TYPOGRAPHY IN THE *U.S. REPORTS* AND SUPREME COURT VOTING PROTOCOLS

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Supreme Court Justices frequently divide their opinions into parts, structuring their decisions with Roman numerals, capital letters, Arabic numerals, and so on. This typographical convention, called here "outline-style formatting," began to appear in the U.S. Reports *in 1927 and has changed how the Justices create law. In this Note, Rudolph Delson presents a study of outline-style formatting in Supreme Court opinions. Delson suggests that stylistic concerns, such as the desire to make long opinions more approachable, drove the Court to adopt outline-style formatting. However, over time the Justices came to rely on outline-style formatting when they voted, joining in and dissenting from opinions on a part-by-part basis. Delson concludes that outline-style formatting is therefore no longer merely stylistic, but now facilitates strategic behavior by the Justices.*

INTRODUCTION

Over the last seventy-five years, the Supreme Court has adopted the convention of dividing its opinions into parts. The *U.S. Reports* are now so heavily staffed with Roman numerals (and with their inferiors, capitalized Roman letters; and with *their* inferiors, Arabic numerals; and with the peons in this bureaucracy, uncapitalized Roman letters)[1] that we think nothing of it when a case synopsis informs us, for example, that "Justice Kennedy delivered the opinion of the Court, except as to Part IV-A-2."[2] It seems so natural for the Court to enumerate the logical hierarchy of its opinions in this way—first compartmentalizing its reasoning, then crafting a flow chart to help the reader along—that the fact that the Court has not always used outline-style formatting[3] might appear to be a mere typographical trifle.[4]

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1 See, e.g., City of Monterey v. Del Monte Dunes, 119 S. Ct. 1624, 1655, 1657, 1658 (1999) (Souter, J., concurring in part and dissenting in part) (including Parts III.A.2.a, III.A.2.b, and III.A.2.c).

2 Id. at 1631.

3 This Note uses the phrase "outline-style formatting" to refer to the convention of breaking an opinion into parts entitled I, II, III, and so on, perhaps with some of those

In fact, outline-style formatting is a peculiarly modern innovation. And, while it may have begun as a stylistic device to improve the readability of the Court's prose, it now has become central to how the Justices collaborate to decide what the law is. Specifically, outline-style formatting has facilitated changes in the voting protocols of the Court, allowing the Justices to cast their votes on a part-by-part basis. These changes in how the Court votes have in turn facilitated strategic behavior[5] by the Justices as they craft law.

Part I of this Note presents a history of outline-style formatting in Supreme Court opinions. It suggests that the Justices began using outline-style formatting not as a result of any conscious effort to change the Court's voting practices, but primarily as a way to make long opinions more approachable.

Part II discusses the relationship between outline-style formatting and the voting protocols of the Court. Two voting protocols have received attention in academic literature: case-by-case voting and issue-by-issue voting.[6] This Note identifies a third voting protocol: voting by part.[7] Part II demonstrates that voting by part is distinct from the two voting protocols that have already been identified, and argues that through the phenomenon of voting by part, outline-style formatting has come to play a role in strategic behavior on the part of the Justices. This Note concludes by describing why voting by part might

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parts broken into sub-parts entitled A, B, C, and so on, down through the familiar pyramid of outline headings.

[4] The device of dividing opinions into parts is so intuitive for some editors of legal texts that they reformat historical texts to reflect the modern style. Compare, e.g., Geoffrey R. Stone et al., Constitutional Law 501-04 (3d ed. 1996) (printing Chief Justice Taney's opinion in *Dred Scott* as if it were divided into Parts "I" and "II"), with Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 399-454 (1856) (Taney, C.J.) (lacking any such device). Interestingly enough, while Taney's fifty-five-page opinion appears as an unbroken sequence of paragraphs in the *U.S. Reports*, the five-page synopsis that precedes his opinion is divided with centered Roman numerals. 60 U.S. at 393–96.

[5] For the purposes of this Note, strategic behavior by the Justices will mean behavior which is undertaken with the objective of bringing the law to reflect the Justices' own policy preferences, while accounting for the institutional setting in which the Justices act. For a further discussion, see infra notes 98-101 and accompanying text.

[6] The terms "case-by-case voting" and "issue-by-issue voting" are borrowed from Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Cal. L. Rev. 1, 11 (1993). See also infra note 76. For a more detailed discussion of these two voting protocols, see infra Part II.A.

[7] This Note uses the phrase "voting by part" to refer to the phenomenon of Justices opting into and out of their colleagues' opinions on a part-by-part basis. For example, a Justice would vote by part if she were to join in Parts I, II, and III.B of the majority opinion, but not join in Part III.A. It is important to note that voting by part does not always affect the disposition of a case. If Justices A and B were the only dissenters in a case, and Justice A wrote a dissenting opinion, but Justice B joined only Part I of Justice A's dissent, then Justice B would have voted by part, but the outcome of the case would not have been affected.

facilitate such strategic behavior, and by observing that any future effort to model the behavior of individual Justices must account for voting by part.

I
A HISTORY OF OUTLINE-STYLE FORMATTING IN THE *U.S. REPORTS*

Flocks of opinions in today's *U.S. Reports* display outline-style formatting, but as late as the 1930s such opinions were rare.[8] Because the Justices began to write concurring and dissenting opinions with greater frequency during the 1940s,[9] an initial question is whether the growth of outline-style formatting was motivated by the Justices' desire to coordinate fractured decisions. A study of the *U.S. Reports* suggests, however, that the adoption of outline-style formatting was not motivated by the Justices' desire to change how the Court collaborated to determine the law, but instead was a stylistic response to the growing length of the Court's opinions.

A. Methodology

The history of outline-style formatting that follows[10] is based upon several manual reviews of the *U.S. Reports*, supplemented by searches of electronic databases. The purpose of this study was to establish the rate at which the Court has adopted outline-style formatting by sampling the *U.S. Reports* at fifteen-year intervals.[11] It classified opinions by kind (i.e., opinions of the Court, concurrences, dissents, and so on),[12] and by the degree of organizational hierarchy

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8 See infra notes 28-33 and accompanying text.

9 Prior to the Chief Justiceship of Harlan Stone, which began in 1941, during no Chief Justice's tenure did the Court publish an average of more than one separate (i.e., concurring or dissenting) opinion for every five majority opinions. See John P. Kelsh, The Opinion Delivery Practices of the United States Supreme Court 1790–1945, 77 Wash. U. L.Q. 137, 177 (1999). But in 1941, an average of one separate opinion was published for every three majority opinions, and by 1948 the ratio of separate opinions to majority opinions was about one to one. Id. at 175-77. Since 1966, the ratio has not fallen below one to one. Id. at 177.

10 See infra Part I.B.

11 The Terms examined were 1950, 1965, 1980, and 1995. The results appear below in Figures 1-4.

12 The classifications were: "Opinions of the Court," a category that also included any opinions that "announced the judgment of the Court"; "Dissents," a category that also included any opinions styled "*dubitante*"; "Concurrences," a category that included any opinions "concurring in the result" or "concurring in the judgment," as well as simple "concurrences"; and finally "C.i.P. / D.i.P.," a category that included any opinions "concurring in part," "dissenting in part," or "concurring in part and dissenting in part." The "C.i.P. / D.i.P." category was made dominant relative to the others, so that if an opinion was described, for example, as both "concurring in the judgment and concurring in part," it

employed.[13] The study then calculated the median lengths, in pages, of the resulting groups of opinions.[14] The study also tracked the propensities of individual Justices to employ outline-style formatting.[15] To locate examples of outline-style formatting that appeared in the *U.S. Reports* prior to those Terms that were reviewed in their entirety, manual searches were augmented by searches of electronic databases.[16]

B. Seventy-Five Years of Outline-Style Formatting

A court can employ any number of methods to make clear which stretch of text belongs to which stage of the court's argument; even *Marbury v. Madison* has its "1st," "2dly," and "3dly."[17] But outline-

was tallied as an "in part" opinion. Excluded from this tally were: (1) all Per Curiam opinions; (2) dissents from or concurrences with Per Curiam opinions; (3) orders and decrees; and (4) opinions related to grants or denials of certiorari.

[13] This study divided opinions into four classes, depending on the amount of hierarchy employed: Class 0 opinions lacked any sort of outline-style formatting; Class 1 opinions had one layer of outline-style hierarchy (e.g., Parts I, II, III, etc.); Class 2 opinions had two such layers (e.g., Parts I, II.A, II.B, III, etc.); Class 3 opinions had three such layers (e.g., Parts I, II.A.1, II.A.2, II.B, III, etc.). Of course, there were numerous opinions that deviated from any simple classification; the number of opinions that presented classificatory problems are noted after each Figure.

[14] The study calculated lengths in terms of pages in the *U.S. Reports*, with any fraction of a page rounded up to count as an entire page. When a Justice merely registered his or her stance (e.g., "Justice Brennan dissents") without filing an opinion, it was tallied as a one page opinion. The calculations of the lengths of opinions exclude any appendices or charts.

[15] The study examined the 1950, 1965, 1980, and 1995 Terms. The results appear in Figures 5, 6, 9, and 10. For the purposes of examining Term-to-Term fluctuations in the use of outline-style formatting by individual Justices, reviews also were made of the 1978 and 1979 Terms of the Court. These results appear in Figures 7 and 8. In those instances where a set of Justices registered its dissent or concurrence together but did not file an opinion, the dissent or concurrence was treated (1) as an opinion that did not have any outline-style formatting, and (2) as an opinion written by the first Justice listed among the dissenters or concurrers. When a set of Justices dissent or concur together without filing an opinion, the *U.S. Reports* usually lists the Justices in the order of their seniority. Consequently, the number of opinions without any outline-style formatting credited to the more senior Justices may be skewed upward.

[16] For example, a search of the string "II" in Westlaw's SCT-OLD database will produce any early Supreme Court opinion divided into parts using Roman numerals (because any such opinion will have at least a Part I and a Part II). The use of such searches has been noted where appropriate.

