. Hayes
218	Weyerhaeuser v. Hoyt
219	Campbell v. Weyerhaeuser
220	North v. Pacific
221	Armstrong v. Reade
222	Caverton v. U.S.
223	Dr. W. H. Medical Co.
224	Travis v. Yale and Iowa
225	Standard Paint Co.
226	Geo. and Fox Indiana
227	Oklahoma
228	Standard Oil v. U.S.
229	U.S. v. American Tobacco
230	West v. Kansas National Bank
231	Dowdell v. U.S.
232	Wilson v. U.S.
233	Meier v. U.S.
234	Montello Sales Co. v. Utah
235	C. S. v. O.A. Johnson
236	Carpanter v. Winn
237	Coyle v. Salin
238	Hopkins v. Gleason Collier
239	T.O. v. Dittman
240	Union Pacific v. Pacific Grain Co.
241	Southern R.R. v. Bell
242	Wine v. Kirkendall
243	Kay and Co. v. Jordan
244	Dick v. U.S.
245	Henry v. Dick Co.

## APPENDIX II (cont'd.)

Case No.	Name of Case
244	I.C.C. v Goodrich Transit Co.
245	Title Guaranty and Surety v Nichols
246	Gromer v Standard Dredging Co.
248	Heckman v U.S.
249	Leary v U.S.
250	Creswill v Knights of Pythias of Georgia
251	Hyde v U.S.
252	Brown v Elliott
253	Selover, Bates and Co. v Walsh
254	U.S. v Patten
255	See case 254
256	Evans v U.S.
257	Missouri, Kansas, and Texas R.R. v Wolf
258	Michigan Central R.R. v Vreeland
259	American Railroad Co. v Didricksen
260	Troxell v Delaware, Lackawanna and Western
261	Bradley Co. v City of Richmond
262	Grand Truck Western R.R. v South Bend
263	See Case 262
264	Southern Pacific v Portland
265	Kansas City Southern R.R. v Carl
266	Missour, Kansas and Texas R.R. v Harriman Bros.
267	Frosch v Walter
268	Houghton v Burden
269	Donnelly v U.S.
270	See Case 269
271	McCoach v Minehill and Schuykill Haven R.R.
272	Slocum v New York Life Insurance
273	Northern Pacific R.R. v Boyd
274	Clarke v Rogers
275	Consolidated Turnpike v Norfolk and Oceanview R.R.
276	Bauer and Cie v O'Donnell
277	Petersen v Delaware, Lackawanna and Western
278	St. Louis, San Francisco and Texas v Seale
279	Wheeler v Denver
280	McGovern v City of New York
281	Nash v U.S.
282	U.S. v Chippewa Indians
283	Owensboro v Cumberland Telephone and Telegraph
284	Pennsylvania R.R. v International Coal Mining Co.
285	Mitchell Coal and Coke Co. v Pennsylvania R.R.
286	Morris Dale Coal Co. v Pennsylvania R.R.
287	Simpson v Shepard
288	Baltic Mining v Massachusetts
289	Union Pacific v Laramie Stockyards
290	Union Pacific v Snow
291	Union Pacific v Sides
292	Stratton's Independence, Ltd. v Howbert
293	New York Life Insurance v Deer Lodge County
294	Kinder v Scharff

## APPENDIX II (cont'd.)

<u>Case No.</u>	<u>Name of Case</u>
295	Aetna Life Insurance v Moore
296	Prudential Insurance v Moore
297	Patsone v Pennsylvania
298	Thomas v Matthiessen
299	Leroy Fibre Co. v Chicago, Milwaukee and St. Paul RR.
300	Rubber Tire Wheel Co. v Goodyear Tire and Rubber Co.
301	Boston & Maine R.R. v Hooker
302	Atcheson, Topeka and Santa Fe v Robinson
303	Kansas City Southern R.R. v Anderson
304	Tennessee Coal, Iron and R.R. v George
305	German Alliance Insurance v Lewis
306	Wheeler v Sohmer
307	See Case 306
308	Holden Land and Livestock Co. v Interstate Trading Co.
309	Richards v Washington Terminal Co.
310	Gompers v U.S.
311	Smith v Texas
312	Detroit Steel v Sistersville Brewing
313	Oceanic Steam Navigation Co. v Mellor
314	Texas and Pacific R.R. v American Tie and Lumber
315	Mullen v Simmons
316	International Harvester v Kentucky
317	Houston Eastern and West Texas R.R. v U.S.
318	Johnson v Gearlds
319	U.S. v Ohio Oil
320	U.S. v Uncle Sam Oil
321	See Case 319
322	Louisiana v McAdoo
323	Waterman Co. v Modern Pen Co.
324	U.S. v Reynolds
325	McCabe v Atcheson, Topeka, and Santa Fe
326	Western Life Indemnity Co. v Rupp
327	U.S. v Louisville and Nashville R.R.
328	Lankford v Platte Iron Works
329	American Water Softener v Lankford
330	Farish v State Banking Board of Oklahoma
331	Norfolk and Western R.R. v Holbrook
332	Arizona and New Mexico R.R. v Clark
333	Coppage v Kansas
334	See Case 333
335	Yost v Dallas County
336	U.S. v Holte
337	Pierce Co. v Wells-Fargo
338	Globe Bank and Trust Co. v Martin
339	Pennsylvania R.R. v U.S.
340	U.S. v Midwest Oil
341	Northern Pacific v North Dakota
342	Norfolk and Western R.R. v Conley
343	Wright v Central Georgia R.R.
344	Wright v Louisville and Nashville R.R.

## APPENDIX II (cont'd.)

Case No.	<u>Name of Case</u>
345	Louisville and Nashville R.R. v Maxwell
346	Greenleaf-Johnson Lumber v Garrison
347	Louisville and Nashville R.R. v Western Union Telegraph
348	Frank v Mangum
349	Ellis v I.C.C.
350	Cumberland Glass Mfg. v DeWitt
351	Georgia v Tennessee Copper
352	Lumber Underwriters v Rife
353	Louisville and Nashville R.R. v U.S.
354	Kreitlein v Ferger
355	U.S. v Mosley
356	Chicago, Milwaukee and St. Paul v Wisconsin
357	Newman v U.S.
358	See Case 357
359	U.S. v Hiawassee Lumber
360	Brand v Union Elevated R.R.
361	U.S. Fidelity & Guaranty v Riefler
362	Traux v Raich
363	Wagner v Leser
364	Cramp and Sons Ship and Engine Co. v U.S.
365	MacKenzie v Hare
366	Texas and Pacific R.R. v Bigger
367	Atcheson, Topeka and Santa Fe v Swearingen
368	Reese v Philadelphia and Reading R.R.
369	Northern Pacific R.R. v Meese
370	Fleitmann v Welsbach Street Lighting Co.
371	Crocker v U.S.
372	Kansas City Southern R.R. v Guardian Trust Co.
373	Straus v Notaseme Hosery
374	Rogers v County of Hennepin
375	Hamilton-Brown Shoe v Wolf Brothers and Co.
376	Illinois Central R.R. v Messina
377	Allen and Wheeler Co. v Hanover Star Milling Co.
378	Detroit and Mackinac RR. v Michigan Railroad Commission
379	Southern Express Co. v Byers
380	Northern Pacific RR. v Wall
381	See Case 380
382	U.S. v Archer
383	American Well Works v Layne and Bowler Co.
384	Chesapeake and Ohio v Atley
385	Cubbins v Mississippi River Commission
386	U.S. v Jin Fuey Moy
387	Duel v Hollins
388	Missouri v Chicago, Burlington and Quincy RR.
389	Mutual Life Insurance v Hilton-Green
390	Holmes v Conway
391	Lynch v Turrish
392	U.S. Glue Co. v Oak Creek
393	Tayabas Land Co. v Manila RR.

## APPENDIX II (cont'd.)

<u>Case No.</u>	<u>Name of Case</u>
394	Northern Pacific v North Dakota
395	Capital Trust v Calhoun
396	Godchaux Co. v Estopinal
397	New York City v Mohny
398	Minnesota v Wisconsin
399	Western Union v Speight
400	Street v Lincoln Safe Deposit Co.
401	See Case 171
402	See Case 174
403	See Case 174
405	See Case 176
406	Geddes v Anaconda Copper Mining
407	See No. 184
408	U.S. v Cohen Grocery
409	Tedron v Lewis & Son Dry Goods
410	Kennington v Palmer
411	Kinnane v Detroit Creamery
412	Weed Co. v Lockwood
413	Willard Co. v Palmer
414	Oglesby Grocery v U.S.
415	Weeds v U.S.
416	Oregon-Washington Railroad and Navigation Co. v U.S.
417	See Case 188
418	Merchants Loan and Trust Co. v Smietanka
419	Goodrich v Edwards
420	Walsh v Brewster
421	Newberry v U.S.
422	See Case 421
423	See Case 421
424	La Belle Iron Works v U.S.
425	See Case 9
426	See Case 16
427	See Case 19
428	See Case 19
429	See Case 19
430	See Case 22
431	See Case 30
432	See Case 38
433	See Case 43
434	See Case 45
435	See Case 58
436	See Case 70
437	See Case 75
438	See Case 84
439	See Case 94
440	See Case 95
441	See Case 106
442	See Case 106
443	See Case 107
444	See Case 108

## APPENDIX II (cont'd.)

<u>Case No</u>	<u>Name of Case</u>
445	See Case 128
446	See Case 131
447	See Case 142
448	See Case 165
449	See Case 165
450	See Case 165
451	See Case 167
452	See Case 240
453	See Case 343
454	See Case 317
457	See Case 191
458	See Case 127
501	I.C.C. v Chicago, Rock Island and Pacific R.R.
502	Chiles v Chesapeake and Ohio R.R.
503	Shevlin-Carpenter Co. v Minnesota
504	Southern R.R. v King
505	Citizens National Bank v Kentucky
506	Weens v U.S.
507	U.S. v Welch
508	Stewart v Griffith
509	Missouri and Pacific R.R. v Nebraska
510	Southwestern R.R. v Arkansas
511	International Text Book Co. v Pig
512	Board of Assessors of New Orleans v New York Life Ins.
513	Price v Henkle
514	Haas v Henkle
515	Louisville and Nashville R.R. v Gaston
516	Southern R.R. v Greene
517	U.S. v Plowman
518	Pendleton v U.S.
519	Monogahela Bridge Co. v U.S.
520	Ludwig v Western Union Telegraph
521	Pullman Co. v Kansas
522	See Case 521
523	Western Union Telegraph v Kansas
524	Brill v Washington Railway and Electric Co.
525	North Dakota v Hanson
526	Mason Grocery v Atlantic Coast Line R.R.
527	Baltimore and Ohio R.R. v U.S.
528	I.C.C. v Chicago and Alton R.R.
529	I.C.C. v Illinois Central R.R.
530	Kuhn v Fairmont Coal Co.
531	Illinois Central R.R. v Sheegog
532	U.S. v Corbet
533	Steward v American Lava Co.
534	McGilvra v Ross
535	Westerman v Canal-Louisiana Bank and Trust Co.
536	Fall v Eastin
537	U.S. v Shipp
538	Texas and Pacific R.R. v Eastin and Knox

## APPENDIX II (cont'd.)

## Case

<u>No.</u>	<u>Name of Case</u>
539	U.S. v Delaware and Hudson R.R.
540	Sand Filtration Corporation v Cowardin
541	American Banana v United Fruit Co.
542	Chesapeake and Ohio v Ma Cabe
543	Keller v U.S.
544	Hurly v Atcheson, Topeka and Santa Fe
545	Hepner v U.S.
546	Atcheson, Topeka and Santa Fe v Sowers
547	Western Union Telegraph v Wilson
548	Davidson Brothers Marble Co. v U.S.
549	In Re Dunn
550	Hammond Packing Co. v Arkansas
551	Continental Wall Paper v Louis Voight & Sons
552	See Case 551
553	Louisville and Nashville v Central Stockyards
554	Presidio County v Noel-Young Bond and Stock Co.
555	Missouri and Pacific v Larabee Flour Mills
556	See Case 555
557	Southern Realty Investment v Walker
558	Green County v Thomas' Executor
559	Green County v Quinlan
560	McLean v Arkansas
561	Bailey v Alabama
562	Harriman v I.C.C. (No. 317)
563	Harriman v I.C.C. (Nos. 315,316)
564	Ingersol v Coram
565	North American Cold Storage Co. v Chicago
566	Honolulu Rapid Transit and Land Co. v Hawaii
567	Prentis v Atlantic Coast Line
568	See Case 567
569	See Case 567
570	Twining v New Jersey
571	Berea College v Kentucky
572	Frosch v Moore
573	Hertz v Woodman
574	Roach v Atcheson, Topeka and Santa Fe
575	Herndon v Chicago, Rock Island and Pacific
576	See Case 571



