The Gleeson Court on Constitutional Law: An Empirical Analysis

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I Introduction

At the inaugural holding of this conference last year, Stephen Gageler delivered the address which this morning has fallen to Justice Kenny – a reflective comment upon the High Court's constitutional law decisions of the preceding year.[1] In doing so, he acknowledged this as an American tradition found within the pages of the *Harvard Law Review* for over fifty years now.[2] But, as he said, in the beginning, there were the statistics. The commentary on the Supreme Court's term began its life as a foreword to the presentation of tables and charts indicating 'some of the more significant features of the Court's activity'[3] across that period.

The practice of critiquing recent developments in constitutional law, albeit through the lens of a particular year, is one which we can adopt without much difficulty. The work of the High Court of Australia in this field is already subject to a healthy amount of analysis – a steady stream in fact – from the profession, academia and, to some extent, the media. Australian lawyers have, however, been largely reticent about the use of empirical studies as a means of appreciating legal phenomena.[4] Not for us, the

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1 Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25 *UNSW Law Journal* 194.

2 The first such piece is Paul A Freund, 'The Supreme Court, 1951 Term: Foreword: The Year of the Steel Case' (1952) 66 *Harvard Law Review* 89.

3 'The Supreme Court, 1948 Term' (1949) 63 *Harvard Law Review* 119.

4 There have been, of course, notable exceptions to this. See AR Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964-1969' (1972) 3 Lawasia 1; AR Blackshield, 'X/Y/Z/N Scales: The High Court of Australia, 1972-1976' in Roman Tomasic (ed), *Understanding Lawyers – Perspectives on the Legal Profession in Australia* (1978). In recent years there has been more activity on this front, chiefly by Russell Smyth: Russell Smyth, 'Academic writing and the courts : a quantitative study of the influence of legal and non-legal periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164; Russell Smyth, ' "Some are More Equal than Others" – An Empirical Investigation Into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra Law Review* 193; Russell Smyth, 'Other than 'accepted sources of law'? A quantitative study of secondary source citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19; Russell Smyth, 'What do judges cite? An empirical study of the 'Authority of Authority' in the Supreme Court of Victoria' (1999) 25 *Monash University Law Review* 29; Russell Smyth, 'What do intermediate appellate courts cite? A quantitative study of the citation practice of Australian state supreme courts' (1999) 21 *Adelaide Law* Review 51; Russell Smyth, 'Law or economics? An empirical investigation into the influence of economics on Australian courts' (2000) 28 *Australian Business Law Review* 5; Russell Smyth, 'Who gets cited? An empirical study of judicial prestige in the High Court' (2000) 21*University of Queensland Law Journal* 7; Russell Smyth, 'The authority of secondary authority : a quantitative study of secondary source citations in the Federal Court' (2001) 9 *Griffith Law Review* 25; Russell Smyth, 'Judicial prestige : a citation analysis of Federal Court judges' (2001) 6 *Deakin Law Review* 120; Russell Smyth, 'Citation of judicial and academic authority in the Supreme Court of Western Australia' (2001) 30 *University of Western Australia Law Review* 1; Russell Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935-1950' (2001)

number crunching of jurimetrics – or even a simple curiosity in raw data. As a result, a custom of annually producing general statistical information about the High Court may be harder to develop.

In any case, that has not been my brief in being invited to speak this morning. This is, after all, a *constitutional* law conference and it is cases of this nature which interest us. The many other matters which reach the High Court as the final court of appeal throughout the year are to be put to one side. This subtraction presents a difficulty to the empiricist in that what remains may well be too small a sample from which to observe any significant patterns and trends. The solution arrived at has been to abandon the constraint which the speakers before me have worked within – the single calendar year of 2002. Instead, my paper today concerns the almost five years from Chief Justice Gleeson's arrival at the High Court in May 1998 until the last decision handed down in 2002.[5] As such, it represents a snapshot of the Court's handling of constitutional matters over recent years, rather than purporting to be a thorough documentation of all its work in any one year.

II The *Harvard Law Review* Tradition

Before considering the statistics themselves and explaining the means by which they were compiled, I feel that some comment upon the practice and purpose of this kind of work may be helpful.

The *Harvard Law Review's* employment of statistical analysis did not suddenly emerge of its own accord with the 1949 volume's review of the Supreme Court's 1948 term. Seemingly the impetus for this development lay in the success of an earlier series of articles by then Professor Felix Frankfurter in co-authorship with various others.[6] The Frankfurter articles provided statistics from the Court's 1928 term but broke off when their chief author was appointed to the subject of his study and

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47 *Australian Journal of Politics and History* 330; Russell Smyth, 'Explaining Voting Patterns on the Latham High Court 1935-50' (2002) 26 *Melbourne University Law Review* 88; and Russell Smyth, 'Acclimation Effects for High Court Justices 1903-1975' (2002) 6 *University of Western Sydney Law Review* 167. See also Richard Haigh, ' 'It is Trite and Ancient Law': The High Court and the Use of the Obvious' (2000) 28 *Federal Law* Review 87; Patrick Keyzer, 'The Americanness of the Australian Constitution: The Influence of American Constitutional Jurisprudence on Australian Constitutional Jurisprudence: 1988 to 1994' (2000) 19 *Australasian Journal of American Studies* 25; and Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 *Adelaide Law Review* 181.