[17] 5 U.S. (1 Cranch) 137, 167-68 (1803). At the time when outline-style formatting first appeared in the Justices' opinions some other devices commonly employed by the Court to divide up its opinions were: section titles, centered on the page and separated from the surrounding text by a pair of carriage returns, see, for example, United States v. Trenton Potteries, 273 U.S. 392, 395, 402, 404 (1927) (including sections on "REASONABLENESS OF RESTRAINT," "QUESTION OF VENUE," and "QUESTIONS OF EVIDENCE"); Arabic numerals at the beginnings of the first paragraphs of each section, see, for example, Whitney v. California, 274 U.S. 357, 366, 368, 369, 371 (1927); and the words "first," "sec-

style formatting has distinguished itself from every other method of organizing the text of an opinion in that it has become a part of the official voting apparatus of the Supreme Court; since the 1970 Term, the "lineup" sections of the synopses[18] in the *U.S. Reports* have kept tally of which Justices concur in, and which Justices dissent from, the various parts of an opinion formatted in outline style.[19]

The first Justice to employ centered Roman numerals to format an opinion was John C. McReynolds, who used outline-style formatting in a pair of opinions in 1926.[20] In one of those opinions, *Myers v. United States*,[21] McReynolds filed a sixty-one page dissent—Proustian proportions by the standard of the day[22]—divided into no fewer than eighteen parts.[23] In the other opinion, *Federal Trade Commission v. Western Meat Co.*,[24] Justice McReynolds wrote for the Court, resolving three separate suits brought by the Federal Trade Commission (FTC) under the Clayton Act. McReynolds dealt with each FTC suit in a separate section of the opinion, demarcating each section with a centered Roman numeral.[25] Four Justices, led by Louis Brandeis, dis-

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ond," "third," and so on, in italics at the beginning of the first paragraph of each section, see, for example, Assigned Car Cases, 274 U.S. 564, 575, 578, 582, 583 (1927). Because centered Roman numerals create a swath of page free from ink (beyond the unassuming numerals themselves), they create visual breaks more powerful than those created by any of these other devices.

18 The lineup is the section of the synopsis that reports which Justices filed opinions and which Justices joined each opinion filed; it is drafted by the Court's Reporter of Opinions rather than by the Justices themselves. Telephone Interview with Frank D. Wagner, Reporter of Decisions, U.S. Supreme Court (Feb. 26, 2001) (on file with the *New York University Law Review*).

19 See Gillette v. United States, 401 U.S. 437, 438 (1971) (synopsis) (noting that "Black, J., concurred in the judgment and in Part I of the Court's opinion"). *Gillette* was isolated as the first example of a synopsis referring to the Parts of the Justices' opinions by running the search "sy("Part I" "Part II" "Part III" "Part IV" "Part V")" through Westlaw's SCT-OLD and SCT databases. This search returned no cases earlier than *Gillette*.

The Reporter began publishing these voting lineups in the spirit of helping the press and the public better understand the Court's decisions. Interview with Frank D. Wagner, supra note 18.

20 Many of the cases cited infra in notes 24-33 and discussed in the accompanying text were isolated through decade-by-decade searches on the string "II" within Westlaw's SCT-OLD database. See supra note 16.

21 272 U.S. 52, 178 (1926) (McReynolds, J., dissenting).

22 During the 1921-28 terms, the average McReynolds opinion was only about five pages long, and Justice Pitney, the most prolix of any Justice to serve during those terms, averaged less than ten pages. See Robert Post, The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court, 85 Minn. L. Rev. 1267, 1290 fig.8 (2001)

23 *Myers*, 272 U.S. at 178, 182-83, 185, 188, 191-93, 204, 208-09, 215, 228, 230, 232-33, 237.

24 272 U.S. 554 (1926).

25 See id. at 557, 560, 561. This most familiar form of outline-style formatting—employing centered Roman numerals at the highest level of hierarchy—was not

sented in part from the majority's opinion, disagreeing with its resolution of the second and third suits.[26] Brandeis enumerated his disagreement with McReynolds not, however, as a modern Justice would, by referring to "Part III" and "Part IV" of McReynolds's opinion, but rather by referring to "Nos. 213 and 231," the docket numbers of the second and third suits.[27]

Justice McReynolds's 1926 opinions were hardly watershed moments, however. It would be eighteen months and five volumes of the *U.S. Reports* before any Justice again divided an opinion into parts using centered Roman numerals.[28] And it would be more than a decade before Roman numerals appeared again as they did in McReynolds's opinions—not only centered on the page, but without any explanatory titles to prop them up.[29]

In the early 1940s, enthusiasts of the Roman numeral began expressing themselves in the *U.S. Reports* with more regularity. Justice Douglas liked using Roman numerals but preferred to situate them in the margin, uncentered;[30] Justices Black, Jackson, and Murphy fol-

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McReynolds's innovation. For example, the first volume of the *Harvard Law Review* contained an article divided into parts by centered Roman numerals. F.J. Stimson, "Trusts," 1 Harv. L. Rev. 132, 135, 141 (1887). And, in the issue of the *Harvard Law Review* dated the month after the first of McReynolds's two 1926 opinions, two of the three "Leading Articles" used centered Roman numerals in their formatting. Edwin D. Dickinson, Jurisdiction at the Maritime Frontier, 40 Harv. L. Rev. 1, 4, 9, 12, 18, 27 (1926) (using Roman numerals); Alvin E. Evans, Testamentary Republication, 40 Harv. L. Rev. 71, 76, 85, 90, 92, 93, 95, 100 (1926) (using Arabic numerals); Theodore F.T. Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 30, 35, 49, 61, 68 (1926) (using Roman numerals). In fact, the *U.S. Reports* already contained at least one example of centered Roman numerals being used as a formatting device. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 393-96 (1856) (synopsis). And, of course, the Constitution employs centered Roman numerals as well. See U.S. Const. arts. I, II, III, IV, V, VI, VII, www.earlyamerica.com/earlyamerica/freedom/constitution/index.html (facsimile of original print). Nor was the centered Roman numeral an exclusively legal preoccupation. Compare, e.g., William Shakespeare, Sonnets (1609) (facsimile) (containing sonnets "1," "2," "3," etc.), http://www.shu.ac.uk/emls/Sonnets/Sonnets.html, with William Shakespeare, Sonnets, in 20 The Plays and Poems of William Shakespeare 225-358 (F.C. & J. Rivington et al., 1821) (containing sonnets "I," "II," "III," etc.).

[26] See *Western Meat Co.*, 272 U.S. at 563-64 (Brandeis, J., dissenting).

[27] Id. at 564.

[28] See Sisseton & Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424, 428, 430, 432, 434 (1928). Justice Stone wrote the opinion of the Court, and used centered Roman numerals, accompanied by titles (e.g., "Appellants' Claim for Additional Compensation for Lands Ceded Under the Treaty of 1858," "Appellants' Claim for Compensation Arising Under the Act of March 3, 1863, 12 Stat. 819"), to divide up the text. Justice Stone would use that same device again in United States v. Oregon, 295 U.S. 1, 14, 24, 26 (1935).

[29] Again, it was McReynolds who used the device. See Labor Bd. Cases, 301 U.S. 58, 76, 79, 81, 83, 85, 87, 93, 99, 101 (1937) (McReynolds, J., dissenting).

[30] See, e.g., Palmer v. Hoffman, 318 U.S. 109, 111, 116 (1943); Howard Hall Co. v. United States, 315 U.S. 495, 498-99 (1942); United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 480, 482, 486, 488 (1942); Maguire v. Comm'r of Internal Revenue, 313

lowed McReynolds's approach of centering the numerals.[31] Eventually Douglas began to relent,[32] and by the mid-1940s the centered Roman numeral had clearly become the Court's favored device for dividing opinions into parts.[33]

Such questions of precisely which typographical devices appear in the *U.S. Reports* are important because they help reveal who exactly has been responsible for propagating outline-style formatting on the Court. For example, one might ask whether the Justices' clerks popularized outline-style formatting.[34] Because clerks arrive on and depart

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U.S. 1, 3, 8 (1941); Consol. Rock Prods. Co. v. Du Bois, 312 U.S. 510, 520, 527 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 391, 393, 401 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166, 170, 177-78, 181, 185, 190-91, 194, 198, 201, 208, 208-10, 228, 231, 237, 243, 248, 250, 254 (1940) (containing Roman numerals as well as capitalized letters and Arabic numbers); Helvering v. Fuller, 310 U.S. 69, 73, 76 (1940).

[31] See, e.g., Wickard v. Filburn, 317 U.S. 111, 117-18, 129 (1942) (Jackson, J.); Williams Mfg. Co. v. United Shoe Mach. Corp., 316 U.S. 364, 371, 383 (1942) (Black, J., dissenting); Seminole Nation v. United States, 316 U.S. 310, 315 (1942) (Murphy, J.); Seminole Nation v. United States, 316 U.S. 286, 290, 293, 308 (1942) (Murphy, J.); Swift & Co. v. United States, 316 U.S. 216, 221, 225, 231 (1942) (Jackson, J.); State Tax Comm'n v. Aldrich, 316 U.S. 174, 186, 190, 199 (1942) (Jackson, J., dissenting); Helvering v. Safe Deposit & Trust Co. of Balt., 316 U.S. 56, 57, 63 (1942) (Black, J.); Power Comm'n v. Pipeline Co., 315 U.S. 575, 599, 601 (1942) (Black, J., concurring); United States v. Bethlehem Steel Corp., 315 U.S. 289, 296-97, 299, 309 (1942) (Black, J.); Duckworth v. Arkansas, 314 U.S. 390, 397-98, 400 (1941) (Jackson, J., concurring in result); Bridges v. California, 314 U.S. 252, 260, 263, 268 (1941) (Black, J.).

[32] See Helvering v. Griffiths, 318 U.S. 371, 404, 409 (1943) (Douglas, J., dissenting) (using centered Roman numerals).

[33] The *U.S. Reports* for the October 1945 Term of the Court contain sixteen opinions that are divided using Roman numerals. In fourteen instances these Roman numerals are centered, and both the opinions with uncentered Roman numerals are by Justice Douglas.

[34] As one pair of commentators coyly put it, "[i]t has been charged that law clerks have on occasion written the opinion issued in the name of the justices." 2 Joan Biskupic & Elder Witt, Guide to the U.S. Supreme Court 828 (3d ed. 1997); see also Richard A. Posner, The Federal Courts: Crisis and Reform 102-19 (1985) (discussing federal judiciary's reliance on law clerks and arguing that increasingly academic writing style of the Federal bench is symptomatic of reliance on clerks).