# APPENDIX III

## Cases Used in Scales

1910-1915 Period

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
1	355,310.	523.
2	267,362,248,349,234,386,310,215, 251,252,269,270,348,212,452,242, 240,297,298,214,230,231,220,229, 221,365.	506,537,525,532, 518,570,535,562.
3	267,362,315,236,248,273,240,452, 282,241,220,225.	543,535,297,298, 289,290,291.
4	386,310,215,251,252,269,270,348, 212,242,214,229,221.	614,506,537,525, 532,518,570,612, 613,616.
5	248,315,269,270,318,235,282,225.	
6	386,362,297,365,452,240.	543.
7	362,310,215,333,452,240,334.	
8	332,384,376,369,278.	531,542
9	257,260,258,259,304,277,366,331 367,368.	546,608,549.
10	378,388,303,216,253,305,328,329, 330,333,356,316,311,334,326,341, 342.	553,509,568,503, 569.
11	240,374,261,363,452,293,288,306, 344,343,453,335.	522,505,630,523, 515,516,521.
12	216,283,213,344,343,263,453,262, 264,279.	639,550,628,566, 627.
13	211,319,293,288,233,228,237,238, 317,287,239,346.	522,504,555,556, 523,515,516,521, 250,511,574,575, 510,512,519.
14	309,297,359,340,351,282,217,218, 219,232.	517,530,503.
15	355,362,324,250,215,325,145,146.	606,571,576,561, 502.



## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
16	315, 248, 253, 282, 217, 218, 219, 289, 290, 291, 241, 236.	530.
17	390, 229, 274, 230, 245, 256, 371, 308, 251, 252, 338, 387, 234, 268, 323, 294.	570, 513, 514, 532, 506.
18	382, 385, 225, 364, 241, 256, 371, 249, 357, 340, 359, 309.	548, 517, 540, 636, 507.
19	322, 231, 292, 386, 271.	525, 573, 633.
20	231, 318, 336, 386, 268	545, 519, 532, 543.
22	345, 321, 339, 319, 317, 244, 454, 237, 238, 353, 258, 286, 314, 327, 284, 349.	501, 563, 562, 526.
23	388, 345, 305, 213, 237, 238, 287, 317, 284, 285, 286, 314, 353, 327, 341, 342.	555, 501, 556, 568, 527, 569, 526.
24	345, 317, 244, 375, 237, 238, 373, 353, 239, 284, 327, 314, 286, 285.	555, 556, 527.
25	361, 245, 309, 211, 274, 326, 345, 303, 298, 317, 244, 299, 253, 308, 372, 352, 375, 366, 273, 272, 350, 360, 354, 237, 238, 373, 370, 379, 380, 265, 266, 387, 338, 389, 296, 295, 301, 302, 337, 294, 390, 353, 239, 284, 327, 314, 286, 285, 313, 315, 312.	555, 556, 621, 527.
26	326, 361, 245, 272, 352, 296, 295.	
27	309, 211, 303, 299, 366, 360, 379, 380, 265, 266, 301, 302, 337, 313.	547.
28	274, 298, 253, 372, 308, 273, 350, 354, 370, 387, 338, 294, 390, 315, 312.	621.
29	224, 377, 383, 375, 276, 243, 373, 323, 300.	626, 524, 533, 572.
30	255, 222, 254, 273, 316, 370, 281, 226, 227.	552, 620, 551, 539, 541.
31	297, 369, 383, 322, 332, 347, 348, 235, 308, 325, 243, 350, 369, 270, 452, 359, 334, 215, 382, 250, 317, 318, 377, 324, 384, 346, 239, 278, 365, 236, 214, 355, 362, 248, 315.	546, 535, 559, 558, 557.

## APPENDIX III (cont'd.)

NO.	NAME	AGE
1	JOHN W. BROWN	25
2	JAMES E. SMITH	28
3	WILLIAM H. JONES	32
4	CHARLES F. WHITE	35
5	HENRY G. BLACK	38
6	EDWARD L. GREEN	42
7	FRANK M. HARRIS	45
8	ALFRED N. KING	48
9	ROBERT P. LEE	52
10	JOHN Q. ROSS	55
11	WALTER S. TAYLOR	58
12	GEORGE T. WALKER	62
13	HERBERT U. YOUNG	65
14	JOHN V. ZIMMERMAN	68
15	ALBERT A. BROWN	72
16	CHARLES B. SMITH	75
17	WILLIAM C. JONES	78
18	CHARLES D. WHITE	82
19	HENRY E. BLACK	85
20	EDWARD F. GREEN	88
21	FRANK G. HARRIS	92
22	ALFRED H. KING	95
23	ROBERT I. LEE	98
24	JOHN J. ROSS	102
25	WALTER K. TAYLOR	105
26	GEORGE L. WALKER	108
27	HERBERT M. YOUNG	112
28	JOHN O. ZIMMERMAN	115
29	ALBERT P. BROWN	118
30	CHARLES R. SMITH	122
31	WILLIAM S. JONES	125
32	CHARLES T. WHITE	128
33	HENRY V. BLACK	132
34	EDWARD W. GREEN	135
35	FRANK X. HARRIS	138
36	ALFRED Y. KING	142
37	ROBERT Z. LEE	145
38	JOHN A. ROSS	148
39	WALTER B. TAYLOR	152
40	GEORGE C. WALKER	155
41	HERBERT D. YOUNG	158
42	JOHN E. ZIMMERMAN	162
43	ALBERT F. BROWN	165
44	CHARLES G. SMITH	168
45	WILLIAM H. JONES	172
46	CHARLES I. WHITE	175
47	HENRY J. BLACK	178
48	EDWARD K. GREEN	182
49	FRANK L. HARRIS	185
50	ALFRED M. KING	188
51	ROBERT N. LEE	192
52	JOHN O. ROSS	195
53	WALTER P. TAYLOR	198
54	GEORGE Q. WALKER	202
55	HERBERT R. YOUNG	205
56	JOHN S. ZIMMERMAN	208
57	ALBERT T. BROWN	212
58	CHARLES U. SMITH	215
59	WILLIAM V. JONES	218
60	CHARLES W. WHITE	222
61	HENRY X. BLACK	225
62	EDWARD Y. GREEN	228
63	FRANK Z. HARRIS	232
64	ALFRED A. KING	235
65	ROBERT B. LEE	238
66	JOHN C. ROSS	242
67	WALTER D. TAYLOR	245
68	GEORGE E. WALKER	248
69	HERBERT F. YOUNG	252
70	JOHN G. ZIMMERMAN	255
71	ALBERT H. BROWN	258
72	CHARLES I. SMITH	262
73	WILLIAM J. JONES	265
74	CHARLES K. WHITE	268
75	HENRY L. BLACK	272
76	EDWARD M. GREEN	275
77	FRANK N. HARRIS	278
78	ALFRED O. KING	282
79	ROBERT P. LEE	285
80	JOHN Q. ROSS	288
81	WALTER R. TAYLOR	292
82	GEORGE S. WALKER	295
83	HERBERT T. YOUNG	298
84	JOHN U. ZIMMERMAN	302
85	ALBERT V. BROWN	305
86	CHARLES W. SMITH	308
87	WILLIAM X. JONES	312
88	CHARLES Y. WHITE	315
89	HENRY Z. BLACK	318
90	EDWARD A. GREEN	322
91	FRANK B. HARRIS	325
92	ALFRED C. KING	328
93	ROBERT D. LEE	332
94	JOHN E. ROSS	335
95	WALTER F. TAYLOR	338
96	GEORGE G. WALKER	342
97	HERBERT H. YOUNG	345
98	JOHN I. ZIMMERMAN	348
99	ALBERT J. BROWN	352
100	CHARLES K. SMITH	355

## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
32	369, 383, 322, 332, 308, 243, 350, 452, 454, 359, 376, 377, 384, 239, 278.	
33	297, 348, 235, 347, 269, 270, 215, 338, 382, 317, 250, 318, 324, 365, 248, 236, 362, 214, 355, 315.	546, 535.
34	293, 288	522, 523, 515, 516, 521.
35	211, 319, 233, 228, 237, 238, 317, 287, 239, 346.	504, 555, 556, 520, 511.
36	363, 240, 374, 261, 452, 246, 306, 307, 343, 344, 353, 335.	505, 610.
37	229, 230, 371, 256, 251, 252.	513, 514, 532, 506.
38	318.	525.
39	326, 304, 253.	624, 546, 623, 625, 536.
40	382, 268, 338, 335, 234, 310, 357, 328, 329, 330, 213, 347, 224.	
41	378, 362, 382, 338, 224, 250, 351, 308, 335.	506, 530.
42	279, 226, 214, 268, 384, 381, 289, 290, 291, 265, 452, 376, 380, 243, 251, 252, 307, 328, 329, 330, 358, 306, 346.	
43	230, 231, 244, 349, 234.	611, 563, 562
44	390, 274, 245, 308, 338, 387, 234, 268, 323, 294.	570
45	317, 345, 237, 238, 284, 285, 286, 314, 353, 327.	501, 556, 568, 569.
46	388, 305, 213, 287, 317, 239, 341, 342,	555, 556, 568, 569.
47	345, 230, 231, 321, 339, 319, 317, 318, 244, 336, 252, 308, 233, 386, 237, 238, 268, 353, 285, 286, 314, 327, 284.	532, 507, 543, 556, 555, 526.
48	299, 366, 379, 380, 266, 265, 301, 302, 337.	



## APPENDIX III (con'td.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
49	298,253,372,308,338,390,312	
50	258,259,304,260,257,332,277,384, 331,368,376,367,369,278.	546,531,542,549.
51	388,345,321,339,244,305,375,213, 237,238,373,287,317,239,234,285, 286,314,353,327,341,349.	555,501,556,563, 527,568,569,526, 562.
52	274,371,273,350,354,370,387,294 315.	601
59	236,238,329,330,335.	559,558,554.
60	280,382,275,385,347,289,290,291, 236.	519,636,507.
61	318,328,329,330,357,335,353,339, 346.	537.
62	326,299,332,366,277,272,360,384, 331,352,376,379,368,367,389,295, 296,229.	
63	269,270,243,454,346,317,318,382, 214,365.	530.
64	214,384,381,378,374,380,265,376, 243,213,308,348,326,248,315.	530.
65	272,214,355,384,248,362,381,378, 374,338,250,380,265,224,289,376, 291,343,290,243,213,351,307,328, 329,330,308,306,347,348,335,261, 326,229,315.	506,530,537.

## APPENDIX III (cont'd.)

1916-1920 Period

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
1	407,184,421,38,403,438,131,49,50, 181,76,446,98,114,116,143,188, 174,84,417,402.	617
2	80,109,96,408-415,129,8,78,184, 127,171,401,202,446,457,10,191, 37,168,148,175,196,105,393,182, 400,62,56.	605
3	80,406,109,408-415,129,52,78,127, 171,401,72,457,191,168,148,182, 400,393.	605
4	96,129,184,202,446,10,37,105,56.	
5	168,62,56.	
6	105,175,196.	
7	176,404,429,432,170,428,38,20,19, 206,427,45,73,82,83,204,434,49, 50,181,69.	603
8	397,30,31,158,437,75,431,28,29, 122,92,126,198,199.	
9	42,115,176,405,24,155,156,441, 442,17,106,178,189,71,149,209.	
10	11,12,13,14,26,119,64,186,20,173, 61,87,163,118,396.	
11	195,48,392,223,124,138,153,112, 440,111,137,95,89,39,40,41,93, 166,201,205,34.	
12	433,1,8,32,140,43,172,180,193, 194,111,87,61,16,426,7,54,57,66, 118,190.	
13	51,392,46,120,86,10,47,60,172, 112,65,187,440,33,72,89,95,121, 183,201,99,100,101,102,394,68, 103,104,117,34,113.	
14	147,64,78,173,168.	



## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
15	145,146.	606
16	80,8,64,78,168,393,398.	
17	103,104,23,56,109,406,79,110, 55,78,5,4,159,421,422,121,423, 160,136,150,179,81.	
18	62,67,393,123,125,182,35,55, 128,78,63,159,445,204,152, 416,160,168,150,79.	
19	210,424,15,132,133,134,44,90, 91,142,161,418,419,420,447, 391,93,74,197.	603
20	51,103,104,15,182,185,86,55,52, 421,136,159,10,90,91,422,423,197.	
21	123,113,125,132,133,134,128,206, 127,177,193,2,73,121,408-415,3, 46,157.	
22	394,113,18,177,2,3,46,157.	
23	123,119,125,433,26,128,43,47, 193,194,177,159,187,445,61,87, 163,121,7,118,408-415,99-102, 394.	
24	27,154,177,2,81,3.	
25	397,444,186,207,70,107,436,2, 65,439,443,451,108,88,94,25,203, 167,81,3,6,399,117,46.	
26	186,65.	
27	53,157,200,27,397,444,107,439, 443,108,88,94,25,203,71,3,6, 399,117.	
28	190,110,93,72,121,159,63,164, 135,136,52,25,208,109,406,80.	
29	79,59,77,97,78,58,21,22,435, 436,70,144,141,151,430.	602,604.

## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
30	139,207,154,436,70,130,2,192, 451,167,84.	601
31	46,402,450,51,9,64,36,397,145,146, 85,4,5,457,185,449,75,89,121,205, 183,165,86,169,147,113,448,117, 103,104,68,148,99-102,394,80,400.	
32	46,64,397,85,457,75,89,121,205, 99,100,101,102,394,113.	
33	402,450,51,9,145,146,4,5,185, 449,86,165,169,147,117,103,104, 68,448,148,80,400.	
34	392,120,112,440,95,89,201,34.	
35	51,46,86,10,47,60,172,65,187,33, 72,121,183,99,100,101,102,394, 68,103,104,117,113.	
36	195,48,396,223,124,138,153,112, 137,39,40,41,166,205.	
37	79,23,56,55,78,421,422,423, 160,150,179.	
38	450,127,449,86,165,148,458,9, 182,400,51,56.	
39	186,72.	
40	140,185,98,161,163,181,171, 177,184,88.	
41	96,407,185,184,171,177,81.	
42	68,3,88,161,163,181,177,164,8, 140,24,396.	
43	129	
44	103,104,109,406,110,5,4,159, 121,136,81.	
45	99,100,101,102,394,123,125,121, 128,177,159,445,408-415.	

## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
46	119,433,26,43,47,193,194,187, 61,87,163,121,7,118,99-102,394.	
47	123,113,148,103,104,15,182,125, 185,86,55,132,133,134,52,128,18, 206,421,127,136,177,159,193,10, 90,91,2,73,422,423,121,408-415, 3,197,46,157.	
48	53,27,397,444,107,439,443,108, 88,94,6,399,117.	
49	93,121,159,52,109,406,80.	
50	42,115,176,24,397,155,156,405, 441,17,106,30,31,158,437,75,431, 178,28,29,122,189,71,149,92,126, 162,198,199,209.	
51	113,123,119,125,433,26,128,27, 207,18,43,47,193,194,177,159, 187,2,445,61,163,87,121,7,118, 408-415,99-102,394,81,46,157.	
52	190,135,72,63,164,110,136,208.	
53	208,395,404,176,35,25,405,4,5, 63,20,159,65,27,152,79.	
54	190,53,157,27,200,93,110,397,444, 72,121,207,154,186,20,107,436,2, 65,439,159,443,108,63,164,135, 451,136,88,94,25,203,71,52,167, 81,3,6,399,117,208,46,109,406,80.	
55	109,406,80,171,401,72,457,190, 148.	605
56	408-415,129,127,78,168,182, 400,393.	
57	185,161,98,163,181,171,177,164, 8,140,27,96,81,53.	
58	80,8,147,64,78,173,168,393.	

## APPENDIX III (cont'd.)

Whole Period, 1910-1920

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
1	355,407,310,184,421,38,403,438, 131,49,50,181,76,446,98,114,116, 143,188,174,84,417,402.	617
2	248,362,80,109,267,386,96, 408-415,129,8,184,215,127,310, 273,171,401,202,251,252,269, 270,348,212,457,10,78,191,37, 240,168,148,175,196,242,240,105, 297,373,182,400,365,214,229,221, 220,230,231,62,56.	506,614,537,532, 525,605,616,570, 518,612,613.
3	80,362,109,406,349,315,248,267, 129,408-415,234,273,127,171,401, 457,72,452,240,78,244,282,220, 225,230,231,297,298,191,168,148, 182,400,393.	562,563,543,605, 532,513,514,535.
4	96,386,129,184,310,215,202,446, 251,252,269,270,212,348,10,37, 105,56,242,214,229,221.	506,537,525,614, 532,518,570,612, 613.
5	248,315,269,270,318,235,282, 225,168,62,56.	
6	362,386,452,240,297,105,175, 196,365.	543,605.
7	362,176,404,429,432,170,310,428, 215,20,38,19,206,427,45,73,82, 83,333,204,434,49,50,181,452, 240,334,69.	543,561.
8	332,397,384,31,158,437,30,75, 431,376,369,28,29,122,92,126, 162,192,199,278.	531,542.
9	304,258,259,257,260,42,277,115, 176,24,155,156,405,441,366,17, 106,331,178,368,367,189,71,149, 209.	546,549.
10	11,390,280,388,378,12,13,14,26, 119,297,320,216,64,186,253,305, 173,20,333,328,329,330,356,316, 61,87,163,311,334,118,341,342, 275,326,396.	553,509,568,503, 569.

## APPENDIX III (cont'd.)

<u>Scale No<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
11	194, 240, 261, 48, 392, 396, 374, 223, 124, 138, 153, 363, 240, 293, 288, 306, 112, 137, 111, 440, 89, 95, 344, 343, 453, 335, 39, 40, 41, 93, 166, 201, 205, 34.	522, 505, 523, 515, 516, 521.
12	433, 1, 8, 32, 140, 218, 43, 172, 180, 193, 194, 283, 263, 213, 344, 343, 111, 453, 262, 264, 118, 87, 61, 16, 54, 57, 66, 7, 426, 279, 190.	550
13	211, 46, 392, 120, 86, 319, 10, 47, 60, 172, 293, 288, 233, 228, 237, 238, 112, 65, 187, 440, 317, 33, 72, 89, 95, 121, 183, 201, 287, 239, 346, 99-102, 394, 68, 103, 104, 117, 34, 113.	522, 555, 556, 504, 523, 515, 516, 521, 520, 511.
14	309, 297, 359, 147, 64, 78, 340, 173, 351, 282, 217, 218, 219, 168, 232.	517, 530, 503.
15	355, 362, 324, 250, 215, 325, 145, 146.	606, 571, 561, 502.
16	236, 80, 315, 248, 8, 253, 340, 78, 64, 359, 282, 217, 218, 219, 220, 289, 290, 291, 168, 232, 393, 241.	530
17	79, 390, 103, 104, 274, 229, 109, 406, 23, 56, 230, 245, 371, 110, 256, 55, 78, 4, 5, 159, 308, 251, 252, 421, 422, 121, 136, 387, 423, 234, 338, 160, 268, 323, 294, 81, 150, 179.	570, 513, 514, 532, 506.
18	382, 385, 393, 123, 62, 67, 125, 182, 225, 364, 241, 282, 256, 371, 249, 335, 357, 35, 55, 128, 78, 63, 159, 340, 445, 204, 328, 329, 330, 152, 359, 168, 160, 416, 150, 79, 309, 236.	548, 517, 540, 558, 559, 507, 503.
19	424, 15, 210, 322, 231, 386, 132, 133, 134, 292, 44, 90, 91, 142, 271, 161, 418, 419, 420, 447, 391, 93, 74, 197.	525, 573, 603.
20	123, 51, 15, 231, 230, 318, 115, 185, 86, 336, 252, 55, 52, 128, 421, 127, 136, 159, 10, 90, 91, 171, 233, 422, 423, 121, 386, 268, 197.	532, 543



## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
21	123, 113, 103, 104, 321, 339, 345, 125, 319, 317, 244, 132, 133, 134, 128, 206, 127, 177, 233, 193, 2, 73, 237, 238, 408-415, 3, 353, 285, 286, 314, 327, 284, 46, 157.	507, 556, 555, 526.
22	394, 113, 345, 321, 339, 319, 317, 244, 18, 177, 2, 237, 238, 353, 3, 285, 286, 314, 327, 284, 349, 46, 157,	501, 563, 562, 526.
23	123, 388, 345, 125, 433, 26, 119, 43, 47, 128, 305, 193, 194, 177, 159, 187, 445, 61, 87, 163, 213, 237, 238, 121, 118, 7, 317, 408-415, 284, 285, 286, 314, 353, 327, 341, 342, 99-102, 394, 287.	555, 501, 556, 568, 527, 569, 526.
24	345, 317, 244, 27, 375, 207, 154, 70, 237, 238, 373, 436, 2, 121, 451, 353, 239, 284, 327, 314, 286, 285, 167, 81, 3, 46.	177, 555, 556, 527.
25	361, 245, 309, 211, 274, 326, 345, 303, 298, 317, 244, 299, 397, 253, 308, 372, 352, 375, 444, 366, 186, 207, 70, 107, 273, 272, 350, 360, 436, 2, 65, 354, 439, 443, 451, 237, 238, 373, 108, 88, 94, 370, 379, 380, 25, 203, 167, 265, 266, 387, 338, 81, 3, 6, 399, 117, 389, 296, 295, 301, 302, 337, 294, 390, 353, 239, 284, 327, 314, 286, 285, 46, 312, 313, 315.	555, 556, 621, 527.
26	326, 361, 245, 272, 186, 352, 65, 389, 295, 296.	
27	309, 53, 157, 27, 397, 200, 444, 211, 303, 299, 366, 107, 360, 439, 443, 108, 88, 94, 379, 380, 265, 266, 25, 203, 71, 3, 6, 399, 117, 301, 302, 337, 313.	
28	190, 274, 110, 93, 72, 121, 298, 253, 372, 308, 273, 350, 354, 159, 63, 164, 135, 136, 370, 52, 25, 387, 338, 294, 390, 208, 109, 406, 80, 315, 312.	621
29	224, 377, 79, 59, 77, 383, 97, 78, 373, 375, 58, 21, 22, 435, 246, 243, 436, 70, 144, 300, 141, 151, 430, 323.	602, 524, 533, 626, 572, 604.





## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
30	406, 255, 222, 139, 207, 254, 154, 436, 273, 70, 130, 2, 192, 316, 370, 451, 281, 284, 167, 84, 226, 227.	551, 620, 601, 541, 539.
31	297, 402, 450, 46, 369, 383, 322, 347, 235, 348, 332, 51, 9, 64, 36, 397, 85, 145, 146, 308, 4, 5, 325, 243, 350, 457, 269, 270, 215, 250, 185, 449, 452, 359, 376, 338, 382, 317, 384, 75, 89, 121, 205, 183, 86, 165, 169, 147, 113, 448, 148, 103, 104, 68, 117, 365, 362, 318, 377, 324, 346, 239, 248, 278, 355, 315, 236, 214, 99-102, 394, 80, 400.	546, 535
32	46, 369, 383, 64, 332, 397, 308, 243, 350, 457, 75, 89, 121, 452, 185, 359, 376, 384, 239, 205, 99-102, 394, 113, 377, 278.	
33	297, 402, 450, 51, 36, 348, 235, 347, 9, 145, 146, 85, 4, 5, 269, 270, 215, 338, 317, 382, 449, 86, 183, 165, 169, 147, 117, 103, 104, 68, 448, 148, 400, 250, 318, 324, 365, 248, 236, 362, 214, 315, 80, 355.	546, 535
34	392, 293, 120, 288, 112, 440, 95, 89, 201, 34.	522, 583, 515, 516, 521.
35	51, 46, 86, 211, 233, 319, 172, 47, 60, 10, 228, 65, 187, 33, 72, 121, 237, 238, 317, 183, 99-102, 394, 68, 103, 104, 117, 113, 287, 239, 346.	504, 555, 556, 520, 511.
36	195, 48, 396, 223, 124, 138, 153, 363, 240, 374, 261, 452, 246, 306, 112, 307, 137, 344, 343, 453, 335, 39, 40, 41, 166, 205.	505, 610.
37	229, 79, 230, 23, 56, 371, 256, 55, 78, 251, 252, 421, 422, 423, 160, 150, 179.	513, 514, 532, 506.
38	450, 127, 449, 318, 86, 165, 148, 458, 9, 182, 400, 51, 56.	525
39	326, 304, 186, 253, 72	624, 546, 623, 625, 536.

No.	General fund in dollars
10	<p>386,304,166,523.75</p> <p>250,000,000,000.00</p>
11	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
12	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
13	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
14	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
15	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
16	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
17	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
18	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
19	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
20	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
21	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>
22	<p>420,125,400,00.00</p> <p>420,125,400,00.00</p>

## APPENDIX III (cont'd.)

<u>Scale No.<sup>a</sup></u>	<u>Cases Used in Scale<sup>b</sup></u>	<u>Tie-breaking Cases</u>
40	224, 53, 140, 347, 185, 98, 161, 163, 181, 27, 171, 177, 213, 184, 328, 329, 330, 357, 335, 338, 234, 268, 382, 6, 3, 88, 407, 396.	
41	96, 407, 362, 378, 382, 224, 338, 184, 185, 250, 351, 171, 177, 308, 335, 81.	506, 530, 537
42	68, 3, 384, 279, 226, 214, 268, 381, 289, 290, 291, 88, 265, 452, 376, 380, 243, 161, 163, 181, 251, 252, 307, 171, 177, 164, 8, 328, 329, 330, 140, 306, 24, 346, 53, 396.	
43	230, 231, 244, 349, 234.	611, 563, 562.
44	390, 103, 104, 274, 109, 406, 245, 110, 4, 5, 308, 159, 121, 136, 387, 234, 338, 268, 323, 294, 81.	570
45	99-102, 394, 123, 125, 345, 121, 317, 128, 177, 159, 445, 237, 238, 408-415, 284, 285, 286, 314, 353, 327.	501, 527, 526.
46	388, 119, 433, 26, 305, 43, 47, 193, 197, 187, 61, 87, 163, 213, 317, 341, 342, 118, 121, 7, 287, 99-102, 394.	555, 556, 568, 569.

<sup>a</sup>See Tables 1 and 2 for key to names of scales.

<sup>b</sup>Cases are given in the order of their fit in the scale. See Appendix I and II for key to case numbers, giving their names and breakdown of votes.

# APPENDIX IV

## Ranks of Justices on Scales

1910-1915 Period

Justice	Scale Number <sup>a</sup>											
	1	2	3	4	5	6	7	8	9	10	11	12
Holmes	1	3	9	3	8	3½	4½	7	9	3	3	7
Pitney	9	11	7	11	5	2	9½	6	2	7	1	1½
White	2	8	4	9	5	10	7	5	6½	11	9	11
McReynolds	10	10	5	8		8	11	4	11	5	11	3
Day	7	7	6	7	3	6½	4½	1	4½	8	5½	4
Van Devanter	8	9	8	10	7	5	9½	3	6½	9½	10	9
McKenna	3	6	1	6	2	6½	6	9	4½	2	4	5
Hughes	4	2	2	2	9	3½	3	8	3	4	2	1½
Lamar	6	4	3	5	5	9	2	10	8	9½	8	9
Lurton	5	5	10	4	10		8		10	6	5½	9
Harlan		1	11	1	1	1	1	2	1	1	7	6
	13	14	15	16	17	18	19	20	22	23	24	25
Holmes	4	7	9	7	6	6	8	4½	7	6	7	7
Pitney	2	4	3	5	1	10	9	1	2	1	1½	2
White	10	8	7	8	3	4½	7	4½	9	7	9	11
McReynolds		3	10½		2	8	10	7	11	11	6	8
Day	7½	2	2	2	10	7	3½	8	5	5	5	5
Van Devanter	9	10	5	10	4	9	6	6	6	8	8	10
McKenna	1	9	6	9	11	11	11	11	4	3	3	3
Hughes	3	11	4	3	5	3	5	3	3	4	4	4
Lamar	6	5	8	6	8½	4½	1	9	8	9	10	6
Lurton	5	6	10½	4	8½	1½	3½	10	10	10	11	9
Harlan	7½	1	1	1	7	1½	2	2	1	2	1½	1
	26	27	28	29	30	31	32	33	34	35	36	37
Holmes	8	9	7	8	11	7	7	5	1	6	5	8
Pitney	1	1	1	2	1	6	4	4	8	1	1	1
White	4	8	11	7	9	8	5½	8	9	10	9	2
McReynolds	8	10	9	4	7	3	5½	2½			10	9½
Day	2	5½	4	3	4	9	9	9	4½	8½	6	5
Van Devanter	5½	7	10	10	8	10	8	6	10	7	8	4
McKenna	3	2	3	11	3	11	10	11	2	2	7	11
Hughes	8	4	5	6	5½	4	2	7	6	3	4	9½
Lamar	5½	3	6	5	5½	5	3	10	3	5	11	6½
Lurton	10	5½	8	9	10	2	1	2½	4½	4	2½	6½
Harlan			2	1	2	1		1	7	8½	2½	3



## APPENDIX IV (cont'd.)

Justice	Scale Number <sup>a</sup>											
	38	39	40	41	42	43	44	45	46	47	48	49
Holmes	6	11	4	8½	4½	6	7	8½	6	8	5	5
Pitney	7	1	11	7	7	4½	1	1½	1½	1	1	2
White	11	7	2	8½	8	7½	5½	8½	7	7	9	10
McReynolds	1	9½	5	11	3		3½	10½	9	11	10	3
Day	5	2	9	2	9	2	8½	5	5	4	6	7½
Van Devanter	4	9½	10	3	10	4½	8½	6½	8	5	8	9
McKenna	2	6	3	4	6	3	10	4	3	6	2½	7½
Hughes	8½	4	1	10	2	7½	2	3	4	2	2½	5
Lamar	8½	4	8	5	11	9½	5½	6½	11	9	4	5
Lurton	3	4	6½	6	4½	9½	3½	10½	10	10	7	1
Harlan	10	8	6½	1	1	1	11	1½	1½	3		
	50	51	52	59	60	61	62	63	64	65		
Holmes	9	6	11	4	6	6	7	6	7	4		
Pitney	3	1	1	11	10	10	2½	9	3	7		
White	5	10	9	4	4	5	10	9	6	3		
McReynolds	10	11	7	2	3	2	10	1	1	1		
Day	4	5	3	9	7	7	4½	11	10	8		
Van Devanter	6	7	8	9	5	9	8	7	9	9		
McKenna	1	3	4	6	8½	4	2½	9	5	6		
Hughes	2	4	5	4	2	3	4½	4	4	2		
Lamar	7	9	6	9	11	8	6	5	2	10		
Lurton	11	8	10	7	8½	1	10	3	8	5		
Harlan	8	2	2	1	1		1	2	11	11		

## 1916-1920 Period

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Holmes	2	4	6	3	8	8	3	4	5	3	4	3	5	4	8
Brandeis	1	3	5	4	3	3½	2	2	3	2	1	2	1	2	5
Pitney	7½	9	9	9	5½	9	8	3	4	5	3	4	2	5	2
White	4	2	2	1	5½	2	5	6½	7	7	7	7	7	6	7
McReynolds	9	6	3	7½		3½	9	6½	9	9	9	8	8	8	9
Day	7½	5	4	7½	4	6	6	9	2	6	5	5	4	3	1
Clarke	3	1	1	2	2	1	1	1	1	1	2	1	3	1	6
Van Devanter	6	8	7½	6	7	7	7	8	8	8	8	6	6	9	3
McKenna	5	7	7½	5	1	5	4	5	6	4	6	9	9	7	4



## APPENDIX IV (cont'd.)

## 1916-1920 Period

Justice	Scale Number <sup>a</sup>														
	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
Holmes	6	5	3	3	4	4	5	4	6½	7	8½	6	5	7	9
Brandeis	1	3	4	2	2	1	3½	1	3	4½	3	4	8	6	2
Pitney	4	2	6	4	3	2	1	3	2	1	1	1	1	3	3
White	5	4	2	7	6	5	6	6	9	6	6	9	6	5	8
McReynolds	7	9	9	8	9	7	9	9	6½	9	8½	7½	3	1	5
Day	3	6	5	5	5	8	2	5	4	4½	4	5	7	4	4
Clarke	2	1	1	1	1	3	3½	2	1	2	2	2	9	2	1
Van Devanter	9	7	8	9	8	9	8	7	8	8	7	7½	4	8	7
McKenna	8	8	7	6	7	6	7	8	5	3	5	3	2	9	6
	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45
Holmes	5	4	4	7	5	2	5½	6	9	2	6	3	7	5	3½
Brandeis	3	1	5	1½	1	1	3	7½	2	1	6	1½	5½	3	2
Pitney	1	3	3	1½	2	4	2	7½	2	9	4	8	1	2	1
White	6	5	7	9	7	8	4	9	6	4	6	5	4	4	3½
McReynolds	4	6	1½	5	9	9	7½	2	7½	5	9	9		9	9
Day	8	8	8	4	4	5	5½	5	4	6	8	4	3	6	6
Clarke	2	2	1½	3	3	3	1	1	2	3	1	1½	5½	1	5
Van Devanter	9	9	9	6	6	7	7½	4	7½	7	2	7	9	7	8
McKenna	7	7	6	8	8	6	9	3	5	8	3	6	2	8	7
	46	47	48	49	50	51	52	53	54	55	56	57	58		
Holmes	3	4	6	5½	4	5	5½	5	7	9	6	2	4		
Brandeis	1	1	4	8	2	1	8	3½	4	3	8	1	1		
Pitney	4	2	1	3	3	2	1	6	1	6	9	9	6		
White	7½	6	8½	5½	7	7	5½	2	9	2	7	5½	5		
McReynolds	9	9	7	1	9	9	3	9	6	5	1	3	8		
Day	5	5	5	8	5	4	5½	3½	5	4	5	4	3		
Clarke	2	3	3	9	1	3	9	1	2	1	2	5½	2		
Van Devanter	6	8	8½	2	8	8	5½	7½	8	7½	3	7	9		
McKenna	7½	7	2	4	6	6	2	7½	3	7½	4	8	7		



APPENDIX IV (cont'd.)

