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On the Mysterious Demise of Consensual Norms in the United States Supreme Court

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The early 1940s marked a period in which the consensus norms of the Supreme Court experienced a radical and apparently permanent change. The consistent pattern of relatively high cohesion characteristic of the Court's earlier years gave way to surging rates of concurring and dissenting opinions. The present research is an examination of the factors possibly contributing to the justices' sharply increasing tendency to express their individual views rather than to defer to the opinion of the Court. Using both historical and quantitative methods, the authors evaluate the impact of the Court's discretionary jurisdiction, changing caseload, associate justice characteristics, and judicial leadership. The evidence presented points to the conclusion that in combination with other factors the leadership style introduced by Harlan Fiske Stone in 1941 had a dramatic effect on the consensus norms of the Court.

Patterns of social behavior occasionally experience abrupt changes that defy explanation by apparent cause. When precipitous deviations from the norm are experienced by politically important institutions, they should be treated not as idiopathic curiosities, but as perplexing phenomena worthy of systematic analysis.

Figure 1, which illustrates the rate of dissenting and concurring opinions on the Supreme Court since 1800, presents such a mystery.¹ From John Marshall's appointment as chief justice to the end of the Charles Evans Hughes era, the Court exhibited relatively stable, cohesive behavior. These years are marked by individual justices accepting the Court's majority opinions. Although the nation suffered through turbulent periods of war, rebel-

*The authors are indebted to Professor James Stimson for his generous assistance on this project and to the anonymous referees for their very helpful comments.

¹Dissent is measured as the number of dissenting opinions per 100 opinions of the Court; concurrence as the number of concurring opinions per 100 opinions of the Court. These particular measures were employed because the issuance of a dissenting or concurring opinion represents behavior clearly inconsistent with traditional consensus norms. Our measures are based on data provided by Blaustein and Mersky (1978) and the *Supreme Court Reporter's* annual summaries.

lion, economic depression, and political cleavage, the high court maintained the norm of consensus. Individual expression was kept at a minimum and within a relatively consistent range. In the early 1940s, however, the conventions of the Court radically changed. The incidence of individual justices separating themselves from the majority by articulating dissenting and concurring opinions surged to unprecedented levels. Not only was the increase dramatic in magnitude, but it represented an apparently permanent alteration in the Court's decision-making regime.² Consider, for example, that prior to 1941 an average of 8.5 dissenting opinions were issued for every 100 majority opinions, but after 1941 that figure rose to seventy-three dissenting opinions. This evolutionary development presents the following research question: What transformed the practices of the Supreme Court from a regime in which individual views were suppressed in deference to the majority into a decision-making system in which individual expression became the rule rather than the exception?

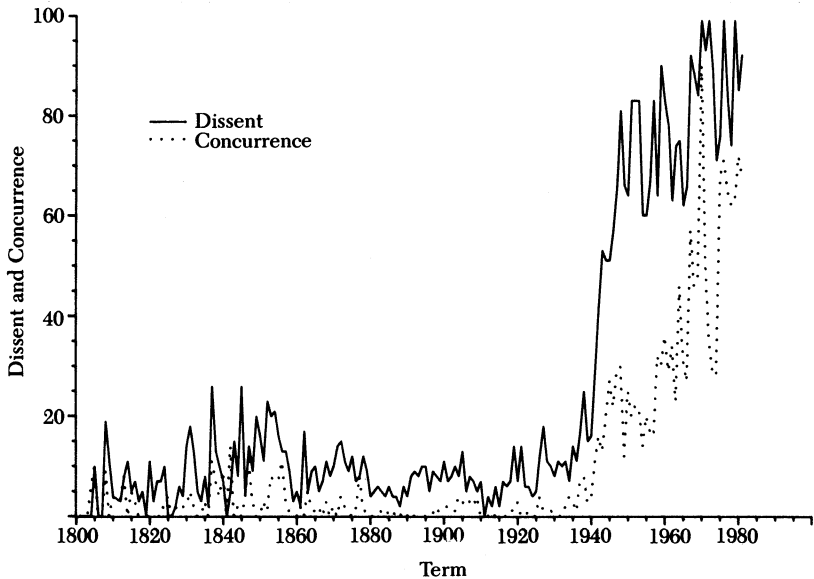
The answer to this question is of no small consequence. C. Herman Pritchett has argued that the increase in dissenting and concurring opinions weakened the Court's "institutional ethos" (Pritchett, 1954, p. 22). The Court moved from a decision-making process based on consensus to one characterized by individual decision making, or what Justice Lewis Powell recently claimed to be decisions emanating from nine separate law offices. Ironically, this particular change is precisely what John Marshall sought to avoid when he eliminated the practice of *seriatim* opinions that allowed each justice to voice his individual views on every case. According to Bernard Schwartz, "if carried to its extreme, the right to concur or dissent leads back . . . to the practice . . . of *seriatim* opinions" (1957, pp. 356-57). Surely, Court norms since the 1940s approximate such a reversal; today, a decision announced by a single, unanimously supported opinion is a rarity.

Not only did the decade of the 1940s irrevocably alter the institutional norms of the Supreme Court, but the skyrocketing dissent and concurrence rates of that period radically changed the way scholars viewed the judiciary. Prior to 1941, traditional legal approaches provided satisfactory explanations for a Supreme Court whose institutional practices led to consensus decisions with relatively low levels of expressed disagreement. Pritchett was the first to recognize the scholarly implications of the Court's post-1941 abandonment of strong consensus norms. Writing in 1954, he argued, "it is precisely because the Court's institutional ethos has become so weak that we must examine the thinking of the individual justices . . ." (1954, p. 22). At Pritchett's urging, scholars such as Nagel (1961), Ulmer (1962), and Schubert (1962) initiated the exploration of factors that affect the decisions of individual justices

²We use the term "regime" to refer to shared norms and rules governing the actions of individuals engaged in an established collective decision-making process. Our usage is similar to that proposed by Kegley (1987) in a different context.

FIGURE 1

DISSENT AND CONCURRENCE PER 100 MAJORITY OPINIONS
IN THE UNITED STATES SUPREME COURT, 1800–1981



on federal and state courts. These efforts propelled the field of public law into the behavioral revolution, a theoretical perspective that continues to dominate our perceptions of the American legal system. All this, it seems, occurred because after 1941 there were huge variations in judicial voting behavior begging to be explained.

Consequently, unravelling this mystery involves confronting questions of substantial importance. Although the much studied Warren and Burger Courts have led contemporary scholars to take individual judicial expressions for granted, a mere glance at figure 1 indicates that such an assumption ignores 140 years of Court history. Whoever or whatever was responsible for the abrupt and dramatic increase in dissenting and concurring opinions not only changed the norms of the Supreme Court, but also altered the way in which an entire cohort of political scientists now view the judicial process.

How do we identify the causes of change? As any good investigator knows, the first steps in solving a mystery are to establish a list of suspects and set criteria by which to eliminate them from culpability. In creating our list we are aided by two important factors. First, we are able to determine with some precision the point at which the Court's behavioral patterns were altered. As figure 1 shows, consensus norms did not gradually erode, but were abruptly shattered. Table 1, which presents in numerical form dissent and

TABLE 1
 DISSENT AND CONCURRENCE RATES, 1935-1946

Term	Dissent Rate	Concurrence Rate
1935	.14	.03
1936	.11	.01
1937	.17	.07
1938	.25	.08
1939	.15	.04
1940	.16	.03
1941	.29	.11
1942	.43	.16
1943	.54	.13
1944	.51	.20
1945	.51	.27
1946	.57	.22

For data source and methods of calculation, see footnote 1.

concurrence rates from 1935 to 1946, isolates the 1941 term, the first under Chief Justice Harlan Fiske Stone, as the turning point. This evidence allows us to focus our efforts on a particular historical period. Second, there is a body of scholarly research that has sought to identify the causes of dissent. This literature provides theoretical grounding for the identification of factors suspected to have contributed to the demise of the Court's strong consensus norm. Following these leads we have constructed a list of five possible causes and tested their viability as explanations for the Supreme Court's regime change:

1. Congressional enactment of the Judiciary Act of 1925.
2. Changes in the Court's caseload.
3. The promotion of a sitting associate to be chief justice.
4. Changes in the Court's composition.
5. The leadership of the chief justice.

