WHY DO HIGH COURT JUDGES JOIN?
JOINING BEHAVIOR AND AUSTRALIA'S SERIATIM TRADITION

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ABSTRACT

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The American majority opinion tradition is the fulcrum on which theories of joining behavior on the U.S. Supreme Court are balanced (e.g., Hammond et al. 2005; Maltzman et al. 2000; Segal and Spaeth 2002). Because majority opinions alone carry the weight of precedent in the American system, they provide a strong motivation for the Justices to assent to a common set of reasons. The High Court of Australia, however, operates under a seriatim opinion tradition, wherein each Justice writes a separate set of reasons for his or her decision. Even though the Australian system does no explicitly encourage joint opinions, the High Court produces a substantial—and increasing—number of joint opinions each year. The goal of this dissertation is to explain why Justices on the High Court engage in what appears to be unnecessary joining behavior. Why do they accept the reasons of their colleagues when there is no institutional reward for doing so?

This dissertation builds upon the existing literature by developing and testing a model of joining behavior that is applicable in courts using a seriatim opinion tradition. Using data from the High Courts Judicial Database (Haynie et al. 2007), this dissertation uses a time series fractional cointegration analysis to provide support for the assumption that the seriatim tradition is functioning properly in the High Court of Australia. In other words, the analysis finds no evidence of an underlying consensual norm that discourages individual Justices from writing separate opinions. A series of logistic regression

analyses reveal patterns in joining behavior on the High Court. Justices on the High Court engage in joining behavior because 1) the Chief Justice successfully facilitates such behavior, 2) the Justices are able to find coauthors with similar policy views to their own, 3) the case at hand is simple and/or not of great importance, and 4) because the Justices are accustomed to and comfortable with the process of collegial decision making.

To Marvin and Mary Wood

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> *It is because of this basic need for mutually confirmatory studies that quantitative analysis must finally operate at an international level.*
>
> — Anthony Blackshield (1972, 64)

The research presented in this dissertation adapts existing judicial behavior theories to courts with varied institutional arrangements. Specifically, theories of joining behavior that have been developed almost exclusively to explain majority opinion coalitions on the U.S. Supreme Court will be generalized to explain joining behavior on the High Court of Australia—a court without a majority opinion tradition.

The High Court is producing an increasing number of joint opinions each year. The goal of this research is to explain why Justices on the High Court engage in what seems to be unnecessary joining behavior. Why do they accept the reasons of their colleagues when there is no institutional reward for doing so? To address this question, this dissertation is organized into the following chapters. Chapter One provides an introduction to practice and procedure on the High Court. Chapter Two presents a brief history of the High Court, with a special focus on the issues and personalities that have shaped the modern Court. Chapter Three focuses on the foundations for a theory of joining behavior. Chapter Four presents an econometric analysis of consensual norms on the High Court. Chapter Five presents eleven conceptual hypotheses derived from the existing theories, but adapted for the unique characteristics of the High Court. Chapter Six provides operational hypotheses and describes the data and measures used to test them. Chapter Seven conducts a series of tests of these operational hypotheses and presents the results. Finally, Chapter Eight offers some concluding remarks about joining behavior on the High Court.

CHAPTER ONE: PRACTICE AND PROCEDURE IN THE HIGH COURT

> *As in the case of the United States, we believe that the decisions of this court will breathe a living spirit into the dry bones of a parchment constitution, and that your names will live in history with those of the illustrious exponents of American constitutional law.*
>
> — Governor-General Tennyson to the Court in 1903 (Bennett 1980, 23)

The Governor-General's remarks at the commissioning of the first three Justices of the High Court illustrate the overt comparisons already being made between that institution and the one on which it was modeled: the U.S. Supreme Court. While the High Court of Australia was fashioned largely in the image of the U.S. Supreme Court, there are many differences in practice and procedure between the two courts (Hunt 1930). Because most theories of judicial decision-making behavior have been designed to study Justices on the U.S. Supreme Court (Atkins 1991), institutional differences make it inappropriate to transplant these theories wholesale to judges in other courts (Tate 1983). After a brief review of the structure of the Australian government, some important institutional characteristics of the High Court are outlined. These include the broad jurisdiction of the High Court, the way Justices are selected, the structure of the legal profession from which they arise, and the daily operating procedures that govern the handling of the Court's business.

The Institutional Context

The structure of the Australian government has been described as a "Washminster" system—part Westminster parliamentary government and part Washington-inspired separation of powers (Thompson 1980). This arrangement is detailed in the Commonwealth Constitution, which was enacted by an act of the British Parliament[1] and

[1] *Commonwealth of Australia Constitution Act 1900* (Imp).

took effect on January 1, 1901. Australian independence came as a peaceful agreement between Britain and the Colonies, and the new government maintained its ties to the British crown. As such, Australia is a constitutional monarchy with the Queen of England as its nominal sovereign. So friendly was this relationship that the new Australian government invited King George V to open its inaugural parliamentary session on May 9, 1901 (Hirst 1998).

Australia adopted a federal structure similar to the American government. The national legislature is a bicameral parliament made up of a lower house (the House of Representatives), an upper house (the Senate), and the Queen, who is typically represented by a Governor-General chosen on the advice of the Australian Prime Minister. Members of the House of Representatives are elected in single-member districts based on population and using preferential voting. In keeping with the Westminster tradition, the leader of the party or coalition with a majority in the House becomes the Prime Minister. The Prime Minister forms his government by assembling a Cabinet and other ministers from among the members of his own party in Parliament. This combination of parliamentary government with a majoritarian electoral design encourages a strong two-party system, where party discipline is maintained through the unitary nature of the legislature and the executive (Galligan 1987). Because the House is the origin of all supply (or appropriation) bills, the party in control of the House essentially controls the government.

The Senate was modeled not on the British House of Lords but on the U.S. Senate (Meek 1999). Each of the six states is allotted 12 senators, and the mainland territories

each have two.[2] Senators serve six-year terms. The intent was for the Senate to represent the interests of the states (Hirst 1998). Unlike the U.S. Senate, Australian senators are chosen through a proportional voting system using statewide multi-member districts. This arrangement promotes the proliferation of political parties, such that the party composition of the Senate is much more diverse than the largely two-party House (Lijphart 1999). This diversity contributes to the Senate's role as a house of review, as it often results in divided government—something otherwise rare in parliamentary systems (Sawer 1999). The government cannot pass legislation—including supply bills—without the assent of the Senate. When the Senate refuses to pass supply bills, the government may be forced to dissolve Parliament in order to keep from a government shutdown. In this way, the structure of the Senate adds a separation of government power that is not found in the British Westminster system.

Some argue that the most important feature of the Australian government is its federal arrangement (Galligan 1995). Each of the six Australian states has its own parliamentary government.[3] The head of government in each state is the Premier. The state Premier is the leader of the party or coalition with majority control in the lower house of that state's parliament. Each state also has a Governor who is appointed by the Queen on the advice of the state's Premier. The distribution of power between the national and state governments has been one of the major sources of political

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[2] The six states are New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. The mainland territories are the Australian Capital Territory and the Northern Territory. The Constitution does not guarantee representation for these territories, so their representation in the Commonwealth Parliament is by statutory arrangement.

[3] Three of the territories are also self-governing: the Northern Territory, the Australian Capital Territory, and Norfolk Island. The unicameral legislatures in the territories are called "legislative assemblies," and are parliamentary in design. The remaining territories are governed by the national government.

disagreement since Australia's federation (Blackshield 1972). The authors of the Australian Constitution rejected the more centralized wording found in the Canadian Constitution[4] in favor of an American-style arrangement, where the states retain all powers not delegated to the national government (Hodgins et al. 1978). Just as in the United States, though, the boundaries of national power are incompletely delineated in the Constitution.

The High Court has played an important role in refereeing the distribution of power between the two levels of government (Selway and Williams 2005).[5] It has been a distinctly political branch of government from the start, even if the Court itself has been slow to acknowledge this fact (Galligan 1987). While Westminster-style governments are characterized by parliamentary sovereignty, Australia has been characterized by constitutional sovereignty since its founding document took effect (Gleeson 2003b). The architects of the Australian Constitution recognized this, and some acknowledged the crucial role the High Court would play in maintaining constitutional sovereignty (Mason 2003a).

Staffing the High Court

In countries with a civil law tradition, judges and lawyers begin their careers on separate paths. Would-be judges and lawyers attend separate training institutions, and there is little lateral movement between the two professions (Guarnieri 2004). In

[4] The relevant provision is Section 91 of the Canadian Constitution, which specifies that the federal government retains reserved powers. Section 52 of the Australian Constitution enumerates the powers of the Commonwealth Government, leaving residual powers to the states.

[5] Most decisions of the Australian judiciary were originally appealable to the Privy Council in Britain. The Constitution has always stipulated that the High Court is the final arbiter of *inter se* questions—questions dealing with the distribution of power between the federal and state governments. This arrangement is addressed in detail later in this chapter.

common law countries like Australia and the United States, judges are often chosen from the ranks of the legal profession. As such, the process is far less self-selecting than in civil law countries. As a preliminary step to understanding how judges function on the bench, it is necessary first to examine the way in which people become judges. In Australia, as in the American federal judiciary, judges are given their jobs by politicians. This is the main opportunity for the government of the day to exert *de jure* influence over the judiciary. Understanding how and why judges are selected for the job, then, is a very important step for understanding what they do once they arrive (Ostberg and Wetstein 2004).

The Legal Profession

The legal profession in Australia dates back to well before Australian Federation.[6] As in colonial America, the British system was imported as the basis for the legal profession in Australia. Each colony developed its own Bar admission and regulation structures, and these structures are still largely in place today. This is a similar system to the United States, where the Bar is organized on a state level. The current state systems are all derived from a shared legal tradition, but the state legal societies do differ to a degree. There is no nationalized legal profession currently, although the Law Council of Australia (LCA) and others have been working to unite the various state-based systems (LCA 2003).

The legal profession in Australia is a multi-billion dollar industry, generating more than AUD$10 billion in 2002 (LCA 2003). In the states of Victoria, Queensland, and

[6] The term "Australian Federation" refers to the culmination of the process by which the six self-governing British colonies in Australia united in a federation. This is akin to the use of the term "American Founding."

New South Wales, unlike the unified American systems, the legal profession is divided. As in the British tradition, these three states divide practitioners into two types of lawyers: solicitors and barristers (Meek 1999). A solicitor handles all non-trial matters. This includes the drawing up of wills and real estate transactions. Additionally, the solicitor conducts the initial legal research in preparation for a case, and then turns the matter over to a barrister. The solicitor has no direct parallel in America, although the role performed by a solicitor combines certain aspects the duties of a paralegal and a research attorney. The solicitor is the main point of contact between a litigant and his or her legal representative, and may join law firms and distribute work among colleagues (LCA 2001). In most cases, a client must hire a solicitor, who will then provide initial legal advice and procure a barrister on the client's behalf.

Barristers are expert advocates, and plead cases at both the trial and appellate levels. They are solo practitioners, and are not permitted to join forces to form law firms (LCA 2001). Barristers appointed to argue cases in front of the High Court receive the title of Queen's Council (QC). This is also commonly called "taking silk." It is a professional ranking, as is becoming a member of the U.S. Supreme Court Bar, but is bestowed on barristers by the Crown.[7] This honor is generally attained by only the most exceptional barristers after ten to fifteen years as a practicing junior counsel (Meek 1999). Like members of the U.S. Supreme Court Bar (McGuire 1994), QCs also tend to be elite members of both their profession and their society.

In Victoria, Queensland, and New South Wales, barristers and solicitors are regulated under different bodies. In these states, the Bar is the professional organization

[7] In the Australian context, "the Crown" refers to the head of the British monarchy, who is also the Australian head of state.

for barristers. In other states, both types of practitioners are regulated by the state Bar. It is from the ranks of the Bar that most judges are selected (Gleeson 2003a). Some of the distinctions between the barrister and the solicitor, however, are common among all of the states and territories. In 1993, the state of New South Wales passed legislation allowing practitioners to be listed as both barristers and solicitors. Prior to this, however, the barrister was not allowed to perform the duties of the solicitor, and vice versa. In the states with an undivided profession, lawyers can be admitted as practitioners, enabling them to perform the duties of a solicitor, a barrister, or both.

With the introduction of a mutual recognition scheme in 1992, it has become relatively simple for a lawyer in one state to gain permission to practice law in another state. In addition, standards for admission to the profession are similar across states. An applicant must have a degree in law. This is roughly an equivalent to an American bachelor's degree. The Australian law degree typically takes five years to complete, and law students also earn a degree in an additional subject. Admission to the profession also requires practical training, which involves serving an apprenticeship or articles of clerkship.

The membership of the profession, however, remains relatively homogeneous. As of 1999, there were more than 30,000 members of the Australian legal profession (LCA 2001). The majority of these worked in private solicitor practices. Despite the fact that there are now nearly equal numbers of male and female law graduates, the profession remains dominated by men. Nearly 90% of barristers, for example, are men. Legal aid offices and community legal centers are staffed largely by women, while men tend to dominate the other, more lucrative sectors of the profession (LCA 2001).

The Selection Process

Unlike the American Constitution, the Australian Constitution provides explicit instructions for the selection of all Commonwealth judges. The process is governed by section 72, which provides:

> The Justices of the High Court and of the other courts created by the Parliament – (i) Shall be appointed by the Governor-General in Council; (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity; (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. (*Commonwealth Constitution*, § 72)

In 1977, this section was amended following a national referendum to prescribe a mandatory retirement age of 70 years for all judges.

Appointments to the High Court are formally made by the Governor-General, who is the British Crown's representative in Australia. The Governor-General's choice is almost always based on the recommendation of the Prime Minister's Cabinet through the Attorney-General (Evans 2002). The *High Court of Australia Act 1979* (Cth)[8] added the additional requirement that the Attorney-General consult the states before the recommendation is made. The role of the states in the process, however, is minimal at best (Moens 1997). There is no formal judicial confirmation process. Procedures for the selection of judges are based on tradition as opposed to hard and fast legal requirements. The Commonwealth Attorney-General typically advises the state Attorneys-General of vacancies and solicits nominations.[9] Nominees for the High Court are selected by the

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[8] The abbreviation in parentheses represents the jurisdiction in which the act was passed. Following the *Australian Guide to Legal Citation* (Kirwin and Masters 2002), "Cth" is the abbreviation for "Commonwealth," in this case the Commonwealth Parliament.

[9] The Attorney-General in a parliamentary system is a Member of Parliament by definition. This is in contrast to the American Attorney General, who is appointed by the President from outside Congress. Any

government from the legal profession. They usually come from lower levels of the judiciary or the Sydney or Melbourne Bar. The Commonwealth Attorney-General presents this list, along with his or her additions and recommendations, to the Cabinet. The Cabinet then makes a decision, and the Governor-General carries out the formal appointment.

The Resulting Judges

In the current system, the list of names presented to the Cabinet is not on the public record, and this fact concerns many observers. There have been a number of calls for reform of the current selection system, most calling for a more formalized merit selection process. Some politicians have made clear their desire to shape the Bench to reflect their own political leanings. In one example, former Deputy Prime Minister Tim Fischer made it known that the Howard government intended to appoint only "capital 'c' conservatives" to the Bench (Jackson 2003, 3).

The Australian Democrats, a minor party, proposed a merit-based selection plan intended to minimize the impact of political consideration on the resulting appointments. This plan was dismissed as unnecessary by the Law Council of Australia and the Liberal Coalition government, among others (LCA 1997). Many important people, including Justice Michael Kirby, have called for greater transparency in the process, with an eye to keeping political forces out of the process (Childs 2001).

Justice Mary Gaudron has called attention to the potential danger of invoking the "merit" justification for appointments made in the current selection system (Gaudron 2002). Because the pool of potential nominees is small and lacking in diversity, the

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nominee from the ranks of Congress would have to resign his position, as per Article I, section 6 of the U.S. Constitution.

Australian judiciary tends to be a highly homogenous group (Gleeson 2003a). This is especially true in the High Court. Justice Gaudron, appointed in 1987, was the first female to sit on the High Court bench. Justice Gaudron had high hopes that her 2003 retirement would lead to the appointment of a female replacement, but, in her words, "we muffed it" (Mazzocchi 2003, 1). The return to an all-male Court sparked renewed debate about the appropriateness of affirmative action-type policies for High Court nominees. With Gaudron's retirement and subsequent replacement by Justice Dyson Heydon, there were no female Justices on the Bench until the appointments of Susan Crennan in 2005 and Susan Kiefel in 2007.

Former Chief Justice Sir Harry Gibbs has expressed concern that, at least in Queensland, merit has been surpassed by gender as the deciding factor in nominations for judicial appointment (Richards 2000). National Bar Association President Tom Glynn points to the importance of strictly merit-based selection procedures, ruling out a "female seat" on the bench (Mazzocchi 2003). The Attorney-General has said that John Howard's Liberal Coalition government used exactly such a merit-based program for selecting new judges. In response to questions about Justice Gaudron's male replacement, he responded as follows:

> Gender was not a basis for identifying whether people were suitable for the appointment or not. What we seek to do is appoint the best person for the job. (Attorney-General Daryl Williams, as quoted in Rubenstein 2002, 3)

It is clear, however, that there is a lack of consensus on this issue. Many observers are highly critical of the notion that there is a single "best person" for a position on the nation's highest court (Rubenstein 2002). Alexandra Richards, former president of Australian Women Lawyers, explains this position:

> There are, at any given time, a number of lawyers who have the requisite ability, character, temperament and experience to be suitable for a particular judicial appointment. There is no serious argument that appointments should be made otherwise from those so qualified as are willing to accept an appointment. However, to suggest that the "best" appointment from within that group can be identified on the basis of "merit" is to give a false objectivity to something which can only be a matter of opinion and judgment. (Richards 2000, 1)

This is what Justice Gaudron has called "the merit fiction," and she cites it as one reason why women are still highly underrepresented at the Bar and in Australia's senior judiciary (Gaudron 2002). She admits that this problem "wouldn't matter a fig," except that having women in the judiciary is crucial to administration of justice (Gaudron 2002, 5). This sentiment is echoed by other women in the legal profession, who often note that a diverse bench is one that can better administer justice in Australia's diverse society (Rubenstein 2002).

Similar arguments are advanced on the need for more diversity in other areas. One complaint is based on the lack of geographic representation on the High Court. Of the first 44 appointees to the High Court, more than half have come from the state of New South Wales (Dominello and Neumann 2002). Over 80% have come from either New South Wales or Victoria. Another complaint is the lack of racial diversity on the Bench. All of the Justices—current and former—are white.

Some judges are cautiously optimistic. Chief Justice Murray Gleeson notes that the professional base from which judges are selected has been expanded, so that now "there is a wider pool of legal talent than used to be drawn upon" (Gleeson 2001a, 3). Gleeson argues that the judiciary will inevitably reflect the population of the legal profession—admittedly with some delay (Gleeson 2003a). Because of the increased diversity in the younger generation of lawyers, the ranks of the judiciary are bound to follow suit. Justice Ian Callinan has also noted the increased number of female members of the highest ranks

of Australia's legal profession. Addressing the newest Queen's Counsel appointees in 2000, he made mention of the number of females in the group:

> There are among you only five women. Tonight is not the occasion to debate whether that number should be regarded as a reasonably sufficient number in all of the circumstances. But on any view, that you are at last here and that your numbers are increasing show that we have moved a distance from some of the discriminatory practices of the past. (Callinan 2000, 3)

In general, though, many of the Court's onlookers do not share in this confidence. Justice Gaudron spoke at the inaugural meeting of the Women Lawyers' Association of New South Wales, noting that little progress has been made since the first female Australian lawyers emerged—nearly a century ago (Branson 1997). Federal Court Judge Catherine Branson spoke to the group a few weeks later. She argued that the obstacles facing women in the profession start not with the judicial appointment process, but much earlier in the legal career (Branson 1997). The subtle bias experienced by female practitioners from law school to judicial vetting often hinders them in their quest to achieve the top positions in the profession (Branson 1995).

Kim Rubenstein argues that the problem is not just with the homogenous pool of potential judges, but also with the group of people doing the deciding:

> At the moment it is a predominantly male conservative cabinet deciding who the "best" person is for the job. Indeed, our century-old experience of judicial selection has shown that when male politicians gaze at the available gene pool of potential High Court appointees, they only see reflections of themselves, and what they understand as depictions of merit. (Rubenstein 2002, 1)

The replacement of Justice Mary Gaudron with Dyson Heydon increased the prevalence of this kind of criticism. Many female practitioners saw this as an affront to the cause of promoting diversity, noting that there were plenty of well-qualified females from which to choose (McDonald 2002).

High Court Jurisdiction

Jurisdiction is the power and authority of a court to hear and rule on controversies, and forms the crux of the institution's role and function. The American Constitution was undoubtedly the model for a great deal of the Australian Constitution, especially where the judicial power is concerned (Cowen and Zines 2002). The Australian Constitution, however, was drafted more than a century after its American counterpart. The lessons of the American experience informed the Australian framers. The differences between the two documents reflect those lessons, as well as the fundamental differences between presidential and parliamentary governmental structures.

Original Jurisdiction

Like the American Constitution, the Australian Constitution lays out particular situations in which the highest national court hears cases at first instance. The original jurisdiction of the High Court is laid out in section 75, which reads:

> In all matters (i) arising under any treaty; (ii) affecting counsuls or other representatives of other countries; (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (iv) between States, or between residents of different States, or between a State and a resident of another State; (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction. (*Commonwealth Constitution*, § 75)

This section confers an original jurisdiction that is similar—but not identical—to the original jurisdiction that Article III Section 2 of the United States Constitution confers on its Supreme Court. Many of the specific subject matters conferred by the Australian Constitution were probably adopted without much thought as to their suitability for the Australian situation (Cowen and Zines 2002). One similarity is the use of the term 'matters' in describing the Court's jurisdiction. This has been interpreted to mean that the High Court, like the American Supreme Court, lacks jurisdiction to provide advisory

opinions (Cowen and Zines 2002). Additional restrictions were implemented in the *Boilermakers' Case*,[10] when the Court held that non-judicial functions could not be delegated to judicial bodies.

The Australian Constitution contains a specific provision allowing the Commonwealth Parliament to confer additional matters to the original jurisdiction of the High Court. This is a significant departure from the American system. The provision in section 75(v) of the Australian Constitution is similar to the provision in the American *Judiciary Act* held invalid in *Marbury v. Madison*.[11] Under the *Judiciary Act* 1903 (Cth), the High Court's original jurisdiction was exclusive in matters involving suits between states, between the Commonwealth and a state, or matters in which a writ is sought against an officer of the Commonwealth. Original jurisdiction in matters of constitutional interpretation, admiralty, and federal law are not constitutionally entrenched, but are instead left for Parliament to confer. The *Judiciary Act 1903* (Cth) provided this jurisdiction. Additionally, Parliament has conferred original jurisdiction in a number of other matters through such legislation as the *Commonwealth Electoral Act 1918* (Cth), the *Income Tax Assessment Act 1936* (Cth), the *Patents Act 1952* (Cth) and the *Admiralty Act 1988* (Cth).

As a result of Parliament's tendency to add to—but never subtract from—the Court's original jurisdiction, it grew to proportions much larger than that of the U.S. Supreme Court (Cowen and Zines 2002). By the 1960s this extensive nondiscretionary original jurisdiction, coupled with the burdensome nondiscretionary appellate jurisdiction

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[10] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254

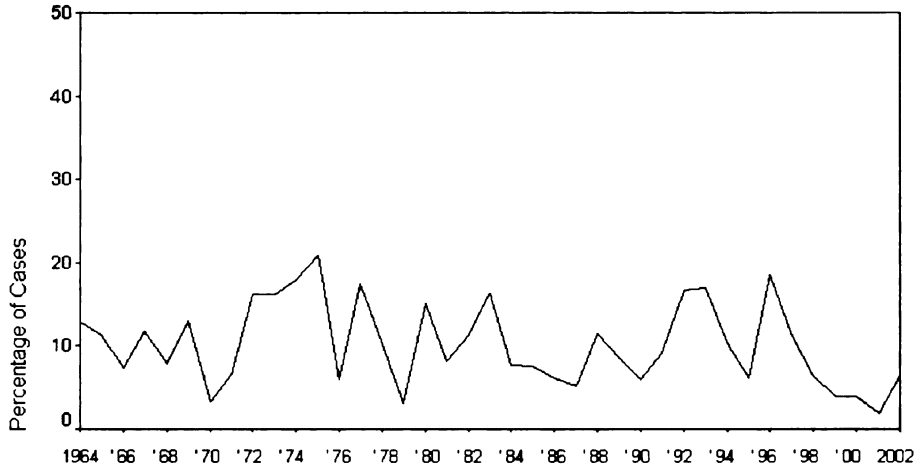
[11] (1803) 1 Cranch 137

discussed in the next section, resulted in nearly insurmountable workload pressures (Bennett 1980). As the scope of Australian statutory law increased, the High Court was unable to continue its role as federal trial court while still maintaining its more important role as interpreter of the constitution (Beaumont 2002).

Section 77(iii) of the Australian Constitution provides Parliament the option to parse the federal jurisdiction among the various state courts. In the 1970s, the High Court increasingly remitted cases to appropriate state supreme courts for determination (Cowen and Zines 2002). Matters arising under laws made by the Commonwealth Parliament were routinely handled by state courts under this provision, but this still left a great deal of work to be handled by the High Court alone (Australian Law Reform Commission 2000). The High Court was still the preferred venue for adjudicating on first instance in many matters because it provided a level of uniformity and consistency that the numerous state courts could not match (Mason 2000). This left the High Court with an incredibly high caseload.

As Attorney-General, Garfield Barwick was instrumental in presenting a solution to this problem. He first advocated the creation of an intermediate federal court in the early 1960s, but the Federal Court of Australia did not begin to exercise jurisdiction until February of 1977 (Beaumont 2002). This new statutory court was created through amendments to the *Judiciary Act 1903* (Cth). It was to be a small court, with jurisdiction conferred in special areas only (Australian Law Reform Commission 2000). The Federal Court began by handling mostly bankruptcy, administrative law, industrial law, and trade practices law.

Figure 1 - Original Jurisdiction Cases as a Percent of Reported Cases: 1965-2002



Soon, the Federal Court began to assume jurisdiction concurrent with much of the High Court's original and appellate jurisdictions. Some of this transfer arose from the increasing tendency of Parliament to confer original jurisdiction through legislation (Australian Law Reform Commission 2000). In *Phillip Morris*,[12] the High Court also expanded the Federal Court's original jurisdiction by refining its doctrine of accrued jurisdiction to include the Federal Court (Australian Law Reform Commission 2000).

Some scholars have speculated that the establishment of the Federal Court alleviated much of the workload stress due to original jurisdiction cases (Gageler 2002a). Figure 1 shows the original jurisdiction cases as a percentage of all reported cases. Among the reported cases from 1970 through 2002 there seems to be little lasting shift in the overall percentage of original jurisdiction cases. At the most, original jurisdiction cases have constituted a maximum of 13 cases of the Court's business in a year.

[12] *Philip Morris v. Commissioner of Business Franchises (Vic.)* (1989) 167 CLR 399

Appellate Jurisdiction

The majority of the High Court's caseload comes from its appellate jurisdiction. One of the main differences between the Australian High Court and the American Supreme Court is the breadth of appellate jurisdiction conferred by the respective constitutions. While the American Supreme Court is limited to adjudicating federal issues, the High Court may hear appeals from state courts even in the absence of a federal question. The American founders were deeply suspicious of the new centralized government, and were loathe to allow it interfere in the affairs of the states. By contrast, the Australian experience provided no impetus for such a complete separation (Quick and Garran 1901). Section 73 of the Australian Constitution therefore confers a general appellate jurisdiction to the High Court, subject to such restrictions as Parliament cares to legislate. This section also prevents Parliament from restricting the jurisdiction to hear appeals from the state supreme courts.

The availability of appeals from judgment is not derived from the common law tradition, but instead is largely a product of statute. Because of this, the nature and extent of the availability of appeal varies depending on the statute conferring the right (Australian Law Reform Commission 2000). The appeals process serves to correct trial court errors, and also to provide consistency and clarity in the law and its proper application. The role of the High Court in this process is largely the latter, especially in recent times. Before 1984, many of the appeals to the High Court came as of right. This right to appeal was conferred by the various statutes under which the litigation was commenced, and was usually related to the amount of money at issue in civil litigation. In addition, interlocutory judgments could be appealed by leave to appeal, granted by either the state supreme courts or the High Court. Such leave would be granted if the

judgment in the lower court was arguably incorrect (Australian Law Reform Commission 2000). The Court had a largely nondiscretionary appellate jurisdiction for that reason, and many of the cases before it tended to be similar and straightforward (Gleeson 2000b).

Amendments to the *Judiciary Act 1903* (Cth) in 1976 altered this situation slightly. The new default mechanism for taking an appeal to the High Court was to obtain special leave to appeal. Appeals as of right remained, however, in constitutional issues or issues involving property in excess of AUD$20,000. This nondiscretionary appellate jurisdiction was removed in 1984 through further amendments to the *Judiciary Act*. These amendments provide that appeals will not be heard by the High Court unless the High Court itself grants special leave to have an appeal heard on the merits. Criminal appeals have always required special leave, but most civil litigation enjoyed a right to appeal until the 1984 amendments. The result of these amendments was to abolish the Court's nondiscretionary appellate jurisdiction, in service of the Court's role as interpreter of laws.[13]

High Court Jurisdiction and the Privy Council

The Judicial Council of the Privy Council in England sat above the High Court at the pinnacle of the Australian legal system for most of Australia's history. The Privy Council is a division of the British House of Lords, and is also called "Her Majesty in Counsel." The Privy Council is partially staffed by English Law Lords. There is no limit to the number of Privy Counsellors, and there are currently around 550 members. It is

[13] Additionally, the Court has changed its interpretation of what constitutes an appeal. Section 73 of the Constitution provides High Court jurisdiction "to hear and determine appeals from all judgments, decrees, orders and sentences" of a number of different types of courts. Recently, the Court has held that determinations can be made on questions posed to the court during the course of trial proceedings without the trial court judge's assent (*O'Toole v. Charles David* (1991) 171 CLR 232).

not an appellate court for England proper, but instead is a body of judges charged with maintaining a degree of unity in the English common law around the world (Matson 1993). In addition to the British jurists, judges from many of the Commonwealth countries are regularly appointed as Privy Counsellors (Voigt et al. 2006), including a number of former High Court Justices.[14] Traditionally, the Privy Council was made up of special advisors, and their decisions were phrased as advice to the British monarch. For this reason, there is a long tradition of unanimous judgments on the Privy Council—a tradition that Barwick helped to eliminate during his service (Blackshield et al. 2002).

The constitutional provision allowing appeals to the Privy Council was a major point of contention at federation. The Privy Council was one mechanism through which the precedents of the British judiciary were "continually injected into the caselaw of the Australian states" (Castles 1971, 139). As early as 1906, the Privy Council experienced a hostile Australian reaction to its intervention in Australian litigation (Blackshield et al. 2002). The relations between these institutions were unpredictable, due in part to the ever-changing membership of the Privy Council. At times, the Privy Council might promise not to interfere in certain situations, only to have a differently constituted Privy Council forget or ignore such arrangements (Blackshield et al. 2002).

The Constitution remains silent on appeals from the state supreme courts to the Privy Council, tacitly leaving no limitations on such appeals. There are, however, two constitutional limitations on Privy Council appeals from the High Court. First, the High Court has always retained the right to determine all questions regarding the distribution

[14] This list includes Barwick, Gavan Duffy, Gibbs, Griffith, Kitto, Knox, Latham, McTiernan, Menzies, Owen, Rich, Stephen, Taylor, Walsh, and Windeyer (Blackshield et al. 2002).

of federal and/or state powers, often called *inter se* questions. The relevant portion of the Constitution reads:

> No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. (*Commonwealth Constitution*, §74)

Over the years, the exact definition of an *inter se* question has been the subject of much debate and litigation. In the end, potentially important federal issues were excluded from this category, including interstate trade, separation of powers between branches of the Commonwealth government, and many questions of inconsistency between state and Commonwealth legislation (Blackshield et al. 2002). While the High Court only issued a single prerogative writ to appeal under section 74,[15] the Privy Council was still able to hand down numerous important constitutional decisions. This is especially true in the interpretation of section 92, which provides for free trade among the states (Blackshield et al. 2002).

It is through the second limitation on Privy Council appeals that the High Court eventually obtained final jurisdiction over all matters. This second limitation is found in the last provision in section 74, which reads:

> Except as provided in this section, this constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure. (*Commonwealth Constitution*, §74)

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[15] The High Court issued a section 74 certificate in *Colonial Sugar Refining Co v. Attorney General (Cth)* (1912) 15 CLR 182. Justice O'Connor's absence resulted in an evenly split vote among the remaining four Justices.

The first exercise of this provision was undertaken by the Commonwealth Government when it passed the *Privy Council (Limitation of Appeals) Act 1968* (Cth). This legislation limited potential Privy Council appeals from the High Court to those that did not potentially deal with an issue of federal law. In *Kitano v. Commonwealth,*[16] the Privy Council agreed that this was a valid exercise of parliamentary power under section 74. Several years later, the Commonwealth Parliament passed the *Privy Council (Appeals From the High Court) Act 1975* (Cth). This legislation abolished all remaining appeals from the High Court to the Privy Council without prior permission of the High Court. This provision was challenged in the High Court in *Attorney-General (Cth) v. T&G Mutual Life.*[17] The High Court rejected the challenge and declared that it would no longer certify cases for appeal to the Privy Council. As per the 1968 legislation, no appeal to the Privy Council remained (Blackshield et al. 2002).

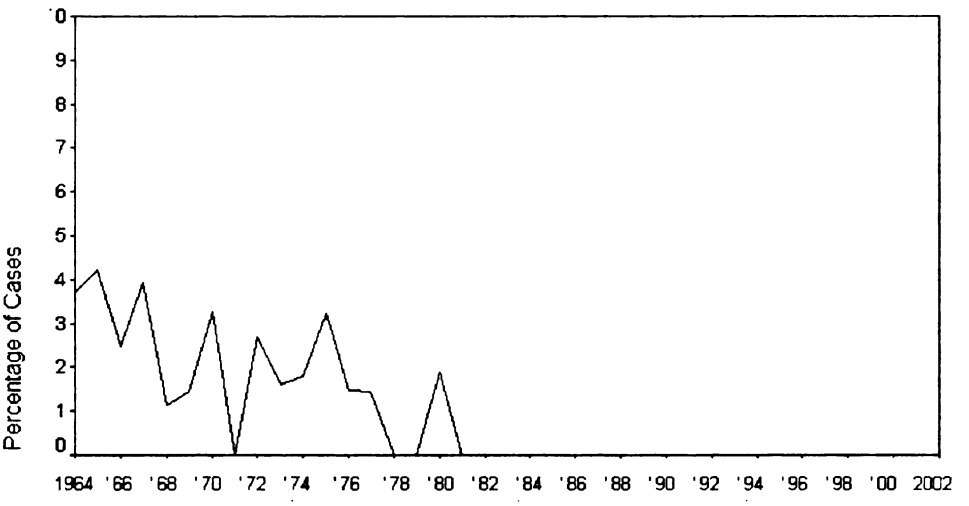
Although appeals from the High Court and other federal courts were abolished, cases could still be appealed to the Privy Council from the decisions of the state courts. This resulted in a unique situation where litigants who were unsuccessful at the state court level could effectively choose their appellate venue (Blackshield et al. 2002). This provided wealthy appellants the ability to "shop around" for their preferred remedy, giving them a distinct advantage over respondents (Gleeson 2002a). Litigants continued to appeal to the Privy Council from the state courts long after the High Court refused to certify further appeals. Although the total number of Australian cases in front of the

[16] (1976) AC 99, 135 CLR 1.

[17] (1978) 144 CLR 161

Privy Council subsequently declined, the Commonwealth Law Reports continued to report cases appealed to the Privy Council into the 1980s (see Figure 2).

Figure 2 - Number of Privy Council Cases in Commonwealth Law Reports by Year



This also resulted in a good deal of confusion at the lower court levels. Various High Court Justices advised lower court judges to abide by High Court precedent, but these judges effectively had two different – at times conflicting – masters. This dilemma was finally solved in 1986 with the passage of *The Australia Act 1986* (Cth). This was one of a pair of statutes, the other of which was passed by the United Kingdom Parliament. The effect of these statutes was to give the Australian states independence from Britain. They served to end all remaining appeals from the Australian judiciary to the Privy Council, among other things (Blackshield 2002b). This placed the High Court at the apex of the Australian legal system and made its judgments the highest source of precedent (Twomey 2002).

These formal developments, according to some scholars, also helped cultivate a new mindset among the High Court Justices (Blackshield et al. 2002). Before the

abolition of these appeals, the Privy Council had a direct and tangible effect on the decisions of the High Court, as well as on the development of law in Australia (Gleeson 2000b). As the formal structures of this influence were removed, the Justices were no longer bound by English authority. The Justices used this opportunity to exert control over issues previously controlled by English precedent, including the rapid development of a new approach to section 92 (Gleeson 2002a).

Daily Operating Procedures

In many significant ways, the daily operation of the High Court of Australia is similar to that of the U.S. Supreme Court. Given the shared common law tradition, many of the same concepts are applicable to both institutions. There are, however, a number of procedural differences. While seemingly negligible, they can produce many significant differences in terms of agenda, decision making, and the reporting of decisions. The theories of judicial decision making that are most well known in American circles assume a particular set of operating procedures. Even procedural rules that seem very similar can produce very different effects (Glendon et al. 1999). Only by examining the rules and traditions that shape the daily operation of the High Court can the appropriate adjustments be made to our existing theories.

Setting the Agenda

The current agenda-setting process in the High Court is roughly comparable to the American Supreme Court's *certiorari* process, but with several important differences. In the American Supreme Court, a *writ of certiorari*[18] is granted when at least four of the

[18] To complicate the situation further, the term *writ of certiorari* means something substantively different in the Australian legal context. A *writ of certiorari* in Australia serves to quash a lower court decision. It is granted as a remedy on the grounds that 1) there was error on the face of the lower court record, 2) the lower court acted outside its jurisdiction, or 3) the applicant was denied procedural fairness at the lower

Justices agree that an appeal should be heard on the merits. The decision is made in a conference that all Justices attend, and is made based on examination of the written submissions alone. The Supreme Court clerks have a large role in this procedure, as they are responsible for drawing up memoranda for each of the applications (Perry 1994).

In the High Court, the agenda is set through the special leave process. When there is no leave as of right, all parties wishing to appeal must apply for special leave to appeal. These special leave petitions are heard by a subset of the Bench. The panel is chosen by the Chief Justice, and is now typically made up of two to three Justices (Jackson 2002b). The panel size is a matter of practice, and is not dictated by law (Australian Law Reform Commission 2000). The practice in the past was to have a three judge panel in civil cases, five judges in criminal cases, and seven Justices in cases deemed important by the Chief Justice (Gibbs 1986). This has been abandoned in favor of the smaller panel sizes, largely due to workload concerns (Australian Law Reform Commission 2000).

The applicant traditionally has a right to appear in person for an oral argument on the application, which is limited to twenty minutes of argument and five minutes of reply for the applicant and the respondent (Clark 2003). These oral arguments are increasingly being heard *via* video link between Canberra and the other capitol cities. While oral arguments take up valuable time, the Court has been reluctant to eliminate this tradition altogether (Clark 2003). These oral arguments serve to supplement the written briefs submitted by counsel, which have been required for special leave applications since 1994 (Jackson 1996). Recently, however, Chief Justice Gleeson has advocated eliminating the right to appear in person as a way to save the Court valuable time (Clark 2003). Changes

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court level. In the American context, a *writ of certiorari* serves to grant the applicant a hearing on the merits before the Supreme Court.

to the High Court Rules in 2004 now allow the Court to determine special leave applications on the papers only, if it is deemed appropriate by two Justices (Doogan 2004).

Until recently, the special leave process was not the primary way by which cases came to be heard by the High Court. In its earlier years, the Court had a substantial non-discretionary jurisdiction. The Court, for example, was obligated to hear appeals from state supreme courts in civil matters involving £300 (Jackson 2002b). Appeal as of right was also guaranteed in cases in which the outcome may affect a person's status in terms of citizenship, marriage, divorce, bankruptcy, and insolvency. In addition to the abolition of these appeals as of rights, the creation of the Federal Courts allowed the High Court to share its original jurisdiction with lower courts. These two developments, taken together, have virtually eliminated the High Court's non-discretionary jurisdiction. The High Court has interpreted these acts of Parliament as a grant of complete discretion as to the cases it hears (Solomon 1999). Thus, the High Court's agenda became almost wholly dependent on the special leave process. Although the practice was challenged in the *Smith Kline & French* [19] case, the Court upheld the practice unanimously.

In the High Court, like the American Supreme Court, the refusal of a special leave application is not equivalent to a denial of the appeal. A special leave application heard by a panel of five or more Justices is often disposed of during the special leave process. The High Court often grants special leave with specific terms. On some occasions, the Court will require one litigant to pay the other litigant's costs of appeal. Additionally, special leave is subject to rescission at or before the hearing on the merits (Jackson

[19] *Smith Kline & French Laboratories v. Commonwealth* (1991) 173 CLR 194.

2002b). In 1999-2000, the High Court decided 387 special leave applications, of which 66 succeeded. Due to the ever-increasing number of special leave applications being heard, many hearings are now being conducted via a closed-circuit video link system.

Both Courts follow similar guidelines when deciding whether a case will be heard. The American Supreme Court has written its own guidelines in Rule 10. These guidelines reflect the role of a secondary appellate tribunal, which is to clarify important points of law, and generally not to simply correct trial court errors. The criteria for the High Court are set out not by the Court itself, but by Parliament. The provision in Australia that corresponds to the Supreme Court's Rule 10 is Section 35A of the *Judiciary Act 1903* (Cth). This section requires the Court to consider the need to promote uniformity throughout the legal system, the public importance of the question, and the individual-level interests of justice and fairness.

The Panel System

In the United States, it is rare to see a Supreme Court case on which fewer than nine Justices sit. In Australia, however, this is a very common occurrence. Instead of sitting *en banc*, the High Court sits in panels. Neither the Australian Constitution nor the *Judiciary Act* gives much help in determining how these panels are assigned (Schubert 1969a). This panel tradition comes largely from two factors. First, the Court has always operated on a circuit system. In the early years, the Justices seldom lived in the same city, and travel was long, harsh and difficult. Because of this, it was much more efficient to allow for a subset of Justices to comprise "The Court" and exercise its jurisdiction.[20]

[20] While the U.S. Supreme Court abandoned the circuit-riding practice after 120 years, the High Court of Australia still travels to the various state capitals to hear cases each year. Because of the role circuit riding plays in keeping the Justices abreast of the legal and societal differences across a large and diverse nation, some American scholars argue that the Supreme Court should readopt the practice (Stras 2007).

Additionally, a High Court Justice was usually serving on the Privy Council at any given time. This required one Justice to travel to England, often for months at a time. Instead of putting the work of the Court on hold, the panel system allowed for the continued completion of day-to-day business (McMillan 2003).

The size of the panels is dependent on a number of different factors. The *Judiciary Act* and the High Court Rules require that a Full Court consist of no fewer than two Justices. In appeals from the Full Court (or Court of Appeal) of a state supreme court, a Full Court must consist of no fewer than three. Aside from these rules, the jurisdiction of the Court may be exercised by any number of Justices (Brennan 2002a). A single Justice in chambers may exercise the Court's jurisdiction in cases dealing with practice and procedure. The single Justice, when necessary, may refer a question to the Full Court.

Traditionally, appeals brought from decisions of single state supreme court judges were heard by a panel of three Justices. Since the 1984 changes to the judicial system, however, appeals from single state supreme court judges are extremely rare (Brennan 2002a). Most of the appeals from state supreme courts have now been heard by a Full Court or Court of Appeals division of the state supreme courts, and are heard in the High Court by a panel of five or more Justices. Special leave petitions may be heard by panels of three Justices, but criminal case petitions are often heard by five Justices and disposed of during the special leave process.

The assignment of panels is arranged by the Chief Justice. The Chief also assigns Justices to a schedule of sitting in chambers or in original jurisdiction cases (Mason 2002d). While the Chief may organize the panel assignments, any Justice is entitled to sit on any case if he or she so desires, although this privilege is seldom invoked (McMillan

2003). The Chief Justice typically selects panels of five Justices unless the case is deemed especially important (McMillan 2003). Typically, these especially important cases involve interpretation of the Constitution. In such cases, all available Justices are assigned to the panel (Brennan 2002a). There is little information available about how a Chief Justice might capitalize on this power, as Schubert observes:

> The apparently available explanation is not very satisfactory: reference is made to 'settled practices' and to 'common sense' – which remain equally undefined – as the basis for the exercise of discretion which takes into account such self-evidently weighty measures as the 'relative importance of a case' and the number of justices 'available' for assignment. (Schubert 1969a, 10)

It seems clear that many contemporary Australian legal scholars do not see evidence that the Chief Justices use the power to assign panels to affect the outcome of a case (McMillan 2003). As the current Chief Justice has noted,

> I've never heard any complaints by people about the system by which we select the five to sit. I'm the one who proposes who sits, and it's usually done on the basis of evening out the workload. (Gleeson, as quoted in Clark 2003, 10)

Schubert (1969a), however, finds evidence that at least one Chief Justice—Dixon—did not choose panels randomly.

As the jurisdiction of the High Court has changed, the number of Justices on the average panel has also changed. With the elimination of non-discretionary jurisdiction, the Court now hears more of these "especially important" cases, and far fewer cases that are heard by three-judge panels (see Figure 3). According to Chief Justice Brennan,

> The Court tries to ensure that the opinions of all available Justices are secured to finally settle any questions of these kinds. It is unsatisfactory to have finely balanced questions resolved by fewer Justices than a majority of the whole Court. (Brennan 2002a, 61)

This rule of thumb, however, is not always followed perfectly. In *Woods v. Multi-Sport Holdings*,[21] only five Justices sat on the panel. Justice Kirby was not one of them. In a subsequent case involving a similar question,[22] Justice Kirby expressed his disappointment about the majority decision in *Woods*, and implicitly about his absence from the panel. In *Ex Parte Aala*, [23] Kirby noted that the seven-member panel might have been overkill:

> In this matter, this Court has been involved, not in the elucidation of some important question of constitutional, statutory or other legal significance. The applicable principles are clear. This Court has been engaged in nothing more than the elucidation of the facts and the application to them of settled rules of law.

Although the size of the panel is related to the type of case involved, it is not clear that the membership of any given panel is related to the Chief's assessment of any individual Justice's ideology, predilections, or likely vote on a case (McMillan 2003). Issues like illness, vacation, preparation for retirement, service on the Privy Council, and geographical location may affect the panels, but Australian scholars anticipate that, as far as they can tell, concern for efficiency dominates this process (McMillan 2003). Because the most important cases tend to involve all of the Justices, the Chief Justice's ability to assign panel membership would not likely benefit him much on major policy decisions.

Hearing Cases on the Merits

Like the U.S. Supreme Court, the High Court rules on the merits of only a fraction of the cases brought to it. The abolition of appeals as of right has allowed the Court the discretion to choose cases to be heard on the merits. This has allowed the Court to hear

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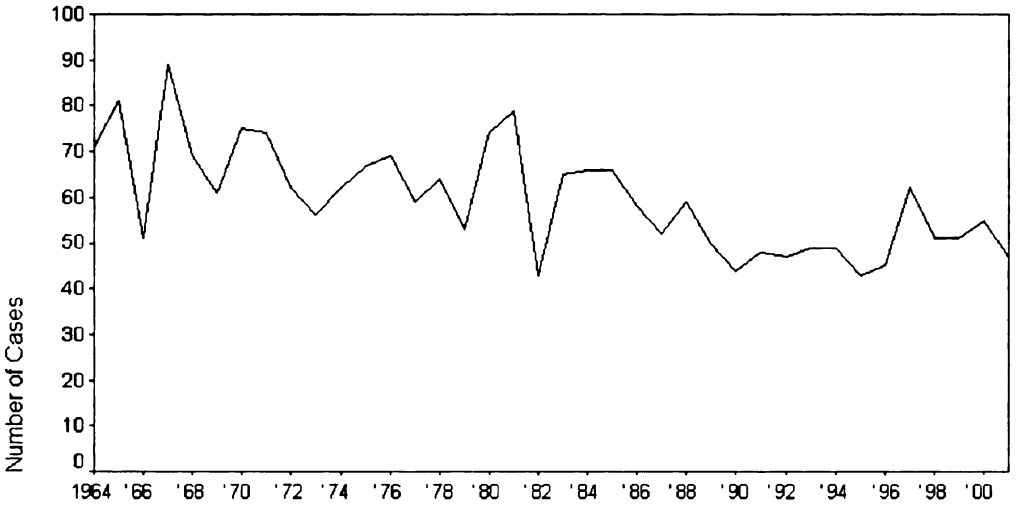
[21] (2002) 208 CLR 460.

[22] *Graham Barclay Oysters v. Ryan* (2002) 208 CLR 460.

[23] *Re: Refugee Review Tribunal; Ex Parte Aala* (2000) 176 ALR 219.

fewer and fewer cases on the merits over time (see Figure 4). While the procedure for hearing and deciding cases on the merits is similar between the U.S. Supreme Court and the Australian High Court, there are some important differences.

Figure 3 - Average Panel Size by Year



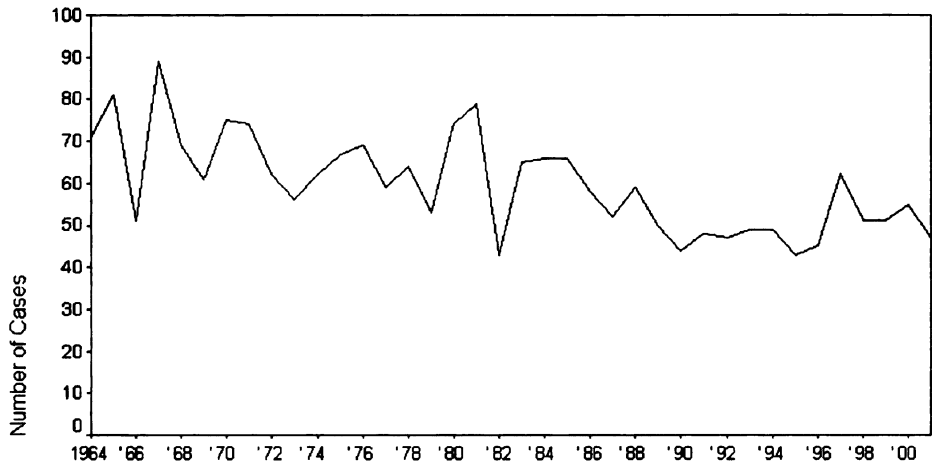
Submission of written briefs

Written briefs are a relatively new addition to the High Court's decision-making procedure. It was not until the 1950s that the Court provided a non-compulsory procedure for the submission of written cases or detailed briefs. Before this, the Court relied almost exclusively on oral arguments. Chief Justice Latham applauded the measure, indicating that it would increase clarity and efficiency (Bennett 2002).

In 1982, the Court began to require barristers to present rough outlines of their arguments to the Justices at the beginning of arguments (Brennan 2002b). The submission of cases fully briefed "on the papers" prior to argument was finally mandated by the High Court in 1997. This was largely an attempt to increase the Justices' understanding of the cases prior to oral argument. In recent years, the Court has

increasingly adopted the stance that oral argument must follow from the information provided in the written briefs (Young and McLeish 2004). Especially when hearing appeals on the merits, though, the Justices do not see the cases on the papers as a replacement for oral argument (Leigh 2000).

Figure 4 - Total Number of Cases by Year



As in the United States Supreme Court, litigants are not always the only parties to submit briefs. Interveners and amici curiae are less common in the High Court than in the U.S. Supreme Court. As in the United States, amici curiae do not become actual parties to the proceedings. Instead, they appear before the court or submit briefs in an attempt to assist the Court when the actual litigants are unwilling or unable to provide certain information. In the High Court, interveners become full parties to the proceedings, although sometimes limited to specific issue areas.

Until recently, there was no statutory right to intervene. Instead, leave to intervene was granted at the discretion of the Court. In 1976, amendments to the *Judiciary Act* gave attorneys-general of the Commonwealth and the states the right to intervene in cases

where constitutional interpretation is involved (Burmester 2002). Now, government interveners are nearly always granted leave to intervene or appear as amicus curiae. The Court, however, retains its discretion as to whether or not to allow other parties to intervene. Traditionally, the Court has been reluctant to allow interest groups or other non-government parties to intervene (Williams 2000). As a result, most of the intervening appearances and written brief submissions occur in constitutional cases, usually about the distribution of power between the Commonwealth and the states (Parish 2000).

In the United States, the Justices on the Supreme Court have four clerks apiece, and these clerks have a crucial role in processing and summarizing incoming briefs (Perry 1991). Because of the huge workload, much of the Supreme Court's work is delegated to law clerks. In Australia, however, this is not the case. Although a High Court associate's job description is similar to that of a Supreme Court clerk, Australian Justices tend to rely on them less (Leigh 2000). One reason for this might be the smaller workload. The associates may create summaries of written briefs, but this is not the norm. This means that the associates have less influence at this stage of the process than their American counterparts (Leigh 2000).

Oral arguments

After the submission of the written briefs, litigants present oral arguments to the Court. The High Court spends an average of about one day hearing oral arguments for a single case. This is quite extensive, especially when compared to the two hours spent per case by the United States Supreme Court. Chief Justice Gleeson thinks that this comparison is not very helpful, though, because the U.S. Supreme Court does not "have our tradition of oral advocacy" (Clark 2003, 10). While most of the work of the highest

courts of Canada and the United States are done "on the papers," the Australian judiciary has adopted the British focus on oral arguments over written briefs (Leigh 2000). As Chief Justice Brennan notes,

> The practice of the Court has been to rely heavily on oral argument. The dialectic of advocacy and exchanges between Bench and Bar illuminate the issues for decision and usually identify the material on which the decision is based. (Brennan 2002b, 197)

For this reason, the High Court has declined to adopt formal time limits for oral arguments, except in the case of special leave applications (Bennett 2002). Despite the lack of formal limits, the length of oral arguments has declined over time. Before written briefs were commonplace, the Court relied almost exclusively on oral argument. The evolving process of getting access to briefs prior to oral argument has helped to shave significant time off of the actual hearings (Brennan 2002b).

