The Formation of Opinion Coalitions on the U.S. Supreme Court

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The purpose of this paper is to explore the politics of coalition formation in judicial arenas. In particular, our research addresses this question: How might we best explain, theoretically and empirically, the formation of opinion coalitions on collegial courts? After describing the significance of the research, we outline the underlying assumptions and core assertions of our argument. We next consider previous research that applied one school of coalition theory, office-driven approaches, to judicial arenas. By reflecting on the assumptions of that school and by evaluating those theories' applications to the U.S. Supreme Court, we show that they provide an inappropriate lens through which to view opinion coalition formation on judicial bodies. We contend that a second class of theories—which takes into account policy motivations and models multidimensional policy space—offers the most promising approach to understanding coalition formation on collegial courts. Accordingly, we follow this line of research in developing a theory of opinion coalition formation.

I. Introduction

The politics behind the formation of coalitions is of long-standing and continuing interest to social scientists. How and why governments form in European parliamentary systems and legislative coalitions emerge in the U.S. Congress represent two major areas in which scholars have conducted a significant amount of research and have made important theoretical breakthroughs (e.g., Austen-Smith and Banks 1988; Baron and Ferejohn 1989; Laver and Schofield 1990; Shepsle 1979, 1986).

The purpose of this paper is to explore the politics of coalition formation in another institutional setting, namely judicial arenas. In particular, our research addresses this question: How might we best explain, theoretically and empirically, the formation of opinion coalitions on collegial courts? After describing the significance of the research, we outline the underlying assumptions and core assertions of our argument. We next consider previous research that applied one school of coalition theory, office-driven approaches, to judicial arenas. By reflecting on the assumptions of that school and by evaluating those theories' applications to the U.S. Supreme Court, we show that they provide an inappropriate lens through which to view opinion coalition formation on judicial bodies. We contend that a second class of theories—which takes into account policy motivations and models multidimensional policy space—offers the most promising approach to understanding coalition formation on collegial courts. Accordingly, we follow this line of research in developing a theory of opinion coalition formation.

1Opinion coalitions differ from decision coalitions (for an example, see Appendix A). Opinion coalitions exclude jurists who dissent from the court's decision on the merits and those who agree with "the disposition made by the majority or plurality, but disagree with the reasons contained in the opinion" (i.e., cast a special concurrence, as opposed to a regular concurrence, an "opinion notwithstanding membership in the majority or plurality opinion coalitions" [Segal and Spaeth 1993, 277]). Regular concurrences are part of the opinion coalition; special concurrences are not. Decision coalitions exclude only dissenters, not regular or special concursers.
II. Significance

We see the significance of our research as three-fold. It makes important contributions to the literatures on both judicial processes and coalition formation. And it seeks to test formal theories that claim general applicability but have faced relatively limited empirical scrutiny.

Significance for the Judicial Literature

Two aspects of the decisions of collegial courts are critical: the votes of individual jurists and the opinions issued by the court and its members. The votes tell us who wins and who loses: If a majority of a court's members support one party over the other, as is usually the case, then that side wins. Opinions set forth and clarify the justifications in legal reasoning behind the votes. Opinions that represent the views of a majority of members ("Opinions of the Court") constitute future doctrine and policy. Plurality opinions ("Judgments") lack precedential value.

Curiously, almost all research on collegial court decision making focuses on explaining the individual (or collective) vote in a given case, e.g., whether the jurist (or the court) affirmed or reversed a particular judgment, whether she (or they) took the liberal or conservative position. This emphasis exists and persists even though most scholars recognize that predicting the vote in a case may be less important than understanding the coalition that produces the doctrine and policy. As Rohde and Spaeth (1976, 193) assert: "The formation of the opinion coalition is the crucial stage of Supreme Court decision making. ...[T]he importance of the Supreme Court in our political system rests to a substantial degree on the fact that its decisions have policy impacts that reach far beyond the particular parties involved in a case. It is in the majority opinion that the Court lays down the broad constitutional and legal principles governing the outcome in the instant case."

Despite the fact that many analysts operate under the assumption that the membership of the opinion coalition has an important effect on the resulting policy, scholars of the judicial process (with few exceptions) have not tried to understand the politics behind opinion coalition formation. Why? Many answers can be adduced. A critical one is that, unlike many other substantive areas of social scientific inquiry, the study of judicial processes remains enmeshed in behaviorism, with the so-called attitudinal model the predominant paradigm. This model posits that the "facts of a case vis-à-vis the ideological attitudes and values" of individual jurists provide the single best explanation for whether they vote to affirm or reverse a particular judgment and that those attitudes are relatively impervious to internal or external pressure (Segal and Spaeth 1993, 65).

It is probably true that the attitudinal model explains the judicial vote. Indeed, little evidence suggests that the individual (or collective) vote—the "bottom line"—in a given case is the product of bargaining, persuasion, or anything other than judicial values, attitudes, and, perhaps, roles.3 But

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2 Collegial courts make many different types of decisions. We focus here and throughout the paper on one type, decisions rendered on the merits of cases.
3 Yet we do not want to deny the possibility of strategic activity over the vote. Brenner (1982, S29) shows that fluidity does, in fact, exist between the initial (or conference) vote and the final vote on the merits:

A comparison of the original and final votes [for the 1946-1956 Terms] reveals strong fluidity in nine percent of the situations (N=197), weak fluidity in three percent (N=71), and no fluidity in the remaining 88 percent (N=1,899). Different results...are obtained when cases are examined instead of votes. In 61 percent of the cases there was at least one strong or weak change of vote...

Brenner's (1982) results for the 1956-1967 Terms are comparable. Brenner (1980, 532) does not seem to place much stock in these findings because he finds—contrary to Howard (1968)—that a switch rarely results in a directional change in the Court's ruling: "A strong or weak change in vote took place in 12 percent of the votes and 61 percent of the cases. Only in 14 percent of the cases, however, did the
when it comes to the focus of our research—opinion coalitions—substantial evidence suggests that, in fact, jurists do bargain, compromise, and build coalitions. And, as we later describe, there is good reason to believe that jurists can be strategic about how they write opinions, about precisely which rationale they use, about whether to cast a special concurrence, and so forth.

If we are to understand opinion coalition formation, then, we must move beyond the attitudinal model and toward those theories that allow for strategic behavior on the part of politicians, be they legislators, executives, or judges. Doing so, of course, does not require the complete abandonment of the tenets of attitudinalism. To the contrary, many formal theories of coalition formation explicitly view politicians in the same terms as the attitudinal model, as policy seekers. What they do, and what static behavioral models cannot do, is provide mechanisms for understanding the politics behind coalition formation. In other words, many formal coalition theories and behavioral models posit the same sort of goal for politicians: the attainment of policy outcomes. Formal coalition theories isolate and dissect the means by which politicians attain their policy goals: strategic interactions with other politicians. Thus, our research contemplates a significant, albeit unexplored, aspect of judicial behavior—opinion formation—through a lens that is appropriate and powerful, though largely ignored by court scholars: deductive theories of coalition formation.

