

## **Coalition Formation on the U.S. Supreme Court: 1969-2009**

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## Abstract

We apply a fallback model of coalition formation to decisions of the U.S. Supreme Court, focusing on the seven natural courts, which had the same members for at least two terms, between 1969 and 2009. The predictions of majority coalitions on each of the courts are generally bourn out by the 5-4 decisions, whereas the predictions of the Martin-Quinn (2002) model, which assumes a single underlying dimension along which the justices can be ordered, are not. The present model also provides insight into the dynamic process by which subcoalitions build up into majority coalitions and, in addition, identifies “kingmakers” and “leaders” on the natural courts.

## Coalition Formation on the U.S. Supreme Court: 1969-2009

### 1. Introduction

In this paper we apply a fallback model of coalition formation, whereby players “fall back” on their preferences to form majority coalitions, to the U.S. Supreme Court.<sup>1</sup> The preference of each justice for every other justice as a coalition partner is assumed to be revealed by his or her level of agreement with that justice—the greater this level, the higher a justice ranks another justice as a coalition partner.

The rankings of each justice by every other are the data we use to predict which majority coalitions form on different *natural courts*, which have the same members over one or more terms.<sup>2</sup> We cover the 40-year span, beginning with Warren E. Burger’s appointment as chief justice in 1969 and ending with the retirement of David Souter in 2009. By holding constant the members of a court, we eliminate the influence that different members may have on the decision to join a coalition.

But more than predicting majority coalitions, the fallback model finds smaller subcoalitions that form on their way to becoming either a majority coalition or a nonmajority opposition coalition. Explaining the *process* of coalition formation is just as important as predicting the final division of the court because, without understanding the process, one cannot fully understand the forces that produced a decision.

We do *not* assume that the justices, based on their voting records, can be scaled along a single liberal-conservative dimension. Although we respect the efforts of Martin

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<sup>1</sup> The first application of this model was to bargaining (Brams and Kilgour, 2001), wherein the assent of all players (i.e., unanimity) was assumed. More recent applications have been to voting (Brams, Jones, and Kilgour, 2002, 2005; Brams and Kilgour, 2011), wherein a simple-majority or qualified-majority rule is assumed. The application analyzed in section 2 is briefly discussed in Brams and Kilgour (2011), which mainly provides a theoretical analysis of kingmakers and leaders when the preferences of players are ordinally or cardinally single-peaked (not true of the Supreme Court, as we will show).

<sup>2</sup> A term of the Supreme Court begins in October and ends in June or July of the next year.

and Quinn (2002), and others before them, to situate justices along a single ideological dimension, the coalitions that one can infer from the Martin-Quinn scales of the natural courts do a poor job of predicting *minimal* majority coalitions (i.e., in 5-4 decisions). By contrast, the fallback model's predictions are far more accurate and, in addition, help explain, even when one side's subcoalitions are tighter than the other's ("tightness" will be discussed and illustrated later), why they may fail to jell into a majority coalition.

The success of the fallback model's predictions stems in part from its not assuming that there is a single underlying dimension along which members can be arrayed. Because the justices' views on the different issues that come before the court are complex, a model that takes into account this complexity is needed not only to make good predictions but also to explain finer cleavages on the court.

The fallback model, on occasion, predicts the formation of more than one majority coalition. In those cases, we identify the members common to these different coalitions, whom we call *kingmakers* because, if they agree, they can decide which majority coalition forms.<sup>3</sup>

The *leader* of a fallback coalition is the first member, as less preferred coalition partners are added to form a majority coalition, to be acceptable to all its members. As with kingmakers, there may be more than one leader, who may also be a kingmaker. As we show, justices who are both kingmakers and leaders not only determine which majority coalition forms but also tend to be moderates in the majority coalition.

The paper proceeds as follows. In section 2 we describe the fallback model by applying it to the 2005-2009 natural court. Because the next natural court, which began

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<sup>3</sup> We could, as well, use the term "queenmaker" instead of "kingmaker." With no intention of favoring one gender or the other, we use the latter term for convenience.

with the appointment of Sonia Sotomayor and ended with the retirement of Justice John Paul Stevens and the subsequent appointment of Justice Elena Kagan in 2010, lasted only one term, we exclude it from the analysis. We also exclude all natural courts between 1969 and 2009 that had a duration of less than two terms to ensure that there are sufficient cases to establish a regular pattern of behavior.

In section 3 we apply the fallback model to the six natural courts, lasting at least two terms, that preceded the 2005-2009 court. We compare the fallback coalitions that formed on these courts with those occurring most often in 5-4 decisions of each natural court.

In section 4 we draw comparisons across the natural courts. Among other findings, we show that chief justices are often but not always leaders. This suggests that they use their power of assigning cases to good effect when they are in the majority. Kingmakers occur on two natural courts, and some are also leaders. Finally, we identify three justices whose views changed over the course of their tenure, leading to their exclusion from the majority coalitions most likely to form.

