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SUPREME COURT DECISIONS WITHOUT MAJORITY OPINIONS

A Thesis

Presented for the

Master of Arts

Degree

The University of Tennessee, Knoxville

Phillip Anthony Smith

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To lovers of political knowledge

whom I love--

Donna Elaine, Kenny, MEW and my other fellow Arcadians,

and in memory of Faye Jean--

and to Jason, Daniel, Jesse, Curtis, and Amanda,

whom I love and wish to give opportunities to gain knowledge:

THIS M.A.'S FOR YOU!

ACKNOWLEDGEMENTS

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ABSTRACT

Not all judgments of the United States Supreme Court are supported by majority opinions. That is, the Court cannot always reach a decision on the merits of a case and also produce one opinion joined into by a majority of the justices participating. As many Americans may not realize this, it is worth asking why this happens, what the results are, and how individual justices today regard the phenomenon, or more importantly, how they act in the face of it. What insights might be gained about typical decisionmaking processes through such an inquiry?

In theory, there are rational grounds for justices to use separate opinions, voting blocs, and other tactics that may lead to Court fragmentation. A reason perhaps more compelling than others is that judicial politics below the Supreme Court level is often governed by necessity and individual preferences of public policy, rather than by precise legal principles. Can the members of a body that formulates policy for all of American society, even the nation's leading jurists, be expected to be governed much differently in their actions? Might they even engage in one-upmanship, sensing that how each of them performs in the most difficult cases can affect the real influence upon American life each attains over the long haul? This study asserts that, theoretically, each justice might try to increase his or her relative influence by appealing to the discretionary tendencies of the lower courts and that, in actuality, whatever their true intentions, some justices succeed.

<u>Procedure</u>--Certain strategies may optimize conditions for the inclusion of a given justice's ideas in principles (here termed "least

common denominators") deemed legally controlling by the lower courts. Using a computerized legal research system, the numbers of affirmative citations to the opinions in which each justice participated are compared, the data being arranged in two different ways for slightly different rankings; a justice's position in these rankings is termed "prime factor status." The focus is upon decisions without Court opinions of the Burger Court after 1975, and citations by district and appellate courts under the umbrella of the Federal Sixth Circuit (a "typical" jurisdiction). The findings are weighed against norms of majority opinionmaking, and inferences made.

Findings--Marshall and Brennan rank second and third, respectively, in each tabulation, while White and Stevens top each ranking respectively. Burger, Rehnquist, and O'Connor (in that order) lag behind Blackmun, Powell, and (in one ranking) Stewart.

Conclusions--Brennan and Marshall, with Stevens as their strongest ally, may exercise greater bloc cohesion, and more sophistication in writing separate opinions, than other justices in these divisive cases. It is "in character" to develop a propensity to be cited whenever possible, thereby exerting long-term policy influence, because "the other side" so often gains the majority this duo would naturally wish to win over.

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LIST OF SYMBOLS AND ABBREVIATIONS

Opinion Citation

U.S. = citations are to United States Reports
F2d = Federal Reporter Second
FS = Federal Supplement
Vol. = reporter volume number
Title = reporter page number at which case title appears
# = number of different references to each Supreme Court opinion

"Cited info begins": reporter page number, in each Supreme Court opinion, where words or ideas used by the lower court first appear.

Supreme Court Justices

Bu = Burger, C.J.
Br = Brennan
Wh = White
Ma = Marshall
Bl = Blackmun
Po = Powell
Re = Rehnquist
Stv = Stevens
Oc = O'Connor
Stw = Stewart (retired 1981, died 1985)

Opinion Participation

P = plurality opinion
J = nonplurality opinion announcing Court's judgment
C = opinion concurring in judgment or result in pertinent part
D = opinion dissenting from judgment

Parentheses (_) denote authorship of each opinion.

CHAPTER I

INTRODUCTION

A. Historical Background

The Supreme Court of the United States was an institution slow to find its feet. The Court was established by the 1787 Constitution but was not formally organized until passage of the Judiciary Act of 1789. In its first three years of existence its six justices were busy riding the federal circuits, and the High Court had few cases to decide collegially (Kelly, Harbison, & Belz, 1983, p. 164). Once the Court began to flex its constitutional muscles it found itself on the defensive. The decision to accept jurisdiction in a suit by two South Carolinians against the State of Georgia, despite Georgia's claim of sovereign immunity, in _Chisholm v. Georgia_ (1793), offended the former antifederalists; they responded by securing ratification of the Eleventh Amendment, stripping the federal courts of the power to hear cases initiated against state governments by citizens of other states.

It can be reasonably asserted that the _Chisholm_ decision suffered a dilution of impact, and was therefore vulnerable to political attack, because of the way it was announced. The custom of the day was for justices to deliver opinions _seriatim_, i.e., individually. The reading of the first opinion by Chief Justice Jay evidenced the procedural holding of _Chisholm_ (in the strictest sense), but could not completely relate the Court's rationale for either that holding or the substantive holding (reaching the merits and determining that Georgia should return confiscated property). Only after every member of the voting majority had elaborated upon the nature of constitutional union could observers begin to recognize the crosscutting rationales, the ones necessary to the decision. Regardless of the reality, the Court gave the appearance of equivocality on what the law was.

In a legal system which generally follows the doctrine of <u>stare decisis</u> ("let the decision stand"), the proper application of prior court rulings is at the center of most debate. The rights of parties to a controversy today are viewed largely in terms of the adjudicated rights of similarly situated parties yesterday and yesteryear; today's judgment can establish a guide to future judicial conduct. Moreover, holdings clearly communicated are useful not only to recipients but to the communicators. For the early Supreme Court, an institution at the apex of one branch of national government, definitive holdings were the keys to functional survival. Without effective expression of its authority, the Court could never achieve widespread popular support; with it, a semblance of coequal status with the elective branches, and the respect of the people, might be attained. A change in Court custom was necessary, and a change in personnel helped affect it.

A forceful, practical leader would sense that a reduction in the ambiguity of case holdings would increase the Court's control over American legal dialogue. Such a leader came to the bench in 1801 in the person of Chief Justice John Marshall, a man whose desire to build a strong federal judiciary was almost impossible to ignore. The Marshall Court moved away from justice-by-justice issuance of opinions; instead, like-minded justices were encouraged to collaborate their efforts. An institutional goal evolved: to have a "carrying vote" of the justices (that is, over 50% of those participating in the deliberations and judgment of a case) adopt an opinion drafted by a single justice among them, with the consultation and input of all of them. In this opinion the Court sought to demonstrate conclusions leading to its decision, and thereby flesh out its holdings, making them more intelligible, less transitory, and easier to locate. The author of this opinion need not wait for his or her turn to read on opinion day, for "the opinion of the Court" was to be delivered first, as it still is today. While unanimous agreement in one opinion is achievable, more often support will come from a majority of the Court. (Hereafter the terms "opinion of the Court," "the Court's opinion," "Court opinion," and "majority opinion" are used interchangeably, in reference to opinions with majority or unanimous backing.)

Marshall's brethren came to accept a custom related to that of the majority opinion: the power of the Chief Justice to assign the Court's opinion when on the majority side of the initial vote on the merits of a case. As will be discussed, this power opens strategies to the chief, among them the assignment to oneself of cases of constitutional importance. Most major Supreme Court cases in the Marshall era dealt with the powers of the national government, and the Chief Justice was careful not to squander his prerogative. During his tenure he authored the "opinion of the Court" in a majority of cases decided (Baum, 1985, p. 149). In cases he deemed crucial he pushed very hard for a united front, striving for unanimity in vote and opinion while seeking to dilute the force of any possible dissents (a lesson not lost on Earl

Warren over a century later in Brown v. Board of Education, 1954). The great jurist made the phrase "marshalling the Court" something of a double entendre.

John Marshall was a politician long before he became Chief Justice, a man who had a knack for making his exceptions enforce his rules. Were he alive today, he could sense the inherent difficulties of a Supreme Court two members larger than the Court of his heyday, a Court for which five and not four is the "carrying vote" when all justices participate. He would recognize that nine highly individualistic lawyers, each with the potential (if not the time) to be as brilliant and resourceful on any given case as he and Joseph Story ever were, are seldom likely to achieve unanimity and sometimes will struggle just to render a majority opinion. (They, of course, deal with a drastically more complex and litigious society, and a century and a half more American law, than did Marshall.) Therefore, while he could appreciate the fact that justices through the years had maintained his Court's standards of practice as their own, John Marshall might secretly admire the ingenuity of individual justices who occasionally accept deviations from the standard in order to keep the ship of state upright but slightly favoring their chosen currents.

B. The Theoretical Import of Justices' Tactics

The Supreme Court's continuing effort to render majority opinions has not had a 100% success rate. However, it has become a tenet of American jurisprudence that any decision justified by an "opinion of the Court" is (in comparison to other judgments) more compelling, more readily applied, and thus of highest value as precedent. Legal scholars frown upon holdings developed by less than a Court majority, holdings found in opinions that were concurred in for only the sake of finalizing the respective disputes. Rationales which must be derived from, and limited to, the commonalities of two or more nonmajority opinions are commonly predicted to be too narrow to be of much value at all. The members of the Court would presumably attach the same meanings to these types of precedent; this assumption may be worth questioning.

In his classic study of the policy-shaping capabilities of individual Supreme Court justices, Walter Murphy (1964) addresses the complexities of High Court decisionmaking. He concentrates on the practical possibilities that justices may explore (intentionally or unintentionally) in expressing choices drawn from a range of options; he theorizes that a "rational" justice could develop an overall strategy for furthering a broad policy objective, comprised of separate tactics for dealing with other justices, the lower courts, lawyers, and the public on a case-by-case basis (1964, pp. 3-10). Murphy's framework for the decisionmaking process, cast in terms of individual judicial power (1964, pp. 31-36), consists of two stages. The latter stage, group consensus, is dependent upon how the justices choose to express to one another the results of the first stage, individual evaluation. The second and third parts of group consensus are the processes of coming to an agreement on the decision of the Court, and of attempting to reach agreement on the justification for the decision. The tactics employed in these final steps are of concern here.

