Court Divided: An Analysis of Polarization on the United States Supreme Court in the October 1957 Term, A Supreme Court History Project: The Warren Court 1957-1961: Project

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PROJECT COMMENTS

A COURT DIVIDED: AN ANALYSIS OF POLARIZATION ON THE UNITED STATES SUPREME COURT IN THE OCTOBER 1957 TERM

INTRODUCTION

The United States Supreme Court entered the October 1957 Term encountering waves of protest from Congress, the press, and the internal membership of the Court itself.¹ The docket contained many issues that had divided the Court in the past and brought it under attack. Issues such as loyalty oaths, segregation, criminal procedure, and states' rights were ripe amid the public's clamor to curb the Court. Nevertheless, the Court heard arguments and disposed of by opinion the largest number of cases since Chief Justice Earl Warren had come on the bench in 1953.²

This comment is a companion to Professor Galloway's article on the second period of the Warren Court (1957-61).³ His thesis is that a resurgence of judicial conservatism occurred late in the October 1957 Term.⁴ This Term also showed the highest level of disagreement in the entire sixteen years of the Warren Court.⁵ The Court was highly polarized.⁶ Chief Justice Warren and Justices Black and Douglas formed a liberal bloc. Justices Frankfurter, Burton, and Harlan comprised the conservative faction. Justice Whittaker tended to side with the conservatives. Justice Brennan, on the other hand, usually sided with the liberals. Justice Clark held a swing position, often casting the deciding vote in important cases.⁷

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⁴. Hereinafter, whenever a Supreme Court Term is referred to by year, it is assumed to be the October Term of that year. Thus, the reference to the 1957 Term means the October 1957 Term that extended into the first six months of 1958.
⁵. Galloway, supra note 3, at 957.
⁶. Although Professor Galloway's entire analysis of the 1957 Term shows this polarization, it is perhaps most evident when one considers that the average dissents per decision (2.2) was the second highest in the entire history of the Court. Galloway, supra note 3, at 952.
⁷. The examples of Justice Clark's deciding vote are numerous throughout the
In light of this polarization, it is of interest to determine 1) which substantive areas produced high or low polarization, and 2) how the individual Justices voted in those areas. Although voting patterns and “bloc analysis” are helpful in summarizing vast amounts of information, one must assess decisions in particular substantive areas to fully understand the legal developments and trends produced by the Court. This comment will focus on the issues involved and the positions held by the Justices. It will present the main themes of the decisions rendered and attempt to paint a judicial portrait of the Supreme Court in the 1957 Term.

Initially, an overview of the Term will be presented by looking at separate categories of cases, observing whether there were voting blocs and, if so, what alignment of particular Justices occurred. This will be followed by a substantive analysis of loyalty oath/subversion and race discrimination to illustrate how the Justices and their “blocs” interacted in individual decisions.

**METHODOLOGY**

The research methodology utilized for this project involved a compilation of all decisions rendered on the merits by the Supreme Court in the 1957 Term in which a formal opinion was prepared and credited to a Justice. These decisions were classified into the following ten categories: Interstate Commerce Commission (ICC); administrative law (except ICC, labor, and tax); admiralty and railroads; business regulation and federal agencies (except ICC); citizenship and aliens; constitutional law; criminal procedure; jurisdiction and procedure; labor relations; and tax. Each category contained between five and twelve decisions, the exceptions being criminal procedure and

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8. Thus the following cases were not considered: cases in which certiorari was denied; cases that were summarily decided by the Court; and per curiam decisions, including those with opinions. In order to maintain the uniformity of data used in the Supreme Court History Project articles, both divided and unanimous decisions are included.

9. A complete list of the 1957 Term’s decisions used in this project are classified by the above categories and are set forth in app. A.
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constitutional law with twenty-one and twenty decisions respectively.

Some decisions in the 1957 Term were so multi-faceted that they could logically fit into more than one category.10 In those cases, an extra effort was made to isolate the most important issue resolved in the decision and categorize it accordingly.

After each decision in the Term was classified, the cases were analyzed on the basis of voting polarization.11 This enabled consideration of whether the Court's high disagreement rate in 1957 extended over the entire spectrum of decisions or whether it was confined to a few highly controversial areas.