THE JUDICIARY ACT OF 1925

Perhaps of all our suspected causes, most scholarly fingers point to congressional passage of the Judiciary Act of 1925. In essence, this legislation, known as the "Judges' Bill," changed the Court's docket from one of obligation to one of discretion. The statute allowed the justices to avoid hearing frivolous cases involving well-established legal issues and to concentrate instead on questions of true significance. There is reason to believe that a discretionary docket will contain a relatively large number of controversial cases that generate divisions of opinion (Halpern and Vines, 1977; Grossman and Wells, 1980, p. 232). Therefore, grounds exist to hypothesize that the

Act, which began to affect the ratio of obligatory to discretionary cases in 1927, had a permanent impact on patterns of individual judicial expression.

In an article published in 1977, Stephen Halpern and Kenneth Vines tested this expectation and concluded that the Act had "contributed" to the behavioral patterns depicted in our Figure 1.³ Their analysis rests largely on a comparison of dissent behavior for nearly equal periods shortly before [1922–1925] and after [1927 through the first sixty-five cases of the 1929 term] passage of the statute (pp. 472–73). The results revealed a slight overall increase in dissent following the implementation of the legislation. The change occurred almost exclusively in the Court's obligatory cases (an 8.2 percent dissent rate prior to enactment and a 25.1 percent dissent rate after), leading the authors to explain that the Act eliminated appeal as a matter of right in numerous classes of cases which generally raised straightforward legal issues (1977, p. 475). The dissent rate in the Court's discretionary docket showed virtually no change (7.6 percent before the Act and 8.3 percent after). To substantiate their position further, Halpern and Vines presented a series of graphs illustrating the incidence of dissenting behavior longitudinally. From these data, the authors concluded that "1925 stands out . . . as a starting point in the evolution of a new trend of dissenting votes" (1977, pp. 479–80).

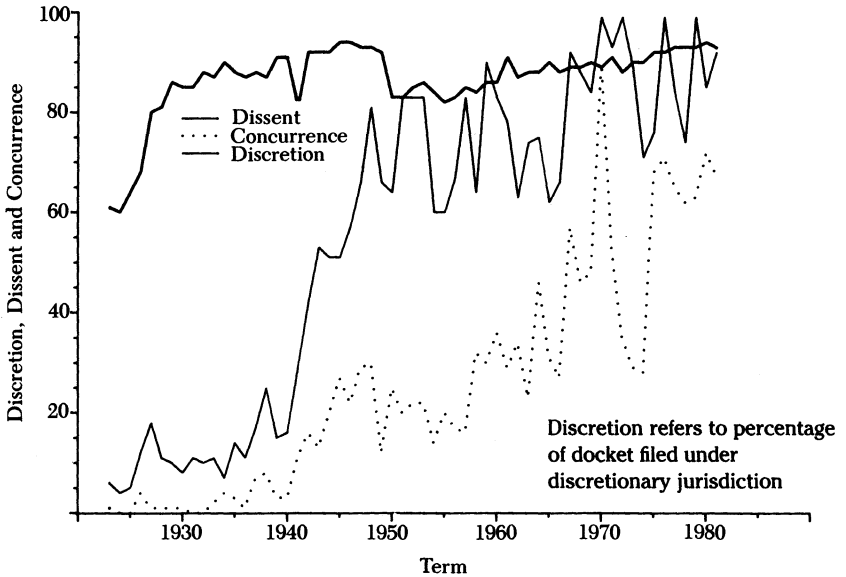
While granting the Court broad discretionary jurisdiction surely affected the nature of the institution, a closer examination of the data leads us to doubt that the Judges' Bill alone can account for the massive increases in individual judicial expression. First, the changes in the Court's ratio of obligatory to discretionary cases do not coincide with the justices' patterns of increasing dissent activity. As figure 2 demonstrates, the discretionary share of the Court's docket rose dramatically immediately following the Act and remained relatively stable thereafter, a phenomenon also observed by Halpern and Vines (1977, pp. 475–76). However, as is also readily observable in figure 2, significant escalation in both the dissent and concurrence rates did not occur until almost fifteen years later.

Second, an analysis of the terms immediately surrounding implementation of the Judges' Bill indicates, contrary to Halpern and Vines, that 1925 was not the beginning of a sustained upward trend in dissent. By focusing on that portion of figure 2 which illustrates the Court's dissent patterns for the years immediately preceding and following the 1925 statute, we readily observe that Halpern and Vines were correct in noting a slight increase in individual expression following passage. However, dissent clearly leveled off to pre-statute rates shortly thereafter and remained relatively low for another

³Halpern and Vines clearly indicate that their work did "not seek to explain all the causes that have produced the increased division of opinion commonly found on the high court in recent decades." Rather, they "attempted to assess to what extent and in what ways the 1925 Act may have been one of the starting points . . ." (1977, p. 472).

FIGURE 2

DISCRETIONARY JURISDICTION, DISSENT AND CONCURRENCE
IN THE UNITED STATES SUPREME COURT, 1923-1981



decade. Simply stated, a radical jump in dissent following 1927 is not evident. Dissent rates did not begin their major upward move until the early 1940s. We have no theoretical or empirical reason to suspect that a fifteen year lag existed between passage of the Act and its putative effect on the incidence of individual judicial expression.

Based upon this evidence, we must dismiss enactment of the 1925 statute as the primary factor in the alteration of the Court's consensus norms. Certainly, it is possible that a discretionary docket may be one factor, and a necessary one at that, in maintaining high levels of conflict once such patterns are established. Little support exists, however, for the position that the Judges' Bill alone initiated the significant elevation in individual judicial expression.

CHANGES IN THE COURT'S CASELOAD

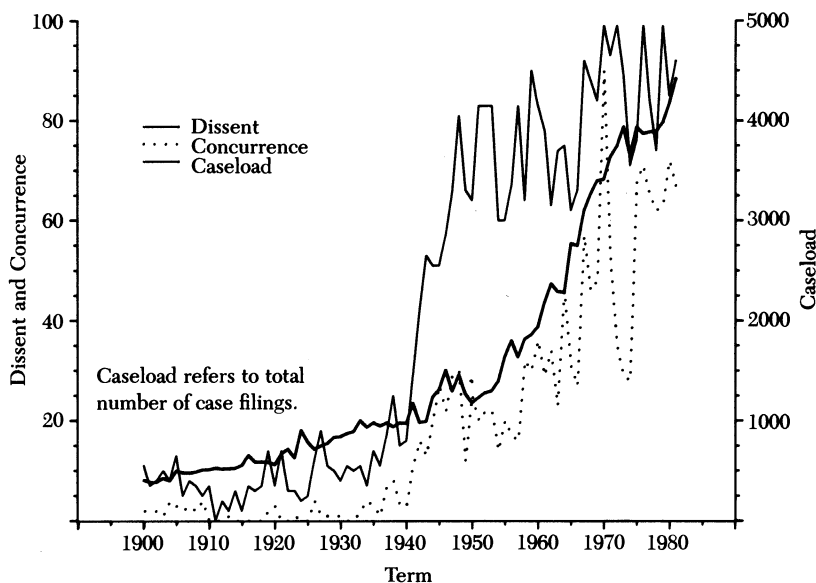
It is reasonable to suspect that docket changes can affect the level of decision-making consensus on the Court. Two possibilities exist. First, we might anticipate that marked increases in caseload volume are associated with heightened levels of individual expression. As demands on the Court increase, the justices lose the luxury of ample time to build consensus and

construct the compromises that hold the Court together. Constant pressure exists to arrive at a decision and move on to address the next case. It is no longer as advantageous to expend substantial resources to convince a dissenting or concurring justice to join the majority opinion. Second, the Court's docket can change in terms of case mix. Some issues obviously tend to provoke disagreement and others present questions attracting broad-based consensus. If the Court undergoes an abrupt alteration in the kinds of cases the public brings to it for resolution, we might witness a corresponding change in consensus levels. Both of these caseload factors can be examined as possible causes of the increased levels of individual judicial expression which began in the 1940s.