Murphy (1964, pp. 37-38) sees the process of opinion drafting as one in which justices are bargaining (with varying degrees of intensity) for the elusive "carrying vote." Prospective supporters must be convinced that they and the author can adapt an opinion's holdings and resulting judgment to their collective needs, at least well enough to suffice (and despite that a different holding and subsequent judgment might render relatively the same result). The more indifference to the topic at hand, the less energy an author may expend. When opposing factions develop, possible strategic payoffs and possible sanctions both increase. Tradeoffs and future concessions come into play. (For example, sometimes the best way to lessen the impact of the opposition's emerging majority consensus is to decrease personal intensity concerning the given issues.) These realities of give and take eventually determine whether there will be an "opinion of the Court."

In light of a potential majority opinion, alternatives occur to everyone. Spinoff opinions take various forms. A concurring opinion can be written by anyone, in or out of agreement with a majority opinion, and whether or not the justice joins another opinion. Normally a concurrence is in basic accord with the conclusions reached in a majority opinion, but expresses alternative views of the issues, or underscores a particular principle or line of reasoning. An opinion concurring "in the result only" expresses a unique view of the law or facts of a case (or perhaps fails to state any rationale), but recommends the same disposition of the case as do other opinions supporting the judgment. Coincidence of preferred treatment of the parties to a controversy does not mean coincidence of proposed holdings, but merely finalizes the outcome (i.e., which litigants get what when).

Since multiple holdings may arise from a single case, affirmative and negative choices need not be mutually exclusive. Concurring in part and in result is not uncommon; even a dissent in part while concurring in the result is possible. A dissent in result could conceivably agree with a majority right up to its final conclusion. Of course, the standard dissent (or dissent in part) disagrees not only with the disposition but with the specific holdings and more general rationale. Whatever their form, holdings proposed in nonmajority opinions supposedly cannot be realized unless the point upon which the voted result turns is found to run through them. Therefore the opinions themselves are considered to carry less (if any) weight under *stare decisis* than any majority opinions, and are thought at best to be merely persuasive of future conduct.[1]

The above discussion presents an overview to expose three sides of the conventional wisdom of Supreme Court decisionmaking:

1. majority opinions are highly desirable to anyone who agrees with them or who needs relatively unattenuated legal guidance;

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[1]If there is a "carrying vote" in support of a judgment (as well as a result), but not for any one opinion, the Court can choose to produce an anonymously authored *per curiam* opinion expressing its decision. This occurs in very few cases, but many subsequent opinions will refer back to these special ones; this, unfortunately, complicates term searches by computers. The present research is best served by ignoring cases with *per curiam* statements, but in a comprehensive examination of decisions without majority opinions this is not recommended. The impact of landmark decisions such as *New York Times Co. v. United States* (1971) and *Furman v. Georgia* (1972), both judgments delivered *per curiam*, deserves consideration.

2. in seeking to share in majority opinions, justices have tactical options open to them; and
3. majority-forming tactics are not exclusive of forms of alternative expression.

By isolating these concepts, clarity is given to the proposition that the assigned official opinion (the one intended to announce the judgment, if it can retain the majority vote in some form) is not on a pedestal prior to final judgment. Yet its value as precedent, case by case, is not often questioned in relation to that of spinoff opinions. In other words, there are rarely Supreme Court decisions without majority opinions. By the time the final vote in conference is taken on a case, the justices can be fairly certain that better than half of them will generally (if not fully) agree with a single opinion, and accordingly that most or all of the holdings therein contained will stand on their own.

Only when all the opinions come up short of majority support (even just one justice shy, as do so many "plurality opinions") does it become imperative to examine <u>in detail</u> how each of the nine justices chose to participate. In the course of opinion circulation the possibility must occur to justices that a decision without a majority opinion is emerging; the members of a plurality (or potential plurality) might see the hand writing on the wall long before the final vote, and begin to jockey against any other potential plurality to pick up the concurring votes for their preferred result. Individual members of the plurality must be persuaded that it is in their best interest not to jump ship, that the force of numbers (and the outside chance of salvaging an opinion for the whole Court) is going to be advantageous, at least in the long term. Here, then, is where doubt might first be cast on the assumption that the rulings enunciated in majority opinions carry more actual weight for each justice than other principles pronounced in other ways. If the Supreme Court has its own falling out over a controversy, individual justices may use certain tactics to ensure specific beneficiaries receive specific judicial heirlooms.

CHAPTER II

EXPLANATION OF THE PROBLEM

A. Supreme Court Fragmentation

Over the course of our constitutional history, certain generations of Americans might be expected to have known Supreme Court decisions to be reached and yet not be complemented by Court opinions. Some eras have been characterized by a proliferation of major social and economic issues; among the catalysts were war, economic depression, and constitutional amendment. In these times the odds have favored the occurrence of serious disagreement within all political bodies, including the High Court. Furthermore, time and politics inevitably alter the Court's composition, for better or worse. If some justices have been satisfied to function more or less within the _status quo_, others have felt compelled to exercise exceptional independence of thought and deed. The latter put themselves in a precarious position, because "encouragement of judicial nonconformity" (read "spurring" or "manipulation") is apt to come from many sources, including practicing attorneys and legal commentators, social causes and other "friends of the Court," old political cronies, the other branches of government, public opinion (actual or as mistakenly perceived), and occasionally upstart law clerks. A Court with a number of individualists may splinter in all directions, even if the importance of the question at hand behooves the justices to provide a definitive answer. The person who occupies the office of

Chief Justice has a direct bearing on all such matters, and to this leadership dimension our attention momentarily turns.

The power of a chief justice was mentioned earlier in relation to the assignment of the official opinion. To elaborate, since the majority of Supreme Court cases result in unanimous or nearly unanimous decisions, the chief is usually in the majority and thereby entitled to assign the opinion; since justices can withold judgment during the initial conference vote, there may be no tentative majority, and again the chief chooses a drafter (Baum, 1985, p. 115). Moreover, the chief may vote with a majority during the first vote, all the time intending to switch positions in the final vote, just to be able to make the assignment; this prevents the senior justice in the majority from exercising the prerogative. The custom thus used allows the chief justice great influence upon the ultimate grounds for most judgments, as well as the number of supporters each opinion is likely to garner. Distribution of the workload is a concern, but more significantly the chief can dish out favors to advocates of personally preferred policies, and apply sanctions to opponents, by choosing whom speaks for the Court. The appeal of the draft can be maximized by selecting a justice with a moderate view of the current issues, or the chief's favored legal position can be preserved with assignment of the prospective Court opinion to an ally, unless the chief decides to write it personally (Baum, 1985, pp. 149-150).

A chief justice who wields this power in a manner conducive to compromise and conciliation, at the same time commanding intellectual respect, may almost never allow the Court to fail in fulfilling the public's expectation of unequivocal interpretations of law; John Marshall must have realized this. But even in "the best of times" for the Supreme Court (when there is a strong chief justice, greater interdependence among the justices, and at most the periodic "novel" legal question with which to deal), the justices are not bound by law to do everything in their power to produce an "opinion of the Court" in every case given full treatment. A majority opinion may aid public understanding, it may enhance the institution's image, and it may add several worthy precepts to our body of law; it still may not further the policy objectives of an individual justice, who may be in the position to cause a given opinion never to reach such status. The tactics of consensus building and consensus disintegration merge; not only can a justice fail to become a participant in a potential majority opinion, but if another rationale can be stated well enough a justice might dissolve an existing majority, if not attract a new one.

"Rational" Justices Acting Separately

In bargaining for the "carrying vote" case after case, the key items a lone justice has to offer (whether in trade with, or as sanctions against, fellow justices) are one vote and the right to draft a separate opinion. If the Court is sharply divided after the first vote, each individual's potential influence increases; at this point there is much to be gained by being uncommitted, since this will cause others to offer present and future favors in return for the vote. One who is privately committed to a sole outcome might feign uncertainty in order to acquire this advantage (Murphy, 1964, pp. 57-58).

In writing separate opinions, justices differentiate between the purposes of (a) posting a personal view before the final vote is taken, and (b) registering a vote in opposition to the pending judgment, and authoring a dissent. In (a) there is an attempt to resolve the present conflict of individual interpretations, and it can take one of a number of forms: an appeal to the plurality or majority to tone down its rhetoric as a gesture of conciliation; an effort to attract the potential dissenters and others yet undecided, aimed also at those already committed to the would-be official opinion (in case it can be forced by attrition to become a dissent); or a clarification, perhaps a narrowing, of the prospective holdings, enabling the writer to inject personal policy concerns or even offer alternative holdings. A dissent, on the other hand, is a concession that the position(s) the justice finds disagreeable will prevail at any rate, for the time being; it informs contemporaries and future justices alike that, as far as the writer is concerned, the decision should be overruled the first chance available. Dissenting affords a justice a free platform for voicing any policy concerns even vaguely related to the subject of the case, in quite dramatic form; and since misery loves company, fellow dissenters are actively recruited. (Murphy, 1964, p. 60.)

Meanwhile the author of the assigned opinion is working to satisfy those justices ambiguously committed to it, trying to integrate their suggestions without sacrificing the enthusiasm of the first draft, all the time competing with the separate opinion writers for the uncommitted votes. Then again, coalitions apparent during the first vote may shift as the case is considered more thoroughly. For example, if a justice who at first voted to dissent becomes a convert to the official opinion, its writer can attempt to accommodate everyone; problem is, the convert may have a firmer belief than members of the original "congregation," and some may opt to concur rather than support a change of doctrine. (Murphy, 1964, pp. 66-67.)

If this much maneuvering is possible (not that it always occurs, but that it can) when self-interested justices interact collectively, relationships between and among specific justices should provide the bases for the evolution of more complex tactics. There is of course much more than "strength in numbers" involved in the interpersonal dealings of persons who will probably work together until they die. However personalities complement one another or clash, our focus remains on the effect tactics have upon the production of majority opinions and upon the furtherance of personal policy objectives.

"Rational" Justices in Alliance

The next logical step in the struggle to forge a Court opinion is for justices with roughly similar policy preferences to pool their resources. Bloc formation is a recognizable phenomenon, and to examine the range of choices it involves may be to understand better those justices utilizing it. To begin with, justices who share a minority viewpoint have limited options. They may go along with the majority for the first vote, and then try to cut their losses by persuading others into compromises of opinion writing. They may each dissent, leaving themselves very little room to bargain. A third strategy is to form a voting bloc for specific issues, thereby bettering the odds of winning a final vote. Whatever an individual justice forfeits in doctrinal purity by joining a bloc can be recouped in policy-shaping power, if the level of agreement among bloc members is high. But "rational" justices will not make bloc voting an ironclad rule, for the threat exists that an even more cohesive counterbloc will become a rival for dominance of the given debates. Thus, in many instances, members of a bloc might intentionally vote against one another; at the very least individual justices may concur separately. (Murphy, 1964, pp. 78-80.)

