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Small Group Influences in the United States Supreme Court*

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This research tests the hypothesis, derived from small group theory, that subgroup membership in the United States Supreme Court is stable over time across all issues of public policy. Using cluster bloc analysis, two separate criteria (the Sprague criterion, and the 70 percent criterion) for determining subgroup membership, and two different criteria for stability (100 percent continuity, and agreement a majority of the time), it was discovered that, contrary to the hypothesis, subgroup membership was not stable over time for the natural courts of the Warren Court and the Burger Court through 1978. Small group theory may not be as powerful an explanation of subgroup membership and stability in the Supreme Court as previously believed.

Introduction

One of the primary goals of judicial politics research has been to identify the political forces that structure the exercise of discretion in the United States Supreme Court. Recently, the theoretical approach most often taken, and the one generally believed to have the greatest explanatory power, is the attitudinal perspective.[1] Attitudinal theory focuses on the importance of the individual decision maker and suggests that the personal values of the decision maker largely determine the direction of votes cast within an institution. In other words, a justice's political preferences, which are believed to be shaped by various background experiences and social characteristics,[2] are seen largely to explain the behavior of appellate court judges (Pritchett, 1941, 1948; Schubert, 1961, 1962, 1965, 1974; Spaeth, 1961, 1963a, 1963b, 1979).

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1. See Gibson (1983) for a comprehensive discussion of the development of theory in the judicial behavior literature.
2. See Ulmer (1973) and Tate (1981) for studies that successfully connect background variables directly to votes in the United States Supreme Court.

One significant form of judicial behavior, the tendency to develop voting blocs or coalitions within the Supreme Court, is typically viewed as the result of mere attitudinal agreement among particular subsets of justices. Since political preferences, or ideologies, are thought to be relatively consistent through time and are believed to be composed of a variety of issue dimensions (e.g. civil liberties, economic rights), attitudinal theory predicts the formation of different yet stable coalitions for each broad policy area. Therefore, the specific coalitions of justices which emerge on one set of issues may be quite different from those formed around other issues, although each voting bloc should consist of the same members over time.

The literature has convincingly confirmed the notion that coalitions within the Supreme Court are stable in structure over time within the confines of various policy domains. C. Herman Pritchett (1941, 1948), describing the Roosevelt Court, reported that regular patterns of alignment occurred within the Court. Eloise Snyder (1958) detected stable subgroups formed on questions involving constitutional amendments in the Supreme Court from 1923 to 1953, and Goldman and Jahnige (1985) discovered a similar pattern of overall coalition membership stability in the Warren and Burger Courts on civil liberties cases.

A somewhat different, albeit highly complementary, theoretical approach for understanding voting behavior in the United States Supreme Court is small group theory.[3] Attempting to explain behavior that may be inconsistent with individual preferences, small group theory suggests that the collegial nature of the Supreme Court alters the rigid pursuit of policy preferences, so that justices behave differently within the collegial setting than if they were acting alone (Howard, 1968). To wit, group considerations and such devices as interpersonal influence and bargaining (Danelski, 1960; Murphy, 1964) help determine a justice's final decision.

Specifically in regard to subgroup formation, small group theory proposes that the formation of alliances within the Court reflects particularized values and goals which may modify or transcend the individual preferences of its members (Ulmer, 1965, 1971). Once these alliances among members of the Court develop, long term commitment to group values, as well as the expectations and reinforcement of the other justices, lead members to cling tenaciously to established

3. See Ulmer (1971) for a thorough discussion of the application of small group theory concepts to collegial courts and the literature utilizing these concepts.

behavior patterns (Sprague, 1968). Therefore, small group theory, like attitudinal theory, predicts the formation of stable coalitions within the Court.

What distinguishes the attitudinal perspective from the small group approach to coalition behavior in research design, however, is a simple empirical operationalization. Because small group influences are believed to transcend individual preferences or ideologies, small group impacts on subgroup formation generally have been operationalized as membership stability in coalitions which form across all issues of public policy, without attention to particular issue subsets (Ulmer, 1965, 1971). Since stable coalitions which are issue specific are more likely to be the result of the coincidence of justices' individual preferences and goals rather than small group pressures, small group influences can be more readily detected in an undifferentiated case universe rather than within particular subsets of public policy.

Utilizing the small group approach, S. Sidney Ulmer (1965), in a seminal article on small group analysis, examined subgroup formation on all nonunanimous cases decided by the Vinson and Warren Courts. Finding a pattern of membership stability without having differentiated policy domains, Ulmer concluded that during this period the process of bloc formation within the Court was, to some extent, the result of small group interaction. In other words, because Ulmer detected a high degree of membership stability in the subgroups of the Vinson and Warren Courts, without taking note of particular issue areas, he concluded that subgroups "organized around and reflecting long range interests" (1965:135) develop within the Court. Therefore, the Ulmer analysis supports not only the stability hypothesis in general but also the notion that small group processes are significant determinants of votes within the Supreme Court.

While the above findings are very interesting and theoretically significant, the Ulmer propositions about subgroup stability in the United States Supreme Court remain relatively unaddressed by subsequent research. No contemporary data on subgroup formation have been examined specifically from a small group perspective, and it is somewhat unclear whether the findings of the Ulmer (1965) analysis are accurate descriptions of subgroup formation in more recent eras. Moreover, recent literature generally calls into question the application of small group theory to the Supreme Court. Other manifestations of a small group impact, such as freshman effects in voting (Heck, 1979; Heck and Hall, 1981; Scheb and Ailshie, 1985), opinion assignment

tendencies (Slotnick, 1979), and fluidity in voting (Brenner, 1980), have been questioned in more recent decisions. Finally, it is quite possible that Ulmer found a great deal of stability in voting blocs undifferentiated by policy area because of his analysis of votes term to term. Analyzing votes on an annual basis would lead to a finding of a higher level of stability than if data were organized for longer time periods around the concept of the natural court.[4] Furthermore, the data which underlie the recognition of small group influences provide a stronger foundation when organized by the natural court instead of the annual term because the natural court places the emphasis on groups of justices, the preferred focus in small group analysis.