The fallback model offers a moving picture of individuals merging into subcoalitions, and these in turn merging into majority coalitions, culminating in the emergence of kingmakers or leaders. While this moving picture is implicit in the justices' agreement scores, the fallback model succinctly and accurately reveals the dynamics of coalition formation that earlier models have not delineated.

## **2. Application of the Fallback Model to the 2005-2009 Natural Court**

In the November issues of the *Harvard Law Review* each year, statistics are given on the percent agreement of each justice with every other justice on “full-opinion

decisions” involving “substantial legal reasoning” in the previous term of the Supreme Court. Using these statistics, which are given by a 9 × 9 table (because agreement scores are symmetric, and agreement with oneself is 100 percent, less than half the table has data points), we illustrate the application of the fallback model to the 2005-2009 natural court.

The court comprised the nine justices shown in Table 1, who are listed from the most conservative (Clarence Thomas) to the most liberal (John Paul Stevens) according to the one-dimensional ideological scaling technique developed by Martin and Quinn (2002). The Martin-Quinn (MQ) scores are the cardinal positions of the justices on the scale, whereby positive scores indicate conservative, and negative scores indicate liberal, positions.<sup>4</sup>

**Table 1. MQ Scores and Rankings by Each Justice of Every Other**

<i>Justice</i>	<i>MQ Score</i>	<i>Ranking of Coalition Partners</i>							
Clarence Thomas (T)	2.68	Sc	R	A	K	So	B	G	St
Antonin Scalia (Sc)	1.63	T	R	A	K	So	B	G	St
Samuel Alito, Jr. (A)	1.10	R	K	Sc	T	B	So	G	St
John G. Roberts Jr. (R)	1.01	A	Sc	K	T	So	B	G	St
Anthony M. Kennedy (K)	0.34	R	A	B	So	Sc	T	G	St
Steven G. Breyer (B)	-0.79	So	G	St	K	R	A	Sc	T
David H. Souter (So)	-0.92	G	B	St	K	R	A	Sc	T
Ruth Bader Ginsburg (G)	-1.04	So	St	B	K	R	A	Sc	T
John Paul Stevens (St)	-1.61	G	So	B	K	R	A	Sc	T

<sup>4</sup> The terms “conservative” and “liberal,” which we apply both to individual justices and the coalitions they join, are no more than labels that we use for convenience. Our main purpose is to explain, based on the preferences of the justices, how subcoalitions dynamically build up into majority coalitions. We computed the MQ scores from case information given in the Supreme Court Database 2010 Release 2, using Justice Centered Data with Cases organized by Supreme court Citation, described at <http://scdb/wist/edi/>. The MQ estimations were performed in R with the MCMCpack package described at <http://mcmcpack.wustl.edu/>. We used the static version of the model (MCMCirt1d) with the same prior parameters and same cases as in Martin and Quinn (2002), because we were interested in ideal point estimates for natural courts over more than one term, not year by year.

We stress that each justice's ranking of every other justice as a coalition partner is *not* based on the MQ scores but, instead, on their *Harvard Law Review* agreement scores. To illustrate, because Thomas agreed most often with Antonin Scalia (84.7 percent of the cases they both participated in) and least often with Stevens (41.7 percent of the cases they both participated in), Thomas ranks Scalia 1<sup>st</sup> and Stevens 8<sup>th</sup> (first line of Table 1). While Thomas also ranks Scalia and Stevens closest and farthest based on their MQ scores, agreement-score rankings do not, in general, coincide with those given by the MQ scores.

For example, the MQ scores reverse Thomas's ranks of 2<sup>nd</sup> and 3<sup>rd</sup> for Roberts and Alito, and 6<sup>th</sup> and 7<sup>th</sup> for Breyer and Ginsburg, in Table 1. To see why Thomas ranks Alito ahead of Roberts according to the MQ scores, notice that Alito's MQ score of 1.10 is less distant than Roberts's MQ score of 1.006 from Thomas's score of 2.68. To take a less obvious example, observe that Scalia's MQ score is closer to Alito's, Roberts's, and Kennedy's on his left than to Thomas's on his right, so Scalia's MQ ranking of Thomas is 4<sup>th</sup>, whereas his agreement-score ranking of Thomas is 1<sup>st</sup> in Table 1. In short, the agreement-score rankings are not consistent with the MQ-score rankings, primarily because the latter force the justices' preferences to be "cardinally single-peaked" (more on this shortly) when their pairwise agreement levels may indicate otherwise.

There were 224 cases decided in the 2005-2009 period and, with one exception (Samuel Alito, Jr.), each justice participated in at least 213 of them. Alito, who joined the court on January 31, 2006, participated in only 182 cases.