When a bloc's basic position has wide support, one or two members can afford to quibble over a minor procedural point or some other non-vital issue. A more cunning maneuver is suggested when a bloc knows it cannot win on the primary issues. To concur separately in judgment with a dominant plurality is to be able to inject secondary policy positions into the high visibility "mainstream" of High Court decisionmaking, rather than isolating such principles in dissents that other members of one's bloc plan to write anyway. Here, then, is one example of fusion of individual and bloc tactics. A whole range of options could conceivably be exercised in sequential order, a veritable "standard operating procedure": a justice could appear uncommitted; refuse to support a potential majority's rationale; perhaps concur in the judgment (maybe to draw participants away from the official opinion), perhaps dissent; keep pet issues on the frontburner; and help keep a minority voting bloc moderately prosperous.

In reality a justice may not go through these motions consciously, and may not always have to do all things all at once, and usually will not feel the need. But if two, three, four, or even five justices (each possibly advocating a unique position) approximate these tactics in a single case, the prospects for producing an "opinion of the Court" are dim indeed. When a full Court is closely divided, a determined lone justice may singlehandedly disrupt the majority opinion custom. (This might even be the author of the assigned opinion who decides that clinging to the judgment with one vote, in order to retain official status for the original draft, is more pragmatic than becoming a dissenter.)

A Rationale Behind Blocking Majority Opinions?

Justices can, in many instances, be excused for momentarily abrogating the institutional commitment to the majority opinion. If a bloc is holding out in a longshot effort to render the Court's opinion, or an assigned writer is none too eager to be pushed out of position, and all compromise is exhausted, it is difficult to fault anyone for standing his or her ground. These justices would like to give authority to a far more expansive legal interpretation than is permitted by the circumstances, but they will settle for the distinction of having contributed to the precise holdings of the given case. Our curiosity is aroused, however, at the energies exerted by justices not so keen on the decision produced, whose opinions may be filled with policy positions that (while somehow related to the subject at hand) cannot be considered necessary rationale for their votes in support of the judgment.

Were stare decisis (never a sacred doctrine) upheld at the minimum level dictated by conventional wisdom, viewpoints not essential to decisions would never receive significant legal justification without the extended passage of time and a concomitant change of attitudes on the Court. Holdings from majority opinions would always afforded a higher degree of respect and compliance than others. Moreover, Supreme Court decisions without majority opinions, characterized by narrow holdings, would be of limited immediate and practical value to the public at large. These conclusions may be fine as rules of thumb, but because the conditional clause may be of questionable validity, they are not necessarily rules that justices will live by.

The justices, probably better than anyone else, understand that long-term Supreme Court influence is established incrementally. In its consideration and its aftermath, each judgment on the merits is imbued with unique features and follows its own timetable. Meanwhile, other architects of public policy must handle unique situations as they arise, and may refuse to acknowledge the contextual boundaries drawn around the concepts of justices, concepts usefully integrated into the solutions of pressing problems. The appeals process cannot serve as a check against every specious application of a Supreme Court decision, and so certain justices might find their positions hold ultimate sway in spite of the contravening intentions of most other justices. Do the actions of any of the justices serve as evidence that they are motivated by these incidental forces of reaction? Maybe a study in reverse, examining the legacies of Supreme Court decisions without majority opinions, will point toward justices who, in theory, are so motivated.

Using preemptive tactics against a potential majority may be one means of optimizing support for one's own minority viewpoint. There may be no better time than the present to express such a view, and rather than see it ignored, a justice could draw attention to it by forcing all readers to search through all opinions to find the pivot on which the decision is made to turn, just as in the days of Chisholm. In the process someone may stumble across the position, even if it is not necessary to the decision, and be impressed enough to adopt it. One would be expected, of course, to prefer the plurality opinion as a conduit for ideas, because of its high visibility and the likelihood it will be the official opinion; as will be shown below, a mingling of personal priorities with actual holdings can only aid one's cause. But whether the official opinion or a separate opinion is utilized, a "rational" justice using these tactics must believe that an "opinion of the Court" is not the "be-all and end-all" for the shaping of public policy by members of the Court, implicitly recognizing a slight flaw in conventional legal and political wisdom. The source of confusion at this point is the treatment of justices' opinions "below," the second aspect of our problem to be examined.

B. Lower-Court Discretion

Hypotheses of the impact of, and compliance with, Supreme Court decisions parallel the goals established by the Marshall Court years ago. Among these suppositions are that clarity of rulings increase their impact, hastening and extending compliance with them; furthermore, noncompliance is increased by the presence of separate opinions and decreased by unanimity (Wasby, 1973). The validity of these statements depends on the actual practices of those who set legal policy for the various segments of society. The judges of the many federal, state, and municipal court systems are among such officials.

Commentary on the relationship between the High Court and the lower courts portrays it as "love/hate," or at best respect/resentment. The respect dimension encompasses the Supreme Court's "institutional charisma" (Murphy, 1964, p. 13), its "intangible authority" (Baum, 1985, p. 209), the notion deeply engrained in the American conscience that the Court's pronouncements are more than interpretations of the law--they <u>are</u> law. This is something quite apart from mere respect for <u>stare decisis</u>, and lower-court judges may be compelled to acknowledge it even when incentives exist not to follow the Court's lead. Thus when the lower courts sense a new doctrinal trend running through Supreme Court decisions, the tendency is not to resist it, but rather to proceed with "cautious extrapolation" (Frank, quoted in Murphy, 1973, p. 73).

On an everyday basis, however, the lower courts are not subject to review by the Supreme Court concerning their procedures or policy standards; the Court's orientation toward substantive policymaking keeps the cases it chooses to hear politically charged, and no systematic "spot-checking" of lower-court decisionmaking occurs (Ball, 1980, pp. 247-248). This means that however broad or narrow the Court's holdings in a case may be, judges who disagree with them may restrict their implementation, seizing upon ambiguities within the decision to limit its impact; as one particularly recalcitrant federal judge has stated, those who truly dislike Court policy will ". . .follow Supreme Court decisions [only] when [they] can't get around them." (Baum, 1985, p. 209.) Among those judges who <u>would</u> follow the Court <u>if</u> given enough clear guidance in a situation, there may arise a "freeplay of judicial predilections, conscious and sub-conscious," partly in resentment of the Court's refusal or failure to resolve a public conflict effectively (Murphy, 1973, p. 76).

The power of the Supreme Court is checked by the institutional factors of decision and opinion formulation; moreover, its communications may lose something in the many translations provided by lower courts. The value preferences of individual judges in applying decisions will inevitably differ from those of the decisionmaking justices, just as the justices differ among themselves. Some judges will not in good conscience be able to implement some of the Court's rulings completely, believing injustice would be done to litigants in specific cases. Other judges will be so ingenious in their applications of judgments, the justices might question the Court's "control" over the lower cases. The difficulty of articulating a majority rationale in a Supreme Court case increases proportionately with the number and complexity of issues. (Murphy, 1964, pp. 23-25.) If a case was controversial enough to prevent the production of a Court opinion, the number of ways lower courts can treat such a decision may also be increased. This is the nature of the beast now attacked.

How a Judge Might Be Expected to Read a Fragmented Decision

When a Supreme Court decision does not have a majority opinion, the contents of the opinion with official status may not provide a lower court with easy answers to pressing problems. If the lower court is lucky, the occasion to find out never materializes. (Obviously a proper case must arise within a jurisdiction before judges are forced to deal with the Supreme Court's logic.) Once a judge is called upon to write the opinion in a case involving facts or issues which are similar or analogous to an ambiguous precedent (and trying to ignore the prior High Court ruling is out of the question), he or she may first attempt to distinguish between the immediate case and the prior decision. The finer points of law and fact can often be differentiated. If distinction proves difficult the judge may choose to take the Court to task, challenging the justices to establish a firm rule of law, perhaps even to reverse the present judgment; this reading is close to giving oneself a blank check, with the knowledge it could but likely will not bounce.

However, judicial protocol and adept lawyers will probably cause the judge to make an extra effort to find something within the Supreme Court's decision to follow as controlling. What the judge finds may not be worth following, or it may not determine the outcome of the immediate case. But if a question is tough enough to splinter the Supreme Court, a judge who purports to make better sense of it without heeding any justice's advice could be viewed as being presumptuous or inventive, brave or energetic, stupid or assertive, or all of the above.

An efficient way of reading these decisions for guidance is to look for applicable points of law in each plurality opinion, and then to conduct a secondary search through the opinions of the justices concurring in judgment. The goal is to uncover agreement, by acquiescence or implication (which could include silence), on these points. Majority intentions are thereby arguable, even if the rules stated are not crucial to the decision. The advantage of this method is plain. If the latter probe is fruitless, the judge can declare sincerely that the former and most populous opinion is the closest thing to a controlling statement available; the outcome mandated by the justices can be used to justify the result in the lower court without making a major policy statement. This can be expected to be the normal use of cases without Court opinions.

The Delightful Dilemma of Dicta

A judge seeking to rationalize a forthcoming judgment may well be open to ideas of justices expressed not in narrow holdings but in *obiter dicta*, nonbinding judicial commentaries incident to the cases which prompt them. So much of the language included in the various non-majority opinions of justices ends up as dicta, cases without Court opinion are rich in less-than-authoritative legal positions and poor in broadly applicable rules of law. When faced with the necessity, judges may be persuaded to make use of these questionable precedents either because of their holdings, or *in spite of* their holdings.

As it becomes harder to separate "law" from dicta, lower-court judges have more and more leeway in choosing what to regard as binding precedent (Baum, 1985, p. 123). This becomes particularly important for opinions concurring in judgment, and may even affect the power of dissents. The grace and clarity so painstakingly achieved in many separate opinions (yet so necessarily compromised in many majority and plurality opinions) may occasionally raise mere persuasion to the height of authority, in the eyes of judges in need; in their discretion the lower courts may sidestep true Court holdings, but citation of sound reasoning outside holdings may be just the "window dressing" certain situations demand. Dictum from a barely supported opinion can become "considered dictum," discussion of a point of law so well developed that it is subsequently adopted or incorporated into opinions supporting other judgments, <u>just as though it were authority</u>.