Even if clerks were not composing opinions in their entirety, they might have been instrumental in determining how opinions were formatted. One interesting example is provided by John Sexton, Dean of the New York University School of Law. Sexton clerked for Chief Justice Warren Burger during the 1980 Term. In every opinion on which he assisted the Chief Justice, Sexton ensured that if the opinion was divided into parts at all, it was divided into exactly four parts—i.e., the opinion had to have a Part I through a Part IV, but could never have a Part V. Sexton intended this as a tribute to the four letters in his wife Lisa's name. Interview with John Sexton, Dean, N.Y.U. School of Law, in New York, N.Y. (Feb. 23, 2001); see also infra note 42 (relating one caveat to Dean Sexton's anecdote).

One also might imagine that a very active Reporter of Decisions could have some effect on the Justices' use of outline-style formatting. The reporter and his staff do "correct typographical and other errors in the opinions" in preparation for publication. Biskupic & Witt, supra, at 825. Reporters of Decisions must receive approval from chambers to make even corrections for misspellings, however, and the current Reporter of Decisions has made an editorial suggestion about altering the parts of an opinion (such as inserting or

from the Court on a yearly cycle, one would expect that if the clerks played a decisive role in the use of outline-style formatting, then there would be many Term-to-Term fluctuations in the typographical devices employed by individual Justices. In fact, examples of such Term-to-Term shifts are few.[35]

Instead, many Justices have typographical fingerprints that reappear Term after Term. For example, throughout his tenure on the Court, Chief Justice Burger had a distinctive predilection for parentheses. In his early years on the Court, he would write opinions not with a Part III.A, but with a Part III.(a).[36] Ten terms later, his taste was unchanged—he had taken to writing opinions not with a Part II.A.3, but with a Part II.A.(3),[37] or, even more idiosyncratically, with I, II, and III replaced by (1), (2), and (3).[38] Justice Potter Stewart similarly had a typographical solecism: Toward the end of his tenure on the Court, he flirted with the use of capital letters instead of Roman numerals when formatting an opinion with only one layer of hierarchy.[39] Justice Stevens also has a formatting hallmark: Throughout his tenure on the Court, he has avoided using multiple layers of orga-

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deleting a Roman numeral) in only a handful of instances during his fifteen terms with the Court. Interview with Frank D. Wagner, supra note 18.

35 One possible example arises from the study detailed in this Note. In the 1978, 1979, and 1980 Terms, Justice Rehnquist used two- or three-layered outline formats in 21%, 34%, and 3% of his opinions, respectively. See infra figs.7-9. Given that there do not appear to have been Term-by-Term shifts in the length of the opinions that Justice Rehnquist wrote, see infra fig.11, these shifts in Rehnquist's propensity to use outline-style formatting may reflect differences in the writing styles of Rehnquist's clerks during these three Terms.

36 See, e.g., Tilton v. Richardson, 403 U.S. 672, 678 (1971); Lemon v. Kurtzman, 403 U.S. 602, 615, 620 (1971).

37 See, e.g., CBS v. FCC, 453 U.S. 367, 388-89 (1981); Estelle v. Smith, 451 U.S. 454, 466 (1981); Fullilove v. Klutznick, 448 U.S. 448, 473, 475-76, 479, 482, 484-86 (1980).

38 See, e.g., Smith v. Daily Mail Publ'g Co., 443 U.S. 97-98, 100, 101, 104-05 (1979); Aronson v. Quick Point Pencil Co., 440 U.S. 257, 259-61, 264 (1979); cf. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 556-57, 559, 561, 563-64, 567, 569 (1981) (Burger, C.J., dissenting) (containing Parts (1), (2)(a), (2)(b), (2)(c), (3)(a), (3)(b), (3)(c), and (4)).

39 See, e.g., Donovan v. Dewey, 452 U.S. 594, 610, 612 (1981) (Stewart, J., dissenting); Watt v. Alaska, 451 U.S. 259, 277, 279 (1981) (Stewart, J., dissenting); UPS v. Mitchell, 451 U.S. 56, 65, 68, 71 (1981) (Stewart, J., concurring); Michael M. v. Superior Court, 450 U.S. 464, 476, 477, 479, 481 (1981) (Stewart, J., concurring); Fullilove v. Klutznick, 448 U.S. at 523, 527, 531 (Stewart, J., dissenting); Andrus v. Shell Oil Co., 446 U.S. 657, 674, 676-78 (1980) (Stewart, J., dissenting); Mackey v. Montrym, 443 U.S. 1, 20, 22, 27, 30 (1979) (Stewart, J., dissenting). Whatever the idiosyncrasy of this device, it occasionally captured the imagination of the other Justices. See, e.g., Robbins v. California, 453 U.S. 420, 430, 432, 435 (1981) (Powell, J., concurring with plurality opinion written by Stewart); Brown v. Louisiana, 447 U.S. 323, 338, 340 (1980) (Rehnquist, J., dissenting); Carbon Fuel Co. v. United Mine Workers of Am., 444 U.S. 212, 216, 218 (1979) (Brennan, J.); Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 53, 58, 60 (1979) (Blackmun, J., concurring in result).

nizational hierarchy.[40] These examples, together with others (like that of Justice Douglas),[41] suggest overall that clerks have played a secondary role in the shift to outline-style formatting, generally deferring to the Justices' established typographical styles.[42]

Setting aside the issue of precisely which typographical devices the Court has employed to divide opinions into parts, one might ask what motivated the Justices to divide their opinions into parts in the first place. Justice McReynolds's twin 1926 opinions nicely exemplify the two most obvious explanations for the Court's adoption of new styles of formatting. The Justices might have begun dividing their opinions into parts in order to help coordinate the various opinions produced by the Court on a given case. In 1926, when the opportunity presented itself in *Western Meat Co.*,[43] Brandeis did not take advantage of McReynolds's organizational hierarchy; Brandeis specified those passages of the majority's opinion with which he agreed and disagreed by referring to docket numbers rather than to parts.[44] But during the early 1940s the ratio of unanimous to nonunanimous decisions by the Court began to tumble.[45] The Court may have begun using outline-style formatting with more frequency because, by providing a convenient way for dissenters to specify their disagreements with the Court, outline-style formatting helped integrate the new masses of dissents into the Court's jurisprudence.

Alternatively, the Justices might have adopted the new style of dividing up opinions to make long opinions more readily digestible, just as, for example, Justice McReynolds divided his massive dissent in *Myers*[46] into madeleine-sized pieces.[47] The Court's opinions began to

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[40] An opinion with multiple layers of hierarchy might have, for example, not simply Parts I, II, and III, but Parts I, II.A, II.B, and III (two layers of hierarchy), or Parts I, II.A, II.B.1, II.B.2, II.C, and III (three layers). During the 1978-80 Terms, while his brethren used two or more layers of hierarchy in one out of every four or five opinions, Justice Stevens used multiple layers in only about one in fifteen. See infra figs.7-9. His aversion persists today. See infra fig.10.

[41] See supra notes 30-33 and accompanying text.

[42] As a caveat to his anecdote about ensuring the four-part structure of opinions, see supra note 34, Dean Sexton notes that he only concerned himself with the top layer of Chief Justice Burger's formatting hierarchies (i.e., the Roman numerals), and did not worry about the typography of the lower tiers (in which the Chief Justice's parentheses proliferated). Interview with John Sexton, supra note 34.

[43] 272 U.S. 554 (1926).

[44] See supra notes 24-27 and accompanying text.

[45] During Justice Holmes's tenure on the Court, 1902-32, 91% of opinions were unanimous; by 1951 that figure had dropped to 22%, with the explosion in nonunanimous opinions occurring after 1941. See Kelsh, supra note 9, at 138.

[46] 272 U.S. 52, 178 (1926) (McReynolds, J., dissenting).

[47] See supra notes 22-23 and accompanying text.

grow longer after 1950,[48] and as the Court became more comfortable with the writing conventions of legal academia,[49] it may have turned to one of legal academia's preferred formatting devices for dividing up long texts.[50]

1. *Outline-Style Formatting and Coordination*

There is only thin evidence for the first of these possibilities, that outline-style formatting helped the Justices to coordinate the various dissenting and concurring opinions produced by the Court on a given case.[51] In the years during which outline-style formatting became common in the *U.S. Reports*, dissenters or concurrers made reference to a majority's outline-style formatting in only a small fraction of cases. The first reference by one Justice to a "Part" of another Justice's opinion with which he agreed or disagreed did not occur until 1945,[52] well after outline-style formatting had become familiar to the Court.[53]

In the 1950 Term, there were ten unambiguous uses of outline-style formatting in lead opinions,[54] but in only one case did a dissenting or concurring Justice mention the "Parts" of the majority's opinion when describing how he agreed or disagreed with the Court.[55] In the 1965 Term, forty-four lead opinions used outline-style formatting; dissenting or concurring Justices relied on the formatting to specify the locus of their dissent in ten of these cases.[56] In the 1970 Term—the first Term when the lineups in the *U.S. Reports* began tracking dis-

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[48] The average length of the Court's full opinions during the 1912-28 Terms was seven pages. See Post, supra note 22, at 1282 fig.3. During the 1950 Term, the median length of full opinions was eight pages; during the 1965 Term, eleven pages; and during the 1980 Term, sixteen pages. See infra figs.1-3.

[49] The Court began to employ outline-style formatting in earnest during Chief Justice Harlan F. Stone's tenure from 1941-46. See supra notes 30-33 and accompanying text. Justice Stone was an early proponent of increasing the role that legal scholarship played in helping shape the Court's jurisprudence. See Post, supra note 22, at 1359-80.

[50] See supra note 25.

[51] The cases discussed in Part I.B.1 of this Note were isolated through searches within Westlaw's SCT and SCT-OLD databases. Limiting by decade, these databases were searched for: (dissent! /5 part! /2 (I II III IV VI VII)) (concur! /5 part! /2 (I II III IV VI VII)) (agree! /5 part! /2 (I II III IV VI VII)) (disagree! /5 part! /2 (I II III IV VI VII)) (join! /5 part! /2 (I II III IV VI VII)). Searches for "Part V" were also conducted ("V" alone being too common to be searched within Westlaw).

