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Alec D. Francen April 11, 2017

The Decision to Disagree: A Revisit of Eroding Consensus on the U.S. Supreme Court

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An abstract of
a thesis submitted to the Faculty of Emory College of Arts and Sciences
of Emory University in partial fulfillment
of the requirements of the degree of
Bachelor of Arts with Honors

Department of Political Science

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Abstract

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Dissent can be a powerful means of judicial expression. For many years, dissent on the Supreme Court was relatively rare, and most cases in a term were decided unanimously. In the early 1940s, a sudden shift in activity on the Court led to a sharp increase in dissenting behavior, for which such patterns have remained to the present day. This study offers a unique perspective on the longstanding question of eroding consensus in two ways. First, a framework for dissenting behavior is offered, lending better understanding as to why justices might dissent. A second unique aspect comes from the utilization of new data, which allows for a more refined analysis of cases and judicial votes than previously possible. This availability in data allows for two avenues of analysis to be pursued. One path of inquiry considers institutional changes, namely the Judges' Bill of 1925 as a possible explanation for the erosion of consensus on the Court. Another consideration is the behavior of individual justices during the Roosevelt Court, from 1937 to 1945. There is evidence to suggest that the Judges' Bill may have an influence on increasing dissent rates by a reduction in the Court's workload. Moreover, analysis of the Roosevelt Court suggests the 1941 term was a critical point in the erosion of consensus, which is consistent with previous research.

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Acknowledgements

It would be unfitting to not recognize the following individuals, for whom this thesis would not be possible. First and foremost, I would like to thank Dr. Giles, for his willingness to serve as my advisor, his unending support, and his genuine enthusiasm towards my studies. I believe his mentorship has allowed me to grow both as a scholar and as an individual.

I would also like to appreciate the members of my committee, Dr. Walker and Dr. Master, for their eagerness to read and for their contributions, both related to this thesis and beyond. If not for Dr. Walker's classes, I do not know if my passion for the law would be the same. Never more did I feel challenged in a class than in any of the four classes I took with Dr. Walker, yet each one was a rewarding and worthwhile experience. Although I may have only had one class with Dr. Master, I will not forget his charisma and sincere care for his students. Moreover, as the outside member on this committee, I greatly appreciate his feedback and insightful comments on this thesis.

In addition, I would like to thank Dr. Reingold and Dr. Doner for their time and effort as the directors of the Political Science Honors Program as well as the instructors of the Honors Tutorial class. As for Tutorial, I appreciate all my fellow honors students, whose feedback during class and continuous support has kept myself (and others) going for the past nine months.

Finally, I would like to thank my friends and family for their encouragement throughout the entire process.

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Dissent on the Supreme Court can be a valuable and sometimes influential means of expression. Consider the words of Justice Louis Brandeis, dissenting in *Olmstead v. United States* (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy (277 U.S. 438, at 485).

In later years, scholars have considered Justice Brandeis' opinion in *Olmstead* to be one of the most prominent dissents in the history of the Supreme Court. As such, dissent is widely perceived to characterize the decisions of the United States Supreme Court. In reality, frequent dissent on the Supreme Court is a relatively new phenomenon. For most of its history, the Supreme Court rendered a unanimous decision in an overwhelming majority of its cases in a term. As seen in figure 1, levels of non-unanimous cases currently seen on the Supreme Court only appeared in the early 1940s. Over the past several decades, political scientists, legal scholars, and even judges have pondered the causes of the increase in dissent in Supreme Court cases. Although several potential causal factors have been identified, there is yet to be consensus on the relative importance of these factors.

(Figure 1 about here)

This paper does not seek to provide a definitive answer to the phenomenon of eroding consensus. In fact, there is likely not a single solution to this puzzle. This study does, however, revisit existing theories while utilizing the newly released Legacy Version of the Supreme Court Database (Spaeth et al. 2016a). This data allows for a more detailed examination of judicial behavior in the critical period of shifting dissent rates than previously possible. The data allows two paths of inquiry.

The first is the role institutional developments play in the operation of the Supreme Court. The institutional development of primary interest is the Judiciary Act of 1925, hereinafter

referred to as the Judges' Bill. This law transformed the Court from being primarily a corrector of errors to a venue that grappled with the nation's most important legal questions. Because of the Judges' Bill, the Court gained significant control over its docket, leaving only a select few cases "of national or at least general concern" eligible for mandatory review (Frankfurter and Landis 1928a, 2-3). After 1925, the Court operated in a manner largely comparable to its modern-day counterpart.

The second line of inquiry is concerned with the behavior of individual justices. This is of particular interest during the "Roosevelt Court," an era of the Supreme Court from 1937 to 1945 in which scholars note the increasing presence and influence of justices appointed by President Franklin D. Roosevelt (Pritchett 1948; see also Corley, Steigerwalt and Ward 2013). Major turnover on the Court in the late 1930s and early 1940s coincided with a rapid increase in non-unanimous decisions. A better understanding of *who* was dissenting during this critical period may lend better insight as to *why* dissent rapidly increased to unprecedented levels by the mid-1940s.

This paper develops in the following manner. First, I will present a framework for dissenting behavior. Thereafter, I will give a historical outline of developments that made the Supreme Court the institution it is today. I will then introduce the existing debate on factors behind eroding consensus. Finally, I will present series of testable hypotheses that will attempt to shed light on existing notions of eroding consensus.

Why Do Justices Dissent?

A justice's choice to dissent is one component of a broader array of decisions that he makes when sitting on the bench. Studies on judicial behavior have long evolved from C. Herman Pritchett's (1941; 1948) tabulations of Supreme Court justices' votes. A modern conception of

judicial behavior portrays judges and justices as arbiters of legal text, policymakers, and moreover, as people, who are concerned about their own personal interests and motivations (Epstein, Landes and Posner 2013; see also Posner 2008).

Dissent presumes disagreement. One would expect a justice to dissent only if his preferred disposition of a case differs from that of the Court's majority. The factors behind disagreement may vary. Differences in legal interpretation are one source that can divide members of a collegial court. Personality and other sociological influences, such as education, religion, gender, or career background, may also provide the grounds for justices to disagree (Epstein, Landes, and Posner 2013, 257). Yet disagreement is a necessary but not sufficient cause for dissent. Should a justice disagree with other members of the Court, it is ultimately the choice of the justice to either express such disagreement, or silently join the majority. To weigh the rewards and risks of dissenting, a cost-benefit analysis illustrates why a justice may be driven to decide one way or the other.

Dissenting has a unique appeal that can cater to a justice's individual interests. Dissenting opinions are a means by which a justice can express his own legal viewpoint; these opinions may also enhance the justice's reputation (Epstein, Landes, and Posner 2013, 256-57). Some justices, such as Oliver Wendell Holmes and John Marshall Harlan have become well regarded for their dissenting behavior. Justice Brandeis' dissenting opinion in *Olmstead*, as noted in the onset of this paper, is now considered to be one of the Court's most noteworthy dissents. A justice may also use dissents as a tool to undermine the opinion of the Court's majority (Epstein, Landes, and Posner 2013, 256). The value of dissenting or the reasons for exercising dissent may vary among justices, but there clearly exists some benefit to vocalizing a non-consensual opinion.

The allure of dissenting must be weighed against the potential costs to the justice. A

dissent is a separate, voluntary action by a justice. In order to "remain in good standing with their colleagues," a justice must write some majority opinions for the Court (Epstein, Landes, and Posner 2013, 256). Additionally, a dissenting justice must devote time and effort to furnish a separate opinion that signals disagreement with the Court (Epstein, Landes, and Posner 2013, 256). Costs assumed from dissents may extend beyond that of the individual dissenting justice. The reputation of the Court may be diminished "if the dissenting opinion criticizes the majority forcefully" (Epstein, Landes, and Posner 2013, 261). Moreover, the Court's majority may assume effort costs of revising the majority opinion "to meet the points made by the dissent" (Epstein, Landes, and Posner 2013, 261). Furthermore, these costs imposed on the majority may undermine collegiality (Epstein, Landes, and Posner 2013, 261, 263). Thus, dissents are not created without consequences, making the decision to dissent a product of many factors.

Two questions motivate this study. First, what conditions allowed for increased dissent on the Supreme Court? Some change or changes over time allowed the incentives of dissenting to overcome its associated costs in a greater proportion of cases. Second, who was responsible for the increase in dissenting behavior? There is likely not one individual responsible for the sharp increase in dissent in the late 1930s and early 1940s. However, dissent can only happen if justices act upon such disagreement. Further insight into these questions may help to understand how consensus seemingly eroded so quickly.

An Evolving Court

The Supreme Court has long evolved from its early beginnings. Internal and external institutional changes have shaped the Court into its modern form.[1] Internal developments, such as the consolidation of opinion writing by Chief Justice John Marshall, created a more cohesive

[1] Corley, Steigerwalt, and Ward (2013) offer a similar framework on internal and external developments and the breakdown of consensus.

appearance early in the Court's existence (ZoBell 1959, 193). In the pre-Marshall Court, each justice could write an opinion in seriatim (ZoBell 1959, 192). After Marshall's decision to have one opinion represent the Court's majority, a justice could issue a separate dissenting or concurring opinion if he disagreed with the opinion of the Court (ZoBell 1959, 196). Internal developments, such as this example, are one method to transform the daily operation of the Court.

External developments are the result of actions taken by external actors, such as Congress. Arguably, external developments to the federal judiciary in the late 1800s and early 1900s significantly impacted the operational nature of the Supreme Court. In 1875, the Supreme Court was granted federal question jurisdiction. This expansion of power made the federal courts "the primary and powerful reliances [*sic*] for vindicating every right given by the Constitution, laws, and treaties of the United States" (Frankfurter and Landis 1928b, 65). Consequently, this action "added voluminously to the business of the federal courts without equipping them to discharge it" (Frankfurter and Landis 1928b, 78). Congress sought to address the issue of an ill-equipped federal judiciary by passing the Evarts Act in 1891. This law established the United States courts of appeals, an intermediate appellate court of federal jurisdiction. The courts of appeals consequently assumed a portion of the cases that the Supreme Court would otherwise hear. As shown in figure 2, the Supreme Court disposed fewer cases in the immediate years following the establishment of the courts of appeals. Moreover, the Evarts Act marked the first instance the Supreme Court gained discretionary review. In cases where the courts of appeals had final judgment, a litigant could petition the Supreme Court to review the case on a writ of certiorari (Hartnett 2000, 1650-51). Ultimately, it would be at the discretion of the Supreme Court to accept or deny a litigant's petition for certiorari. Despite the Supreme Court's newly

established discretionary review, its scope was rather limited, primarily focusing on "those [cases] which depended upon the diverse citizenship of the parties as the basis for federal jurisdiction" (Taft 1925, 1-2). The reduction in the workload of the Supreme Court was consistent with the intent of the Evarts Act; the creation of an immediate appellate judiciary "soon removed the 'hump' in the docket of the Supreme Court" (Taft 1925, 2).

