DOCUMENT RESUME

ED 178 407 SO 012 067

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TITLE Manual for the Judicial Behavior Laboratory.
INSTITUTION Minnesota Univ., Minneapolis. Dept. of Political Science.
SPONS AGENCY National Science Foundation, Washington, D.C.; Office of Education (DHEW), Washington, D.C.
PUB DATE 69
GRANT GY-3772; OEG-3-7-061513-0058
NOTE 208p.; For related documents, see ED 026 628, ED 040 890, and SO 012 065-066; Some pages may not reproduce clearly due to light print

EDRS PRICE MF01/PC09 Plus Postage.
DESCRIPTORS *College Curriculum; Comparative Analysis; *Constitutional Law; *Court Litigation; *Data Analysis; Higher Education; Individual Power; Instructional Materials; Legal Education; *Political Science; Politics; Research Methodology; Research Skills; Supplementary Textbooks

ABSTRACT

This manual introduces undergraduates to resources and data analysis methods for studying judicial behavior and constitutional law. It contains 12 exercises, most of which are based on outside reading and analysis of data provided in appendices. Exercise one introduces the basic tools and methods for research in a law library, emphasizing use of the "Corpus Juris Secundum," "Shepard's Citations," and the "Index to Legal Periodicals." Exercise two discusses fundamentals for reading and briefing a case, and for understanding and organizing a court opinion. Exercise three explores the relation of established rules of law to the values and attitudes of the community or culture in which they have developed. Exercises four through six examine the relationship between judges' background characteristics, such as religion or party affiliation, and their judicial decisions. Data from voting records provide the basis for these exercises. Various data analysis methods are explained in exercises seven through 12. These include construction and use of Guttman scales, bloc analysis matrices, and a voting power index. These methods are useful in determining how a specific judicial decision compares to others, and how much influence one member of a voting body has in comparison to other members of the same body. (Author/AV)

MANUAL
for the
JUDICIAL BEHAVIOR LABORATORY

by

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This manual was prepared under grant OEG-3-7-061513-0058 from the Office of Education and grant GY 3772 from the National Science Foundation. All or parts of this manual may be used without restriction, provided credit is given.

Fall 1969

Introduction

This manual is one in a series of such efforts by members of the Department of Political Science at the University of Minnesota, under grants by the National Science Foundation and the U. S. Office of Education. The general philosophy of the series and the specific titles are contained in the Editor's Preface, while this introduction is written in application to this volume alone.

From the beginning, each of these efforts has varied slightly in response to problems in the sub-field, the state of the literature in the relevant area of study and the type of course for which the material is relevant. Some have more or less emphasis on substance and method; some have plans for political games; others have computer-based exercises.

We have adapted the general outline of the manual to courses in judicial behavior and constitutional law in two ways: (1) We have included a small but significant portion of work in the traditional legal virtues and skills -- briefing cases, shepardizing, and use of legal indexes; (2) recognizing the size of many such courses, we have made our data self-available. Other manuals in the series involve data on cards and runs on the counter-sorter or, even, technical efforts. Because the usual number of variables doesn't usually justify automation, we have also supplied tables of voting in our appendixes, which, in effect, are our data sources.

This preliminary edition will shortly be replaced by a permanent one by Little, Brown and Company. We will appreciate all the more, therefore, criticism and comment.

Samuel Krislov
Minneapolis
November 12, 1969

Editor's Preface

This manual is the third of a series aimed at bringing to undergraduate teaching the sophistication and the excitement of dealing with genuine research problems, the discovery and examination of data, rather than passive acceptance of conclusions. Members of the Department of Political Science at the University of Minnesota have been involved in the development of such a program for nearly six years. The first of the series -- on political behavior, written by William Flanigan and David RePass -- was issued in 1967. A revised edition of that effort is available from Little, Brown and Company. The second -- on comparative politics by Edwin Fogelman -- will be available from them in Spring 1970. We expect over the course of the next year to issue similar -- but individualized -- efforts as follows: community power, Thomas Scott; legislative behavior, Eugene Eidenberg; international relations, Ellen Pirro; political development, Roger Benjamin; and quantitative methods by Roger Benjamin and William Flanigan. As these are revised for final publication, they will also be published by Little, Brown and Company.

The project itself is supported by the Office of Education and the National Science Foundation. In accordance with the principles of public support, and our own purposes, we are making all materials available without restriction, asking only that credit be given for any use of the materials.

Samuel Krislov
Minneapolis
November 1969

Judicial Process Laboratory

EXERCISE #1

The first exercise is intended to familiarize you with the problems and procedures of data-gathering that are peculiar to judicial process research. In particular, there are certain reference resources that you should learn to use. Among these are Shepard's Citations, Corpus Juris Secundum and the Index to Legal Periodicals.

1. Shepard's

Every printed case can be characterized by a short-hand address, a citation. This is in principle the same as any reference citation, but because lawyers utilize so many sources the citation has less redundancy and is condensed. Standard abbreviations are also used so as to permit further condensing of information.

Each case citation is coded by reference to the volume and page numbers of the particular report in which it is printed. For example, the citation "75 US 809" indicates Volume #75 of United States Supreme Court Reports, p. 809. There are a number of reporting systems. Some of the major ones are:

(1) for Supreme Court cases: US (United States Supreme Court Reports)

LE (Lawyer's Edition, United States Supreme Court Reports)

SC (Supreme Court Reporter)

(2) for lower Federal Courts: F or F2d (Federal Reporter, Second Series)

FS (Federal Supplement)

(3) for state courts: regional reporters, A2d (Atlantic Reporter, Second Series, for states in the Atlantic area), etc.

state court reporters published by individual states, Pa or Minn or Va, etc.

Shepard's is a further compacting of a great mass of information in short compass. It attempts to take all reported decisions, indicate the history of the case through lower courts, and point out the use of the decision in later cases.

Each case is listed in single-column indicating volume number; the case is identified only by the opening page number which constitutes its unique address (see our example: 354 US 234). The history is indicated by listing the lower court decision and preceding it by a descriptive letter. So, "a 100 NH 163" would mean the case was decided in Volume 100 of the New Hampshire Reports and is affirmed in this Supreme (or other) Court decision.

Further use of the case or treatment uses a different set of lower case letters to indicate outcomes. In this case Sweezy was followed in 354 US 929 but distinguished in 360 US 73.

Turn now to the example which follows from Shepard's United States Citations and note their own directions. Note especially their abbreviations on page 9. Read this thoroughly. The following questions are designed to test your understanding of this method.

1) What are the two other citations for the U.S. Supreme Court decision Sweezy vs. New Hampshire (354 US 234)? _____

_____

2) This case originated in the state courts of New Hampshire. What are the two state Supreme Court citations for that decision?

_____

3) What does "App. & E." stand for? _____

4) On the point of refusal to answer questions in legislative inquiries, which Supreme Court case (Majority opinions) cite Sweezy favorably? _____

_____

_____

_____

Which lower Federal courts? _____

_____

_____

_____

_____

_____

5) What is the difference between the top cases (marked by a bracketed "1" in your example) and those marked "2"? _____

_____

_____

_____

_____

6) Why does Shepard's go to the trouble of indicating by "j" citations of the case by dissenters, as opposed to majority use of the case?

_____

_____

_____

7) Has Sweezy been overruled? _____

Distinguished? _____

_____

8) If you were a lawyer preparing a case and wanted to cite Sweezy why would you want the above information? _____

_____

_____

_____

9) How would you find out in what way the case was distinguished?

_____

_____

_____

10) If your case dealt with the question of jurisdiction but had nothing to do with investigations, refusal to answer and the fourteenth amendment, would you be as interested in 360 US 73? _____

What case would interest you most? _____

You should now have some grasp of how this system works, so that you are able to use it to find needed information on other cases. To give you some further practice, we have included on page 10 a partial set of citations from Shepard's for another case, which you will use to answer the following questions. The case is Gitlow vs. New York (268 US 652), a very significant free speech case, which we will refer to later.*

11) If you were interested in criticisms of this (Gitlow) decision by other courts, which cited case would you want to look up?

_____

12) How would you know if the Gitlow cases were overruled by any of the other cited decisions? _____

Is there any indication that it was overruled? _____

13) In how many cited cases was the ruling in Gitlow explained?

_____

14) How many of these were Supreme Court decisions? _____

15) If you wanted to trace the pre-decision history of Gitlow, where would you look?

_____

_____

_____

2. Corpus Juris

Another useful reference is Corpus Juris Secundum, which is a type of encyclopedia using important legal terms and phrases as headings. Each heading contains both explanatory comments and comprehensive references

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* Shepard's tries to cumulate its citations but the process of building up citations goes on. This means that you have to look in a few volumes for a complete history of a case, particularly an older one. This is less confusing in practice than it appears. Vol. 1 of the US citations covers through 1943; Gitlow was decided in the 1920's so you have to start with Vol. 1 and go through the two bound volumes and the recent paper-bound supplement to completely Shepardize. Sweezy was decided after 1943, so you start with Vol. 2. Since old cases are constantly being cited in new ones you always must go to all issues subsequent to the first one.

to the relevant case law. Corpus Juris is comprised of two sets of volumes: the first is a general index containing only headings and references to the full discussion found in the second set of volumes. There are a variety of subheadings under each indexed subject. As with most indexes, one should search through several headings and subheadings to find precisely what one is looking for. Note that the text gives both summary points of law and references to the relevant case law.

On page 1-11 of this manual you will find a reproduced page of the C.J.S. (Vol. 46, p. 1090) taken from the section on sedition. We have chosen this particular page to show how one might pursue some topics related to the Gitlow case. The sedition heading is only one of several possible leads to further information on this case.

16) Where would one find material on the right of assembly?

_____

_____

17) What Supreme Court case, holding that assembly could not be forbidden without regard to topic, would seem to be useful to Shepardize if you were interested in freedom of assembly?

_____

_____

_____

18) On freedom of speech where would you look in C.J.S.?

_____

_____

19) On treason, where would you look? _____

_____

_____

3. Index

A third useful reference source is the Index to Legal Periodicals, which is similar in format to any periodical index. We have reproduced a page of this Index (page 1-12) which contains the section on the topic of free speech. Again, we might have looked under other headings (such as

"sedition") but in this Index the topics relating to the Gitlow decision were grouped under the heading "freedom of speech." You will not always be that lucky.

20) Why would you want to refer to this Index in addition to Corpus Juris Secundum and Shepard's Citations?

21) Using the page list of cases of the Index reproduced here, compile a short list of cases dealing directly with the Gitlow decision.

22) Using the Index list three articles you might pursue to write a paper on Gitlow.

ILLUSTRATIVE CASE

United States Supreme Court Reports

Vol. 354

—234—
(1 LE1311)
(77 SC1203)
s352 US 812
s 77 SC 49
s355 US 852
s 2 LE 61 1
s 78 SC 7
s100 NH 103
s121 A2d 783
f354 US 929
f 1 LE1532
f 77 SC1391
j354 US 929
j 1 LE1532
j 77 SC1391
f354 US 929
f 1 LE1535
f 77 SC1403
j354 US 929
j 1 LE1535
j 77 SC1403
f355 US 16
f 2 LE 22
f 78 SC 57
365 US 437
5 LE 658
81 SC 588
App. & E. Jurisdiction -Showing- Necessity
357 US 473
2 LE1429
78 SC1314
Const. Law 2
Fourteenth Amendment-Subversive Persons Investigation-Refusal to Answer
357 US 463
2 LE1500
78 SC1172
359 US 353
3 LE 870
79 SC 843
j350 US 382
j 3 LE 801
j 79 SC 817
d360 US 73
d 3 LE1094
d 79 SC1043
j360 US 82
j 3 LE1099
j 79 SC1047
Continued

Citations to the case of Sweezy v. New Hampshire, by Wyman, Attorney General as reported in Volume 354 United States Supreme Court Reports at page 234 are shown in the left margin of this and the following page in the same form in which they appear in the United States Supreme Court Reports division of this volume.

Cross references to a cited case as also reported in the Lawyers' Edition, United States Supreme Court Reports, Supreme Court Reporter and the Annotated Reports System are shown enclosed in parentheses immediately following the page number of that case when first available and are not repeated in subsequent volumes. Thus the references "(1 LE 1311)" and "(77 SC 1203)" immediately following the —234— page number of the Sweezy case indicate that that case is also reported in Volume 1 Lawyers' Edition, United States Supreme Court Reports, Second Series at page 1311 and in Volume 77 Supreme Court Reporter at page 1203 and the absence of an Annotated Reports System reference enclosed in parentheses indicates that it is not reported in the Annotated Reports System.

Citations to each cited case in the United States Supreme Court Reports division are grouped as follows:

1. citations by the United States Supreme Court, the lower federal courts and state courts analyzed as to the history of the cited case;
2. citations by the United States Supreme Court and the lower federal courts analyzed as to the treatment accorded the cited case;
3. citations in federal department reports;
4. citations in state reports and units of the National Reporter System arranged alphabetically by states;
5. citations in articles in the American Bar Association Journal; and
6. citations in annotations of the Lawyers' Edition, United States Supreme Court Reports and of the Annotated Reports System.

For the purpose of illustration only, this grouping has been indicated by bracketing the citations accordingly. It will be noted that as yet there are no citations in group three.

In indicating the history and treatment of a cited case, the letter-form abbreviations shown on page 17 are used.

An examination of the citations relating to the history of the cited case indicates that another phase of the same case "s" in the United States Supreme Court was reported

h360 US 127
h 3 LE1129
h 79 SC1093
j360 US 140
j 3 LE1137
j 79 SC1100
j360 US 166
j 3 LE1151
j 79 SC1114
360 US 424
3 LE1348
79 SC1250
362 US 66
4 LE 504
80 SC 539
j363 US 506
j 4 LE1363
j 80 SC1552
364 US 487
5 LE 237
81 SC 251
j364 US 495
j 5 LE 242
j 81 SC 256
j365 US 447
j 5 LE 665
j 81 SC 504
j367 US 143
j 5 LE 716
j 81 SC1435
j367 US 514
j 6 LE1002
j 81 SC1761
e252 F2d 130
j252 F2d 138
j252 F2d 840
272 F2d 660
294 F2d 711
e154 FS 605
174 FS 360
d196 FS 755
d22 FRD274

220 Ark825
319 SW 41
196 CA2d804
16 CaR818
— Fla —
16 So2d 17
18 J2d 213
163 NE 445
101 NH 83
133 A2d 788
101 NH 139
136 A2d 221
101 NH 173
137 A2d 514
103 NH 218
169 A2d 4
6 NY 143
188 S2d 526
160 NE 68
18 Misc2d535
188 S2d 887
167 OS 295
147 NE 847
402 Pa 103
166 A2d 275
202 Va 159
116 SE 68

44 ABA 86
45 ABA234
46 ABA272

2 LE1723n
6 LE1357n

2

4

5

6

both in 352 United States Supreme Court Reports "US" 812 and in 77 Supreme Court Reporter "SC" 49, that a further phase of the same case was reported in 355 US 852 as well as in 2 Lawyers' Edition, United States Supreme Court Reports, Second Series "LE" 61 and 78 SC 7 and that another phase of the same case in the Supreme Court of New Hampshire was reported both in 100 New Hampshire Reports "NH" 103 and in 121 Atlantic Reporter, Second Series "A2d" 783.

Each reference for a citing case as reported in one of the principal series of federal or state reports is followed by any cross reference to the same case as also reported in one or more of the other series of reports listed on the title page to the United States Supreme Court Reports division.

An examination of the treatment accorded the cited case indicates that it has been followed "f", distinguished "d" and harmonized "h" by the United States Supreme Court, distinguished and explained "e" by lower federal courts, referred to without particular comment by the United States Supreme Court in several cases and by a lower federal court in a case reported in 174 Federal Supplement "FS" 360 and has been cited in dissenting opinions "j" by the United States Supreme Court in several cases and by lower federal courts in two cases reported in Federal Reporter, Second Series "F2d".

The subject matter involved in any particular point of law dealt with in the cited case is indicated by topic words under which are shown any citing references by the federal courts relating to that particular point of law. Thus the words "Appeal and Error", abbreviated to "App. & E." and "Jurisdiction–Showing–Necessity" indicate the subject matter of a point of law dealt with in the Sweezy case which is also dealt with in the case reported in 357 US 473, 2 LE 1429 and 78 SC 1314.

Through the topic words, the citations dealing with a particular point of law may be referred to instantly without examining every citation to the cited case. The topic words do not apply to citations listed below a separation line across the column and so in this illustration do not apply to the citations following "d 22 FRD 274".

The cited case has also been referred to by the courts of Arkansas, California, Florida, Illinois, New Hampshire, New York, Ohio, Pennsylvania and Virginia in cases reported in each instance in both the state series of reports and in the corresponding unit of the National Reporter System.

The cited case is also shown as having been cited in articles in 44 American Bar Association Journal "ABA" 86, 45 ABA 234 and 46 ABA 272 and in annotations "n" in 2 LE 1723 and 6 LE 1357.

ABBREVIATIONS—ANALYSIS

History of Case

a (affirmed)	Same case affirmed on rehearing.
cc (connected case)	Different case from case cited but arising out of same subject matter or intimately connected therewith.
m (modified)	Same case modified on rehearing.
r (reversed)	Same case reversed on rehearing.
s (same case)	Same case as case cited.
S (superseded)	Substitution for former opinion.

Treatment of Case

c (criticised)	Soundness of decision or reasoning in cited case criticised for reasons given.
d (distinguished)	Case at bar different either in law or fact from case cited for reasons given.
e (explained)	Statement of import of decision in cited case. Not merely a restatement of the facts.
f (followed)	Cited as controlling.
h (harmonized)	Apparent inconsistency explained and shown not to exist.
j (dissenting opinion)	Citation in dissenting opinion.
L (limited)	Refusal to extend decision of cited case beyond precise issues involved.
o (overruled)	Ruling in cited case expressly overruled.
p (parallel)	Citing case substantially alike or on all fours with cited case in its law or facts.
q (questioned)	Soundness of decision or reasoning in cited case questioned.

151 F2d 691
171 F2d 948
175 F2d 620
181 F2d 952
('50 MC 1103)
185 F2d 780
188 F2d 718
d230 F2d 642
201 F2d 34
282 F2d 512
284 F2d 231
288 F2d 582
308 F2d 917
38 FS 515
39 FS 187
50 FS 388
55 FS 904
59 FS 638
(64 PQ164)
61 FS 612
66 FS 120
69 FS 588
75 FS 699
82 FS 361
83 FS 396
99 FS 892
101 FS 60
109 FS 147
d117 FS 646
130 FS 61
148 FS 496
e166 FS 794
q178 FS 564
('61 MC758)
180 FS 693
209 FS 736
d 4 FRD354
5 FRD 18
7 FRD204
(73 PQ 8)
9 FRD314

312 IIA 605
38 NE 821
214 La 802
38 So2d 787
4 FRD219

—625—

Const. Law
Sixteenth Amendment-Construction-Scope
j366 US 248
j 6 LE 270
j 81 SC1071
200 FS 333

Int. Rev. Income Tax-Railroad Subsidies
e319 US 103
e 87 LE1290
e 63 SC 994
126 F2d 726
d129 F2d 765
131 F2d 622
d135 F2d 115
150 F2d 588
d166 F2d 650
180 F2d 422
d210 F2d 369
q211 F2d 931
d254 F2d 109
308 F2d 638
86 FS 230
107 FS 944
(123 CCl 514)
f118 FS 352
197 FS 676
203 FS 273

W. & Ph. Income
180 F2d 850
189 FS 74

44 BTA793
45 BTA 81
45 BTA360
47 BTA136
9 TCt1093
12 TCt 259
19 TCt 587
27 TCt 727
27 TCt 730
27 TCt 733
6 H2d 99
126 NE 713
51 NJS 50
143 A2d 190
58 W2d287
302 P2d 246
96 LE1242a

—633—

359 US 234
3 LE 773
79 SC 703
('59 MC 2094)

Lim. of Act. Shippers-Reparation Claims-Filing
320 US 359
88 LE 100
64 SC 129
d352 US 72
d 1 LE 137
d 77 SC 160
176 F2d 644
184 F2d 588
184 F2d 943
192 F2d 477
89 FS 984
80 FS 880
d205 FS 856
(133 PQ642)
210 FS 550

Statutes New Enactments-Pending Cases
80 FS 738

Retroactive-Due Process
320 US 363
88 LE 103
64 SC 132
d325 US 312
d 89 LE1634
d 65 SC1141
d326 US 298
d 90 LE 89
d 66 SC 127
826 US 810
90 LE 95
66 SC 132

TD19217
21 Cn2d250
131 F2d 548

—CA2d—

124 F2d 910
216 Mia 277
13 NW 5
258 Mia147
103 NW 235

—NY—

92 S2d 204
21 W2d426
151 F2d 443
21 W2d436
161 F2d 448
9 FRD154
98 LE312n
137 AR1441n
105 AR 508n

—638—

Railroads Federal Control-Director General-Liability
66 FS 264
11 FRD345

-Substitute Defendant-Limitations
121 F2d 208
186 F2d 303
('51 MC538)
202 F2d 410
d217 F2d 28
301 F2d 242
40 FS 269
66 FS 268
87 FS 425
92 FS 947
(86 PQ468)
111 FS 151
114 FS 454
146 FS 931
153 FS 923
155 FS 357
190 FS 884
('60 MC 2101)
191 FS 120
199 FS 885
200 FS 27
f 2 FRD168
22 FRD 36

244 Ia 912
58 NW 304
318 Mas 125
60 NE 597
371 Pa 441
89 A2d 530
7 LE1040n
8 A3 144n
67 A21050n

—648—

Taxation Government Property
822 US 188
88 LE1220
64 SC 916
140 F2d 287
145 F2d 331
49 FS 438
163 FS 205

60 Az 156
132 P2d 636
347 Mo1125
152 SW 58
212 Or 407
320 P2d 281
347 Pa 203
32 A2d 242

—646—

App. & E. Unassigned Errors
316 US 592
86 LE1099
62 SC1237
321 US 259
88 LE 713
64 SC 551
327 US 484
90 LE 801
66 SC 968
347 US 206
98 LE 630
74 SC 464
('54 CD311)
(100 PQ328)

—652—

323 US 527
89 LE 438
65 SC 321
j352 US 595
j 1 LE 580
j 77 SC 543
j366 US 62
j 6 LE 123
j 81 SC1013

Const. Law Free Speech-When Violated
314 US 281
86 LE 202
62 SC 193
j314 US 290
j 86 LE 218
j 62 SC 207
315 US 571
86 LE1035
62 SC 769
316 US 593
86 LE1099
62 SC1237
318 US 422
87 LE 877
63 SC 669
j319 US 121
j 87 LE1302
j 63 SC 892
j326 US 512
j 90 LE 271
j 66 SC 281
328 US 335
90 LE1298
66 SC1031
j332 US 79
j 91 LE1023
j 67 SC1090
333 US 509
92 LE 840
68 SC 667
j337 US 20
j 93 LE1147
j 69 SC 997
339 US 305
94 LE 941
70 SC 682
e341 US 505
e 95 LE1150
e 71 SC 805
341 US 536
95 LE1160
71 SC 881
341 US 541
95 LE1169
71 SC 883
341 US 562
95 LE1180
71 SC 893
j341 US 592
j 95 LE1195
j 71 SC 998
j343 US 270
j 96 LE 940
j 72 SC 742
j343 US 291
j 96 LE 946
j 72 SC 748
343 US 500
96 LE1105
72 SC 780
d350 US 500
d100 LE 651
d 76 SC 479
354 US 318
1 LE1375
77 SC1070
j354 US 503
j 1 LE1517
j 77 SC1319
357 US 460
2 LE1498
78 SC1171
357 US 530
2 LE1475
78 SC1353
j360 US 83
j 8 LE1100
j 79 SC1047
j364 US 497
j 5 LE 243
j 81 SC 257
365 US 47
5 LE 466
81 SC 393
j366 US 150
j 6 LE 180
j 81 SC 975
j367 US 148
j 6 LE 710
j 81 SC1437
j368 US 201
j 7 LE 230
j 82 SC 271
370 US 382
8 LE 576
82 SC1369
120 F2d 864
130 F2d 656
f138 F2d 145
141 F2d 373
167 F2d 247
182 F2d 65
183 F2d 208
183 F2d 235
183 F2d 502
203 F2d 23
258 F2d 783
260 F2d 24
291 F2d 494
38 FS 583
49 FS 300
63 FS 432
50 FS 247
78 FS 165
78 FS 175
80 FS 484
80 FS 597
103 FS 926
106 FS 641
128 FS 622
156 FS 929
161 FS 11
164 FS 128
179 FS 948
181 FS 486
183 FS 625
202 FS 357
206 FS 702

Statutory Crime-Anarchy
j350 US 515
j100 LE 658
j 76 SC 487

Statutes Construction-Police Power-Presumption
336 US 91
93 LE 524
69 SC 456
342 US 492
96 LE 524
72 SC 385
357 US 537
2 LE1479
78 SC 1346
249 F2d 621
56 FS 248
78 FS 165
j 78 FS 182
e 90 FS 428
144 FS 389

244 Ala 54
14 So2d 233
250 Ala 68
33 So2d 328
31 AlA 125
14 So2d 239
32 AlA 425
26 So2d 523
91 Az 305
372 P2d 725
19 Cn2d514
122 P2d 37
28 Cn2d102
168 P2d 714
28 Cn2d543
171 P2d 890
28 Cn2d561
171 P2d 900
48 Cn2d434
311 P2d 517
65 CA2d586
151 P2d 159
78 CA2d649
178 P2d 544
DCMunApp
81 A2d 201
156 Fla 242
22 So2d 883

— Fla —

128 So2d 184
37 Il 632
230 Ia 621
298 NW 827
379 Ill 514
41 NE 517
408 Ill 517
97 NE 346
225 Ind 436
75 NE 918
226 Ind 524
82 NE 409

— Ky —

247 SW 901
200 La 158
7 So2d 693
318 Mas 558
62 NE 848
324 Mich 453
36 NW 735
193 Md 328
67 A2d 507
193 Md 496
69 A2d 459
194 Md 484
71 A2d 486
191 Mis 870
4 So2d 361
194 Mis 26
11 So2d 669
180 Mt 120
205 P2d1051
91 NH 317
18 A2d 760
99 NH 49
165 A2d 760
100 NJ 446
130 A2d 286
8 NJ 616
71 A2d 378
12 NJ 271
96 A2d 520
25 NJS321
96 A2d 62
127 NJL401
22 A2d 881
135 NJL587
52 A2d 807
47 NM 241
141 P2d 199
301 NY 490
95 NE 812
303 NY 171
100 NE 407
305 NY 351
113 NE 510
305 NY 357
113 NE 514
268 Ap 31
48 S2d 231
276 Ap 509
95 S2d 457
276 Ap 529
96 S2d 469
280 Ap 523
113 S2d 761
2 Ap2d 8
151 S2d 408
12 Ap2d280
211 S2d 31
190 Msc1014
76 S2d 562
196 Msc698
93 S2d 256
208 Msc160
142 S2d 744
23 Msc2d870
198 S2d 199
20 Msc2d997
53 S2d 597
35 Msc2d513
231 S2d 740
36 Msc2d740
233 S2d 901

— NY —

30 S2d 490
53 S2d 597
159 OS 824
112 NE 816

OhioNP
108 NE 585
123 NE 445
152 NE 24
76 OCr309
184 P2d1018
77 OCr314
141 P2d 313
856 Pa 340
51 A2d 790
377 Pa 74
104 A2d 147
377 Pa 86
104 A2d 147
386 Pa 111
125 A2d 340
386 Pa 262
126 A2d 684
398 Pa 327
157 A2d 303
408 Pa 133
182 A2d 701
186 Ten 201
209 SW 276
150 Tx Cr612
193 SW 186
110 Ut 546
175 P2d 731
195 Va 183
77 SE 409
236 Wis 341
294 NW 638
270 Wis 274
70 NW 608
51 W2d763
822 P2d 817
77 Wyo 21
805 P2d 787
38 ABA337
41 ABA475
42 ABA 20
42 ABA820
43 ABA284
44 ABA 86
45 ABA1014
48 ABA931
93 LE1152n
93 LE1162n
96 LE1126n

—676—

No. 220
10 A31130n
10 A31134n

Continued

nated as criminal syndicalism[98] or criminal anarchy.[99]

Ordinarily these statutes have been upheld as valid,[1] and they have been held not to be in violation of the constitutional definition of treason.[2] Such statutes have been held not to be unconstitutional by reason of the fact that they do not penalize the same acts if done for the purpose of maintaining or perpetuating the same industrial or political condition,[3] or because the offense may be committed in any one of several different ways.[4] Such statutes have, however, been held invalid where they violate fundamental rights or are otherwise objectionable.[5]

Affiliation with syndicalist association. The statutes may not only prohibit the advocacy of the doctrines of syndicalism, but they may also, and often do, prohibit and penalize the association with, or membership in, organizations advocating such doctrines,[6] or inviting others to join such organizations,[7] and the courts have upheld the validity of statutes of this character.[8] It has been held, however, that the legislature cannot make it a crime to belong to a party organized or formed for the purpose of encouraging hostility or opposition to the government, unless the hostility or opposition includes a purpose to overthrow or subvert such government.[9]

Persons liable. Statutes against criminal syndicalism apply to corporations as well as to individuals.[10] The managing editor of a newspaper may be criminally responsible for an unlawful publication advocating the doctrines under consideration unless the unlawful publication is made under such circumstances as to negative any presumption of privity or want of ordinary precaution on his part

N.Y. 132, affirmed 45 S.Ct. 625, 268 U.S. 652, 69 L.Ed. 1138.

98. Cal.—People v. Lesse, 199 P. 46, 52 Cal.App. 280.

Purpose of act

The design and purpose of the Criminal Syndicalism Act is the suppression of what was deemed by the lawmakers a growing menace, arising from sabotage and other unlawful methods of terrorism in furtherance of industrial ends and in the adjustment of alleged grievances against employers.—State v. Dingman, 219 P. 760, 37 Idaho 253.

99. N.Y.—People v. Gitlow, 167 N.Y.S. 783, 195 App.Div. 773, 39 N.Y.Cr. 120, affirmed 136 N.E. 317, 234 N.Y. 132, affirmed 45 S.Ct. 625, 268 U.S. 652, 69 L.Ed. 1138.