**Significance for Coalition Theories**

For three reasons, collegial courts offer an especially interesting and important setting in which to test predictions from formal theories of coalitions. The first deals with the way that individuals are chosen for membership on courts. Formal theories have typically used elected politicians—in particular, legislators—as their empirical reference point. All institution-focused coalition theories assume that the decision-making group they depict is elected and is subject to re-election, although few directly model the electoral connection (but see Austin-Smith and Banks 1988). Even institution-free coalition theories implicitly assume an electoral constraint, for they have in mind applications to legislative choice and/or parliamentary systems. As one masterful survey of the literature observes, "the formation of governments is the aspect of coalition politics that has attracted the lion's share of attention over the past twenty years or so, both from theorists and from empirical researchers. ...On the theoretical front, most of the progress that has been made has had to do with legislative coalitions, though this work, appropriately modified, has clear applications to executive coalitions" (Laver and Schofield 1990, 142). Because jurists on many courts—including the U.S. Supreme Court—are not elected, our research is able to examine whether the absence of an electoral constraint impinges on the accuracy of predictions generated by formal theories. Do non-elected actors bargain more freely than elected politicians? Are non-elected actors less concerned with

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4 Exceptions include Rohde 1972a, 1972b; Rohde and Spach 1976. We discuss these studies later.

5 A useful distinction to draw in the game-theoretic literature is between institution-focused theories, which incorporate some model of rules or procedures into their account of coalitions, and institution-free theories, which do not attempt to model any institutional features and claim to be generally applicable, regardless of institutional setting.

6 Laver and Schofield contrast here the formation of parliamentary governments with the duration of governments and portfolio distribution in governments; but the judgment applies as well to a comparison of legislative and judicial settings.
maintaining a distinctive identity before the public, and thus more willing to compromise? Our research investigates these and related issues.

Second, because we look at politicians who attain office without election (and retain office without re-election), we shed new light on the importance of policy (or ideological) motivations. The earliest formal theories of coalitions (Riker 1962) started from the premise that politicians desire office above all else. By the 1980s, students of parliamentary coalitions reached the consensus that coalition theories should incorporate some form or some degree of policy motivation for political actors. And yet the relationship between office and policy motivations remains murky, empirically and theoretically. Very few theorists have dropped office motivations entirely, and "very few who have written on coalitions ... have fully digested the profound implications of this fundamental assumption ... that policy is an intrinsic end valued in and for itself" (Laver and Schofield 1990, 38; cf. Strom 1990a). What happens to office motivations in a non-elected institution? What happens to policy motivations when office is secure for life? Once again, we are well positioned to answer these and similar questions.

The third reason compelling interest in our study has to do with stability in decision making. A central—perhaps the central—result in the formal literature on coalitions is that voting games in multidimensional policy space under simple majority rule are subject to endless cycles among alternative decisions: Voting generates chaos, as one majority backs a decision and is overthrown by a second majority endorsing a second decision; that decision yields to a third, then to a fourth, and on and on (see, among others, McKelvey 1976, 1979; McKelvey and Schofield 1987; Schofield 1983; for discussion, see Riker 1980; Schofield, Grofman, and Feld, 1988; Shepsle 1986). This literature also shows that the potential for chaos depends on the nature of decision-making rules (supramajoritarian rules can avert chaos) and on the number of policy dimensions relevant to decision makers (stable decisions are possible in two dimensions and very rare in more than two).

Given our research design and the characteristics of the U.S. Supreme Court, we are well equipped to assess the impact of both decisional norms and numbers of dimensions on the stability of opinion coalitions. Decision-making norms have changed on the Court over time, with concurrences and dissents more acceptable in post-New Deal Court eras (Walker, Epstein, and Dixon 1988). Hence, we may observe supramajoritarian rules in force before the New Deal, trace the weakening of those rules afterwards, and assess the relative solidity or fragility of opinion coalitions under such varying conditions. Moreover, judicial specialists routinely separate the content of policies considered on the Court into many different dimensions (e.g., civil liberties, economic liberties). Recent evidence suggests that the policy dimensions relevant to justices have changed (Hagle and Spaeth 1992). And, because of the evolving norms on the Court, the number has risen if we count as a dimension of decision making the degree to which justices do or do not desire institutional unity (Segal and Spaeth 1993; Walker, Epstein, and Dixon 1988). Thus, we may also evaluate the extent to which increased dimensions destabilize or fragment opinion coalitions.

**The Importance of Testing Formal Theories**

One of the oft-heard complaints about predictions originating in formal theories is that they are rarely subject to rigorous examination. Perhaps more than most, formal theories of coalitional behavior have been tested against real-world examples. Governments in parliamentary systems constitute the most common empirical reference point, with the U.S. Congress, a close runner-up. Even so, the available empirical tests have their limits, as one specialist in legislative behavior has suggested: "If the promise of formal theory is to be fulfilled, it will be fulfilled sooner and more convincingly if models are regularly held up to empirical scrutiny. Even in the case of seminal theoretical contributions, models may not withstand such scrutiny particularly well" (Krehbiel 1988, 260).
Not only do we seek to examine systematically the predictions generated by coalition theories. We also hope to add to the database for coalition studies, overcoming the problem of analysts using subsets of the same universe of data. Franklin and Mackie (1984) show that precisely which countries a study of government formation covers powerfully influences the study's finding about the empirical accuracy of the hypotheses tested. Laver and Schofield (1990, 9) lament that "each empirically based coalition theory developed hitherto has addressed the same rather small fixed universe of post-war European governments" and call for research on local government coalitions to redress this shortcoming. Another fruitful line of inquiry would be to extend the focus to judicial arenas, as we propose.

III. A Policy-Based Approach to Opinion Coalition Formation

Our general argument is that spatial and institutional conditions shape the opinion coalitions that emerge on collegial courts. The positions of justices and the location of the opinion writer in policy space affect the formation of coalitions. In addition, the Court's institutional features—some of which do not vary over time (plurality opinions always lack precedential value) and some of which do vary over time (the norm against non-consensual behavior relaxed after Stone ascended to the Chief Justiceship [Haynie 1992; Walker, Epstein, and Dixon 1988])—influence which coalitions emerge and how durable or fragile they are.

We elaborate on these predictions in a later section. For now we concentrate on the assumptions on which these predictions are based. To realize the promise of contributing to the judicial and coalition literatures and testing formal theories in legal settings, we need to specify the assumptions that we believe are appropriate to make about jurists. One of the flaws of the previous research that applied coalition theory to judicial arenas, as we show below, was the failure to lay out the assumptions under which it operated.

Goals for Policy and Unity

We assume that justices pursue policy outcomes in particular areas and, further, that they seek specific policy outcomes that are consistent with their general philosophy of the law. In other words, justices want to sign opinions that are as close as possible to their own policy preferences. Thus, as discussed below, we predict that a justice is likely to coalesce with other justices who are nearby in policy terms (Rohde and Spaeth 1976; Segal and Spaeth 1993).7

We also assume that a concern for unity or consensus in decision making is differentially felt across justices. That is, some justices, more than others, seek to coalesce the Court behind their opinions. As Segal and Spaeth (1993, 293) write, "justices vary in the extent to which they are willing to subordinate their views in the interests of institutional loyalty." Justices' drive for unity may be less important than their interest in attaining their policy preferences but it presents an additional dimension we cannot disregard (Haynie 1992; Segal and Spaeth 1993; Walker, Epstein, and Dixon 1988). Unity reflects long-standing (though recently weakened) institutional norms against concurring and a respect for previous decisions (the doctrine of stare decisis). Moreover, it stems from a desire to establish precedent, an effort to get as many justices on board as possible so as to maximize the life span of a ruling, and an attempt to gain support among lower court judges (Johnson and Canon 1984). Justices' motivations, then, are shaped by the features of the institution in which they work (Segal and Spaeth 1993).

