Some Effects of Ideology and Threat Upon the Size of Opinion Coalitions on the United States Supreme Court

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Scholars engaged in the behavioral study of the Supreme Court usually explain differences in voting on the Court as a function of differing judicial attitudes toward public issues. Rather than assuming that attitudes determine behavior and there is nothing more to say, we will explore the possibility that certain coalition-formation processes influence the relationship between attitudes and behavior on the Court. More specifically, we will focus upon the number of justices who support the Court's opinions in an attempt to ascertain the extent to which opinion size is determined by ideological and non-ideological variables.

If non-ideological factors affect the size of Supreme Court opinions it is valuable to identify them. One such variable was discovered by David Rohde[1] who examined the civil liberties opinions of the Warren Court and found that issues that posed a threat to the Court produced larger winning coalitions than other issues. We will reexamine Rohde's finding in this paper.

OPINION SIZE AND IDEOLOGY

If one is concerned with the size of winning coalitions, it is reasonable to turn to the size principle formulated by William Riker.[2] The Riker notion is based upon a division of payoff rationale. More precisely, it assumes that there is a fixed and constant payoff or benefit of winning which will be divided by the members of the winning coalition. Therefore, those who first form a minimum winning coalition will seek to remain minimum winning, for to allow others to join will reduce their shares of the winnings. The major defect of using the Riker model for

[1] David W. Rohde, "Policy Goals and Opinion Coalitions in the Supreme Court," *Midwest Journal of Political Science* 17 (May 1972), 208-224.
[2] William H. Riker, *The Theory of Political Coalitions* (New Haven: Yale University Press. 1962).

the study of the Supreme Court is that in the Court, as in most political bodies, "there is no payoff waiting to be divided. Instead, payoffs are those proposals . . . which are agreed upon by coalition members once a coalition has been formed." [3]

If the winning coalition on the Court is the opinion majority, it may, nevertheless, remain minimum winning; but not because of the reason suggested by Riker. Rather, the minimum winning size will be a consequence of the desire of the opinion writer to have the opinion mirror his policy views and his refusal, therefore, to write an opinion that might attract the votes of additional justices.[4] Based upon this model Rohde hypothesized that in the usual situation the opinion coalition will be minimum winning.

If the opinion writer seeks an opinion that most approximates his own policy preferences, as Rohde contends, the opinion coalition that will be created will consist of the opinion writer himself and the four justices closest to him ideologically. Yet when Rohde tested his minimum winning model he ignored ideology altogether. Instead, he posited that an opinion coalition consisting of any five or six justices, without regard to ideological position, would indicate minimum winning voting on the Court. Rhode's operationalization conforms to the Riker model and not to his own. We agree with Rohde's model but not with the way he tested it.

There may be circumstances when the opinion writer will seek additional votes for his opinion. In these situations he will be motivated (and the additional justices induced to join the opinion) by goals other than, or at least in addition to, ideology. For, if the sole motivation of the opinion writer was an opinion that conformed to his ideological position, he would refuse to write an opinion to accommodate the views of justices beyond the minimum winning size. Thus, we anticipate that opinion coalitions of larger than five members will be *less* ideologically based than five-person coalitions. More specifically, we hypothesize:

Coalitions larger than minimum winning are less likely to occupy the smallest ideological space and are less likely to be ideologically connected than coalitions with five-man majorities.

To test this hypothesis we will assume, as did Rohde, that the winning coalition on the Court is the opinion majority (those justices

[3] Eric C. Browne. *Coalition Theories: A Logical and Empirical Critique* (Beverly Hills: Sage Publications, 1973), p. 73.

[4] David W. Rohde, "A Theory of the Formation of Opinion Coalitions in the United States Supreme Court," in Richard Niemi and Herbert Weisberg (eds.) *Probability Models of Collective Decision Making* (Columbus: Charles Merrill, 1972).

who join the Court's opinion), instead of the decision majority (those justices who agree with the Court's disposition of the case). Using the opinion majority does not result in substantially different coalitions than if we employed the decision majority, for in seventy-one percent of the cases from our data set the membership of both coalitions was the same and in additional 14.5 percent of the cases the composition of the two coalitions differed in terms of the vote of only one justice.

