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POLAR CLASSIFICATION OF SUPREME COURT JUSTICES

S. SIDNEY ULMER*

It has been fashionable for some time now to apply labels with political connotations to Supreme Court Justices. Such labels as "right", "left", "conservative" and "liberal" are widely used and various speculations, inferences and conclusions are based upon these labels. Yet virtually no attention has been given to analysis of this popular terminology. This paper is designed to emphasize some of the patent shortcomings of fuzzily-structured concepts and to indicate how possible improvements in categorization may be made.

The best known "labeler" of Supreme Court Justices is Professor Herman Pritchett of the University of Chicago. Professor Pritchett has made significant contributions to the understanding of judicial behavior by analysis of voting patterns of individual justices in non-unanimous decisions. Pritchett's most common technique is to arrange the justices by name in tabular form so as to show the participation of and agreements among particular justices in dissenting opinions by terms of court. Such a table he says, "provides a kind of X-ray insight into opinion on the Court. The total number of dissents for each justice is an index to the *intensity* of his disagreement with the Court's predominant trends. . . . The charting of interrelationships in the dissenting vote enables us to discover the *direction* of dissent. . . ."¹

The use of this method permits identification of blocs or alignments of justices. These blocs are then characterized as being to the left, right or center of the Court, or as constituting liberal and conservative groupings. On this basis the following blocs are identified for the 1931-35 terms: on the left — Stone, Cardozo and Brandeis; on the right, Van Devanter, Sutherland, Butler and McReynolds; in the center, Roberts and Hughes. For the 1939 term, Hughes, Roberts and McReynolds are referred to as the "right-wing group".² In the three terms spanning 1946-1948, Douglas, Rutledge, Murphy and Black are classified to the left, Jackson and Frankfur-

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1. PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT*, 178 (1954).

2. *Id.* at 180.

ter to the right, with Reed, Vinson and Burton making up the center group. Finally for the 1949-1952 terms, the majority of five justices, Vinson, Burton, Reed, Clark and Minton constitute the right, while the other four justices failed to meet the requirements of a bloc because of a low average inter-agreement rate.³

Professor Pritchett has made good use of a relatively effortless method of ascertaining groupings and alignments of Supreme Court Justices in terms of inter-unit cohesion. Beyond this the tabular compilations used by Pritchett disclose very little. Without additional data, further characterization of groupings originally identified on the basis of cohesion can only occur in terms of group core-values imposed upon the data by its manipulator. This does not necessarily imply objection to such an imposition. Nevertheless, conscious attempt should be made to give precise content to these core values.

What is meant by such terms as "right", "left", "center", "liberal" and "conservative"? Certainly it is not enough to characterize a cohesive bloc of justices as "left" of the Court simply because the bloc includes Justices Black and Douglas who are widely regarded as libertarian activists. Pritchett merely says that "right" and "left" are used in "order to accord with usual political designations."⁴ But clearly such "usual political designations" have no "usually designated definition". The use of terminology connoting political disposition to describe blocs identified by tabular compilation only in terms of inter-unit cohesion, is to associate with the method inferences not suggested by the data. Pritchett's tables constitute an index to the *intensity* of disagreement only if "intensity" is intended to convey numerical degree. But these tables constitute an index to the *direction* of dissent only in the sense of direction of tendencies to adhere to various groupings on the Court. They do not constitute an index to political disposition. They neither speak to nor identify the factors underlying the dissent. And yet knowledge of these factors is a pre-requisite to determining social and political dispositions and attitudes on the Court.

There would seem to be two basic factors underlying dissenting votes in Supreme Court adjudication: (1) the dissenting justice might object to the direction of the doc-

3. *Id.* at 184.

4. *Id.* at 179.

trinal movement approved by the majority or (2) the dissenter may be fundamentally resistant to abrupt change or break with precedent. Pritchett's method goes to neither of these factors. Indeed he specifically states that his tables reveal the "anatomy of opinion in the Court, quite irrespective of the issues over which the disagreement arose."⁵

The formidable challenge is to disentangle these two factors in such a way as to expose the dominant influence on the decision. In so far as the disagreement is the result of the direction of the doctrinal movement, qualitative study of the non-unanimous opinions would seem to be the best tool of analysis. In so far as basic resistance to break with precedent is concerned, a quantitative approach promises results. At least three indices to "change-resistance" are furnished by a compilation of judicial voting statistics in overruling cases.⁶ Attitude toward change is reflected in the vote of the individual justice to overrule or not to overrule the precedent established by a prior decision. In this context terms such as "right" and "left" may be supplied with meaningful content by associating them with judicial attitudes toward sharp breaks with the past.