This research tests the coalition stability hypothesis by analyzing votes on all nonunanimous cases decided by the Warren Court and the Burger Court through 1978, using the most straightforward method of identifying blocs — agreement percentages between pairs of justices. If stable subgroups form across a wide variety of issues for substantial periods of association, there will be additional support not only for the stability hypothesis but also for the proposition that small group influences are, in fact, operating on the process of coalition formation in the Supreme Court.

Design

Derived from small group theory, the specific hypothesis to be tested is the following: voting blocs within the United States Supreme Court are stable in membership across all issues of public policy. The first task in testing the hypothesis is to define or identify blocs empirically. Because the stability hypothesis deals with the tendency of the individual justices to align with one or more of their colleagues over large numbers of votes, cluster bloc analysis was chosen as the technique to identify blocs. Cluster bloc analysis describes "in a succinct and precise manner the extent to which subgroups of judges vote together on a court" (Murphy and Tanenhaus, 1972:167) by summarizing large numbers of cases into a single matrix that permits identification of justices who exhibit a high rate of agreement in voting. A bloc is defined as a pattern of scores that represents agreement at a specified level in the votes of pairs of justices (Sprague, 1968:56).[5] A matrix of agreement

4. Sprague (1968:6) defines a natural court as a period without change in personnel. Snyder was one of the first to analyze data by natural court instead of annual term, a practice now widely accepted by political scientists studying the Court. See e.g., Snyder (1958), Schubert (1974), and Handberg (1976).

5. See Schubert (1959) and Sprague (1968) for discussions of the application of cluster bloc analysis to judicial voting. Although agreement scores are clearly the most straightforward method of analyzing blocs, utilization of clustering does permit an element to appear in more than one cluster (Rohde and Spaeth, 1976:94). Therefore, some justices are assigned to more than one voting bloc during a natural court.

percentages was constructed for each natural court (see Table 1) of the Warren and Burger eras.[6]

In ordering the justices in each matrix, Sprague's procedures (1968) were followed. This technique maximizes the level of agreement in first-order relationships (those between contiguous justices in an array). First, the pair of justices having the highest level of agreement is identified. The agreement scores of these two justices with each of the remaining justices are then examined. Positions two and three are assigned to, respectively, the justice from the original pair who had the highest agreement score with another member of the court, and that member. The first position is occupied by the other justice from the original pair. The fourth position is assigned to the remaining justice with whom the justice placed in the third position has the highest association score. The process is continued until all justices have been ordered in the matrix, which represents a replicable array (Murphy and Tanenhaus, 1972).

From the matrix of agreement for each natural court, blocs were identified as groups of justices having specified levels of agreement. In identifying blocs, two separate procedures were employed. First, the Sprague criterion (Sprague, 1968) was used as the level of agreement necessary to infer the existence of a bloc. According to this method, a court cohesion index is calculated by averaging the percentage of agreement for all pairs of justices in any court.[7] The Sprague criterion is then calculated by adding to the court cohesion index one-half the difference between that score and 100. Any subgroup with a court cohesion index greater than or equal to the Sprague criterion is a bloc — a subgroup which shows substantially greater cohesion than the Court as a whole. Secondly, because the Sprague criterion may be unrealistically high, a second — stage analysis was performed using an average agreement score of 70 percent as the basis for identifying a cohesive bloc (Schubert, 1959).

A second task in testing the hypothesis is to define stability empirically. Unfortunately, there is no definitive guidance in the judicial politics literature as to what level of continuity is necessary to

6. Generally, periods were not treated as separate natural courts during which one justice missed a substantial number of votes because of disability. Rather, for the purposes of simplicity, new courts begin with retirement or death of one or more justices or appointment of a successor. Court 11, however, was treated separately because the death of two justices created a significantly different group.

7. The scores of the freshman justices were excluded from the calculations in the event of the presence of a "freshman effect" in voting. The possible instability of the freshman scores would distort the subgroup structures.

Table 1.
Natural Courts of the United States Supreme Court from 1953 to 1978

	Period	Assigned Court	Members			
1	1953-55	Warren*	Black Clark	Frankfurter Reed	Minton Burton	Douglas Jackson
2	1955-56	Warren	Black Clark	Frankfurter Reed	Minton Burton	Douglas Harlan*
3	1956-57	Warren	Black Clark	Frankfurter Reed	Brennan* Burton	Douglas Harlan
4	1957-58	Warren	Black Clark	Frankfurter Whittaker*	Brennan Burton	Douglas Harlan
5	1958-62	Warren	Black Clark	Frankfurter Whittaker	Brennan Stewart*	Douglas Harlan
6	1962-65	Warren	Black Clark	Goldberg* White*	Brennan Stewart	Douglas Harlan
7	1965-67	Warren	Black Clark	Fortas* White	Brennan Stewart	Douglas Harlan
8	1967-69	Warren	Black Marshall*	Fortas White	Brennan Stewart	Douglas Harlan
9	1969-70	Burger*	Black Marshall	(Vacant) White	Brennan Stewart	Douglas Harlan
10	1970-71	Burger	Black Marshall	Blackmun* White	Brennan Stewart	Douglas Harlan
11	1971-72	Burger	(Vacant) Marshall	Blackmun White	Brennan Stewart	Douglas (Vacant)
12	1972-75	Burger	Powell* Marshall	Blackmun White	Brennan Stewart	Douglas Rehnquist*
13	1975-78	Burger	Powell Marshall	Blackmun White	Brennan Stewart	Stevens* Rehnquist

*Indicates the freshman justice(s) during the period under consideration.

confirm the hypothesis. However, since the hypothesis clearly suggests that a significantly high level of stability should be present in bloc membership, a stability rate of 100 percent could be expected. That is, only those blocs which meet the formation criteria consistently for all possible natural courts can be considered stable. To ascertain stability by this method simply requires the researcher first to establish the identity of a bloc using the Sprague or 70 percent criterion and then to search for the bloc's continuation for all natural courts in which all

members of the bloc continue to be members of the Court. Only those blocs which form for every possible natural court are determined to be stable.

