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JUDICIAL ATTITUDES AND
POLICY-MAKING
IN THE DIXON COURT*

by GLENDON SCHUBERT**

Political man, according to a well-known definition by Harold D. Lass-well, is he who displaces his private attitudes upon public objects, and then rationalizes the result on the basis of what he claims to be the public interest.[1] A question upon which lawyers and political scientists tend to differ concerns the extent to which it is appropriate, in public discussion, to describe the decisional behavior of judges as political. No doubt much of the apparent difference in professional perspective, as between lawyers and political scientists, reflects the corresponding difference in emphasis, in the orientations toward judges, of the two professions. Lawyers seek to exercise a monopoly of influence upon and control over the judicial function; and to *become* a judge is an ultimate professional goal for many, if not most, lawyers, who understandably feel a considerable vested interest in defending the judiciary against the usually misguided, always (by definition) "unprofessional," and indeed often potentially dangerous, disclosures of laymen. Non-legal critique of judicial institutions is an assault upon the interests of every lawman. Political scientists, on the other hand, tend (at least, in modern times) to view judges as makers of public policy who ought to be studied by means of the same theories and methods as are employed in the analysis of political behavior generally. The vested interest of the political scientist lies in describing, analyzing, and predicting how public policy gets made; and in polities such

as the American or the Australian, where judges clearly play and have played a major role in the shaping of the political destinies of the nation, it would be both reprehensible and irresponsible for political scientists to fail to include judges in their designs for research.

The present article is written by a political scientist (and a non-Australian, to boot) with the objective of providing for lawyers a basis for better understanding of the doubly alien point of view, toward judicial behavior, of American political science. The explicit subject-matter concerns the Australian High Court, and the author thus far has been able to pursue his inquiry about the Court only through reading and not on the basis of first-hand observation and experience. Data so limited in scope are bound to be inadequate in various respects—not so much in comparison to the conventional research basis for legal commentary, but rather when appraised against one's ideals of what needs to be done in order to do the job properly. The author's lack of a law degree may be reckoned a handicap; but a much greater difficulty is posed by the problem faced by any person who seeks to project his own understanding into, and to make interpretations on the basis of, what is for him an alien culture—politically, socially, psychologically, and economically—in which he has not been reared. But half a loaf is better than none.

There can be no doubt that judges make decisions about matters which, in Lasswellian terms, we can fairly describe as "public objects." Similarly, it is even literally true that judicial opinions are intended to function as post hoc statements of rational justification, pro and con, judicial decisions. The only part of Lasswell's definition about which any disagreement seems possible is the first part: do judges make decisions on the basis of their private attitudes? Or, to the contrary, are judges merely technicians, "bureaucrats" in the Weberian idiom (and "experts" in the Laskian), whose task is to utilize their specialized knowledge about (and authority to pronounce) consensually-approved systems of norms that have been formulated by actors other than the immediate judicial decision-makers? These are the horns of the dilemma as it typically is posed; but the dichotomy, like many attempts to oversimplify the frequency distributions of continuous variates by enfolding[2] them into a nominal measure, can be (and usually is) very misleading. In life (including judicial life) as in statistics, it all depends upon where and how one draws the cutting points.[3] Unless one is prepared to dismiss as invalid much of the work done in modern psychology, there is no *physiological* alternative to the proposition that judges decide on the basis of their "private" attitudes.[4] However, such a resolution of the question is merely semantic, because attitude defined thus broadly—and this is the meaning that will be attributed to it by the present author—subsumes concepts of institutional role and of professional

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[2] Cf. C. Coombs, A THEORY OF DATA (New York: Wiley, 1964) pp. 9-11 and Ch. 5.

[3] R. G. Francis, THE RHETORIC OF SCIENCE (Minneapolis: University of Minnesota Press, 1961); H. Blalock, CASUAL INFERENCES IN NONEXPERIMENTAL RESEARCH (Chapel Hill: University of North Carolina Press, 1961).

[4] S. G. Tomkins and C. E. Izard, AFFECT, COGNITION, AND PERSONALITY (New York: Springer, 1965). Cf. A. F. Davies, PRIVATE POLITICS (Melbourne: Melbourne University Press, 1966).

obligation which, as understood by lawyers, would be articulated under such
familiar rubrics as *"stare decisis"* and "due process of law." All judges make
policy, to some extent; and all judges are technicians, to some extent. Some
judges, such as those who act in the role of municipal magistrates in traffic
courts, have considerable discretion to control how questions will be framed
for judicial decision, but relatively little discretion over the verbal statements
of norms which are invoked to rationalize, and presumably to guide, their
decisions. Supreme court justices, on the other hand, are specialists in the
casting and recasting of verbal statements of norms, and their primary concern
is with the policy component of adjudication. The extent to and the manner
in which judicial decisions are affected by the beliefs, opinions and attitudes
of judges will depend upon the time, place, and circumstances; but there has
been no relevant time in the history of the United States Supreme Court (or,
it is submitted as being highly probable, in that of the High Court of Aus-
tralia) during which an understanding of the private attitudes of the justices
has not been of critical importance to the public policy outcomes preferred
by the court.

The present report is based on an analysis of part of the data collected
for research, concerning the High Court, that the author has been carrying
out in recent years. The time period covered extends for a decade, from Sir
John Latham's *de facto* retirement as Chief Justice on May 11, 1951, to
the appointment of Justice Sir Francis Owen on September 22, 1961. Only
nine men served during this time, and the two changes of personnel both
occurred during the middle third of 1958. Thus, we shall deal with what
from a sociological point of view are two different "courts,"[5] the first sitting
from 1951-58, and the second from 1958-61, although a majority subgroup of
five of the justices were members of both courts and served (subject to a
caveat for Taylor)[6] throughout the decade. The period sampled corresponds
to volumes 84-107 of the *Australian Law Reports,* which were the source
of the raw data: the reports of the decisions of the Court and the opinions
of the justices. All cases heard in appellate jurisdiction and decided with
opinion(s) were included in the sample, providing that they were reported
as having been decided within the period defined by the boundary dates.
The result totaled 710 decisions of the High Court, of which about a fourth
(187) were nonunanimous or "split" decisions, in the sense that one or more

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[5] Because of changes in the composition of the small decision-making group. Cf.
Snyder, *The Supreme Court as a Small Group,* (1958) 36 SOCIAL FORCES 232-238.

[6] Actually there were three such courts, because Sir Alan Taylor was not appointed
until September 2, 1952, so there was one six-man court without an active Chief during
the first year; a full seven-man court with a very active Chief during the next half dozen
years; and a somewhat different seven-man court with the same Chief during the final
three years. But we shall ignore what may possibly prove to have been important differ-
ences between the first and the next six years, and distinguish only between an initial
seven-year period, and a later three-year period. (Statistically-minded readers may choose
to view this treatment of the data, made as it was in order to maximize the size of the
sample, as a potential source of error variance; those whose taste runs to the rhetoric of
the humanities may prefer to conceptualize the matter as a case of robbing Peter to pay
Paul.)

of the participating justices disagreed with the outcome favored by the Court.[7] There were a total of 3248 participations or votes; and the average size deci-sion-making panel of the Court (4.6) included about two-thirds of the incum-bent justices—actually, panels for split decisions (4.9) tended to be slightly larger than those for unanimous decisions (4.5). A total of 2977 opinions were associated with these decisions, so opinions accompanied almost all (92%) of the votes; or, stated otherwise, there were on the average about four (4.2) opinions delivered per decision.[8] These findings stand in sharp con-trast to the corresponding ones for the United States Supreme Court,[9] whose average ratio of participation is much higher, and ratio of opinions to partici-pation is much lower, reflecting (of course) the differences in customs and institutional roles that have obtained, for these two courts, at least during the period of their co-existence.[10]

Our particular concern here is with the interrelationship among three classes of variables which relate to the votes of the High Court justices in the

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[7] During the same ten year period, the United States Supreme Court decided on the merits 1749 cases, of which 946 (54%) were non-unanimous. The Supreme Court, therefore, decided over twice as many cases in absolute terms; and the Supreme Court divided in voting twice as frequently as did the High Court. Consequently, the corre-sponding sample of split decisions available for the study of the Supreme Court is five times larger than the present High Court sample.

[8] Disagreement in opinions was more widespread than that concerning outcomes, because dissenters almost without exception disagreed with the opinions of justices who voted in the majority; and majority justices were by no means in invariant agreement concerning rationales. Moreover, opinion differences were observed to obtain frequently in decisions for which the vote as to outcome was unanimous, and such "unanimous" decisions were much more numerous than those in which a division of votes occurred. I have reserved the subject of opinion agreement and disagreement for discussion in another article, *Social Attributes and Opinion Agreement Among High Court Justices,* (April, 1968) 4 AUSTRALIAN AND NEW ZEALAND JOURNAL OF SOCIOLOGY, 1-16; and see also my *The Dimensions of Decisional Response: Opinion and Voting Behaviour of the Australian High Court,*" in J. Grossman and J. Tanenhaus (eds.), FRONTIERS OF JUDICIAL RESEARCH (New York: Wiley, 1969), pp. 163-195.