The lifting of considered dicta from individual opinions (not uncommon for citations of majority opinions, but here examined for pluralities or nonplurality official opinions, and accompanying concurrences and dissents), and combinations thereof, can be executed with some unique twists. In the routine effort to discern any agreement on the majority side of the vote, a judge may find, for example, dissenting justices have admitted agreement with other justices on an issue, without agreeing with the outcome of the case. By citing the same policy position in every opinion that articulates it, pro- and anti-judgment alike, a lower court is implicitly speculating that various justices would vote together as a majority on the given issue if asked about it in a different context. A good label for this phenomenon, a principle apparently supported by some majority combination of justices without entering into any actual case holdings, is "pseudoholding." Its "cousin" may be called the "nonholding," simply a judge's means of proving that a majority of justices have explicitly or implicitly declined to take a given position. By citing the appropriate opinions, the lower court gives itself another form of the blank check. Clearly, the number of ways lower courts can treat Supreme Court decisions of such dubious authority enhances their potential impact.

C. Summary: "Least Common Denominators"

Lawrence Baum (1985, p. 116) contends that a Supreme Court case without a majority opinion is "unfortunate," and he goes on to state: "In this situation, lower court judges and other observers can attempt to discern a 'least common denominator' from the positions of the justices on the majority side, but this task may be difficult." As has been shown above, the process can, in practice, be even more complicated than Baum admits. Yet "rational" lower-court judges will not bemoan their range of options, just as Supreme Court justices will not regret having to make some tough decisionmaking choices, if reminded of the alternative: renunciation of individualized efforts to shape public policy. The term "least common denominators" ("LCD's" for short) will be used throughout the remaining chapters to refer to unique sets of ideas, drawn from opinions in fragmented High Court decisions, and treated by lower courts in a manner typically reserved for authoritative pronouncements; citations of narrow (but normally authoritative) holdings, of dicta, and of combinations thereof will be included under the term.

The common perception of majority as opposed to nonmajority opinions does factor heavily into cumulative Supreme Court influence. However, the perceptions of lower-court judges, who are the foremost arbiters of competing legal and sociopolitical interests, account for the practical applications of each Supreme Court decision. One effect of High Court fragmentation is the encouragement to lower courts to wield their already enormous discretion more freely than usual, in molding principles of law out of most any material provided by any justices participating in a case, whenever it is advantageous and somewhat justifiable to do so. A lower court may quite literally take the law into its own hands, if the precise holdings of the best available precedents are not "on target," that is, directly controlling the outcome of a subsequent legal controversy. Judges may prefer to cite plurality opinions, just as justices will prefer to participate in them, but neither custom nor <u>stare decisis</u> can constrain the forms of judicial strategy used in exigent circumstances.

The various "least common denominators" discerned by lower courts have a single thread running through them: each is part in parcel of the Supreme Court's logic as applied to a set of complex, controversial issues. But perhaps some shorter, less noticeable, <u>personative</u> strands bind significant numbers of "LCD's" into overlapping subsets. In this regard any "rational" justice could make it his or her goal to be, more probably than fellow justices, a contributor to the lines of reasoning subsequently cited in lower-court cases. The tactics of locating personal policy goals in certain opinions, according to the circumstances of each case decided on the merits, may pay off in just such a manner by establishing the optimum conditions for this form of influence.

CHAPTER III

FIRST INSIGHTS

A. "Prime Factor Status": Ranking Long-Term Individual Influence

The primary object of this investigation is to determine if one or more justices may, consciously or not, by overt action, achieve this rational goal: To have personally espoused positions taken by the lower courts more often than those similarly stated by other justices, thereby increasing long-range influence upon American public policy (comparatively speaking), when expressing these positions in High Court cases without majority opinions. Other angles for approaching this subject might have been taken, for example, asking whether or not particular lower-court judges consciously or unconsciously indulge in favoritism, preferring the writing styles of some justices over others.[2] Conceivably there are ways to find variable relationships, to map out patterns of partiality shown by individual judges to the opinions of individual justices, but these are likely to be fraught with problems of conceptualization; "ideology" would undoubtedly rear its undefinable head. For our purposes, simple tallying of events will suffice; cross-tabulations,

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[2]This project began as a search for an "undercover majority writer." A fellow legal scholar had perceived an increase in the number of fragmented Supreme Court decisions included in contemporary casebooks; furthermore, opinions of lower-court judges in recent cases seemed to him, more often than not, to omit the names of the justices whose opinions from such judgments were cited as supportive. From these observations the following question was raised: Could one justice emerge from the pack with all the force of the author of majority opinions that were never produced, all the while retaining "anonymity"?

regression analyses, and other quantitative methods can be reserved for future theorizing.

A key point to bear in mind is that lower-court judges can cite only what justices have produced; so if parity does not exist among the justices in amount or types of production, one should not expect it in the number of favorable citations to each one's views. (The meaning of the term "production" here of course includes not only the principal authorship of opinions, but also the consultation and final agreement in the opinions of others.) Since particular manners of participation may increase the likelihood of other justices, and judges generally, paying heed to one's advice now and in the future, a "rational" justice would be inclined to act accordingly whenever possible; if other justices acted otherwise, for whatever reasons, there obviously would not be parity of production, or of peer recognition, or of citation.

Therefore the question becomes: In cases in which the United States Supreme Court does not produce a majority or unanimous opinion, are justices inclined toward manners of participation such that the policy preferences of certain justices are more likely than not to prevail, if such decisions are eventually followed as controlling by the lower courts? A negative reply connotes acceptance of the null hypothesis, which has each justice author roughly the same number of concurring, dissenting, and plurality opinions, of comparable persuasive worth; concomitantly, each justice joins such opinions in more or less equal share. Under the null, the lower courts follow the opinions of one justice as frequently as they do those of the next, having equal opportunities to do so. To reject the null, and answer the question posed in the affirmative, means coming to terms conceptually with the alternative.

If each opinion from the High Bench relied upon by any lower-court judge is thought of as having its own unique "denominator," to which all the justices participating in it contributed, then the "common" in Baum's term "least common denominator" must refer to the lower court's adoption of specific ideas asserted among the opinions available for consideration; the "least" expansive application of the controlling case to the circumstances of the case under consideration is (theoretically) to be expected. While each lower court's situation is different, it is conceivable that a number of judges locating a number of "LCD's" over time would in fact take the positions of the same justices repeatedly. In mathematics it is possible to find one or more prime integers to be factors common to two or more denominators of different fractional expressions. By analogy, the participation of a justice in opinions cited throughout several "least common denominators" is a "prime factor" in those "LCD's"; as a result, some of his or her positions are given virtual legal authority in a number of jurisdictions for some period of time (perhaps indefinitely), even though the Supreme Court decisions where his or her opinions are found had commanded little actual authority when first rendered. This notion gives direction to the present research; therefore, the term "prime factor status" will be used as shorthand to refer to a justice's propensity to write and/or join the opinions, prepared for decisions without majority opinions, that are later cited to help explicate controlling principles of law in lower-court cases.

B. The Latter-Day Burger Court as a Case Study

In the closing days of 1975 the last remaining Supreme Court appointee of President Franklin Roosevelt retired. The departure of William Douglas ended four decades of FDR influence upon the Court's makeup; Felix Frankfurter and Hugo Black were also of this vintage, and like Douglas were not afraid, during lengthy tenures, to express firmly their particular (and often opposing) views of the Constitution and the role of the judiciary under it. The replacement of Douglas with John Paul Stevens brought to an end another kind of era: a seven-year recomposition of the Court, beginning with the selection of Warren Burger as Chief Justice in 1969, that caused the holdovers from Earl Warren's days to become a minority rather abruptly. If the 1976 version of the High Court needed time for its members to get acquainted, to establish ground rules for communication and bargaining among themselves, the time has certainly been made available.

A single seat on the Supreme Court has changed hands in over a decade, with Sandra Day O'Connor replacing the second-most senior justice, Potter Stewart, in 1981. Such low turnover is unusual. In fact, one must go back to the seven-man Marshall Court of 1811-1823, with no changes in personnel, to find lower. Eight of the 10 justices serving after 1975 have, as a unit, produced a considerable body of work, to which they add daily; and the years of assistance from Stewart and

O'Connor are now split about evenly, each with significant "playing time" with this "team." It is a fairly safe bet that the members of today's Court know one another's methods as well as any group of justices ever has, and there should today be plenty of material available for study to speculate upon these methods.

Moreover, the latter-day Burger Court is unique in that the reputations and basic policy preferences of individual justices are well established over time and highly unlikely to change overnight. After all, the average age of the sitting justices is the highest in Court history. As for lengths of tenures, William Brennan is at 30 years and Byron White is nearing the quarter century mark, while Stewart exceeded 20 years and Thurgood Marshall is closing in on that milestone; Brennan's service time compares with that of Oliver Wendell Holmes, and White's has already exceeded that of Louis Brandeis and Felix Frankfurter. The associate justices' perceptions of the strategically important chief justiceship should be solidly formed by now--in his seventeenth Court term Warren Burger has surpassed the tenure of his predecessor, Earl Warren, and is fourth in length of service among the 15 Chief Justices of the United States.

The comparative wisdom or senility of the justices, and the perceived effectiveness or ineffectiveness of Chief Justice Burger, are not very accessible subjects of investigation at this writing. But perhaps our inquiry is workable, even desirable, at the present time, since the initial impact of many post-1975 Burger Court decisions should be apparent. Prime factor status will obviously be affected by the number of cases decided without Court opinion, and the latter-day Burger Court might be expected to render many such decisions because it is a product of, and it reacts to, the rapidly changing sociopolitical environment of this generation. Yet from 1969 to 1981, it is estimated that only about 5% of the cases decided were without majority opinions (Baum, 1985, p. 116). It is a special phenomenon, and one that may allow special insights into the tactics of the persons serving on the United States Supreme Court in the foreseeable future.

Certain inferences can be made from the routine performance of this Court. For example, some justices are normally expected to write opinions in the "close cases," the 5-4 decisions. One thinks of the more persuasive members of the Court's respective voting/policy preference camps. Even when the Court has no majority opinion, one camp may retain a plurality, and its foremost speaker will probably pick up the pad and pen once again. Since lower courts probably turn first to plurality opinions for guidance, a justice's regular posture may afford him or her greater influence. Under these criteria William Brennan and William Rehnquist are likely to have high prime factor status. When faced with a subject of multiple dimensions, the centrist justices of the past decade (Byron White, Harry Blackmun, Lewis Powell, John Paul Stevens, and the late Potter Stewart) would be most likely to state separate views, so expect one or more of them to have relatively high prime factor status. This leaves Warren Burger, Thurgood Marshall, and Sandra Day O'Connor. Burger, as Chief Justice, often selects the writer of the key opinion; he may strategically position himself as a voter and author.