The subcoalitions that form at each level, up to the two simple-majority fallback coalitions of five justices that form at level 6 (in boldface), are shown in Table 2. The fallback process that yields these coalitions unfolds as follows:

**Table 2. Subcoalitions at Each Level up to the Fallback Coalitions at Level 6**

<i>Level</i>	<i>Subcoalitions/Fallback Coalitions*</i>
1	(Scalia, Thomas); (Alito, Roberts); (Ginsburg, Souter)
2	(Roberts, Scalia); (Alito, Kennedy); (Breyer, Souter); (Ginsburg, Stevens)
3	(Alito, Scalia, Roberts); (Alito, Kennedy, Roberts); (Breyer, Ginsburg, Souter, Stevens)
4	(Alito, Roberts, Scalia, Thomas); (Breyer, Kennedy, Souter)
5	(Alito, Kennedy, Roberts, Scalia); (Kennedy, Roberts, Souter)
6	<b>(Alito, Kennedy, <u>Roberts</u>, Scalia, Thomas);</b> <b>(Alito, Breyer, Kennedy, <u>Roberts</u>, Souter)</b>
	<b><i>Minimal Diameter: (Breyer, Ginsburg, Kennedy, Souter, Stevens)</i></b>

\*Leader of fallback coalitions underscored.

1. In Table 1, consider each justice's ranking of his or her 1<sup>st</sup> choice. Notice that Thomas ranks Scalia 1<sup>st</sup> and Scalia ranks Thomas 1<sup>st</sup>, so they are a subcoalition at level 1. Similarly, (Alito, Roberts) and (Ginsburg, Souter), each of whose members rank each other 1<sup>st</sup>, also become subcoalitions at level 1.

2. Consider each justice's ranking of both his or her 1<sup>st</sup> and 2<sup>nd</sup> choices. Notice that Ginsberg ranks Stevens 2<sup>nd</sup>, and Stevens ranks Ginsburg 1<sup>st</sup>, so they become a subcoalition at level 2. Likewise, (Breyer, Souter), (Alito, Kennedy), and (Roberts, Scalia) are all pairs in which each member ranks the other member either 1<sup>st</sup> or 2<sup>nd</sup>, so they also become subcoalitions at level 2.

3. Continue the descent to lower and lower levels of preference, creating subcoalitions of justices—all of whose members find each other acceptable at that

level—until one or more majority coalitions (of at least five members) forms for the first time. These coalition(s) are the *fallback coalition(s)*.

We do not show in Table 2 *proper subsets* of subcoalitions that form at each level. For example, the subcoalition of four members at level 3, (Breyer, Ginsburg, Souter, Stevens), contains several proper subsets of two and three members that did not form either at level 1 or level 2. A case in point is (Breyer, Ginsberg), whose members rank each other 2<sup>nd</sup> and 3<sup>rd</sup>, respectively. Because such subsets are contained in (Breyer, Ginsburg, Souter, Stevens) at level 3, we do not list them at this level.

Perhaps surprisingly, a liberal 4-person coalition forms at level 3 before two different conservative 4-person coalitions emerge at levels 4 and 5. This indicates that the four liberal justices have more affinity for each other than do the conservative justices;<sup>5</sup> only at level 6 does a 5-person conservative and a 5-person middle-of-the-road fallback coalition emerge.

The preferences of the nine justices, as given by their agreement rankings, are neither ordinally nor cardinally single-peaked. Their preferences would be *ordinally single-peaked* if they could be ordered from left to right along a line. But because Thomas's ranking and Stevens's ranking of justices in Table 1 are not diametrically opposed, the agreement-score ordering is not ordinally single-peaked.

A *cardinally single-peaked* ordering is not only ordinally single-peaked but also one in which the justices can be placed at points, from left to right, on the real line. The

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<sup>5</sup> In fact, the four liberals form a *build-up* (BU) coalition at level 3, because their members all rank each other highest (Brams, Jones, and Kilgour, 2002, 2005), which is not true of the two conservative 4-person subcoalitions that form at levels 4 and 5. For example, Kennedy ranks Breyer and Souter, who are not in either of these conservative subcoalitions, ahead of Scalia (see Table 1), who is in both. Because the liberals rank *only* each other highest, their 4-person subcoalition is *tighter* than the 4-person conservative subcoalitions, wherein some members rank outside justices higher.

MQ scores *force* such a placement but, as we have shown, this placement is not consistent with the justices' agreement scores, and the ranking of the justices derived therefrom (shown in Table 1).

Edelman and Chen (2007) provide evidence that a single dimension, like that given by the MQ scores, is insufficient to explain the voting behavior of the justices, but their focus is less on coalition formation and more on the power of individual justices to alter outcomes. Kaniovski and Leech (2009) also analyze the power of justices on the Supreme Court.

To test the validity of the MQ scores as predictors of coalitions, we calculated the 5-person coalition with the *minimal diameter*—that is, the coalition that minimizes the distance between its extreme members—which necessarily comprises five ideologically adjacent justices. This coalition turns out to be the 4-person liberal coalition, which forms at level 3, plus Kennedy; its diameter is the difference between Kennedy's positive MQ score (on the right) and Stevens's negative MQ score (on the left):  $0.34 - (-1.61) = 1.95$ , which is shown on the last line of Table 2.

But this relatively cohesive 5-person coalition, which one would expect on the basis of the MQ scores, formed far less frequently than the 5-person conservative coalition, which also included Kennedy and formed at level 6. For the 2005-2009 natural court, statistics that the *Harvard Law Review* compiles on 5-4 decisions show that the 5-person liberal coalition formed only 15 times in 71 5-4 cases (21.1 percent), whereas the 5-person conservative coalition formed 35 times (49.3 percent).