1946-1950 Period

State Income

Location

18 17 16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

Holmes	4	2	7	3	4	4	4	4	4	4	4	4	4	4	4	4	4
Stratton	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Finney	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
White	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Day	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Clark	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Van Dusen	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17

Holmes	4	2	7	3	4	4	4	4	4	4	4	4	4	4	4	4	4
Stratton	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Finney	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
White	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Day	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Clark	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Van Dusen	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17

Holmes	4	2	7	3	4	4	4	4	4	4	4	4	4	4	4	4	4
Stratton	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Finney	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
White	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Day	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Clark	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Van Dusen	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17

Holmes	4	2	7	3	4	4	4	4	4	4	4	4	4	4	4	4	4
Stratton	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Finney	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
White	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Day	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Clark	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Van Dusen	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Kochynski	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17

## APPENDIX IV (cont'd.)

## Whole 1910-1920 Period

Justice	Scale Number <sup>a</sup>											
	1	2	3	4	5	6	7	8	9	10	11	12
Holmes	2	8	10	4	10	3½	6	6	9	4	5	6½
Brandeis	1	4	11	6	5	8½	1½	3	6	3	1	2
Pitney	11	13	12	13	7	2	12	5	4	6	3	4
White	4	7	3	9	7	11	8	8	10	11	11	13
McReynolds	12	10	7	12		8½	13	9	12	13	13	11
Day	9	11	6	10	4	6	9	12	3	9	8	5
Clarke	3	2	1	2½	3	12	1½	1½	1	2	2	1
Van Devanter	10	12	9	11	9	5	11	11	11	12	12	9
McKenna	5	6	2	8	2	7	7	7	7	5	6	12
Hughes	6	3	5	2½	11	3½	5	4	5	7	4	3
Lamar	8	5	3	7	7	10	4	1½	8	10	10	9
Lurton	7	9	8	5	12		10		13	8	7	9
Harlan		1	13	1	1	1	3	10	2	1	9	6½
	13	14	15	16	17	18	19	20	21	22	23	24
Holmes	6	8	11	8½	10	6	7	6	5	8	6	9
Brandeis	1	3	7	1*	3	7	2	2	1	4½	1	4
Pitney	2	6	3	7	2	10	8	3	2	2	3	2½
White	12	9	9	8½	4	5	10	8	8	9	9	11
McReynolds	13	12	12½	11	12	12½	11	11	10	13	13	8
Day	9	4	2	4	6½	9	9	7	9	6	7	7
Clarke	3	2	8	3	1	3	1	1	6	4½	4	1
Van Devanter	11	13	5	13	11	11	12	10	11	10	10	10
McKenna	4	11	6	12	13	12½	13	9	7	7	8	5
Hughes	5	10	4	5	6½	4	5	5	3	3	5	6
Lamar	8	5	10	10	8½	8	3	12	12	11	11	12
Lurton	7	7	12½	6	8½	2	6	13	13	12	12	13
Harlan	10	1	1	1½	5	1	4	4	4	1	2	2½
	25	26	27	28	29	30	31	32	33	34	35	36
Holmes	10	10½	9	8	10	13	8	7	6	5	7	3
Brandeis	5½	3	4½	12	9	3	4	1	7	1	1	1
Pitney	2	1	1	1	4	4	5	5	5	2	2	4
White	13	6	12	11	8	11	10	8	9	12	12	11
McReynolds	9	9	11	4	2	6	6	9	3	11	13	13
Day	7	4	8	5	5	5	12	10	11	8	6	8
Clarke	3	2	2	13	3	1	3	4	3	3	3	2
Van Devanter	12	8	10	10	12	10	13	11½	12	13	8	10
McKenna	4	5	3	3	13	7	11	11½	10	4	9	9
Hughes	5½	10½	7	6	7	8½	7	3	8	7	5	7
Lamar	8	7	4½	7	6	8½	9	6	13	6	10	12
Lurton	11	12	6	9	11	12	2	2	3	9	4	5½
Harlan	1			2	1	2	1		1	10	11	5½



## APPENDIX IV (cont'd.)

## Whole 1910-1920 Period

Justice	Scale Number <sup>a</sup>									
	37	38	39	40	41	42	43	44	45	46
Holmes	7	7	13	3	10	5	8½	8	6½	6
Brandeis	3	8½	2	2	10	4	5½	3½	3	1
Pitney	2	8½	2	13	6	11	2	2	1½	4
White	4	13	9	5	10	8	8½	5	6½	10
McReynolds	11½	2	11½	6	13	10	11	12	12	11
Day	6	6	4	8	5	6	4	9	9	7
Clarke	1	1	2	4	2	2	5½	1	5	2
Van Devanter	8	5	11½	12	3	12	10	10	11	9
McKenna	13	3	8	7	4	9	3	11	8	8
Hughes	11½	10½	6	1	12	3	7	3½	4	5
Lamar	9½	10½	6	9	7	13	12½	6½	10	13
Lurton	9½	4	6	10½	8	6	12½	6½	13	12
Harlan	5	12	10	10½	1	1	1	13	1½	3

For scale number 6, in the 1910-1915 period and the whole period small numbers indicate an anti-civil liberty attitude. In the 1916-1920 period, small numbers indicate a pro-civil liberty attitude. In scales 28, 49 and 52, small numbers indicate an anti-debtor attitude. In all judicial power scales except 41, small numbers indicate an anti-judicial power attitude. Ranks with ½ indicate two- or four-way ties.

---

<sup>a</sup>See Tables 1 and 2 for full names of scales. See Appendix III for cases used in scales.



# APPENDIX V

## Non-scaled Responses for Individual Justices in Scales

1910-1915 Period

Justice	Scale Number <sup>a</sup>																
	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	
Holmes	2	0	2	1	0	4	0	1	2	0	0	3	0	1	0	2	
Pitney	1	1	0	0	0	0	0	1	3	3	0	1	0	0	0	1	
White	2	3	1	0	0	0	0	0	4	0	1	2	1	0	1	0	
McReynolds	1	0	0	0	1	0	0	0	1	2	0	0	0	0	0	0	
Day	0	1	0	1	0	0	0	0	0	0	2	0	2	0	2	2	
Van Devanter	1	0	1	0	0	0	0	0	0	0	0	1	1	1	0	1	
McKenna	3	2	3	0	0	1	0	1	2	2	1	3	2	0	2	2	
Hughes	1	3	1	0	1	0	1	1	0	2	0	2	1	0	3	3	
Lamar	3	0	1	0	0	1	0	1	1	3	0	1	0	1	0	0	
Lurton	3	0	2	1	0	0	0	2	0	0	0	2	1	0	1	0	
Harlan	1	3	1	0	0	1	0	0	0	0	0	0	0	0	0	2	

	18	19	20	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37
Ho	1	2	0	0	0	0	6	0	2	2	1	0	7	1	6	0	2	0	3
Pi	3	0	0	1	1	1	5	2	2	1	0	0	5	2	2	0	0	2	0
Wt	0	1	0	2	1	0	4	1	0	1	2	0	1	0	1	0	1	0	0
MR	0	0	0	0	0	1	3	0	1	1	0	0	3	0	0	0	0	2	0
Dy	1	1	1	1	0	0	4	0	0	2	1	0	3	1	1	0	0	1	0
VD	0	0	0	0	0	0	3	0	0	1	0	0	1	0	0	0	0	0	0
MK	0	1	1	1	1	0	5	2	1	1	2	0	5	2	1	0	3	1	2
Hu	1	0	0	0	0	0	5	0	2	1	1	0	3	2	1	1	1	2	0
La	0	0	0	0	0	0	3	0	1	0	0	0	4	1	1	0	1	0	0
Lu	0	0	0	0	1	1	5	0	1	1	0	0	2	1	0	0	2	0	0
Ha	0	0	0	0	1	0	0	0	0	0	0	0	1	0	2	0	0	0	1

	40	41	42	44	45	46	47	48	49	50	51	52	59	60	61	62	63	64	65
Ho	0	1	0	1	0	0	2	0	0	6	0	1	0	0	0	3	0	1	3
Pi	0	3	4	1	1	1	2	2	1	2	1	1	0	1	0	5	1	2	5
Wt	0	0	2	0	0	1	5	0	0	0	2	0	0	0	1	3	1	1	3
MR	1	1	1	0	0	0	1	1	0	0	1	0	0	0	0	0	0	1	2
Dy	0	0	1	0	0	0	2	0	0	3	0	1	0	1	0	3	0	1	2
VD	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0
MK	2	2	2	0	0	1	7	0	0	2	1	1	1	0	2	0	1	3	6
Hu	2	1	1	1	0	0	2	2	0	1	0	1	0	0	0	4	0	1	1
La	1	0	3	0	0	0	0	0	0	1	0	0	0	0	1	1	2	0	4
Lu	0	1	0	0	0	2	0	0	0	0	0	0	0	0	0	0	1	1	3
Ha	0	0	0	0	0	1	1	0	0	1	1	0	0	0	0	0	0	0	1



## APPENDIX V (cont'd.)

## 1916-1920 Period

## Justice

Scale Number<sup>a</sup>

	1	2	3	4	7	8	9	10	11	12	13	14	16	17	18	19			
Holmes	1	3	1	0	0	0	0	1	5	1	1	0	1	0	0	0			
Brandeis	0	10	10	0	0	0	1	0	1	0	1	0	0	0	2	0			
Pitney	1	1	0	0	1	0	2	1	1	4	4	1	1	3	2	0			
White	1	4	3	2	1	0	2	1	5	0	3	0	0	1	1	0			
McReynolds	0	4	5	0	0	0	2	0	0	1	0	0	0	2	0	1			
Day	1	1	0	0	0	0	0	0	1	1	0	0	0	1	1	5			
Clarke	1	3	2	1	0	0	0	0	0	0	4	0	0	1	0	4			
Van Devanter	0	1	0	0	0	0	0	0	0	0	1	0	0	0	1	1			
McKenna	1	5	0	2	2	0	0	1	2	3	2	1	1	5	2	1			
	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35			
Holmes	2	0	0	1	0	0	0	0	1	0	0	2	0	2	0	0			
Brandeis	0	1	1	2	0	1	0	0	0	0	3	7	2	1	0	1			
Pitney	5	3	1	7	1	6	0	5	2	1	0	8	0	6	0	4			
White	1	1	1	3	0	0	0	2	0	1	0	2	0	2	2	1			
McReynolds	2	1	0	0	0	0	0	1	3	1	1	5	1	2	0	0			
Day	2	3	0	1	0	1	0	2	1	0	0	0	0	0	0	0			
Clarke	2	2	1	0	1	0	0	1	3	0	0	5	1	3	0	4			
Van Devanter	2	0	0	1	0	1	0	0	1	0	1	2	0	1	0	1			
McKenna	0	2	1	0	1	5	0	0	1	3	0	3	1	2	1	1			
	36	37	38	40	41	42	44	45	46	47	48	49	50	51	52	53	54	57	58
Ho	1	0	2	1	1	0	0	0	1	2	0	1	0	6	0	1	1	1	1
Br	0	0	0	0	0	0	0	7	1	1	0	0	2	2	0	0	5	0	0
Pi	0	0	0	2	2	2	3	2	2	8	4	1	2	8	3	2	9	1	2
Wt	3	1	0	1	0	2	0	0	0	3	2	0	1	5	0	3	4	2	0
MR	0	0	2	4	1	1	2	1	0	5	0	1	3	2	0	1	8	3	0
Dy	0	0	0	1	0	0	1	1	0	8	1	1	4	1	0	0	3	0	0
Ck	0	0	0	2	1	1	1	1	0	6	1	0	0	3	0	1	10	4	0
VD	0	0	2	0	0	1	0	0	0	1	0	0	1	2	0	2	4	0	0
MK	1	2	3	1	0	1	1	0	0	3	0	0	0	3	1	0	6	0	2

<sup>a</sup>See Tables 1 and 2 for full name of scales.





# APPENDIX VI

## Ranks of Various Courts on Socioeconomic Status, Political Party, Economic and Libertarian Attitudes

Low numbers indicate lower-class status, Democratic party identification, "liberalism", and libertarianism.