[9] The average size decision-making panel of the Supreme Court, for a much larger sample of split decisions extending for an overlapping period of over a decade and a half, was 8.6; and the ratio of participation (*i.e.,* the average size divided by the maxi-mum size of the Court) was .95 (rather than the .66 for the High Court). On the other hand, the ratio of opinions to voting appears to be much lower for the American court; what seem to be the only available reported data indicate that for one recent Supreme Court justice, whose tenure overlapped in part the earlier period for our present High Court sample, the ratio of his opinions to his votes was only .15. Robert Jackson wrote a total of 302 opinions (for the Court, concurring, or dissenting) during his dozen terms of participation in an estimated total of 2065 votes on the merits. I have corrected the Court's estimated total of 2347 decisions by Jackson's participation rate of 88% (for split decisions, 1946-53 Terms) which I have assumed for present purposes to apply also to unanimous decisions and for the earlier four terms, which are taken from Pritchett but corrected by a weight of 1.5, since his data do not include per curiam decisions on the merits, as the other data do. For the opinion data, see my article, *Jackson's Judicial Philosophy: An Exploration in Value Analysis,* (1965) 49 AMERICAN POLITICAL SCIENCE REVIEW 941; for the decisional and voting data, see (1941-44 Terms) C. H. Pritchett, THE ROOSEVELT COURT (New York: Macmillan, 1948) 25; and (1946-53 Terms) my THE JUDICIAL MIND: ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963 (Evanston: Northwestern University Press, 1965) 45, 50-57.

[10] Cf. Anon., *The High Court,* (August 14, 1967) 40 CURRENT AFFAIRS BULLETIN No. 6; and J. Schmidhauser, THE SUPREME COURT: ITS POLITICS, PERSONALITIES, and PROCEDURES (New York: Rinehart, Holt, and Winston, 1960).

split decisions of the sample. The three classes of variables include: (1) the *attributes,* or background characteristics of the justices; (2) the extent of their *participation* in these decisions; and (3) similarities and differences in their *voting* behavior. The objective of our inquiry will be to examine the correlations between pairs of these three classes of variables, thereby describing both the patterns and the degrees of relationships that obtained among them, for the period of our sample. Such an analysis will fall short of the prediction of relationships that one would require of a theory that could be deemed scientific; but the present work will at least constitute a step in the direction of, and may even help to lay the basis for, the subsequent construction of a social scientific theory of the behavior of judges in Australia.

Attributes

An attempt was made to collect systematic information concerning an extensive array of background characteristics for the nine justices in the sample. Among the subjects of inquiry were: the location, size, and socio-economic aspects of the community in which the judge was raised; his relatives and family connections; the occupation of his father, father-in-law, and other close male relatives; his age; his ancestry; religion; education; legal, governmental, and other occupational experience; partisan affiliation and political activity; social clubs and similar group affiliations; military experience; honors and awards; and publications and academic ties. Published sources of biographical data, available in the United States, were of course quite inadequate to provide the required information; and so the author arranged to employ a qualified graduate student in the social sciences, at an Australian university, to assist by searching through sources available in Sydney libraries. The results are disappointing, because it proved impossible to acquire any information about many of the items on the schedule; and only for a few are there systematic data for all nine justices. Nevertheless, analysis of the compiled returns shows that it is highly probable that the justices of the High Court constituted a very much more homogeneous group than did any subset of the same number of justices of the American Supreme Court during the 1950's. Our interest, however, is in identifying attributes, for which theory suggests a plausible potential bearing upon the making of decisional choices, in regard to which there are *differences* of importance among the High Court justices in the sample; characteristics on which they are all alike may bear an important relationship to their decision-making, but such shared attributes are of absolutely no help in accounting for differences in the voting behavior of the justices. All, for example, held university law degrees; and all belonged to exclusive, upper-class social clubs—reflecting, no doubt, their typically middle-class origins. (There was no Isaacs nor Higgins nor Evatt in this group; to have included such social radicals in the sample it would have been necessary to study an earlier period in the Court's development.)[11]

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[11] For a study which *does* include these more progressive judges, see Blackshield, *Guttman Scales and the Neutralist Ideology: The High Court of Australia, 1903-1967,* (forthcoming).

Two characteristics for which complete data are readily available are age and domicile. Age is potentially relevant because it is an index to the pattern of dominant cultural norms of a person's youth and socialization,[12] and to his direct experience (and therefore, internalized understanding) of major upheavals for his society (such as those accompanying a major war or depression). Moreover, there are biological correlates of maturation which suggest the likelihood that age-mates are more apt to share social interests than are persons separated by generational differences. Domicile has a potential bearing upon judicial behavior because of the distinctive subcultural differentiations found in various regions of a country. Even in relatively homogeneous countries like Japan and the United States and Australia, such distinctions are among the first and most obvious ones which natives are quick to perceive in each other. It takes no Professor Henry Higgins for the man from Tokyo to identify his country cousin from Kyushu; Mississippians are noticeably different, in many respects that reciprocally are deemed important, from Bostonians; and one gathers from a perusal of Australian social history that equivalent distinctions are perceived as between, for example, Melbourne and Darwin.

The dimension of age constitutes one of the relatively few variables in social science research for which ratio scaling is possible; but because the other variables with which comparisons must be made are much cruder, only slight advantage can be taken of this facet of the statistical potential of the data on judicial age. In fact, there are two principal clusters of age-mates in the sample: an older group of five justices (Dixon, Webb, Williams, Fullagar, and McTiernan) all of whom were born during the half-dozen years from 1886-1892, and four others (Windeyer, Taylor, Kitto, and Menzies) all of whom were born during the present century and within a seven-year span of each other. The difference between the means for these two groups is thirteen and a half years, or almost half a generation; and the gap between Chief Justice Owen Dixon, the senior in point of both age and tenure, and Douglas Menzies, the youngest and most recently appointed justice in the sample, is twenty-one years. All, of course, were past fifty at the time they joined the Court; but there remained this division in their relative elderliness. Because the highest common level of measurement possible for the set of attribute variables is ordinal, the age variable was scored as ranks for purposes of comparison with other variables.

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[12] As Danelski has pointed out, the present expectation is that the Supreme Court of Japan will become even more conservative in terms of "the Court's lack of activism in the protection of human rights. My guess [Danelski continued] is that in this regard things are probably going to get worse before they get better. The reason is that if appointments are made much as they are now, the men coming to the Court in the next ten years will have been born around 1910. Unlike some of their predecessors, they will not have had the experience of the liberal World War I period and the early Taisho Democracy in their backgrounds. In interviews with retired justices and high court judges, the importance of this period of modern Japanese history often came up, especially in regard to the genesis of their liberal ideas which, in some cases, they wrote in Supreme Court opinions...." *The Supreme Court of Japan: An Exploratory Study*, p. 17 (mimeographed paper presented at the 1966 Annual Meeting of the American Political Science Association, New York City, September 10, 1966).

For the dimension of domicile, there was no very meaningful alternative to trichotomization: five of the justices were from New South Wales (Mc-Tiernan, Williams, Kitto, Taylor, and Windeyer) and, in testimony to the equity—except for the rest of the country—of the prevailing system of judicial appointment,[13] another three of the justices came from Victoria (Dixon, Fullagar, and Menzies); the remaining justice was Webb (from Queensland).

Age is a natural interval scale that clustered (empirically, for this sample) nominally but was converted to ranks for intercorrelation; domicile, though there were only the three categories, was scaled ordinally, with the highest rank (hypothesized to be most conservative) assigned to Victoria, and the lowest rank to Queensland. All intercorrelations discussed below are Spearman (rho) rank correlation coefficients.

A third attribute variable was constructed as an index combining several discrete characteristics which, as it was assumed, could be scaled in the same direction along a single dimension of conservatism and liberalism. The four subcomponents of the index are: partisan affiliation of the justice himself (as reinforced by his own prior political activity), partisan affiliation of the government appointing a justice, religious affiliation, and familial socio-economic status. For each of these components, scores were assigned according to the subcategories denoted below. The *direction* of alignment was conservative; therefore, each category so designated was scored as +1 if observed to obtain for a justice; liberal categories were scored −1; and neutral categories were scored zero. For the political party component, affiliation with the Liberal Party was positive, and the Labour Party was negative. (For this component only, an intensity weighting was used, in that the score was doubled if a justice could be identified as having engaged directly in partisan political activity, as in campaigning publicly for, or in serving in, legislative office.) For the appointment component, the six appointees of Sir Robert Menzies were of course scored as positive; McTiernan's appointment by the Scullins Labour Government in 1930, and Webb's by the Chiffley Government in 1946, were considered negative; but Dixon's appointment to the Court in 1929, by the Bruce-Page Government, was scored as neutral. Affiliation with the Anglican or Presbyterian Church was deemed positive, and Roman Catholicism, negative; Dixon, an avowed agnostic who professed to

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[13] The distribution of states of domicile of all members of the High Court, including the nine justices in the present sample, is: New South Wales, 14 (58%); Victoria, 7 (29%); Queensland, 3 (12%); and South Australia, Western Australia, and Tasmania, 0 (0%). Measurements of the domicile variable in previously published reports on this research assign Kitto to Victoria instead of to New South Wales. I am indebted to Tony Vinson for his *Comment on 'Opinion Agreement Among High Court Justices,'* (1968) 4 AUSTRALIAN AND NEW ZEALAND JOURNAL OF SOCIOLOGY 158-59, in which he points out that Kitto, though born in Victoria, was reared and educated in New South Wales. The measurements of domicile discussed here have been recalculated to take into account this correction.

