THE REHNQUIST COURT: REVISITING PRITCHETT BLOC ANALYSIS AND GUTTMAN SCALING

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The Rehnquist Court: Revisiting Pritchett Bloc Analysis and Guttman Scaling

I. Introduction

Judicial voting behavior has been a primary focal point in American political analysis since the 1940's. Civil rights, the development of the legal philosophy of affirmative action, abortion rights, and separation of church and state have been major issues in recent legal history. The U. S. Supreme Court has been a primary player in each of these issues. The decisions that have came down from the high court have affected the social make-up of the country and have indeed affected the lives of every American. The Supreme Court's expanding power and its ability to promote social change have made the voting behavior of its justices a very significant topic for analysis.

This Chancellor's Scholar Thesis will begin the process of analyzing the voting behavior of each justice on the current U. S. Supreme Court in civil rights cases. The focus of this study will be the voting tendencies (ideological direction) of each justice on these cases. The cumulative information gathered in this study will be used to predict the probable ideological direction of the Supreme Court in the area of civil rights as well as predicting the probable future of civil rights cases under the leadership of Chief Justice William Rehnquist. Research methods pioneered and tested by C. Herman Pritchett and Louis Guttman will be used to accomplish these tasks. The hypothesis of this paper is that the research should show a trend toward a conservative ideology and a more restrictive interpretation of civil rights laws in the immediate future of the U. S. Supreme Court.

II. Judicial Conversion

Judicial Conversion is the process by which justices process input from the individual cases into written opinions. Why and how judges/justices decide the cases which come before them has been an engaging area of study in the 20th century. The legal and political science communities have expressed a great deal of interest in the motivations of various justices in the federal court system. This interest has developed judicial conversion theory from the traditional concepts of mechanical jurisprudence into the modern day judicial behavioral movement. The following sections will outline the development of the study of judicial conversion.

A. Mechanical Jurisprudence

The first traditional theory of judicial conversion is descriptively referred to as mechanical jurisprudence. This theory was the accepted explanation of judicial conversion dating back to the early English heritage of law from which our legal system was modeled.[1] The theory was simply summarized in the infamous words of President Calvin Coolidge when he said, "Men do not make laws. They do but discover them."[2] Judges, in other words, make exact, logical, and totally objective decisions about the cases which come before them.[3]

One of mechanical jurisprudence's most ardent supporters, Justice Owen Roberts stated, "This Court neither approves nor condemns any legislative

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[1] Sheldon Goldman and Thomas P. Jahnige, The Federal Courts as a Political System, Second ed. (New York: Harper & Row, 1976), p. 156.

[2] Ibid, p. 155.

[3] Ibid, p. 156.

policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or contravention of, the provisions of the Constitution."[4] Roberts suggested that the function of the Court was "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.[5]

According to the theory of mechanical jurisprudence, a judgment rendered by a judge or justice was not a judgement at all. Instead it was a simple matter of input and output and the answer is automatically deduced there. The slot machine theory, as it is commonly called, was abandoned by the academic community during the early and mid 1900's because it portrayed justices as mindless machines who had no decision making capability.[6]

B. Legal Realism

The beginnings of the 1900's were filled with an onslaught against the ideas of mechanical jurisprudence. Oliver Wendell Holmes is commonly associated withe the legal realism movement. Legal Realism was defined as the thought that judging was a human process and that judgments were often affected and even decided by the personal opinions of various justices rather than the merits of the individual cases. The members of the realism movement emphasized the tremendous amount of discretion which is afforded judges and the numbers of opportunities that they have to exercise that discretion. This theory was contrary to the idea of slot machine judging and, as one would expect, caused a sizable division in the academic community.[7]

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[4]Ibid, p. 156.
[5]Ibid p. 156.
[6]Ibid, p. 156.
[7]Ibid, p. 156-157.

The legal realists, even at the height of their popularity, only constituted a small minority of the legal community. One reason for this was the lack of consensus on exactly what constituted the doctrine of legal realism. The true distinguishable difference between the realist and the traditionalists was that the realists rejected the idea of mechanical jurisprudence. Other differences were not common enough within the movement to call them a doctrinal norm and the movement virtually died for lack of agreement. However, legal realism is still regarded as the first step away from the slot machine theory of judicial conversion.[8]

C. Attitudinal/Behavioral Approach

During the 1930's, political science began a period of change which separated it permanently from the legal profession. Political realism, concurrently with legal realism, began to gain strength while the traditionalist or institutional interpretation went into decline. Unlike legal realism, political realism developed several areas of agreement which gave its members a foundation to defend itself against challenges. This common foundation led to theories which were much more tangible. The academic community was less willing to write off the theories as in the case of legal realism. Instead it gave birth to a whole new approach to political analysis which resulted in the development of Pritchett Bloc Analysis and Guttman Scaling.[9]

Political realism as it relates to judicial conversion is referred to as the behavioral or attitudinal approach. The behavioral approach is a concept which developed as a result of the trends in the legal profession. The political

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[8]Ibid, p. 156-157.
[9]Ibid, p. 157-158.

behaviorists explored the idea of non-mechanized conversion. They began behavioral testing through the use of judicial biographies, political histories of the Supreme Court, case studies, descriptive studies of justices' socio-economic characteristics and records of interest groups attempts to influence the decision making process of Supreme Court justices. These studies were aimed at discovering a previously undetected factor which affected the decision making process of judges. The first major discovery was made during the early stages of political realism by Professor C. Herman Pritchett.[10]

[10] Ibid p. 158.

III. Ideology

Ideology, or "the doctrines, opinions, and beliefs of a person"[11] has been shown by psychologists and political scientists alike to affect the decision making process of most people.[12] Ideologies are systematic patterns of . . . thoughts and beliefs.[13] These beliefs are molded by a series of life experiences which affect the way an individual perceives reality.[14] This perception of reality will affect the manner in which decisions are made. For example, a person who has grown up in the inner city of large metropolitan area with few financial resources will have a substantially different perception/attitude toward homeless people than that of a middle class suburbanite in the same area. This attitudinal difference, according to behavioralists, should cause measurably different responses from the two individuals if they are asked to decide the fate of a homeless person who is on trial.