Much rarer is the 5-person middle-of-the-road coalition of (Alito, Roberts, Kennedy, Breyer, Souter) that is also predicted by the fallback model at level 6. In fact,

this coalition formed only twice (2.8 percent of the 5-4 cases) over the 4-year period of the natural court.<sup>6</sup>

We conclude that neither the 5-person minimal-diameter liberal coalition, nor the 5-person middle-of-the-road fallback coalition, is a good predictor of 5-4 Supreme Court decisions. However, the second 5-person conservative fallback coalition is a good predictor, so it behooves us to look more closely at which of the two fallback coalitions at level 6 (see Table 2) is more likely to form.

Observe that Alito, Kennedy, and Roberts are the common members of the two coalitions. This renders these justices kingmakers, who can decide which one they prefer. Since the middle-of-the-road coalition hardly ever formed, the real contest is between the liberal and conservative coalitions. Because Kennedy, the most liberal of the conservatives, prefers Roberts and Alito to Breyer and Souter, and Scalia and Thomas to Ginsburg and Stevens (see Table 1), the fallback model predicts that he will side with the conservatives.<sup>7</sup>

Among not only the kingmakers but also the two other members of the conservative 5-person coalition, Roberts, the chief justice, is the only member acceptable at level 2 and, hence, the leader (underscored);<sup>8</sup> the four other members become acceptable only at level 3 (Alito), level 4 (Kennedy), level 5 (Scalia), or level 6 (Thomas)

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<sup>6</sup> Coincidentally, this is the unique prediction of the fallback model when it is applied to the MQ scores. (We do not give these rankings here, but they can be readily calculated from the MQ scores in the manner illustrated earlier.) Because these rankings imply—falsely, based on the agreement-score rankings—that the justices’ preferences are cardinally single-peaked, we did not apply the fallback model to them for any of the six natural courts analyzed in section 3.

<sup>7</sup> Note that Kennedy’s preferences are not unequivocal: He does not prefer all the conservatives to all the liberals but has *pairwise preferences* (e.g., prefers Roberts and Alito to Breyer and Souter, and Scalia and Thomas to Ginsburg and Stevens). Of course, the facts and nature of a case also matter, leading Kennedy, on occasion, to side with the liberals.

<sup>8</sup> Roberts is also the leader of the fallback coalition that includes Breyer and Souter, because he is the first member of this coalition to become acceptable to all the other members (albeit only at level 5).

to all the other coalition members. This makes Roberts a natural bridge among the members, supporting the frequently made observation that not only did the conservative coalition hold sway in 2005-2009 but also that Roberts was the driving force behind it (Stearns, 2008; Toobin, 2008; Liptak, 2009, 2010). He, along with Alito and Scalia, is a middle member of it, which is anchored on the left by Kennedy and on the right by Thomas.

The fallback model gives insight into why the liberals, by and large, failed. The tight 4-person liberal subcoalition that formed at level 3 could not attract a fifth member at either level 4 or level 5, when different conservative 4-person subcoalitions emerged. Critically, the liberal coalition's best prospect, Kennedy, ranked the extreme liberals, Ginsburg and Stevens, below the extreme conservatives, Scalia and Thomas, so it is hardly surprising that Kennedy more often sided with the conservatives.

### **3. Coalition Formation on Six Earlier Natural Courts**

In this section we give the agreement-score rankings (as in Table 1), and the subcoalitions and fallback coalitions (as in Table 2), for the six natural courts that had durations of at least two terms between 1969 and 2005. We compare these with the minimal-diameter majority coalitions and comment briefly on the predictions of these different models in the 5-4 decisions of the court.<sup>9</sup>

#### **1994-2005**

#### **Table 3. MQ Scores and Rankings by Each Justice of Every Other**

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<sup>9</sup> Only beginning with the 1981 court did the *Harvard Law Review* give the composition of the 5-person majorities in 5-4 decisions, so for the two earliest natural courts analyzed in this section, we relied on data given in the Supreme Court Database. Because the fallback model predicts 6-person majorities for two of the natural courts, our comparisons in the 5-4 decisions are with 5-person subsets of the 6-person majorities.

*Justice*                      *MQ Score*                      *Ranking of Coalition Partners*

Clarence Thomas (T)	2.33	Sc	R	K	O	So	G	B	St
Antonin Scalia (Sc)	2.06	T	R	K	O	So	G	B	St
William H. Rehnquist (R)	1.06	K	O	T	Sc	B	So	G	St
Anthony M. Kennedy (K)	0.60	R	O	T	Sc	So	G	B	St
Sandra Day O'Connor (O)	0.44	R	K	B	So	T	Sc	G	St
Steven G. Breyer (B)	-0.59	G	So	St	O	K	R	Sc	T
David H. Souter (So)	-0.60	G	B	St	O	K	R	Sc	T
Ruth Bader Ginsburg (G)	-0.75	So	B	St	K	O	R	Sc	T
John Paul Stevens (St)	-2.89	G	So	K	O	R	A	T	Sc