no religion, was scored neutral. Most of the justices came from middle-class[14] families with fathers and/or fathers-in-law who were clergymen, solicitors, or merchants; these were scored as positive on the economic component. McTiernan's father was a policeman, and this was scored as negative (that is, as constituting a lower or working-class occupation). The matrix of scores is reported in Table I, from which it can be observed that over a fourth of the cells are blank, indicating that information, for a particular justice on a particular characteristic, is unknown to the author. Only for three justices

TABLE I. SOCIAL, ECONOMIC, AND POLITICAL SCALE OF CONSERVATISM AS A BACKGROUND CHARACTERISTIC

Judge	Religion	Economic	Appointment	Partisan	Index Sum	Judicial Rank
Windeyer	+1	+1	+1	+2	+5	1
Menzies	+1	+1	+1	+1	+4	2
Fullagar	+1	+1	+1		+3	3.5
Williams	+1		+1	+1	+3	3.5
Kitto		+1	+1		+2	5
Dixon	0	+1	0		+1	6.5
Taylor			+1		+1	6.5
Webb	−1		−1		−2	8
McTiernan	−1	−1	−1	−1	−4	9

(Windeyer, Menzies, and McTiernan) is full information available on all four components, and in the case of one (Taylor) only his age was ascertained. Of course one would have more confidence in an index for which there were no missing data; but Table I represents the best information the author could get, and it seems unlikely that the reduction of his ignorance would bring about any dramatic changes in the rank order of the justices on the index scale. Half of the blank cells, for instance, are for the political party affiliations of five justices; and although the author is unable to assert positively that Fullagar, Dixon, Taylor, and Kitto were anti-Labour in their sympathies, it does seem unquestionable that they were not Labourites. Similarly, even if it could be proved that Webb was a Labour Party Member, or sympathizer, this would not change his order in the next to bottom rank on the scale. And it is most probable that the religious affiliations for Kitto and Taylor are positive; certainly neither one was at this time a practising Roman Catholic.

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[14] An earlier article unfortunately uses the adjective "lower" in describing the modal class status of the High Court justices in the present sample. In retrospect, I can suggest no very satisfactory explanation for this slip, which contradicts my own research notes (and, indeed, the evidence presented in the discussion where the remark appears). The mistake is perhaps best understood as a triumph of mind over matter. In any event I completely agree with what Tony Vinson has pointed out, *idem,* and I wish to thank him for his comment. See also Appendix *"Social Origins of the Judiciary"* to Roger N. Douglas, *Courts in the Political System,* (1968) 1 MELBOURNE JOURNAL OF POLITICS 36-47, at 47; and also his critique of some aspects of the scales reported in the present article, in (1969) 2 MELBOURNE JOURNAL OF POLITICS 78.

The rank correlation of the third or SEP (socioeconomic-political) index with the age and the domicile variables is $-.48$ and $+.39$, respectively; while the rank correlation between age and domicile is $+.17$. This indicates that age and domicile are substantially independent statistically: there is slight relationship between judicial age and judicial residence, for the judges in this small sample. However, the correlation between domicile and SEP conservatism is moderate and we may well infer that there probably is some important tie between the degree of conservatism apparent in a judge's background, and the subculture in which he was socialized—at least, as between Victoria and New South Wales. Moreover, the moderately high negative correlation between age and conservatism is an even clearer indication that the younger judges had more than conservative backgrounds than did the older ones.

Participation

At least as measured quantitatively, voting differences among High Court justices can arise only as a function of their joint participation in decisions. If participation were the rule, as it is for United States Supreme Court justices, then attention might profitably focus upon norms and practices relating to nonparticipation ("disqualification"), a question which has not been without political interest from time to time.[15] Or, if some device assuring randomization were employed, as it is for the assignment of judges to cases in many American metropolitan courts, then any question of structural bias in the composition of the High Court could be resolved by the explanation that this was (from a statistical point of view) only a form of error variance and due to chance. In the absence of controls to assure randomization in judicial assignments to decision-making panels, however, it is appropriate to hypothesize the possibility of bias and to test for this against the alternative of differences within a range of magnitude that could be explained by chance variation.

Turning first to Part III of the Judiciary Act (1903-59), one learns little of relevance. The High Court sits in panels of one justice for hearing cases in original jurisdiction, and panels of at least three may exercise appellate jurisdiction. A majority of three must concur in any decision "affecting the constitutional powers of the Commonwealth" unless the Court sits *en banc*. One Australian authority has suggested, in private correspondence, that an odd number of justices (3, 5, or 7) is preferred over an even number (2, 4, or 6) in order to avoid the possibility of equal division; that maximal participation of 7 or—when for some reason an individual justice cannot sit —of 6 is preferred for the decision of *all* constitutional questions, or when a precedent is being challenged. The same authority observed that only three-judge panels sit in South Australia or Tasmania, with the Court normally dividing its terms between Sydney and Melbourne, although panels of five

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[15] See E. Gerhart, AMERICA'S ADVOCATE (Indianapolis: Bobbs-Merrill, 1958), ch. 15 on *The Black Controversy*.

to seven do sometimes go to Brisbane in which event five are deemed suffi-
cient to decide constitutional issues and precedent-challenging cases.[16] With
regard, however, to the critical question of how the presiding judge—almost
always the Chief Justice—determines who will sit on which panels, the
apparently available explanation is not very satisfactory: reference is made to
"settled practices" and to "common sense"—which remain equally undefined
—as the basis for the exercise of discretion which takes into account such
self-evidently weighty matters as the "relative importance of a case" and
the number of justices "available" for assignment.[17] It is certainly a striking
contrast that the Australian Chief Justice seems to have considerable influence
in deciding which justices will participate in decisions, although once a case
has been heard the writing of judicial opinions seems to be the very paragon
of Holmes' "free trade in ideas . . . in the competition of the market"; while
the American Chief Justice usually has considerable influence in deciding
who will speak "for the Court," but virtually none in determining which jus-
tices will participate in any particular case.

It does seem indisputable that in choosing the panels to decide the
seven hundred odd decisions in the present sample, Sir Owen Dixon was not
drawing from a table of random numbers to guide his judgment. The average
rate of participation, for all justices in all decisions in the sample, is 3248/7
= 464; and Sir Owen himself set a Stakhanovite example for his brethren
by sitting in no less than 626, almost ninety (88.2) percent of the total of
710 decisions, and at a rate +35% higher than the Court's average.
McTiernan, the next senior justice but half a dozen years younger than the
Chief, participated at the much lower rate of −23%. Participation ratios for
all of the justices, in both the total sample and the subsets of split and of
unanimous decisions, are shown in Table II, which distinguishes also between
the ratios for the earlier, the later, and the combined time periods. There are
thus nine participation scales; and each shows differences that are highly
significant statistically, in that the probability of accounting for the observed
differences on the basis of chance variation is considerably less than one in a
thousand.[18]

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[16] An analysis of the 129 decisions of the first period (1951-58) shows that 57%
were appeals from the Supreme Courts of New South Wales and Victoria, so the High
Court sits where the business is (and the barristers are). Unlike the United States
Supreme Court, which convenes *only* in the District of Columbia, the High Court *never*
meets in Canberra, the Australian Capital Territory.

[17] Certain aspects of "availability" are, at least in principle, amenable to operation-
alization: health, and assignment to hear cases in original jurisidiction, for example.
I attempted without success to acquire systematic information about the health of the
justices in my sample for the decade studied; certainly health is a relevant consideration
which delimits the activities of most groups of elderly men. Few decisions in original
jurisidiction (except those which are appealed to a larger panel of the High Court) are
reported, so I could not compare, as one would wish to do, the extent of such assignments,
to the participation data for group decisions. It has also been pointed out to me that
some justices may dislike flying, or for other personal reasons may prefer to work in the
city of their residence (Melbourne or Sydney), and Dixon may have tried to indulge
such individual desires.

[18] The X^2 one-sample test was used to measure differences in the frequencies, for
each of the six distributions.

TABLE II. FREQUENCY OF PARTICIPATION IN DECISIONS

Judge	Early Period Unan.	Split	Total	Judge	Later Period Unan.	Split	Total
D	.48	.27	.36	D	.37	.18	.31
K	.12	.14	.13	Me	.02	.16	.06
We	.02	.04	.02	Wn	.08	−.02	.05
F	.03	−.06	.01	F	−.06	.11	−.01
T	−.06	−.04	−.05	K	.01	−.06	−.01
Wi	−.23	−.24	−.23	Mc	−.22	−.14	−.19
Mc	−.28	−.14	−.24	T	−.21	−.24	−.22

Judge	Combined Periods Unan.	Split	Total	Composite Ordinal Scale (Split Decisions) Judge	Rank
D	.39	.25	.35	D	1
K	.09	.08	.09	Me	2
F	.00	.00	.00	K	3
T	−.10	−.10	−.10	We	4
Mc	−.26	−.14	−.23	F	5
				Wn	6
				T	7
				Mc	8
				Wi	9

One question of interest is whether the structural bias—whatever its direction and motivation may be—resulting from these participational differences, acts similarly upon both split and unanimous decisions, and similarly during both time periods. For the five justices who served during both periods, the product-moment correlation between the participation scales for split and for unanimous decisions is +.99, which indicates that there certainly were no important differences for a majority of the justices in their overall relative rates of participation in unanimous and nonunanimous decisions. When we observe differences *between the two periods,* we find that r = .96 for unanimous decisions, but it drops to a moderate .58 for split decisions. The correlations *between split and unanimous decisions* for the full courts of seven justices are .94 for the earlier period, and .75 for the later one. It seems clear that participation patterns were remarkably stable for unanimous decisions during both periods; for both unanimous and split decisions during the early period; and for a majority of the justices, in both unanimous and split decisions, during both periods combined. Evidently, however, there were some changes in participation patterns, particularly in split decisions during the later period. Fullagar's participation increased, and that of Kitto and Taylor decreased, in split decisions of the later in comparison to the earlier period; during the later period, Fullagar's and Menzies' participation was higher in split than in unanimous decisions; and during both periods, Chief Justice Dixon participated not only at the highest rates, but also significantly more in unanimous than in split decisions.