"Political ideology is a system of beliefs that explains and justifies a preferred political order, either existing or proposed, and offers a strategy (institutions, processes, programs) for its attainment.[15] This type of orientation makes any system capable to make decisions by giving the system a process to make those decisions (i.e. person, council, panel, jury, etc.). Therefore, any system with the capability of decision-making will have a specific political orientation or ideology. This ideology is a composite of the

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[11] Webster's New World Dictionary of the American Language, Second College ed. (New York: Warner Books Inc. , 1987), p. 299.

[12] James W. Kalat, Introduction to Psychology, (Belmont: Wadsworth Publishing, 1986) Ch. 19.

[13] Reo M. Christenson, et al, Ideologies and Modern Politics, Third ed. (New York: Harper and Row Publishers, 1981), p. 5.

[14] Sheldon Goldman and Thomas P. Jahnige, p. 177.

[15] Reo M. Christenson, et al, p. 4.

individual ideologies or actors in the larger system and the cumulative ideology acts as a guide for the decision-making process within the system.[16]

For example, a particular panel may consist of persons having vastly different views or ideologies. If the panel is to make any decisions, it must first agree upon the process (regardless of the degree of complexity) for making those decisions. The group must then follow the agreed upon process to come to a consensus or decision of the group. While the individual actors in the system would probably have approached a problem from several angles and came up with several different answers, the group by virtue of the panel approach is forced to alter the individual responses into one specific answer which incorporates most of the individual orientations into one response which expresses the orientation of the group as a whole.

Likewise judicial ideology, or the legal doctrines, attitudes, and beliefs of a judge[17] have been shown by judicial behavioralists to guide the decision making process of most justices.[18] Not until the early 1940's, however, was a realistic theory formulated to explain this phenomenon. C. Herman Pritchett demonstrated that "... all courts, but especially the [U. S.] Supreme Court, are political actors whose [ideologies] are often decisive in shaping their votes and opinions."[19] Louis Guttman followed up on Pritchett's research by formulating a mathematical scale which "not only indicated the ideological orientation of a judge [or justice] but also indicated the intensity of that orientation."[20] Research by both Pritchett and Guttman has shown a direct positive correlation

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[16]Ibid, p. 4-17.

[17]Webster's New World Dictionary of the American Language, p. 299.

[18]Sheldon Goldman and Thomas P. Jahnige, p. 155-172.

[19]C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947, (Chicago: Macmillan, 1948), p. xii.

[20]Sheldon Goldman and Thomas P. Jahnige, p. 165.

between the votes of Supreme Court justices and their ideological/political orientations.[21] By using the theories of both Pritchett and Guttman on past decisions of the Court, the ideology and the intensity of that ideology can be empirically deduced. The cumulative information from these studies can be used to make calculated predictions of how the court will operate as a whole in the future.

Given a steadily growing number of landmark cases, the tendency of special interest groups to take their agendas to the legal arena, and the growing partisanship within the Supreme Court, there is a considerable amount of interest in the "doctrines, opinions, and beliefs (ideologies)"[22] of the members of the Court. This interest peaks when there is an apparent shift in the ideology of the court as justices from the controlling orientation leave the Court and are replaced by justices of another orientation. The members of the majority ideology wish to maintain control of the court and therefore retain control of the manner in which laws are interpreted and applied. The members of the opposition, on the other hand, are looking for an opportunity to have their ideological agenda expressed and have the laws of the land applied in a fashion that is concurrent with their beliefs.

This interest has been no more evident than the series of Senate confirmation hearings which eventually led to the appointment of Justice Kennedy. The hearings became a platform for a war of words characterized by ideological concerns. At stake was the crucial fifth vote in the U. S. Supreme Court. These hearings saw numerous witnesses on the relative competence and fitness of the three presidential nominees. All three nominees were self

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[21] Glendon Schubert, Quantitative Analysis of Judicial Behavior, (New York: Free Press, 1959) pp. 99-127.

[22] Webster's New World Dictionary of the American Language, p. 299.

proclaimed conservatives. They were supported by the United States Bar Association, the National Right to Life Organization and the Republican National Committee (RNC). The nominees were also heavily opposed and challenged by traditionally liberal organizations such as the National Organization for Women (NOW), the American Civil Liberties Union (ACLU), and the National Association for the Advancement of Colored People (NAACP).[23]

This shift from one ideology while being seemingly uneventful, has had a long lasting effect on the laws which govern the United States and has resulted in a profound change in the culture over time. For example, during and after the Roosevelt Era of the court, the judicial activists gained control of the court after an extended period of judicial restraint.[24] From 1940 until the late 1960's activist appointments dominated the Court.[25] This shift in power essentially took the power of the Supreme Court from the laissez faire law makers, who had held control since the 1880's[26], and placed that control into the hands of the judicial activists. This resulted in what is considered the high point in judicial activism and civil rights decisions within the Supreme Court under Chief Justice Warren.[27]

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[23]Ann McDaniel et al., "Will the Court Turn Right?", Newsweek, July 6, 1987, pp. 16-18.

[24]Sheldon Goldman and Thomas P. Jahnige, p. 232.

[25]David C. Saffell, The Politics of American National Government, Fifth ed. (Boston: Little, Brown and Company, 1983), p. 375.

[26]Sheldon Goldman and Thomas P. Jahnige, p. 8.

[27]Ibid, p. 277.