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7 We assume Euclidean preferences, so that preferences are measured by the Euclidean distance from a justice's ideal point. In other words, justices like a policy position close to their own and prefer it to a position that is far from their most preferred, ideal position. We also assume that justices agree on the relative weighting of dimensions in multidimensional policy space and that they have separable, convex preferences defined on the space.
*Policy and Unity Benefits*

By signing an opinion, a justice endorses a policy close to her preferences and helps to ensure that the opinion has precedential value. In almost all circumstances, the addition of a justice to an opinion coalition affects the policy gains available for signing justices: The addition (or subtraction) of a justice entails further (or fewer) policy compromises (Rohde and Spaeth, 1976). In one set of circumstances, however, policy benefits are neither diluted by the addition of a justice nor enhanced by the removal of a justice: If the opinion writer is located at the core of policy space (as defined below), she dictates policy, regardless of the opinion coalition's size and membership.

A justice receives policy benefits if she dissents or specially concurs. But a justice obtains unity benefits only if she agrees with the opinion of the Court. As she registers her agreement, she enlarges the consensus and increases the unity benefit available to other members of the opinion coalition. With each justice that dissents or specially concurs, on the other hand, the unity shared by remaining justices declines.

Thus, each justice faces some trade-off between policy and unity. A justice accepts a policy outcome that is not identical to her most preferred policy in order to maintain or increase the size of the opinion coalition. As justices differ in their concern for unity, their definitions of this trade-off differ as well. Figure 1 illustrates how two justices, A and B, view the relationship between policy and unity benefits. Justice B prizes unity more than Justice A does and is willing to back a policy outcome further away from her ideal point in order to amplify unity.

(Figure 1 about here)

*Persuasion without Side Payments*

We assume that justices want to get an opinion as close as possible—not necessarily exactly equivalent—to their own preferences. This calculus makes room for compromise within limits. We assume that justices are willing to bargain, within bounds, to compromise on the statement of legal reasoning (the opinion and the coalition backing it) in order to reach an outcome that they prefer (Murphy 1964; Epstein and Kobylka 1992). Justices think about the probability of drawing additional justices into an opinion coalition (or preserving a conference vote coalition), given the opinion writer and the legal reasoning she presents, frames, and develops. At times they make threats (to publicize disagreement, for example). Justices do not offer side payments (e.g., do not trade law clerks) (see Brenner and Spaeth 1988) but aim to persuade colleagues of the correctness of their view of the legal import and societal consequences of the case at hand.

*History and Time Horizons*

We assume that, although justices do not have perfect foresight, they do project beyond the short term. They also have hindsight and memory. Indeed, the role of legal precedent (Segal 1984) makes any other assumptions about justices' capacity for retrospective and prospective evaluations disturbingly unrealistic. Precedent may be malleable but it is rooted in the past: Justices achieve their positions having been trained in the art of drawing out, applying, interpreting, and amending precedents from past cases (Epstein and Kobylka 1992). And precedent weighs on the future: Justices think prospectively about the precedent that their opinion will create, about the addition to future legal doctrine that their reasoning will make (see Cameron, Segal, and Songer 1993).

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8Appendix B discusses evidence of strategic behavior on the part of the justices.
9A classic example was Justice Douglas' threat to make public the Court's handling of the 1973 abortion cases if Chief Justice Burger insisted on ordering rearguments (see Urofsky 1987, 184).
10For example, as Charles Evans Hughes (1928, 68) wrote, a dissenting opinion may make "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error..."
Given the role and nature of precedent, policy decisions have a different meaning in the Court as compared to legislative arenas in either parliamentary or presidential systems. A policy decision in the Court may impinge on the fundamental rules of the political game in ways that usually respect the past and are expected to bind the future. A policy decision in a legislature may signal incremental changes from the past and may create resources and reference points that influence future decisions. But policy decisions in legislatures do not carry the standards, obligations, and commitments for future action that legal precedent does.

Information

We assume that justices operate under uncertainty and with imperfect information. Justices obtain information about the likely outcome of a case and the reasonings likely to be salient in deciding a case at the tentative vote stage, which quickly leads to opinion assignment (see Appendix A). Justices reason forward from the tentative vote and use information gathered there as they proceed through the writing of an opinion. Justices also know the past voting records and signed opinions of their colleagues on the Court. Nonetheless, justices never have exact knowledge of full certainty of the ways that the reasonings behind past votes and opinions will be applied by the opinion writer and assessed by prospective opinion signers in the case under current deliberation.

The Weight of the Opinion Writer

In one sense, all nine members of the Supreme Court have equal weight: Each justice has one vote and one decision to join an opinion or not. In another sense, however, justices are not equal: At certain moments in the decision making process, the Chief Justice (or the associate assigning the opinion) and the opinion writer have more weight than other justices. Their extra weight derives from their capacities to shape the opinion. The assignment of the opinion and then the actions of the opinion writer affect the likelihood of getting more or fewer justices behind an opinion and affect the policy content and expertise dominant in the opinion's reasoning. As Baum (1992, 125-126) explains,

Once the opinion is completed and circulated, it often becomes the focus of negotiation. Ordinarily the assigned [opinion writer] wishes to obtain the support of as many colleagues as possible for the opinion. The writer will seek to convince justices who were originally in the minority to change positions, and it also may be necessary to discourage allies in conference from leaving the fold. At the very least, the assigned justice wants to maintain the original majority for the outcome supported by the opinion and a majority in support of the rationale expressed in the opinions, so that the opinion becomes the official statement for the Court...

Accordingly, when the Court renders a judgment, the opinion writer may have "disregard[ed] the preferences of one or more of the members of the majority vote coalition" (Segal and Spaeth 1993, 293).

With these assumptions in mind, we now turn to previous research that investigated opinion coalition formation on collegial courts. Those studies, though pioneering and intriguing, adopted a theoretical perspective out of line with the real workings of court decision making.

IV. Previous Applications of Coalition Theories to the Courts: Office-Driven Approaches

Scholars have developed various sorts of theories to explain the formation of governments in

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11A large literature treats opinion assignment (for a recent summary, see Segal and Spaeth 1993, Ch. 7). We are more concerned with the formation of the opinion coalition and less with opinion assignment, although a relationship may exist between the two (for an interesting examination, see Brenner and Spaeth 1988).
European parliamentary systems and legislative coalitions in the U.S. presidential system. One of the most prominent dividing lines in the game-theoretic literature involves the motivations that actors are assumed to have. *Office-driven* theories posit that politicians bargaining over coalitions are moved by the pursuit of office, whereas *policy-driven* theories assume that politicians seek policy influence.

In this section, we consider office-driven theories, the only theories that previous research has applied to opinion coalition formation in judicial arenas. Our goal is to explore what occurs, theoretically and empirically, when a theory's predictions confront the record of opinion coalition formation on the U.S. Supreme Court. We concentrate on two theories—minimal winning and minimal connected winning—in the office-driven school. For each theory, we describe the predictions to be tested and the problems that arise when adapting them for use in judicial arenas. We consider each theory using data from the 1989 Term of the Supreme Court and, whenever possible, from other relevant research.²

**Minimal Winning Coalitions**

In his seminal work, William Riker (1962) predicts the formation of minimal winning coalitions—coalitions that would lose their parliamentary majority if any member party were to withdraw from them. Riker assumes that politicians seek power above all else and share power only to enhance efforts to win, and that office provides fixed rewards. His argument is that coalitions do not expand beyond minimal winning size because no ally wants to hand over slices of power to a party superfluous to the majority. Pushing the logic of power maximization as far as it can go, Riker reaches the prediction of minimum winning coalitions—the subset of minimal winning coalitions with the narrowest possible majority in parliament.