[52] Malinski v. New York, 324 U.S. 401, 410 n.6 (1945) (noting that Justices Black, Murphy, and Rutledge "join in Part I" of majority's opinion).

[53] See supra notes 30-33 and accompanying text.

[54] See infra fig.1.

[55] Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951) (Black & Douglas, JJ., concurring in Parts I and II of majority's opinion, but agreeing with lower court as to Part III).

[56] See infra fig.2.

sents and concurrences by part[57]—fifty-seven lead opinions used outline-style formatting, but only nineteen dissents or concurrences took advantage of that formatting in explaining their differences from the Court.[58] Thus, rather than motivating the adoption of outline-style formatting, the institution of referring to a specific part of the majority's opinion when dissenting or concurring appears to have been an afterthought. Consequently, it appears that the desire to coordinate the Justices' opinions better was not a principal factor motivating the adoption of outline-style formatting.

2. *Outline-Style Formatting and Readability*

By contrast, substantial evidence supports the possibility that the increasing popularity of outline-style formatting bore some relation to the growing length of Supreme Court opinions.[59] In 1950, fewer than one-in-seven opinions published in the *U.S. Reports* employed any device for dividing the opinion into subparts.[60] The median length of subdivided opinions was sixteen pages, compared with a median length of five pages for the Court's opinions overall.[61] For dissenting opinions the contrast is even sharper—the median length of the Court's seventy-eight dissenting opinions was two pages; the median length of the five dissents that used outline-style formatting was seventeen pages.[62]

Sampling the *U.S. Reports* at fifteen-year intervals shows that this pattern continues. In the 1950, 1965, 1980, and 1995 Terms of the Court, the median lengths of opinions employing outline-style formatting are always longer than the median lengths of those opinions that do not, regardless of the kind of opinion in question.[63] And over the last half-century, as the median opinion has more than doubled in length,[64] outline-style formatting has gone from a curiosity to a commonplace.[65] In 1980, of 317 opinions in the *U.S. Reports*, only 152—

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57 See supra note 19.

58 To determine these figures, the 1970 Term was reviewed manually.

59 For the purposes of this Note, the length of an opinion is meant to stand as a rough indicator of how difficult it is for a reader to follow the Justice's argument from beginning to end.

60 Fewer than one in ten used anything resembling outline-style formatting. See infra fig.1.

61 See infra fig.1.

62 See infra fig.1. One reason that the median length of dissenting opinions was only two pages is that, in many instances, a dissenter offered no justification, or only a very cursory justification, for his dissent.

63 See infra figs.1-4.

64 The median opinion increased in length from five pages in 1950 to eleven pages in 1995. See infra figs.1-4.

65 Compare infra fig.1 with infra fig.4.

about 48%—did *not* have outline-style formatting.[66] In 1995 this figure dropped to 43%.[67] Generally speaking, today's Justices fail to use outline-style formatting only in the very briefest of opinions.[68]

The relationship between the length of opinions and the incidence of outline-style formatting suggests that the desire to make long opinions more readable was central to the proliferation of outline-style formatting.[69] The Justices undoubtedly had intuitions about the length after which it was appropriate to divide an opinion into parts; and those intuitions were undoubtedly influenced by the formatting styles embodied in the opinions previously published in the *U.S. Reports*.[70] Consequently, change in the Court's formatting style occurred slowly.[71] Nonetheless, as the Court's opinions grew longer, outline-style formatting became more and more common.

If this account is accurate, then the adoption of outline-style formatting was driven primarily by stylistic concerns.[72] But whatever the motivations underlying the initial adoption of outline-style formatting, it seems likely that the Court eventually came to recognize the

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66 See infra fig.3.

67 See infra fig.4. In fact, by 1995 it had become so common for the Court to use *multiple* layers of hierarchy in outline formatting that, among majority and plurality opinions, the median opinion with *only one* layer of hierarchy was shorter than the median opinion *overall*; the *overall* median length of opinions of the Court and opinions announcing the judgment of the Court was sixteen pages, but the median length of such opinions using *only one* layer of hierarchy was just fifteen pages. See infra fig.4.

68 See infra fig.4.

69 This conclusion does not assume that the length of opinions is the best indicator of how difficult an opinion will be to understand, but only that long opinions present difficulties for a reader that short opinions do not. See supra note 59.

It should be noted that length alone cannot account for all of outline-style formatting. For example, if the desire to make long opinions more readable were the sole motivation for the adoption of outline-style formatting, there would be no reason for the Justices ever to use multiple tiers of hierarchy; dividing an opinion into Parts I, II, III, IV, V, and VI dices the text into shorter pieces just as efficiently as dividing the opinion into Parts I, I.A, I.B, II, II.A, and II.B. Clearly the Justices are concerned not only with the length of their opinions, but also with having their typography reinforce the internal logic of their opinions.

70 Nor need the Justices have been conscious that they were imitating their predecessors on the Court. One learns to write in part by reading, and just as Brennan read Brandeis, now Breyer reads Brennan.

71 It has taken several decades for outline-style formatting to achieve its present popularity. See infra figs.1-4.

72 Without further study it cannot be determined conclusively that stylistic concerns were the principal motive for the adoption of outline-style formatting. Future studies might consider whether dissensus (as measured, for example, by the number of distinct positions assumed by the Justices in any given case), the number of issues presented by a case, the identity of the author, or indeed simple length is the best predictor of when the Justices use outline-style formatting. The purpose of this Part is only to offer initial speculation about why outline-style formatting originally appeared.

strategic utility of outline-style formatting,[73] and that strategic motivations—like the desire to coordinate better the Justices' voting—now play a substantial role in its continuing use. Because, as Part II will show, despite its apparently stylistic origins, outline-style formatting is now central to the voting protocols of the Court.

II
THE ROLE OF OUTLINE-STYLE FORMATTING IN HOW THE COURT VOTES

The Court has come to use outline-style formatting as an index by which to keep track of how many Justices endorse each part of an opinion.[74] This Note will now turn to an analysis of that phenomenon: voting by part.

The voting behavior of the members of the Supreme Court is of course the focus of much scholarly attention,[75] some of it focused on the protocols that the Court adopts when cases present multiple legal issues.[76] While commentators on the voting protocols of the Court

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[73] See infra Parts II.B and II.C.

[74] See supra note 19 and accompanying text.

[75] See, e.g., Lee Epstein & Jack Knight, The Choices Justices Make 10 (1998) (describing strategic behavior of Justices in voting and opinion writing); C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947, at xii (Octagon Books 1963) (1948); David W. Rohde & Harold J. Spaeth, Supreme Court Decision Making 72 (1976) (arguing that Justices vote to achieve policy preferences); Glendon Schubert, The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963, at 38 (1965) (describing voting of Court in terms of attitudes and beliefs of individual Justices); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 64-69 (1993) (arguing that ideological values are best predictors of Justices' votes); Harold J. Spaeth & Jeffrey A. Segal, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court 287 (1999) (arguing that precedent rarely influences voting of Supreme Court Justices); Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 Am. Pol. Sci. Rev. 557, 559 (1989) (correlating votes of Justices with their ideologies as reflected in newspaper coverage); C. Neal Tate, Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978, 75 Am. Pol. Sci. Rev. 355, 355 (1981) (correlating personal attributes of Justices with their voting). For a more general discussion of multimember courts and theories of adjudication, see Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 Yale L.J. 82 (1986).

[76] See generally Kornhauser & Sager, supra note 6, at 30-33 (discussing voting protocols and arguing that courts should take "metavotes" to determine which protocol to use); David Post & Steven C. Salop, Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels, 80 Geo. L.J. 743 (1992) (comparing different voting protocols and concluding that "issue voting" is most preferable); John M. Rogers, "I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides, 79 Ky. L.J. 439 (1991) [hereinafter Rogers, Justice as Epimenides] (describing Court's historical preference for case-by-case voting and discussing policies supporting that preference); John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 Vand. L. Rev. 997 (1996) [hereinafter Rogers, "Issue Voting"] (criticizing Kornhauser & Sager's and Post & Salop's arguments); see also Maxwell L. Stearns, Should Justices Ever

occasionally remark upon the fact that voting by part has taken place,[77] they have neglected to consider it as a distinct voting protocol. Instead, discussions of how the Court votes have focused on two other voting protocols: issue-by-issue voting and case-by-case voting.[78] Voting by part is, however, distinct from issue-by-issue and case-by-case voting, and must be taken into account by future studies of the behavior of the Court.

Part II.A distinguishes voting by part from other voting protocols that commentators on the Court have studied. Part II.B considers the relationship between voting by part and strategic behavior by the Justices. Finally, Part II.C suggests some ways voting by part might facilitate strategic behavior by the Justices.

A. Voting Protocols on the Supreme Court

1. Voting Issue-by-Issue and Case-by-Case

Commentators have identified two voting protocols that are available in cases that present multiple legal issues: issue-by-issue voting and case-by-case voting.[79] Issue-by-issue voting occurs when the Court tallies votes on each issue presented by a case.[80] If some majority of the Justices have voted favorably to a party on the set of issues that the party needed to win, then the party will prevail in the case as a whole.[81] By contrast, case-by-case voting occurs when the Court tallies votes only on the bottom line question of the disposition of the case.[82] If a majority of the Justices vote favorably to a party on that question, then that party will prevail.[83]

Switch Votes?: *Miller v. Albright* in Social Choice Perspective, in 7 Supreme Court Economic Review 87, 90 nn.1-3 (Ernest Gellhorn & Larry E. Ribstein eds., 1999) (citing further literature).

77 See, e.g., Lee Epstein et al., The Norm of Consensus on the U.S. Supreme Court 1 (Feb. 27, 2001) (paper prepared for presentation at Georgetown Colloquium on Constitutional Law, on file with the *New York University Law Review*) (comparing synopsis of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), with lineup of Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999), as evidence of rise of dissensus on Court).

78 See, e.g., Kornhauser & Sager, supra note 6, at 11 (defining "case-by-case" and "issue-by-issue" voting); Post & Salop, supra note 76, at 743-44 (defining "outcome-voting" and "issue-voting"); Rogers, "Issue Voting," supra note 76, at 999 (discussing "outcome voting" and "issue voting").