1. Cal.—People v. McClennegen, 234 P. 91, 196 Cal. 445—Ex parte Wood, 227 P. 908, 194 Cal. 49—People v. Chambers, 72 P.2d 746, 22 Cal.App. 2d 687—People v. Wagner, 225 P. 464, 65 Cal.App. 704.
Idaho.—State v. Dingman, 219 P. 760, 37 Idaho 253.
Kan.—State v. Fiske, 230 P. 88, 117 Kan. 69, reversed on other grounds 47 S.Ct. 655, 274 U.S. 380, 71 L.Ed. 1108.
Mich.—People v. Ruthenberg, 201 N.W. 358, 229 Mich. 315, error dismissed Ruthenberg v. People of State of Michigan, 47 S.Ct. 470, 273 U.S. 782, 71 L.Ed. 890.
Ohio.—State v. Kassay, 184 N.E. 521, 126 Ohio St. 177.
Okl.—Wood v. State, 141 P.2d 309, 77 Okl.Cr. 305—Berg v. State, 233 P. 497, 29 Okl.Cr. 112.
Or.—State v. Denny, 68 P.2d 713, 153 Or. 541—State v. Pugh, 51 P.2d 827, 151 Or. 561—State v. Boloff, 4 P.2d 326, 138 Or. 568, rehearing denied 7 P.2d 775, 138 Or. 568.
38 C.J. p 162 note 29—p 168 note 34.

Validity of statutes under constitutional provisions as to:
Class legislation see Constitutional Law § 501.
Due process see Constitutional Law § 580.
Freedom of speech see Constitutional Law § 213.
Personal liberties see Constitutional Law § 202.
Right of assembly see Constitutional Law § 214.

Statute held sufficiently explicit

The act defining criminal syndicalism as the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing industrial or political ends, and declaring guilty of a felony any person who becomes a member or voluntarily assembles with any society or assemblage of persons which teaches or advocates such doctrine is sufficiently explicit.—Jaffee v. State, 134 P.2d 1027, 76 Okl.Cr. 95—Wood v. State, 134 P.2d 1021, 76 Okl.Cr. 89—Shaw v. State, 134 P.2d 999, 76 Okl.Cr. 271, rehearing denied 138 P.2d 136, 76 Okl.Cr. 271.

2. Wash.—State v. Hennessy, 195 P. 211, 114 Wash. 351.
38 C.J. p 163 note 35.
"Treason" defined see the C.J.S. title Treason § 1, also 63 C.J. p 814 notes 2, 3.

Fact that treason is defined in federal and state constitutions does not prevent legislature from enacting statute intended to prevent teaching of criminal syndicalism or sabotage.—Berg v. State, 233 P. 497, 29 Okl.Cr. 112.

3. Cal.—People v. Weiler, 204 P. 410, 55 Cal.App. 687.

Distinction discretionary and not arbitrary

The Criminal Syndicalism Act does not violate constitution in penalizing those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions while not penalizing those who may advocate a resort to such methods for maintaining such conditions, since the distinction is not arbitrary but within discretionary power of state to direct its legislation against what it deems an evil without covering whole field of possible abuses.—Jaffee v. State, 134 P.2d 1027, 76 Okl.Cr. 95—Wood v. State, 134 P.2d 1021, 76 Okl.Cr. 89—Shaw v. State, 134 P.2d 999, 76 Okl.Cr. 271, rehearing denied 138 P.2d 136, 76 Okl.Cr. 271.

4. Idaho.—State v. Dingman, 219 P. 760, 37 Idaho 253.

5. Cal.—Ex parte Campbell, 221 P. 952, 64 Cal.App. 360.

Conducting communist meeting

Statute, as applied to member of Communist party convicted for assisting in conducting meeting called under auspices of party, regardless of what was said or done at meeting, was unconstitutional.—De Jonge v. State of Oregon, Or., 57 S.Ct. 255, 299 U.S. 353, 81 L.Ed. 278.

6. Or.—State v. Laundy, 201 P. 958, 103 Or. 443.

7. Wash.—State v. Aspelin, 203 P. 964, 118 Wash. 331.

8. Cal.—People v. Thompson, 229 P. 896, 68 Cal.App. 487—People v. Wagner, 225 P. 464, 65 Cal.App. 704.

9. N.J.—State v. Gabriel, 112 A. 821, 95 N.J.Law 337.

10. Minn.—State v. Workers' Socialist Pub. Co., 185 N.W. 931, 150 Minn. 406.
Liability of corporation to criminal prosecution for criminal syndicalism see Corporations § 1364 a.

FREEDOM OF SPEECH—Continued

Due process of law, liberty, free speech. [Gitlow v. New York, 45 Sup Ct Rep 625.] Law Q Rev 42:12-15 Ja '26; **J. P. Hall.** Ill L Rev 20:809-13 Ap '26; Oreg L Rev 5: 324-9 Je '26

A few historical reminders as to importance of right of free speech. **F. W. G.** Mass L Q 11:25-8 Ag '26

Injury to trade or business; threat of prosecution. [American Mercury, Inc. v. Chase (Mass.) 13 F (2d) 224.] Mich L Rev 25:74-5 N '26

"Liberty" as including freedom of speech. [Whitney v. California, 47 Sup Ct 641, 646.] **C. T. L.** Va L Rev 14:49-55 N '27; id 63; **C. P.** U Pa L Rev 76:108-203 D '27; **E. F. Albertsworth.** Ill L Rev 22:541-5 Ja '28

Our courts and free speech. **T. J. Norton.** A B A Jour 13:658-9 N '27

Present status of freedom of speech under federal Constitution. [Fiske v. Kansas, 274 U S 380.] Harv L Rev 41:525-8 F '28

FREEDOM OF THE PRESS

Contempt of court. [Rex v. Editor of the New Statesman, 44 T L R 301; Rex v. Editor of the Daily Mail, 44 T L R 303.] L T 165:138 F 18 '28; Sol J 72:126 F 25 '28; Ir L T 62:61-2 Mr 10 '28; Just P 92:2[illegible] Ap 21 '28

Freedom of the press under our constitutions. **K. E. Michael.** W Va L Q 33:29-63 D '26

FREEHOLD

Customary freeholds. L T 163:489 Je 4 '27

Freehold estates in tenement buildings. L T 165:78 Ja 28 '28

Freehold, when involved within meaning of Illinois Practice Act. [Olin v. Reinecke, 322 Ill 440; Duncanson v. Lill, 322 Ill 528.] E. M. Leesman. Ill L Rev 21:808-10 Ap '27

FRENCH REVOLUTION

Barère, champion of nationalism in the French Revolution. **L. Gershoy.** Pol Sci Q 42:419-30 S '27

FUNERALS

Funeral expenses. L T 165:350-1 Ap 21 '28

FUTURE INTERESTS

See also Perpetuities

Acceleration of future interests. Harv L Rev 40:758-62 Mr '27

Acceleration of power to sell. [Aldenderfer v. Spangler (Ohio) 153 N E 517.] Ill L Rev 22:212-13 Je '27

Descent and distribution of contingent and executory interests. [Smith v. Sweetser, 19 F (2d) 974.] Mich L Rev 26:454-5 F '28

Executory devises, gift over for life attached to fee. [Abbott v. Boston Safe Deposit & Trust Co. (Mass.) 154 N E 861.] Harv L Rev 40:1016 My '27

Fee limited upon a fee by deed, heir construed as heir of the body. [Kidwell v. Rogers (W.Va.) 137 S E 5.] **H. Caplan.** W Va L Q 34:101-2 D '27

Future interests in Indiana. **B. C. Gavit.** Ind L J 3:505-27, 627-47 Ap-My '28

"Heirs" construed, vesting of legacies. [Lippincott v. Purtell (N.J.) 131 Atl 210.] Mich L Rev 24:724-5 My '26

Meaning of "lawful heirs." [Beardsley v. Johnson (Conn.) 134 Atl 530.] Mich L Rev 25:675-7 Ap '27

Ohio law as to creation of future interests in land. **C. C. White.** U Cin L Rev 1: 136-53 Mr '27

Personal property, estate by entirety, future interests. [Winchester v. Cutler, 194 N C 698, 140 S E 622.] **A. S. Kartus.** N C L Rev 6:342-5 Ap '28

Remainder to surviving children vested when. [Harrison v. Harrison (Ala.) 105 So 179.] **W. L. H.** Mich L Rev 24:399-402 F '26

Right of legislature to take way inchoate right to destroy contingent remainder. [Jennings v. Capen (Ill.) 151 N E 900.] **A. A. Bruce.** Ill L Rev 21:498-502 Ja '27

Right to dower in estate subject to executory devise. [Alexander v. Fleming (N.C.) 130 S E 867.] Yale L J 35:885-6 My '26

Running of Statute of Limitations against contingent remainderman. [Callison v. Wabash Ry Co. (Mo.) 275 S W 965.] Mich L Rev 24:422-3 F '26

Some Ohio problems as to future interests in land. **C. C. White.** U Cin L Rev 1:36-56 Ja '27

Vesting of legacies. [In re Roth's Will. (Wis.) 210 N W 826.] Mich L Rev 25:916-17 Je '27

GAME

See Fish and Game

GAMING

See also Lotteries

Agreement to refer to single arbitrator, jurisdiction of committee. [Joe Lee, Ltd. v. Dalmeny & Tattersall's Committee, 136 L T R 375.] Ir L T 61:96 Ap 16 '27

Betting. (Legislation.) L T 161:52-3 Ja 16 '26; id 163:207 Mr 5 '27

Betting and the totalisator. L T 165:252 Mr 24 '28

Betting certificates, liability of "runners." Just P 91:840 N 5 '27

Betting duty and illegal betting. [Clark v. Westaway, 91 J P N 622.] Just P 91:683 S 17 '27

Betting duty and the totalisator. [Attorney-General v. Luncheon and Sports Club Ltd., 165 L T 259.] L T 165:348-9 Ap 21 '28

Betting on horse racing as game of chance. [Utah State Fair Ass'n. v. Green (Utah) 249 Pac 1016.] **A. S. H., Jr.** Va L Rev 13:316-20, 324 F '27

Betting overseas. Sol J 71:275 Ap 2 '27

Judicial Process Laboratory

EXERCISE #2

Assigned Readings:

Gitlow v. New York 268 US 652 (1925)

Cantwell v. Connecticut 310 US 296 (1939)

Suggested Readings:

Harold Spaeth, An Introduction to Supreme Court Decision-Making (San Francisco: Chandler Publishing Company, 1965).
Karl Llewellyn, The Bramble Bush (New York: Oceana Publications, 1951).
Henry Abraham, The Judiciary: The Supreme Court in the Governmental Process (Boston: Allyn and Bacon, 1965).

While in the first exercise you familiarized yourself with the basic tools and methods for research in the law library, this exercise is designed to help you focus on the object of that search, the substance of the case itself. Here the fundamentals for reading and briefing a case will be discussed. In particular, a procedure for understanding and organizing a court's opinion will be presented. Before examining this procedure, however, several distinguishing features of judicial opinions should be emphasized and warnings issued.

A most important fact to remember in reading law is that it is often a tedious and slow process; plan to spend a great deal of time reading and especially re-reading a judicial decision. While opinions are often short and to the point, more often they are long and drawn-out, at times extending to dozens of pages. But more difficult than sheer length are the style and argumentation. Argumentation is often very subtle and involved; key words, phrases, or points are not underlined and often do not emerge on a first reading; secondary arguments and historical developments embellish the opinion; and a myriad of facts, often introduced with something less than clarity, are presented. Furthermore, contrary to what one might expect from a mechanism for articulating and applying precise and carefully drawn distinctions and rules, there is no standard format or style for presenting judicial decisions. Often the reader discovers the relevant facts distributed throughout the opinion rather than neatly summarized in the first paragraphs. Nor is the main argument always readily apparent. It too may be submerged in a host of other arguments and the judge's own rhetoric. Thus from all this, it is the reader's task to abstract the essence of the controversy and precisely identify the court's ruling. Generally speaking, this is what is meant by briefing a case. More precisely, briefing is summarizing and condensing in writing the nature of the controversy, the court's opinion, and its ruling in concise and clear language.

With this introduction we will now turn our attention to the details of briefing a case. A standard and very helpful format is to divide the brief into four sections: 1) facts, 2) question or problem, 3) opinion or reasoning, and 4) decision or ruling. It is the task of the reader, then, to proceed to condense and reconstruct the judicial opinion into these four parts. Thus, in the completed brief the initial section should state only the important facts of the case leading to the question. Then it should move into the general legal or constitutional question posed by the controversy. Next it should summarize the core of the court's opinion — the justification or reasoning behind its answer to the question. And lastly, it should present the court's decision, the ruling made after having posed and then examined the question. This is the suggested format of the brief; now let us consider each of its sections in more detail.

Section #1: The Facts

In appellate court cases the facts are rarely in question; rather the court resolves problems surrounding the application of rules or laws to a given controversy. As such, it deals with a "frozen record" from the trial court. The relevant facts, for purposes of briefing a case, therefore, are not the details surrounding an actual illegal act, but more generally are the set of circumstances that precipitated the conflict in law or a controversy arising in the question or problem posed to the appellate court. What is the nature of the controversy and how has it arisen in the appellate court? Paring the facts down to the bare essentials — to focus on the precise controversy before the appellate court — and determining the question are obviously highly interrelated; determining the one can often aid in determining the other, or perhaps they are even discovered simultaneously.

Section #2: The Question

In most cases there are numerous questions to which the court addresses itself. However, usually (but not always) there is only one major question for which the case is singled out. This question is not always made explicit or even asked in the text of the court's opinion, and it is usually the reader's task to identify and formulate it. Occasionally, in fact, the court might pose as "the" question one that from historical perspective or from a more general point of view is not actually "the" question of significance.

While there is no clear-cut set of procedures, one can learn to identify correctly the questions of appellate court opinions. The capacity to do so sharpens with experience in reading judicial opinions and greater familiarity with legal and constitutional principles and controversies. But regardless of the extent of one's experience, the most important factor in correctly identifying and formulating the legal or constitutional question is a careful reading and re-reading of the case. It is advisable to delay beginning the actual briefing until at least the second reading of the case. Two, three, or even four slow and deliberate readings of a case

are not unusual, even for those with considerable training in the law, before the question can be clearly identified and formulated and the heart of the court's argument becomes evident.

One helpful hint is to avoid what might on first glance seem to be a convenient way (and one the court itself might use) of formulating the question. Such examples might be, "Is Section __ of the 1964 Civil Rights Act unconstitutional?" or "Should _____ get a new trial?". While these questions might certainly emanate from the case, the form in stating them leaves much to be desired. It does not specify the nature of the controversy; that is, it does not focus on the nature of, or reasons for, the conflict which resulted in the case. Nor does it specify precisely the legal or constitutional principles in question. A well formulated question should identify both these components.

In the first of the two questions above, the language is too broad. It does not specify the particular portions or provisions of the act under question, the constitutional provision being envoked, or the actual situation which gave rise to its being challenged in court. A more appropriate and precise wording of the question might be: "Does the prohibition against racial discrimination in locally owned and operated restaurants not on main highways exceed Congress' power to regulate interstate commerce?" Thus stated, the question both specifies the precise principles or rules under question and gives an idea as to the nature of the conflict which gave rise to the case. One can now begin to see the nature of the problem with which the court must wrestle. Furthermore, an answer to the question — the rule or principle of the case — is often easily stated by turning the question into a declarative sentence, and perhaps adding some type of qualification.

The second question given above, "Should _____ get a new trial?", is also inadequate: it is too particularistic and narrow as well as imprecise. While the fate of the defendant might be a matter of life and death, the case is of legal interest for the general principle or rule emanating from it. The question, as presently formulated, does not begin to direct attention toward such a principle. A more appropriate formulation of the question in such a case might be, "Does a trial court's refusal to provide counsel for an indigent defendant charged with a criminal offense violate his 'right to counsel' as guaranteed by the Fourth Amendment?" This reformulation moves from the immediate and particular to the broad and general principle which the court will deal with. As in the reformulated question on the Civil Rights Act case, here too the new question specifies the nature of the conflict and the precise legal rule which the court will consider.

This discussion and these examples should now provide you with a basis for the questions which arise in the court cases you come across. You might be warned again, however, that precise formulation of the question before the court takes close and painstaking reading and re-reading of the opinion.

Section #3: The Opinion or Reasoning

In this section of the brief you are to reconstruct and summarize in your own words the core of the reasoning or argumentation the court uses to resolve and answer the question of the preceding section. Much of the written opinion will not be directly germane in that it will deal with subsidiary points, perhaps jurisdition, implementation, or directions to the lower court. These types of points constitute a major portion of the decision for those parties involved, but in terms of the search for the basic principle of the case — particularly in constitutional law — they are primarily interesting sidelights and should not be confused with the essentials.

Section #4: The Decision or Ruling

This is simply the court's answer to the question or problem posed above in the second section of the brief, and can be regarded as the rule or principle of the case. Like the question, it can usually be summarized in a single sentence, and as noted previously, it is often simply a reformulation of the question into a declarative sentence with perhaps additional qualifications. In constructing it, the same cautions holding for the question apply here as well.

These then are the four elements of the brief, though there are some additional rules of thumb which might prove helpful in briefing cases. It is a good practice to be as economical with words as possible. Try to keep the brief within a sing (single-spaced) typewritten page. This will discipline you to isolate and concisely summarize the key points. Also, the shorter the brief (to a point), the more useful as a review note it becomes. Additionally, you might want to record the name of the author of the majority or court opinion in parentheses at the beginning of the section on the opinion or reasoning. If there are concurring or dissenting opinions you might note their authors and brief their reasoning in a paragraph or two to distinguish it from the other opinions. This is conveniently done after the briefing of the majority opinion. With this the brief is completed.

Functions of the Brief

The task of drawing up a written brief of a court case serves several important functions. First, the actual process of outlining a condensed and organized version of the court's opinion tends to force the reader to dig out the most important elements of the case and restate them in his own words. He will have to separate (1) the court's ruling from its obiter dicta; (2) the possible or alleged problems brought up and perhaps discussed at length from those the court actually uses to resolve the dispute at hand; and (3) the relevant facts from those which are only interesting or possible, but not actually, relevant. The discipline involved in writing a brief enhances this discriminating confrontation

between the case and the reader. Secondly, the written brief serves as a clear record of the reader's understanding of the case, which can then be checked and compared for correctness and thoroughness in order to see if in fact the case has been properly understood. Thirdly, the brief serves as an excellent personal study and review guide for students in law courses, since they have thereby taken cases and committed them to an abbreviated and organized form in their own words.

Because of these several particularly important reasons, briefing cases is a standard and indispensible practice for most students in case-law courses. Indeed, those whose work emphasizes quantitative analysis of judicial behavior would not take issue with the importance of a close textual analysis and understanding of the judicial principles and arguments which briefing facilitates. It would be ludicrous, in fact, to think that an understanding of judicial behavior or judicial policy-making could be achieved without an understanding of the textual argumentation and style of judicial reasoning. Consequently, this exercise on briefing cases seems quite appropriate, even necessary, in this manual which emphasizes quantitative methods and techniques in judicial process and behavior research. More particularly, this knowledge and ability to brief cases will prove to be useful in subsequent exercises in this manual.

The following exercise is designed to provide you with some practical experience in briefing cases. Below is a sample brief of the case you researched in the first exercise on using the law library, Gitlow v. New York (the text of this case is included in the Appendix to this exercise). Note that the brief conforms to the style and organization for briefs discussed above. While there is obviously room for variation and individual differences, and no two briefs are likely to be identical, the fundamental points of a case should be present in all good briefs.

Sample Brief

Gitlow v. People of New York (268 U.S. 652, 69 L.Ed. 1138, 45 S.Ct. 625), 1925
Heard before the Supreme Court on Writ of Error

I. Facts: Gitlow, the defendant, was convicted of the crime of criminal anarchy by the New York Supreme Court. He was convicted under New York Penal Laws, Sections 160, 161, which make it a crime to overthrow by force, violence, or assassination the organized government or executive officers therefore. Specifically, he was charged with publishing documents which called for the violent overthrow of the government by unlawful means and teaching the necessity and propriety of such action. The conviction was affirmed by the Appellate Division and the Court of Appeals.

II. Question: Does the New York statute penalize mere utterances which have no quality of incitement, without regard for the possible consequences of such utterances, i.e., "the likelihood of substantive evil," and does said statute abridge freedom of speech and press?

III. Reasoning:

1) The New York law doesn't prohibit speaking or uttering "abstract" doctrine, or academic discussions which don't incite action.

2) It prohibits "advocating, advising, or teaching the overthrow of organized government by unlawful means. The words imply "urging to action."

3) Advocacy implies action.

4) The "Manifesto" is not abstract doctrine or prediction. It calls for mass action in the language of direct incitement.

5) The means advocated for bringing about the destruction of government are inherently unlawful in a constitutional government.

6) That the "Manifesto" advocated concrete action, not abstract action, is clear.

7) Freedom of Speech and Freedom of the Press are among the fundamental personal rights and liberties protected by the Fourteenth Amendment from encroachment by the states.

8) Freedom of Speech and Press are not absolute rights free from responsibility.

9) Justice Story claimed that "reasonably limited, this freedom is an inestimable privilege in a free government; without such limitation it might become the scourge of the republic."

10) States have the right to punish abuse of this freedom.

11) A state may punish utterances which endanger its existence. Freedom of Speech and the Press does not protect attempts to subvert the government. States have the essential right to self-preservation.

12) It is to be presumed that the state has every right to institute such a statute.

13) Statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest.

14) Immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen.

15) The statute cannot be held to be arbitrary or unreasonable exercise of state police power and is sustained in its constitutionality.

16) The statute was constitutionally created by a legislature acting within its legal rights and constitutionally exercising its discretion.

17) The statute being constitutional, it may constitutionally be applied to every utterance.

Holmes' dissent:

1) In virtue of the scope given the word "liberty" the principle of free speech must be included in the Fourteenth Amendment.

2) Do the words used in certain circumstances present a clear and present danger bringing about substantive evils that the state has a right to prevent?

3) There is no present danger due to the small size of the group sharing the defendant's view.

4) Every idea is an incitement.

5) If proletarian dictatorship beliefs are destined to be accepted by the majority the only meaning of free speech is that they be given a chance to have their way.

IV. Decision: The statute was constitutional and did not abridge the defendant's rights as protected by the due process clause of the 14th Amendment.

As an initial exercise to familiarize you with the art of reading and briefing cases, read the case of Gitlow v. New York in its entirety. It should soon be evident that constructing a brief is not quickly or casually completed.

1) Does the sample brief accurately present the substance of the case?

2) Might you suggest some changes or alterations in any of the sections? If so, note and explain how and why.

In our judgment, the sample brief we gave you is a very bad one. If you didn't answer accordingly to the above question, we suggest you re-read Gitlow and try to better our effort once more.

The second task in this exercise will be for you to brief another case, Cantwell v. Connecticut (reprinted in the Appendix to this exercise). You will use this case again in a later exercise. On the following blank pages, brief the case following the format and principles outlined in the discussion above.

GITLOW v. PEOPLE OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161.[1] He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"§ 160. *Criminal anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"§ 161. *Advocacy of criminal anarchy.* Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any

[1] Laws of 1909, ch. 88; Consol. Laws, 1909, ch. 40. This statute was originally enacted in 1902. Laws of 1902, ch. 371.

form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . ,

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand

copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin.[2] Coupled with a review of the rise of Socialism, it

[2] Italics are given as in the original, but the paragraphing is omitted.

"The Left Wing Manifesto"

"Issued on Authority of the Conference by the National Council of the Left Wing.

"The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. . . . Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. . . . The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. . . . The dominant Socialism united with the capitalist

condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism", based on "the class struggle" and mo-

governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism. . . . [The] proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of 'all power to the Soviets,'—organizing the new transitional state of proletarian dictatorship. . . . Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism. . . . Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. . . . Revolutionary Socialism alone is capable of mobilising the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship. . . . Imperialism is dominant in the United States, which is now a world power. . . . The war has aggrandized American Capitalism, instead of weakening it as in Europe. . . . These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. . . . Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. . . . These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant, use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. Revolutionary Socialism must base itself on the mass struggles

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bilizing the "power of the proletariat in action," through mass industrial revolts, developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg [3] were cited as instances of a development already verging on revolutionary action and suggestive of prole-

of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. . . . Our task . . . is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power. . . . Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. The class struggle is a political struggle . . . in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state. Revolutionary Socialism does not propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. . . . It proposes to conquer by means of political action . . . in the revolutionary

(*Footnote 3 continued on following page.*)

[3] There was testimony at the trial that "there was an extended strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication and fire and sanitary protection were suspended or seriously curtailed."

tarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

At the outset of the trial the defendant's counsel objected to the introduction of any evidence under the

Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat *in any form* having as its objective the conquest of the power of the state. . . . Parliamentary action which emphasizes the implacable character of the class struggle is an indispensable means of agitation. . . . But parliamentarism cannot conquer the power of the state for the proletariat. . . . It is accomplished, not by the legislative representatives of the proletariat, but by *the mass power of the proletariat in action*. The supreme power of the proletariat inheres in the *political mass strike*, in using the industrial mass power of the proletariat for political objectives. Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is *the political mass strike*. . . . The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. . . . The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation. The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. . . . The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie*. . . . Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the

indictment on the grounds that, as a matter of law, the Manifesto "is not in contravention of the statute," and that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal "on the grounds stated in the first objection to evidence",

bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. . . . The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism. . . . While the dictatorship of the proletariat performs its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new 'government,' which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order. . . . It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle!"

and again on the grounds that "the indictment does not charge an offense" and the evidence "does not show an offense." These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness,

with the object of overthrowing organized government. These were also denied.

The Appellate Division, after setting forth extracts from the Manifesto and referring to the Left Wing and Communist Programs published in the same issue of the Revolutionary Age, said:[4] "It is perfectly plain that the plan and purpose advocated . . . contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, . . . but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. . . . The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown . . ."

The Court of Appeals held that the Manifesto "advocated the overthrow of this government by violence, or by unlawful means."[5] In one of the opinions represent-

[4] 195 App. Div. 773, 782, 790.

[5] Five judges, constituting the majority of the court, agreed in this view. 234 N. Y. 132, 138. And the two judges, constituting the minority—who dissented solely on a question as to the construction of the statute which is not here involved—said in reference to the

ing the views of a majority of the court,[6] it was said: "It will be seen . . . that this defendant through the manifesto . . . advocated the destruction of the state and the establishment of the dictatorship of the proletariat. . . . To advocate . . . the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means." In the other[7] it was said: "As we read this manifesto . . . we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism" and "in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of . . . force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described."

And both the Appellate Division and the Court of Appeals held the statute constitutional.

The specification of the errors relied on relates solely to the specific rulings of the trial court in the matters hereinbefore set out.[8] The correctness of the verdict is not

Manifesto: "Revolution for the purpose of overthrowing the present form and the established political system of the United States government by direct means rather than by constitutional means is therein clearly advocated and defended . . ." p. 151.

[6] Pages 141, 142.

[7] Pages 149, 150.

[8] Exceptions to all of these rulings had been duly taken.

questioned, as the case was submitted to the jury. The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2nd, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching

the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . ."

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass in-

dustrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.*

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., § 1580, p. 634; *Robertson* v. *Baldwin*, 165 U. S. 275, 281; *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Fox* v. *Washington*, 236

* Compare *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Twining* v. *New Jersey*, 211 U. S. 78, 108; *Coppage* v. *Kansas*, 236 U. S. 1, 17; *Fox* v. *Washington*, 236 U. S. 273, 276; *Schaefer* v. *United States*, 251 U. S. 466, 474; *Gilbert* v. *Minnesota*, 254 U. S. 325, 338; *Meyer* v. *Nebraska*, 262 U. S. 390, 399; 2 Story On the Constitution, 5th Ed., § 1950, p. 608.

U. S. 273, 276; *Schenck* v. *United States*, 249 U. S. 47, 52; *Frohwerk* v. *United States*, 249 U. S. 204, 206; *Debs* v. *United States*, 249 U. S. 211, 213; *Schaefer* v. *United States*, 251 U. S. 466, 474; *Gilbert* v. *Minnesota*, 254 U. S. 325, 332; *Warren* v. *United States*, (C. C. A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Robertson* v. *Baldwin*, *supra*, p. 281; *Patterson* v. *Colorado*, *supra*, p. 462; *Fox* v. *Washington*, *supra*, p. 277; *Gilbert* v. *Minnesota*, *supra*, p. 339; *People* v. *Most*, 171 N. Y. 423, 431; *State* v. *Holm*, 139 Minn. 267, 275; *State* v. *Hennessy*, 114 Wash. 351, 359; *State* v. *Boyd*, 86 N. J. L. 75, 79; *State* v. *McKee*, 73 Conn. 18, 27. Thus it was held by this Court in the *Fox Case*, that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case*, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *State* v.

Holm, supra, p. 275. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. *People* v. *Most*, *supra*, pp. 431, 432. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. *People* v. *Lloyd*, 304 Ill. 23, 34. See also, *State* v. *Tachin*, 92 N. J. L. 269, 274; and *People* v. *Steelik*, 187 Cal. 361, 375. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. *Turner* v. *Williams*, 194 U. S. 279, 294. In *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 419, it was said: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas*, 123 U. S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest." *Great Northern Ry.* v. *Clara City*, 246 U. S. 434, 439. That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In *People* v. *Lloyd*, *supra*, p. 35, it was aptly said: "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there

would be neither prosecuting officers nor courts for the enforcement of the law."

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in *Fox* v. *Washington, supra*, p. 277; *Abrams* v. *United States*, 250 U. S. 616, 624; *Schaefer* v. *United States, supra*, pp. 479, 480; *Pierce* v. *United States*, 252 U. S. 239, 250, 251;[10] and *Gilbert* v. *Minnesota, supra*, p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language

[10] This reference is to so much of the decision as relates to the conviction under the third count. In considering the effect of the decisions under the Espionage Act of 1917 and the amendment of 1918, the distinction must be kept in mind between indictments under those provisions which specifically punish certain utterances, and those which merely punish specified acts in general terms, without specific reference to the use of language

used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck* v. *United States, supra*, p. 51; *Debs* v. *United States, supra*, pp. 215, 216. And the general statement in the *Schenck Case* (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should

have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. *Queen* v. *Most*, L. R., 7 Q. B. D. 244.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute, that we think the decisions under them cast no helpful light upon the questions here.

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in *Schenck* v. *United States*, 249 U. S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in *Abrams* v. *United States*, 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer* v. *United States*, 251 U. S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

55627°—25——43

CANTWELL ET AL. v. CONNECTICUT.