It was Riker's theory that was first applied in the judicial literature. David Rohde (1972a) initially argued that opinion coalitions on the U.S. Supreme Court should be minimal winning. Yet his reasoning spun Riker's argument on its head. Rohde assumed that policy-motivated justices would enter minimal winning coalitions because they did not want to see their opinions diluted; that once the opinion writer had convinced four of her colleagues to sign on, she would no longer wish to enlist others as they would demand policy compromises that she would not be willing to make—and would not need to make in order to command a majority. Riker assumed, in contrast, that politicians were driven purely by desires for office and disregarded ideological concerns. Thus, they would enter into minimal winning coalitions—regardless of their partners' policy preferences—because their sole concern was to minimize the number of partners and thus maximize the number of portfolios (or other spoils of office) under their own control. Seen in this way, minimal winning predictions make little sense for collegial courts. They fail to consider expected utility in terms of policy motivations, which the extant literature assumes legal actors to possess (see Segal and Spaeth 1993 for a review). Rather, these predictions hinge on maximizing the accumulation of the spoils of office, which justices do not possess.³

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² The organization and discussion of the theoretical literature in Sections IV and V draw on Mershon 1993. While we test these theories against the behavior of the U.S. Supreme Court, they should be applicable to some other collegial courts, as well. For the 1989 Term data, our unit of analysis is the coalition, not the case. Thus, a given case could produce two or more distinct sets of coalitions, depending on which justices signed on to what parts of the majority opinion. For a more complete discussion, see Appendix C.

³ Because the Supreme Court has a total of nine members of equal weight, minimum and minimal winning coalitions are equivalent: Both consist of five justices.

⁴ Or, more precisely, for which justices do not have to compete. Justices do employ law clerks and secretaries, enjoy prestige, and work in an attractive, imposing, building. But these benefits accrue automatically with the attainment of office and are distributed relatively equally across justices. Significantly, no judicial specialist has ever argued that the desire for highly trained law clerks motivates jurists to seek elevation to the Supreme Court.
Not surprisingly, neither data derived from the Warren Court era (1953-1968 Terms) nor those we collected support the minimal winning prediction. Of the 508 coalitions included in the Rohde (1972b, 218) and Rohde and Spaeth (1976, 199) analyses, 59.3 per cent were surplus (six or more members); 36.2 per cent were minimal winning, and 4.5 per cent consisted of four or fewer justices. Table 1 indicates a similar picture for the 1989 Term: It shows the presence of surplus coalitions in 62.4 per cent of all those opinion coalitions that formed during the 1989 Term and plurality coalitions in 8.9 per cent.

(Table 1 about here)

The data presented in Table 2 below, which represent only civil liberties cases and thus most closely approximate Rohde's (1972b) analysis,\(^{15}\) also fail to support the minimal winning prediction. While almost 40 per cent of opinion coalitions are composed of five justices, the predominance of surplus coalitions and the frequency of unanimity are surprising in light of the theory.\(^{16}\)

(Table 2 about here)

Beyond this, the data implicitly point to an additional problem with minimal winning theories: They yield an overabundance of predictions. Because they fail to consider an ideological or any other sort of constraint, they suggest that any combination of five justices could form a coalition. Not only does this work against the judicial literature's fundamental assumption that jurists care about policy but a nine-person court holds out the possibility of 126 minimal (and minimum) winning coalitions.\(^{17}\) The sheer number of coalitions predicted undermines the usefulness of minimal

\(^{15}\) We provide these data in recognition of the usual way in which scholars of the judicial process model Supreme Court decisions—by issue dimension. To be precise, though, minimal winning theories are policy-free, meaning that they should operate across issue areas. Table 1, accordingly, is the more apt test of the theory.

\(^{16}\) A more precise way of considering the minimal winning hypothesis may be to compare the observed results with their expected values. Using one formulation, Rohde (1972a) generated the following stochastic model based on the assumption that each justice is as likely to join the majority opinion coalition as she is not to join it. If \(C_w\) is a winning opinion coalition and \(j_i\) is the \(j\)th justice, then:

\[
Pr(j_i \text{ joins } C_w) = Pr(j_i \text{ does not join } C_w)
\]

Rohde also suggests that the distribution of non-minority coalition sizes for a nine-person Supreme Court is binomial with \(p=1/2\). Accordingly (see Hoyer, Mayer, and Bernd 1977, 387), the probability of a coalition size being the size \(r\) is:

\[
Pr(n(C_w) = r) = [9/2(9-r)!]/(1/2),
\]

where \(n(C_w)\) is the number of Justices in the dominating opinion coalition. This model yields the following probabilities (see Hoyer, Mayer, Bernd 1977, 387):

<table>
<thead>
<tr>
<th>Coalition Size ((r))</th>
<th>(Pr(n(C_w) = r))</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>.492</td>
</tr>
<tr>
<td>6</td>
<td>.328</td>
</tr>
<tr>
<td>7</td>
<td>.141</td>
</tr>
<tr>
<td>8</td>
<td>.035</td>
</tr>
<tr>
<td>9</td>
<td>.004</td>
</tr>
</tbody>
</table>

Neither in our data nor in Rohde’s (see Hoyer, Mayer, and Bernd 1977) does the proportion of minimal winning coalitions exceed the .492 benchmark.

\(^{17}\) In a decision-making body with \(n\) members of equal weight and a majority criterion \(m\), the number of minimal winning coalitions possible is equal to \(n!(n-m)!/m!\); and, as already noted, minimal and minimum coalitions are equivalent (see, e.g., De Swaan 1973, 58). The total number of coalitions possible in a body with \(n\) members
Table 1. Size of Decision and Opinion Coalitions, 1989 Term Cases

<table>
<thead>
<tr>
<th>Size of Decision Coalition</th>
<th>Size of Opinion Coalition</th>
<th>Total (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>8</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>9</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2</strong></td>
<td><strong>2</strong></td>
</tr>
</tbody>
</table>

*Note:* Decision coalitions exclude dissents; opinion coalitions exclude dissents and special concurrences.
Table 2. Size of Decision and Opinion Coalitions, 1989 Term Civil Liberties Cases

<table>
<thead>
<tr>
<th>Size of Decision Coalition</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>Total (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>25</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>30 (34.9)</td>
</tr>
<tr>
<td>6</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>19 (22.1)</td>
</tr>
<tr>
<td>7</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>10 (11.6)</td>
</tr>
<tr>
<td>8</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>5 (5.8)</td>
</tr>
<tr>
<td>9</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>13</td>
<td>22 (25.6)</td>
</tr>
<tr>
<td>Total Percent</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>34</td>
<td>15</td>
<td>12</td>
<td>4</td>
<td>13</td>
<td>86 (100)</td>
</tr>
</tbody>
</table>

Note: Opinion coalitions exclude dissents and special concurrences. Civil Liberties includes cases involving criminal procedure, civil rights, due process, privacy, the first amendment, and attorney regulations.
winning theory as a tool for understanding the politics of coalition formation, a conclusion with which many analysts of legislative settings agree (e.g., Lijphart 1984, Ch. 4; Strom 1990b). We endorse the position eventually reached by Rohde (1977): Minimal winning predictions give us little theoretical or empirical leverage for understanding opinion coalition formation in collegial courts.

**Minimal Connected Winning Predictions**

A theory closely related to Riker's classic work reduces the number of predictions yielded by incorporating policy concerns. Axelrod (1970) assumes that political actors locate themselves and others on a single, ordinal policy scale (typically a left-right dimension). He predicts minimal connected winning coalitions, which join parties adjacent to each other on the policy spectrum and which would either slip below a majority or stop being connected if any party were to withdraw. The logic here is that internal policy conflicts threaten unconnected protocoalitions and coalitions, whereas policy compatibilities make connected coalitions easier to erect and then maintain. Hence, bargaining is pictured as a costly activity and politicians save on bargaining costs if they span differences in policy across partners. This view suggests that politicians first figure out how to attain office via a minimal winning coalition and next think about bargaining simplicity, applying a policy criterion (Taylor 1972).