Missing data, resulting from the differences in tenure for four of the justices, precluded the calculation of *interval* scales for the combined period; but an ordinal scale for split decisions in the combined period was determined

by interpolation from the interval scales for the subperiods. This rank order scale, which is shown in Table II, was used for comparison with other variables. In general, we can observe that Dixon and Menzies—who were (respectively) the oldest and the youngest justices, and the ones with the greatest and the least tenure—participated relatively most often, in the sample of split decisions; and that McTiernan and Williams, both older judges with long tenure, took part least often in these decisions of the Court. Differences among the participation ratios for the remaining five justices, in the middle ranks of the scale, were less extreme.

We can also describe the extent to which panels of different sizes are employed. As Table III indicates, five-justice panels were utilized for a majority of the decisions, and three-justice panels were next in popularity,

TABLE III. FREQUENCY OF TYPES OF PANELS

Panel Size	Number of Decisions			% of Decisions		
	Unan.	Split	Total	Unan.	Split	Total
3	522	90	612	22	10	19
4	108	48	156	5	5	5
5	1330	540	1870	57	60	58
6	138	108	246	6	12	8
7	252	112	364	11	12	11
Totals	2350	898	3248	101	100	101

particularly for unanimous decisions, followed by *en banc* panels of 7 and then (as we have assumed) *de facto en banc* panels of 6. Panels of four justices were utilized least frequently, except that two-justice panels were not observed to occur at all for any of the decisions in the sample. The only apparent difference between split and unanimous decisions relates to the three-justice panels, which were used much more often in unanimous than in split decisions; and this is a difference of statistical significance, with a probability of chance occurrence of less than one in a thousand.[19]

Voting

There are many ways in which the content of judicial decisions can be analyzed. The usual mode of analysis by lawyers consists, of course, of the interpretation of policy outcomes in terms of legal norms which are inferred from the language of the opinions associated with decisions. The different approach followed here will be to examine the opinions for information concerning the policy issues at stake in the decisions, and concerning the extent to which individual justices agree and disagree to particular dispositions of cases. For certain purposes it is desirable to characterize the votes of individual justices in each decision as being either in the majority or else in

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[19] This observation is based on a X^2 test for two independent samples, comparing the difference in frequencies for the use of three-justice panels (split, N=90; unanimous, N=522) with the combined corresponding frequencies for panels of all other sizes (split N=808; unanimous, N=1828).

dissent; but our objective here is to classify decisional sets of individual votes as being either in support of, or else in opposition to, the major policy issue which is attributed to each decision. Given a sufficiently large sample of votes so classified, one can seek to establish the pattern of maximal consistency in the data as the basis for a possible inference of a latent attitudinal dimension as an explanation for the manifest consistency in voting on the issues observed.

Previous research on the United States Supreme Court has proceeded on the basis of the *a priori* definition of the content of scale variables, of which political liberalism (pro "civil liberties") and economic liberalism have been identified as the most important in the research published to date.[20] Although the extent to which this may be true was probably not fully appreciated by the persons who were responsible for the initial conceptualization of the scale variables of political and economic liberalism, a considerable degree of sophistication about the prevailing political ideology in the United States today was doubtless essential to the formulation of appropriate (to say nothing of successful!) hypotheses. Moreover, these two variables reflect directly the policy emphases of the United States Supreme Court during the past generation. The highest court of a different country, such as Australia, may well (as has been suggested[21]) confront a different array and range of policy issues, reflecting the differences in the social, economic, political, and other problems that arise in the two polities. And it is difficult for a foreigner who is not a specialist in the study of Australian political society to attain the sophistication required for preconceptualization of the scale variables appropriate for analysis of policy making by the High Court. For these reasons, the present study does not hypothesize either the American or alternative *a priori* scale variables as the basis for delineating the content boundaries for the sets of votes (decisions) to be analyzed by cumulative scaling.

Instead, we shall follow the alternative approach of associating together sets of decisional votes on the basis of pattern similarity, thereby building scales objectively.[22] The manifest content of the policy issues subsumed by the scales so defined can be observed, and the latent attitudinal dimension to which these issues relate then can be *induced* from the direction and range of the content of the issues.

Our sample includes a total of 187 decisions, 129 for the earlier and 58 for the later period. Of these, 42% combine to form what I shall call, temporarily, the X scale; and another 28% define the Y scale. Thus, over two-thirds of the total decisions lie on one or the other of these scales, both of which are perfectly consistent in the voting patterns that they denote. Moreover, an additional 8% of the decisions fit the X scale, and 9% fit the Y

[20] See THE JUDICIAL MIND, op. cit. ftn. 9, supra, ch. 5.

[21] Sawer, *The Supreme Court and the High Court of Australia,* (1957) 6 JOURNAL OF PUBLIC LAW 488.

[22] Cf. Lingoes, *Multiple Scalogram Analysis: A Set Theoretic Model for Analyzing Dichotomous Items,* (1963) 23 EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENT 501-524; and S. Sidney Ulmer, *"The Dimensionality of Judicial Voting Behavior,"* (1969) 13 MIDWEST JOURNAL OF POLITICAL SCIENCE 471-483.

Justices:

Item	Mc	Wi	We	D	K	T	F	Scale Type	Issue
084442	+	—	—	—	—		—	B	5
093493	+	—	—			—	—	B	5
097100	+	—	—			—		B	3
098398	+	—		—		—		B	4
100478	+	—		—	—	—		B	1
096099	+		—	—		—	—	B-C	1
097310	+		—	—	—	—	—	B-C	5
099285	+		—	—	—	—		B-C	1
100211a	+		—	—		—	—	B-C	1
089229	+	+	—	—	—	—	—	C	4
099132	+	+	—	—	—	—		C	5
086209	+			—		—		B-D	0
088322	+			—			—	B-D	1
092142	+			—	—			B-D	1
092190	+			—	—			B-D	1
093325	+			—	—	—	—	B-D	3
093418	+			—	—	—	—	B-D	1
094001	+			—	—	—	—	B-D	4
095245		+		—	—	—	—	C-D	1
097444	+	+		—	—	—	—	C-D	0
099325	+	+		—	—	—		C-D	1
098296			+	—	—	—		D	1
089486			+	—	—	—		D	1
096131	+		+	—	—	—		D	1
097248	+		+	—	—	—		D	2
099111	+		+	—	—	—		D	3
085352	+		+	—	—		—	D	1
100211b	+		+	—		—	—	D	1
084490	+	+	+	—			—	D	4
087575		+			—		—	C-E	3
086570	+	+	+		—		—	D-E	4
090391			+		—		—	D-E	2
094430		'	+		—		—	D-E	1
085202		+	+	+	—		—	E	0
087049	+	+	+	+	—	—	—	E	5
090211			+	+	—			E	2
095190			+	+	—			E	0
097279	+			+	—	—	—	E	3
097566		+		+	—			E	1
100032	+	+		+	—	—		E	1
090515			+	+	—			E-F	0
098228	+			+	—			E-F	1
098586	+		+	+	—		—	E-F	0
090235			+	+	+	—		F	0
097633	+		+	+	+	—	—	F	1
085159	+	+	+	+			—	E-G	2
097599				+	+		—	F-G	1
096261		+		+	+	+	—	G	0
097230		+		+		+	—	G	1
097548		+		+	+	+	—	G	1
097667	+		+	+	+	+	—	G	1
Pro	35	16	21	18	06	04	00		
Con	00	05	09	27	30	30	30		
NP	16	30	21	06	15	17	21		

Figure 1. THE X SCALE (Early Period)

Justices:

Item	Mc	D	Wn	K	T	F	Me	Scale Type	Issue
100627	+	−	−		−	−		B	1
101197	+	−	−		−	−		B	1
102001	+	−		−		−	−	B	4
102108	+	−	−	−	−	−	−	B	5
102607	+	−	−	−			−	B	1
103486	+	−	−			−	−	B	1
104419	+	−		−		−	−	B	0
107208	+	−	−	−	−	−		B	4
103353	+		−	−				B-C	3
103194		+	−	−		−	−	C	1
105379		+	−				−	C	1
101073	+				−	−		B-E	4
107086	+	+		−		−	−	C-D	1
104057			+	−		−	−	D	1
104394		+	+	−				D	2
104529a	+	+	+	−	−	−	−	D	0
104609	+	+	+	−	−	−	−	D	0
107411		+	+	−		−	−	D	0
101403		+				−	−	C-F	0
101353	+	+	+	−		−		D-E	1
104124		+	+	+		−	−	E-F	1
105630		+	+	+		−	−	E-F	4
100597	+	+			+		−	F-G	4
103610	+	+		+	+		−	F-G	2
101169			+	+	+	+	−	G	1
104274	+	+	+			+	−	G	1
105102		+	+	+		+	−	G	1
Pro	17	15	11	05	03	03	00		
Con	00	08	09	13	08	18	20		
NP	10	04	07	09	16	06	07		

Figure 2. THE X SCALE (Later Period)

scale, with a single inconsistent vote for each decision.[23] Thus, only 13% (24) of the total decisions do not appear to relate to either scale variable.