79 See Kornhauser & Sager, supra note 6, at 11.

80 See id.

81 See id.

82 See id.

83 See id.

The outcome of a case may depend upon which of these two voting protocols the Court follows.[84] Imagine a criminal appeal where the defendant argues that both his Fourth Amendment and Fifth Amendment rights were violated; a finding in favor of the defendant on either issue will lead to the reversal of his conviction. Imagine further that the Justices are divided 3-1-1-4 as follows: Justices R, S, and T believe that the police violated both the defendant's Fourth and Fifth Amendment rights; Justice U believes that the police violated only the defendant's Fourth Amendment rights; Justice V believes that the police violated only the defendant's Fifth Amendment rights; and Justices W, X, Y, and Z believe that the police behavior was perfectly constitutional.

If the Court were to follow a case-by-case voting protocol, the defendant would prevail, because Justices R, S, T, U, and V would all vote to overturn the conviction. If the Court were to follow an issue-

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[84] One need not resort to hypotheticals. For example, in Arizona v. Fulminante, 499 U.S. 279 (1991), the Court addressed three issues. The trial court had admitted a confession into evidence against the defendant, and the Court asked: (1) Was the confession coerced; (2) Should the harmless-error rule apply when coerced confessions are admitted erroneously against defendants; and (3) If this defendant's confession was coerced, and if the harmless-error rule did apply, was the admission of this confession against this defendant harmless error? Id. at 313 (Kennedy, J., concurring in the judgment).

Five Justices (White, Marshall, Blackmun, Stevens, and Scalia) felt that the confession was coerced. Id. at 282, 288 (White, J., writing for the Court). The other four Justices (Rehnquist, O'Connor, Souter, and Kennedy) disagreed. Id. at 302, 305-06 (Rehnquist, C.J., dissenting). Five Justices (Rehnquist, O'Connor, Souter, Scalia, and Kennedy) felt that the harmless-error rule should apply. Id. at 302-03, 308 (Rehnquist, C.J., writing for the Court). The other four Justices (White, Marshall, Blackmun, and Stevens) disagreed. Id. at 288 (White, J., dissenting). Justice Scalia was the only Justice to conclude both that the confession was coerced and that the harmless-error rule applied. He felt that the error in admitting the confession was harmless. Id. at 302-03, 312. Consequently, there were five Justices (Rehnquist, O'Connor, Souter, Kennedy, and Scalia) who concluded either that the confession was not coerced, or that it was coerced but that its admission was harmless. Had the Court voted on a case-by-case basis, those five Justices would have voted against a new trial for the defendant.

The Court, however, voted on an issue-by-issue basis. Justice Kennedy deferred to the majority of the Court (White, Blackmun, Marshall, Stevens, and Scalia) who felt that the confession was coerced. Id. at 313-14 (Kennedy, J., concurring in the judgment). Accordingly, although he would not have reached the issue had he been deciding the case alone, Kennedy applied the harmless-error rule to the admission of the confession and (along with Blackmun, Marshall, Stevens, and White) found that the error was not harmless. Id. at 313-14 (Kennedy, J., concurring in the judgment). Therefore, the defendant received a new trial. Id. at 295-96 (White, J., writing for the Court).

For further discussion of how the choice of voting protocol affected the outcome not only in *Fulminante*, but also in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), and National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), see Kornhauser & Sager, supra note 6, at 18-21, and Post & Salop, supra note 76, at 748-55. For an extensive study of cases in which the choice of voting protocol might have affected the outcome, see Rogers, Justice as Epimenides, supra note 76.

by-issue voting protocol, the government would prevail, because Justices V, W, X, Y, and Z would vote that the defendant's Fourth Amendment rights were not violated, and Justices U, W, X, Y, and Z would vote that his Fifth Amendment rights were not violated.

2. *Voting by Part*

Issue-by-issue voting and voting by part might seem strongly connected. For example, separating opinions into numbered parts invites the Justices "to shop among the parts" and creates "an environment of issue-by-issue deliberation."[85]

Nonetheless, voting by part is distinct from issue-by-issue voting. Issue-by-issue voting occurs only when the Court reaches the conclusion it does after taking a vote on each issue necessary to resolve a case. By contrast, voting by part occurs every time one Justice joins one part of another Justice's opinion without joining that opinion in its entirety.[86] Indeed, voting by part occurs much more frequently than does issue-by-issue voting; while the Court has voted by part hundreds of times over the last several decades,[87] it has only voted issue-by-issue in a tiny handful of known cases.[88]

The Court can vote by part without voting issue-by-issue because the fact that one Justice has joined another Justice's opinion on a part-by-part basis does not mean that the Court only reached the outcome that it did after tallying votes on each issue necessary to the resolution of the case. The "parts" of an opinion do not necessarily represent "issues" that will be determinative in the case. For example, the Court might agree on *how* to resolve the issues in a case, but disagree over *why* to resolve them that way; in such cases, voting by part signifies disagreement over rationale but not over issues.[89] The Court has

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[85] Kornhauser & Sager, supra note 6, at 20.

[86] Note, however, that the fact that Justice A has joined one part of Justice B's opinion ensures neither that Justice A will express any opinion about the other parts of Justice B's opinion, nor that Justice C will express her agreement or disagreement with Justice B on a part-by-part basis. Because the phenomenon described by this Note occurs whenever one Justice tailors her support for another Justice's opinion to fit the parts of that opinion, the phenomenon has been called "voting by part" and not "part-by-part voting"—the latter phrase suggesting too strongly that every Justice has expressed an opinion about every part of every other Justice's opinion.

[87] See, e.g., infra fig.13 (tallying twenty-three instances of voting by part in 1983 Term alone).

[88] See Stearns, supra note 76, at 89-90, 128-42 (claiming that as of 1999 there were only three known instances of Court voting on issue-by-issue basis: *Union Gas Co.*, 491 U.S. 1; *Fulminante*, 499 U.S. 279; and United States v. Vuitch, 402 U.S. 62 (1971)).

[89] See, e.g., Williams v. Taylor, 529 U.S. 362 (2000). In *Williams*, the Court interpreted several provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.), regarding

even voted by part when the part in question presented neither issues nor rationale.[90]

The Court can vote by part without voting issue-by-issue because while issue-by-issue voting and case-by-case voting are mutually exclusive, the Court can vote either issue-by-issue or case-by-case with or without voting by part. To demonstrate this, it is helpful to reconsider the hypothetical criminal appeal discussed above.[91]

Assume that the Justices had voted on a case-by-case basis but did not vote by part. In such a scenario, Justice R might write the plurality opinion, joined in full by Justices S and T. Justice R would announce the judgment of the Court reversing the defendant's conviction, and explain why both the defendant's Fourth and Fifth Amendment rights were violated. Justices U and V would provide the fourth

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the issuing of writs of habeas corpus. Id. at 402-13. The lineup section of the synopsis in *Williams* reads in part:

> STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG and BREYER, JJ., joined, and an opinion with respect to Parts II and V, in which SOUTER, GINSBURG and BREYER, JJ., joined. O'CONNOR, J., delivered the opinion of the Court with respect to Part II (except as to the footnote), in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, and in which SCALIA, J., joined, except as to the footnote, and an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined.

90 Id. at 365-66. The Justices clearly voted by part, as evidenced by the part-by-part shifts in who signed on to Stevens's and O'Connor's opinions. The Court, however, did not vote issue-by-issue.

After the passage of AEDPA, writs of habeas corpus may not issue unless the petitioner shows that the state court adjudication in question resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1) (1994 & Supp. IV 1998). Stevens and O'Connor agreed that the Virginia Supreme Court's decision in Williams's case was "contrary to," or involved an "unreasonable application" of, the Court's "clearly established" precedent. *Williams*, 529 U.S. at 399 (Stevens, J., writing for Court); id. at 413 (O'Connor, J., concurring in part and concurring in judgment). However, Stevens and O'Connor disagreed sharply over what it means for a state court decision to be "contrary to," or involve an "unreasonable application" of, "clearly established" precedent. Id. at 402-04 (O'Connor, J., writing for Court).

The fact that the Court voted by part in *Williams* did not reflect any disagreement about the issue of whether or not the petitioner had met the requirements set out by § 2254(d)(1)—O'Connor and Stevens agreed that the petitioner had. Instead, the voting by part in *Williams* reflected a disagreement about the rationale underlying the resolution of the § 2254(d)(1) issue.

One famous example is Flood v. Kuhn, 407 U.S. 258 (1972), a case involving professional baseball's exemption from federal antitrust laws. Justice Blackmun delivered the opinion of the Court, with Justices Stewart and Rehnquist joining in the entirety of his opinion, and Chief Justice Burger and Justice White joining in everything except Part I. Id. at 258, 285. Part I was Justice Blackmun's encomium to the game of baseball. Id. at 260-64.

91 See supra Part II.A.1.

and fifth votes needed to achieve this outcome. They would concur in the judgment, and might issue opinions explaining their disagreement with R's reasoning: U would disagree with R's Fifth Amendment analysis, and V would disagree with R's Fourth Amendment analysis. Justice W, joined by Justices X, Y, and Z, might meanwhile issue a dissenting opinion, denouncing all of the plurality's reasoning.[92]

Assume now that the Justices had voted on a case-by-case basis and *had* voted by part. In this scenario, Part I of R's opinion might lay out R's Fourth Amendment analysis, Part II R's Fifth Amendment analysis, and Part III would be a statement of the disposition of the case. S and T would join all of R's opinion; U would join Parts I and III of R's opinion, but would not join Part II; and V would join Parts II and III of R's opinion, but would not join Part I. Justices U and V might also issue separate opinions concurring in the judgment. Justice W would again dissent, possibly dividing that dissent into parts. Justices U and V might even sign on to certain parts of Justice W's dissenting opinion, in which case those parts would command a majority of the Court and would become opinions of the Court. It would be more likely, however, that U and V would decline to reach the Fifth Amendment and Fourth Amendment issues, respectively; on their views, the case could be resolved in the defendant's favor without considering both issues.[93]

Now assume that the Court has voted issue-by-issue. If the Court did not vote by part, Justice W might write a plurality opinion announcing the judgment of the Court sustaining the conviction. W, joined by Justices X, Y, and Z, would explain why both the defendant's Fourth Amendment and Fifth Amendment claims failed. Justices U and V would concur in the judgment, but might file opinions explaining their votes. For example, Justice U might explain why, out of deference to the five Justices who felt that the defendant's Fourth Amendment rights were not violated, she was voting to uphold the defendant's conviction; and Justice V might explain why, out of deference to the majority that disagreed with him on the defendant's Fifth

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[92] The lineup section of the synopsis of such a case might read:
R announced the judgment of the Court and filed an opinion in which S and T joined. U and V filed opinions concurring in the judgment. W filed a dissenting opinion in which X, Y, and Z joined.