However, because a stability criterion of 100 percent seems particularly rigid, a second, much less demanding criterion was also used — whether the bloc tends to form a majority of the time (or more often than not). This criterion represents the absolute minimum which would be acceptable to confirm the hypothesis. Utilizing this criterion of stability, the researcher determines the existence of a bloc using the Sprague and 70 percent criteria and then calculates the amount of time covered by the natural courts in which the bloc is present and the amount of time covered by the natural courts in which the bloc is absent (looking only at those natural courts in which all members of the bloc continued to be members of the Court). The amount of time in which a bloc is present is compared to the amount of time in which a bloc is absent, and only those blocs forming a majority of the time are declared to be stable.[8] These two stability criteria, 100 percent continuation and formation a majority of the time, represent the maximum and minimum standards possible for a finding of bloc stability.[9]

The data set used in this research includes all nonunanimous cases decided by the Warren and Burger Courts from 1953 through 1978.[10] Included are split decisions announced in per curiam opinions as well as those announced in formal, signed opinions.

Findings

Using these data, the hypothesis was tested that voting blocs within the Supreme Court are stable in membership across all issues of public policy. Utilizing the Sprague criterion to identify blocs and the 100 percent criterion to ascertain stability, as demonstrated in Table 2, only 18 blocs formed during the 12 natural courts under consideration. Excluding the three new blocs which formed during a member's final

8. These calculations are necessary because the amounts of time encompassed by the natural courts can vary significantly. Simply counting the number of natural courts is insufficient.

9. In the literature on Congress, a stability criterion of 90 percent has occasionally been utilized for assessing coalition structure. The use of both the 100 percent criterion and the more often than not standard of stability in this analysis encompasses the 90 percent requirement of the congressional studies.

10. The data from the Warren Court were those utilized by Glendon Schubert in The Judicial Mind Revisited (1974). The data from the Burger Court were collected and coded by Edward V. Heck following the Schubert coding scheme.

court,[11] only four of 15 blocs (26.7%) exhibit the hypothesized stability of membership. The other two-member blocs (Brennan-Marshall and Burger-Blackmun) came close; these justices fell short of the Sprague agreement level in only a single isolated instance after initially forming a cohesive pairing. Since it seems quite unreasonable to reject these pairs as stable, the second criterion of stability, time, was applied to the Sprague criterion blocs. Using this measure of continuity, the Brennan-Marshall and Burger-Blackmun blocs are labeled as stable. However, even with this modification, only six of 15 blocs (40%) conform to the hypothesis. Therefore, by every standard, the weight of the evidence is clearly against the hypothesis of membership stability.

Table 2.
Membership Stability of Sprague Criterion Blocs

Bloc	Court In Which Present	Court In Which Absent
Warren-Clark	1,2	3,4,5,6,7
Burton-Clark	1	2,3,4
Warren-Black-Douglas	2	3,4,5,6,7,8
Warren-Black	2,3,4,5	6,7,8
Black-Douglas	2,3,4	5,6,7,8,9,10
Warren-Douglas	2,6	3,4,5,7,8
Clark-Reed*	3	
Warren-Brennan**	3,4,5,6,7,8	
Warren-Brennan-Goldberg*	6	
Frankfurter-Harlan**	4,5	
Warren-Fortas**	7,8	
Warren-Fortas-Brennan-Marshall*	8	
Brennan-Marshall	8,9,10,12,13	11
Burger-Blackmun	10,11,12	13
White-Blackmun	11	12,13
Stewart-Marshall	11	12,13
Burger-Powell	12	13
Burger-Rehnquist**	12,13	

*Excluded from analysis due to bloc forming during member's final court.
**Blocs which confirm the hypothesis using the 100 percent stability criterion.

Using a joint agreement score of 70 percent as the criterion for bloc identification provides even less evidence that blocs within the Supreme Court are stable over time (see Table 3). Of the 41 blocs

11. Since subgroup stability is being examined over time, new subgroups that form during a member's final court are, by definition, not going to continue since a justice composing the new bloc will be leaving the Court.

identified by that method which developed between 1953 and 1978, only eight (19.5%) exhibit membership stability as hypothesized at the 100 percent stability level. And of these eight stable blocs, only the pairs of Warren-Brennan and Brennan-Marshall appeared consistently for more than four natural courts. Using time as a stability criterion, only 12 more blocs can be added to the stability category, resulting in only 48.8 percent of the blocs supporting the hypothesis.[12] In short, the membership stability hypothesis must be rejected.

Conclusion

The United States Supreme Court is frequently regarded as a small group in which the individual attitudes or preferences of the justices are modified significantly by group pressures. From this theoretical perspective, the hypothesis was tested that subgroup membership in the Supreme Court would be stable across all issue areas. Using cluster bloc analysis, two separate criteria to determine the inclusion or exclusion of members of the Court as bloc members, and two different measures of stability, the stability hypothesis was rejected.

The results of this analysis, though intriguing, are quite preliminary. They do tentatively suggest the need to reformulate explanations of bloc formation and stability. If small group theory is to explain subgroup formation in the United States Supreme Court, it would appear that more complex hypotheses must be posited that accommodate changes in bloc structure over time.

Alternatively, the results of this analysis potentially challenge the value of small group theory as a significant explanation of subgroup formation in the United States Supreme Court. Indeed, as previous studies suggest, small group influences may not be as important a determinant of Supreme Court behavior as believed (Brenner, 1980; Heck and Hall, 1981; Scheb and Ailshie, 1985; Slotnick, 1979). Clearly there is the need to reconsider whether the United States Supreme Court is actually a small group as defined by social psychologists or is rather an extremely individualistic decision-making body in which small group influences, while perhaps present, are muted by other types of processes.

12. Blocs which form over time more often than not, but which do not meet the 100 percent stability criterion, are the following: Burton-Reed, Black-Douglas, Warren-Black-Douglas, Warren-Black, Harlan-Frankfurter, Douglas-Brennan, Warren-Brennan-Black, Brennan-Black, Stewart-Harlan, Warren-Brennan-Douglas, Marshall-Douglas, Brennan-Marshall-Douglas. In addition to these blocs, those eight blocs (identified in Table 3) which meet the 100 percent criterion also form a majority of the time. Thus, a total of 20 blocs appear within the Court more often than not.