Figures 1-4 report the scales, for each period separately. The scales were so constructed, by periods rather than for the total data, in order to minimize the indeterminacy which results from nonresponse; and the changes in personnel which occurred in 1958 would have led, had composite scales spanning both periods been constructed, to non-participation equivalent to a doubled rate of nonresponse. One has considerably more confidence, in other words, in a composite scale sequence formed by joining the separate

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[23] These one-error decisions could be added to the scales without depressing the coefficients of reproducibility or of scalability below conventional levels of acceptability; but they would add nothing to the determination of the scalar array of justices. There are however, other and persuasive reasons for questioning these scales because of their failure to meet auxiliary criteria for scalogram analysis: see W. S. Torgerson, THEORY AND METHODS OF SCALING (New York: Wiley, 1958) 324.

Justices:

Item	F	D	K	Mc	T	We	Wi	Scale Type	Issue
085306	+	−				−		B	2
096429	+	−	−	−	−	−	−	B	5
099028	+	−	−	−	−	−	−	B	0
099094	+	−	−		−	−		B	0
099462	+	−	−					B	1
088285	+	−		−		−	−	−	B-C	4
090024	+	+	−		−	−		C	3
091001	+	+	−		−	−		C	2
093645	+	+	−	−		−		C	2
095620	+	+	−	−			−	C	0
096073	+	+		−	−	−	−	C-D	2
091540	+	+	+	−	−			D	2
092565	+	+	+	−	−	−		D	5
091233		+			−	−		C-E	1
091368	+	+	+		−		−	D-E	2
093376	+		+		−	−	−	D-E	1
094470		+	+		−	−	−	D-E	4
095043	+	+	+		−		−	D-E	1
096018	+	+	+		−		−	D-E	0
096493	+		+		−	−	−	D-E	2
094254	+	+	+	+	−	−	−	E	3
092245	+		+			−		D-F	1
085488a	+	+	+	+		−	−	E-F	0
090001		+			+	−		F	0
090353	+	+	+	+	+	−		F	3
097202		+	+	+	+	−		F	0
097521		+	+	+	+	−		F	0
098022		+	+	+	+	−		F	0
100066		+	+	+	+	−		F	0
100095		+	+	+	+	−		F	0
100277		+	+	+	+	−	−	F	3
094030		+			+		−	F-G	1
085055		+	+			+	−	G	1
085237	+	+	+	+		+	−	G	2
087001	+	+	+	+	+	+	−	G	0
089381	+		+		+	+	−	G	0
097503	+			+	+	+	−	G	1
Pro	26	25	22	12	12	05	00		
Con	00	05	09	07	17	24	20		
NP	11	07	06	18	08	08	17		

Figure 3. THE Y SCALE (Early Period)

scales for the two periods, than he would have in a single composite scale resulting from the maximally consistent pattern for the pooled data for both periods combined. Even when the data are scaled by periods, thereby avoiding what might be termed artifactual nonparticipation, the average rate of non-response in these scales is almost a third, as a consequence of the High Court's custom of utilizing panels rather than the full court for most of its decisions. Thus, one possible objection to the acceptability of these scales is

Justices:

Item	F	D	Wn	K	Mc	T	Me	Scale Type	Issue
100177	+	−			−	−		B	2
101536	+	−			−	−	−	B	0
105214	+	−	−	−	−	−	−	B	3
103135a	+			−			−	B-D	1
106268	+		+	−		−	−	D	1
101265		+		+	−	−	−	E	2
102315	+	+		+	−		−	E	2
101246		+	+	+		−	−	E-F	0
106205	+	+		+		−	−	E-F	2
101135	+		+		+	−	−	F	0
101428		+			+	−		F	1
102029		+	+	+	+	−		F	2
103135b	+			+			−	E-G	1
105071	+	+	+	+			−	E-G	1
100537	+	+			+	+	−	G	0
103588	+	+	+			+	−	G	2
Pro	12	09	06	07	04	02	00		
Con	00	03	01	03	05	10	13		
NP	04	04	09	06	07	04	03		

Figure 4. THE Y SCALE (Later Period)

the argument that the degree of nonresponse precludes the determination of a maximally consistent pattern, since several different patterns might equally well satisfy the data; and with no errors, all such patterns necessarily are "maximally" consistent. (I shall discuss the merits of this argument below.) A second objection might be that the decisions of three-justice panels, in particular, often could be apportioned with equal "objectivity" to either the X or the Y scale. An alternative way to make the same point is to observe that a majority of the justices (Dixon, Windeyer, Kitto, Taylor, and Menzies) are positioned in the same sequence, in relation to each other, on both scales; and if we wish to confine our attention to the five justices who participated during both periods, it remains true that a majority (Dixon, Kitto, and Taylor) are in the same sequence on both scales during both periods. Therefore, to take the strongest example in support of the criticism, any split decision by a panel consisting of Dixon, Kitto, and Taylor, in which the division is consistent with the specified order for these three justices, necessarily will fit either the X or the Y scale equally well.[24] The answer to this hypothetical objection is that the inclusion of such decisions in the scale does not help at all in discriminating the scalar order of the justices, which must be based upon other decisions where no such arbitrary choice between scales is open to the analyst. Hence, they are included in the scale for descriptive rather than for analytical purposes. To this end, the analyst assigns them to that scale whose content generally is the more similar to that of the decisions in question.

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[24] It happens that empirically the hypothetical panel made no split decisions, although it did make a dozen unanimous ones.

The other criticism—that several scalar patterns are possible, for the same set of voting data—would be more serious, if it were true empirically. In general, the invariance of the scalar pattern is a function of the presence in the data of a complete set[25] of scale-type divisions of votes in decisions, which in turn tends to depend primarily upon the size of the sample available for analysis. One parameter which limits the possible size of samples of voting data is the kind of nonresponse discussed above, which is created arti-factually when an attempt is made to build directly a scale that extends the sample of decision-makers beyond the "natural" group who together comprised "the court" during any given time period. (As noted above, we have met this problem by constructing separate scales for each period in which the personnel of the court differs.) Another parameter which makes more difficult the determination of an invariant pattern is the use of panels for decision-making; and here the only solution seems to be to choose for analysis extended periods during which personnel turnover does not occur, thereby making it possible for vote samples of adequate size and diversity to be produced "naturally", as it were. This is what I attempted to do in selecting the present sample for study.

An examination of the two X scales (Figs. 1 and 2) and the corresponding Y scales (Figs. 3 and 4) shows that we can discriminate the rank order of most pairs of adjacent justices, on the X scale, on the basis of multiple observations (i.e., several decisions in which the justice on the left votes positively in the same decision in which the next adjacent justice to the right votes negatively). The weakest discrimination is between Williams and Webb, Dixon and Windeyer, and Kitto and Taylor, with only two supporting observations, in each instance. The first two instances are the result, no doubt, of the circumstance that only one (or the other) of the two subsamples of the data is available to observe; that is to say, if Williams and Webb, and Dixon and Windeyer, all had served together throughout the total period, the additional decisions that we might then be able to observe probably would supply further evidence either to strengthen—or, conceivably, to weaken—our confidence that the scalar order denoted by the X scale corresponds to empirical attitudinal differences between the pairs of justices in question. On the other hand, Kitto and Taylor did serve together throughout all except the first year of the total period, and yet we have but two decisions which distinguish their scalar positions. It seems plausible to infer that at least in relation to the data of our sample, Kitto and Taylor are closer together, in their attitude toward the issues raised by the X scale, than are any of the other justices. Note also that given only the X scale for the later period, we could distinguish between Kitto and Fullagar, but not between either Kitto and Taylor or Taylor and Fullagar; so we could not then say whether Taylor should be deemed tied with Kitto, tied with Fullagar, or in a separate rank between them both. Of course, the X scale for the earlier period permits us to resolve this question in favor of the alternative which specifies a separate rank for Taylor, but subject to the qualification already noted that the apparent difference be-

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[25] That is to say, there are $N+1$ scale types, when $N =$ the number of respondents in the scale.

tween Taylor and Kitto is slight, and the additional caveat that a differently biased sample of cases (issues) might well have produced a dozen decisions distinguishing between these two judges. Thus, although we might repose varying confidence in the discriminating power of various positions on the X scale, there is a single ordinal sequence which posits a unique rank order for all nine justices.

There are only two-thirds as many cases on the two Y scales as there are for the pair of X scales, so it is not surprising that with these smaller samples, less complete discrimination of the scale order of the justices is possible. The first period Y scale shows four decisions which distinguish Dixon from Kitto; and the second period scale shows only a single decision separating Windeyer and Kitto, and no additional decisions which divide Dixon from Kitto. On the basis of this evidence, we must consider Dixon and Windeyer to be tied for the same position (i.e., for rank 2½). We have only a weak basis (two decisions) for discriminating between Taylor and Menzies; and no basis whatsoever for distinguishing Menzies' rank from those of Webb and Williams, since the latter two rank sixth and seventh on the first period Y scale, and Menzies ranks seventh on the second period Y scale. It is arbitrary to consider Menzies tied with Williams (as I have done), but it would have been equally arbitrary to have deemed Menzies to be tied with Webb.