Like many scholars of government formation, Rohde (1972b) and Rohde and Spaeth (1976, Ch. 9) turned to Axelrod's approach upon finding that the assumptions of Riker's theory were [not] reasonable characterizations of the decision making context under study (Rohde 1977, 410). In a series of papers, Rohde (1972b, 214) and Rohde and Spaeth (1976) set out the following scenario:

We [assume] that the justices are motivated by their own policy preferences. Their goal is to make policy [conform] as closely as possible to those preferences. After the vote on the merits is taken in conference, one of the members of the majority on the merits (which we may call the decision coalition) is assigned the task of writing the majority opinion. The opinion drafts will be shaped by his own preferences, but he is not a free agent. If he is to attain a winning coalition, he must gain the assent of at least four other justices. Because he is trying to make the opinion approximate his own position, he will accept those proffered bargains which are most attractive to him and reject others. Moreover, since he only needs the agreement of four justices in addition to himself, he has to accept compromises only until he achieves that result, after which he can reject further proposals to change the opinion. By rejecting bargains after he has obtained the agreement of a majority, the opinion writer minimizes the conflict of interest within the coalition and the deviation from his preferred policy position.

Based on this account, Rohde and Spaeth (1976, 203) predicted that opinion coalitions "should include only justices who are adjacent on the issue dimensions." In other words, they hypothesized that opinion coalitions would be connected in certain situations.\(^{18}\)

Rohde's (1972a, 1972b) and Rohde and Spaeth's (1976) efforts should not be underrated. After all, they remain the only scholars who sought to consider opinion coalition formation in a serious way. Moreover, the adoption of the connected criterion significantly reduces the number of predicted coalitions.\(^{19}\) Yet, their account contains flaws, some of which have been reviewed elsewhere (an unduly harsh critique is Hoyer, Mayer, Bernd 1977 on Rohde 1972a). Especially obvious is that to

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\(^{18}\) Rohde (1972b) and Rohde and Spaeth (1976, Ch. 9) differentiated between threat and non-threat situations, claiming the Court would be more likely to produce surplus coalitions when its authority was threatened by outside forces. By doing so, they essentially imposed an underdeveloped institutional model on what was originally an institution-free theory.

\(^{19}\) In our analysis of the 1989 Term below, for example, only eight possible coalitions of justices would meet both the minimal winning and the connected criteria. This figure may be high because of a tie between O'Connor and Scalia on the underlying scale we used.
Table 3. Connectedness of Opinion Coalitions, 1989 Term Civil Liberties Cases

<table>
<thead>
<tr>
<th>Plurality Coalitions (Total N=8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size=2; N of occurrences=2; N of Connected=1</td>
</tr>
<tr>
<td>Stevens, O'Connor=1</td>
</tr>
<tr>
<td>Size=3; N of occurrences=1; N of Connected=0</td>
</tr>
<tr>
<td>Size=4; N of occurrences=5; N of Connected=1</td>
</tr>
<tr>
<td>O'Connor, White, Kennedy, Rehnquist=1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Minimal Winning Coalitions (Total N=34)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimal Connected Winning Coalitions=20</td>
</tr>
<tr>
<td>Marshall, Brennan, Blackmun, Stevens, O'Connor or Scalia=0</td>
</tr>
<tr>
<td>Brennan, Blackmun, Stevens, O'Connor, Scalia=0</td>
</tr>
<tr>
<td>Brennan, Blackmun, Stevens, O'Connor or Scalia, White=0</td>
</tr>
<tr>
<td>Blackmun, Stevens, O'Connor, Scalia, White=0</td>
</tr>
<tr>
<td>Blackmun, Stevens, O'Connor or Scalia, White, Kennedy=0</td>
</tr>
<tr>
<td>Stevens, O'Connor, Scalia, White, Kennedy=0</td>
</tr>
<tr>
<td>Stevens, O'Connor or Scalia, White, Kennedy, Rehnquist=0</td>
</tr>
<tr>
<td>O'Connor, Scalia, White, Kennedy, Rehnquist=20</td>
</tr>
<tr>
<td>Minimal Non-Connected Winning Coalitions=14</td>
</tr>
<tr>
<td>Marshall, Brennan, Blackmun, Stevens, White=8</td>
</tr>
<tr>
<td>Marshall, Brennan, Blackmun, Scalia, Kennedy=1</td>
</tr>
<tr>
<td>Marshall, Brennan, Stevens, O'Connor, Scalia=1</td>
</tr>
<tr>
<td>Marshall, Brennan, O'Connor, Scalia, Kennedy=1</td>
</tr>
<tr>
<td>Blackmun, O'Connor, Scalia, White, Rehnquist=1</td>
</tr>
<tr>
<td>Blackmun, O'Connor, White, Kennedy, Rehnquist=1</td>
</tr>
<tr>
<td>Stevens, O'Connor, Scalia, Kennedy, Rehnquist=1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Surplus Coalitions (Total N=31; Excludes Coalitions of 9)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size=6; N of occurrences=15; N of CW=4</td>
</tr>
<tr>
<td>Stevens, O'Connor, Scalia, White, Kennedy, Rehnquist=4</td>
</tr>
<tr>
<td>Size=7; N of occurrences=12; N of CW=9</td>
</tr>
<tr>
<td>Marshall, Brennan, Blackmun, Stevens, O'Connor, White, Kennedy=1</td>
</tr>
<tr>
<td>Blackmun, Stevens, O'Connor, Scalia, White, Kennedy, Rehnquist=8</td>
</tr>
<tr>
<td>Size=8; N of occurrences=4; N of CW=4</td>
</tr>
<tr>
<td>Brennan, Blackmun, Stevens, O'Connor, Scalia, White, Kennedy, Rehnquist=2</td>
</tr>
<tr>
<td>Marshall, Brennan, Blackmun, Stevens, O'Connor, White, Kennedy, Rehnquist=2</td>
</tr>
</tbody>
</table>

*Note: Boldface shows non-connected members. Justices aligned on a left-to-right scale: Marshall, Brennan, Blackmun, Stevens, O'Connor and Scalia (tied), White, Kennedy, Rehnquist. Scale constructed from votes cast in all 1988 Term civil liberties cases decided with full opinion. Alignment is based on data presented in Epstein, Segal, Spaeth and Walker (1993, Be 6.2).*
Table 4. Membership in Decision and Opinion Coalitions: The Median Justice, 1989 Term Civil Liberties Cases

<table>
<thead>
<tr>
<th>Justices</th>
<th>In Decision Coalition (A)</th>
<th>In Opinion Coalition (B)</th>
<th>Special Concurrences (A) - (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marshall</td>
<td>51.2</td>
<td>37.2</td>
<td>14.0</td>
</tr>
<tr>
<td>Brennan</td>
<td>55.8</td>
<td>44.2</td>
<td>11.6</td>
</tr>
<tr>
<td>Blackmun</td>
<td>70.9</td>
<td>61.6</td>
<td>9.3</td>
</tr>
<tr>
<td>Stevens</td>
<td>64.0</td>
<td>58.2</td>
<td>5.8</td>
</tr>
<tr>
<td>D''Connor</td>
<td>88.4</td>
<td>86.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Scalia</td>
<td>82.7</td>
<td>75.9</td>
<td>6.8</td>
</tr>
<tr>
<td>White</td>
<td>88.4</td>
<td>86.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Kennedy</td>
<td>85.9</td>
<td>80.0</td>
<td>5.9</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>79.1</td>
<td>76.7</td>
<td>2.4</td>
</tr>
</tbody>
</table>

*Note:* Based on 86 coalitions. The numbers represent percentages (e.g., Marshall was in 51.2 percent of decision coalitions and 37.21 percent of opinion coalitions).
content of an opinion and thus on the array of justices endorsing it.