To test our first suspicion we superimposed the number of case filings each term on a graph of dissent and concurrence rates for the years 1900 to 1981. The result, which is displayed as figure 3, reveals that the increasing caseloads observed over this period are not likely to be responsible for the marked rise in individual expression occurring after 1940. In the first place, it is apparent that dissent rates are not systematically affected by caseloads since the surge in the former actually *precedes* the period of strongest growth in case filings. More generally, the shapes of the curves in figure 3 are inconsistent with the caseload hypothesis, since the extraordinary rise in

FIGURE 3

CASELOAD, DISSENT AND CONCURRENCE IN THE
UNITED STATES SUPREME COURT, 1900-1981



dissents and the smaller but still dramatic jump in concurrences are rather unlikely consequences of the comparatively more uniform growth in case filings. Additionally, by using the transfer function technique (Norpoth, 1986), we attempted to determine whether caseload "drove" up dissent or concurrence rates. The results corroborated our initial conclusion that the series follow independent processes. Thus, by visual consideration of figure 3, as well as results based on a more powerful analytic tool, we can conclude that caseload levels and individual expression are not causally associated with one another.⁴

Our second docket hypothesis prompts us to examine changes in case mix. Because the precipitous increase in dissent began with Harlan Fiske Stone's first term as chief justice in 1941, we can best evaluate our suspicions by taking a "snapshot" of the relationship between case mix and dissent during the last two terms of the Hughes Court (1939-1940) and the first two terms of the Stone Court (1941-1942).⁵ For every case decided with a full opinion, we recorded the issue brought to the Court and the number of dissenting opinions, if any. Specifically we were looking for particular issues during the last two terms of the Hughes era that produced unusually high or low levels of dissent. If changes in case mix are responsible for the surge in dissenting opinions, we would expect the 1941-1942 Stone Court to have been faced with larger numbers of issues associated with high levels of dissent, and correspondingly fewer cases with issues associated with high levels of consensus. Such changes in case mix might be attributable to an alteration in the variety of issues the public brought to the Court or a change in the kinds of cases the justices granted review.

The results of the Hughes/Stone comparisons are illustrated in table 2. In order to control for personnel changes, the dissent data in this table are based only on justices who served during both the Hughes and Stone years. Examining the Hughes Court portion of the table, we note a rate of fifteen dissenting opinions for every 100 opinions of the Court. Anti-trust cases constituted the most dissent-prone issue (dissent rate = 43; $n = 7$), closely followed by issues involving banking and stocks (both dissent rates = 33, $n = 6$). Cases bringing questions of criminal procedure, Indian rights, the Federal Communications Commission, and maritime and patent law failed to yield any dissenting opinions. Thus, knowing that dissent behavior increased tremendously after Stone took the reins of the Court and knowing

⁴In addition to total filings as a measure of caseload, we did a similar set of analyses using "number of cases decided with full opinions" as the independent variable. There was no evidence to suggest that increasing numbers of decided cases were associated with the abrupt rise in nonmajority opinions. In fact, the number of cases decided declined over the years studied.

⁵Realizing that issues would vary tremendously from one Court era to the next, this "snapshot" view provides the best mechanism for determining the most and the least conflictual issues for this particular set of justices.

TABLE 2
ISSUES AND DISSENT: 1939–1942*

Issue	Hughes Court (1939–1940)		Stone Court (1941–1942)	
	Dissenting Opinions ^a	n=	Dissenting Opinions ^a	n=
Anti-Trust	43	7	50	8
Banking	33	6	50	2
Stocks	33	6	33	3
Labor	27	26	43	28
Civil Liberties	25	8	38	16
Jurisdiction/Procedure	21	14	20	10
Civil Rights	20	5	0	3
Insurance	17	6	40	10
Taxes	16	86	26	51
Miscellaneous ^b	9	53	28	50
Bankruptcy	9	23	28	18
Railroads	7	14	36	11
Commerce	6	17	39	23
Criminal Rights	0	13	52	27
FCC	0	4	80	5
Indian Law	0	2	27	11
Maritime	0	2	57	7
Patents	0	8	38	16
Total	15	300	35	299

*Data collected by authors.

^aDissenting opinions per 100 majority opinions, counting only dissenting opinions written by justices who served on both the Hughes and Stone Courts.

^bIncludes case types appearing infrequently in both Court eras (e.g., utilities, issues involving Puerto Rico).

what case types tended to produce dissent, we would expect to find a sharp increase in the number of anti-trust, banking and stock cases during the Stone era.

Scrutiny of the Stone Court's first two terms, however, does not meet our expectations. The numbers of cases in the three most dissent-prone categories either decreased or remained relatively stable during the first two years of the Stone era. The dissent rates in these three issue categories either remained unchanged or increased slightly.

What about the consensual issues of the Hughes Court? Since certain cases acted as non-dissent stimuli during the Hughes era, we would expect to find fewer such cases during the Stone period, or, at the very least, similarly low dissent rates. Again this was not the case. Not only did cases in these categories increase in number, but every issue evoking unanimity in the Hughes Court surpassed a dissenting opinion rate of 25 during Stone's

first two terms. FCC cases illustrate the most extreme example of this phenomenon, with the dissent rate moving from 0 to 80. Consider also issues of criminal rights, which failed to evince a dissenting opinion from 1939 to 1940, but increased to a rate of 52 during the 1941 and 1942 terms.

Although changes in the number of cases falling within the various issue areas were insufficient to have caused the sharp increase in conflictual behavior, it is possible that our aggregated scheme may be masking the effect of differences within issue categories. Take, for example, civil liberties cases. They doubled in number from eight during the 1939–1940 terms to sixteen during the 1941–1942 period, presenting squarely the possibility that the Stone Court was faced with more complex and/or wholly different kinds of civil liberty cases than its earlier counterpart. Based upon an examination of the twenty-four civil liberties cases, however, we must eliminate this explanation. Five of the eight Hughes Court cases involved solicitation, picketing, or loitering; nine of the Stone Court cases raised similar issues. In fact, the Jehovah's Witnesses were responsible for bringing the majority of these cases to both Courts. Even more illustrative of the parity of issues raised were the Flag Salute cases, one of which was heard in each of the two periods. The only litigation presenting substantially different civil liberties claims were the Japanese internment cases decided in the 1942 term. However, no dissenting opinions were issued in these disputes.

These data lead us to reject the notion that case mix changes ushered in the dissent-prone period after 1941. It is clearly not the case that dissent-producing issues increased in frequency concurrently with Stone's assumption of the chief justiceship, nor is it true that consensus-prone issues decreased in number. On the contrary, it appears that dissent-prone cases remained relatively stable and that the consensus-producing issues of the Hughes years began producing dissent on the Stone Court. Whoever or whatever was responsible for increasing the level of individual judicial expression beginning with the Stone years was a powerful force indeed, for it was able to produce judicial conflict over issues that during the previous two terms were associated with unanimity.

THE PROMOTION OF A SITTING ASSOCIATE TO BE CHIEF JUSTICE

Because the incidence of widespread individual expression began with the New Deal Court, the judicial selection policies of Franklin Roosevelt clearly demand attention. One of the more commonly expressed possibilities is that Roosevelt's elevation of Harlan Fiske Stone, a sitting associate justice, to be chief justice created an internal condition not conducive to consensus decision making. The rationale is that internal promotions lead to intra-Court conflict and cause acrimony prompted by jealousies or prior interpersonal conflicts (see Mason, 1968, p. 52). Inside candidates are saddled with the scars of past battles and are unable to discard them. Consequently, Stone's

ability to lead the Court as a cohesive whole may have been impaired by his previous Court service.