This focus on oral argument makes it far more relevant to the decision-making process than is typically ascribed to oral argument in the United States (Glendon et al. 1999). Although some research has shown oral arguments to be marginally important in the U.S. Supreme Court (Johnson 1997), the brevity of these arguments necessarily limits the amount of information the Justices can expect to extract from the parties. Chief Justice Gleeson observes of the U.S. Supreme Court system that "most of their work is done on the papers" (Clark 2003, 10). Nonparty litigants are rarely allowed to participate in oral arguments in the U.S. Supreme Court (Segal and Spaeth 2002). The lack of time limits on High Court oral argument leaves significantly more time for the Justices to engage counsel. It is perhaps for this reason that the High Court does allow for oral presentations from interveners, and less often for amici curiae (Burmester 2002).

The courtroom environment during oral argument has changed over time, largely influenced by the composition of the Bench and the leadership of the various Chiefs (Bennett 2002). At times, the Bench has been known for intense interrogation of counsel, rarely allowing them to finish a sentence without interruption. Justice Dixon resolved to curtail such judicial Socratic methods, but it was revived under Chief Justice Barwick (Gageler 2002c). Because the Justices use oral arguments as an important part of the decision-making process, counsel will often be faced with difficult questions about the quality of their arguments (Hayne 2004). For this reason, barristers are encouraged by the Bar to "turn judicial questioning, including in particular hostile questioning, to his or her advantage" (Young and McLeish 2004, 16).

Some Justices—both past and present—have been exceptional in their displays of wit and humor on the Bench (Davis and Simpson 2002). Others, however, find such banter distasteful and distracting (Ackland 2003). Gleeson has argued that the display of humor on the bench can have unintended consequences, largely because "judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judges appears to be taking the occasion lightly" (Gleeson 1998). Additionally, the Justices expect counsel to refrain from attempting to appeal to the emotional or otherwise extra-legal sensibilities. As Justice Hayne warns, "the Court is not a jury let alone a talk-back radio announcer's audience" (Hayne 2004).

The spontaneous nature of the oral argument process, however, often produces comedy despite attempts at restraint. Some argue that this judicial humor is an inextricable part of the judicial decision-making process (Heerey 2004). Common

examples are wry comments to counsel about the poor quality of their arguments (Davis and Simpson 2002) or playful jabs at their fellow Justices (Ackland 2003). In a recent case,[24] for example, counsel for the appellant produced a pistol as an exhibit. Justice Gleeson commented to counsel: "If you are going to point it at us, would you mind pointing it in the direction of Justice Callinan?" While humor might be taken to an extreme in the judicial context, it can be used to relieve the stress and frustration of the courtroom environment when used judiciously (Davis and Simpson 2002).

The Decision and Reasons

The decision-making process in Australia is much different from that of the U.S. Supreme Court. Because of the influence of the British system, the Justices follow a *seriatim* tradition of individual opinion writing. This has important consequences for the process of negotiation and opinion creating. In addition, the traditions and norms on the Court make the opinion-writing effort look foreign to American onlookers. The differences, in turn, necessarily change the motivations driving the decision-making behavior of each individual Justice.

The seriatim opinion-writing tradition

Like the early U.S. Supreme Court, the High Court of Australia follows a *seriatim* opinion-writing tradition. Latin for "one after the other," the seriatim tradition calls for individual opinions or reasons to be produced by each judge. This method of individual opinions was inherited from the English tradition. Under its first Chief Justice, John Jay, the U.S. Supreme Court adopted this procedure. Under Chief Justice John Marshall, however, the tradition was abandoned in favor of a single *per curium* opinion (Ginsburg

[24] *Gillard v. The Queen* (2003) 219 CLR 1.

1994). Only one opinion of the Court was typically handed down, and any dissenters remained silent (Gleeson 2003b). This change was largely an effort on the part of Marshall to reduce the appearance of discord and to protect the Court's legitimacy (Seddig 1991).

This practice was not universally applauded. As Thomas Jefferson wrote in a letter to a sitting Supreme Court Justice,

> The practice is certainly convenient for the lazy, the modest and the incompetent. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all. (Jefferson 1822, 1)

Indeed, the practice of publishing a single majority opinion was later abandoned in the Supreme Court in favor of a hybrid system. While the Supreme Court retains the majority opinion, other Justices are free to express concurring or dissenting views in separate opinions. The majority opinion still maintains importance, though, because precedential weight is only attached to opinions joined by a majority of the Justices.

The High Court, however, never strayed from the British *seriatim* opinion-writing process. Although there have been intermittent attempts to consolidate the majority into a single opinion, these attempts have always been short-lived (Coper 2002c). Instead, the rugged individualism of the Court and its members has encouraged them to produce individual opinions (Mason 2003c). While Justices do occasionally join opinions, the solitude and independence of a barrister's work likely works to feed the seriatim opinion process (Wheeler 2003).

This process, however, is not without its own difficulties. In terms of clarity of law, the tradition of producing multiple "majority" opinions makes discerning the ratio decidendi far more difficult. As Chief Justice Mason observes,

> The Court is a collective institution; it is the Court, rather than the individual Justices, that decides the case and declares the law. There is now an expectation that the Court will declare the law in clear terms in order to provide guidance for trial judges, the legal profession and the community. (Mason 2002d, 91)

This tradition does provide individual accountability, but provides little help for those wishing to discern the common thread among majority opinions. Though there may be a majority agreement on the result, the reasoning used to get to the decision can vary widely (Willheim 2002). While legal academics like the intellectual challenge of discerning the ratio decidendi, practitioners often lament this tradition (McMillan 2003).

Judicial conferences

The U.S. Supreme Court has long followed a tradition of formal judicial conferencing. In some of these conferences, the Justices meet to discuss cases heard on the merits. After a discussion of the case at hand, apparently proceeding in descending order of seniority, the Justices cast a vote (Segal and Spaeth 2002). The most senior Justice in the majority assigns the authorship of the majority opinion, and discussion moves to the next case. The most junior Justice opens the door for the refreshments, answers the telephone, and keeps records of the conference proceedings (Ginsburg 1994).

In Australia, however, the process is far more obscure. It has varied wildly over time, largely dependent on the personalities of the Justices and the leadership of the Chief Justice (Simpson 2002). The closest thing to opinion assignment probably happened under Chief Justice Latham after the appointments of Fullagar and Kitto. The Privy Council looked unfavorably on this practice, and it soon faded. The practice of holding conferences waxed and waned over the years. It seems as though incoming Chiefs were likely to attempt to begin such a tradition, but most abandoned it altogether in short stead (Mason 2002d).

Some former High Court associates indicate that there is no formal conference process. Following the extensive oral arguments, oftentimes the Justices seem to understand where their colleagues will stand. Recent alumni indicate that there is now a monthly "judgment meeting." Indeed, Chief Justice Gleeson has acknowledged this monthly meeting, as well as informal meetings over tea (Clark 2003). While the process remains secretive, the result of the monthly conferences is called the "judgment list." This is a list of the matters before the Court along with the status of all active business. The list indicates who has written or joined opinions. After the business is done, these lists are destroyed. One thing that is certainly missing from this list – if it does exist – is a majority opinion assignment.

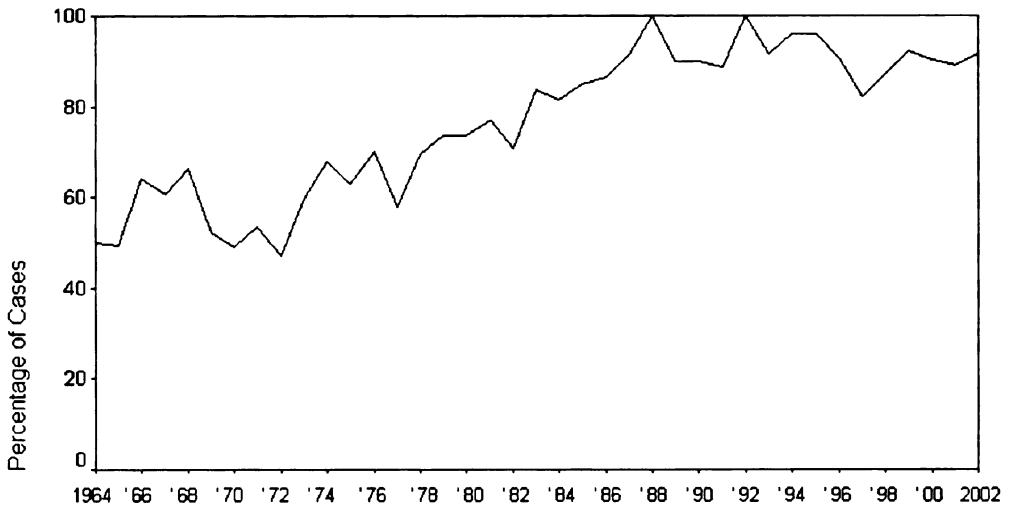
The writing and circulation of drafts

In the U.S. Supreme Court, the process of writing and circulating drafts is very important. Because of the weight a majority opinion holds, there is a high level of motivation for its author to recruit other Justices to join. Many of the Justices permit their clerks to write the first draft (Tarr 2003). The Justice will then edit the first draft, distribute it to his peers and respond to any concurring or dissenting opinion drafts that have been circulated. During the course of this process, Justices may change their votes or decide to write concurring opinions.

The process in the High Court is somewhat different, due largely to the different opinion writing tradition. When it comes to opinion writing, High Court Justices work more like a set of independent law firms than a collegial court. It is very rare that a Justice would allow an associate to create the first draft of the opinion (Craske and Haigh 2002). The Justices edit this draft to their liking, and then circulate it to the other

members of the panel. Oftentimes the original drafts will later be edited based on discussions with colleagues, or in response to other circulated opinions.

Figure 5 - Percentage of Cases with at least One Joint Opinion



This is not to say that the opinion circulation process is not important in the High Court. Clearly, the ability to have the first opinion in circulation allows a Justice to frame the case according to his perspective. This gives the first opinion author the benefit of influencing the way his peers interpret the case (Kirby 2003). The other panel members may decide to adopt some—or the entirety—of the first author's reasoning.

The pressure to negotiate and bargain for agreement, however, is almost non-existent in the High Court. Because the majority opinion will have no less precedential value if it is divided among various individual opinions, the Justices may express their particular thought process without worry of losing support for the majority outcome. Although there is no tradition of a single majority opinion, the Justices do join with their colleagues. Sometimes this involves actually signing multiple names to a single opinion.

In this situation, it is impossible to discern which Justice is the main author.[25] Other times, a Justice may submit a very short opinion expressing concurrence with the reasons and result of another's opinion. When considered together, these two types of joint opinions occur considerably often on the Court (see Figure 5). On average, 30.2% of all opinions handed down are joint opinions. Between 1965 and 2002, an average of 77% of cases had at least one joint opinion. As Figure 5 illustrates, however, joint opinions are becoming increasingly common.

Proliferating the decisions

As in the U.S. Supreme Court, one of the most important duties of the High Court is its proliferation of precedent through written opinions. The High Court's authorized reporter is the *Commonwealth Law Reports* (CLR). Volumes of the CLR have been published privately since its inception in 1903. The CLR has contained select decisions of the High Court, as well as Australian cases decided by the Privy Council in London. Additionally, cases can be found in several other places, including the *Australian Law Reports*, the *Australian Law Journal Reports* and more recently the Australasian Legal Information Institute website[26] and the High Court's official website.[27]

Editors of the various reports have always reported only a selection of the High Court's business (Meek 1999). Only cases deemed "important" are typically included. The presence of constitutional interpretation is a flag for the editors, and these cases are always included (Jones 2002). The editors, however, have not always been able to

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[25] The lack of an authorship designation, however, has not stopped legal scholars from attempting to discern which of the Justices penned particular joint judgments.

[26] http://www.austlii.edu.au

[27] http://www.hcourt.gov.au

appreciate the future importance of a case. In an attempt to fill in the blanks, the CLR issued a special volume in 1994. This volume included cases from up to thirty years earlier that had gained importance in High Court jurisprudence over time.

As the Court's discretionary jurisdiction has increased dramatically over the years, a higher percentage of the cases handed down have been reported. The practice of handing down *ex tempore* or "spur of the moment" judgments has declined, as the agenda has become more heavily weighted to difficult legal and constitutional issues (Kirby 1992). Currently, nearly all judgments of the High Court are reserved judgments, or judgment accompanied by written opinions handed down some time after oral arguments. These reserved judgments provide more detailed reasons, and are thus more suitable for inclusion in the reporters.

As the proportion of "important" decisions has increased, so has access to the entirety of the High Court's business. In 1980, legal scholar David Solomon began publishing *The Legal Reporter*, in which he included all of the High Court's judgments (Jones 2002). Additionally, since 1997, the High Court itself has made available the full text versions of all opinions on its official website. The media coverage of the Court has increased over time, and the major Australian newspapers each have journalists who spend a significant portion of their time covering the High Court's business (Williams 1999).

Practice and Procedure in Comparative Perspective

The High Court and the U.S. Supreme Court are alike in many respects. Each court sits at the apex of a British common law-inspired system, and each is charged with interpreting and clarifying the law for its respective judiciary. Each exercises discretionary jurisdiction, and they are both understood to be important political as well

as legal institutions. In some important ways, though, these two institutions differ. These differences are critical for conceptualizing the ways in which the behaviors exhibited by members of the High Court bench might be different from what we know about U.S. Supreme Court Justices. Differences in judicial selection, jurisdiction, agenda setting and opinion production must be considered before an attempt is made to use existing judicial behavior literature to explain the production of joint opinions on the High Court.

CHAPTER TWO: A BRIEF HISTORY OF THE HIGH COURT OF AUSTRALIA

Judicial biographies in Australia are as rare as hen's teeth.

— Justice Michael D. Kirby (1998a, 1)

The High Court of Australia shares much in common with the American Supreme Court. From a number of distinct state systems of courts, the enactment of a constitution created a new federal jurisdiction. The High Court, like the U.S. Supreme Court, has seen periods of calm, times of turbulence, and a number of very interesting characters. In order to understand the functioning of the contemporary High Court, it is important to conduct at least a cursory review of the High Court's history. This history can help to put various current issues into context. Additionally, the understanding of the behavior of recent members of the bench can be illuminated by examining the tradition of decision making and interpersonal relations among Justices throughout the Court's hundred-year history.

The Early History of the High Court

The High Court of Australia first sat on October 6, 1903. This first sitting took place in Courtroom Number One of the Melbourne Supreme Court, and it was met by relatively little popular excitement. It was reportedly a slightly awkward affair, and one Melbourne newspaper quipped that "the most experienced man in the court was the crier" (Bennett 1980, 23). That there was little public attention, however, did not mean that the opening of the Court was not the subject of intense debate among lawyers and politicians (Galligan 1987).[28]

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[28] The Court's first case, *Hannah v. Dalgarno* (1903) 1 CLR 1, asked the Justices to decide when the Court actually came into existence. The decision on the merits hinged on whether the Court was in existence as of the ratification of the Constitution on January 1, 1901, or not until the passage of the Judiciary Act in August of 1903. The Court ducked this question, instead rescinding the grant of special

The eventuality of a supreme court of appeal was taken without much comment during the process of drafting the Commonwealth Constitution (Bennett 1980). In the late 1890s, the most pressing disagreements had to do with the maintenance of appeals to the Privy Council. By 1903, however, additional serious complaints were lodged during the Parliamentary debate over the Judiciary Bill, which would create the High Court (McHugh 2002). Among these concerns were gloomy prophecies that the Court would be a waste of resources and would have little or no work to keep it occupied (Bennett 1980). Many observers also assumed that the long-established state supreme courts, coupled with the Privy Council, would eclipse the High Court in prestige and importance. In this way, the High Court would be rendered largely impotent (Bennett 1980). In the years that followed, however, the Court would prove its critics to be profoundly mistaken. In a series of measured steps and giant leaps, the High Court ultimately cemented itself as a competent and powerful tribunal.

Establishing an Identity (1903-1919)

The personalities on the first High Court bench—along with impassioned pleas from the ambitious Attorney-General Alfred Deakin—helped to assuage much of this criticism (McHugh 2002). Indeed, the three men selected by the Protectionist Party government were quite distinguished. All had worked together in various capacities to draft the Commonwealth Constitution, and were all largely in agreement as to the political and economic role of the newly constituted government (Bennett 1980).

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leave on the grounds that the negligence question at hand "was not a question of sufficient public importance" (Coper 2004).

The Chief Justice, Samuel Griffith, was the Premier of Queensland prior to Federation. Griffith was widely seen as the main architect of the constitution.[29] While some of his contemporaries thought him too self-serving and ambitious for the position (McHugh 2002; Clark 2003), his appointment was generally heralded by the press as a positive step (Gibbs 2002). He had proven himself a great legal mind in his role as the Chief Justice of the Supreme Court of Queensland.

The puisne Justices[30] were also among the most upstanding of Australian citizens. In fact, many legal scholars – past and present – argue that either one would have been a superior choice for the position of Chief Justice (McHugh 2002). Richard O'Connor had been solicitor-general for the state of New South Wales and was the first Leader of the Government in the Commonwealth Senate. Edmond Barton resigned his position as the first Prime Minister of the newly constituted Commonwealth of Australia in order to serve on the High Court. Both O'Connor and Barton were chosen for the position by Attorney-General Alfred Deakin. Deakin was criticized for his choice of Barton, as onlookers correctly anticipated that Deakin wished to succeed Barton as Prime Minister (Bennett 1980).

During the first few years of its existence, the High Court made a significant mark on the Australian legal world. This was due largely to the leadership of its first Chief Justice (McHugh 2002). The members of the Bench enjoyed a friendly personal rapport, and these agreeable relationships translated into a high degree of ideological unanimity in

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[29] According to Botsman (2000), it was not until John Reynolds' 1958 publication of Andrew Inglis Clark's draft constitution that Griffith's role has been diminished, although only minimally so.

[30] The term puisne (pronounced 'puny') is used to refer to the 'junior' judges, or any High Court Justice other than the Chief Justice (Blackshield 2002f).

the Court's output (Simpson and Simpson 2002). Each of the members of the first Griffith Court was dedicated to the protection of state's rights (Botsman 2000). The puisne judges typically assented to opinions, which were mostly written solely by Griffith (Gibbs 2002).

The Griffith Court managed to prove wrong those High Court critics who anticipated a weak and useless tribunal. In fact, Griffith managed to solidify the Court's position as the paramount Australian legal institution in just a few years (Gibbs 2002). The first Court successfully confronted the Attorney-General (Priest 2002), the Commonwealth Parliament (Mason 2002b), and even the Privy Council (Bennett 1980). The Australian political climate was strongly majoritarian at the time; citizens and politicians alike became wary of the large role the High Court was assuming, especially in exercising judicial review of legislation and executive action (Galligan 1987). Many onlookers, especially Commonwealth Parliamentarians, began to wish for the impotent tribunal against which they once campaigned. It was the Commonwealth Parliament itself, in the *Judiciary Act 1903* (Cth) that provided for the High Court's power of judicial review (Mason 2002c). While these concerns were not center stage in the parliamentary debates over the bill, they began to reveal themselves as the Court began to assert its substantial role (Bennett 1980).

By 1906, the Court's workload had increased such that its members requested an enlarged bench. Their request was answered, and the Protectionist Party government appointed Justices Isaac Isaacs and Henry Higgins (Bennett 1980). With this addition, however, the personal and professional goodwill on the Bench deteriorated markedly (Gibbs 2002). The main point of professional contention was the intergovernmental

immunities doctrine established by the foundation members of the Court (Mason 2002b). This doctrine held that the Constitution contained an implied protection of the reserved state powers against Commonwealth interference, and vice versa (Coper 2002b). This arrangement was derived from American Supreme Court principles in cases like *McCulloch v. Maryland* (1819),[31] and followed nicely from Griffith's vision of the appropriate structure of coordinate federalism (Zines 1997). In its first year, the High Court cited the U.S. Supreme Court's decision in *McCulloch* when it struck down a state tax on a federal officer's income.[32] The newer Justices disagreed, and began to write a large number of dissenting opinions (Gibbs 2002).

Part of the problem centered on the method of constitutional interpretation instituted by the Court's founding members. The reasoning behind the doctrine of intergovernmental immunities involved distinctly political considerations (Patapan 2000c). This was largely a result of the characters on the Bench at the time. The first three Justices were all senior statesmen, heavily involved in the creation of the federal system found in the Constitution (Galligan 1987). Griffith, Barton and O'Connor shared a common political vision, namely of a strong system that divided powers between the states and the Commonwealth (Patapan 2000c). For this reason, they often agreed on a balanced, political approach to distributing powers between levels of government. Because the first Justices were among the framers of the document, their interpretive approach "relied more heavily on the sagacity and authority of the Justices than on logical consistency or a literal construing of the constitution's text" (Galligan 1987, 80).

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[31] 17 U.S. (4 Wheat) 316.

[32] *D'Emden v. Pedder*, 1 CLR 91 (1904).

They tended to approach the question as politicians allocating power, and not as lawyers interpreting the law.

Neither Isaacs nor Higgins accepted the doctrine of intergovernmental immunities established by the founding members of the Court (Cowen 1955). There is some scholarly disagreement, however, on the substance of their complaint. It is clear that Isaacs and Higgins were both involved in the framing of the constitution. Some argue, however, that these men saw the Constitution in terms of its legal consequences, and not in political terms (Goldring 1997). According to this view, their legalistic perspective kept them from agreeing with the holistic interpretation style of the founding members of the Bench, instead preferring a strictly legal approach (Patapan 2000c).

Others argue that it was not the interpretation style that troubled Higgins and Isaacs, but the political vision that was supported by its use. Galligan notes that "they were both ardent federalists intent upon expanding commonwealth powers," a position distinctly opposed to the existing High Court doctrine (Galligan 1987, 84). Isaacs and Higgins were both unimpressed by the doctrines of immunity and reserved powers. Higgins was particularly and vocally critical of the doctrine of implied immunities, and took to berating American Chief Justice John Marshall for his landmark opinion on the issue (Zines 1997).

Soon after their appointments, Isaacs and Higgins also expressed dismay at the methods of constitutional interpretation favored by the other members of the Bench. In *Baxter's Case*,[33] the Court was charged with determining the extent to which the High Court must be bound by the decisions of the Privy Council. The majority in this case

[33] (1907) 4 CLR 1087.

refused to apply the Privy Council's decision in *Webb v. Outtrim* (1907).[34] Griffith's majority opinion in *Baxter's Case*, joined by Barton and O'Connor, embraced a contextual strategy for interpreting the constitution:

> There is no doubt as to the meaning of the words used, but the circumstances under which the power was intended to be exercised must be discovered from some other source. That source is to be found in a consideration of the whole purview of the Constitution, and the answer to the question cannot be given without having regard to its history. (*Baxter's Case*, 1103)

In his dissenting opinion, Isaacs argued that such external information is at the very least unnecessary in this case:

> I know of no clearer words in the Constitution, or words having a more obvious purpose. Sec. 74 is one of the pillars of the Constitution. Unless it stands firm, much of the true meaning of that document is lost. (*Baxter's Case*, 1151-52)

Higgins conceded that he would agree with the majority as a statesman, but asserted that his role on the Bench required something decidedly different. In his words:

> I admit that, before taking my seat on this bench, I thought that it would be wiser to leave, as far as possible, the interpretation and the application of Australian laws to Australian Courts ... But my duty here is to accept the law as I find it. (*Baxter's Case*, 1166)

This increase in disagreement on the Court was a matter of great concern for the press (Bennett 1980). There were only four dissents before the expansion of the Bench in 1906 (Lynch 2002b), but the appointment of Isaacs and Higgins led almost immediately to an increase in individual concurring opinions and, eventually, dissenting opinions (Mason 2002b). This new tradition of disagreement and individual opinion authorship is one that continues to the present day (Lynch 2002b). Griffith's hold on the direction of Court doctrine was further diminished with the replacement of O'Connor by Frank Gavan Duffy and the 1913 expansion of the Bench (Mason 2002b). Charles Powers and George

[34] (1906) 4 CLR 356.

Rich[35] filled the two newly created seats on the Court. All three of these Justices were appointed by the Australian Labor Party government. By the time of Griffith's resignation in 1919, the Court's thinking had changed substantially, especially in terms of constitutional interpretation (Bennett 1980).

Growing Pains (1919-1950)

Settling on a replacement for Griffith was difficult. Griffith's resignation date was postponed twice as the government debated whether to elevate a sitting puisne Justice or to choose from outside the Court (Fricke 1999). The Cabinet preferred to give the job to Justice Barton, but his old age and ill health led Griffith to recommend against the idea. Finally, the Nationalist Party Cabinet settled on Adrian Knox. Shortly thereafter, Barton died. Hayden Starke was appointed by the Nationalist government to replace him. Although Knox was the Chief, Isaacs had a commanding personality and largely dominated the Court during this time (Fricke 2002d). On the Griffiths Court, Isaacs was a frequent dissenter, but things had changed by the early 1920s. Isaacs's expansive view of Commonwealth power began to win a majority on the Court (Kirby 2005b). He penned a long line of joint opinions, to which Knox, Rich, and Starke generally concurred.

In the aftermath of World War I, the Commonwealth government was enjoying a strengthened position in Australian federal politics. The founding members of the Bench had generally sought to protect the states from the Commonwealth's encroachment into their reserve powers (Bennett 1980), but had also interpreted the Commonwealth defense

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[35] Before Rich's appointment, Albert Bathurst Piddington was appointed to the second new seat. He resigned before taking his seat, however, amidst criticism that neither he nor Powers were of the keenest contemporary legal minds (Bennett 1980). Rich was then appointed to replace Piddington. Powers did not seem to be dissuaded by the popular criticism.

power in extraordinarily broad terms (Galligan 1987). The expansion of Commonwealth defense power, followed with the introduction of Justices who favored the expansion of Commonwealth power over the states, led to what is largely regarded as the foundation of Australian constitutional law: The *Engineers' Case*.[36]

The Griffith Court had largely approached constitutional interpretation in terms of political and legal context, and the doctrines of intergovernmental immunities and reserved state powers were the results. *Engineers'* swept these doctrines aside and replaced them with a doctrine derived from a literal approach to constitutional interpretation (Blackshield 2002d). Substantively, the decision gave the commonwealth government the power to bind the states under legislation passed concerning the conciliation and arbitration of industrial disputes. The joint opinion found no legal basis for the Court's earlier decisions protecting the states from the legislative power of the Commonwealth (Bennett 1980). While this result might have been achieved by augmenting the doctrines of immunity and reserved powers, the Court dismissed these doctrines altogether, claiming:

> They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or any recognized principle of the common law underlying the expressed terms of the Constitution but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. (*Engineers'*, 141-42)

This decision served to greatly expand the Commonwealth government's legislative powers under section 92 of the Constitution (Zines 1997). This is especially true in regard to trade, commerce, and arbitration (Fricke 2002d). *Engineers'* marked the

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[36] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

introduction of a newly legalist approach to constitutional interpretation, and largely resulted from the replacement of the early politicians on the Court with purportedly apolitical lawyers (Galligan 1987; Patapan 2000c). *Engineers'* reliance on legalism, however, is seen by some as a strategic decision rather than a philosophical one:

> One cannot escape the view that in the *Engineers'* case, as elsewhere, reliance on 'express provisions' and the 'golden rule' of interpretation was emphasized because it suited a purpose and was a means of advancing the vision he had of Australia and its governmental institutions. (Cowen and Zines 2002, 426)

Whatever the reason it was employed, however, legalism remained the *de jure* method of interpretation on the Court for decades to come. As one scholar notes, "*Engineers'* can be seen as the decisive juncture where conventional rules of interpretation asserted their dominance over the innovation of federalism" (Patapan 2000c, 250). Justice Kirby agrees with this assessment, arguing that Isaacs merely used the rhetoric of the legalistic style of interpretation "and applied it with uncompromising rigour" (Kirby 2005b, 27).

During the Knox Court, several procedural changes were introduced. Attorney-General John Latham proposed an amendment to the Judiciary Act. This amendment provided pensions for Justices on the High Court. It also discussed the High Court's need for a permanent home in the seat of government, although action would not be taken on this recommendation for more than fifty years (Bennett 1980). The Court also adopted several changes to the High Court Rules, the most memorable of which was the method for conducting the delivery of opinions. Instead of requiring the Justices to read the text of their written opinions aloud in open court, these changes allowed the Justices to simply state their opinion briefly and then deliver the written reasons to the clerical staff in open court (Fricke 2002d).

As the 1920s drew to a close, Isaacs lost his hold on the majority of the Court (Fricke 2002d). Subsequent challenges to state law under section 92 were largely handled through statutory interpretation as opposed to constitutional interpretation. Many of these cases began to whittle away at the extreme centralization of government power advocated by the *Engineer's* decision (Fricke 2002d). With the death of Higgins and the resignation of Powers in 1929, Isaacs' views became more isolated (Fricke 2002d). Owen Dixon was appointed by the Nationalist government to replace Higgins, but the Labor Party was back in office before Powers could be replaced. Soon after, Chief Justice Knox retired.

The new Labor government appointed Herbert Evatt and Edward McTiernan as replacements for Knox and Powers, and elevated Isaacs to the position of Chief Justice. Evatt was, at age 36, the youngest ever to be elevated to the High Court (Bayne 2002). McTiernan and Evatt had both been involved in Labor politics, and the pair of appointments attracted significant criticism from the media (Bennett 1980). Neither Evatt nor McTiernan sat on the Court during Isaacs' tenure as Chief Justice, as he would remain in this position for a mere 42 weeks (Fricke 2002c). Effectively, the Isaacs Court was a Bench of five. As the Great Depression took hold, the once steady flow of taxation cases was replaced by an increasing number of bankruptcies (Fricke 2002c). Overall, though, the work of the Court diminished significantly during this period.

As Isaacs was uncharacteristically ill during much of his Chief Justiceship, the considerable influence of Owen Dixon was allowed significant space to flourish (Fricke 2002c). Isaacs resigned in 1931 in order to accept the vice-regal position of Governor-General. Despite rumors that Evatt would be elevated to succeed him, the position

instead went to the seventy-eight year old Gavan Duffy.[37] Some historians believe that this choice was the Labor government's reaction to criticism of its previous appointments, which were perceived as politically motivated (Fricke 2002a). During the same year, under pressure to economize, the Labor government officially reduced the number of seats on the High Court Bench from seven to six, leaving unfilled the empty seat vacated by Isaacs (Fricke 2002b). The circuit system, which required that the judges travel regularly to each of the state capitals, was suspended during this time in an attempt to save money (Del Villar and Simpson 2002).

The Gavan Duffy Court was unspectacular by most accounts. Tensions rose as alliances between the Justices shifted, and the rivalry between the Court's two leaders, Dixon and Evatt, flourished (Fricke 2002b). The work of the Court was still dominated by Depression-related litigation, including many bankruptcy, taxation and corporations law cases. Gavan Duffy's retirement in 1935 led to the appointment of John Latham by the United Australia/Country Party coalition government.[38] For the first time since Griffith's departure, the Court enjoyed a capable and effective Chief Justice (Cowen 2002).

The Latham Court enjoyed an unmatched measure of membership stability. All four of the longest-serving Justices sat during this time, and the Court saw only one retirement and two appointees during the fourteen year period (Douglas 2002). Evatt retired in order to stand for the 1940 commonwealth parliamentary elections. He was successful, and went on to serve as Attorney-General and Minister for External Affairs

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[37] Frank Gavan Duffy may have been seventy-eight years on the earth, but had only celebrated 20 birthdays, as he was born on February 29, 1852,

[38] The United Australia Party changed its name to the Liberal Party in 1944.

for the Labor government until 1949 (Bayne 2002). He was replaced on the Court by Dudley Williams, a United Australia Party appointee. William Webb was appointed in 1947 by the Labor government to fill the newly reinstated seat on the High Court bench, bringing the Court back to its previous size of seven.[39] Additionally, Justices Latham and Dixon each took leave from the bench in order to serve as Foreign Ministers (Douglas 2002).

The stability of membership on the High Court, however, was accompanied by stable conflicts between members of the Court. As Roger Douglas explains,

> The most bitter conflicts were those between Starke on one hand and the two former Labor politicians, Evatt and McTiernan on the other – but Starke was also resentful towards Dixon, somewhat contemptuous of Rich, and cool towards Latham. Evatt reciprocated Starke's hostility and his relations with Latham could sometimes be prickly. (Douglas 2002, 421)

This severe fragmentation effected a notable decline in the frequency of joint opinions, which until this time had been relatively frequent (Cowen 2002). Votes dissenting from the case outcome were present in 42% of cases during the Latham Court, and in an astounding 72% of cases in 1944 (Blackshield 1972). This, coupled with the even number of judges on the Bench until 1946, meant that a large number of decisions were handed down by an evenly divided Court (Bennett 1980). The idea of holding conferences among the Justices was abandoned as an impossibility, in great contrast to the daily lunches enjoyed by the Court's first three members (Bennett 1980). Starke seems to have been the instigator of much of this trouble, refusing to circulate draft

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[39] The relevant amendment to the *Judiciary Act 1903* (Cth) was introduced by the Commonwealth Attorney-General, Herbert Evatt. Thus, the new appointment would be made by the Labor government, of which he was a member.

opinions and making "no attempt to conceal his personal animosities" (Cowen 1967, 117).

The Latham Court did manage to make a mark on several important social issues brought forward by World War II. These issues were important to lawyers, but they were also the most widely salient issues of the day among the citizens generally (Hayne 2003). Many of the Court's decisions in these cases knocked back Labor government plans for increasing the power of the Commonwealth to nationalize industry (Galligan 2002). In the *Bank Nationalisation Case*,[40] the Court struck down Labor Prime Minister Chifley's plan to nationalize all of the banks in Australia. In the *Communist Party Case* (1951) the Court held the *Communist Party Dissolution Act 1950* (Cth) unconstitutional, despite Dixon's best efforts to uphold the anti-communist legislation (Dawson and Anderson 1996). In this decision to limit the use of defense power during peacetime—and to prevent its use to curtail the expression of pro-communist sentiment—Latham was the lone dissenter (Botsman 2000). Through his tenure, Latham was seen as the epitome of a legalistic judge. Some blame this legalism for his position as a dissenter in the critical cases of his day (Cowen and Zines 2002, 429), but Dixon criticized Latham's opinion in the *Communist Party Case* as being an abrogation of the judicial duty to uphold the law (Dawson and Anderson 1996).

[40] *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR 1.

Time to Regroup (1950-1964)

In the twilight years of the Latham Court, both Rich and Starke resigned. They were replaced in 1950 by the Liberal Coalition[41] government appointments of William Fullagar and Frank Kitto. On Latham's retirement in 1952, Owen Dixon was elevated to the Chief Justiceship and Alan Taylor was appointed by the Liberal Coalition government.

Dixon presided over a notably harmonious bench, and much credit is often given to the new appointees (Simpson and Simpson 2002). As most of the dissenters had been replaced with more "likeminded" Justices, a spirit of friendliness and cooperation grew quickly, and helped to support the stature of the Court in the public eye (Bennett 1980). The Dixon Court, however, did endure a great deal of change over the years. Before the end of his tenure, Fullagar would be replaced by William Owen, Webb by Douglas Menzies, and Williams by Victor Windeyer. All were appointees of the Liberal Coalition government, though, furthering the homogeneity of thought and experience on the Bench (Simpson and Simpson 2002).

Although Dixon's leadership ability had been apparent nearly from the time of his appointment, it flourished to an unprecedented degree during his tenure as Chief (Bennett 1980). He was adept at forging consensus on the Court, both through his facilitation of professional cooperation and his negotiation of personal relationships (Smyth 2003b). Dixon is often associated with the term 'strict and complete legalism.' Indeed, Dixon noted that "[t]here is no other safe guide to judicial decisions in great conflicts than a

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[41] The Liberal Coalition at this time was made up of the Liberal Party (once the United Australia Party) and the Country Party. The Country Party adopted the name "National Country Party" in 1975, and further amended its name in 1982, becoming simply the "National Party." The Liberal Coalition today is made up of the Liberal and National Parties.

strict and complete legalism."[42] Some interpret this remark to mean that Dixon favored an approach to constitutional interpretation that sidelines the consideration of practical policy consequences (Bhattacharya and Smyth 2001b). The legalist reputation of the Dixon Court is enhanced by the perception that Douglas Menzies's appointees also favored this approach (Sawer 1975).

Others argue that this reputation for legalism may be due more to the famous comment being taken out of context than a mechanistic view of the judicial task on Dixon's part (Hayne 2002). In this view, Dixon rejected the notion that judges had to ignore information about the implications following from judicial decisions (Cowen and Zines 2002). The Dixon Court, according to many scholars, remained flexible and even creative in the face of difficult challenges (Zines 2002a). During this period, the Commonwealth government was dominated by the Liberal Coalition. Unlike Labor governments past, the Liberal Coalition government was generally happy to stay within the express powers granted by the Constitution (Zines 2002a). For this reason, the Court had little reason to strike down Commonwealth legislation.[43] This light use of the judicial review power contributed to the Dixon Court's reputation as a legalistic bench.

This is not to say that the Dixon Court was inactive. Great innovations were made during this time, especially regarding the interpretation of section 92 of the Constitution. This section provides for freedom of interstate commerce, and had previously been interpreted as a limitation only on protectionist mechanisms among the states. The Dixon Court continued the evolution begun by the *Bank Nationalisation Case*, giving section 92

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[42] (1952) 35 *CLR* xi, xiv.

[43] One notable exception is the *Boilermaker's Case* (1956), in which the Court expanded the operation of separation of powers at the Commonwealth government level.

a distinctly *laissez-faire* flavor (Sawer 1957). The Court overturned previous rulings, instead holding that the Constitution confers an individual right to free trade, subject only to reasonable regulation (Zines 2002a). In the *Second Uniform Tax Case* (1957), the Court affirmed the power of the Commonwealth government to tax to such a degree as to make it politically impractical for the states to levy additional taxes (Bennett 1980). All of this, coupled with the increase in Commonwealth defense powers during the Latham Court, contributed to a further erosion of state powers.

The Modern High Court

With the appointment of Chief Justice Garfield Barwick in 1964, the High Court began a period of transformation. The membership of the Court shifted dramatically through Barwick's tenure, and he instigated several important changes in jurisdiction and procedure during this time (Mason 2002a). The Court physically took its place among the other branches of Australian government, leading to "a new national vision of the Court" (Kirby 1996). More than his predecessors, Barwick emphasized the High Court's role as the final arbiter of the important questions of the day (Mason 2003b).

The Barwick Court (1964-1981)

Chief Justice Barwick's term was a time of transformation for the High Court in a number of important ways. The Barwick Court saw many changes in jurisdiction and procedure. Some of these changes were due largely to the work of Barwick himself, both as Chief Justice and in his previous role of Commonwealth Attorney-General. During his tenure as Chief, the Court gained greater independence from the Privy Council, dramatically decreased its nondiscretionary docket, and obtained administrative control over the affairs of the Australian judiciary (Mason 2002a). Barwick was even instrumental in securing a permanent home for the High Court, which prior to 1980 was a

traveling tribunal. The new retirement age of 70, however, was the brainchild of the Commonwealth Parliament, not Barwick.

The Court also saw huge membership shifts during this time and ended the period much younger than it began (see Table 1). Secondly, many jurisdictional and procedural changes dramatically altered the nature of the Court's work. Finally, due in part to the first two changes, the role of the Court and its Justices began its own transformation. These changes began to build momentum as politicians, the public, and the Justices themselves began to re-examine the position of the High Court in the government and society.

Garfield Barwick was appointed Chief Justice by Liberal Coalition Prime Minister Robert Menzies. Although Barwick had an impressive resume, he had a difficult time fitting in on the High Court. As one scholar has noted,

> Barwick did not slip easily on to the bench. Rather, he was an intruder in the club. (Marr 1980, 213)

His reputation at the bar was extraordinary, so much so that he was knighted in 1953 (Winterton 2002). Immediately prior to his appointment to the High Court, he was serving as the Liberal Party Member of Parliament for Parramatta, Minister for External Affairs,[44] and Commonwealth Attorney-General.[45] Many of his contemporaries believed that Barwick had aspirations to assume the Prime Ministership on the retirement of

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[44] Barwick had mixed reviews at best in terms of his role as Minister for External Affairs. In one instance, he mistakenly claimed that America would be necessarily drawn into any potential Australian-Indonesian conflict as a result of its treaty obligations. This caused a stir among Australians and members of the Johnson administration alike (Galligan 1984).

[45] In Australia, the Commonwealth, state, and territory Attorneys-General are members of their respective parliaments, and are ministers of state. For this reason, the Commonwealth or State Attorney-General is always an elected politician. Barwick was not the first former Commonwealth Attorney-General to serve on the High Court, as Henry Higgins, Isaac Isaacs, and John Latham had also previously served in this position. The last such appointee to date was the controversial Justice Lionel Murphy in 1975.

Robert Menzies, but the retirement of Owen Dixon forced Barwick to choose between the two prestigious jobs (Winterton 2002).

Following Barwick's appointment, there were several more changes in the Court's membership. In fact, not one of the Justices who began the Barwick Court would remain until its end. Two Justices served their entire High Court careers within the space of Barwick's tenure. This was due largely to Barwick's unprecedented seventeen-year stint as Chief Justice. For this reason, legal scholars tend to split the Barwick Court into distinct periods (Mason 2002a). Near the beginning of the Barwick Court, the Liberal Coalition government made several appointments to the Bench. Cyril Walsh was appointed after Taylor's death in 1969. After graduating at the top of his class at the University of Sydney, Walsh had acquired a substantial law practice, sharing chambers with Barwick. Unlike many Liberal party appointees, Walsh had never been involved in legal academia, and he had never taken silk (Fricke 1986). Shy and modest, Walsh was appointed to the New South Wales Court of Appeal at the recommendation of his admiring colleagues at the Bar (McLaughlin 2002). He held this position until his elevation to the High Court.

The following year, Kitto resigned and was replaced by Harry Gibbs. The son of a successful lawyer, Gibbs excelled in his academic career. Shortly after beginning his law practice, Gibbs enlisted in the military during World War II. Subsequently, he helped to plan a post-war government for Papua and New Guinea. After returning to practice, where he quickly developed great prestige, he was appointed to the Queensland Supreme Court (Jackson and Priest 2002). He was then promoted to the Chief Justiceship, and

later to the Supreme Court of the Australian Capital Territory and the Federal Court of Bankruptcy. It was from this position that he was elevated to the High Court.

In 1972, Windeyer resigned and Owen died. They were replaced by Ninian Stephen and Anthony Mason. Stephen, like Gibbs, enlisted in the military at the beginning of his law career. He returned to join the Melbourne Bar, and from there was appointed to the Supreme Court of Victoria. Two years later, he was elevated to the High Court. Mason served in the Royal Australian Air Force before completing law school. After a distinguished career in legal practice, he was appointed to the New South Wales Court of Appeal. He was elevated to the High Court shortly thereafter.

The Labor Party came into power in 1972. Labor's first new appointment to the Barwick Court was Sydney Jacobs in 1974, in the seat left vacant after Walsh's death. Jacobs enlisted during World War II, and was appointed as a military intelligence officer. Upon his return, he completed law school and developed a legal practice. He stood for a New South Wales Parliament vacancy, but his campaign failed by a single vote (Blackshield and Mackrell 2002). He was then appointed to the Supreme Court of New South Wales, where he worked with Mason and Walsh. He became that court's president before being elevated to the High Court. Soon thereafter, Menzies died at a New South Wales Bar Association function and the Labor government appointed the Commonwealth Attorney-General Lionel Murphy to replace him. Murphy, who first earned a degree in organic chemistry, sat for the New South Wales Bar exam before actually graduating from law school. He passed, and proceeded to make a name for himself in labor law. He was elected to the Commonwealth Senate in 1961, and subsequently was selected to be

Table 1 - Justice Attributes on the Barwick Court

Judge	Born	Appt. Age	Region	Religion	Judicial Exp.	Gov't Atty.	Schooling/Univ.	Politics	Appt. PM
Barwick*	1903	60	NSW	Protestant	None	A-G (Cth)	Public/U.Syd.	Liberal MP	LNC
Aickin	1916	60	VIC	Protestant	None	None	Private/U.Melb.	?	LNC
Gibbs	1917	53	QLD	Protestant	11 yrs.	None	Private/U.Qld.	?	LNC
Jacobs	1917	56	NSW	Protestant	14 yrs.	None	Private/U.Syd.	Liberal	ALP
Kitto*	1903	46	NSW	Protestant	None	None	Public/U.Syd.	?	LNC
Mason	1925	47	NSW	Catholic	3 yrs.	S-G (Cth)	Private/U.Syd.	?	LNC
McTiernan*	1892	38	NSW	Catholic	None	A-G (NSW)	Catholic/U.Syd.	Labor MP	ALP
Menzies*	1907	50	VIC	Protestant	None	None	Public/U.Melb.	Liberal†	LNC
Murphy	1922	52	NSW	Catholic	None	A-G (Cth)	Public/U.Syd.	Labor MP	ALP
Owen*	1899	61	NSW	Protestant	25 yrs.	None	Private/None	Liberal	LNC
Stephen	1923	48	VIC	Protestant	2 yrs.	None	Overseas/U.Melb.	?	LNC
Taylor*	1901	50	NSW	Protestant	1 yr.	None	Public/U.Syd.	?	LNC
Walsh	1909	60	NSW	Protestant	14 yrs.	None	Public/U.Syd.	?	LNC
Wilson	1922	56	WA	Protestant	None	G-G (WA)	Public/U.WA,Penn	?	LNC
Windeyer*	1900	58	NSW	Protestant	None	None	Private/U.Syd.	Liberal	LNC

* Indicates members of the original Barwick Court
† Douglas Menzies was the cousin of former LNC Prime Minister Robert Menzies

leader of the opposition and later Attorney-General. Against Barwick's protests, Murphy was appointed to the High Court.

After sustaining a fractured hip at the age of 84, McTiernan was confined to a wheelchair.[46] Because the High Court had no accessible entrances, McTiernan ended hisreturned to Australia and built a reputation as a capable practitioner. He declined an offer to replace Taylor on the Court, but accepted another invitation a few years later. After another two years of the Barwick Court, Jacobs retired and was replaced by Ronald Wilson. Wilson left school after his tenth year and started work as a messenger in his local Western Australia courthouse. He enlisted in the Royal Australian Air Force and flew Spitfires in England. After the war, when he could not secure a position as a flying clergyman, he abandoned hope at joining the ministry and chose to study law instead. After graduating, he worked in Western Australia's state prosecutor's office. He studied briefly in the United States on a Fullbright Scholarship. He returned to the Crown service, and was appointed Solicitor-General of Western Australia. He served in this position for ten years before being the first Western Australian ever appointed to the High Court.

These changes in membership resulted in a Bench that resembled very little of the original Barwick Court. These changes affected a shift in approach that was at first subtle, but set the groundwork for the more marked departures that would occur in later Courts (Botsman 2000). The Barwick Court, though, is probably best known for its extraordinarily literal interpretation of tax law under section 90 of the Constitution. Most

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[46] Apparently, McTiernan sustained his injury while "trying to squash a bug on the floor of his bedroom" (Callinan 1999). Chief Justice Barwick denied McTiernan's request for a ramp to be built, leaving him physically unable to continue his record-breaking tenure on the High Court.

notably, the Barwick Court majority gutted section 260 of the *Income Tax Assessment Act 1936* (Cth) (Mason 2002a). This section was meant to be an anti-avoidance provision. In cases like *FCT v. Commonwealth Aluminium*[47] and *Slutzkin v. FCT*,[48] the Barwick Court set the groundwork for the creation of numerous tax avoidance schemes by reading section 260 very narrowly (Kobetsky and Krever 2002). This process added complexity to the tax code, and purposefully failed to consider the intent of the legislatures. Barwick himself argued against any civic or moral duty of citizens to comply with tax laws, citing only a legal obligation (Winterton 2002). Criticism of this interpretation came from the Court's onlookers, but also from within the Court. Justice Murphy was the most outspoken of the dissenters. Later, he noted that:

> The [Barwick] Court used to read Acts of Parliament absolutely literally - the words were all important - the spirit was often ignored. This made it easy for any competent lawyer or accountant to devise schemes to turn profits into tax losses. Because of this many of the rich ceased to pay tax and the burden fell on the workers and the scrupulous. (Murphy 1983, 1)

Chief Justice Barwick's large personality shaped a good deal of the public's opinion of the Court (Mason 2002a). He twice gave informal constitutional advice to the Governor-General, both instances seen by the public as morally dubious at best. The second and most famous of these is the advice he gave to Governor-General John Kerr surrounding the 1975 dismissal of Prime Minister Gough Whitlam. When it appeared that Whitlam would not be able to get the budget passed in the Senate, the Governor-General solicited Barwick's extra-judicial advice on the situation. Barwick responded in writing that he agreed with Kerr's unprecedented plan to sack the Prime Minister and

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[47] (1980) 143 CLR 646

[48] (1977) 140 CLR 314

invite the opposition leader to form an interim government (Blackshield 2002c). Barwick continued to defend his role in the dismissal, but many of the Court's observers maintain that the advice was controversial at best (Winterton 2002).

Additionally, the modicum of civility maintained prior to Barwick's tenure eroded significantly over this period. Especially tense was the relationship between Barwick and Murphy. They differed in a fundamental way in their approach to law and their conception of the nature of democracy (Hocking 1997). Barwick had opposed Murphy's appointment, and was unabashed in his criticism after Murphy joined the bench. One scholar has observed that the Court was "...dominated by the increasingly erratic behaviour of its Chief Justice, Garfield Barwick" (Hocking 1997, 227).

The Gibbs Court (1981-1987)

As compared with the Barwick Court, there were fewer changes in personnel during the Gibbs Court (see Table 2). Upon Barwick's 1981 retirement, Liberal Coalition Prime Minister Malcolm Frasier appointed Harry Gibbs to the position of Chief Justice. Gerard Brennan was selected to fill the resulting vacancy. This pair of appointments was meant to help depoliticize the Court after the controversy of the Barwick Court (Galligan 1987). The son of a Justice of the Supreme Court of Queensland, Brennan passed his high school exams at age 16. After university, he worked as an associate to his father. He had a very successful practice in Queensland before his appointment as the first President of the Administrative Appeals Tribunal. He was also appointed to the Federal Court, but stayed only a short time before being elevated to the High Court.

Soon thereafter, Justice Stephens resigned in order to take up the Governor-Generalship. Justice Keith Aickin died as a result of injuries sustained in a car accident

(Holloway 2001). William Deane succeeded Stephens, and Daryl Dawson joined the Bench shortly thereafter, both appointed by conservative Prime Minister Malcolm Frasier. Daryl Dawson was appointed to the High Court from his position as Solicitor General for the state of Victoria. In this role, he had argued 60 cases in the High Court, some of them critical in the development of Australian constitutional law.

William Deane, who was knighted by the Queen of England in 1988, has gone on to become a very popular figure in Australian public life. Born to a strict Catholic family, Deane excelled in a string of prestigious private schools and colleges (Holloway 2001). He went on to become a university lecturer, a prominent lawyer, and finally a judge before his appointment to the High Court Bench. His only participation in party politics was his short-lived membership in the Democratic Labor Party—a right-wing anti-communist party founded in the late 1950s (Stephens 2002). He, like his predecessor, would later resign in order to accept an appointment as Governor-General.

These High Court appointments, along with the growing tension between Gibbs and Murphy over Murphy's legal troubles, changed the dynamics of the Bench. In November of 1983, information was leaked to the press about illegally recorded telephone conversations between a Sydney solicitor and an unnamed judge. It was not until three months later that the judge on the tapes was identified as now High Court Justice Lionel Murphy. At this time, a series of allegations—most politically motivated—were leveled against Murphy (Blackshield 2002a). Among these charges was the allegation that he gave legal advice to and attempted to influence the judge in the trial of an acquaintance.

Table 2 - Justice Attributes on the Gibbs Court

Judge	Born	Age Appt.	Region	Religion	Judicial Exp.	Gov't Atty.	Schooling/Univ.	Politics	Appointed
Gibbs	1917	53	QLD	Protestant	11 yrs.	None	Private/U.Qld.	?	LNC
Aickin	1916	60	VIC	Protestant	None	None	Private/U.Melb.	?	LNC
Brennan	1928	52	QLD	Catholic	5 yrs.	None	Catholic/Downlands	?	LNC
Dawson	1933	48	VIC	Protestant	12 yrs.†	None	Public/U.Melb,Yale	?	LNC
Deane	1931	51	NSW	Catholic	5 yrs.	None	Catholic/U.Syd.	*	LNC
Mason	1925	47	NSW	Catholic	3 yrs.	S-G (Cth)	Private/U.Syd.	?	LNC
Murphy	1922	52	NSW	Catholic	None	A-G (Cth)	Public/U.Syd.	Labor MP	ALP
Stephen	1923	48	VIC	Protestant	2 yrs.	None	Overseas/U.Melb.	?	LNC
Toohey	1930	56	WA	Catholic	10 yrs.	None	Catholic/U.WA.	?	ALP
Wilson	1922	56	WA	Protestant	None	G-G (WA)	Public/U.WA,Penn	?	LNC

† Dawson's judicial experience was on the Australian Motor Sport Appeal Court.

* Deane joined the Democratic-Labour Party briefly in the 1950s as a result of his anti-communist stance (Campbell and Lee 2001).

Two separate Senate committees looked into charges against Murphy, the second of which resulting in his prosecution. At the first trial, in 1985, he was convicted of attempting to pervert the course of Justice. On appeal, the conviction was quashed and a new trial ordered. At the second trial in April of 1986, Murphy was acquitted of all wrongdoing. In light of the fact that Murphy had recently been diagnosed with terminal cancer, impeachment hearings against him had been halted (McGarvie 1999). Nevertheless, Chief Justice Gibbs wrote to Murphy and suggested that he refrain from returning to the Bench. He indicated that he thought Murphy's return undesirable, and that he thus had no intention of listing Murphy to sit (Campbell and Lee 2001). Notwithstanding the wishes of the Chief Justice, Murphy returned to the Bench until his death later that year (Blackshield 2002a).

It was during this turbulent time that some of the most provocative cases in the Court's history made their way to the Justices (Twomey 2002). The often-divided Court began to expand the powers of the Commonwealth government at the expense of the states. The proposal to dam the Franklin River may not sound politically controversial, but it lead to the infamous *Tasmanian Dam Case* (1983).[49] In this case, the majority of the Court dealt a crushing blow to state sovereignty by preventing Tasmania from building a dam on land entered in a 'World Heritage List' at the federal government's request (Twomey 2002). The opinions in the case, for both the majority and the minority, were "replete with policy considerations and value judgments" (Zines 2002c, 14).

[49] *Commonwealth v. Tasmania*, 158 CLR 1

In *Koowarta's* Case (1982),[50] the Court expanded the Commonwealth government's external affairs power. The Commonwealth government's conciliation and arbitration powers were also expanded during this time, especially in the *CYSS Case* (1983).[51] The Court's role in the centralization of government power did not go unnoticed, even by a previously disinterested public (Walker 2002b; Zines 2000).