The limitations of this approach are several. A justice may dissent from overruling a past decision because of the direction of doctrinal movement taken by the majority even though he has no basic objection to breaks with precedent. Or the justice may object on both grounds with the two factors so intermingled as to make disentanglement almost impossible. But if a justice votes *against* overruling the precedent, the fact exists that he has voted to maintain the *status quo* and has rejected the change suggested by his colleagues. There is, therefore, a distinctive quality attaching to a dissenting vote in an overruling case. This distinctiveness gives an insight into judicial attitudes toward values of the past and deviation from them.

The classification of a particular justice will inevitably depend upon the context in terms of which the category is defined. For example, one preliminary index to change-resist-

5. *Id.* at 180.

6. A precedent is considered overruled if (1) the majority opinion expressly so states, (2) if one or more justices expressly so state in case opinions or in their outside writings, (3) if cited as overruled by the Court Reporter in the case headnotes, and (4) if cited by Shepard as overruled. For an analysis of overruling as an aspect of lawmaking see: Ulmer, *Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414 (1959).

TABLE A

FREQUENCY OF INSTANCES INDIVIDUAL JUSTICES VOTED AGAINST OVERRULING
IN OVERRULING CASES BY PERCENTAGE OF TIMES VOTING 1790-1958 TERMS

<i>Justice</i>	<i>Dates of Service</i>	<i>No. Years on Court</i>	<i>Times Voting</i>	<i>Vote Against Overruling</i>	<i>Vote Against Overruling as Percentage of Times Voting</i>
Livingston	1806-1823	17	1		
Chase	1796-1811	15	1		
Washington	1798-1829	31	2		
Johnson (Thos.)	1791-1793	2	2		
Duval	1811-1835	24	2		
Story	1811-1845	34	3		
Thompson	1823-1843	20	2		
McLean	1829-1861	32	5		
Baldwin	1830-1844	14	1		
Wayne	1835-1867	32	4		
Taney	1836-1864	28	3		
Catron	1837-1865	28	4		
McKinley	1837-1852	15	2		
Grier	1846-1870	24	4		
Curtis	1851-1857	6	2		
Campbell	1853-1861	8	2		
Swayne	1862-1881	19	10		
Hunt	1872-1882	10	6		
Lurton	1909-1914	5	1		
Lamar (Joseph)	1910-1916	6	1		
Pitney	1912-1922	10	7		
Taft	1921-1930	9	4		
Sanford	1923-1930	7	4		
Cardozo	1932-1938	6	4		
Byrnes	1941-1942	1	3		
Woods	1880-1887	7	5		
Matthews	1881-1889	8	7		
Blatchford	1882-1893	11	9		
Lamar (Lucius)	1888-1893	5	3		
Fuller	1888-1910	22	5		
Shiras	1892-1903	11	3		
Peckham	1895-1909	14	1		
Vinson	1946-1953	7	8		
Clark	1949- ?	—	3		
Minton	1949-1956	7	3		
Douglas	1939- ?	—	29	1	3.5
Hughes	1910-1916	6			
	1930-1941	11	20	1	5
Stone	1925-1946	21	35	3	8.6
Black	1937- ?	—	34	3	8.9
Waite	1874-1888	14	11	1	9.1
Field	1863-1897	36	21	2	9.6
Sutherland	1922-1938	16	10	1	10
Burton	1945-1958	13	9	1	11.2
Strong	1870-1880	10	8	1	12.5
Day	1903-1922	19	7	1	14.3
Rufledge	1943-1949	6	12	2	16.7
Miller	1862-1890	28	18	3	16.7
Brandeis	1916-1939	23	18	3	16.7
Nelson	1845-1872	27	6	1	16.7
Davis	1862-1877	15	6	1	16.7
Gray	1881-1902	21	12	2	16.7
Van Devanter	1910-1937	27	17	3	17.7
Bradley	1870-1892	22	17	3	17.7
Clifford	1858-1881	23	11	2	18.2
Murphy	1940-1949	9	25	5	20