Such positioning may subtract from potential writing opportunities of others in his voting camp, while improving his chances of participating in the ultimate plurality opinion. The remaining two justices, their respective voting camps dominated by others, would be expected to write the smallest fraction of total opinions cited, and therefore would not be expected to achieve prime factor status based upon authorship alone.

Marshall's "tagalong" prime factor status is another story. His record for voting with Brennan is strong (see, e.g., Figure 4-2 of Baum, 1985), which strengthens his influence if Brennan does in fact author many plurality opinions. Burger and now O'Connor (Scheb & Ailshie, 1985) belong to the Rehnquist camp, but their voting relationships do not as yet rival the Brennan-Marshall alignment. Moreover, O'Connor's tenure on the Court is so relatively short and so very recent, few occasions have arisen (outside the majority opinion norm) for lower-court judges to examine her logic. The centrists should make a great difference, if only by casting their lots as they see fit. When not writing on their own they will almost certainly join in the opinions of others. (Note, too, that any justice can both write alone and join another opinion at any time.) Even if White and Stevens have recently shown greater propensity to ally with the Rehnquist and Brennan camps respectively (see, e.g., Tables 3 & 4 of Scheb & Ailshie, 1985), these multifaceted cases may encourage them to "shop around" for the strongest opinion, or to write their own opinions when they otherwise would not. Given the possibilities for increasing one's status, it may even be that the non-plurality and dissenting opinions of a single justice are cited as part of "LCD's" (that is, cited as legally controlling) more often than the average justice's plurality opinions.

C. A Caution About Improper Acknowledgement of Precedent

When citing, as controlling, a Supreme Court decision without majority opinion, a judge may sacrifice style to pinpoint substance; that is, the quotations and paraphrases taken from such decisions are apt to blend the thoughts and ideas of a number of justices, many times without ample acknowledgements. A thorough lower-court jurist, when discussing the elements of a collegial judgment of the nation's highest court, might write: "Justice A was of the opinion that . . . and was joined by Justice B . . . . Justice E's opinion concurring in the judgment said . . .," and so on, giving page citations. Many judges, unfortunately, have neither time nor desire to be so painstaking, and so may employ various types of "shorthand."

One style is to put a footnote after the holding, as analyzed in the lower-court text, and admit that it is derived from two or three different opinions, crediting the respective authors but not those justices who joined in each opinion. Another is to cite pages of the Supreme Court text and include, parenthetically, "plurality opinion" or "A, J., concurring." Occasionally a judge will neglect to mention that the statement cited is not from a majority opinion; when only the directive "See" is given with a page number, the casual reader cannot know if the point of law is considered a long-settled one, or if it is dictum, and its author and other supporters go unacknowledged.

Judges not giving credit where credit is due is a problem extending beyond the additional footwork it causes students of the law, because the impressions the lower-court texts make may be misleading to the lay-person. The distinctions between considered dictum and clear precedent are meaningful, but improper acknowledgements muddy the already murky judicial waters. Around these obstacles a proper research method must be structured, and to this our attention now turns.

CHAPTER IV

AN APPROACH TO THE PROBLEM

A. Scope and Method

In developing a test for prime factor status, the chief requirement is to find a way of checking the voting/opinion alignment of the Supreme Court rapidly for a large number of cases, in order to extract those without majority opinions and to know who participated in what opinions. An up-to-date check of citations in subsequent lower court decisions must also be available. Some standard acceptable in the field for determining if a case has been followed must be adapted to our present needs. Lastly, as brought out in the preceding chapter, a system of attributing citations to individual justices and quantifying them is necessary.

But first the focus of research must be sufficiently narrowed, for even with the comparatively low percentage of decisions handed down without majority opinions, the total number of citations to these cases in the various state and federal jurisdictions will be vast. A more or less "typical" jurisdiction must be chosen for study, one more likely than most any other to yield results reflective of the nation as a whole. (A systematic approach in its "infancy" is best served in this manner.) For its medium size, geographic centrality, and overall socio-political typicality, the organization of lower federal courts under the umbrella of the United States Court of Appeals for the Sixth Circuit is examined here (see Appendix A for details of the rationale behind choosing the Sixth Circuit).

Having chosen the Sixth Circuit as the focus of lower-court inquiry, our concerns turn to the data collection method. It has its pitfalls, but these are surely outweighed by its availability, relative ease, inclusiveness, and most importantly, speed. West Publishing Company's WESTLAW Computer-Assisted Legal Research System, integrated with McGraw-Hill's Shepard's United States Citations (Case Edition), is utilized. This system will retrieve 58 documents containing one or both of two specially selected phrases common to decisions without majority opinions. Two of these documents must be thrown out since they contain only references by justices to past announcements of judgments. The general breakdown of the 56 remaining post-1975 decisions is discussed below.

For the Sixth Circuit, no subsequent citations of 13 of the cases were discovered; the 13 included (predictably) the seven most recent Supreme Court decisions in the list. Of the six older decisions (decided from 1977 to 1981), two involved capital punishment (a staple subject of litigation) while the others addressed jury size, at-large elections, unemployment compensation, and double-trailer trucks, respectively. That the judges of this jurisdiction have not yet faced an opportunity or otherwise felt obliged to cite decisions arising from unique circumstances such as these (comprising 12% of the list, excluding the most recent decisions) should hardly be surprising. At any rate, nearly 9 out of 10 of the older decisions have been mentioned at least once by at least one judge.

How the remaining 43 cases have been "treated" in the Sixth Circuit is only a bit surprising. The earlier discussion of "least common denominators" suggested that lower-court judges would either struggle _not_ to follow these decisions as controlling, or struggle _to follow_. According to _Shepard's_ (a recognized standard in the field), only 17 of the 43 decisions cited (40%) have been followed as controlling in at least one subsequent case from the Sixth Circuit. Yet only five of the 26 cases deemed not applicable to this study have been criticized, questioned, or distinguished by authoring judges of the Sixth. An explanation of the prior case, or the underscoring of a well-established proposition of law, or else the invocation of the Supreme Court by a dissenting lower-court judge, is the usual reason for citation.

Finally the actual case citations of circuit and district court opinions which have followed as controlling the 17 decisions without majority opinions are retrieved, so that the "least common denominators" may be examined. Of the 17 decisions deemed by _Shepard's_ to have been followed, three were cited in solitary instances, each cited in passing. These (_Moore v. City of East Cleveland_, 1977; _Lockett v. Ohio_, 1978; and _Guardians Ass'n v. Civil Service Comm'n_, 1983) are not considered. Three other ambiguous references appeared among the 14 remaining decisions, as did one reference which meets all criteria of specificity but is mistakenly labeled by _Shepard's_ as "controlling" (it is little more than flowery dictum on the Chief Justice's part--see _In re Webb_, 1984). (Even the recognized standard has its deficiencies.) The omission of these four citations from the final tabulations does not entirely eliminate the Supreme Court decisions to which they refer from quantification, since other sufficiently specific references occur.

To find out which Supreme Court justices the judges within the Sixth Circuit have relied upon in the past decade whenever a majority opinion was nonexistent, all that is left is the counting. The above method demonstrates that using electronics now is mostly superior to waiting for paperback reporter and citation supplements to arrive in weeks or months. Replication is comparatively fast and efficient, and the system and others like it are now widely available in law libraries. (See Appendix B for a detailed explanation of the system's use in this study.) Our next task is to examine the data that has been generated.

B. Selective Analysis

In preparing to quantify the participation of the justices in the opinions cited by the lower courts, it is worthwhile to review the general subject matter of the Supreme Court cases, and at the same time to examine how a few of the 17 lower-court writers have managed to follow these decisions without majority opinions. The assertion in Chapter II that the most controversial issues cause the Court to fail to produce authoritative opinions is here reinforced. Yet in spite of the status of these decisions, a number of them have undeniable impact upon our daily lives.

Of the 14 cases, four implicate the First Amendment, three question the admissibility of evidence at trial, two discuss the right to privacy, two examine racial discrimination, one involves the illegal seizure of a person under the Fourth Amendment, and the remaining two question particular methods of courts. To categorize them by popular (rather than legal) issue, three involve drugs, two involve preferential treatment, and one each involves abortion, pornography, censorship, separation of church and state, open trials, political association, bankruptcy, perjury, and deference to state courts. By either categorization, most of these subjects lend themselves to volatile debate. When the particular facts and ancillary issues of each case also are considered, it is possible to understand why no one opinion captured the essential interpretations of a majority of justices.

It comes as no surprise that the ways in which the Sixth Circuit judges "follow" these decisions are varied. A questionable precedent, being unlikely to reach the heart of the matter at hand, may be incorporated by analogy or logical extension or mere speculation (not that clear precedents are not also subject to this at times). Take for example the plurality opinion in Elrod v. Burns (1976), which concerns possible violation of the prenumbral First Amendment rights of political belief and association (employees of the Cook County, Illinois, sheriff's office claimed to have been fired because of their party identification). It has been cited in the Southern District of Ohio to support the issuance of an injunction, barring that State's civil rights commission from investigating charges of sex discrimination against a Christian school (pending appeal). What is the connection? The plurality stated (427 U.S. at 373): "The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." The lower court held "the concept is equally applicable to the religion clauses of the First Amendment." (Dayton Christian Schools v. Ohio Civil Rights Comm'n, 1984, Footnote 2.)

Another example shows how far "silent acquiescence" may be carried. One question of law faced by the Supreme Court in Walter v. United States (1980) and later by a court in the Eastern District of Michigan (United States v. Tolbert, 1981) was the "abandonment" theory: If a suspect denies or fails to exercise ownership rights to a container not in personal possession and its contents (because claiming the contents would mean criminal prosecution) but nonetheless holds proof of ownership, does the suspect retain a reasonable expectation of privacy in the container? (If so, the contents cannot be examined outside the suspect's presence without a search warrant. The prosecution's theory says no warrant is required; the contents can be used as evidence regardless.) The vote on the outcome in Walter was 5-4 to suppress the evidence, but only the opinion announcing the judgment (Stevens, joined by Stewart) explicitly rejected the "abandonment" theory (447 U.S. at 658, Footnote 11). The concurring opinion of White, Brennan, and Marshall (the only four-justice opinion was the dissent) did not mention the theory at all. Yet the lower court, in citing the two-justice opinion as controlling, noted its assumption that the three concurring justices "must have rejected it [the theory] in order to vote as they did." Thus another majority-supported constitutional standard is purported to exist, even though a "majority of the majority" never explicitly adopted the standard.