During the Gibbs Court, the High Court's place at the pinnacle of the Australian legal system was finally secured. The Court severed its remaining ties to the Privy Council. In *Caltex Oil v. XL Petroleum* (1984),[52] the Court asserted that its decisions should prevail over Privy Council decisions on the same subject matter. Additionally, the *Australia Acts 1986* (Cth) were enacted at the end of the Gibbs Court, abolishing appeals to the Privy Council from the state courts. In 1984, by an amendment to the Judiciary Act of 1903, appeals as of right were replaced with a system requiring special leave to appeal. This gave the High Court an almost completely discretionary agenda. Perhaps in part because of this newfound docket control, the Court began to take on a more flexible approach to jurisprudence. In the process, Australian scholars point to the Gibbs court as the beginning of the end of strict legalism in the High Court, and a move toward a "more expansive view of Commonwealth legislative power" (Twomey 2002, 305).

The Mason Court (1987-1995)

If the Gibbs Court began to move away from strict legalism, then the Mason Court might be said to have abandoned it altogether (Doyle 1996). While the eight years of the

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[50] *Koowarta v. Bjelke-Petersen*, 153 CLR 168

[51] *R v. Coldham; Ex Parte Australian Social Welfare Union*, 159 CLR 297

[52] 155 CLR 72

Mason Court enjoyed a relatively stable membership (see Table 3), very little else was without tumult. Lionel Murphy lost his battle with cancer in October of 1986, leaving a vacancy on the High Court. Shortly thereafter, Gibbs reached the newly instituted retirement age of 70. This left a good deal of space for the new Labor Party Prime Minister, Bob Hawke, to alter the composition of the Court. Anthony Mason, by this time knighted by the Queen of England, was elevated to the position of Chief Justice to replace Gibbs. Mary Gaudron and John Toohey rounded out the first wave of Mason Court appointments.

Mary Gaudron was the first woman ever appointed to the High Court. Born in a country town in New South Wales, Gaudron's interest in the Australian Constitution developed early. She witnessed protests against a proposed amendment meant to ban the Australian Communist Party (Kalowski 2002). She attended law school on scholarship after getting married and becoming a mother. By most reports, she faced a good deal of resistance in a legal profession that was quite chauvinistic at the time (Blackshield et al. 2002). Despite the obstacles, she had developed a blossoming legal practice in New South Wales. She was appointed a Deputy President of the Arbitration Commission by age 31. She left the commission to lecture at the University of New South Wales, and was quickly appointed Solicitor-General of New South Wales in 1981. Her appointment to the High Court as Murphy's replacement was greeted with near universal praise.[53]

Like Mary Gaudron, John Toohey grew up in the country. Only the second appointee from Western Australia, he left his profitable law practice in Perth to establish the Aboriginal Legal Office in Port Hedland (Edelman and Gray 2002). At the same

[53] Among the few opponents of this appointment was a local gossip sheet accusing her of having "an emotional disposition inappropriate in a holder of judicial office" (Kalowski 2002, 294).

time, he served on the benches of both the Federal Court and the Supreme Court of the Northern Territory. For the remainder of his time on the bench—and beyond—he has been best known for his passionate defense of Aboriginal Rights. Moreover, he has proven to be willing to bend the traditional judicial role in order to achieve his goals. In an interview shortly before his retirement, he noted that:

> the decision not to change or not to develop the law is just as 'activist' as a decision to change the law and can have consequences just as dramatic. (Edelman and Gray 2002, 675)

The only other personnel change during the Mason Court was the retirement of Wilson in 1989. Michael McHugh was appointed by Prime Minister Bob Hawke to replace Wilson. McHugh's career got off to a shaky start when he dropped out of school at age fifteen to pursue various blue-collar jobs. At age 22, he began taking night classes, and soon finished his law degree (Guilfoyle 2002). Taking time to build a successful career in Newcastle, he was eventually appointed Judge of Appeal in the New South Wales Court of Appeal.

The Mason Court reinvented the role of the High Court, all the while shaping the interpretation of the Australian Constitution for a new era (Lavarch 1996). The establishment of the video link system in 1988 allowed the Court to hear special leave petitions from the comfort of their own Canberra building. This reduced the need for the Court to travel, while still maintaining accessibility (Jackson 1996). With the passage of the Australia Acts of 1986, the last avenues for appeal to the Privy Council were severed. The High Court, finally the only final court of appeal in all Australian Cases, turned its back on the Dixonian doctrine of legalism in favor of what has been described as a more practical and realistic approach (Galligan 1995). Leading the charge was Mason himself. He was not afraid to speak in public about judges and judging, and in the process

Table 3 - Justice Attributes on the Mason Court

Judge	Born	Age	Region	Religion	Judicial Exp.	Gov't Atty	Schooling/Univ.	Politics	Appointed
Mason	1925	47	NSW	Catholic	3 yrs.	S-G (Cth)	Private/U.Syd.	?	LNC
Brennan	1928	52	QLD	Catholic	5 yrs.	None	Catholic/Downlands	?	LNC
Dawson	1933	48	VIC	Protestant	12 yrs.	None	Public/U.Melb,Yale	?	LNC
Deane	1931	51	NSW	Catholic	5 yrs.	None	Catholic/U.Syd.		LNC
Gaudron ‡	1943	44	NSW	Catholic	6 yrs.	S-G (NSW)	Catholic/St. Ursula's	?	ALP
McHugh	1935	53	NSW	Catholic	5 yrs.	None	Catholic/U.Syd.	*	ALP
Toohey	1930	56	WA	Catholic	10 yrs.	None	Catholic/U.WA.	?	ALP
Wilson	1922	56	WA	Protestant	None	G-G (WA)	Public/U.WA,Penn	?	LNC

* McHugh married Jeanette Goffet, who later became a Labor Party Member of Parliament.

‡ Gaudron was the first female appointed to the High Court. Another would not be appointed until 2005.

introduced the idea that policy has an important role to play in the Court's decision-making process (Brennan 1996a).[54]

The Chief Justice's outspoken personality came as a bit of a surprise to onlookers, especially given Anthony Mason's cautious beginnings on the Bench (Doyle 1996). As apuisne Justice, Mason and Barwick issued many legalist-minded joint opinions (Walker 2002c). At the beginning of his tenure as Chief, the Court decided one of the most important cases in its history: *Cole v. Whitfield*.[55] In this case, the Court

> abandoned the various legalistic tests which had previously been developed for the application of section 92 of the Constitution. Instead it adopted a test based on the underlying purpose of section 92, which was, of course, to provide a free trade area throughout Australia. (Lavarch 1996, 15)

In its unanimous decision, the Court considered the political and economic history dating back to Australia's pre-federation experience (Selway 2002). They also considered modern context and values, arriving at a simple and lucid solution to the longstanding quagmire of free-trade jurisprudence (Coper 2002a).

Then, in 1992, the Court addressed the controversial native title issue in *Mabo*.[56] In this case, the Court incorporated the native title doctrine into Australian law. In the process, the majority overturned the longstanding policy that Australia was *terra nullius* on the arrival of the European settlers. Instead, they gave legitimacy to the society of indigenous people that existed here before colonization. This decision overturned 200

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[54] The one sitting Justice most clearly opposed to this new approach was Daryl Dawson, who expressed his distaste for the new radical approach on several occasions (Dillon and Doyle 2002).

[55] (1988) 165 CLR 360

[56] *Mabo v. Queensland [No. 2]* (1992) 171 CLR 1

years of ostensibly settled law and unleashed a good deal of social and political unrest, albeit with a delay of a couple of years (Solomon 1999).

The Mason Court's new approach to constitutional interpretation was also used to secure implied rights and freedoms (Dillon and Doyle 2002). As Leslie Zines observed:

> The decisions of the Court in respect to implied rights and freedoms, together with the minority views of Deane and Toohey JJ, led to some speculation whether Australia would finish up with something like a Bill of Rights without the necessity of actually enacting one. (Zines 2000, 226)

In the *Free Speech Cases*,[57] the majority held that a fundamental freedom of speech could be implied from the principle of representative government laid out in the Constitution. In these cases, the Court overturned legislation that was intended to limit political speech. The resulting doctrine falls far short of the American First Amendment standard, and is instead meant to encompass mainly political speech. Because of this, politicians were the most vocal critics of these new implied rights (Solomon 1999).

The Court also increasingly referenced international law in its opinions. As the Australian Constitution has no written statement of individual rights, Australia's commitment to various international treaties provided the Mason Court with another avenue through which to secure the protection of such rights (Patapan 2000a). While international treaties are not automatically incorporated into Australian domestic law, the ratification of the treaty can be seen as an obligation under international law (Joseph and Castan 2001). In *Teoh*,[58] the Mason Court prevented the deportation of a convicted drug dealer. He was the father of several children, and his deportation would have left them

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[57] *Nationwide News v. Wills* (1992) 177 CLR 1; *Australian Capital Television v. Commonwealth* (1992) 177 CLR 106

[58] *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273

without any parents. Although the UN Convention on the Rights of the Child had not yet been specifically incorporated into law, the Court held that ratification had generated a legitimate expectation that the treaty would be honored (Solomon 1999). This new legitimate expectation approach allowed the High Court to police the Commonwealth government, effectively bypassing the Parliament in the incorporation of these treaties.[59]

Through all of the doctrinal tumult, the Mason Court enjoyed a collegial workplace. Cooperation among judges on opinions was common and, as Brennan later recalled:

> Suggestions for changes in a draft judgment were freely given or received with full recognition of the independence and intellectual integrity of the other Justices. It is no wonder that the members of the Court remained on the most agreeable terms, though we often divided on issues of the greatest importance. (Brennan 1996a, 13)

Although the Court faced some of the most difficult issues in Australian law, it openly acknowledged its perennial law-making role. This allowed the Court to avoid haphazardly squeezing novel situations into tired and outdated precedent (Doyle 1996). This fell in line nicely with Mason's developing belief that the Court's primary function is to keep Australian law up to date with the changing conditions of the country (Galligan 1995).

The Brennan Court (1995-1998)

On Mason's retirement in 1995, Gerard Brennan was elevated to the Chief Justice position by Labor Prime Minister Paul Keating. During the course of Brennan's short tenure as Chief, the Court went through a transitional period, both in terms of membership (see Table 4) and of administrative difficulties. This is not to say that the

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[59] See also *Dietrich v. The Queen* (1992)177 CLR 292.

Brennan Court did not accomplish great things, but simply that the discontinuity of membership made the process more difficult (Jackson 2002a).

The first addition to the Brennan Court was William Gummow. He was appointed in April of 1995 by Prime Minister Keating to fill the vacancy left by Brennan's elevation. Gummow attended private school until university, when he attended the University of Sydney and graduated with honors. Gummow went on to teach in the Faculty of Law at the University of Sydney until his appointment to the Federal Court in 1986. While active in academic circles, he also maintained a diverse law practice before becoming a judge. His work included serving as junior counsel to then Commonwealth Solicitor-General Maurice Byers (Lehane 2002).

The following year, Justice Deane announced that he would retire early in order to serve as Governor-General. His replacement, Justice Michael Kirby, would soon be the most talked-about judge since Justice Murphy.[60] Like most High Court appointees, Kirby was an exceptional student. After graduating with numerous degrees from the University of Sydney, he maintained an active academic life. Additionally, he was chairman of the Australian Law Reform Commission. Following this, he served as the special representative of the Secretary-General of the United Nations for Human Rights in Cambodia. The assignment allowed Kirby to pursue one of his most passionate causes: the fight against discrimination and human rights abuses. His experience as an openly homosexual professional "taught him the pain and distress that discrimination causes" (Sheller 2002, 394).

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[60] Justice Kirby was awarded the "Judicial Oscar" by journalist John Henningham for Kirby's excessive mentions in newspaper articles in 2003. According to Henningham, Kirby was mentioned in 303 stories about the High Court (Albrechtsen 2003).

Justices Dawson and Toohey also retired during the three years of the Brennan Court. Their replacements were appointed by Liberal Coalition Prime Minister John Howard. Justice Dawson was replaced by Kenneth Hayne. Hayne was a Rhodes Scholar, but defied the predictions of his peers by eschewing a career in academia. After a wildly successful commercial law practice spanning two decades, Hayne was appointed to the Victorian Supreme Court and Court of Appeal. From here, he was elevated to the High Court.

Justice Toohey was replaced by Ian Callinan. Callinan took an unusual path to the High Court bench. After completing the equivalent of a high school education, he worked as an Immigration Department clerk. He subsequently studied law part-time at the University of Queensland, and later embarked on a very successful nation-wide practice in civil litigation. He was also called upon in 1985 to join the prosecutorial team in the case against Justice Lionel Murphy, which he did.[61] His interest in the law did not keep him from a second passion—fiction. He authored two novels and a series of plays which drew on his experience with jurisprudence and the related issues of ideology and morality (Hasluck 1998). In 1998, he became the first High Court Justice in two decades to be appointed directly from private practice.

The replacement of three Justices in as many years caused a great deal of technical difficulty on the Court. High Court protocol requires that the Court hand down opinions prior to the departure of any participating Justice. This made scheduling hearings very difficult, and resulted in a number of important constitutional issues being decided by a six-member Bench. Additionally, the members had little opportunity to familiarize

[61] Callinan secured a conviction on the first instance, but in the retrial mandated by the appellate court, Murphy was acquitted.

themselves with the style and idiosyncrasies of their colleagues, and thus endured times of noticeable tension (Jackson 2002a).

Despite these difficulties, the Brennan Court managed to accomplish a lot more than many onlookers had expected (Haultain 1997). As a Chief Justice, Brennan was "generally non-interventionist and invariably polite" (Kirby 2003, 6). The Court under Brennan's leadership worked mainly to consolidate the law. In this, it was quite successful (Baker and Gageler 2002). One of the most notable areas clarified by the Brennan Court is the freedom of political speech. In *Lange v. ABC* and *Levy v. Victoria*,[62] the Court unanimously confirmed an implied constitutional protection of political speech related to both defamation and non-verbal political protest. This move helped to clarify the deep divisions among the members of the Mason Court regarding the effect of implied free speech on the defamation of public figures and non-verbal political speech (Blackshield 2001).

The *Lange* decision, despite its acceptance of an implied freedom of communication, is sometimes seen as the beginning of the Court's return to a more conservative, doctrinal approach to constitutional jurisprudence. This is due not to the substance of the opinion, but the more traditional, legalistic arguments surrounding the substantive conclusions (Zines 2000; Stone 2000). Observers of the Court anticipated that this shift in tone and language was an attempt by the Brennan Court to distance itself from the perceived activism of the Mason Court, while sustaining the substance (Stone 2000).

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[62] *Lange v. Australian Broadcast Corporation* (1997) 189 CLR 520; *Levy v. Victoria* (1997) 189 CLR 579

Table 4 - Justice Attributes on the Brennan Court

Judge	Born	Appt. Age	Region	Religion	Judicial Exp.	Gov't Atty	Schooling/Univ.	Politics	Appointed
Brennan	1928	52	QLD	Catholic	5 yrs.	None	Catholic/Downlands	?	LNC
Callinan	1937	60	QLD	Protestant	None	None	Private/U.Qld.	?	LNC
Dawson	1933	48	VIC	Protestant	12 yrs.	None	Public/U.Melb,Yale	?	LNC
Deane	1931	51	NSW	Catholic	5 yrs.	None	Catholic/U.Syd.		LNC
Gaudron	1943	44	NSW	Catholic	6 yrs.	S-G (NSW)	Catholic/St. Ursula's	?	ALP
Gummow	1942	52	NSW	Protestant	9 yrs.	None	Private/U.Syd.	?	ALP
Hayne	1945	52	VIC	Protestant	5 yrs.	None	Private/U.Melb,Oxford	?	LNC
Kirby †	1939	56	NSW	Protestant	13 yrs.	None	Public/U.Syd.	*	ALP
McHugh	1935	53	NSW	Catholic	5 yrs.	None	Catholic/U.Syd.		ALP
Toohey	1930	56	WA	Catholic	10 yrs.	None	Catholic/U.WA.	?	ALP

* Kirby reportedly had links to the Labor Party (Sheller 2002).

† Kirby is the first and only openly homosexual Justice on the High Court as of 2008

The Brennan Court also attempted to refine the application of the doctrine of intergovernmental immunities. The *Cigamatic*[63] case held that the Commonwealth government maintained a wide exemption from state-levied taxes. Since the *Cigamatic Case*, the Court had not yet managed to unify behind a specific area of governmental immunity (Dominello 2001). It was not until *Henderson's Case*[64] in 1997 that the Court began to resolve the issue. Here, the majority reduced the extent to which the Commonwealth would be free from taxes levied on its agencies by the various state governments. In *Ha v. NSW*,[65] though, the Brennan Court found that state-instituted tobacco taxes were to be classified as excise duties. Thus, the power to tax these items remained solely with the Commonwealth government. These decisions taken together worked to keep the states "out of the traditional areas of taxation" (Haultain 1997, 2).

Another important topic clarified by the Brennan Court is the area of native title. In *Mabo*,[66] the Mason Court had determined that pastoral leases did not necessarily extinguish native title. If this were true, then up to 42% of Australia might be redistributed through native title claims (Patapan 2000b). This very question came to the Brennan Court in the *Wik*[67] case. The majority held that, to the extent that pastoral leases were in conflict with native title rights, the leases would prevail. In this way, the

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[63] *Commonwealth v. Cigamatic Pty Ltd* (1962) 108 CLR 372

[64] *Residential Tenancies Tribunal (NSW), Re; Ex parte Defence Housing Authority* (1997) 190 CLR 410

[65] *Ha v. New South Wales* (1997) 189 CLR 465

[66] See n. 56.

[67] *Wik Peoples v. Queensland* (1996) 187 CLR 1

Brennan Court acknowledged native title rights, but reigned them in (Baker and Gageler 2002).

The Gleeson Court (1998-present)

Chief Justice Brennan retired in 1998. His replacement, Murray Gleeson, was elevated directly to the Chief's position from the Supreme Court of New South Wales. While some early assessments assumed that the Gleeson Court would continue the consolidation of the jurisprudential changes of the Mason Court (Patapan 2000b), the substantial imprint of John Howard's more conservative appointees leads some to question this assumption (Carne 2002). Although Australian legal scholars had once declared the demise of legalism, the Gleeson Court has at least resurrected the debate (McHugh 2004) much to the chagrin of some observers (Carrigan 2003).

Murray Gleeson was raised in a Catholic family in New South Wales. Not only did he excel in his academic studies, but as a youth he also played cricket and raised piranhas (Kirby 1998b). After graduating with honors from Sydney University, he began a very successful law practice. He very quickly became a highly sought-after barrister. In 1980, he won the last appeal by leave from Australia to the Privy Counsel in England (Walker 2002a).[68] In 1988, he was appointed Chief of the Supreme Court of New South Wales. This appointment was popular among members of the law profession (Walker 2002a). Ten years later, he was elevated to the High Court Bench by Liberal Coalition Prime Minister John Howard. He was certainly not a new face in the High Court, as he had appeared as counsel in 70 reported cases (Blackshield et al. 2001).

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[68] See *Port Jackson Stevedoring v. Salmond & Spraggon* (1980) 144 CLR 300.

Table 5 - Justice Attributes on the Gleeson Court

Judge	Born	Apt. Age	Region	Religion	Judicial Exp.	Gov't Atty.	Schooling/Univ	Politics	Appointed
Gleeson	1938	59	NSW	Catholic	10 yrs.	No	Catholic/U.Syd.	?	LNC
Callinan	1937	60	QLD	Protestant	None	None	Private/U.Qld.	?	LNC
Gaudron	1943	44	NSW	Catholic	6 yrs.	S-G (NSW)	Catholic/St. Ursula's	?	ALP
Gummow	1942	52	NSW	Protestant	9 yrs.	None	Private/U.Syd.	?	ALP
Hayne	1945	52	VIC	Protestant	5 yrs.	None	Private/U.Melb,Oxford	?	LNC
Kirby	1939	56	NSW	Protestant	13 yrs.	None	Public/U.Syd.		ALP
McHugh	1935	53	NSW	Catholic	5 yrs.	None	Catholic/U.Syd.		ALP

The Gleeson Court is mostly seen as relatively conservative, quite a change from the more adventurous Benches of the recent past. Generally, the main point of departure cited is a renewed emphasis on the text and structure in statutory and constitutional interpretation (Zines 2002b; Patapan 2002). Indeed, Chief Justice Gleeson has been anything but shy in advocating a return to Dixonian legalism (Gleeson 1998, 2001b, 2002b), and Sir Anthony Mason has taken note of this shift (Mason 2000). This focus is not shared by all members of the Court, however, and "there *is* an interpretation debate occurring on the High Court and how it unfolds may have a significant impact on the trajectory of our future constitutional jurisprudence" (Meagher 2002, 14).

The High Court Centenary and Beyond

The analysis of the High Court presented here extends from Chief Justice Barwick's 1964 ascension to the High Court through Justice Gaudron's retirement in 2003. While the three subsequent appointees are not included in the analysis, a few words about them can help to paint a picture of the future of the High Court under Chief Justice Gleeson and beyond. Indeed, these changes to the Court have likely consolidated the Gleeson Court's return to legalism (Pelly 2008). While it is too soon to know for sure, some observers argue that all three new appointees are likely to follow Gleeson's favored path of Dixonian legalism (Ackland 2007).

Dyson Heydon was appointed in 2003 after Justice Gaudron's early retirement. An avid crusader for a return to a more traditional style of judicial decision making, he gave a lecture entitled "Judicial Activism and the Death of the Rule of Law" mere months before his appointment to the High Court (Heydon 2003). In this piece, he lamented two tendencies working to pull the judiciary further from Dixonian ideals.

> The first is the desire to litter judicial decisions with the judge's opinions on every subject which may have arisen, however marginal. The second is the desire to state the applicable law in a manner entirely unconstrained by the way in which it has been stated before because of a perception that it ought to be different. (Heydon 2003, 12)

As for Justice Susan Crennan, the picture is much less clear. Crennan was appointed to replace Justice McHugh upon his mandatory retirement in 2005. She was one of "McHugh's Angels," as the ten women named by McHugh as suitable replacements have been dubbed (Pelly 2005). There has been some early speculation that she may be more of an activist than John Howard's Liberal Coalition bargained for. In her swearing-in speech she noted that legal developments in the High Court have occurred against a background of significant social change, and major shifts in public and private values.

> But the images to which I have referred, of a judiciary which transfuses fresh blood into our polity and of the law as a living instrument conjure up the human qualities needed for the impartial dispensation of Justice according to law. (Donald 2005)

The most recent appointee to the High Court was a favorite among McHugh's Angels to replace McHugh, and had also reportedly missed the nod to replace Justice Gaudron by a small number of cabinet votes (Pelly 2005). After being passed over twice, Susan Kiefel was appointed in 2007 to replace Justice Callinan. Justice Kiefel's appointment has been regarded as largely uncontroversial and relatively apolitical (Bradford 2007). She was appointed to the High Court by Liberal Attorney-General Philip Ruddock, but was previously appointed to the Federal Court bench by Labor Attorney-General Michael Lavarch. One reporter explains that, while she is "regarded as conservative, Kiefel is not expected to be captive to either side of politics" (Marriner 2007, 1). She has been described by a conservative commentator as having "earned a reputation as a fine black-letter lawyer" (Albrechtsen 2007, 14).

In 2004, the High Court celebrated its centenary amidst the thunderous roar of two Royal Air Force F-111 jets setting excess fuel ablaze in the Canberra night sky. The reaction to this exercise was mixed.[69] Justice Kirby later pondered the symbolism of the two streaks of light stretching across the horizon in a speech at the University of Notre Dame. He indicated that, in many respects, this display represented a distinct change from the past to the future (Kirby 2004).

It remains to be seen whether the centenary becomes an historical turning point. In the span of its first hundred years, though, the High Court has changed dramatically. From a roving band of three constitutional framers traveling the Australian continent, the High Court has become a highly respected and very important part of the Australian political system.

That said, the increasing willingness for members of the Court to embrace a less legalistic vision of the High Court's decision-making process has raised more than a few eyebrows. While some members of the current Bench are making a concerted effort to reinstate a less activist reputation, they still find themselves needing to defend their actions to an ever-more-critical media and public. Legal scholar Anthony Blackshield noted in a recent panel discussion that the Court "has been subjected to what really were unprecedented political attacks" over the course of the last decade (Blackshield in Jackson 2003). In part as a reaction to this, the High Court has appointed a Public Information Officer to help improve the Court's relationship with the media.

Another suggestion aimed at improving the Court's approval ratings is to alter the format of its opinions. One prominent legal scholar advises the Court to "consider

[69] Having been an unsuspecting witness, the author was among those extremely startled by the sight of the fiery sky.

making a greater effort to produce joint judgments" (Williams 1999, 145). Observers lament that the Court's adherence to a seriatim opinion tradition makes the Court's output unnecessarily confusing, especially given that the Court's most important role is to clarify the law (Willheim 2002; Campbell 2003). After a review of the High Court's practices and procedures, the remainder of this analysis will examine the role of joint opinions on the High Court of Australia.

CHAPTER THREE: EXISTING THEORIES OF JOINING BEHAVIOR

Despite much progress during the past few decades in the study of courts and judicial behavior, most theory and data developed by social scientists for understanding legal systems still remain very much the product of, and thus bound to, the inevitable peculiarities of the U.S. context.

— Burton Atkins (1991, 881)

The study of joining behavior has become an important part of the judicial behavior scholarship. Certainly, joining behavior on the United States Supreme Court is the main focus of what Epstein and Knight call the "strategic revolution" in the study of law and courts (2000). As Segal and Spaeth point out, the decision whether or not to join the majority opinion is "among the most important decisions a justice makes" (2002, 387). A good deal of evidence has been amassed in the study of joining behavior on the Supreme Court. Researchers have identified numerous factors that contribute to the formation of opinion coalitions. These include the policy positions of the individual judges (Rohde 1972a), the selection of a majority opinion author (Brenner and Spaeth 1988), the content of the opinion itself (Schwartz 1992), workload considerations (Spriggs et al. 1999), and issue specialization (Brenner and Spaeth 1986).

The mere presence of opinion coalitions, of course, is related to the norms and traditions of the Court and the interpretation of these by the individual judges (Grossman 1968). As the previous chapter demonstrates, the High Court of Australia has institutional differences—most notably the seriatim opinion tradition—that may give joining behavior a significantly different purpose and meaning.

The American Literature

The quest to fashion a complete theory of judicial decision making has been going on for quite some time. In many respects, it has been successful. The major contributors

have been proponents of the traditional legal model, the personal attribute model, the attitudinal approach, and various rational actor models. Together, these have yielded an enormous list of factors that have been hypothesized to contribute to the understanding of judicial behavior, with various degrees of empirical support.

The legal model of Supreme Court decision making is traditionally associated with the legal positivist tradition, emphasizing the mechanical role of the judge in the application of the law. More recently, judicial behavior scholars have developed a more sophisticated contemporary version of this tradition, most often referred to as post-positive legalism. This perspective shares one thing in common with its more deterministic predecessor—namely, the assertion that decisions of the Justices should be understood largely in terms of the dictates of the laws that speak to the dispute in question. All told, the legal model's understanding of judicial decision output is most significantly derived from knowledge of the relevant laws (in the legal positivist tradition) or, alternatively, from knowledge of the judge's understanding of the relevant laws (in the post-positivist tradition).

The traditional legal model, holding that case facts and precedent serve as the sole determinants of the outcome of litigation, was called to task by Pritchett's *The Roosevelt Court* (1948). Pritchett identified policy preference as an important explanatory variable, along with some of the traditional legal factors involved in understanding judicial outcomes. He stopped short of an empirical test of such factors, but other researchers quickly stepped in to conduct statistical analyses (Baum 2003).

The attitudinal model represents a significant break from the legalist traditions. Developed in response to the American legal realist movement, the attitudinal model is

the culmination of a large and varied behavioralist tradition. Political scientists, intrigued by Pritchett's introduction of legal realist theory to the discipline, sought to find ways to empirically validate or invalidate this politicizing revelation about the judiciary.

The earliest attempts to scientifically analyze judicial behavior led researchers to probe such explanatory variables as social background characteristics (e.g., Nagel 1961; Schmidhauser 1962), policy-oriented attitudes and values (e.g., Schubert 1965; Spaeth and Parker 1969), conception of the judicial role (e.g., Grossman 1968), and the dynamics of small-group membership (e.g., Snyder 1958; Ulmer and Nicholls 1978). Each of these approaches arose out of the search for satisfactory statistical evidence. Small-group dynamics research is arguably closer to the rational choice tradition than the others are, while the role orientation approach is closer to the legalist tradition. This diversity of behavioral measures illustrates the rapid innovation of the field in the late 1950s through the 1960s. It is also a demonstration of the willingness of behavioralist researchers to pursue numerous avenues in an effort to gain an empirical handle on the issue. In terms of Supreme Court research, the attitudinal model has survived the others, largely because of its impressive ability to explain behavior. The attitudinal model derives its leverage by concentrating on individuals—specifically on the *differences* between individuals in terms of policy orientations.

The rational choice tradition, like the attitudinal tradition before it, grew largely out of theoretical advances in other fields of research. Rational choice theorists, most notably William Riker (1962), were beginning to develop a positive political theory, applying the assumptions of rational choice to political behavior and phenomena. These assumptions, although stated differently by different researchers, largely center on 1) the

ability of actors to rank alternatives in terms of their goal preferences, and 2) the ability of actors to select from available alternatives in order to maximize the attainment of these goals (see Epstein and Knight 2000). The focus of the theory is on the individual, but the theory emphasizes the similarities between individuals instead of their differences. In the context of judicial decision making, this difference is usually manifested in the concentration on strategy as shaped by institutions. Although this is different from the attitudinal model, most incarnations of judicial strategy include explicit provisions for individual attitudes and goals. Because of the Supreme Court's majority opinion tradition, eliciting joining behavior is a crucial part of judicial strategy.

While the seeds of rational choice can be found in the early work of Schubert (1965) and Pritchett (1961), the first explicit application of rational choice theory to judicial decision making is found in Murphy's *Elements of Judicial Strategy* (1964). Although the trend toward rational choice theory in the other American political science sub-disciplines grew at a fever pitch, judicial scholars largely abandoned the approach. The empirical rewards of the more behavioral strategies were more immediately apparent. It was not until the work of economist Brian Marks (1989) that rational choice once again grabbed the attention of the judicial subfield.

Marks, followed by reputable political scientists from various sub-disciplines, reintroduced rational choice theory to the judicial subfield (Ferejohn and Shipan 1990; Ferejohn and Weingast 1992). Some argue that there is now a distinct trend toward rational choice theory in the study of Supreme Court decision making (Epstein and Knight 2000). Certainly, with a number of significant strategy-based models of decision making emerging in the last decade, the approach occupies an important space in the

contemporary literature (Epstein and Knight 2000; Hammond et al. 2005; Maltzman et al. 2000).

The result is a renewed debate about the appropriate paradigm for understanding judicial decision making on the Supreme Court. Traditional proponents of the attitudinal model have been reinvigorated, responding to the challenge of the rational choice theorists (i.e., Segal and Spaeth 2002). While compelling reasons for employing a rational choice approach in lower court studies are well understood, the case for abandoning the attitudinal model at the Supreme Court level is not nearly as clear-cut.

But while the attitudinal model tells us how Supreme Court Justices are expected to vote on the merits, it has a harder time helping us understand processes that happen before, during, and after the merits stage. Proponents of the rational choice approach to studying judicial politics have developed many theories about the constraints on U.S. Supreme Court Justices. Constraints are imposed either by external actors limiting the expression of judicial preferences (Epstein and Knight 2000), or by the judges upon themselves and each other (Maltzman et al. 2000).

Proponents of applying strategic, rational choice-based theories to the Supreme Court largely argue that such an application affords researchers the ability to describe more than simply the votes on the merits (Epstein and Knight 2000). For example, the decision of a litigant to pursue a remedy through the filing of a petition for a *writ of certiorari* is an external constraint on the judges that is not explicitly addressed by the attitudinal model (McGuire et al. 1999). Other such external constraints include the effects of public opinion, congressional policy positions, and more. In addition to this, there are internal constraints on the Justices such as collegiality, equity, efficiency, and

strategic considerations of the positions of others. The adoption of the rational choice approach allows for an understanding of judicial constraints, while not abandoning the idea that judges have (and use) policy preferences to make decisions (Shapiro 1995).

Proponents of the attitudinal model do not concede much to this argument. Segal and Spaeth (2002) take up the cause against using rational choice models of Supreme Court behavior. First among their criticisms of this approach is the stringency of the assumptions that are inherent in rational choice models. This is a familiar argument from critics of rational choice theory as applied to political behavior generally (Green and Shapiro 1994). Perhaps more damning, however, is their contention that the empirical evidence simply fails to bear out the hypotheses derived from these strategic theories (Segal and Spaeth 2002).

The research has begun to come full circle. Several scholars have started to take a fresh look at the traditional legal model variables, integrating them with the lessons learned from other empirical work. Segal (1984) has examined Supreme Court search and seizure cases from the perspective of the legal model. In this research, he uses a multivariate model in an attempt to bring order to the seemingly chaotic realm of Fourth Amendment litigation. His findings suggest that traditional legal characteristics do matter in these particular cases. Aliotta (1988) applies a similar approach to equal protection cases. Although her legal variables do not correspond in any meaningful sense with those used by Segal (1984), she does find that they add explanatory power to the attitudinal variables. George and Epstein (1992) also find evidence to support the inclusion of traditional legal variables in models of capitol punishment cases.

The lesson here, of course, is that competing models of judicial decision making are only "competing" to the extent that they are incompatible in their approach to a particular task. A reliance on attitudes is important in most functioning strategic models, and this pairing can be extremely helpful in understanding decision-making behavior in courts other than the United States Supreme Court. If nothing else, it reminds the researcher to be aware of potentially significant internal, external, or legal positivism-inspired constraints on judicial behavior. It also instructs the researcher how to go about accounting for the impact of any of these constraints once they are identified. Judicial scholars should not be deterred from considering these resources in other judicial decision-making contexts; to the contrary, there is reason to believe that such considerations would carry significant explanatory power across national borders. The fact that these theoretical resources have been little used in the comparative context, it seems, is mostly a sign of the relative infancy of the comparative judicial research program.

Judging Across the World

The business of courts around the world is to settle disputes in accordance with some sort of written or understood set of laws or norms (Tate et al. 1990). While courts tend to have similar broad goals, they pursue these goals in diverse ways. Some courts have the power only to decide small matters of legal application. Others are given the responsibility of judging the laws created by the legislature against some higher or constitutional norm. In any case, courts are always situated within a particular social and political context, and they always have a particular set of institutional features and procedures that shape the way they administer justice in their own society.

Even courts embedded within democratic systems of government have widely different methods, responsibilities and contexts. As Australian High Court Chief Justice Murray Gleeson put it, "democracy itself can hardly be said to contain an inherent definition of the role of the judiciary" (Gleeson 1997). These differences can have important consequences for the application of the standard American judicial behavior models even to courts in other liberal democratic countries.

With a few notable exceptions, though, judicial behavior scholars have virtually ignored courts outside the United States. While Tate (2002b) traces the tradition of studying non-American courts as far back as the late 1800s, the first modern examples of systematic research on the judiciaries of other nations were written in the 1960s. Some of the earliest works were translations of behavioralist work from native scholars. The first research programs that actively compared more than one country in the modern tradition began to emerge in the late 1960s (e.g., Sheldon 1967). Shortly thereafter, Glendon Schubert began his global odyssey, applying jurimetrics techniques to courts in various corners of the world, inspiring others to do the same. Two major collections of comparative (and quantitative) judicial behavior research appeared at the end of the decade, setting the stage for what seemed likely to be a major movement in the subfield (Grossman and Tanenhaus 1969; Schubert and Danelski 1969).

From these dramatic beginnings, however, the resulting trickle of comparative empirical work has been less than impressive (Tate 2002a). Despite the repeated pleas of Tate and others, comparative judicial research remains a sub-sub-discipline, with little acknowledgement from American judicial scholars generally. Indeed, from 1960-1991, Tate (1992) found that comparative court research occupied less than five percent of the

published work in major political science journals. Many wondered what all of the fuss was about in the first place, why studying courts in other countries may be important, or even why it could be interesting. Despite the promise of travel to exotic locations, many gave up on this line of research because of the difficulty in obtaining data—especially the non-unanimous decisions that were critical to the existing American judicial theories of the time.

The benefits of comparing judicial institutions across countries should seem obvious to the student of comparative politics. By studying the American courts almost to the exclusion of other systems, we have developed intricate models that may not be generalizable to any other system (see Sartori 1970). Even if we desire only a way to understand the American system, though, this myopic case-study method may rob us of potentially useful information. By failing to observe more than one system, we fail to gain a handle on the importance of a myriad of institutional, cultural and political variables in the judicial decision-making process.[70]

One purpose of comparative judicial research may be to relieve the United States Supreme Court of its most prevalent stigma: that of the Western high courts, it is alone in its overtly political decision making. Outside of the United States, the legal positivist model is widely held by lawyers and social scientists alike (Haynie and Tate 1998). Without systematic empirical analysis, researchers will continue to be unable to identify those countries that may share this dubious distinction. While our experience in America has led us to suspect that ours is not the only political high court in town, empirical

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[70] In the early 1980s, Tate observed that the study of comparative judicial politics had yet to be integrated into the study of comparative politics more generally (1981a). Although he provides several concrete steps toward achieving this goal, progress on this front has remained sporadic at best.

evidence is only now beginning to confirm this (Epp 1998; Magalhaes 1998; Smithey 2002; Stone 1992; Tate and Vallinder 1995; Volcansek 1993; Waltman and Holland 1987).

Comparative judicial research can also be a worthy pursuit in its own right. The one area where the study of courts has been taken up by comparative politics scholars is in the area of democratization research. One section of this literature examines the relationship between institutional arrangement (i.e., presidential or parliamentary system) and the independence of the judiciary (Ferejohn 1995). Ferejohn's findings support the idea that presidential systems afford the judiciary more independence, which is associated in other research with the destabilization of fragile democracies (Tate et al. 1990). Other research shows that single party dominance begets low levels of judicial independence (Ramseyer 1994; Ramseyer and Rasmusen 1997), which in turn presents complications for democratic consolidation (Rose and Shin 2001). In short, the comparative study of courts can assist not only in the validation and refinement of models of American judicial behavior, but it can also assist in the understanding of political systems generally.

Australian Jurimetrics and Beyond

While many comparative judicial scholars lament the lack of attention to courts outside of the United States (Tate 1996), it may be unfair to conclude that the Australian High Court has been neglected completely. The field of jurimetrics was especially well-received by a handful of Australian legal scholars. Jurimetrics, or the application of quantitative mathematical methods to legal problems, arose from the behavioralist focus on "attitudinal" variables in the study of judicial decision-making behavior. Very quickly following the behavioral revolution in the study of American courts, like-minded researchers abroad began to apply similar techniques to the Australian High Court.

After his book *The Judicial Mind* (1965) inspired the behavioral approach to studying American courts, Glendon Schubert himself contributed much to the early jurimetrics work in Australia. In the late 1960s, Schubert published two articles on the High Court (Schubert 1968; 1969a), largely in an attempt to verify the findings of his work on the U.S. Supreme Court. He identifies two significant ideological scales for the tenure of Chief Justice Dixon (1952-1964). The first is called the "X-scale," and is made up of issues including support for economic underdogs, religious morality, security, socialism, and government regulation of business. The "Y-scale" is made up of more broad theoretical divides including adherence to a strict interpretive theory of the constitution, perspective on the role of judicial review, and judicial and federal government centralization (Schubert 1969a). He finds that a judge's position on these two scales is related to that person's age, state of residence, and score on a conservatism/liberalism scale.

This work was closely followed by Australian researchers, some of whom conducted their own research in this vein (Blackshield 1972; 1978; Douglas 1969). By the end of the 1970s, nearly forty year's worth of High Court data had been analyzed for decision-making patterns (Blackshield 2002e). The result of these studies had some findings in common with Schubert's – most importantly that at least two distinct dimensions of decision making existed in the High Court during the analyzed years. One of these dimensions, according to Blackshield (1972), roughly corresponds to the familiar left-right dimension of policy preferences. His findings also pointed to a second relevant dimension, this one corresponding with differences in attitudes about the distribution of legal control of the institutions of government.

The systematic study of the Australian High Court was not limited to Schubertian-style endeavors. A parallel line of Australian jurimetrics research was inspired by the work of American researcher Fred Kort (1957; 1963). This research applies mathematical methods in an attempt to create models of judicial votes, thus predicting future court outcomes. Kort's models place heavy emphasis on the importance of case facts in the production of judicial outcomes. Prediction-minded researchers like Alan Tyree (1977; 1981) have analyzed the High Court in this way (Blackshield 2002e). Tyree attempted to salvage the practice of using content analysis to model case facts by relaxing the strict deterministic assumptions of previous research (Tyree 1981). In doing so, he finds evidence to support the idea that case facts are at least related to decision output, even in Australia's highest court. He also offers an alternative to the Schubertian classification of similarities and differences between judges. By using a fact-based distinction, he created issue-specific multidimensional maps in ideological space. In this way, he is more confident that he is, indeed, comparing apples to apples (Tyree 1977). He concludes that this non-metric multidimensional scaling method allows structure to emerge in data that were previously devoid of any obvious pattern.

In the 1970s and 1980s, as interest in comparing courts waned among American scholars (Tate 2002a), a similar trend formed in Australia. Australian researchers turned away from this type of research for practical and theoretical reasons. The limits of the factor analysis techniques had largely been reached, especially at a time where computing power was at a premium. Additionally, Australian legal scholars were faced with a general lack of statistical training and doubts about the ability of the methodology to add significantly to the existing knowledge (Blackshield 2002e).

This lack of confidence in statistical methodology may be due to the 'legalist' culture among Australian scholars and High Court observers at the time. From the legalist perspective, judges are constrained in large part by legal precedent, and outside influences are irrelevant to the decision-making process. Legalism does not deny the political nature of the questions before the Court, nor does it eschew the policy implications of the Court's decisions (Gageler 2002b). Instead, it simply denies the use of such non-legal factors in the decision-making process. Members of the High Court have been known to perpetuate the idea that decisions are made exactly this way (Galligan 1987), and that creating law on the basis of extra-legal concerns is simply beyond the scope of the High Court's role (Gageler 2002b). The Court has traditionally held fast to the legalist framework as its sole method for interpreting common law, statutory law, and the constitution (Thompson 1982).

The High Court was not conceived until well after the famed *Marbury v. Madison* (1803) case. The constitution that created the High Court modeled it largely after the U.S. Supreme Court as it operated in the late 19th century, and gave it the power of judicial review outright (Galligan 1991). Unlike the U.S. Constitution, though, the Australian Constitution does not have an explicit list of individual rights. The existence of the Bill of Rights means that "each Justice is inevitably drawn deeply into its boiling brew of politics, the attributed or perceived social values of innumerable groups" of American politics (Callinan 1999, 3). The absence of such a constitutional document in Australia means that the Australian High Court Justices are not directly subjected to the aforementioned fate. On the other hand, the role of the High Court in determining which rights are implied in the document is necessarily more ambiguous than in the United

States (Kirby 1999). In most other ways, though, the Australian Constitution is much more explicit than the American Constitution, making it less necessary for the High Court to appear to be divining the true meaning of the document (Crawford 1993). In this way, with the exception of civil rights cases, the judges in the Australian system have an easier time maintaining the air of legalism. Before ascension of Sir Anthony Mason to the High Court Chiefship, the High Court generally stayed away from addressing civil rights cases beyond assenting to the will of Parliament, making their claims of legalism nearly airtight.

For this reason, legalism is particularly important in the context of the High Court. Not only is it the traditionally accepted interpretation strategy but it is also one of the few defenses the Court has against its particular political context. Because of the history of conflict between the Labor and Liberal parties, the liberal consensus enjoyed in America is not a guarantee in the Australian context. The Labor party was virtually excluded from the drafting and ratification process of the Australian Constitution, and their main political goals remain outside the scope of the constitutional framework. Since the ratification of the U.S. Constitution, political debate in America has generally taken place inside the framework of the institutions prescribed by the Constitution. In Australia, however, the main points of contention between the parties run much deeper—to the very core of the liberal institutions contained in the Australian Constitution. The authors of the Australian Constitution were decidedly anti-centralist, and the labor movement's interests in creating a strong central authority were generally excluded from the discussion (La Nauze 1972). The labor movement saw the Australian Constitution as an obstacle to its objectives, and approached it with a degree of hostility (Hirst 1995). This

debate has continued into modern times, and the High Court has often been drawn into the debate (Walsh 1997). Because of this unique political difficulty, the Justices rely on the popular legalist rhetoric in order to show that they remain impartial in the face of this potentially divisive conflict (Crawford 1993).

This is not to say that the U.S. Supreme Court does not need the support of the people in order to maintain its power. On the contrary, the constitutional weakness of the Supreme Court means that it needs the support of the public in order to keep its legitimacy (Franklin and Kosaki 1989). Research has shown that Justices, especially the moderate ones, are sensitive to the ebbs and flows of public opinion (Mishler and Sheehan 1993; 1996). Justice Kirby warns that any dissatisfaction with the U.S. Supreme Court might foreshadow similar feelings about the Australian High Court:

> Nowadays, abuse and insult are not unknown. Every judge can accept criticism and acknowledge that sometimes it is warranted. But Australians must be careful to avoid the perils of damage to our institutions that the judiciary faces in the United States. (Kirby 2001)

That this observation comes from one of Court's leading critics of Australian legalism is of particular interest. The commonly accepted way to defer criticism of the Australian judiciary has been to invoke a legalist perspective – whether in practice or only in rhetoric. Indeed, analysis of mid-20th century Communist Party cases indicates the High Court was particularly unresponsive to public opinion (Sheldon 1967).

Although the legalist culture has begun to wither among Australian legal scholars and casual court observers alike, the concern for legitimacy remains. This has left a significant rift among members of the Court, both past and present. While some Justices adamantly believe that legalism is the only way to secure public confidence in the judiciary (e.g., Gleeson 2000a), others argue that a failure to accept the duty to craft law

in the best interests of the Australian people might be detrimental to the Court's legitimacy (Kirby 1996).

No matter which of these camps is correct, experts and citizens alike have begun to speculate that some set of extra-legal factors influences the policy output of the Court (e.g., Galligan 1987; Haultain 1997). Some of the opposition to the traditional legalist view likely comes from cues given by some members of the Court. Like the U.S. Supreme Court, the High Court decides many cases in which all of the members fail to agree on what should be the proper outcome. In these cases, both the majority and the dissenters put forth logical arguments to support their positions. In most cases neither argument is logically necessary, and each is logically feasible (Sawyer 1967). As witnesses to the empirical studies of the U.S. Supreme Court, Australian legal scholars are beginning to protest loudly against the idea that even a relaxed version of the traditional legalist model is an appropriate way to characterize the work of the High Court (Galligan 1987).

This realist critique of legalism is now coming not only from onlookers but also from the members of the Court (Kirby 1983). The High Court under Chief Justice Mason (1987-1995) moved down a path of innovation and activism. Some of the Justices began to embrace their roles as policy-makers, and they tipped their hand by showing willingness to undertake sharp departures from the status quo. Many of the Mason Court Justices were taught by prominent legal realists. Some even publicly acknowledged the work of jurimetrics scholars directly, taking seriously the patterns of social attitudes in judicial decisions that these scholars had uncovered (Murphy 1980).

More recently, Australian scholar Russell Smyth has almost single-handedly reinvigorated the empirical study of judicial behavior in Australia. The High Court itself publishes basic information in its annual reports including workload data in various breakdowns and budget expenditures, despite the strains this puts on the Court's data management system (Popple 1999). Sometimes, the judges themselves make use of these data in their speeches or extra-judicial writings (Gleeson 2004b). A number of interesting hypotheses, many derived from the American literature, have also been tested using empirical data about the High Court. Research has found a relationship between case complexity and the reliance on citations of authority in judicial decisions (Smyth 2003a). One analysis fails to find support for party capability theory (Smyth 2000), but another finds evidence to the contrary (Haynie et al. 2001). The number and type of interveners in the High Court have been evaluated over time (Pierce 2006), and these data have been systematically compared to the Supreme Court of Canada (Williams 2000).

The role of the associates has been compared to the U.S. Supreme Court clerks using survey data (Leigh 2000). The use of American precedents in the High Court over time has been examined (von Nessen 1992). An analysis of voting blocs on the Latham Court presents an interesting (if somewhat problematic) assessment of coalition success (Smyth 2001), and a later incarnation of this work finds support for the application of many American judicial behavior theories to the Latham Court (Smyth 2002b).

Another area of interest to scholars has been the prestige and productivity of judges at different stages of the judicial life cycle. Valiant attempts have been made to quantify judicial performance according to productivity, citations, extra-judicial writings and reversals (Smyth 2005a). Judicial productivity has been found to follow a life-cycle

trend, rising to a peak and then declining again near the end of the judicial career (Bhattacharya and Smyth 2001a). Judicial productivity, along with ideological compatibility between the judge and the current administration, may also help to predict the timing of retirements (Maitra and Smyth 2005). Previous judicial experience, combined with youth and a conservative appointing prime minister, have been associated with judicial prestige, measured in terms of citation rates (Bhattacharya and Smyth 2001b).

A very popular line of research attempts to define (Lynch 2002a) and to explain variations in dissent rates (Smyth 2004) and other separate opinions (Groves and Smyth 2004) over time. Fluctuation in nonconsensual behavior have been explained as a function of institutional changes and different leadership styles (Smyth and Narayan 2004), as well as attitudinal factors (Smyth 2003b; 2005b), acclimation effects (Smyth 2002a) and consensual norms (Narayan and Smyth 2005; 2007; but see Smyth 2002c; Wood 2008). It is on this line of research that the present analysis builds.

Conceptualizing Joining Behavior

In a situation where a number of different people are asked to come to a decision on a topic, there will likely be some level of disagreement between the parties. This is also true in the case of judges. Unless we are willing to accept the legalist doctrine that the outcome of each case is logically derived from the law and stare decisis, there is the potential in each case for some level of disagreement between the judges. This level of disagreement can be thought of as a continuous variable, with no necessary limits on its value. The extent of these disagreements cannot be directly observed by the researcher, though, or even by the Justices themselves.

Decision Patterns

In Australia, as in the United States, there is an institutionalized proxy measure for such disagreement. If the level of disagreement reaches a certain critical level on a given case, judges will cast dissenting votes. From a strict legalist perspective, dissents are the result of the breakdown of the process of finding the legally necessary outcome. Critics of the legalist model, however, see the dissent as a result of ideological disagreement among the judges (Brace and Hall 1993). Because of the independence of the judiciary and the design of the court system, it is not necessary for judges in the United States or Australia to assent to decisions with which they do not agree. This leaves the researcher with an observable measure of disagreement between the judges, the importance of which has been well documented in the study of judicial behavior in the American court system (Segal and Spaeth 1993).

In the American system, concurring opinions might also add an important piece of information to this puzzle. Indeed, much of the research on Supreme Court judicial behavior concentrates on voting behavior, typically omitting the distinction between a concurrence and assent to the majority opinion. A scale could be constructed using information about both concurrences and dissents to incorporate this additional opinion agreement information (see Handberg 1978). The exact role of the concurring opinion in the American context, however, is not altogether clear. Typically, concurring opinions are assumed to be a middling option, indicating less agreement with the majority than a vote for the majority opinion, but more agreement than the filing of a dissenting opinion (Segal and Spaeth 1993). The precise mechanism, however, is very difficult to understand in the American context, especially from the perspective of current models of judicial decision making (Maveety 2003).

The seriatim format of the Australian High Court decisions makes the concurrence/majority opinion distinction nearly impossible. Each judge tends to write a separate opinion, whether or not the opinion expressed supports the final majority vote. In any case, a Justice writing a concurring opinion still votes with the majority of the members of the Court, even though there is usually no single majority opinion with which to concur. For this reason, concurrences and majority opinions typically look exactly alike in the vote totals. This fact removes from practicality the option of using concurring opinions as a refinement to an agreement/disagreement scale. It does introduce another possible avenue: the phenomenon of joint opinions. Without the institutionalized motivation to produce a majority opinion, why do the judges engage in such behavior? The decision to join or not to join is subject to far fewer constraints in the absence of the majority opinion tradition. In this way, patterns of "inter-agreement in opinions makes possible the discrimination of differences among the justices" in all cases, be they unanimous or not (Schubert 1969b, 339).

Joining Behavior in the U.S. Supreme Court

The motivation to join the opinions of other judges is easier to explain in the American context than in the Australian context. The majority opinion "is the core of the policy-making power of the Supreme Court" of the United States (Rohde 1972b, 653). When a joint opinion carries additional force beyond that of an individual concurrence or dissent, the desire to achieve a joint opinion is to be expected. In the U.S. Supreme Court, there is a tradition "which generally encourages each justice to join the majority opinion whenever possible" (Atkinson and Neuman 1969, 273). This pressure, coupled with the need to establish and maintain a relatively coherent body of precedent, serves as a force to keep judicial individualism at bay (Kelman 1985).

If a judge finds the majority opinion acceptable, there is "little need for a justice to push assertively to change it or to write separately" (Spriggs et al. 1999, 489). When a judge finds the majority opinion unacceptable, he faces a number of potential options. The first and most obvious choice is to simply dissent from the majority. Dissenting behavior is not uncommon on the Supreme Court, and is firmly rooted in the history of Anglo-American jurisprudence (Bergman 1991). Historically, Supreme Court onlookers saw dissenting opinions as a useless and unnecessary drain on the Court's legitimacy (Stager 1925). While there is still a bias against dissenting among some members of the legal community (Campbell 1983), the practice is now generally understood to be a natural part of the decision-making process (Maveety 2003). As William O. Douglas puts it,

> When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views. (Douglas 1948, 106)

The modern Supreme Court, with its discretionary jurisdiction and its position at the apex of the judicial system, is far more likely to deal with these divisive issues than most other American courts (Post 2001). Evidence has shown that judges become more likely to dissent once they are elevated to the Supreme Court bench (Gerber and Park 1997). Indeed, some dissenting opinions have become "canonized," or received by the legal community as among the "highly authoritative legal texts that command special reverence in the law" (Krishnakumar 1999, 781).