TABLE A.—Continued

<i>Justice</i>	<i>Dates of Service</i>	<i>No. Years on Court</i>	<i>Times Voting</i>	<i>Vote Against Overruling</i>	<i>Vote Against Overruling as Percentage of Times Voting</i>
Clarke	1916-1922	6	5	1	20
Reed	1938-1957	19	32	7	21.9
White	1894-1921	27	9	2	22.3
McKenna	1898-1925	27	9	2	22.3
Holmes	1902-1932	30	13	3	23.1
Roberts	1930-1945	15	26	6	23.1
Daniel	1841-1860	19	4	1	25
Harlan	1877-1911	34	15	5	33.4
Frankfurter	1939- ?	—	33	11	33.4
Marshall	1801-1837	36	3	1	33.4
Chase (Salmon)	1864-1873	9	3	1	33.4
McReynolds	1914-1941	27	23	9	39.2
Brewer	1889-1910	21	5	2	40
Butler	1922-1939	17	17	7	41.2
Jackson (Robt. H.)	1941-1954	13	18	8	44.5
Brown	1890-1906	16	4	2	50
Jackson (Howell)	1893-1895	2	2	1	50

ance is represented by Table A. This table contains the names of the 72 justices who have participated in overruling cases, the number of cases in which each voted ("Times Voting"), the number of instances in which the justice's vote was to uphold the precedent ("Vote against Overruling"), and the ratio of such votes to the number of votes cast by one justice in overruling cases. The justices are then ranked on the basis of the percentage of dissents from overruling ranging from 0 to 50. It will be noted that the smaller number of total instances and the smaller percentage of dissents tend to be associated with justices of an earlier day. The larger number of total instances and the lower percentage of dissents tend to be associated with justices of more recent times. There are exceptions to these tendencies, however, as illustrated by latter day justices such as Byrnes, Minton and Clark with a small number of total cases and no dissents, and by earlier justices such as Miller, Harlan and Bradley with a relatively large number of total cases and high dissenting ratios. On the whole, however, the figures reflect the modern tendencies to more frequent overruling and to greater frequency of dissent.

The significance of the percentage figures increases in direct proportion to the increase in the total number of cases in which the justice is involved. Thus, the fact that Joseph Lamar participated in one overruling case with a dissenting percentage of 0 is plainly less significant than the fact that Swayne has a score of 0 after participating in ten overruling

cases. In more recent times with a justice such as Stone taking part in as many as 35 such cases, the figures take on added significance. Thus the scaled figures furnish a preliminary index to the attitude of the justices toward break with precedent and are, in a sense, a change-resistance scale. The scaled percentages are not reflective of absolute values; the scale does not lend itself to literal comparison of the raw data for one justice to the raw data of another. The score for each justice indicates during his Court career the extent to which his attitudinal perspective in respect to departure from precedent deviated from that of all the majorities of the Courts on which he sat in overruling cases. The data for one justice is comparable to that of another only in the sense that the range of one's deviation from his majorities in overruling cases may be compared to the range of another's deviation from his majorities in such cases. The fact that Robert H. Jackson, for example, deviated from his majorities in 44.5 percent of the overruling cases does not mean that Jackson deviated from the majority of any particular Court to that extent. In any one term of Court he may have deviated to a greater or lesser extent than his career-time score indicates. That can be determined only by analysis of particular courts.

If 0 is used to represent the extreme "left" (*i.e.*, no indicated resistance to abrupt break with precedent) and 50 is represented as extreme "right" (*i.e.*, the highest indicated resistance to abrupt break with precedent) individual justices may be classified in this context as tending over a career-time to the left or to the right of the Courts on which they sat. On this basis Douglas, Hughes, Stone, Sutherland and Black appear to have had pronounced tendencies toward the left. Jackson, Frankfurter, McReynolds, Butler and Roberts on the other hand show tendencies toward the right. At the center we identify such justices as Van Devanter, Murphy and Brandeis. In the light of our previous knowledge the results of this analysis do not appear surprising on the whole. The justices identified as tending toward the right are often so classified. At the left the only surprise is Sutherland who on the basis of his dissents in the thirties with Butler, McReynolds and Van Devanter had acquired in some quarters the connotation of right-conservative. Pritchett classifies all four as constituting a right-bloc on the 1931-1935 Courts. Indeed in 1929 Chief Justice Taft in a letter to Justice But-

ler declared that: "The most that could be hoped for is continued life of enough of the present membership to prevent disastrous reversals of our present attitude. With Van and Mac and Sutherland and you and Sanford, there will be five to steady the boat. We must not give up at once."⁷

Curtis classifies Van Devanter, McReynolds, Sutherland and Butler as conservatives in "the best and soundest sense", that is, men who were not able to believe that there was anything wrong with a society in which, largely by their own efforts, they had been successful.⁸ In terms of change-resistance, however, it appears that Sutherland in particular and Van Devanter to a lesser extent are not in the same category as Butler and McReynolds. The two latter justices score 41.2 and 39.2 respectively, while Van Devanter and Sutherland have scores of 17.7 and 10 indicating much stronger tendencies to the "left". Coupled with the known conservatism of all four justices, the inference from the statistics is that the higher overall dissenting position of McReynolds and Butler resulted more from resistance to abrupt departures from past values, and less from objection to the direction of proposed change, than was the case with Van Devanter and Sutherland. It should be kept in mind that the relationship is the range of Butler and McReynolds from their majorities as compared to the range of Van Devanter and Sutherland from their majorities.