Table 3.
Membership Stability of Seventy Criterion Blocs

Bloc	Court In Which Present	Court In Which Absent
Warren-Frankfurter-Clark	1	2,3,4,5
Warren-Clark	1,2,3,7	4,5,6
Burton-Clark	1	2,3,4
Burton-Reed	1,2	3
Frankfurter-Jackson*	1	
Black-Douglas	1,2,3,4,5,6	7,8,9,10
Warren-Black-Douglas	2,4,5,6	3,7,8
Warren-Black-Clark	2	3,4,5,6,7
Warren-Black	2,3,4,5,6	7,8
Clark-Minton*	2	
Minton-Reed-Burton*	2	
Harlan-Frankfurter	2,4,5	3
Warren-Clark-Brennan	3,7	4,5,6
Warren-Brennan**	3,4,5,6,7,8	
Clark-Reed*	3	
Harlan-Burton	3	4
Warren-Black-Douglas-Brennan	4,6	5,7,8
Black-Douglas-Brennan	4,6	5,7,8,9,10
Douglas-Brennan	4,6,7,10,12	5,8,9,11
Harlan-Whittaker-Burton*	4	
Harlan-Whittaker**	4,5	
Warren-Brennan-Black	5,6	7,8
Brennan-Black	5,6	7,8,9,10
Stewart-Whittaker-Frankfurter-Harlan*	5	
Stewart-Harlan	5,7,10	6,8,9
Warren-Brennan-Goldberg-Douglas*	6	
Warren-Brennan-Douglas	6,7	8
Warren-Brennan-White	6	7,8
Brennan-White	6,7,8,9	10,11,12,13
Brennan-Warren-Fortas-Douglas	7	8
Brennan-Warren-Clark*	7	
Brennan-White-Clark*	7	
Stewart-Harlan	7,10	8,9
Marshall-Brennan-Warren-Fortas-Stewart*	8	
Marshall-Brennan-Stewart	8,11	9,10,12,13
Marshall-Douglas	8,10,12	9,11
Marshall-Brennan-White	9	10,11,12,13
Marshall-Harlan	9	10
Burger-Stewart	9,10	11,12,13
Blackmun-Burger-Stewart-Harlan*	10	
Blackmun-Burger-Stewart	10	11,12,13
White-Burger-Stewart-Blackmun	10	11,12,13
Brennan-Marshall-Douglas	10,12	11
Brennan-Marshall**	8,9,10,11,12,13	
Burger-Blackmun**	10,11,12,13	
White-Blackmun**	10,11,12,13	
White-Stewart	10,11	12,13
Stewart-Marshall-Brennan	11	12,13
White-Powell-Burger-Rehnquist-Blackmun	12	13
Stewart-Powell**	12,13	
Burger-Powell-Blackmun**	12,13	
Burger-Rehnquist**	12,13	

*Excluded from analysis due to bloc forming during member's final court.
**Blocs which confirm the hypothesis using the 100 percent stability criterion.

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Caseloads and Controversies: A Different Perspective on the "Overburdened" U.S. Supreme Court*

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Allies, critics and members of the U.S. Supreme Court often comment on the "burdensome" workload the justices bear, but most empirical research has focused only on caseload as the dependent variable. In this analysis, attention is refocused on productivity as the dependent variable. The impacts of age, dissension, clerks, and Chief Justice Burger on productivity are estimated. The Court continues to increase its output, albeit more slowly, in the face of growing caseloads. Older Courts and those with more clerks authorized are associated with lower productivity. Courts with greater numbers of dissenting votes and Courts during Burger's tenure as Chief Justice are revealed to be more productive. A parsimonious model is found to be very powerful in estimating the Court's output.

Introduction

Concerns about the ability of the U.S. Supreme Court to handle a rapidly rising workload are nearly as old as the Court itself. Claims of delay attributable to the increased caseload date at least to the second decade of the 19th century. In their comprehensive early study of federal court jurisdictional changes, Frankfurter and Landis (1928) report a repeated doubling of the size of the Court's docket within a single decade. McLauchlan (1980; 1984) and O'Brien (1985a; 1985b; 1986) have graphically shown the historically rising trend in caseloads throughout the Court's history. While jurisdictional reforms occasionally bring relief, Supreme Court dockets invariably resume their upward surge.

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Old though the problem may be, discussion of an "overburdened" Supreme Court has been more common since former Chief Justice Burger declared in his 1971 State of the Federal Judiciary message that "we cannot keep up with the volume of work" brought before the Court (Burger, 1971:859). So frequently was this theme repeated in subsequent years that the Chief Justice felt compelled to preface a later plea for relief with a declaration that he was not "crying wolf" (Burger, 1983:442). By 1985, O'Brien (1985b:667) could assert with certainty that "[a]ll of the justices now agree that they are overworked by deciding too many cases." Mark Cannon (1985:680), administrative assistant to the Chief Justice, reiterates Burger's points from the administrative perspective in strong terms:

> Probably the most serious problem for judicial administrators today is the growing caseload that confronts each judge. This observation may seem trite to some, but its truth cannot be gainsaid regardless of how often it is repeated.

The argument seems to be, quite simply, that a Court that disposes of more than 4,000 cases in a single term must be overburdened.

The response of researchers to the argument that the Court is overburdened has been to follow the lead of practitioners by focusing on the inputs to the Court—the caseload.[1] Casper and Posner (1974) analyze case filings in light of a sophisticated theory of caseload change. Hellman (1978) conducts a detailed analysis of the Court's plenary docket. However, moving from the indisputable fact that the Court's caseload is heavy and rising to any conclusions about what effect this has on the Court's output is more problematic. Casper and Posner (1974:368) state that they "cannot conclude that the caseload has become so heavy as to undermine the Court's effectiveness seriously." Hellman (1978) depicts a tribunal adequately discharging its responsibilities in some areas (e.g., constitutional interpretation), but unable to provide the lower federal courts with adequate guidance in