If the hypothesis that internal promotions disrupt consensus norms is correct, we would expect that the pattern of increasing individual expression characteristic of the Stone era would also be found on the Court during the leadership years of Edward White, the only other individual to have completed a tenure as chief justice after having been promoted from a sitting associate position.⁶ White, who like Stone had sixteen years of prior service as an associate justice, assumed the chief justiceship in 1910. At that time the Court was plagued with personality conflicts (Abraham, 1986, p. 206) and carried a high potential for internal divisiveness. White, however, was quickly able to overcome what on the surface appeared to be insurmountable problems. He was "plainly anxious to create an atmosphere of friendliness and to promote agreement in the disposition of cases" (Goldman, 1982, p. 262). Through the institution of various practices, White was able to maintain good relations with and among his colleagues.

It is obvious from the data examined thus far that White's efforts succeeded in maintaining the Court's consensual norms. The mean level of dissent exhibited by the Court for all years prior to White's promotion was 8.3 while during his first five years as chief justice this figure declined to 3.8. Stone's record is radically different. The Court's mean dissent rate of 8.5 before Stone's leadership ballooned to 45.2 during his five-year tenure as chief justice. Similar patterns hold for the concurrence data. We also examined trends in the Court's behavior by regressing our measure of dissent on the term number for the first five years of each internally-promoted chief justice. Because slope estimates from these regressions indicate the average annual change in dissent, large positive slopes for both Courts would lend some credence to the internal promotion hypothesis. Our results reveal the expected upward trend in dissents under Stone ($b = 4.5$; $t = 3.4$), but virtually no change during the five years following White's promotion ($b = -.25$; $t = -.37$). It is possible, of course, that the promotion of a sitting associate was an unwise decision because of particular conditions inside the Court in 1941. However, given the contradictory consequences of the White and Stone appointments, we are unable to accept the general validity of the internal promotion hypothesis.

CHANGES IN THE COURT'S COMPOSITION

Although the leader of any group influences the relations among its members, "it is difficult to imagine any judge, even a Marshall, dominating . . . a

⁶Conclusions put forward in this section must obviously be tentative since only two cases exist for analysis. The 1986 appointment of William Rehnquist to replace Chief Justice Warren Burger will allow us the opportunity at some future date to evaluate the internal promotion hypothesis with a third case.

Court composed of brilliant, individualistic, and strong willed . . ." justices (Murphy, 1964, pp. 40-41; but see Roper, 1965). Thus, in searching for the causes of the Court's rejection of consensus norms, we must take into account the role of the associate justices. It is quite possible that Stone was faced with a Court composed of associates who were to a significant degree "unleaded." Four possible conditions merit examination:

1. The associate turnover rate was unusually high.
2. The associates were disproportionately young and inexperienced.
3. The associates were deeply divided ideologically.
4. The associates were abnormally dissent prone.

High Turnover. We first need to address the possibility that the Stone Court experienced unusually high levels of turnover. The Supreme Court is a continuing institution averaging only one new member every two years. This gradual rate of membership change allows the institution to socialize new justices into the acceptance of its internal norms. However, a rapid and large influx of new members can disrupt the Court and stunt normal socialization processes. It is possible that the Court was faced with just such a condition, making the enforcement of traditional consensus norms impossible.

The first column in table 3 indicates the number of justices appointed during the 1941 to 1946 Stone era as well as during the tenures of the four chief justices preceding him: Melville Fuller, Edward White, William Howard

TABLE 3
ASSOCIATE JUSTICES UNDER FIVE CHIEF JUSTICES

Chief Justice	New Justices ^a	Turnover Rate ^b	Mean Age ^c	Mean Youngest/Oldest ^d	Inexperience Index ^e
Fuller (1888-1910)	11	.50	63.9	54.0-74.4	18.8
White (1910-1921)	7	.64	63.0	53.0-75.4	26.1
Taft (1921-1930)	4	.44	66.7	57.7-84.0	16.7
Hughes (1930-1941)	7	.64	67.0	53.8-80.6	19.3
Stone (1941-1946)	4	.80	61.6	50.0-70.0	32.5

^aTotal number of associate justices added to the Court during the period from the date of a chief justice's confirmation to his death or resignation. Associates confirmed between May and September were coded as joining the Court at the beginning of the October term.

^bMean number of new associate justices per term.

^cMean age of associates calculated for each term and averaged over the tenure of the chief justice.

^dAge of the youngest and oldest associate justice each term averaged over the tenure of the chief justice.

^ePercentage of associate justice seats occupied by justices with three or fewer years of experience, combining all terms of a chief justice's tenure.

Taft, and Charles Evans Hughes. The number of new associates joining the Court during these periods ranged from a high of eleven under Fuller to a low of four for Taft and Stone. Turnover rates, however, place matters in a different perspective. The Court under Fuller, White, Taft, and Hughes averaged .55 new associates per term, with only modest deviations from the mean. Stone, on the other hand, experienced a turnover rate of .80, considerably higher than his four predecessors. The addition of four associate justices in a five-year period certainly carries with it the potential of creating a disruptive situation.

Youth and Inexperience. It is possible that Chief Justice Stone was asked to lead justices who were unusually young, inexperienced and resistant to the norms of the Court's old guard. One author has alluded to this problem, noting that "Stone presided over a Court consisting primarily of new, inexperienced justices" (Goldman, 1982, p. 339). And, as Pritchett claimed, the justices were not only "inexperienced," but youthful as well (1948, p. 13). It is conceivable that the comparatively large number of new justices and their relative youth presented Stone with conditions conducive to dissension that were not faced by chief justices who served before him. The third and fourth columns of table 3 portray the mean age and age ranges for the Court during the time Chief Justices Fuller, White, Taft, Hughes, and Stone served. The average age of the justices during the Stone years was the lowest of the five eras, but the differences are not substantial. Moreover, we cannot verify an argument that it was an unusually large "spread" in ages (young vs. old) that affected levels of disagreement. In fact, the range of ages during the Stone era was the smallest of the Courts examined.

High levels of inexperience may also provide conditions conducive to a breakdown in decision-making norms. Veteran group members with loyalties to existing behavioral customs must exist in sufficient numbers to inculcate less experienced members into acceptable patterns of behavior. A disproportionately inexperienced Court may have difficulty maintaining allegiance to ways of the past. For purposes of this analysis, we defined as inexperienced any justice with three or fewer full terms on the Court. This defining criterion is admittedly somewhat arbitrary since justices have individually different rates of adapting to the demands of their new positions. It seems reasonable to assume, however, that after three years on the bench a justice will be fully acclimated and can no longer be labeled as inexperienced or under the influence of a "freshman effect."

The final column in table 3 illustrates the percentage of associate justice seats occupied by inexperienced justices over the full tenures of Chief Justice Stone and his four immediate predecessors. The Stone Court associates distinguish themselves by having the highest inexperience rates of the five courts examined. When Chief Justice Stone first convened the Court in Oc-

tober 1941, five of the eight associate positions were filled by justices falling into the inexperienced category. Conditions such as this make the transition of decision-making values susceptible to interruption.

The Stone justices not only had a lack of experience on the Supreme Court, but an extremely low level of judicial service at any level. Of the ten men who served as associate justices under Stone, Wiley Rutledge's three years on the Court of Appeals for the District of Columbia represents the only prior appellate court experience. Consequently, Stone associates had almost no exposure to the "no dissent" traditions common to appellate tribunals. Furthermore, the backgrounds of these men were not such that they would naturally value the practice of deferring to the views of others on matters of public and legal policy. Like Chief Justice Stone, Frankfurter, Douglas, and Rutledge had devoted the bulk of their careers to university teaching, an occupation which encouraged them to articulate their individual theories of law and legal institutions. Black, Byrnes, and Burton had come to the Supreme Court directly from the United States Senate where free debate was valued. Roberts had come from private practice, and Jackson, Murphy, and Reed had been high ranking Justice Department attorneys. Consequently, the Stone Court associates not only possessed relatively low levels of Supreme Court experience, but came from occupational traditions that encouraged individual expression.