(Figure 2 about here)

Despite a reduced workload in the immediate terms after 1891, figure 2 also illustrates that the volume of cases disposed eventually returned to unsustainable levels. Often, oral arguments in cases were delayed as much as a year due to a congested docket (Taft 1925, 2). The continuation of a demanding workload into the 1920s was mostly due to the prevalence of cases appealed to the Court as a matter of right, via a writ of error or writ of appeal. As shown in figure 3, cases heard by writ of appeal or a writ of error comprised a significant share of the Court's appellate docket into the 1920s.[2] The high volume of mandatory appeals certainly did not please those sitting on the Court. In his resignation letter, Justice John Hessin Clarke wrote to President Woodrow Wilson, "My theory of writing opinions has always been that if clearly stated 9 cases out of 10 will decide themselves […] I protested often, but in vain, that too many trifling cases were being written, that our strength should be conserved for better things…" (quoted in Post 2001, 1287-88). Among those most concerned was Chief Justice William H. Taft, who "urged that the Court be saved from the burden of improvident appeals and the public inconvenience of undue congestion…" (Frankfurter and Landis 1928b, 259). Thus, the Court needed a solution to rectify the "grinding, uninteresting, bone labor" that came from disposing many "trifling cases" each term (quoted in Post 1287-88).

[2] These are not the only means in which the Supreme Court may hear a case. For example, the Supreme Court has original jurisdiction, as outlined in Article III, Section 2 of the Constitution.

(Figure 3 about here)

The Judges' Bill of 1925 presented itself as that solution.[3] It fulfilled Chief Justice Taft's goal of increasing "the Court's 'absolute and arbitrary' discretion" (Hartnett 2000, 1704). Substantively, the Judges' Bill accomplished Taft's goal in several ways. First, the Judges' Bill limited the scope of mandatory appeals. Thereafter, only a select number of issues, which "transcend[ed] in importance the immediate interests of litigants and involve[d] those national concerns which [were] in the keeping of the Supreme Court" were heard by a mandatory writ of error (Frankfurter and Landis 1927, 842). Second, the Judges' Bill widened the scope of discretionary cases that could be heard by a writ of certiorari.

Consequently, these measures transformed the Court in two primary ways. First, as noted in figure 2, the Judges' Bill reduced the overall workload of the Court. This was done primarily by reducing the scope of cases that the Court was obligated to hear and decide. Second, enhanced discretion through certiorari allowed the justices to determine what issues they wanted to decide in a given term. This would allow the Court to have a docket filled not with trifling cases, but rather, issues considered to be of great national interest.

A secondary development, related to the Judges' Bill, occurred in 1928. At the behest of the American Bar Association, Congress abolished writs of error as a method of appeal to the Supreme Court. The primary purpose of this action was "to remove the confusion which had frequently existed as to whether a writ of error or a writ of appeal was the proper remedy to bring a case before a higher court…" (Payne 1929, 306). Cases formerly petitioned as a writ of error would thereafter be sought by writ of appeal (Payne 1929, 318). Figure 3 indicates this occurrence; after 1928, writs of error disappear in favor of writs of appeal. Substantively, this action had little impact on the consequences of the Judges' Bill; rather, its aim was to reclassify

[3] See The Judiciary Act of 1925, 43 Stat. 936, February 13, 1925

writs of error and simplify the appeals process. Thus, from 1928 forward, the Supreme Court would have small stream of mandatory cases appealed as a matter of right.

The consequences of the Judges' Bill would reach beyond its substantive aims. Enhanced discretion over its caseload allowed the Supreme Court "to maintain a flexible but firm control over the volume and nature of its work" (Gressman 1964, 744). This control would free up judicial resources and better allow the Court to pursue an agenda. Moreover, the Judges' Bill ushered in a new Court, which operated in a similar manner to the present-day Court. As the next section will note, the implications of the Judges' Bill may reach beyond those already described, as some scholars have considered the Judges' Bill to be an early source for the breakdown of consensus on the Supreme Court.

On Competing Theories for the Decline of Consensus

Scholars have investigated several potential causal factors for the erosion of consensus on the Supreme Court in the late 1930s and early 1940s. Two lines of reasoning have emerged in the literature. One theory focuses on the nature of cases brought to the Court, and the other theory considers the composition and behavior of the justices sitting on the bench.

A Theory of Hard Cases

Early investigation into the puzzling erosion of consensus on the Supreme Court focused on the evolution of cases brought up to the Court. The origins of the "hard case" theory trace back to C. Herman Pritchett's (1941; 1948) analyses of divisions among justices on the Supreme Court in the late 1930s and early 1940s. According to Pritchett, hard cases made for "divided decisions," since they often included difficult legal questions or novel issues (Pritchett 1948, 30). Pritchett assumed that given the choice, justices would select hard cases "precisely because they do present difficult questions" (Pritchett 1948, 30). Before 1925, a hard case was not the typical

case on the Court's docket. Instead, many of the appeals to the Court as a matter of right involved "clear cases in settled fields" (Pritchett 1948, 30). Because of such clarity, "no opportunity [was] allowed for the autobiographies of the justices to lead them to opposing conclusions" (Pritchett 1941, 890). This would lead Pritchett to believe that those cases which present difficult questions lead to a divergence in preferences, and hence, disagreement in the outcome of the case.

Halpern and Vines (1977) most directly test Pritchett's theory that enhanced discretion from the Judges' Bill was a driving force behind dissent. Unlike Pritchett, they analyzed the rates of dissent on the Court in the immediate terms before and after the passage of the Judges' Bill. They found that after 1925, an increasing proportion of cases on the Court's docket were non-unanimous. Two case-related factors drove this increase in non-unanimous outcomes. First, certiorari cases became a significantly greater portion of the docket (Halpern and Vines 1977, 474-75). Although this might suggest that the Court was selecting a greater of proportion of hard cases, Halpern and Vines' second finding suggests otherwise. Whereas the dissent rate in certiorari cases increased only slightly after 1925, a much larger increase in dissent occurred in mandatory appeals (Halpern and Vines 1977, 475). Although contrary to Halpern and Vines' expectations, the reasons mandatory appeals became more contentious is quite clear – the narrowed scope of mandatory appeals eliminated many easy cases in favor of more difficult issues. Beyond the immediate years of the study, the percentage of mandatory and obligatory cases with at least one dissent was nearly parallel up until 1950 (Halpern and Vines 1977, 476). The Halpern and Vines study does not dismiss Pritchett's original conjecture; rather, it suggests that if anything it may have taken the Court a few terms to acclimate selecting a much larger discretionary docket than previously accustomed to doing.

Further studies on eroding consensus tend to be skeptical of the hard case position. Walker, Epstein, and Dixon (1988, 366) argue that the lack of "a radical jump in dissent" in the immediate years after the Judges' Bill makes this explanation unconvincing. Sunstein (2015) agrees with this rationale. He posits that the persistence of internal disagreement in early years of the Court and the lag in the rapid increase of dissent dismisses the Judges' Bill as a sufficient condition for the breakdown of consensus (Sunstein 2015, 795). Although scholars may dismiss this theory as a sufficient explanation, it remains possible that the Judges' Bill was a necessary condition to transform the business of the Court.

More recent scholarship on this phenomenon has generally drifted away from the study of the hard case theory and the Judges' Bill, yet it is apparent that by the mid-1930s, the dissent rate in certiorari cases was equal, or even slightly greater, than found in obligatory cases (see Halpern and Vines 1977, 476). One consequence may be acclimation to selecting certiorari cases (Lanier 2003, 121). Another possible consequence could be the composition of sitting justices, who select the cases to hear (Schubert 1962). Other consequences could be a declining workload, which reduces the cost of dissenting to a justice, or an increase of cases from salient issue areas. Whereas some consideration has been given to the changing nature of cases on the Court, further analysis about these cases is to be desired.

A Theory of Consensual Norms

A second theory proposed by scholars considers a Court where operational norms have existed, and eventually, were disrupted. Scholars have argued that consensus was a norm ingrained in the operation of the Court (Walker, Epstein, and Dixon 1988; see also Caldeira and Zorn 1998; Epstein, Segal, and Spaeth 2001; Haynie 1992; Hendershot et al. 2013; Hurwitz and Lanier 2004; Smyth and Narayan 2006). The basic premise of this norm was that "[i]ndividual

expression was kept at a minimum and within a relatively consistent range" (Walker, Epstein, and Dixon 1988, 362).

A norm of consensus does not imply that justices never disagreed; rather "the disagreement is not disclosed publicly" (Sunstein 2015, 756). In fact, it is likely that justices disagreed more often than revealed to the public. Using the docket books of Morrison Waite, Chief Justice from 1874 to 1888, Epstein, Segal, and Spaeth (2001) found evidence consistent with a norm of consensus. They noted, "justices of the nineteenth (and perhaps into the twentieth) century did seem to hide their private disagreements from the public…" (Epstein, Segal, and Spaeth 2001, 376). This apparent norm of acquiescence in silence appears to be longstanding. Chief Justice Marshall wrote in *Bank of the United States v. Dandridge* (1827), "I should now, as in my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion…" (quoted in Sunstein 2015, 786-87). Certainly, Chief Justice Marshall's attitude and institutional shift to a singular opinion of the Court helped to enforce unanimity, which remained for over a century. Yet as scholars note, if a norm of consensus existed, certainly it has all but disappeared. As such, several possible explanations for its demise have been considered.

One explanation behind the demise of the norm of consensus considers the personnel on the Court. Several scholars note that the Roosevelt-appointed justices were more youthful and lacked judicial experience relative to their predecessors (e.g. Pritchett 1948; Walker, Epstein, and Dixon 1988). The lack of such experience meant that these justices "had not been deeply immersed in the traditional norms of the institution," possibly increasing their proclivity to not adhere to the established norms (Walker, Epstein, and Dixon 1988, 385). Many of these justices come from non-judicial backgrounds, such as academia (Walker, Epstein, and Dixon 1988, 374).