POLARIZATION ON THE ISSUES

Almost every decision of importance during the Term saw sharp disagreement among the Justices. Dissent rates were unusually high.12 Of the 104 decisions rendered with assigned opinions, fifty-seven showed polarization between the voting blocs.13 By investigating the areas of high polarization, it can be determined whether the Justices' basic ideologies differed or whether the high disagreement rate was concentrated in just a few controversial areas. The categories are presented in descending order of their degree of polarization.

Citizenship and Aliens

This was the most polarized category in the 1957 Term. A majority of these decisions involved loyalty oaths. Out of the twelve cases decided, ten were polarized; seven of those were decided five-to-four.

The most significant decision in this category was Kent v.

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10. The most appropriate examples are those decisions that deal with tax, citizenship and aliens, or criminal procedure that overlapped into the area of constitutional law.

11. Voting polarization occurred whenever one of the following groups dissented in a decision: at least two of the three core liberal members (Warren, Black, or Douglas); or both core conservatives (Frankfurter and Harlan); or one core conservative with Burton and Whittaker, who were considered moderate conservatives.

12. Galloway, supra note 3, at 950. The average dissent rate in the 1957 Term was 2.2 dissents per nine votes. The only other Warren Court Terms when the average dissent rate climbed to more than two dissents per case were the 1959 and 1960 Terms.

13. The requirements for a decision to be considered polarized are set forth in note 11 supra.
Dulles and its companion case, Dayton v. Dulles. The Court held that the Secretary of State was without authority to deny passports to persons refusing to sign anti-Communist affidavits or to deny passports to Communists traveling abroad. Civil liberties gained greater protection in Trop v. Dulles. The Justices split five-to-four with Justice Whittaker joining the liberals to reverse the denaturalization of a citizen for desertion from the Army. The majority based their ruling on the determination that such punishment was cruel and unusual and therefore, in violation of the eighth amendment. Justices Frankfurter, Burton, Clark and Harlan joined in dissent on the theory that the executive branch requires broad authority to protect national security.

Labor Relations

Labor unions did not fare too well during the Term; they lost several important decisions, some by close votes. Polarization was well above average; six of eight decisions were polarized. The margin by which many of the close cases were decided is indicated by a 75% polarization rate and the number of split decisions. While only one case involved a five-four split, five decisions had three dissenters, usually Warren, Black and Douglas. A fairly representative labor decision in the Term was that of Youngdahl v. Rainfair, Inc. The Court upheld the right of a state to restrict mass picketing by strikers where there was a high probability of violence. Warren, Black and Douglas dissented on the ground that the National Labor Relations Board had exclusive jurisdiction over the strike and its effects. But the Justices did not divide on all the issues presented to them regarding unions; they unanimously upheld the right of black union members to sue their union for following discriminatory practices.

Criminal Procedure

Only a few years before the criminal procedure revolution of the 1960’s, the Court dealt with a large number of cases in this area. Of the twenty-one decisions rendered, thirteen were

17. 355 U.S. 131 (1957).
polarized; and nine of those were determined by a five-to-four vote. Two or more dissents were recorded in eighteen of the twenty-one cases. The Justices found themselves divided on most major issues in the area, especially those involving constitutional safeguards. The swing vote of Justice Clark provided the Frankfurter/Harlan bloc with the extra vote necessary to prevail in most of the close decisions.\(^{19}\)

The difference in basic ideologies was well represented by *Crooker v. California*.\(^{20}\) Justice Clark delivered the opinion, finding no denial of due process where police refused defendant's request for assistance of counsel during questioning. Justice Douglas, dissenting on behalf of the liberal bloc, stressed that the denial of counsel violated the fourteenth amendment's due process clause.\(^{21}\) The Court's decision in *Benanti v. United States*\(^{22}\) is of particular interest since it unanimously held that a federal court could not admit wiretap evidence obtained by state police acting under a valid state statute. A high incidence of agreement, however, was the exception rather than the norm in this volatile area.