Ideological Division. The third possibility is that the associate justices were deeply divided ideologically, forcing a large amount of individual expression. To evaluate this contingency, we examined the configuration of ideological voting blocs among the justices of the Hughes and Stone Courts. We expect, of course, that all Courts are divided to some degree along ideological lines. That is, scholars have consistently found that during most eras at least two voting blocs exist: liberal and conservative. If these blocs have high degrees of internal cohesion, dissenting opinions occur at modest levels and concurring opinions are very infrequent. On the other hand, when the ideological subgroups themselves are highly fractionalized internally, dissenting and concurring opinions proliferate.

In *The Roosevelt Court*, Pritchett examined agreement scores of the Hughes and Stone Court justices in "every nonunanimous opinion" (see Pritchett, 1948, pp. 242-47). His findings are startling: between the 1931 and 1940 terms "the existence of well-defined groups, referred to as left wing and right wing, was clearly evident." That is, strong intra-bloc agreement existed. According to Pritchett, however, ". . . [A]fter 1941, a marked decline was apparent in the cohesiveness of the judicial bloc on the right, and later in that on the left" (p. 241). In sum, "In 1941, divisive forces of some kind hit the Court in full force" (p. 251). This occurred in spite of the fact that the Stone Court had the potential of being one of the most ideologically united in the history of the institution. After all, except for the seat held first

by Roberts and then Burton, every Stone Court justice was an appointee of Franklin Roosevelt who placed a priority on nominating justices loyal to New Deal policies.

Pritchett's findings are certainly pertinent to our inquiry. The future Stone Court justices while serving under Hughes were not divisive within their ideological blocs. Well-defined subgroups existed, but justices of the same ideological leanings agreed. After 1941, however, agreement was not even evident within blocs of justices sharing the same ideology. Given that it is well established that judicial attitudes are stable, there is no reason to presume that beginning with the 1941 term the justices underwent radical fragmentation of their ideologies. Instead, it appears reasonable to conclude that a significant and generalized decline in norms of cohesion occurred.

This point is reinforced by examining the concurrence data. To some extent, concurrences control for ideology. That is, concurring opinions denote a general agreement with the directional outcome of a case. Standard ideological divisions do not necessarily result in increased numbers of concurring opinions. In fact, it could be convincingly argued that as ideological divisions deepen, concurring opinions should decline. A mere glance at either figure 1 or table 1, however, reveals a much different situation. As Chief Justice Stone took lead of the Court, both dissenting and concurring opinions rose dramatically. Almost overnight, the justices began expressing their personal views at extraordinarily high levels, demonstrating little compulsion to defer to the opinion of either the Court majority or of their own attitudinal subgroups. This indicates that ideology alone cannot account for the sharp rise in individual judicial expression.

Dissent-Prone Associates. The decline in the Court's consensus norms may have occurred because the Stone Court associates, regardless of ideology, were particularly prone to state positions at odds with those articulated by the Court's designated spokesmen. To test for this possibility, we examined the proportion of total dissenting votes and dissenting opinions for which the Stone Court associates were responsible before Stone assumed the leadership position. If these justices had consistently high levels of individual expression, then we would have reason to believe that consensus norms deteriorated because a particular set of judicial mavericks happened to be on the Court at a specific point in time. The findings, which are illustrated in table 4, suggest a different conclusion. If we expect each justice to carry .11 (1/9) of both categories (dissenting votes and opinions), then prior to Stone's ascension, the justices did not demonstrate particularly high propensities to dissent. Excluding Stone, only two of the future Stone associates had disproportionately high dissent rates: Roberts and Black. The Roberts case is clear-cut—he grew increasingly conflictual following the Court's 1937 shift in constitutional philosophy. Black, however, started his tenure with relatively high proportions, which declined slightly until the Stone ascen-

TABLE 4
 PROPORTIONS OF DISSENTING VOTES CAST AND DISSENTING OPINIONS WRITTEN
 BY FUTURE STONE COURT JUSTICES, 1925-1942*

Dissenting Votes**	Pre-Stone-Terms														Stone Terms			
	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42
Stone	.11	.14	.19	.08	.21	.13	.24	.20	.19	.18	.22	.03	.05	.03	.05	.05	.14	.09
Roberts						.04	.07	.04	.06	.05	.05	.09	.03	.11	.27	.26	.11	.18
Black													.17	.14	.05	.13	.13	.14
Reed														.06	.01	.07	.09	.10
Frankfurter															.02	.02	.10	.12
Douglas															.05	.13	.18	.13
Murphy																.05	.11	.15
Actual	.11	.14	.19	.08	.21	.17	.31	.24	.25	.23	.27	.12	.25	.34	.45	.71	.86	.91
Expected ^a	.11	.11	.11	.11	.11	.22	.22	.22	.22	.22	.22	.22	.33	.44	.66	.77	.77	.77
Deviation ^b	.00	+.03	+.08	-.03	+.10	-.05	+.09	+.02	+.03	+.01	+.05	-.10	-.08	-.10	-.21	-.06	+.09	+.14

Dissenting Opinions***

	Pre-Stone-Terms														Stone Terms			
	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42
Stone	.09	.14	.16	.23	.46	.16	.37	.29	.27	.43	.30	.00	.00	.08	.05	.15	.16	.09
Roberts						.08	.00	.05	.11	.07	.15	.11	.04	.11	.50	.34	.06	.12
Black													.32	.19	.11	.15	.23	.18
Reed														.05	.05	.07	.14	.06
Frankfurter															.00	.07	.14	.19
Douglas															.05	.11	.14	.10
Murphy																.00	.00	.15
Actual	.09	.14	.16	.23	.46	.24	.37	.34	.38	.50	.45	.11	.36	.43	.76	.89	.87	.89
Expected ^a	.11	.11	.11	.11	.11	.22	.22	.22	.22	.22	.22	.22	.33	.44	.66	.77	.77	.77
Deviation ^b	-.02	+.03	+.05	+.12	+.35	+.02	+.15	+.12	+.16	+.28	+.23	-.11	+.03	-.01	+.10	+.12	+.10	+.12

* Data depicted here represent the proportion of the Court's dissenting votes and opinions for which each of the future Stone Court justices was responsible.

** Data sources: 1925-1938 terms, annual summary, *Harvard Law Review* (1928-1939); 1939-1942 terms, Pritchett (1948).

*** Data sources: 1925-1938 terms, annual summary, *Harvard Law Review* (1928-1939); 1939-1942 terms, collected by authors.

^aExpected totals = .11 x number of justices.

^bDeviations = total proportion - expected total.

sion. Even more interesting, perhaps, are the proportions of Justices Douglas and Frankfurter. Although both would later be known as dissenters, they were relatively quiet until 1941. Thus, the associate justices were not a particularly dissent-prone group prior to Stone's assumption of the center chair.

A final observation centers on the "bottom line" figures provided in table 4. For each Court term, we computed the total proportion of dissenting votes and opinions for which the Stone Court justices accounted and the deviation from our expected proportions (actual proportion less expected proportion), where the expected proportion equals the number of justices \times .11. As is readily observable between 1926 and 1935, the two Stone Court justices generally accounted for more than their fair share of dissent solely because Stone well exceeded his expected values. This situation quickly changed as more justices were added. Between 1936 and 1940, the associates who would later staff the Stone Court cast dissenting votes at lower rates than expected. Their propensity for writing dissenting opinions was slightly elevated, but this was due primarily to the high rates exhibited by Roberts and Black. Reed, Frankfurter, Douglas, and Murphy expressed minority viewpoints at relatively low levels. If these judges possessed a desire to articulate their individual views more freely, the prevailing norms of the Court kept such tendencies in check. This situation, of course, radically changed when Stone assumed the mantle. These same generally "quiet" justices began to dissent at relatively equal, high proportions.