**Table 4. Subcoalitions at Each Level up to the Fallback Coalition at Level 6**

*Level*    *Subcoalitions/Fallback Coalition\**

1	(Scalia, Thomas); (Kennedy, Rehnquist); (Ginsburg, Souter)
2	(Kennedy, O'Connor, Rehnquist); (Breyer, Ginsburg, Souter)
3	(Kennedy, Rehnquist, Thomas); (Breyer, Ginsburg, Souter, Stevens)
4	(Kennedy, Rehnquist, Scalia, Thomas); (Breyer, O'Connor, Souter)
5	(Kennedy, O'Connor, Rehnquist, Thomas) (Kennedy, O'Connor, Souter)
6	(Breyer, O'Connor, Rehnquist, Souter); (Kennedy, O'Connor, Rehnquist, Souter) <b>(Kennedy, O'Connor, Rehnquist, Scalia, Thomas)</b>
	<b><i>Minimal Diameter: (Breyer, Ginsburg, Kennedy, O'Connor, Souter)</i></b>

\*Leader of fallback coalition underscored.

As in 2005-2009, there are three coalition pairs that form at level 1, two of which, (Scalia, Thomas) and (Ginsburg, Souter), duplicate those in the later natural court analyzed in section 2. The same tight liberal coalition, (Breyer, Ginsburg, Souter, Stevens)—all of whose members rank each other highest—emerges at level 3, but it takes three more levels before a 5-person fallback coalition forms. As in 2005-2009, this coalition comprises the most conservative justices, but unlike 2005-2009, the coalition is unique, precluding kingmakers. The unique leader once again is a chief justice, now William H. Rehnquist (underscored), who becomes acceptable to all members of the conservative coalition at level 2.

The minimal-diameter coalition (see Table 4) is a left-of-center coalition, ranging from Kennedy on the right to Ginsburg on the left, which formed in only one of the 193 5-4 decisions (0.5 percent). By contrast the conservative coalition predicted by the fallback model prevailed in 86 of these decisions (44.6 percent).

### 1991-1993

**Table 5. MQ Scores and Rankings by Each Justice of Every Other**

<i>Justice</i>	<i>MQ Score</i>	<i>Ranking of Coalition Partners</i>							
Antonin Scalia (Sc)	1.46	T	R	K	So	W	O	St	B
William H. Rehnquist (R)	1.16	T	K	W	Sc	O	So	B	St
Clarence Thomas (T)	1.16	Sc	R	K	W	O	So	B	St
Anthony M. Kennedy (K)	0.49	R	So	T	Sc	W	O	B	St
Byron R. White (W)	0.46	R	So	K	T	O	Sc	B	St
Sandra Day O'Connor (O)	0.30	R	So	K	T	W	Sc	B	St
David H. Souter (So)	0.29	K	W	R	O	St	T	B	St
Harry A. Blackmun (B)	-1.07	St	W	O	So	K	R	T	Sc
John Paul Stevens (St)	-1.96	B	W	So	O	K	R	T	Sc

**Table 6. Subcoalitions at Each Level up to the Fallback Coalitions at Level 6**

<i>Level</i>	<i>Subcoalitions/Fallback Coalitions*</i>
1	(Scalia, Thomas); (Blackmun, Stevens)
2	(Kennedy, Rehnquist); (Kennedy, Souter); (Souter, White)
3	(Rehnquist, White); (Kennedy, Rehnquist, Thomas)
4	(Rehnquist, Thomas, White); (O'Connor, Souter); (Kennedy, Rehnquist, Scalia, Thomas),
5	(Kennedy, Rehnquist, Thomas, White); (O'Connor, Rehnquist, Thomas, White); (Souter, Stevens)
6	<b>(Kennedy, O'Connor, <u>Rehnquist</u>, Scalia, Thomas, White);</b> <b>(Kennedy, O'Connor, <u>Rehnquist</u>, Souter, Thomas, White)</b>
	<b><i>Minimal Diameter: (Kennedy, O'Connor, <u>Rehnquist</u>, Thomas, White)</i></b>

\*Leader of fallback coalitions underscored.

The major change from 1994-2005 is that there is no 5-person fallback coalition but, instead, two 6-person fallback coalitions, which are the same except that Scalia is a

member of one and Souter a member of the other. The five justices common to these coalitions are kingmakers and include Rehnquist; once again, he is a leader, acceptable to all five other members of each fallback coalition at level 2 in the coalition that includes Scalia, and at level 3 in the coalition that includes Souter. In the latter coalition, Kennedy is also a leader, so both of these justices are underscored in Table 6.

Because Rehnquist ranks Scalia 4<sup>th</sup> and Souter 6<sup>th</sup>, one would expect the fallback coalition that includes Scalia to form more often in 6-3 decisions. We do not have relative-frequency data on 6-person coalitions that occurred, but for the 32 5-4 decisions, it turns out that 10 (31.3 percent) include a subset of the 6-person coalition that includes Scalia, whereas none (0 percent) includes a subset of the 6-person coalition that includes Souter, making the six most conservative justices the better prediction.