Justice Felix Frankfurter especially emphasized an academic attitude, once writing to Justice Hugo Black, "[a]nd so I venture to make some observations on your opinion, I hope in the same spirit and for the same academic purpose as I would were I writing a piece as a professor in the *Harvard Law Review*" (quoted in Corley, Steigerwalt, and Ward 2013, 38). It is possible that Roosevelt appointees generally did not place a high value on acquiescing to the norm of consensus, and thus, were responsible for driving up the rate of dissent.

The explanation that has received the most attention among scholars concerns the leadership of the Chief Justice (e.g. Epstein, Segal, and Spaeth 2001; Haynie 1992; Hendershot et al. 2013; Walker, Epstein, and Dixon 1988). At first this theory almost seems to occur by happenstance. The 1941 term was considered a turning point for consensus on the Supreme Court; scholars witnessed a noteworthy increase in non-unanimous outcomes from that point forward (see, e.g. Walker, Epstein, and Dixon 1988). The 1941 term was also the first term under the leadership of Chief Justice Harlan Fiske Stone. In that manner, scholars were quick to investigate the leadership of Chief Justice Stone.

Indeed, the Stone hypothesis appears attractive. Biographical accounts of Chief Justice Stone describe him as someone who "would have a good deal of difficulty in massing the Court" and "not a leader" (Mason 1979, 70). Stone appeared to reject the "no dissent unless absolutely necessary" mantra that was promoted by his predecessors (Walker, Epstein, and Dixon 1988, 381). Danelski (1960) argues that Stone lacked the influence over his associates in conference, unlike his predecessors. This led to Justice Hugo Black assuming much of the task leadership during the Stone era. Employing a psychological perspective, Danelski (2016) suggests that it was Stone's intuitive extroverted personality that contributed to his failure as Chief Justice. Stone "lacked Taft's likeability and restraint" as well as "Hughes's detachment and control of the

conference" (Danelski 2016, 85). Further statistical analysis suggests that Stone's leadership may be the culprit of eroding consensus. Hendershot et al. (2013) found that the Stone Court was a source of breakdown in consensual decision-making. In turn, they argued that Stone was "unique… with respect to his predecessors" in terms of leadership (Hendershot et al. 2013, 478). From a variety of perspectives and approaches, scholars have considered the leadership of Chief Justice Stone to be a major contributor to eroding consensus.

Yet other analyses yield mixed results that Stone led the breakdown in consensus. Hendershot et al. (2013) also suggest that the roots of declining consensus can also be traced back to Stone's predecessor, Charles Evans Hughes. Haynie (1992) finds that Chief Justice Hughes' inability to control an ideologically divisive Court resulted in an increase in concurring opinions. Caldeira and Zorn (1998) suggest a gradual decline in norms around 1925, with a break point around 1939 and 1940. The 1939 term was the first in which a majority of justices were Roosevelt appointees, which suggests that some other factors predating Stone's leadership could have influenced consensual norms. Although these studies do not reject the potential impact Stone's leadership and on institutional norms, they do suggest that there are other conditions that may have facilitated a breakdown in consensual norms before Stone assumed the chief justiceship.

The Stone hypothesis may be met with further skepticism. Stone's tenure as Chief Justice was not long lasting; he died in 1946. Despite changes in leadership over time, the dissent rate remained high. Moreover, although Stone did dissent more than Chief Justices of the past (see Walker, Epstein, and Dixon 1988, 383), this does not necessarily mean he was a chronic dissenter. Even if Stone did not hold justices to a principle of "no dissent," his associates found the benefits of dissenting to outweigh its associated costs. Thus, further insight into the

Roosevelt Court may help to understand how and why the norm vanished.

Revisiting Factors Behind the Erosion of Consensus

The following hypotheses are derived from existing theories on the erosion of consensus. These hypotheses also strive to incorporate the framework for dissenting behavior presented in the onset of this paper. The goal of these inquiries is to gain better insight into potential factors driving the increase in dissent on the Supreme Court. As previously noted, there are two lines of inquiry. The first concerns external institutional transformations in the mid-to-late 1920s. The second is a more immediate analysis of judicial behavior during the apparent breaking point of consensual norms in the late 1930s and early 1940s.

Changing Institutions: The Judges' Bill of 1925

The first line of analysis is concerned with the institutional developments of the Court; the Judges' Bill is the central focus of these developments. The illustration in figure 3 notes the increasing number of certiorari cases after 1925. This demonstrates that a central purpose of the Judges' Bill was fulfilled; the Court gained increased control over its docket and had the ability to select most of the cases it would hear in a term.

Scholars contend that prior to the passage of the Judges' Bill, many cases reaching the Court contained trivial issues, and thus, often produced unanimous outcomes. There is little, if any, value for a justice to dissent in a case that does not pose salient issues or lacks legal novelty or complexity. Thus, an assumption is that the Judges' Bill allowed the justices to weed out many, if not most cases that did not contain at least some potential for contention among justices. This stream of literature gives rise to Hypothesis 1:

> *Hypothesis 1: The rate of non-unanimous outcomes among cases heard on a writ of certiorari was greater after 1925 than before.*

The preceding hypothesis assumes that if given the option, justices will select cases that pose difficult questions – this is the essence of the hard case theory. The mechanism to support this theory is that justices would gravitate towards more salient issue areas. Some issue areas tend to produce fewer unanimous decisions than others; table 1 shows the dissent rates among various issue areas between 1891 and 1924. Among these issue areas, cases involving unions, federalism, and due process issues tended to produce the greatest proportion of non-unanimous outcomes.[4] If justices were selecting harder cases, it would seem likely that they would come from these issue areas. Thus, hypothesis 2 provides the potential mechanism for hypothesis 1.

Hypothesis 2: Cases containing union, federalism, or due process issues will comprise a greater proportion of the Court's certiorari docket after 1925.

(Table 1 about here)

A second consequence of the Judges' Bill, although not as often considered, is the reduction in the Court's workload after 1925. Figure 2 clearly illustrates a decline in the number of cases disposed by the Court in the post-1925 period. Arguably, the foremost constraint on a justice when considering whether to dissent is the time and effort required to write a separate opinion. Whereas non-consensual opinion writing is optional, justices must fulfill their obligation of writing a share of majority opinions "in order to remain in good standing with their colleagues" (Epstein, Landes, and Posner 2013, 256).

It is expected that a justice will dissent only if he "anticipates a benefit that offsets the cost [of writing an opinion]" (Epstein, Landes, and Posner 2013, 256). A lighter workload "reduces the opportunity cost of dissenting," thus increasing the probability of dissent (Epstein,

[4] Cases involving privacy also produced a higher than average dissent rate, but the number of cases disposed regarding privacy issues is too small to gauge the intensity of the issue (n = 11). Also, due to the lack of specificity among cases coded as miscellaneous, this category has been omitted from consideration.

Landes, and Posner 2013, 262). The literature suggests that reduced workloads free up judicial resources, for which justices can devote time to other tasks. This is the framework for hypothesis 3:

Hypothesis 3: Court terms with fewer cases disposed will have a greater probability of non-unanimous outcomes.

The Roosevelt Court: 1937-1945

Most scholarship is attracted to the precipitous rise in dissent during the late 1930s and early 1940s. Matching that uniquely sharp increase in dissent is a high degree of turnover on the Court. Figure 4 shows the composition and ideological alignment of the Roosevelt Court, from 1937 to 1945. This pattern suggests that a series of personnel changes on the Court could be a source for increasing rates of dissent. Yet it is not clear who is responsible for dissenting behavior. A few possibilities exist when predicting where the dissenting activity is coming from.

(Figure 4 about here)

One explanation considers that the newly appointed Roosevelt justices drove up the dissent rate. Previous literature characterized the Roosevelt appointees as "unusually young, inexperienced, and resistant to the norms of the Court's old guard" (Walker, Epstein, and Dixon 1988, 373). Besides generally non-judicial backgrounds, new justices may have been attracted to a newfound allure to dissenting. Epstein, Landes and Posner (2013, 266) note that an increasing number of dissents from recently retired justices were becoming law; thus, "the perceived value of dissenting shot up." These considerations from the existing literature give rise to hypothesis 4:

Hypothesis 4: Justices appointed by Roosevelt will cast a higher share of dissenting votes than pre-Roosevelt appointees.

An alternative explanation suggests the opposite phenomenon. Rather than the new

justices driving up the dissent rate, the holdover justices may be a source of increasing dissent. As the Court experienced more turnover, a pre-Roosevelt justice found himself in an increasingly minority position. In a position where his "views are shared by few of the other judges, [the pre-Roosevelt justice might] derive a benefit from frequent dissenting that exceeds the cost he incurs in effort and impairment of collegiality" (Epstein, Landes, and Posner 2013, 257). As the Court became increasingly filled with Roosevelt appointees, it is plausible that the non-Roosevelt appointees decreasingly shared the viewpoint of the Court's majority. The preceding framework leads to hypothesis 5:

Hypothesis 5: With each new Roosevelt justice appointed, the likelihood that a non-Roosevelt justice dissents increases.

It is possible that a change in the composition of justices sitting on the Court resulted in a change in the types of cases selected. As discretionary cases via certiorari became an increasing part of the Court's business, the justices had greater power to set the agenda of the Court. Previous studies suggest that changes in personnel may influence the agenda of the Court (e.g. Schubert 1962). A major turning point in the composition of the Court's personnel occurred in the 1939 term, when a majority of the sitting justices were Roosevelt appointees.[5] This may also serve as an explanation for identified regime shifts around the 1939-40 terms (see Caldeira and Zorn 1998). With the assumption that the Roosevelt-appointed justices could control the Court's agenda by the 1939 term, the following hypothesis is given:

Hypothesis 6: Starting in the 1939 term, the distribution of certiorari cases changes by issue area.

[5] Although it only takes four justices to grant certiorari in a case, the 1939 term represents the first full term in which there were at least four Roosevelt appointees sitting on the bench. However, with the appointment of Justice Frank Murphy in the middle of the 1939 term, the total number of Roosevelt justices sitting on the bench was five. Thus, the 1939 term was the first full term in which the Roosevelt appointees could plausibly control the agenda of the Court.