[93] The lineup section of the synopsis of such a case might read:
R announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, and delivered an opinion with respect to Part I and Part II. S and T joined Parts I, II, and III of that opinion; U joined Parts I and III; and V joined Parts II and III. U and V filed opinions concurring in part and concurring in the judgment. W filed a dissenting opinion in which X, Y, and Z joined.

Amendment claim, he, too, was voting to uphold the conviction. Justices R, S, and T would dissent.[94]

Finally, assume that the Court voted on an issue-by-issue basis but *did* vote by part. Justice W, joined by Justices X, Y, and Z, might issue an opinion announcing the judgment of the Court; Parts I and II of W's opinion would be W's Fourth Amendment and Fifth Amendment analyses, respectively, and Part III would be W's conclusion. Justice U would join Parts II and III; Justice V would join Parts I and III. U and V might also file opinions concurring in the judgment, again explaining that out of deference to the majority that voted against them on the Fourth and Fifth Amendment issues, respectively, they concurred in upholding the defendant's conviction. Finally, Justice R might file a dissent. Part I of that dissent might contain R's Fourth Amendment analysis, Part II R's Fifth Amendment analysis, and Part III R's outrage at the Court for having voted issue-by-issue. Justices S and T would join all of R's opinion. Justice U, if she joined Justice R at all, would join only Part I, and Justice V would join only Part II.[95]

These four hypotheticals show that voting by part can coexist with both case-by-case voting and issue-by-issue voting. They also demonstrate that the choice whether or not to vote by part affects these cases in a different way than the choice whether to vote on a case-by-case or an issue-by-issue basis. The choice between issue-by-issue voting and case-by-case voting was determinative of the outcome in the hypothetical we just considered. The choice between voting by part and not voting by part was determinative only of how much support a given part of a given Justice's opinion would enjoy.[96]

We therefore might expect the Justices to use voting by part to help themselves ensure majorities for any parts of their reasoning that

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[94] The lineup section of the synopsis of such a case might read:
W announced the judgment of the Court and filed an opinion in which X, Y, and Z joined. U and V filed opinions concurring in the judgment. R filed a dissenting opinion in which S and T joined.

[95] The lineup section of the synopsis of such a case might read:
W delivered the opinion of the Court. X, Y, and Z joined Parts I, II, and III of that opinion; U joined Parts II and III; and V joined Parts I and III. U and V filed opinions concurring in the judgment. R filed a dissenting opinion. S and T joined Parts I, II, and III of that opinion; U joined Part I; and V joined Part II.

[96] Or, more precisely, the choice was determinative of how many votes a given passage of a given Justice's opinion formally would receive. It is, after all, possible for one Justice to indicate support for a specific passage of another Justice's opinion without voting by part. Infra notes 106, 118.

do enjoy majority support.[97] And indeed, as this Note now will show, the Justices do use voting by part when they interact strategically to create law.

B. *Voting by Part and "Sophisticated Opinion Writing"*

Because the Court frequently votes by part, outline-style formatting—which seems to have begun as a merely stylistic innovation—has evolved into a device that facilitates strategic behavior by the members of the Court. Lee Epstein and Jack Knight's study of the strategic behavior of the Supreme Court[98] helps to demonstrate this point.

Epstein and Knight argue that Supreme Court Justices act "strategically." To say that the Justices act "strategically" means that while the Justices seek to animate their own policy preferences, they do not "make decisions based only on their own ideological attitudes," but rather "realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[99] Consequently, when they act strategically, rather than always taking actions which reflect their sincere policy preferences, the Justices "bargain and accommodate, they think prospectively, and they alter their opinions"[100] in order to shape the law. One aspect of strategic behavior by the Justices is "sophisticated opinion writing"—that is, opinion writing undertaken with the objective of attaining the best *possible* outcome in a case given the preferences of the other Justices, as opposed to writing undertaken with the objective of articulating the opinion writer's *genuinely* most preferred outcome.[101]

Epstein and Knight studied "sophisticated opinion writing" during the 1983 Term of the Court. They looked for cases in which the policies or rationales in the opinion writer's first draft differed from those in the opinion ultimately published in the *U.S. Reports*—that is,

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[97] At the very least, the Justices may vote by part in order to achieve majority support for those sections of an opinion which, if the Justices did not vote by part, would enjoy only plurality support, and which therefore would be of questionable precedential value. See, e.g., John F. Davis & William L. Reynolds, Juridical Cripples: Plurality Opinions in the Supreme Court, 1974 Duke L.J. 59, 71 & n.56 (arguing that plurality opinions may cause confusion in lower courts); Ken Kimura, Note, A Legitimacy Model for the Interpretation of Plurality Decisions, 77 Cornell L. Rev. 1593, 1600-10 (1992) (discussing various methods for deciding how much precedential weight to accord plurality opinions); Mark Alan Thurmon, Note, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 Duke L.J. 419, 422-27 (1992) (discussing difficulties in determining precedential weight to ascribe to plurality decisions).

[98] Epstein & Knight, supra note 75.

[99] Id. at 10.

[100] Id. at 106.

[101] Id. at 95-96.

cases where the drafting and revising of the opinion itself reflected strategic behavior by the Justices.[102] Figures 12 and 13 present data concerning the set of cases studied by Epstein and Knight.[103]

Figure 12 compares the frequency with which the Justices used outline-style formatting in two sets of cases: those where Epstein and Knight found evidence of "sophisticated opinion writing," and those where they found none. Figure 13 compares the frequency with which the Justices voted by part in those same two sets of cases. As Figure 12 shows, the Justices employed outline-style formatting with approximately equal frequency in both sets of cases.[104] As Figure 13 shows, however, the Justices were more than three times more likely to vote by part in the context of a decision that involved sophisticated opinion writing than in the context of a decision that did not.[105]

In only a subset of the Court's cases is the strategic pursuit of policy reflected in the drafting of opinions. It is in that same subset of cases that the Justices are most likely to vote by part. One implication is that voting by part may result from the same pressures that produce "sophisticated opinion writing." In other words, the Justices may employ voting by part to complement or facilitate their strategic behavior.[106] A question remains unanswered, however: Exactly what strategic advantage does voting by part provide to the Justices?

C. *The Strategic Value of Voting by Part*

Voting by part provides Justices with a powerful tool for winning one another's votes on particular passages of an opinion. To see why this is so, it is helpful to distinguish four ways in which a Justice might

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[102] Id. at 98-99. Epstein and Knight studied the case files of Justices William Brennan, Thurgood Marshall, and Lewis Powell to find those opinions in which "major changes in rationale or policy" occurred between the initial draft of an opinion and the opinion that was ultimately published in the *U.S. Reports*. Id.

[103] See infra figs.12-13.

[104] See infra fig.12. Figure 12 shows the frequency with which opinions both with and without major changes displayed a given amount of organizational hierarchy. For the purposes of Figures 12 and 13, a case was considered to involve "major changes" if and only if Epstein and Knight reported a major change in the lead opinion for that case.

[105] See infra fig.13. A case was considered to involve "voting by part" if, in the *U.S. Reports*, one or more of the Justices lent their support to an opinion filed by another Justice and specified which parts of that opinion they did or did not support by referring to the organizational hierarchy of that opinion.

[106] Of course, the effect achieved by voting by part can also be achieved without the use of outline-style formatting. One example of this is Allen v. Regents of the University System of Georgia, 304 U.S. 439 (1938), in which different majorities of Justices coalesced around the different issues necessary to the resolution of the case without any mention of the hierarchical structure of the lead opinion. By providing a convenient index by which the Justices can specify the particular passages with which they agree or disagree, outline-style formatting merely makes these results easier to achieve.

proceed when presented with the option of signing on to a lead opinion with which she does not entirely agree.[107] First, the Justice might try to persuade the author to change the objectionable passages. Second, the Justice might simply acquiesce to those passages with which she disagrees and sign on to the opinion in its entirety. Third, the Justice might write a separate concurring or dissenting opinion, in the course of which she would indicate those passages in the lead opinion with which she agrees or disagrees.[108] Fourth, the Justice might join the lead opinion in part, adding her vote to those passages of the lead opinion that she endorses (and perhaps drafting a separate opinion to explain her reservations about those passages in the lead opinion with which she disagrees).

The more obstinate the Justices are in their views, the less likely it is that they will use the first and second options. In this sense, the third and fourth options, writing separately and voting by part, may be less apt to engender the spirit of accommodation and acquiescence that characterize the first and second options.[109] It is easiest to see the strategic value to the Justices of voting by part when the option of

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[107] These four options are not meant to be exhaustive, but rather illustrative of what a Justice might do. The co-occurrence of voting by part and "sophisticated opinion writing," discussed supra in Part II.B, indicates that the Justices often do rely on more than one means to win support for an opinion.

[108] Here the difference between a "concurrence in the judgment" and a "simple concurrence" becomes more important. While a concurrence in the judgment is intended to support the majority's result but not the majority's reasoning, a simple concurrence lends support to both the majority's result and reasoning. A Justice who concurs in the judgment will deprive the reasoning of the lead opinion of a vote, even if she endorses some of that reasoning. By contrast, a Justice who issues a simple concurrence will add a vote to the reasoning of the lead opinion, even if she does not agree with all of that reasoning. It is possible for a concurring Justice to specify the locus of her agreement or disagreement with the lead opinion by writing, for example: "While I agree with the plurality when they say A, I disagree when they say B." The more specifically the concurring Justice identifies the passages with which she agrees or disagrees, the more her behavior comes to resemble a concurrence in part—the fourth option described here.