Interestingly, three different 4-person subcoalitions, which are subsumed by one or both of the 6-person fallback coalitions, appear at levels 4 and 5. The two justices that make no appearance in any of these subcoalitions, or in the two fallback coalitions, are Blackmun and Stevens, the two most liberal justices according to their MQ scores.

The minimal-diameter coalition (see Table 6) is a right-of-center coalition—excluding only Scalia—ranging from Rehnquist on the right to O’Connor on the left. It formed in none of the 32 5-4 decisions (0 percent).

### **1987-1989**

**Table 7. MQ Scores and Rankings by Each Justice of Every Other**

<i>Justice</i>	<i>MQ Score</i>	<i>Ranking of Coalition Partners</i>							
William H. Rehnquist (R)	1.52	K	O	W	Sc	St	Bl	Br	M
Antonin Scalia (S)	1.21	K	R	O	W	St	Bl	Br	M
Sandra Day O’Connor (O)	1.17	R	K	Sc	W	Bl	St	Br	M

Anthony M. Kennedy (K)	0.96	R	Sc	O	W	Bl	St	Br	M
Byron R. White (W)	0.70	R	K	O	Sc	St	Bl	Br	M
John Paul Stevens (St)	-0.41	Br	M	Bl	W	R	O	K	Sc
Harry A. Blackmun (Bl)	-0.56	Br	M	St	W	R	O	K	Sc
William J. Brennan (Br)	-2.17	M	Bl	St	W	K	O	R	Sc
Thurgood Marshall (M)	-3.29	Br	Bl	St	W	K	R	O	Sc

**Table 8. Subcoalitions at Each Level up to the Fallback Coalition at Level 4**

<i>Level</i>	<i>Subcoalitions/Fallback Coalition</i>
1	(Kennedy, Rehnquist); (Brennan, Marshall)
2	(O'Connor, Rehnquist); (Blackmun, Brennan, Marshall)
3	(Rehnquist, White); (Kennedy, O'Connor, Scalia); (Blackmun, Brennan, Marshall, Stevens)
4	<b>(Kennedy, O'Connor, Rehnquist, Scalia, White)</b>
	<b><i>Minimal Diameter: (Blackmun, Kennedy, O'Connor, Stevens, White)</i></b>

\*Leaders of fallback coalitions underscored.

This natural court stands out for its paucity of subcoalitions, and its lack of levels, compared to the two later courts analyzed earlier. As level 3, a 4-person liberal subcoalition, (Blackmun, Brennan, Marshall, and Stevens), appears. But at the very next level, a conservative 5-person fallback coalition, disjoint from the liberal subcoalition, appears, indicating a sharp divide between the liberals and the conservatives on this natural court.

The conservative fallback coalition has two leaders, Rehnquist and Kennedy, who are both acceptable to the other members at level 2. This pair were also leaders in one of the two fallback coalitions in the 1991-1993 court. That they are each other's top coalition partners (i.e., at level 1) helps to explain why they share leadership of the unique fallback coalition on this court.

Of the 45 5-4 decisions, the conservative fallback coalition prevailed in 26 (57.8 percent). By contrast, the middle-of-the-road minimal-diameter coalition (see Table 8), with O'Connor on the right and Blackmun on the left, formed in none (0 percent).

### 1981-1986

**Table 9. MQ Scores and Rankings by Each Justice of Every Other**

<i>Justice</i>	<i>MQ Score</i>	<i>Ranking of Coalition Partners</i>							
William H. Rehnquist (R)	2.34	O	B	P	W	Bl	St	Br	M
Warren E. Burger (Bu)	1.08	R	O	P	W	St	Bl	Br	M
Sandra Day O'Connor (O)	0.93	Bu	R	P	W	Bl	St	Br	M
Lewis F. Powell, Jr. (P)	0.62	Bu	O	R	W	Bl	Br	St	M
Byron R. White (W)	0.46	Bu	R	O	P	Bl	Br	St	M
Harry A. Blackmun (Bl)	-0.16	Br	M	W	O	P	St	Bu	R
John Paul Stevens (S)	-0.31	Br	Bl	M	W	O	Bu	P	R
William J. Brennan (Br)	-1.50	M	Bl	St	W	P	O	Bu	R
Thurgood Marshall (M)	-2.11	Br	Bl	St	W	P	O	Bu	R

**Table 10. Subcoalitions at Each Level up to the Fallback Coalition at Level 4**

<i>Level</i>	<i>Subcoalitions/Fallback Coalition</i>
1	(Brennan, Marshall)
2	(Burger, O'Connor, Rehnquist); (Blackmun, Brennan, Marshall)
3	(Burger, O'Connor, Powell, Rehnquist); (Brennan, Marshall, Stevens)
4	<b>(Burger, O'Connor, Powell, Rehnquist, White)</b>
	<i>Minimal Diameter: (Blackmun, O'Connor, Powell, Stevens, White)</i>

\*Leader of fallback coalition underscored.

Coalition formation on this natural court is similar to that on the 1987-1989 court: The court at the first three levels bifurcates into conservative and liberal subcoalitions, some of which duplicate those on the earlier court. This court includes three Richard Nixon appointees—Powell, Blackmun, and Burger—the latter being the chief justice.