Data and Methodology

This study utilizes the Legacy Version of the Supreme Court Database (also known as the Spaeth database). Previously, the Spaeth Database contained every Supreme Court case and justice vote from the 1946 term to the present. The new Legacy Database includes each case and justice vote from the Court's inaugural term in 1791, through the end of the 1945 term. Many studies have used the original Spaeth database, but due to its timeframe limitation, these studies were confined to the modern area.

The overall timeframe analyzed in this study begins with the 1891 term of the Supreme Court and ends with the 1945 term. The United States courts of appeals were established in 1891. The creation of this intermediate appellate court marked the beginning of a federal judicial system comparable to today. Some analysis is more focused, such as inquiries into the Judges' Bill and the Roosevelt Court. In these cases, the timeframe will be defined appropriately.

There are two levels of analysis in this study. The first level of analysis considers the outcomes of individual cases across terms of the Supreme Court. This level of analysis is used to test the hard case and workload theories presented in hypotheses 1, 2, and 3, as well as the consideration of a changing agenda in hypothesis 6. The second level of analysis considers the votes of individual justices across terms of the Supreme Court. This level of analysis is used to test the theories about judicial behavior on the Roosevelt Court, noted in hypotheses 4 and 5. More specific notes regarding the methodology for testing each hypothesis is outlined below.

Case-Level Analysis

Hypothesis 1 assumes that given the choice, justices will select "harder" cases as part of the Court's discretionary docket. The critical point for this hypothesis is the 1925 term, which was the first term following the passage of the Judges' Bill. All cases granted on a writ of certiorari

from the 1920 to 1934 terms were selected to test this hypothesis. Thereafter, these cases were divided into three groups of five terms each. The first group, which contains all certiorari cases from the 1920-24 terms, represents the activity of the Court in the immediate terms preceding the Judges' Bill. The second group, from 1925-29, represents the Court's activity in the first five terms immediately following the passage of the Judges' Bill. The third group, from 1930-34, represents a slightly longer-term outlook on the relationship between Judges' Bill and the selection of hard cases.

If the dissent rate of certiorari cases increases after 1925, the expectation outlined in hypothesis 2 is that the occurrence is due to justices gravitating towards more contentious issue areas. The methodological approach for hypothesis 2 is similar to hypothesis 1. All certiorari cases from 1920 to 1934 are selected, and divided into three groups of five terms each. Thereafter, a test of significance will be employed to determine if there is a change in the composition of issues on the certiorari docket. If the results yield significant results, an analytical examination of the changes in the docket between groups will be conducted to determine where the shift in issue areas occurred, and if such shifts are consistent with the expectation outlined in hypothesis 2.

The expectation in hypothesis 3 is that terms with lighter workloads will result in higher dissent rates. The methodological approach for hypothesis 3 is a most likely cases research design. First, to control for potential changes in cases reaching the Court, only mandatory appeals from the highest state court in which a state law was upheld as constitutional or a federal law was struck down as unconstitutional were selected.[6] This stream of cases remained unchanged before and after the passage of the Judges' Bill. Second, two contrasting periods of

[6] For purposes of this study, the highest state court is defined as "State Supreme Court" in the Supreme Court Legacy Database.

workload were selected. Figure 2 illustrates a period of relatively high workload before 1925 and a period of relatively low workload after 1925. To keep the length of terms equal, a ten-term period of relatively high workload (1914-24) was compared to a ten-term period of relatively low workload (1927-37). Thereafter, statistical testing would determine if the difference in the proportion of cases with at least one dissent was significantly different between these two periods.

The expectation of hypothesis 6 is that a change in the composition of the Court would result in a change in the Court's agenda. To test this, all cases granted on a writ of certiorari, from the 1937 to 1942 terms, were selected. Thereafter, the cases were divided up into three groups of two-terms each. The first group, including the 1937-38 terms, represents the early Roosevelt Court, in which Roosevelt appointees were the clear minority. The second group, from 1939-40, represents the emergence of the Roosevelt Court as a majority. The final group, from 1941-42, represents a change in leadership, with Stone becoming chief justice. Should there be a statistically significant difference in the distribution of issues between any of the groups, an analytical examination of where the docket was changing would be conducted.

Justice-Level Analysis

Hypotheses 4 and 5 are concerned with the votes of individual justices on the Roosevelt Court. Analysis of the Roosevelt Court is best considered in three distinct periods. The first period, from 1937 to 1938, marks a transition away from the rival liberal and conservative factions that grappled with New Deal legislation. The second period, from 1939 to 1940, represents a shift in the composition of the Court's personnel. By 1939, a majority of sitting justices were appointed by President Roosevelt. The third period, from 1941 to 1945, represents a change in leadership, as Harlan Stone becomes Chief Justice in 1941. In each period,

the dissenting behavior of justices and their relative impact on the overall dissent rate of the Court will be examined.

Results and Analysis

The Judges' Bill

Hypothesis 1 expects that after the passage of the Judges' Bill in 1925, a greater percentage of certiorari cases will be non-unanimous. This expectation is generated by the assumption that justices, if given the choice, will select harder cases. Table 2 displays the dissent rate of certiorari cases from 1920 to 1934. In the immediate five terms after the passage of the Judges' Bill, from 1925 to 1929, the overall dissent rate in certiorari cases was 9.1 percent, down from 11.9 percent in the five terms prior to the Judges' Bill. However, the trend in the dissent rate reversed over the next five-term period; from 1930 to 1934, the dissent rate in certiorari cases returned to 11.9 percent. Figure 5 considers the long-term pattern of dissent in certiorari cases. As noted in figure 5, the dissent rate in certiorari cases continue to increase throughout the late 1930s and into the 1940s. Moreover, the dissent rate in certiorari cases is relatively consistent with the Court's overall dissent rate in each term.

(Table 2 and figure 5 about here)

Further analysis supports the findings of increased dissent in certiorari cases over time. From 1891 to 1924, about 19.5 percent of certiorari cases were decided non-unanimously. By contrast, from 1925 to 1945, 25.8 percent of certiorari cases decided were non-unanimous. A chi-squared test finds this difference in the proportion of non-unanimous certiorari cases before and after 1925 to be statistically significant ($p < .001$). There appears to be enough evidence to reject the null hypothesis that the dissent rate of certiorari cases does not increase after 1925. As the volume of certiorari cases increases after 1925, a greater proportion of these cases had at least

one dissent, thus breaking unanimity in the case. Thus, it appears that the increasing non-consensual nature of certiorari cases played an integral role in driving up the dissent rate.

The findings of hypothesis 1 suggest that certiorari cases did become more contentious after 1925, since a greater proportion of these cases ended with a non-unanimous decision. This may be due to justices selecting harder cases. Hypothesis 2 presents a possible mechanism that justices were indeed selecting harder cases. Table 1 identified criminal procedure, unions, and federalism as the most contentious issue areas from 1891 to 1924. For the null hypothesis to be rejected, two findings must occur. First, there must be a demonstrable shift in the issue areas of cases granted certiorari by the Court. Second, the shift of issue areas must be related to the issues identified in hypothesis 2 as potential hard case issues.

To determine if there is a shift in the distribution of issues that the Court is hearing by a writ of certiorari, a chi-squared test is conducted between each of the three groups described in the data and methodology section. The results of the chi-squared test note that there is not a statistically significant difference ($p = .516$) in the distribution of issues among certiorari cases decided in the 1920-24 terms and the 1925-29 terms. However, there is a statistically significant difference in the distribution of cases by issue area when comparing the 1925-29 terms with the 1930-34 terms ($p = .014$). Moreover, there is also a statistically significant difference between the 1920-24 terms and the 1930-34 terms ($p < .001$). This suggests that although not immediate, the Supreme Court did shift its focus to one or more issue areas not as often considered before the Judges' Bill.

Given that a shift in the issue areas of certiorari cases did occur, it must be determined if the justices were gravitating towards the issue areas posited in hypothesis 2. Table 3 displays the volume and distribution of certiorari cases by issue area, from 1920 through 1934. The results in

table 3 tend to not support the expectation in hypothesis 2. First, there is a low correlation (r = .089) between the dissent rates displayed in table 1 and the distribution of cases from 1930 through 1934 in table 3.[7] Whereas a high correlation would suggest that there is a relationship between more controversial or salient issue areas and the Court's proclivity to select those issues, a low correlation suggests that the Court is not selecting cases simply due to the perceived difficulty of questions posed in certain issue areas.

(Table 3 about here)

A second finding that disagrees with hypothesis 2 regards the shift in issue areas. Of those issue areas identified in hypothesis 2 – criminal procedure, unions, and federalism – only criminal procedure cases had any noticeable increase in its share of the certiorari docket. As noted in table 3, from the 1920-24 terms to the 1930-34 terms, criminal procedure cases increase from 7.1 percent to 8.2 percent of the Court's certiorari docket. In the same period, union cases comprised no more than 1.0 percent of the Court's certiorari docket and federalism cases decreased slightly, representing only 2.4 percent of the Court's certiorari docket from 1930-34. By contrast, the largest shift occurs between economic activity and federal taxation cases. From the 1920-24 terms to the 1930-34 terms, economic activity cases decrease from 50.4 percent of the Court's certiorari docket to 33.5 percent. Conversely, federal taxation cases increased from 9.9 percent to 26.7 percent of the Court's certiorari docket over the same period. However, as table 2 suggests, federal taxation cases did not produce above average dissent rates in neither the 1925-29 or the 1930-34 terms. This further confirms that justices are not exclusively selecting cases in issue areas that were projected to produce hard cases.

One consequence of the Judges' Bill was that the Supreme Court had increased discretion

[7] Due to the unknown nature of cases coded as miscellaneous, these cases were excluded from this calculation.

over the cases that would comprise its docket each term. A second consequence was that the overall workload of the Supreme Court was reduced. Hypothesis 3 expects that a smaller workload, defined as the number of cases disposed per term, would reduce a justice's cost to dissent. Using the most likely cases approach outlined in the methodology section of this paper, there appears to be support for hypothesis 3. Whereas the dissent rate in the selected cases from 1914 to 1924 was 17.0 percent, it increased to 29.7 percent in the period from 1927 to 1937. A chi-squared test finds that the difference in the proportion of non-unanimous outcomes is statistically significant ($p = .004$). Thus, the null hypothesis can be rejected. These findings suggest that the Judges' Bill may have influenced an increase in the dissent rate by reducing the workload costs of dissenting.