In his study of the size of the opinion coalitions[5] Rohde examined the civil liberties cases of the Warren Court. Since we are interested in the validity of his findings, it would be desirable to use the same cases he did. Unfortunately, this cannot be done since Rohde discarded his list of cases.[6] Instead, we will utilize similar data, namely, the cases used by Rohde in his opinion assignment study.[7] These consist of 615 cases, which comprise all orally argued civil liberties decisions of the Warren Court that could be placed into thirty-four Guttman scales. We refined Rohde's list of cases for the purposes of this study by omitting the 110 *per curiam* decisions. When the Court decides a case *per curiam* it usually means that the case is insufficiently important for anyone to seek an ideologically pure opinion. Rather, these cases are handled summarily with no opinion writer and with the expectation that all the justices usually will agree with the short opinion. We further refined Rohde's list by eliminating the twenty-six cases which either contained more than one opinion of the Court with different justices joining the multiple opinions or were companion to other cases with the same votes and were counted twice by Rohde. Our final data set consisted of 479 cases.

The ideological positions of the justices were obtained by employing the scale scores in Rohde's thirty-four scales. Utilizing such a large number of scales enabled us to locate with precision the position of the justices in the various areas. We used the scores as interval measures of the justices' ideal points or most preferred positions on the issues. There is precedent for considering Guttman scales as interval measures,[8] and

[5] Rohde, "Policy Goals and Opinion Coalitions."
[6] Joseph L. Bernd, R. W. Hoyle and Lawrence S. Mayer. "Some Problems with the Theory of Political Coalitions as Applied to the Judiciary," a paper delivered at the 1974 Annual Meeting of the American Political Science Association, Palmer House, Chicago.
[7] David W. Rohde, "Policy Goals, Strategic Choices and Majority Opinion Assignments in the U. S. Supreme Court," *Midwest Journal of Political Science* 16 (November 1972), pp. 652-82.
[8] Rohde, "Policy Goals, Strategic Choices"; Gregory James Rathjen, "A Theory of Intracourt Influence: The Supreme Court," a paper delivered at the 1973 Annual Meeting of the American Political Science Association, Jung Hotel, New Orleans.

such use is supported by Blalock and others.[9] There is doubt, however, about the ability of such scales to identify ideal points. Niemi and Weisberg [10] argue that Guttman scales fail to distinguish such points, because the dichotomous nature of the raw data may hide the true ideal point of an individual. This problem cannot be surmounted here, since our scales are based on roll call data which are always dichotomous. Thus, we decided to proceed by making the unsupported assumption that Rohde's scales are valid approximations of the ideal points of the justices.

In testing our hypothesis we divided the cases into three groups. The first is the smallest space coalitions. This means a coalition in which the opinion majority occupies the smallest possible span on that Guttman scale for that size coalition. If the opinion majority included justices who are adjacent to each other on the ideological scale, but the coalition does not occupy the smallest ideological space, we placed it in a second category called "ideologically connected." A third category consists of non-connected cases. The smallest space group is the most ideologically based, the non-connected category the least, and the connected cases in an intermediate position. The seventy-one unanimous cases were excluded from this analysis since they all fall into the smallest ideological space category. The seventeen cases in which the opinion coalition was less than five justices were also omitted because the small N makes the figures unreliable.

To determine whether coalitions beyond minimum winning are less ideologically based than minimum winning ones, it is useful to posit a norm of non-ideologically based voting for each size coalition. For this purpose we will use the Riker model which assumes that it is equally likely for any justice to vote the same way as any other justice. As can be seen from Table 1, the Riker model gives results that are precisely the opposite to our expectations. If ideology were unrelated to the selection of coalition partners then the chance of a case having an ideologically connected coalition or a smallest space coalition would increase as the size of the opinion coalition increases.