APPEAL FROM AND CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County each of them was convicted on the third count, which charged a violation of § 6294 of the General Statutes of Connecticut,[1] and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court the conviction of all three on the third count was affirmed. The conviction of Jesse Cantwell, on the fifth count, was also affirmed, but the conviction of Newton and Russell on that count was reversed and a new trial ordered as to them.[2]

By demurrers to the information, by requests for rulings of law at the trial, and by their assignments of error in the State Supreme Court, the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner

[1] General Statutes § 6294 as amended by § 860d of the 1937 supplement.

[2] 126 Conn. 1; 8 A. 2d 533.

they made the point that they could not be found guilty on the fifth count, without violation of the Amendment.

We have jurisdiction on appeal from the judgment on the third count, as there was drawn in question the validity of a state statute under the Federal Constitution, and the decision was in favor of validity. Since the conviction on the fifth count was not based upon a statute, but presents a substantial question under the Federal Constitution, we granted the writ of certiorari in respect of it.

The facts adduced to sustain the convictions on the third count follow. On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted he asked the person to buy the book described and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the listener was willing to make. If a contribution was received a pamphlet was delivered upon condition that it would be read.

Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled "Enemies," included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah's Witnesses.

The statute under which the appellants were charged provides:

"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable

or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute but consisted only of distribution of books, pamphlets, and periodicals. The State Supreme Court construed the finding of the trial court to be that "in addition to the sale of the books and the distribution of the pamphlets the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute." It overruled the contention that the Act, as applied to the appellants, offends the due process clause of the Fourteenth Amendment, because it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes.

The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped

two men in the street, asked, and received, permission to play a phonograph record, and played the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

The court held that the charge was not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to breach of the peace, and that the facts supported the conviction of that offense.

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.[1] The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the

[1] *Schneider v. State*, 308 U. S. 147, 160.

second cannot be. Conduct remains subject to regulation for the protection of society.[4] The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee.[5] It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior restraint on the exercise of their religion within the meaning of t Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to

[4] *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333.

[5] Compare *Near* v. *Minnesota*, 283 U. S. 697, 713.

that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that "it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not

been performed."[6] It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.[7]

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.[8] The State is likewise free to regulate the time

[6] *Woodmont Assn. v. Milford*, 85 Conn. 517, 522; 84 A. 307, 310; see also *Connecticut Co. v. Norwalk*, 89 Conn. 528, 531; 94 A. 992.

[7] *Near v. Minnesota*, 283 U. S. 697.

[8] Compare *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 306-310; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 72.

and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Second. We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer.[9] Such a declaration of the State's policy

[9] Compare *Gitlow v. New York*, 268 U. S. 652, 670-1; *Thornhill v. Alabama*, *ante*, pp. 98–105.

would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner's conduct constituted the commission of an offense under the state law, and we accept its decision as binding upon us to that extent.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he

intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question "Did you do anything else or have any other reaction?" "No, sir, because he said he would take the victrola and he went." The other witness testified that he told Cantwell he had better get off the street before something happened to him and that was the end of the matter as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or

personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.[10]

The judgment affirming the convictions on the third and fifth counts is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Judicial Process Laboratory

EXERCISE #3

One interesting area for research, which has gone virtually unexplored in any systematic fashion, is the relation of the established rules of law to the values and attitudes of the community or culture in which they have developed. The problems raised by this question are quite broad and their breadth has probably contributed to the lack of research. Furthermore, there are several schools of thought in regard to the functions of law and the relation of attitudes and values to the rules of law. The resulting controversies have not been distinguished by rigorous appeals to empirical evidence, even though many of the issues raised clearly turn on empirical questions. One example of the sort of claim that has been made in this area is as follows:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
>
> ——— Justice Oliver Wendell Holmes, The Common Law*———

Not only does this claim turn on empirical questions, but it is also too broadly stated to be examined closely. In this exercise we shall focus on selected aspects of this broad problem in an attempt to formulate specific and testable propositions. This approach will allow us to examine the validity of the statement above in at least some of its aspects.

For example, it is often asserted that the Constitution and Bill of Rights embody the basic political values of American democracy, values which are presumed to be widely held in the United States. Since the Constitution and Bill of Rights form the basis for much of the fundamental rules of American law, it will be interesting to relate individuals' attitudes and values on particular issues deriving from the Constitution to the actual legal interpretations and decisions deriving from it. The guarantees of individual liberty found in the First Amendment provide interesting cases in point. Do Americans, in fact, believe in free speech?

Having posed the substantive question, the next question is: how can we find out whether or not Americans believe in free speech? We might, as Herbert Hyman has suggested, ask them. Samuel Stouffer, for his study Communism, Conformity and Civil Liberties, did just that. Among the many questions Stouffer asked of members of the American public were two dealing with the right of free speech:

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*Published by Little, Brown and Company, Inc., Boston, 1963, p. 1.

(1) If a person wanted to make a speech in your community against churches and religion, should he be allowed to speak, or not?

(2) Suppose an admitted communist wanted to make a speech in your community. Should he be allowed to speak, or not?

In a national cross-sectional sample these questions were answered in the following way:*

Table 3.1: Attitude of General Public Toward Selected Free Speech Issues

	Yes	No	Undecided
In favor of allowing speeches against churches and religion	37%	60%	3%
In favor of allowing speeches by an admitted communist	27%	68%	5%

1) What do the responses lead you to conclude about public attitudes on at least selected aspects of free speech?

2) Do you think the responses would have been different if the respondents were asked whether they agreed or disagreed with the following statement:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...." (First Amendment)?

Explain your answer:

*The data and tabulations utilized in Tables 3.1-3.5 were made available by the Inter-University Consortium for Political Research (Ann Arbor, Michigan). The data were originally collected by Samuel A. Stouffer.

Questions regarding free speech that are very similar to those which Stouffer asked of the American public have come before American courts. Gitlow v. New York 268 US 652 (1925) and Cantwell v. Connecticut 310 US 296 (1940) are examples of cases which spell out the law on these issues. Re-read the decision and opinions of the court in each of these cases, which were included in the Appendix of Exercise 2. Also re-read the briefs you prepared and answer the following questions.

3) State the question and the Court's decision in each case:

a) Gitlow v. New York: _____

b) Cantwell v. Connecticut: _____

4) Compare the Court's decision with the responses of the general public on these issues.

5) Compare Holmes' statement with the responses of the public and of the Court.

As Krislov has noted in his book, The Supreme Court and Political Freedom, the relationship between law and political values in American life is characterized by "a three tiered pattern of response": first, Americans overwhelmingly favor civil liberties in abstract terms; second, Americans tend to respond negatively on specific applications of these abstract principles; third, courts tend to uphold these abstract principles in specific applications, and the American people tend to support the courts.

This paradoxical picture demonstrates that the problem we have posed is more complicated than it first appeared. The question now becomes: what are the various intervening processes that account for this discrepancy between individual attitudes and institutionalized public policy?

An initial consideration is that the anti-libertarian attitudes shown above do not in fact represent an unequivocal picture of anti-libertarianism in American attitudes. A significant proportion of Stouffer's sample did support the libertarian position on these two questions, and an even larger proportion did so on other questions.

6) Give the percentage figure representing the respondents favoring the libertarian position on:

a) question #1 _____.

b) question #2 _____.

Thus it is clear that the observed discrepancy between individual attitudes and institutionalized public policy is not clear-cut across a wide range of issues.

A second consideration is the possibility of variations in responses according to variations in the characteristics of the respondents. For example, it would be interesting to break the sample down into several different categories, such as region, educational background, and urban versus rural. These breakdowns are reported in Tables 3.2, 3.3, and 3.4 below.

Table 3.2: Comparison of Attitudes by Region Toward Selected Free Speech Issues

	Yes	No	Undecided
In favor of allowing speeches against churches and religion:			
Northeast.....	43.8%	53.8%	2.4%
Midwest.....	36.1%	61.5%	2.4%
South.....	25.7%	71.5%	2.8%
West.....	53.4%	42.8%	3.8%
In favor of allowing speeches by an admitted communist:			
Northeast.....	31.4%	64.3%	4.3%
Midwest.....	27.7%	68.6%	3.7%
South.....	18.6%	75.7%	5.7%
West.....	36.0%	58.0%	6.0%

Table 3.3: Comparison of Attitudes Toward Selected Free Speech Issues by Educational Background

	Yes	No	Undecided
In favor of allowing speeches against churches and religion:			
None, or grammar school....	19.9%	76.6%	3.5%
Some high school.....	36.2%	61.4%	2.3%
High school graduate.....	47.8%	50.0%	2.2%
Some college.....	57.4%	40.0%	2.6%
College graduate.....	65.7%	33.0%	1.3%
In favor of allowing speeches by an admitted communist:			
None, or grammar school....	18.1%	74.4%	7.5%
Some high school.....	24.3%	73.2%	2.5%
High school graduate.....	29.8%	67.4%	2.8%
Some college.....	41.3%	55.4%	3.3%
College graduate.....	50.0%	44.9%	5.1%

Table 3.4: Comparison of Attitudes Toward Selected Free Speech Issues by Urban/Rural Setting

	Yes	No	Undecided
In favor of allowing speeches against churches and religion:			
Urban.....	41.9%	55.3%	2.8%
Rural.....	27.9%	69.6%	2.5%
In favor of allowing speeches by an admitted communist:			
Urban.....	29.9%	65.9%	4.2%
Rural.....	21.2%	73.1%	5.7%

7) Are there any variations by region? If so, identify the "most libertarian" and the "least libertarian" region on each of these questions.

8) Now state why you think it is or is not useful for our purposes to have this additional information.

9) Are there any variations in the breakdown according to respondents' education? If so, identify the "most libertarian" and the "least libertarian" educational groupings according to these questions.

10) Now state why you think it is or is not useful for our purposes to have this additional information.

11) Are there any variations apparent in the urban/rural breakdown? If so, identify the "more libertarian" and the "less libertarian" areas on these questions.

12) Now state why you think it is or is not useful for our purposes to have this additional information.

Still another consideration is the possibility that institutional patterns somehow mediate between the attitudes of the general public and institutionalized public policy. For example, an obvious distinction we would want to make is between the attitudes of the general public and the attitudes of those in leadership positions. The following table shows such a distinction for the responses to the same questions considered above.

Table 3.5: Comparison of Attitudes Toward Selected Free Speech Issues of Community Leaders and Non-leaders

	Yes	No	Undecided
In favor of allowing speeches against churches and religion:			
Leaders.....	64%	34%	2%
Non-leaders.....	37%	60%	3%
In favor of allowing speeches by an admitted communist:			
Leaders.....	51%	47%	2%
Non-leaders.....	27%	68%	5%

13) Are there any variations in the breakdown between community leaders and non-leaders? If so, which is the "more libertarian" on these questions?

14) Can you speculate as to why this difference should exist?

15) What effect do you think this difference has on public policy?

16) Comparing Tables 3.2, 3.3, 3.4, and 3.5, which table shows the greatest variation of responses among its several categories?

Can you speculate as to why this might be?

The Stouffer study was conducted in 1954, a year which is generally considered a turning-point for civil liberties aspects of American jurisprudence. It was in 1954 that the United States Supreme Court, under the leadership of Chief Justice Earl Warren, handed down its desegregation ruling in Brown v. Board of Education. And from that point on the Court became increasingly involved in cases where fundamental aspects of the Bill of Rights were appealed to out of circumstances of growing social and political conflict in American life. Hence, it could be anticipated that the stability of the three-tiered pattern of response would be strained.

17) Re-state the three tiered pattern of response. _____

_____

_____

_____

_____

_____

_____

18) Where in this pattern might you expect to find overt signs of strain under the conditions mentioned above? _____

_____

Explain your answer. _____

_____

_____

_____

_____

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_____

_____

_____

_____

A study by Walter Murphy and Joseph Tanenhaus, based on 1966 Survey Research Center data, will enable us to examine key aspects of the three-tiered pattern of response more closely.* The 1966 survey did not ask the same questions as did Stouffer in 1954, but it did elicit responses indicative of the American public's perceptions of the Supreme Court's role and decisions. The first set of responses, which are of interest for our purposes, was to questions concerning general evaluations of the Court's performance. The respondents were then asked if there were specific things that the Court had done which they either liked or disliked. Table 3.6, below, reports the two sets of responses in comparative terms.

Table 3.6: Comparison of General and Specific Evaluations of United States Supreme Court: 1966**

Evaluation	Positive	Mixed	Negative	No Indication[1]	Total
General	37.0%	11.9%	21.7%	29.4%	100%
Specific	9.5%	5.0%	31.7%	53.8%	100%

N = 1,291

[1]The category "No Indication" embraces two different categorizations used by Murphy and Tanenhaus: (1) the figure 29.4% represents responses categorized as "cannot be classified" on their diffuse support scale; (2) the figure 53.8% represents responses categorized as "don't know, no response" on their specific support scale.

19) In Table 3.6, what is the significance of:

a) the figure 29.4%? _____

_____

_____

_____

_____

*Walter Murphy and Joseph Tanenhaus, "Public Opinion and the Supreme Court," Law and Society Review, Vol. 11, No. 3 (May, 1968).

**Table 3.6 is adapted from Table 5 (p. 370) and Table 7 (p. 374) of the Murphy and Tanenhaus article cited above.

b) the figure 53.8%? _____

c) the difference between the two figures (29.4% and 53.8%)?

20) In Table 3.6, what is the significance of:

a) the difference between the figures 37.0% and 21.7%? _____

b) the difference between the figures 9.5% and 31.7%? _____

c) the difference between the two sets of figures, 37.0%/21.7% and 9.5%/31.7%?

21) Is your answer to question 19 (c) related to your answer to question 20 (c)? _____.

Explain: _____

22) How do the data reported in Table 3.6 bear on the three-tiered pattern of response?

Unfortunately, no such survey of American perceptions of the Court was made in 1954 - nor, for that matter, at any time in the 1950's. But the SRC did ask some of the same questions of their 1964 presidential sample. Specifically, both the 1964 and the 1966 SRC samples were asked the following set of questions:

> Not everyone has time to follow closely the activities of the Supreme Court (in Washington), but I wonder if there is anything in particular that the Supreme Court (in Washington) has done that you have disliked? What is it?
>
> Is there anything else the Court has done that you have disliked? What is it?
>
> Is there anything in particular that the Supreme Court in Washington has done that you have liked? What is it?
>
> Is there anything else that the Court has done that you have liked? What is that?

The responses to this set of questions, for both 1964 and 1966, are presented in Table 3.7 below.

Table 3.7: Specific Likes and Dislikes about the Work of the U.S. Supreme Court:* A Comparison of 1964 and 1966 Responses**

Subject	1964	1966
(a) Civil Rights of Negroes	38.1%	25.1%
(b) School Prayer	30.3%	23.8%
(c) Rights of Criminal Defendants	5.8%	15.9%
(d) Reapportionment	5.4%	.8%
(e) Other	20.4%	34.3%
	100.0%	99.9%

1964: N = 915

1966: N = 1,063

*Refers to specific mentions, with no distinction made between likes and dislikes.

**Table reprinted from Murphy and Tanenhaus, "Public Opinion and the Supreme Court," Op. cit., p. 362.

23) Notice that likes and dislikes are lumped together by the authors. Can you think of reasons why this is? Justifiable? Not so desirable? Why do you think they did it?

24) Calculate the differences, or amount of change, between the 1964 and the 1966 responses, and record each (as a percentage figure) in the appropriate spaces below. Also, indicate the direction of the difference in each case by a + or - sign.

a) Civil rights of Negroes: _____

b) School prayer: _____

c) Rights of criminal defendants: _____

d) Reapportionment: _____

e) Other: _____

25) What percentage of the <u>total</u> number of responses do the responses to items (a) and (b) above, taken together, account for:

a) In 1964? _____

b) In 1966? _____

What might be the significance of the direction of the difference in each case?

Compare the direction of the difference in responses between 1964 and 1966 to items (a) and (b) with that to items (c) and (e).

26) What might be the significance of the difference in responses between 1964 and 1966 to item (c)?

27) What might be the significance of the difference in responses between 1964 and 1966 to item (e)?

28) Why is the difference between responses to items (c) and (d) in 1966 somewhat ironic?

29) How do the data reported in Table 3.7 bear on the three-tiered pattern of responses?

It was suggested at the beginning of this exercise that one can learn how the American people feel about their traditional political values by asking them. It should now be apparent that this method has both advantages and disadvantages. The major disadvantage is probably the fact that there is a limit to the amount and significance of the information one can obtain regarding a complex problem by asking people directly how they feel about it. On the other hand, one can ask a whole series of questions covering a range of topics which are thought to be somehow related to the central problem at issue. One can then perform certain operations on the resulting data to determine whether or not, and to what degree, these variables are in fact related. For example, Murphy and Tanenhaus examined possible relationships between the American public's perceptions of the Supreme Court and a variety of political and social variables.

In order to understand how this approach can contribute to our capacity to answer some of the broad empirical questions which we have posed, it is necessary to be completely clear about the nature of the additional information it provides. Specifically, we must be clear (1) about how the variables are operationally defined, and (2) about how the relationships between them are measured. We have already presented some of the Murphy-Tanenhaus data on their variables, specific support and general support, which we have termed specific and general evaluation. Murphy and Tanenhaus define specific support (specific evaluation) as "the extent to which people praise or criticize particular decisions and the performance of individual justices." This definition of specific support was operationalized on the basis of responses to the likes and dislikes questions discussed above, with each respondent given a score computed as the sum of his responses (both negative and positive) to these questions. All respondents were then placed on a scale which ranged from a point representing three or more positive (+) mentions to three or more negative (-) mentions. Table 3.8 below is a partially completed representation of the resulting scale. Study it carefully and then complete those portions left blank.

Table 3.8

Scale Score	Support Level	Number of Mentions
1	Very strong positive	+ + +
2		+ +
	Moderate positive	
	Pro/con	+ + - -
5		-
6	Strong negative	
7		- - -

30) Referring to the scale you have just completed, describe the responses of those having:

a) a scale score of 1: _____

_____

b) a scale score of 5: _____

_____

The diffuse support variable (general evaluation) was defined by Murphy and Tanenhaus as "the degree to which people think a court carries out its overall responsibilities in an impartial and competent fashion." The variable was operationalized in much the same way as was the specific support variable, using a summated scale which represented responses to a set of questions about Supreme Court performance in general terms. A third variable with which we shall be concerned is "awareness of the work and constitutional role of the Supreme Court." The constitutional role part of this category was operationalized as appropriate responses to the question:

> Now I'd like to ask you what you think the Supreme Court's main job in the government is, as you understand it. I mean, what kind of thing do you think the Supreme Court in Washington is supposed to do?

Levels of awareness of the Court's constitutional role were operationally determined by combining the responses to the above question with the number of specific mentions (likes and dislikes) which each respondent was able to give in response to the earlier likes/dislikes questions. This combination produced a scaled variable which Murphy and Tanenhaus call: "awareness of the Court's work and constitutional role." A summary of the characteristics of the American public on this variable are shown in Table 3.9 below.

Table 3.9: Awareness of the Supreme Court's Work and Constitutional Role

		Specific Mentions of Court's Work (Likes and dislikes)		
		None	One or More	Total
Awareness of Constitutional Role	Aware	12.3%	27.4%	39.7%
	Unaware	41.5%	18.8%	60.3%
	Total	53.8%	46.2%	100.0%

31) How do the findings on awareness of the Court's work and constitutional role in Table 3.9 compare with the findings in Table 3.6 on:

a) general evaluations of Court performance? _____

b) specific evaluations of the work of the Court? _____

You have now seen how Murphy and Tanenhaus constructed three of their variables. Part of their study was an attempt to delineate possible relationships between these variables, representing public perceptions of the Supreme Court, and a number of social and political variables. Among the political variables chosen by Murphy and Tanenhaus for this purpose were the following three: efficacy, political knowledge, and reaction to the civil rights issue. The following discussion will demonstrate how Murphy and Tanenhaus went about investigating possible relationships between the three variables representing perceptions of the Court, on the one hand, and the three political variables just mentioned, on the other hand.

The political knowledge category was operationalized as responses to a set of questions asking respondents to identify political party issues and candidates, and government officials and problems. For our purposes here, responses to the questions asking that respondents identify government problems will be used to indicate level of political knowledge. Reaction to the civil rights issue was measured by variations in responses to the question:

> Some say that the civil rights people have been trying to push too fast. Others feel that they haven't pushed fast enough. How about you? Do you think that civil rights leaders are trying to push too fast, are going too slowly, or are they moving at about the right speed?

The third of these political variables, efficacy, is considerably more complex than the two stated above. An individual's sense of political efficacy is defined as the degree to which he feels he can influence political processes - that is, it represents the effectiveness the individual feels in his relation to politics. Operationally, the sense of political efficacy is measured by responses to the following four items:

(1) People like me don't have any say about what the government does.

(2) Voting is the only way people like me can have any say about how the government runs things.

(3) Sometimes politics and government seem so complicated that a person like me can't really understand what's going on.

(4) I don't think that public officials care much about what people like me think.

The efficacy variable, then, is a cumulative scale representing degrees of strength of respondents' feelings of political efficacy.

The question which we want to answer now is the following: to what extent are any, or all three, of the political variables related to the three variables representing public perceptions of the Supreme Court? The possible relationship, or correlation, may be positive or negative. When a correlation is positive the value of one variable increases as the

value of the other variable increases; or the value of one variable decreases as the value of the other decreases. When a correlation is negative, the value of one variable increases as the other decreases. Most correlational measures have definite upper and lower limits, representing perfect positive and negative correlations. A perfect positive correlation is given a value of +1.0, and a perfect negative correlation is given a value of -1.0. A zero correlation indicates an absence of a relationship. The coefficients varying between +1.0 and -1.0 are therefore interpretable in the following way: the closer the coefficient approximates +1.0 or -1.0, the stronger the relationship; as the values approach zero (with either positive or negative signs) weaker relationships are indicated.

Obviously we are verging on some complex statistical issues at this stage in the discussion, and it is not the purpose of this exercise to confront these issues. Rather, we are interested in seeing what sorts of correlations are obtained between the variables which we are examining, and in attempting to interpret these correlations. Without concerning ourselves with either theoretical or technical statistical questions, then, let it suffice that Murphy and Tanenhaus derived the following correlational values.

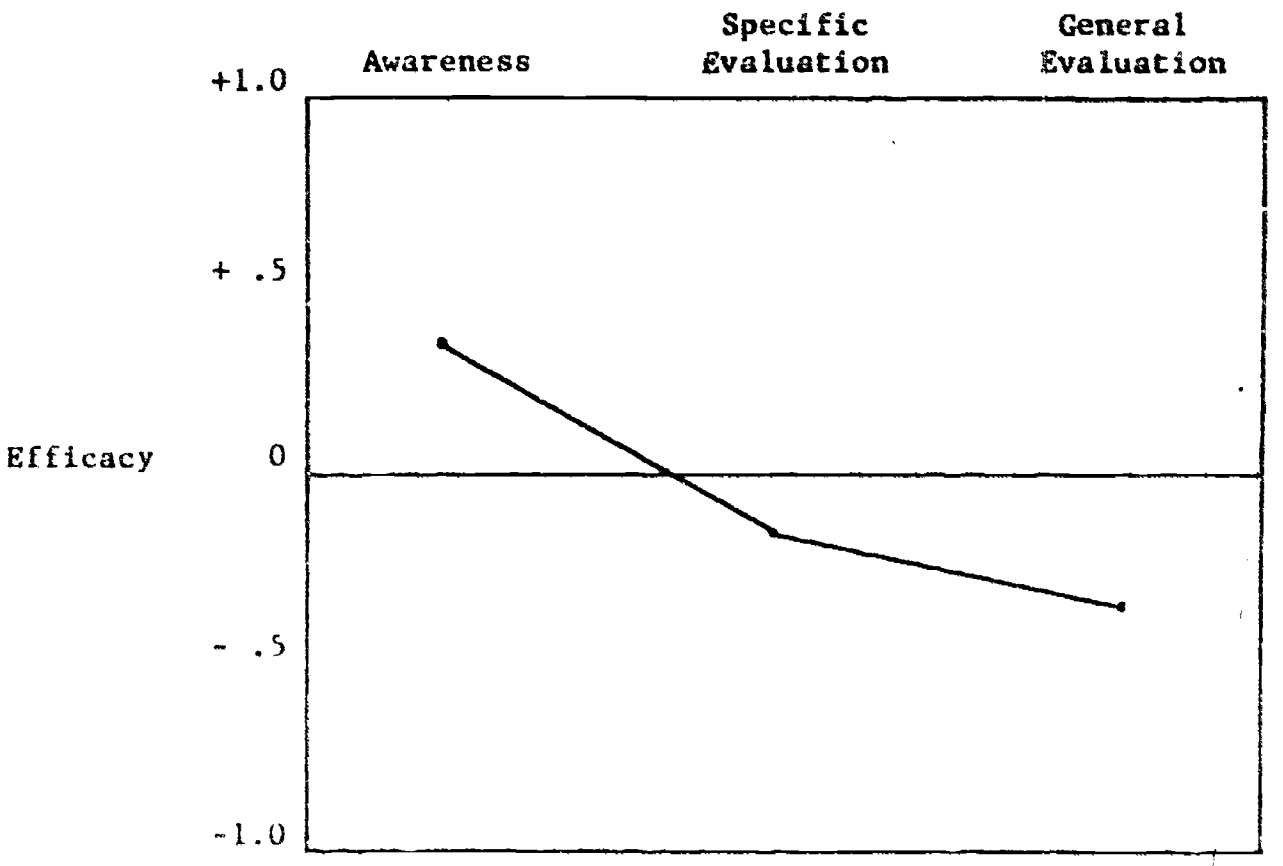
Table 3.10: Correlations Between Public Perceptions of the United States Supreme Court, and Political Variables: 1966

	Awareness	Specific Evaluation	General Evaluation
Efficacy	+.24	-.13	-.31
Political Knowledge	+.41	-.03	-.01
Reaction to Civil Rights Issue	-.02	+.45	+.25

Awareness.....scored high
Specific Evaluation.....positive scored low
General Evaluation.....positive scored low
Efficacy.....high scored low
Political Knowledge.....high scored high
Reaction to Civil
Rights Issue.....too fast scored high

Table 3.10, it should be emphasized, does nothing but record nine correlational values, in a manner convenient for our purposes. It should also be noted that none of these nine values is high enough to be particularly interesting in itself. On the other hand, they do provide us with some interesting additional information on our original substantive problem. For example, Figure 3.1 below provides a graphic illustration of the comparative effects of a political variable on the three measures of public perceptions of the Supreme Court.

Figure 3.1: Comparative Effects of Political Efficacy on Three Measures of Public Perceptions of the Supreme Court: 1966



Awareness.....scored high
Specific Evaluation.....positive scored low
General Evaluation.....positive scored low
Efficacy.....high scored low

One must be careful in reading such a figure to interpret correctly the information it provides. Notice, for example, that none of the three values represented in Figure 3.1 approaches a perfect correlation; indeed, each is closer to zero than to +1.0 or -1.0. Notice also that one cannot simply say that efficacy is positively correlated with awareness at the .24 level. Such a statement would be hopelessly ambiguous since both of these are scaled variables: i.e., both range from low to high. In this particular case, as a matter of fact, high efficacy is scored low while high awareness is

scored high. Hence a score of 1 on the efficacy scale represents a high level of efficacy; a score of 1 on the awareness scale represents a low level of awareness. Hypothetically, if it happened to be the case that high efficacy was strongly correlated with high awareness, the values on the efficacy scale would decrease while the values on the awareness scale were increasing. The sign of the correlation coefficient in such a case would be negative (-) rather than positive (+). Accordingly, the statement interpreting the strength of the correlation between efficacy and awareness should read: low efficacy is correlated with high awareness at the +.24 level.