As a second option, the Justice may choose to author a concurring opinion. This may take the form of either a regular concurrence or a special concurrence (Kirman 1995). In a regular concurrence the judge agrees with the majority on the result of the case *and* the reasons, but decides to write separately anyway. A concurrence is what the

term "concurrence" is more commonly used to describe. This type of concurrence, also called a "concurrence in judgment," indicates agreement on the disposition of the case but *not* the reasons of the majority. The writing of a concurring opinion, however, is not without its own costs. Besides the extra time it may take to assemble a concurring opinion, the practice is seen as particularly distasteful, even among members of the Court (Maveety 2003).

The third option is to bargain with the author of the opinion seeking accommodation for his views. If the differences are not extreme, the judge may have a strong incentive to pursue this path. The higher precedential value of the majority opinion may entice fence-sitters to attempt to shape that opinion to better reflect their own preferences (Spriggs et al. 1999). Indeed, numerous researchers have found evidence of such bargaining, or strategic behavior, on the Court (Epstein and Knight 1998; Murphy 1964; Wahlbeck et al. 1998). In an attempt to secure accommodation, Justices can exercise various levels of pressure on the majority opinion author. These actions, when combined with the majority opinion author's desire to keep a majority, may lead to accommodation. Absent the need for a majority opinion, however, this may not be the case:

> The collaborative nature of the opinion-writing process stems largely from the author's need to have a majority of justices join the opinion once it is circulated before it becomes the opinion of the Court. This institutional rule therefore provides incentives for justices to bargain with the majority opinion author and for the author to sometimes accommodate their concerns. (Spriggs et al. 1999, 486)

Since the end of the seriatim opinion tradition on the U.S. Supreme Court, the absence of a single majority opinion has been frowned upon (Novak 1980). In the event that a majority opinion cannot be agreed upon, the Court typically produces a plurality opinion – or an opinion assented to by a plurality of the Justices. Plurality opinions lack

the precedential force afforded to majority opinions, and are often criticized for creating chaos in the legal community (Novak 1980). Concurring behavior itself has been criticized for emasculating the opinion of the Court, regardless of whether or not the behavior leads to a plurality decision (Davis and Reynolds 1974). Participation in a special opinion leading to a plurality outcome can work against a Justice's self-interest (Hammond et al. 2005).

This is not to say that all joining behavior on the Supreme Court is easily categorized as a rational compromise in an attempt to further policy goals. In order to qualify as the "Opinion of the Court"—or the majority opinion—the opinion must be joined by a majority of the Justices. In most instances, this means that the minimum number of joiners necessary for a winning coalition is five (opinion author included). The author of the majority opinion, then, will need to gather four additional coalition members. As Rohde notes,

> The opinion he drafts will be shaped by his own preferences, but he is not a free agent. If he is to attain a winning coalition, he must gain the assent of at least four other justices in the opinion. The opinion writer is thus forced to bargain with the other justices. (Rohde 1972a, 214)

Once this minimum winning coalition number of five is reached, though, the motivation for additional compromise or joining behavior is slightly more difficult to explain. While the majority conference coalition needs to maintain a minimum winning coalition, there is little need to entice more than the minimum number of joiners to sign the opinion. From the joiner's perspective, why opt to join the majority opinion once a minimum winning coalition has already been reached? Rohde finds some evidence that the existence of larger than necessary majority opinion coalitions is related to a threat or perceived threat to the Court as an institution (Rohde 1972a). Other researchers, though,

have discounted the empirical evidence surrounding this claim (Brenner 1979; Giles 1977), suggesting that the minimum winning coalition hypothesis finds no support regardless of the presence of a threat.

Saul Brenner (2003) outlines several possible explanations for unnecessary joining behavior. Many of his hypotheses are specifically relevant only to joining a majority opinion, and do not adequately explain the decision to join a special opinion—any opinion that is not the majority opinion. The simplest explanation for unnecessary joining behavior is an attitudinal one: that the judge agrees with the reasons expressed in the opinion. One way to illustrate this is to look at situations where a judge decides to join a colleague's special opinion. While there is institutional pressure to achieve a majority for the opinion of the Court, there is no such pressure to form coalitions for other types of opinions. Indeed, Segal and Spaeth argue that, because there is no institutional pressure to join in concurring or dissenting opinions, these opinions "reflect the strongly held policy views of their authors" (2002, 395). The bargaining and accommodation needed to attract joiners to a majority opinion is not likely to occur in the absence of the institutional pressure to achieve at least a minimum winning coalition.

Because there are no institutional benefits to assembling a coalition for these special opinions, the strategic motivations to join fall away and leave policy preferences as the most obvious explanation. Judges are more likely to join a concurring opinion when they are ideologically distant from the majority opinion writer (Wahlbeck et al. 1999). When judges do join a special opinion, they usually join an opinion written by a close ideological ally (Segal and Spaeth 2002). Even still, judges with similar policy goals are likely to disagree to some extent about the precise details of the reasons.

Brenner (2003) also cites a number of strategic motivations for joining an opinion when there is no institutional pressure to do so. First, a judge may join an opinion if his views have been accommodated by the writer. Indeed, this seems to imply strategy on the part of the opinion author, and not on the part of the joiner. If the joiner's views have been accommodated, then joining the opinion is merely an exercise in pursuing policy preferences. There is some reason to expect a majority opinion writer to accommodate the views of an additional joiner once the minimum winning coalition has been assembled. Evidence from the Warren Court indicates that minimum winning coalitions were more likely to break up prior to the final disposition, giving majority opinion writers a reason to solicit additional joiners (Brenner and Spaeth 1988).

Because the majority opinion sets forth the rationale for subsequent decisions, a larger-than-minimum winning coalition may convey a consistency and certainty in the reasons given by the Court (Murphy 1964). The 5-4 decision set a precedent "which might be overturned if membership changes or if one of the justices in the majority changes his mind" (Brenner et al. 1990, 309). Additionally, the compliance of lower courts may be more likely when the majority opinion coalition is larger (Benesh and Reddick 2002; Woodward and Armstrong 1979; but see Johnson 1979).

The classic example of an accommodation strategy to achieve a unanimous opinion is the effort of Earl Warren in *Brown v. Board of Education*.[71] In this case, it was the likelihood of *widespread* external resistance to the Court's ruling that motivated Warren's pursuit of a unanimous decision. There is less reason to believe, though, that the author of a special opinion would be interested in courting joiners (O'Brien 1999).

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[71] (1954) 347 U.S. 484.

Additional signatures on a special opinion may say something about the ability of the author to persuade his colleagues (Segal and Spaeth 2002); concerns about institutional legitimacy and providing a unified front to external actors are less relevant to special opinions.

A second strategic reason for unnecessary joining given by Brenner (2003) suggests that the joiner may concede some policy ground in an attempt to achieve this gain in legitimacy. He hypothesizes that a Justice may join a majority opinion after the minimum winning coalition has been solidified as a way to strengthen the decision in the eyes of outside actors. Because he lists this hypothesis separately from the previous one, it implies that a Justice may join for this reason even if his policy positions have not been accommodated. For the same reason that a special opinion writer is unlikely to solicit joiners, though, Justices would be unlikely to join a special opinion that does not reflect his policy preferences.

Thirdly, Brenner (2003) suggests that a judge may strategically join a majority opinion because the presence of a separate opinion may raise the salience of the majority opinion. This reason seems to contradict the previous one. In the previous hypothesis, a unanimous opinion is assumed to strengthen the holding in important and controversial cases. In the present hypothesis, though, the presence of a special opinion is assumed to call attention to the majority opinion, which supports something other than the potential joiner's ideal policy. There is empirical evidence indicating that winning coalitions in *nonsalient* cases tend to attract more joiners than those in salient cases (Brenner et al. 1990; Maltzman et al. 2000). In the Burger and Rehnquist Courts, 80% of cases without a majority opinion were in the highly salient area of civil rights and liberties (Segal and

Spaeth 2002). This hypothesis says nothing about joining behavior for special opinions. If the Justice believes that the presence of a separate opinion detracts from the majority opinion, joining a special opinion has essentially the same effect as writing his own. There would seem, then, to be little reason to accept and join a sub-optimal special opinion.

The fourth strategic explanation given by Brenner (2003) is that a Justice may join a majority opinion in order to increase the chance that the author will return the favor in future cases. Because the Justices on the Court are in an iterative game, it is reasonable to expect that their long-term interest can be furthered by working to secure cooperative relationships with their colleagues, even if it may mean compromising (Axelrod 1984; 1986; Murphy 1964). Empirical evidence suggests that such a cooperative strategy can provide real payoffs for the joiner in future attempts to marshal a majority coalition (Collins 2007; Wahlbeck et al. 1999). In this research, though, the measure of cooperation is a function of "the percentage of time that the author joined another justice's separate opinions" (Wahlbeck et al. 1999, 500). In other words, this research finds that joining a special opinion—not a majority opinion—can yield benefits in later attempts to form a majority coalition. If the Justices perceive that this is true, this may provide a motivation to join a special opinion he might not otherwise join.

Small group theory implies that judicial behavior is motivated in part "by considerations of group solidarity and intragroup harmony" (Festa and Vichules 1968, 540). The last group of hypotheses put forward by Brenner (2003) is derived from this perspective. First, he suggests that a Justice may choose to join the majority opinion because he has an interest in being on the winning side. Certainly, this is one common

characterization of Justice Sandra Day O'Connor's approach (Maveety 1996). Early small group research argued that an individual member's power is related to the probability that he would be the pivotal member of a minimum winning coalition in any given decision (Schubert 1964; Shapley and Shubik 1954).

Maveety argues that O'Connor's experience in the Arizona state legislature taught her "that the nature of a compromise can be greatly affected by those who consistently ally with the majority coalition (Maveety 1996, 4). As the majority opinion contains legal rules with future precedential value, Justices may decide to join in an effort to influence the substance of these rules (Spriggs et al. 1999). Once the minimum winning coalition has been assembled, all those remaining Justices who wish influence the text of the final majority opinion would find it prudent to join the majority. This approach worked for O'Connor at least, and her "propensity to join the winning coalition and to retain majority-side membership has kept O'Connor from being marginal to the Court's discussions of policy" (Maveety 1996, 69). This interest in contributing to the majority opinion, along with an institutional bias against unnecessary concurring opinions, might encourage Justices to refrain from writing separate reasons when they agree with the majority's result (Rohde 1977; Caldeira and Zorn 1998). Implementation of this strategy, though, seems to preclude the unnecessary joining of special opinions. If the goal is to be a part of the winning coalition, then nothing is to be gained from joining in concurrences or dissents.

The second small group hypothesis presented by Brenner is that a Justice may join the majority opinion because everyone else has, and "the remaining justice feels uncomfortable as the sole hold-out" (2003, 277). Howard associates this behavior with a

freshman effect, noting that Justice Cardozo "frequently [voted] alone in conference before ultimately submerging himself in a group opinion" (Howard 1968, 45). Indeed, empirical research on voting fluidity between the conference vote and the final case disposition finds that a lone dissenter is twice as likely to join the majority than is a Justice who is part of a three-member dissenting coalition (Maltzman and Wahlbeck 1996b).

In very important cases, this change in opinion may be a result of the accommodation efforts undertaken by the majority opinion author and/or the Chief Justice. Howard argues that this happened in many cases, including the Japanese internment cases, with Justice Murphy suppressing a dissent in *Hirabayashi* and Douglas withholding a dissent in *Korematsu*[72] (Howard 1968). Joining as a way to avoid being the lone dissenter provides an explanation for unnecessary joining of a majority opinion, but does not help to explain the joining of a special opinion.

Brenner's third small group hypothesis seems to predict very different behavior from his second. Here, he asserts that a Justice may join because "she does not care a great deal whether the Court's opinion is written one way or another or because the case is not particularly salient to her" (2003, 277). It is difficult to measure the salience of a particular case to a particular judge, and researchers usually resort to general measures deriving from contemporaneous (Epstein and Segal 2000), or *post hoc* assessments of case salience (Brenner and Arrington 2002). As such, the empirical research on this issue is generally at the level of the Court and not the individual Justice. Much of the evidence from voting fluidity analyses finds that judges are more likely to sign on to majority

[72] *Hirabayashi v. United States* (1943) 320 U.S. 81; *Korematsu v. United States* (1944) 323 U.S. 214.

opinions in less salient cases (Dorff and Brenner 1992; Spriggs et al. 1999). Again, this hypothesis does not provide as much traction when we are considering unnecessary joining behavior involving special opinions. If the judge is relatively ambivalent as to the outcome, other considerations may drive the decision to join the majority opinion, including the first and second hypotheses derived by Brenner (2003) from small group theory.

The last hypothesis concerns the practical cost of authoring separate opinions. Brenner suggests that Justices may join to avoid spending "the time and effort necessary to write a persuasive concurring or dissenting opinion" (2003, 277). Because this hypothesis is separated out from the third small group hypothesis, we can assume that it is not intended to convey simply a lack of interest in the material. Instead, this argument implies that a Justice is responding to workload pressures. Baum (1997) includes minimizing workloads among the important judicial goals. Unlike the other small group hypotheses, the interest in easing workload pressures may apply to unnecessary joining behavior involving both majority and special opinions. Some argue that Justice Brennan's attempt to organize joint opinions for the minority bloc succeeded because the other members of the minority felt significant workload pressures (Cook 1995; O'Brien 1999). While the author of a special opinion may have less motivation to accommodate potential joiners, the benefit to the joiner is likely the same.

While some empirical research supports the assumption that heavy workloads can factor in to opinion-writing decisions, the evidence is far from decisive. Justices in the minority are more likely to acquiesce to the majority opinion without first circulating special opinions when their workloads are heavy (Spriggs et al. 1999). On the other

hand, majority opinion authors with heavy workloads may be less willing to accommodate his colleagues (Wahlbeck et al. 1998). Individual workload does not seem to increase the likelihood that a Justice will join the majority, although this likelihood does increase at the end of the term (Maltzman et al. 2000). A large number of cases on the Court's docket does not seem to increase the likelihood that a member of the minority will switch sides to join the majority opinion (Epstein et al. 2001).

As this discussion illustrates, most of the joining behavior research concerning the Supreme Court has to do with the decision to join the majority opinion. Much of the evidence outlined above suggests that, for various reasons, Justices will join majority opinions even if they do not match their most preferred ideological preferences. This makes sense, given the importance of the majority opinion in this particular institutional context. The need to amass a majority opinion coalition changes the calculation for judges. Because of the unique importance of the majority opinion, the existing American research spends little time investigating other types of unnecessary joining behavior. In addition, the rate of joining behavior on special opinions is quite low on the Supreme Court (Segal and Spaeth 2002). Because of the seriatim opinion tradition in Australia, however, all joining behavior in the High Court resembles this type of unnecessary joining behavior. As such, all joining behavior on the High Court takes place in the absence of a clear institutional incentive to bargain and accommodate.

Joining Behavior in the Context of the High Court

As the previous chapter indicates, the High Court is producing joint opinions at a much higher rate than it did several decades ago.[73] Explaining the reasons behind the decision to join is quite difficult, especially in the absence of a majority opinion tradition. This growing number of joint opinions may reflect a desire of the Justices to clarify important points of law for lower courts or to build legitimacy in contentious areas. Certainly, it is easy to imagine that efficiency concerns may have instigated this shift. Some of this recent increase may have to do with the personal relationships between the judges (Coper 2002c). One High Court observer notes that Justice Gaudron often joined with Justice Gummow because she thought he was quite clever (McMillan 2003). An individual's prior experience or issue expertise may well contribute to a tendency to join.

It is also important to consider the role of ideological agreement in the decision to join. Once we take away the structure of opinion assignments, we should able to see a clearer picture of the "justice's attractiveness to other justices" in terms of opinion writing (Handberg 1978, 373). Without the institutionalized pressure to negotiate a majority opinion, there is less reason to expect the judges to accommodate the views of his colleagues in order to obtain a joint opinion. If this is the case, things like workload concerns, issue expertise and clarity should not satisfactorily explain the incidence of joint opinion production on the High Court. Instead, these joint opinions, like the special opinions of the U.S. Supreme Court, would comprise "a much richer source of information about judicial relationships" (Segal and Spaeth 2002, 395).

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[73] By contrast, the U.S. Supreme Court is producing fragmented decisions at a growing rate (Segal and Spaeth 2002).

Before we can investigate these hypotheses, however, it is important to address some of the recent empirical research on consensual norms in the High Court. Although the High Court formally operates using a seriatim opinion-writing tradition, some researchers have suggested that this tradition is being subverted by a *de facto* norm of consensus (Narayan and Smyth 2005). If this is true, then High Court Justices are increasingly subject to an institutional norm encouraging joint opinions just as Supreme Court Justices are. For this reason, the next chapter investigates this question in depth.

CHAPTER FIVE: CONSENSUAL NORMS ON THE HIGH COURT

> *Unlike their position in America, concurring judgments are simply the usual method by which judges in the English tradition express agreement with each other, despite occasional instances of welcome unanimity.*
>
> —Andrew Lynch (2003a)

This analysis begins with the premise that, with the existence of the seriatim opinion tradition in Australia, there is no functioning consensual norm to encourage judges on the High Court to produce joint opinions. If this is the case, the presence of joint opinions would be unexpected given the standard explanations used in the American attitudinal and strategic decision-making models. These joint opinions would either be expressions of attitudinal congruence between judges, or attributable to some other mechanism (such as workload pressures, deference to issue experts, etc.). The first step to approaching the question, then, is to determine the extent to which the premise is reasonable.

To do this, it is necessary to examine the extent to which the High Court as a whole subscribes to some sort of consensual norm. A norm is "a social rule that does not depend on government for either promulgation or enforcement" (Posner and Rasmusen 1999, 369). The consensual norm—at least in its American formulation—is a social rule that causes judges to feel "obliged to mask their differences from public view by working them out via a single majority opinion" (Epstein et al. 2001, 364). Certainly, the seriatim tradition is also a norm, in that under it judges feel "a very strict obligation under the constitution to express their individual opinions" (Clark 2003, 10). It is reasonable to assume that the High Court's seriatim opinion tradition precludes any type of functioning consensual norm (Smyth 2002c), but this is an empirical question. This chapter will approach this question by adapting the relevant Supreme Court research to accommodate

the High Court's unique institutional setting. This is helpful for the present analysis, as it provides an institutional-level baseline of normal joining behavior. It will also provide evidence as to whether joining behavior is largely norm driven (as it seems to be on the Supreme Court), or if it may be driven by some other mechanism.

Defining Types of Opinion-Writing Behavior

Before considering the factors influencing joining behavior in the High Court, it is necessary to address an important practical concern. In the High Court of Australia, it is nearly impossible to distinguish a joiner from an author. In the U.S. Supreme Court, a measure of writing behavior is easy to create. With the exception of per curium opinions, the writer of a Supreme Court opinion is typically identified in the written reports. This makes it possible to attribute writing behavior to those judges who have written an opinion, be it the majority opinion or some other opinion. The traditions and reporting style of the High Court, however, create significant differences that make the process more complicated.

Terminology

Even among Australian legal scholars and practitioners, the use of opinion-writing terminology is far from precise (Lynch 2002a). To complicate matters further, the American and Australian literature often use the same words to describe very different things. The American use of opinion-writing vocabulary is more consistent, and provides a solid point of comparison for settling on terminology to accurately describe opinion-writing on the High Court.

Describing opinion-writing on the U.S. Supreme Court

In the common law tradition, the written opinion is an explanation (or set of explanations) of the Court's disposition of a particular case. These reasons are published

in the relevant reports, and are made available to lawmakers, lawyers, and the general public. The Court's decision as to the disposition or outcome of the case—what actually happens to the litigants—is called a "judgment," while the associated reasons are called "opinions." In the Supreme Court, members of the majority vote coalition all agree with the disposition of the case at hand. Justices who disagree with the majority as to the outcome of the case will author or join a dissenting opinion. These dissenting opinions support an alternative disposition for the case, and they provide reasons for this conclusion.

Members of this coalition typically join (or author) the opinion of the Court. The opinion of the Court is also called the majority opinion, as it is a set of reasons that a majority of Justices have joined. If the majority voting coalition fails to secure a majority of joiners, the resulting opinion is a plurality opinion and is called a "judgment of the Court." While the reasons contained in the opinion of the Court carry the weight of precedent, the reasons in a judgment of the Court do not (Hochschild 2000).

If they are dissatisfied with the reasons of the majority opinion, members of the majority vote coalition may choose to author or join a concurring opinion. If a Justice agrees with the reasons contained in the majority opinion and simply wishes to add additional observations or reasons, she may author or join a regular concurrence. Justices writing or joining a regular concurrence are also part of the majority opinion coalition. If a Justice agrees only with the outcome but not with the majority's reasons, that Justice may write or join a special concurrence. A special concurrence is essentially an alternative set of reasons to that presented by in the majority opinion. When a Justice authors or joins a special concurrence, he is not part of the majority opinion coalition. In

this way, a special concurrence diminishes the majority coalition in a way that a regular concurrence does not (Maveety 2003).

A lexicon for describing High Court opinion-writing

First, it is important to note that the common Australian use of the term "judgment" is different from the American usage. Although some purists protest (Kirby 2006), most legal commentators and practitioners use the terms "judgment" and "opinions" interchangeably. Justice Kirby points out that the word "judgment" is used in the Constitution to refer to the orders handed down by the Court, and he suggests using either "opinion" or "reasons" to denote the written explanation of the Court's orders (Kirby 2007b). The term "opinion" will be used here to refer to the written explanations of the case disposition, which will be termed the "judgment" or "outcome."

All separate opinion-writing behavior on the Supreme Court is described relative to the majority opinion. Regular concurrences concur with the majority opinion, special concurrences concur with the majority's disposition of the case, and dissenting opinions disagree with both. In the absence of a majority opinion tradition, these terms lose their moorings. The classic seriatim-style disposition of a case is a collection of separate sets of reasons—one set for each participating Justice. Dissenting opinions express the reasons for disagreement with the outcome favored by the majority. The use of the term "concurring opinion" is much more problematic. In a sense, a unanimous decision handed down in the traditional seriatim style is much like a collection of what Americans call special concurrences.

The main difference, of course, is that the seriatim tradition leaves no central explanation of reasons with which to concur. When Australians use the term "concurrence," they are actually referring to a separate opinion that supports the majority

vote coalition's disposition of the case. Because precedential weight is distributed among all of the opinions in support of the majority, the concurring opinions essentially *are* the Australian version of a majority opinion. The term "concurrence" is somewhat problematic in this context, as it implies the existence of a single majority opinion. The other descriptor commonly used in Australia—the term "separate opinion"—is even more problematic. This term is over-broad, as it incorporates separate opinions in the minority as well as the majority. The more precise alternative may be "separate opinion in support of the majority vote coalition," but this is far too cumbersome. As such, the term "concurrence" will be used here to denote the separately-delivered opinions that, together, make up the reasons for the majority's disposition of the case.

The High Court does not always dispose of cases using the classic seriatim style. Indeed, the intent of this research project is to explain the Court's production of joint opinions in the absence of an American-style majority opinion tradition. For this reason, some additional terminology is needed to describe the full range of opinion-writing behavior of the High Court Justices. On occasion, the Court will publish a single set of reasons, with which all the Justices agree. In the Supreme Court, this would be a majority opinion. The use of that term, however, implies the unique precedential weight that American majority opinions carry. In Australia, these opinions do not carry additional weight. To avoid this confusion, the Australian version will be called a "single-opinion disposition."

Often, smaller opinion coalitions will form on the High Court. Instead of a single-opinion disposition, many cases will have one or more opinions coauthored by a subset of the panel. These are often called "joint judgments" in the Australian literature but, for

consistency, they are referred to as "joint opinions" here. These joint opinions can be in support of the majority or in dissent. On occasion, Australian researchers refer to joint opinions in support of the majority as "joint majority opinions" or simply "majority opinions." As this chapter will demonstrate, this can lead to serious measurement and equivalence problems. Instead, the term "joint opinion" will be used to refer to any instance where more than one Justice coauthors an opinion. The single-opinion disposition is a specific kind of joint opinion, and is included in analyses of joint opinions unless otherwise specified.

Consensual Norms in the Literature

At its heart, a consensual norm in the judicial context is an institutional tradition of deference on the part of the individual judge to the decisions of the majority. At the height of the consensual norm in the U.S. Supreme Court, "[i]ndividual expression was kept to a minimum and within a relatively consistent range" (Walker et al. 1988). Essentially, this means that dissenting and specially concurring opinions were somewhat unusual, even if private difference of opinion was not (Epstein et al. 2001). In the American context, the decision to author a concurring opinion is seen as "strategic devices that further short-term individual ends at the expense of institutional integrity" (Schwartz 1992, 241). Researchers have documented the decline of the consensual norm in the Supreme Court (Best 2000; Caldeira and Zorn 1998; Haynie 1992; Walker et al. 1988). This decline has long been lamented as being harmful to the institutional legitimacy of the Supreme Court (Hand 1958; Pritchett 1954).

The reasons given for the decline are varied. Much of the blame is laid on the shoulders of the Court's leadership (Caldeira and Zorn 1998), Chief Justices Stone (Danelski 1960; Walker et al. 1988) and Hughes (Haynie 1992) especially. Others

attribute the decrease in consensual behavior to practical considerations, and not to an underlying consensual norm. The increase in discretionary jurisdiction created by the Judges' Bill of 1925 has been cited as a reason (Halpern and Vines 1977), along with the subsequent decrease in routine cases (Wood et al. 1998b). Others point to an actual increase in ideological disagreement among members of the Court, especially in the areas of civil rights and civil liberties (Hurwitz and Lanier 2004). Even technological and organizational advances in Court administration have been cited as a cause for the proliferation of separate opinions (Martin and Soroka 2004).

Whatever the cause, the declining levels of consensual behavior are manifested in the decreasing propensity of the Justices to deliver joint opinions with their colleagues. If this is due to norm-related behavior, identifying a changing consensual norm on the Supreme Court first requires an identification of what constitutes a deviation from consensus. Often called a measure of "dissensus," this can be little more than a count of occurrences of non-joining behavior (Caldeira and Zorn 1998). Most times, this amounts to a calculation of the proportion of dissenting or concurring opinions per opinion written (Haynie 1992; Hurwitz and Lanier 2004; Walker et al. 1988).[74]

Clearly, this method measures only that level of dissensus that can be seen in the final opinion tally (Atkins and Green 1976). It acts as a proxy for the actual level of disagreement existing among the members of the Court. This can be problematic for researchers interested in determining the root cause of the measured dissensus, and its relationship to some more general consensual norm. In short, an increasing incidence of separate opinions does not necessarily mean that a norm of consensus that once existed

[74] Caldeira and Zorn (1998) do not standardize the dissents and concurrences, but argue that the results would have been similar if they had.

has now weakened (Epstein et al. 2001). If changes in agenda composition are the root cause of increased dissensus, it would be reasonable to believe that a norm of consensus never existed in the first place. In that case, the increasingly contentious cases may have brought disagreement to a Court that experienced little real disagreement in the past and, thus, had no need of a consensual norm to discourage the expression of individual opinion.

Several researchers have provided qualitative documentation of an active culture of consensual norms in the pre-1940 Supreme Court (Schaefer 1966; Wood et al. 1998b). Epstein, Segal and Spaeth (2001) address this problem directly through an empirical investigation of Chief Justice Waite's docket books. They utilize an independent measure of dissensus: the votes of the Justices during the Court's private conferences. They compare these private votes to the reported votes that, of course, provide the public face of unanimity during the Waite Court (1874-1888). While they find evidence that the nondiscretionary caseload muted disagreement all around, they also find that "a norm of consensus did, in all likelihood, exist" (Epstein et al. 2001, 376).

Caldeira and Zorn (1998) test the consensual norm hypothesis from a different angle. They begin from the theoretical stance that, if a norm of consensus is the underlying cause of shifting levels of public disagreement, this norm should similarly impact both dissent rates and rates of concurring opinions. They analyze rates of dissent and concurrence between 1800 and 1991. They find a cointegrated relationship between rates of concurrence and dissent, with changes in the former following changes in the latter. They argue that this specific type of relationship demonstrates that "a common element underlies levels of both dissents and concurrences, and thus provides more direct

evidence for the existence and influence of consensual norms" (Caldeira and Zorn 1998, 888).

In this view, concurrences and dissents are both types of nonconsensual behavior. In the Supreme Court, though, dissents and concurrences serve very different purposes. While dissents express more complete dissatisfaction with the judicial outcome, they also fit with the policy-oriented predictions of the attitudinal and strategic models of decision-making behavior (Maveety 2003). These models focus on the policy importance of the case outcome, and argue that doctrinal rules contained in the opinions "merely rationalize decisions; they are not the causes of them" (Segal and Spaeth 1993, 66). For this reason, as Maveety explains, "to concur is to agree ... but to disagree, yet to disagree about matters which judicial behaviorism discounted as superfluous: the legal content of the majority opinion" (Maveety 2003, 176). Concurrences can result in plurality opinions (or "judgments of the Court"), undercutting the precedential value of the opinion without tangible policy-related benefits (Davis and Reynolds 1974).

In this way, the attitudinal and strategic models would predict different causes for dissents as compared to concurrences. For each, dissenting behavior is a reflection of dissatisfaction with the substantive outcome of the case. Strategic theorists have predicted that concurrences will be used as a negotiating tool (Murphy 1964), and attitudinalists have speculated that concurrences are essentially throw-away votes cast in cases involving less-strongly-held policy preferences (Segal and Spaeth 1993). Indeed, both camps seem skeptical of their own *post hoc* attempts to explain concurrences, and instead seem to coalesce around a norm-based explanation (Maveety 2003). Caldeira and Zorn (1998) argue—implicitly, at least—that rates of these two distinct types of

nonconsensual behavior would not trend together unless an underlying consensual norm were responsible. Investigating the possibility of consensual norms on the High Court can provide insight into the aggregate patterns of separate opinions and joining behavior. This is critical for the present research project, beginning as it does with the assertion that joining behavior in a seriatim institution is something unusual and deserving of explanation.

Consensual Norms in the Australian Context

Investigations of the norm of consensus on the U.S. Supreme Court usually begin with the tenure of Chief Justice John Marshall. While this is appropriate for the kinds of questions asked by observers of the Supreme Court, it starts from a premise that is inappropriate for courts operating under the British tradition of seriatim opinion production. Marshall "eliminated the practice of seriatim opinions that allowed each Justice to voice his individual views on every case," believing that this would best protect the institutional legitimacy of the Court (Walker et al. 1988, 362). The norm of consensus that would result from a wholesale repudiation of the seriatim tradition, then, would be one in which the expression of both dissenting *and* concurring opinions would be discouraged. It is this sort of norm that is identified in the work of Caldeira and Zorn (1998).

Given the Australian High Court's adherence to the seriatim opinion tradition, however, such a norm would be quite unexpected. In Australia, judges conform to a much different norm. By definition, the seriatim opinion tradition tolerates concurring opinions. In the context of this tradition, a norm of consensus would not likely include pressure to join an opinion for the Court. However, this does not preclude a different sort of consensual norm—one that values individual voices that agree with the disposition of

the case. Such a norm may encourage consensus by suppressing dissenting votes, while treating separately-written opinions in support of the vote consensus as consensual behavior. Of course, this is of less immediate concern in the context of a model of joining behavior on the High Court. If the writing of concurring opinions is truly suppressed by a consensual norm, the joining behavior on the High Court can be explained in the same way as it is on the Supreme Court. If not, then an alternative model of joining behavior will be necessary to explain why unconstrained judges choose to join.

The Norm of Concurring Opinions

The simplest definition of a concurring opinion is a separate opinion in favor of the majority vote coalition's judgment in the case. Such an opinion advocates for the same case outcome as the majority of the judges on the bench. In contrast, a dissenting opinion is one that advocates a case outcome different from the outcome of the majority. While this is a relatively straightforward classification system in the context of the United States, these concepts "are more than a little difficult to apply ... due to the seriatim tradition followed by the Australian courts" (Lynch 2002a, 471). Indeed, a concurring opinion in Australia often has no single majority opinion with which to concur. In other words, Australian cases are disposed of with what would be called a plurality opinion in the United States: a collection of opinions in support of a particular outcome, but with no single opinion signed by a majority of the judges.

The individual responsibility for one's own reasons is seen to trump the need for the institution to produce a unified opinion of the court (Coper 2002c). This follows more closely the opinion of Thomas Jefferson on the matter, who notes that the seriatim tradition

> ... shews whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve. (Jefferson 1822, 1)

The result of this tradition is that judges frequently author—and are expected to author—separate opinions, regardless of the degree to which they agree with the majority on the disposition of the case.

In the United States, this practice is frowned upon. Researchers describe the task of sorting out the mess of seriatim-style opinions as Herculean (Gerber and Park 1997). They lament the lack of clarity in cases without a unified majority opinion, as well as the danger they pose to the legitimacy of the Court as an institution (Davis and Reynolds 1974). In the High Court of Australia, however, this lack of clarity is not seen to be a critical problem. While some legal practitioners continue to call for a more united front (McMillan 2003), the practice is generally accepted. In Australia, "the law is not the function of a majority opinion but instead of the highest common factor among the opinions supporting the judgment" (Rosenberg and Williams 1997, 443).

Ever since the addition of the independent-minded Higgins and Isaacs to the High Court in 1906, the decision-making process on the Court has been characterized by this "rugged individualism" (Smyth and Narayan 2004, 404). Indeed, each judge is seen to have a duty under the judicial oath to produce reasons for which he can be held individually accountable (Coper 2002c). While some Justices have occasionally expressed an interest in creating more joint opinions where the judges are already inclined to agree with one another (Gleeson 2004b; Mason 2003a), "there does not seem to be even an informal policy against separate judgments" (Bagaric and McConvill 2005, 5).

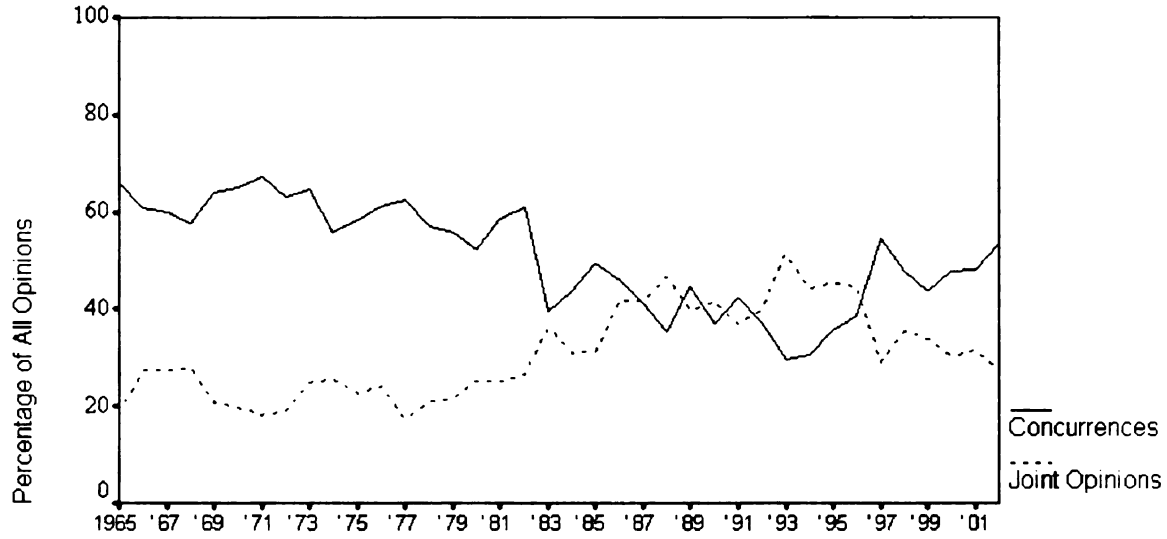
Of the little empirical research there is on decision making in the High Court, much of it concerns voting behavior as opposed to opinion-writing behavior (e.g., Blackshield 1972; Schubert 1969a). There is, though, some empirical evidence supporting the claim that the institutional norms allow the writing of separate concurring opinions. In a study of joining behavior on the Latham Court (1935-1950), Smyth (2002b) reports that nearly 60% of cases reported were delivered in the seriatim style. Narayan and Smyth (2005) explain that the seriatim tradition creates what they call a "low consensus equilibrium," in which there is a lack of consistent and significant promotion of joint opinion production.

There are several ways to assess the level of support for this norm of concurring opinions. One way, in keeping with the measurements used by Narayan and Smyth (2005), is to look at concurring opinions as a percentage of all written opinions over time. They do not count cases, but instead count *opinions*—individual statements of reasons, be they in support of the majority or not. In the data analyzed in the present study, from 1965 to 2002 an average of 53% of all opinions written were separate opinions in support of the majority disposition of the case.[75] As Figure 6 illustrates, this number has decreased slightly over time, with a distinct dip between 1981 and 1996. In contrast, joint opinions in support of the majority represent 29% of all opinions written.

This measure, however, fails to account for the fewer opportunities for joint majority opinions as compared to concurring opinions. If four Justices decide to join, the resulting opinion is only counted as one joint opinion. If the same judges decide to write separately, this is counted as four separate opinions. This significantly undercounts joint opinions—a problem which will be addressed at some length in the next section. If the

[75] Judgments written in cases disposed of by a single judge are removed from this analysis, as they provide no opportunity for joining, concurring or dissenting behavior on the part of the judge.

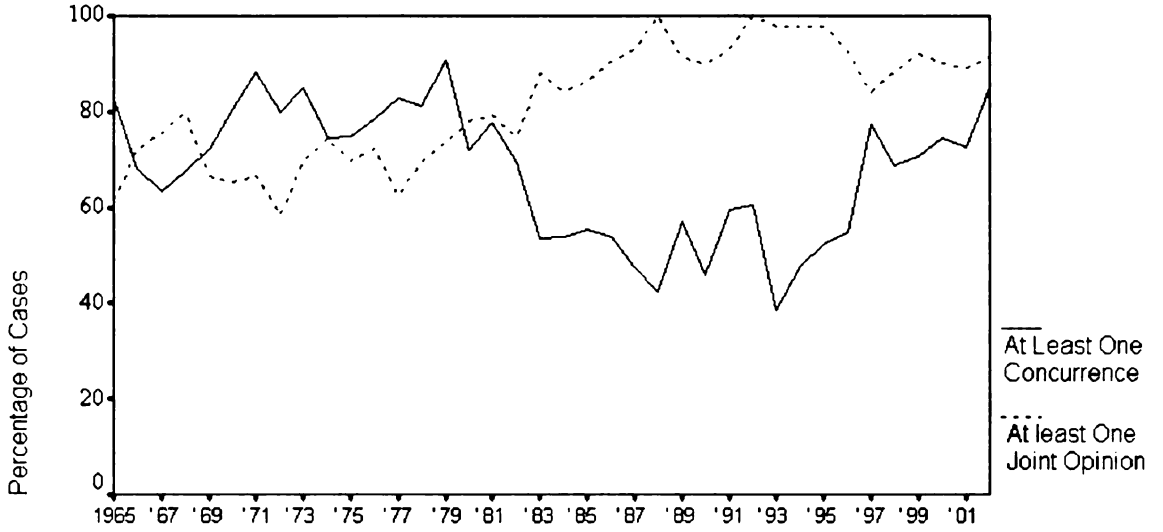
Figure 6 - Concurring and Joint Opinions in Majority per 100 Reported, 1965-2002



frequency of concurring and joint opinions in the majority by case is substituted for the opinion-based measure, the joint opinions are no longer undercounted. Figure 7 shows the percentage of cases per year with at least one concurring opinion. On average, 70.1% of cases have at least one concurring opinion filed. Additionally, Figure 7 shows the percentage of cases with a joint opinion in the majority. A joint opinion in support of the majority can be penned by a coalition of as few as two Justices. A case can easily have a mixture of joint opinions and concurrences in support of the majority.

Taken together, these two accounts of consensual behavior indicate that, for the period investigated, concurring opinions are not successfully discouraged on the High Court. These opinions account for over half of the opinions filed, and are present in the majority of cases heard by the Court. That is not to say, however, that joint opinions are effectively discouraged, either. Clearly, the incidence of joint opinions in the majority has remained high through this period, and especially so since the early 1980s.

Figure 7 - Percentage of Cases with Concurrences and Joint Opinions in Majority, 1965-2002



Of course, the evidence above is descriptive in nature, and represents only an account of the observable incidence of such behavior. Determining whether this stems from a norm is much more difficult. As the research on the U.S. Supreme Court indicates, finding empirical evidence of an underlying norm accounting for observable behavior is rarely a simple matter. The cause can be advanced by identifying external confirmation of such a norm, or by failing to find evidence of independent causes for the behavior. The task of identifying dynamism over time, however, will be reserved for later in the chapter.

The self-conscious maintenance of the seriatim tradition is, in itself, evidence that there is an institutional norm at work. Chief Justice Gleeson argues that the practice of encouraging joint majority opinions "involves a formal discipline that has never been accepted in the High Court" (Gleeson 2004b). Chief Justice Mason agrees, arguing that shoehorning divergent legal perspectives into a single opinion risks compromising judicial integrity (Mason 2003a). Justice Kirby attributes a similar sentiment to Justice

Kitto, who argued that, "on balance, the writing of individual judgments tends to produce the better work" (Kitto, as quoted in Kirby 1998c, 29).

Still, the fact remains that several Justices, especially those in leadership positions, have sought to facilitate the joint majority opinion. Chief Justice Griffith's very early leadership has been described as unity seeking in the mold of John Marshall (McGinley 1987). More recently, Chief Justices have attempted to facilitate the production of joint opinions. Gleeson has instituted regular conferences that, while informal, "provide for the exchange of views [and] the reaching of consensual opinions and judgments" (Callinan 1999). Chief Justice Mason also made "a more concerted effort to achieve that result, particularly by inviting one of our number to write an initial judgment or draft" (Mason 2003a).

Even those Justices who would like to see more joint opinions are quick to defend the seriatim tradition. Chief Justice Gleeson explains,

> I welcome joint judgments when we can get them and I'm anxious to promote the writing of joint judgments but not at the expense of people feeling obliged to compromise or to join in what is not really an expression of their own opinion. (Gleeson, CJ, quoted in Clark 2003, 10)

Indeed, observers of the Court have seen these attempts at encouraging joint opinions as lackluster at best. According to Kildea, Australian courts "have not adopted, in any methodical way, a practice that encourages joint judgments" (Kildea 2003, 61). It seems, then, that a separate opinion norm may indeed exist on the High Court. Despite the rhetoric encouraging joint opinions, the Justices themselves seem reluctant to compromise individual accountability to facilitate them. Joint opinions seem welcome when they happen to emerge, but a culture of encouraging negotiation and compromise appears to be absent on the Court. While separate concurring opinions may not be openly

encouraged, they seem clearly not to be actively discouraged. As Justice Callinan noted early in his High Court career, "no justice seeks to exert any pressures on the others" (Callinan 1999).

In short, the seriatim tradition should result in particular patterns in concurring behavior over time. Namely, we should expect that concurrence is frequent and that this rate is relatively stable over time. If this is the case, it provides support for the claim that the seriatim tradition is a functioning norm on the Court that at least accommodates (and at most encourages) the production of concurring opinions. The previous section provides some confirmation that concurring opinions are produced at a relatively high rate over time (see Figure 6 and Figure 7). The following section will address this in more detail. First, however, it is necessary to consider the meaning of the phrase "consensual norm" as we would expect it to apply to a court with an active seriatim tradition. By evaluating the various existing approaches to the study of consensual norms in the U.S. Supreme Court and in the High Court of Australia, an alternative measure of concurrence and dissent emerges. By using this insight, it is possible to develop a comprehensive analysis of patterns of concurrence and dissent that applies to the unique institutional configuration of the High Court.

Dissent and the Consensual Norm

Identifying an underlying norm of consensus requires more than looking at the patterns of opinion writing in support of the majority. Many of the approaches used by American researchers to identify an underlying norm have utilized information about both dissenting and concurring opinion production (e.g., Epstein et al. 2001; Haynie 1992). This certainly makes sense, as the most obvious breach of a consensual norm is to dissent. In the context of the U.S. Supreme Court, the incidence of concurring and

dissenting opinions are both used as proxy measures for a failure to reach consensus. In essence, "dissenting and concurring opinions and votes represent modes of conflict on the Supreme Court" (Caldeira and Zorn 1998, 877).

In the seriatim opinion tradition, though, concurring opinions are the norm. Certainly, some Chief Justices of the High Court have been inspired to pursue joint majority opinions, usually in response to pressure from the legal community (Clark 2003). Unlike the Supreme Court, however, the High Court does not view concurring opinions as an expression of conflict. The dissenting opinion in the High Court, though, does represent a distinct break from the majority on the part of the individual dissenter. For this reason, if we are to expect any sort of consensual norm in a court with a seriatim opinion tradition, we would expect this norm to extend to dissenting opinions and not concurrences.

Researchers have attempted to discern whether there has been a norm of consensus in Australia. Mirroring the approach of Caldeira and Zorn (1998), Smyth and colleagues have attempted to find evidence of an underlying consensual norm guiding the High Court's behavior over time. In an early version of the research, Smyth (2002c) applies a cointegration analysis to aggregate-level data on High Court opinion production rates from 1903-1975. Smyth looks for a cointegrated relationship between concurring opinions and dissenting opinions on the High Court, but fails to find one. As such, analysis fails to yield support for the hypothesis that the same underlying process drives both concurring and dissenting behavior in Australia. Instead, Smyth concludes that "a single consensual norm does not underlie decision making in the High Court" (Smyth 2002c, 255).

Given what we know about the role of concurring opinions in Australia, however, this is not terribly surprising. The seriatim opinion tradition is itself a norm, guiding the High Court's institutional view of concurring opinion production. If this seriatim tradition fails to discourage concurring opinions, it can do so in one of two ways. First, the tradition may lump separate concurring opinions together with dissenting opinions, classifying both as institutionally acceptable outlets for judicial expression. In this way, the tradition would be tolerant of judicial dissensus. In such a situation, a norm of consensus would clearly not exist.

Alternatively, the seriatim tradition may distinguish between concurring opinions and dissenting opinions, accepting the former but discouraging the latter. Such a norm can be considered a norm of consensus, but must be differentiated from the American version by the way consensus is defined. In the Supreme Court since Marshall, the concurring opinion has been seen as an expression of dissensus. This Australian version of the consensual norm, a seriatim consensual norm, could include concurring opinions as expressions of consensus.

In a more recent revisiting of the consensual norm question, Narayan and Smyth (2005) find some support for a more understated version of the American-style consensual norm in the High Court. In an analysis spanning 1904-2001, they reinterpret the meaning of the consensual norm, this time looking for "some norm on the issue of dissent in operation on the Court at most times," with this norm prescribing "either high or low dissent" (Narayan and Smyth 2005, 165). They are not looking for a seriatim consensual norm as defined above, but instead seek to find a common norm underlying the changes in both concurring and dissenting behavior.

They find some evidence for a cointegrated relationship between dissenting and concurring opinions on the High Court. In other words, they find a long-memoried relationship between changes in dissent rates and changes in rates of concurrence. Because of the institutional differences between the High Court and the Supreme Court, Narayan and Smyth (2005) use slightly different measures from those in Caldeira and Zorn (1998). First, Narayan and Smyth decide to "treat the majority joint opinion in any given case as the de facto opinion of the Court" (2005, 155). By joint majority opinion, they mean *any* joint opinion written in support of the majority vote coalition. As such, what they call a "majority joint opinion" is not usually signed by a majority of the Justices. They concede that joint majority opinions in the High Court have a substantially different connotation from the Supreme Court counterpart, but argue that this "comes closest to representing the opinion of the Court with a system of seriatim opinion writing" (2005, 155).

There is no added precedential weight given to joint majority opinions in the High Court (Gleeson 2004b). Additionally, a substantial percentage of cases will have no joint majority opinion with which a judge could concur, if he should so desire. What this means, in a sense, is that the opinions classified as "concurring" are actually part of the majority. Andrew Lynch gives the following example of this difficulty:

> It has certainly not been uncommon for all seven members of the Court to deliver their own individual opinions in full. In such instances it is, to an extent, quite meaningless to regard concurrences and dissents as being of the same ilk—judgments which together stand 'separate' from a clearly identified and concerted majority. Rather the collection of concurrences amounts to a majority and it is the dissents alone which are on the outer. (Lynch 2003a)

This is not to say that the decision to measure concurrence this way is incorrect. Instead, this definition of the concurring decision as a distinctly nonconsensual behavior may be

misleading in that it includes opinions written in situations similar to the one outlined above.

The second place where the Narayan and Smyth (2005) piece diverges from Caldeira and Zorn's (1998) methodology is essentially a consequence of the first, and has to do with the way opinions are counted. Previous research on consensual norms in the Supreme Court typically used weighted concurrence and dissent rates, or the number of opinions per 100 majority opinions (Haynie 1992; Walker et al. 1988). In other words, the data consisted of the number of separate opinions per 100 decided cases. Caldeira and Zorn (1998) use the raw number of opinions with concurrences and dissents. They do not standardize their data by the number of cases per year, but they do consider the concurrence and dissent rates on the case level.

Perhaps as a way to simplify the data collection process in light of the seriatim opinion tradition in the High Court, Narayan and Smyth (2005) analyze the number of concurring and dissenting opinions per 100 opinions. This differs from the aforementioned studies because it does not consider the concurrence and dissent rates on the case level. This works to overemphasize the variation in concurrence rates, weighting the cases delivered seriatim more heavily than those delivered in joint opinion style.

Consider two types of unanimous cases in the High Court: the first type is delivered seriatim, with seven different opinions all supporting the majority, the second type is disposed of with an opinion signed by all five judges and two separate concurring opinions. Next, imagine that there were fifty instances of each type in one year. The Narayan and Smyth methodology weighs the seriatim cases two and one-third times more heavily than those delivered in joint opinion style. The fifty seriatim cases yield seven

opinions each, for 350 total opinions. For this half of the agenda, one hundred percent of opinions are concurring opinions. The fifty joint opinion style cases, on the other hand, yield only 150 opinions total: 100 concurring opinions and 50 joint opinions. For this half of the agenda, two-thirds of the opinions are concurring. Taken as a whole, the Smyth and Narayan methodology would determine that 90% of opinions from this hypothetical year are concurring opinions.

While this is indeed true, it fails to capture the phenomenon more relevant to the study of consensual norms: the number of judge-level opinion-writing opportunities leading to concurring opinions. Using the above example, we have seven judges with one hundred opinion-writing opportunities each, for 700 total. In the fifty seriatim cases, all opinion-writing opportunities resulted in concurring opinions, or 350 in all. In the joint opinion cases, 250 of the opinion-writing opportunities resulted in joint opinions. The remaining 100 led to concurring opinions. Total, this makes for 450 concurring opinions out of 700 opinion-writing opportunities, or 64.3%.

The difference between 90% and 64.3% is substantial. Using the opinion-writing opportunities standardization allows for a more precisely targeted measure. This operationalization also helps to account for differences in panel sizes both case-by-case and year-by-year. It is true that, when the panel system is working correctly, there will be more opinion-writing opportunities in constitutional cases and other cases deemed important by the Chief Justice (Brennan 2002a). This is because these important cases will be heard by a full bench, while other cases will be heard by a smaller panel. What is of interest here, though, is the individual-level judge behavior. This behavior is more

accurately captured by investigating the choices judges make for each decisional opportunity.

For this reason, the investigation of the consensual norm in the High Court will focus on the opinion-writing opportunity, although the Narayan and Smyth (2005) measure will be presented for purposes of comparison. This investigation is intended to accomplish two goals. First, it will revisit the relationship between concurrence and dissent in the High Court. Specifically, it will provide a replication of Smyth (2002c) and Narayan and Smyth (2005). Second, it will investigate the longitudinal patterns of concurrence and joining behavior. Taken together, these analyses will provide insight into whether joining behavior is something that occurs in the High Court for reasons other than the "consensual norm" that has been described in the literature.

An Underlying Norm of Consensus in Australia?

As the previous section explains, past research has attempted to find evidence of a norm of consensus on the High Court (Narayan and Smyth 2005; Smyth 2002c). This norm of consensus, if it exists, would have significant consequences for our evaluation of the seriatim tradition in the Court. Indeed, such a finding would implicate a waning tradition of separate opinion writing. Additionally, the presence of such a norm would suggest that joining behavior is not something particularly unusual given the institutional context of the Court, as joining in the U.S. Supreme Court is not particularly unusual. Caldeira and Zorn (1998) suggest a very specific operational definition of the consensual norm in the judicial context. Because this consensual norm is something driving both dissents and concurrences, they argue that finding a cointegrated relationship between rates of concurrences and dissents over time "is good circumstantial evidence" of the existence of the consensual norm (Caldeira and Zorn 1998, 881). As such, the opinion-

writing data from the High Court of Australia from 1965-2002 will be evaluated for such evidence.

Stationarity and cointegration

A cointegrating relationship exists between two series of order I(1) if the difference between them yields an I(0) series. In other words, two non-means stationary series are cointegrated if a linear, means stationary combination of these variables exists. In this case, the series share a linear attractor, and tend to trend together. If a shock occurs in one series, the other exerts a gravitational pressure of sorts on it, pulling it back in line. This provides an avenue for a very intuitive indicator of theoretical constructs like institutional norms, as such a norm could be the origin of the trend in each series. Surely, this is the application intended by those applying cointegration techniques in search of consensual norms in judicial institutions (i.e., Caldeira and Zorn 1998; Smyth 2002c; Narayan and Smyth 2005; 2007)}.

No pair of series can be cointegrated if either series is stationary—in other words, both series must trend in order for them to be trending together. For a time series to have second-order stationarity which is the customary assumption for normally distributed data, the process must have a constant mean and variance over time (Maddala and Kim 1998).[76] In mathematical notation for series y_t, this can be represented as

$$E(y_t) = E(y_{t-1}) = \ldots = E(y_{t-n}) = \mu$$

$$V(y_t) = V(y_{t-1}) = \ldots = V(y_{t-n}) = \sigma^2$$

[76] This is contrasted with first-order stationarity, which requires that the distribution of the series would be unaffected by an arbitrary shift in time. This is not the customary assumption because it is "defined in terms of the distribution" (Maddala and Kim 1998, 10).

$$COV(y_t) = COV(y_{t-1}) = \ldots = COV(y_{t-n}) = \gamma^2$$

Variance stationarity is fairly straightforward to diagnose and correct. While there are tests for variance stationarity, simply looking at the data is a reasonable approach to diagnosis (Granger and Newbold 1977). Ignoring it can lead to overparameterized models (Milionis 2004), but correcting for variance nonstationarity can be as simple as computing a log transformation for the series (Box and Cox 1964). Indeed, this is the approach used by Narayan and Smith (2005).