**Business Regulation**

Trade and economic regulation is an area that has traditionally divided the conservative and liberal members of the Court, and the 1957 Term was no exception. Antitrust matters constituted a majority of the cases in this area. The liberal Justices (Warren, Black, Douglas and Brennan) favored a broad reading of the antitrust laws, while the core conservative faction (Frankfurter, Burton and Harlan) stood in opposition in each case. Thus Justices Clark or Whittaker usually determined the majority depending on the bloc that they joined. In the Term, six of the ten cases were polarized. This is slightly above the average polarization rate for the entire Term (55%). The only noteworthy decision rendered was *Federal Trade Commission v. Standard Oil Co.*\(^{23}\) This decision concluded a seventeen-year-old lawsuit in which Standard Oil was claimed to have maintained a dual pricing system discriminating among dealers. The Commission lost, four liberals dissenting.

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19. Of the thirteen polarized decisions, the liberal bloc prevailed only five times; the conservatives prevailed in the other eight cases.
21. *Id.* at 447-48 (Douglas, J., dissenting).
Constitutional Law

Categorizing the decisions involving constitutional law is always difficult since many of the issues spill over into other subject areas. However, twenty decisions were placed in the category and exactly half were polarized. Many decisions showed high agreement rates; seven decisions in the area had only one dissenting vote cast or were unanimously decided. Several of the cases are examined in detail below in the section that deals with loyalty oaths/subversion and race discrimination.

Administrative Law and Interstate Commerce Commission

Major polarized decisions were not confined to areas where public criticism of the Court was high. In Public Service Commission of Utah v. United States,24 the Court, speaking through Justice Clark, reversed, for lack of substantial evidence, the order of the Interstate Commerce Commission raising freight rates fifteen percent. Justices Frankfurter, Burton, Harlan and Whittaker dissented, arguing that requiring the additional evidence was inconsistent with the Interstate Commerce Act and that the Commission had exclusive jurisdiction to set the rates.25 Only two of the six cases in both the ICC and administrative law categories were polarized.

Admiralty and Railroads

In matters regarding admiralty and railroads, only five decisions were rendered by the Court; three were polarized. All involved on-the-job injuries and the procedural problems in seeking compensation for them. Most of the holdings appeared to be limited to the facts presented in the particular dispute.

Other Categories

In the tax category there was little polarization. Seven of the nine decisions rendered had two or fewer dissenters. In jurisdiction and procedure (involving such issues as states' rights26 and pre-trial discovery under the Federal Rules of Civil Procedure27), the Court was sharply divided. However, none of

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25. Id. at 429 (Frankfurter, J., dissenting).
27. See, e.g., Societe Internationale Pour Participations Industrielles et Com-
these categories produced an overall pattern but rather contained a hodgepodge of cases of a miscellaneous nature.

In conclusion, the highest polarization rates occurred in those sensitive areas where public criticism of the Court was greatest. In matters related to citizenship and aliens (where most of the loyalty oath decisions appear), ten of the twelve cases were decided by a polarized vote. Similarly, the volatile criminal procedure area was also highly polarized. On the other hand, only half of the constitutional law decisions showed divided voting blocs—somewhat less than expected. And, in labor relations, three-quarters of the decisions were polarized. This is somewhat more than anticipated, mainly because the Warren Court was not considered to be activist in the labor area during its first decade.

**TRENDS IN SUBSTANTIVE AREAS**

To form a better understanding of the interactions of the voting blocs throughout the Term, a closer look at two substantive areas is instructive. The two areas selected are subgroups of the above categories: loyalty oath/subversion cases and cases involving Blacks.28 There are two reasons for such an inquiry. First, one area showed a high polarization rate (loyalty oaths/subversion—78%) and the other a low disagreement rate (Blacks—20%). Second, these areas have traditionally been thought to be areas of emphasis during the first decade of the Warren Court.

*Loyalty Oath/Subversion Cases*

The 1957 Term brought no relief to a Supreme Court caught in a crossfire between the Constitution and the cold-war mentality. The Court rendered opinions in nine loyalty oath/subversion cases with seven showing clear polarization.29 Furthermore, six were decided by bare five-vote majorities. The Court did not have one unanimous opinion in this area.30

In the concluding days of the 1956 Term, the Court had a field day handing down three major decisions gutting Congress'
anti-subversion programs.\textsuperscript{31} Thereafter, several members of the House introduced bills to reinstate measures which had been struck down.\textsuperscript{32} But in the 1957 Term, the Court responded with even more "pro-Communist" decisions. Without any doubt, the most significant of these was \textit{Kent v. Dulles},\textsuperscript{33} where petitioners had applied for a passport but had refused to sign a non-Communist affidavit. The Secretary of State denied the application, basing his authority on a 1952 statute\textsuperscript{34} which he asserted gave the State Department authority to deny passports to those engaged in Communist activities.