It is apparent from an inspection of Figures 1 and 2, and 3 and 4, that the merging of the scales for these two periods results in the composite X scale and the composite Y scale shown in Table IV.

TABLE IV. THE VOTING SCALES (BOTH PERIODS, COMPOSITE)

Scales:

X	Rank		Y	Rank
Mc	1		F	1
Wi	2		D	2.5
We	3		Wn	2.5
D	4		K	4
Wn	5		Mc	5
K	6		T	6
T	7		We	7
F	8		Wi	8.5
Me	9		Me	8.5

Let us now consider the two pairs of scales (Figs. 1-4) from several other points of view. The scales show, for example, that the marginal distributions of the voting totals for each justice (pro and con the issues) support the scale order depicted. In the earlier X scale, we see that McTiernan voted 35-0 in favor of the issues associated with this variable, and Fullagar 0-30, with the other justices giving support proportionate to their positions in the scale sequence. Decisions are identified by the six-digit numbers in the first column at the left margin of each scale; these are citations to volume and page in the *Commonwealth Law Reports*. The letters in the first column at the right margin of the scale classify each decision according to its scale type; viz., "A" would be an unanimous 7-0 decision in favor of (say) X, and

hence neither A, nor H (0-7), type decisions appear in the scales; B is 1-6; C is 2-5, and so on. Of course, very few of the decisions reported are in fact decisions of the full court; but decisions of panels are analogized to the full-court scale type to which they most closely correspond. Where nonparticipation is such that assignment to more than one type is equally plausible, the decision is given a range classification (e.g., 096099 on the initial X scale is classified as B-C) and it then appears on the scale between the ranks to which it has been analogized. Of course, all decisions of the same type are deemed to be tied in rank order on the scale, and the listing of five B decisions in the initial X scale should be understood to subserve primarily the purposes of empirical description and of the enhancement of statistical confidence, since from a psychological point of view these five decisions are repetitive observations of responses to the same (that is, to an equivalent) stimulus.

The other column at the right margin of each scale identifies the major issued raised for decision by each case in the scale. There are five issues on each scale, as described in Table V. The table shows that three of the X scale issues, and most of the decisions, relate to questions of economic policy.

TABLE V. SCALE POLICY CONTENT

Issue	Collectivism: Pro (X+)	N	Issue	Authoritarianism: Pro (Y+)	N
1	Economic Underdog (Econ.)	37	1	Strict Interpretation of Legal Norms (Psych.)	13
2	Religious Morality (Soc.)	6	2	Governmental Fiscal Interest (Econ.)	14
3	Order and Security [Anti-Civil Liberties] (Pol.)	7	3	Judicial Review (Pol.)	5
4	Socialism (Econ.)	9	4	Judicial Centralization (Pol.)	2
5	State Regulation of Commerce (Econ.)	6	5	Federal Centralization (Pol.)	2
0	Miscellaneous	13	0	Miscellaneous	17
	Totals	78			53

Most of the Y scale issues, on the other hand, are political or psychological, although it should be noted that in this instance, the number of related decisions is less than half of the total for the scale, because of the larger number of decisions classified as miscellaneous on the Y scale than on X. Thus, the Y scale is weaker than X both from the point of view of determination of the scale order of the justices, and also from that of identification of its substantive attitudinal content. The clustering of economic issues on the X scale, and of political issues on the Y scale, suggests the hypothesis that X is a scale of attitudes toward economic policy, and Y toward political policy. From a preconceptual standpoint, however, we undoubtedly would have expected that the second and third X scale issues (pro religious morality, and anti civil liberties)[26] "ought" to belong to the Y scale, while the second Y scale issue (pro governmental fiscal interest) "belongs" in the X scale. But

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[26] In sharp contrast to the United States Supreme Court, where civil liberties policy problems constitute a principal preoccupation, very few cases raising such issues reach the High Court.

these empirical data do not support such conceptual clarity; and so I have located these issues on the basis of how they appear to have seemed consistent to the justices, rather than to where they would have seemed more consistent to me. Having noted these caveats, there may yet be some advantages in designating the scales according to their respective principal semantic content; and so in subsequent discussion I shall frequently refer to X as the Collectivism Scale, and to Y as the Authoritarianism Scale.

Any interested reader can, of course, check the accuracy of my observations and judgments by checking the data of the scales against the reports of the cases. I shall discuss here, solely for purposes of illustrating the issues, a few cases selected so as to present examples of all of the scale types and issues, for both scales.

X Scale Issues

Item 084442. *Cam & Son Pty v. The Chief Secretary of New South Wales,* 84 C.L.R. 442 (10/17/51), is a B scale type which presents for decision the fifth issue (pro state regulation of commerce). This is the earliest decision in the total sample of nonunanimous decisions, as well as the first case on the X scale; but the coincidence is entirely that. A majority of the court decided, over McTiernan's dissent, that state regulation of food sales in interstate commerce could not be sustained in the light of s. 92 of the Constitution. Hence McTiernan alone voted positively, *viz.,* in support of state regulation of commerce, and thereby also in support of the postulated scale variable of Collectivism.

Item 102108. *Mason v. State of New South Wales* (2/27/59) also is type B and issue 5: McTiernan alone protested the decision of the rest of the full court, to approve the refunding of permit fees paid under protest and collected prior to *Hughes & Vale* (in which the Privy Council, reversing the High Court, had declared invalid on constitutional grounds New South Wales road regulations).

Item 107208. *Queen v. Commonwealth Conciliation and Arbitration Commission* (9/9/59), is type B and issue 4 (pro socialism): McTiernan dissented against the court's decision upholding the recognition of unionization rights for groups of *professional* engineer employees of state and municipal governments. (The majority's decision, that is, was—at least in one sense— "pro-union" but "anti-labor".)

Item 089229. *Commonwealth v Bogle, Clark and Boreham* (3/13/53) is type C and issue 4. McTiernan and Williams dissented against the decision, of the rest of the full court, that a corporate agency, staffed with civil servants and set up by the Commonwealth Department of Labour and National Service to manage governmentally subsidized hostels for immigrants, was a "private" company.

Item 097248. *Shaw v Ipatoff* (5/20/57), is type D and issue 2 (pro religious morality). McTiernan and Webb, the only two Roman Catholics on the court, dissented against the decision of a three-justice majority which permitted to a non-relative the continued custody of an illegitimate child, over the claims

of blood relatives who were, otherwise, strangers to the child. (The scale implies that Fullagar would have joined the majority, and Williams the dissenters, had they participated in this decision; hence the decision type is +3/−4.)

Item 087049. *Hughes & Vale Pty Ltd. v New South Wales* (4/16/53), is type E and issue 5. A majority of the full court (McTiernan, Williams, Webb, and Dixon) voted, over the dissents of the remaining three justices, to uphold the state system of regulations over interstate trucking in competition with the state railways. Chief Justice Dixon, whose vote was critical to the outcome in view of his median position on the scale, explained how marginal his choice had been, stating that (in distinction from the other three members of the majority, who said that they agreed with the merits of the policy outcome which they supported) he agreed on the merits with the dissenters, and voted otherwise only on stare decisis grounds. In terms of scale theory,[27] it is of course appropriate that the marginal decision-maker (as Dixon was, with his colleagues equally divided on the issue) should have found choice most difficult, both to make and to rationalize; just as from the point of view of game theory, it is understandable that this case should therefore have been appealed to the Privy Council, 28 A.L.J. 385 (11/17/54). That court, not being bound—psychologically or otherwise—by the precedents of the High Court, was quite free to decide (as it did) in favor of the more economically conservative policy (of unregulated competition) that had been defended by the High Court minority plus (though ambivalently) Dixon.

Item 097279. *Ziems* v. *The Prothonotary of the Supreme Court of New South Wales* (7/2/57), is type E and issue 3. McTiernan and Dixon favored the more severe penalty of disbarment, while the majority thought suspension an adequate punishment, ancillary to the imprisonment of a barrister convicted of manslaughter.

Item 097633. *Barton* v. *Commissioner for Motor Transport* (7/11/57), is type F and issue 1 (pro economic underdog). A majority of four members of a six-justice court upheld the recovery by a trucker of road permit fees paid under protest, in pursuance of the regulations declared unconstitutional by the Privy Council in *Hughes & Vale*. The High Court itself had declared unconstitutional legislative attempts to bar directly by statute the recovery of such fees; and only Fullagar and Taylor, the two justices most negative on the scale (at this time, prior to the appointment of Menzies), dissented in behalf of an interpretation of a general statute of limitations that would bar recovery.

Item 097667. *Edmund T. Lennon Pty. Ltd.* v. *Commissioner of Road Transport* (7/11/57), is type G and issue 1. This case was argued with, and decided at the same time, as the *Barton* decision immediately above. All of the justices except Taylor voted the same way in this decision as they had in *Barton;* Fullagar, for example, explicitly stated that this "case does not differ in any material respect from *Barton*" and that his dissent here was based on

[27] Coombs, op. cit. ftn. 2, supra; Torgerson, op. cit. ftn. 23, supra; and A. L. Edwards, TECHNIQUES OF SCALE CONSTRUCTION (New York: Appleton-Century-Crofts, 1957).

the reasons that he had given in his opinion in *Barton*. But Fullagar dissented alone in *Lennon;* Taylor stated that he agreed with Fullagar on the merits, but that he was joining the majority because "the pleadings are defective" in this case. Of course, it is quite in accord with scale theory that Taylor, as the marginal respondent in the pair of decisions, should perceive between the two cases a difference which none of his colleagues thought important, and that he should rationalize his differing responses in the two decisions on the basis of what he described as a question of procedural law. Like the Chief Justice in the *Hughes & Vale* decision, Taylor resolved his ambivalence when confronted with an issue that was for him close by giving his vote to the majority and his opinion to the support of the dissent.