1. By "caseload" we mean the number of cases confronting the Court in a given time period — specifically, in this paper, the number of cases on the Court's docket each term. This measure of caseload encompasses both new filings and cases carried over from the previous term's docket and is the measure generally used by former Chief Justice Burger in his efforts to estimate the extent of the Court's "workload" (Hellman, 1985:950-952). Use of new filings alone would produce a similar, but consistently lower, measure of the Court's caseload. O'Brien (1986:148) shows that in recent years docket size has more or less tracked new filings. There is evidence that perceptions of a workload crisis for the Court are generally associated with periods when docket size begins to outpace new filings by a significant margin (O'Brien, 1986:148). Thus, we believe docket size is slightly preferable to new filings as a measure of caseload. Of course it is also important to note that "caseload is not equivalent to workload" (O'Brien, 1986: 152). His point that "[f]ilings and cases are not fungible; some take a great deal more time than others" is well taken. Our examination of the relationship between caseload and opinions may well shed more light on the Court's burden than do analyses that equate caseload and workload.

important fields involving statutory authority. Estreicher and Sexton (1984:812) conclude that the Court would have adequate capacity to function as manager of the federal judicial system if the justices were careful to grant review "only when necessary to resolve fundamental interbranch or federal-state clashes or to render a final resolution of a question that has ripened for decision after percolation in the lower courts." Despite these studies (see also, Casper and Posner, 1976; Hellman, 1983; 1985; McLauchlan, 1980; 1984; and, O'Brien, 1985a; 1985b; 1986), the relationship of the Court's caseload to its outputs has not been fully explored.

This study presents a somewhat different approach to the caseload issue, focusing on opinions in cases decided on the merits as the Court's primary output. A focus on caseload alone ignores important dynamics in the decision-making process. A heavy caseload becomes a serious problem only if it significantly affects outputs or outcomes. In recent years almost one-half of the Court's docket has been made up of in *forma pauperis* petitions filed by indigents (Hellman, 1985:961). Many of these petitions, as well as others presenting questions clearly not of national importance, require "little of the justices' time" (O'Brien, 1985b:669; see also Brennan, 1973; White, 1982). Although some dispositions other than full opinions technically have some precedential value (e.g., appeals dismissed), it is the Court's opinions that are "relied on by lawyers and lower courts as authoritative explications of the federal Constitution and laws" (Hellman, 1985:948). Thus, it is reasonable to regard opinions as the most important, direct, and tangible outputs of the Court (see Burger, 1983; Hellman, 1978).[2] If the burden of dealing with a heavy influx of cases were affecting the Court's ability to carry out its decision-making function, it would not be unreasonable to expect to see evidence of that effect in the volume of opinions. The heavy load, for example, might diminish or slow the writing of opinions by taking time away from deliberation and opinion writing for such activities as certiorari decisions or supervising additional staffers.[3]

This research explores the relationship between the caseload (inputs) and the production of opinions of the Court (outputs) during the last

2. Another possible measure of output would be the number of docketed cases disposed of by the Court each year. The Court, on average, has increased its case disposition total by approximately 100 cases each year during the period under study. Simply counting the number of cases disposed of, however, does not seem an appropriate measure of output for a court that employs elaborate opinions as vehicles for enunciating legal doctrine and framing public policy.

3. Although the quality of the Court's opinions is beyond the scope of this study, it should be noted that discussions of the Court's workload have often proceeded on the assumption that the quality of opinions suffers when the justices are overburdened (Burger,

four decades. We refer to this relationship as the Court's "productivity." After defining this relationship empirically, we examine the impact of a variety of variables which might plausibly affect this relationship. The results should be a more explicit connection of the Court's caseload to an important output and a clearer understanding of what level of "production" we can reasonably expect of the Court given what we know about the conditions under which it operates.

What Is The Court's Productivity?

Productivity is defined as the rate at which an output is produced, given an input (Cutchin, 1981:77.) Using data for the 1948-1985 terms from the *Harvard Law Review*'s statistical summaries of the Court's activities for each annual term of the Court, we first examine the chosen output—opinions of the Court.[4] The range in opinions of the Court runs from a low of 78 in 1953 to a high of 167 in 1981. The Court's output has varied considerably in recent years, ultimately stabilizing at a level approximately double the output of the lowest years. A simple bivariate regression of opinions of the Court over time indicates that the overall trend has been a slow increase in the number of opinions of the Court written each term ($b=1.87$; $r^2=.68$). This evidence, at first blush, does not mesh with the idea of an "unproductive" Court. However, output must be compared with input before we can meaningfully discuss "productivity." The number of cases on the Court's docket in a term, the relevant input here, is collected from the same source.

An appropriate approach to describing this relationship between these inputs and outputs is to regress the $\log_{10}$ of the number of opinions of the Court (LOPINCT) on the $\log_{10}$ of the number of cases on the dockets (LDOCKET) for the 38 terms from 1948-1985. In this way we get at the simple question: Has the Supreme Court been able to increase its opinion production as rapidly as the docket has expanded? Use of logged variables simplifies interpretation because the

1983:445; Hart, 1959). In fact, Burger (1983:447) argued that the Court should cut back its opinion production from about 150 to approximately 100 cases per year, a position not supported by the current Chief Justice (Rehnquist, 1986:6). We believe that the difficulties inherent in attempting to measure opinion quality are possibly insurmountable. Still, we see no reason to dispute Rehnquist's (1984:6) observation that "I am not at all sure that it can be demonstrated that during the times 150 cases per term were decided those decisions were markedly worse than when the Court was deciding 100 cases per term."

4. Our measure of opinions includes all majority opinions (including plurality opinions announcing a judgment of the Court) signed by an individual justice, plus per curiam opinions judged by the editors of *Harvard Law Review* to contain substantial legal reasoning. These and all other data used in this analysis are available from the authors upon request.

regression coefficient becomes, in effect, a productivity measure and can be spoken of in percentage terms (Tufte, 1974). A <1 indicates an inability on the part of the Court to increase its opinion production as rapidly as the docket increases; a b=1 indicates perfectly consistent growth patterns; and a b>1 would indicate that opinion production has grown more rapidly than the docket. We expect b<1.