32) Frame a statement interpreting the strength of the correlation between:

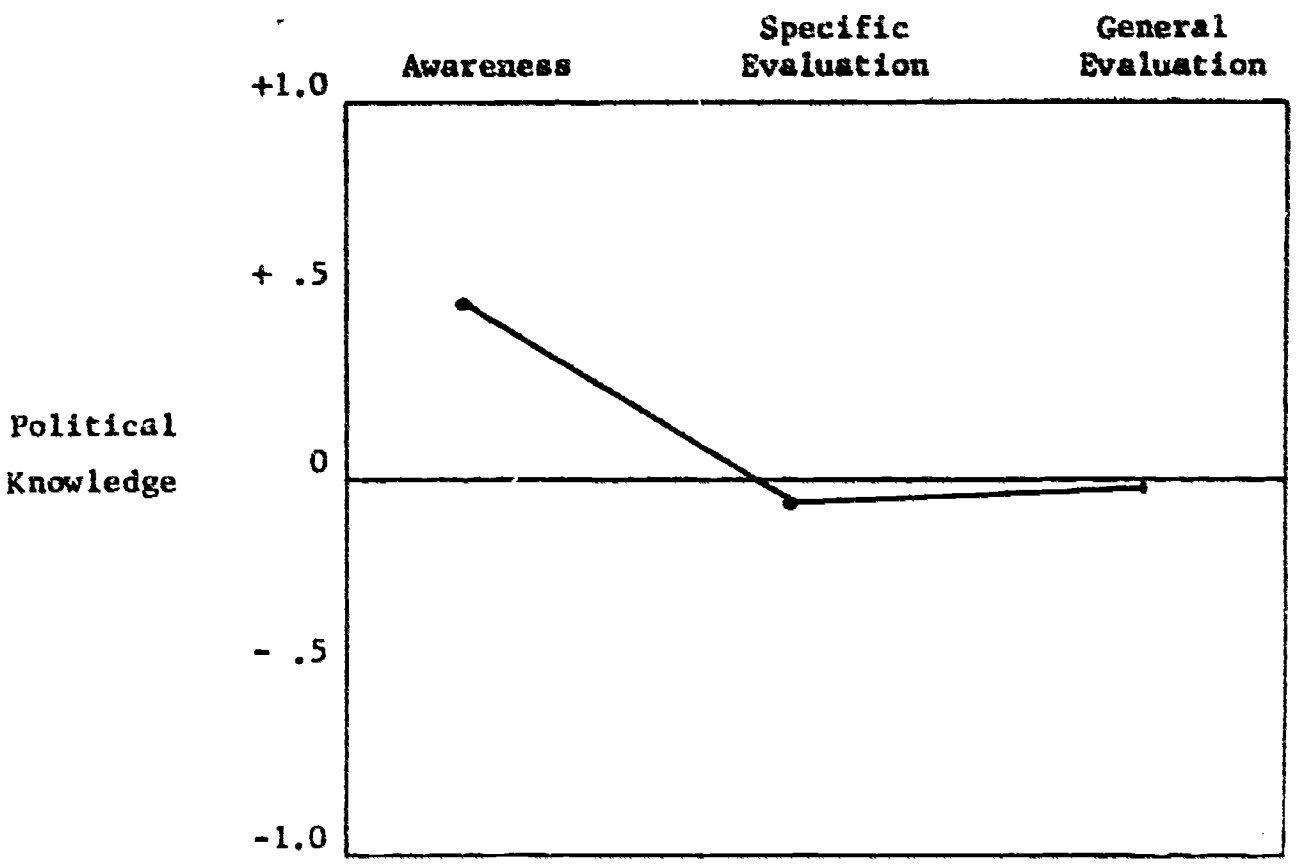
a) efficacy and specific evaluation: _____

b) efficacy and general evaluation: _____

c) Explain your answers. _____

33) Of what substantive value is the information presented in Figure 3.1? _____

Figure 3.2: Comparative Effects of Political Knowledge on Three Measures of Public Perception of the Supreme Court: 1966



Awareness.....scored high
Specific Evaluation.....positive scored low
General Evaluation.....positive scored low
Political Knowledge.....high scored high

34) Frame a statement interpreting the strength of the correlation between:

a) political knowledge and awareness: _____

_____

_____

b) political knowledge and specific evaluation: _____

_____

_____

c) political knowledge and general evaluation: _____

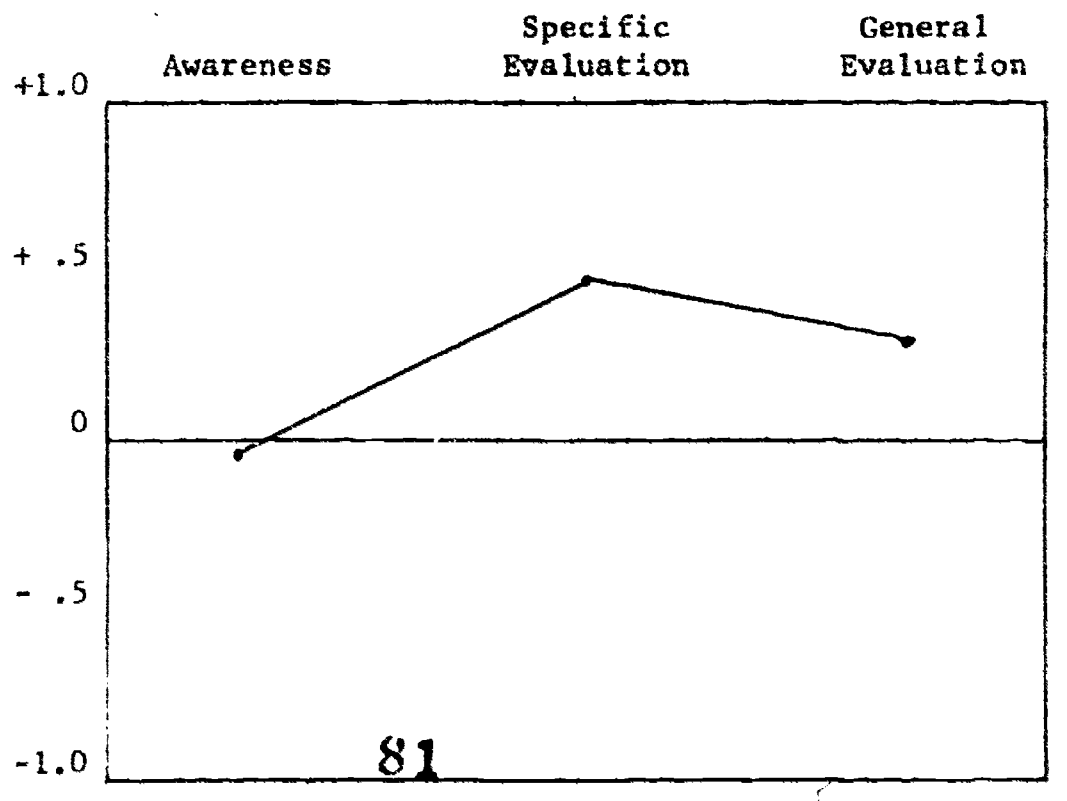
_____

_____

d) Explain your answers. _____

35) Of what substantive value is the information presented in Figure 3.2?

Figure 3.3: Comparative Effects of Reaction to the Civil Rights Issue on Three Measures of Public Perception of the Supreme Court: 1966



Awareness.....scored high
Specific Evaluation.....positive scored low
General Evaluation.....positive scored low
Reaction to Civil Rights Issue.....too fast scored high

36) Frame a statement interpreting the strength of the correlation between:

a) reaction to the civil rights issue and awareness: _____

b) reaction to the civil rights issue and specific evaluation:

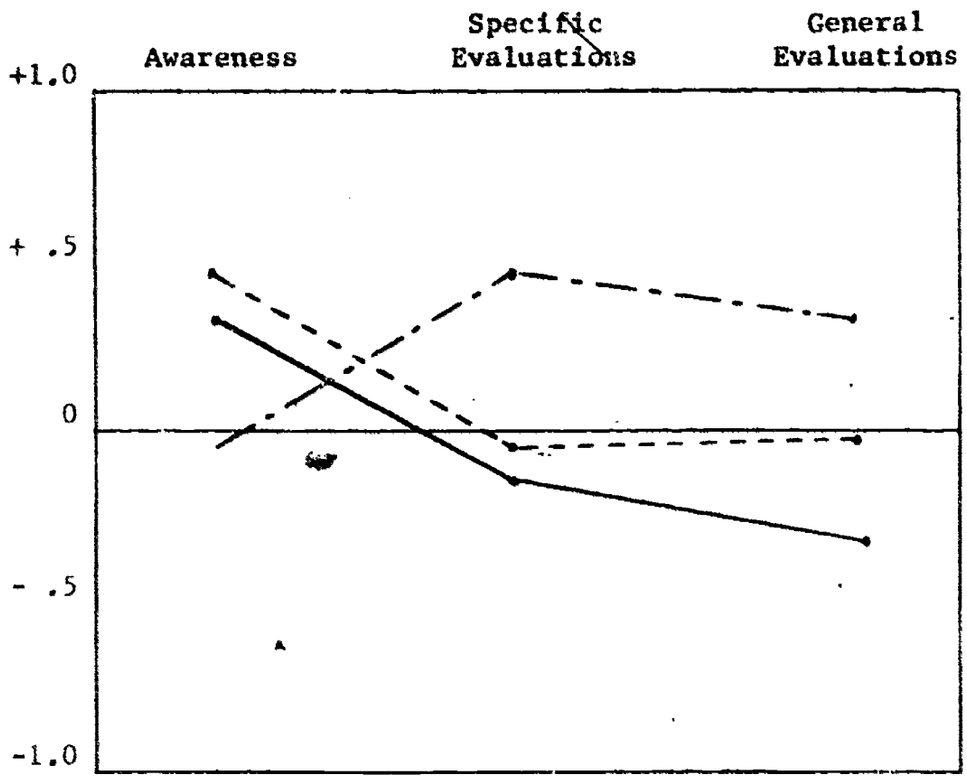
c) reaction to civil rights issue and general evaluation: _____

d) Explain your answers. _____

37) Of what substantive value is the information presented in Figure 3.3

There are, of course, a variety of formats one can use to present the same data; each such presentation can be instructive in its own way. In this instance, it would be useful to compare the three sets of comparative effects: that is, to collapse Figures 3.1, 3.2, and 3.3 in such a way that the comparative effects of each of the three political variables can be shown in combination. Figure 3.4, below, illustrates this mode of presentation.

Figure 3.4: Comparison of Awareness of Role, Specific Evaluations and General Evaluations of the U.S. Supreme Court (1966) with Three Political Correlates



———— Represents SRC Efficacy (high scored low)

– – – – – – – Represents Political Knowledge, as measured by number of government problems identified (high scored high)

— – — . — Represents Reaction to Civil Rights Issue: are leaders pushing too fast? (high score: too fast)

38) Frame a statement (set of statements) comparing the effects of the three political variables on awareness, specific evaluation, and general evaluation of the Supreme Court.

39) How does your answer to question #38 bear on the three-tiered pattern of response?

40) Now, reflecting back on the broad substantive problem with which we began this exercise, formulate at least three propositions concerning selected aspects of the problem which could be tested using the various kinds of data presented in the several tables and figures of this exercise. Indicate briefly what data would be appropriate in each case.

a) _____

b) _____

c) _____

Judicial Process Laboratory

EXERCISE #4

Assigned Readings:

Donald Matthews, The Social Background of Political Decision-Makers (New York: Random House, 1954), chapters 1-3.

Samuel Krislov, The Supreme Court in the Political Process (New York: Macmillan, 1965), chapter 1.

Joseph Schlesinger, Ambition and Politics (Chicago: Rand McNally, 1966), chapters 1 and 2.

One major area of interest for the student of the judicial process is judicial decision-making. We assumed that judges, like other political actors, are influenced to some degree by factors related to their prior experiences, as well as by strictly legalistic factors. This is a complex problem, however, and there are several ways in which one might approach it. The simplest of these is to look at background characteristics such as religion and political party affiliation. This exercise is designed to show you how to begin an analysis of the relationship between judicial decision-making and background characteristics. The assigned readings will serve to familiarize you with some basic literature on this subject and will also be helpful to you in Exercise #5.

Perhaps the first question is to determine whether judges have any distinctive background characteristics in comparison to other national political actors. In his study, Ambition and Politics, Schlesinger compares presidential and vice-presidential candidates, cabinet members, and Supreme Court justices on the basis of their last previous office in politics. The results of this study appear in Table 4.1.

Table 4.1: Relation of last previous office to current office held by members of the national leadership group (1900-1958)

LAST OFFICE	CURRENT OFFICE: Presidential and Vice Presidential Candidates	Cabinet Members	Supreme Court Justices
Major Elective			
Pres. or V.P.	6.5%	.5%	2.8%
U.S. Senator	25.0	3.0	8.6
U.S. Representative	4.5	6.5	---
Governor or other state office	32.0	4.5	5.7
Defeated candidate for Pres. or V.P.	2.5	1.5	---
	70.5	16.0	17.1
Administrative			
Federal Cabinet	6.5	7.0	19.8
Federal Sub-cabinet	---	15.0	---
Federal Administration	9.0	24.0	2.8
State Administration	---	1.0	---
	15.5	47.0	22.6
Court System			
Federal Judge	2.5	1.0	28.9
State Judge	---	1.0	14.6
Federal Lawyer	2.5	3.0	11.1
	5.0	5.0	54.6
Miscellaneous			
Major party administration	---	9.5	---
Defeated Gov. or Senator	2.5	1.5	---
Local elective officer	---	1.0	---
No recent public office or nomination	6.5	19.0	5.6
	9.0	31.0	5.6
TOTAL	100.0%	99.0%	99.9%
N	(44)	(159)	(35)

1) From which category of office is each of the three types of political actors recruited most frequently?

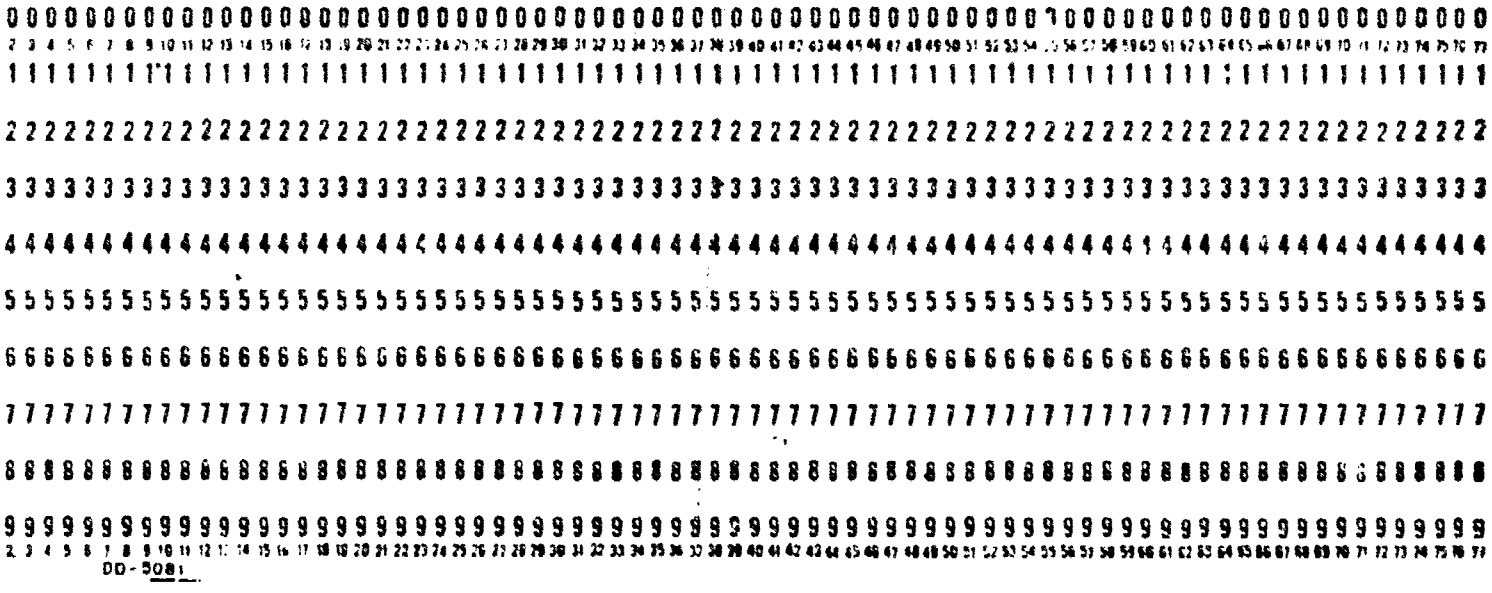
2) Is major elective office a characteristic recruitment route for all national political leaders? Why or why not? _____

In order to construct tables like the one above, data on each of the justices must first be collected and tabulated. One convenient method of collecting this information is to code and store it on IBM cards. Data recorded in this form, (that is, actually punched onto the cards), facilitates the storage of large quantities of information which then can be processed by high speed data processing equipment.

Codes can be quite sophisticated if necessary, though for illustrative purposes in this exercise, a rather simplified code has been constructed. The codebook on pages 4-7 through 4-12 codes the collected information on only six characteristics of the justices.

3) What are the six characteristics? _____

The codebook is the key to the information punched on the IBM card, (one card per justice), which then contains the actual data being stored. At the top of the following page you will find a sample IBM card.



Notice that there are eighty columns across the card, with ten spaces (0 through 9) in each row. Data are stored on these cards by punching out certain of the spaces on the cards according to a predetermined code. For instance, this study was given the Identification Number of 00001, which should be punched in the first five columns on the above card (and on each card in the deck).

Column #6 contains the "deck number," which, in this case, is 1; this means that it is the first deck, or set of cards for the justices. (There may be occasion to use more decks, if more information is collected than can be stored on this one deck.) Columns 7-10 contain the coded name of each justice: the justices are listed in order of appointment and numbered accordingly, 0001 through 0098. Only columns 9 and 10 have been used so far; when the number of justices reaches 100, column 8 will also be used. Thus, a card with 0098 punched in columns 7 through 10 will be the card of Chief Justice Warren Burger.

4) In what columns is the characteristic "Party Identification of Justice" punched?

_____

5) In what punch (number) in those columns is "Democrat" recorded?

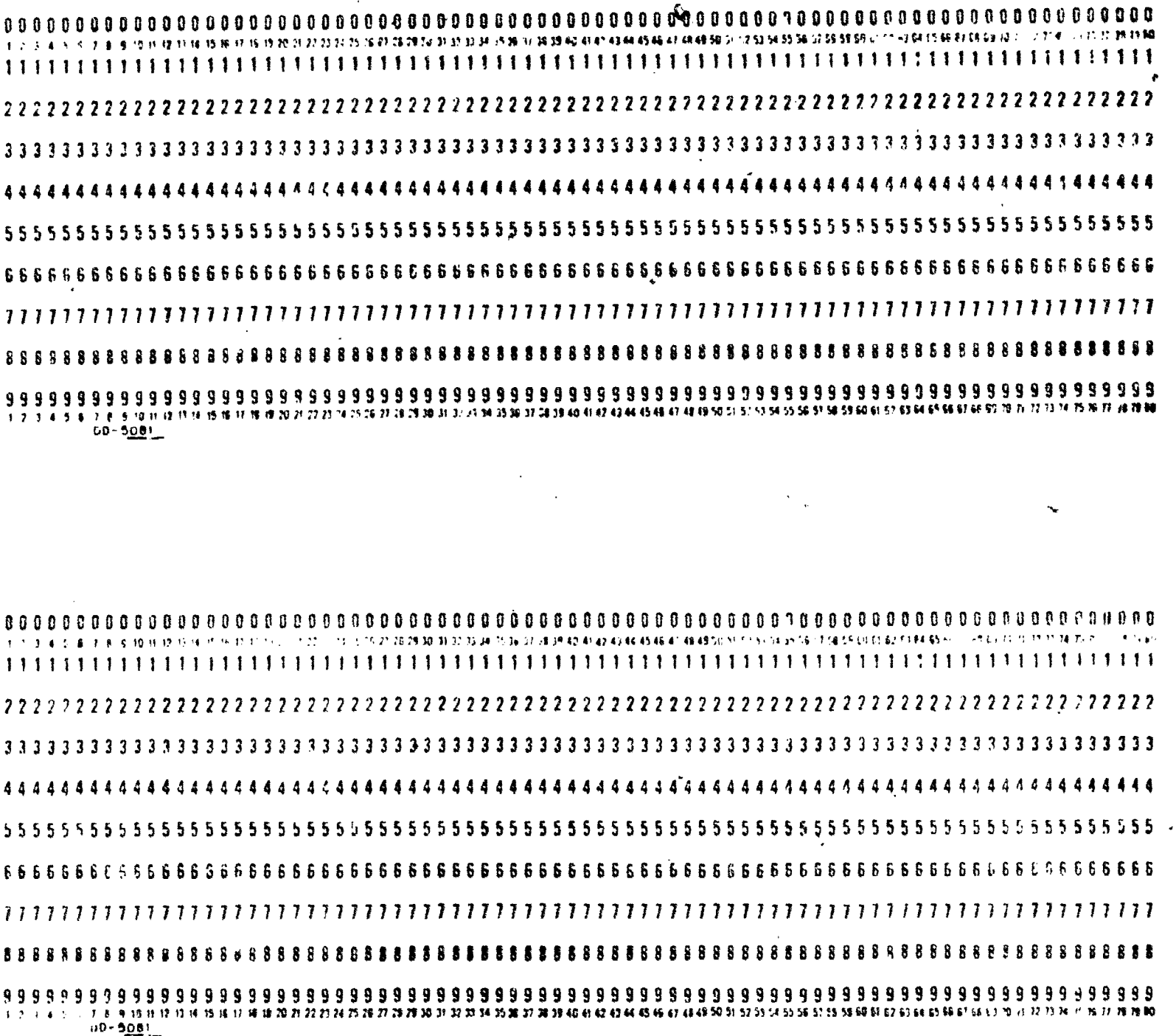
_____

On the blank sample IBM card, indicate by X marks, the correct punched-out spaces for: a) Study Identification Number, b) Deck Number, and c) the Identification Number of Justice Louis Brandeis.

6) In what columns and punches (numbers) will Justice Brandeis' "Last Previous Office" be recorded?

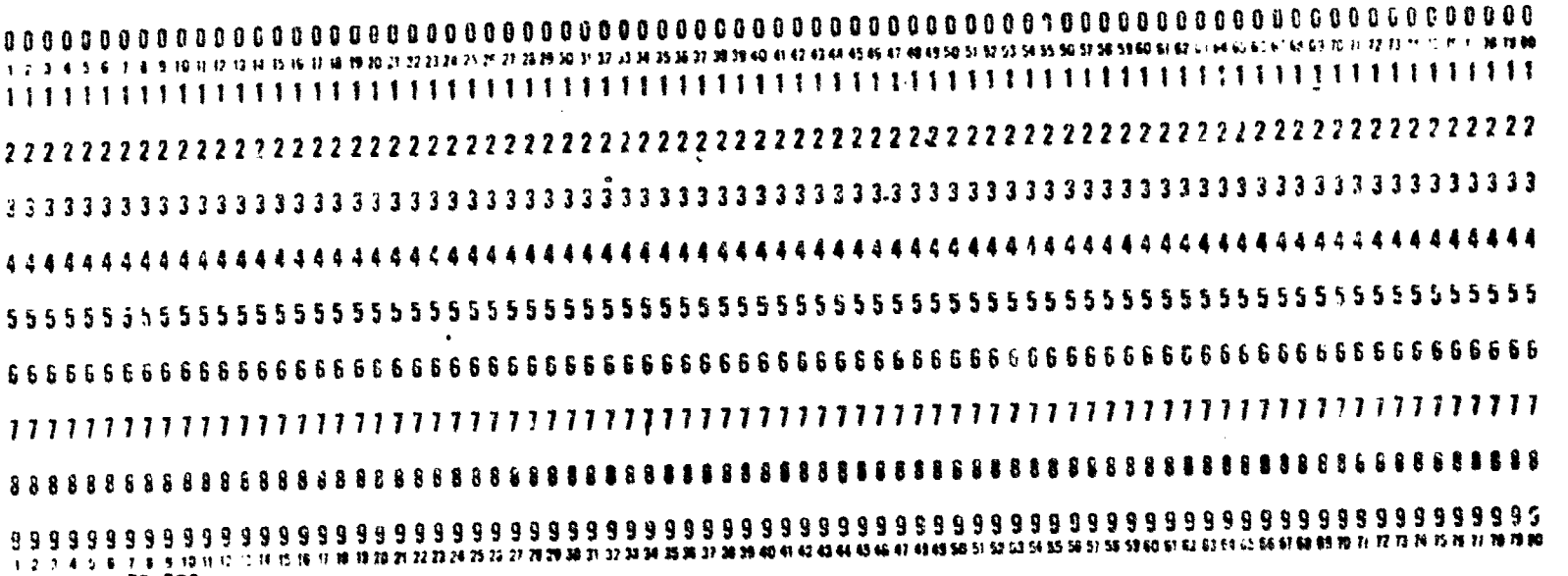
_____

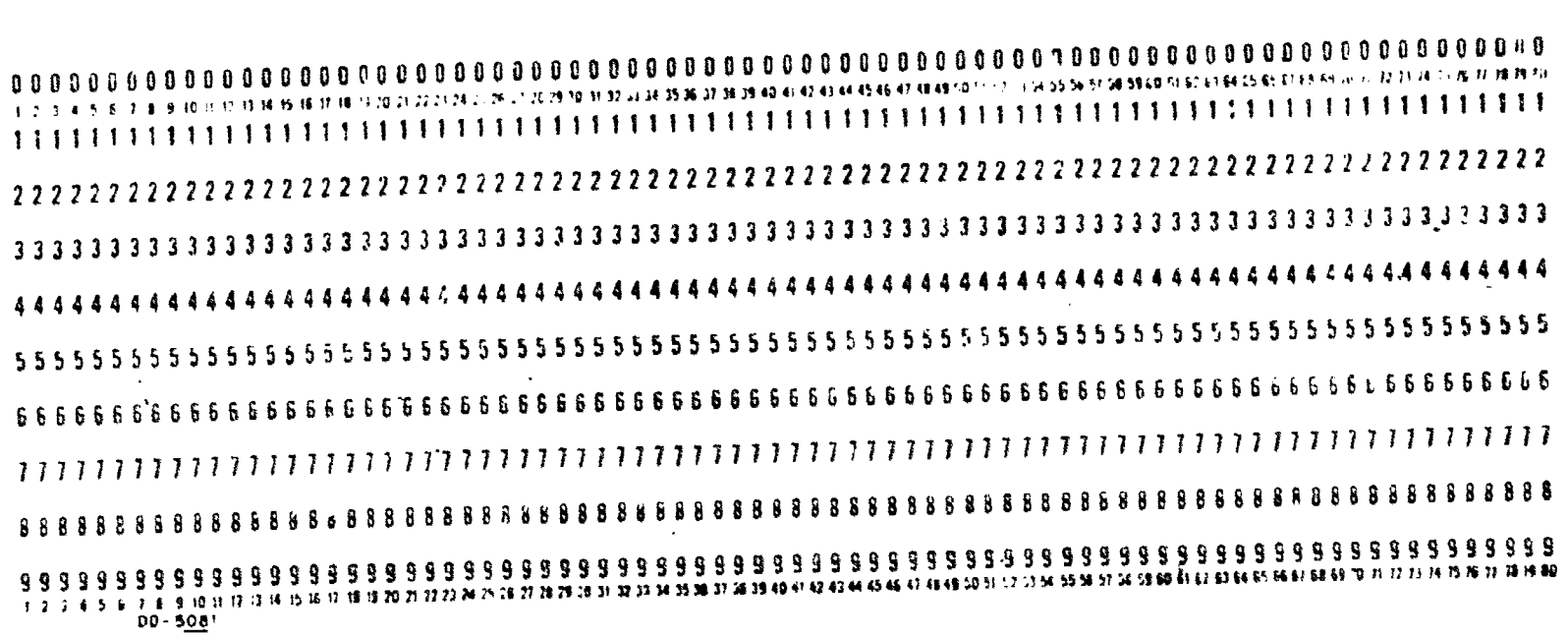
On this and the following page, five blank IBM cards are reproduced, and in the Appendix to this exercise are biographical sketches for five of the recently appointed Supreme Court Justices: Byron White, Arthur Goldberg, Abe Fortas, Thurgood Marshall, and Warren Burger. Fill out a card for each Justice by recording an X mark in the appropriate columns and punches; include all information required by the code.

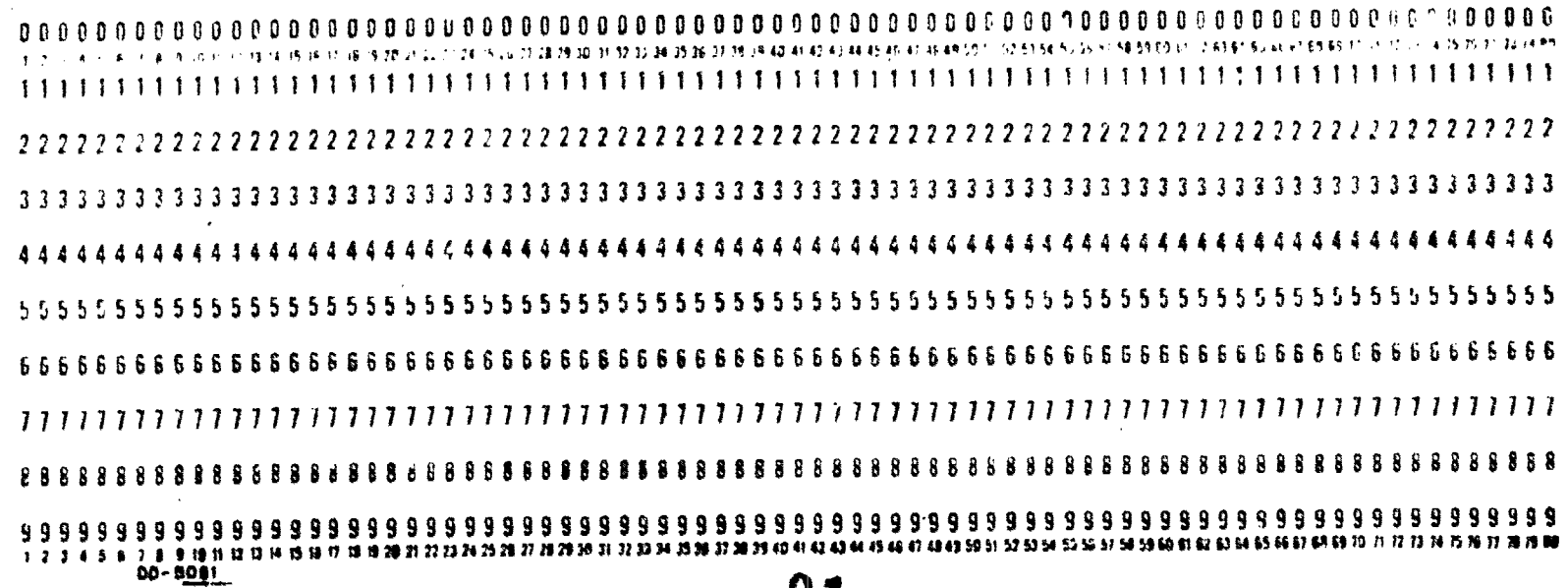


GD-5081

GD-5081


00-5081


00-5081


00-5081

APPENDIX A

Code Book for Judicial Behavior Laboratory Data on Supreme Court Justices

Deck 01

Column Number	Code
01-05	Study Identification Number (00001)
06	Deck Number (1)
07-10	Judge Identification Number: Justices are numbered consecutively according to their order of appointment. Thus, the first Justice appointed, John Jay, is 0001, etc.