Analysis of the eleven overruling cases in which Sutherland took part shows that he voted to overrule the precedent at issue in ten of the eleven; this indicates little reluctance to break with past principles if the change was a movement in the "proper direction". McReynolds and Sutherland were both property conscious and consistently voted together for the protection of property. But in the one overruling case pertaining to civil liberties in which McReynolds, Butler, Sutherland and Van Devanter participated we find the two latter voting to overrule the precedent to protect the individual while Butler and McReynolds voted to uphold the precedent on which the government based its position.⁹ In the earlier case, *Pennsylvania R. R. v. Towers*, 245 U. S. 6 (1917), McReynolds voted to follow a precedent preventing state regulation of commercial carriers and Van Devanter voted to overrule. Thus differences may be detected within the four-

7. Quoted in CURTIS, *LIONS UNDER THE THRONE*, 96 (1947).

8. *Id.* at 98.

9. *Funk v. United States*, 290 U. S. 387 (1933).

justice bloc as to subject matter which warranted such drastic action as overruling a precedent. Other differences may be revealed respecting the extent to which property should be judicially protected. The differences among the scaled scores, however, are partially accounted for by factors other than attitudinal differences. Butler cast five of his seven votes to uphold precedent in the two terms following the departure of Sutherland and Van Devanter from the Court. McReynolds cast five of his nine dissenting votes in overruling cases in the three years following the retirement of Sutherland and Van Devanter. This indicates that the Court moved sharply to the left (in the defined sense of that term) in the years immediately following the retirement of Sutherland and Van Devanter. This movement had the effect of placing McReynolds and Butler farther to the right in relation to their majorities than had previously been the case.¹⁰ Analysis shows that the four new Roosevelt appointees in the 1937-1939 terms voted to overrule precedent eight, six, six and five times respectively casting not a single vote in dissent in an overruling case.¹¹

While the generalizations derived from long term data tend to suppress the short term positions as well as the short term shifts from one court to another, these relationships can be highlighted by analysis of particular terms of court using the same overruling case data.

This requires the development of additional preliminary indices. While our first index is a measure of the ratio of deviant voting behavior to total case participation, additional indices may be designed to measure deviation through time and the extent of deviation when it occurs.

Table B contains a representative list of justices for purposes of this analysis. The third column ("Terms dissenting as percent of terms voting") shows the ratio between the number of terms in which the justice deviated from his majorities in overruling cases (Column 2) and the total number of terms in which he voted in such cases (Column 1). The data reflect the extent of the *time* in which the behavior of the justice was dissonant with his majorities. This in-

10. On inter-clique shifting among Supreme Court Justices see: Snyder, *The Supreme Court as a Small Group*, SOCIAL FORCES (March 1958); and the same author's article, *Uncertainty and the Supreme Court's Decisions*, 65 AMERICAN JOURNAL OF SOCIOLOGY 241 (1959).

11. Black, Reed, Frankfurter and Douglas respectively.

dex yields for the justices a ranking slightly different from the ranking in our first index, (Table A, *supra*).

TABLE B
VOTING BEHAVIOR OF SELECTED JUSTICES OF THE UNITED STATES
SUPREME COURT IN OVERRULING CASES

<i>Justice</i>	(1) <i>Terms Voting</i>	(2) <i>Terms Dissent- ing</i>	(3) <i>Terms Dissenting as % of Terms Voting</i>	(4) <i>Average % Deviation Per Term Dissenting</i>
Douglas _____	11	1	9.09	33.3
Hughes _____	10	1	10	25
Sutherland _____	9	1	11.1	100
Black _____	13	2	15.3	60
Stone _____	16	3	18.7	25
Van Devanter _____	15	3	20	100
Brandeis _____	15	3	20	100
Roberts _____	12	4	33.3	33.3
McReynolds _____	17	6	35.2	69.2
Butler _____	12	5	41.6	71.4
Murphy _____	9	4	44.4	55.5
Frankfurter _____	12	6	50	69.3
Jackson (R. H.) _____	8	5	62.5	55.5

Our third preliminary index (Column 4 in Table B) produces still another ranking. These differences merely point up the thesis of this paper, that labels must be given specific content to avoid gross misunderstanding and/or error. Such terms as "right" and "left" have meaning only in a specific context; as the context is varied the ranking is varied since the rank order is dependent upon the context variable. Thus one interested in resistance to change might be concerned with a number of different variables; this paper is limited to three — (1) the relationship of deviant voting behavior to total opportunities, (2) the relationship of time to deviant voting behavior, and (3) the scope of deviant voting behavior when it occurs.