The Court based its appellate jurisdiction in \textit{Kent} and its companion case, \textit{Dayton v. Dulles},\textsuperscript{35} on dicta in \textit{United States v. Curtiss-Wright Export Corp.}\textsuperscript{36} which held that even the executive’s power in the conduct of foreign affairs "must be exercised in subordination to the applicable provisions of the Constitution."\textsuperscript{37} The statute was construed narrowly, the Court holding that Congress had not delegated authority to the Secretary of State to deny passports to those engaged in Communist activity. Although not essential to the holdings, the majority did not bypass the opportunity to declare the fundamental nature of the right to travel rooted in the fifth amendment.\textsuperscript{38}

The dissents in \textit{Kent} and \textit{Dayton} were bitter. Justice Clark, joined by Justices Burton, Harlan and Whittaker, stressed the executive’s need for discretion and power to deny passports to persons whose activities outside the United States might be detrimental to its interest, and the clear congressional intent in the legislation.\textsuperscript{39} Finally Justice Clark took a swipe at the majority for not reaching the constitutional questions presented by the parties.

These cases involved substantial activism by the Court. They raised access to passports to the status of a right of citizenship, contrary to prior assumptions that such access was

\begin{itemize}
  \item \textsuperscript{32} C. Pritchett, \textit{Congress Versus the Supreme Court} 11 (1961).
  \item \textsuperscript{33} 357 U.S. 116 (1958).
  \item \textsuperscript{34} 8 U.S.C. § 1185 (1952).
  \item \textsuperscript{35} 357 U.S. 144 (1958). Dayton’s application for a passport was denied upon the Secretary’s confidential findings that he associated with members of the Communist Party and that his mission abroad was for the advancement of that cause. \textit{Id.}
  \item \textsuperscript{36} 299 U.S. 304 (1936).
  \item \textsuperscript{37} \textit{Id.} at 319-20.
  \item \textsuperscript{38} 357 U.S. at 129-30.
  \item \textsuperscript{39} Congressional intent to deny passports may be derived from the Internal Security Act of 1950 §§ 2, 6, 50 U.S.C. §§ 781, 785 (1952).
\end{itemize}
merely a governmental privilege. The decision also demonstrated that the Court would review the executive's power over foreign affairs whenever a basic liberty of a citizen had been threatened. On the other hand, the majority refused to reach the due process thrust of the case. As will be shown, the Court was to waffle throughout the Term in the areas of loyalty oaths and subversion.

Another pair of loyalty oath decisions in which the majority failed to reach the substantive constitutional issue were Speiser v. Randall and its companion case, First Unitarian Church v. County of Los Angeles. Both cases involved an amendment to the California Constitution prohibiting the granting of tax exemptions to any individual or organization which advocated the violent overthrow of the state or federal government. To implement the amendment, each claimant was required to sign a loyalty oath on the bottom of his tax return. Both Speiser and the First Unitarian Church refused to sign the affidavit and were subsequently denied the tax exemptions normally given to veterans' and church organizations.

The Court by a seven-to-one majority overturned the statute. However, only five Justices agreed with the reasoning of the majority opinion written by Justice Brennan. They held that the procedure for determining the eligibility for the exemption was constitutionally defective because the state was inflicting a penalty without proof of disloyalty. The more important constitutional issue presented was the substantive question addressed by Justices Black and Douglas in their concurring opinions. The loyalty oath was a restriction on petitioners' first amendment rights; hence no procedure could withstand constitutional scrutiny.

The decisions in Speiser and First Unitarian Church were the only two decisions in this sub-area considered non-polarized. However, only two Justices reached the constitutional question; five based their decision on the procedure, and one upheld the statute. Therefore, even though the voting was not formally polarized, a closer analysis reveals major differences in policy values.