Once the variance is stationary, the stationarity of the means can be assessed. A means-stationary process is one in which the data exhibit no trend. Diagnosing means stationarity is important in order to satisfy the assumptions of many analytical models, and also as a first step in cointegration analysis (Zivot and Wang 2006). There are many ways to accomplish this, the most famous being the Augmented Dickey-Fuller (ADF) (Said and Dickey 1984) test (Elder and Kennedy 2001). Like other unit root tests (e.g., Phillips and Perron 1988), the null hypothesis of the ADF test is non-stationarity, or first-order integration. More specifically, the ADF test is a test for random walk, random walk with drift, or random walk with deterministic trend,

$$\Delta y_t = \beta_0 + \beta t + \gamma y_{t-1} + \sum_{i=1}^{k} \gamma_i \Delta y_{t-1} + \varepsilon_t$$

where β_0 is a constant (representing drift), β is the constant on time trend t (representing deterministic trend), and γ is the test statistic with a non-standard t distribution. This augmented version of the original Dickey-Fuller (1979) test contains a lagged

endogenous variable to help ensure that there is no information left in the residuals of the test equation.

The Elliot, Rothenberg and Stock (ERS) test (1996) is a modified version of this type of autoregressive unit root test, improving on the difficulty the ADF test and other unit root tests have in detecting alternative, non-unit root hypotheses (Zivot and Wang 2006). This test, also called the DF-GLS test, essentially uses a process of GLS detrending to derive the test statistic more efficiently. The error term is less constrained, and can be specified using different formulation. This allows for the removal of the deterministic terms in the ADF test, giving it more power to distinguish between persistent I(0) series and those containing a unit root.

Stationarity tests, including the popular KPSS test (Kwiatkowski et al. 1992), begin with a null hypothesis of stationarity. The KPSS test is a test of parameter constancy, with the null hypothesis being that the parameter for trend is equal to zero. More precisely, the KPSS is actually two different tests: a test for stationarity in level form ($H\mu$) and a test for stationarity with deterministic trend ($H\tau$). This test is often used in conjunction with unit root tests as a confirmatory step, as in Narayan and Smyth (2005). Like the ERS test, the KPSS test was designed to more efficiently distinguish the persistent I(0) series from the I(1) series.[77]

Identifying a unit root in a series is important, as analysis of two means non-stationary series is likely to yield evidence of relationships that are actually spurious (Granger and Newbold 1977; Yule 1926). The standard treatment of such a series is to render them stationary through the process of first differencing. While this process can

[77] For a discussion of issues surrounding unit root diagnosis, see Campbell and Perron (1991).

help us avoid the problems of spurious regression results, it eliminates information contained in these series pertaining to their possible long-run relationship. Engle and Granger (1987) identify an alternative which involves the identification and examination of possible cointegration between the series.

There are several ways to identify cointegration between a pair of series. Engle and Granger (1987) present a two-step method. This method involves regressing one series on the other, then examining the residuals of this cointegrating regression for stationarity. If the residuals are stationary, the null hypothesis of no cointegration between the series can be rejected. The Johansen and Juselius (1990) procedure is a pair of maximum likelihood tests evaluating two different measures of cointegration.

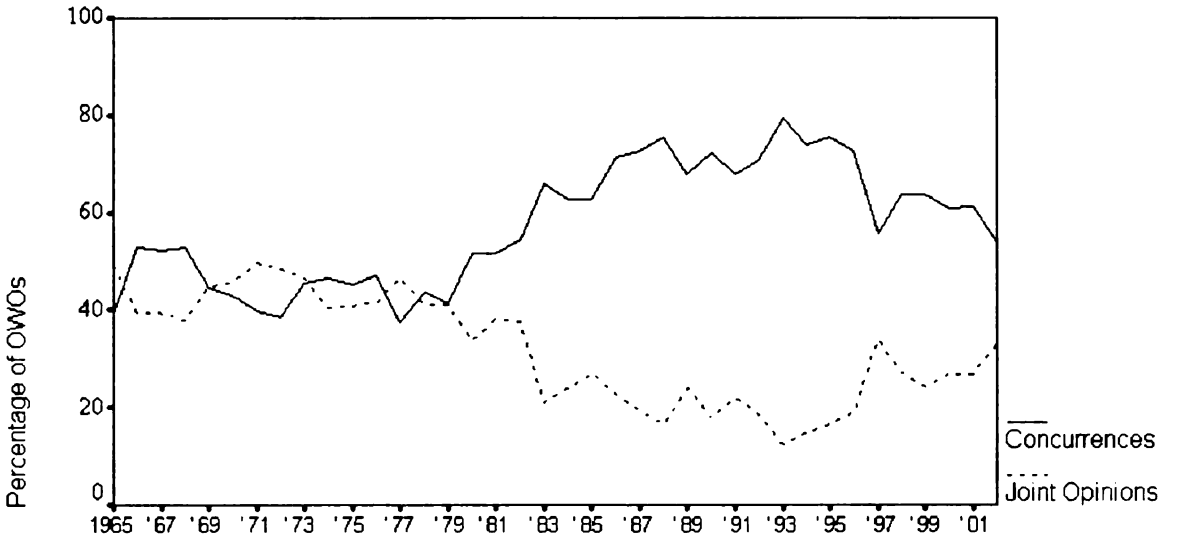
Evaluating the High Court data for unit roots

Of course, a cointegrated relationship necessarily requires that both series have a long run pattern in the first place. If either series is I(0), there is no cointegrated relationship by definition. For this reason, the first step in any such analysis is to identify the order of integration for the relevant series. Before testing the means stationarity of the two series, it is critical to identify and correct for possible variance nonstationarity. Figure 7**Error! Reference source not found.** demonstrates that the series of concurring opinions is likely to be variance nonstationary. To correct for this, it is customary to apply a natural log transformation to the data (Tabachnick and Fidell 2001).

A series of unit root tests, as described above, can now be run on the transformed series. To be sure, the results for the KPSS stationarity tests for each series are not entirely consistent with the results of the various unit root tests (see Table 6). This is not a terribly unusual result. As one researcher notes, "much of the problem with the unit root literature arises from the belief that estimates or test statistics would provide the

answer in themselves" (Smith 2000, 200-201). There is, however, a good deal of evidence that the log transformation of the concurring opinion series contains a unit root.

Figure 8 - Concurring and Dissenting Opinions per Opinion-Writing Opportunity



The dissenting opinion series, however, does not appear to have a unit root. The results for the unit root tests of the log-transformed Narayan and Smyth (2005) measure yield similar results (see Table 7). Narayan and Smyth calculate the number of concurring and dissenting opinions per one hundred written opinions. As was discussed earlier in the chapter, this measure tends to weight separate opinions much more heavily. The present analysis finds that, like the measure weighted by opinion-writing opportunity, the measure of concurring opinions contains a unit root. This is also consistent with the findings in Narayan and Smyth's analysis (2005). The present results differ, however, when it comes to the evidence of the means stationarity of the measure of dissenting opinions as displayed in Table 7.

There are several possible explanations for this difference. Certainly, the present study uses a smaller sample than the Narayan and Smyth (2005) piece, which traces

separate opinions from 1904-2001. The earlier piece by Smyth (2002c) analyzed separate opinions from 1903-1975 and, while it failed to find a cointegrated relationship,

Table 6 - Unit Root Tests on Log-Transformed Separate Opinions per OWO

Test	Dissents	Concurrences	Critical Value ($p < .05$)
Dickey-Fuller Tests			
Constant, No Trend	-3.90*	-1.94	-2.94
Constant, Trend	-3.92*	-1.96	-3.53
Augmented Dickey-Fuller (ADF) Tests			
No Trend	-3.68*	-1.47	-2.94
With Trend	-3.59*	-1.46	-3.53
(# of Lags)	0	0	
Elliot, Rothenberg and Stock (ERS) Tests			
DF-GLS No Trend	-3.96* (0)	-1.60 (0)	-1.95
DF-GLS With Trend	-4.03* (0)	-2.18 (0)	-3.19
Kwiatkowski et al. (KPSS) Tests			
Lags = 0	0.17	0.38	0.15
Lags = 2	0.11*	0.17	0.15
Lags = 4	0.10*	0.13*	0.15
Lags = 8	0.09*	0.13*	0.15
Mean	-2.17	-1.22	
Standard Deviation	0.19	0.39	
N	38	38	

* Indicates rejection of the null hypothesis. DF, ADF and ERS critical values are based on MacKinnon (1991). Optimal lags for ADF selected on the basis of Schwartz's Information Criterion. Optimal lags for ERS based on Ng-Perron (1995) sequential t-test. KPSS results are *eta(μ)* statistics.

it did find evidence that both the concurring and dissenting opinion series contained a unit root. The sample in the present analysis is 38 years, which means that there are fewer time points analyzed in the unit root tests. Shorter time spans have been demonstrated to result in decreased power in traditional unit root tests, making it harder for them to identify correctly a stationary series (Campbell and Perron 1991). The

Table 7 - Unit Root Tests of Log-Transformed Separate Opinions per 100 Opinions

Test	Dissents	Concurrences	Critical value ($p = .05$)
Dickey-Fuller Tests			
Constant, No Trend	-3.17*	-2.13	-2.94
Constant, Trend	-4.43*	-2.35	-3.53
Augmented Dickey-Fuller (ADF) Tests			
No Trend	-2.15*	-1.71	-2.94
With Trend	-2.33*	-1.80	-3.53
(# of Lags)	3	0	
Elliot, Rothenberg and Stock (ERS) Tests			
DF-GLS No Trend	-1.76 (2)	-1.80 (0)	-1.95
DF-GLS With Trend	-4.55* (1)	-2.54 (0)	-3.19
Kwiatkowski et al. (KPSS) Tests			
Lags = 0	0.17	0.34*	0.15
Lags = 2	0.11*	0.17*	0.15
Lags = 4	0.10*	0.13*	0.15
Lags = 8	0.09*	0.13*	0.15
Mean	-1.65	-0.70	
Standard Deviation	0.22	0.23	
N	38	38	

* Indicates rejection of the null hypothesis. DF, ADF and ERS critical values are based on MacKinnon (1991). Optimal lags for ADF selected on the basis of Schwartz's Information Criterion. Optimal lags for ERS based on Ng-Perron (1995) sequential t-test. KPSS results are *eta(μ)* statistics.

decreased power leads to a lessened ability to correctly identify persistent *non unit root* series (Elliot et al. 1996).

In the present situation, however, the question is whether the series representing dissent has been mistakenly diagnosed as a non-unit root series. Whatever the reason, the failure to find evidence of a unit root in the dissenting opinion series does not mark the end of the search for a cointegrated relationship. Instead, the series can be tested for a *fractionally* cointegrated relationship by loosening the assumption that the series must be I(0) of I(1).

Testing for fractional cointegration

A means-stationary process is one in which the data exhibit no trend. Diagnosing means stationarity is important in order to satisfy the assumptions of many analytical models, and also as a first step in cointegration analysis (Zivot and Wang 2003). Many researchers argue, however, that series compiled through the aggregation of data created through disparate individual-level data generating processes are likely to be fractionally integrated (Box-Steffensmeier and Tomlinson 2000; Granger 1980; Lebo et al. 2000). Instead of the series being characterized by the traditional "knife-edged" classification of I(0) or I(1), the order of integration is allowed to vary. The fractionally integrated series is said to be I(d), such that $0<d<1$. Fractionally integrated series are long-memoried processes, as they "exhibit statistically significant correlations across time lags" (Clarke and Lebo 2003b, 288).

Traditional cointegration tests assume that the series in question both contain unit roots, and that error correction term derived from the cointegrating regression is means-stationary (Johansen and Juselius 1990). These restrictions, though, are not required under the Granger representation theorem (Bollerslev and Baillie 1994). Just as the concept of integration can be generalized to fractional integration, "[e]xtending the methodology of cointegration to include fractional cases enables one to generalize the concept of an error correction mechanism" (Clarke and Lebo 2003b, 295).

In other words, the requirement that the error correction mechanism be I(0) can also be relaxed, allowing for an error correction term of order I(d). If the error correction term is significant in the cointegrating regression and has an order of integration less than either of the original series, the original series may be appropriately described as

fractionally cointegrated. In this system, "the effect of a shock declines at a slower rate" than the classical cointegration paradigm allows (Bollerslev and Baillie 1994, 742).

The presence of a fractionally cointegrated relationship, which is a generalization of the cointegration procedure used by Caldeira and Zorn (1998), requires that some preconditions be met. First, each of the individual series must be at least fractionally integrated (i.e., I(d) such that $0 < d < 1$). The rates of concurrence and dissent rates for each of the four courts, then, must be evaluated for means-stationarity.[78] Then, if both series are means-nonstationary, a cointegrating regression can be estimated to determine whether or not the series are cointegrated. If the series are found to be cointegrated, an error correction model can be specified to estimate the long- and short-run dynamics of the system.

As one researcher notes, "much of the problem with the unit root literature arises from the belief that estimates or test statistics would provide the answer in themselves" (Smith 2000, 200-201). One solution to this problem is to estimate the value of d directly. In other words, "instead of running multiple tests and looking for patterns suggesting stationarity, one can instead rely upon the point estimates of d and the associated t-ratios" (Box-Steffensmeier and Tomlinson 2000, 66). These parameters are estimated using Robinson's (1995) semi-parametric estimator, and they are reported in the bottom half of Table 8. The results show evidence that, while dissent rates are not

[78] In order for a time series to have second-order stationarity which is the customary assumption for normally distributed data, the process must have a constant mean and variance over time (Maddala and Kim 1998). Ignoring variance nonstationarity can lead to overparameterized models (Milionis 2004), but correcting for it can be as simple as computing a log transformation for the series (Box and Cox 1964). As such, each of the series here are log-transformed.

Table 8 – Unit Root Tests and Robinson's Gaussian Semiparametric Estimates of *d* (OWO Data)

Tests	Concurrences		Dissents	
KPSS (1992)				
$l = 0$	0.41	*	0.14	
$l = 2$	0.18	*	0.11	
$l = 4$	0.13		0.10	
$l = 8$	0.11		0.10	
ERS (1996)				
Trend	-1.46(3)	*	-2.08(5)	
No Trend	-2.02(0)		-3.92(1)	*
Robinson's *d*. (1995)†				
Est. $d + 1$	0.73		0.31	
S.E.	(0.12)		(0.12)	
H_0: $d = 0$	-2.23	*	-5.69	*
H_0: $d = 1$	6.02	*	2.56	*

* Indicates rejection of the null hypothesis at $p < .05$ level. ERS critical values are based on MacKinnon (1991) and optimal lags for ERS (indicated in parentheses) are based on Ng-Perron (Ng and Perron 1995) sequential t-test. KPSS results are eta(μ) statistics.
† Due to the fact that the parameter space of d is constrained such that $-1.5<d<0.5$, the parameter estimates were calculated on the first-differenced series. As such, the results reported for the estimate of d have been adjusted by adding one. The t-ratios associated with the null hypotheses reflect the probability that the d of the differenced series is equal to 0 or 1.

I(1), each series is significantly different both from I(0) and I(1). In other words, concurrence and dissent rates are not stationary, but instead are fractionally integrated.

The next step is to test concurrence and dissent rates for cointegration. The classic method, as employed by both Caldeira and Zorn (1998) and Narayan and Smyth (2005) is to use cointegration tests such as Engle-Granger (1987) or Johansen-Juselius (1990). Because we have determined that the series of interest are all significantly different from I(1), however, a fractional cointegration method is more appropriate. Demonstrating the presence of a fractionally cointegrating relationship is as simple as demonstrating that "the residuals produced by regressing one fractionally cointegrated series on another one are of a lower order of integration than are either of the fractionally integrated series" (Clarke and Lebo 2003a, 294).

The results for the cointegrating regression of dissent rates on rates of concurrence in Australia are presented in Table 9. Here, the estimate of *d* for the residuals is 0.72,

which makes the order of integration higher than that of the rate of dissent, which is estimated to be an I(0.31) series (see Table 8). As such, concurrences and dissents are not fractionally cointegrated. Through these analyses, no evidence has been found to support the hypothesis that rates of dissent and concurrence share a common linear attractor.

Table 9 - Cointegrating Regression of Dissents on Concurrences

Independent Variables		Coefficient	Std. Error	
Constant		-0.386	(0.171)	*
Percent of Cases with a Dissent Log-transformed		0.035	(0.185)	
Rob. (1995)† for the Error Term				
Est. $d + 1$	0.72	H_0: $d = 0$	-2.31 *	
S.E.	(.012)	H_0: $d = 1$	5.94 *	

† Due to the fact that the parameter space of d is constrained such that -1.5<d<0.5, the parameter estimates were calculated on the first-differenced series. As such, the results reported for the estimate of d have been adjusted by adding one. The t-ratios associated with the null hypotheses reflect the probability that the d of the differenced series is equal to 0 or 1.

This result, while contrary to the findings of Narayan and Smyth (2005), is more in keeping with the expectations we would have given the High Court's explicit adherence to the seriatim opinion tradition. Narayan and Smyth were left to describe this relationship as evidence of a "low consensus equilibrium," presumably different from the high consensual norm of the U.S. Supreme Court only inasmuch as it exists in a court with a seriatim opinion tradition (Narayan and Smyth 2005, 148). As they explain,

> The low consensus equilibrium in the High Court is a manifestation of the prevalence of seriatim opinion writing and general absence of institutions designed to build consensus, while the high consensus equilibrium on the US Supreme Court, at least up to the 1940s, reflected institutional practices such as the opinion of the Court and formal conferencing arrangements. (Narayan and Smyth 2005, 165)

While they argue that this "makes sense from a comparative perspective," they do not explain the mechanism by which we would expect concurrences and dissents in a

seriatim court to have a common underlying cause. It makes more sense, surely, to expect a consensual norm to impact only dissents. A seriatim consensual norm, as the term is used earlier in this chapter, refers to an institutional norm of consensus that considers concurrence an acceptable expression of consensus. Unlike the way the consensual norm is conceptualized in the U.S. Supreme Court research (and the research by Narayan and Smyth), the seriatim consensual norm would, by definition, have different mechanisms driving concurring and dissenting behavior.

The analysis in this chapter does not prove the existence of a seriatim consensual norm. As difficult as the traditional consensual norm is to identify, a seriatim consensual norm is even harder to identify empirically. Because this norm would treat concurrences and dissents differently, there is no obvious factor with which the series of concurring opinions would be cointegrated.

This analysis does, however, provide evidence that the seriatim tradition is not malfunctioning in Australia. While there is fluctuation in concurring and dissenting opinion behavior over time, there is no evidence in this analysis to suggest that they are driven by a single common factor. In itself, this is an important finding. While the critics of the seriatim tradition in Australia may lament it, it appears that the High Court has not yet abandoned the rugged individualism in opinion writing that has characterized the institution for most of its history. That being the case, the phenomenon of the joint opinion on the High Court remains to be explained.

CHAPTER SIX: THE PRODUCTION OF JOINT OPINIONS

> *Courts of final appeal have different methods for the preparation and production of opinions. It is an issue of interest to the profession, law teachers and students, and judges of other courts.*
>
> —Chief Justice Murray Gleeson (2004a)

As the previous chapter demonstrates, there is little evidence that an underlying consensual norm influences rates of dissenting and separately written concurring opinions on the High Court of Australia. Indeed, this finding is in keeping with the High Court's institutional tradition of using a seriatim opinion-writing style. The seriatim tradition, when functioning properly, creates a norm of separate opinion writing. In the previous chapter, no evidence is found which might suggest rates of concurrences and dissents are driven by a common factor. What the previous chapter cannot tell us is why, in a court with a seriatim opinion tradition, judges would sacrifice the ideological flexibility afforded by such a tradition in order to coauthor joint opinions.

This chapter develops a set of conceptual hypotheses about joining behavior on the High Court. As Chapter 4 illustrates, theories to explain joining behavior in the U.S. Supreme Court cannot be transplanted wholesale to the High Court. The hypotheses presented here are derived from many relevant judicial behavior theories, but adapted for the unique traditions of this institution.

Joining Behavior and Case-Level Characteristics

By joining behavior at the case level, many important factors can be isolated. Among these are characteristics of the decision making environment, characteristics of the case itself, the role of other government actors, the litigation history, and characteristics of the case outcome. Each of these is addressed in turn below.

Characteristics of the Decision Making Environment

Several characteristics of the decision making environment may influence joining behavior on the Court. Small group theory suggests that increased workload pressure may influence a judge's decision to join in opinion (Brenner 2003). Another important small group explanation of joining behavior is the leadership of the Chief Justice (Ulmer 1971). Finally, attitudinal theory suggests that judges will take actions that are in line with their policy preferences (Segal and Spaeth 1993). As such, judges are expected to join only when their policy preferences are reflected in the opinion. These theories, while developed in the institutional context of the Supreme Court, can be used fruitfully to establish expectations of joining behavior in the High Court.

Judicial Workload

Among the challenges of being a judge is the pressure of a heavy workload. Certainly, Justices on the Supreme Court and the Australian High Court alike have registered complaints about excessive workload burdens (Baum 1997; Craske and Gibbs 2002). Justice Michael McHugh has noted that "the workload of the High Court Justices borders on oppressive" (McHugh 2005, 3). The heavy workload of the U.S. Supreme Court has led researchers to question the ability of the Justices to adequately address the growing number of petitions it must dispose of (Jucewicz and Baum 1990; O'Brien 1985).

While the High Court of Australia deals with a smaller number of agenda-setting decisions, jurisdictional restrictions put in place by the Australian Parliament force judicial review cases to bypass the Federal court, "thereby imposing an oppressive and inappropriate burden on the High Court" (Mason 2003a, 7). In addition, the High Court Justices handle the agenda-setting decisions on their own (Horton 2002). This is in stark

contrast to greater degree of discretionary power delegated to the U.S. Supreme clerks (Duxbury 2001).

One of the most significant drains on the High Court Justices is the hearing and disposal of the increasing number of special leave petitions (Gleeson 2004b). The addition of the video link system in 1987 allowed the Justices to begin hearing nationwide petitions without the need to travel (Jackson 1996). While this made the process more efficient, these petitions are still a significant drain on the Court's time. The Court deals with fewer agenda-setting decisions than the U.S. Supreme Court does (Mason 2003a), but the High Court has a tradition of hearing oral arguments in virtually all of these special leave petitions.[79]

The consideration and disposition of applications for special leave to appeal is a duty that the Justices do not take lightly (McHugh 2005). Typically, special leave petitions are heard by a panel of three Justices. This is in stark contrast to the American tradition of dealing with petitions for *certiorari* through written submissions. Special leave hearings allow the judge to deal directly with the litigants, "without the go-between of the associate, without the risk of documents not reaching the Judge, of being summarised in some erroneous way, or of crucial information simply being buried in the briefs or missing entirely from the submissions" (Horton 2002, 120).

It has sometimes been argued that a heavy workload encourages individual judges to join the opinions of their colleagues, thus producing a higher incidence of joint opinions (Brenner 2003). As the hypothesis goes, judges can save time by assenting to

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[79] This tradition has been changed by a 2005 revision of the High Court Rules. The new rules allow the Justices to consider certain types of special leave petitions "on the papers" instead of in oral arguments. See (Gleeson 2005).

the opinion of a colleague instead of preparing a separate opinion (Posner 1995). There is, however, at least as much reason to expect that an increase in workload might produce the opposite results. Justices on the U.S. Supreme Court have noted that the production of separate opinions can be a natural result of time pressures (Kirman 1995). While the time taken to actually research and produce an individual opinion may be substantial, it may pale in comparison to what is necessary to negotiate an opinion acceptable to multiple judges. As Baum notes, "workload concerns might actually encourage the writing of separate opinions and move the Court further from unanimity, because it is time-consuming to seek consensus (1997, 47).

From the perspective of the opinion author, "circulating a new draft in order to accommodate one's colleagues requires an investment of time and energy" (Wahlbeck et al. 1998, 301). The pressures of a heavy workload can stifle the maturing of collective thought on a particular case (Davis and Reynolds 1974). Australian legal scholars seem to agree that workload pressures tend to decrease the number of joint opinions. High Court researcher Michael Coper contrasts the opinion-writing behavior on two very important cases, one written in a short time and the other over the span of nearly a year:

> The seven individual (and long) judgments in the *Tasmanian Dam Case* (1983) appear to have been the product of a shortage of time to explore the potential for agreement. By contrast, in *Cole v. Whitfield* (1988), the eleven months between argument and decision no doubt facilitated the production of a single, unanimous, joint judgment. (Coper 2002c, 368)

Because of the time necessary to amass collegial support for joint opinions – especially in the absence of a majority opinion tradition – increased workload pressures is likely to hinder the production of joint opinions on the High Court of Australia.

> *Hypothesis 1: As workload pressures increase, joint opinion production will decrease.*

The most obvious workload-related pressure is the actual amount of time remaining in the term. Researchers have often used the end of the term as a deadline of large importance to appellate justices (Maltzman and Wahlbeck 2005). As the end of the term approaches, the judges may likely feel significant pressure to dispose of the remaining cases (Wahlbeck et al. 1998). Research on U.S. Supreme Court opinion assignment finds that organizational and efficiency concerns are increasingly important as the end of the term approaches (Maltzman and Wahlbeck 2004). This suggests:

> *Hypothesis 1a: When a case is heard near the end of the term, joining behavior will be less likely.*

Additionally, the end of a natural court can have the same effect. When a High Court Justice leaves the Bench, it is customary that any undelivered opinions remain undelivered (Williams 2002). The 1977 amendment to section 72 of the Australian Constitution, which provides for a mandatory retirement age of 70, makes the departure of a member of the Bench slightly more predictable. The first Justice to retire at the mandatory retirement age was Justice McHugh in 2005. Even still, the impending retirement of a Justice is generally known by his or her colleagues.

> *Hypothesis 1b: When there is a retirement date approaching, joining behavior will be less likely.*

The time pressures that may hinder the production of joint opinions are a result not only of the number of months between hearing and opinion, but also of the amount work to be accomplished during that time. On the High Court of Australia, the vast majority of judicial work consists of the disposition of cases and petitions for special leave to appeal (Craske and Gibbs 2002). Generally, increases in workload demands result in pressure on the judges themselves, as the Justices remain reluctant to rely on their associates to assist in opinion-writing duties (Leigh 2000).

Hypothesis 1c: When the number of cases heard in a term is higher, joining behavior will be less likely.

Leadership of the Chief

Another important characteristic of the decision-making environment is the leadership of the Chief Justice. Variations in the ability of a Chief Justice to lead the way in forging consensus is an important factor in determining levels of consensus behavior on the U.S. Supreme Court (Haynie 1992). While there is some disagreement on the issue (Best 2000), it is clear that many judges and scholars believe that the leadership abilities of a Chief Justice are important to understanding the character of the institution during that judge's tenure. As Supreme Court Justice Charles Evans Hughes once noted, "in a small body of able men with equal authority in the making of decisions, it is evident that his actual influence will depend upon the strength of his character and the demonstration of his ability in the intimate relations of the judges" (Hughes 1928, 57). The differences in the success of various Chief Justices on the High Court in the first half of the twentieth century have also been shown to correlate with levels of dissensus behavior (Smyth 2003b). Thus,

Hypothesis 2: Joining behavior will be related to the leadership of the Chief Justice.

One of the recurring themes circling the question of leadership styles is the practice of conferencing. The U.S. Supreme Court famously conducts formal, private conferences on a regular basis. The Justices use these conferences to discuss cases with each other, usually for the first time (Powell 2004). It is in this atmosphere that ideas are honed and tentative opinion coalitions are forged. Because of the majority opinion tradition on the U.S. Supreme Court, the need for conferences is acute (Wahlbeck et al. 1998). Around the turn of the century, conferences were supplemented with the circulation of opinions

after conference and "the system of laborious negotiation over substance and language" needed to facilitate this collaboration (Kirman 1995, 2102). Despite the fact that there is no institutional requirement for these conferences, the judges maintain an extraordinarily consistent meeting schedule (Rehnquist 2004).

The extent to which such an institution exists in Australia is unclear in the literature (Fricke 1986). The New South Wales Court of Appeals maintains a strategy for encouraging joint opinions, and one of the dimensions of this strategy is a system of conferencing and equitable "primary draft" assignment (Kirby 2005c). Chief Justice Murray Gleeson has made some effort to encourage joint opinions on the High Court, and he sees his role as being an important variable in their proliferation (Clark 2003). According to Justice Kirby, though, formal techniques for reducing excessive separate opinions "have never been features of the High Court of Australia" (Kirby 2005c, 3). Indeed, there is nothing in the Australian High Court akin to the systematic conferencing process of the U.S. Supreme Court. That said, several Chief Justices have attempted to institute some sort of informal conference (Smyth 2003b). At the beginning of his tenure, Chief Justice Gleeson had instituted a somewhat structured conference following oral arguments. In a 1999 speech, Justice Callinan described these conferences:

> The meetings are very useful because of the opportunity they provide for the exchange of views, the reaching of consensual opinions and judgments, when possible, and the identification, and usually, in consequence, the narrowing of difference between the Justices. (Callinan 1999, 3)

Barwick tried a similar strategy, but was far less successful (Smyth 2003b).

The categorization of Chief Justices as "successful" or "unsuccessful" in this regard will have a lot to do with their ability to promote, as Kirby describes, a "culture of mutual respect, reinforced by happy social intercourse" (Kirby 2005c, 3). The production of

joint opinions "is affected by the extent to which the Chief Justice promotes arrangements that will encourage the writing of joint judgments" (Gleeson as quoted by Clark 2003, 10). As Chapter 3 describes, the modern Chiefs have been very different from each other in their ability to promote a harmonious working environment. As such, we might expect joint opinions to flourish under some Chiefs, and to languish under others. Because of the importance of the conferences as an opportunity for the emergence of cooperative behavior,

> *Hypothesis 2a: Joining behavior will be higher during the tenure of Chief Justices who were able successfully to implement a system of regular conferences.*

Being elevated to the position of Chief Justice is a great honor, but it also comes with great administrative responsibility. Research on the U.S. Supreme Court indicates that new Chief Justices have a distinct period of acclimation to their new jobs (Lanier and Wood 2001). An analysis of the Canadian Supreme Court also finds evidence that new Chiefs are less likely to author majority opinions during the beginning of their tenure (McCormick 1994; but see Wetstein and Ostberg 2005).

There is good reason to expect the opposite result in the High Court. While there likely is a learning curve, many Chief Justices come to the position intending to facilitate the production of joint opinions (Clark 2003; Mason 2003c). For better or worse, many of the Chief Justices abandon attempts to organize the formal conferences and regular communication necessary to maintain a steady flow of joint opinions (Smyth and Narayan 2004; McMillan 2003). As such,

> *Hypothesis 2b: During the first year of a new Chief Justice's tenure, joining behavior will be more likely.*

The ideological makeup of the panel

There are a couple of reasons to suspect that liberal and conservative Justices will join opinions at different rates. First, we may hypothesize that liberal and conservative Justices differ in their propensity to join. There is little systematic evidence to support this assumption. The second reason, however, is a more tenable one. With the exception of the Gleeson Court, the modern High Court has never had a majority of judges appointed by the Labor Party. In other words, the appointees of Liberal-National Coalition prime ministers have constituted the majority on the Court during the tenures of Barwick, Gibbs, Mason and Brennan. The attitudinal model suggests that, in the absence of a majority opinion tradition, judges will join only when their policy preferences are adequately represented by a colleague's opinion (Segal and Spaeth 2002). When there are more ideologically compatible judges to choose from, joining behavior will be more likely.

> *Hypothesis 3: The likelihood of joining behavior will depend on the ideological makeup of the panel.*

The logic described above would predict that, *ceteris paribus*, conservative panels would be more likely than liberal panels to dispose of cases with a single opinion (with the exception of the Gleeson Court). The impact of panel ideology on other types of joint behavior is more difficult to predict. If liberal (or conservative) judges are more likely to engage in joining behavior, liberal (or conservative) panels may produce more joint opinions because of this tendency.

> *Hypothesis 3a: Single-opinion dispositions will be less likely on panels with higher mean liberalism scores than on panels that are more conservative.*

The ideological diversity of the panel is an important consideration in predicting joining behavior. Ideologically homogenous panels will be more likely to engage in both

types of joining behavior. The heterogeneity of the majority coalition in the Supreme Court has been linked to greater accommodation by the opinion writer (Wahlbeck et al. 1998), but it is unlikely to have this effect in the High Court. In the absence of a majority opinion tradition, cases that would have required greater accommodation to win over a majority of judges would simply be disposed of by several separate opinions. On homogenous panels, and individual judge is more likely to find his preferences supported in the opinions of his colleagues. This is especially critical in the production of single-opinion dispositions, especially in complex or salient cases.

Hypothesis 3b: Joining behavior will be less likely on panels with high diversity of liberalism scores than on panels with less diversity of scores.

From an attitudinal perspective, the notion that ideological agreement would predict joining behavior seems obvious. Certainly, the voting behavior of judges on the Supreme Court has been quite satisfactorily explained in this way (Segal and Spaeth 2002). Similar research has shown that attitudinal explanations of voting behavior can help to explain decision-making behavior in the highest courts of other countries, including Australia (Ostberg et al. 2002; Songer and Johnson 2002; Schubert 1969a; Smyth 2005b).

Much research into attitudinal explanations of judicial voting behavior has used scales other dimensional analysis techniques to measure attitudes. The early jurimetrics literature followed Glendon Schubert's lead and used cumulative scaling or "scalogram" analysis (Tate 1983). Criticism of this methodology points to serious problems of properly ranking the cases and the difficulties imposed by seemingly inconsistent votes (Tanenhaus 1966). The more sophisticated multidimensional scaling techniques have

bypassed many of these difficulties, and methods evolved to apply scaling techniques even to courts that sat in panels (Mc Iver 1976).

One of the major limitations to using scaling techniques is the need to use the available vote data in order to produce ideological scales. While the scales may prove useful in helping to identify patterns of agreement, the measures cannot be used in a model to explain the voting behavior from which they were derived. For this purpose, it is necessary to collect information external to the data contained in the voting records. [80]

Hypothesis 4: The relationship between a Justice's ideological position and the position of the rest of the bench will affect the likelihood of his joining.

In the Supreme Court, majority opinion authors must increase their accommodation efforts when the majority coalition is more diverse. Evidence from the U.S. Courts of Appeals also suggests that a judge is more likely to author a separate opinion—either a concurrence or a dissent—when he is ideologically distant from the majority opinion author (Hettinger et al. 2003a). The ideological make-up of the majority coalition is important in the context of the American courts because of the majority opinion tradition, but the make-up of the panel as a whole will be more important in Australia. Because there is no need to marshal a majority for the opinion, the ideological distance of the individual judge to the mean of the entire panel is the relevant factor. Research on the High Court has suggested that when a Justice is an outsider, he is less likely to join (Smyth 2001).

Hypothesis 4a: When a Justice's ideological position is far from the mean position of the bench, he will be less likely to join.

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[80] One of the most accurate ways to do this is to analyze the content of various sources of information besides the judicial record (Segal and Cover 1989). As yet, no such measure has been created for members of the High Court.

Case Characteristics

Certain characteristics of the cases before the judges will likely be a factor in determining whether a joint judgment will be produced. Specifically, joint judgment production may depend on case complexity, salience, the influence of other government actors, and litigation history.

Case complexity

Over time, the Court has seen the complexity of its cases increase steadily (Leigh 2000). Complex cases have many potential points of disagreement, and this can make consensus on a joint judgment less likely (Spriggs et al. 1999). The production of joint judgments is more difficult in complex cases, and the resulting judgments are less likely to capture the real differences among the Justices (Coper 2002c). It is difficult to pinpoint exactly what makes a case complex. As Smyth points out, "cases which are complex might be complex precisely because they involve policy considerations" (Smyth 2003a, 8). In the Supreme Court, research has shown that it takes significantly more drafts to marshal a majority opinion coalition in complex cases (Wahlbeck et al. 1998).

In Supreme Court research, case complexity has been measured using a count of the number of issues raised in the case, the number of legal provisions addressed (Johnson 2003), the number of opinions published in a case, and various combinations of these measures (Bailey et al. 2005; Spriggs et al. 1999; Wahlbeck et al. 1998). In terms of joining behavior, case complexity is important because "the legal complexity surrounding some cases may create additional uncertainty for the individual Justices as they figure out their own position" (Hoekstra and Johnson 2003, 352). When there are several issues or provisions that could be controlling in a case, judges are less able to

anticipate the direction of the final draft of the majority judgment and are less likely to agree with its emphasis. As such,

> *Hypothesis 5: Joining behavior will be more likely in simple cases than in cases that are more complex.*

In the U.S. Supreme Court, oral arguments are generally limited to thirty minutes per side. Oral argument is the only opportunity for "a direct interchange of ideas between court and counsel" (Rehnquist 1983, 1021). A recent study of oral argument in the Supreme Court found evidence that "justices need more information in complex cases and a pertinent source of such information is oral arguments" (Johnson 2004, 121). Justice Byron White notes that Supreme Court Justices treat lawyers in oral arguments as resources for clarifying their own thoughts on a case (White 1982).

While the Supreme Court maintains abbreviated arguments, the High Court has implemented no strict limits on oral arguments. As one prominent Australian legal scholar notes, "the United States Supreme Court allows only one hour of oral argument per case whereas the High Court in the *Bank Nationalisation Case*[81] let the argument run for 39 days" (Coper 2003, 6). These days, most arguments in the High Court take place in a single day. In complex cases, though, oral arguments will sometimes run longer (Kirby 2006). Because the variability of oral argument length is related to the complexity of the case, the former can serve as a proxy for the latter.

> *Hypothesis 5a: Joining behavior will be less likely in cases with long oral arguments than in cases where oral arguments last less than one day.*

Another commonly used approximation of case complexity is the length of the opinion used to dispose of the case (Black and Spriggs 2007; Hettinger et al. 2004;

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[81] *Bank of New South Wales v. Commonwealth* (1948). 76 CLR 1.

Schuck and Elliot 1990). The rationale behind this is relatively simple; it takes more pages to explain the reasons for judgment in complex cases. Additionally, the consideration of more than one case adds a dimension of complexity to the case.

> *Hypothesis 5b: Joining behavior will be less likely in cases with longer judgments than in cases with short judgments.*

> *Hypothesis 5c: When the Court hears a number of different cases together, joining behavior will be less likely.*

When a court exercises discretionary jurisdiction, it can weed out uncontroversial cases in favor of more important ones. The U.S. Supreme Court gained much more agenda control through the Judiciary Act of 1925. The difference in the Court's output was marked by fewer cases decided on the merits, longer opinions, and more dissents (Halpern and Vines 1977). The differences in agenda are also apparent in other national high courts (Songer and Johnson 2007). As the earlier chapters have discussed, the High Court's control over its agenda has expanded over time. The nature of the Court's work changed significantly as a result (Jackson 1996), leaving the Court free to address more salient cases (Pierce 2006).

> *Hypothesis 5e: When the Court is exercising control over its agenda, joining behavior will be less likely.*

Case salience

Research on opinion writing in the American courts has long pointed to case salience as an important factor in a judge's decision to write separately (e.g., Kluger 1976; Murphy 1964; Schubert 1959). Indeed, most judges are thought to be "more likely to be concerned with the legal rules announced in important cases" (Wahlbeck et al. 1999, 496). This is thought to work independently from workload concerns, with Justices likely less to rely on organizational concerns when writing opinions in salient cases

(Maltzman and Wahlbeck 2004). Indeed, judges in non-salient cases may be more willing to assent to the written judgment of a colleague than they might otherwise be (Dorff and Brenner 1992; Spriggs et al. 1999).

Hypothesis 6: In salient cases, joining behavior will be less likely than in non-salient cases.

One common measure of case salience in the context of the U.S. Supreme Court is the participation of amici. While their specific content may not influence the Court's final decision (Spriggs and Wahlbeck 1997), their presence and number serve as an indicator that the importance of the case extends beyond the litigants (Wahlbeck et al. 1999). Indeed, this measure can capture a case's "salience to the larger social and political systems" (Hettinger et al. 2003b, 224).

In Australia, however, the participation of non-party interveners is more complicated. Since the Judiciary Amendment Act of 1976, the attorneys-general of the federal government and the states have had the right to intervene in constitutional cases under section 78A(1). Non-governmental parties enjoy no such right. Indeed, the Court has maintained, to varying degrees, the strict standard laid out by Chief Justice Dixon more than fifty years ago (Williams 2000). In *Australian Railways Union v. Victorian Railways Commissioners* (1930),[82] Dixon requires that intervening parties demonstrate "some particular right, power or immunity in which they are concerned" in order for the Court to grant leave to intervene (331).

The process of obtaining leave to intervene is shrouded in mystery. The Court only sporadically gives reasons for denying leave to intervene (Williams 2000), making the

[82] 44 CLR 319.

process quite difficult to navigate for potential interveners. Indeed, the costs of intervening are quite high. According to George Williams,

> [t]he situation is made worse by the fact that the Court does not hold a directions hearing before the case begins to indicate whether leave will be given. Instead, potential interveners must prepare submissions for the actual day of the hearing both on whether they should be granted leave and also setting out the full argument that they wish to make in the event that leave is granted. Counsel appearing for a potential intervener must be prepared to present oral argument to the Court on each issue that might be of interest to the Bench. Of course, if leave is refused, the expense and time spent in preparing full submissions and oral argument is wasted. (Williams 2000, 384)

Perhaps because of these high costs, Williams finds that most interveners in the court, even through the 1990s, are attorneys-general intervening under section 78A(1) (*ibid.*). As such, the number of interveners in any given High Court case is made up of two main groups. The first and larger group consists of attorneys-general intervening in a constitutional case. The second group is made up of other, non-governmental interveners who have a demonstrable stake in the outcome and the ambition (and resources) to win leave to intervene.

In either situation, the presence of non-party interveners in a High Court case is an indication that the case is salient. In U.S. Supreme Court research, the use of *amicus* participation has been criticized. As Collins points out, "amicus participation in a case does not imply the case is salient to a particular jurist; instead it denotes that the case is salient to those organized interests who filed the briefs" (2005, 3). If this is true in Australia, however, it is to a lesser extent. In the case of the non-governmental interveners, the judges themselves play a role in vetting the submissions. Their assent to intervener participation, then, is more directly related to their own view of the salience of the case. As such,

Hypothesis 6a: Joining behavior will be less likely in cases with non-party participation than in cases without non-party participation.

A Federal Court Judge notes that Australian courts "have not, until recently favoured the participation as amicus curiae of public interest groups" (Kenny 2004, 8). In some cases, interest groups may bypass this leave requirement and get standing to sue as parties to the case. Just as in the United States, and interest group that fails in the political branches may seek to "have its views imposed by means of a sweeping ruling from the Court" (Galligan 1987, 235). In this way, public interest litigants represent another proxy measure for case salience.

Hypothesis 6b: When a non-governmental organization is a party to the case, joining behavior will be less likely.

Another important dimension of case salience has to do with the legal importance of the case. The increase of important constitutional cases is often cited among reasons for the increasing incidence of separate opinions on the U.S. Supreme Court (Kirman 1995). On the High Court, the tradition of rugged individualism remains particularly strong in certain issue areas. As Chief Justice Gleeson explains,

> The cases in which we're likely to write separate opinions are fairly predictable. They are, by and large, constitutional cases and tort cases...Once you get outside those two areas you actually find a very substantial number of joint judgments. (Clark 2003 2003 #188, 10)

While Justices on the U.S. Supreme Court have been known to seek unanimity on controversial cases of constitutional law (Scott et al. 2003), the approach is quite different in the High Court. In constitutional cases, the Justices "feel a very strict obligation under the constitution to express their individual opinions" (Clark 2003, 10). The central importance of these cases encourages the Justices to provide their specific set of reasons.

Hypothesis 6c: Joining behavior will be less likely in constitutional cases than in other cases.

It may be reasonably clear to American onlookers why constitutional cases might elicit special treatment, but coupling these with tort cases will seem quite unusual. Cases in contentious issue areas may well have a lower level of consensus than the norm. The U.S. Supreme Court rarely fails to produce a majority opinion, but when they do, the "vast majority of these cases concern civil rights and liberties" (Segal and Spaeth 2002, 388).

In Australia, though, tort law has been used to further civil liberties, including free speech (Luntz 2002). One commentator has noted that, in Australia, "[t]ort law is characterized by loose sets of relatively abstract principles which allow maximum discretion to be exercised (in the main) by reference to 'common sense' values" (Bennett 1989, 216). The Court has recently indicated the possibility of tort law as a means to protect against privacy invasions by the media (Lindsay 2002)[83] in the absence of constitutionally derived protections as are enjoyed in the United States (Butler 2005). In a similar way, tort law is an avenue for protecting women against various types of harm, including job discrimination (Hocking and Smith 1996). The Court has also indicated that tort law may be the avenue for pursuing litigation regarding the subject of abortion (Luntz and Hambly 2006), perhaps providing remedies both for "wrongful birth" and for "wrongful life" (Stretton 2005).

Australian tort law has traditionally been largely dependent on common law precedent, and only recently has the Australian Parliament begun to take an active role in reforming the law in this area (Gardiner and McGlone 1998). The dearth of legislation means that the judiciary must take a more active role in creating a system of tort law than

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[83] *A.B.C. v. Lenah Games Meats* (2001) 185 ALR 1

in other areas, and in addressing the calls for a more efficient and fair system of balancing the interests of various groups of citizens (Cane 2003). This is especially critical in situations dealing with the tort liability of public authorities, when the Court is left to delineate the boundaries of individual and state power (Kneebone 1998). For this reason,

Hypothesis 6d: In tort cases, joining behavior will be less likely than in other cases.

Government as a party to the case

When an agent of the federal government is a party to a High Court case, the Court may approach its decision making differently. Rational choice research has been developed to explain the relationship between the Court and other government actors in the United States. The main point of this literature is a recognition that the Justices must (or do) consider the power, position, and perspective of other players in the political game. This neo-institutionalist approach emphasizes the importance of the judge's position in the context of the political system, seeing attitudes and motivations as only a secondary influence on judicial behavior (Gillman and Clayton 1999).

Hypothesis 7: Joining behavior will be more likely when the Court is concerned about the reaction of the other branches of government.

Because the executive branch controls the implementation of High Court decisions, Justices wishing to pursue their policy goals will seek to avoid alienating the bureaucracy wherever possible (Epstein and Walker 2001). While some research on the Supreme Court has found evidence that executive influence is diminishing (Deen et al. 2001; Pacelle and Marshall 2001), the threat of executive action may have a constraining effect on the Court and its members (Johnson 2003).

In Australia, there is conflicting evidence as to the relative success of the federal government in High Court litigation. Some evidence suggests that the federal government fares better than any other subgroup in the High Court (Smyth 2000). Other research finds only a modest net advantage for the federal government in public law cases (Haynie et al. 2001). Even still, the High Court's more explicit adoption of a lawmaking role has caused tension between the Court and the other branches of government (Alvey and Ryan 2005). As two Australian scholars have recently noted, "[w]hen the Court speaks with many voices, its decisions are potentially more vulnerable to outside criticism" (Smyth and Narayan 2004, 401). If members of the Court are interested in creating a united front in the face of this influence, joint judgments may be the likely result.

Hypothesis 7a: When the federal government is a party to a case, joining behavior will be more likely.

Litigation history

Certain aspects of the case history may also be related to the production of joint judgments. There may be systematic differences between cases appealed from different types of courts.[84] One type of distinction to be made is between courts of general appellate jurisdiction and courts of specialized jurisdiction. A second distinction is between state supreme courts and federal appellate courts.

Hypothesis 8: The source of the case will have an impact on the likelihood of joining behavior.

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[84] Spaeth and Segal imply as much when they suggest that investigating the Supreme Court's treatment of different courts' decisions "may help in the formulation and implementation of litigation strategies" (Segal and Spaeth 2002, 229).

In the United States, there are few specialized judicial bodies from which cases may be appealed to the Supreme Court. In Australia, there are several separate administrative tribunals and other specialized tribunals that have been recognized by the High Court as substantively different from the general jurisdiction courts.[85] As one researcher observes, the Court sees such tribunals as an extension of the executive power, "accountable to the courts in the same way as other executive decision-makers" (Pearson 2007, 5). These tribunals are "a significant provider of adjudication services" in Australia, and are "responsible for developing law affecting more Australians than the courts" (Creyke 2001, 426). These tribunals have been saddled with tremendous responsibility in issues ranging from the provision of unemployment benefits (Bacon 2002) to the protection of native title claims (McIntyre et al. 1999).

In the American context, numerous studies have shown administrative agencies to be among the most successful litigants before the Supreme Court (Cannon and Giles 1972; Pritchett 1948; Sheehan 1990, 1992), although less so before federal appellate courts (Songer and Humphries 1999). In Australia, the right to judicial review of administrative action, at least at the federal level, is enshrined in the constitution. Innovations in administrative law over the years have resulted in the creation of numerous administrative tribunals, including the creation of a general appeals tribunal, the Administrative Appeals Tribunal (AAT) in 1975 (Griffiths 1985). While some scholars have doubted the ideological importance of administrative law cases in the United States (Wald 1999). Some prominent legal scholars have been critical of the High Court's general tendency to favor executive discretion, especially in matters of

[85] *Craig v. South Australia* (1995) 185 CLR 163

immigration and other human rights cases (e.g., McMillan 2002). Research on the impact of U.S. Supreme Court rulings on administrative law have shown that compliance is enhanced when there is a clear statement of policy delivered by larger majority coalitions (Baum 1981; Johnson 1987; Wasby 1970; but see Spriggs 1996). Additionally, institutional and jurisprudential concerns may lead Justices to promote a more united front in an administrative law cases (Cohen and Spitzer 1994). As such,

> *Hypothesis 8a: Cases appealed from administrative tribunals or specialized courts will be more likely to result in joining behavior than cases from other sources.*

In addition to differences in subject matter jurisdiction, the geographic jurisdiction of the lower appellate court may be systematically related to appellate decision making. Like the United States, Australia has a dual system of courts consisting of state courts and federal courts. Because a "natural antagonism exists between the Supreme Court and state courts—particularly the states' highest appellate courts"—we may expect a systematic relationship between high court decision making and the geographic jurisdiction of the lower appellate court (Cannon 1974, 109). The "long tradition of competition between courts" has also been acknowledged by members of the Australian judiciary (Spigelman 2004).[86]

> *Hypothesis 8b: Joining behavior will be more likely in cases appealed from federal appellate courts than from other courts.*

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[86] Another consideration here is the difference in jurisdiction between the state and federal courts. While there are differences, they are much less obvious than in the American system (Crawford 1993). With the passage of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), the line between state and federal jurisdiction became even more blurry. In *Re Wakim* (1999) 198 CLR 511, the Court struck down this scheme, much to the disappointment of many observers (Spigelman 2004).

The Disposition of the Case

Certain characteristics of the outcome of High Court cases may also be related to joining behavior. Important explanatory disposition characteristics include a unanimous vote, the ideological direction of the outcome, and whether the Court overturns the decision of the court below.

> *Hypothesis 9: Characteristics of the outcome of the case will have an impact on the likelihood of joining behavior.*

Unanimity

Joint judgments are more likely for an obvious reason: when all Justices agree on the outcome, there are more opportunities to collaborate. Certainly, a unanimous vote "does not necessarily indicate that there is agreement over how certain issues should be treated" (Atkins and Green 1976, 740). Indeed, truly consensual decisions appear to have made up less than three percent of the Supreme Court's unanimous decisions on the Warren and Burger Courts (Spaeth 1989). On the other hand, the absence of dissenting votes presents a larger pool of colleagues supporting the same case disposition. For this reason,

> *Hypothesis 9a: Joining behavior will be more likely in unanimous cases than in nonunanimous cases.*

The ideological direction of the outcome

In the Supreme Court, some evidence suggests that Justices react differently to the progeny of liberal cases as compared to conservative cases (Spaeth and Segal 2001; but see Songer and Lindquist 1996). Even so, there is little reason to expect that the ideological direction of a case outcome would directly influence the rate of joint judgment production on the Court (Hurwitz and Lanier 2004). Instead, the degree of

congruence between the Court's baseline ideology and the outcome of an individual case may be related to joint judgment production.

Hypothesis 9b: Case-level joining behavior will be less likely in cases with a liberal outcome.

Dissent is "usually conceptualized as a disagreement with the results reached by the majority on a multi-judge court" (Peterson 1981, 412). Many studies involving joining behavior in the United States involve case-level analyses of majority coalition size (Rohde 1972a) and fluidity (Brenner and Spaeth 1988) as well as accommodation rates (Wahlbeck et al. 1998). In these analyses, dissenting behavior is empirically equivalent to any other behavior in which the Justice does not join the majority coalition. In other words, the joining behavior of interest is joining the majority judgment. Other types of joining behavior are less interesting in the Supreme Court, partly because they are quite rare (Segal and Spaeth 2002). If we consider all types of joining behavior on the Supreme Court, joint judgments are far more likely on the winning side of the vote than on the losing side. This, of course, is a function of the majority opinion tradition.

In judge-level analyses of joining behavior, the vote status of the individual judge can be controlled for in the analysis. One such study uses dissenting vote status as part of the dependent variable, predicting the type of separate opinion a Justice will author or join (Wahlbeck et al. 1999). This piece, however, does not attempt to separate joining behavior from the act of authoring a separate opinion. Segal and Spaeth (2002) evaluate joining behavior in non-majority opinions, but do not separate these special opinions into concurrences and dissents. They explain this decision in a footnote, arguing that "no theoretical reasons support one rather than the other as a vehicle for the expression of personal policy preferences" (Segal and Spaeth 2002, 395, n.82).

Without a majority judgment tradition, the relative rarity of joint judgments in the majority and the minority is an empirical question. Certainly, there is at least one more potential joining partner for Justices in the majority than for those in dissent. This is not the case in the Supreme Court, where most members of the majority vote coalition feel pressure to join the majority opinion coalition (Maveety 2003). In courts with a majority opinion tradition, concurrences often "belong to the space of dissent" (Johnson and Belleau 2006, 2). In the seriatim tradition, as Chapter 5 demonstrates, concurrences and dissents are different in kind. Because "concurring" opinions on the High Court are essentially part of the majority judgment (Lynch 2002a), it is the dissenting opinions alone which "can be uncongenial and burdensome" (Kirby 2005a).

Hypothesis 9c: The decision to join will be less likely when a Justice dissents from the ideological outcome of the case.

Allowing an appeal

Unlike intermediate appellate courts, final courts of appeal tend to overturn lower court decisions more often than they let them stand. This is especially true in courts with discretionary jurisdiction. Recent data from the Supreme Court show the rate hovering above 75% (Segal et al. 2007). Because the Court may choose its cases, most of its reversals represent its exercise of error correction (Glick 1983; but see Snyder 1959). There is evidence that Supreme Court Justices are more likely to join the majority opinion in these error correction situations (Brenner et al. 1990). Similarly, High Court Justices may be more willing to entertain joining opportunities in cases where the Court allows the appeal, overturning the decision of the lower court.