**Institution-Free, Policy-Driven Theories: Multidimensional Variants**

Models of multidimensional policy space predict that a party will control policy and will govern if it occupies the core—a policy position that cannot be overturned, given the overall configuration of actors' sizes and positions (e.g., McKelvey and Schofield 1987; Schofield 1986, 1989). A core party is likely to form a minority cabinet, for allies offer it no gain in policy (which the core party already dictates) and impose costs in office terms (e.g., Schofield 1993, 8). This school expects lasting governments only in the presence of a stable core. Under simple majority rule in two dimensions, a core is unusual and only the largest party is able to occupy a stable core. The adoption of supramajoritarian rules can give rise to a core even in three dimensions; under such rules, a party of any size can qualify as the core.23

Translated to the Court, the predictions would be that any justice who qualifies as the core justice will control policy and will dictate precedent in opinions—even in judgments. A core justice is likely to frame plurality opinions. An opinion coalition will remain intact from the tentative vote to the final decision, with no justices switching positions, only if some justice occupies the core. When prevailing norms amount to simple majority rule, only the opinion writer can qualify as the core justice. When supramajoritarian rules are in force, any justice can occupy the core.

We devote the next two sections to an investigation of these and related predictions. For now, recall a finding already reported: that a mere 4.5 per cent of the coalitions in the Rohde (1972b, 218) and Rohde and Spaeth (1976, 199) analyses consisted of four or fewer justices; and that plurality coalitions constituted only 8.9 per cent of all those opinion coalitions formed during the 1989 Term. Why are plurality opinion coalitions so rare on the Court? Justices prefer to establish precedent if at all possible and the Court's rules require a majority for precedent. These answers are obvious, reflect institutional design, and direct attention to institution-focused coalition theories.

**Institution-Focused, Policy-Driven Theories**

Institution-free theories tend to yield multiple predictions without specifying which one or few might predominate (but see Schofield 1993). Institution-focused theories alleviate this problem and generate a smaller number of predictions by examining how institutions restrict the alternatives that politicians find open to decision (e.g., Austen-Smith and Banks 1988; Laver and Shepsle 1990a, 1990b, 1990c; Shepsle 1979, 1986; Shepsle and Weingast 1987). For example, one institution-focused model of parliamentary government highlights the rule that the largest party is invited first to form a government; another stresses the discretion enjoyed by cabinet ministers in their policy jurisdictions. We need not survey this school's predictions, which pertain to executive or legislative coalitions made up of elected legislators. We do follow the logic of this body of work, however, in identifying elements of institutional design as powerful influences on the opinion coalitions that appear on collegial courts.

**VI. Predictions in a Policy-Based Approach to Opinion Coalition Formation**

Our predictions build on existing institution-free models of coalition bargaining in multidimensional policy space and incorporate the essential insight of institution-focused theories that institutions shape the alternatives facing politicians. We argue that spatial and institutional conditions shape opinion coalitions on collegial courts. The weights and positions of justices in policy space affect which coalitions emerge and how durable or fragile they are. The powers of the opinion writer endow that justice with extra weight. We contend that three other institutional features, along with rules about the opinion writer, influence the formation and durability of

23Our thanks to Itai Sened for help on this point.
coalitions on the Supreme Court: the absence of an electoral constraint, the requirements for precedent, and the norm against specially concurring. With one exception, these features do not vary in the post-John Marshall Court era. Elections have never placed jurists on the Supreme Court, the opinion writer has always played a special role, and judgments have always lacked precedential value. However, the norm against non-consensual behavior relaxed around the New Deal period (Haynie 1992; Walker, Epstein, and Dixon 1988). Our general argument noted, we now turn to the predictions.

Coalition Size

We expect plurality opinion coalitions to be rare—because of institutional design, because judgments lack precedential value. We see no reason for minimal winning coalitions to be especially frequent. Indeed, since justices are not constrained to present distinctive campaigns to an electorate and since at least some justices care about unity and legitimacy, surplus coalitions should form and should be more frequent than minimal winning coalitions. Unanimous coalitions are even possible, although—given changes in consensual norms—we expect them to be rarer after Stone became Chief Justice.

In our view, however, the most important characteristic of coalitions to predict is not size but instead policy. We move from how many to which justices enter opinion coalitions.

Coalition Composition

A justice is likely to coalesce with other justices who are nearby in policy terms. Justices who are more unity-driven are more likely to compromise and justices who are less unity-driven are more likely to exclude themselves from the opinion coalition. Thus, for example, if a justice who dissents on the tentative vote is highly unity-driven and is close to the opinion writer in left-right terms, she is likely to join the final opinion. (Indeed, this reasoning helps to explain why most justices who switch from the tentative to the final vote go from the minority to the majority [see Brenner and Dorff 1992]).

What do these statements about individual justices imply for collective coalition outcomes? If any justice is located at the core of policy space, she dictates policy, regardless of the opinion coalition’s size and membership; the opinion coalition will contain relatively unity-driven justices near the core, who are willing to endorse the core justice’s policy preferences as enunciated in the opinion. If no justice occupies the core, the opinion coalition will join justices in or near the core set of the policy space.24

The policy content of an opinion should reflect coalition composition. Justices have room for choice in the doctrine and precedent they bring to bear in writing the opinion, and what they do actually emphasize should be related to which justices sign on.

Coalition Maintenance

As stated, we expect that an opinion coalition will remain intact from the tentative vote to the final decision, with no justices switching positions, only if some justice occupies the core. If there is no core justice and supramajoritarian norms are relatively weak, an opinion coalition is likely to fragment into separate portions signed by different justices, with some justices endorsing only a portion of the opinion and writing a special concurrence on another portion.

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24The core and cycle set may be defined as follows. In two-dimensional policy space, a median line demarcates two alternative majority coalitions: one on the line and to the right; and the other on the line and to the left. If all median lines intersect, the point of intersection is the core of the policy space. If the median lines do not intersect, the area they bound is the cycle set. Figures 3 and 4 below illustrate these definitions for a nine-member court.
The Impact of Variations in Institutional and Spatial Conditions

We expect greater fragility in coalitions—greater fluidity between the tentative and final coalitions, greater fragmentation of the opinion into different parts—in recent times, with the erosion of institutional norms against dissents and concurrences and with the rise of additional policy dimensions. Again, unanimous coalitions should be less frequent in recent years.

VII. Exploring the Predictions

Our overall plan is to test our theory against data from the 1874 to 1888 and 1937 to 1985 Terms of the Court. An adequate test requires that we compile a large data set. The most exacting and time-consuming task is to measure justices’ positions on the unity-disunity dimension. Because docket books are available for the 1874-1888 and 1937-1985 Terms (Palmer and Brenner 1989), we are able to construct a valid and reliable unity-disunity dimension. We need not collect data from the Vinson era forward since Spaeth and Palmer are in the process of integrating conference and final vote data. But we must do the same for earlier periods. This is especially important for our study since a major change in institutional norms occurred in the early 1940s: The Court moved from a largely consensual body to one of dissensus. It is critical for us to compile a relatively long series of data before the watershed of the early 1940s so that we can capture any distinctions in coalitional behavior that the norm change might have produced. Appendix C contains more detailed information about our proposed measures and design plan.