In sum, the Stone Court associates do not appear to have been especially divided ideologically; nor do those who initiated their service during the Hughes era seem to have been unusually prone to dissent. Yet there were ample signs that the possibility of high rates of individual expression existed. Because of their low levels of Supreme Court experience, the Stone associates had not been firmly tutored in the norms of consensus; indeed, as table 4 indicates, Frankfurter, Douglas, and Murphy had only served a short period under Chief Justice Hughes. The great turnover rate left the Stone Court with few justices who were schooled in and committed to the traditional ways and who had moved beyond the "freshman" experience. The Stone associates were relatively young. They came from the ranks of professors, senators, and private or government attorneys rather than being promoted from lower court service. Because of these conditions, the caliber of leadership and the quality of group socialization efforts carried the promise of exerting an even greater than normal impact on the future of the institution.

THE LEADERSHIP OF THE CHIEF JUSTICE

Many scholars have noted that the character of leadership provided by the chief justice has a great influence on the operating norms of the Court. Pritchett claimed that in court periods prior to the "Roosevelt Court," "there [were] vital conformist effects in the operating methods of the Court itself.

Probably the most important of these is the discussion which goes on around the judicial conference table, out of which consensus can often be achieved. The influence of a strong and skillful Chief Justice is of great importance in leading to the discovery of solutions satisfactory to all members of the Court" (1948, p. 24). In his seminal work, *Elements of Judicial Strategy*, Walter Murphy (1964) developed Pritchett's argument, suggesting that chief justices can design special tactics to "marshal" or "mass" the Court. According to Murphy, chief justices can employ an array of strategies during conference deliberations and in the opinion-assignment process to create the illusion of unanimity even when great splits of opinion exist among the justices.

Chief justices who best perform these functions have been, in the words of David Danelski, good social and/or task leaders. Social leaders are those able to "counterbalance" the "negative aspects of conference" through activity "which relieves tension, shows solidarity, and makes for agreement" (Danelski, 1980, p. 237). Task leadership, on the other hand, concentrates on the business of the Court. According to Danelski, the chief justice has the best opportunity to emerge as both a task and social leader, thus preserving his role as a "first among equals," or the most influential member of the Court. If a chief plays both roles, then the Court members should be socially cohesive, satisfied with conference, and generally less conflictual among themselves.

Since the breakdown in the Court's consensus behavior coincided with his chief justiceship, we must consider Harlan Fiske Stone a major suspect. Consequently, we need to address Stone's leadership qualities and compare them to those of his predecessors who presided over courts with much lower rates of individual expression.

The biographical and historical works on Stone are of one voice. Stone, in spite of his generally acknowledged intellectual greatness, was an ineffective leader. According to Danelski, debates in conference were heated in the Stone Court and a social leader was needed to smooth ruffled tempers, relieve tensions and maintain solidarity. The conflict was not friendly as in Taft's day; rather it was acrimonious, and, at times, descended to the level of personalities (Danelski, 1980). Others, including Mason (1958), Abraham (1986), Murphy (1964), and Wasby (1984), agree with Danelski's view.

Alpheus Mason persuasively argues that Stone was capable of bringing cohesion to the Court; he simply thought that such leadership was not only unnecessary, but harmful. In Stone's own words, "The right of dissent is an important one and has proved to be such in the history of the Supreme Court. I do not think it is the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting in individual cases" (1956, p. 608). Dissent, he believed, was critical because "[s]ound legal principles . . . never sprang full-fledged from the brains of any man or group of men. They are the ultimate resultant of the abrasive force of the clash of competing and sometimes conflicting ideas . . ." (1956, p. 629).

Clearly, we cannot eliminate Stone as a possible cause in the erosion of the

Court's consensus norms. Not only was he ineffective at using task and social leadership to forge consensus, but he believed that those who had been successful were detrimental to the Court. Moreover, the historical evidence suggests that no member of the quartet of twentieth century chiefs immediately prior to Stone (Fuller, White, Taft or Hughes) was as ineffective at building consensus as he, nor did any share his views on individual judicial expression.

Melville Fuller was chief justice from 1888 to 1910. By almost every available account, both by scholars and his colleagues, Fuller was an excellent social leader. He desired harmonious relations among the justices and seemed well equipped to accomplish this task because he was "blessed with conciliatory and diplomatic traits" (Goldman, 1982, p. 178). Others have noted that he was "an extraordinary Chief Justice in his relations with his colleagues" (Frank, 1958, p. 85), creating a "warmth and closeness" on the Court (Schiffman, 1969, p. 1480).

Justices certainly agreed with these scholarly assessments. According to Justice Holmes, Fuller was "extraordinary. He had the business of the Court at his fingers' ends; he was perfectly courageous, prompt, and decided . . . Fuller was the greatest Chief Justice I have ever known" (quoted in Goldman, 1982, pp. 178-79). Later, Justice Frankfurter noted that "When you're in a conference room of the Supreme Court, or en banc in a court of appeals, or at faculty meetings . . . the same kind of thing happens. Men get short of temper and humor is a great solvent. Fuller had that. He presided with great courtesy. He presided with authority, quiet authority . . ." (1963, pp. 215-16).

Chief Justice White, as discussed earlier, was promoted by President Taft from associate to chief justice in 1910, a time at which the Court was divided and difficult to lead. Yet White, perhaps well-schooled by his experience as senate majority leader, possessed the interpersonal skills to lead the Court effectively. He was blessed with a genial temperament and adroit logrolling skills (Watts, 1969) that permitted him to mend fences and reinforce the consensus norms of the Court.

Perhaps of all Stone's twentieth century predecessors, social leadership was most important to William Howard Taft. Taft went to great extremes to attain harmony on the Court. As one biographer has noted: "Taft valued congeniality and goodwill above most things, and consequently had few acrimonious relations with his professional peers. His ideological convictions very often shaped his attitude toward a colleague, but he never let differences on social and intellectual issues override his desire for harmonious personal relations" (White, 1976, p. 179). Another scholar has stated that "[h]appy working relations were not accidental. Taft went to great pains to establish *esprit de corps*" (Mason, 1969, p. 2114).

To achieve "team spirit" on the Court, Taft took a number of tacks. First,

because "he hated dissenting opinions, (he) wrote very few himself and made every effort to dissuade others from writing them" (White, 1976, p. 180). He strongly believed that "important questions of law should not be broken anymore than we can help by dissents" (Murphy, 1964, p. 47). In fact, he once told Justice Clarke, "I don't approve of dissents generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way" (Murphy, 1964, p. 61). In short, Taft's views were diametrically opposed to Stone's. Second, Taft was the "most active Supreme Court lobbyist of the 20th Century" (Baum, 1985, p. 35). Among his most important lobbying activities, of course, was "frequently exerting pressure on behalf of people he wanted nominated" (Wasby, 1984, p. 93; see also Danelski, 1964). He then socialized those new justices in the "no dissent unless absolutely necessary" tradition (Danelski, 1980). Finally, when required, Taft was willing to use his opinion assignment power to reward team players and punish dissidents. Among those on the "punish" list—none other than Associate Justice Stone. In one instance, Taft sent the following message to Stone: "I voted to reverse. While this sustains your conclusion to affirm, I still think reversal would be better. But I shall in silence acquiesce. Dissents seldom aid in the right development or statement of the law. They often do harm. For myself I say: 'lead us not into temptation'" (quoted in Abraham, 1986, p. 224).