Item 104274. *Commissioner for Railways (N.S.W.)* v. Cardy (7/25/60), also is G-1, but drawn from the later period (when Fullagar no longer was the most extreme X– justice) and more typical, than the preceding cases, of the first issue. Four of the five justices in the assigned panel agreed that a boy trespasser, who suffered badly burned feet when (while at play) he fell through the crust of a slag heap on a dump operated by a state railway, could recover damages; only Menzies—who at no time during the period covered by this sample encountered an X scale claim persuasive enough to engage his support—dissented in favor of the government.

Y Scale Issues

Item 105214. *Clayton* v. *Heffron* (12/15/60), is type B and issue 3 (pro judicial review) for the Y (Authoritarianism) scale. In this decision of the full court for the later period, Fullagar alone dissented in favor of declaring unconstitutional a bill for the disestablishment of the second chamber of the New South Wales Legislature.

Item 096429. *Queen* v. *Members of the Railways Appeals Board et al. (N.S.W.); Ex parte Davis* (4/15/57), is B-5 (pro federal centralization). Fullagar dissented alone, against the decision of the five members of the majority that only state (and not federal, as Fullagar argued) statutes governed the right of appeal in a promotion action by a state railroad employee.

Item 088285. *Queen* v. *Kelly* (6/4/53), is B/C-4 (pro judicial centralization); whether the decision should be classified as type B or as type C remains uncertain, because Dixon was not a member of the decision-making panel in this case. Fullagar alone protested the majority's deference to the discretion of the Commonwealth Court of Conciliation and Arbitration to discontinue the hearing of a dispute after one member of that court elected to withdraw from further participation in the case; Fullagar wanted to mandamus the lower court to go on with its hearing of the case.

Item 090024. *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (4/7/54), is C-3. Fullagar and Dixon, in dissent, wanted the court to uphold the constitutionality of a section of a Commonwealth statute which a union sought to challenge; but the majority of the five-justice panel ruled that the case was inappropriate for the exercise of judicial review.

Item 093645. *Lloyd* v. *Federal Commissioner of Taxation* (12/15/55), is C-2 (anti governmental fiscal interest). Dixon and Fullagar dissented in

behalf of the application of estate tax duty upon a bequest of property in trust for the Navy League Sea Cadets Geelong Branch; but the three-justice majority ruled that the bequest was for public educational purposes and therefore exempt from taxation. (There is no mention of this point in the opinions, but a majority of the majority—McTiernan and Webb—were Roman Catholics who, it might be presumed, would favor the stretching of the concept of "public educational purpose" to include bequests in support of Roman Catholic schools:[28] cf. *Thompson* v. *Federal Commissioner of Taxation*, 102 C.L.R. 315, an E-2 case on the Y scale for the later period; and *Salvation Army* v. *Shire of Fern Tree Gully*, 85 C.L.R. 159, an E/G-2 case on the X scale for the earlier period.)

Item 092565. *O'Sullivan* v. *Noarlunga Meat Ltd.* (12/17/54), is D-5. A six-justice court divided equally on the question of whether Commonwealth regulations concerning the slaughtering of lambs for the export trade had so occupied the field as to preclude additional state regulations on the subject. Because the Chief Justice was among the group (which also included Fullagar and Kitto) supporting exclusive Commonwealth authority, the state regulations were declared invalid.

Item 094254. *Queen* v. *Kirby; Ex parte Boilermakers Society of Australia* (3/2/56), is type E and issue 3, although it might also be classified as issue 4. McTiernan, the median justice on the Y scale for the earlier period, joined his three predecessors on the scale (Fullagar, Dixon, and Kitto) to form a majority of the full court which ruled unconstitutional a purported legislative delegation of the power of contempt of court, to the (as it then was) Commonwealth Court of Conciliation and Arbitration. In an opinion which is replete with overtones of legal dogmatism, the majority indulged in the highly unusual step of joining in a common opinion which declared that "judicial power" could be exercised only by genuine courts and judges.

Item 090353. *Queen* v. *Davison* (9/10/54), is F-3 and presents a very similar question as the decision above, except that the statutory agency in this case was a subordinate administrative official of the Federal Bankruptcy Court. Taylor, the next justice on the scale, joined with the majority of the *Boilermakers'* decision to declare that a Deputy Registrar of Bankruptcy cannot be invested with judicial power; but Webb, the next justice on the scale after Taylor, dissented, and Williams did not take part.

Item 100277. *Queen* v. *Spicer; Ex parte Australian Builders' Labourers' Federation* (11/22/57), also is F-3. Like *Davison* above, this was the decision of a six-justice court which included all except an end man on the scale, although here the nonparticipant was Fullagar (at the positive end of the scale) rather than, as in *Davison,* Williams (at the negative end). In view of the difference in the locus of nonresponse in the scalar pattern, this was a 4-2 decision, although *Davison* was 5-1 and both are scale type F. Necessarily, of course, the partition was between Taylor and Webb, with Dixon and McTiernan and Kitto joining Taylor in the majority which declared unconstitutional a purported legislative delegation of *non*-judicial power to

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28 See Lawry, *Education,* ch. 5 in A. F. Davies and S. Encel (eds.), AUSTRALIAN SOCIETY: A SOCIOLOGICAL INTRODUCTION (New York: Atherton, 1965) at 77-78.

the Commonwealth Industrial Court; Williams and Webb both dissented. (The rationale for the outcome in the *Kirby* and *Spicer* decisions was, therefore, that the Commonwealth Court of Conciliation and Arbitration *was not,* but the Commonwealth Industrial Court (which replaced it) *was,* a "judicial" court; and judicial powers could be exercised only by judicial courts, just as non-judicial powers could be exercised only by non-judicial agencies.)

Item 097503. *Board of Management of Agricultural Bank of Tasmania* v. *Brown* (9/2/57), is G-1 (pro strict enforcement of statutes). A four-justice majority of a five-justice panel insisted upon the strict construction of a marine insurance contract, in favor of the owners of a vessel and against the insurance company; Williams dissented alone.

In comparing the outcomes of decisions on the collectivism and authoritarianism scales, respectively, we can observe that there is a consistent trend difference in what we might call "the court's" position regarding these two sets of issues: only about a third of the scale cases were decided in favor of collectivism (*viz.,* in the positivey defined direction of the scale), but three-fifths of the Y scale cases were authoritative outcomes. This consistency in the ratio of "pro" outcomes is not, however, what one would have predicted on the basis of changes in the attitudinal (as distinguished from participational) bias of the structure of the court as a set of decision-makers. In view of the fact that Williams and Webb, who occupied the second and third positions on the composite X scale, were replaced by Windeyer and Menzies, who filled the fifth and ninth ranks, we ought to expect that a court which had become decidely more X− in its aggregation of individual values would produce a lower ratio of X+ decisional outcomes; and although the changes in Y were less pronounced, still the substitution of Windeyer (in the third rank on the composite Y scale) for Williams (the ninth rank) might be expected to result in a slightly higher ratio of Y+ decisions. But the changes, although in the predicted direction, were so small—from 37% during the earlier period to 33% during the later period, for X; and from 59% during the earlier period to 62% during the later one, for Y—that they are without statistical significance. One possible explanation for the absence of greater change in the ratios of outcomes is the hypothesis that the justices themselves changed; that is, that when placed in the social context of a less collectivistically oriented, generally speaking, court after mid-1958, the five justices with continuing tenure compensated by adjusting their attitudes in the opposite (*viz.,* collectivist) direction from that of the new bias of the court; and vice versa, of course, for the other scale. But this interpretation hardly seems plausible; the findings of small group research[29] point oppositely toward the anticipation of reinforcement of attitudes, which is to say that if any change were to occur in the attitudes of the continuing members of the court, it ought to be *towards* (not away from) the new structural bias. Of course, the evidence of our scales does not permit us to disconfirm the hypothesis empirically; but the strong evidence of consistency of rankings, as

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29 See B. E. Collins and H. Guetzkow, A SOCIAL PSYCHOLOGY OF GROUP PROCESSES FOR DECISION-MAKING (New York: Wiley, 1964); and B. Berelson and G. A. Steiner, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS (New York: Harcourt, Brace and World, 1964), ch. 2 and 14.

between the two periods, which the scales *do* provide, suggests that at least there is no support for the hypothesis in the data available. An alternative hypothesis is that litigants and counsel recognized the value implications of the personnel changes of 1958, and adjusted their own behaviors to the court's new biases,[30] thereby raising what Guttman would call "more difficult" questions during the later period. The ratio of outcomes did not change significantly (according to this latter interpretation) because a court that had become more X— and Y+ in its biases was asked to decide cases that (in comparison to the earlier period) tended to present more extremely individualistic or authoritarian questions for decision, thereby maintaining a balance between the change in the respondents and the change in the stimuli to which they were asked to respond, with the consequence that little change can be observed in the response ratios. This latter hypothesis seems more in keeping with what traditional legal research informs us to be trends in the development of legal principles,[31] although a differently designed analysis of the content of issues—and in particular, an independent measure of the intensity of issues in cases—would need to be carried out in order to confirm or refute the proposed interpretation.