IV. Judicial Restraint vs. Judicial Activism

A. Judicial Restraint

Upholding precedent [*stare decisis*] or those laws and interpretations of laws which have been established and reviewed substantially by past court decisions has historically been the typical role of the Supreme Court.[28] *Stare decisis* is a Latin phrase which means to abide by or adhere to decided cases. The principles of this legal philosophy were laid out in the cases of *Neff v. George* and *Horne v. Moody*. In those decisions, ironically, a precedent was set which stated it would be the "policy of the courts to stand by [the established legal philosophy] and not disturb [a] settled point."[29] The decisions also stated that "when [a] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same."[30] This philosophy became the rule of thumb for courts in the United States during the late 19th and 20th Centuries and the ideologue which followed this philosophy became know as conservatives.[31]

For the purposes of this research, conservative will be defined as voting behavior which is oriented toward adherance to the concept of *stare decisis*, the strict limitation of the courts from creating laws, and the distribution of power to the executive and legislative branches of the state and federal government in civil rights matters.

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[28] Henry R. Glick, Courts, Politics, and Justice, Second ed. (New York: McGraw-Hill, Inc., 1983), p. 8.

[29] Black's Law Dictionary, Fifth ed., (St. Paul: West's Publishing Co., 1979), p. 1261.

[30] Ibid, p. 1261.

[31] Sheldon Goldman and Thomas P. Jahnige, p. 232.

B. Judicial Activism

During the Franklin D. Roosevelt administration, however, the role of the Court began to change as judicial activists or liberals began to enter the ranks of the high court. This new ideology held the philosophy of judicial review in higher regard than that of *stare decisis* Judicial review is the philosophy which states that the courts, and especially the Supreme Court, have the power to review the actions of the Congress, the President and the Executive Branch, the states, as well as other courts.[32]

Judicial activism is defined as "any judicial decision that changes past patterns of judicial policy or [*stare decisis*] precedent.[33] The judicial activist (liberal ideology) is primarily one who believes that the Supreme Court should play an active role in the development of laws and regulations. This role often includes the review of actions taken by other branches of government and the actions of lower state and federal courts.

For example, in *Brown v. Board of Education* (1954, 1955) the U. S. Supreme Court declared that the state laws requiring racial segregation of the public schools were unconstitutional.[34] This decision was considered to be judicial activism because it clearly ignored and overturned the established precedent which had previously allowed the practice for almost one-hundred years. The decision also overruled a number of state legislatures. While the difference between judicial activism and restraint seems fairly clear, the definition become clouded and contradictory very easily. *Brown v. Board of*

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[32]Ibid p. 232.
[33]Henry R. Glick, p. 308.
[34]Brown v. Board of Education of Topeka, 347 U. S. 483 (U. S. Supreme Court, 1954).

Education(1954, 1955)[35], as stated earlier, was originally considered to be a very activist decision. However, the adherence to the legal principle of Brown v. Board by the lower courts in later cases would eventually establish a legal precedent. Therefore, the adherence to the legal precedent of Brown v. Board, which was originally an activist decision, ironically becomes an example of judicial restraint.[36]

This philosophy of the judiciary having the power to review other branches of government had its beginnings with the case of *Marbury v. Madison*

> William Marbury was to become a special justice of the peace in Washington, D. C., but he was not given his appointment papers by the time the Federalist [party members] left office. He sued James Madison, the new Republican secretary of state, for refusing to complete the appointment process. In a shrewd political move, Chief Justice John Marshall agreed that Marbury should have received the appointment, but stated that the congressional law that had required the Supreme Court to hear this particular case violated the Constitution. Marshall's goals were to object to Republican policy but without ordering the administration to carry out the appointment, since it probably would refuse to comply. A confrontation between a new popular President and the Federalist dominated Supreme Court would focus unavoidable attention on the Court's inability to enforce its own decisions. But at the same time Marshall proclaimed that the Court had the power to review acts of Congress.[37]

For the purpose of this research, liberal will be used to describe that voting behavior which is oriented toward judicial activism and the use of the judicial review legal philosophy to expand the powers of the U. S. Supreme Court in civil rights matters.

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[35]Ibid.
[36]Henry R. Glick, pp. 308-309.
[37]Ibid, p. 38.

C. Conflicting Ideals

Judicial review and its role in policy-making, at least initially, has been thought to be the chief area of disagreement between the liberal and conservative ideologues.[38] This conflict can better be described from the perspective of the right/power to make policy and who has the power. A conservative justice would suggest that policy-making is the responsibility, according to the Constitution, of the legislative and executive branches of government and that judicial review should be used sparingly and then only in case of a crisis. A liberal, on the other hand, believes that the original intent of the constitution combined with the concept of judicial review justify and even suggest that the court should play an active part in policy-making to protect the rights of the individual and to prevent the government from becoming too powerful.[39]

The area of greatest conflict between the respective ideologues in the last twenty years has been in the area of civil rights and liberties. Civil rights and liberties in the United States are [powers and privileges[40]] granted to individuals[41] within the country legally (i.e. citizens, legal immigrants, foreign visitors with visas, etc.). The liberal ideology believes that individual fulfillment should not be subject to control of any government.[42] They have therefore, through judicial activist interpretation of law, used the Supreme Court to limit the federal and state government power while giving the

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[38] Ibid, pp. 307-311.

[39] Personal interview with Robert Schneider, Chairman of Pembroke State University's Political Science Department, Pembroke, North Carolina, March 1990.

[40] Webster's New World Dictionary of the American Language, Second College ed. p. 515.

[41] Words and Phrases, Permanent ed. (St. Paul: West Publishing Company, 1952), p. 435.