The famous "reverse discrimination" case Regents of the University of California v. Bakke (1978) was the basis for a classic "nonholding," the citing of eight justices' worth of opinions to establish the existence of a "clean slate" (followed, oddly enough, by agreement with the ninth justice's stand). The question was whether Title VI of the Civil Rights Act of 1964 implies a private cause of action for damages. Noting that everyone except White refused to address the issue (all eight agreeing that it was improperly raised for the first time in the Supreme Court), the lower court determined (as did White) that no such private remedy exists (Detroit Police Officers' Ass'n v. Young, 1979). Thus four opinions and every one of the justices were credited so that the district court could feel justified in interpreting the law for itself.

Lest anyone think that Bakke is the exception to the rule, that Supreme Court decisions such as these must have minimal impact on American constitutional law, take note of the other "headline makers" in this collection. Richmond Newspapers, Inc. v. Virginia (1980) established the constitutional right of public access to criminal trials. Fullilove v. Klutznick (1980) upheld the constitutionality of a 10% set-aside for minority business enterprises in public works projects funded by congressional appropriation (with three of the six who voted for the outcome--as well as Stevens in dissent--all demanding some proof of past racial discrimination before allowing such an affirmative action program to be implemented). Board of Education v. Pico (1982) established First Amendment limitations on the banning of books from school libraries, citing a constitutional right of access to ideas with which persons in charge may disagree. Truly, decisions without majority opinions are capable of making their mark on history; and after all, they often represent the first or only High Court dispositions of the given issues.

C. Findings

The courts of the Sixth Circuit have extracted 23 "least common denominators" from 14 questionable Supreme Court precedents decided after 1975. In 14 instances only one opinion per decision has been cited; 10 times this was the plurality opinion, four times the nonplurality opinion announcing the Court's judgment. In the other nine instances, more than one opinion per decision have been cited; four of these times there were at least three different opinions cited. Proportionately, over 43% of the "LCD's" are based solely in official opinions of three or four justices, and over 17% are based in official opinions of one or two justices, a total of nearly 61% relying on the opinion announcing the judgment and no other. At the same time over 17% are based upon three or four different opinions. (See Appendix C.) These numbers indicate that justices with flexibility will lead in total citations credited, because of their willingness to write for or join a variety of plurality configurations, and because their concurrences can be cited with plurality opinions to establish majority consensus for specific points of law (in holdings or considered dicta).

Table I arranges all 23 instances of favorable citation in rank order by justice and by the mode of participation resulting in each

TABLE I

Participation of the Justices in Post-1975 Decisions Without Majority Opinions for All Times Opinions Were Followed Within the Sixth Circuit

Mode	P	(P)	C	(C)	(J)	J	(D)	
Times	48	18	14	10	7	3	1	(n=101)
23								
**								
12	Wh							
*								
*								
9	Ma							
8		Br						
*								
6	Bl Stv							
5	Bu							
4	Po	Re	Ma		Po			
3	Oc	Bu	Bl	Stv				
2	Stw		Br	Br Po Stw	Stw	Re		
1	Re	Wh Bl Po	Bu Wh Re Oc Stw	Re	Stv	Stw	Stv	

<u>Note</u>--Total credits for all citations are as follows:

White	14	Blackmun	10
Marshall	13	Burger, C. J.	9
Brennan	12	Rehnquist	9
Powell	11	Stewart	8
Stevens	11	O'Connor	4

For complete explanation, see the List of Symbols and Abbreviations, p. viii.

justice's credits, with total credits listed in the Note. (The modes of participation are ranked by their frequency in citations.) To illustrate, in the 23 instances there are 48 examples (not necessarily all different) of justices joining the cited plurality opinion (the most frequent mode of participation), and Justice White's vote accounts for 12 of those examples (see Table I, column 1, row 1). White leads this category; he also leads in overall example credits with 14.

Table II is arranged the same as Table I with one important difference: it is calculated on a per decision basis. On the rows under "438 265" (Bakke) in Appendix C, Justice Powell is credited four times for the same opinion, his solo effort announcing the Court's judgment. Justice White, on the other hand, is credited by a single lower court for his concurrence in Bakke (written outside the plurality he joined). By per decision tabulation, Powell and White receive one credit each, because each justice has been cited by at least one court for his opinion in Bakke. (This avoids the skewed results created by oft-cited cases.) Thus in 14 Supreme Court decisions cited within the Sixth Circuit, 29 examples (all different) of justices joining in the cited plurality opinion appear, with White's vote accounting for six of these. His overall per decision credits total 8. Moving from Table I to Table II alters White's prime factor status significantly, in a negative fashion.

Table I gives the appearance that Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist are within striking distance of Justices Brennan, White, Marshall, and Stevens in the top participatory

TABLE II

Justices' Participation in Opinions Followed Once or More Within the Sixth Circuit for Each Post-1975 Decision Without a Majority Opinion

Mode	P	C	(P)	(C)	(J)	J	(D)	
Credits	29	14	11	10	3	2	1	(n=70)
14 **								
6	Wh							
5	Ma Stv							
4		Ma	Br					
3	Bu Bl Po	Bl		Stv				
2	Stw	Br	Bu Re	Br Po Stw				
1	Re Oc	Bu Wh Re Oc Stw	Wh Bl Po	Re	Po Stv Stw	Re Stw	Stv	

<u>Note</u>--Total credits for all decisions are as follows:

Stevens	10	Powell	7
Marshall	9	Stewart	7
Brennan	8	Burger, C. J.	6
White	8	Rehnquist	6
Blackmun	7	O'Connor	2

For complete explanation, see the List of Symbols and Abbreviations, p. viii.

categories (joining, writing plurality opinions). The Note shows only five credits separating White, the overall leader, from Burger and Rehnquist. The change of calculation in Table II might be expected to elevate Rehnquist and even Burger to higher prime factor status (as suggested they might achieve in Chapter III), because the other justices may have received multiple credits for the same opinions in Table I. The Table I rankings of Stewart and O'Connor are to be expected, since they shared a seat on the bench during this period. (Adding their credits yields a sum of 12, just above the average number of overall credits for the other eight justices.)

The actual effect of the change to Table II (per decision) is to <u>lessen</u> Rehnquist's prime factor status (overall and in participatory categories). Stewart, however, moves to the middle of the pack, despite his abbreviated presence. (If his score were increased in proportion to his absence from the bench, it would be near the top of the Table II list.) Burger remains competitive in times joining the plurality; this squares with his ability as Chief Justice to align himself with the official opinion. Yet Burger joins Rehnquist at the bottom of the rankings overall, along with O'Connor.

In comparing and contrasting the two arrangements of data, one notices that the top six justices in overall credits are the same in both Notes, though not in the same order. The greatest difference between the tables is the leap of Justice Stevens from fifth overall in Table I to first in Table II. The appearance of the five centrists in the top seven for Table II is not surprising (recall Chapter III). The positions of Stevens and White relative to the other centrists gives credence to the earlier suggestion of their possible willingness to "shop around" in situations in which the Court splinters. But Stevens attains highest prime factor status in Table II by equalling his plurality-joining credits with concurrences, nonplurality opinions announcing judgments, and dissents authored. In fact, with 5 credits in the latter categories, Stevens answers a speculation made in Chapter III by exceeding the average credits per justice for the two plurality-participation categories combined (4; 4.4 if Stewart and O'Connor's credits are added together).

By far the most significant finding of this study is that Marshall and Brennan place second and third, respectively, in prime factor status according to either tabulation. One each of the pair tops the second- and third-ranked participatory categories either way. (Note that the plurality author mode, favoring Brennan, and the concurrence-joining mode, Marshall's second best, reversed positions from Table I to II.) Marshall joins Stevens in placing second to White in plurality-joining in Table II. The results for Brennan and Marshall square completely with projections in Chapter III of their chances for having high prime factor status. The theoretical importance of this finding is not to be overlooked.

CHAPTER V

CONCLUSIONS

A. Preliminary

The justices' overall credits are comparatively "bunched up" (the Table II Note contains two 6's, three 7's, two 8's, a 9 and a 10). Because of our use of the Sixth Circuit as our lower-court jurisdiction, however, there is sufficient "breathing room" for inferring a few conclusions worthy of debate and future investigation. First, no one other than William Brennan and Thurgood Marshall can be absolutely certain that the two justices have thought through any strategies which may optimize their chances for superior long-term policy influence. Furthermore, any attempt to define the "political agenda" of either man would lead us down the path of conjecture, even if their voting records can in fairness be tagged "liberal." Yet the results at least imply that, in a chosen collection of decisions, Marshall and Brennan have spent the last decade behaving <u>as "rational" justices would</u>--to a greater degree than their brethren and sister, at any rate. Chapter II hinted at ways these results can be interpreted, however rudimentary our actual knowledge may be, in terms of answering this question: Why them and not the others?

B. Further Inferences

<u>Method in Madness</u>

Were anyone to understand tactical intricacies from the vantage of a United States Supreme Court justice, common sense suggests it would be the most senior justices. There is no substitute for experience, and rank, of course, has its privileges. Brennan, the elder justice in both applicable senses of the term, and Marshall, third in seniority (shy of second by a handful of years), obviously fit the bill. Moreover, the man in second, Byron White, tops one ranking of prime factor status and places high in the other; as noted earlier, the former number two in tenure, Potter Stewart, might have done similarly well had he not exited the High Bench when he did. Interestingly, these are the holdovers from the Warren Court, often accused of "improper" judicial activism. Can it be speculated that John Paul Stevens, next to last in seniority now but prolific in writing separate opinions later cited (see Table II), has somehow assumed the vestiges of office of his predecessor, the very most senior William Douglas?