Table 2 shows the relationship between the size of the opinion coalition and the nature of that coalition. Contrary to the Riker model, the minimum winning coalitions (five members) have the largest share of smallest space coalitions and the smallest number of non-connected ones. Coalitions beyond minimum winning are, indeed, less ideologically based, with six-, seven- and eight-member coalitions equally likely to be

[9] See sources cited in footnote 23 in Rathjen, *Ibid.*
[10] Richard G. Niemi and Herbert F. Weisberg, "Single Peakedness and Guttman Scales: Concepts and Measurement," *Public Choice* XX (Winter 1974), 33-45.

non-connected. That our data indicate that eight-man coalitions are more likely to be smallest space coalitions than six- or seven-man coalitions is not strong evidence to the contrary. Rather, this result simply reflects the greater likelihood of achieving such coalitions by chance when only one justice is dissenting. If the data in Table 2 is collapsed so that the six-, seven- and eight-member coalition columns are combined, the gamma figure increases to .32, and the z-score also increases indicating greater statistical significance.[11] Thus it is clear that ideology is relevant to the formation of the minimum winning coalitions, but less so for larger coalitions. This result probably suggests two situations operating on the Court. One circumstance would be when the opinion writer seeks ideological purity and as a consequence a minimum winning vote will occur. The other involves when the opinion writer seeks a maximum vote and when that takes place ideology will be less important. In the second situation an opinion will be written that appeals to as many justices as possible. Some justices, however, still will refuse to join because of role or personality reasons. These refusals are non-ideological and, therefore, are unrelated to ideological scale scores.

TABLE 1

*Relationship Between the Size of the Opinion Majority
and the Nature of the Coalition
Non-Ideological Norm Based on the Riker Model*

| | Size of the Opinion Coalition | | | |
	Five	Six	Seven	Eight
Smallest space ideologically for that size coalition assuming only one possible smallest space situation	.08%	1.20%	3.00%	11.00%
Connected but not smallest space	3.92	3.80	5.00	11.00
Not ideologically connected	96.00	95.00	92.00	78.00
Total	100.00%	100.00%	100.00%	100.00%

[11] For the methods of computing the significance of gamma see Linton G. Freeman, *Elementary Applied Statics for Students in Behavioral Science* (New York: John Wiley and Sons, 1965), Chapter 13.

TABLE 2

Relationship Between the Size of the Opinion Majority
and the Nature of the Coalition
The Actual Data from Rohde Cases

	Size of the Opinion Coalition			
	Five	Six	Seven	Eight
Smallest space ideologically for that size coalition	55%	32%	27%	46%
Connected, but not smallest space .	21	25	32	15
Not ideologically connected	24	43	42	39
Total	100%	100%	101%	100%
N = ...	(164)	(121)	(60)	(46)
Gamma=.23, z=3.48, statistically significant at the .01 level				

This conclusion suggests the further question concerning the conditions under which minimum winning results are sought and those under which a maximum vote is pursued. One possible condition when a maximum vote is likely is when the justices seek to protect the Court from an outside threat. It is to this subject that we now turn.

OPINION SIZE AND THREAT

It was David Rohde [12] who first tested the relationship between threat and opinion size. Rohde divided the civil liberties issue areas he examined into threat and nonthreat areas and found that in nonthreat situations there is a "progressive tendency" toward opinion majorities of five or six members, while in threat situations opinion majorities tended to consist of either nine or eight justices or five or six in about equal proportions.[13] Despite the mixed findings Rohde obtained for the threat category, he concluded that the threat/nonthreat distinction was crucial.

Rohde assumed that the mere presence of a threat will induce justices originally outside the original minimum coalition to join the Court's opinion. But the mixed results found by Rohde for his threat issue areas undermine this assumption. Rather, we contend that larger than minimum winning votes are likely to occur only in those threat circumstances in which the justices originally in the minority are persuaded that joining the Court's opinion is to their benefit. In making this decision the minority

[12] Rohde, "A Theory of the Formation of Opinion Coalitions."
[13] Rohde, "Policy Goals and Opinion Coalitions," p. 219.

justices are likely to ask themselves such questions as: (1) How severe is the outside threat? (2) How much will our votes add to the Court's defense? (3) How strong is the pressure being applied by the opinion writer and other justices to persuade us to join the Court's opinion? and (4) How much of our ideological commitments will we have to surrender to do so? Based upon the responses to such questions the minority justices will calculate in crude cost/benefit terms whether joining the Court's opinion is in their interest or not. At the same time the opinion writer will make a similar evaluation to determine how broad an opinion he will be willing to write and how much pressure he and his colleagues will be willing to exert to gain the additional votes.