### Supreme Court since the New Deal (1941-1966)

	<u>SES<sup>a</sup> Rank</u>	<u>Party Rank<sup>b</sup></u>	<u>C-Scale Rank<sup>c</sup></u>	<u>E-Scale Rank<sup>d</sup></u>
Goldberg	1	6	7	11
Fortas	2	6	4	6½
Douglas	3	6	2	3
Vinson	4	6	20	8
Minton	5	6	19	12
Murphy	6	6	1	1
Rutledge	7	6	3	4
Black	8	6	5	2
Warren	9	18½	6	5
Stone	10	18½	9	19½
Brennan	11	6	8	6½
Frankfurter	12	14	11	16
Jackson	13	12	12	18
White	14	13	10	19
Reed	15	6	21	13
Whittaker	16	18½	16	19½
Clark	17	6	18	9
Roberts	18	18½	14½	21
Burton	19	18½	17	15
Stewart	20	18½	13	14
Harlan	21	18½	14½	17

### The Stone Court (1941-1946)<sup>e</sup>

Douglas	1	3½	4	2½
Vinson	2	3½	11	10
Murphy	3	3½	1	2½
Rutledge	4	3½	2	4
Black	5	3½	3	1
Stone	6	10	5	9
Frankfurter	7	7	6	7
Jackson	8	8	7	8
Roberts	9	10	8	11
Reed	10	3½	9	5
Burton	11	10	10	6

Rank of Various Courts on Socioeconomic  
Party, Economic and Liberalism

Four low numbered indicate lower-class  
party identification, "liberalism", etc.

Rank of Various Courts since the New Deal (1933-1960)

Rank	Party	Rank	Party
1	Goldberg	1	Goldberg
2	Fortas	2	Fortas
3	Douglas	3	Douglas
4	Warren	4	Warren
5	Black	5	Black
6	Harlan	6	Harlan
7	White	7	White
8	Stevens	8	Stevens
9	Brennan	9	Brennan
10	Frankfurter	10	Frankfurter
11	Roberts	11	Roberts
12	Conrad	12	Conrad
13	Black	13	Black
14	Harlan	14	Harlan
15	White	15	White
16	Stevens	16	Stevens
17	Brennan	17	Brennan
18	Frankfurter	18	Frankfurter
19	Roberts	19	Roberts
20	Conrad	20	Conrad
21	Black	21	Black
22	Harlan	22	Harlan
23	White	23	White
24	Stevens	24	Stevens
25	Brennan	25	Brennan
26	Frankfurter	26	Frankfurter
27	Roberts	27	Roberts
28	Conrad	28	Conrad
29	Black	29	Black
30	Harlan	30	Harlan
31	White	31	White
32	Stevens	32	Stevens
33	Brennan	33	Brennan
34	Frankfurter	34	Frankfurter
35	Roberts	35	Roberts
36	Conrad	36	Conrad
37	Black	37	Black
38	Harlan	38	Harlan
39	White	39	White
40	Stevens	40	Stevens
41	Brennan	41	Brennan
42	Frankfurter	42	Frankfurter
43	Roberts	43	Roberts
44	Conrad	44	Conrad
45	Black	45	Black
46	Harlan	46	Harlan
47	White	47	White
48	Stevens	48	Stevens
49	Brennan	49	Brennan
50	Frankfurter	50	Frankfurter
51	Roberts	51	Roberts
52	Conrad	52	Conrad
53	Black	53	Black
54	Harlan	54	Harlan
55	White	55	White
56	Stevens	56	Stevens
57	Brennan	57	Brennan
58	Frankfurter	58	Frankfurter
59	Roberts	59	Roberts
60	Conrad	60	Conrad
61	Black	61	Black
62	Harlan	62	Harlan
63	White	63	White
64	Stevens	64	Stevens
65	Brennan	65	Brennan
66	Frankfurter	66	Frankfurter
67	Roberts	67	Roberts
68	Conrad	68	Conrad
69	Black	69	Black
70	Harlan	70	Harlan
71	White	71	White
72	Stevens	72	Stevens
73	Brennan	73	Brennan
74	Frankfurter	74	Frankfurter
75	Roberts	75	Roberts
76	Conrad	76	Conrad
77	Black	77	Black
78	Harlan	78	Harlan
79	White	79	White
80	Stevens	80	Stevens
81	Brennan	81	Brennan
82	Frankfurter	82	Frankfurter
83	Roberts	83	Roberts
84	Conrad	84	Conrad
85	Black	85	Black
86	Harlan	86	Harlan
87	White	87	White
88	Stevens	88	Stevens
89	Brennan	89	Brennan
90	Frankfurter	90	Frankfurter
91	Roberts	91	Roberts
92	Conrad	92	Conrad
93	Black	93	Black
94	Harlan	94	Harlan
95	White	95	White
96	Stevens	96	Stevens
97	Brennan	97	Brennan
98	Frankfurter	98	Frankfurter
99	Roberts	99	Roberts
100	Conrad	100	Conrad

The Supreme Court (1961-1962)

1	Goldberg
2	Fortas
3	Douglas
4	Warren
5	Black
6	Harlan
7	White
8	Stevens
9	Brennan
10	Frankfurter
11	Roberts
12	Conrad
13	Black
14	Harlan
15	White
16	Stevens
17	Brennan
18	Frankfurter
19	Roberts
20	Conrad
21	Black
22	Harlan
23	White
24	Stevens
25	Brennan
26	Frankfurter
27	Roberts
28	Conrad
29	Black
30	Harlan
31	White
32	Stevens
33	Brennan
34	Frankfurter
35	Roberts
36	Conrad
37	Black
38	Harlan
39	White
40	Stevens
41	Brennan
42	Frankfurter
43	Roberts
44	Conrad
45	Black
46	Harlan
47	White
48	Stevens
49	Brennan
50	Frankfurter
51	Roberts
52	Conrad
53	Black
54	Harlan
55	White
56	Stevens
57	Brennan
58	Frankfurter
59	Roberts
60	Conrad
61	Black
62	Harlan
63	White
64	Stevens
65	Brennan
66	Frankfurter
67	Roberts
68	Conrad
69	Black
70	Harlan
71	White
72	Stevens
73	Brennan
74	Frankfurter
75	Roberts
76	Conrad
77	Black
78	Harlan
79	White
80	Stevens
81	Brennan
82	Frankfurter
83	Roberts
84	Conrad
85	Black
86	Harlan
87	White
88	Stevens
89	Brennan
90	Frankfurter
91	Roberts
92	Conrad
93	Black
94	Harlan
95	White
96	Stevens
97	Brennan
98	Frankfurter
99	Roberts
100	Conrad

The Supreme Court (1963-1964)

1	Goldberg
2	Fortas
3	Douglas
4	Warren
5	Black
6	Harlan
7	White
8	Stevens
9	Brennan
10	Frankfurter
11	Roberts
12	Conrad
13	Black
14	Harlan
15	White
16	Stevens
17	Brennan
18	Frankfurter
19	Roberts
20	Conrad
21	Black
22	Harlan
23	White
24	Stevens
25	Brennan
26	Frankfurter
27	Roberts
28	Conrad
29	Black
30	Harlan
31	White
32	Stevens
33	Brennan
34	Frankfurter
35	Roberts
36	Conrad
37	Black
38	Harlan
39	White
40	Stevens
41	Brennan
42	Frankfurter
43	Roberts
44	Conrad
45	Black
46	Harlan
47	White
48	Stevens
49	Brennan
50	Frankfurter
51	Roberts
52	Conrad
53	Black
54	Harlan
55	White
56	Stevens
57	Brennan
58	Frankfurter
59	Roberts
60	Conrad
61	Black
62	Harlan
63	White
64	Stevens
65	Brennan
66	Frankfurter
67	Roberts
68	Conrad
69	Black
70	Harlan
71	White
72	Stevens
73	Brennan
74	Frankfurter
75	Roberts
76	Conrad
77	Black
78	Harlan
79	White
80	Stevens
81	Brennan
82	Frankfurter
83	Roberts
84	Conrad
85	Black
86	Harlan
87	White
88	Stevens
89	Brennan
90	Frankfurter
91	Roberts
92	Conrad
93	Black
94	Harlan
95	White
96	Stevens
97	Brennan
98	Frankfurter
99	Roberts
100	Conrad

## APPENDIX VI (cont'd.)

Vinson Court (1946-1952)

	<u>SES</u> <u>Rank</u>	<u>Party</u> <u>Rank</u>	<u>C</u> <u>Scale<sup>f</sup></u>	<u>E</u> <u>Scale<sup>g</sup></u>
Douglas	1	4½	3	3
Vinson	2	4½	10	5
Minton	3	4½	9	6
Murphy	4	4½	1	2
Rutledge	5	4½	2	4
Black	6	4½	4	1
Frankfurter	7	10	5	10
Jackson	8	9	6	11
Reed	9	4½	11	8
Clarke	10	4½	7	7
Burton	11	11	8	9

Taney Court (1846-1858)

	<u>SES</u> <u>Rank</u>	<u>Party<sup>h</sup></u> <u>Rank</u>	<u>C</u> <u>Scale<sup>i</sup></u>	<u>E</u> <u>Scale<sup>j</sup></u>	<u>E</u> <u>Scale<sup>k</sup></u>
Catron	1	3	8	2½	3
McLean	2	10	1	9	11
Curtis	3	11	2	10	10
McKinley	4	3	4	7	7½
Grier	5	7½	10	6	5
Campbell	6	3	3	2½	2
Woodbury	7½	6	11	8	7½
Nelson	7½	3	5½	4	4
Wayne	9	9	7	11	9
Taney	10½	7½	9	5	6
Daniel	10½	3	5½	1	1

<sup>a</sup>See Appendix VII.

<sup>b</sup>Clear Democratic party identification is 6, clear Republican identification is 18.5.

<sup>c</sup>Based on Schubert (1965b, p. 125) averaging scale scores.

<sup>d</sup>Ibid., p. 145.

<sup>e</sup>Clear Democratic party identification is 3.5, Republican is 10. C-scale and E-scale is based on Pritchett (1948, p. 257).

<sup>f</sup>Based on Pritchett (1954, p. 225).

APPENDIX VI (cont'd.)

---

<sup>g</sup>Based on Schubert (1965a) ranks for these terms.

<sup>h</sup>11 = Whig, 10 = Adams Republican, 9 = Democrat turned Whig, 7.5 = Federalist turned Democrat, 3 = Democrat.

<sup>i</sup>Based on a revised scale by Harold Spaeth which involves slavery, criminal cases, and rights of women.

<sup>j</sup>Based on the average of scales by Harold Spaeth involving business in a context of federalism and the Commerce Clause.

<sup>k</sup>Based on Schmidhauser, 1961.

## APPENDIX VII

### Reason for Classification of Justices in Ranks: Father's Socioeconomic Status and Occupation

- Goldberg: son of Russian immigrant Jewish peddler; died when he was 3.
- Fortas: son of English Jewish immigrant, cabinet maker, lived in Memphis slums.
- Douglas: father Canadian immigrant, itinerant preacher, died when he was 5.
- Vinson: father was town jailer in Louisa, Kentucky; died when he was young; mother supported family by running a boarding house.
- Minton: son of a poor Indiana farmer.
- Murphy: son of Irish Catholic lawyer; Judge Murphy worked in a factory early in life.
- Rutledge: Father was a Baptist circuit-riding preacher. Judge Rutledge taught school, had a long illness, and apparently lived on the edge of poverty for some time. He obtained a law degree at age 27.
- Black: son of a small storekeeper and farmer in a poor rural area. Justice Black was an unsuccessful small town lawyer and a police judge. He ran for the Senate with practically no funds.
- Warren: Scandanavian immigrant parents; father a skilled mechanic.
- Stone: father a Canadian immigrant, very poor, acquired a small farm, engaged in farming and "trading".
- Brennan: father an immigrant Irish Catholic union organizer, started as laborer (a coal heaver).
- Frankfurter: father was a German Jewish immigrant, middle-class proprietor.
- Jackson: father operated livery stable and bred horses in rural Republican area.
- Bryon White: father was lumber dealer and Republican mayor.
- Reed: son of prosperous country physician.
- Whittaker: son of large farm owner.