Together, these findings yield mixed results regarding the impact of the Judges' Bill on dissent. Whereas the evidence generally does not support the expectations of a hard case theory, there is support for the workload explanation, described in this paper's framework on dissenting behavior.

The Roosevelt Court

The second line of analysis is concerned with the phenomenon of rising dissent in the late 1930s and early 1940s. While it is evident that the Court is dissenting more often during this time, it is less clear which justices are dissenting and how the behavior of individual justices influenced the overall dissent rate of the Court. Hypotheses 4 and 5 present competing, but not mutually exclusive, predictions to determine which justices were driving up the dissent rate in the Roosevelt Court era, from 1937 through 1945.

Table 4 shows the dissenting behavior of each sitting justice, from 1937 to 1945. Noted in table 4 are the dissent rates of each justice, relative to the total number of cases in which a

justice participated; the total number of dissenting votes cast is displayed in parentheses under the justice's dissent rate. Table 5 offers an additional perspective by estimating a justice's contribution to the Court's overall dissent rate in a term. A justice's "contribution score" is calculated by weighing a justice's dissenting vote against the dissenting votes of other justices in each case.[8] The implications of table 4 and table 5 will vary infrequently, as the most active dissenters in a term will often have the largest contribution score. However, should a justice have an abnormally high number of solo dissents, for example, a justice's contribution score may better reflect his impact on the Court's overall dissent rate for that term.

(Tables 4 and 5 about here)

The Roosevelt Appointees. One possible explanation for increased dissent during the Roosevelt Court era is that newly appointed justices were more prone to dissent. Justices Black and Reed were the first Roosevelt appointees, taking office in the 1937 term. Justice Black emerged as a vocal outsider in 1937 and 1938. Out of the 14 cases in which Justice Black dissented, 11 were solo dissents. It is estimated that Justice Black increased the Court's dissent rate by 7.1 percent in 1937, second only to Justice McReynolds. Justice Black exhibited similar behavior in 1938, filing a solo dissent in 7 of 14 cases in which he dissented, with an estimated contribution score of 6.9 percent.

By the 1939 term, Justices Frankfurter, Douglas, and Murphy joined Justices Black and Reed as Roosevelt-appointees on the Court. As tables 4 and 5 suggest, the dissenting behavior of these justices in the 1939 and 1940 terms is not necessarily prominent. Of the Roosevelt

[8] Each non-unanimous case is worth 1 point, which is divided evenly between the number of dissenters in a case. For example, if a justice is the sole dissenter in a case, he would receive full credit (1 point) for that case. In a case where four justices dissent, each justice receives .25 points. Each justice's total score is then divided by the number of cases disposed in the term. This is reflected by the percentages for each justice in table 5. The sum of the justice's percentages in a term is equal to the overall dissent rate of the Court for that term. Thus, the contribution score estimates how much a single justice increased the Court's overall dissent rate in each term.

appointees sitting on the bench in 1939 and 1940, only Justices Douglas and Black could be characterized as having above average dissenting behavior. As tables 4 and 5 note, both justices dissented in about 7 to 8 percent of cases in which they participated; they also had the highest contribution scores among Roosevelt-appointed justices. Yet the data do not suggest that either justice was a strong force behind the elevated dissent rate of the Court at the time.

A noteworthy change of behavior among Roosevelt-appointees occurs in 1941. Each Roosevelt-appointed justice dissented more often, and increased their dissent share from 1940 to 1941. Moreover, Justices Byrnes and Jackson, both taking the bench in 1941, dissented in about 7 percent of the cases in which they participated. Although the dissent rates of Justices Byrnes and Jackson were the lowest of those sitting on the bench in 1941, their dissent rates were comparatively higher than other Roosevelt-appointees in their first term, which averaged about 4 percent. This suggests that it did not take much time for these newer Roosevelt appointees to acclimate to the newfound dissenting behavior of the Court in 1941.

From 1941 to 1945, dissenting behavior is generally uniform among Roosevelt-appointees. Yet with a clear majority of members on the Court, such widespread dissent suggests that there exists fragmentation in the majority coalition. Perhaps the most formidable dissenting block during this period consisted of Justices Black, Douglas, Murphy, and from 1942 to 1945, Justice Rutledge. Including solo dissents, these justices were the exclusive dissenter of 10 cases in 1941, 19 in 1942, 22 in 1943, 22 in 1944, and 28 in 1945. When controlling for the cases in which these justices were the exclusive dissenters, the dissent rate decreases from 37.3 percent to 33.3 percent in 1941, 41.3 percent to 33.9 percent in 1942, 59.3 percent to 51.7 percent in 1943, 55.5 percent to 48.6 percent in 1944, and 54.7 percent to 43.2 percent in 1945. Even with notably larger influence in the 1945 term, the dissent rate was still high during these years. As noted in

tables 4 and 5, the other Roosevelt appointees were often as likely to dissent, albeit their voting coalitions may vary more than these justices. Based on this evidence, it appears that the Roosevelt-appointed justices dissented quite often, and as a collective, played a role in bringing the dissent rate to historic highs for the time. As noted in tables 4 and 5, there does seem to be one Roosevelt appointee that is significantly more likely to dissent than others from 1941 to 1945.

The Pre-Roosevelt Holdovers. The second explanation for the rise in dissent among the Court suggests that the pre-Roosevelt appointees found an increased value in dissenting as members of a minority. Tables 4 and 5 suggest that pre-Roosevelt conservative justices, namely Justices McReynolds, Butler, Sutherland, and Roberts, were among the most active dissenters and contributors to the Court's dissent rate in the Roosevelt Court era. Yet these justices were not career dissenters. Table 6 suggests that in the terms preceding the Roosevelt Court, from 1925 to 1936, the dissenting behavior of these justices was rather infrequent.

(Table 6 about here)

In the 1932 to 1936 terms, there existed a formidable conservative bloc on the Court known as the "Four Horsemen." This bloc, consisting of Justices McReynolds, Butler, Sutherland, and Van Devanter, actively opposed New Deal legislation. With the retirement of Justice Van Devanter before the 1937 term, this bloc was officially dissolved, yet evidence exists that the remaining Horsemen tended to dissent together. Moreover, their dissenting activity had a noteworthy impact on the Court's overall dissent rate in the 1937 and 1938 terms. In 1937, Justices McReynolds, Butler, or Sutherland were solely responsible for 25 of the Court's 45 non-unanimous decisions. In 1938, the duo of Justices McReynolds and Butler accounted for 21 of the Court's 50 non-unanimous decisions. When controlling for cases in which Justices

McReynolds, Butler, or Sutherland were the exclusive dissenters, the dissent rate of the Court drops from 26.5 percent to 13.8 percent in 1937 and from 33.1 percent to 22.3 percent in 1938. These findings suggest that in the first two terms of the Roosevelt Court, two (and occasionally a third) justices primarily were responsible for increasing the dissent rate of the Court. Indeed, in both terms, the dissenting behavior of these justices elevated the Court's dissent rate by at over 10 percent in each term. The controlled dissent rates tend to be consistent with the annual dissent rate, which ranged from 10.1 percent to 19.0 percent from 1930 to 1936.

The 1939 and 1940 terms marked transition for the pre-Roosevelt appointees. Justice Butler died early into the 1939 term, creating a shift in the dissenting coalition among right-leaning justices. Arguably, Justice McReynolds had the largest influence on the dissent rate of the Court in 1939, with an estimated contribution score of 14.4 percent. Of the 46 non-unanimous decisions rendered by the Court in 1939, Justice McReynolds was solely responsible for 13 of them. When controlling for cases in which Justice McReynolds filed a solo dissent, the Court's dissent rate decreases from 31.7 percent to 25 percent in 1939. The 1939 term also marked increasing dissenting behavior from Justice Roberts and Chief Justice Hughes. These two justices often dissented with Justice McReynolds. Including solo dissents, these three justices were the exclusive dissenters in 33 of the Court's 46 non-unanimous cases during the 1939 term. When controlling for cases in which Hughes, Roberts, or McReynolds were the exclusive dissenters, the Court's dissent rate falls from 31.7 percent to 11.6 in 1939. This suggests that the advent of a Roosevelt-appointed majority in 1939 placed many pre-Roosevelt appointees in a minority position. Given Justice McReynolds proclivity to dissent by this point, it appeared that the costs of dissenting were reduced for Justices Roberts and Chief Justice Hughes.

Justice McReynolds would retire from the Court midway through the 1940 term, thus

effectively leaving Chief Justice Hughes and Justice Roberts as the most conservative members on a liberal Court. Indeed, Hughes and Roberts would dissent as a pair in 11 of the Court's 55 non-unanimous cases. Moreover, Justice Roberts was the Court's only solo dissenter in 1940; he dissented on his own 8 times. When controlling for the 19 cases in which Hughes or Roberts were the only dissenters, the Court's dissent rate was 22.6 percent. This suggests that up through the 1940 terms, pre-Roosevelt justices largely contributed to an abnormally high dissent rate. When controlling for the two or three outsider justices in each term, the dissent rate of the Court is not notably higher than it was in terms before 1937.

The Court from 1941 forward was particularly challenging for Justice Roberts. By 1941, Justice Roberts was the only non-Roosevelt appointee sitting on the bench.[9] As figure 4 suggests, Roberts was the most conservative member of the Court from 1941 until his retirement after the 1944 term. Being in an increasingly minority position seemed to have influenced Justice Roberts' dissenting behavior. From 1941 to 1944, Justice Roberts' dissent rate increased from 14.8 percent to 31.1 percent; his contribution to the Court's dissent rate increased from 6.0 percent to 17.2 percent in the same timeframe. Not only did Justice Roberts' dissenting behavior increase over this time, but his proclivity to dissent alone did as well. From 1941 to 1944, Justice Roberts filed a solo dissent 39 times, including 16 times in 1944. Arguably, Roberts' solo dissents were the biggest factor in his contribution scores, noted in table 5. Unlike the pre-1941 Court, Roberts did not dissent consistently with one bloc of justices. Thus, when controlling for Justice Roberts' solo dissents, the Court's overall dissent rate drops from 37.4 percent to 35.4 percent in 1941, 41.3 percent to 38.0 percent in 1942, 59.3 percent to 56.4 percent in 1943, and 55.5 percent to 50.7 percent in 1944. Certainly, Justice Roberts' had some influence on inflating

[9] Although Coolidge originally appointed Harlan Stone, most scholars consider Stone a Roosevelt appointee when he became Chief Justice in 1941. Thus, by 1941, Roberts was the only sitting justice not to be appointed by Roosevelt.

the dissent rate from 1941 to 1944; his contribution scores in table 5 suggest that he may have increased the dissent rate by as much as 17.2 in each term. Despite this, the Court's dissent rate was still higher than in previous terms. This evidence suggests that the breakdown of consensus becomes more widespread in 1941, with outsider justices, such as Roberts, further increasing the dissent to record levels.