Rohde identified two kinds of threats to the Court—threats to the Court's *power* and threats to its *authority:*

> Threats to the Court's power will be defined as serious pending attempts to limit the Court's jurisdiction in an issue area . . . or to change the Court's personnel. . . . Threats to the Court's authority will be defined to exist in issue areas in which it is probable that there may be serious resistance or disobedience to the Court's mandate by those to whom it will apply . . .[14]

Rohde included under the first category (i.e., threats to the Court's *power*) the internal security cases decided during the consideration by Congress of the Jenner-Butler Bill of 1958 and listed under his second category (i.e., threats to the Court's *authority*) the establishment of religion decisions, the protest cases involving the rights of blacks, cases concerning involuntary confessions, warrantless search and seizure decisions, and cases involving racial discrimination.

From our knowledge of the threat cases it appears likely that the circumstances favorable for a maximum winning vote were present only in the racial discrimination area. We know from Ulmer's research on the *Brown* decision of 1954 that the justices on the Court were aware that Chief Justice Warren's proposed opinion would evoke resistance to the Court.[15] Warren specifically urged unanimity to meet that threat and exerted much effort over a number of months to achieve that goal. We also know that the justices who originally disagreed with Warren's position were ideologically close to it. These justices had joined in the unanimous vote for the three previous school desegregation decisions prior to *Brown;* i.e., *Sipuel v. Board of Regents* 332 US 631 (1948),

[14] *Ibid.,* p. 212.
[15] S. Sidney Ulmer, "Earl Warren and the Brown Decision," *Journal of Politics* 33 (August 1971). 692-696.

Sweatt v. Painter 339 US 629 (1950), and *McLaurin v. Oklahoma State Regents* 339 US 639 (1950). In *Brown* itself the minority justices argued that the Court should refrain from rejecting the separate but equal doctrine, not because they favored segregation, but mainly because they feared disruption in the schools.[16] These justices could hardly dissent from an opinion with which they sympathized on the grounds that it might inflame disobedience, for then, they could be accused of fostering the very result they feared. Thus in *Brown* the situation was ripe for a unanimous vote and Warren achieved it. It is probable that Warren's influence endured beyond *Brown* and affected the size of opinion coalitions in the other racial discrimination cases as well.

In the other threat areas listed by Rohde there is no evidence that the conditions were favorable for a maximum vote. In some areas a threat was present in one or two cases only and thus the area is of little statistical importance. In the internal security area only a few cases at most can be classified as a threat to the Court's power and may even involve only one case, *Speiser v. Randall* 375 US 513 (1968), for in Rohde's first testing of the threat hypothesis[17] this was the only internal security case he included. Only one establishment of religion case was likely to be viewed by the Court as a threat to its authority. That case is *Abington v. Schempp,* 374 US 203 (1963), the Bible reading and Lord's prayer decision. Even *Engel v. Vitale* 370 US 421 (1962), the New York Regents prayer case, was unlikely to have been perceived as a threat to the Court's authority for there was no reason for the Court in *Engel* to anticipate that the Regents prayer would continue to be recited after it handed down its decision and indeed this practice ceased.

Contrary to Rohde's designation, the protest area involving blacks hardly constituted a threat to the Court's authority. In these sit-in and other protest cases the Court failed to lay down explicit guidelines for the treatment of protestors and thus their arrest by the police cannot legitimately be characterized as a "serious resistance or disobedience to the Court's mandate." Rather, these cases were handled by the Court on a case-by-case basis with the justices deciding whether particular protest tactics in particular settings were legal.