[42] The Encyclopedia Americana, International ed. (Danbury: Americana Corporation Publishers, 1978), p. 768.

individuals a tremendous amount of freedom and Constitutional protections.[43] The conservatives, on the other hand, have adopted the stand that the activists have expanded the powers of the court beyond the original intent of the authors of the Constitution. They believe that neither the Fourteenth Amendment, which is commonly cited in activist civil rights decisions, nor any other portion of the Constitution was intended to give the federal courts a substantial amount of power in the area of domestic or foreign policy making.[44]

D. Transition of Power

Since the 1930's the liberal ideology has been a powerful force in the legal community and has resulted in a shift in the ideological direction of the U. S. Supreme Court away from a conservative ideologue. This shift, while being seemingly uneventful, has had a profound impact on the laws which govern the United States and has changed the culture over time. For example, during and after the Roosevelt Era of the court, the judicial activists gained control of the court after an extended period of judicial restraint.[45] From 1940 until the late 1960's activist appointments dominated the Court.[46] This shift in ideological direction essentially took the power of the Supreme Court from the *laissez faire* law makers, who had held control since the 1880's,[47] and placed that control into the hands of the judicial activists. This resulted in

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[43]Sheldon Goldman and Thomas P. Jahnige, p. 129, 233, 283.
[44]Henry R. Glick, pp. 309.
[45]Sheldon Goldman and Thomas P. Jahnige, p. 232.
[46]David C. Saffell, p. 375.
[47]Sheldon Goldman and Thomas P. Jahnige, p. 8.

what is considered the high point in judicial activism and civil liberty [rights] decisions within the Supreme Court under Chief Justice Warren.[48]

The transition from a *stare decisis* orientation into a judicial review role caused many changes. The Civil Rights Act of 1964 began a new era of legal thought, commonly referred to as affirmative action, as it sought to end discrimination in the work place. Since that time there have been several Supreme Court precedents which have alarmed the conservatives. In *Regents of the University of California v. Bakke* (1978), the Supreme Court decided that the university's admissions program, which was segregated to favor minority students, was unconstitutional because the strict quotas it used discriminated against whites. However, the decision also said that attempting to achieve ethnic diversity was a worthy goal and that the university should continue to search for constitutional ways to achieve the same objective.[49]

The following term, the Supreme Court moved in the opposite direction when it decided in *United Steelworkers v. Weber* that minorities could be given a priority rating in selection processes, but, it was extremely vague in its legal language and did not clearly explain its policy on affirmative action. In 1980, however, the court decided in *Fullilove v. Klutznick* to approve a 1977 federal law which required that 10 percent of all federally funded building projects be given to minority owned businesses.[50]

Since those first cases which established a precedent toward affirmative action, there have been two cases which have solidified the concept into established legal precedent. In *Fire-fighters v. City of Cleveland* and *Sheet Metal Workers v. Equal Opportunity Commission* the majority

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[48]Ibid, p. 277.
[49]Henry R. Glick, pp. 359.
[50]Ibid, pp. 359.

members of the Supreme Court held that hiring and promoting black fire-fighters at the expense of better qualified white workers and enforcing strict quotas for minority hiring were constitutional. The dissenters, led by the current Chief Justice Rehnquist, argued that such quotas were not permitted by law and were clearly reverse discrimination.

V. Pritchett Bloc Analysis

A. C. Herman Pritchett

C. Herman Pritchett, a mid 20th century scholar, was the first political analyst to systematically study judicial bloc voting behavior in the U. S. Supreme Court. He studied judicial voting from an attitudinal or behaviorist approach and emphasized the analysis of Supreme Court voting for the purpose of discovering behavior patterns. Pritchett theorized that voting "blocs' or groups of ideologically similar judges could be found by studying the non-unanimous votes of the court. He also theorized that the ideological position of a justice could be discerned by analyzing the voting behavior of that justice[51] In his book, The Roosevelt Court: A Study in Judicial Politics and Values 1937 - 1947, Pritchett stated,

> A unanimous judicial decision throws little light upon what Walton Hamilton calls "deliberation in progress". It tells nothing of the conflicts around the judicial conference table, the alternative lines of argument developed, the accommodations and compromises which went into the final result. A unanimous opinion is a composite and quasi-anonymous product, largely valueless for the purposes of understanding the values and motivation of individual justices.
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> A non unanimous opinion admits the public to the Supreme Court's inner sanctum. In such a case the process of deliberation has failed to produce a conclusion satisfactory to all participants. Having carried the argument as far as they usefully can, the justices find it necessary finally to take a vote, state and support the winning and losing positions, and place the arguments before the world for judgment. In informing the public of their divisions and their reasons, the justices also supply information about their attitudes and their values which is available in no other way. For the fact of disagreement demonstrates that the members of the Court are operating on different assumptions, that their value systems are differently constructed and weighted, that their political, economic, and social views contrast in important respects. These differences and contrasts are not always evident on the surface of the conflicting opinions. It may be necessary to search out the true causes of dispute, and not all the searchers will come back with the same findings. But that the search is

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[51] Sheldon Goldman and Thomas P. Jahnige, p. 159.

appropriate and essential to a fuller understanding of the judicial process, few will doubt it.[52]

B. Pritchett Bloc Analysis

Pritchett analyzed the voting behavior of the Supreme Court by manipulating the voting information through the use of "matrices of agreement scores (i. e. the percentage of non-unanimous cases in which every two judge combination voted alike)."[53] Matrices of agreement scores were tables which aligned the justices names in pairs **much like multiplication or mileage tables**. The names of the justices would appear on the left and top of the tables and would have the percentage that each pair of justices concurred in a decision. These numbers would be placed on the table in the location which matched the two justices. Once the table was completed, the names and numbers on the chart could be arranged to show a progression from one ideological extreme to another.[54]

Pritchett believed that two ideological extremes existed in every Supreme Court and by analyzing the Supreme Court eras between 1931 and 1984 he established what is now the accepted ideological alignment of justices for that period. He labeled the ideological extremes "conservative and liberal"[55] which conveniently fit into the classifications that are used in this study. The results section of this paper will include a matrices of agreement table for the period beginning with the 1983 and ending with the 1987 terms inclusive of the U. S. Supreme Court.

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[52]C. Herman Pritchett, The Roosevelt Court:, p. xii.

[53]Sheldon Goldman and Thomas P. Jahnige, p. 161.

[54]C. Herman Pritchett, Civil Liberties and the Vinson Court, Third ed. (Chicago: University of Chicago Press, 1969), p. 177-179.

[55]Sheldon Goldman and Thomas P. Jahnige, p. 161.