This relationship is expressed by equation (1).

$$\begin{aligned} \text{LOPINCT} &= .86 + .35\ \text{LDOCKET} \qquad (1)\\ t &= (5.97)\ (8.52)\\ r^2 &= .67 \end{aligned}$$

This simple bivariate equation explains two-thirds of the variance in level of opinions of the Court from term to term. The b=.35 indicates that a 10 percent increase in docketed cases yields a 3.5 percent increase in opinions of the Court. In effect, the Court seems to have hit a threshold beyond which its output rises only slowly, even if demands on the Court continue to expand. The rate at which the dockets are expanding is approximately three times the rate at which the Court is expanding its production of opinions.

Factors Possibly Affecting Supreme Court Productivity

Empirically defining the Court's productivity leaves open the question of what might affect the level of productivity. While the number of justices has remained constant over the span of time considered in this study, other factors have varied and might reasonably be expected to affect the Court's productivity level. Omission of these relevant explanatory variables would lead to specification errors in formulating and interpreting the regression equation (Kmenta, 1986). Four such variables—age, dissension, number of law clerks, and "the Burger factor"—are considered here.

Age. Since at least Franklin Roosevelt's time there has been a feeling that older justices hamper the Court's work (or, at least in Roosevelt's case, issued opinions with which he disagreed). Roosevelt's infamous "Court-packing" plan was initially justified by the need to provide "assistance" to elderly judges presumed unable to keep up with docketed cases. For most of the period under study, the Supreme Court was known collectively as "nine old men." The youngest Court which sat from the 1948 through 1985 terms had an average age of 58.3 years (1948), while the oldest averaged 70.6 years (1985). If age of the justices has an effect on the Court's productivity, the curve expressing the relationship between opinions of the Court and caseload should be

depressed when the Court is composed of a relatively older group of justices.

A possible complicating factor is that the average age of the Court is highly correlated with average tenure on the Court (r = .83). Experience might promote productivity. Justice Brennan (1973:478-479) has written that an experienced justice is able to process certiorari petitions more rapidly than a newcomer because of a "feel" developed for cases deserving of review. A more experienced Court, then, should have more time available for writing opinions in cases decided on the merits. If this analysis reveals that an aging Court is at least as productive as a younger Court, it may be because of the countervailing effect of experience. The age variable (AVGAGE) is operationalized as the mean age of justices who sat during each term as of the beginning of that term.[5]

Dissension. In his excellent study of leadership by the Chief Justice, Danelski (1978) finds that increased dissension in the conference decreases production in the sense that more time is required for the conference to reach decisions. Similarly, dissension over the Court's final decision might be expected to reduce productivity because of the time required to write dissenting opinions.

On the other hand, the norms of the Court operate very strongly to mitigate the possible negative effects of dissent on productivity. One of the most pervasive norms of the modern Court is the expectation that each justice will shoulder an approximately equal share of the majority opinion writing load (Slotnick, 1979; Spaeth, 1984); dissent is "on your own time."

Furthermore, the norm against "excessive" dissent behavior seems to have decreased over time. Dissent is increasingly common, accepted, and even expected. Justices may then be less concerned with crafting opinions which will command a consensus. Less time may be required to draft opinions for a smaller majority. If the opinion-writing stage of the Supreme Court decision-making process is more streamlined, i.e. fewer drafts, less prolonged negotiations to avoid dissents, and word processing to facilitate revisions, the justices may be more productive in the face of greater dissent.[6]

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5. Justice Minton and Justice Burton are excluded for the 1956 and 1958 terms respectively because of their lack of significant participation. Each sat on the Court only briefly in these respective terms, casting one dissenting vote in a case disposed of by memorandum.

6. We are grateful to a reviewer for suggesting this line of argument. It should also be noted that we do not mean to imply anything about the justices' interpersonal rela-

In short, we have competing expectations about the likely impact of dissension on the Court's productivity. The measure of dissension used in this analysis is the number of dissenting votes cast in cases disposed of by opinion (DISVS), again drawn from the annual statistical summaries in the *Harvard Law Review*.[7] This variable ranges from a maximum of 319 (for the 1981 term) to a minimum of 117 (for the 1954 term).

Clerks. Law clerks are "the most important part of the [Court's] support staff" (Baum, 1985:15). If "[m]any justices give their clerks considerable responsibility for the actual writing of opinion drafts" (Baum, 1985:16), an increase in the number of clerks could enhance the Court's productivity. The impositions on the justices' opinion-writing time occasioned by the rising caseload could be obviated by the clerks.

Clerks are not costless resources, however. As their numbers grow, coordinating and managing their activities puts each justice in the position of being at the head of a "little law firm" (O'Brien, 1986:122-124). Former Justice Douglas, noted for his position that the Court was not overworked, argued that additional staff were counterproductive: "Delegation of work merely increases the length of the week—unless the justice is to be a rubber stamp for the clerks" (Douglas, 1980:175). As the "managing of chambers and supervising of paperwork consumes more time than in the past" (O'Brien, 1986:124), the rise in the number of clerks might actually be associated with a decline in productivity. To test these competing hypotheses, we employ as a variable the number of law clerks authorized to be employed for each term (CLERKS).[8] In the earliest years this variable numbered 19; by the 1980s the value had risen to 36.

The Burger Factor. A final possibility to be considered in this analysis is that the former Chief Justice Burger's often articulated concern

tionships. We realize that people with excellent interpersonal relationships can strongly disagree and can accept the right of opponents to express differences of opinion.

7. A justice is considered to have dissented when s/he voted to dispose of the case in any manner different from that of the majority of the Court. Cases disposed of by memorandum are not included.

The number of dissenting votes is probably the broadest possible measure of dissent since multiple justices' dissents might be expressed in one dissenting opinion. Other possible measures—the number of dissenting opinions written (including opinions dissenting in part) and the number of opinions with dissent, i.e. decisions in which at least one justice wrote a dissenting opinion—were also used in separate equations. The results are substantially the same.

8. We use the number of clerks authorized as opposed to the number of clerks actually employed for both theoretical and practical reasons. From a theoretical perspective, the number of clerks authorized should reflect the collective, institutional response to

with the Court's burdens had an independent effect on the Court's productivity. This line of inquiry is obviously speculative, but it does not seem farfetched to suggest that Burger's frequent notice of the load on the Court might spur him and his colleagues to endeavor to be more productive. Furthermore, the Chief Justice introduced such time-saving devices to the Court as the photocopier, a word processing system, and computer-based data retrieval systems (O'Brien, 1985b:671). However, it would not be surprising to find either no effect or a negative effect if these efforts failed or if the Court had reached the point by the time Burger ascended to the position of Chief Justice that no further gains in productivity were possible.