The Relationship Among
Attributes, Participation and Voting[32]

Three attribute variables (age, domicile, and SEP conservatism/liberalism), a set of ordinal scales of the extent of participation in split decisions (Table II), and two voting scales (X and Y) have been described. In this concluding section we consider the correlations between variables in these three classes: to what extent are attributes related to participation, to what extent is participation related to voting, and to what extent are attributes related directly (rather than through participation, as an intervening variable) to voting? Although it is possible to make strictly verbal statements about these relationships, on the basis of the observation of the data that already have been presented, we can speak more precisely and consistently about the direction and strength of these observable relationships if our judgment is guided by the computation of correlation coefficients. Table VI reports the intercorrelations among the variables, for the two major periods, with the earlier period above and the later below the major diagonal; Table VII reports the matrix for the combined period and the composite scales for the nine-justice sample.

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[30] See my *"Political Ideology on the High Court,"* (May, 1968) 3 POLITICS (The Journal of the Australasian Political Studies Association) 21-40.

[31] Cf. J. Stone, LEGAL SYSTEM AND LAWYERS' REASONINGS (Stanford University Press, 1964).

[32] For a more comprehensive treatment of the path relationships among these and related sets of variables, see my *"Two Causal Models of Decision-Making by the High Court of Australia,*" chapter 12 in G. Schubert and D. J. Danelski (eds.), COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST (New York: Oxford University Press, 1969), at 335-366.

TABLE VI. INTERCORRELATIONS AMONG ATTRIBUTE,
PARTICIPATION, AND VOTING SCALES
(EARLIER AND LATER PERIODS)†

	Age	Dom.	SEP	Par.	X	Y
Age		.04	−.08	−.31	.47	.00
Dom.	.14		.44	.14	−.46	.79
SEP	−.51	.22		−.20	−.49	.16
Par.	.29	.87	.40		−.36	.43
X	.43	−.43	−.56	−.18		−.57
Y	.51	.22	.19	.34	.23	

† Upper right matrix is for the earlier period; lower left matrix is for the later
period. All correlations are rho (rank order) coefficients.

TABLE VII. INTERCORRELATIONS AMONG ATTRIBUTE,
PARTICIPATION, AND VOTING SCALES
(BOTH PERIODS COMBINED)

	Age	Dom.	SEP	Par.	X	Y
Age		.17	−.48	.02	.62	.22
Dom.			.39	.47	−.56	.34
SEP				.08	−.54	.07
Par.					−.47	.24
X						−.15

Let us observe first Table VI, and some of the changes in correlations, between periods, for the same variable pairs. The drop in the correlations, between age and SEP (from −.08 to −.51) reflects, of course, the substitution of two young conservatives for one old conservative and one old liberal. The increase in the correlation between age and participation (from −.31 to +.29) results from the fact that Fullagar's participation increased from low to high, and Kitto's decreased from high to low, between the two periods; these changes plus the departure of Webb (whose rank was moderate in participation but at the bottom of the domicile scale) account for the sharp rise in the correlation between domicile and participation. The moderately positive correlation between age and collectivism remained highly stable at +.47 and +.43; and except for Fullagar's idiosyncratic position (as an older, but X−, judge), these correlations would have been almost twice as large: in general, the older judges were the ones most sympathtic to collectivism. In contrast, the correlation between age and authoritarianism rose from .00 to +.51, reflecting the discontinuities between the judges involved in the personnel changes: Williams and Webb—contrary to the trend among their colleagues—were older but *non*-authoritarian, whereas one (Windeyer) of the two new judges was young but pro-authoritarian. (Statistically speaking, all three of the named judges had the same effect, that of *reducing* the positive association; so the really critical difference was that the *other* new judge—Menzies—did fit the pattern of his colleagues, by voting as a young anti-authoritarian, thereby permitting the correlation to increase.) The other apparently large change in Table VI, the decrease in the correlation between

domicile and authoritarianism, from +.79 to +.22, is entirely due to the conjoint effect of the substitution of Menzies (a Y— Victorian) and Windeyer (Y+, but from New South Wales) for Williams (from New South Wales, and Y—) and Webb (Queensland and Y—).[33]

The change in correlation between SEP and participation shows the more conservative bias in the structure of the court's decision-making panels consequent upon the appointments of Windeyer and Menzies, both high-participation judges who rank first and second on the SEP scale. However, there is very little change between the two periods in the correlations of SEP and the two voting scales (SEP/X= −.49, −.56; SEP/Y = +.16, +.19) or in those for participation (Par/X = −.36, −.18; Par/Y = +.43, +.34); clearly, the tendency for conservative backgrounds and high participation to be negatively associated with collectivism and positively associated with authoritarianism remained quite stable and was little affected by the two changes in the court's personnel. The greatest change is between the two voting scales themselves, from −.57 to +.23, resulting from the fact that Webb and Williams both were + on X and − on Y; while Windeyer ranks positively, and Menzies last, on both scales.

Observation of Table VII confirms our previous finding that the age and domicile attribute variables appear to be largely independent of each other, with an intercorrelation of only +.17. On the whole, younger judges show a moderate tendency to have experienced relatively more conservative backgrounds, while there is a greater tendency for such conservative backgrounds to be associated with the subculture of Victoria than with that of New South Wales. There is a moderate positive correlation of +.47 between domicile and participation: two of the three Victorians are high and positive in their overall participation, and the other (Fullagar) is average; four of the justices from New South Wales have negative (i.e., below average) ratios of participation.[34] Not only did Chief Justice Dixon set the pace for his court; he also saw to it that his colleagues who were products of the same regional subculture helped him to share the burden of the lion's share of the court's workload. An incidental consequence of this practice is reflected in the moderately high correlations between domicile and the voting scales, −.56 with X and +.34 with Y, resulting from the fact that Victorians by birth or residence occupy three of the *bottom* four ranks on the X scale, and three of the *top* four ranks on the Y scale. Participation correlates in the same direction as do the conservatism index and domicile with both scales, demonstrating the extent to which the court's panels were biased toward the relatively conservative values of authoritarianism and individualism. Table VII shows that the collectivism scale is moderately highly correlated with age, with a relatively liberal SEP background, with being reared in New South Wales or Queensland, and with *not* being favored in assignments to panels by the Chief Justice. The authoritarianism scale, on the other hand, is much more weakly correlated

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[33] During the early period, both of the Victorian judges ranked first and second on Y; Fullagar and Dixon continued to so rank during the later period as well, but then the other Victorian (Menzies) ranked last.

[34] The other justice from New South Wales (Kitto) and the one from Queensland (Webb) both were slightly above average in participation.

with Victorian domicile, with participation (which in turn is dominated by the domicile variable), and with age, which suggests the query—which the present author has no competence to attempt to answer—what there may be about the political-legal subculture of the one state which could lead those judges whom it socializes to assume an ideological (qua voting) position which seems to contrast so sharply with that of the judges who are products of the other state?

It would come as no surprise to an Australian audience to be informed that old progressives favor collectivism[35], although the weak association between the justices' age and socioeconomic and political backgrounds, and their attitudes toward authoritarianism, is a perhaps somewhat more novel finding[36] of this study. On the other hand, it is less certain whether one might have predicted in advance (and I certainly did not) that differentials in judicial participation would function primarily[37] as a device by means of which the effects of subcultural homogeneity of standpoint might be reinforced. The allocation of greater systematic attention to the background characteristics of judges; to the effect of such attributes upon judicial attitudes towards questions of public policy; and to the effect of both attributes and attitudes upon judicial decision-making; all these may well prove, in future studies of the Australian judiciary, to be a more enlightening course of scholarly activity than to continue to put all of the eggs of research inquiry into the ancient basket of ratios decidendi cum res adjudicata.

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[35] Cf. Z. Cowen, ISAAC ISAACS (Melbourne: Oxford University Press, 1967).

[36] Cf. H. Eysenck, THE PSYCHOLOGY OF POLITICS (London: Routledge and Kegan Paul, 1954) 128-142; R. E. Lane, POLITICAL IDEOLOGY (New York: The Free Press, 1962); H. McClosky, *Consensus and Ideology in American Politics*, 58 AMERICAN POLITICAL SCIENCE REVIEW 366-369; J. Jupp, *Their Labor and Ours*, ch. 15 in H. Mayer (ed.), AUSTRALIAN POLITICS: A READER (Melbourne: F. W. Cheshire, 1966); and Davies, *op. cit.* ftn. 4, *supra.*

[37] Note also, however, the social implications of several of the findings about participational behavior. For example, the finding (p. 11, *supra*) that Dixon participated significantly more often in unanimous than in split decisions implies that the Chief Justice either catalyzed compromise among his panel associates, or else he was successful in getting them to acquiesce in his own views. Similarly, the finding (p. 12, *supra*) that three-justice panels achieve unanimity more than twice as often as not, while there are no differences between the percentages of unanimous and of split decisions for panels of other size, implies that panel associates were much less willing to dissent alone than they were when conjoint dissent was at least possible. The latter inference is strictly in accord with what one ought to expect to occur in any small face-to-face group: see B. Berelson and G. A. Steiner, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS (New York: Harcourt, Brace and World, 1964), at p. 335.

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