Hypothesis 9d: Joining behavior will be less likely in cases where the decision of the court below is overturned.

Joining Behavior and Judge-Level Characteristics

In addition to the case-level factors addressed in the previous section, an understanding of joining behavior will require the incorporation of judicial characteristics in the model. The relationship between joining behavior and judicial career and other social background characteristics are explored. Additionally, the disparity between the judge's ideology and that of his colleagues is connected to joining behavior.

Approach to the Working Environment

Judges differ in the way they approach the decisions of law and fact they must make as the centerpiece of their judicial duty (Wells 1991). While the attractiveness of a judge as a collaborator might be related to things like expertise, the judge might instead be something of an expert at collaboration. As two prominent High Court scholars have noted, maybe "some Justices have a greater like of, and aptitude for, co-operative work" (Lynch and Williams 2005, 12). The development of collaboration skills, then, might logically place a judge nearer to the top of the list of potential coauthors.

> *Hypothesis 10: A Justice's decision to join will be influenced by his approach to the task of judging.*

Career history

As Ulmer notes, "judges, like other men, are born, develop, mature, and become socialized" (1970, 580). Professional socialization, in particular, is an important component of judicial decision making (Tate and Sittiwong 1989). In civil law systems, judges and lawyers part ways early in the career paths; judges are trained to be judges and lawyers to be lawyers (Gleeson 2003a). This is not the case in systems sharing the English common law tradition. As in the United States, Justices on the High Court of Australia come from advanced positions in different professional backgrounds. Most of

these judges come from one or more of three main groups: attorneys in private practice, lower court judges and government attorneys (Hulme 1994). While the focus of each of these professions is the law, the barrister's approach to the working environment differs greatly from that of the judge and the government attorney (Goldsmith 2006). As Chief Justice Gleeson notes, "no one ever professed to believe that all good barristers would make good judges" (Gleeson 2003a). In other words, the requirements needed to excel in private practice are to some extend different from those needed on the bench.

While the life of a barrister may not be nasty, brutish or short, it is often described as rather solitary. A twenty-five year veteran of the profession warns that prospective barristers should be aware of the "long anti-social hours" (Etherington 2005). Early work on the social backgrounds of judges has theorized that particular kinds of professional experience that can alter the judge's orientation toward cooperative behavior. Ulmer finds some evidence that previous experience as a non-political lawyer can impact one's disposition for dissenting behavior (1970). His conception of dissenting behavior is relevant in the present context because he describes the behavior as "a form of compensation for those who perform better in the dissenter's role than in the role of the majority judge – a position often calling for an ability to compromise" (Ulmer 1970, 588).

As compared to the work of the barrister, the work of a political attorney is more collaborative in nature. Australian attorneys-general are uniquely political as compared to their counterparts in the United Kingdom (McCarthy 2004). Their responsibilities include the formulation of legal advice for the relevant government officials, as well as significant ministerial duties (Carney 1997). Indeed, the significant decision-making

duties of the attorneys-general make them more similar to judges than to self-employed barristers (Cornall 2007). While their private-sector counterparts work alone (Etherington 2005), government attorneys work in collegial departments. This experience provides them with the ability to "[let] everyone have their say within a sensible structure and time frame," which fosters the ability to collaborate (Goldsmith 2006, 8). As such,

> *Hypothesis 10a: Justices with previous experience as government attorney will be more likely to join than will other Justices.*

In addition to experience as a government attorney, judicial experience likely contributes to the development of skills and temperament needed to produce joint opinions. Previous research has found judicial experience to contribute to higher rates of liberal decisions in Canada (Tate and Sittiwong 1989) and the United States (Tate 1981b). It has been associated with assertion of judicial power (Wood et al. 1998a) and a willingness to abandon previous court precedents (Schmidhauser 1962). A recent meta-analysis found that "of the twenty-two studies located that investigate this linkage, nearly 70% found some sort of a relationship between career experience and judicial choices" (Epstein et al. 2003, 954).

There is reason to believe that previous judicial experience may socialize judges to the practice of writing jointly. Intermediate appellate courts in America are generally characterized by their high levels of consensus (Brace and Hall 2005; Hettinger et al. 2003b). Justice Kirby's (2007b) account of opinion writing on the Supreme Court of New South Wales indicates that joint opinions are the standard on that court.

> *Hypothesis 10b: Justices with prior judicial experience will be more likely to join than those without previous judicial experience.*

Acclimation to the job and colleagues

Much of the American research suggests that opinion assignors will assign fewer majority opinions to freshman judges and most attribute this pattern to the organizational concerns of the assignor (Brenner and Hagle 1996; Howard 1968; Maltzman and Wahlbeck 1996a). Others attribute the pattern to the freshman's inability to marshal strong majorities in support of their majority opinions (Lax and Cameron 2007). Because experienced authors take less time to construct well-crafted opinions, they "need not compromise so heavily toward the ideological preferences of the median Justice" (Lax and Cameron 2007, 294).[87] An analysis of the High Court found evidence that about a third of the Justices experienced acclimation effects, making them more likely to join at the beginning of their tenure (Smyth 2002a).

> *Hypothesis 10c: Justices will be more likely to join during the beginning of their career on the High Court bench.*

Another influence on the decision to join may be a predisposition for co-authorship. Indeed, "it may be that some Justices have a greater like of, and aptitude for, co-operative work" (Lynch and Williams 2005, 12). If a Justice has established a pattern of joining behavior, he is likely to continue that pattern in subsequent cases.

> *Hypothesis 10d: When a Justice has established a pattern of joining, he will be more likely to continue to join.*

Social Background Characteristics

Researchers have long used the personal attributes of judges to explain their voting behavior, essentially capturing relevant judicial attitudes indirectly (Goldman and Sarat

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[87] While evidence from the Supreme Court of Canada show no freshman effect on voting or opinion-authoring patterns, the researchers attribute this finding to that court's greater interest in "fostering and maintaining a collegial environment and reaching unanimous rulings" (Ostberg et al. 2003, 710).

1978; Schmidhauser 1962; Tate 1981b). Certainly, this is the approach that has been taken by most of the jurimetrics scholars in the investigation of judicial decision-making behavior on the High Court of Australia (Blackshield 1972; Schubert 1969a). In his study of the Dixon Court, Schubert included more than a dozen personal attribute variables (Schubert 1969a). Indeed, even some of the recent quantitative work on the High Court has centered on the use of the personal attribute model (Smyth 2003b). While most of the personal attribute research seeks to predict voting behavior, it may also be relevant to an assessment of joining behavior.

Hypothesis 11: Certain personal background characteristics of the judges will influence their decision to join.

Religious background

Religious background is another time-tested indicator of judicial behavior (Ulmer 1973). In particular, Catholicism has been associated with judicial support for liberal outcomes in the United States (Schubert 1969a) and Canada (Songer and Johnson 2007; Tate and Sittiwong 1989). It has also been linked to higher rates of dissent behavior in the United States (Ulmer 1970) and Australia (Smyth 2003b).

Hypothesis 11a: A Justice's religious background will influence her decision to join.

State-based variations

Previous research indicates that where a person grows up can influence his behavior as a judge later in life (Tate 1981b). Research on the Canadian Supreme Court indicates that regionalism—specifically, whether a judge is from Quebec—has an effect on judicial liberalism rates (Songer and Johnson 2007; Tate and Sittiwong 1989). Region has also been linked to perceptions of judicial ability (Walker and Hulbary 1978) and the tendency to dissent (Schmidhauser 1962).

Having practiced law at the New South Wales Bar (NSWB) is thought to be a unique experience that may shape a Justice's attitudes and approach (McMillan 2003). The NSWB has a tradition of very high standards, and has been the preeminent legal association since before the Australian founding (Bennett 1969). The Court itself has been accused of being distinctly Sydney-centric (Allen 2008; Hudson and Crabb 2002), as has the preeminent legal journals in Australia (Lindgren 2007).

Hypothesis 11b: Being from New South Wales will affect the likelihood that a judge will join.

Party of the Appointing Prime Minister

In the United States, the selection of Supreme Court nominees is overtly political. Nominees are selected according to the President's perception of the nominee's political ideology and judicial philosophy (Maltese 1998). Indeed, political party affiliation is a long-used and successful explanatory variable for judicial decisions on the merits in the United States (Pinello 1999). Outside of the United States, though, high court judges are generally perceived to be "substantially outside the systems containing those who make and administer the laws" (Dawson and Ward 1987, 254).

The current Chief Justice has taken pains to defend the idea that the party of the appointing prime minister has no relationship to the behavior of the appointees. According to a piece in the Sydney Morning Herald, "Gleeson has even gone to the trouble of preparing a statistical analysis which, he says, show the High Court is untouched by political bias" (Ackland 2003, 5). If the party of the appointing prime minister in Australia operates in the way the party of the appointing president is in the United States, then it is important to include this variable in any model of judicial behavior in the High Court.

Hypothesis 11c: Justices appointed by Australian Labor Party Prime Ministers will be less likely to join than will those appointed by Liberal-National Coalition Prime Ministers.

These eleven hypotheses have been adapted from the existing literature, which is heavily weighted toward explaining joining behavior on the U.S. Supreme Court. The defining characteristic in the Supreme Court—at least as far as joining behavior is concerned—is the majority opinion tradition. The High Court of Australia does not share this majority opinion tradition. As the previous chapter demonstrates, there is little evidence that American-style consensual norms drive opinion-writing behavior on the High Court. As such, the hypotheses in this chapter have been adjusted to account for these differences. In the next chapter, these hypotheses will be operationalized using data from the High Courts Judicial Database (Haynie et al. 2007).

CHAPTER SEVEN: DATA AND MEASURES

> *I am sure that these descriptions will strike a responsive chord with those of us who increasingly shake our heads in despair at the typical joint majority opinions of the present High Court - pretentious displays of erudition that yield no intelligible principle, and contribute nothing to any discernible pattern of legal reasoning that justifies the result.*
>
> —Professor Anthony Blackshield (2004)

While some observers, such as Professor Blackshield, have been disappointed with the shape of the Court's recent joint opinions, the Court has been making use of this type of opinion at an increasing rate (Coper 2002c). This chapter sets out to explain the presence of joint opinions in an institutional context that is seemingly hostile to cooperative opinion writing. Operational hypotheses are presented below, following the structure of the previous chapter. The data that will be used to test these hypotheses are described, as are some of the methodological issues these data may present.

Joining Behavior on the High Court

In the seriatim tradition, the judges each typically pen their own opinion and are identified as authors in the reports. Because of this tradition, the articulation of individual opinions is relatively high on the High Court. One way to illustrate this relative frequency is through a calculation of the ratio of opinions to votes (Schubert 1969b). Over time, the opinion-to-vote ratio has tended to decrease substantially (see Figure 9). From the beginning of the Barwick Court in 1964 through the retirement of Justice Gaudron in 2003, this ratio is .621. This is much lower than the .917 ratio reported in Schubert's analysis of the High Court from 1951 to 1961 (Schubert 1969b). This indicates that the rate of joint opinions on the High Court has increased since the 1950s.

Figure 9 - Opinion to Vote Ratio on the High Court over Time

Schubert defined joining behavior as "social deference," and created a scale of inter-agreement between judges as its measure (Schubert 1969b). The deference measure is impractical, though, in large part due to the increasing inability to distinguish opinion writers from opinion joiners. The typical unanimous case in the *seriatim* tradition has several separately written opinions. In the present analysis, 20% of the cases have one opinion for each vote cast.[88] For these opinions, the single author of each is clear. A parallel could be drawn between this situation and a set of special concurrences in a Supreme Court case, although there is no single majority opinion on the High Court with which to concur.

This is not always the case, though. In some instances, the High Court will hand down a single set of reasons, disposing of the case with a single opinion. In such a situation, it is easy to identify the majority opinion. Because the judges' names are listed in order of seniority, however, it is nearly impossible to ascribe properly the authorship of

[88] This is 426 cases of the 2147 cases with more than one judge on the panel.

such an opinion. In this way, the author of a single-opinion disposition on the High Court can only be identified as "the Court." In other instances, two or three members of the Bench may join. Again, the authors of such a joint opinion will be listed in order of seniority, with no indication as to the authorship of the opinion. Assigning writing behavior to individual judges, then, is difficult.

Problems Distinguishing the Author from the Joiner

Although joining behavior is the subject of this analysis, distinguishing joining from authoring on an individual level is also problematic. On occasion, High Court Justices have been known to join the opinion of a colleague with a single statement, like the following from the opinion of Justice Kitto in *Murphy v. Ramsay* (1964):[89]

> KITTO, J.: I agree in the judgment of the Chief Justice and have nothing to add.

In this case, it is clear that Chief Justice Barwick has authored an opinion and Justice Kitto has joined it. For this reason, it is possible to call this type of opinion a "joining statement." In this analysis, authors of such joining statements are included as joiners to the opinion. When a joining statement is present, joiners are easily distinguished from authors.

Another Justice in *Murphy v. Ramsay* provides an example of a more complex form of joining behavior. The following is the beginning of Justice Taylor's opinion in that case:[90]

> TAYLOR, J. I agree that this appeal should be dismissed for the reasons given by the Chief Justice and I wish to add only a brief observation with respect to the appellants' argument ....

---

[89] 111 CLR 344 at page 351

[90] *Ibid.*

After this, Justice Taylor proceeds to clarify his perspective for a paragraph. While there is no tradition of concurring opinions on the High Court *per se*, this example is similar to what would be called a simple concurrence on the Supreme Court. The trouble, of course, is determining the point at which a joining statement becomes an opinion of its own accord. For the purposes of the present analysis, instances in which the judge includes substantive content or clarification (beyond what is contained in the joined opinion) have been treated as individual opinions. This is the classification for the statement by Justice Taylor excerpted above. Where the separate statement provides no more than a restatement of the arguments and information of the joined opinion, the statement is classified as a joining statement.

Sometimes, a judge will write a separate sentence adopting the reasons from a jointly-written opinion. In *Geyer v. Downs* (1977),[91] Justice Mason adds another layer of complexity, agreeing with the reasons of two different opinions:

> MASON, J. I would allow this appeal for the reasons given by Murphy and Aickin J.J. in their joint judgment and for the reasons given by Stephen J.

The one thing that is clear from this opinion is that Mason is doing the joining. We can also assume that Justice Stephen has authored one opinion with which Mason agrees, but we can only speculate as to who authored the Murphy-Aickin opinion. Indeed, it may well have been a truly collaborative effort. While this may provide a clear example of joining behavior on the part of Justice Mason, it does not give us a way to identify a single judge (nor a single opinion) with which Justice Mason agrees. In order to avoid the perilous task of matching such an opinion with one or another of the joined opinions, such cases have been classified as individual opinions. For the example above, this

[91] 138 CLR 91 at page 95.

opinion is classified as a single-authored opinion by Justice Mason. While the vote totals will indicate his agreement with both of the joined opinions on the merits, this particular type of statement does not allow for a replicable allocation of the joiner/author combination.

These considerations, combined with the absence of data on conference votes, make the present analysis distinct from investigations of joining behavior on the Supreme Court. The use of the term "joiner" in this context is perhaps inaccurate; because we cannot systematically distinguish the three, "joiner" will refer to joiners, coauthors and joinees. In the same way, the term "joining behavior" will refer to joining, coauthoring and being joined by another Justice.

Operational Definitions of Joining Behavior

The unit of analysis for the first series of models is the individual case. This single-opinion model will be applied first to all cases, and then to only cases with a unanimous vote on the outcome. This second application will allow for the investigation of the characteristics that make single-opinion cases different from other unanimous cases. The dependent variable in each analysis is a dichotomous variable, where the presence of the joint opinion is coded as 1 and the absence is 0.

The data for this analysis come from the High Courts Judicial Database (HCJD) project (Haynie et al. 2007). This ambitious data project—with over 17,000 judicial decisions collected across ten national high courts—is a worthy answer to Schubert's attempt to "stimulat[e] the production of better quality data by demonstrating the effects of their lack" (Schubert 1969b). The data file for the High Court of Australia consists of the universe of cases reported in the Commonwealth Law Reports between the beginning of the Barwick Court (April 27, 1964) through the retirement of Justice Gaudron

(February 10, 2003). Cases in which only one judge presided have been removed, leaving 2145 cases and 873 unanimous cases.

For the period under analysis, 19.3% of all cases were disposed of with a single opinion (see Table 10). In the subset of unanimous decisions, 32.1% were single-opinion dispositions. Joint opinions involving two or more Justices were present in 80.7% of all cases, and in 86.4% of unanimous cases. For both of these dependent variables, extremely short statements by individual Justices indicating their agreement with the reasons of a colleague are included in the tally of opinion joiners. Any statement longer than a sentence or two, or any statement adding substantive observations to the opinion of a colleague, is counted as an individual opinion.

The second series of models evaluate the individual decision to join. This model will be applied first to all decisions and second to criminal cases only. For each analysis, the dependent variable is a dummy variable, which is coded as 1 if the Justice was involved in a joint opinion in the case, and 0 otherwise. These analyses are conducted on a judge-centered version of the HCJD project data (Brennan 1996b, 13).[92] This transformation leaves the data organized by opinion-writing opportunity. There are 10,855 opinion-writing opportunities in the full dataset, 2,425 of which are criminal cases. In the full judge-centered dataset, 56.7% of opinion-writing opportunities resulted in a decision to join. The rate for criminal cases is slightly higher, at 57.8%. As in the first series of models, joining behavior includes short statements of assent, but excludes longer statements.

[92] The data transformation was completed using STATA code detailed by Collins (2006).

Predicting the Single Opinion for the Court

Few activities of the members of the United States Supreme Court are more important than the crafting of a majority opinion. It is the legal rule articulated in the majority opinion, not just the disposition of a particular case, that serves as a guide for other branches of government, the lower courts, and even the general public (Wahlbeck et al. 1998, 311). In most existing judicial decision making research, unanimous cases disposed of with a single opinion are often seen as the least interesting (e.g., Schubert 1965; Tate 1981b). When the focus is on unexpected patterns of agreement (as opposed to unexpected patterns of disagreement), these cases become far more interesting. Specifically, these cases are examples of the most obvious abrogation of the seriatim norm. By analyzing these cases, we can determine why some unanimous cases are disposed of using a single opinion instead of the multiple opinions we would expect.

In their investigation of decision making on the Supreme Court of Canada, Tate and Sittiwong explain their decision to exclude unanimous decisions from the data:

> Nonunanimous decisions are used because they mark the territory of dissensus among the justices of a collegial court; they are the cases on which the justices are unable to reach agreement on a single policy outcome, despite institutional pressures to do so, the cases in which presumably learned and well-intentioned jurists can see at least two alternative interpretations of the law, at least two competing policy options. (Tate and Sittiwong 1989, 902)

Here, a strong case is made for excluding unanimous decisions from an analysis of the conditions in which judges disagree with one another as to the outcome of a case. For a case to be helpful in this regard, it must have some interesting variation among the votes of the participants. If we are interested in the decision to join, however, we are looking for disagreement of a different kind.

It is certainly feasible for judges agreeing on the outcome of a case to disagree on the wording of the reasons. In the context of the U.S. Supreme Court, this takes the form of the concurring opinion. This possibility increases the alternatives available to the judges.

> In arriving at their decisions, the individual justices are free actors in two separate senses. First, they may vote as they see fit. ... Second, except for the opinion of the Court, the justices may write such opinions as they desire to explain their individual votes. As a consequence, a justice may be a member of the voting coalition, but not a member of the opinion coalition that supports that vote. (Segal and Spaeth 2002, 383)

Of course, this situation is the norm in the seriatim tradition. There is no institutional norm encouraging the creation of a majority opinion for purposes of conferring precedential weight. In other words, the second dimension of this freedom of action is much more pronounced in the High Court. Not only are judges free to vote as they wish, but they are also free of institutional pressure to adopt the reasons of their peers.

In a court with a seriatim tradition, then, we would expect most unanimous decisions to consist of an explanation of reasons from each of the participating judges. In the case of the High Court, a significant percentage of unanimous cases are resolved by a single opinion. In the 873 unanimous decisions of the High Court in the nearly four decades included in this analysis, 32% of these were single-opinion dispositions.[93] As Figure 10 shows, the early 1980s are associated with a large increase in the percentage of unanimous cases disposed of with a single opinion. Beginning in the early 1990s, the single-opinion disposition rate begins its return to the earlier pattern.

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[93] As noted earlier, some of these single judgments take the form of a single statement of reasons accompanied by several single-sentence statements of agreement from the other judges on the panel.

Figure 10 - Percentage of Unanimous Cases with Single-Opinion Dispositions

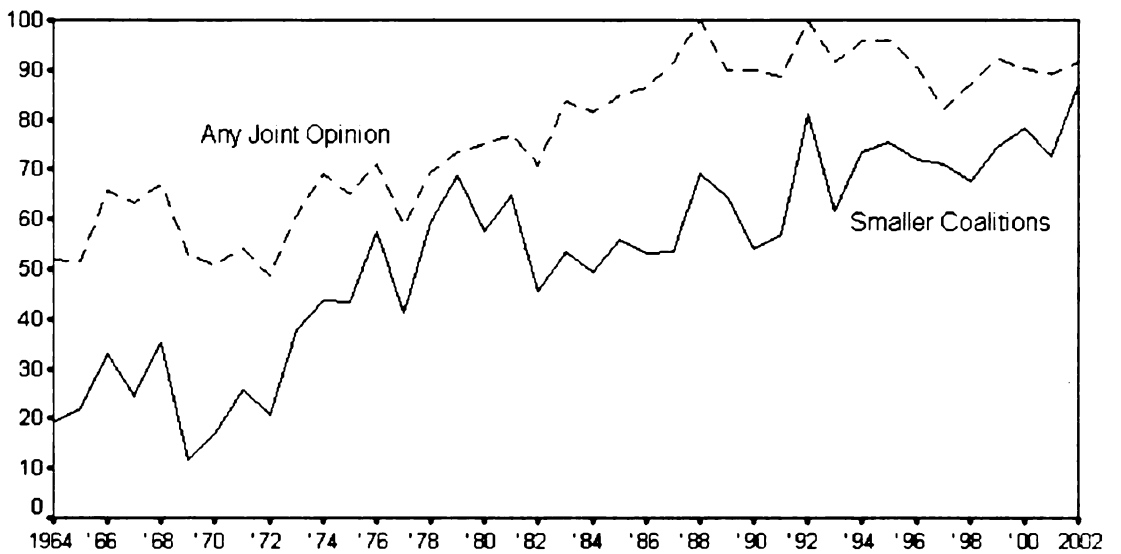
Approaching the question from the case level is the most appropriate strategy for analyzing the production of single-opinion case dispositions. The actions of each individual Justice are important, but the only way a single opinion can be produced is if all of the members of the panel choose to join. Using a binary logistic regression, we can investigate the case-level hypotheses from the preceding chapter as they relate to the production of this particular type of joint opinion.

Predicting Other Joint Opinions

Of course, the single-opinion disposition is not the only joining behavior we see in the High Court. Despite the lack of institutional incentive, the Justices have been forming smaller opinion coalitions with increasing frequency (see Figure 11). Observers have sometimes lauded (Kildea 2003; Moisidis 2002) and sometimes criticized (Blackshield 2004) this development. None, however, has been able to pinpoint the reason for this trend (Bagaric and McConvill 2005; Coper 2002c).

As in the case of single-opinion dispositions, an analysis of joining coalitions does not require the exclusion of unanimous cases. Instead, the influence of unanimity on the production of these joint opinions can be evaluated empirically. Of the 2,145 cases included in this analysis, 80% have at least one joint opinion. In nearly 57% of opinion-writing opportunities, Justices engaged in joining behavior.

Figure 11- Percentage of Cases with Any Joint Opinion and Smaller Coalitions Only



Operational Hypotheses

The challenge now is to explain these instances of joining behavior. The conceptual hypotheses outlined in the previous chapter provide numerous plausible explanations for joining behavior on the High Court. The concepts presented in Chapter 6 are operationalized, providing a set of propositions that can be testing using the HCJD project data (Haynie et al. 2007), with additions and modifications as described below.

Characteristics of the Decision Making Environment

Hypothesis 1: As workload pressures decrease, joint opinions will be less likely.

As the previous chapter illustrates, workload pressures are expected to decrease the joint opinion production rates on the High Court. For this institution, though, some workload pressures are easier to isolate than others are. While the judges cite increasing special leave hearings as an important drag on their time, there is not as of this writing a readily available source of information about this topic.[94] Drawing on previous research addressed in Chapter 6, though, several measures of Court-level workload pressures can be derived.

> *Hypothesis 1a: When oral arguments take place less than three months before the end of the term, single-opinion dispositions, joint opinions, and decisions to join will be less likely.*
>
> *Hypothesis 1b: When final opinions in a case are handed down within three months of a known retirement single-opinion dispositions, joint opinions, and decisions to join will be less likely.*
>
> *Hypothesis 1c: When the number of cases heard in a term is higher, single-opinion dispositions, joint opinions, and decisions to join will be less likely.*

The independent variables in the above hypotheses serve as operational proxies for the workload pressure facing the Justices. The oral argument variable is a dummy variable coded as 1 when the oral argument is held in the last three months of the term, and 0 otherwise. The dates for oral argument are included with the official opinions in the Commonwealth Law Reports. Because the Court's term ends before the July recess, this variable is coded as 1 when the oral argument falls between March 1 and June 31. This is a similar strategy to that used in research on the U.S. Supreme Court (Wahlbeck et al. 1998). For both unanimous and non-unanimous cases, oral arguments were heard

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[94] The Commonwealth Law Reports provide lists of special leave petitions that were denied, but these data have not yet been aggregated into special leave rates over time. Additionally, these special leave listings indicate which Justices were on the special leave panel. These data, once compiled, could allow for judge-specific estimations of agenda-setting pressures.

during the last three months of the term about 40% of cases and opinion-writing opportunities (see Table 10).

The retirement proximity variable is also a dummy variable. This variable is coded 1 if the final decision was handed down within three months of a known retirement, and 0 otherwise. The distinction is made between known retirements and other departures from the bench (e.g., deaths) because the hypothesized effect has to do with the judges' reparation for the departure.[95] Around 20% of the cases in the dataset—and 23% of opinion-writing opportunities—were decided within three months of a known retirement. The final variable from this set of hypotheses is the number of cases decided during the term. For the purposes of this analysis, the variable has been calculated as a count of cases published in the Commonwealth Law Reports with dates falling within the relevant term. The average number of cases per term is around 62 for the period under investigation. This number does not include the number of special leave hearings, nor does it include unreported decisions.

Hypothesis 2: Joint opinions will be more likely during the tenure of Chief Justices with successful leadership styles.

As the previous chapters have indicated, the Chief Justices of the High Court have enjoyed varying degrees of success in creating an atmosphere of cooperation on the Bench (Smyth and Narayan 2004). Some of this has been traced to the inability of some Chiefs to coordinate the activities of highly individualistic judges (Fricke 1986). To be sure, Chief Justice Barwick showed little interest in maintaining collegiality as his term

[95] Information about retirement dates was gathered from various sources, including the *Oxford Companion to the High Court of Australia* (Coper et al. 2002) and the High Court of Australia's official website (http://www.hcourt.gov.au).

Table 10 – Descriptive Statistics for Model Variables[†]

Variables	All Cases	Unanimous Cases	All OWOs	Criminal OWOs
	n=2,145	n=873	n = 10,855	n = 2,425
Dependent Variables				
Joint Opinion Flag	80.7 %	86.4 %	56.9 %	57.8 %
Single-Opinion Disposition	19.3 %	32.1 %	- - -	- - -
Independent Variables				
Workload				
Late Oral Argument	40.7 %	42.0 %	41.0 %	37.0 %
Retirement Near	21.4 %	19.3 %	23.0 %	25.0 %
Cases This Term	61.3 cases	61.9 cases	60.2 cases	57.8 cases
Chief Justice				
Barwick	45.5 %	46.9 %	42.0 %	31.0 %
Gibbs	17.3 %	18.3 %	17.5 %	16.8 %
Mason	19.3 %	18.7 %	21.1 %	27.9 %
Brennan	6.8 %	6.4 %	7.3 %	8.3 %
Gleeson	11.2 %	9.7 %	12.5 %	16.1 %
New Chief Justice	12.7 %	13.9 %	13.2 %	15.0 %
Ideology Measures				
Panel Liberalism Score	.09	.08	- - -	- - -
Panel Diversity	.13	.13	0.09	0.09
Distance from Panel Mean	- - -	- - -	0.07	0.07
Agree with Outcome Direction	- - -	- - -	58.0 %	69.3 %
Complexity				
Long Oral Argument	45.8 %	41.3 %	47%	40.0 %
Avg. Opinion Length	10.2 pages	10.0 pages	10.6 pages	9.7 pages
Number of Matters	1.2 matters	1.2 matters	1.2 matters	1.2 matters
No Leave as of Right	83.6 %	82.8 %	50.0 %	- - -
Salience				
Nonparty Participants	0.5 parties	0.4 parties	0.6 parties	0.4 parties
NGO as a Party	7.5 %	7.5 %	8.2 %	0.7 %
Constitutional Issue	18.0 %	16.0 %	22.0 %	22.0 %
Tort Cases	14.9 %	13.5 %	17.0 %	- - -
Fed. Gov't as a Party	38.6 %	39.2 %	37.0%	72.5 %
Litigation History				
Admin./Specialized	7.5 %	8.2 %	7.6 %	1.6 %
Federal Jurisdiction	29.7 %	28.4 %	12.4 %	5.7 %
Case Outcome Characteristics				
Unanimous Vote	62.4 %	- - -	- - -	- - -
Liberal Outcome	42.3 %	45.0 %	- - -	- - -
Allow Appeal	48.0 %	47.1 %	47.0 %	50.0 %
Judge Characteristics				
Gov't Attorney Experience	- - -	- - -	39.2 %	38.5 %
Prior Judicial Experience	- - -	- - -	62.8 %	67.4 %
Freshman (1st 50 Cases)	- - -	- - -	5.4 %	5.1 %
Predisposition to Join	- - -	- - -	0.43	0.46
Catholic	- - -	- - -	45.0 %	50.8 %
New South Wales	- - -	- - -	57.8 %	57.2 %
Labor Appointing P.M.	- - -	- - -	30.0 %	34.0 %
Control Variables				
Panel Size	5.1 Justices	5.0 Justices	5.4 Justices	5.5 Justices
Coalition Size	- - -	- - -	4.4 Justices	4.4 Justices

[†] For the dummy variables, the results given are the percentage of judge decisions where x=1. For the other variables, the results are the means. Note that cases decided by a single Justice are excluded.

progressed, to the extent that he refused to speak at all to one of his colleagues (Hocking 1997).

Hypothesis 2a: Single-opinion dispositions, joint opinions, and decisions to join will be more likely in the Mason and Gibbs Courts and less likely during the Barwick Court.

Hypothesis 2b: Single-opinion dispositions, joint opinions, and decisions to join will be more likely during the first year of a new Chief Justice's tenure.

The role of the Chief Justice in facilitating single-opinion dispositions is captured in this analysis by the use of a nominal-level variable. For each Chief Justice in this sample—Barwick, Gibbs, Mason, Brennan and Gleeson—this variable takes on a different value. In the full model below, the Barwick Court is the reference category, and the results for the other Chief Justices are in comparison to Justice Barwick. This is not an arbitrary decision. The Barwick Court spans the longest period in these data, stretching from 1964 through 1981. Nearly half of the decisions in this dataset were made under Barwick's tenure. Because panel sizes have increased over time, only 42% of opinion-writing opportunities in these data come during Barwick's tenure.

Chief Justice Barwick is also known for his unsuccessful attempts at instituting consensus-building conferences (Blackshield 1980; Winterton 1998). Indeed, Barwick himself has confessed that his suggestion that conferences be a regular part of the calendar fell on deaf ears (Barwick 1995). The Mason Court, by contrast, is recognized for its cooperative procedures and generally positive personal relationships (Groves and Smyth 2004). Chief Justice Mason was able coordinate draft opinion exchanges and, in this way he "fostered [the Court's] collegiate spirit" (Brennan 2002b, 13).

The beginning of a new Chiefship may also affect the production of joint opinions. Previous research on acclimation effects has measured the "freshman" period as the first

one (Brenner and Hagle 1996), two (Wetstein and Ostberg 2005), or three years (Hagle 1993; Smyth 2002a). Most of the research uses the one-term time span, as Justices are expected "to adapt quickly to the simple mechanics of the Court's opinion writing procedures and workload" (Brenner and Hagle 1996, 239). The new Chief Justice variable is coded 1 when the case or opinion-writing opportunity comes in the first year of a new Chiefship and 0 otherwise. About 13% of opinion-writing opportunities are under the tenure of a new Chief Justice. This is 12.7% of all cases, and 13.9% of unanimous cases.

Hypothesis 3: The likelihood of a joint opinion will depend on the ideological makeup of the panel.

Research on the U.S. Supreme Court generally utilizes two liberal-conservative dimensions—one for economics and one for civil rights and liberties—to capture the meaningful ideological differences among the Justices (Mishler and Sheehan 1996; Schubert 1965; Songer 1978; Tate 1981b). These two scales explain the bulk of the work of the Supreme Court, which is "unambiguously classifiable into these two categories" (Tate 1981b, 356). The work of the High Court, though, may not be so easy to classify. In his very early jurimetrics work on the High Court, Schubert used the two-scale strategy to model ideological outcomes (Schubert 1969a). The same year, Schubert used a collectivism scale and an authoritarian scale to predict judicial interagreement (1969b). Blackshield (1972) used six separate areas to predict judicial votes, none of them except the criminal appeals category approximating the American civil rights and liberties dimension.

For the purposes of predicting joining behavior across all issue areas, though, an issue-specific set of ideological scales may be unnecessary. Instead, individual judicial

liberalism scores are computed using an average of the outcome direction across the universe of each judge's votes. The original HCJD outcome direction variable has been recoded such that -1 is a vote supporting a traditionally conservative outcome, and 1 supporting a traditionally liberal outcome (see Appendix B, Section 3). Decisions with no identifiable outcome directionality were recoded to 0. The resulting scores range from -.14 to .37. This scoring demonstrates concurrent validity, as the mean score for Labor appointees is significantly higher than the mean score for Liberal appointees (see Figure 12).[96] Because the dependent variables are all related to joining behavior, using voting behavior to derive the independent variable is acceptable.

Hypothesis 3a: Single-opinion dispositions and joint opinions will be more likely on panels with high mean liberalism scores than on panels with low scores.

Hypothesis 3b: Single-opinion dispositions, joint opinions, and decisions to join will be less likely on panels where there is more variation in the members' liberalism scores than on more ideologically homogenous panels.

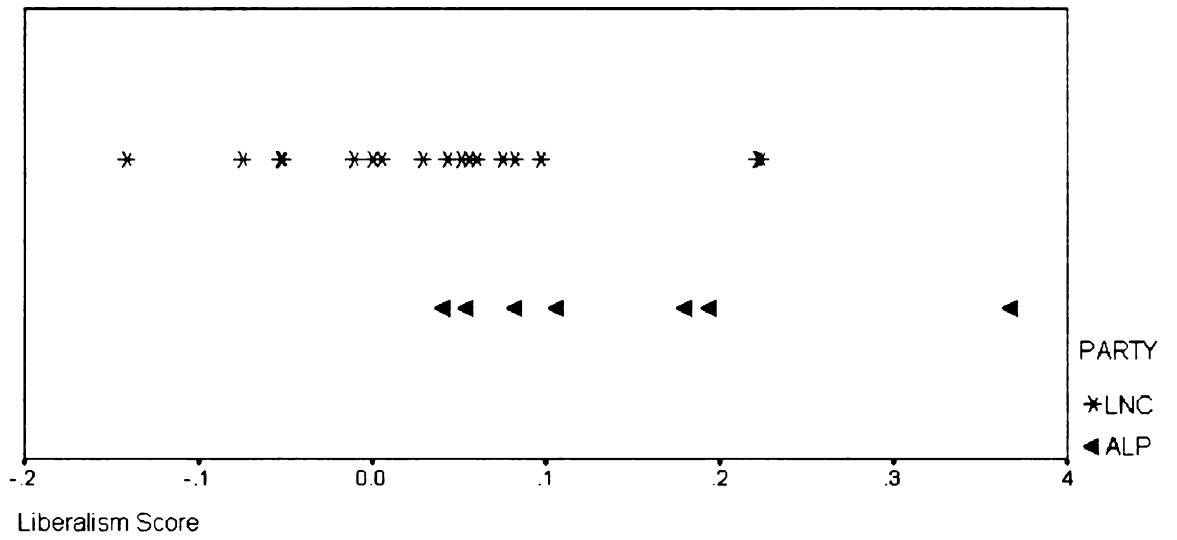
For the case-level analyses of joining behavior and single-opinion dispositions, the mean panel liberalism score is a way to isolate the general ideological makeup of the panel. Because the High Court frequently sits in rotating panels, the mean panel scores vary from case to case as well as among natural courts. The metric remains the same as the individual level, with higher numbers representing greater support for liberal outcomes. The overall panel mean is .09, and falls to .08 when nonunanimous cases are excluded.

For the case-level and judge-level analyses, a measure of ideological diversity on the panel is an important addition to a model of joining behavior. For each panel, the

---

[96] Liberal appointees have a mean score of 0.16, while Labor appointees have a mean score of 0.03. An independent samples t-test not assuming equal variances rejects the null hypothesis that these scores are not different from each other (t=61.73, p=.000).

Figure 12 - Liberalism Scores by Party of Appointing Prime Minister



standard deviation of panel members' individual liberalism scores serves as the ideological diversity measures. The average panel diversity score across all cases is .13, and across all opinion-writing opportunities is .09.

> *Hypothesis 4: The ideological position of the Justice relative to the panel mean will influence the decision to join.*
>
> *Hypothesis 4a: If a Justice's liberalism score is further from the panel mean, she will be less likely to join.*

In the judge-level analyses, we leverage the additional information about the individual Justice's ideological position relative to the panel mean. For each opinion-writing opportunity, the Justice's individual position is subtracted from the panel mean, yielding a measure of the relative distance from the panel mean. For these analyses, the average distance from the panel mean is .07 units.

Case Characteristics

> *Hypothesis 5: Joint opinions will be less likely in complex cases than in simple cases.*

As is the case in the U.S. Supreme Court (Wahlbeck et al. 1998) complex cases likely require more individual accommodation in order to reach a consensus on the reasons for judgment. Case complexity has been measured in numerous ways in previous research. Some of these, like the number of opinions published in a case (Wahlbeck et al. 1998), are obviously inappropriate for the present purpose. Measures of the number of issues raised in a case or the number or relevant legal provisions (Maltzman et al. 2000) are not as readily available for the High Court as they are for the U.S. Supreme Court. Instead, several alternative measures are employed to capture variation in case complexity.

> *Hypothesis 5a: Single-opinion dispositions, joint opinions, and decisions to join will be less likely in cases with oral argument spanning more than one day.*
>
> *Hypothesis 5b: Single-opinion dispositions, joint opinions, and decisions to join will be less likely in cases with higher average opinion length than in cases with shorter opinions.*
>
> *Hypothesis 5c: When the Court combines a number of different cases to consider together, single-opinion dispositions, joint opinions, and decisions to join will be less likely.*
>
> *Hypothesis 5d: When the Court hears a case by special leave, single-opinion dispositions, joint opinions, and decisions to join will be less likely.*

Because the U.S. Supreme Court has a set length of time allotted for oral argument, there is little variation duration of oral arguments. In the High Court, though, there are no strict limits placed on oral arguments on the merits. Oral argument in most cases is completed within a single day. As Justice Kirby recently pointed out, "[o]nly in the most complex appeals will oral argument be permitted to stretch into a second day or further" (Kirby 2006, 20). This institutional difference can be leveraged into a proxy measure of case complexity. As such, this complexity measure for Hypothesis 2a is a dummy variable coded as 1 when the oral arguments for a case span more than a day and 0

otherwise. Oral argument information is derived from the dates listed in the Commonwealth Law Reports. In the period under investigation, about 46% of cases were argued for more than one day. The rate for unanimous cases is lower, at about 41%. About 47% of opinion-writing opportunities followed long oral arguments.

The average length of the Court's opinions is another important measure of the complexity of cases on the High Court's docket (Campbell 2003; Groves and Smyth 2004). The average opinion length is a measure of the number of pages the average opinion in a case spans in the Commonwealth Law Reports. This is calculated by divided the number of pages dedicated to the case by the number of opinions filed in that case. The data in this analysis show an average opinion length of around 10 pages. When nonunanimous cases are removed, the average opinion length remains virtually unchanged.

The two remaining measures of complexity are the number of matters dealt with and the Court's control of its agenda. The number of matters variable is simply a count of the number of separate cases disposed of in each single entry in the Commonwealth Law Reports. For most cases, this number is one. The average number of matters per case (and per opinion-writing opportunity) is 1.2 matters. The variable representing the Court's control over its own agenda is a dummy variable. It is coded 1 in situations where the Court would have heard the case at its own discretion through the special leave process.

Most criminal matters have always required special leave. As such, the agenda control variable is 1 for all criminal cases. Many other appeals were as of right until the *Judiciary Amendment Act* 1976 (Cth) began the process of restricting access to the Court

(Kirby 2007a). By 1984, appeals as of right were essentially eliminated (Jackson 2001). As such, non-criminal cases decided in 1984 or later are also coded as 1. The control of agenda variable is flagged in 83.6% of cases, but in only 50% of opinion-writing opportunities.

Hypothesis 6: Joint opinions will be less likely in salient cases than in non-salient cases.

As the previous chapter indicates, cases dealing with important legal or political issues are expected to elicit fewer examples of collaborative behavior. One popular measure for case salience in the American literature is the use of a list of landmark cases (Epstein et al. 1996). This type of measure captures case salience only with the benefit of hindsight, though, and what is important in the decision-making context is to capture the judge's view of the case at the time (see Epstein and Segal 2000). Instead, measures of non-party participation and issue area salience are included in the analysis.

Hypothesis 6a: Single-opinion dispositions, joint opinions, and decisions to join will be less likely when there is more non-party participation.

Hypothesis 6b: Single-opinion dispositions, joint opinions, and decisions to join will be less likely when a non-governmental organization is a party to the case.

Hypothesis 6c: Single-opinion dispositions, joint opinions, and decisions to join will be less likely in constitutional cases than in other cases.

Hypothesis 6d: Single-opinion dispositions, joint opinions, and decisions to join will be less likely in tort cases than in other cases.

While the use of non-party interveners has been criticized in the American literature for failing to capture salience to the judges themselves (Collins 2005), the previous chapter illustrates that the High Court Justices play an important role in allowing this sort of participation. The calculation of non-party participation here includes both amici curiae and the more common interveners (see Chapter 2). The

resulting measure is a count of the number of non-party interveners who are granted leave to participate in the case on the merits. Non-party participation rates are derived from the Commonwealth Law Reports, where all interveners are listed. On average, there are 0.45 non-party participants per case. In the subset of unanimous decisions, this number drops to an average of 0.37 parties. The average number per opinion-writing opportunity is 0.6 parties.

The HCJD project includes information about the nature of the litigants appearing before the High Court. To measure the participation of non-governmental organizations, the private/nonprofit organization codes were used. This category includes business and trade associations, unions, charitable organizations, political parties, and other political groups. If any of these parties is present, the non-governmental organization variable is coded 1. This is the case in 7.5% of cases and 8.2% of opinion-writing opportunities.

The third measure of salience is a dummy variable indicating whether a constitutional issue was raised in the case. More specifically, this variable is coded as 1 when the Court is asked to review the constitutionality of a government law or action, and 0 otherwise. This measure is derived from the text of the cases themselves. For the period of study, a constitutional issue is raised in 18 % of cases, but in only 16% of unanimous cases. Additionally, 22% of opinion-writing opportunities involved a case posing a constitutional question.

As the previous chapter explains, tort cases have a different connotation in the High Court than in the U.S. Supreme Court. These cases are politically salient in Australia (Cane 2003), and are sometimes a vehicle through which human rights claims can be litigated (Kyriakakis 2005). The measure for tort cases is a dummy variable coded as 1

when the main issue in the case is a tort claim, and 0 otherwise. Here, around 15% of cases and 17% of opinion-writing opportunities deal with torts.

Hypothesis 7: Joint opinions will be less likely when the Court is concerned about the reaction of the other branches of government.

Hypothesis 7a: Single-opinion dispositions, joint opinions, and decisions to join will be less likely when the federal government is a party to the litigation.

An indicator of government participation can be created the same set of party type variables as the indicator for non-governmental organizations. When the federal government appears as a party to the case, the variable is coded 1. The federal government was a party in nearly 40% of cases in this analysis.

Hypothesis 8: The source of the case will have an impact on the likelihood of joint opinions.

The willingness of judges to assent to a single opinion may be related to the litigation history associated with the case. As the previous chapter explains, cases coming from administrative or special tribunals might be expected to produce more joining behavior than other cases. Additionally, cases from the federal jurisdiction are expected to present questions that are more divisive to the Court.

Hypothesis 8a: Single-opinion dispositions, joint opinions, and decisions to join will be more likely in cases appealed from administrative tribunals & specialized courts than cases from other sources.

Hypothesis 8b: Single-opinion dispositions, joint opinions, and decisions to join will be less likely in cases originating in the federal courts than cases from other sources.

The variable representing administrative tribunals and specialized courts is coded 1 if the case was appealed directly from a body of this type, and 0 otherwise. Administrative agencies and specialized courts may be at the state or the federal level, and include bodies specializing in family law, industrial relations, environmental issues,

and various administrative appeals.[97] In these data, around 8% of the cases heard by the High Court were appealed from an administrative tribunal or a specialized court.

Between 1965 and 2003, there have been several different courts in Australia exercising federal original jurisdiction. The Federal Magistrates Court of Australia was established by the Federal Magistrates Act 1999 (Cth), and it is classified by Haynie et al. (2007) as a minor trial court in the federal system. Before 1999, the federal original jurisdiction was exclusive to the Federal Court of Australia, established by the Federal Court of Australia Act 1976 (Cth). The Federal Court, in turn, consolidated the jurisdiction of a number of other federal courts, including the Australian Industrial Court and the Federal Court of Bankruptcy. Additionally, the Federal Court assumed some of the original jurisdiction previously exercised by the High Court of Australia.

In the analyses to follow, a dummy variable is included flagging those cases originating in the federal jurisdiction. Cases tried in the original jurisdiction of the Federal Magistrates Court, the Federal Court of Australia, the Australian Industrial Court, or the Federal Court of Bankruptcy are coded 1. Nearly 30% of the cases in this analysis originate in the federal jurisdiction. Of opinion-writing opportunities, only 12.4% come from the federal jurisdiction.

Outcome of the Case

Hypothesis 9: Characteristics of the outcome of the case will have an impact on the likelihood of joint opinions.

In addition to the existing features of the case, the likelihood of a joint opinion may be affected by characteristics of the disposition itself. The most obvious variable of interest when discussing the outcome of the case is whether the vote on the case is

[97] For a full list of the institutions included in this category, see Appendix B.

unanimous. Additionally, we can control for both the ideological outcome of the case and the disposition in relation to the decision of the lower court.

> *Hypothesis 9a: Joint opinions will be more likely in unanimous decisions than in nonunanimous decisions.*
>
> *Hypothesis 9b: Single-opinion dispositions and joint opinions will be less likely in cases where the outcome is "liberal."*
>
> *Hypothesis 9c: A Justice is more likely to join when he agrees with the ideological direction of the case outcome*
>
> *Hypothesis 9d: Single-opinion dispositions, joint opinions, and decisions to join will be less likely in cases where the decision of the court below is overturned.*

The measure of unanimity here is a dummy variable flagging cases with a unanimous vote as to the orders. Of all cases in this dataset, 62.4% were unanimous. When investigating single-opinion dispositions, this variable is omitted because only unanimous cases can be disposed of by a single opinion for the Court.[98]

The classification of case outcomes as liberal or conservative is "by now routine in studies of judicial decision making" (Tate 1981b, 356). Indeed, much of the early judicial behavior research explained the differences among judges in terms of these ideological differences (Maveety 2003). Generally, researchers classify case outcomes as liberal or conservative using the coding scheme developed by Harold Spaeth (1997). The HCJD uses a similar approach. The liberal outcome variable in this analysis is derived directly from this measure. If the case outcome supports the economic underdog, the criminal defendant, the federal government's power to regulate, or other liberal outcomes (see Appendix B), this variable is coded 1. In all other cases, it is coded as 0. In these

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[98] The unanimity variable is also left out of the judge-centered analyses because these analyses include a variable that controls for the size the judge's coalition. This variable is detailed in the section on control variables below.

data, 42% of all case outcomes were liberal. Of the unanimous cases, 45% had liberal outcomes.

Another outcome variable of interest is the treatment of the decision in the court below. For this analysis, the treatment of the lower court's decision is measured with a dummy variable. In cases where the appellant wins—outright or in part—this variable is coded as 1. Otherwise, this variable is coded as zero. The Court overturned the lower court in 48% of the cases and 47% of the opinion-writing opportunities in this dataset.

Judge Characteristics

A series of judge-specific variables is also included in the judge-centered analyses. These variables capture the relevant variations in social background, politics, and previous experience. Schubert's attempts to amass this kind of information on the High Court Justices were largely frustrated by a lack of information (Schubert 1969a). Since that time, the availability of background information on the Justices has improved markedly, largely thanks to the efforts of the editors of *The Oxford Companion to the High Court of Australia* (Coper et al. 2002). The Justices themselves have roundly praised the effort (McHugh 2002; Gleeson 2002c), and several current and former Justices contributed to it. Much of the background information comes from this volume, supplemented by biographical information available through the High Court's website.[99]

Approach to the Working Environment

Hypothesis 10: Justices with a collaborative approach to the working environment will be more likely to join.

Of course, it is impossible to devise a direct measure of a collaborative approach to judging. As the previous chapter outlines, several other characteristics may serve as

[99] http://www.hcourt.gov.au

proxy measures for this concept. The first of these is experience as a judge and/or a government attorney.

Hypothesis 10a: Justices with previous experience as a government attorney will be more likely to join.

Hypothesis 10b: Justices with prior judicial experience will be more likely to join.

Hypothesis 10c: Justices will be more likely to join during their first year on the Bench.

Hypothesis 10d: Justices who have developed a pattern of joining in previous cases will be more likely to join.

The variable representing experience as a government attorney is a dummy variable coded as 1 when the Justice has previously served as a government attorney. Experience as a federal or state attorney-general or solicitor-general is included in this measure, but lower-level prosecutors are not. Seven of the Justices in the sample have experience as a government attorney, and nearly 40% of opinion-writing decisions were made by Justices with this experience. For prior judicial experience, the dummy variable is coded 1 if the Justice has any judicial experience at any level.[100] Of the 26 judges in this analysis, 16 had at least some judicial experience prior to their elevation to the High Court. Almost 63% of opinion-writing decisions were made by judges with prior judicial experience.

Acclimation effects for judges have been measured in a number of different ways. Some have considered a true freshman effect, including a flag for the first calendar year of service (Ostberg et al. 2003). Others have advocated the use of a two year (Hettinger et al. 2003a), three year (Smyth 2002a), or five year acclimation period (Hagle 1993). For this analysis, the acclimation period variable is a dummy variable coded 1 when the

[100] Other measurement strategies were also tested, including a variable counting the number of years of experience (Tate and Sittiwong 1989) as well as ordinal and dummy variables representing various lengths of judicial service (Tate 1981b). None of these improved on the explanatory power of the variable.

opinion-writing decision is one of his first 50. This corresponds roughly to a single year on the Bench.[101] Approximately 5% of opinion-writing decisions were made by Justices in their freshman period.

The final measure of judicial approach is the presence of a pattern of joining behavior. If a Justice has developed a pattern of joining behavior in previous cases, that Justice is more likely to continue this joining behavior. This measure is the average of the joining behavior from the previous five opinion-writing opportunities. The variable ranges from zero (indicating no joining behavior in the previous five cases) and 1 (indicating that the Justice has joined in each of the previous five cases).[102] Interestingly, seven of the twenty-six Justices never managed to string together five joint opinions in a row during the course of their tenure.[103] The average value of this measure is 0.43. In other words, the average opinion-writing decision is made by a Justice who has joined in 2.15 of the previous five cases.

Social Background Characteristics

Hypothesis 11: Certain social background characteristics will be related to the decision to join.

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[101] Several other measures were tested in the model, including various calendar year dummies and a dummy for the first 100 and 150 cases. None of these varied substantially from the results of the chosen method.

[102] Brace and Hall (1997)use a similar strategy for measuring the predisposition of state supreme court justices to support a death penalty outcome. They argue that this avoids circularity by using prior behavior patterns to control for present decision-making choices.

[103] These are Justices Jacobs, McTiernan, Menzies, Murphy, and Walsh. By contrast, three Justices had fewer than five 0-for-5 stretches: Chief Justice Gleeson and Justices Gummow and Toohey.

In addition to the career-related characteristics, several other social background characteristics have been tied to judicial behavior in the literature. Following the structure of the previous chapter, several of these are presented below.

Hypothesis 11a: Catholic Justices will be less likely to join than Justices with other religious backgrounds will.

Hypothesis 11b: Justices from New South Wales will be less likely to join than will Justices from other places.

Hypothesis 11c: Justices appointed by Labor Party Prime Ministers will be less likely to join than will Liberal Party appointees.

Each of the remaining social background measures is a dummy variable coded 1 when the characteristic is present and 0 otherwise. The information used to create these variables comes almost exclusively from the various biographical entries in the *Oxford Companion to the High Court of Australia* (Coper et al. 2002). Nine of the Justices have a Catholic background, and 45% of the opinion-writing decisions were made by Catholic Justices. Fourteen Justices hail from New South Wales, and they are responsible for 58% of the opinion-writing decisions. Finally, eight Justices in this sample were appointed by Prime Ministers affiliated with the Australian Labor Party (ALP). These appointees were responsible for 30% of the opinion-writing decisions.

Controlling for Panel and Coalition Size

When the panel size is larger, there are more joining possibilities for the participating Justices. Even when the panel is large, joining opportunities are limited by the number of Justices who agree on the outcome of the case. At the same time securing a single opinion disposition for a case becomes more difficult the larger the panel size. The more judges involved, the less likely they will all agree to a single set of reasons for

disposition. For different reasons, then, it is important to control for panel size in analyses of both kinds of joint opinions.