Our second preliminary index (Table B, column 3) shows that Frankfurter and Jackson were dissatisfied with the position taken by their majorities in overruling cases 50 and 62.5% of the terms. This suggests that their objection was more related to change by overruling than to the direction taken by Court policy. For if direction of change were the primary concern, changes in Court personnel would most likely affect the attitude of the disaffected justice. One might assume, therefore, that Douglas and Hughes, who disaffected in only one term of those in which they participated, were behaving more in terms of a policy content variable than in terms of a change resistance variable. For Frankfurter and Jackson on

the other hand we might infer the opposite. Indeed, it is easily established by case analysis that Frankfurter and Jackson have shown much more deference for the rule of *stare decisis* than Hughes and Douglas.

Our third preliminary index (Table B, column 4) reveals the extent of the disagreement in those Court terms in which one or more dissenting votes were cast in overruling cases. We note that the extent of the disagreement for Douglas and Hughes is quite moderate. In his one dissenting term Douglas voted with his majority to overrule precedent in two cases, while voting to uphold precedent in one case. In the single term when he dissented from overruling, Hughes' ratio was three votes to overrule and one vote against overruling. Thus we infer not only that Douglas and Hughes rarely deviated from their majorities in overruling cases (measured by cases or by terms) but that such deviation as did occur was minor in scope. For such justices as Brandeis, Sutherland, Van Devanter and Butler the story is quite different. The figures for these justices indicate that the cleavage on the courts on which they sat was much more pronounced.

Finally, since the three different contexts give three different rankings, is it possible to generalize about the dispositions of Supreme Court Justices in such a way as to transcend the discrepancies between the preliminary indices? One may, of course, be content to consider any one of the preliminary indices adequate to justify some particular categorization of the justices. The important thing, after all, is to indicate the content given the terms used and the context in which the classifications are made. But, if considered desirable, one may generalize in such a way as to take account of the inferences to be drawn from all three of the indices. Such a final index may be obtained by taking the mean of the percentage figures in the last column of Table A, and columns (3) and (4) of Table B.¹² The final index would

12. This method of ranking selected justices may be extended to all justices who have sat on the Supreme Court. However, some justices have never participated in an overruling case. Others have participated too infrequently for their voting record to be of much use. This may be overcome by introducing additional voting data bearing on attitude toward change. For example, if a justice has not participated in an overruling case he more than likely has taken part in cases in which precedent has been criticized, questioned, limited or distinguished. His attitude in such cases may be determined and utilized for purposes of the final index. It should be noted that in taking a mean of percentages it is necessary to take account of the variance in the base of each percentage. They may not be simply summed. A general reference is ZELDITCH, *A BASIS COURSE IN SOCIOLOGICAL STATISTICS*, 129 (1956).

rank our selected justices as follows :

Douglas	7.0%
Hughes	8.8%
Stone	14.3%
Sutherland	15.0%
Black	15.4%
Brandeis	25.0%
Van Devanter	25.7%
Murphy	30.2%
Roberts	31.5%
McReynolds	45.3%
Frankfurter	45.9%
Butler	47.2%
Jackson	51.4%

This index enables us to make generalizations concerning the relation of any justice to the Court on which he sat. The relationship is determined in terms of attitude toward change which in turn supplies the content of "left", "right", "liberal", and "conservative". Thus we may say that on the Courts on which they sat Hughes and Douglas were further to the left in the sense of change resistance than Butler and Jackson, while Frankfurter and McReynolds were further to the right than Stone and Black. As for present members of the Supreme Court, we would note that Douglas and Black have been more liberal than Frankfurter, while Douglas has been considerably more liberal than Black.

Thus we have, in conclusion, ranked justices in terms of political and philosophical disposition, but we have given our terminology specific content based on attitude toward change as measured through overruling case statistics. This has been done on the assumption that resistance to change is a common sense definition of the "right" or "conservative", while readiness to accept change defines "liberal" or "left". Whether this final ranking coincides with some objective reality is of minor concern for the point of this paper. The manner in which the final designations are reached is made clear and may be argued and corrected if erroneous. This, it is submitted is an improvement over less systematized approaches which draw from cohesion data inferences concerning political and philosophical dispositions.