The 1957 Term added two more decisions to the important
line of cases involving dismissal of public employees for security reasons. In *Lerner v. Casey* and *Beilan v. Board of Public Education*, the Court upheld, by five-to-four votes, the dismissal of public employees for refusal to answer questions regarding membership in the Communist Party. Lerner had been a subway conductor for New York’s transit system and was fired under New York’s Security Risk Law; Beilan was a public school teacher in Philadelphia and was dismissed on grounds of incompetency.

The conservative majority explicitly stated that their holding was not based on the fact that petitioners took the fifth amendment, as was the case in *Slochower v. Board of Higher Education*, nor the inference of possible Communist Party ties. The major fault with the “transparent denials” of the majority in both decisions is that they are based upon the “patent fiction that they are anything but loyalty cases.”

The Court carefully stated that no findings were made as to Beilan’s loyalty and that *Konigsberg v. State Bar* could be distinguished in that the dismissal there was based on inferences drawn from a refusal to answer questions and not on the refusal itself. The majority’s reasoning is even more bewildering since the record showed that the dismissal proceedings against Beilan began just seven days after he took the fifth amendment before the House Subcommittee on Un-American Activities. Certainly, *Slochower* would seem to apply to the dismissal. However, the Court relied on a 1951 decision, *Garner v. Board of Public Works*, that allowed the dismissal of a public employee based solely on a refusal to answer relevant questions. In the following Term, the *Garner* rule was amended in *Wieman v. Updegraff* to provide that refusal to sign a loyalty oath was not legitimate grounds for dismissal.

44. 357 U.S. 468 (1958).
46. 350 U.S. 551 (1956). The Court held that due process prohibits automatic dismissal of a public teacher merely because he has taken the fifth amendment before a Senate Subcommittee. Invoking the fifth amendment is insufficient to establish a conclusive presumption of conduct inconsistent with continued public employment. *Id.* at 558-59.
49. 357 U.S. at 424 (Brennan, J., dissenting).
52. 344 U.S. 183 (1952).
Was Garner, as amended by Wieman, more applicable than Slochower in this instance? The Court summarily distinguished Slochower since, in that case, the loyalty questions were asked during a federal investigation that was not an inquiry into job fitness. Beilan's dismissal was based on his fitness as a teacher. However, the fact remains that both cases involved inquiry into a public teacher's loyalty. As one commentator wrote, to hold that Slochower does not govern the results in this case is "to ignore the realities of the record."\(^53\)

Clearly the Court ignored the realities of the situation in applying the law in these cases. Warren, Black, Douglas and Brennan all wrote dissenting opinions. As Justice Brennan's dissent emphasizes, a dismissal would result in a "simultaneous public labeling of the employees as disloyal."\(^54\)

There were three other decisions in the 1957 Term concerning the government's anti-subversion programs. In Rowoldt v. Perfetto,\(^55\) the Court held, by a bare majority, that the government must show "a meaningful association" before instituting deportation proceedings against aliens for membership in the Communist Party. While the liberal majority, joined by Justice Frankfurter, based their interpretation of the statute on legislative intent of the Internal Security Act of 1950,\(^56\) the dissent claimed the Court was taking impermissible liberties in reading the statute.\(^57\)

In Brown v. United States,\(^58\) the Court held that the scope of the fifth amendment's protection against self-incrimination did not extend to federal civil cases where the defendant had testified. Mrs. Brown, involved in denaturalization proceedings based on alleged Communist affiliations, voluntarily took the stand on direct testimony; but she asserted her fifth amendment right to remain silent on cross-examination in the same subject areas. The majority affirmed her conviction holding that a defendant who voluntarily takes the stand and offers testimony on her own behalf has waived the privilege during

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54. 357 U.S. at 418 (Brennan, J., dissenting). When carried to its logical conclusion, such labeling for refusal to answer a loyalty question would seem to clash with another decision of the Term, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).
56. *Id.* at 120. The section of the Internal Security Act that the court construed is now located in 8 U.S.C. § 1182(28) (1976).
57. 355 U.S. at 122 (Harlan, J., dissenting).
cross-examination to the extent that questions relate to matters raised by her own testimony on direct examination. The liberal dissenters pressed the same arguments their counterparts had used in *Rowoldt*: that the majority was needlessly extending a rule that was constitutionally debatable even in the criminal area. Nevertheless, the Frankfurter/Harlan bloc prevailed, noting that the defendant had the choice not to take the stand.