Tenure alone cannot explain the relative success of Marshall and Brennan in seeing their inclinations prevail in the aftermath of judgments without Court opinions; the judicial savvy seniority connotes clearly might. Consider for the moment the climate the justices have to function in, and do, as well or better than anyone else. It has been argued that willing implementation of controversial, politically charged Supreme Court decisions need not be either automatic or inevitable (Wasby, cited in Baum, 1983, p. 192). Much like the opening tip-off of a basketball game, lower-court judges may bat the rulings around seeking a logical advantage in them. Justices, perhaps with innate talent or perhaps with not-so-accidental tactics, may stand ready to pick up the "ball" for judges, taking silent credit for "assists" to their own policy preferences. Under such conditions, what would the "rational" personas of Brennan and Marshall think and do?

Brennan and Marshall have popularly perceived roles on the Court. Evidence suggests that they, along with Stevens today, will be on the minority side of most 5-4 votes that the media cast as "conservative over liberal" ideological battles. With such "underdog" expectations prevalent, our duo (known as quite principled men) is encouraged to strive for a higher degree of voter bloc cohesion than another bloc might achieve during deliberation of an exceptionally hard case. Those times when "the other side" falls apart, theirs might preserve the ever desirable plurality, the basis for a potential majority and most conspicuous of nonmajority opinions otherwise. This is a particularly plausible goal when the maneuver-capable Chief Justice, in this case Warren Burger, has rarely been convincing to our duo, and in fact is a member of a rival bloc.

The numbers reveal that, as the cited decisions go, our duo excels at participating in plurality opinions. The other key avenue for the two men's influence has been concurrence in judgments; tactically this is a sensible route. To keep deeply held, alternative viewpoints out front by agreeing in part of the dominant opposition's logic is to keep the audience thinking and choosing. It might be thought of as "concurring with a vengeance." If Marshall or Brennan perceives the other's separate opinion, or a plurality's rationale, or others hinting at or acquiescing in one of his preferred positions, he might zero in on that issue in his writing; he thereby offers lower courts opportunity to discern a new "doctrinal trend" of the "Court majority."

The importance of the use of separate opinions is highlighted by the prime factor status of John Paul Stevens. He (as could Marshall or Brennan) may rationally wish to shadow the significance of bloc voting in the eyes of his peers, who (as brought out in Chapter II) might reply to unmistakable opposition with even more cohesive counterbloc voting, a practical blow to the success of the Brennan-Marshall-Stevens axis. Therefore Stevens exhibits reasonable opinion flexibility over time, while at a certain level he is helping to preserve his bloc's clout. This sort of presence may serve as a drawing card for other centrists to enter into potential pluralities or majorities sponsored primarily by Brennan and Marshall. Furthermore, the popular understanding of Marshall, Brennan, and Stevens as a bloc may carry over into the thinking of lower-court judges, who may look very hard to find points of implicit agreement among the three justices' opinions, even when they have not officially "signed on" with one another. Such mental linkages may color the various readings of fragmented High Court decisions.

If any of the above submissions approach accuracy, Byron White's prime factor status is at first glance an enigma. Yet White may cast himself as a societal and institutional "norm enforcer," a justice who always tries to be part of a majority coalition voicing views a majority of Americans supposedly hold. If this is the case, he would necessarily become a habitual plurality-joiner, which in turn would enhance his long-term influence (regardless of the true national concensus). He may lean toward the Rehnquist-Burger-O'Connor bloc, but he is just the type of centrist Brennan and Marshall might win over to their side occasionally (at least they might isolate him in a separate opinion), thereby diluting the rival bloc's power.

Where the Others Falter

Chief Justice Burger, as expected, fared better than his Court allies Rehnquist and O'Connor in prime factor status. Perhaps when the going gets tough, the Chief goes shopping, to find a way to write or assign the most populous opinion and increase his influence. Were his relationship with William Rehnquist as steadfast as that between Brennan and Marshall appears to be, it could be guessed that Burger would regularly share the honors of authoring his favored plurality opinions with his articulate ally and fellow Nixon appointee. The raw numbers do nothing to dispute this hypothesis; with 2 plurality-writing credits each, to Brennan's 4 and Marshall's 0, Rehnquist and Burger seem to match their rival bloc's influential performance. But the truth is they are rarely cited in the Sixth Circuit for the same plurality opinion (see Appendix C). In his own way Rehnquist may be more doctrinal than either Marshall or Brennan, and so may choose to concur or even dissent rather than compromise on some issues; this could explain why he and Sandra Day O'Connor will find themselves separated from the Chief Justice's pluralities from time to time.

This creates interesting possibilities for Harry Blackmun and Lewis Powell, as it may have for Potter Stewart in his time. Each of these justices can remain uncommitted to any bloc and therefore have more influence with each bloc. They can bargain for issue compromise and opinion assignments with greater ease than their fellows when the Court divides sharply. If no side shows sufficient adaptability, they can use their crucial votes to call attention to their independent rationales. Their use of dicta may not overcome Brennan and Marshall's use of bloc tactics in the influence equation, but as long as it allows them an edge over the Chief Justice and friends on occasion and in the long run, it will be just as meaningful.

Of Mathematics and Old Lawyers and Basketball and Shakespeare

A couple of aspects of these conclusions are more bothersome than burdensome. Why, if lower courts have so much discretion, are there not more "least common denominators" composed of opinions other than those announcing the Supreme Court's judgments? Previously suggested was that there is safety in the most populous opinion. Moreover, the impact of considered dicta upon public policy is dependent upon public readiness to put the justices' words to the test of the lower courts, by citation in briefs. Briefs are the artistry of the lawyer, and conventional legal wisdom still calls for the use of strongly supported precedent. The hesitance to cite dicta is understandable when it is remembered that most all judges are lawyers, and would be assumed to adhere to the same wisdom. The fact that judges will bend the law to their own inclinations and logics is another example of the privilege of rank; the bold attorney will challenge the judge to exercise prerogative, and may be the more successful for it. Critics say there are already too many bold lawyers, drafting new laws in the guise of interpreting old ones; so it goes.

The other aspect worth questioning concerns our portrayals here of the "rational" Brennan and Marshall. Are they really any more than two old men trying to make the best out of bad situations? Our hope is that, if they are conscious of their talent for getting cited for positions mapped out in decisions without Court opinions, they are utilizing strategies not to the detriment of their institution, but to its benefit. If they desire the kind of compliance associated with a majority opinion, they can work for one; if not, they should be free to make their own thoughts on public policy as accessible as anyone else's will be. After all, a "better case" in which to develop their principles may never reach the Court. All is not lost for them or like-minded jurists thanks to such use of their prerogative, however upsetting it may be to traditionalists. (One cannot help but snicker at the irony of Thurgood Marshall, in occasional practice, "outmarshalling" John Marshall!)

If the only lesson to be learned from a study of Supreme Court decisions without majority opinions is that sometimes a justice or justices are better off forcing a logical "jump ball," the reader may feel slighted. So it is now proffered that any decent examination of the theoretical import of judicial tactics in the more difficult cases of Supreme Court decisionmaking can yield insights into most all judgments. A step in the direction of comprehending this thesis is Lief Carter's recent work on contemporary constitutional lawmaking (1985). Carter (who displays great intellectual respect for--if not overall agreement with--the work of Walter Murphy, respect that a warm blurb for Carter's book indicates is mutual) can be critical of the Burger Court generally (see, e.g., 1985, p. 193), but he is never too harsh with individual justices, who he believes may be captive to their working conditions as well as political realities:

> . . . If we told nine performers to prepare a character, a "dramatic persona," and then to maintain it throughout an extended improvisation, we might then observe, on the "stage," much <u>collective nonsense</u> and <u>much consistency of individual characterization</u> all at once. This is, I think, a plausible characterization of the modern Court. Neither <u>rules, precedents, nor constitutional theories</u> seem to cause results or unite the justices. Rather, <u>individual justices use these tools selectively to create and justify their personal visions</u>. (p. 156; emphasis added)

Carter also provides a sound rationale for avoiding the question of precisely what preferences the justices are seeking to bolster at any given instance; the difficulty for political scientists and others in "discovering preferences," he states, is that "preferences change as conditions change, and . . . the choice of a common standard by which to measure differences in preferences cannot itself be defined by those preferences." (1985, p. 7.) In other words, no one can ever know completely what Supreme Court justices are trying to achieve. Yet selected examples of their "collective nonsense" may provide clues as to how they go about working toward their goals. A few select scenes, depicting the most intense moments of reflection and conflict from a play taking hours to perform (e.g., the "to be or not to be" semisoliloquy, the "play within the play," and the "alas, poor Yorick" scene, all from Shakespeare's <u>Hamlet</u>), serve a purpose analogous to that served for us by decisions of the latter-day Burger Court without majority opinions: the overt actions of the characters establish the scope of, but do not define, their motives, and at the same time may well define reactions of collateral characters a couple of acts or years down the road.

"[Great justices] teach because they communicate, and they communicate because they perform persuasively." (Carter, 1985, p. 193; emphasis added.) There are good performances and bad performances, to be sure, but the important thing for a Supreme Court justice who wants to maintain the respect of his or her peers, and who wants to leave a real social and jurisprudential legacy, is to perform. Thus the question never really has been whether to strive for an "opinion of the Court." To persuade, or not to persuade--that is the question.

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Cases

[Bracketed information includes: name and year of appointment of judge authoring lower court's opinion, for each of 23 citations of lower-court cases found in Appendix C; or an asterisk (*) if a case is included solely in Appendix C and never in the reading; or both.]

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APPENDIXES

APPENDIX A

THE UNCOMMONLY TYPICAL SIXTH CIRCUIT

The subsystem of lower courts chosen for this study must normally deal with federal questions, as does of course the United States Supreme Court, and should contain courts both of original and appellate jurisdiction, to provide a blend of judicial perspectives. One of the federal circuits is appropriate, if the district courts within its organization are considered along with the three-judge and special panels of the circuit court of appeals. As for which circuit to choose, it is best to have one of diverse geography. The ideal is a circuit of more than just one or two states, which combines East and West as well as North and South, comprised of both rural and large urban areas, sustained by agriculture and industry alike, with mountains and river valleys and ocean shores and landlocked regions, all of which stimulate cultural diversity. The comparative size of the circuit used should be medium, not only in number of states but number of judicial subunits (federal districts).