Personnel and the Court's Agenda. Turnover in personnel may result in changes to the Court's agenda. The composition of certiorari cases is one way to determine if the Court is giving attention to new issues. Table 7 shows the composition of case issues that were granted certiorari from 1937 to 1945. To determine if there was a change in the types of issues the Court was selecting, a test of the distribution of issues as described in the methodology section is conducted.

(Table 7 about here)

The results of a chi-squared test find that there is not quite a significant difference in the distribution of issues among certiorari cases between the 1937-38 terms and the 1939-40 terms ($p = .079$). However, there is a significant difference between the 1939-40 terms and the 1941-42 terms ($p < .001$), as well as between the 1937-38 terms and the 1941-42 terms ($p = .009$). Thus, the expectation set forth in hypothesis 6 is not supported and the null hypothesis cannot be rejected. However, these findings do suggest that a shift in the Court's agenda does occur a few terms later, coinciding with the advent of Harlan Stone's tenure as Chief Justice.

An analysis of table 7 finds an increase in cases involving criminal procedure, unions, and economic activity between the 1939-40 and 1941-42 terms. Whereas criminal procedure cases only comprise 5.7 percent of the Court's certiorari docket in 1939-40, these cases comprise 11.5 percent of the Court's certiorari docket in 1941-42. Moreover, union cases increase from 7.3

percent to 8.7 percent over the same period. Cases involving economic issues and civil rights see a resurgence in this period. Whereas civil rights cases increase from 1.6 percent of the Court's docket in 1939-40 to 7.9 percent in 1941-42, economic cases increase from 32.5 percent to 37.3 percent in the same timeframe. Moreover, as table 7 notes, many of these issue areas tend to produce noteworthy levels of dissent. Of the issues mentioned, economic cases were decided unanimously the most often; about 36.2 percent of criminal procedure cases had at least one dissent. Conversely, union and civil rights cases were notably more contentious, with 63.6 and 65.0 percent of these cases containing one dissent, respectively. Some of the shifts in the Court's certiorari docket during this time suggest that the Court is moving towards new issue areas, particularly involving unions, as well as civil rights and liberties issues. Moreover, these issue areas tend to be of heightened division among justices.

Discussion

Immediate Considerations

There are several immediate implications of this study. First, this study lends little evidence to support a theory of hard cases. While it is true that the dissent rate in certiorari cases does increase in the post-Judges' Bill era, the effects are not immediate. Moreover, there is little support for the identified mechanism that justices were gravitating towards contentious issue areas. Although there was a shift in the types of issues the Court would choose to hear, the shift in distribution of issue areas was not strongly related to the dissent rate of those issue areas in the past. This does not necessarily mean that justices are not sensitive to the salience or controversial nature of some issues. As some studies suggest, changes over time may produce different issue areas of interest to the Court; thus, the Court will decide more cases in these areas (e.g. Lanier 2003). However, since this activity is not observed in the studied period, it is likely that some

other factor, such as the Court's personnel or the changing nature of important issues, that motivates justices to select potentially difficult cases. In other words, it seems unlikely that justices are selecting cases almost exclusively because they present difficult issues.

Despite little evidence in support of a hard case theory, a second implication of the Judges' Bill was the reduction of the Court's workload. In fact, concerns over a growing docket was the primary motivation for judicial reform. The results of this study find supporting evidence that a reduced workload increased the likelihood of non-unanimous decisions. This is empirically consistent with other studies (e.g. Epstein, Landes, and Posner 2013). Moreover, in a theoretical framework of dissent, this finding suggests that a reduced workload lowers the costs of dissenting, thus giving a justice greater agency to deviate from the Court's majority. This finding also gives relevance to the Judges' Bill as a potential factor behind increasing dissent. Although the findings of this study cannot determine the degree in which a reduced workload influenced dissent rates, it seems plausible that the consequences of the Judges' Bill on workload set up favorable conditions for dissenting behavior.

Another implication of this study concerns the activity of the Court around the critical period of rising dissent in the 1930s and 1940s. Although dissent begins to rise before 1941, it is largely due to a few justices that fall out of line with the Court's majority. Presumably, the once successful conservative bloc of the Supreme Court used dissent as a means of vocalizing an opinion, albeit in a losing effort. Indeed, many of the right-leaning justices used dissent to express a minority position on the Court between 1937 and 1945. As Roosevelt justices increased their share of seats on the Supreme Court, non-Roosevelt appointees, namely Owen Roberts, increased their dissenting behavior.

Even as conservative pre-Roosevelt justices contributed to the increase in dissent, there

still exists a shift in dissent during the 1941 term. As previously noted, pre-1941 dissent was largely concentrated in a few justices. After 1941, nearly the entire Court dissented more frequently. This suggests a shift in the costs and benefits of dissent occurred. Dissent became more common and the distribution of dissent among justices was relatively equal. When controlling for outsiders on the Court, the dissent rate reached historic highs in the mid-1940s. Moreover, even after Roberts left the Court at the end of 1944, the following term had a dissent rate over 50 percent.

Further evidence suggests a shift in the operative nature of the Court occurred around Stone's ascendency to Chief Justiceship in 1941. Although the Roosevelt-appointed justices have a clear majority by 1939, there is not a noticeable change in the Court's certiorari docket until the 1941-42 terms. Moreover, some issue areas become more contentious as the Court moves into the 1940s. Overall, certiorari cases become increasingly non-unanimous through the end of Stone's tenure as Chief Justice. Thus, there two findings suggest that the 1941 term was a noteworthy point in the puzzle of eroding consensus.

Broader Implications

There are a few other considerations beyond the scope of this study. First, although this study does consider 1941 to be an important point for eroding consensus, this study does not further probe the Stone hypothesis. Granted, this was not a central consideration of this study. Better data allowed this study to revisit theories previously considered, yet not rigorously tested. Although it seems that Chief Justice Stone had an influence on the operational norms of the Court, this study does not consider in what manner that may have occurred, or to what degree his influence impacted the behavior of the other justices. Biographical accounts and interdisciplinary studies may provide the best evidence of Stone's behavior and its impact on

the Court at-large (see, e.g. Danelski 1960; 2016; Mason 1979).

A second larger consideration regards a theory of consensual norms. As suggested in the onset of this paper, two primary theories have been considered regarding eroding consensus. This study finds little evidence supporting a theory of hard cases, and certain findings may be consistent with a norm of consensus. However, a norm of consensus cannot be measured; thus, it makes it difficult to fully grasp how strong a norm was on suppressing dissenting behavior, especially considering other competing factors. Whereas some studies (e.g. Epstein, Segal, and Spaeth 2001) have contended that a norm of consensus was quite strong due to disagreement behind the curtain, yet silent acquiesce in public, other relevant factors, such as workload were not considered. Thus, it is possible, and even plausible, that some norm of consensus existed. However, this study does not contend that such a norm existed, or that it did not. Rather, it is possible that violating a norm was one of several costs of dissenting, and in turn, kept justices from frequently dissenting. Thus, there is still plausibility to the theory of consensual norms.

In sum, this study offers unique insight into existing theories, while incorporating a framework for dissent into a puzzle that scholars have long pondered. Surely, this study does not explore all possible factors behind eroding consensus, nor can it posit that its findings are definitive answers to this phenomenon. Rather, it offers better perspective to considerations, both new and old, with the goal of understanding how changes to the Supreme Court influenced its operational nature.

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Table 1: Dissent Rate and Case Volume by Issue Area, 1891 to 1924

	Dissent Rate and Case Volume
Criminal Procedure	17.8% (550)
Civil Rights	12.2% (548)
First Amendment	18.9% (53)
Due Process	20.0% (350)
Privacy	36.4% (11)
Attorneys	7.8% (128)
Unions	30.2% (43)
Economic Activity	19.1% (2797)
Judicial Power	8.4% (1591)
Federalism	22.2% (176)
Interstate Relations	6.3% (95)
Federal Taxation	17.8% (304)
Private Action	11.7% (846)
Miscellaneous	25.7% (35)
Total	15.3% (7527)

Note: The value in parentheses is the total volume of cases disposed in the particular issue area.

Table 2: Volume and Dissent Rate of Certiorari Cases by Issue Area, 1920 to 1934

	Term		
	1920-24	1925-29	1930-34
Criminal Procedure	11.1% (18)	6.7% (30)	20.0% (45)
Civil Rights	11.8% (17)	11.5% (26)	21.1% (38)
First Amendment	*	0.0% (3)	50.0% (2)
Due Process	0.0% (5)	0.0% (11)	15.8% (19)
Privacy	*	*	0.0% (1)
Attorneys	0.0% (3)	0.0% (5)	0.0% (6)
Unions	100.0% (2)	25.0% (4)	0.0% (1)
Economic Activity	13.4% (127)	9.2% (163)	9.3% (183)
Judicial Power	0.0% (29)	8.5% (47)	7.0% (57)
Federalism	0.0% (8)	15.4% (13)	7.7% (13)
Interstate Relations	*	*	100.0% (1)
Federal Taxation	16.0% (25)	8.3% (60)	10.3% (146)
Private Action	16.7% (18)	9.1% (33)	14.7% (34)
Miscellaneous	*	50.0% (2)	100.0% (1)
Total	11.9% (252)	9.1% (397)	11.9% (547)

Note: Cases denoted with an asterisk indicate that no such cases in that issue area were granted certiorari. Percentages reflect the proportion of total cases (indicated in parentheses) that contained at least one dissent.