We would not expect whatever effect the Chief Justice might have had to have been immediate. Instead, it is more likely that if Burger could have any impact it would be over a long term. Thus, we operationalize this variable (BURGER) as a counter, 1 for the first year of Chief Justice Burger's tenure (1969), 2 for the second, etc.

Analysis and Findings

In order to examine the impact which these factors might have on the Court's productivity, these four variables were added to Equation (1). Interpretation of the coefficient for the docket (LDOCKET) proceeds as it did for Equation (1). Since the additional variables are not logged, however, interpretation of their coefficients is slightly different. For each of the additional variables, the coefficient, multiplied by 100, equals the percent change in the output of the Court per unit increase in that independent variable (Tufte, 1974:124-128). Since this is an additive model, these coefficients can be thought of as raising or lowering the production curve defined by the coefficient for docket size (LDOCKET) by the magnitude of the coefficient of each of the additional variables. Since competing propositions are available for each of the additional variables, two-tailed tests of significance are used.

a rising caseload while a sum of those actually employed would factor in idiosyncratic factors (e.g., Justice Douglas only occasionally employed the full contingent of clerks authorized). Whether an individual justice's predilections or abilities allow her or him to use fewer than the authorized number of clerks is less relevant for the questions at hand here than the fact that a certain number of clerks have been authorized in response to a perceived need.

From a practical standpoint, "... the computation of the Court's law clerk strength is ... complex ... — the Chief Justice has additional clerks, and the clerks assigned to retired Justices normally assist active Justices as well" (Casper and Posner, 1976: 72, note 15). Furthermore, some personnel not officially dubbed "law clerks" (e.g., Judicial Fellows) serve as de facto law clerks.

In sum, the approach used here is a reasonable one for measuring the potential effects of law clerks on productivity. The data were compiled from Newland (1961:304); Casper and Posner (1976:72,109); and Oakley and Thompson (1980:21), and mesh with the information presented by O'Brien (1986:122-125).

Table 1 presents the coefficients for the full regression analysis. The model is quite powerful, explaining nine-tenths of the variance. Each of the independent variables is a highly statistically significant predictor.[9]

Table 1.

Regression of Opinions of the U.S. Supreme Court (Logged) on Docket (Logged) and Four Factors Possibly Affecting the Court's Productivity

Variable		b	t	p<
LDOCKET		.25	7.04	.0001
AVGAGE		−.012	−3.34	.003
DISVS		.00077	6.37	.0001
CLERKS		−.0066	−2.65	.02
BURGER		.012	3.19	.004
a = 1.85	$R^2 = .91$			
F = 67.06	adj. $R^2 = .90$			

The first point to note is the change in the coefficient for docket size from the bivariate Equation (1). Addition of other variables to the analysis depresses this coefficient by .10, suggesting that Equation (1) is incomplete and that part of the Court's apparent level of productivity observed in Equation (1) is dependent on other factors. Still, the relationship between docket size and opinion writing is significant.

9. The fact that each of the variables is moderately to highly correlated with time means that the secular trend may lead to problems associated with spurious correlation. While no foolproof statistical method for detecting spurious correlation in such instances exists, one way we can obtain some assurance that secular trends are not creating insurmountable problems is to test for autocorrelation. In some instances, regression analysis of secular trends which are causally unrelated will manifest serially correlated errors due to differential rates of change. If analysis reveals that significant autocorrelation does not exist, we can be more confident that the secular trend in the variables is not seriously biasing the results. The Durbin-Watson D for this equation = 2.26 (N = 38), which suggests very slight, statistically insignificant, negative autocorrelation. Ultimately, the best guard against these problems is good theoretical development. We believe that we at least minimally meet this criterion.

An even greater potential threat to the reliability of the analysis is multicollinearity. Yet, we are in somewhat of a "damned if we do," "damned if we don't" situation. To omit a relevant variable which is correlated with other independent variables will bias the parameter estimates of the independent variables involved, often severely (Kmenta, 1986: 442-446). But if variables with high multicollinearity are included, the parameter estimates may become unstable and the variance estimates will be inflated, producing lowered t values. While standard tolerance tests indeed indicate significant multicollinearity in this analysis (Lewis-Beck, 1980:58-62), the t values are large, the parameter estimates are stable, and the addition of each independent variable increases the adjusted R^2. These characteristics, particularly given the small N, suggest that the effects of the multicollinearity are not serious enough to alter the interpretation presented here.

Assuming other relevant factors were constant, the Court increased its opinion writing at one-quarter the rate that its dockets have grown during this 38 year period.

Turning to the other variables, the full equation indicates that older Courts tend to be less productive. For every year the Court ages (a naturally occurring event unless a change in membership occurs) the model predicts a 1.2 percent drop in the productivity curve, *ceteris paribus*. F.D.R.'s implicit premise that a younger Court would be a more productive Court appears well founded. Whatever advantages experience brings, to the extent that it is accompanied by advancing age, those advantages are apparently overwhelmed.

The coefficient for dissent indicates that Courts in which the justices cast more dissenting votes tend to be slightly more productive. Because the coefficient seems minute in absolute terms, caution is required in assessing its substantive significance. Still, at the very least, the model indicates that increased dissension does not necessarily make the Court less productive. The one clear implication is that the "dissent on your own time" norm is alive and well.

The authorization of additional clerks appears to yield a net loss in the Court's productivity. While it may be the case that the Court is simply not authorizing additional clerks fast enough to keep pace with its burgeoning dockets, this model would predict a drop of about 6 percent in opinion production if each justice were authorized to hire an additional clerk. Whatever work an additional clerk is able to do for a justice is apparently offset, and more, by the administrative costs.