Finally, in an interesting sidelight to the Term, *Yates v. United States* came back to the Court from California. Late in the 1956 Term, the Court struck down ten of Mrs. Yates' eleven contempt citations, based on unnecessary multiplication of offenses for failure to answer questions regarding her alleged Communist associates. When the Ninth Circuit reinstated the one-year sentence originally given, the Court reduced her sentence to time served, basing its authority on the rarely used supervisory power over the administration of justice. The only difference in the views of the Justices was that the core liberal bloc would have gone further and dismissed the last contempt citation.

Although five of the nine decisions in this area in the 1957 Term were apparent victories for critics of the government's loyalty programs, the dominant pattern was the Court's refusal to decide the hard issues; instead, the decisions drew distinctions, relied on technicalities and limited the holdings to the particular facts. However, the core liberal bloc supported basic freedoms such as the right to travel, to receive tax exemptions, and not to be deported without sufficient evidence. The conservatives practiced judicial self-restraint whenever possible, and read statutes literally.

Although each member of the Court may cast a vote in a particular case not in accordance with his usual ideologies, an understanding of general bloc alignments is still helpful. In the loyalty oath/subversion area, the polar figures were clear. On one side were Justices Black and Douglas who favored greater protections and freedoms for the individual; they were usually joined by Warren, and often Brennan. At the other end of the spectrum were Justices Burton, Harlan and Whittaker along

59. *Id.* at 155-56.
60. *Id.* at 158 (Black, J., dissenting).
62. *Id.* at 76-79 (Douglas, J., dissenting).
with Justice Clark who, although considered a swing vote in most areas, consistently supported government anti-subversion programs.

The goal as well as the problem for each of the blocs was to gain the badly needed fifth vote, usually Frankfurter's. Perhaps this is why the reasoning waffled, the denials became "transparent," and the wordy opinions meant little, often conflicting with and confusing past decisions. The adage that hard cases make bad law was never more clear. What should be equally clear is that any case decided under great pressure and stress also has the tendency to make bad law.63 This certainly was true of the subversion cases in the 1957 Term. The statement once made in dissent by Justice Jackson, "the more ... you explain it, the more I don't understand it,"64 was fully applicable to the nine splintered, confusing decisions made by a tribunal in bitter disagreement.

Racial Discrimination Cases

In terms of public clamor in 1957 and 1958, the race discrimination area was second only to the Court's decisions in the area of subversion. However, the number of decisions involving blacks in the 1957 Term was small and the polarization rate was low. There were only five decisions and three were decided unanimously.65

Perhaps the most significant case heard in the 1957 Term and certainly in the area of race was *NAACP v. Alabama ex rel. Patterson.*66 In that case, Alabama attempted to oust the National Association for the Advancement of Colored People from the state for failure to comply with the registration requirements for foreign corporations. More specifically, the state demanded that the NAACP produce its membership list.67 The NAACP refused to comply and was found in civil

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65. Although a number of books and articles have included the Little Rock desegregation case, Cooper v. Aaron, 358 U.S. 1 (1958), decided in the 1957 Term, this comment does not evaluate the decision because it was issued in Special Term, August, 1958.


67. The Association eventually produced all requested records except for the membership materials. *Id.* at 454.
contempt. On certiorari, the United States Supreme Court unanimously held that the fourteenth amendment did not permit Alabama to require membership lists unless the state could show a compelling need. The Court found that petitioners had standing based on the claim that enforcement of the Alabama statute might defeat the members' constitutional right to freedom of association.

The Court in the 1957 Term rendered decisions in two other civil cases dealing with the treatment of blacks, *Eubanks v. Louisiana* and *Conley v. Gibson*. In *Eubanks*, the Court unanimously confirmed its earlier decisions that the systematic exclusion of blacks from juries, whether grand or petit, violated the equal protection clause of the fourteenth amendment. In *Conley*, the Court again unanimously upheld the right of black union members to sue their union for failure to represent them fairly, equally, and without discrimination. Although decided by unanimous votes, the decisions were not far-reaching in the substantive area of the law but were limited to the particular facts of the cases.