Chief Justice Hughes, Stone's immediate predecessor, joins the ranks of Fuller, White, and Taft as a highly skilled social leader. His colleagues indicated that the chief worked for sociability and harmony among the justices. Owen Roberts, in fact, claimed that Hughes's efforts resulted in "a feeling of personal cordiality and comradeship that . . . was unique in a Court so seriously divided in its review on great matters. . . ." Roberts also noted that even those justices deeply divided, such as Brandeis and Van Devanter, "were at one in their admiration and affectionate regard for their presiding officer" (1963, p. 210). The scholarly literature supports the view of Hughes's colleagues: the chief justice "was the most esteemed member of his Court" (Danelski, 1980, p. 238). As Tressolini contends, Hughes "had the ability to allay jealousies and minimize personal frictions. This was no mean accomplishment on a Court made up of strong, tough minded personalities . . ." (1963, p. 87).

Little doubt exists about Hughes's leadership. But what of his views on the value of the justices expressing their individual opinions on cases? On the surface, Hughes's writings lead us to believe that he was a major proponent of dissent. A relevant section of his 1928 book, *The Supreme Court of the United States*, is often quoted: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a

later decision may possibly correct the error into which the dissenting judge believes the Court may have been betrayed" (1928, p. 68).

Taken on its face, this passage seems to echo the views expressed by Chief Justice Stone. However, we have several reasons to suspect that upon being elevated to the chief justiceship in 1930, Hughes's perception of dissent had more in common with that of Taft than Stone. Simply stated, Hughes and Taft, as Danelski points out, both shared the "no dissent unless absolutely necessary" tradition (Danelski, 1980, p. 242; see also Schmidhauser, 1979, p. 170).

This suspicion is verified by a number of points. First, Hughes was extremely time conscious, attempting to get the most out of conference in the least amount of time. To accomplish this, Hughes provided concise summaries of each case and then presented his view in "a forceful, confident manner" (Goldman, 1982, p. 337). After that, he "controlled discussion tightly, limiting the time devoted to each case" (Baum, 1985, p. 114). Hughes's summaries and opinions "were so complete that in many cases nothing needed to be added by any of his associates" (Roberts, 1963, p. 207; see also Murphy, 1964 and Frank, 1958).

Second, Hughes was determined to present the Court to the public as a dignified and united institution (Abraham, 1986, p. 230). Hughes discouraged dissent in part because it would expose divisions within the Court to the public. In an attempt to show the ever dissenting Associate Justice Stone why he would go along with an opinion with which he disagreed, Hughes wrote, "I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to expose my views" (quoted in Abraham, 1986, p. 224).

Finally, Hughes often kept opinions for himself by joining the majority even if it meant changing his view of the case. He did this, at least in part, because he believed that he could prevent dissents and concurrences "by compromising and incorporating several different lines of reasoning in his opinion" (Murphy, 1964, p. 64). Moreover, like Taft, Hughes tried to ingratiate himself to new justices, socializing them in the no-dissent tradition (see Murphy, 1964; Goldman, 1982; Bates, 1936).

We do not question Hughes's intentions at the time he wrote his book, a period during which "dissents were usually saved for serious business . . ." (Frank, 1958, p. 127). We are suggesting, however, that when Hughes assumed the role of chief justice he, in contrast to Stone, strove for harmony among the justices. In fact, in summarizing the differences between the two, John Schmidhauser wrote, "In many respects Merlo Pusey's biography of Chief Justice Hughes and Alpheus Mason's biography of Chief Justice Stone provided polar viewpoints on the propriety of strong efforts on the part of the Chief Justice to 'mass the Court'" (1979, p. 170).

The conclusion of the historical works is further supported by quantitative evidence. Although many mechanisms exist for a chief to exert social leadership affecting consensus norms, one of the most important is his own dissent behavior. According to Stephen Wasby, "The Chief Justice's leadership is affected by the degree to which he dissents: a dissenter may exercise *policy* leadership, but exercising leadership over colleagues in the short term is difficult if one is often in dissent" (Wasby, 1984, p. 188). S. Sidney Ulmer has provided an analysis of the dissent patterns of eleven chief justices (Ulmer, 1986). Data based on a portion of his study are illustrated in table 5. They are clearly consistent with the more qualitative evidence. Chief Justice Stone's dissent rate was far greater than any of his predecessors and even exceeded the two who followed him. Chief justices serving before Stone kept their dissent to a minimum (mean = 1.8 percent); Stone voted against the majority of his Court at a rate of 13.5 percent.

Stone's behavior as chief justice was consistent with his earlier record as an associate. Referring back to his associate justice years in table 4, we find that for nine of the sixteen and ten of the sixteen terms depicted, Stone cast more dissenting votes and wrote more dissenting opinions, respectively, than would be expected. During six terms, in fact, he wrote a higher proportion of dissenting opinions than any of the other eight justices with whom he served. And as the histories of the Court tell us, he might well have cast even more dissenting votes had Chief Justices Taft and Hughes not discouraged him from doing so. Thus, when Stone ascended to the head of the Court, dissent was fully acceptable to him as an outlet for individual expres-

TABLE 5

DISSENT BEHAVIOR OF ELEVEN CHIEF JUSTICES*

Chief Justice	N of Cases	N of Chief Justice Dissents	Dissent Proportion ^a
Marshall	1187	7	.0058
Taney	1708	38	.0222
Chase	1109	33	.0297
Waite	2642	45	.0170
Fuller	4866	113	.0232
White	2541	39	.0153
Taft	1708	16	.0093
Hughes	2050	46	.0224
Stone	704	95	.1349
Vinson	723	90	.1244
Warren	1772	215	.1213

*Source: Ulmer (1986), p. 53.

^aNumber of Chief Justice dissents divided by number of cases.

sion. Furthermore, as he moved to the leadership position he experienced no changes in role orientation that caused him to modify his views on the Court's consensus norms.

The foregoing analyses led us to several conclusions. First, Stone's leadership appears to be a prime cause of the Court changing from an institution emphasizing consensus to one characterized by a high level of individual expression. In a break from the tradition of his predecessors, Stone steadfastly held that justices should be free to assert their individuality—that imposed unanimity was no virtue in developing the law. Second, Stone's attitudes were translated into action. He did not draw back from challenging the majority. He expressed his own views frequently, and by doing so gave a signal to the other members of the Court that it was perfectly permissible to engage in concurring and dissenting opinions. Furthermore, unlike his predecessors, there is no evidence that Stone engaged in any actions to enforce the traditional consensus norms of the Court or to socialize new justices into the no dissent convention. Third, Stone's views appear to have been reinforced by his lack of appreciation for the tightly run conferences of Hughes and what he believed to be the superficial harmony of the Taft years. Stone, in a sense, rebelled against the chiefs under which he had served. As Mason has best stated: "On the matter of 'massing the court,' Stone thought there was a line beyond which a Chief Justice could not, with propriety, press for compromise. He might seek unanimity by removing doubts and misunderstanding 'so far as that could be accomplished by exposition and discussion at conference.' But unanimity purchased at the cost, 'either for himself or others, of strongly held convictions' was not worth the price. A Chief Justice should recognize the 'part played in the development of law by the dissenting opinion'" (Mason, 1956, p. 575). In short, Stone boasted that "in his Court . . . conflict represented intellectual, not personal differences" (Mason, 1956, p. 591).

DISCUSSION AND CONCLUSIONS

The evidence examined in the foregoing analysis leads to the conclusion that much of the responsibility for changing the operational norms of the Court from institutional unity to permitting free expression of individual views can be attributed to the leadership of Harlan Fiske Stone. His conception of the chief justiceship radically differed from his predecessors. He rejected the "no dissent unless absolutely necessary" rule and believed that good law was the product of the clash of individually expressed positions. Importantly, Stone refused to enforce consensus expectations, always remaining a participant rather than a leader (Steamer, 1986, p. 266). He led by example in maintaining high rates of concurring and dissenting opinions.