For present purposes, we assess some of our predictions in light of available data and elaborate others through hypothetical illustrations. As Figure 2 shows, the Court has issued judgments relatively rarely. Unanimous decisions have been handed down rather frequently and do show the expected decline after Stone’s ascendency to the Chief Justiceship.25

(Figure 2 about here)

These trends are well in line with our predictions about the size of coalitions. Yet, as noted earlier, our more important expectations center on policy. These we can consider most fully and rigorously against the data we are in the process of compiling. For now, we may develop the implications of our predictions about coalition composition and maintenance by discussing hypothetical distributions of justices in policy space.

Imagine that the justices are arrayed as in Figure 3. Given Justice C’s position, her assignment as the opinion writer, and the positions of other justices, Justice C qualifies as the core justice.26 The predictions are that Justice C will dictate the policy content of the opinion, that the opinion coalition will not lose any members from the tentative to the final vote, and that the justices will unanimously sign on to the opinion coalition. (As shown, all justices are fairly concerned about unity in decision making; no justice is located at the extreme right of the figure.)

(Figure 3 about here)

Next consider the configuration of justices pictured in Figure 4 and a case where Justice W is assigned as the opinion writer. The shaded area in the figure depicts the cycle set. Our predictions are that the opinion coalition will be composed of justices W and B (whose positions form part of

25Note that the data presented in Figure 2 are unanimous decisions, not opinions. Hence, these data do not provide the most appropriate test of our predictions because—in at least some of these—one or more justices specially concurred. Still, if we assume that the percentage of unanimous cases with one or more special concurrences is relatively constant since the 1940s, the expected pattern does emerge.

26Let the opinion writer’s weight be represented as \((1 + x)/9 + x\), where \(0 < x < 1\). All other justices have a weight of \(1/9 + x\). An opinion that establishes precedent must be endorsed by a coalition equal to or larger than \((5 + x)/9 + x\). Given these weights, all median lines intersect at Justice C’s most preferred position, as shown in the figure.
Figure 2. Judgments and Unanimous Decisions as a Proportion of all Opinions, 1925-1991 Terms

Source: Epstein, Segal, Spaeth, and Walker 1993, Tables 3.1 and 3.5.
the boundary of the cycle set), justice G (who lies very close to the boundary of the cycle set), and justices E and F (who are further outside the cycle set than is justice G, but who are also more unity-minded than is justice G). Justice H may endorse all or only part of the opinion, for although his most preferred position lies slightly outside the cycle set, he is the least unity-minded justice of all those portrayed here. Indeed, since there is no core, the opinion coalition in this case may well shift from the tentative vote to the final decision and may splinter into different portions signed by different groups of justices. Whatever special concurrences there may be, we expect justices A, C, and D to dissent.

(Figure 4 about here)

VIII. Conclusion

How might we best explain the formation of opinion coalitions on collegial courts? We reject office-driven approaches to understanding the politics of opinion coalition formation. We contend instead that policy-driven theories offer the most fruitful approach to studying opinion coalitions on the U.S. Supreme Court. Building on existing themes in the game-theoretic literature, we argue that spatial and institutional conditions shape which coalitions emerge and the degree of stability they exhibit.

Our primary effort here has been to develop the rationale for taking the approach we do and to identify the ways we will pursue our ideas in future research. The predictions we lay out clearly call for more systematic and thorough testing. The results of this preliminary examination are encouraging. The evidence we have evaluated reinforces our conviction of the promise of our research plans. But we are still in the process of gathering and analyzing the data that will enable us to reach more firm, fulfilling conclusions.
Appendix A. The Processing of Supreme Court Cases

General Process

Court Receives Requests for Review (4000-5000): Occurs throughout Term

*appeals
*certification
*petitions for writ of certiorari (most common request for review)
*requests for original review
*requests for extraordinary writs

Cases are Docketed: Occurs throughout Term

*original docket (cases coming under its original jurisdiction)
*appellate docket (all other cases)

Justices Review Docketed Cases: Occurs throughout Term

*Chief Justice (in consultation with associate justices) prepares discuss lists
*Chief Justice circulates discuss lists prior to conferences

Conferences: Fridays

*selection of cases for review, for denial of review
*Rule of Four: Four or more Justices must agree to review most cases

Announcement of Action on Cases: Begins Mon. after Conference

Clerk Sets Date for Oral Argument

*usually not less than 3 months after the Court has granted review

Attorneys File Briefs

*appellant must file within 45 days of Court’s granting of review
*appellee must file within 30 days of receipt of appellant’s brief

Oral Arguments:
Seven 2-week sessions from October through April on Mondays, Tuesdays, Wednesdays

Court typically hears 4 cases per day, with each case receiving 1 hour of Court’s time

An Example:
Ohio v. Akron Center for Reproductive Health (1990)

10 November 1988: Ohio requests Supreme Court review

10 November 1988: docketed as 88-805.

3 July 1989: Court accepts case

26 September 1989: case set for November orals

28 August 1989: Ohio submits brief (time extended)

14 October 1989: Akron Center submits brief (time extended)

29 November 1989
Conferences: Wednesdays p.m., Fridays

- Discussion of cases
- Tentative votes

Assignment of majority opinion following conference

Drafting and Circulation of Opinions

Issuing and Announcing of Opinions

6 (Kennedy, Rehnquist, White, Stevens, O'Connor, Scalia) to 3 (Brennan, Marshall, Blackmun)\textsuperscript{a}

Kennedy\textsuperscript{a}

Through June

25 June 1990

KENNEDY announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which REHNQUIST, WHITE, STEVENS, O'CONNOR, and SCALIA joined, and an opinion with respect to Part V, in which REHNQUIST, WHITE, and SCALIA joined. SCALIA filed a concurring opinion. STEVENS filed an opinion concurring in part and concurring in the judgment. BLACKMUN filed a dissenting opinion, in which BRENNAN and MARSHALL joined.

********

Decision (or Vote) Coalition:
6 (Kennedy, Rehnquist, White, Stevens, O'Connor, Scalia)

Opinion Coalitions:
6 (Kennedy, Rehnquist, White, O'Connor, Scalia, Stevens)
4 (Kennedy, Rehnquist, White, Scalia)

Note: In \textit{Ohio v. Akron Center for Reproductive Health}, the Court reviewed a state law requiring that one parent be notified prior to the performance of an abortion on an unmarried, unemancipated minor (unless a court has authorized the procedure).

Sources: The General Process is from Epstein, Segal, Spaeth, and Walker (1993, Table 1.9); data for the Akron Center case come the \textit{Supreme Court Reporter} (110 S.Ct. 2972) and microfiche records for 88-805.

\textsuperscript{a}Based on the Court's final records, not tentative vote data from docket books.
Appendix B. The Equivalence Hypothesis

Some scholars of the judicial process might argue that while we have some theoretical (Murphy 1964) and anecdotal (Urofsky 1987; Schwartz 1985, 1988) support for virtually all of our assumptions, we lack systematic empirical evidence that justices behave strategically. Even more pointedly, they might contend that the available evidence suggests quite the opposite. Giles (1977) found, for example, that the final voting and opinion coalitions in given cases tend to be equivalent in number. This led him to conclude that little bargaining transpires between the tentative vote and the opinion writing stage.

To this we respond in two ways. First, equivalence between the decision and opinion coalitions does not negate any occurrence of bargaining. The assigned opinion writer may negotiate in order to maintain her voting bloc, a possibility supported by many scholars' accounts and by the justices themselves. So, too, we should not forget that Giles based his conclusion on actual votes cast, not on tentative vote data. Accordingly, he could not say whether or not justices changed their vote in response to strategic activity (persuasion and bargaining) on the part of the opinion writer or other members of the majority coalition. This is a distinct possibility given Brenner's (1980, 1982) analyses, which indicate that justices who shift their votes tend to move from minority to majority positions. Although numerous examples exist, a few sources are especially rich in evidence of the negotiations among members of opinion coalitions in important cases. We refer the reader to Urofsky's (1987) book, which contains Justice Douglas' memoranda, and to Schwartz's volumes on the unpublished opinions of the Warren (1985) and Burger (1988) Courts.