[109] To the extent that voting by part replaces accommodation and acquiescence, the votes that an opinion *does* garner when the Court has voted by part may be more reliable—i.e., a better indicator of each supporting Justice's jurisprudence—than the votes that a majority opinion garners without voting by part.

In opinions where there is no voting by part, it seems more likely that at least one member of the majority will have acquiesced on one point in order to achieve her preferred outcome overall. That is, it seems more likely that a Justice will have compromised on issue A in order to achieve her preferred outcome on issue B. Were that Justice subsequently presented with a second case—one that presented issue A but did not present issue B—she might seize the opportunity to vote according to her true preference on issue A.

Such a scenario seems less likely when voting by part has occurred. If a Justice votes by part in one case to endorse the majority's view both of issue A and of issue B, she probably would not change her vote were a second case to present issue A in isolation from issue B. This follows because it is less likely that the Justice voted as she did on issue A in the first case only to achieve her preferred result on issue B.

voting by part is contrasted specifically with the option of writing separately, and so it seems likely that voting by part is most valuable to the Justices in those cases where they find it hardest to be acquiescent or accommodating in their views.

Contrasted with writing separately, voting by part allows for greater resolution in the voting of the Court.[110] Consider a case that presents several issues, where the Justices are divided into several camps with regard to how and why to resolve those issues, and where the Justices feel so strongly about the resolution of those issues that they will only sign on to a passage if they endorse it entirely. If the Justices write separately instead of voting by part, we would expect several Justices to write separate concurring opinions; an extreme example of this phenomenon might be *Furman v. Georgia*,[111] where a terse per curiam opinion was supported by five separate concurring opinions, none of them garnering more than one vote, each of them offering separate reasoning in support of the judgment.[112] By contrast, if the Justices were to vote by part, while it is possible that no two Justices would endorse the same sets of parts, we would expect that at least some parts would receive more than a few votes; an extreme example of this phenomenon might be *Arizona v. Fulminante*,[113] where the Justices divided into five camps, yet generated only three opinions between them.[114] Because voting by part allows the Justices to express the nuances of their support for an opinion on a part-by-part basis instead of obliging them to opt in or out of an opin-

110 "Resolution" is here intended in its digital and optical sense: The greater the resolution of an image, the more clearly distinguishable the contours of the object that the image represents; the greater the resolution in the Court's voting, the more clearly distinguishable the sentiments of the Justices.

111 408 U.S. 238 (1972).

112 See id. at 239-40, 257, 306, 310, 314. Four dissents were filed as well, and each of the four dissenting Justices joined in the other three dissents. See id. at 375, 405, 414, 465.

113 499 U.S. 279.

114 See supra note 84. Justice White, along with Justices Marshall, Blackmun, and Stevens constituted the first camp; all four endorsed Parts I through V of an opinion written by White. Id. at 282. Justices Rehnquist and O'Connor were the second camp; both endorsed Parts I-III of an opinion written by Rehnquist. Id. at 302. Justice Scalia was the third camp; he endorsed Parts I and II of White's opinion and Parts II and III of Rehnquist's opinion. Id. at 282, 302. Justice Kennedy was the fourth camp; he endorsed Parts I and IV of White's opinion and Parts I and II of Rehnquist's opinion, and wrote an opinion concurring in the judgment. Id. at 282, 302, 313. Justice Souter was the fifth camp; he endorsed Parts I and II of Rehnquist's opinion. Id. at 302. *Fulminante* is also noteworthy as being an example of issue-by-issue voting by the Court.

ion on an all-or-nothing basis,[115] voting by part increases the resolution of the Court's voting.[116]

The strategic value of this resolution is twofold. On the one hand, it allows the Justices to ensure that those passages of an opinion that really do enjoy the support of a majority of the Court become Opinions of the Court. On the other hand, it allows the Justice authoring an opinion to express a viewpoint that she knows enjoys only plurality support without risking the votes that she knows will coalesce around other, less controversial parts of that opinion.[117] Voting by part is an asset to the Justices, then, because it allows them to win as much support as possible for as many passages as possible without omitting those passages that do not enjoy strong support.

Of course similar results might be achieved through the use of carefully worded concurrences, indicating with great specificity which passages the concurring Justice did and did not join. It is more cumbersome to draft such a concurrence than it is to vote by part, however,[118] because outline-style formatting creates an index by which the

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115 A closely related (though perhaps unique) phenomenon has resulted from Justice Scalia's reluctance to employ legislative history in statutory interpretation. Justices relying on Scalia's vote will frequently isolate their references to legislative history to a footnote, from which Scalia will then withhold his support. See, e.g., Williams v. Taylor, 529 U.S. 362, 399, 408 (2000) (noting that "JUSTICE O'CONNOR delivered the opinion of the Court with respect to Part II (except as to the footnote)" and that "JUSTICE SCALIA join[ed] this opinion with respect to Part II, except as to the footnote, *infra*, at 408"). Undoubtedly this practice has conveyed to students of the Court the extent of Scalia's commitment to eschewing legislative history.

116 It is possible, of course, that the existence of voting by part is one of the causes of the very fractiousness and obstinacy that make it desirable for the Court to have higher resolution in its voting. Under this view, voting by part allows each Justice to refuse to compromise with the other Justices without the result of the *U.S. Reports* filling up with cases like *Furman v. Georgia*, with many partially redundant opinions, none of them wholly authoritative. See supra notes 111-12 and accompanying text. In other words, voting by part may eliminate one of the strongest incentives for the Justices to practice accommodation and acquiescence. This Note, however, does not attempt to demonstrate any causal relationship between voting by part and any increase in fractiousness or obstinacy on the Court.

117 Such considerations might prove particularly strong when the Justices disagree over *how* to formulate a particular point of law. One illustration may be Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987), where the Justices disagreed over how to elucidate the jurisdictional notions of "purposeful availment" and the "stream of commerce." Voting by part allowed Justice O'Connor to win seven of her colleagues' votes for Part II.B of her opinion (her argument that exercising personal jurisdiction over Asahi would not comport with "fair play and substantial justice") even though Part II.A of her opinion (her explication of purposeful availment and the stream of commerce) received only three of their votes. Id. at 104-05, 108-16.

118 Consider, for example, Justice Blackmun's concurrence in part to PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980) (Blackmun, J., concurring in part). Blackmun's opinion reads, in its entirety: "MR. JUSTICE BLACKMUN joins the opinion of the Court except that sentence thereof, *ante*, at 84, which reads: 'Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority

Justices may opt into and out of an opinion. Furthermore, as contrasted with drafting concurrences, tallying votes by part ensures that lower courts will not mistake the amount of support which a given view enjoys on the Court. This may be especially important for the Justices in those cases where what divides the Justices is the language or logic with which to articulate or elucidate a particular point of law.[119]

CONCLUSION

It has become routine for the Court to employ outline-style formatting in the drafting of its opinions, and it is increasingly common for the Justices to vote by part in resolving the cases before them. The Justices often rely on voting by part when they act strategically. As a consequence, an account of when and why the Justices vote by part is crucial to an understanding of the behavior of the Court and how its members interact to create law. Unfortunately, many of the richest sources of information about the behavior of the Court gloss over the fact that the Justices do vote by part.[120] As their incidence increases, voting by part and its typographical companion, outline-style formatting, demand the attention of anyone seeking to model the behavior of the Supreme Court.

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that enables it to define "property" in the first instance.'" Id. at 88-89. This method of citing the locus of a Justice's dissent would be cumbersome in a case like Washington v. Confederated Tribes, 447 U.S. 134 (1980), where, to quote the lineup section of the synopsis:

> WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and STEVENS, JJ., joined; in Parts I, II, III, IV-B(1), IV-D, V, and VI of which BRENNAN and MARSHALL, JJ., joined; in Parts I, II, III, IV (except IV-B(2)), and VI of which STEWART, J., joined; and in Parts I, II, III, IV-C, IV-E and VI of which REHNQUIST, J., joined.

Id. at 137. Frank D. Wagner, who as Reporter of Decisions for the Supreme Court oversees the drafting of synopses and lineups, believes that the phenomenon of voting by part is a convenient way for the Justices to pinpoint exactly which part of an opinion they are joining. Interview with Frank D. Wagner, supra note 18.

119 One such example might be Williams v. Taylor, 529 U.S. 362 (2000). For a discussion, see supra note 89.

120 Most significant among these is the *Harvard Law Review*'s annual presentation of statistics on the Supreme Court. Unfortunately, these statistics do not distinguish, for example, between dissenting opinions and opinions concurring in part and dissenting in part. See, e.g., The Supreme Court, 1999 Term—The Statistics, 114 Harv. L. Rev. 390 (2000). For a complete explanation of how the *Harvard Law Review* compiles its statistics, see The Supreme Court, 1967 Term—The Statistics, 82 Harv. L. Rev. 301, 301-02, 313-17 (1968); The Supreme Court, 1969 Term—The Statistics, 84 Harv. L. Rev. 247, 254-55 (1970); cf. Harold J. Spaeth, Documentation to the United States Supreme Court Judicial Data Base, 1953-1999 Terms, 64-69 (2001) (discussing methods of coding Justices' voting), at http://www.ssc.msu.edu/~pls/pljp/supremecourt2.html (March 6, 2001).