Both *Payne v. Arkansas* and *Thomas v. Arizona* concerned the voluntariness of confessions given by black defendants charged with murder. Although the cases were criminal procedure cases, both involved black petitioners, and the Court appeared particularly sensitive to this fact in its opinions. Therefore, they are logically included in this analysis.

Chief Justice Warren reiterated the traditional standard of review regarding coerced confessions as set out in the prior Term: the totality of the circumstances would be scrutinized to determine whether the confession was "voluntary." No better case than *Payne* could have been found for applying this principle. The defendant was a mentally dull, nineteen-year-old with a fifth grade education. He was held incommunicado for three days, denied food, and threatened by the chief of

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68. *Id.* at 466.
70. 355 U.S. 41 (1957).
72. 355 U.S. at 42.
73. Indeed, in *Eubanks*, Justice Black explicitly warned that the opinion was limited to the particular facts presented in the case. 356 U.S. at 585.
76. *Id.* at 393, 356 U.S. at 561.
police that "there would be thirty or forty people there in a few minutes that wanted to get him unless he talked." Justice Whittaker, speaking for a majority of seven, reversed the conviction stating: "It seems obvious from the totality of this course of conduct and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice'." Justices Burton and Clark dissented, finding that even if the confession was coerced, there was sufficient other evidence to show guilt.

In Thomas, voluntariness was much more debatable. The accused, a twenty-seven-year-old veteran with a partial high school education, was twice lassoed around the neck by a posse member. On both occasions, the sheriff immediately removed the rope. No other mistreatment was recorded. The next day, over twenty hours after the roping, the defendant confessed. The Court, by a five-to-four vote, upheld the conviction. Justice Clark wrote the opinion, holding that "the undisputed facts before us do not show that petitioner's oral statement was a product of fear engendered by them." Chief Justice Warren and Justices Black, Douglas and Brennan dissented without opinion.

These five 1957 Term decisions show a Court that continued to have a healthy respect for the rights of blacks, four years after Brown v. Board of Education. In four of the five cases, the rights of blacks were upheld by a unanimous vote or strong majority; the sole case decided against a black defendant was by a bare majority of five votes. It is particularly interesting that the Court accepted only five cases involving blacks in the Term. The Court may have desired to retreat from the issue until public attacks on the desegregation decisions eased. Perhaps the lower courts had understood the high Court's message and attempted to solve problems before they reached the Supreme Court. In any case, the violent reaction of Congress and the public to the activist role the Warren Court was playing in attempting to integrate the schools did not lead to any retreat in the protection of blacks in the cases decided in the 1957 Term.

78. 356 U.S. at 567.
79. 356 U.S. at 400.
VICTORY FOR NEITHER BLOC

Throughout this comment, evidence has been presented documenting a dynamic polarization within the Court. The Court's high degree of disagreement spread over the entire Term and affected every subject area. Over half the decisions rendered were polarized. Two additional inquiries into the empirical data are helpful in further understanding the 1957 Term: 1) a study of opinion assignments by the Justices, and 2) a determination as to which bloc prevailed the greatest number of times during the Term.

The Supreme Court is often viewed as a group of persons who pass judgments on cases collectively. But as the late Justice Robert Jackson once noted, "The fact is that the Court functions less as one deliberative body than as nine." The truth of this statement becomes even more apparent as the individual Justices' opinion assignments in each subject area are presented. Below, in Table 1, each member's 1957 opinions are set forth. The upper left triangle contains the number of opinions the Justice wrote in that area; while the bottom right gives the number of those opinions that were polarized. Justice Harlan's opinion assignments in the area of constitutional law may be taken as an example. He wrote five opinions in the area; three of which were polarized. The far right column holds the totals for each Justice, and the bottom line contains the summary in each substantive area.

The table suggests some interesting patterns. The core conservative members (Frankfurter, Burton and Harlan) wrote majority opinions in thirty-two cases; twenty-six were polarized. The core liberal bloc (Warren, Black and Douglas) wrote majority opinions in thirty-six cases; only fifteen were polarized. Justice Brennan, considered in this article to be quite possibly a second-swing Justice, wrote majority opinions in ten cases; only four were polarized.

Clearly, the conservatives were more active in writing opinions when voting splits occurred. One interesting sidelight is that Justice Clark, in a swing position, wrote nine of his fifteen opinions in polarized cases, indicating that both blocs used him as the moderate to ease the impact of many decisions.