0001	John Jay	1789-1795
0002	John Rutledge	1789-1791
0003	William Cushing	1789-1810
0004	James Wilson	1789-1798
0005	John Blair	1789-1796
0006	James Iredel	1790-1799
0007	Thomas Johnson	1791-1793
0008	William Paterson	1793-1806
0009	Samuel Chase	1796-1811
0010	Oliver Ellsworth	1796-1800
0011	Bushrod Washington	1798-1829
0012	Alfred Moore	1799-1804
0013	John Marshall	1801-1835
0014	William Johnson	1804-1834
0015	Henry Brockholst Livingston	1806-1823
0016	Thomas Todd	1807-1826
0017	Gabriel Duval	1811-1835
0018	Joseph Story	1811-1845
0019	Smith Thompson	1823-1843
0020	Robert Trimble	1826-1828
0021	John McClean	1829-1861
0022	Henry Baldwin	1830-1844
0023	James M. Wayne	1835-1867
0024	Roger B. Taney	1836-1864
0025	Philip B. Barbour	1836-1841
0026	John Catron	1837-1865
0027	John McKinley	1837-1852
0028	Peter V. Daniel	1841-1860
0029	Samuel Nelson	1845-1872
0030	Levi Woodbury	1845-1851
0031	Robert C. Grier	1846-1870
0032	Benjamin R. Curtis	1851-1857
0033	John A. Campbell	1853-1861
0034	Nathan Clifford	1858-1881
0035	Noah H. Swayne	1862-1881
0036	Samuel F. Miller	1862-1890

Column Number	Code		
07-10 (cont.)	Judge Identification Number (cont.)		
	0037	David Davis	1862-1877
	0038	Stephen J. Field	1863-1897
	0039	Salmon P. Chase	1864-1873
	0040	William Strong	1870-1880
	0041	Joseph P. Bradley	1870-1892
	0042	Ward Hunt	1872-1882
	0043	Morrison R. Waite	1874-1888
	0044	John Marshall Harlan	1877-1911
	0045	William B. Woods	1880-1887
	0046	Stanley Matthews	1881-1889
	0047	Horace Gray	1881-1902
	0048	Samuel Blatchford	1882-1893
	0049	Lucius Q. C. Lamar	1888-1893
	0050	Melville W. Fuller	1888-1910
	0051	David J. Brewer	1889-1910
	0052	Henry B. Brown	1890-1906
	0053	George Shiras	1892-1903
	0054	Howell E. Jackson	1893-1895
	0055	Edward D. White	1894-1921
	0056	Rufus W. Peckham	1895-1909
	0057	Joseph McKenna	1898-1925
	0058	Oliver W. Holmes	1902-1932
	0059	William Rufus Day	1903-1922
	0060	William H. Moody	1906-1910
	0061	Horace H. Lurton	1909-1914
	0062	Charles E. Hughes	1910-1916
	0063	William Van Devanter	1910-1937
	0064	Joseph R. Lamar	1910-1916
	0065	Mahlon Pitney	1912-1922
	0066	James C. McReynolds	1914-1941
	0067	Louis D. Brandeis	1916-1939
	0068	John H. Clarke	1916-1922
	0069	William H. Taft	1921-1930
	0070	George Sutherland	1922-1938
	0071	Pierce Butler	1922-1939
	0072	Edward T. Sanford	1923-1930
	0073	Harlan F. Stone	1925-1946
	0074	Charles E. Hughes	1930-1941
	0075	Owen J. Roberts	1930-1945
	0076	Benjamin Cardozo	1932-1938
	0077	Hugo L. Black	1937-
	0078	Stanley F. Reed	1938-1957
	0079	Felix Frankfurter	1939-1962
	0080	William O. Douglas	1939-
	0081	Frank Murphy	1940-1949
	0082	James F. Byrnes	1941-1942
	0083	Robert H. Jackson	1941-1954
	0084	Wiley B. Rutledge	1943-1949
	0085	Harold H. Burton	1945-1958

Column Number	Code		
07-10 (cont.)	Judge Identification Number (cont.)		
	0086	Fred M. Vinson	1946-1953
	0087	Tom C. Clark	1949-1967
	0088	Sherman Minton	1949-1956
	0089	Earl Warren	1953-1969
	0090	John M. Harlan	1955-
	0091	William J. Brennan	1957-
	0092	Charles E. Whittaker	1957-
	0093	Potter C. Stewart	1958-
	0094	Byron White	1962-
	0095	Arthur Goldberg	1962-1965
	0096	Abe Fortas	1965-1969
	0097	Thurgood Marshall	1967-
	0098	Warren Burger	1969-
11-13	Appointing President Identification Number. (Appointing Presidents will be numbered consecutively according to their order of election. All Presidents and Vice-Presidents who assumed the presidency are listed.)		
	001	George Washington	
	002	John Adams	
	003	Thomas Jefferson	
	004	James Madison	
	005	James Monroe	
	006	John Quincy Adams	
	007	Andrew Jackson	
	008	Martin Van Buren	
	009	William Henry Harrison	
	010	John Tyler	
	011	James Knox Polk	
	012	Zachary Taylor	
	013	Millard Fillmore	
	014	Franklin Pierce	
	015	James Buchanan	
	016	Abraham Lincoln	
	017	Andrew Johnson	
	018	Ulysses Simpson Grant	
	019	Rutherford Birchard Hayes	
	020	James Abram Garfield	
	021	Chester Alan Arthur	
	022	Grover Cleveland	
	023	Benjamin Harrison	
	024	Grover Cleveland	
	025	William McKinley	
	026	Theodore Roosevelt	
	027	William Howard Taft	
	028	Woodrow Wilson	
	029	Warren Gamallel Harding	
	030	Calvin Coolidge	

Column Number	Code
11-13 (cont.)	Appointing President Identification Number (cont.)
	031 Herbert Clark Hoover
	032 Franklin Delano Roosevelt
	033 Harry S. Truman
	034 Dwight David Eisenhower
	035 John F. Kennedy
	036 Lyndon B. Johnson
	037 Richard M. Nixon
14-15	Party Identification of Justice
	01 Federalist
	04 Republican-Democrat (Includes Jeffersonian Republicans, National Republicans)
	05 Whig
	07 Republican
	09 Democrat
16-17	Party Identification of Appointing President
	01 Federalist
	04 Republican-Democrat (Includes Jeffersonian Republicans, National Republicans)
	05 Whig
	07 Republican
	09 Democrat
18-19	Region and State of Justice. (First column denotes region, second denotes state within that region.)
	New England
	01 Connecticut
	02 Maine
	03 Massachusetts
	04 New Hampshire
	05 Rhode Island
	06 Vermont
	Middle Atlantic
	11 Delaware
	12 New Jersey
	13 New York
	14 Pennsylvania

Column Number	Code
18-19 (cont.)	Region and State of Justice (cont.)
	East North Central
	21 Illinois
	22 Indiana
	23 Michigan
	24 Ohio
	25 Wisconsin
	West North Central
	31 Iowa
	32 Kansas
	33 Minnesota
	34 Missouri
	35 Nebraska
	36 North Dakota
	37 South Dakota
	Solid South
	41 Alabama
	42 Arkansas
	43 Florida
	44 Georgia
	45 Louisiana
	46 Mississippi
	47 North Carolina
	48 South Carolina
	51 Texas
	52 Virginia
	Mountain States
	61 Arizona
	62 Colorado
	63 Idaho
	64 Montana
	65 Nevada
	66 New Mexico
	67 Utah
	68 Wyoming
	Pacific States
	71 California
	72 Oregon
	73 Washington
	74 Alaska
	75 Hawaii

Column Number	Code
18-19 (cont.)	Region and State of Justice (cont.)

Border States

81 Kentucky
82 Maryland
83 Oklahoma
84 Tennessee
85 Washington, D.C.
86 West Virginia

20-21 Last Previous Office of Justice Prior to Appointment to Supreme Court. (First column denotes broad category of offices, major elective, administrative, etc.; second column denotes particular type of office within that category.)

Major Elective Office

01 President or Vice-President
02 U.S. Senator
03 U.S. Representative
04 Governor or other State Office
05 Defeated Candidate for President or Vice-President

Administrative

11 Federal Cabinet
12 Federal Sub-Cabinet
13 Federal Administration
14 Federal Lawyer

Court System

21 Federal Judge
22 Federal Lawyer
23 State Judge
24 State Lawyer

Miscellaneous

31 Major Party Administrator
32 Defeated Governor or Senator
33 Local Elective
34 No recent public office or nomination

APPENDIX B

Biographical Sketches

Byron R. White was born in Fort Collins, Colorado on June 8, 1917. He graduated from the University of Colorado in 1938, was a Rhodes Scholar at Oxford University, and graduated from Yale Law School. White was appointed by President John F. Kennedy to be U.S. Deputy Attorney General in 1961, and as Associate Justice of the U.S. Supreme Court in 1962.

Arthur J. Goldberg was born in Chicago, Illinois on August 8, 1908. A graduate of Northwestern in 1929, Goldberg became prominent as a labor lawyer. He was appointed by President John F. Kennedy to be U.S. Secretary of Labor in 1961, and as Associate Justice of the U.S. Supreme Court in 1962.

Abe Fortas was born in Memphis, Tennessee on June 19, 1910. He graduated from Southwestern College in 1930 and from Yale Law School in 1933. A prominent Washington attorney and one-time Undersecretary of the Interior under President Roosevelt, Fortas was appointed by President Lyndon B. Johnson as Associate Justice of the U.S. Supreme Court in 1965. He resigned from the Court in 1969.

Thurgood Marshall was born in Baltimore, Maryland on July 2, 1908. He graduated from Lincoln University in 1930 and received his law degree from Harvard University in 1933. Marshall became prominent as a special counsel to the NAACP and argued numerous civil rights cases, including the landmark school segregation cases. He was appointed by President John F. Kennedy as a U.S. Circuit Judge in 1961. President Lyndon B. Johnson appointed Marshall to be U.S. Solicitor General in 1965, and an Associate Justice of the U.S. Supreme Court in 1967.

Warren Burger was born in St. Paul, Minnesota in 1907. He graduated from the St. Paul College of Law. He served under President Dwight D. Eisenhower as Assistant Attorney General from 1953-1956 and was appointed a U.S. Circuit Judge in 1956. President Richard M. Nixon appointed Burger as Chief Justice of the U.S. Supreme Court in 1969.

Judicial Process Laboratory

EXERCISE #5

This exercise has two purposes: first, to introduce the student to the techniques for presenting data in a form appropriate for the sort of analysis he will be undertaking; second, to explore some simple techniques for analysis of these data.

Table 5.1: Relation of last previous office to current office held by members of the national leadership group (1900-1958)

	CURRENT OFFICE		
LAST OFFICE	Presidential and Vice Presidential Candidates	Cabinet Members	Supreme Court Justices
Major Elective			
Pres. or V.P.	6.5%	.5%	2.8%
U.S. Senator	25.0	3.0	8.6
U.S. Representative	4.5	6.5	---
Governor or other state office	32.0	4.5	5.7
Defeated candidate for Pres. or V.P.	2.5	1.5	---
	70.5	16.0	17.1
Administrative			
Federal Cabinet	6.5	7.0	19.8
Federal Sub-cabinet	---	15.0	---
Federal Administration	9.0	24.0	2.8
State Administration	---	1.0	---
	15.5	47.0	22.6
Court System			
Federal Judge	2.5	1.0	28.9
State Judge	---	1.0	14.6
Federal Lawyer	2.5	3.0	11.1
	5.0	5.0	54.6
Miscellaneous			
Major party administration	---	9.5	---
Defeated Gov. or Senator	2.5	1.5	---
Local elective office	---	1.0	---
No recent public office or nomination	6.5	19.0	5.6
	9.0	31.0	5.6
TOTAL	100.0%	99.0%	99.9%
N	99(44)	(159)	(35)

Table 5.1 on p. 5.1 of this manual exhibits correct form for table construction, and we will use it as an example. First, some minor points of style should be noticed. This table presents the relationship between two variables: last office held by members of the national leadership group and current office held. Each variable is broken down into several categories. It is important that each of these categories and the variables themselves be fully and accurately labeled. Notice that the distributions are in percentages, with sub-total and total percentages clearly indicated. N denotes the actual number of cases (individuals) in each column and appears under the total percentage so the reader can assess the relative importance of the category.

It is important to realize what one can and cannot say on the basis of the data presented in this table. For example, we cannot say that more Supreme Court justices have come from major elective offices than have cabinet members. What we can say is that a higher percentage of Supreme Court justices have come from major elective offices than have cabinet members. A common error is to read percentages as if they were absolute numbers rather than percentages of absolute numbers. In this case, of course, there are nearly five times as many cabinet members as Supreme Court justices. Another common error is to extend interpretations of data beyond the data presented in the table; one can make statements only on the basis of information actually presented in the table.

1) On the basis of the percentages reported, could you say that more Supreme Court justices than presidential and vice-presidential candidates held administrative positions as their last previous political office? Why or why not?

_____

_____

2) Which of the following two statements can you make on the basis of this table?

a) A higher percentage of Supreme Court justices than any other political actors in America had their last previous office in the court system.

b) A higher percentage of Supreme Court justices than cabinet members and presidential and vice-presidential candidates had their last previous office in the court system.

Explain: _____

_____

3) On the basis of this table can we make the following statement: A higher percentage of Supreme Court justices have had prior judicial experience than have cabinet members or presidential and vice-presidential candidates? Explain your answer.

_____

_____

It is also important to design a table so as to include only the information that is appropriate for a specific use. Needlessly complex tables are a burden to read and interpret correctly. For example, Table 5.1 was used in Exercise #4 to illustrate simple relationships between the single variable, last previous position held, and current political position. It therefore was unnecessary to include other possibly interesting information. However, if desired, this table can be expanded to include a break-down of the individuals on the basis of political party affiliation. Table 5.2 below is such an expanded version of this table.

Table 5.2: Relation of last previous office to current office held by members of the national leadership group (1900-1958)

LAST OFFICE	CURRENT OFFICE: Presidential Vice Presidential Candidates		Cabinet Members		Supreme Court Justices	
	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.
Major Elective						
Pres. or V.P.	9.1%	4.5%	---%	1.45%	5.0%	---%
U.S. Senator	22.7	27.2	2.2	4.35	---	20.0
U.S. Representative	4.5	4.5	3.3	8.70	---	---
Governor or other state office	31.8	31.8	4.4	4.35	10.0	---
Defeated candidate for Pres. or V.P.	---	4.5	1.1	2.90	---	---
	68.1	72.5	11.0	21.75	15.0	20.0
Administrative						
Federal Cabinet	9.1	4.5	8.9	4.35	10.0	33.3
Federal sub-Cabinet	---	---	11.1	20.30	---	---
Federal Administration	4.5	13.6	25.6	21.70	---	6.7
State Administration	---	---	---	2.90	---	---
	13.6	18.1	45.6	49.25	10.0	40.0
Court System						
Federal Judge	4.5	---	---	2.90	35.0	20.0
State Judge	---	4.5	1.1	1.45	25.0	---
Federal Lawyer	---	---	2.2	5.80	15.0	6.7
	4.5	4.5	3.3	10.15	75.0	26.7
Miscellaneous						
Major party administration	---	---	7.8	11.60	---	---
Defeated Gov. or Senator	---	4.5	3.3	---	---	---
Local elective officer	---	---	1.1	1.45	---	---
No recent public office or nomination	13.6	---	27.8	5.80	---	13.3
	13.6	4.5	40.0	18.85	0.0	13.3
TOTAL	99.8%	99.6%	99.9%	100.0%	100.0%	100.0%
N	(22)	(22)	(90)	(69)	(20)	(15)

On the basis of Table 5.2 it is difficult to make statements about each category of officeholders as a whole. There is no one single percentage figure for any of the categories. However, if one is interested in the relation of party affiliation to the variables, then the more complex table is warranted. For example, we can now make statements about the differences between the backgrounds of Republican and Democratic officeholders.

4) Which of the following statements can be made on the basis of the percentages presented in Table 5.2? (If you decide that none of the statements can be made, explain why not.)

a) The overwhelming majority of Supreme Court justices have had as their last previous office a position in the court system.

b) A higher percentage of Supreme Court justices who are Democrats had as their last previous office an administrative position than have Supreme Court justices who are Republicans.

c) No Supreme Court justice who is a Republican was a member of Congress as his last previous political office.

You have seen that different statements can be made on the basis of simpler or more complex presentations of the same data. It is important to tailor your presentation to the type of statements you wish to make. The data in Table 5.2 added information that was not included in Table 5.1. On the other hand, tables should not be more complex than is warranted by the information contained in them. Table 5.3 on the following page is designed to show the relationship between the last previous office of Supreme Court appointees and the party affiliation of the respective appointing presidents. Referring to Data Table #9, calculate the indicated figures and record them in the appropriate cells of Table 5.3.

Table 5.3: Relation Between Last Previous Office of Supreme Court Appointees and Party Affiliation* of Appointing President

		1789-1860			1861-1900			1901-1968			
		Dem.	Rep.	Other	Dem.	Rep.	Other	Dem.	Rep.	Other	N
Major Elective	Fed.										
	State										
Administrative	Fed.										
	State										
Court System	Fed.										
	State										
Miscellaneous											
	N										

*Categories: 1) Democrats includes Republican-Democrats of the mid-1800's.

2) Republicans includes Whigs of the mid-1800's.

3) Other includes Federalists, and one Independent, (Justice Frankfurter).

5) Formulate the hypothesis that would have led you to construct this table. _____

_____

_____

_____

6) Is your hypothesis confirmed? To what degree? _____

_____

_____

_____

Complete Table 5.4 by collapsing Table 5.3, eliminating the historical periods.

Table 5.4: Relation Between Last Previous Office of Supreme Court Appointees and Party Affiliation* of Appointing President

		Democrat	Republican	Other	N
Major Elective	Fed.				
	State				
Administrative	Fed.				
	State				
Court System	Fed.				
	State				
Miscellaneous					
N					

*Categories: 1) Democrats includes Republican-Democrats of the early 1800's.

2) Republicans includes Whigs of the mid-1800's.

3) Other includes Federalists, and one Independent, (Justice Frankfurter).

7) What information is sacrificed by collapsing the historical categories?

_____

_____

_____

_____

8) Which of the two tables (Table 5.3 or Table 5.4) more parsimoniously presents the data in support of your hypothesis? Explain.

_____

_____

_____

Below is a table (Table 5.5) designed to show the relationship between the party affiliation of Supreme Court justices and the party affiliation of appointing presidents. Referring again to Data Table #9, calculate the indicated figures and record them in the appropriate cells of Table 5.5.

Table 5.5: Relation of Party of Supreme Court Justices to Party of Appointing President

		1789-1860			1861-1900			1901-1968			
Party of Justice:*		Dem.	Rep.	Other	Dem.	Rep.	Other	Dem.	Rep.	Other	N
Party of Presidents*	Dem.										
	Rep.										
	Other										
	N										

*Categories: 1) Democrats includes Republican-Democrats of early 1800's.

2) Republicans includes Whigs of the mid-1800's.

3) Other includes Federalists, and one Independent, (Justice Frankfurter).

9) Formulate the hypothesis that would have led you to construct this table. _____

_____

_____

_____

10) Is your hypothesis supported? To what degree? _____

_____

_____

_____

Complete Table 5.6 below by collapsing Table 5.5, eliminating the historical periods.

Table 5.6: Relation of Party of Supreme Court Justices to Party of Appointing President (1789-1968)

Party of Presidents	Party of Justices: Democrat	Republican	Other	N
Dem.				
Rep.				
Other				
N				

11) What information is sacrificed by collapsing the historical categories?

12) Which of the two tables most parsimoniously presents the data in support of your hypothesis? Explain.

Judicial Process Laboratory

EXERCISE #6

Assigned Readings:

Samuel Krislov, The Supreme Court in the Political Process (New York: Macmillan, 1965), chapters 2 and 3.

Stuart S. Nagel, "The Relationship Between the Political and Ethnic Affiliation of Judges, and Their Decision-Making," in Judicial Behavior, Glendon Schubert, editor (Chicago: Rand McNally, 1964).

This exercise is designed to provide you with a simple means for analyzing the relationship between the background characteristics of judges and judicial decisions. For the purpose of this exercise we will confine our consideration of background characteristics to party affiliation, since it is the easiest to dichotomize across a large number of judges. The following are some of the hypotheses that have been advanced concerning the relationship between the party affiliation of judges and their decision-making:

Hypothesis #1: Judges who are Democrats tend to decide for the defendant in criminal cases more often than do judges who are Republicans.

Hypothesis #2: Judges who are Democrats tend to uphold the government in administrative regulation cases more often than do judges who are Republicans.

Hypothesis #3: Judges who are Democrats tend to support the claimant in workmen's compensation cases more often than do judges who are Republicans.

1) Explain briefly the rationale for these hypotheses. _____

_____

_____

_____

_____

_____

2) If these hypothesized relationships were not confirmed, or only weakly supported, what factors would you consider to be most responsible?

_____

_____

_____

_____

The data tables we have provided in the back of this manual will allow you to make your own tests of these hypotheses. Notice that the judges for each court are listed alphabetically, along with their respective party affiliations. Each table presents decisions for only one court and for only one issue. Your first task is to make a simple frequency count of "yes" and "no" votes for each judge; then record these figures in the space provided below.

	Pennsylvania Supreme Court			Michigan Supreme Court		
Hypothesis #1:	Judge	Yes	No	Judge	Yes	No
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___
	_____	___	___	_____	___	___

	Pennsylvania Supreme Court			Michigan Supreme Court		
Hypothesis #2:	Judge	Yes	No	Judge	Yes	No
Hypothesis #3:						

3) Given these simple frequency figures, what impression do you have about the validity of the hypothesized relationships?

4) On the basis of the data as now presented, is there any particular reason for feeling more (or less) confidence in any one of these hypothesized relationships? Why or why not?

Your next task is to manipulate the data in such a way as to allow you to make more interesting statements. Nagel has suggested (see your reading assignment) calculating what he calls a "decision score" for each judge and for each court. One can then compare decision scores of judges in terms of a bench mark determined for each court; that is, each judge's decision score is either above or below the decision score (the average) for his court. The decision score for a judge is simply the proportion of times voting for the defendant (or claimant, or whatever, depending on the type of issue before the court) out of the total number of his votes on that issue. The decision score for the court, on the otherhand, is an average of the court's decisions on the selected issue, which is calculated by adding the decision scores of the individual judges together, and dividing by the number of judges.

Using the data tables again, calculate the appropriate decision scores for the judges, and for the two courts, on the defendant's rights issue. Enter the figures in the empty tables below (Tables 6.1 and 6.2), and label the tables correctly.

Table 6.1:

Judges	Party	Decision Score	Above or Below Court Averages

Table 6.2:

Judges	Party	Decision Score	Above or Below Court Averages

5) What does this procedure allow you to say that the earlier procedure (simple frequencies) did not? _____

_____

_____

_____

6) How does Nagel propose to deal with the judge whose decision score falls <u>at</u> the average of the court, and why? _____

_____

_____

_____

_____

_____

7) Referring to Tables 6.1 and 6.2, would the hypothesis being tested be confirmed if the average decision score of all the Democrats was higher than the average decision score of all the Republicans? Why or why not?

8) Explain why a statement of the following form is an appropriate interpretation of Tables 6.1 and 6.2: Judges of party A tend to be above the average of their respective courts in deciding cases of type X, while judges of party B tend to be below the average of their respective courts in deciding cases of type X.

9) Which of the following statements, then, would constitute a test of the hypothesized relationships when two or more courts are involved? Why?

a) Judges of party A will be presumed to favor X more than judges of party B, if the average score on votes for X is higher for judges of party A than it is for judges of party B.

b) Judges of party A will be presumed to favor X more than judges of party B, if the judges of party A tend to be above the average of their respective courts on votes for X while the judges of party B tend to be below the average of their respective courts on votes for X.

Nagel suggests constructing 2-by-2 tables to show the relationship between a judge's party affiliation and his being above or below the average of his court on any issue. In order to do this, select one of the hypotheses on page 6-1, calculate the decision scores for all of the judges and each of the two courts included in the two data tables which deal with the issue you have chosen. Then, using the 2-by-2 table provided below, label the table by issue and enter the figures in the appropriate cells. Below the table write an interpretive statement (using the proper form, as in question #8).

Table 6.3:

	Republican Judges	Democratic Judges
Above the average of one's court on the decision score		
At or below the average of one's court on the decision score		
Totals		

Statement: _____

_____

_____

10) In what way is your interpretive statement <u>weaker</u> than you might want it to be? (See Nagel, pp. 240-41, especially footnote 13).

_____

_____

_____

11) What <u>kind</u> of procedure might you perform in order to make your statement stronger? _____

_____

_____

_____

12) How adequate is this statement in terms of testing the hypothesis?

13) Do you think that Nagel has adequately solved the comparability problem?

Not all hypotheses relating background variables to judicial decisions are as intuitively obvious as those given on page 6-1. This is true because not all background variables are so obviously related to particular types of issues which judges face. In fact, the "obvious" relationships do not always hold.

For example, an interesting relationship to examine might be that between a judge's religious affiliation (Protestant/Catholic) and his decisions in domestic law controversies (e.g., divorce, separation, child custody, etc.). On the one hand, one might expect Catholic judges to take a broader view on the legal issues because of their traditional liberalism on social issues; on the other hand, one might equally well expect that Catholic judges reflect the more conservative position of their church on divorce. Therefore, the relationship between religious affiliation and decision on domestic issues might be stated in either of the two hypotheses:

1) Judges who are Catholics tend to be more lenient in domestic law cases than judges who are Protestants.

or

2) Judges who are Catholics tend to be less lenient in domestic law cases than judges who are Protestants.

In fact, available data tends to support the second hypothesis.

Another interesting relationship to examine is between this category of domestic law cases and judges' political party affiliation. What do you hypothesize the relationship to be?

14) Frame your hypothesis in testable form. _____

_____

_____

15) Explain briefly the rationale for your hypothesis. _____

_____

_____

_____

_____

To test this hypothesis, enter the appropriate figures in Table 6.4 below, using the data provided in Data Tables 5 and 6.

Table 6.4:

	Republican Judges	Democratic Judges
Above the average of one's court on the decision score		
At or below the average of one's court on the decision score		
Totals		

16) Is your hypothesis confirmed? _____

_____

_____

17) Briefly state a rationale for framing such hypotheses and testing them in this manner.

18) How adequately do you think this accounts for the behavioral differences among judges?

Judicial Process Laboratory

EXERCISE #7

Assigned Reading:

Joseph Tanenhaus, "The Cumulative Scaling of Judicial Decisions," Harvard Law Review, vol. 79, no. 8 (June, 1966), 1583-94.

This exercise is intended to show you how to "scale" judicial decisions. Since this technique is a relatively complex form of data analysis, some careful discussion of its implications and requirements is in order. We have assumed, in preceding exercises, that certain characteristics in a judge's background in some way affect his decision-making. In our choice both of these characteristics and of the issues decided, we have implicitly assumed that there is an intervening ideological dimension which is describable in terms of a liberal-conservative continuum. In other words, we have assumed that a "yes" vote on, for example, a workmen's liability claim against his employer is the equivalent of a "liberal" position, and that a judge who is a Democrat will tend to vote "yes" on such an issue; conversely, we have assumed that a "no" vote on such a claim is the equivalent of a "conservative" position, and that a judge who is a Republican will tend to vote "no" on such issues.

The technique of Guttman cumulative scaling is designed to allow the researcher to make statements about this intervening ideological dimension. For this purpose, then, it is assumed that for all judges on a court there exists a single definable set of attitudes toward any one issue, and that each case which bears on this issue operates as a stimulus evoking a pro or con response. In order to do this, of course, it must be further assumed that the set of cases chosen as stimuli is unidimensional. The following questions are designed to test your understanding of these assumptions as they apply to judicial decisions.

1) Why is it important to consider an intervening ideological dimension? Does it have to be ideological to serve its purpose?

2) Is the assumption of a single definable set of attitudes (for all judges on a court toward any one issue) a particularly stringent assumption for judicial decision-making? Explain.

3) Is the assumption of unidimensionality across a set of cases a particularly stringent assumption for judicial decision-making? Explain.

A scale is intended to measure intensity of response; Guttman's cumulative scale is designed specifically to measure ordinal intensity, from weaker to stronger responses, across a large set of stimuli. Presumably, therefore, any such set of stimuli can be arranged in a weaker to stronger ordering for any set of responses assumed to have a single set of attitudes toward these items. To give you some idea of how one goes about ordering judicial decisions according to this requirement, we have listed below a summary of the facts of five workmen's compensation cases.

Case #1: An employee of a trash removal company is suing for disability compensation for the period of three months during which he was recovering from back injuries suffered when he fell off a moving truck. The facts show that the truck was in service at the time of the accident, and that the claimant had consumed a six-pack of strong beer during the two hours preceding his accident.

Case #2: An employee of a house painting company is suing for two months sick leave compensation for the period in which he was recovering from a broken leg suffered in a fall from a ladder. The facts show that the employee was experienced, and that the fall occurred when the rung on which he was standing broke.

Case #3: The widow of a factory worker is suing her deceased husband's employer for death benefits. The facts show that the deceased was killed in an automobile accident while riding to work with fellow employees in a car pool organized by the union local.

Case #4: The widow of a San Francisco bank executive is suing her deceased husband's employer for death benefits. The facts show that the deceased was asphyxiated in a New York hotel fire, that a female companion was found asphyxiated in the same room, and that empty liquor bottles were also found in the hotel room; the deceased was attending a banking convention at the time of his death.

Case #5: An employee of an automobile manufacturer is suing for full disability compensation. The facts show that the claimant suffered the loss of his right arm in an accident involving a punch press machine.

4) Arrange these cases (by number) on a conservative-liberal continuum.

_____

5) Explain your ordering. _____

_____

_____

_____

_____

_____

6) Of course the order can be reversed without changing the logic of this situation. Write your scale "backward" with the item at the extreme right first, then the next most right, etc. _____

Now read your explanation of ordering in question #5. It still makes sense because you have maintained _____

_____

_____

as defined by Guttman.

7) Of your two possible orderings, reproduce here the one with the most "conservative" holding (that is, the granting of compensation would be most likely to be acceptable to a conservative) on the left, the most "liberal" on the right. _____

8) Assuming that you are testing for intensity of "liberalism," would the case on the far left extreme of your ordering be a weak or a strong stimulus? Explain.

9) Assuming that you are testing for intensity of "conservatism" would the case on the far left extreme of your ordering be a weak or strong stimulus?

10) Given Guttman's assumptions, would it be "harder" or "easier" for a "liberal" judge to vote "yes" on the case on the far left extreme than to vote "yes" on a case in the center? Explain.

11) Now state briefly what is meant by cumulative scaling.

Judicial Process Laboratory

EXERCISE #8

This exercise is designed to introduce you to the correct use of scale analysis in studying judicial decision-making. You have created a simple scale by logic from information on the items. But most of the time we do not know and cannot trust our intuitive notions of how the cases line up or what the unidimensional difference (or other non-scalable differences) among the judges or other decision-makers might be. Here we will consider how to take a mass of votes - yeses and noes - and try to array them into a scale like the one you created in Exercise #7. You will then be faced with the problem of what you might have when and if you can create such an array. But we will consider that question later. We can best get at the problems you might encounter by considering the simple procedural requirements for constructing a scale.

In constructing a scale matrix, one must first choose a set of respondents (all judges on a court) and a set of stimuli (a set of cases which meets intuitively the requirement of unidimensionality). The arrangement of responses in a scale matrix (with stimulus items ordered on a left-right, conservative-liberal continuum) should allow one to draw a line from the upper right to the lower left of the matrix, which dichotomizes each judge's responses as follows: all "yes" votes should be to the left of this line, and all "no" votes should be to the right of this line. Any deviations in location of "yes" and "no" votes, according to this rule, are termed "inconsistent" votes. The sample scale, showing decisions of the New York Court of Appeals (page 8-2), should give you a good indication of these procedures.

Unfortunately, there are no absolute rules for ordering the stimulus items, so you must proceed by trial and error. However, efforts to guide or to be prescriptive have been made. More advanced discussions are to be found in:

Glendon Schubert, Quantitative Analysis of Judicial Behavior (Glencoe: Free Press, 1959), pp. 269-376.