This measure is not without substantive importance. The panel size is not independent of the characteristics of the case. As in the case of the English Court of Appeal the size of the panel can be an "especially useful indicator to case importance" (Atkins 1991, 891). In Australia, the Chief Justice has a degree of flexibility in determining both the size and composition of the panels assembled to hear cases. As Chapter 2 reveals, the Chief Justice has a degree of flexibility in terms of both the size and the composition of the panels. When the Chief believes that the case is important, he will often assign all available Justices to the panel (Popple 2003). Even if the Chief selects a smaller panel for a case, a judge who is not assigned to the panel may opt to sit on the case if he believes it to be important (McHugh 2005). In other words, salient cases will have larger panels than other cases. Because of this, the average panel size has grown over time.[104] The average panel size is smaller in earlier years, most notably during the tenure of Chief Justice Barwick.

As such, it is reasonable to expect that the inclusion of the panel size variable in a model of joining behavior may introduce multicollinearity. Multicollinearity is suspected if the overall model explains a statistically significant amount of variance in the dependent variable, but many of the individual independent variables are not statistically significant. Another warning sign is when the removal of one statistically insignificant variable from the model leads to a notable decrease in the model's overall explanatory

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[104] Over time, the number of cases falling under the jurisdiction of a single Justice under the *Judiciary Act 1903* (Cth) has fallen significantly. In the analyses presented here, though, cases heard by a single Justice are excluded.

power. This happens because multicollinearity artificially inflates the variances of the individual parameter estimates.

Multicollinearity is caused by a strong correlation between independent variables. In some cases, these strong correlations are bivariate in nature. In other words, sometimes the correlations between pairs of variables will be high, leading to the multicollinearity problem. To check for this, bivariate correlations (or associations for nominal-level data) are presented in Table 11. Each of the suspect independent variables is included here, and bivariate statistics are presented for both control variables. While there are significant associations between many of these bivariate pairs, none of these pairs reveals extremely high levels of association. The highest association is between the judge-level measure panel size and the dummy variable flagging constitutional cases. At .498, this association is moderate.

Table 11 - Correlation Coefficients between Control and Independent Variables

Independent Variable	Control Variables		
	Panel (Case)	Panel (OWO)	Coalition (OWO)
Salience			
Nonparty Participants †	.391 ***	.404 ***	.189 ***
Constitutional Issue	.463 ***	.498 ***	.228 ***
NGO Participation	.069 ***	.045 ***	.043 ***
Tort Case	.029	-.012	-.032 ***
Chief Justice			
Barwick	-.340 ***	-.037 ***	-.199 ***
Gibbs	.009	-.034 ***	.034 ***
Mason	.198 ***	.198 ***	.102 ***
Brennan	.100 ***	.079 ***	.046 ***
Gleeson	.200 ***	.192 ***	.095 ***
Panel * Coalition		.489 ***	.489 ***

† The statistic presented here is Pearson's r, as the nonparty participant variable is a continuous variable. The other statistics presented are Spearman's ρ, which is appropriate for nominal-level data.

Sometimes, though, several variables may be involved in interdependent relationships. In this case, the problematic relationships may not be obvious in the bivariate statistics. In

order to detect these relationships, the entire system of independent variables can be evaluated for signs of multicollinearity. Using an OLS regression of the independent variables on the dependent variables, the tolerance can be calculated by subtracting the squared multiple correlation from one—or, $1\text{-}R^2$ (Miles and Shelven 2001). A tolerance of zero means that a variable is perfectly predicted by the other variables in the system. The variance inflation factor (VIF) can be calculated for each variable in the system by taking the inverse of the tolerance, providing a measure of how inflated the variance for each regression coefficient actually is (Cohen et al. 2003). These statistics, along with the associated tolerance measures, are reported in Table 12..

Some researchers suggest that VIFs higher than two are indicative of collinearity problems (Blaikie 2003). Others set the threshold at five (de Vaus 2002) or ten (Myers 1990). If high VIFs are found, researchers often suggest dropping independent variables from the analysis, using ridge regression, or collapsing the problematic independent variables into a single index. This single-minded focus on multicollinearity may be unwise, and less drastic approach to increase the stability of models is desirable (O'Brien 2007). In the absence of pure multicollinearity, increasing the sample size can reduce the detrimental effects of collinearity on the variance of the regression coefficients (Goldberger 1991). O'Brien demonstrates that in some circumstances, a regression with a VIF as high as 40 ought not be dismissed out of hand (O'Brien 2007).

As Table 12 shows, the highest VIFs are in the case-level models. The panel liberalism variable has a VIF of 10, while the panel diversity variable has a VIF of a little more than 14. By contrast, the judge-level panel diversity variable has a VIF of 2. Certainly, the additional data affects the R^2 for each variable in the diagnostic regression

Table 12 - Collinearity Diagnostics[†]

Independent Variables	Case-Level Analysis		Judge-Level Analysis	
	Tolerance	VIF	Tolerance	VIF
Workload				
Late Oral Argument	.991	1.009	.984	1.016
Retirement Near	.460	2.176	.437	2.290
Cases This Term	.501	1.996	.463	2.158
Chief Justice				
Barwick	- - -	- - -	- - -	- - -
Gibbs	.510	1.961	.368	2.717
Mason	.315	3.172	.148	6.743
Brennan	.449	2.227	.255	3.916
Gleeson	.134	7.451	.161	6.204
New Chief Justice	-	-	.767	1.304
Ideology Measures				
Panel Liberalism Score	.100	10.050	- - -	- - -
Panel Diversity	.070	14.235	.468	2.137
Distance from Panel Mean	- - -	- - -	.495	2.020
Agree with Outcome Direction	- - -	- - -	.587	1.703
Complexity				
Long Oral Argument	.843	1.187	.817	1.224
Avg. Opinion Length	.694	1.441	.677	1.477
Number of Matters	.933	1.072	.931	1.074
No Leave as of Right	.610	1.640	.144	6.921
Salience				
Nonparty Participants	.701	1.427	.701	1.427
NGO as a Party	.864	1.157	.877	1.141
Constitutional Issue	.625	1.601	.625	1.599
Tort Cases	.846	1.182	.842	1.188
Fed. Gov't as a Party	.793	1.261	.750	1.333
Litigation History				
Admin./Specialized	.793	1.261	.851	1.175
Federal Jurisdiction	.566	1.766	.830	1.205
Case Outcome Characteristics				
Nonunanimous Vote	.928	1.078	- - -	- - -
Liberal Outcome	.907	1.102	- - -	- - -
Allow Appeal	.933	1.072	.923	1.083
Judge Characteristics				
Gov't Attorney Experience	- - -	- - -	.554	1.806
Prior Judicial Experience	- - -	- - -	.436	2.295
Freshman (1st 50 Cases)	- - -	- - -	.874	1.144
Predisposition to Join	- - -	- - -	.741	1.349
Catholic	- - -	- - -	.482	2.076
From New South Wales	- - -	- - -	.590	1.694
Labor Appointing P.M.	- - -	- - -	.595	1.694
Control Variables				
Panel Size	.601	1.665	.438	2.281
Coalition Size	- - -	- - -	.450	2.225

[†] The statistics reported here are tolerance scores and variance inflation factors (VIFs) for the full models. These are calculated using an OLS regression where the dependent variable is a dichotomous flag indicating the presence of any joint opinion.

of each independent variable on all the others, allowing for less inflation of the variance associated with the estimated parameters.

The most obvious problem associated with the high VIFs is the inability to reject the null hypothesis in the models (O'Brien 2007). Parameter estimates can also be volatile because the regression equation has no mechanism to allocate the parameter estimates among the collinear independent variables (Miles and Shelven 2001). Essentially, *post hoc* assessment of multicollinearity is necessary, as the diagnostics "need to be interpreted in the context of other factors that influence the stability of the estimates" (O'Brien 2007), including the stability of parameter estimates across different specifications and the associated size of the confidence intervals. As such, the specification of the models will include the controls and the other suspect measures until their effects on the model can be assessed.

CHAPTER EIGHT: ANALYZING JOINING BEHAVIOR ON THE HIGH COURT

> *If the real process by which judges reach decisions is unveiled the effect will be that the courts will be more accountable for their choices.*
>
> — Justice Michael McHugh, as quoted in Galligan (1995)

The previous two chapters have provided conceptual and operational hypotheses aimed at explaining joining behavior on the High Court of Australia. This chapter presents several analyses, using logistic regressions to test the eleven operational hypotheses set out in Chapter 7. Separate analyses are presented for joint opinions and the special case of the single-opinion disposition. The decision to join is evaluated at the case level as well as at the judge level. Finally, a model of joining behavior on the Gleeson Court is assembled and tested, using a multidimensional scaling analysis to provide a spatial representation of joining behavior on that Court.

Methodology

The dependent variables in these analyses are the presence or absence of a single opinion for the Court, the presence of any joint opinion, or a judge's decision to join an opinion. Because all of these are dichotomous variables, ordinary least squares regression (OLS) is inappropriate (Aldrich and Nelson 1984; Maddala 1983; but see Hellevik 2007). The resulting linear probability model (LPM) typically suffers from non-normal error terms, heteroscedasticity, and estimates of conditional probabilities outside the necessary range of 0 and 1. While several strategies have been proposed for circumventing this issue (see Aldrich and Nelson 1984), most of these are much more difficult as compared with the use of the maximum likelihood estimation of a nonlinear probability model (Harrell 2001).

A binary dependent variable y_i is distributed as a Bernoulli distribution, where the possible values are 0 or 1. The probability that y_i is equal to one, given the vector of independent variable(s) x_i can be described well using any cumulative distribution function because they are all bounded by 0 and 1. This approach works nicely for determining the odds that a binary variable takes one or the other value, as "it seems likely that the effect of a unit change in the independent variable on the predicted probability would be smaller near the floor or the ceiling than near the middle" (Pampel 2000, 5).

This link function allows for the transformation of y_i with a Bernoulli distribution to the scale of the linear predictor, while maintaining the nonlinear relationship between the likelihood of the dependent variable of interest and the independent variable. Binary logistic regression uses the logit function as a link function. This links the log odds of observed outcome y_i to the vector of covariates x_i. Instead of using the binary variable as y_i, the dependent variable is the log odds that $y_i=1$. The likelihood function is the product of all of the individual likelihoods. Taking the natural log of each side of this equation renders the model linear in its logarithms, or log-linear (Knoke and Burke 1980).

This yields a direct probability model, and makes no assumptions about the characteristics of the distribution of $P(y_i=1|x_i)$ (Harrell 2001). The logit model has "grown to become the de facto standard means for estimating regression-like models of binary outcomes" (Zorn 2005, 157). Because of the slightly s-shaped curve of the logit

Table 13 - Case-Level Logistic Regression Predicting Single-Opinion Dispositions

Model Estimates	All Cases (1)		Unanimous Cases (2)	
	Full	Reduced	Full	Reduced
Constant	1.161 (.667)	1.555 (.329) ***	1.050(.723)	1.079 (.350) **
Workload				
Late Oral Argument	-.048 (.122)		-.109 (.135)	
Retirement Near	.047 (.217)		-.010 (.247)	
Cases This Term	.001 (.007)			
Chief Justice†	23.344 ***	44.073 ***	22.573 ***	42.602 ***
Gibbs	.591 (.221) **	.541 (.170) ***	.432 (.245)	.450 (.190) *
Mason	.774 (.265) **	.716 (.177) ***	.657 (.299) *	.616 (.205) **
Brennan	-.316 (.372)	-.380 (.287)	-.742 (.414)	-.788 (.329) *
Gleeson	-.176 (.510)	-.473 (.255)	-.657 (.584)	-.759 (.291) **
New Chief	.080 (.181)		.061 (.198)	
Ideology Measures				
Panel Liberalism	-1.662 (1.669)		-.696 (1.839)	
Panel Diversity	.384 (1.852)		.349 (2.077)	
Complexity				
Long Oral Argument	-.975 (.141) ***	-.928 (.138) ***	-.999 (.160) ***	-.970 (.157) ***
Avg. Opinion Length	0.98 (.011) ***	.095 (.010) ***	.125 (.014) ***	.124 (.014) ***
Number of Cases	-.395 (.136) **	-.405 (.134) **	-.395 (.153) **	-.390 (.150) **
No Appeal as of Right	.221(.218)		.264 (.237)	
Salience				
Nonparty Participation	-.058 (.061)		-.055 (.065)	
Constitutional Issue	.208 (.216)		.088 (.233)	
Tort Cases	-.285 (.186)		-.188 (.205)	
Federal Gov't a Party	.139 (.137)		.313 (.154) *	.365 (.137) **
NGO a Party	.370 (.224)	.458 (.208) *	.321 (.252) *	
Litigation History				
Admin./Specialized	.298 (.244)		.110 (.273)	
Federal Courts	.028 (.174)		.115 (.194)	
Case Outcome				
Liberal Outcome	.203 (.126)		.047 (.142)	
Allow Appeal	-.304 (.124) **	-.280 (.121) *	-.255 (.139)	
Control Variables				
Panel Size	-.647 (.073) ***	-.657 (.066) ***	-.514 (.079) ***	-1.079 ** (.350)
Model Summary				
Omnibus Test of Coeff. ‡	299.356 ***	287.026 ***	237.026 ***	227.462 ***
Cox & Snell R-Square	.130	.125	.170	.163
Nagelkerke R-Square	.209	.201	.238	.229
Hosmer & Lemeshow Test ‡	4.976	10.135	5.120	5.317
Correctly Predicted	82.6%	82.4%	73.7%	73.2%
n =	2144	2144	1275	1275

*p≤.05, ** p≤.01, *** p≤.001

† This is a categorical variable. The Wald statistic is provided. The indicator group is Barwick CJ.

‡ The numbers presented here are test statistics distributed as chi^2.

distribution, this model has the additional benefit of weighing more heavily the effect of inputs near the center of the distribution. In other words, "increasingly larger inputs are needed to have the same impact on the outcome near the ceiling or floor" (Pampel 2000, 6).

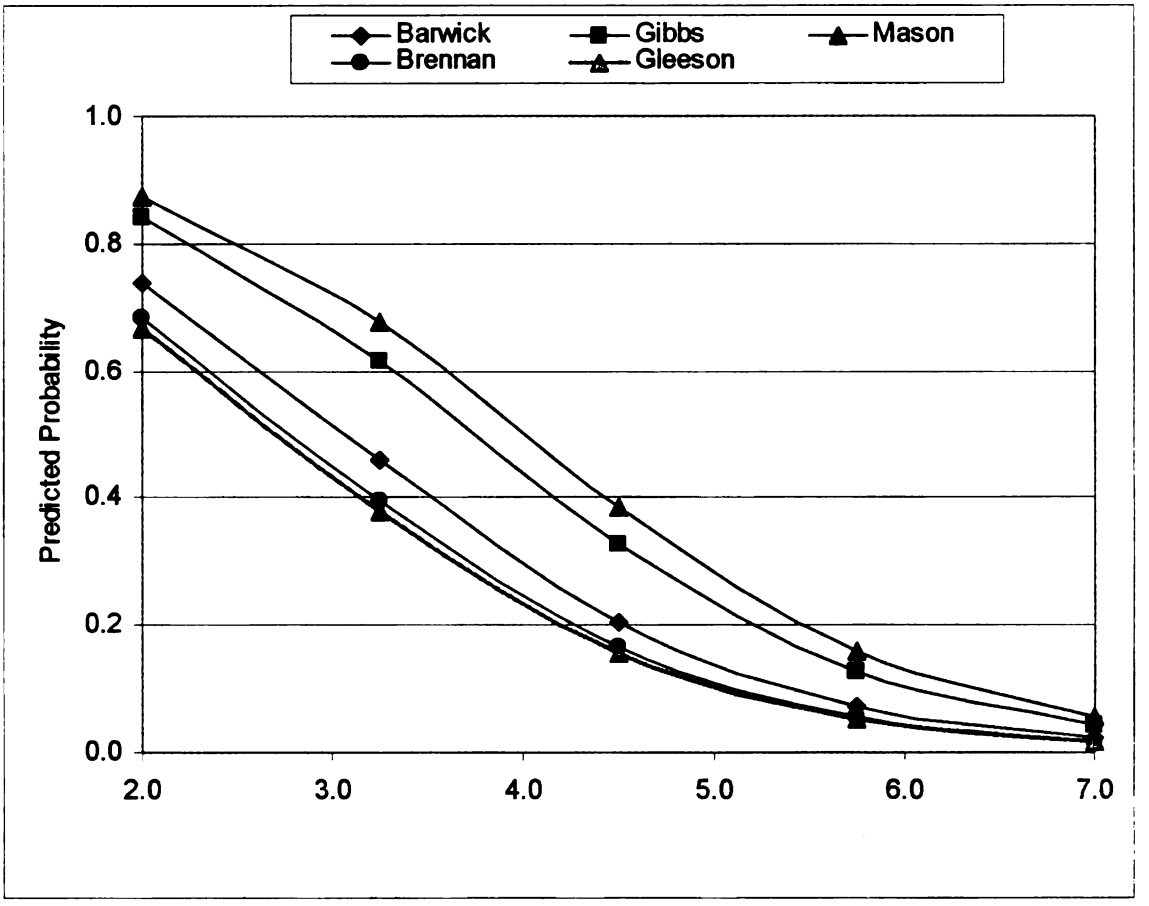
Models of Single-Opinion Dispositions

In the first pair of analyses, the dependent variable is the presence of a single-opinion disposition. Here, the dependent variable is coded 1 when the entire panel has agreed to a single set of reasons. The results are presented in. First, the model was applied to all cases decided by more than one Justice. The second application is to the subset of cases with a unanimous vote on the merits. As expected, the panel size control has a significant negative relationship with the probability of a single-opinion disposition in both models. As the panel size increases, the probability that all of the Justices will agree to a single set of reasons decreases substantially. This relationship is presented graphically in Figure 13, with separate lines for each Chief's tenure.

The other hypothesis garnering strong support in these analyses is Hypothesis 5. Three of the four case complexity measures are significant in both applications of the model. Longer oral arguments and more matters at issue both decrease the likelihood of a single-opinion disposition. The average opinion length, however, has a consistently positive relationship with the likelihood of a single-opinion disposition.

The average opinion length for this analysis is 10.13 pages, with a standard deviation of 8.05 pages. If we move from one standard deviation below the mean to one standard deviation above the mean, the predicted probability of a single-opinion disposition increases from 0.07 to .029. This relationship may be a function of bargaining and accommodation behavior. The length of U.S. Supreme Court majority

Figure 13 - Predicted Probabilities of a Single-Opinion Disposition by Panel Size



opinions has been tied to bargaining activity, even after controlling for other measures of case complexity (Spriggs 2008). In order to accommodate the views of more Justices, the opinion may well need to be longer. This, of course, assumes that Justices are willing to engage in bargaining behavior in the absence of an institutional drive to do so. Unfortunately, no comparable indicators of bargaining are currently available for the High Court.

A simpler explanation may be that this relationship is due to the nature of the single-opinion itself. Before the Dixon Court, the Justices did not make a habit of circulating draft opinions during the opinion-writing process (Fricke 2002b). While Barwick was less successful at assembling conferences or opinion coalitions, the habit of

draft circulation that began in the Dixon Court largely survived (Marr 1980). As such, the Justices are rarely unaware of the content of their colleagues' opinions (McHugh 2005). If one Justice has included a discussion of the factual background of the case, for instance, the remaining Justices may omit this lengthy discussion in their own opinions. The longer opinion will be averaged in with several shorter opinions. If only one opinion is handed down in a case, that opinion will have to review the background information. The pages dedicated to the factual background will not be averaged across several opinions.

The performance of the salience measures is also counter to expectations. Hypothesis 6 suggests that salient cases will be less likely to have a single-opinion disposition. These models provide no support for this hypothesis. In the model tested on all cases, the presence of a non-governmental organization as a litigant is associated with a greater likelihood of a single-opinion disposition. When all other variables are held at their mean and all cases are considered, the presence of an NGO as a litigant increases the predicted probability of a single-opinion disposition from .14 to .21.

Case-Level Models of Joining Behavior

The next set of analyses uses the case-level data to construct models of joining behavior. Here, the dependent variable is the presence of *any* joint opinion. First, the model is applied to all cases decided by more than one Justice. Then, the model is applied to criminal cases only. The results of these models are presented in Table 14. Unlike the single-opinion disposition, an expanded panel size increases the opportunity for a joint opinion. Here, the panel size control is positively related to the likelihood of a joint opinion. Figure 14 demonstrates this, with separate curves for each Chief Justice.

Table 14 – Case-Level Logistic Regression Predicting Joining Behavior

Model Estimates	All Cases (3)		Criminal Cases (4)	
	Full	Reduced	Full	Reduced
Constant	1.064 (.929)	.924 (.412)*	3.987 (1.639)*	2.460 (1.094)*
Workload				
Late Oral Argument	-.073 (.122)		.018 (.302)	
Retirement Near	.395 (.231)		1.283 (.646)*	1.239 (.629)*
Cases This Term	-.002 (.007)		-.019 (.017)	
Chief Justice†	22.622***	30.260***	9.429*	7.578
Gibbs	-.693 (.590)	-.345 (.165)*	.268 (.585)	.277 (.411)
Mason	-.429 (.605)	.802 (.249)***	.152 (.799)	.488 (.454)
Brennan	.656 (.672)	-.302 (.278)	-1.733 (.933)	-1.226 (.681)
Gleeson	-.631 (.673)	.515 (.446)	.366 (1.578)	.355 (1.356)
New Chief	-.113 (.201)		.565 (.517)	
Ideology Measures				
Panel Liberalism	3.640 (1.501)**	3.442 (1.405)**	12.494 (4.615)**	13.294 (4.399)**
Panel Diversity	-4.202 (2.119)*	-4.095 (2.038)*	-13.140 (7.209)	-12.757 (6.962)
Complexity				
Long Oral Argument	-.253 (.130)*	-.259 (.128)*	-.668 (.318)*	-.727 (.293)**
Avg. Opinion Length	.039 (.013)**	.032 (.013)**	-.026 (.033)	
Number of Cases	-.095 (.072)		- - -	
No Appeal as of Right	.391 (.188)*		- - -	- - -
Salience				
Nonparty Participation	-.088 (.056)		.012 (.145)	
NGO a Party	.150 (.241)		-.612 (1.479)	
Constitutional Issue	-.772 (.189)***	-.856 (.166) ***	-.564 (.408)	-.736 (.354)*
Tort Cases	-.184 (.172)		- - -	- - -
Federal Gov't a Party	-.152 (.143)		.249 (.341)	
Litigation History				
Admin./Specialized	.111 (.244)		- - -	
Federal Courts	-.035 (.186)		- - -	
Case Outcome				
Liberal Outcome	.006 (.126)		-.121 (.362)	
Allow Appeal	-.205 (.123)		-.144 (.376)	
Nonunanimous Vote	-1.144 (.128)***	-1.151 (.126)***	-.890 (.298)**	-.888 (.292)**
Control Variables				
Panel Size	.329 (.329)***	.327 (.069)***	.039 (.187)	.051 (.177)
Criminal Outcomes				
Allow Jury Challenge			.650 (.591)	
Exclude Confession			4.981 (11.542)	
Model Summary				
Omnibus Test of Coeff. ‡	328.007***	308.920***	91.004***	84.415***
Cox & Snell R-Square	.142	.137	.179	.167
Nagelkerke R-Square	.227	.214	.300	.280
Hosmer & Lemeshow Test ‡	2.280	5.808	3.239	11.724
Correctly Predicted	82.1%	81.9%	85.7%	85.2%
n =	2148	2148	461	461

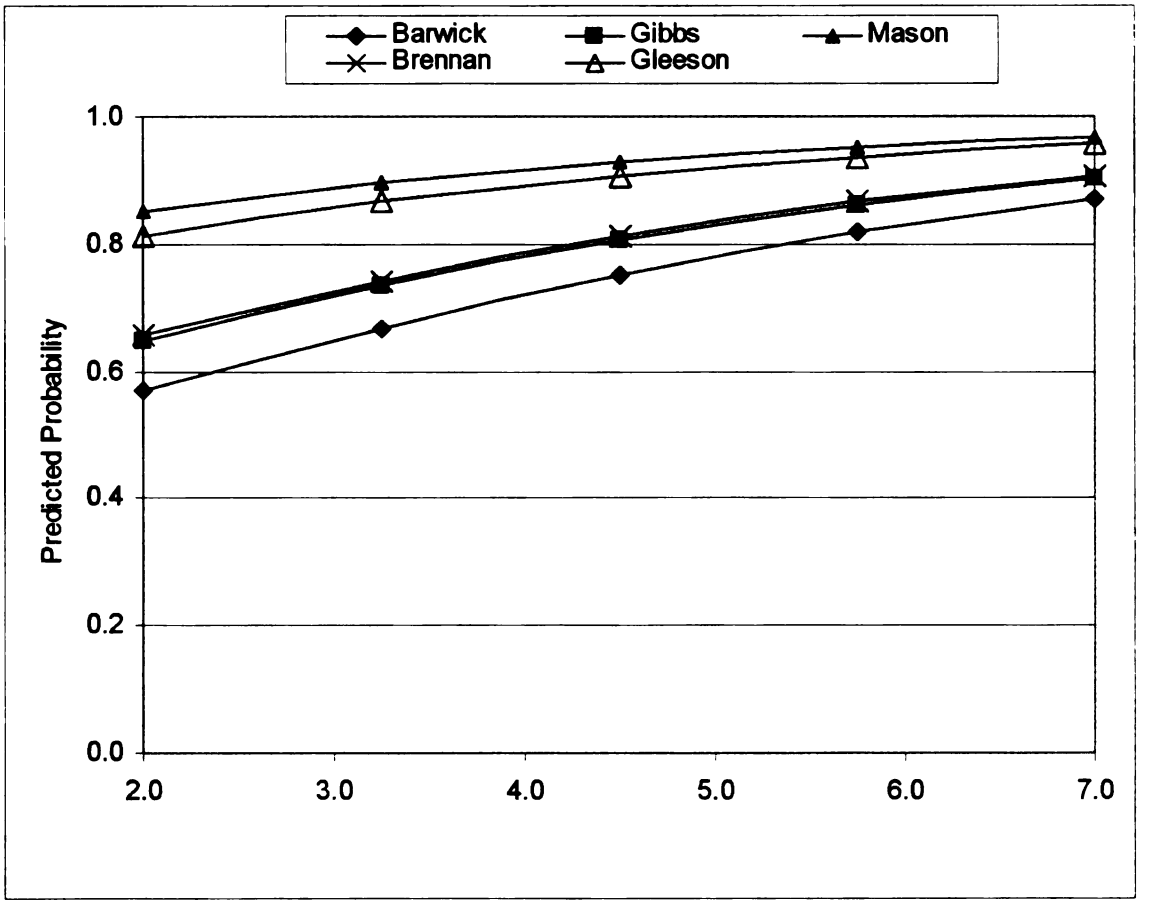
* p≤.05, ** p≤.01, *** p≤.001

† This is a categorical variable. The Wald statistic is provided. The indicator group is Barwick CJ.

‡ The numbers presented here are test statistics distributed as chi^2.

Like the single-opinion disposition model, Hypothesis 1 regarding workload pressures is not supported. While joint opinions are less likely under Chief Justice Gibbs, the predicted probability for joint opinions increases from .82 to .95 in the Mason Court. The complexity measures also mirror the single-opinion disposition model. While the number of matters considered is not significant here, joint opinions are less likely when the Court entertains a long oral argument.

Figure 14 - Predicted Probabilities of Joint Opinions by Panel Size

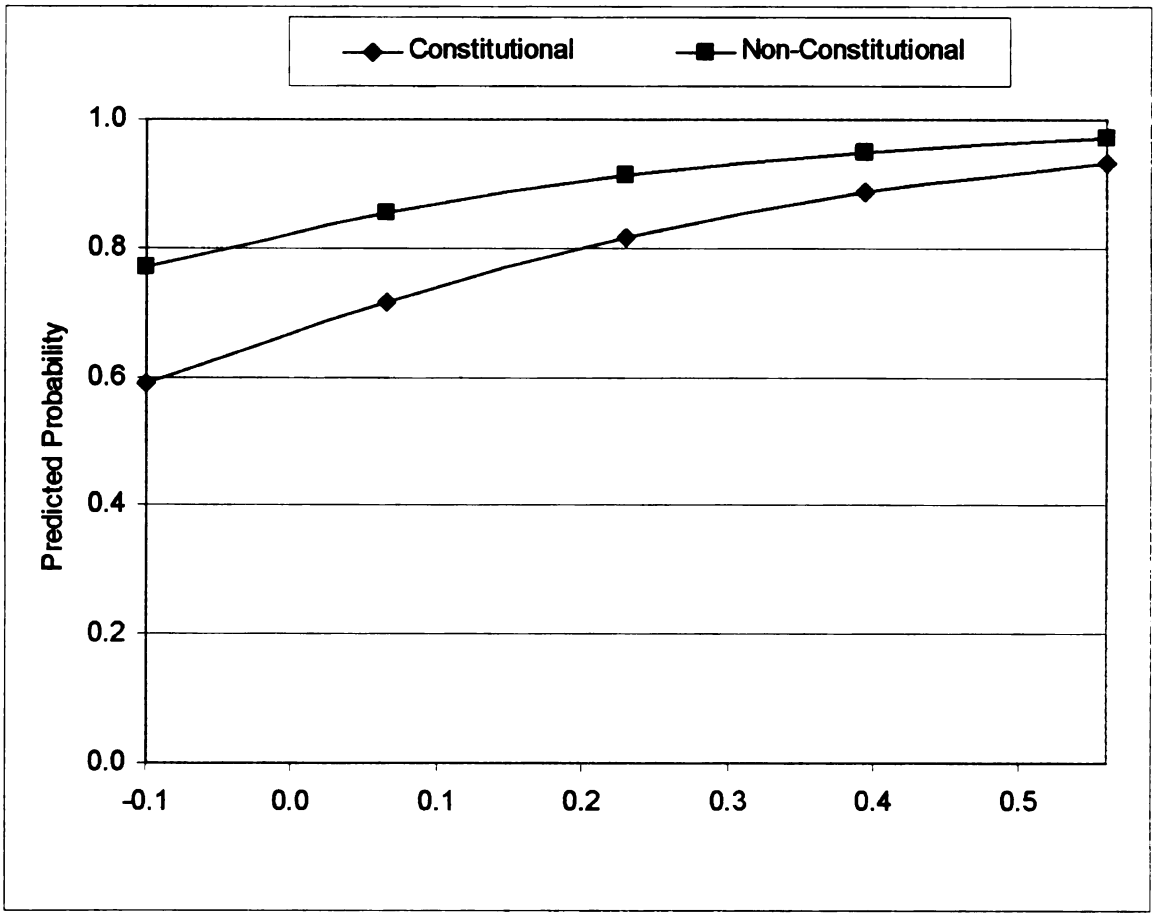


There are some notable differences between the single-opinion disposition model and the joint opinion model. First, joint opinions are less likely in nonunanimous cases. This variable was omitted from the single-opinion disposition models, as this kind of disposition is not possible except in unanimous cases. Here, the probability of a joint

opinion is .91 in unanimous cases, but only .75 when there is at least one dissenting vote. In addition, constitutional cases are less likely to garner a joint opinion. The probability drops from .88 to .75 when a constitutional question is raised.

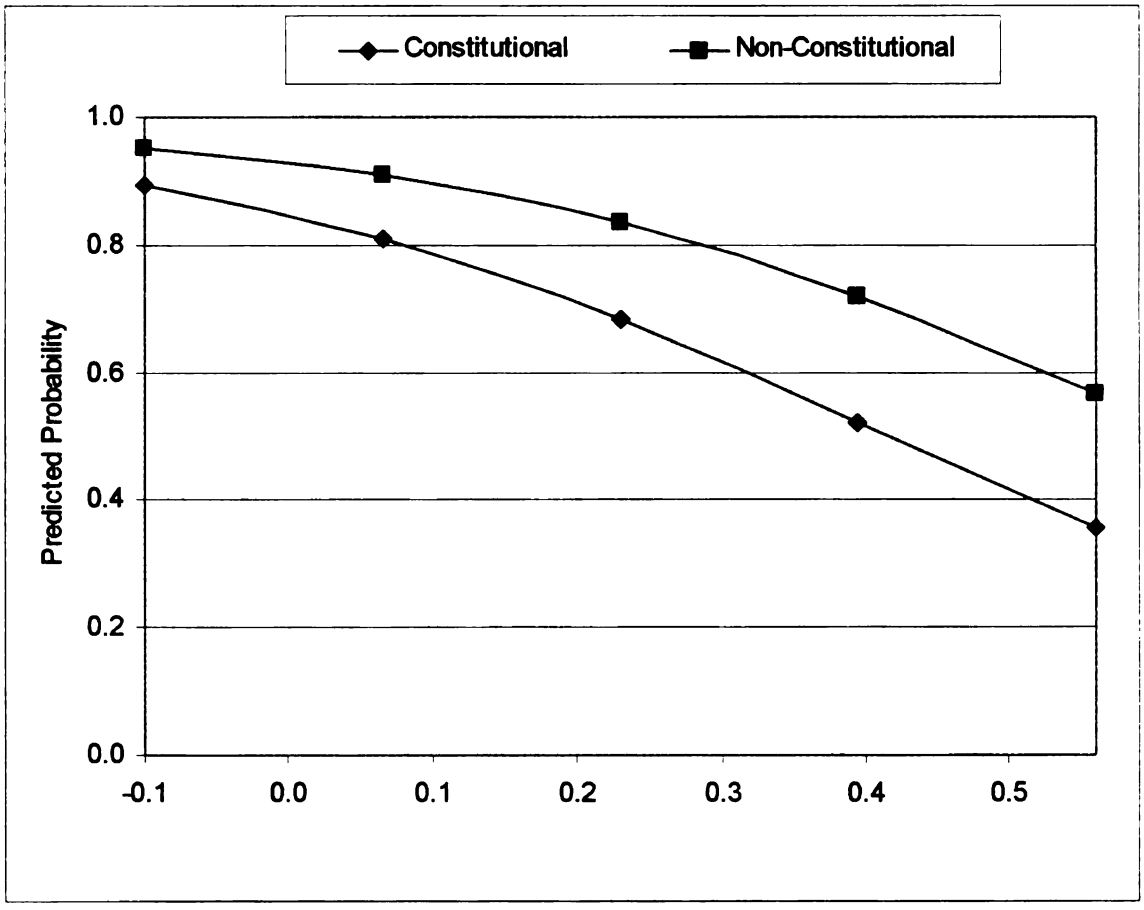
Perhaps the most interesting difference between the single-opinion and joint opinion models is the role of the ideology measures. The panel liberalism score is positively related to joint opinion likelihood. In other words, as the panel mean liberalism is raised, joint opinions become more likely. This is illustrated in Figure 15, with separate curves given for constitutional and non-constitutional cases. This gives support to Hypothesis 3a.

Figure 15 - Predicted Probabilities of a Joint Opinion by Panel Liberalism



At the same time, higher levels of ideological diversity make joint opinions less likely. As Figure 16 demonstrates, this is especially pronounced in constitutional cases. In keeping with the prediction in Hypothesis 3b, the Justices become less likely to find a partner with whom they agree with enough to author a joint opinion when ideological diversity increases. Therefore, while panel liberalism and diversity do not significantly affect the likelihood of single-opinion dispositions, they do influence the production of joint opinions made up of smaller coalitions.

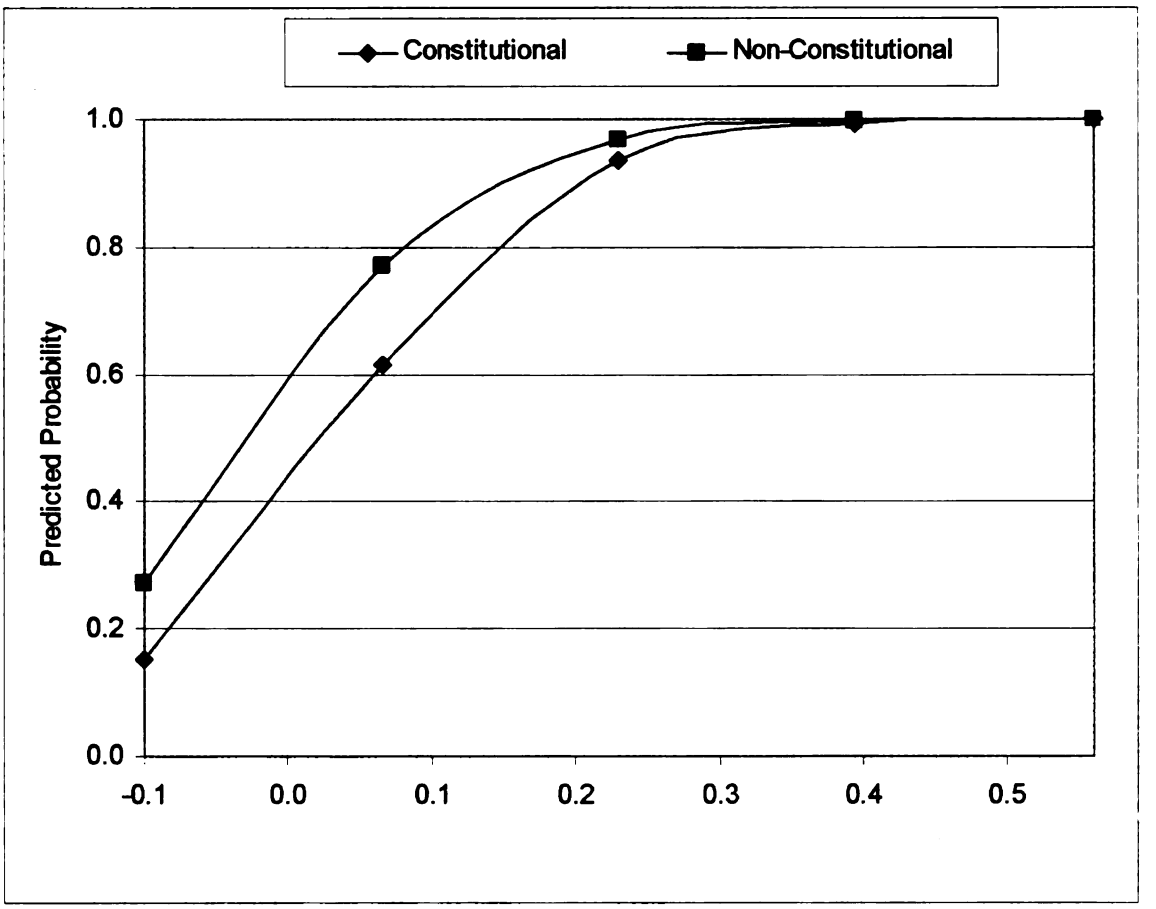
Figure 16 - Predicted Probabilities of a Joint Opinion by Panel Diversity



The joint opinion model was also applied to the subset of criminal cases. The effect of Chief Justice on the likelihood of joint opinions is insignificant in criminal cases. The Justices are more likely to author joint opinions when a retirement date is

approaching. The probability that a joint opinion be produced in a case increases from .84 to .95 if the case is handed down within three months of a scheduled retirement. This provides support for Hypothesis 1b. Additionally, criminal cases with long oral arguments are less likely to produce a joint opinion. When oral arguments last more than a single day, the predicted probability of a joint opinion drops from .91 to .83.

Figure 17 - Predicted Probabilities of a Joint Opinion in Criminal Cases by Panel Liberalism



While the panel diversity measure is insignificant in the model, liberal panels are still more likely to produce a joint opinion. This effect is more pronounced in constitutional cases, as Figure 17 illustrates. On conservative panels, the difference in

Table 15 – Judge-Level Logistic Regression Predicting Joining Behavior

Model Estimates	All OWOs (5)		Criminal Cases (6)	
	Full	Reduced	Full	Reduced
Constant	-.185 (.256)	-.364 (.145)**	-.897 (.725)	-.839 (.347)*
Workload				
Late Oral Argument	.017 (.045)		.029 (.103)	
Retirement Near	.044 (.081)		.048 (.194)	
Cases This Term	-.003 (.003)		-.003 (.007)	
Chief Justice†	29.369 ***	35.677 ***	14.189 **	17.666 ***
Gibbs	.181 (.192)*	.122 (.083)	.144 (.521)	.113 (.203)
Mason	.501 (.139)***	.459 (.127)***	.276 (.317)	.155 (.282)
Brennan	.108 (.168)	.078 (.149)	-.547 (.381)	-.641 (.316)*
Gleeson	.010 (.171)	.020 (.138)	-.171 (.391)	-.088 (.296)
New Chief	-.014 (.074)		.193 (.161)	
Ideology Measures				
Panel Diversity	.830 (.857)		-1.567 (1.277)	
Panel Mean Distance	-2.419 (.555)***	-2.149 (.482) ***	-1.567 (1.277)	-1.847 (.621)**
Agree with Direction	.202 (.043)***	.197 (041)***	.508 (.105)***	.503 (.104) ***
Complexity				
Long Oral Argument	-.360 (.048)***	-.367 (.048)***	-.612 (.114)***	-.632 (.110)***
Avg. Opinion Length	.053 (.005)***	.058 (.005)***	.045 (.012)***	.040 (.011)***
Number of Cases	-.097 (.028)***	-.099 (.028)***	-.153 (.082)	
Agenda Control	.265 (.113)*	.268 (.104)**	- - -	- - -
Salience				
Nonparty Participation	-.049 (.017)***	-.047 (.017)**	-.038 (.046)	
Constitutional Issue	-.400 (.066)***	-.390 (.066)***	-.163 (.155)	-.281 (.140)*
Tort Cases	-.196 (.063)**	-.168 (.060)**	- - -	
NGO a Party	.174 (.086)*	.158 (.082)*	-.418 (.620)	
Federal Gov't a Party	-.105 (.075)		.376 (.123)**	.276 (.117)*
Litigation History				
Admin./Specialized	-.024 (.088)		-.153 (.411)	
Federal Courts	-.105 (.075)		-.068 (.218)	
Case Outcome				
Allow Appeal	-.102 (.045)*	-.109 (.044)**	.214 (.111)*	
Justice Characteristics				
Catholic	-.030 (.063)		-.246 (.137)	
Labor Appointing P.M.	-.201 (.063)***	-.195 (.059)***	-.196 (.128)	
From New South Wales	.057 (.057)		-.324 (.128)	-.353 (.124)**
Gov't Attorney Exp.	.494 (.060)***	.516 (.053)***	.706 (.134)***	.653 (.128)***
Prior Judicial Exp.	.251 (.066)***	.274 (.057)***	.487 (.161)**	.455 (.133)***
Predisposition to Join	.651 (.095)***	.666 (.094)***	.854 (.209)***	.892 (.203)***
Freshman (1st 50 Cases)	-.078 (.103)		-.173 (.219)	
Control Variables				
Panel Size	-.483 (.032)***	-.480 (.031)***	-.447 (.077)***	-.458 (.073)***
Coalition Size	.530 (.023)***	.531 (.022)***	.449 (.056)***	.447 (.055)***
Criminal Outcomes				
Allow Jury Challenge			-.476 (.161)**	-.307 (.146)*
Exclude Confession			-.780 (.339)*	-.645 (.325)*

Table 15 (cont'd)

Model Summary	All Cases (5)		Criminal Cases (6)	
	Full	Reduced	Full	Reduced
Omnibus Test of Coeff. ‡	2403.582 ***	2394.600 ***	684.900 ***	666.699 ***
Cox & Snell R-Square	.199	.198	.246	.240
Nagelkerke R-Square	.267	.266	.331	.323
Hosmer & Lemeshow Test ‡	3.225	5.731	7.486	5.635
Correctly Predicted	69.8%	69.8%	73.7%	73.6%
n =	10855	10855	2425	2425

*p≤.05, ** p≤.01, *** p≤.001
† This is a categorical variable. The Wald statistic is provided. The indicator group is Barwick CJ.
‡ The numbers presented here are test statistics distributed as chi^2.

predicted probability between constitutional and non-constitutional cases is pronounced. As the panel liberalism score approaches its maximum of .49, the difference in the predicted probability of a joint opinion between constitutional and non-constitutional cases shrinks as they both draw near 1.00.

Judge-Level Models of Joining Behavior

The third set of analyses applies the model of joining behavior—with the addition of several judge-centered control variables—on the judge-level data. The first models each opinion-writing opportunity in the dataset, and the second isolates criminal cases. The results are reported in Table 15. In addition to the panel size control variable, as the size of the individual Justice's coalition is also included. As the coalition size get larger, the Justice is more likely to join. Increasing a coalition from two to four raises the probability that a Justice will join from .28 to .53. Adding three more members to the coalition boosts the probability to .85. The coalition size variable essentially controls for the increased opportunity to join in larger vote coalitions. Because of this, the panel size variable now has a negative sign. Once the size of the coalition is controlled for, the panel size variable likely reflects the relationship between panel size

and case importance. As the panel size increases, the predicted probability of a decision to join decreases (see Figure 18).

Perhaps the most obvious difference between these models and the case-level models is the number of null hypotheses that have been rejected. Despite the similarities in overall model statistics, the increased volume of data allowed this model to overcome the problem of micronumerocity (Goldberger 1991). When additional data are added in an environment of incomplete multicollinearity, the detrimental effects of lower-level multicollinearity on the parameter variances are lessened (O'Brien 2007). In this way, the regression model is better able to assign appropriately-signed parameter estimates, yielding more power in hypothesis testing (Miles and Shelven 2001). This is reflected in

Figure 18 - Predicted Probabilities of a Decision to Join by Panel Size

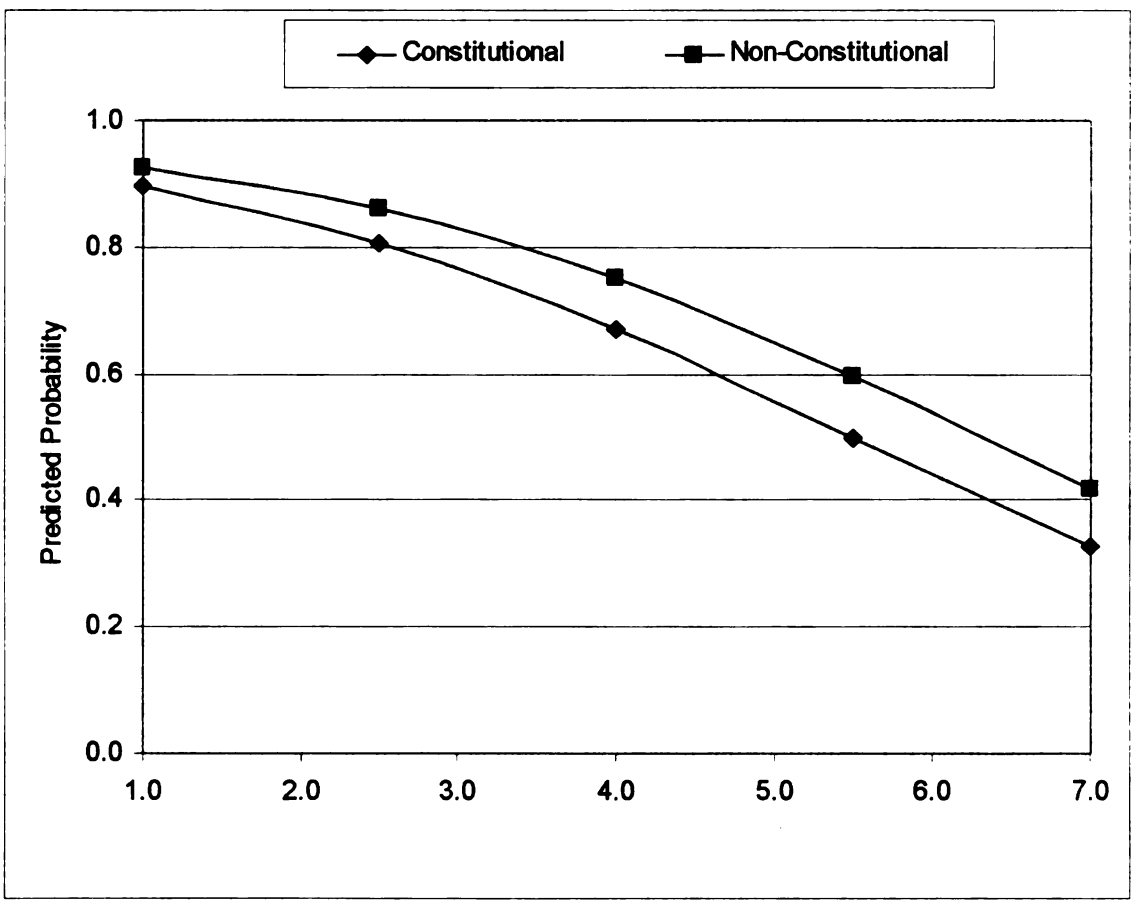
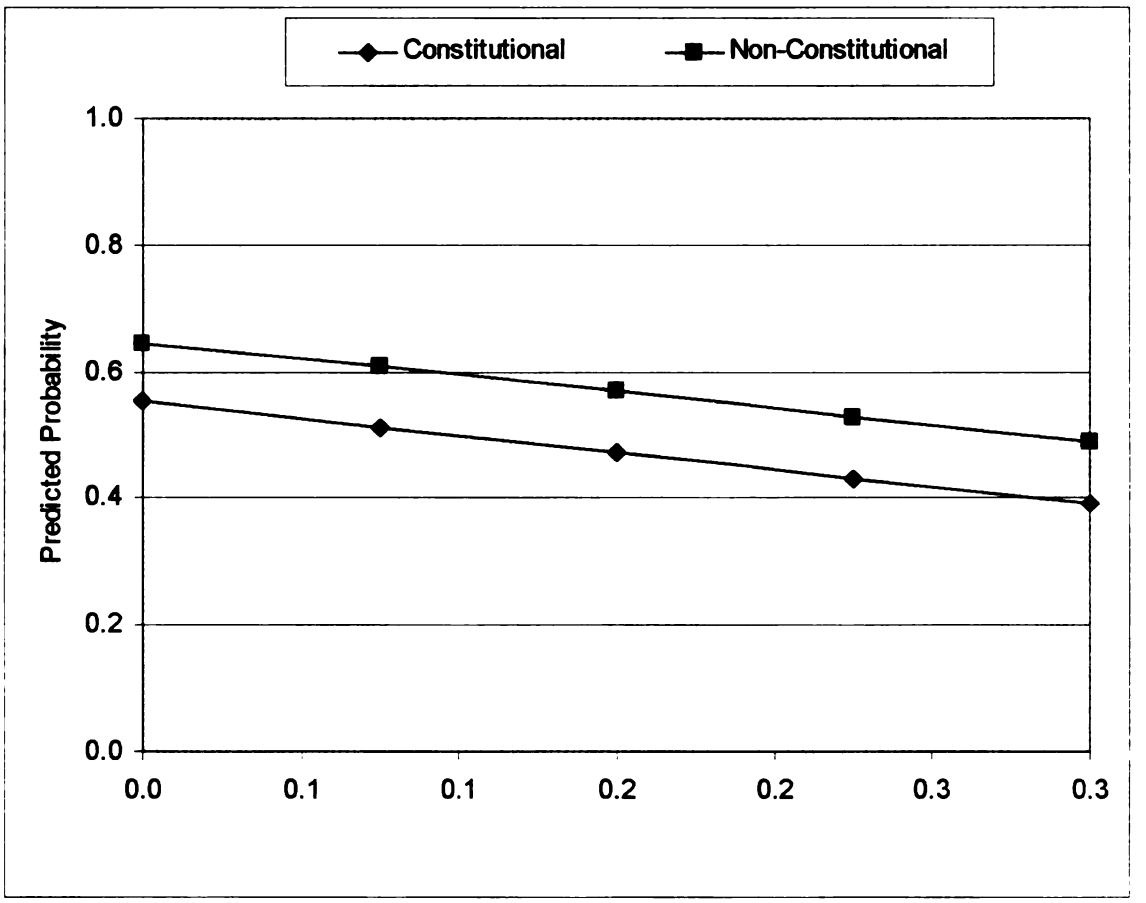


Table 12, where the judge-level VIFs tend to be much smaller than the same measures in the case-level data.

Even in this environment of increased hypothesis-testing power, Hypothesis 1 fares badly. Neither model provides support for the argument that workload pressures discourage (or encourage) joining behavior on the High Court. In addition, the suggestion offered in Hypothesis 8—that the litigation history is important—remains unsupported. In the Mason Court, the predicted probability of a decision to join is .90, as compared to .87 during the tenure of the other Chiefs. With this exception, the Chief Justice variables are insignificant here. This may be a result of the inclusion of the Justice characteristics. Because the membership of the Court is generally stable over the course of a Chief's tenure, the relative distribution of particular Justice characteristics may explain much of the variation that the Chief Justice variables would have accumulated in the case-level analyses.

The ideology measures perform quite strongly in this analysis. The panel diversity measure is insignificant in these models, but distance of the individual Justice from the panel mean is significant and large in the expected direction. As the panel mean moves farther from the Justice's liberalism score, she is less likely to join. Figure 19 illustrates that this relationship holds for constitutional and non-constitutional cases alike, although Justices at any distance from the panel mean less likely to join when a constitutional issue is raised. In much the same way, Justices who agree with the ideological direction of the decision are more likely to join than those who are not.