C. Pritchett Matrices of Agreement Scores

Table 1-1 is the matrices of agreement table which resulted from the Pritchett Bloc analysis testing on the sample cases. The last names of the justices which served in the Supreme Court during the 1983-87 terms are listed along the top and left side of the table. Each justice is assigned to a particular column and row. The columns and rows in this table are prearranged and intended to illustrate the progression from one ideological extreme to the other.

Figure 1-1 Pritchett Bloc Analysis Chart

	Marshall	Brennan	Blackmun	Stevens	Kennedy	Scalia	O'Connor	White	Rehnquist
Marshall	*****	94%	82%	47%	50%	25%	20%	24%	12%
Brennan	94%	*****	78%	48%	50%	26%	18%	26%	14%
Blackmun	82%	78%	*****	49%	63%	36%	29%	33%	25%
Stevens	47%	48%	49%	*****	38%	57%	45%	53%	61%
Kennedy	50%	50%	63%	38%	*****	88%	50%	50%	50%
Scalia	25%	26%	36%	57%	88%	*****	61%	50%	68%
O'Connor	20%	18%	29%	45%	50%	61%	*****	76%	69%
White	24%	26%	33%	53%	50%	50%	76%	*****	80%
Rehnquist	12%	14%	25%	61%	50%	68%	69%	80%	*****

To use Table 1-1, follow these simple guidelines. First, identify the two justices you wish to compare. Then locate one of the two justices along the columns on top of the chart. Once this is accomplished, you can locate the second justice by following the column identified with the first justice from top to bottom until you reach the row identified as the one belonging to the second justice. The number in the cell which corresponds with both the column of the first justice and the row of the second justice denotes the percentage of decisions that the justices in the corresponding columns and rows agreed on the opinions of the cases in the sample. In addition, the series of five stars in the cells (*****) denotes a match of a justice to themselves and, of course, would always be 100% and irrelevant to this study.

VI. Guttman Scaling

A. Louis Guttman

Louis Guttman is Professor of Social and Psychological Assessment at the Hebrew University and has been since 1954. His areas of teaching include Business Administration, Statistics, Psychology, and Sociology with an emphasis on empirical study and development of mathematical laws of behavior. Guttman's primary focus has been to develop technical rather than substantive features of data analysis as it relates to human behavior.[56] Pritchett's research and theories, being highly substantive in nature, became of specific interest to Guttman and so he began developing his own theories of judicial conversion based on the works of Pritchett.

B. Coefficient of Reproducibility

Louis Guttman took the developments of Pritchett and expanded the theories. Guttman felt that if you could empirically establish the ideology of justices of the Supreme Court then that same information could be used to calculate the intensity of that ideology.[57] Guttman established the variable he called CR, which represents the phrase "coefficient of reproducibility". This dependent variable consisted of two independent variables which could be taken from the cumulative scores in Pritchett's Bloc Analysis. These scores were achieved by arranging the scores in descending order on a graph and looking for

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[56]Samuel Shye, gen. ed., Theory Construction and Data Analysis in the Behavioral Sciences, (San Francisco: Jossey-Bass, 1978), p. xvii-xx.

[57]Glendon Schubert, Chapter 3.

inconsistencies in the graph of these votes. These inconsistent votes (denoted as "I") would be totalled for each justice, divided by the total number of votes the justices participated in (denoted as"Tv") and the dividend would be subtracted from the integer one to give the percentage chance that the same resulting vote of a justice would occur again.[58] The resulting formula is as follows:

$$CR = 1 - \frac{I}{Tv}$$

Where **CR** = Coefficient of reproducibility

I = Number of inconsistent votes

Tv = Total Number of votes

To be assured of a suitable sample, the coefficient of reproducibility score must average 90% or greater. The following figures are the result of the CR test performed on the sample cases:

1. **Thurgood Marshall**	CR = 1.00 or 100%
2. **William Brennan**	CR = .977 or 98%
3. **Harry Blackmun**	CR = .953 or 95%
4. **John P. Stevens**	CR = .907 or 91%
5. **Anthony Kennedy**	CR = 1.00 or 100%*
*percentage based an insufficient sample	
6. **Antonin Scalia**	CR = .928 or 93%
7. **Byron White**	CR = .837 or 84%
8. **Sandra D. O'Connor**	CR = ..930 or 93%
9. **William Rehnquist**	CR = .884 or 88%
10. **Average**	CR = .927 or 93%

[58] Ibid, Chapter 3.

The average of the Coefficient of Reproducibility Scores is indeed over the 90% suggested score for this test and are very high considering that the cases having only one dissention were eliminated from consideration.

C. Glendon Schubert and Scalability Scores

Glendon Schubert modified the use of this equation by eliminating the votes which only had one dissention. He suggested that this was a common sense approach to statistics and that it decreased the chance that the (CR) percentage was too high. He also developed a method of testing the (CR) variable for accuracy by predicting the possibility of an inconsistent vote. Schubert did this by taking the (I) variable and dividing it by the total possible inconsistent votes (denoted as "Ip"). The resulting dividend was subtracted from the integer one as was done in the (CR) equation and the total (denoted "S") or scalability was the percentage of probability that the (CR) was correct.[59] The equation for this procedure is as follows:

$$S = 1 - \frac{I}{Ip}$$

where **S** = The scalability of the sample

I = Number of inconsistent votes

Ip = Total possible number of inconsistent votes

The end result of these two calculations is a check of the cases that have been collected. This check establishes whether or not you have a suitable sample to make conclusions on the ideological direction of the Court. A score

[59] Ibid, Chapter 5.

of over 75% on the Scalability equation are recommended for a defendable sample. The following percentages are the results of the scalability tests:

1. **Thurgood Marshall**	S = 1.00 or 100%
2. **William Brennan**	S = .958 or 96%
3. **Harry Blackmun**	S = .917 or 92%
4. **John P. Stevens**	S = .833 or 83%
5. **Anthony Kennedy**	S = 1.00 or 100%*
*percentage based an insufficient sample	
6. **Antonin Scalia**	S = .917 or 92%
7. **Byron White**	S = .708 or 70%
8. **Sandra D. O'Connor**	S = .875 or 88%
9. **William Rehnquist**	S = .792 or 79%
10. **Average**	S = .875 or 88%

The high average scalability score (88%) suggest that a suitable sample has been compiled to make conclusions on the ideological direction of the Court.