S. S. Ulmer, "Scaling Judicial Cases: A Methodological Note," American Behavioral Scientist, 1961, pp. 31-34.

Harold J. Spaeth, "Unidimensionality and Item Invariance in Judicial Scaling," Behavioral Science, Vol. 10, No. 3 (July, 1965), 290-304.

Two other interesting comprehensive works on scaling are Warren S. Torgerson's Theory and Methods of Scaling (New York: Wiley, 1958), and Allen Edwards' Techniques of Attitude Scale Construction (New York: Appleton-Century Crofts, 1957).

NEW YORK COURT OF APPEALS

Workmen's Compensation Cases: 1955-1959

Judges	Case Position: 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	Vote Totals per Judge	Scale Position	Scale Scores
Cases:	4 NY 2d 360	309 NY 708	308 NY 1027	4 NY 2d 199	308 NY 842	2 NY 2d 654	309 NY 962	3 NY 2d 654	6 NY 2d 506	5 NY 2d 360	308 NY 1022	5 NY 2d 529	308 NY 1031	2 NY 2d 323	309 NY 558	308 NY 996	1 NY 2d 424	2 NY 2d 446	4 NY 2d 28	2 NY 2d 1007			
Dye	+	+	0	+	+	+	0	+	+	+	+	+	+	+	0	+	+	(-)	+	+	16-1	20	+ 1.00
Conway	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	19-1	19	+ .90
Froessel	+	+	+	+	+	+	(-)	+	+	(-)	+	+	(-)	+	+	+	+	+	-		15-5	18	+ .80
Desmond	+	+	+	+	+	+	+	+	+	+	+	+	+	-	-	-	-	-	-	-	13-7	13	+ .30
Burke	(-)	+	+	+	(-)	(-)	+	(-)	+	+	-	-	-	-	-	-	-	-	-	(+)	7-13	10	.00
Fuld	+	+	+	+	+	+	+	+	-	-	-	-	(+)	-	-	-	-	-	-	-	9-11	8	- .20
Van Voorhis	+	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1-19	1	- .90
Division of +	6	6	5	6	5	5	4	5	5	4	4	4	4	3	2	3	3	2	2	2			
Votes per Case -	1	1	1	1	2	2	2	2	2	3	3	3	3	4	4	4	4	5	5	5	137		

Vote for the Defendant: +

Vote Against the Defendant: -

Not Participating: 0

$$CR = 1 - \frac{9}{110} = .92$$

$$CS = 1 - \frac{10}{31} = .68$$

In ordering the stimulus items you might, for example, make the preliminary inference that, for any set of items measuring degree of "liberalness," the judges who are Democrats will have higher scale rankings than judges who are Republicans. You would then switch the cases and/or judges around until you have reached an ordering that results in the fewest "inconsistent" votes.

1) How in terms of the votes might you find that your preliminary ordering of judges does not hold?

2) Can you give several explanations why your initial ordering of judges might produce inconsistent votes? One, in terms of the judge might be

One, in terms of the particular vote in the case might be

One, in terms of your selection of cases might be

3) How convincing is the assumption that the final matrix accurately represents relative degrees of "liberalness" in the votes of the judges? Explain.

4) How convincing is the assumption that the final ordering of cases accurately represents relative degrees of "weak" or "strong" stimuli in terms of testing the "liberalness" of respondents? Explain.

5) What does Tanenhaus mean (see Exercise #7) by "nominal," "ordinal" and "interval" scales?

6) Referring to the sample scale on page 8-2, what can be said about the "distance" between case number 1 and 2?

7) What can be said about the "distance" between Judges Conway and Froessel on the one hand, and Judges Van Voorhis and Fuld on the other?

8) What limitations to cumulative scaling do your answers to Questions 6 and 7 indicate?

9) How is the term "inconsistency" (or error) used in referring to votes recorded on a scale? How convincing is this use?

It is important to consider carefully the types of statements one might legitimately make on the basis of a Guttman Scalogram. For example, the hypothesis that one might be testing in the sample scalogram on page 8-2 is: assuming that the items (cases) are arrayed on a liberal/conservative dimension, the liberal judges will be more likely to vote for the claimant (have higher scale scores) than will the conservative judges. Obviously, such a proposition assumes that the technique used is measuring judges' attitudes toward these cases. But notice that these attitudes are inferred from the judges' votes, while the votes are in turn predicted from the assumed attitudes. Our point is not that the hypothesis is uninteresting. Rather, it is that the scalogram cannot be used by itself to test this hypothesis, since it includes no independent measure of attitudes. In other words, the scalogram is simply a useful descriptive device. What sort of device is that? It allows one to array the judges votes in a parsimonious manner. The scale score, then, is an index of the judges' position along the assumed continuum.

10) What is the problem with the following statement: "This scale (p. 8-2) explains the 20 decisions dealing with workmen's compensation cases in terms of a single attitudinal dimension"? Explain your answer.

11) Does scalogram analysis provide you with an explanation of judicial decisions? Explain.

Referring to the sample scale on page 8-2 again, it is seen that the judges have a wide variety of responses to the set of workmen's compensation claims. For example, Judge Dye supported the claimant 16 our of a possible 17 times, while at the other end, Judge Van Voorhis supported the claimant only once in 20 opportunities. We can now relate these differential scale positions to independently measured factors, such as party affiliation, age, religious affiliation, etc. For example the party affiliations of the judges on the New York Court are as follows: Burke, Democrat; Conway, Democrat; Desmond, Democrat; Dye, Democrat; Froessel, Democrat; Fuld, Republican; Van Voorhis, Republican.

12) Construct a hypothesis relating the judges' party affiliation to their positions on the workmen's compensation cases. Is your hypothesis confirmed? Disconfirmed?

13) How does this method of hypothesis testing differ from the use of the 2 x 2 tables discussed in Exercise #6? Is it an improvement?

Judicial Process Laboratory

EXERCISE #9

By now you should be familiar with the conceptual design of Guttman scales. This exercise is intended to introduce you to some of the more technical aspects of scale construction.

The first task is to organize your data in a preliminary matrix to facilitate ordering them on the scale. The form in Table 1 of the Data Tables exemplifies this organizing procedure. Notice that this preliminary matrix uses various codes to present the data. Each case is identified by a code number: for example, the first case in Table 1 is coded 398 Pa 198, which refers to volume 398 of the Pennsylvania Reports, page 198. The votes of each judge are also coded in the following way: a minus sign (-) represents a "no" vote, a plus sign (+) represents a "yes" vote, and a zero sign (0) represents non-participation in the case. One can invent his own code if he wishes, which can be as simple or complex as need be. The important point to remember is that the full code should be clearly indicated on your preliminary matrix. Notice that the plus and minus signs represent "yes" and "no" votes on the selected issue, and <u>not</u> participation in the majority or minority. Obviously, the issue or set of cases should be clearly labeled on the matrix along with the identification of the particular court.

As we have already stated, there are no absolute rules for deriving the final scale matrix. Since the scaling of judicial decisions involves such a small number of respondents (judges) compared to some uses of scaling, a fairly simple trial and error method will be sufficient for your purposes. There are two major rules of thumb: for a preliminary ordering of judges, make a simple frequency count of the "yes" votes of each judge and then place the judges in descending order. This procedure will give you a rough ranking of judges, although there may be some changes in the final scale form. The second rule concerns the ordering and placing of the cases on a left-right continuum. First, categorize the cases according to the division of the vote on the court in the following way: 6(yes)-1(no), 5-2, 4-3, 3-4, etc. Then place all those cases in the 6-1 category on the extreme left of the scale matrix, followed by the 5-2 category, and so on. This should provide you with a preliminary scale ordering.

Using the data in Data Table 1 as your preliminary matrix, construct your own scale, following the procedures discussed above. Use the space provided on page 9-2 for work on this preliminary scale matrix. For convenience, write in the division for each case below its column on Data Table 1 before you begin your preliminary ordering. Since you will be re-arranging your ordering several times, we suggest that you use a pencil.

Preliminary Scale Matrix

(Title)

9-2

Case Numbers:

Judges	

If you have a perfect scale at this juncture, it should be the case that all the + signs will be on the upper left side of the matrix, and all the - signs on the lower right. In fact, this will not be the case for the data in Data Table 1. Your goal, of course, is to approach as closely as possible a perfect scalar pattern. (That is, a pattern that has all the plus signs on the upper left and minus signs on the lower right.) In an obviously imperfect scalar pattern such as you have just produced, you must proceed on a trial and error basis by switching both judges and cases around until you have most closely approximated the perfect scale pattern. It should be emphasized that neither of the two "rules of thumb" mentioned above are inviolate; they are intended solely for the preliminary ordering and neither is required for the final scale.

Now draw a line (as shown in the sample scale in Exercise #8, page 8-2) from the upper right to the lower left of the matrix, dichotomizing the votes as indicated. Circle all those votes that now appear on the "wrong" side of the line (both + and - votes). Recheck your scale to be sure that you have minimized the number of votes that are circled. These circled votes are termed "errors" or "inconsistencies" because they do not follow the strictly cumulative pattern that is theoretically required for the Guttman scaling.

1) What is the total number of "errors" or "inconsistencies" on your scale? _____

2) In what sense should these circled votes be viewed as "errors" or "inconsistencies"?

3) In what scale position did you place Case #399 Pa 160? Does this placement conform to the preliminary rules of thumb? Why or why not?

4) B. Jones and C. Jones have the same number of "yes" votes. Do the two have the same scale position? Explain why or why not.

5) If B. Jones had had a "yes" vote in Case #403 Pa 262, would his resulting scale position have been higher than that of C. Jones? Why or why not?

6) What is unusual about Case #399 Pa 458?

7) Why might it be interesting to investigate further those cases with "inconsistencies"?

There are three criteria conventionally used in evaluating scales of judicial decisions: the Scale Score (S.S.), the Coefficient of Reproducibility (C.R.), and the Coefficient of Scalability (C.S.). The S.S. is a summary indicator, based upon the proportion of consistent "yeses" on the scale. The computing formula is:

$$SS = \frac{2P}{N} - 1$$

P is the Scale Position of each judge - that is, the point at which the line partitioning his votes is drawn. See scale example in Exercise #8.

N is the Number of Cases in the scale.

The value of the SS can range from a -1.00 (no scalar "yes" votes) to +1.00 (all scalar "yes" votes). The SS is the most useful device for discussing the relative positions of the judges on the scale.

The CR and the CS represent two conventional bench marks for determining the "scalability" of a set of cases; the generally accepted level for the CR is .90 and for the CS, .60. The Tanenhaus article provides a good discussion of the differences between these two coefficients, and a critique of their usefulness. It is important to emphasize that a scale that does not achieve a CR of .90 or a CS of .60 might still be interesting simply because it raises questions as to why a scalar pattern does not emerge.

The computing formula for the CR is:

$$CR = 1 - \frac{I}{N}$$

I is the number of inconsistencies, excluding those occurring in cases with single dissents.

N is the number of votes scored, excluding those occurring in cases with single dissents.

The computing formula for the CS is:

$$CS = 1 - \frac{I^*}{MI}$$

I* is the total number of "inconsistent" votes on the scale.

MI is the number of potential "inconsistencies" in the scale.

If, for instance, we include cases with 9-0 votes no "inconsistencies" could occur, and this would inflate the coefficients artificially. Similarly, in 8-1 votes only one inconsistency can occur and in a 7-2 vote only two inconsistencies, etc. The highest number of errors that can occur is equivilent to the minority vote in that item.

To correct for this it has been traditional to exclude extreme items - 9-0 and 8-1 - particularly from calculating the CR. The CS uses, as the denominator, the number which constitutes the real possibility of error in the scale. This will always be smaller than the numerator for the CR (except in scales composed exclusively of unanimous cases, which can tell us nothing in any event). Therefore, the CS is regarded significant at .60. When we compute the CS we control for extremeness of items (a 9-0 item adds nothing to the denominator). Under these circumstances we could if we wished include extreme items in the CR, duly noting the lessened significance of a high CR and relying on the CS to correct for these extreme items.

Some further comment should be made about the Coefficient of Scalability. The MI should be computed in two different ways, and the smaller result of the two is to be used as the denominator in computing the CS. The first of these two ways is as follows: referring to the vote division for each case (recorded along the bottom of the scale), sum the smaller value (number in the minority) in each case. For example, in the sample scale, there are twenty vote divisions (one for each case); simply total the twenty smaller numbers (in each case) - 1+1+1+1+1+2....=43. The resulting figure is the MI for the cases. The second way to compute the MI is as follows: referring to the vote division for each judge (recorded along the right side of the scale), sum the smaller of each of the two vote total values for each judge. For example, there are seven judges included in the twenty case scale; simply total the seven smaller numbers (for each judge) - 1+1+5+7+7+9+1 = 31. The resulting figure is the MI for the judges. In the case of the sample scale the MI for the judges was the smaller value, and was, therefore, selected as the denominator for the computation of the CS.

8) What does it mean to say that there is a maximum potential error of one in Case #399 Pa 411?

9) What does it mean to say that there is a maximum potential error of seven for Judge Desmond? (Refer to p. 8-2 of the previous exercise.)

10) Why choose the smaller of the two possible values of MI for the denominator in the CS computing formula?

11) According to Tanenhaus, what is the greatest weakness of the CR?

12) Is the Scale Score (SS) a useful indicator? Why or why not?

Returning to your scale, compute and record the correct totals as exemplified on the sample scale. Then compute and record the SS, CR, and CS.

13) Does your scale meet the levels of acceptability conventionally used in scaling judicial votes?

On the following page is a table showing the judges of the Pennsylvania Supreme Court, along with their respective party affiliations, religious affiliations, and whether or not each has had experience as a criminal prosecutor.

Table 9.1: Party Affiliation, Religious Affiliation, and Prosecution Experience of the Judges on the Pennsylvania Supreme Court

Judges	Party	Religion	Prosecution Experience
Bell	Republican	Episcopalian	Assistant District Attorney
Bok	Democrat	Quaker	District Attorney
Cohen	Democrat	Jewish	_____
Eagen	Democrat	Roman Catholic	District Attorney
B. Jones	Republican	Presbyterian	Assistant District Attorney
C. Jones	Democrat	_____	_____
Musmanno	Democrat	Roman Catholic	_____

Using these variables, the following propositions can be constructed:

A) Judges who are Democrats tend to decide for the defendant in criminal cases more often than do judges who are Republicans

B) Judges who are non-Protestant tend to decide for the defendant in criminal cases more often than do judges who are Protestant.

c) Judges without experience as a criminal prosecutor tend to decide for the defendant in criminal cases more often than do judges with such experience.

14) Does your scale tend to support proposition A above? Comment briefly.

_____

_____

_____

_____

_____

15) Does your scale tend to support Proposition B above? Comment briefly.

16) Does your scale tend to support Proposition C above? Comment briefly.

Judicial Process Laboratory

EXERCISE #10

Like scaling, bloc analysis is a technique for describing judicial votes. The difference might be described in the following way: while scaling rank orders respondents along a set of cumulatively arrayed stimuli, bloc analysis orders individuals in relation to each other. The first to use bloc analysis in the study of judicial decision-making, C. Herman Pritchett, has commented:

> ...One of the most useful things to know about a justice [of the United States Supreme Court] is where he is located on the Court in relationship to his colleagues. Is he seldom or usually in disagreement with the decisions of the Court? Does he dissent often by himself? This, of course, would be an indication of a generally unorthodox state of mind. Do his dissents in company with other justices seem to be simply random associations, or is some pattern of alignment indicated? That blocs of opinion exist on the Court has long been recognized. Some three decades ago the phrase 'Holmes and Brandeis dissenting' was a famous one. Persons who follow the decisions of the Court with any care will be acquainted with the general alignment of justices; but a more systematic method of analyzing these associations is clearly desirable, particularly in recent years, which have seen such a remarkable proliferation of dissenting opinion.*

It is important to examine the differential usuages of scale and bloc analyses. Found on pages 10-2 and 10-3 are two matrices, each representing a distinct type of bloc analysis. In the following discussion we will compare these two types of bloc matrices with each other and with a scale matrix (p. 10-4) of the same data, Workmen's Compensation cases decided by the New York Court of Appeals, (the data in the sample scale which you encountered in Exercise #8).

Since a bloc matrix shows relationships of judges to each other, it presents an index of the relationship for each possible pair. There are a variety of indices which can be used to express these relationships, and we will explore them in detail in the following exercise. In the following tables the relationships are expressed in simple percentages.

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* C. Herman Pritchett, Civil Liberties and the Vinson Court (Chicago: The University of Chicago Press, 1954), p. 177.

Table 10.1: Interagreement in Non-unanimous Decisions
New York Court of Appeals

(In Percentages) (1955-1959)

	Con	Dye	Fro	Des	Ful	Bur	Van
(D) Conway		88	80	70	50	30	10
(D) Dye	88		70	70	47	35	12
(D) Froessel	80	70		60	50	30	30
(D) Desmond	70	70	60		75	60	40
(R) Fuld	50	47	50	75		60	60
(D) Burke	30	35	30	60	60		60
(R) Van Voorhis	10	12	30	40	60	60	

Indices of Interagreement

Conway-Dye-Froessel = .79

Conway-Dye-Froessel-Desmond = .74

Fuld-Burke-Van Voorhis = .60

Fuld-Desmond = .75

Table 10.2: Dissenting Blocs on the New York Court of Appeals

(1955-1959)

	Con	Dye	Fro	Van	Bur	Ful	Des
(D) Conway		4	5	0	0	0	0
(D) Dye	4		3	0	1	0	0
(D) Froessel	5	3		3	1	1	0
(R) Van Voorhis	0	0	3		5	4	0
(D) Burke	0	1	1	5		2	0
(R) Fuld	0	0	1	4	2		0
(D) Desmond	0	0	0	0	0	0	
Dissents per Judge	6	5	8	12	8	4	0

Indices of Cohesion

Left = .63

Right = .45

Table 10.3

NEW YORK COURT OF APPEALS

Workmen's Compensation Cases: 1955-1959

Judges \ Cases:	4 NY 2d 360	309 NY 708	308 NY 1027	4 NY 2d 199	308 NY 842	2 NY 2d 654	309 NY 962	3 NY 2d 654	6 NY 2d 506	5 NY 2d 360	308 NY 1022	5 NY 2d 529	308 NY 1031	2 NY 2d 323	309 NY 558	308 NY 996	1 NY 2d 424	2 NY 2d 446	4 NY 2d 28	2 NY 2d. 1007	Vote Totals per Judge	Scale Position	Scale Scores
Case Position:	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20			
Dye	+	+	0	+	+	+	0	+	+	+	+	+	+	+	0	+	+	(-)	+	+	16-1	20	+ 1.00
Conway	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	19-1	19	+ .90
Froessel	+	+	+	+	+	+	(-)	+	+	(-)	+	+	(-)	+	+	+	+	+	-	-	15-5	18	+ .80
Desmond	+	+	+	+	+	+	+	+	+	+	+	+	+	-	-	-	-	-	-	-	13-7	13	+ .30
Burke	(-)	+	+	+	(-)	(-)	+	(-)	+	+	-	-	-	-	-	-	-	-	-	(+)	7-13	10	.00
Fuld	+	+	+	+	+	+	+	+	-	-	-	-	(+)	-	-	-	-	-	-	-	9-11	8	- .20
Van Voorhis	+	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1-19	1	- .90
Division of Votes +	6	6	5	6	5	5	4	5	5	4	4	4	4	3	2	3	3	2	2	2	137		
Votes per Case -	1	1	1	1	2	2	2	2	2	3	3	3	3	4	4	4	4	5	5	5			

Vote for the Defendant: +

Vote Against the Defendant: -

Not Participating: 0

$CR = 1 - \frac{9}{110} = .92$

$CS = 1 - \frac{10}{31} = .68$

1) Referring to Table 10.1, which pair has the highest (percentage) rate of interagreement? Which has the lowest?

2) What is meant by interagreement?

3) Notice that the bloc matrix does not specify the direction ("pro" or "con" on any given issue) of the votes, as do scale matrices. In light of this, what does the figure 75% interagreement between Judges Desmond and Fuld represent (Table 10.1)?

4) Referring back to scale analysis, on what basis are the judges rank ordered? Can you say the same for the positioning of the judges on a bloc matrix? Why or why not?

5) Looking at Judge Van Voorhis on the scale and on the Interagreement Bloc Matrix, can you give the same rationale for his positioning in each of these two matrices? Why or why not?

It should now be clear that bloc analysis is a more straightforward and simple technique than is scale analysis. Bloc analysis does not require any assumptions about attitudinal dimensions or the particular array of cases. As Pritchett's comment suggests, bloc analysis is a useful device for isolating pairs or groups of justices who regularly vote together. There are a few rules for ordering the data on a bloc matrix that are conventionally used (discussed in the next exercise), but even these are essentially arbitrary. On the other hand, bloc analysis can show interesting voting patterns that are not evident in scale analysis. For example, the rates of interagreement are not obvious on a scale matrix. Also, as Table 10.2 demonstrates, bloc analysis can be used to isolate pairs or groups of dissenting justices.

6) Notice that the positioning of the judges on the two bloc matrices is different. Can you explain why?

7) What does the Dissenting Bloc Matrix indicate about the voting behavior of Justice Desmond?

8) What does the Dissenting Bloc Matrix indicate about the voting behavior of Justice Van Voorhis that is not obvious from either the interagreement bloc matrix or the scale matrix?

There are several ways in which bloc analysis can be applied to the study of judges' voting behavior. Interesting studies have been constructed which have traced the voting patterns of judges through time on a single issue. For instance John Sprague looked at the term by term voting division of Supreme Court justices on cases dealing with federalism over a 70-year period (John Sprague, Voting Blocs on the U.S. Supreme Court: Cases in Federalism, 1889-1960, Indianapolis: Bobbs-Merrill, 1968). An interesting problem for such a study would be to discover what kinds of differences appeared in the voting patterns as the intensity of that issue varied in the political arena.

9) How might bloc analysis be useful in dealing with this problem?

Bloc analysis has been used fruitfully to view a court as a small group of individuals interacting on a variety of issues. Thus one can isolate pairs and groups of justices, on the basis of their voting patterns, which adhere across a wide range of issues. It is obvious, then, that bloc analysis is an appropriate tool for the application of small group theory to courts. For example, Eloise Snyder in her article, "The Supreme Court as a Small Group," (in The Courts, Robert Scigliano, Editor) examined the voting behavior of newly appointed Supreme Court justices.

10) How might bloc analysis be used in identifying whether or not there is a consistent pa ern in the voting behavior of newly appointed justices?

11) How might bloc analysis be used to determine whether or not the justices' patterns of voting behavior changed as they acquired some experience on the Court?

12) What difference would it make to one's interpretative statements if a bloc matrix includes data from a wide range of issues rather than from a single issue?

Judicial Process Laboratory

EXERCISE #11

In the previous exercise you were introduced to the basic form and uses of bloc analysis; this exercise is designed primarily to familiarize you with some of the actual procedures and mechanics of constructing bloc matrices. This can best be accomplished by carefully examining the form of a correct and fully labeled bloc matrix. Such a matrix of the votes of the United States Supreme Court Justices is presented in the table on page 11-2.

You will notice that this matrix contains a great deal more information than do the two bloc matrices presented in Exercise 10. Through out this manual we have urged that an essential preliminary step in any analysis be the systematic collection and recording of all data that might possibly be used in a study. Table 11.1 is a preliminary source matrix containing a complete record of non-unanimous votes for the 1961 term; information for limited problems can then be drawn from this matrix, if desired. For instance, information on interagreement in dissent only can be drawn from this matrix and presented in a simpler form, similar to Table 10.2.

There are several features of the matrix in Table 11.1 that should be clarified. Initially it should be noted that the names of the justices are abbreviated, and run both across and down allowing one to identify each paired combination. Notice that in a bloc matrix there are two cells for each paired combination of justices, and in this particular matrix each of the two cells contains different information; that is, the upper right is not a mirror image of the lower left, as was the case in Table 10.2. Each cell of the upper right contains four figures, indicating the four possible voting relationships for any pair of justices. A close examination of the Douglas (D) / Warren (Wa) cell shows the following:

		D +	D -
Wa	+	54	00
	-	12	15

Each figure represents raw frequencies of votes rather than percentages; the plus sign (+) represents voting with the majority, and the minus sign (-) represents voting with the minority.

Table 11.1: United States Supreme Court: 1961 Term

(Matrix Showing Voting Interagreement Pattern)

	Br	Wa	D	Bl	BW	S	Wh	C	F	H
		+ -	+ -	+ -	+ -	+ -	+ -	+ -	+ -	+ -
Br	+	64 01	53 00	56 01	10 01	59 15	17 06	52 23	20 13	35 39
	-	10 05	22 06	18 05	01 00	06 00	05 00	06 00	05 00	05 01
Wa	.86	+	54 00	56 10	09 01	52 14	13 06	43 23	15 13	24 41
		-	12 15	02 12	01 00	13 01	09 00	14 01	10 00	15 00
D	.73	.85	+	46 08	07 01	40 14	08 06	31 23	09 13	15 39
			-	12 15	04 00	26 01	14 00	27 01	16 00	25 02
Bl	.76	.85	.75	+	09 01	44 13	11 05	36 22	13 11	17 40
				-	02 00	21 02	11 01	21 02	12 02	22 01
BW	.83	.83	.58	.69	+	10 01	-- --	09 02	00 00	03 08
					-	01 00	-- --	00 01	00 00	01 00
S	.74	.66	.51	.58	.83	+	18 04	45 12	22 09	34 31
						-	03 02	21 03	02 04	05 10
Wh	.61	.46	.29	.43	.00	.74	+	19 06	16 06	16 06
							-	03 00	04 02	02 04
C	.64	.54	.39	.47	.83	.59	.68	+	21 11	33 24
								-	04 02	07 17
F	.53	.39	.24	.39	.00	.70	.64	.62	+	21 03
									-	02 11
H	.45	.30	.21	.23	.25	.55	.71	.62	.86	

1) Explain in your own words what each of the four figures in the Douglas/Warren cell represents.

a. _____

b. _____

c. _____

d. _____

2) Referring to the matrix in Table 11.1, identify the Black (Bl)/ Frankfurter (F) cell, and explain in your own words what each of the four figures in this cell represents. Specify the correct figure in each case.

a. _____

b. _____

c. _____

d. _____

Turning your attention to the lower left of the matrix notice that there is only one figure in each of the cells. These figures represent an index of interagreement for each paired combination of justices.

3) What is the "Interagreement Score" for the pair Douglas (D)/ Warren (Wa)? _____.

4) What is the "Interagreement Score" for the pair Black (Bl)/ Frankfurter (F)? _____.

The "Interagreement Score" is a rather simple measure; it is the proportion of times the two members of any pair vote together (in either the majority or minority) out of the total number of votes in which both participated. Labeling the four alternatives in each cell in the following manner:

	+	-
+	a	b
-	c	d

The computing formula for the "Interagreement Score" is:

$$\text{I.A.} = \frac{a + d}{a+b+c+d}$$

If multiplied by 100, this index is simply the percentage of times a pair of justices votes together out of the total number of opportunities for doing so. For example, the "Interagreement Score" for the Douglas/Warren pair is computed as follows:

$$\text{I.A.} = \frac{54 + 15}{54 + 0 + 12 + 15} = \frac{69}{81} = .85$$

When this score is multiplied by 100 (.85 x 100 = 85%), we find that this pair votes together 85% of the time. It should be noted that several other indices of interagreement might legitimately be used as well.

It should be apparent that there is a pattern to the ordering of the justices on the source matrix on page 11-2. The point of bloc analysis is not only to discover pairs of justices with high interagreement scores, but also to discover blocs of justices sharing high scores with each other. A procedure is needed, therefore, which will locate and distinguish any voting blocs which might be found to exist on a given court. John Sprague has dealt with this problem at some length, and has suggested a set of rules to accomplish a systematic ordering.* One begins with a preliminary matrix in which the recorded data are the Interagreement Scores for each pair of justices. One then works from this preliminary matrix to arrive at the proper ordering of these pairs for the source matrix. Sprague's rules for accomplishing this ordering are as follows:

*See John Sprague, Voting Patterns of the U.S. Supreme Court: Cases in Federalism, 1889-1959 (Indianapolis: Bobbs Merrill), 1968.

Rule #1: Find the largest Interagreement Score or Scores.

In the case of the source matrix of Table 11.1, for example, there are two candidates for the largest Interagreement Score:

a) the Warren/Brennan pair, at .86
b) the Harlan/Frankfurter pair, at .86

Rules #2 and #3 below provide a criterion for deciding which of these pairs is to be placed in the first (upper left) position.

Rule #2: Taking each pair in turn, place one member of the pair in the first position and one in the second.

Rule #3: Choose that positioning of justices which leads to the highest Interagreement Score for the relationship between the justice in position two and the justice in position three.

Below are the four possible orderings on rules #1, #2, and #3.

I(a): With Warren in position one and Brennan in position two (rule #2), the highest Brennan/ _____ pair (rule #3) is the Brennan/Byron White pair at .83.

	Wa	Br
Wa		
Br	.86	
BW		.83

I(b): With Brennan in position one and Warren in position two (rule #2), the highest Warren/ _____ pair (rule #3) is either the Warren/Douglas pair at .85 or the Warren/Black pair at .85.

	Br	Wa
Br		
Wa	.86	
D		.85

II(a): With Harlan in position one and Frankfurter in position two (rule #2), the highest Frankfurter/ _____ pair (rule #3) is the Frankfurter/Stewart pair at .70.

	H	F
H		
F	.86	
S		.70

II(b): With Frankfurter in position one and Harlan in position two (rule #2), the highest Harlan/ _____ pair (rule #3) is the Harlan/Whittaker pair at .71.

	F	H
F		
H	.86	
Wh		.71

On the basis of rules #1, and #2, and #3, therefore, it is clear that Justice Brennan should be placed in position one and Justice Warren in position two. But position three remains open, because the Warren/Douglas pair and the Warren/Black pair are tied at .85. Since rule #4 is designed to specify the procedure for completing the ordering for the entire matrix, it also provides a criterion for determining how ties are to be broken.

Rule #4: Starting with the justice whose position was last established, place next to him in the arrangement the justice with whom he has the highest Interagreement Score. Repeat the last step until all the justices have been placed.

On the basis of rule #4, then, the ordering should be extended in the following way:

	Br	Wa	D	Bl	BW
Br					
Wa	.86				
D		.85			
Bl			.75		
BW				.69	

	Br	Wa	Bl	D	BW
Br					
Wa	.85				
Bl		.85			
D			.75		
BW				.58	

It is clear from the above that the tie between the Warren/Douglas pair and the Warren/Black pair cannot be broken until the ordering has been extended to the fifth position.