As for the politics and public opinion of the "typical" circuit, it is proper to expect a milieu reflective of the general changes in American society which have taken place since Brennan (the present Supreme Court justice with the greatest seniority) was named to the Court in 1956. Such changes include, among other things, the migration of various peoples among the states, the rise of a vocal minority population, and the growth of industry (both blue-collar/white-collar and service-sector) toward the Sun Belt. Also, since federal judges are appointed by the President with the advice and consent of the Senate (and since varying degrees of senatorial courtesy permeate the nomination process), the voters of the "typical" circuit should be more or less in step with the rest of the nation, supporting electorally those who choose the finders of "least common denominators." If a semblance of party balance is somehow achieved in the appointment process, so that Democrats and Republicans in the White House name roughly equal numbers of "LCD" judges (the only lower-court judges with whom this study is concerned), so much the better.

Finally, the chosen circuit should have experienced a certain degree of judicial stability and normalcy since Brennan's first days on the Court. For example, it should be comprised of the same states now as then. At least one Supreme Court justice should have been named from one of those states since that time, probably to preside over the circuit. Furthermore, for the sake of getting an informational handle on the circuit, it is best that it not be subject to either a continuous flood of litigation (e.g., the Second, Third, Fifth, and Ninth Circuits are likely to be the bastions of overloaded dockets) or to lower-than-average activity (e.g., the First and Tenth Circuits may be able to manage their caseloads without as much trouble as others). Basically, then, the "typical" circuit should be a jurisdiction representative of Middle America which probably (though not necessarily) has been asked to consider as precedent some or all of the post-1975 Supreme Court decisions without majority opinions.

The United States Sixth Circuit (centered in Cincinnati) is almost tailor-made to the purposes of this study. With four states, 10 federal districts, and under 20 federal judges total, it is middle-sized in virtually all ways. Moreover, its geographic centrality is unmatched, with two south-central states (Tennessee and Kentucky) and two north-midwestern states (Ohio and Michigan). The economy varies from the automobile industry (now tied to all four states) to cotton, tobacco, and horses. The same circuit which contains Detroit, Memphis, and Cleveland also encompasses the Upper Peninsula, much of Appalachia, and Bluegrass Country. Bounded by the Mississippi, the Great Lakes, and the Great Smoky Mountains, the region is fortuned with the fertile valleys and commercial (as well as hydroelectric) power of the Ohio and Tennessee Rivers. For the earliest of American pioneers and for a host of immigrants, the land today served by the Court of Appeals for the Sixth Circuit has been home.

Despite the cultural diversity, homogeneity among the four states of the circuit has been promoted by migration of two interrelated types: black flight, to the North after the Civil War and later back to the South; and economic flight to the urban industrial areas of the North, with industrial growth toward the South (especially the partial transplant of the auto industry from Detroit to Tennessee and Kentucky) shifting the gears of society again. The personal and political hardships of integration and busing known in the Sixth contrast with the personal and political innovations experienced there: the consolidation of city and county government in Nashville, the first nonelected

President of the United States in a Michigander, and a presiding (if not homegrown) Circuit Justice who happens to be the first female Supreme Court justice. A native justice has presided over the circuit in recent history in the person of Potter Stewart of Ohio, appointed two years after Brennan, and the four-state composition of the circuit has remained unchanged in all this time.

Politics at the national level has its general trends, visible over the last 30 years in the states of the Sixth. Since 1956 at least 3 of the 4 circuit states have given their electoral votes to the GOP in all but 2 of 8 presidential races (the 1964 Johnson landslide and the 1976 post-Watergate election of Carter). But meanwhile, in the last 10 regular U.S. Senate races in each state, 3 of the 4 states have voted Democrat more often than Republican. Perhaps this has an incidental balancing effect on the judicial selection process--of the lower-court opinions considered in this study, authoring judges appointed by Democratic presidents outnumber Republican presidents' appointees by only one, 9 to 8 (this according to the table of judges in Federal Reporter Second). (For election statistics, see Scammmon & McGillivray, 1981, and Barone & Ujifusa, 1985.)

APPENDIX B

DATA COLLECTION

The search query entered into the Supreme Court ("sct") database (which is keyed to West's Supreme Court Reporter rather than United States Reports) is based upon the material in Chapters I and II (and omits decisions including *per curiam* opinions--see Footnote 1); it is also limited to the period after the retirement of Justice Douglas but before October Term 1985. The query is: DATE(AFT 1975 AND BEF 10/7/85) & "ANNOUNCED THE JUDGMENT! OF THE COURT" "FILED SEPARATE OPINION! IN SUPPORT OF THE JUDGMENT!". As each case was first examined a check of phrase location was made (repeated entry of "t" for "term mode" puts every appearance of a phrase on screen in boldface), revealing the insignificant documents.

A check of the Court's opinion alignment in each of the 56 valid cases is (unfortunately) a two-step process. West's editors provide the names of the author of the official opinion and of all justices writing or joining other opinions within the first few screen pages of each document, in their case summary. For the justices who joined the official opinion--not necessarily whoever is left--a "field search" for that specific portion of the opinion is required (enter "fields" and field number). Despite the additional time involved at this stage (screen paging is slow, as is changing modes), it allows the conquest of the first hurdle--obtaining an up-to-date list of the questionable precedents (enter "L") and the divisions of the drafters.

The next two hurdles in establishing the test are leapt by a single bound into the Shepard's system. By simply "shepardizing" each case on WESTLAW (enter "sz" or hit special key), the accepted reference of the legal profession for subsequent citation and treatment of a Supreme Court decision is on screen in its most current form. In this study, nothing was shepardized earlier that one month prior to the completion of computer research (on November 13, 1985). To find the circuit's designation, merely "page forward"; the cases found to be "followed as controlling" are denoted by "f."

The computer makes calling up the "citing cases" another two-step process; though the process is not without its problems, this time the user can be grateful. A "citing case" may be retrieved by entering its WESTLAW number as listed in the Shepard's system (enter "wl" and number), automatically sending the user to the Sixth Circuit database. By pressing the "enter" key again, the first full citation to the Supreme Court decision appears on the screen. Press again and the next full citation (if any) appears. In WESTLAW, a full citation is defined as the volume and title page of a case as it appears in West's Supreme Court Reporter; care must be taken not to miss any references which lack any of this numerical information, because such references to justices' opinions are not located automatically. The greatest chance for objective error in the entire data collection method is at this stage; inadvertently failing to page ahead far enough is all it takes to distort the data.

Once all references to the Supreme Court decision at hand are discovered in a "citing case," the real problems of conceptualization begin. Any references which do not demonstrate that any one justice's opinion is truly being followed as controlling must be dropped from consideration. This includes general citations to a decision which neither note specific pages of the text nor demonstrate reliance upon a specific writer's line of reason, as well as explanations of facts and other references which do not enter directly into the ruling of the lower court. Such determinations may be scholar-dependent to a degree, but are necessary if true prime factor justices are to be identified.

Chapter II discussed how lower-court judges may use shorthand which demands matching up page numbers to opinion alignment in order to attribute ideas to particular justices. Whenever parallel citations of Supreme Court decisions are omitted or unavailable at writing, the faithful hardcover reporters regain their utility, since WESTLAW is not programmed to allow matching of screen pages to the pagination within opinions in the reporters. Thus the final pitfall in the data collection method is conquered the old-fashioned way.

APPENDIX C

CITATIONS OF POST-1975 SUPREME COURT DECISIONS WITHOUT MAJORITY OPINIONS IN SUPPORT OF JUDGMENTS OF COURTS WITHIN THE SIXTH CIRCUIT

Decisions cited (U.S.) (Vol./Title)		Citations per lower opinion (Cited info begins/#)		Justices participating in each opinion cited by lower court (Bu-Br-Wh-Ma-Bl-Po-Re-Stv-Oc-Stw)										Citing case (Vol./Title)		
Vol.	Title	begins	#	Bu	Br	Wh	Ma	Bl	Po	Re	Stv	Oc	Stw	Vol.		Title
425	564	594	1		(C)		C							545	F2d	548
		609	1					C					(C)			
426	736	747	1	P				(P)	P					485	FS	432
427	347	363	1		(P)	P	P							434	FS	95
		373	1		(P)	P	P							604	FS	101
437	655	664	1			P				(P)	P		P	588	F2d	543
438	265	287	1						(J)					608	F2d	671
		324	9		(P)	P	P	P								
		287	2						(J)					483	FS	930
		325	2		(P)	P	P	P								
		320	1						(J)					494	FS	66
		283	1						(J)					520	FS	5
		324	1		(P)	P	P	P								
		381	1	C						C	(C)		C			
		419	1			C										
443	622	642	1	P					(P)	P			P	479	FS	1172
		652	1		C		C	C			(C)					
446	544	554	1							J			(J)	692	F2d	1041
		554	1							J			(J)	699	F2d	832
447	649	658	1								(J)		J	517	FS	1081

Decisions cited (U.S.) (Vol./Title)		Citations per lower opinion (Cited info begins/#)		Justices participating in each opinion cited by lower court (Bu-Br-Wh-Ma-Bl-Po-Re-Stv-Oc-Stw): Bu	Br	Wh	Ma	Bl	Po	Re	Stv	Oc	Stw	Citing case (Vol./Title)		
448	448	467	2	(P)		P			P					713	F2d	167
		474	1	(P)		P			P					522	FS	338
		496	1						(C)							
		537	1								(D)					
448	555	565	4	(P)		P					P			710	F2d	1165
		592	2		(C)		C									
		599	1										(C)			
457	853	863	1		(P)		P	P			P			556	FS	427
		871	1		(P)		P	P			P			610	FS	577
458	50	88	1		(P)		P	P			P			704	F2d	254
		92	1							(C)		C				
460	491	501	1			(P)	P		P		P			723	F2d	1221
460	730	743	1	P		P				(P)		P		727	F2d	95
		737	1	P		P				(P)		P		743	F2d	1158
		738	1	P		P				(P)		P		744	F2d	1215
		744	1					C	(C)							
		751	1		C		C				(C)					

Note--For complete explanation, see the List of Symbols and Abbreviations, p. viii.

VITA

Phillip Anthony Smith was born in Murfreesboro, Tennessee, on December 11, 1960. He attended elementary and middle schools in that city and was graduated from Riverdale High School as valedictorian of the class of 1979. In August of 1979 he entered The University of the South, Sewanee, and in May 1983 he received a Bachelor of Arts degree magna cum laude in Political Science. Following a year of legal studies at the University of Tennessee, Knoxville, he began study toward the Master's degree, accepting a research assistantship in the Department of Political Science in September 1984.

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