Table 3: Volume and Distribution of Certiorari Cases by Issue Area, 1920 to 1934

	Term		
	1920-24	1925-29	1930-34
Criminal Procedure	7.1% (18)	7.6% (30)	8.2% (45)
Civil Rights	6.7% (17)	6.5% (26)	6.9% (38)
First Amendment	*	0.8% (3)	0.4% (2)
Due Process	2.0% (5)	2.8% (11)	3.5% (19)
Privacy	*	*	0.2% (1)
Attorneys	1.2% (3)	1.3% (5)	1.1% (6)
Unions	0.8% (2)	1.0% (4)	0.2% (1)
Economic Activity	50.4% (127)	41.1% (163)	33.5% (183)
Judicial Power	11.5% (29)	11.8% (47)	10.4% (57)
Federalism	3.2% (8)	3.3% (13)	2.4% (13)
Interstate Relations	*	*	0.2% (1)
Federal Taxation	9.9% (25)	15.1% (60)	26.7% (146)
Private Action	7.1% (18)	8.3% (33)	6.2% (34)
Miscellaneous	*	0.5% (2)	0.2% (1)
Total	252	397	547

Table 4: Dissent Rate of Justices on the Roosevelt Court, 1937 to 1945

	1937	1938	1939	1940	1941	1942	1943	1944	1945
Stone*	2.4% (4)	2.0% (3)	2.8% (4)	2.9% (5)	13.2% (21)	8.2% (14)	10.9% (15)	17.9% (29)	12.6% (13)
Black	8.3% (14)	9.3% (14)	2.8% (4)	7.4% (13)	13.0% (21)	13.6% (23)	14.6% (20)	16.7% (27)	13.1% (18)
Reed	3.6% (2)	3.4% (5)	0.7% (1)	4.5% (8)	8.6% (14)	8.2% (14)	13.7% (19)	9.8% (16)	10.3% (14)
Roberts	1.8% (3)	8.7% (12)	16.1% (23)	18.2% (31)	14.8% (18)	15.9% (27)	26.3% (35)	31.1% (50)	
McReynolds	15.9% (27)	22.1% (33)	25.0% (32)	12.9% (8)					
Hughes	0.0% (0)	3.4% (5)	9.7% (14)	12.6% (22)					
Brandeis	0.6% (1)	0.0% (0)							
Butler	11.8% (20)	21.5% (32)							
Cardozo	7.5% (4)								
Sutherland	13.3% (8)								
Frankfurter		1.5% (1)	1.4% (2)	1.1% (2)	9.6% (16)	10.5% (18)	15.7% (22)	13.0% (21)	21.2% (29)
Douglas		5.3% (1)	2.8% (4)	8.1% (14)	16.5% (27)	12.4% (21)	17.5% (24)	14.1% (22)	15.3% (21)
Murphy			1.7% (1)	3.0% (5)	11.1% (18)	16.6% (25)	16.9% (23)	12.0% (19)	8.9% (12)
Byrnes					7.2% (12)	0.0% (0)			
Jackson					7.4% (10)	9.9% (16)	14.5% (19)	11.0% (17)	
Rutledge						3.0% (2)	11.6% (16)	13.4% (22)	13.7% (19)
Burton									13.7% (19)

Note: Roosevelt appointees denoted in italics.
*Stone was appointed by Roosevelt as Chief Justice in 1941.

Table 5: Individual Dissent Contribution, 1937 to 1945

	1937	1938	1939	1940	1941	1942	1943	1944	1945
Stone	0.9%	0.8%	1.6%	1.6%	5.0%	3.9%	4.8%	6.6%	4.5%
Black	7.1%	6.9%	1.4%	3.2%	4.4%	6.3%	5.5%	6.9%	7.3%
Reed	0.9%	1.7%	1.0%	2.1%	3.0%	3.4%	5.1%	2.8%	4.7%
Roberts	0.6%	2.7%	7.4%	10.6%	6.0%	8.9%	14.0%	17.2%	
McReynolds	8.7%	10.1%	14.4%	1.6%					
Hughes	0.0%	1.0%	3.6%	5.8%					
Brandeis	0.2%	0.2%							
Butler	5.5%	9.3%							
Cardozo	0.9%								
Sutherland	1.7%								
Frankfurter		0.2%	0.8%	1.1%	4.2%	3.9%	6.3%	4.1%	10.6%
Douglas		0.2%	1.4%	3.5%	6.1%	4.6%	6.4%	4.5%	9.0%
Murphy			0.2%	1.5%	3.5%	5.8%	7.1%	4.1%	4.6%
Byrnes					2.3%				
Jackson					3.0%	4.3%	6.1%	4.7%	
Rutledge						0.3%	4.1%	4.6%	7.3%
Burton									6.6%
Expected Share	2.9%	3.7%	3.5%	3.4%	4.2%	4.6%	6.6%	6.2%	6.1%
Total Dissent Rate	26.5%	33.1%	31.7%	30.9%	37.4%	41.3%	59.3%	55.5%	54.7%

Table 6: Dissent Rate of Roosevelt Court Justices, 1925 to 1936

	Term											
	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936
Sutherland	1.9% (4)	4.0% (8)	4.0% (7)	2.3% (3)	0.7% (1)	3.0% (5)	2.0% (3)	3.0% (5)	3.0% (5)	2.9% (5)	1.9% (3)	6.7% (11)
Stone	2.0% (4)	5.2% (10)	7.7% (13)	3.2% (4)	5.1% (7)	3.8% (6)	9.0% (13)	5.9% (10)	7.7% (13)	7.0% (12)	9.7% (15)	3.0% (3)
McReynolds	3.3% (7)	5.5% (11)	5.1% (9)	5.4% (7)	0.0% (0)	6.5% (11)	3.3% (5)	4.7% (8)	4.7% (8)	3.0% (5)	2.5% (4)	10.4% (17)
Brandeis	3.8% (8)	7.0% (14)	9.6% (17)	6.2% (8)	6.5% (9)	3.0% (5)	8.6% (13)	3.6% (6)	5.3% (9)	6.0% (10)	9.4% (15)	3.2% (5)
Butler	0.5% (1)	4.5% (9)	2.3% (4)	3.9% (5)	1.5% (2)	3.0% (5)	3.3% (5)	6.0% (10)	5.3% (9)	4.1% (7)	2.5% (4)	9.3% (15)
Hughes					0.0% (0)	1.2% (2)	0.0% (0)	1.8% (3)	2.4% (4)	1.8% (3)	2.5% (4)	1.2% (2)
Cardozo							7.8% (4)	5.9% (10)	6.5% (11)	7.0% (12)	10.0% (16)	4.3% (7)
Roberts							1.3% (2)	0.6% (1)	2.4% (4)	1.8% (3)	1.9% (3)	2.5% (4)

Table 7: Dissent Rate and Case Distribution by Issue Area, 1937 to 1945

	Term								
	1937	1938	1939	1940	1941	1942	1943	1944	1945
Criminal Procedure	33.3% (12)	50.0% (2)	16.7% (6)	25.0% (8)	45.5% (11)	38.9% (18)	90.0% (10)	63.6% (11)	64.7% (17)
Civil Rights	12.5% (8)	33.3% (9)	50.0% (2)	0.0% (2)	60.0% (6)	70.0% (7)	71.4% (7)	50.0% (10)	57.1% (7)
First Amendment	*	100.0% (1)	75.0% (4)	0.0% (1)	33.3% (3)	66.7% (3)	100.0% (1)	60.0% (5)	0.0% (1)
Due Process	50.0% (2)	0.0% (1)	33.3% (3)	0.0% (5)	*	60.0% (5)	*	*	50.0% (4)
Privacy	*	0.0% (1)	*	*	*	*	*	*	*
Attorneys	*	100.0% (1)	*	*	*	*	66.7% (3)	100.0% (3)	0.0% (1)
Unions	50.0% (6)	80.0% (5)	33.3% (6)	58.3% (12)	75.0% (12)	50.0% (10)	56.3% (16)	80.0% (20)	57.1% (7)
Economic Activity	35.3% (34)	37.5% (32)	24.2% (33)	25.5% (47)	30.0% (50)	43.2% (44)	50.0% (30)	41.2% (34)	45.8% (24)
Judicial Power	0.0% (18)	20.0% (10)	22.2% (18)	7.1% (14)	27.3% (11)	26.7% (15)	69.2% (13)	53.3% (15)	39.1% (23)
Federalism	0.0% (5)	12.5% (8)	16.7% (6)	0.0% (3)	40.0% (5)	50.0% (2)	100.0% (1)	0.0% (2)	50.0% (6)
Federal Taxation	27.6% (29)	27.8% (18)	31.8% (22)	35.7% (42)	26.1% (23)	42.1% (19)	33.3% (15)	45.8% (24)	66.7% (15)
Miscellaneous	0.0% (1)	*	0.0% (1)	*	*	*	100.0% (1)	0.0% (1)	*
Private Action	33.3% (3)	50.0% (6)	44.4% (9)	0.0% (2)	0.0% (1)	*	*	50.0% (4)	*
Total	25.4% (118)	35.1% (94)	29.1% (110)	27.2% (136)	37.3% (126)	44.4% (126)	58.8% (97)	53.5% (129)	51.4% (105)