A good argument can be made, however, that the two criminal categories of involuntary confessions and warrantless search and seizure were justifiably regarded as threats to the Court's authority, for in these two areas there was extensive disobedience by the police of the Court's man-

16 *Ibid.,* pp. 695-7.
17 Rohde, "A Theory of the Formation of Opinion Coalitions."

date. In these cases a maximum vote was unlikely, nevertheless, for there was considerable ideological disagreement on the Court concerning its role in supervising the behavior of state police officials. In addition, we have no evidence that any efforts were made to attempt to obtain the votes of the minority justices for the Court's opinion.

From this impressionistic analysis of the Rohde threat areas we hypothesize that only in the racial discrimination area will the Court tend to be maximum winning, while in the other threat areas (and in the nonthreat areas as well) it will tend toward a minimum winning result.

In the analysis of the threat hypothesis we examined both the cases of our data set and, since Bernd [18] attempted to reproduce Rohde's work, the results reported in two of his tables as well. The Bernd data consisted of one table (Table 7) of nonthreat issue areas and another (Table 9) of threat issue areas, both pertaining to full opinion cases in which nine justices participated.

Rohde considered opinion coalitions of five or six as minimum winning and those of eight or nine as maximum winning. We will employ this same definition. As a first test of the Rohde hypothesis we broke down the threat issue areas contained in Bernd's Table 9 into two categories: Fifty-seven threat cases that involve questions of racial discrimination (or, more precisely, the racial discrimination and association category containing forty-two cases and the voting rights and civil rights acts areas consisting of fifteen cases) and, secondly, the other seventy threat cases. We then compared these two categories with the 291 monthreat cases in Bernd's Table 7. It was found that sixty-one percent of the coalitions in the nonthreat cases were five or six in size, while only twenty-one percent were eight or nine. In the non-racial discrimination threat cases the results were comparable; i.e., sixty-four percent were five or six person coalitions and twenty-seven percent were eight or nine. But the racial discrimination cases were strikingly different. Only thirty-seven percent were five or six and fifty-two percent were eight or nine. Indeed, thirty-nine percent of the racial discrimination coalitions were unanimous. It is clear from these statistics that the important distinction is not between threat and nonthreat, as defined by Rhode and Bernd, but rather between racial discrimination cases and all the others.

We then sought to determine whether using the data from Rohde's 479 cases would yield the same results. We first combined the nonthreat and the non-racial discrimination threat cases into a new category of non-discrimination cases. This new category included 400 cases. Our ra-

[18] Bernd.

cial discrimination group of cases consists of the same issue areas we used in constructing the Bernd racial discrimination category and included all the cases from Rohde's scales No. 16, and No. 17 (racial discrimination), No. 18 (voting rights), No. 19 (civil rights acts) and the freedom of association cases involving blacks in scale No. 1. This category contains sixty-two cases. Seventeen cases which were decided by seven-man courts were excluded. We found that sixty-seven percent of the non-discrimination cases were five- or six-man coalitions but only twenty percent were eight or nine in size. In regard to the racial discrimination cases, however, the results were markedly different—twenty-four percent were five or six and sixty-one percent eight or nine, with forty percent of the coalitions unanimous. The differences are clear and unambiguous and support our hypothesis.

Rohde's finding that in threat cases the winning coalition tended to be maximum and minimum in about equal proportions was the result of his merging together of two dissimilar categories of cases. The Court does not respond to Rohde's broad classification of threat situations by maximum winning voting. Rather it behaves in this way only in those threat situations in which the justices involved decide it is to their advantage to do so. We have suggested questions that the justices are likely to confront in making such an evaluation. Based upon probable responses to these questions, we hypothesized that only in racial discrimination cases were the conditions favorable for a maximum winning vote as the predominant pattern. Our typothesis was supported. Our conclusion not only refines the work of Rohde but that of Murphy [19] and Howard [20] as well, for all three scholars appear to contend that the mere existence of a threat and nothing more is sufficient to produce a maximum winning vote.

[19] Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: The University of Chicago Press, 1964).
[20] J. Woodford Howard, "On the Fluidity of Judicial Choice," *American Political Science Review* 62 (March 1968), 43-56.