D. Guttman Scal-o-gram

The next step in Guttman scaling is the construction of the scal-o-gram (See Figure 1-2). A scal-o-gram is a graphic representation of the votes, cases, and justices in a bar graph form. The cases that are represented in the study are denoted by their docket number on the left side of the graphic, the justices are listed by their last name on the bottom of the graphic, and the votes are aligned to triangulate much the same way the matrices of agreement scores are arranged. It is also very important to arrange the votes in ascending or descending order to progressively show the differences in each justices voting behavior.[60]

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[60]Sheldon Goldman and Thomas P. Jahnige, p. 170.

Figure 1 - 2

Docket #	Marshall	Brennan	Blackmun	Stevens	Scalia	White	O'Connor	Rehnquist
85/531	X			*				
82/792	X	X						
86/978	X	X						
86/1471	X	X						
82/1248	X	X	0	X				
82/1278	X	X	0	X				
87/1061	X	X				*	*	
84/6470	X	X	X					
84/1905	X	X	X					
85/250	X	X	X					
85/1409	X	X	X					
85/1626	X	X	X					
85/1581	X	X	X					
86/509	X	X	X					
86/564	X	X	X					
84/231	X	X	X			*		
87/5002	X	X	X					
86/1781	X	X	X					
84/1803	X	X	X			*		
85/1358	X	X	X				*	
85/1708	X	X	X			*		*
82/1371	X	X	X	X				
83/490	X	X	X	X				
84/351	X	X	X	X				
84/6270	X	X	X	X				
84/1529	X	0	X	X				*
85/140	X	X	X	X				
85/1449	X	X	X	X				
85/2099	X	X	X	X				
86/1685	X	X	X	X				
86/7113	X	X	X	X				
86/475	X	X	X	X		*		
85/1217	X	X	X	X	X			
86/1431	X	X	X	X	X			
87/821	X	X	X	0	X			
87/827	X	X	X	0	X			
87/1095	X	X	X	0	X			
85/494	X	X	X	X	X		*	
85/2010	X	X	X	X		*		*
86/728	X	X	X	X		*		*
86/228	X	X	X	X	X			*
85/1277	X	X	X	X	0	X	X	
87/399	X	X	X	X	0	X	X	

Justices >>>>	Marshall	Brennan	Blackmun	Stevens	Scalia	White	O'Connor	Rehnquist
Ideological Score >>>>	100%	95%	84%	49%	25%	21%	12%	12%

Symbols:

X= Consistent vote in support of civil rights claim
*= Inconsistent vote in support of civil rights claim
0= Inconsistent vote against civil rights claim

Total Average Ideological Score

50%

E. Directional Polarization of Ideologies

The final step in Guttman scaling is to determining the ideological direction by totaling the votes of each justice with a mathematical polarization factor of the integer one (denoted as "Tpv"). To give the votes this polarization factor, each vote in a single ideological direction must be assigned a positive one (+1). This assignment must be consistent throughout the scaling process, so a decision of which type of behavior will be denoted as a positive value must be made. Once the votes are totaled, the number should be divided by the total number of votes the individual justices participated (Tv) and the dividend will be the justices ideological direction (denoted "ID"). The formula for this equation is as follows:

$$\mathbf{ID} = \frac{\mathbf{Tpv}}{\mathbf{Tv}}$$

where **ID** = Ideological Direction

Tpv = Total polarized votes

Tv = Total number of votes

The end result of this empirical manipulation is a confirmed number from a zero (0) to a positive one (+1) on an ideological scale with the extremes being totally conservative and totally liberal as you have designated them. For example, if your define a certain behavior as liberal and you assign a positive value to that behavior, then the justices exhibiting a substantial amount of that behavior (i.e. votes) will have a CR substantially closer to the positive integer one (+1) than a justice not exhibiting that behavior. Therefore the

justices with substantially high CR scores would be considered liberals according to your categorization.

The following are the results of the ideological direction test of the sample cases:

1. Thurgood Marshall	ID = 1.00 or 100%
2. William Brennan	ID = .953 or 95%
3. Harry Blackmun	ID = .837 or 84%
4. John P. Stevens	ID = .488 or 49%
5. Anthony Kennedy	ID = .500 or 50%
6. Antonin Scalia	ID = .250 or 25%
7. Byron White	ID = .209 or 21%
8. Sandra D. O'Connor	ID = .116 or 12%
9. William Rehnquist	ID = .116 or 12%
10. Average	ID = .496 or 50%

The average ideological direction score of 50% shows a median or moderate orientation of the court as a whole. This orientation is a result of the two major ideological blocs essentially cancelling out each other. The scores show three distinct blocs. The first bloc, which had the highest amount of liberal behavior, consisted of justices Thurgood Marshall, William Brennan, and Harry Blackmun. The second bloc, which statistically expressed equivalent amounts of liberal and conservative behaviors, consisted of justices John P. Stevens and Anthony Kennedy. The third and final bloc, which expressed liberal behavior in less than 25% of the cases sampled, consisted of justices Antonin Scalia, Byron White, Sandra D. O'Connor, and Chief Justice William Rehnquist.

VII. Problems with Pritchett Bloc Analysis and Guttman Scaling of Supreme Court Voting Behavior

When doing statistical analysis of any kind, it is important to isolate the factor(s) you wish to study (i.e. Civil Rights, Freedom of the Press, Freedom of Speech, etc.) eliminating the factors which could taint the results of your study. Equally important is the establishment of enough statistical evidence to legitimize any results you may get. Once these two conditions have been satisfied, an acceptable conclusion can be derived. To accomplish this task when doing Pritchett Bloc Analysis and Guttman Scaling, one must be able to isolate an acceptable number of cases involving a civil rights and liberties issue with more than one dissenting opinion during the period between the 1983 and 1988 term. With approximately three thousand cases passing through the Supreme Court during that time, the problem of isolation becomes very evident.