Finally, we address the intriguing question, "Did Warren Burger make a difference in the Court's productivity?" The answer is a resounding "Yes." For every additional year that Chief Justice Burger led the U.S. Supreme Court, our model shows that it produced 1.2 percent more opinions, *ceteris paribus*. Given this trend over a 17 year period, the Burger effect is astounding. Whatever the dynamics involved, Burger's tenure on the Court saw it increase its production of opinions significantly above the level of preceding years. If the Burger Court felt overburdened, perhaps it was because that Court was responding to the demands on it at a dramatically higher rate than had previous Courts.

Discussion

The scholars who have studied the U.S. Supreme Court's caseload have done illuminating work. This study supplements their work by

treating the caseload as an input which is processed by the Justices who produce important outputs—opinions of the Court. By relating these inputs and outputs we develop a measure of the Court's productivity which adds perspective to the contention that the Court is overburdened.

Is the Court overburdened? We offer no definitive answer, only some guide posts toward an answer. It is clear that as society has become more litigious (Lieberman, 1981), the number of cases that wend their way onto the Supreme Court's dockets has increased dramatically. Likewise, the Court, with a constant nine justices, now regularly issues almost twice as many opinions per term as it did in the early years of the period under study. The Court has proven to be quite elastic in expanding its output in the face of massive growth in its caseload. While the Court cannot keep pace with the expansion of its docket indefinitely, it is worth pointing out that the Court has continued to increase its output, albeit more slowly, in the face of rising caseloads. While most justices and commentators feel that the Court cannot reasonably be expected to issue more than about 150 opinions in a term (see, e.g., White, 1982:277), Justice Rehnquist's remark that the Supreme Court is "probably no busier than many other courts and private practitioners" (1984:6) could be interpreted to mean that the Court is still capable of increasing its opinion output marginally.

Should the Court try to keep pace with its expanding dockets? The answer to that question depends on the assumptions one makes about the role of the Supreme Court in the political system (Note, 1983). Those who emphasize the Court's responsibility for resolving every important and disputed federal question in order to assure the uniformity and supremacy of national law are most likely to conclude that the Court lacks adequate decisional capacity (Rehnquist, 1986; White, 1982). On the basis of this logic, it would be reasonable to conclude that the time has come for reform of the federal appellate court structure along the general lines of recent proposals for an intercircuit tribunal to decide cases involving conflicts among the circuits and perhaps other questions of statutory construction (U.S. Congress, 1983). On the other hand, critics of such proposals tend to argue that the Court is capable of resolving enough such cases to provide adequate guidance for the lower courts (Estreicher and Sexton, 1984; Hellman, 1986). Moreover, it is not unreasonable to anticipate that the substantive result of such a reform, at least in the Rehnquist Court, might well be an increase in the number of cases in which the

Supreme Court reverses lower court decisions upholding civil liberties claims (Hellman, 1986).

When other functions of the Supreme Court are emphasized, solutions to the caseload problem may be found in simply balancing inputs and outputs. Consistent with a view of the Court as a national law/policy-making body is the position that the justices might well respond to caseload pressure by exercising greater care in selecting for review only truly important cases with national impact. Justice Stevens, in fact, has argued that the Court's burden may be traced to the fact that the Court reviews too many cases or reviews them prematurely (see, e.g., his dissenting opinion in California v. Carney [1985]). Adoption of Stevens' (1983) suggestion that the Court might have to consider abandoning the "rule of four" in favor of a majority decision rule in the case selection process would, if nothing else, reduce the chances of erring on the side of taking relatively insignificant cases by reducing the probability that any particular case will move onto the plenary docket. If the Court's primary function is assumed to be the protection of constitutional guarantees of individual liberties, the justices could respond to expanding dockets by accepting fewer petitions from state and federal prosecutors seeking to overturn lower court decisions favorable to defendants. To the extent that error correction (Howard, 1981) is an important, though secondary, function of the Court, the justices could resort more frequently to summary opinions.

Ironically, the performance of the Burger Court may have undermined the former Chief Justice's arguments for reform. The fact that the productivity of the Court increased dramatically during his tenure suggests that even if the Court is currently overburdened, it was not so when Burger began "crying wolf." Alternatively, the Burger Court may have overburdened itself by agreeing to hear cases that did not require resolution by the Supreme Court.

This analysis also has practical implications. It might seem facetious to recommend that if a president wants a more productive Court he should appoint younger, more contentious justices. However, President Reagan seems to be providing us with just such justices to allow us to test our model in the future. If our model continues to hold, we would expect that if Reagan or his successor replaces the oldest justices on the Court with contentious "youngsters," the institution's productivity should increase.

This analysis also suggests that authorizing additional clerks is no panacea. This bureaucratic approach to increasing caseload appears to

create more problems than it solves. The growth in productivity noted during the Burger era seems even more remarkable in light of this finding because the Court became "increasingly bureaucratic in response to growing caseloads" (O'Brien, 1986:14). Chief Justice Burger's activism on this issue and the impact of that activism seen in the Court's productivity suggest that leadership can make a difference. It will be interesting to see if the significantly positive trend in productivity established during the Burger years is maintained or disappears in the post-Burger years.

If leadership is to be exercised, a direction must be established. So far, the most significant action in response to the burden on the Court has apparently been for the Court to work harder. The lack of action on numerous reform proposals, including some endorsed by the former Chief Justice, may be attributable to a lack of consensus about the nature and extent of the problem (see O'Brien, 1985b). It may well be that the Court's current procedures are sufficiently flexible to permit adaptation to increasing demands without structural reforms requiring Congressional action.

It may well take more than repeated assertions by insiders that the Court is overburdened before the reform agenda gains enough support to produce action. Like reform of the electoral college, reform of the appellate court structure may languish until a major crisis produces a general consensus about what is wrong and what should be done about it. Until this eventuality, we can take some comfort in knowing that the recent aging, dissension-ridden Courts (Witt, 1983; O'Brien, 1985a) have continued to increase their productivity.

As final, obligatory caveats, we must note that we deal only with one, albeit important, output of the Court and only some of the factors which might affect the Court's productivity. Assessment of a more qualitative nature, considering such factors as certainty/uncertainty in legal doctrine, the Court's own rulings, case complexity, types of cases, and the impact of individual justices, for example, will require more thought, creativity, and time.

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