Figure 1: Non-Unanimous Decisions on the Supreme Court, 1875 to 2015

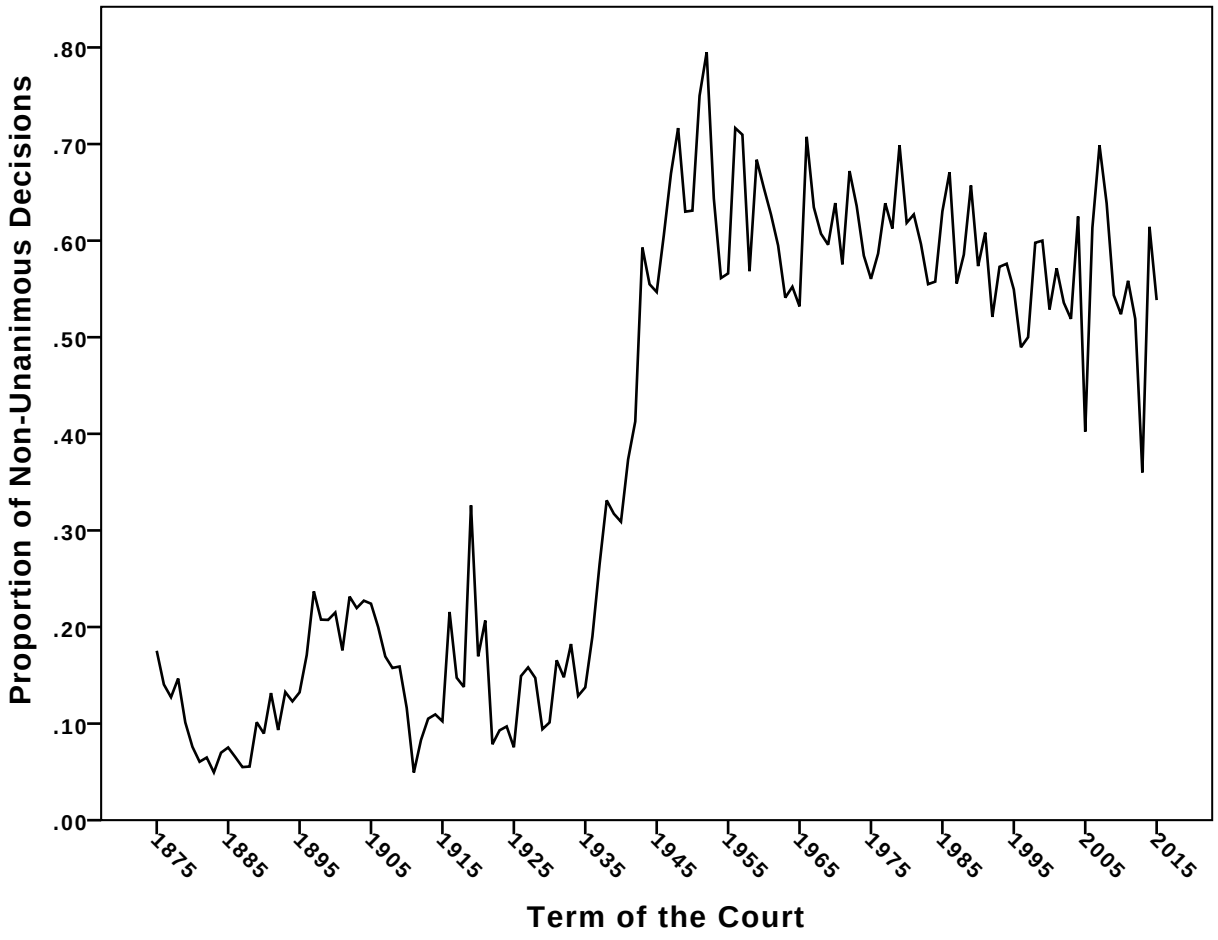


Figure 2: Workload of the Supreme Court, 1875 to 1945

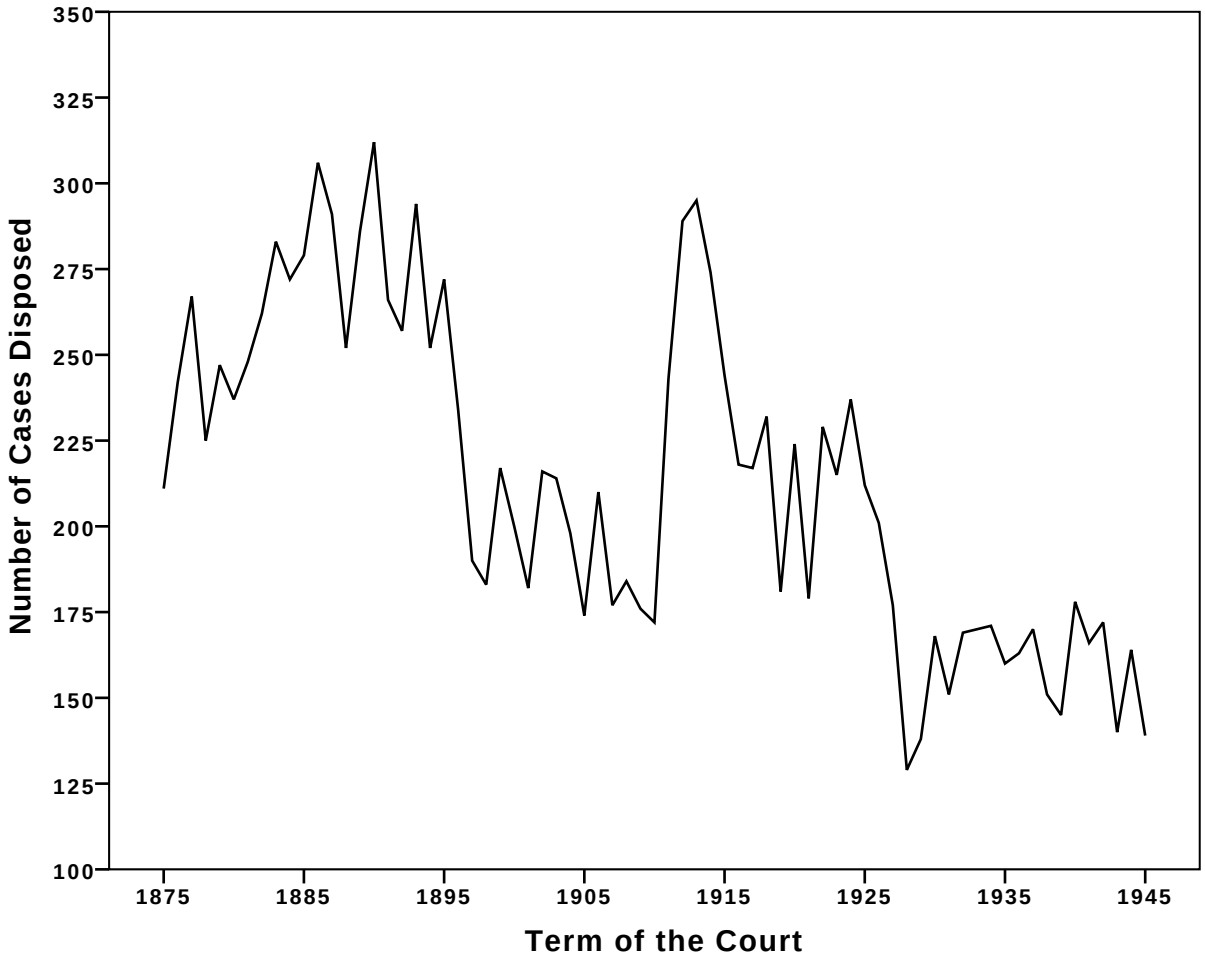
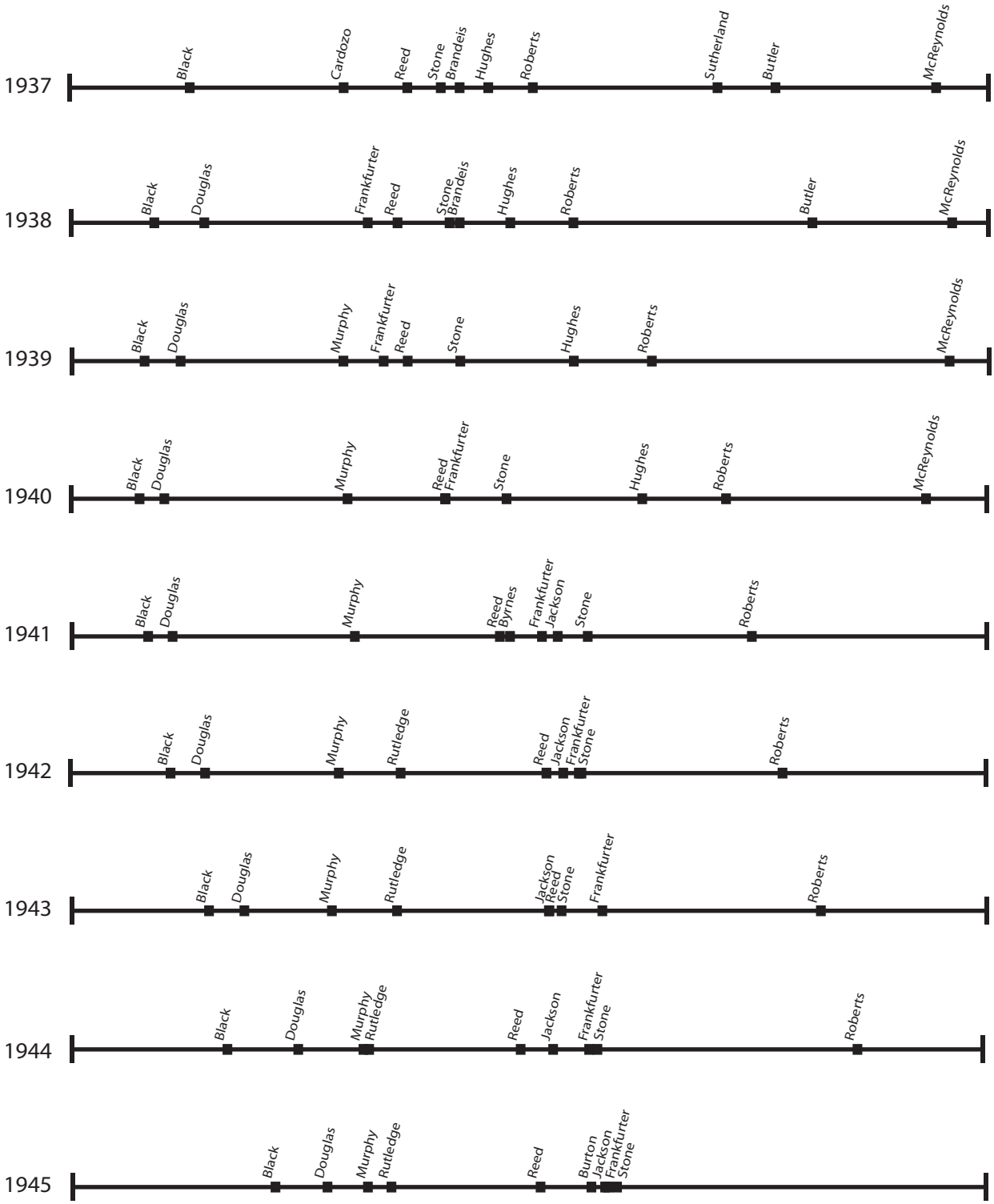


Figure 3: Supreme Court Appellate Docket, 1875 to 1945

Figure 4: The Roosevelt Court, 1937 to 1945

Ideological Score (Liberal to Conservative)



Note: Ideological scores derived from Martin and Quinn (2002).

Figure 5: Dissent Rate in Certiorari Cases, 1920 to 1945