The solution to the isolation problem seems to be the use of computer databases which contain the cumulative voting records of each Supreme Court justice and can recall this information on demand. However, this answer has a few problems of its own. In the article, "Answering Statistical Questions with Lexis and Westlaw", a research librarian by the name of Ralph F. Gaebler demonstrated that the Lexis and Westlaw databases had significant deficiencies which caused them to give extremely faulty information. For example, Mr. Gaebler requested the number of dissents by Justice Stevens three different times but reworded the request minutely. Each response the database gave was vastly different from the one before in number and content of cases

cited.[61] Mr. Gaebler stated that databases did not have "a record structure or data entry standards sufficient to answer [statistical] questions reliably."[62]

Gaebler suggests that the explanation for the problems with databases is that databases mistakenly assume all relevant information is contained in the body of the individual decisions rather than in the characteristics of large bodies of documents. He also suggests that future databases take into consideration the fact that there is a tremendous amount of interest in doing statistical analysis of Supreme Court voting behavior.[63]

Even with all the limitations, the factors of time and manpower dictate the use of databases for at least part of the research. Sorting through three thousand cases attempting to locate those cases which fall under the category of Civil Rights Law (roughly 1%) would be overly labor intensive for one person and would tend to increase the chance of human error occuring. The question then becomes, how does one minimize the potential for error and ensure the quality of a study?

The answer to this question is that you apply a system of quality assurance to the information that is gathered to check any findings you have so they can be substantiated. In gathering information for this project, a new database at Michigan State University was utilized to gather only the cumulative voting records of each justice on the Supreme Court during the 1983 through 1988 terms and the preliminary categorization of legal question being answered (i.e. Civil Rights). Upon receiving this information, those non-unanimous cases which were categorized as being civil rights in nature were reviewed by reading the individual decisions of the Court to verify that they

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[61] Ralph F. Gaebler, "Answering Statistical Questions with Lexis and Westlaw", Legal References Services Quarterly, Vol. 8(3/4), (New York: 1988), pp. 179-188.

[62] Ibid, pp. 179-188.

[63] Ibid, pp. 179-188.

were indeed civil rights cases. In short you should, to the best of your ability, apply the scientific method to your research.

VIII. Conclusions

Determining the ideological orientation of a particular justice is not always as simple as placing figures into an equation and waiting for an answer. The fallacies of the slot machine or mechanical jurisprudence theory of decision-making are also applicable in this instance and must be minimized by incorporating more information into the determination of ideologue. For example, "Democratic judges generally are more liberal than Republican ones."[64] Factors such as judicial biographies, socio-economic status, as well as political orientations must be considered when determining a justice's or a court's ideologue.

A. The Liberal Bloc

The liberal bloc, or the bloc exhibiting the greatest amount of liberal behavior, consists of those justices appointed from the mid 1950's through the early 1970's. This period is consistent with the 1940's to late 1960's period referenced earlier in the paper as a period when the judicial activist philosophy had gained control of a majority in the court. These justices exhibited a high percentage (over 80% of the cases sampled) of liberal behavior directed at expanding the power of the court (judicial activism) by the use of the philosophy of judicial review.

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[64]Henry R. Glick, Courts, Politics, and Justice, p. 261.

1. Thurgood Marshall

Thurgood Marshall, the U. S. Supreme Court's first black justice, is a democrat who worked as the chief lawyer for the NAACP and U. S. Solicitor General before his appointment by the Johnson administration to the Court in 1967. Because of Marshall's political, socio-economic, and biographical orientations; a hypothesis that Marshall would be a liberal justice could be reached. The result of the Pritchett analysis and Guttman scaling tests confirm that Marshall did indeed express 100% of liberal behavior on those cases sampled. The conclusion based on both methods will therefore be that Marshall is a **liberal** justice.

2. William Brennan

William Brennan, also a democrat, was appointed by Eisenhower, but, "had turned out differently than Ike had expected".[65] In other words President Eisenhower thought that Brennan would be a conservative voice in the Court even though he was a democrat. Brennan, however; had other ideas and instead became a very liberal justice.[66] In fact, Brennan's judicial behavior is only quantitatively less liberal than that of Marshall.

From the information available, a reasonable deduction on Brennan's orientation would be that he is a liberal justice. The matrices of agreement scores, when Brennan and Marshall are matched together, show a 94 percent rate of agreement in the cases sampled. In the same cases, the ideological direction scores further verify the liberal ideologue by giving Brennan the

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[65]Bob Woodward and Scott Armstrong, The Brethren, Inside the Supreme Court, (New York: First Avon Printing, 1981), p. 13.

[66]Ibid, p. 13.

second highest liberal score with 95 percent of the cases showing a **liberal** style of decision-making.

3. Harry Blackmun

Justice Harry Blackmun, a Nixon appointee, has probably been the biggest surprise since his appointment in 1970. Even though Blackmun is a Republican, he has consistently supported the liberal civil rights position since coming to the bench. In fact, in the area of abortion rights Blackmun has not only voted liberally, but authored decisions like Roe v. Wade (1973) which legalized abortions nation-wide. Blackmun's scores on the ideological direction test showed a liberal behavior rate of 84 percent, and in the matrices of agreement scores his agreement rates were highest among Marshall (82%) and Brennan (78%) who had already been designated as liberal justices. Therefore, it can be determined that Justice Blackmun, despite his political orientation, is a **liberal** justice.

The example of Justice Blackmun tends to contradict the theory that a justices environment plays a significant part in their decision-making process. The Nixon administration, as well as many judicial behavioralist, have failed to explain the Blackmun phenomena or to identify the factor which determined his ideologue. All that can be inferred by this example is that there is at least one factor that judicial behavioralists cannot identify at this time.