Figure 19 - Predicted Probabilities of a Decision to Join by Ideological Distance

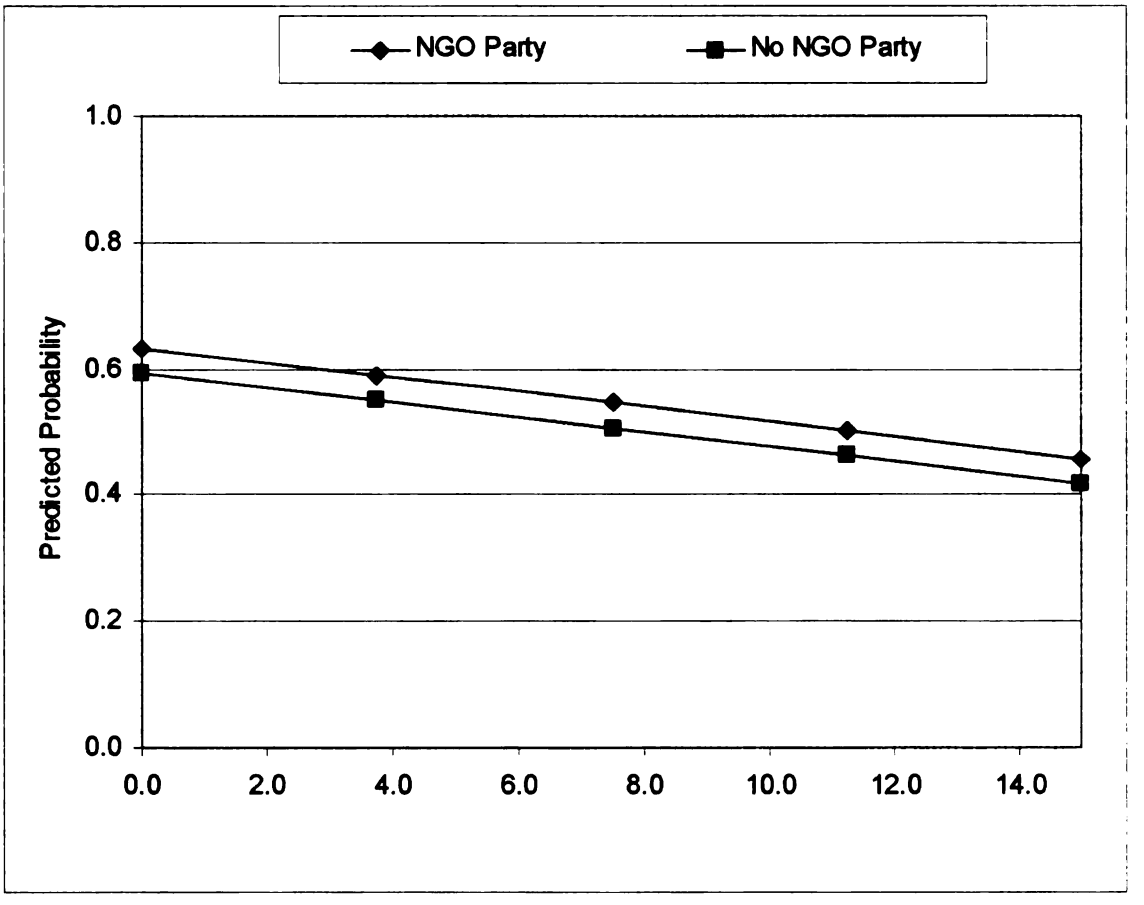


All of the measures of case complexity are statistically significant, but they do not universally support Hypothesis 5. Justices are less likely to join when the oral arguments lasted more than one day, with the predicted probability falling from .63 to .54. Similarly, cases dealing with more than one matter have less joining behavior. A case with a single matter at issue has a predicted probability of .60, whereas a case with five matters has a predicted probability of .50. At ten cases—which is less than the sample maximum of 15—the probability falls to .38.

Like the case-level models, the average opinion length has a positive relationship with the probability of joining behavior. As the earlier discussion suggests, this result may be a result of the additional space per opinion taken up by case facts and background

information. The parameter estimate for the agenda control variable also has a positive sign. When the Court is exercising its discretionary jurisdiction, Justices are more likely to join. This is counter to the prediction of Hypothesis 5d. This hypothesis suggests that agenda control will yield a greater proportion of complex cases, and that Justices will be less likely to join in complex cases. It is difficult to say which portion of this argument is incorrect.

Figure 20 - Predicted Probabilities of Joining Behavior by Nonparty Participation Rate

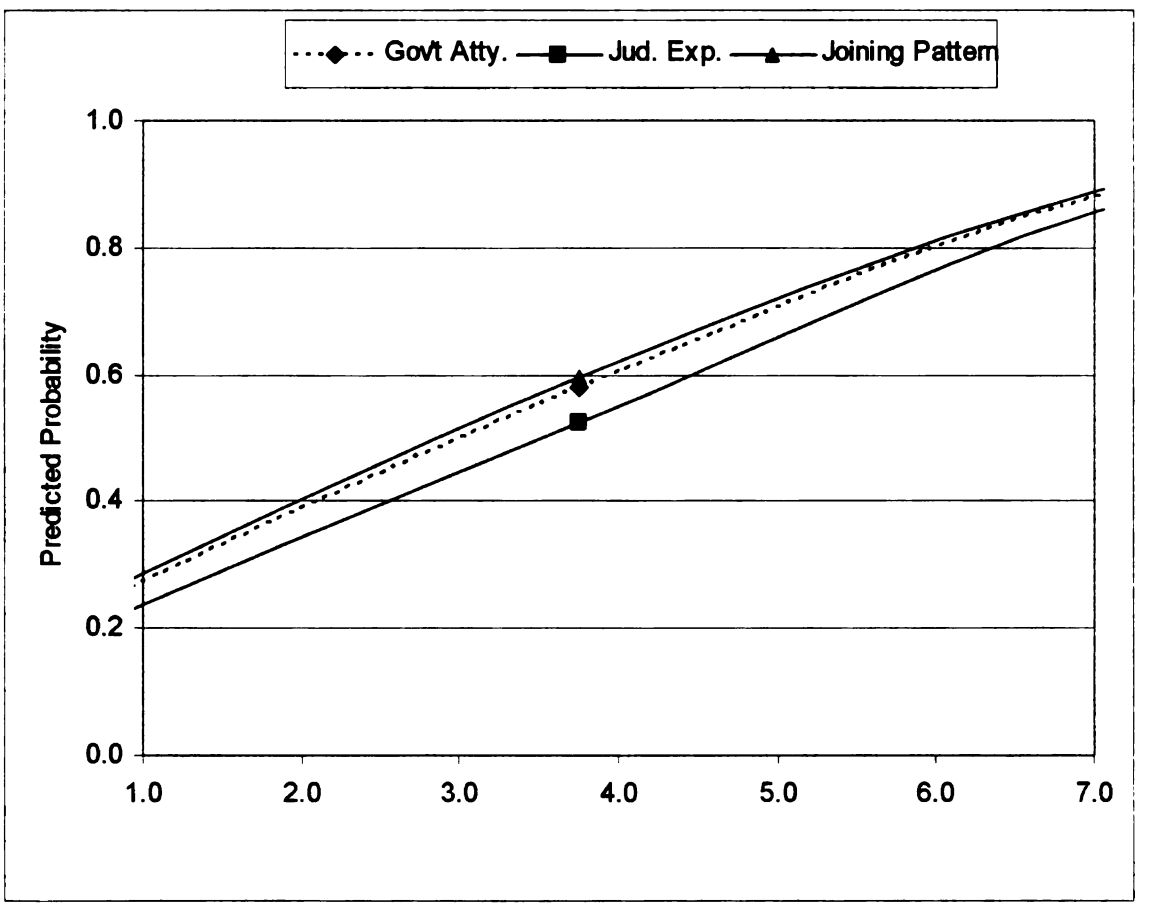


Hypothesis 6 predicts that Justices will be less likely to join in salient cases; this hypothesis is strongly supported in the judge-level analysis. Constitutional cases, tort cases, and cases with nonparty participation are all associated with lower joining rates. Constitutional cases have a predicted probability of joining behavior of .51 as compared

with .61 non-constitutional cases. This relationship is demonstrated in Figure 18 and Figure 19. The difference between tort cases and non-tort cases is less pronounced, with the predicted probabilities at .56 and .60, respectively. Higher rates of nonparty participation are also associated with lower rates of joining behavior. At the same time, the presence of a nongovernmental organization as a litigant is associated with an increased probability of joining behavior. Figure 20 illustrates this relationship.

In addition to the improved success of these measures, several of the Justice characteristics are also related to the decision to join. Hypothesis 10 predicts that a Justice's approach to the working environment will be related to higher joining rates. Previous experience as a government attorney or a judge is associated with a greater

Figure 21 - Predicted Probabilities of Decision to Join across Approach to Working Environment



likelihood that a Justice will join. After a Justice has developed a pattern of joining, she is more likely to continue that pattern. These three factors affect the predicted probability of a decision to join in very similar ways, as Figure 21 shows. Of the other judge characteristics, only the party of the appointing prime minister is significant in the model. The direction of this relationship is rather perplexing. When all other variables are held at their means, Liberal National Coalition (LNC) appointees have a predicted probability of .60, while Australian Labor Party (ALP) appointees have a predicted probability of .56. This is not a remarkable difference, but it is statistically significant. In the case-level models, liberal panels are more likely to yield a joint opinion. Additionally, the discussion of Operational Hypothesis 3 demonstrates the relationship between liberalism and ALP appointee status (see Figure 12).

This model was also applied to the subset opinion-writing opportunities in criminal cases. The results are much the same as the full model, with a few notable exceptions. Joining behavior in criminal cases is not more likely in the Mason Court. Labor Party appointee status is insignificant in this model, but Justices from New South Wales are less likely than other Justices to join in criminal cases.

When the federal government is a party to the case, the Justices are less likely to join. Hypothesis 7a predicted the opposite result, but there is reason to suspect that criminal cases may be different. The theory behind Hypothesis 7 is that the Court will be more interested in presenting a united front when it is concerned about the reaction of other branches of government. In criminal cases, the federal government is generally a party only as the prosecutor of serious crimes. In these situations, the federal party to the

case is usually the Queen,[105] the cases involve questions of law enforcement as opposed to questions of intergovernmental balances of power.

Joining Behavior on the Gleeson Court

The final application of the model is a case study of joining behavior on the Gleeson Court through the retirement of Justice Mary Gaudron in 2003. The results of this model are reported in Table 16, and they reflect many of the same patterns as the earlier models. The panel and coalition size controls work the same way as they do in the other judge-centered models. A larger coalition size is associated with higher predicted probabilities, while a larger panel size is associated with less joining behavior. The workload hypothesis is still wholly unsupported here.[106] The ideological hypotheses are also supported. As Figure 22 shows, a Justice's distance from the panel mean is a powerful predictor of his decision to join.

Experience as a government attorney and a predisposition to join are both associated with higher predicted probabilities of joining behavior. Because Justice Gaudron is the only member of the Gleeson Court with this experience, this coefficient will capture all her idiosyncrasies. As before, appointment by a Labor Party prime minister is associated with lower predicted probabilities. A freshman effect is evident in this model, as well. Because the only freshmen in this sample are Chief Justice Gleeson and Justice Callinan, this variable may be capturing other similarities between these Justices.

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[105] The Queen as a corporate entity is the nominal prosecutor of serious crimes. The actual prosecutor is usually the Commonwealth Attorney-General. Criminal cases not prosecuted by the Queen are generally less serious, and the cases are usually handled by the State Director of Public Prosecutions or the State Attorney-General.

[106] The retirement flag has been omitted from this analysis, as this variable is a constant for the period.

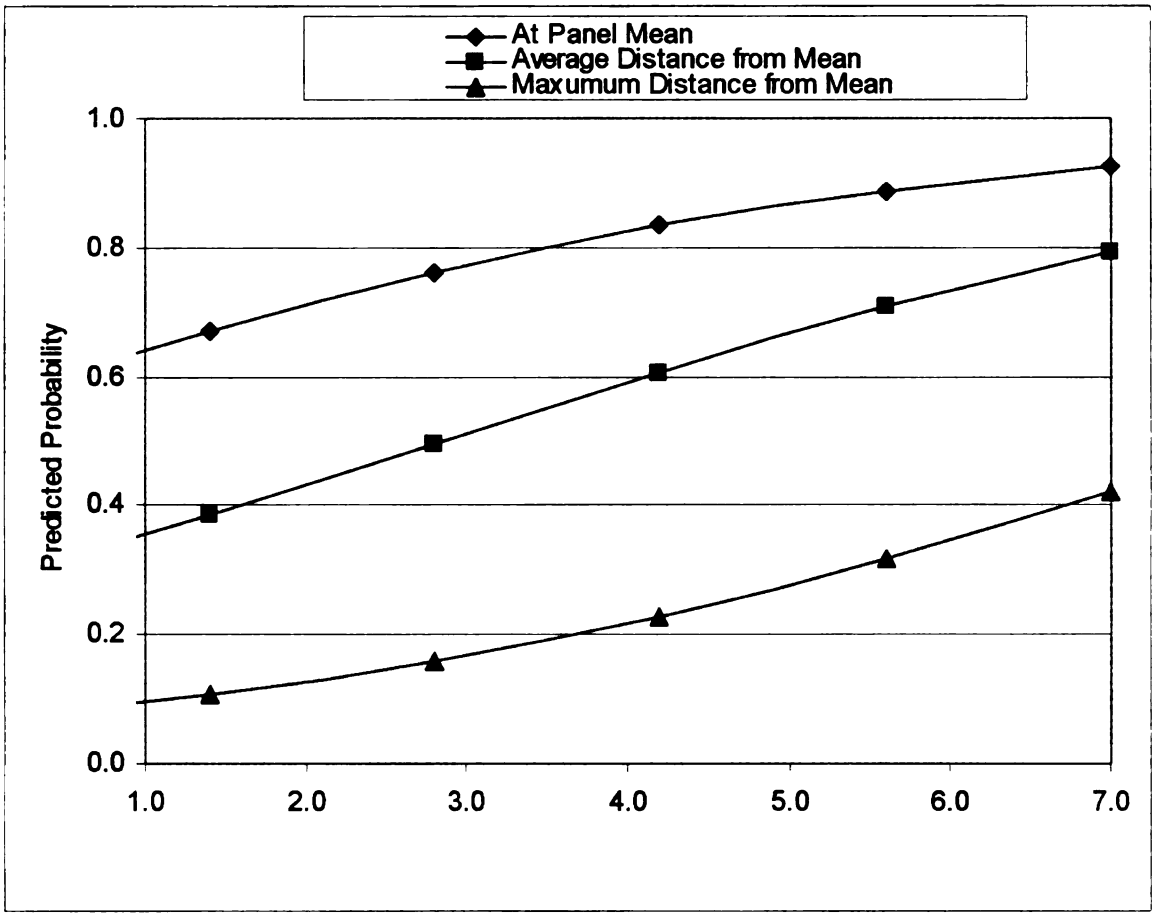
Table 16 – Judge-Level Logistic Regression Predicting Joining Behavior on the Gleeson Court

Model Estimates	Judge-Level (7)	
	Full	Reduced
Constant	-.406 (.979)	.678 (.532)
Workload		
Late Oral Argument	-.037 (.140)	
Cases This Term	.002 (.011)	
Ideology Measures		
Panel Diversity	7.879 (7.470)	
Panel Mean Distance	-24.126 (3.486)***	-23.657(2.761)***
Agree with Direction	.427 (.134)***	.491 (.124)***
Complexity		
Long Oral Argument	-.158 (.169)	
Avg. Opinion Length	.048 (.013)***	.027 (.008)**
Number of Cases	-.078 (.103)	
Salience		
Nonparty Participation	-.069 (.033)*	
NGO a Party	.277 (.324)	
Constitutional Issue	-.287 (.206)	-.474 (.181)**
Tort Cases	-.907 (.215)***	-.948 (.198)***
Federal Gov't a Party	-.240 (.162)	-.377 (.152)**
Litigation History		
Admin./Specialized	-.308 (.288)	
Federal Courts	.027 (.170)	
Case Outcome Characteristics		
Allow Appeal	.242 (.141)	.298 (.133)*
Chief Justice		
New Chief Justice	.112 (.188)	
Justice Characteristics		
Gov't Attorney Exp.	1.987 (.338)***	1.824 (.260)***
Prior Judicial Exp.	.186 (.294)	
Freshman (1st 50 Cases)	.722 (.395)	.767 (.358)*
Predisposition to Join	.720 (.299)*	.735 (.283)**
Catholic	-.365 (.220)	
From New South Wales	.336 (.348)	
Labor Prime Minister	-.663 (.253)**	-.357 (.145)**
Control Variables		
Panel Size	-.224 (.106)*	-.221 (.089)**
Coalition Size	.383 (.069)***	.322 (.062)***
Model Summary		
Omnibus Test of Coeff. ‡	373.867***	382.253***
Cox & Snell R-Square	.253	.243
Nagelkerke R-Square	.345	.330
Hosmer & Lemeshow Test ‡	7.783	5.111
Correctly Predicted	74.1%	73.7%
n =	1371	1371

* p≤.05, ** p≤.01, *** p≤.001

‡ The numbers presented here are test statistics distributed as chi^2.

Figure 22 - Predicted Probabilities of Decision to Join on Gleeson Court by Coalition Size



The measure of opinion length functions as it has across all models: longer average opinions are linked with higher predicted probabilities of joining behavior. With this exception, the complexity hypothesis is unsupported in the Gleeson Court. The salience hypothesis fares much better, though. The predicted probability of joining behavior in a constitutional case is .56, as compared with .67 for non-constitutional cases. The relationship between joining behavior and tort cases is the same, with tort cases yielding a predicted probability of .56 and non-tort cases a predicted probability of .67.

In order to create a more individualized picture of joining behavior on the Gleeson Court, the model has been adjusted and applied to the joining decisions of each individual Justice in the Gleeson Court. The Justice characteristics are removed from the model,

and the results for each model are presented in Table 17. Certainly, these models do not perform as well on the individual judges as they do on the full dataset. The explanatory power is lower, and many of the hypotheses that were supported above are not supported here. The earlier discussion of multicollinearity explains much of this. The division of the data into seven pieces leads to micronumerosity—or too few data points—for each individual model. This can artificially inflate the variance for individual parameter estimates, leaving models with reasonable r-square analogs without hypothesis-testing power.

In an attempt to alleviate some of these effects, a reduced model is presented in Table 18. This model was chosen by including only those variables that showed promise in the earlier models, while avoiding too many measures of the same concept. The models perform better for Gleeson, Callinan, and Gaudron than for the rest of the Justices. All three of these Justices are less likely to join in tort cases. Gleeson, Callinan, and McHugh are all more likely to join when their coalition size is larger, but these effects do not reach the $p \leq .05$ level of statistical significance. The panel size coefficients are in the expected direction across the board, although they approach but do not consistently reach statistical significance.

There are a few more insights here, though, that bear mentioning. First, Justices Gaudron and Gummow are significantly more likely to join when they are in the majority in a decision with a discernibly ideological outcome. In addition, along with Justice Hayne their presence in an opinion coalition is associated with longer average opinion lengths. Finally, Justice Kirby is significantly less likely to join when the case involves a constitutional question.

Table 17 - Individual Models of Joining Behavior on the Gleeson Court

	Gleeson	Callinan	Gaudron	Gummow	Hayne	Kirby	McHugh
Constant	-1.99 (2.21)	-2.83 (2.05)	-.09 (2.36)	5.29 (3.27)	1.41 (2.40)	-2.62 (1.95)	-1.05 (1.84)
Workload							
Late Arg.	.34 (.41)	-.47 (.36)	.07 (.41)	-.22 (.48)	.48 (.43)	-.16 (.38)	-.08 (.35)
Cases	.06 (.03)*	.04 (.03)	-.02 (.03)	-.07 (.05)	-.02 (.03)	-.01 (.03)	.02 (.02)
Ideology							
Agree	.80 (.40)*	.19 (.38)	.89 (.39)*	.77 (.40)*	.58 (.35)	.37 (.40)	.32 (.32)
Complexity							
Long OA	-.18 (.50)	-.58 (.42)	-.80 (.49)	.88 (.67)	.27 (.49)	.00 (.42)	.20 (.41)
Length	.07 (.04)	.09 (.37)	.12 (.05)**	.06 (.05)	.08 (.04)	-.06 (.04)	.06 (.03)*
Matters	-.30 (.29)	-.20 (.26)	-.05 (.30)	.33 (.45)	-.14 (.30)	-.06 (.34)	-.25 (.25)
Salience							
Nonparty	.09 (.11)	-.03 (.10)	-.134 (.09)	-.18 (.10)	.01 (.12)	-.19 (.13)	-.06 (.08)
NGO	.42 (1.25)	-.94 (.85)	1.36 (1.33)	.25 (1.13)	.50 (1.13)	.65 (.84)	-.07 (.70)
Const.	-1.20 (.58)*	-.62 (.57)	.05 (.57)	-.28 (.70)	.25 (.65)	-1.10 (.66)	.17 (.51)
Tort	-1.95 (.61)***	-1.90 (.58)***	1.57 (.60)**	.05 (.71)	-.64 (.62)	-.39 (.58)	-.34 (.53)
Fed. Gov't	-.83 (.50)	-.73 (.42)	.59 (.46)	.39 (.56)	-.43 (.49)	-.306 (.44)	-.26 (.39)
Outcome							
Allowed	.35 (.40)	.39 (.38)	.39 (.41)	-.19 (.49)	.52 (.41)	.45 (.40)	.02 (.34)
Controls							
Panel	-.48 (.30)	-.40 (.28)	-.26 (.30)	-.80 (.38)*	-.39 (.30)	.30 (.29)	-.31 (.25)
Coalition	.45 (.21) *	.54 (.18)**	.31 (.20)	.59 (.25)*	.30 (.21)	.36 (.19)*	.36 (.17)*
Omnibus	41.723 ***	56.143 ***	46.803 ***	25.515 *	24.370 *	34.809 **	27.790 *
Nagerkelke	.304	.355	.344	.228	.192	.242	.196
H& L Test	13.572	12.139	9.006	4.916	7.803	11.748	10.202
n	190	194	180	205	199	207	190

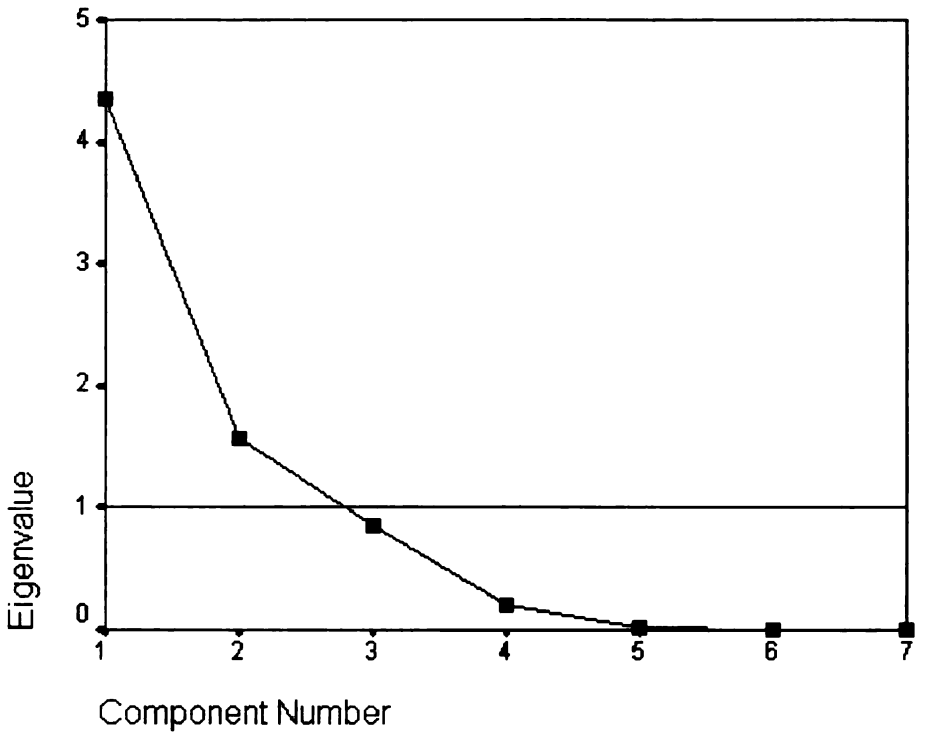
Table 18 - Reduced Individual Justice Models of Joining Behavior on the Gleeson Court

	Gleeson	Callinan	Gaudron	Gummow	Hayne	Kirby	McHugh
Constant	2.03 (1.30)	1.19 (1.23)	-.84 (1.36)	.92 (1.43)	-.239 (1.36)	-1.72 (1.20)	.11 (1.04)
Ideology							
Agree	.68 (.56)	.05 (.34)	.98 (.35)**	.88 (.37)**	.62 (.32)	.41 (.37)	.25 (.30)
Complexity							
Length	.06 (.04)	.03 (.02)	.08 (.04)*	.09 (.05)*	.08 (.04)*	-.06 (.03)	.03 (.02)
Salience							
Const.	-.91 (.48)	-.56 (.48)	-.56 (.49)	-.61 (.59)	-.33 (.56)	-1.28 (.55)*	.10 (.45)
Tort	-1.179 (.54)***	-1.64 (.54)**	-1.54 (.55)**	-.12 (.67)	-.81 (.58)	-.50 (.53)	-.21 (.49)
Fed. Gov't	-.83 (.45)	-.71 (.38)	.30 (.41)	.03 (.50)	-.45 (.46)	-.38 (.41)	-.32 (.36)
Controls							
Panel	-.63 (.26)**	-.68 (.25)**	-.10 (.26)	-.44 (.30)	-.16 (.27)	.11 (.25)	-.33 (.21)
Coalition	.44 (.18)**	.57 (.16)***	.145 (.17)	.34 (.22)	.26 (.19)	.26 (.16)	.36 (.15)*
Omnibus	39.711 ***	46.240 ***	36.642 ***	17.849 **	23.400 ***	26.397 ***	22.950 **
Nagerkelke	.268	.284	.260	.152	.172	.178	.153
H& L Test	3.498	17.414	6.473	5.059	12.857	8.331	4.440
n	190	194	180	205	199	207	190

Another way to evaluate the joining behavior of the Gleeson Court Justices is to represent their positions graphically. Each Justice has many opportunities to join with all of his colleagues on the bench, and the goal of these analyses is to isolate the factors contributing to the decision to join. Pairs of Justices who tend to join when they have the chance can be conceived as being 'close' to each other in terms of some set of criteria relevant to opinion writing. Those who tend not to join with each other are 'far' from each other in the same sense. By observing the patterns of these interactions, a spatial representation of the distances between them can be created.

Multidimensional scaling uses a matrix of dissimilarities in order to reverse-engineer a spatial representation of the Justices. This matrix can be constructed using the proportion of potential joining opportunities in which each pair of Justices does *not* join. In a general sense, a pair of Justices will be closer together in joining behavior terms when they vote together frequently. In other words, analysis of a matrix like the one described above would conflate the effects of joining decisions with voting decisions. For this reason, it is appropriate to condition the joining decision on vote compatibility. If two Justices do not end up on the same side of the vote, their opportunity to join is essentially lost for that case. For this reason, the entries in the matrix represent joining distances conditioned on votes. Each element p_{ij} represents the proportion of cases in which Justice i and Justice j voted together but did not join. Because this matrix is symmetrical—with the list of Justices forming both the row and column entries, it is amenable to multidimensional scaling analysis (Davison 1983).

Figure 23 - Scree Plot for Gleeson Court Conditional Distance Matrix

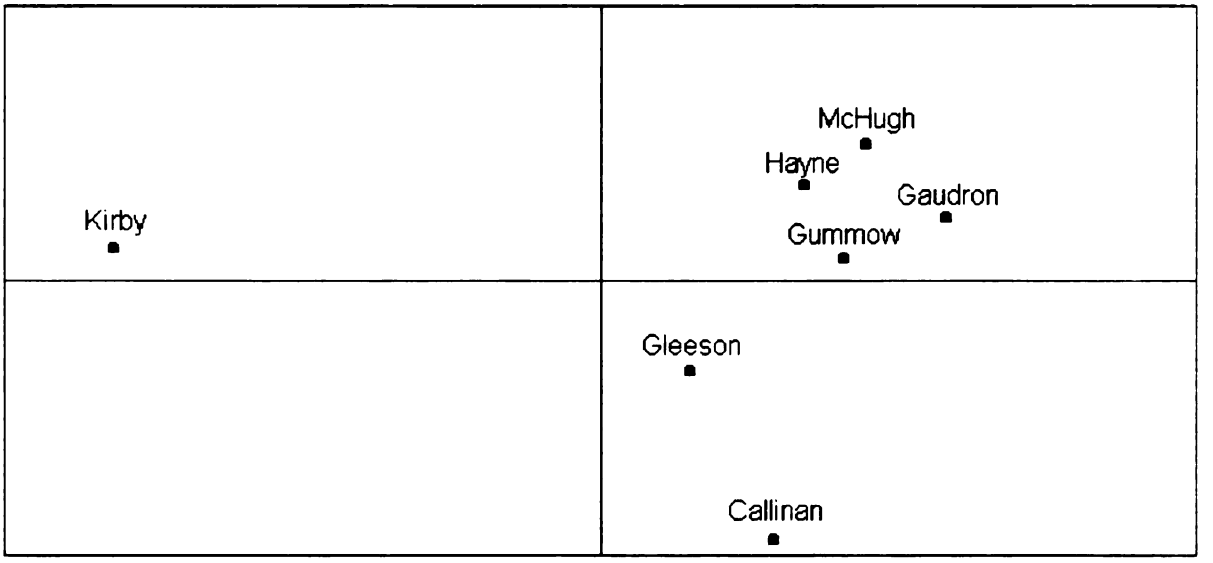


For the purposes of this analysis, the values of the dissimilarities matrix are conceptualized as distances in Euclidean space. Calculations are made with the goal of creating spatial representations of the relative positions for each of the Justices. In order to determine which representation best represents the distances between the Justices without adding unnecessary complexity, it is important to identify the smallest level of dimensionality necessary to depict accurately the judges in Euclidean space. The most common method is to evaluate a scree plot—a plot of eigenvalues against the dimensions in order of extraction. Typically, dimensions with eigenvalues smaller than one considered unnecessary. Figure 23 presents the scree plot for the Gleeson Court conditional distance matrix, and two dimensions are above the cutoff eigenvalue of one.

The two-dimensional representation of the Gleeson Court Justices is presented in Figure 24.[107] The orientation of these dimensions is based only on the distances in the data, and not on any external metric (such as party affiliation, activism, etc.). This arrangement depicts the degree to which Justices join with one another, given that they agree on the vote. When Justices agree on the disposition of the case, Justices who are close together on the map are more likely to join with each other. If judges are far from each other on the map, they are relatively unlikely to join with each other *even* when they vote together on the merits.

The most obvious feature of Figure 24 is Kirby's position to the far left. To find Kirby this far away from the other Justices may not be much of a surprise, given his reputation as an "outsider" (Banham 2003; Pelly 2008). Kirby's dissent rate over this

Figure 24 - Derived Configuration of Joining Behavior Conditional on Votes



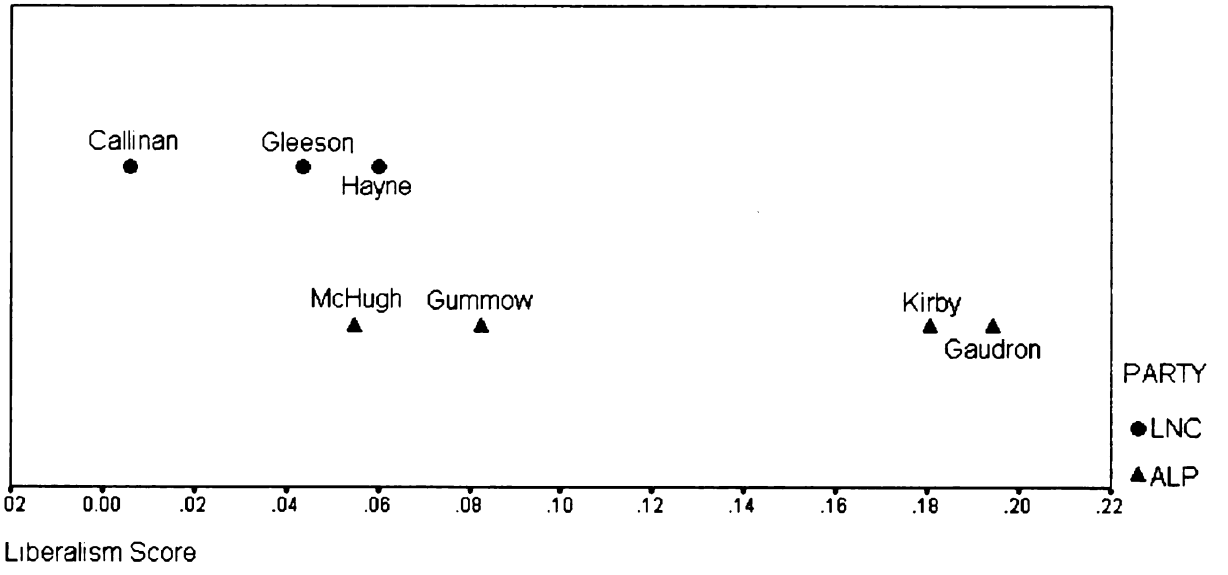
[107] The MDS calculations reported here were made using the ALSCAL procedure in SPSS 11.0, and very similar results were obtained using SAS 8.2. For a review of the procedure, see Davison (1983). For a defense of the two-dimensional representation of voting behavior on the High Court of Australia, see Wood (2002)

period was the highest, followed by McHugh and then Callinan (Lynch 2003b). While Kirby and Callinan appear distant from the others—and from each other—McHugh appears in the core group in the top-left corner. Of course, this spatial representation does not include information about dissent rates. As such, McHugh is more likely than the other dissenters to join when he is in agreement with other Justices—even if this does not happen very often.

Legal scholar Andrew Lynch concludes that "[t]he Court seems to have a solid core led by Justice Gummow and comprising in rough order of influence Chief Justice Gleeson, Justice Hayne and Gaudron" (Lynch 2003b). In this analysis, though, McHugh appears to be closer to this group than Gleeson. The difference is that the scaling procedure has controlled for the vote on the merits. Lynch's analysis uses percentage tables of opinion-writing rates, and conditioned joining behavior cannot be detected in this way.

Patterns of voting behavior are important, but they are not the main subject of this analysis. Certainly, there are patterns of agreement in terms of vote outcomes that coincide with ideology—or at least with the party of appointing prime minister, which is an accepted proxy measure of ideology. The liberalism score used in the above models was derived from voting behavior, and not from joining behavior. The scores for the Gleeson Court Justices are presented in Figure 25, separated by appointing prime minister. Gleeson, Callinan, and Hayne are the Liberal appointees; the rest were appointed by Labor prime ministers. Comparing this arrangement with Figure 24, it becomes clear that ideology has at least some relationship with joining patterns on the Court. Gleeson, Hayne, McHugh, and Gummow appear in a tight cluster in Figure 25,

Figure 25 - Liberalism Scores of Gleeson Court Justices by Party of Appointing Prime Minister[108]



indicating that they tend to favor the same ideological case outcomes. Each of these Justices appears near the others in Figure 24 as well, with Gleeson slightly farther from the rest. In other words, these Justices tend to favor similar ideological outcomes, and they also tend to coauthor opinions on a more regular basis.

The ideological agreement also performs well in many of the logistic regression models of joining behavior. Table 19 summarizes the performance of the various hypotheses in each of the seven reduced models. Ideology does not seem to play a part in single-opinion dispositions, but it is an important explanatory factor in each of the other models. Liberal panels produce more joint opinions. The Justices are more likely to join when they agree with the ideological outcome of the case, and less likely to join when

[108] The liberalism score for each Justice has been assembled from his entire tenure on the High Court. Some Justices had served long before the beginning of the Gleeson Court. For example, Justice Gaudron was appointed in 1987, and Justice McHugh in 1989. During this time, the Court made more liberal decisions. This is how Gaudron can appear to the liberal side of Kirby, even though Kirby's dissent rate is legendary. Over the course of their respective careers, a greater proportion of Gaudron's votes supported liberal outcomes than did Kirby's.

Table 19 - Performance of Hypotheses in Seven Models of Joining Behavior

	Model Number	1	2	3	4	5	6	7
Workload								
1a	Late Oral Argument							- - -
1b	Retirement Near				*			
1c	Cases This Term							
Chief Justice		***	***	***		***	***	
2a	Gibbs	***	*	▫				- - -
2a	Mason	***	**	***		***		- - -
	Brennan		▫				▫	- - -
	Gleeson		▫ ▫					- - -
2b	New Chief Justice							- - -
Ideology Measures								
3a	Panel Liberalism			**	**	- - -	- - -	- - -
3b	Panel Diversity			*				
4a	Distance from Mean	- - -	- - -	- - -	- - -	***	**	***
4b	Agree with Direction	- - -	- - -	- - -	- - -	***	***	***
Complexity								
5a	Long Oral Argument	***	***	*	**	***	***	
5b	Avg. Opinion Length	▫ ▫ ▫	▫ ▫ ▫	▫ ▫	-	▫ ▫ ▫	▫ ▫ ▫	▫ ▫
5c	Number of Matters	**	**			***		
5d	No Leave as of Right				- - -	▫ ▫ ▫	- - -	
Salience								
6a	Nonparty Participants					**		
6b	NGO as a Party	▫				***		
6c	Constitutional Issue			***	*	**	*	***
6d	Tort Cases				- - -	▫		***
7a	Fed. Gov't as a Party		**				*	**
Litigation History								
8a	Admin./Specialized				- - -			
8b	Federal Jurisdiction				- - -			
Case Outcome								
9a	Nonunanimous Vote	- - -	- - -	***	--	- - -	- - -	- - -
9b	Liberal Outcome					- - -	- - -	- - -
9c	Allow Appeal	**				**		▫
Judge Characteristics								
10a	Gov't Attorney Exp.	- - -	- - -	- - -	- - -	***	***	***
10b	Prior Judicial Exp.	- - -	- - -	- - -	- - -	***	***	
10c	Freshman (1st 50)	- - -	- - -	- - -	- - -			*
10d	Predisposition to Join	- - -	- - -	- - -	- - -	***	***	**
11a	Catholic	- - -	- - -	- - -	- - -			
11b	From NSW	- - -	- - -	- - -	- - -		**	
11c	Labor P.M.	- - -	- - -	- - -	- - -	▫ ▫ ▫		▫ ▫
Control Variables								
C1	Panel Size	***	**	***		***	***	**
C2	Coalition Size	- - -	- - -	- - -	- - -	***	***	***

* p≤.05, ** p≤.01, *** p≤.001; the character ▫ is substituted when the relationship is in the opposite direction proposed by the hypotheses. Variables omitted from equations are denoted by - - -.

they are ideologically distant from the panel's mean. Figure 24 suggests that even when voting agreement is controlled for, the Justices tend to join with their ideological kin.

Certainly, ideological compatibility alone does not provide a satisfactory explanation of the joining patterns found in these analyses. For example, Kirby and Gaudron have very similar liberalism scores, but they appear on opposite ends of the spectrum in Figure 24. While the salience and complexity of the case seems to drive joining behavior—as does the leadership of the Chief Justice—these are controlled for in Model 7, presented in Table 16. Instead, judge-specific characteristics seem to play a role in the Justices' joining behavior.

The predisposition-to-join variable provides some insight here. The predisposition-to-join variable is a running average of the last five cases in which each Justice has joined. Figure 26 shows the average value of this variable for each Justice, multiplied by five. This yields the average number of times the judge has joined over the previous five cases. The horizontal reference line is at the average, which is 2.14 cases. Gaudron's average is far above the mean, while Kirby's is far below. The predisposition-to-join variable is related to several of the other Justice-specific background variables. The predisposition variable is significantly higher among Justices with experience as a judge or government attorney, Justices who are not Catholic or from New South Wales, and Justices who are not freshmen on the bench.[109] This may introduce multicollinearity into the regression models, although several of the measures involved consistently performed strongly.

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[109] Independent samples t-test not assuming equal variances rejects the null hypothesis that these scores are not different from each other when divided by government attorney experience (t=10.852, p=.000), judicial experience (t=21.078, p=.000), Catholicism (t=-18.275, p=.000), being from New South Wales (t=4.445, p=.000), and freshman status (t=12.181, p=.000).

Figure 26 - Average Number of Decisions to Join over Previous Five Cases, by Justice

Overall, joining behavior on the High Court seems to be related to several factors familiar to students of judicial behavior. The production of a single-opinion disposition is related to the leadership of the Chief Justice and the complexity of the case. Justices are less likely to join in cases that are salient or complex. Liberal panels are more likely to produce joint opinions, and Justices who are closer to the panel mean are more likely to be involved in a joint opinion. Justices are also more likely to join when they agree with the ideological direction of the outcome.

In addition to these factors, the Justice's approach to the working environment seems to be critical to the production of joint opinions. In short, some Justices are simply more comfortable with the collaborative process. It is likely that Justices on the U.S. Supreme Court also differ in their affinity for the process of collegial opinion production. These differences, though, are largely masked by the majority opinion tradition in that court. In the absence of this institutional pressure to join, the differences among the Justices in this regard are more obvious.

CHAPTER NINE: CONCLUSION AND FUTURE RESEARCH

Truth is still elusive when she wears mathematical robes.

— Anthony Blackshield (1972, 62)

In a 2005 speech, Justice Kirby echoed Professor Blackshield's sentiment, commenting that, "on their own, statistics tell little" (Kirby 2005a). These comments acknowledge that quantitative methods must be supplemented with carefully considered theories in order to gain explanatory traction on complex judicial behaviors. Blackshield notes that international comparisons are particularly hard, "and if comparison is to be attained realistically at this level, specificity is out of the question" (Blackshield 1972, 64). But statistical methods and data availability have improved dramatically since Professor Blackshield made this comment. The distribution of information-rich datasets like the High Courts Judicial Database (Haynie et al. 2007), coupled with advanced methodological theory and computing power, allow for more targeted and fruitful analyses. This dissertation is but one example.

While the results are preliminary, some important trends stand out. The main driving force behind joining behavior on the Supreme Court—the precedential weight of the majority opinion—is absent on the High Court. But, like the U.S. Supreme Court, the leadership of the Australian Chief Justice is strongly related to joining behavior levels. Chiefs who are able to maintain a cooperative atmosphere and regular interactions among the Justices are likely to see joining behavior increase during their tenure. Additionally, judge-specific characteristics are related to the propensity to participate in joint opinions. Most notably, Justices who have experience with a cooperative approach to the working environment are more likely to join than are Justices with a more distinctly "barrister outlook." Joining behavior is less likely in complex cases, where there are aspects of the

case on which the Justices may disagree. Joining behavior is also less likely in salient cases, where Justices are less willing to assent to sub-optimal expressions of the reasons for judgment. Perhaps most importantly, judicial policy preferences do seem to matter. Justices who are farther from the ideological mean of the panel are less likely to join in judgment than those who are near the mean. In other words, a Justice is more likely to join when there are more ideologically compatible colleagues from which to choose.

So, why do High Court Justices join the opinions of their colleagues when they don't have to? It is not because they want to save time, nor because there is a source of institutional pressure to join. Instead, Justices join because 1) the Chief Justice facilitates joining behavior, 2) they are able to find coauthors with similar policy views, 3) a case is simple and not of great importance, and 4) because they are accustomed to the process of collegial decision making.

Evaluating the Findings

In his assessment of empirical legal scholarship, Heise presents a helpful framework to address a number of data collection and methodological problems in the existing literature (Heise 2002). Heise notes that using only the universe of published opinions can be problematic in judicial behavior research. These published opinions represent "only an exceedingly small percentage of cases filed," (Heise 2002, 844) and are likely to be significantly different in many ways from those cases not disposed of with published opinions (Atkins 1992). In this way, making generalizations from findings using reported decisions to all decisions of the court may be problematic (Tate 1983).

The focus in this analysis is on the joining behavior of judges. Case salience is included as an explanatory factor, but the cases reported in the Commonwealth Law

Reports are likely to represent salient cases much more heavily. To isolate fully the effect of case salience on joining behavior, then, it would be helpful to analyze a dataset that includes *all* cases to identify the differential application of the model to published and unpublished decisions.

Another limitation mentioned by Heise is the application of issue-specific explanations to "series of unrelated cases in general areas of the law" (Heise 2002, 844). Heise levels this criticism at research attempting to use social background characteristics to explain judicial votes for and against certain litigants or outcomes. While social background characteristics are used as explanatory variables in this analysis, though, they are not employed to explain judicial votes. Instead, they are analyzed in relation to the propensity of an individual judge to join with his or her colleagues.

A related cause for concern is the categorization of cases into broad issue areas. This may be somewhat problematic in the data analyzed here. These categorizations are only helpful if cases in an individual issue area similar enough that we can assume judicial behavior in one such case "reflects a general judicial attitude rather than an individualized resolution of the unique facts in each particular case" (Heise 2002, 845). The coding scheme for issue areas is contained in Section 2 of Appendix B. Clearly, each issue category contains a relatively broad range of cases. Generally, though the subject matter classifications have been constructed following Spaeth's (1997) lead, grouping like with like to the highest extent possible in a comparative database.

In addition to this, drawing comparisons using a cross-sectional database requires an assumption that cases in one point in time are comparable to similar-looking cases at another point in time. Heise notes that many studies rely on the "assumption that

different cases over a period of years are sufficiently similar that the results are both comparable and generalizable" (Heise 2002, 845). Certainly, institutional changes over time have changed the nature of High Court cases. In this analysis, several dummy variables have been included in an attempt to group like cases with like.

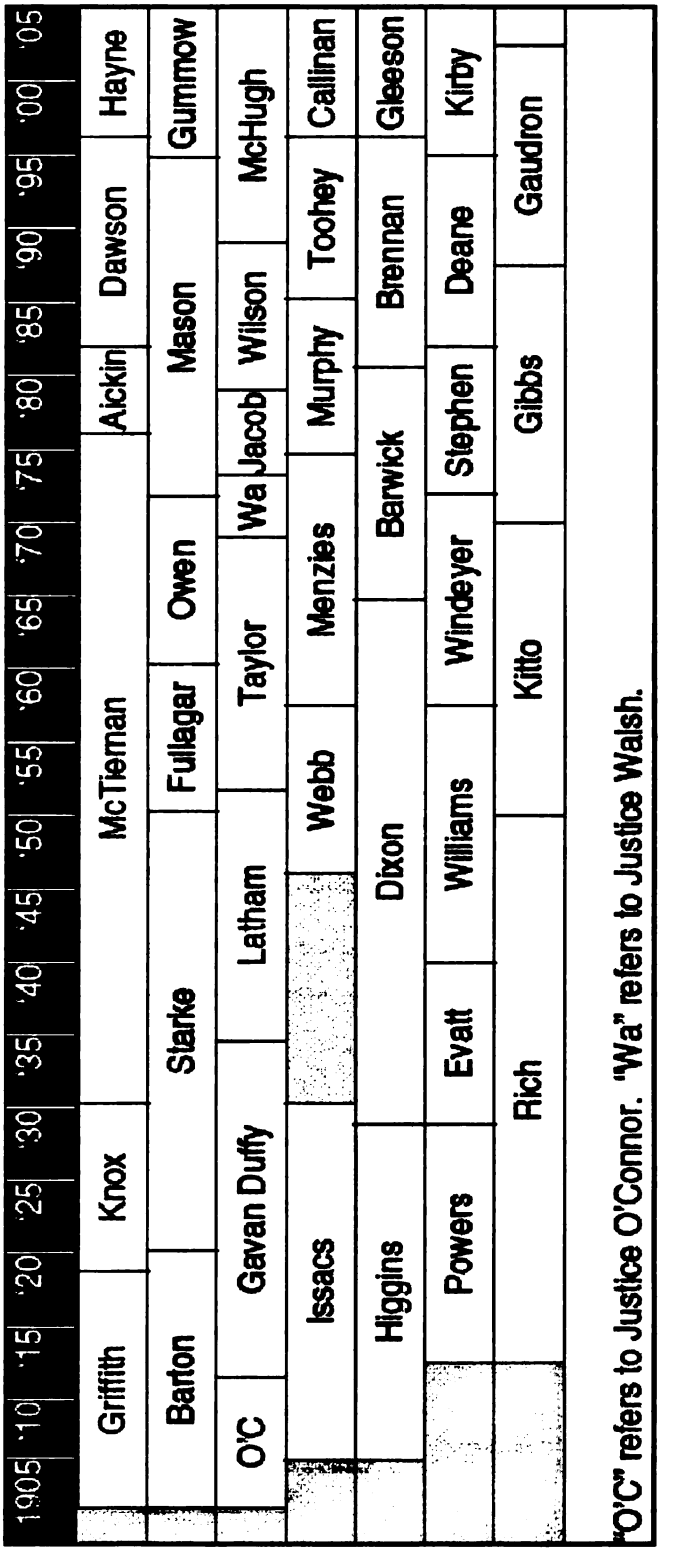
There are some avenues for further research, the results of which might may clarify the findings reported here. Here, I will address the two most promising (and achievable). First, the attitudinal dimension of joining behavior might be better understood using an analysis of judge dyads. This data arrangement would create a much larger sample size, combating the effects of multicollinearity in the models. It would allow for the identification of *shared* characteristics that the panel distance variable in the current analysis measures indirectly. Ideological scores and other judge-level characteristics could be compared with each other, and it would be possible to determine, for example, if Justices who share the same religious background (or experience, or party affiliation, etc.) are more likely to join in judgment. This approach would also allow for the identification of issue specialists and stable opinion coalitions.

A second avenue for future research is to develop a more precise indicator of judicial policy preferences. In this analysis, because the dependent variable was opinion behavior and not ideological outcome, the attitudinal measures were derived from the ideological directionality of the votes cast by the individual Justices. While this avoids the tautology problem, it is not an ideal measure. Certainly, the directionality coding strategy for the HCJD project (Haynie et al. 2007) is not as precise as the Spaeth's (1997) scheme, and the meaning of the various outcomes may not be equivalent across countries (see Appendix B, Section 3). It is possible simply to limit the issue areas subject to

analysis, as many analyses of the Supreme Court do, but this leaves precious few data points to include. A measure akin to the Segal and Cover (1989) scores of Supreme Court Justices would be ideal and could be achieved more easily using content analysis techniques on information available in digital format.

The Australian legal community has divided on the issue of joint opinions. Some argue that they are critical for the coherence of law and the legitimacy of the institution (Kildea 2003) while others argue that separate opinions preserve the integrity of the decision-making process (Bagaric and McConvill 2005) and that joint opinions can amount to an abdication of judicial duty (Blackshield 2004). The Court's production of joint opinions has increased regardless, despite the apparently lack of institutional motivation to engage in the accommodation necessary to craft joint reasons. By creating a generalization of existing research on joining behavior on the U.S. Supreme Court, this analysis has identified some concrete factors to help explain why.

APPENDIX A: JUDGES OF THE HIGH COURT OF AUSTRALIA BY SEAT



APPENDIX B: CODING CLASSIFICATIONS

Section 1- Administrative Agencies & Specialized Tribunals

State Agencies	Appeals Costs Board Building Tribunal Civil and Administrative Tribunal Commercial Tribunal Community Services Appeals Tribunal Consumer Claims Tribunal Criminal Injuries Compensation Tribunal Dust Diseases Tribunal Equal Opportunity Tribunal Fair Trading Tribunal Independent Commission Against Corruption Industrial Relations Commission Lands and Mining Tribunal Mentally Impaired Defendants Review Board Parole Board Residential Tenancy Tribunal Retirement Villages Disputes Tribunal Social Security Appeals Tribunal State Administrative Decisions Tribunal Strata Titles Referee Supervised Release Review Board Victims Compensation Tribunal
Federal Agencies	Administrative Appeals Tribunal Australian Industrial Relations Commission Human Rights and Equal Opportunity Commission Immigration Review Tribunal Native Title Tribunal Refugee Review Tribunal
State Special Courts	Children's Court Compensation Court Drug Court Environmental Resources and Development Court Family Court Industrial Appeal Court Industrial Relations Court Land and Environment Court Liquor Licensing Court Local Government Court Youth Court
Federal Special Courts	Family Court (as a trial court) Industrial Relations Court (1994-1997)

Section 2 - Issue Area Classifications

Criminal Cases	• murder • killing without intent (e.g., manslaughter, reckless homicide) • attempted murder or homicide • rape • other crimes of violence against persons (e.g., assault, child abuse, armed robbery, kidnap, arson, sexual assault) • attempted crime of violence (including attempted rape) • property crimes - serious (theft, burglary, forgery, fraud, destruction of property) • property crimes - minor • drug offenses • crimes against morality (liquor, obscenity, disorderly conduct, gambling) • religious crimes (including blasphemy, heresy) • business regulation & license violations • government corruption or attempts to corrupt government officials • political crimes (rebellion, subversion, sedition, illegal political activities or demonstrations, disloyalty, WAR CRIMES) • other (perjury, contempt of court, DUI) • not able to classify crime
Civil Rights Cases	• civil rights claims by prisoners (does **not** include challenges to their sentence) (includes claims of cruel and unusual punishment while in prison, habeas corpus for convicted prisoners) • equal treatment under the law (discrimination on account of gender, race, religion, age, ethnic, language) • voting rights • speech, press, assembly, right to petition • religion rights (both challenges to restrictions on religion and challenges to government aid to religion that discriminate against other religions) • privacy (include abortion) • access to public information • civil rights of juveniles • rights of indigenous peoples • other civil rights – including legality of detention for the non-convicted
Public Law Cases	• government health & safety regulation • government environmental regulation and natural resources • other government regulation of business • government regulation of agriculture • land reform and government regulation of land use (includes eminent domain and condemnation) • government regulation of races (e.g., apartheid) • government regulation of unions or associations or business/labor relations • other government regulation • taxation, tariffs • government benefits (medical insurance, welfare, unemployment benefits, old age pensions or social security)

Public Law Cases (continued)	• worker's compensation • abuse of governmental authority (other than those in topics included in the civil rights or tort categories) • public employment including disputes between employees about promotions, etc. • immigration, deportation, citizenship • disputes over elections • disputes over appointments to office • disputes related to removal of government officials • disputes between different units of government (Federalism) • special laws dealing with indigenous peoples • religious or customary law • language or cultural issues • other public law (NOT government contract disputes)
Economic Cases	• creditor-debtor disputes (collection; bankruptcy; insolvency cases; etc). • insurance disputes • other contract disputes, breach of contract, franchise agreements, including disputes over government contracts • land possession disputes • landlord - tenant disputes - agricultural • landlord - tenant disputes - commercial or residential (and default) • copyrights, patents, trademarks • corporate law - disputes over control or mismanagement of corporations; stockholders and creditors rights; securities fraud • labor/ management disputes (in private business) • other private economic disputes
Tort Cases	• motor vehicle accidents • injured workers • professional malpractice (legal, medical, etc.) • government tort liability • product liability (not shipping or service liability) • other personal injury • libel or defamation • other torts (including shipping)
Family Law Cases	• marriage, divorce, and family disputes • inheritance, probate, succession disputes • other family law
Other Cases	• regulation of bar and judiciary • other issue • unable to classify

Section 3 - "Liberal" Directionality of Decisions and Votes

Criminal Cases	Outcome supports the position of the defendant.
Civil Rights Cases	Outcome supports the position of the person alleging that their civil rights have been violated.
Freedom of Speech & Religion Cases	Outcome supports the expansion or protection of the right of free expression or free exercise of religion.
Public Law Cases	Outcome supports benefit claims of public employees or other recipients of government benefits.
	Outcome supports the incumbent in electoral disputes.
	Outcome supports the national government over the states in federal disputes.
	Outcome supports the right of the government to regulate labor relations.
	Outcome otherwise supports the position of the government.
Economic Cases	Outcome supports the position of the economic underdog.
	Outcome supports the position of an individual over that of the government in government contract disputes.
	Outcome supports the claim of the person alleging infringement of copyright, patent or trademark.
	Outcome supports the position of the labor union over that of the corporation.
Tort Cases	Outcome supports the party alleging the injury.
Bar/Judiciary Cases	Outcome supports the position of the attorney or judge accused of wrongdoing.

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