FIGURE 1: MEDIAN LENGTHS OF OPINIONS, 1950 TERM

	Total		Ops. of Ct.		Dissenting		Concurring		C.i.P./D.i.P.	
	No.	Length	*No.*	Length	*No.*	Length	*No.*	Length	*No.*	Length
Total	*207*	5	*90*	8	*78*	2	*29*	3	*10*	2
0	*178*	4	*72*	7	*73*	2	*24*	3	*9*	2
1	*29*[121]	16	*18*	15	*5*	17	*5*	19	*1*	2
2	*0*	N/A	*0*	N/A	*0*	N/A	*0*	N/A	*0*	N/A
3	*0*	N/A	*0*	N/A	*0*	N/A	*0*	N/A	*0*	N/A

FIGURE 2: MEDIAN LENGTHS OF OPINIONS, 1965 TERM

	Total		Ops. of Ct.		Dissenting		Concurring		C.i.P./D.i.P.	
	No.	Length	*No.*	Length	*No.*	Length	*No.*	Length	*No.*	Length
Total	*221*	7	*97*	11	*60*	5	*49*	1	*15*	5
0	*158*	5	*53*	8	*47*	4	*48*	1	*10*	5
1	*61*	13	*43*	15	*12*	10.5	*1*	7	*5*	6
2	*2*	19.5	*1*[122]	19	*1*	20	*0*	N/A	*0*	N/A
3	*0*	N/A	*0*	N/A	*0*	N/A	*0*	N/A	*0*	N/A

FIGURE 3: MEDIAN LENGTHS OF OPINIONS, 1980 TERM

	Total		Ops. of Ct.		Dissenting		Concurring		C.i.P./D.i.P.	
	No.	Length	*No.*	Length	*No.*	Length	*No.*	Length	*No.*	Length
Total	*316*	9	*124*	16	*88*	8	*85*	2	*19*	3
0	*151*	3	*11*	11	*52*	5	*73*	2	*15*	2
1[123]	*101*	14	*60*	16	*27*	12	*10*	10.5	*4*	12.5
2	*59*	17	*48*	17	*9*	17	*2*	8	*0*	N/A
3	*5*	27	*5*	27	*0*	N/A	*0*	N/A	*0*	N/A

FIGURE 4: MEDIAN LENGTHS OF OPINIONS, 1995 TERM

	Total		Ops. of Ct.		Dissenting		Concurring		C.i.P./D.i.P.	
	No.	Length	*No.*	Length	*No.*	Length	*No.*	Length	*No.*	Length
Total	*181*	11	*75*	16	*44*	11	*40*	4	*22*	5.5
0	*78*	4.5	*9*	10	*19*	6	*36*	2.5	*14*	2.5
1	*60*	14.5	*36*	15	*18*	15.5	*3*	7	*3*	11
2	*34*	19.5	*24*	18.5	*5*	24	*0*	N/A	*5*	18
3	*9*	30	*6*	18	*2*	62.5	*1*	30	*0*	N/A

121 Includes ten instances of anomalous forms: uncentered Roman numerals; uncentered Arabic numerals; uncentered, italicized captions, etc. Of these, eight are "Opinions of the Court" or "announce the judgment" of the Court.

122 Roman numerals, with subparts enumerated by Arabic digits.

123 Includes opinions employing centered, capitalized Roman letters.

FIGURE 5: NUMBER OF OPINIONS, BY JUSTICE AND LEVEL OF HIERARCHY, 1950 TERM

	Levels of Hierarchy				
Justice (Year Joined Court)	**0**	**1**	**2**	**3**	**Total**
Black (1937)	43 (96%)	2 (4%)	0	0	45
Burton (1945)	6 (50%)	6 (50%)	0	0	12
Clark (1949)	11 (79%)	3 (21%)	0	0	14
Douglas (1939)	33 (100%)	0	0	0	33
Frankfurter (1939)	31 (89%)	4 (11%)	0	0	35
Jackson (1941)	19 (79%)	5 (21%)	0	0	24
Minton (1949)	11 (100%)	0	0	0	11
Reed (1938)	12 (60%)	8 (40%)	0	0	20
Vinson (1946)	12 (92%)	1 (8%)	0	0	13
Total	**178**	**29**	**0**	**0**	**207**

FIGURE 6: NUMBER OF OPINIONS, BY JUSTICE AND LEVEL OF HIERARCHY, 1965 TERM

	Levels of Hierarchy				
Justice (Year Joined Court)	**0**	**1**	**2**	**3**	**Total**
Black (1937)	29 (85%)	5 (15%)	0	0	34
Brennan (1956)	10 (56%)	8 (44%)	0	0	18
Clark (1949)	5 (28%)	13 (82%)	0	0	18
Douglas (1939)	28 (88%)	3 (9%)	1 (3%)	0	32
Fortas (1965)	15 (75%)	4 (20%)	1 (5%)	0	20
Harlan (1955)	29 (67%)	14 (33%)	0	0	43
Stewart (1958)	17 (77%)	5 (23%)	0	0	22
Warren (1953)	6 (55%)	5 (45%)	0	0	11
White (1962)	19 (83%)	4 (17%)	0	0	23
Total	**158**	**61**	**2**	**0**	**221**

FIGURE 7: NUMBER OF OPINIONS, BY JUSTICE AND LEVEL OF HIERARCHY, 1978 TERM

	Levels of Hierarchy				
Justice (Year Joined Court)	**0**	**1**	**2**	**3**	**Total**
Blackmun (1970)	21 (51%)	7 (17%)	13 (32%)	0	41
Brennan (1956)	18 (46%)	17 (44%)	4 (10%)	0	39
Burger (1969)	9 (35%)	14 (54%)	3 (12%)	0	26
Marshall (1967)	9 (30%)	10 (33%)	11 (37%)	0	30
Powell (1972)	15 (41%)	12 (32%)	9 (24%)	1 (3%)	37
Rehnquist (1972)	24 (60%)	8 (20%)	7 (18%)	1 (3%)	40
Stevens (1975)	22 (51%)	18 (42%)	3 (7%)	0	43
Stewart (1958)	15 (45%)	7 (21%)	10 (30%)	1 (3%)	33
White (1962)	7 (23%)	15 (47%)	9 (29%)	0	31
Total	**140 (44%)**	**108 (34%)**	**69 (22%)**	**3 (1%)**	**320**

FIGURE 8: NUMBER OF OPINIONS, BY JUSTICE AND LEVEL OF HIERARCHY, 1979 TERM

	Levels of Hierarchy				
Justice (Year Joined Court)	**0**	**1**	**2**	**3**	**Total**
Blackmun (1970)	24 (50%)	15 (31%)	9 (19%)	0	48
Brennan (1956)	16 (41%)	17 (44%)	6 (15%)	0	39
Burger (1969)	13 (45%)	6 (21%)	9 (31%)	1 (3%)	29
Marshall (1967)	12 (29%)	15 (36%)	14 (33%)	1 (2%)	42
Powell (1972)	10 (23%)	20 (45%)	11 (25%)	3 (7%)	44
Rehnquist (1972)	17 (41%)	10 (24%)	14 (34%)	0	41
Stevens (1975)	24 (56%)	16 (37%)	3 (7%)	0	43
Stewart (1958)	16 (48%)	8 (24%)	7 (21%)	2 (6%)	33
White (1962)	12 (36%)	15 (45%)	5 (15%)	1 (3%)	33
Total	**144 (41%)**	**122 (35%)**	**78 (22%)**	**8 (2%)**	**352**

FIGURE 9: NUMBER OF OPINIONS, BY JUSTICE AND LEVEL OF HIERARCHY, 1980 TERM

	Levels of Hierarchy				
Justice (Year Joined Court)	0	1	2	3	Total
Blackmun (1970)	20 (54%)	9 (24%)	8 (22%)	0	37
Brennan (1956)	12 (32%)	18 (47%)	8 (21%)	0	38
Burger (1969)	12 (43%)	2 (7%)	10 (35%)	4 (14%)	28
Marshall (1967)	7 (29%)	7 (29%)	10 (42%)	0	24
Powell (1972)	15 (39%)	9 (24%)	14 (37%)	0	38
Rehnquist (1972)	22 (59%)	14 (38%)	1 (3%)	0	37
Stevens (1975)	28 (58%)	19 (40%)	1 (2%)	0	48
Stewart (1958)	19 (53%)	10 (28%)	7 (19%)	0	36
White (1962)	16 (53%)	13 (43%)	0	1 (3%)	30
Total	151 (48%)	101 (32%)	59 (19%)	5 (2%)	316

FIGURE 10: NUMBER OF OPINIONS, BY JUSTICE AND LEVEL OF HIERARCHY, 1995 TERM

	Levels of Hierarchy				
Justice (Year Joined Court)	0	1	2	3	Total
Breyer (1994)	10 (53%)	7 (37%)	2 (11%)	0	19
Ginsberg (1993)	7 (39%)	5 (28%)	5 (28%)	1 (6%)	18
Kennedy (1988)	10 (59%)	5 (29%)	1 (6%)	1 (6%)	17
O'Connor (1981)	3 (20%)	7 (47%)	4 (27%)	1 (7%)	15
Rehnquist (1972)	8 (57%)	2 (14%)	4 (29%)	0	14
Scalia (1986)	10 (42%)	10 (42%)	4 (17%)	0	24
Souter (1990)	9 (45%)	2 (10%)	7 (35%)	2 (10%)	20
Stevens (1975)	14 (44%)	18 (56%)	0	0	32
Thomas (1991)	7 (32%)	4 (18%)	7 (32%)	4 (18%)	22
Total	78	60	34	9	181

FIGURE 11: REHNQUIST OPINIONS, BY LENGTH, 1978, 1979, AND 1980 TERMS

	Length of Opinion				
	1-5 Pages	6-10 Pages	11-15 Pages	16-20 Pages	21+ Pages
1978 Term	15	6	8	6	5
1979 Term	11	6	11	8	5
1980 Term	11	8	8	5	5

FIGURE 12: 1983 TERM OPINIONS, BY ABSENCE OR PRESENCE OF "MAJOR CHANGES" AND LEVEL OF HIERARCHY

	Total	Levels of Hierarchy							
		0		1		2		3	
		No.	Percent	*No.*	Percent	*No.*	Percent	*No.*	Percent
All Opinions	*157*	*21*	13	*43*	27	*87*	55	*6*	4
Ops. With no Major Changes	*86*	*15*	17	*25*	29	*43*	50	*3*	3
Opinions With Major Changes	*71*	*6*	8	*18*	25	*44*	62	*3*	4

FIGURE 13: 1983 TERM OPINIONS, BY ABSENCE OR PRESENCE OF "MAJOR CHANGES" AND ABSENCE OR PRESENCE OF VOTING BY PART

	Total	Voting by Part		No Voting by Part	
		No.	Percent	*No.*	Percent
All Opinions	*157*	*23*	15	*134*	85
Ops. With no Major Changes	*86*	*6*	7	*80*	93
Opinions With Major Changes	*71*	*17*	24	*54*	76