At level 4, a unique 5-person fallback coalition emerges that admits Byron White, a justice ranked 4<sup>th</sup> by all its other members, and no lower than 4<sup>th</sup> by the four other justices. Once again, a chief justice, Warren E. Burger, is the leader of the conservative coalition, who becomes acceptable to all fallback coalition members at level 2.

Of the 147 5-4 decisions, the fallback coalition prevailed in 38 (25.9 percent), which is more than any other 5-person majority. By contrast, the middle-of-the-road minimal-diameter coalition (see Table 10), with O'Connor on the right and Stevens on the left, formed in no cases (0 percent).

### 1976-1980

**Table 11. MQ Scores and Rankings by Each Justice of Every Other**

<i>Justice</i>	<i>MQ Score</i>	<i>Ranking of Coalition Partners</i>							
William H. Rehnquist (R)	2.83	B	P	Stw	W	Bl	Stv	Br	M
Warren E. Burger (Bu)	0.84	R	P	Stw	W	Bl	Stv	Br	M
Lewis F. Powell, Jr. (P)	0.36	Bu	Stw	R	W	Bl	Stv	Br	M
Potter Stewart (Stw)	0.25	P	B	W	Stv	Bl	Br	Br	M
Harry A. Blackmun (Bl)	0.13	W	B	P	R	Br	Stw	Stv	M
Byron R. White (W)	0.06	Bl	P	Bu	Stw	R	Stv	Br	M
John Paul Stevens (Stv)	-0.17	Stw	W	Br	P	M	Bu	Bl	R
Thurgood Marshall (M)	-2.17	Br	W	Stv	Bl	Stw	P	Bu	R
William J. Brennan (Br)	-2.26	M	W	Stv	Bl	Stw	P	Bu	R

**Table 12. Subcoalitions at Each Level up to the Fallback Coalitions at Level 5**

<i>Level</i>	<i>Subcoalitions/Fallback Coalition*</i>
1	(Burger, Rehnquist); (Blackmun, White); (Brennan, Marshall)
2	(Burger, Powell); (Powell, Stewart)
3	(Burger, Powell, Rehnquist, Stewart); (Brennan, Stevens)
4	(Burger, Powell, Stewart, White)
5	<b>(Burger, Powell, Rehnquist, Stewart, White); (Blackmun, Burger, Powell, Rehnquist, White)</b>

<b><i>Minimal Diameter: (Blackmun, Powell, Stevens, Stewart, White)</i></b>
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\*Leaders of fallback coalition underscored.

This court takes five levels to find two 5-person fallback coalitions, four of whose members are common and, therefore, kingmakers. Stewart is the fifth member of one of these coalitions, Blackmun of the other. In the fallback coalition that includes Stewart, the chief justice (Burger) is not a leader; instead, Powell is the unique leader, who becomes acceptable to all other members at level 2. However, in the fallback coalition that includes Blackmun, Burger and Powell share leadership at level 3.

Both Powell and Burger, as kingmakers and leaders, prefer Stewart to Blackmun, so the fallback model predicts the conservative coalition that includes Stewart will form more frequently in 5-4 decisions. In fact, this court majority formed in 9 (7.1 percent), and the second fallback coalition in 20 (15.9 percent), of the 126 5-4 decisions; however, these were the two most common 5-4 majorities to form.

By contrast, the minimal-diameter coalition is again a middle-of-the-road coalition (see Table 12), with Powell on the right and Stevens on the left. It formed in no cases (0 percent).

### **1971-1974**

**Table 13. MQ Scores and Rankings by Each Justice of Every Other**

<i>Justice</i>	<i>MQ Score</i>	<i>Ranking of Coalition Partners</i>								
William H. Rehnquist (R)	3.00	Bu	P	Bl	W	S	M	Br	D	
Warren E. Burger (Bu)	1.56	R	Bl	P	W	S	M	Br	D	
Harry A. Blackmun (Bl)	0.97	Bu	P	R	W	S	M	Br	D	
Lewis F. Powell, Jr. (P)	0.86	Bu	R	Bl	S	W	M	Br	D	
Byron R. White (W)	0.54	Bl	Bu	P	R	S	Br	M	D	
Potter Stewart (S)	0.19	P	Bl	M	R	Bu	W	Br	D	
Thurgood Marshall (M)	-0.87	Br	S	D	W	P	Bl	Bu	R	

William J. Brennan (Br)	-0.93	M	D	S	W	P	Bl	Bu	R
William O. Douglas (D)	-3.56	Br	M	S	W	P	Bl	Bu	R

**Table 14. Subcoalitions at Each Level up to the Fallback Coalitions at Level 5**

<i>Level</i>	<i>Subcoalitions/Fallback Coalition*</i>
1	(Burger, Rehnquist); (Brennan, Marshall)
2	(Blackmun, Burger); (Powell, Rehnquist); (Brennan, Douglas)
3	(Blackmun, Burger, Powell, Rehnquist); (Brennan, Douglas, Marshall); (Marshall, Stewart)
4	(Blackmun, Burger, Rehnquist, White); (Powell, Stewart)
5	<b>(<u>Blackmun</u>, <u>Burger</u>, <u>Powell</u>, <u>Rehnquist</u>, <u>Stewart</u>);</b> <b>(<u>Blackmun</u>, <u>Burger</u>, <u>Powell</u>, <u>Rehnquist</u>, <u>White</u>)</b>
	<b><i>Minimal Diameter: (Brennan, Marshall, Powell, Stewart, White)</i></b>

\*Leaders in fallback coalitions underscored.