However, it is doubtful that Stone's leadership alone can account for the abrupt alteration in Court behavior. Other conditions, which coincided with

Stone's elevation, substantially enhanced the impact of his leadership style and may have been necessary, if not sufficient, factors in producing the radical change in Court norms. The Court's jurisdiction had been largely converted to one of discretion. The associates were generally young and had relatively few years of Supreme Court experience. They had not been deeply immersed in the traditional norms of the institution; nor for that matter, of any other appellate court. Instead, they came from backgrounds in which individual articulation of views was expected and independence of thought rewarded. With the most crucial legal battles of the New Deal already won, conditions were ripe for disagreement on emerging issues. Unlike earlier leaders of the Court, Stone did not attempt to curb this tendency but granted the associate justices "permission" to disagree. Delivered from the restrictions of the past, the associates took full advantage of the chief's tolerant attitudes toward individualism.

Stone died in 1946, succumbing to a massive cerebral hemorrhage that struck immediately after he delivered his dissenting opinion in the naturalization case of *Girouard v. United States* (328 U.S. 61). Although he had served only five years in the center chair, the shortest chief justiceship since Oliver Ellsworth stepped down in 1800, Stone's tenure in that position had a remarkable impact on the institution of the Supreme Court.

Importantly, the Court did not revert to its traditional expectations following Stone's death. The norm changes introduced under his leadership were maintained in spite of immediate attempts to reverse them. Like many others, President Truman looked with disapproval on the results of the Stone years. In selecting a new chief justice, the President desired a leader to bring unity back to the Court. Truman's choice was the affable and kindly Fred Vinson (Frank, 1954). Clearly, Truman hoped that Vinson would be capable of curbing the rise of individuality among the justices. As one scholar explained: "Although Truman admired Vinson's record in government and agreed with his political philosophy, his personality was the most important factor in influencing the decision to appoint him to the High Court. His sociability and friendliness, his calm, patient, and relaxed manner, his sense of humor, his respect for the views of others, his popularity with the representatives of many factions, and his ability to conciliate conflicting views and clashing personalities and to work out compromises were qualities that Truman admired. Even more important, those personal qualities seemed to the President to fit the needs of the situation inside the Supreme Court. Dissension and dissent were on the rise . . . Vinson seemed capable of unifying the Court and thereby improving its public image" (Kirkendall, 1969, p. 2641).

Truman's hopes did not materialize. Vinson faced a Court unwilling to return to the old ways. The eight associate justices already in place when the new chief justice opened the October 1946 term represented forty-six years

of experience, 74 percent of which had been served under Stone. All of the associates had spent a majority of their Court tenures under the Stone regime. Rutledge, Jackson, and Burton had served only under Stone and had no exposure to pre-Stone consensus norms. Frankfurter, Douglas, and Black, once freed from the expectations of cohesion and consensus, continued to assert their new prerogatives after Vinson's nomination. Significantly, each member of this trio had long years of service after Stone's death: Black and Douglas for more than a quarter century and Frankfurter for a decade and a half. Vinson was unable to reimpose the norm that individual views should be suppressed in deference to the majority. Instead, the Vinson Court became characterized as "nine scorpions in a bottle" (Steamer, 1986, p. 19). Successive new justices joined and were socialized into a Court with behavioral expectations quite unlike those operative in the pre-Stone years. Consequently, although Stone's term as chief justice was relatively short, his views on individual judicial expression constituted a legacy protected by his surviving associates.

Vinson's successors to the center chair did not attempt to turn back the clock. Earl Warren, Vinson's immediate replacement, may have possessed many of the necessary leadership qualities to promote cohesion. Yet Warren came to the Court directly from the political world having had no exposure to the traditional norms of the judiciary. He could hardly be expected to value pre-1941 behavioral expectations, or impose them on associate justices who were by then accustomed to readily engaging in dissenting and concurring opinions. Except for extraordinary situations, such as posed by the *Brown* case, there is little evidence that Warren expended special effort to bring about unanimity. Instead, he was primarily interested in insuring that internal disagreement was accepted by the justices without rancor (Katcher, 1967, p. 312), thus further institutionalizing the practice. By the time Warren Burger rose to the Supreme Court in 1969, the atmosphere initiated in the Stone era was more than a quarter century old and firmly rooted.

Contemporary justices accept individual expression as an established practice. Some describe dissenting behavior in rather matter-of-fact terms (see, for example, Rehnquist, 1987, pp. 302-03). Others speak of a justice's "responsibility" and "duty" to articulate views that differ from the majority (Brennan, 1985). This attitude is a far cry from earlier times when even Justice Holmes, noted for distinguishing his views from those of the majority, acknowledged "it useless and undesirable, as a rule, to express dissent" (*Northern Securities v. U.S.*, 193 U.S. 197, 400, 1904).

Hence, the long-term consequences of the regime change occurring under Stone's leadership are institutional in nature. Today we have a Supreme Court characterized by division rather than consensus. Was this a change for the better? Naturally this is a very difficult issue to address, but one upon which a great many scholars, lawyers, and judges have commented. Those

who suggest that dissents and concurrences serve a negative institutional function offer the following reasons. First, individual opinions may shake public confidence in the judiciary by bringing into question the certainty of the law (Bowen, 1905; Hughes, 1928; Schmidhauser, 1979). Second, dissents and concurrences avert the Court from functioning in the most ideal way—as an “organic unit” (Swisher, 1958; Schwartz, 1957). And third, as expressed in the American Bar Association’s *Canons of Judicial Ethics*, when individual opinions are inconsistent with past jurisprudence or are based on issues of less than fundamental importance, they tend to pervert the judicial function and weaken the development of the law. In an award-winning essay on dissents, R. Dean Moorhead noted that, “If the decisions of a court are consistently accompanied by concurring or dissenting opinions which represent attempts to substitute the impulses of the present for the wisdom of the past, the law suffers, and the only possible prediction is one of chaos” (1952, p. 884).

However, the institutionalization of individual judicial expression has received a great deal of support from other quarters. One school of thought, grounded in Jeffersonian views of the judiciary,⁷ suggests that dissents and concurrences not only represent divisions of opinion within society (Douglas, 1948), but reflect democratic values as well. According to one adherent, Stanley Fuld, “. . . disagreement among judges is as true to the character of democracy, and as vital, as freedom of speech itself. . . . Indeed, we may remind ourselves, unanimity in the law is possible only in fascist and communist countries” (1962, p. 926). Thus, as Chief Justice Stone would most assuredly agree, individuals, whether they be average citizens or justices of the Supreme Court, should be free to express their views.

Scholars and justices have also argued that dissents and concurrences increase the quality of the judicial decision-making process and generally make for a more “responsible judiciary” (see Stone, 1942). One scholar contends that the mere threat of a dissent in conference helps to improve judicial decisions: “The thousands of potential but unwritten dissents and concurrences have no doubt raised the caliber of judicial opinions substantially just because they might have been written” (Stephens, 1952, p. 404).

What are the implications of this study for future research? On one level, further examination of the evolution, nature, and use of individual judicial expression is indicated. A substantial difference of opinion exists over the implications of the regime change ushered in by Stone’s years in the center chair. The purpose of the present research was merely to locate the sources of that change. Studies examining its ramifications may ultimately address the question of whether history should regard Stone as a hero or a failure.

⁷For example, Jefferson disliked the decision-making process used by the Marshall Court, claiming that the Court was “cooking up opinions in conclave.” Jefferson wanted the Court to return to the *seriatim* tradition (See Moorhead, 1952).

On another and perhaps more important level, the results of this study point to the promise offered by diachronic research designs in the investigation of the American legal system. Those who use traditional methods to explore areas of public law would never consider beginning their studies at the Warren or Burger Court eras. They have always recognized the importance of understanding the historical development of doctrinal trends. Yet, for far too long, students of the judicial process have concentrated exclusively on relatively short, discrete and contemporary periods. Certainly, longitudinal research can help us develop a richer appreciation for the Supreme Court as an institution.

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