Reason for Classification of Justice  
Sociological Status and Location

Reiter, son of German immigrant, Justice  
he was 31

Reiter, son of English Jewish immigrant  
lived in Memphis

Reiter, father Canadian immigrant  
when he was 21

Reiter, father was town father in  
he was younger, mother  
boarding house

Reiter, son of a poor Irish  
lived in Memphis

Reiter, son of Irish Catholic  
a factory early in life

Reiter, father was a Catholic  
Judge Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

Reiter, son of a small  
Justice Reiter was

## APPENDIX VII (cont'd.)

T. Clark: son of prominent lawyer.

Burton: father was Dean of M. I. T.

Roberts: son of corporate businessman of prominent Philadelphia family.

Stewart: father was wealthy lawyer, prominent, also a judge.

Harlan: son of wealthy lawyer, prominent family, grandson of Supreme Court justice.

Catron: son of small farmer

McLean: son of skilled mechanic, midwest farmer. Justice McLean was an Adams Republican.

Curtis: son of ship captain. Justice Curtis was a Whig.

McKinley: son of "professional" man.

Grier: son of clergyman. Justice Grier was a former Federalist turned Democrat.

Campbell: son of lawyer and state legislator.

Woodbury: son of businessman or proprietor. In his first election, Justice Woodbury ran with the support of Federalists against a Democrat. Woodbury later became a Democrat.

Nelson: son of well-to-do farmer.

Wayne: son of plantation owner. Schmidhauser classifies Justice Wayne as a Whig although he was appointed by Jackson.

Taney: son of plantation owner. Justice Taney had been a Federalist but joined the Democratic party when his party disbanded.

Daniel: son of plantation owner.

---

Taney Court data is taken from the National Cyclopedia of American Biography, archive data from John Schmidhauser's Background Characteristics of United States Supreme Court Justices, and Schmidhauser, 1963, p. 491. Other data is taken from Current Biography. The Stone data is taken from Mason, 1956, chap. 1.





# APPENDIX VIII

## Political Party and Socioeconomic Status Relationships with Attitudinal Variables

Rankings of justices are as follows: low numbers indicate lower-class status, Democratic party, "liberalism", and pro-civil liberties.

### Warren Court (1958-1966)

	SES <sup>a</sup> Rank	Party <sup>b</sup> Rank	C-Scale Rank <sup>c</sup>	E-Scale Rank <sup>d</sup>
Goldberg	1	3½	3	8
Fortas	2	3½	2	6
Douglas	3	3½	1	1½
Black	4	3½	4	1½
Warren	5	10½	5	3
Brennan	6	3½	6	4½
Frankfurter	7	8	11	11
White	8	7	8	7
Whittaker	9	10½	9	10
Clark	10	3½	10	4½
Stewart	11	10½	7	9
Harlan	12	10½	12	12

Tau correlation  
of party with  
SES = .48.  
Significant at  
.01 level.

### Attitudes correlating with SES

	Tau	Signif.
Economic equality <sup>d</sup>	.41	.03
Civil liberty <sup>c</sup>	.70	.0008
Criminal cases	.66	.001
Judicial activism	.70	.0008
Socioeconomic equality	.58	.004
Subversion	.56	.005
Free Press	.51	.03
Public interest	.58	.01
Labor	.70	.005
Religion	.89	.001
Contempt of court	.89	.001
Indigents	.61	.01
Pro-union, anti-employee	.46	.02

### Attitudes correlating with party rank

	Tau	Significance
Economic equality <sup>d</sup>	.54	.008
Civil liberty <sup>c</sup>	.46	.02
Criminal cases	.43	.02
Judicial activism	.50	.01
Socioeconomic equality	.49	.01
Subversion	.43	.02
Free Press	.50	.003
Public interest	.57	.01
Labor	.57	.01
Religion	.89	.001
Contempt of court	.89	.001
Indigents	.61	.01
Pro-union, anti-employee	.46	.02
Jury	.58	.01
Religion	.52	.01
Self-incrimination	.49	.02
Obscenity: state	.49	.02
Reapportionment	.52	.02
Voting Rights	.51	.01
Workmen's Compensation	.59	.01
State taxation	.63	.01
Federal gift taxation	.64	.01
Patents (all scales relating to regulation of competition correlate highly.)	.61	.01

See Leavitt (1968) for definitions of above scales.

APPENDIX VIII (cont'd.)

---

<sup>a</sup>See Appendix VII for data on which ranks based.

<sup>b</sup>Clear Democratic party identification is 3 $\frac{1}{2}$ , clear Republican party identification is 10 $\frac{1}{2}$ .

<sup>c</sup>Based on the average ranks of judges on 35 civil liberty scales.

<sup>d</sup>Based on the average ranks of judges on 18 economic scales. These do not include labor scales

# APPENDIX IX

## Shifts in Ranks of Justices between the Two Periods Studied

Justice

Scale Number<sup>a</sup>

	2			3			4			7		
	1	2	W	1	2	W	1	2	W	1	2	W
Holmes	1	2	-1	7	4	+3	1	2	-1	1 $\frac{1}{2}$	1	+ $\frac{1}{2}$
Pitney	7	7		5	7	-2	7	7		5 $\frac{1}{2}$	6	- $\frac{1}{2}$
White	4	1	+3	2	1	+1	5	1	+4	4	3	+1
McReynolds	6	4	+2	3	2	+1	4	5 $\frac{1}{2}$	-1 $\frac{1}{2}$	7	7	
Day	3	3		4	3	+1	3	5 $\frac{1}{2}$	-2 $\frac{1}{2}$	1 $\frac{1}{2}$	4	-2 $\frac{1}{2}$
Van Devanter	5	6	-1	6	5 $\frac{1}{2}$	+ $\frac{1}{2}$	6	4	+2	5 $\frac{1}{2}$	5	+ $\frac{1}{2}$
McKenna	2	5	-3	1	5 $\frac{1}{2}$	-4 $\frac{1}{2}$	2	3	-1	3	2	+1
	8			9			10			11		
	1	2	W	1	2	W	1	2	W	1	2	W
Ho	2	2		6	3	+3	2	1	+1	2	2	
Pi	3	1	+2	1	2	-1	4	3	+1	1	1	
Wt	4	4 $\frac{1}{2}$	- $\frac{1}{2}$	4 $\frac{1}{2}$	5	- $\frac{1}{2}$	7	5	+2	7	5	+2
MR	5	4 $\frac{1}{2}$	+ $\frac{1}{2}$	7	7		3	7	-4	5	7	-2
Dy	7	7		2 $\frac{1}{2}$	1	+1 $\frac{1}{2}$	5	4	+1	4	3	+1
VD	6	6		4 $\frac{1}{2}$	6	-1 $\frac{1}{2}$	6	6		6	6	
MK	1	3	-2	2 $\frac{1}{2}$	4	-1 $\frac{1}{2}$	1	2	-1	3	4	-1
	14			16			17			18		
	1	2	W	1	2	W	1	2	W	1	2	W
Ho	4	2	+2	3	4	-1	5	3	+2	2	2	
Pi	3	3		2	2		1	1		6	4	+2
Wt	5	4	+1	4	3	+1	3	2	+1	1	1	
MR	2	6	-4				2	7	-5	4	7	-3
Dy	1	1		1	1		6	4	+2	3	3	
VD	7	7		6	6		4	5	-1	5	6	-1
MK	6	5	+1	5	5		7	6	+1	7	5	+2
	22			23			24			25		
	1	2	W	1	2	W	1	2	W	1	2	W
Ho	5	3	+2	4	2	+2	5	6	-1	4	5	-1
Pi	1	1		1	1		1	1		1	1	
Wt	6	4	+2	5	4	+1	7	7		7	7	
MR	7	7		7	7		4	4		5	4	+1
Dy	3	2	+1	3	3		3	2	+1	3	3	
VD	4	6	-2	6	5	+1	6	5	+1	6	6	
MK	2	5	-3	2	6	-4	2	3	-1	2	2	
	26			27								
	1	2	W	1	2	W						
Ho	7	7		6	4	+2						
Pi	1	1		1	1							
Wt	4	3	+1	5	7	-2						
MR	6	6		7	5 $\frac{1}{2}$	+1 $\frac{1}{2}$						
Dy	2	2		3	3							
VD	5	5		4	5 $\frac{1}{2}$	-1 $\frac{1}{2}$						
MK	3	4	-1	2	2							



## APPENDIX IX (cont'd.)

## Justice

Scale Number<sup>a</sup>

	28			29			30			31			32		
	1	2	W	1	2	W	1	2	W	1	2	W	1	2	W
Holmes	4	3	+1	4	5	-1	7	7		3	3		4	2	+2
Pitney	7	7		1	2	-1	1	1		2	1	+1	1	1	
White	1	2	-1	6	4	+2	6	6		4	4		2 $\frac{1}{2}$	3 $\frac{1}{2}$	-1
McReynolds	3	5	-2	2	1	+1	4	3	+1	1	2	-1	2 $\frac{1}{2}$	3 $\frac{1}{2}$	-1
Day	5	1	+4	3	3		3	2	+1	5	6	-1	6	5	+1
Van Devanter	2	4	-2	7	6	+1	5	5		6	7	-1	5	7	-2
McKenna	6	6		5	7	-2	2	4	-2	7	5	+2	7	6	+1
	33			34			35			36			37		
	1	2	W	1	2	W	1	2	W	1	2	W	1	2	W
Ho	3	4	-1	1	4	-3	3	3		2	1	+1	5	3 $\frac{1}{2}$	+1 $\frac{1}{2}$
Pi	2	1	+1	4	1	+3	1	1		1	2	-1	1	1	
Wt	5	3	+2	5	6	-1	6	5	+1	6	6		2	2	
MR	1	2	-1							7	7		6	5 $\frac{1}{2}$	+ $\frac{1}{2}$
Dy	6	6		3	2	+1	5	2	+3	3	3		4	3 $\frac{1}{2}$	+ $\frac{1}{2}$
VD	4	7	-3	6	3	+3	4	4		5	5		3	5 $\frac{1}{2}$	-2 $\frac{1}{2}$
MK	7	5	+2	2	5	-3	2	6	-4	4	4		7	7	
	41			42			44			45			46		
	1	2	W	1	2	W	1	2	W	1	2	W	1	2	W
Ho	5 $\frac{1}{2}$	4 $\frac{1}{2}$	+1	2	1	+1	4	3	+1	5 $\frac{1}{2}$	2 $\frac{1}{2}$	+3	4	1	+3
Pi	4	3	+1	4	6	-2	1	1		1	1		1	2	-1
Wt	5 $\frac{1}{2}$	4 $\frac{1}{2}$	+1	5	3	+2	3	2	+1	5 $\frac{1}{2}$	2 $\frac{1}{2}$	+3	5	5 $\frac{1}{2}$	- $\frac{1}{2}$
MR	7	7		1	7	-6	2	7	-5	7	7		7	7	
Dy	1	6	-5	6	2	+4	5 $\frac{1}{2}$	4	+1 $\frac{1}{2}$	3	4	-1	3	3	
VD	2	1	+1	7	5	+2	5 $\frac{1}{2}$	5	+ $\frac{1}{2}$	4	6	-2	6	4	+2
MK	3	2	+1	3	4	-1	7	6	+1	2	5	-3	2	5 $\frac{1}{2}$	-3 $\frac{1}{2}$
	47			48			50			51					
	1	2	W	1	2	W	1	2	W	1	2	W			
Ho	6	2	+4	3	4	-1	6	2	+4	4	3	+1			
Pi	1	1		1	1		2	1	+1	1	1				
Wt	5	4	+1	6	6 $\frac{1}{2}$	- $\frac{1}{2}$	5	5		6	5	+1			
MR	7	7		7	5	+2	7	7		7	7				
Dy	2	3	-1	4	3	+1	3	3		3	2	+1			
VD	3	6	-3	5	6 $\frac{1}{2}$	-1 $\frac{1}{2}$	4	6	-2	5	6	-1			
MK	4	5	-1	2	2		1	4	-3	2	4	-2			

1 = Rank in 1910-1915 period (first period).

2 = Rank in 1916-1920 period (second period).

W = Shift in rank over whole period. + = shift to liberalism in the second period, - = shift to conservatism.