The two 5-person fallback coalitions that form at level 5 are similar to those in the 1976-1980 court. Four members are common to each coalition and, therefore, kingmakers, whereas the fifth member is Stewart in one, White in the other. Each of these coalitions is of a conservative bent that leaves out three of the four most liberal justices.

The leaders of the fallback coalition that includes Stewart do not include the chief justice (Burger). Instead, the leaders are Blackmun and Powell, each of whom finds all the other members acceptable at level 3. However, Burger is the unique leader in the fallback coalition that includes White, finding all members of this coalition acceptable at level 2.

Because Burger and Blackmun favor White over Stewart, whereas only Powell favors Stewart over White, the fallback model predicts that the fallback coalition with White will form more frequently in 5-4 decisions. The 126 5-4 decisions bear out this

prediction: The coalition with White formed in 37 cases (37.4 percent), and that with Stewart in 16 cases (16.2 percent), which were the most common 5-4 majorities to form.

As usual, the minimal-diameter coalition is a middle-of-the-road coalition, with Powell on the right and Stevens on the left. It formed in no cases (0 percent).

#### **4. Summary and Conclusions**

Using the pairwise agreement scores of each justice with every other, we determined the rankings by each justice of every other as a coalition partner. We then applied the fallback model to these rankings, which showed the build-up of subcoalitions into majority fallback coalitions, wherein each justice considers the other members of a subcoalition or fallback coalition acceptable at a designated level. Whereas mutually acceptable pairs of justices form at level 1, it takes 4-6 levels before a majority fallback coalition emerges in the seven natural courts we analyzed.

If more than one fallback coalition emerges, the common members are kingmakers. The leader(s) are the members who are the first to become acceptable to all other members of a fallback coalition. We found that the chief justice is often a leader, sometimes sharing his leadership with another member, but occasionally other justices become leaders. Thus, for example, Warren Burger, as one of the more conservative members of his court, was not always a leader; when this happened, he was replaced by a more centrist member of his fallback coalition.

We compared fallback predictions with minimal-diameter predictions, based on MQ scores, which force the justices to have cardinal single-peaked preferences. Because these scores do not mirror some of the subtleties of the justices' rankings, it is

not surprising that their frequent predictions of middle-of-the-road coalitions are not borne out in the 5-4 cases.<sup>10</sup>

The main cleavage in the past 40 years has been between the conservatives and the liberals. For the most part, the conservatives, led by conservative chief justices (Burger, Rehnquist, and Roberts), have prevailed. By comparison, the Warren court that preceded these courts was generally considered to be liberal.

The fact that the fallback model uses the votes of the justices to predict the coalitions that they formed might appear to be tautological. We would point out, however, that the MQ scores use the same data, and they perform poorly in predicting majority coalitions, at least based on the minimal-diameter criterion.

The fallback model, it should be emphasized, does not predict just a final outcome but also shows the build-up of subcoalitions along the way, offering a moving picture of coalition formation. Included in this picture is information on the tightness of the subcoalitions, because the earlier they form, the greater the affinity of their members for each other. Likewise for fallback coalitions—those that form at level 4 are more cohesive than those that form at level 6.

One might decry the fact that middle-of-the-road coalitions are the exception rather than the norm. But it should be remembered that a significant number of Supreme Court decisions are 9-0 or 8-1; there are fewer 7-2 decisions and then more 6-3 and 5-4 decisions, with 5-4 and 9-0 decisions the most frequent.<sup>11</sup> While the court is in theory a

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<sup>10</sup> The behavior of the justices is undoubtedly more consistent in different classes of cases, maybe even approximating the cardinal single-peakedness that Martin and Quinn (2002) assume, but we did not attempt to distinguish cases by classes.

<sup>11</sup> A theoretical explanation for this bimodal distribution is given by the fallback model (Brams, Jones, and Kilgour, 2005).

nonpartisan body, its members are appointed by Democratic and Republican presidents, which is generally reflected in the liberal and conservative leanings of the justices.

But there are exceptions, which the fallback coalitions reveal. Blackmun, Souter, and Stevens, when they first joined the Supreme Court, were relatively conservative; all were members of the fallback coalitions that formed. But over the years they became more liberal and lost their memberships in these conservative coalitions.

In conclusion, the fallback model provides a dynamic and realistic portrait of the Supreme Court over the past 40 years. Whether or not the dominance of the conservatives will prevail may well depend on whether Barack Obama, if he wins a second term as president in 2012, is able to shift the balance on the court.

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