B. The Conservative Bloc

The conservative bloc, or the bloc demonstrating the least amount of liberal behavior, consist of four justices (Chief Justice Rehnquist, Sandra D. O'Conner, Byron White, and Antonin Scalia). These justices were appointed more diversely with justices taking office from the year 1962 until 1986. All four justices have exhibited at least 75 percent of behaviors directed at judicial restraint and the legal philosophy of *stare decisis* Three of the four justices are Republicans and all have authored decisions in the last two years which have been intended to restrain the power of the Court.

1. Chief Justice William Rehnquist

William Rehnquist has been Chief Justice of the Supreme Court since the 1986 term of the Court. Being Chief Justice has the distinct power of administering the Court docket as well as determining the author of a decision when in the majority. This power, if used correctly, can add a vote or two and often means the difference between minority and a majority. Rehnquist has been recognized by the followers of the Court and by his fellow jurists as an efficient administrator. In fact, the case-load of the Supreme Court has nearly doubled since Rehnquist became Chief.

Rehnquist's efficient administration of the Court, his past voting behavior, and his Republican political orientation lean the scales in favor of a more **conservative** jurist. His ID scores are also among the lowest in liberal behavior of all the justices (12%) and the decisions he has authored have consistently leaned in the conservative direction.

2. Sandra D. O'Connor

Justice Sandra D. O'Connor, a Republican and the first woman in the U. S. Supreme Court, is statistically identical to Chief Justice Rehnquist. Her Ideological direction score is identical with that of Rehnquist to the thousandth decimal place and her matrices of agreement scores are fairly high with the conservative bloc of the Court. The only distinction that can be made between the two justices would be in the area of abortion rights and then the difference is too minute to measure. Therefore, it can be determined that Justice Sandra D. O'Connor is a **conservative** jurist.

C. Byron White

Byron White, the veteran of the conservative bloc, has been in the Supreme Court since 1962. Appointed by the Kennedy administration, White was probably as big a surprise to Kennedy as Blackmun was to Nixon. Even though White is a Democrat, he like Blackmun has forsaken his party for a reason undeterminable by judicial behavioralist. White's ideological direction score shows a low percentage (21%) of liberal behavior and the matrices of agreement scores place White next to both Rehnquist (80%) and O'Connor (76%). These scores place White well within the **conservative** ideologue.

4. Antonin Scalia

Antonin Scalia, who was sworn in as a justice in 1986, is the last of the justices to fall into the conservative bloc. His ideological direction score (25%) is slightly higher than that of White, but, his matrices of agreement pull him

solidly into the **conservative** ideologue. While Scalia does tend to break rank more than the other three conservative justices, the reason for the break away cannot be proven at this time due to a lack of cases for a sample.

C. The Median or "Moderate" Bloc

Justices Stevens and Kennedy make up the third bloc because they have not expressed a recordable tendency to vote either conservative or liberal. In fact they are about as close to 50 percent of each ideological behavior while only agreeing with one another 38 percent of the time. The determination of the ideologue will depend greatly on background information which will make the findings somewhat questionable.

1. John P. Stevens

Justice Stevens, a Republican nominated by the Ford administration, has consistently been on the fence post of civil rights decision-making. While being active in the Republican party, Stevens admired and idolized Justice William O. Douglas who is recognized as one of the most liberal justices in the Warren era of the Court. Even President Ford noticed his lack of "partisan politics [and the absence of a] strict ideology"[67] At this point it is impossible to categorize Stevens as liberal or conservative, therefore, Stevens will be placed in a category entitled **moderate** and no attempt to orient him with either ideology will be made.

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[67] Ibid, p. 476.

2. Anthony Kennedy

Justice Anthony Kennedy was the third Reagan nominee to the Supreme Court. He is Republican and has consistently expressed himself publicly in a conservative manner. The raw data on the cases Kennedy has heard thus far during his career has been insufficient to determine with any degree of accuracy the degree of the justices orientation. However, one fact that does stand out is the fact that Kennedy and Scalia have an 88 percent matrices of agreement score. This information tends to suggest that Kennedy belongs in the **conservative** ideologue, but the categorization cannot be made statistically.

D. Summary

The United States Supreme Court is in a transitional period in history. Its ideological makeup is slowly changing from a judicial activist orientation to one of judicial restraint as the liberal justices from the Warren era of the court age and are replaced by more conservative jurists. This is easily seen when you realize that the last three justices appointed to the high court are self proclaiming conservatives who were nominated by a conservative Republican administration and fall on the conservative half of the ideological scale. The question is then, has the conservative ideologue gained control of the high court.

The answer to this question is not completely determinable at this point. The current Court has three easily distinguishable blocs as determined by the ideological score breakdown. The liberal bloc consists of three jurists (Marshall, Brennan, and Blackmun). The conservative bloc consists of four jurists (Scalia, White, O'Connor, and Chief Justice Rehnquist). The remaining two justices have not expressed a predominant amount of liberal or conservative behaviors and

thus makeup a separate bloc of there own. While neither ideologue can gain a majority without accessing the third bloc of justices, the conservative ideologue has a one vote advantage. This gives the conservatives a two to one advantage because the conservatives only need one of the two votes to establish a majority while the liberals need both of the justices to win a decision.

Through the statistical and behavioral analysis of the U. S. Supreme Court, three separate ideological blocs were identified. The first bloc consisted of three justices which exhibited a substantial amount of liberal behavior. The second bloc contained four justices which demonstrated a substantial amount of conservative behavior. The last bloc, which is needed by both ideologues to arrive at a majority, consists of two justices whose voting behavior cannot be determined at this time. It becomes very apparent, however, that the conservative ideologue holds the administration powers of the court and only needs one vote from the third bloc. These advantages more than double the chances of the conservative bloc retaining a majority and more than triples the advantage the Conservative had during the prior era of the Court.[68]

Therefore, given the recent trend in appointing conservative justices, the individual and cummulative ideological scores of the present Court, and the tendency of the moderate factions of the Court to vote with the conservative minority, a trend toward a conservative ideology in the U. S. Supreme Court has been shown to exist.

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