Rule #5: <u>Be sure that your positioning of the justices depends on those scores that run diagonally between the upper left and the lower right of the matrix.</u>

This rule should be self-evident (given the preceding rules), but it is included to dispel any procedural confusion that might remain. On the basis of rules #4 and #5, then, the final ordering is as follows:

	Br	Wa	D	Bl	BW	S	Wh	C	F	H
Br										
Wa	.86									
D		.85								
Bl			.75							
BW				.69						
S					.83					
Wh						.74				
C							.68			
F								.62		
H									.86	

5) Can you explain why Justice Whittaker is positioned ahead of Justice Clark?

6) Is there any rationale for positioning Justice Frankfurter ahead of Justice Harlan? Explain.

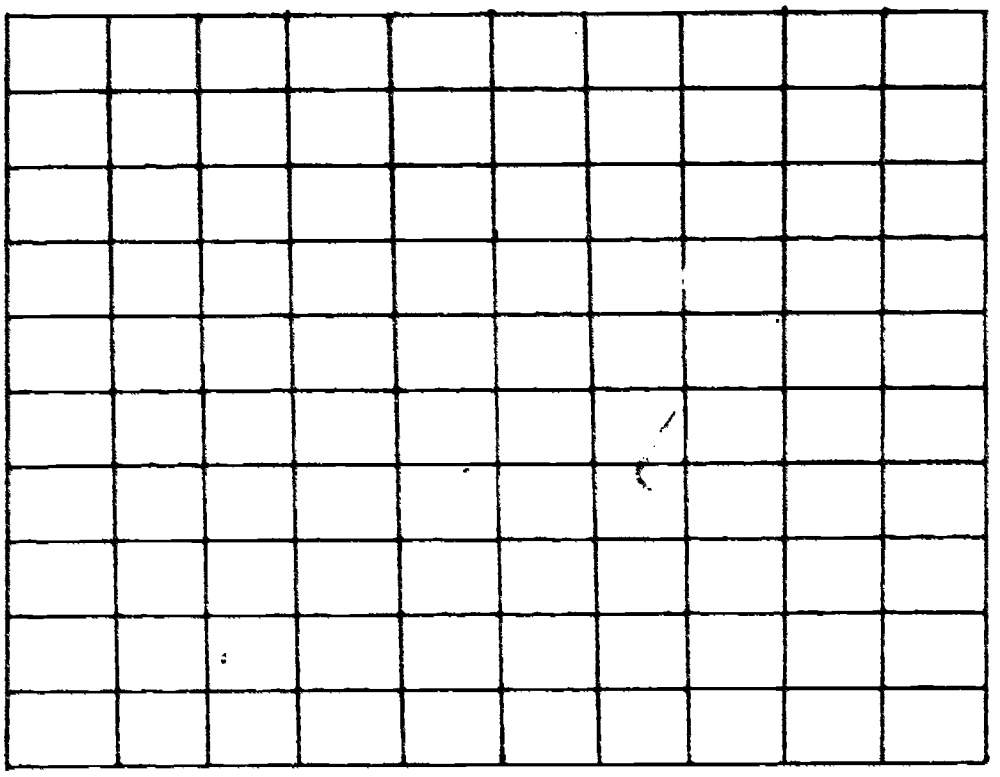
As we have already suggested, the source matrix contains a great deal of information. One of the more interesting uses of bloc analysis is the identification of dissenting blocs, the information for which can be drawn from the source matrix.

7) In what corner of each cell in the source matrix is this information contained?

In the space provided below (Table 11.2), simply record the appropriate data for a dissent matrix on the basis of the information contained in Table 11.1. Using the raw frequency figures, fill in the upper right and lower left halves as mirror images.

Table 11.2: United States Supreme Court: 1961 Term

(Matrix Showing Dissenting Pattern)

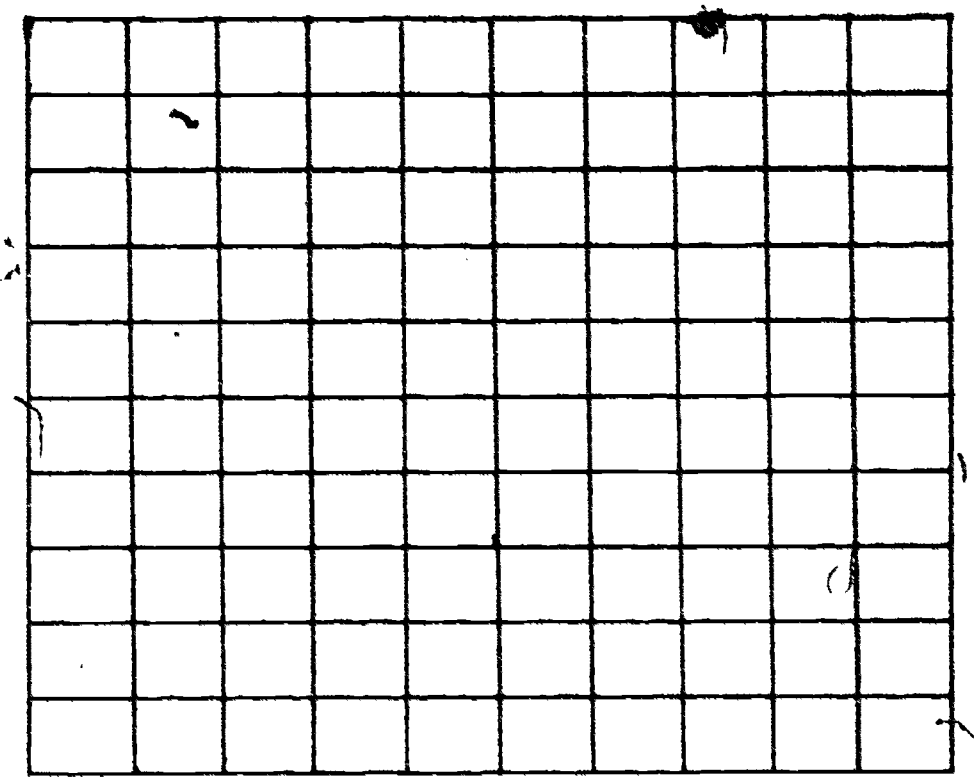


Before proceeding, be sure you have correctly answered question #7 and are using the correct figure in calculating the dissent matrix; i.e., Justices Brennan and Black dissented together on 6 decisions, Douglas and Black on 15 decisions, and so on.

The procedure for positioning the justices on a dissent matrix is identical to that prescribed by the rules above, even though the data being used are now frequency figures, rather than interagreement scores. Table 11.3 provides you with space for presenting your ordered dissent matrix.

Table 11.3: United States Supreme Court: 1961 Term

(Matrix Showing Ordered Dissent Pattern)



After construction of the matrices and the ordering of the judges, there remains the problem of identifying blocs. Since the positioning of the justices is based upon the relative closeness of scores, you should be able to make a tentative identification of any blocs by inspecting the matrix.

8) Where on the matrix might these blocs be located? _____

_____

_____

_____

There are, however, more rigorous devices for identifying blocs than simple inspection. While there are no absolute criteria, Glendon Schubert has proposed several indices which have been generally adopted as conventional criteria to identify blocs.*

*See Glendon Schubert, Quantitative Analysis of Judicial Behavior (Glencoe: Free Press, 1959).

The first of these is the "Index of Cohesion," which is designed to identify blocs of judges who most frequently dissent together. It is computed in the following way: first, taking any tentatively identified bloc, sum all the frequencies for each pair and divide by the number of pairs; the result of this computation is the average number of agreements between the pairs of judges included in that bloc. Second, sum the frequencies of all the dissents of the judges included in the bloc and divide by the number of justices; the result of this computation is the average number of dissents cast per justice. Third, divide the first resulting average by the second resulting average. This last procedure yields the Index of Cohesion for that particular bloc. It should be noted that a bloc can contain as few as two judges. It is conventional to accept as high an Index of .50 or greater; as moderate an Index of .40 to .49 and as low an Index below .40.

9) Compute the Indices of Cohesion for those blocs you have tentatively identified by inspection of Table 11.3.

Schubert has also suggested an Index of Interagreement, to be used to objectively identify blocs on a full matrix of interagreement, such as Table 11.1. Here the Index is based upon the Interagreement Scores. Tentatively identify a bloc by inspection, and then simply compute the average Interagreement Score for all those pairs in the bloc by summing the scores for all the included pairs and then dividing by the number of pairs. The last procedure yields the Index of Interagreement for that particular bloc. It should be noted that a bloc can contain as few as two judges. It is conventional to accept as high an Index of .70 or greater; as moderate an Index of .60 to .69; and as low an Index below .60.

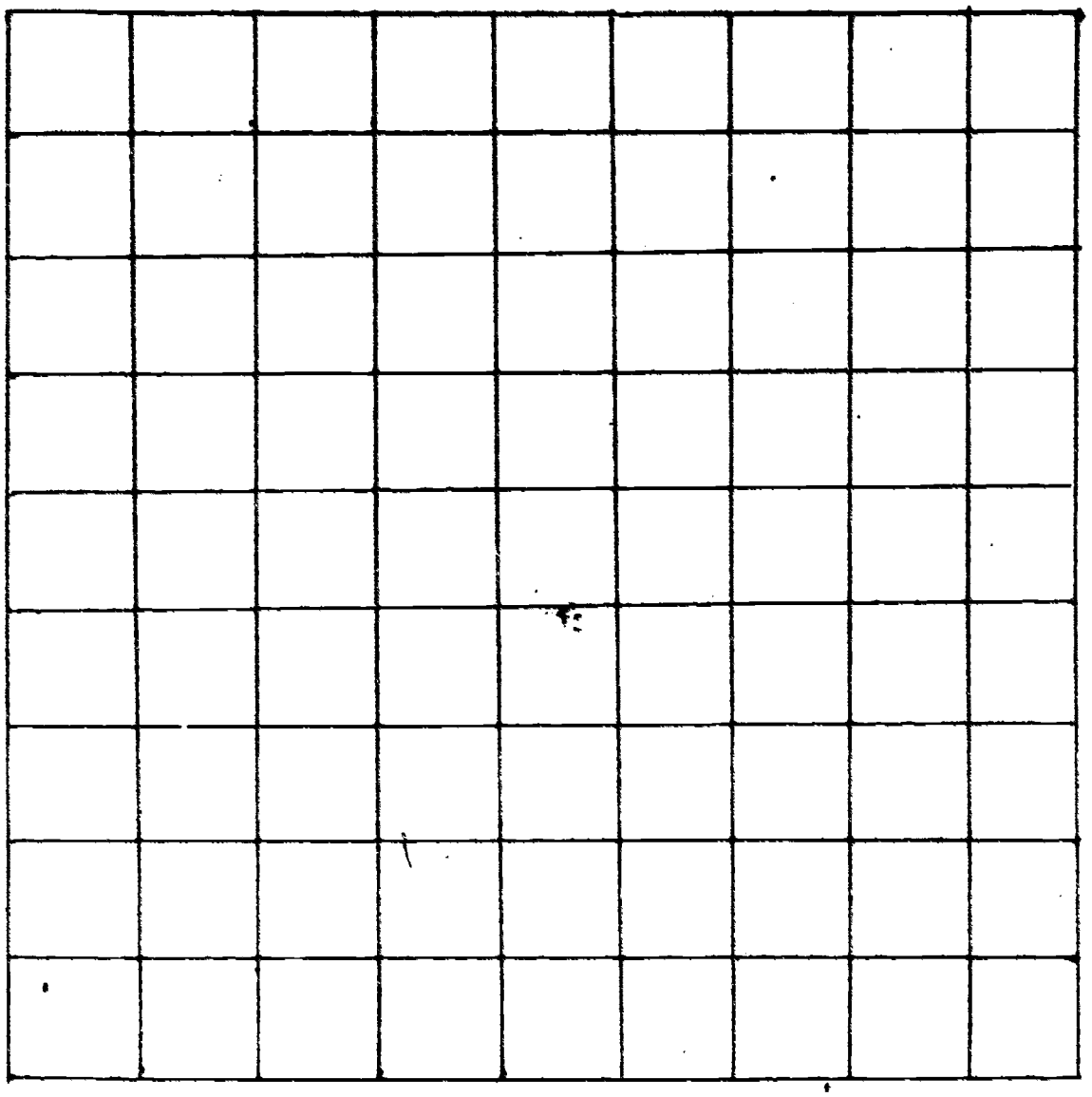
10) Compute the Indices of Interagreement for those blocs you have tentatively identified by inspection of Table 11.1.

11) Referring to Data Table #8 (The Michigan Supreme Court), construct a preliminary source matrix in the space provided below (Table 11.4). Label the table correctly.

Table 11.4:

12) From this preliminary source matrix, position the judges according to the rules discussed in this exercise in the space provided below - Table 11.5. (Correctly label this table.) Compute the Indices of Interagreement for any bloc you tentatively identify, and list them below the table.

Table 11.5:

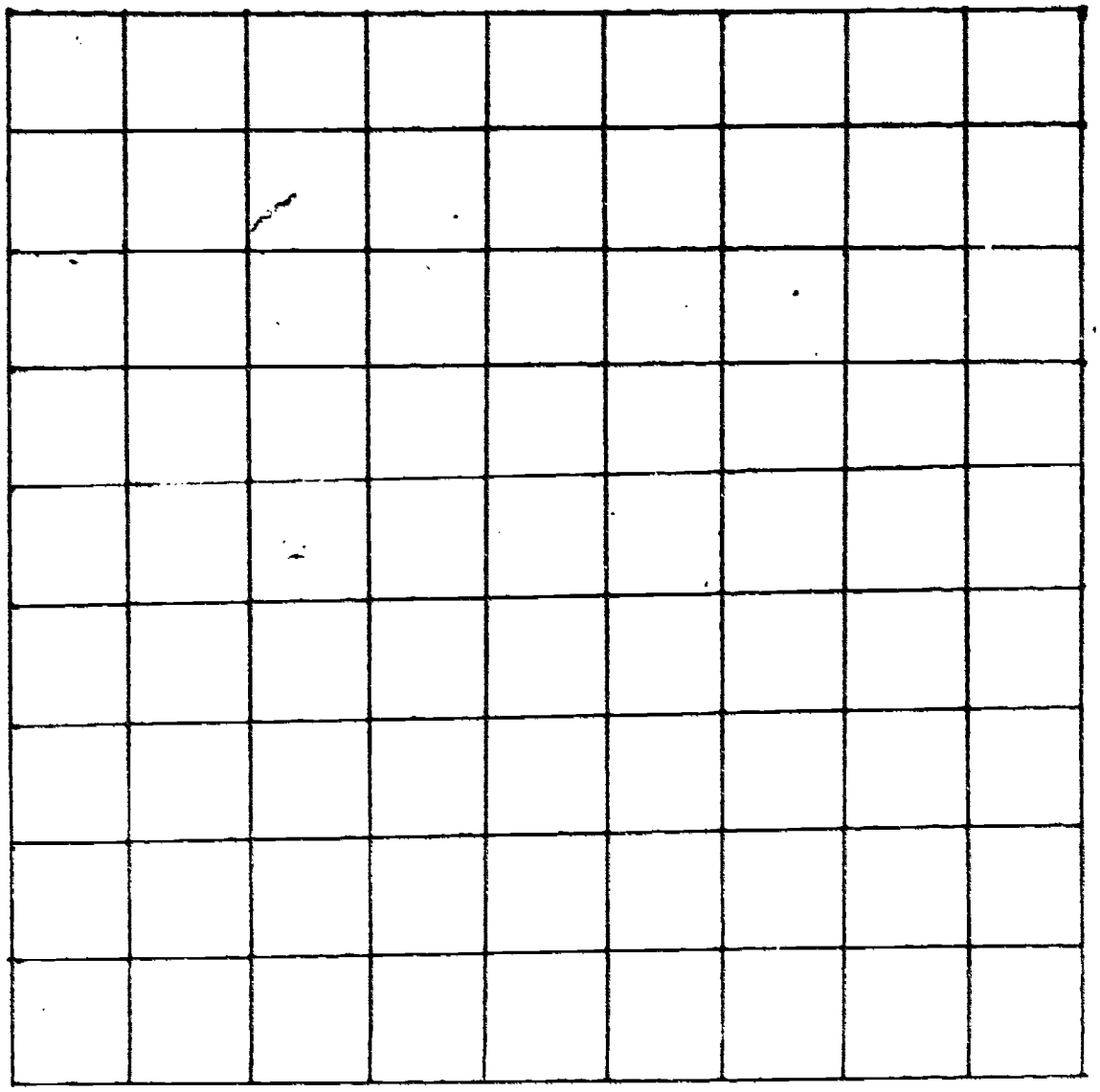


13) From the matrix you constructed in Table 11.4, record the appropriate data for a Dissent Matrix in the space provided below (Table 11.6) and correctly label the table.

Table 11.6:

14) From the matrix you constructed in Table 11.6, position the judges according to the rules discussed in this exercise and correctly label the table. Compute the Indices of Cohesion for any bloc or blocs you tentatively identify, and list them below the table.

Table 11.7:



Judicial Process Laboratory

EXERCISE #12

The Voting Power Index

Assigned Readings:

Samuel Krislov, The Supreme Court in the Political Process (New York: Random House, 1954), pp. 63-72.

Kemeny, Snell, and Thompson, Introduction to Finite Mathematics (Englewood Cliffs: Prentice-Hall, 1957), pp. 74-78, 92-96, 108-112.

A good deal of our focus in this manual and in others has been on voting data. Simple techniques are most easily applied where there is a relatively precise act defined and measurable. As a matter of research strategies this has seemed a good place to begin. We shall continue this approach in this exercise.

Voting arrangements are sometimes durable and prescribed by means of formal rules. At other times we have records of voting in a definite body - a legislative committee, or a plural judge court. Can we use this information in a systematic way to speak of the voting power relationships suggested by the voting arrangements, or the pattern of votes? We are here asking two questions: (1) the *a priori* question: how much power can A have relative to B in a voting system where his vote is set in a definite way and that of B is also known; and (2) the empirical question: A is on the winning side of the question x times, B prevails y times. How much weight does each have across the entire set of votes?

A solution is found through the Shapely-Shubik method for determining voting power in a committee situation. This is a mathematical method for evaluating the effectiveness of the individual members of a voting body. It was developed by a mathematician and a game theorist-economist interested in operations research.

The power index is built on the assumption that the desire of every committee member is to be the pivotal figure in the voting, that is, the individual casting the deciding vote on any question. For example, if 101 votes were cast, 50 on each side of the question, the tie-breaker would at that moment have 100% of the power. Voting power is defined as the ability to cast just such a deciding vote in the maximum number of cases.

DEFINITION: The voting power of a member of a group or committee is the number of alignments in which he is pivotal, divided by the total possible alignments for the group. We shall explain, illustrate, and return to this definition.

Where We have Vote Results

Where we do have a record of votes, we compute an individual's share of power in a decision by assigning to him the probability of his having been the deciding vote. In a six-man majority the probability is one-sixth, in a seven-man majority, one-seventh, and so on, since so far as we know each voter has an equal probability of having been the pivot. Those in the minority receive 0, the probability of their having been decisive.

1) In Data Table 1, case number 398 Pa 198, what was the vote against defendant's rights? _____

2) What was Bok's share of power in Shapley-Shubik terms, expressed as a fraction? _____, as a decimal? _____

3) What was Musmanno's? _____

We can now compute the over-all power of each judge by noting his power in each case, adding the total and dividing by the number of cases in which he participated. We shall do so for only cases 1 through 5 in Data Table #1, though the method is the same for each case or groups of cases.

Table 12.1

Cases	Bell	Bok	Cohen	Eagen	B. Jones	C. Jones	Musmanno
1.							
2.							
3.							
4.							
5.							

4) In Shapley-Shubik terms, who is the most powerful? _____ the least? _____ _____

5) Is it correct to say Cohen is twice as likely to be pivotal as Musmanno? _____

6) If we wish to check our arithmetic, we can add the scores of all the judges in a single case. These should add up to _____

because _____

7) If we wish to check our overall calculations we can add up the power indices of all the judges. These should total _____ because

_____

8) What we have done is calculate the <u>empirical</u> power index. It was obtained by calculating _____

in individual voting situations, summing and dividing the result by the number of total instances.

9) In essence, for each judge we have the average (mean) _____

_____

<u>Where we know only the Voting System</u>

We now turn to the other problem broached on page 12-1, which is the problem of the <u>a priori</u> power index, or expected voting power based upon weighted voting schemes.

10) We return to our basic definition. Find it and reproduce it here.

DEFINITION:

11) Consider a voting situation where the voters are A, B, and C. They are allocated respectively different amounts. Using logic and the definition above, what is the likelihood of being pivotal in each of the following instances?

(a) 3 votes each: in Shapley-Shubik terms, how much power would each have? A _____ B _____ C _____

(b) A: 5, B: 4, C: 2? A _____ B _____ C _____

(c) A: 4, B: 3, C: 2? A _____ B _____ C _____

12) All of these above are equal, because any two form a winning coalition and it is equally probable that any voter would be pivotal. Each has a power index of _____

How do we actually prove this or show what we have teased out by logic? We will turn to one method now. Consider the following situation:

A = 40; B = 30; C = 20

We can arrange all of the possibilities of voting alignments. Each is as likely as the other. We assume "yeses" come in these orders:

1.	40	30	20
2.	40	20	30
3.	30	40	20
4.	30	20	40
5.	20	40	30
6.	20	30	40

This is the universe of possible arrangements. Satisfy yourself that this is so. Now let us take alignment 1: 40 [30] 20. If this is the order in which, say yeses come in, 30 is pivotal. His vote gives us a majority. Before he voted we did not have a majority. With him we do. Similarly, with respect to alignment 2: 40 [20] 30, 20 fs pivotal since 60 is a majority.

Special Note 1: We will indicate pivots by a [ ] surrounding such a vote in that combination.

Special Note 2: We are treating each voting alignment as if they were cast in that order. This is justified by the fact that so far as we know, each possible order is equally probable.*

*Some people are intuitively repelled by this notion of ordering the votes. A much more complex way of doing this has been developed by John Banzhaf. (See his "Weighted Voting Doesn't Work," Rutgers Law Review, v. 19 (1965), pp. 317-43.) He ranks every possible order of votes for all individuals. For example, take our second problem in Table 12.2 (p. 12-6). He tabulates all possible yes-no combinations:

	A (3)	B (3)	C (2)	D (1)	Pivots
(a)	+	+	+	+	
(b)	+	+	+	-	
(c)	+	+	-	+	A, B
(d)	+	+	-	-	A, B
(e)	+	-	+	+	A, C
(f)	+	-	+	-	A, C
(g)	+	-	-	+	B, C
(h)	+	-	-	-	B, C
(i)	-	+	+	+	B, C
(j)	-	+	+	-	B, C
(k)	-	+	-	+	A, C

(continued)

13) Now determine and mark the pivots in the other four alignments above.

14) Now summarize:

A was pivotal in _____ instances.

B was pivotal in _____ instances.

C was pivotal in _____ instances.

Power of A (40) = $\frac{\text{Number of A pivots}}{\text{A + B + C pivots}}$ = $\frac{\quad}{6}$ =

Power of B (30) = = $\frac{\quad}{6}$ =

Power of C (20) = = $\frac{\quad}{6}$ =

15) We are ready to go further. Consider a situation where there are blocs of 4, 3, 1, and 1 all voting together. We now want to find the number of pivots for each weight.

(a) Array the possible alignments and complete those left blank below:

(b) Indicate pivots by ☐

	A (3)	B (3)	C (2)	D (1)	Pivots
(l)	-	+	-	-	A, C
(m)	-	-	+	+	A, B
(n)	-	-	+	-	A, B
(o)	-	-	-	+	
(p)	-	-	-	+	

He then asks whether a change in the vote of any voter regardless of position will change the result. In (a) no one can; (b) no one can; in (c), A and B can (7 - 3 = 4, a minority).

$$A = \frac{8}{24}, \quad B = \frac{8}{24}, \quad C = \frac{8}{24} = \frac{1}{3} \text{ each}$$

The reader may wish to compare the results of the method used in this exercise and Banzhaf's to satisfy himself the results are identical (with less calculation), and no distortions arise from calculating the number of possible minimum coalition by utilizing the advantages of permutational conventions.

(a) 4, 3, 1, 1

(b) 4, 1, 3, 1

(c) 4, 1, 1, 3

(d) 4, 4, 1, 1

(e) 3, 1, ___ ___

(f) 3, 1, ___ ___

(g) 1, 4, ___ ___

(h) 1, 4, ___ ___

(i) 1, 3, ___ ___

(j) 1, 3, ___ ___

(k) 1, 1, ___ ___

(l) 1, 1, ___ ___

16) We now want to find the number of pivots for each weight. For 4 it is 6; for 3 it is ___; and for 1 it is ___. The total number of possible alignments is _____.

17) So: (a) Power of 4 $= \frac{6}{12} = \frac{1}{2}$ or .500

(b) Power of 3 $= \frac{\quad}{12} =$ or .

(c) Power of 1 $= \frac{\quad}{12} =$ or .

but there are two 1's of equal weight so it is _____ for each 1.

18) The index for all possible Supreme Court blocs is given by Krislov in Schubert, Judicial Behavior (Chicago: Rand McNally, 1964), pp. 461-64; so you can check calculations there. Now complete Table 12.2, calculating the combinations of alignments.

Table 12.2

Blocs	Indices
[illegible] 1	___, ___, ___
[illegible] 1	___, ___, ___, ___
[illegible] 1	___, ___, ___, ___, ___, ___

19) Would it make any difference if we were dealing with a legislative committee rather than a court? Why or why not?

20) What is unusual about the power of 1 in the 3, 3, 2, 1 situation? Riker and Shapley have referred to this situation as that of a "dummy." Why?

21) In practice, might his influence be different, through his speaking power and other abilities?

22) Does this apply to the others?

23) What then does the a priori index measure exactly?

Some Lessons from the Power Index

I. The operative weight of any vote total is dependent upon the total system and not merely ratios. The following table will illustrate the point.

Table 12.3

Weight of 49 Votes in a 100-vote Committee, under Differing Distributions

Voting Distribution					Power Index				
A	B	C	D	n	A	B	C	D	n
49	51				0	100			
49	50	1			.166	.667	.166		
49	49	2			.333	.333	.333		
49	49	1	1		.333	.333	.166	.166	
49	(1.....(n=51))				.942	(.00113 each		(n = 51))	

24) 49 out of 100 votes, therefore, can be expected to be pivotal anywhere from _____ to _____% of the time, depending upon how the other votes are distributed.

II. Apparent ratios may have little to do with actual ratios.

25) Let us assume a city council represents 5 well-defined historic neighborhoods. Each has had one commissioner. Population, however, has become unequal. Under the one-man, one-vote doctrine a judge orders weighted voting for these councilmen, proportionate to what the population is. He thinks he is following one-man, one-vote. What is he actually doing in each of the following four cases in Table 12.4, as you determine the power index?

Table 12.4

(1)					(2)				
10,	9,	8,	7,	6	10,	10,	7,	6,	5
—	—	—	—	—	—	—	—	—	—
(3)					(4)				
10,	9,	9,	6,	6	10,	10,	6,	6,	5
—	—	—	—	—	—	—	—	—	—

26) What is the effect of changing to a weighted system in (1) and (3)?

27) Is the effect the same in (2) and (4)? Can you explain why?

28) Can you explain why the New York Court of Appeals requires a Shapley-Shubik analysis before permitting weighted voting schemes?

ADVANCED EXAMPLE: Table 12.5

For 10, 10, 6, 6, 5 we will introduce a somewhat simplified calculation of pivot frequencies.

10	[10]	X	X	X	3 ways
10	6	[10]	X	X	2 ways
10	5	[10]	6	6	1 way
6	5	[10]	X	X	2 ways
6	6	[10]	X	X	2 ways
6	6	5	[10]	10	1 way
6	5	6	[10]	10	1 way
6	10	[10]	X	X	2 ways
5	6	[10]	X	X	2 ways
5	6	6	[X]	10	1 way
5	10	[10]	6	6	1 way
					18 ways
10	6	[6]	X	X	2 ways
10	5	[6]	X	X	2 ways
6	10	[6]	X	X	2 ways
					6 ways
10	6	[5]			2 ways
6	10	[5]			2 ways
					4 ways

III. The a priori index can be used to predict behavior and be compared with the achieved index for various purposes.

The a priori index measures only the abstract power which might be expected to accrue from the voting system alone. A person can utilize that potential poorly - or as we know - he may care about something other than being pivotal. We can test whether he is using his potential effectively by comparing the expected vote and the resultant outcome.

$$\text{That is, voting efficiency} = \frac{\text{achieved index}}{\text{expected index}}$$

Moreover, since the vote of all participants is interdependent, we would not be able to specify, for example, whether Cohen is more efficient, or merely looks so because Musmanno is different or any combination of these reasons.