Second, reconsider Table 1, which shows that the size of the decision coalition differed from that of the opinion coalition in 33 per cent of the cases during the 1989 Term. And a reinterpretation of the data used by Giles (civil liberties cases decided during the 1953-1968 Terms of the Supreme Court) results in a similar conclusion: The sizes of opinion and decision coalitions differed in 32 per cent of the cases. Thus, at least during the Warren Court era and the 1989 Term, a good deal of fluctuation separates the decision from the opinion coalitions.
Appendix C. Testing the Predictions

To test our predictions against actual opinion coalition formation on the U.S. Supreme Court, we must define what we mean by opinion coalitions and we must locate the justices on policy and unity dimensions. One way to define opinion coalitions is to follow the lead of Rohde (1972) and Rohde and Spaeth (1976), and consider an opinion coalition as comprised— in a given case— of justices who: write the opinion or judgment of the Court, write no opinion and join the majority opinion or judgment, and write (or join) an opinion (called a regular concurrence) “not withstanding membership in the majority or plurality opinion coalition” (Segal and Spaeth 1993, 276). In other words, only two kinds of behavior would qualify for exclusion from the opinion coalition: the casting of a special concurrence or a dissent.

We generally adopt this operational definition, with one important modification. Rather than use a given litigation as the unit of analysis (where there is only one opinion coalition per case), we focus on the opinion coalition (where there can be more than one opinion coalition per case). To see the difference in approach, consider Washington v. Harper, 110 S.Ct. 1028 (1990), for which the Supreme Court Reporter noted the following coalition arrangement:

Kennedy, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, IV, V, in which REHNQUIST, C.J. and WHITE, BLACKMUN, O’CONNOR and SCALIA, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined (Harper 1990, 110 S.Ct. at 1032)

One way to approach this case is to code the opinion coalition dominating the decision (a six-member coalition, consisting of Kennedy, Rehnquist, White, Blackmun, O’Connor, and Scalia). We, instead, would note the presence of two opinion coalitions: a unanimous one and the six-person one.

We take this approach for several reasons. First, with the rise in non-consensual behavior, coalitional arrangements of the sort emerging in Washington v. Harper are increasingly common. For example, of the 129 non-per curiam cases decided during the 1989 Term with full opinions, there emerged 157 distinct opinion coalitions (or 1.22 per case). Second, and relatedly, it is exceedingly difficult to fit so many of these into one neat opinion coalition. While the six-person coalition is the predominant one in Washington, we would be hard pressed to locate but one opinion coalition in other cases in which the Court splinters off in numerous different directions (see Baum 1992, 126-127). For those seeking to locate only one opinion coalition per case, such “splintering” does not merely present coding problems; it generates analytic ones as well. For we believe that when a majority opinion or judgment fragments, the justices themselves start to think about the various parts as “mini-cases” and engage in strategic behavior over the contents of those parts. In other words, our approach more closely approximates how the justices seem to view particular cases. Finally, since the focus of our study is the politics behind the formation of opinion coalitions, the coalition— rather than the case— presents the most logical unit of analysis.

With that in mind, we now turn to the construction of our policy and unity dimensions. Locating actors in policy space is a challenge to judicial specialists, not to mention students of political parties, Congress, and so forth. As Laver and Schofield write, “While spatial representations of policy bargaining are powerful, suggestive, and elegant from the point of view of the theorist, they present serious problems in practice. This is because establishing the preferred policy positions of real political actors can be a difficult and elusive practice” (1990, 51).

Many approaches to identifying the preferences of political parties have been advanced (e.g., the use of “expert judgments,” analysis of legislative roll calls, coding of party manifestos). But the problem of finding sources independent of the actual behavior of the political actors under scrutiny persists for coalition analysts, as it does for almost all scientists studying decision making.
It is, perhaps, scholars of legal decisions who face the greatest obstacles of all. Virtually all approaches to the study of judicial decision making—including the attitudinal model, which is the predominant one—would ideally require the analyst to identify the preferences (or attitudes) of jurists from sources independent of the votes they cast (see Segal and Spaeth 1993, 361-362). Yet, because judges and justices—unlike other political actors—are not disposed to uncovering their attitudes and values, scholars use their votes as surrogates for those beliefs. Here lies the crux of the problem: the measures for the independent and dependent variables are identical. As Segal and Spaeth (1993, 361) explain: “[T]he most damning criticism of the attitudinal model in earlier days was that it employed circular reasoning inasmuch as the attitudes used to explain the justices’ votes are based on these self same votes... [E]arly attitudinal theorists used the results of their cumulative scales and factor analyses to explain the justices’ votes, with the scales and factors used to evidence the explanatory power of the attitudinal model.”

While several attempts have been made to overcome the circularity problem, only one holds promise for our purposes: using the past votes of the justices (in particular areas of the law) to align them on a left-right scale. This approach is obviously not problem-free (indeed, it falls far short of evaluating attitudes from sources independent of the vote), but it has its benefits: in particular, as Segal and Spaeth have ably demonstrated (1993, Ch. 6), past votes are an excellent predictor of behavior. Accordingly, they provide us with the most feasible way to map judicial policy preferences.

Constructing the unity dimension is trickier because it is here that we anticipate differential behavior among the justices, which may not be tracked in the actual voting records. Suppose, for example, the tentative conference vote in a given case is 6 to 3 to affirm. Justice X is assigned to write the opinion for the 6-person majority. Being a unity-minded colleague, justice X seeks to enlarge the majority coalition. Two of the minority members are too distant from justice X in policy space to be expected to join the majority. But since justice Y is relatively close, justice X would seek to capture her vote. Let us suppose that justice X is successful and justice Y signs the majority opinion. We can now see the problem with using the reported vote data to indicate “unity”: based on the actual record, we would record the vote as 7-2, never realizing that it was, in fact, a 6-3 one, with the efforts of the unity-minded justice X altering the outcome. To assess unity, thus, we compare the tentative conference votes with those reported. We can locate each justice on the unity dimension by computing the difference between the number of justices who tentatively voted for the position taken by the majority opinion writer with the number eventually signing on to the opinion.

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1Carp and Stidham (1993, 341) well state the problem: “[H]ow can one compile a judge’s attitudes in order to test for their manifestation in collegial court decisions? Unfortunately, judges have shown no willingness to answer the sort of in-depth questionnaires that might reveal judicially significant attitudes—particularly on matters that relate to issues that may come before them in court. Likewise judges are reluctant to give speeches, grant interviews, or write articles that bare their judicial souls. Judges consider such behavior inappropriate and many resist making it easy for reporters and social scientists to suggest a link between their personal values and the way they decided cases.”

2Two studies deserve mentions. In a 1966 article, Danielski extracted values from the speeches made by two Supreme Court justices (Brandeis and Butler) prior to their elevation to the Court. A comparison between their pre- and post-confirmation positions on economic issues revealed a strong relationship between the two. More recently, Segal and Cover (1989) set out a different solution. They content-analyzed newspaper editorials, written between the time of justices’ nomination to the Court through their confirmation, to derive independent measures of ideology. They then tested these independent measures against votes cast by the justices, with the results indicating a high degree of correlation between the two. The Danielski measure would be difficult to replicate for those justices who did not make off-the-bench speeches; the Segal-Cover measure is virtually impossible to take back in time for many reasons, including the paucity of newspaper coverage.
References


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