<sup>a</sup>See Tables 1 and 2 for name of scales



# APPENDIX X

## Ranks of Justices on Background Variables

Variable	Justices <sup>a</sup>												
	<u>Ho</u>	<u>Br</u>	<u>Pi</u>	<u>Wt</u>	<u>MR</u>	<u>Dy</u>	<u>Ck</u>	<u>VD</u>	<u>MK</u>	<u>Hu</u>	<u>La</u>	<u>Lu</u>	<u>Ha</u>
North lv <sup>b</sup>	4	8	4	12	9	4	4	4	4	4	12	12	10
East liv <sup>c</sup>	1½	1½	4	11	5	7½	7½	13	12	3	6	9½	9½
So-E-W <sup>d</sup>	8	6	8	2	4	10½	10½	13	12	8	2	2	5
Religion <sup>e</sup>	1	13	4½	11½	4½	4½	4½	4½	11½	8	10	4½	9
Judge ex <sup>f</sup>	12	2	11	5	2	9½	6	9½	8	2	7	13	4
Elected <sup>g</sup>	13	11½	3	4	10	8	11½	9	1	7	5½	5½	2
Atty Gen <sup>h</sup>	5	5	5	5	11½	5	5	11½	11½	5	5	5	11½
Immigrnt <sup>i</sup>	9	2½	9	9	9	9	2½	9	2½	2½	9	9	9
Orphant <sup>j</sup>	8½	8½	8½	1½	8½	8½	8½	8½	1½	8½	3	8½	8½
Age <sup>k</sup>	12	7	4	9½	1½	8	5½	3	11	1½	5½	9½	13
Yrs Ct <sup>l</sup>	4	12½	10	2	11	5	12½	8	3	8	8	6	1
St Off <sup>m</sup>	1	6	5	9½	13	9½	8	12	11	3½	3½	7	2
St judge <sup>n</sup>	1	7	2	4½	7	9½	12	11	13	7	3	9½	4½
Urban bn <sup>o</sup>	1½	3	4	13	11	6	6	6	1½	8½	11	8½	11
Urban lv <sup>p</sup>	1	2	6	13	5	8	4	9	10	3	7	11	12
Law prof <sup>q</sup>	1½	3½	10½	10½	3½	10½	10½	3½	10½	1½	10½	3½	3½
College <sup>r</sup>	2½	2½	2½	13	5½	5½	8	7	12	2½	10	10	10
North bn <sup>s</sup>	4	8½	4	11½	11½	4	4	4	4	4	11½	11½	8½
East bn <sup>t</sup>	1	8	2	13	10½	6½	6½	12	4	3	5	10½	9
Pres apt <sup>u</sup>	4½	2	8	11	2	4½	2	8	12½	8	8	8	12½
Pty appt <sup>v</sup>	9	2	9	4	2	9	2	9	9	9	9	9	9

<sup>a</sup>See Appendix V for key to judges' names.

<sup>b</sup>Period of time lived in North as compared to time lived in South. 4 = lived longest in North. 12 = lived longest in South.



## APPENDIX X (cont'd.)

<sup>c</sup>Period of time lived in East as compared to time lived in West.  $1\frac{1}{2}$  = lived longest in East. 13 = lived longest in West.

<sup>d</sup>Period of time lived in South as part of a South-East-West continuum designed to compare this continuum with attitudes toward states' rights. 2 = lived longest in South. 8 = lived in East.  $10\frac{1}{2}$  = lived in Midwest. 13 = lived longest in West.

<sup>e</sup>Prestige of religion ascribed to. 1 = highest status religion. 13 = lowest status religion (although Brandeis became a protestant, he was brought up in and here classified as in the Jewish religion.)

<sup>f</sup>Pre-Court judicial experience. 2 = no judicial experience. 13 = most judicial experience.

<sup>g</sup>Time spent in elected office. 1 = longest time spent in elected office. 13 = no time spent in elected office.

<sup>h</sup>Attorney General office-holding. 5 = no experience as Attorney General.  $11\frac{1}{2}$  = former Attorney General.

<sup>i</sup>Immigrant status of parents.  $2\frac{1}{2}$  = had fathers who were immigrants to this country. 9 = fathers were native born.

<sup>j</sup>Orphaned at young age.  $1\frac{1}{2}$  = father died at early age. 3 = mother died at early age.  $8\frac{1}{2}$  = neither parent died during childhood of judge.

<sup>k</sup>Age of judge in 1910.  $1\frac{1}{2}$  = youngest on Court. 13 = oldest on Court

<sup>l</sup>Years of tenure on Supreme Court in 1910. 1 = longest tenure on Court.  $12\frac{1}{2}$  = shortest tenure.

<sup>m</sup>Years of state office-holding as compared to years of national office-holding. 1 = largest proportion of time in state office. 13 = largest proportion of time in national office.

<sup>n</sup>Proportion of time spent as lower court judge as state judge as compared to national judgeship. 1 = largest proportion or longest time as state judge. 7 = neither state nor national judge. 13 = largest proportion or longest time spent as national lower court judge.

<sup>o</sup>Urban versus rural birthplace.  $1\frac{1}{2}$  = birthplace in largest urban unit. 13 = birthplace in most rural area.



## APPENDIX X ( cont'd.)

---

<sup>P</sup>Time lived in urban area as compared to time lived in rural area. 1 = largest proportion of time lived in most urban environment. 13 = largest proportion of life experience in most rural environment.

<sup>Q</sup>Law professorship.  $1\frac{1}{2}$  = full time law professor.  $3\frac{1}{2}$  = part time law professor.  $10\frac{1}{2}$  = not a former law professor.

<sup>R</sup>Status of college attended.  $2\frac{1}{2}$  = attended highest status college. 12 = attended lowest status college. 13 = attended no college.

<sup>S</sup>Northern versus Southern birthplace. 4 = born in North.  $8\frac{1}{2}$  = born in Kentucky.  $11\frac{1}{2}$  = born in South.

<sup>t</sup>Eastern versus Western birthplace. 1 = born in easternmost environment. 13 = born in westernmost environment.

<sup>U</sup>President appointed to Supreme Court by. 2 = Wilson appointee.  $4\frac{1}{2}$  = T. Roosevelt appointee. 8 = Taft appointee. 11 = Cleveland and Taft appointee.  $12\frac{1}{2}$  = appointed by pre-Progressivist era president. This variable aims at measuring commitment of appointing president to Progressivism.

<sup>V</sup>Party of president who appointed justice. 2 = appointed by Democratic president. 4 = received appointments by both parties (White). 9 = appointed by Republican president.



# APPENDIX XI

## Scale of Economic Cases on Fuller Court

Judges	Cases <sup>a</sup>														
	522	566	542	517	565	567	552	528	529	519	505	550	547	540	560
Ha	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Fu	+	⊖	+	+	+	+	+	+	+	+	+	+	+	+	+
MK	+	+	⊖	⊖	+	+	+	+	+	+	+	+	+	⊖	⊖
Ho	+	+	+	+	+	+	+	+	+	+	+	+	+	+	⊖
Mo	+	+	+	+	+	+	+	+	+	+	+	+	⊖	⊖	+
Dy	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Lu	+			+				+	+	+	+				
Wt	⊖	+	+	+	+	+	+	+	+	+	⊖	⊖	+	+	+
Pe		+	+		+	+	+					⊖	+	+	+
Bw	+	+	+	+	-	-	-	-	-	-		⊕	-	⊕	⊕
V	8/1	8/1	8/1	8/1	8/1	8/1	8/1	8/1	8/1	8/1	7/1	7/2	7/2	7/2	7/2

	546	531	525	573	504	530	501	551	553	523	521	520	515	516	511
Ha	+	⊖	+	+	+	+	+	+	+	⊖	⊖	⊖	⊖	⊖	⊖
Fu	+	+	⊖	⊖	+	+	+	+	⊖	+	+	+	+	+	+
MK	+	+	⊖	⊖	⊖	+	+	+	+	+	+	+	+	+	+
Ho	+	+	+	⊖	⊖	⊖	⊖	⊖	⊖	+	+	+	+	+	-
Mo	+	+	+	+	+	+	+	+	+	-	-	-	-	-	-
Dy	+	-	-	+	+	+	+	+	-	-	-	-	-	-	-
Lu			+	+	+	+	-	-	-	-	-	-	-	-	-
Wt	+	+	+	+	-	-	-	-	-	-	-	-	-	-	-
Pe	-							-	-	⊕					
Bw	-	⊕		⊕		⊕		-	-	-	-	-	-	-	-
V	7/2	6/2	5/3	6/3	6/2	6/3	5/3	5/4	3/6	4/6	3/6	3/6	3/6	3/6	2/6

	568	509	527	507	574	575	510	549	541	539	526	569	512	544	Rks
Ha	+	+	+	+	⊖	⊖	⊖	+	+	+	+	+	-	-	1
Fu	⊖	⊖	⊖	+	+	+	+	-	-	-	-	-	-	-	2
MK	+	+	-	-	-	-	-	-	-	-	-	-	-	-	3
Ho	-	-	-	-	-	-	-	-	-	-	-	-	-	⊕	4
Mo	-	-	-	-	-	-	-	-	-	-	-	-	-	-	5
Dy	-	-	-	-	-	-	-	-	-	-	-	-	-	-	6
Lu	-	-	-	-	-	-	-	-	-	-	-	-	-	-	7
Wt	-	-	-	-	-	-	-	-	-	-	-	-	-	-	8
Pe	-							-	-	-	-	-	-	-	9
Bw	-		⊕					-	-	-	-	-	⊕	-	10
V	2/7	2/6	2/7	2/6	1/7	1/7	1/7	1/7	1/7	1/7	1/7	1/7	1/7	1/7	

### Key to Symbols:

Ha = Harlan, Fu = Fuller, MK = McKenna, Ho = Holmes,  
 Mo = Moody, Dy = Day, Lu = Lurton, Wt = White, Pe = Peckham,  
 Bw = Brewer, V = vote on case, Rks = Ranks, + = vote for  
 economic liberalism, - = vote against economic liberalism,  
 ⊖ = non-scaled response, C. R. = .851

<sup>a</sup>See Appendix I and II for key to cases.

## APPENDIX XII

## Scales of Liberty Cases on Fuller Court

## Criminal and Negro Civil Rights

Judges	Cases <sup>a</sup>									Ranks	
	532	506	537	571	571	561	502	570	518		
Harlan	+	+	+	+	+	+	+	+	+	1	
Day	⊖	+	+	+	+	-	-	-	-	2	
Moody	+	+	N	+	-	-	-	-	-	3	
Holmes	+	⊖	+	+	-	-	-	-	-	4	
Fuller	+	+	+	-	-	-	-	-	-	5	C.R. =
Brewer	+	+	+	-	-	-	-	-	-	6	.940
White	+	-	-	-	-	-	-	-	-	7½	
McKenna	-	⊕	-	-	-	-	-	-	-	7½	
Peckham			-	-	-	-	-	-	-	9	
Lurton		N									
Vote	6/2	5/2	5/3	4/5	2/7	2/7	1/6	1/8	1/8		

## Economic Related Civil Liberties

Judges	Cases <sup>a</sup>							Ranks	
	562	543	563	514	513	545	535		
Brewer	+	+	+	+	+	+	-	1	
McKenna	+	+	⊖	+	+	-	-	2	
White	+	+	+	-	-	-	⊕	3	
Peckham	+	+	+	-	-	-	-	4	C.R. =
Fuller	+	+	+	-	-	-	-	5	.943
Holmes	+	⊖	+	-	-	-	-	6½	
Day	+	+	-	-	-	-	-	6½	
Moody	N	-	N	-	-	-	-	8	
Harlan	-	-	-	-	-	-	-	9	
Lurton				-	-				
Vote	7/1	6/3	5/3	2/7	2/7	1/8	1/7		

## Key to symbols:

- + = a vote for liberty claim
- = a vote against liberty claim
- ⊖ = a non-scaled response
- N = a non-participation

Cases above cover only October 1908 and 1909 terms.

<sup>a</sup>See Appendix I and II for key to cases.