DATA TABLE #1

JUDGES, PARTY AFFILIATION AND VOTES: PENNSYLVANIA SUPREME COURT, DEFENDANT'S RIGHTS ISSUE

Case Number:	398 Pa 198	399 Pa 110	399 Pa 160	399 Pa 298	399 Pa 411	399 Pa 458	399 Pa 512	400 Pa 198	400 Pa 326	400 Pa 626	401 Pa 100	401 Pa 242	401 Pa 395	401 Pa 549	402 Pa 48	402 Pa 165	403 Pa 262	403 Pa 553	403 Pa 652	404 Pa 41
Judges																				
Bell (R)	-	-	+	-	-	-	+	-	-	-	-	-	-	-	-	-	-	-	-	+
Bok (D)	-	+	+	-	-	-	+	-	-	-	+	+	-	+	+	-	+	+	-	+
Cohen (D)	-	+	-	-	-	-	+	-	-	-	+	+	+	+	+	+	-	+	+	+
Eagen (D)	0	-	-	-	-	+	-	0	-	-	+	-	-	-	-	-	-	+	-	-
B. Jones (R)	-	-	-	-	-	-	-	-	-	-	+	-	-	-	-	-	-	+	-	+
C. Jones (D)	-	-	-	-	-	-	+	-	-	-	+	-	-	-	-	-	-	+	-	-
Musmanno (D)	+	+	-	+	+	+	+	+	+	+	-	+	-	+	+	+	+	+	-	+

Vote Against the Defendant: -
Vote For the Defendant: +
Not Participating: 0

DATA TABLE #2

JUDGES, PARTY AFFILIATION AND VOTES: MICHIGAN SUPREME COURT, DEFENDANT'S RIGHTS ISSUE

Case Number:	370 Mich 12	369 Mich 692	371 Mich 599	372 Mich 378	373 Mich 94	374 Mich 51	375 Mich 336	376 Mich 252	369 Mich 189	371 Mich 264	371 Mich 438	370 Mich 12	365 Mich 143
Judges													
Adams (D)	0	0	0	0	+	+	+	-	0	0	0	0	0
Black (D)	+	+	+	-	-	-	-	-	-	-	-	+	-
Carr (R)	-	-	-	0	0	0	0	0	-	-	-	-	-
Dethmers (R)	-	0	-	-	-	-	-	-	-	-	-	-	-
Kavanagh (D)	+	+	+	+	+	+	+	+	+	-	-	+	-
Kelly (R)	+	+	-	-	-	-	-	-	-	-	-	+	-
O'Hara (R)	0	0	-	+	+	-	-	-	0	-	0	+	-
Smith (D)	+	+	+	+	+	+	0	+	+	+	+	+	0
Souris (D)	+	+	+	+	+	+	+	+	+	+	-	+	+

Vote Against the Defendant: -

Vote For the Defendant: +

Not Participating: 0

DATA TABLE #3

JUDGES, PARTY AFFILIATION AND VOTES: PENNSYLVANIA SUPREME COURT, QUESTIONS OF GOVERNMENTAL AUTHORITY

Case Number:	398 Pa 447	398 Pa 494	399 Pa 10	399 Pa 387	399 Pa 545	399 Pa 586	400 Pa 65	400 Pa 261	400 Pa 315	400 Pa 368	400 Pa 437	400 Pa 507	400 Pa 584	400 Pa 629	401 Pa 1	401 Pa 62	401 Pa 125	401 Pa 182	401 Pa 310	401 Pa 387	401 Pa 486
Judges																					
Bell (R)	-	-	-	-	-	0	-	-	-	+	-	-	-	-	-	+	-	-	-	-	-
Bok (D)	+	-	-	+	+	-	+	+	0	+	+	-	-	-	-	-	-	+	+	-	-
Cohen (D)	+	+	+	0	0	+	+	+	+	-	+	+	+	+	-	-	-	+	+	+	-
Eagen (D)	+	-	-	+	+	-	+	0	+	+	+	0	-	-	-	+	-	+	+	+	-
B. Jones (R)	+	-	-	-	-	-	+	+	-	+	-	-	-	-	-	-	-	+	+	-	+
C. Jones (D)	+	-	-	+	+	-	+	+	+	+	+	-	-	-	-	-	+	+	+	+	-
Musmanno (D)	-	-	+	+	+	-	-	-	+	0	+	+	-	-	+	+	-	-	+	+	-

Vote for Government Power to Regulate: +

Vote Against Government Power to Regulate: -

Not Participating: 0

DATA TABLE #3 (Cont.)

Case Number:	402 Pa 78	402 Pa 151	402 Pa 284	402 Pa 411	402 Pa 437	402 Pa 495	402 Pa 542	402 Pa 592	403 Pa 117	403 Pa 176	403 Pa 303	403 Pa 373	403 Pa 383	403 Pa 435	403 Pa 499	403 Pa 590	404 Pa 36	404 Pa 156	404 Pa 168	404 Pa 181	404 Pa 293	404 Pa 321	404 Pa 406	405 Pa 83
Judges																								
Bell (R)	-	-	-	-	-	-	-	+	-	+	-	-	-	-	+	-	-	-	-	-	-	-	-	+
Bok (D)	+	+	+	+	+	+	-	+	+	+	+	+	+	-	-	+	+	+	+	+	+	-	+	-
Cohen (D)	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	-
Eagen (D)	+	+	+	-	+	+	-	+	+	+	+	+	+	-	-	+	+	+	+	+	+	-	+	+
B. Jones (R)	+	+	+	+	+	+	+	+	+	-	-	-	-	-	-	-	+	+	+	-	+	-	+	-
C. Jones (D)	+	+	+	+	+	+	-	-	+	+	-	+	+	-	-	+	+	+	+	+	+	0	+	-
Musmanno (D)	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	-	+	+

DATA TABLE #4

JUDGES, PARTY AFFILIATION AND VOTES: MICHIGAN SUPREME COURT, QUESTIONS OF GOVERNMENTAL AUTHORITY

Case Number:	364 Mich 671	365 Mich 79	365 Mich 87	365 Mich 108	365 Mich 601	365 Mich 203	366 Mich 217	373 Mich 198	367 Mich 104	367 Mich 160	367 Mich 176	367 Mich 508	368 Mich 435	369 Mich 415	370 Mich 47	370 Mich 94	371 Mich 304	372 Mich 22	372 Mich 76	372 Mich 418
Judges																				
Adams (D)	0	0	0	0	0	-	0	+	0	-	0	+	+	0	0	0	0	0	0	+
Black (D)	+	+	+	+	+	+	-	0	-	+	+	-	+	-	+	-	+	+	.	+
Carr (R)	-	-	-	+	+	-	-	+	+	-	-	-	-	+	-	-	-	-	+	0
Dethmers (R)	-	-	-	+	+	-	-	-	-	-	-	-	-	+	-	-	-	-	-	-
Kavanagh (D)	-	+	+	+	+	-	-	+	0	+	+	-	+	+	+	-	+	+	+	+
Kelly (R)	0	-	-	+	+	-	-	-	-	-	-	+	-	-	-	-	-	-	-	-
O'Hara (R)	0	+	0	0	0	0	0	+	0	0	0	0	0	0	0	0	-	-	-	+
Smith (D)	0	0	0	0	-	-	0	+	0	-	+	-	+	+	+	-	+	-	+	+
Souris (D)	+	+	+	-	-	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+

Vote for Government Power to Regulate: +

Vote Against Government Power to Regulate: -

Not Participating: 0

DATA TABLE #4 (Cont.)

Case Number:	373 Mich 115	373 Mich 198	373 Mich 250	373 Mich 578	373 Mich 587	373 Mich 627	374 Mich 58	374 Mich 300	374 Mich 476	374 Mich 524	374 Mich 543	374 Mich 597	374 Mich 622	375 Mich 559	375 Mich 573	375 Mich 683	376 Mich 156	376 Mich 170	376 Mich 225
Judges																			
Adams (D)	+	+	+	+	+	-	0	0	+	+	0	-	+	+	-	+	+	+	+
Black (D)	0	+	+	+	+	+	+	+	-	-	-	-	+	+	+	+	+	-	-
Carr (R)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Dethmers (R)	+	-	-	0	0	+	+	-	-	+	-	+	-	-	+	-	-	+	+
Kavanagh (D)	+	+	+	+	+	+	+	+	+	-	+	+	+	+	-	+	-	+	+
Kelly (R)	-	-	-	-	-	0	+	-	-	-	+	+	-	-	-	0	-	-	+
O'Hara (R)	+	+	+	-	-	+	-	+	-	-	-	+	+	-	-	-	-	-	+
Smith (D)	+	+	+	+	+	+	+	+	-	-	+	+	+	+	+	0	-	+	+
Souris (D)	-	+	+	+	+	+	+	-	-	0	+	+	+	+	+	+	+	-	+

DATA TABLE #5

JUDGES, PARTY AFFILIATION AND VOTES: MICHIGAN SUPREME COURT, DOMESTIC LAW ISSUES*

Case Number:	365 Mich 159	367 Mich 284	367 Mich 445	367 Mich 625	368 Mich 91	368 Mich 443	370 Mich 34	370 Mich 640	371 Mich 1	371 Mich 329	371 Mich 516	372 Mich 144	373 Mich 337	374 Mich 278	374 Mich 646	375 Mich 214	376 Mich 21
Judges																	
Adams (D)	0	-	+	0	-	+	0	0	0	0	0	0	0	+	+	-	+
Black (D)	-	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+
Carr (R)	+	+	-	-	-	-	-	-	-	-	-	-	-	0	0	0	0
Dethmers (R)	+	+	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Kavanagh (D)	+	+	+	+	+	+	+	+	-	-	-	+	-	+	+	+	+
Kelly (R)	+	+	-	-	-	-	-	-	-	-	-	-	-	-	-	0	-
O'Hara (R)	0	0	0	0	0	0	-	-	+	0	0	-	-	+	-	-	-
Smith (D)	0	-	+	-	0	+	+	-	-	+	-	+	-	+	+	+	-
Souris (D)	+	-	+	+	-	+	+	+	-	-	+	+	-	+	+	+	+

*Domestic Law Issues: divorce, will, child custody

Liberal or broad position: +

Conservative or narrow position: -

Not participating: 0

DATA TABLE #6

JUDGES, PARTY AFFILIATION AND VOTES: PENNSYLVANIA SUPREME COURT, DOMESTIC LAW ISSUES*

Case Number:	398 Pa 506	399 Pa 59	399 Pa 241	399 Pa 274	399 Pa 432	399 Pa 476	400 Pa 140	400 Pa 350	400 Pa 567	400 Pa 614	402 Pa 123	402 Pa 212	402 Pa 257	402 Pa 376	402 Pa 408	402 Pa 527	402 Pa 534	403 Pa 1	403 Pa 82	403 Pa 179	403 Pa 247	403 Pa 477	403 Pa 517	403 Pa 612	404 Pa 315	405 Pa 61
Judges																										
Bell (R)	-	-	-	+	-	-	-	-	-	-	-	-	+	-	-	+	-	-	-	-	-	-	-	-	-	-
Bok (D)	+	+	-	-	-	-	+	-	+	+	+	-	+	+	-	+	-	-	-	-	+	+	-	-	+	+
Cohen (D)	+	+	-	+	+	-	+	+	+	+	+	+	-	+	+	+	+	-	+	+	+	+	+	-	+	+
Eagen (D)	+	+	0	-	-	-	0	-	0	+	+	+	+	+	-	+	-	-	-	-	+	+	+	-	+	+
B. Jones (R)	+	+	-	+	+	-	+	-	+	+	-	-	-	+	-	+	-	-	-	-	-	+	+	-	+	+
C. Jones (D)	+	+	-	+	-	-	+	-	+	+	+	+	+	0	-	-	-	-	-	-	+	+	+	-	+	+
Musmanno (D)	+	+	+	+	-	+	0	+	+	+	+	+	+	+	-	+	+	+	-	-	+	+	+	+	+	-

*Domestic Law Issues: divorce, wills, child custody

Liberal or broad position: +

Conservative or narrow position: -

Not participating: 0

DATA TABLE #7

JUDGES, PARTY AFFILIATION AND VOTES: PENNSYLVANIA SUPREME COURT, INDIVIDUAL CLAIMS AGAINST COMPANIES

Case Number:	398 Pa 46	398 Pa 250	398 Pa 259	398 Pa 304	398 Pa 386	398 Pa 447	398 Pa 540	399 Pa 211	399 Pa 226	399 Pa 293	399 Pa 332	399 Pa 505	399 Pa 521	399 Pa 569	400 Pa 27	400 Pa 46	400 Pa 98	400 Pa 109	400 Pa 145	400 Pa 173	400 Pa 315	400 Pa 365
Judges																						
Bell (R)	-	-	-	+	-	-	-	-	-	-	-	+	0	-	-	-	+	-	-	-	-	-
Bok (D)	+	+	+	+	-	+	+	-	+	+	+	+	+	+	-	+	+	-	+	+	0	0
Cohen (D)	+	0	0	-	-	+	+	-	+	-	+	0	-	+	-	+	+	-	+	+	+	+
Eagen (D)	+	+	+	-	-	+	+	-	+	-	+	+	-	0	-	+	+	-	0	0	+	-
B. Jones (R)	+	+	+	-	-	+	-	-	-	-	+	+	-	+	-	-	-	-	-	-	-	-
C. Jones (D)	+	+	+	-	-	+	+	-	0	-	+	+	-	+	-	+	+	-	+	+	+	-
Musmanno (D)	+	0	0	+	+	+	+	+	+	-	+	-	+	+	+	+	+	+	0	+	+	+

Vote For Individual's Claim: +

Vote Against Individual's Claim: -

Not Participating: 0

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DATA TABLE #7 (Cont.)

Case Number:	400 Pa 385	400 Pa 423	400 Pa 429	400 Pa 457	400 Pa 485	400 Pa 492	400 Pa 497	400 Pa 533	401 Pa 146	401 Pa 178	401 Pa 267	401 Pa 278	401 Pa 284	401 Pa 307	401 Pa 335	401 Pa 349	401 Pa 358	401 Pa 413	401 Pa 427	401 Pa 477	401 Pa 494	401 Pa 501
Judges																						
Bell (R)	-	-	+	-	-	-	-	-	-	-	-	-	-	-	-	-	-	+	-	-	-	-
Bok (D)	-	0	+	-	+	+	-	+	-	-	+	+	-	-	-	-	+	0	+	+	-	+
Cohen (D)	-	-	+	-	+	+	-	+	-	+	+	+	-	+	+	-	+	-	+	+	-	+
Eagen (D)	-	-	+	-	-	+	-	+	-	-	+	+	-	-	-	-	+	-	+	+	-	+
B. Jones (R)	-	-	+	-	-	+	-	-	-	-	+	+	-	-	-	-	+	+	+	+	-	+
C. Jones (D)	-	-	+	-	+	+	-	+	-	-	+	+	-	-	-	-	+	-	+	+	-	+
Musmanno (D)	+	+	-	+	+	+	+	0	+	-	+	+	+	-	+	+	+	-	+	+	+	+

DATA TABLE #7 (Cont.)

Case Number:	401 Pa 516	401 Pa 520	401 Pa 535	401 Pa 570	401 Pa 588	401 Pa 594	401 Pa 637	402 Pa 1	402 Pa 7	402 Pa 19	402 Pa 27	402 Pa 37	402 Pa 63	402 Pa 73	402 Pa 86	402 Pa 109	402 Pa 138	402 Pa 251	402 Pa 272	402 Pa 288	402 Pa 313	402 Pa 325
Judges																						
Bell (R)	-	-	-	-	-	-	-	-	+	+	-	-	-	-	-	-	-	-	-	-	+	-
Bok (D)	-	+	0	+	+	-	-	-	-	+	+	+	+	-	-	-	-	+	-	-	+	+
Cohen (D)	-	+	+	+	+	-	-	-	+	+	+	+	+	-	-	-	+	+	+	+	+	+
Eagen (D)	-	+	+	+	+	-	-	-	+	+	+	+	-	-	-	-	-	+	+	-	+	+
B. Jones (R)	-	-	+	+	-	-	-	-	+	-	-	+	+	-	-	-	+	-	-	-	-	-
C. Jones (D)	-	+	+	+	+	-	-	-	+	+	+	+	+	-	-	-	-	+	+	-	-	+
Musmanno (D)	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+

DATA TABLE #7 (Cont.)

Case Number:	402 Pa 369	402 Pa 388	402 Pa 391	402 Pa 467	402 Pa 473	402 Pa 523	403 Pa 108	403 Pa 148	403 Pa 171	403 Pa 200	403 Pa 213	403 Pa 281	403 Pa 381	403 Pa 437	403 Pa 547	403 Pa 563	403 Pa 610	403 Pa 627	404 Pa 12	404 Pa 29	404 Pa 47	404 Pa 71
Judges																						
Bell (R)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	+	-	-	-
Bok (D)	-	-	+	-	+	-	+	+	-	-	-	-	+	-	+	+	-	-	-	+	+	+
Cohen (D)	+	-	+	+	+	+	+	-	+	-	+	-	+	-	+	+	-	+	+	+	+	+
Eagen (D)	-	-	-	-	+	-	+	+	-	-	-	+	+	-	+	+	-	-	-	-	+	+
B. Jones (R)	-	-	-	-	-	-	+	+	-	-	-	+	+	-	-	+	-	-	-	-	-	-
C. Jones (D)	-	-	+	-	+	-	+	+	-	-	-	-	+	-	+	+	-	-	-	-	+	+
Musmanno (D)	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	-	-	-	+	+

DATA TABLE #7 (Cont.)

Case Number:	404 Pa 83	404 Pa 91	404 Pa 100	404 Pa 147	404 Pa 159	404 Pa 161	404 Pa 188	404 Pa 297	404 Pa 330	404 Pa 339	404 Pa 382	404 Pa 391	404 Pa 424	404 Pa 479	404 Pa 513	404 Pa 527	404 Pa 549	404 Pa 574	404 Pa 584	405 Pa 55	405 Pa 142
Judges																					
Bell (R)	-	-	-	-	+	-	-	-	+	-	-	-	-	+	-	-	-	-	-	-	-
Bok (D)	+	+	+	-	-	-	+	-	+	+	+	-	-	+	+	+	-	+	+	-	+
Cohen (D)	+	+	-	-	+	-	+	-	+	+	+	+	+	-	+	+	-	+	+	+	+
Eagen (D)	+	+	-	-	+	-	+	-	+	+	+	-	+	+	+	+	+	+	+	-	+
B. Jones (R)	+	+	-	-	+	-	+	-	+	+	+	-	-	+	-	+	-	-	+	-	0
C. Jones (D)	+	+	-	-	+	-	+	-	-	+	+	-	-	+	+	+	-	+	+	-	+
Musmanno (D)	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	0	+	+

DATA TABLE #8

JUDGES, PARTY AFFILIATION AND VOTES: MICHIGAN SUPREME COURT, INDIVIDUAL CLAIMS AGAINST COMPANIES

Case Number:	364 Mich 648	365 Mich 97	365 Mich 209	365 Mich 242	365 Mich 402	366 Mich 1	366 Mich 108	366 Mich 190	366 Mich 430	366 Mich 503	366 Mich 530	366 Mich 649	367 Mich 96	367 Mich 334	367 Mich 356	367 Mich 387	367 Mich 464	367 Mich 485	367 Mich 615	367 Mich 657	368 Mich 45	368 Mich 108
Judges																						
Adams (D)	0	0	0	0	0	0	0	0	0	0	+	0	0	-	+	+	0	+	-	-	+	+
Black (D)	-	-	-	+	+	+	+	-	+	-	+	+	+	+	+	+	+	-	+	+	+	-
Carr (R)	-	-	-	-	-	-	+	+	+	-	-	-	-	-	-	-	-	-	-	-	-	+
Dethmers (R)	+	-	-	-	-	-	+	+	+	-	+	-	+	-	+	-	-	-	-	-	-	-
Kavanagh (D)	+	-	-	-	+	+	-	+	+	-	+	+	-	+	+	+	+	+	-	+	+	-
Kelly (R)	-	-	-	-	+	+	+	+	+	-	-	-	+	-	-	-	-	-	-	-	-	+
O'Hara (R)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Smith (D)	0	0	0	0	0	0	+	0	-	-	-	0	-	+	+	+	+	+	-	+	+	-
Souris (D)	+	+	+	+	+	-	-	+	+	+	+	+	-	+	+	+	+	+	-	-	+	+

Vote For Individual's Claim: +

Vote Against Individual's Claim: -

Not Participating: 0

DATA TABLE #8 (Cont.)

Judges	Case Number: 368 Mich 122	368 Mich 160	368 Mich 182	368 Mich 310	368 Mich 354	368 Mich 366	368 Mich 397	368 Mich 600	368 Mich 631	369 Mich 219	369 Mich 242	369 Mich 252	369 Mich 269	369 Mich 341	369 Mich 439	369 Mich 487	370 Mich 169	370 Mich 521	370 Mich 547	370 Mich 614	370 Mich 670	371 Mich 28
Adams (D)	+	+	+	+	+	+	+	+	-	0	0	0	0	0	0	0	0	0	0	0	0	0
Black (D)	-	-	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+
Carr (R)	-	+	-	-	-	-	-	-	-	-	-	-	-	0	-	-	-	-	-	-	-	-
Dethmers (R)	-	+	-	-	-	-	-	-	-	-	-	-	-	+	-	-	-	-	-	-	-	-
Kavanagh (D)	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+
Kelly (R)	-	+	-	-	-	-	-	-	-	-	-	-	-	+	-	-	-	-	-	-	-	-
O'Hara (R)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	-	0	+	-	-	-	-
Smith (D)	-	+	+	+	+	+	+	+	+	+	+	-	+	-	+	+	+	+	+	+	-	+
Souris (D)	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+

DATA TABLE #8 (Cont.)

Judges	Case Number: 371 Mich 36	371 Mich 153	371 Mich 403	371 Mich 622	371 Mich 689	372 Mich 1	372 Mich 62	372 Mich 98	372 Mich 133	372 Mich 172	372 Mich 181	372 Mich 204	372 Mich 329	372 Mich 407	373 Mich 50	373 Mich 210	373 Mich 222	373 Mich 237	373 Mich 289	373 Mich 442	373 Mich 499	373 Mich 519
Adams (D)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	-	+	+	+
Black (D)	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	0
Carr (R)	-	-	+	-	+	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0	0
Dethmers (R)	-	-	+	-	+	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	+	-
Kavanagh (D)	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	-	+	+	+
Kelly (R)	-	-	+	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	+	-
O'Hara (R)	-	+	-	-	+	+	+	-	+	-	-	-	-	-	-	-	-	-	-	-	+	-
Smith (D)	+	+	-	-	+	+	+	+	+	-	-	-	+	-	+	-	+	+	-	+	+	+
Souris (D)	+	+	-	+	-	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	-	+

DATA TABLE #8 (Cont.)

Judges	373 Mich 531	373 Mich 610	374 Mich 48	374 Mich 194	374 Mich 364	374 Mich 492	374 Mich 564	374 Mich 608	374 Mich 655	374 Mich 692	375 Mich 23	375 Mich 85	375 Mich 102	375 Mich 120	375 Mich 193	375 Mich 392	375 Mich 421	375 Mich 440	375 Mich 490	375 Mich 519	375 Mich 667	376 Mich 98
Case Number:																						
Adams (D)	+	+	+	+	+	+	+	+	0	-	+	+	+	+	+	+	+	+	+	+	+	+
Black (D)	+	-	+	0	+	+	+	+	+	-	+	+	+	+	+	+	+	-	-	-	0	+
Carr (R)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Dethmers (R)	-	+	-	-	-	-	-	-	-	-	+	0	-	-	-	-	-	-	-	-	-	-
Kavanagh (D)	+	-	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+
Kelly (R)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
O'Hara (R)	-	+	+	+	+	+	-	+	+	+	+	-	+	+	-	-	-	+	-	+	-	-
Smith (D)	+	-	+	+	+	+	+	+	-	-	+	+	+	+	-	+	-	+	-	+	+	+
Souris (D)	+	-	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+

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DATA TABLE #8 (Cont.)

Case Number:	376 Mich 113	376 Mich 135	376 Mich 198	376 Mich 209	376 Mich 342	376 Mich 485	376 Mich 532	376 Mich 640
Judges								
Adams (D)	-	0	+	+	+	+	+	+
Black (D)	+	+	+	+	-	-	-	0
Carr (R)	0	0	0	0	0	0	0	0
Dethmers (R)	-	-	-	-	-	-	+	-
Kavanagh (D)	+	+	+	+	+	+	+	-
Kelly (R)	-	-	-	-	-	-	-	+
O'Hara (R)	-	-	-	-	+	-	-	+
Smith (D)	-	0	+	+	+	+	+	+
Souris (D)	+	0	+	+	+	+	+	-

DATA TABLE #9

Justice	Appointing President	Last Previous Office
John Jay (Federalist)	Washington (Federalist)	United States, Secretary for Foreign Affairs
John Rutledge (Federalist)	" "	South Carolina House of Representatives
William Cushing (Federalist)	" "	Chief Justice, Massachusetts Superior Court
James Wilson (Federalist)	" "	United States Congress
John Blair (Federalist)	" "	Virginia, Judge, 1st Court of Appeals
James Iredell (Federalist)	" "	North Carolina, Member of Council of State
Thomas Johnson (Federalist)	" "	Maryland, Chief Judge, General Court
William Paterson (Federalist)	" "	Governor New Jersey
Samual Chase (Federalist)	" "	Chief Judge, Maryland General Court
Oliver Ellsworth (Federalist)	" "	United States Senator
Bushrod Washington (Federalist)	Adams (Federalist)	Virginia House of Delegates
Alfred Moore (Federalist)	" "	Judge, North Carolina Superior Court
John Marshall (Federalist)	" "	United States, Secretary of State
William Johnson (Rep.-Dem.)	Jefferson (Republican-Democrat)	Judge, S. Carolina Court of Common Pleas
Henry B. Livingston (Rep.-Dem.)	" "	Judge, New York State Supreme Court
Thomas Todd (Rep.-Dem.)	" "	Chief Justice, Kentucky Supreme Court
Gabriel Duval (Rep.-Dem.)	Madison (Republican-Democrat)	Comptroller, U.S. Treasury
Joseph Story (Rep.-Dem.)	" "	Massachusetts, House of Representatives
Smith Thompson (Rep-Dem.)	Monroe (Republican-Democrat)	United States Secretary of the Navy
Robert Trimble (Rep.-Dem.)	John Quincy Adams (Rep.-Dem.)	United States District Judge
John McLean (Democrat)	Jackson (Democrat)	Postmaster General
Henry Baldwin (Democrat)	" "	United States House of Representatives
James M. Wayne	" "	United States House of Representatives
Roger B. Taney	" "	United States Secretary of the Treasury
Philip P. Barbour	" "	Defeated candidate for Vice President
John Catron	" "	Tennessee Supreme Court

DATA TABLE #9 (Cont.)

Justice	Appointing President	Last Previous Office
John McKinley (Democrat)	Van Buren (Democrat)	U.S. House of Representatives
Peter V. Daniel (Democrat)	" "	Judge, United States District Court
Samuel Nelson (Democrat)	Tyler (Whig)	Chief Justice, New York Supreme Court
Levi Woodbury (Democrat)	Polk (Democrat)	United States Senator
Robert C. Grier (Democrat)	" "	County Court Judge
Benjamin R. Curtis (Whig)	Fillmore (Whig)	Massachusetts Legislature
John A. Campbell (Democrat)	Pierce (Democrat)	Alabama Legislature
Nathan Clifford (Democrat)	Buchanan (Democrat)	United States Attorney General
Noah H. Swayne (Republican)	Lincoln (Republican)	United States Attorney
Samuel F. Miller (Republican)	" "	Justice of the Peace
David Davis (Republican)	" "	State Judge
Stephen J. Field (Democrat)	" "	Chief Justice, California Supreme Court
Salmon P. Chase (Republican)	" "	United States Secretary of the Treasury
William Strong (Republican)	Grant (Republican)	Pennsylvania Supreme Court
Joseph Bradley (Republican)	" "	None
Ward Hunt (Republican)	" "	New York Court of Appeals
Morrison R. Waite (Republican)	" "	Ohio Legislature
John Marshall Harlan (Republican)	Hayes (Republican)	Kentucky Attorney General
William B. Woods (Republican)	" "	United States Circuit Court Judge
Stanley Matthews (Republican)	" "	United States Senator
Horace Gray (Republican)	Arthur (Republican)	Massachusetts Supreme Court
Samuel Blatchford (Republican)	" "	United States Circuit Court Judge
Lucius Q.C. Lamar (Democrat)	Cleveland (Democrat)	United States Secretary of Interior
Melville W. Fuller (Democrat)	" "	Illinois Legislature
David J. Brewer (Republican)	Harrison (Republican)	United States Circuit Judge
Henry B. Brown (Republican)	" "	United States District Judge
George Shiras, Jr. (Republican)	" "	None

DATA TABLE #9 (Cont.)

Justice	Appointing President	Last Previous Office
Howell E. Jackson (Democrat)	Harrison (Republican)	United States Court of Appeals
Edward D. White (Democrat)	Cleveland (Democrat)	United States Senator
Rufus W. Peckham (Democrat)	" "	New York Court of Appeals
Joseph McKenna (Republican)	McKinley (Republican)	United States Attorney General
Oliver W. Holmes (Republican)	Roosevelt (Republican)	Massachusetts Supreme Court
William Rufus Day (Republican)	" "	United States Circuit Court
William H. Moody (Republican)	" "	United States Attorney General
Horace H. Lurton (Democrat)	Taft (Republican)	United States Circuit Court
Charles E. Hughes (Republican)	" "	Governor of New York
Willis Van Devanter (Republican)	" "	United States Circuit Judge
Joseph R. Lamar (Democrat)	" "	Georgia Supreme Court
Mahlon Pitney (Republican)	" "	Chancellor, New Jersey (Judiciary)
James C. McReynolds (Democrat)	Wilson (Democrat)	Unites States Attorney General
Louis D. Brandeis (Democrat)	" "	None
John H. Clarke (Democrat)	" "	United States District Judge
William H. Taft (Republican)	Harding (Republican)	United States President
George Sutherland (Republican)	" "	United States Senator
Pierce Butler (Democrat)	" "	County Attorney
Edward T. Sanford (Republican)	" "	United States District Judge
Harlan F. Stone (Republican)	Coolidge (Republican)	United States Attorney General
Charles E. Hughes (Republican)	Hoover (Republican)	United States Secretary of State
Owen J. Roberts (Republican)	" "	None
Benjamin N. Cardozo (Democrat)	" "	New York Court of Appeals
Hugo L. Black (Democrat)	Roosevelt (Democrat)	United States Senator
Stanley F. Reed (Democrat)	" "	United States Solicitor General

DATA TABLE #9 (Cont.)

Justice	Appointing President	Last Previous Office
Felix Frankfurter (Independent)	Roosevelt (Democrat)	None
William O. Douglas (Democrat)	" "	Federal S.E.C.
Frank Murphy (Democrat)	" "	United States Attorney General
James F. Byrnes (Democrat)	" "	United States Senator
Robert H. Jackson (Democrat)	" "	United States Attorney General
Wiley B. Rutledge (Democrat)	" "	United States Circuit Judge
Harold A. Burton (Republican)	Truman (Democrat)	United States Senator
Fred M. Vinson (Democrat)	" "	United States Court of Appeals
Tom C. Clark (Democrat)	" "	United States Secretary of the Treasury
Sherman Minton (Democrat)	" "	United States Court of Appeals
Earl Warren (Republican)	Eisenhower (Republican)	Governor of California
John M. Harlan (Republican)	" "	United States Court of Appeals
William Brennan (Democrat)	" "	New Jersey Supreme Court
Charles Whittaker (Republican)	" "	United States Court of Appeals
Potter C. Stewart (Republican)	" "	United States Court of Appeals
Byron White (Democrat)	Kennedy (Democrat)	United States Deputy Attorney General
Arthur Goldberg (Democrat)	" "	United States Secretary of Labor
Abe Fortas (Democrat)	Johnson (Democrat)	United States Undersecretary of Interior
Thurgood Marshall (Democrat)	" "	United States Solicitor General
Warren Burger (Republican)	Nixon (Republican)	United States Court of Appeals