82. Fifty-seven out of a total of 104 cases for a 57% polarization rate.
In determining which voting bloc prevailed, only polarized cases with a five-to-four or six-to-three split were considered. As Table 2, below, shows, of the fifty decisions that were considered, the core conservative bloc prevailed in twenty-four of the cases and the core liberal bloc in twenty-six.

The results show that when the Term is considered in its entirety neither camp could claim victory. In fact, the number of decisions claimed for each side is so close that in only two areas can it be said that the views of one bloc prevailed even slightly. The liberal bloc appears to have prevailed in the area of citizenship and aliens and the conservative bloc in matters relating to criminal procedure. However, it can be noted that

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84. Nine seven-to-two decisions were not included, but were polarized. Likewise two six-to-three decisions were not included because they were not polarized.
85. The liberal bloc prevailed in seven of the ten decisions rendered.
86. Of thirteen decisions rendered, the conservative bloc won eight.
### Table 2

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<td>Criminal Law (13)</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Constitutional Law (7)</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Jurisdiction and Procedure (4)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Labor Law (4)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Taxation Law (1)</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td><strong>Totals (50 decisions)</strong></td>
<td><strong>24</strong></td>
<td><strong>26</strong></td>
</tr>
<tr>
<td><strong>(48%)</strong></td>
<td><strong>(52%)</strong></td>
<td></td>
</tr>
</tbody>
</table>

the "abatement of the liberal trend"\(^{87}\) emerged late in the Term and thus would not be reflected fully in the above table.

Nevertheless, the data show the high disagreement among the Justices and the ideological differences between the two blocs in each of the substantive areas.

**Conclusion**

Analysis of the behavior of the United States Supreme Court within different categories of cases decided in the October 1957 Term provides historical insight into the issues the highly polarized Court found itself struggling to resolve. Although voting statistics were used as a starting point, the goal of this comment has been to go beyond the statistical data and understand how the Court was reacting to the particular issues it faced.

The project began with the assumption that polarization during the 1957 Term would be found primarily in certain sen-

\(^{87}\) Galloway, *supra* note 3, at 950-51.
sitive areas which had become the targets of public concern and protest. This assumption proved to be only partly correct. The most highly polarized area was one in which strong public protest had occurred, namely loyalty oath/subversion cases. Similarly, above average polarization was present in the sensitive criminal procedure area. On the other hand, several unexpected patterns were found. First, decisions in the highly explosive race area were much more unanimous than those in other areas. The Court adhered to its general pro-black stance with relatively little disagreement. Second, above-average polarization occurred in several areas considered to be less sensitive: labor and trade regulation. Third, some evidence of polarized bloc voting was found in each of the areas studied, indicating that the polarization was much broader than expected.

"The true test of any mode of research or technique of analysis is the degree to which it increases understanding or yields solutions to important problems." This comment hopefully is such an experiment. The High Court's polarization throughout the late 1950's is best understood against the backdrop of sensitive issues and differences in judicial philosophy among its different members. The 1957 Term served as a high water mark for these disagreements and laid the foundation for the judicial restraint that was to come in the Terms to follow.

Stephen D. Pahl

88. MURPHY & PRITCHETT, COURTS, JUDGES AND POLITICS 700 (2d ed. 1974).
89. Other studies which have thoroughly explored this area by similar methodologies are: Ulmer, Toward a Theory of Subgroup Formation in the United States Supreme Court, 27 J. of Politics 133 (1963); Synder, The Supreme Court as a Small Group, 36 Social Forces 232 (1958); See generally: C. PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES (1948).
APPENDIX

Decisions rendered in the October, 1957 Term

(Polarized decisions are indicated by *italics*)

CITIZENSHIP AND ALIENS


LABOR RELATIONS


CRIMINAL PROCEDURE

Miller v. United States, 357 U.S. 301 (1958).

BUSINESS REGULATION AND FEDERAL AGENCIES (Hybrid category)


CONSTITUTIONAL LAW

First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958).

ADMINISTRATIVE LAW (Partial category; excludes ICC, tax, labor)


INTERSTATE COMMERCE COMMISSION

Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957).

ADMIRALTY AND RAILROADS

TAX


RACIAL DISCRIMINATION