5 *Aktiebolaget Hassle v Alphapharm Pty Ltd* [2002] High Court of Australia 59 (12 December 2002). The last 2002 case on *AustLII* is *Scott v Bowden* [2002] High Court of Australia 60 (17 December 2002) but as a single judge decision it is ineligible: see further comments upon methodology in Part III.

6 Felix Frankfurter & James M Landis, 'The Business of the Supreme Court at October Term, 1928' (1929) 43 *Harvard Law Review* 33; 'The Business of the Supreme Court at October Term, 1929' (1930) 44 *Harvard Law Review* 1; 'The Business of the Supreme Court at October Term, 1930' (1931) 45 *Harvard Law Review* 271; 'The Business of the Supreme Court at October Term, 1931' (1932) 46 *Harvard Law Review* 226; Felix Frankfurter & Henry M Hart Jr, 'The Business of the Supreme Court at October Term, 1932' (1933) 47 *Harvard Law Review* 245; 'The Business of the Supreme Court at October Term, 1933' (1934) 48 *Harvard Law Review* 238; 'The Business of the Supreme Court at October Term, 1929' (1934) 49 *Harvard Law Review* 68; and Felix Frankfurter & Adrian S Fisher, 'The Business of the Supreme Court at October Terms, 1935 and 1936' (1938) 51 *Harvard Law Review* 577.

continuation of the series would have been, presumably, slightly unseemly.[7] When the student editors of the *Harvard Law Review* revived the practice ten years later, they owed a debt to those earlier works for the example set.[8] This debt extended to the editors' apparent belief that, following on from Frankfurter and company's earlier work, they could simply present the tables of data with only fairly minimal explanation as to their purpose, let alone method of compilation. The editors of the 1961 volume attempted to remedy these deficiencies through greater detail on both scores,[9] but in the 1968 volume the editors provided further practical detail after making the following admission:

> Growing concern in recent years over the accuracy of some of the tables – primarily those which attempt to classify cases by subject matter – has led to suggestions that part or all of the enterprise be substantially revised, if not completely abandoned. At a minimum, it was felt, the nature of the errors likely to be committed in constructing the tables should be indicated so that the reader might assess for himself the accuracy and value of the information conveyed.[10]

Thus qualified, the tables have survived. As a quantitative method tried, tested and occasionally modified for over fifty years, they obviously hold enormous sway over researchers attempting to perform similar work in other jurisdictions. Of course, a straight application of the *Harvard Law Review's* rules of statistical compilation to the practice of the High Court of Australia is not possible. Account must be taken of the different practices and procedures between that institution and the United States Supreme Court, and the rules adapted accordingly.[11] But I wish to acknowledge at the outset that much of the methodology which I have employed in preparing this paper is influenced by that used year in, year out by the *Harvard Law Review*.

What is the purpose or value of empirical research? As distinct from the reasoning contained in the Court's opinions – quite often elusive and subject to competing interpretations by commentators - statistics appear to provide certainty, at least in answering questions of a particular nature: How many cases have been decided over a period? On which areas of law? What is the level of agreement across the bench on various issues? What is the propensity of the Bench to unanimity? Is there any regular pattern of voting amongst the Justices of the Court on certain issues? Which Justices dissent more frequently than others?

The importance of discovering such information lies in how it may assist us in appreciating the way in which the work of the Court is performed and the complexity of the legal controversies which face it. This feeds in to more familiar scholarship about the Court and the legal reasoning of its members. For example, an awareness of the number of cases decided over a period may well be relevant to those examining

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7 Frankfurter was appointed to the United States Supreme Court on 30 January 1939. Thus, the series was concluded by his earlier co-author: Henry M Hart Jr, 'The Business of the Supreme Court at October Terms, 1937 and 1938' (1940) 53 *Harvard Law Review* 579.

8 This was acknowledged by the editors in 'The Supreme Court, 1967 Term' (1968) 82 *Harvard Law Review* 63 at 301.

9 'The Supreme Court, 1960 Term' (1961) 75 *Harvard Law Review* 40 at 84-92.

10 Above, n 8.

11 I have explored this elsewhere: Andrew Lynch, 'Dissent : Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470.

the efficiency of the institution's procedures or the adequacy of its resourcing. A breakdown of those cases by topic may illuminate which areas of the law are in a state of instability or change at any given time. This information would certainly be supplemented by indications as to which issues tend to fragment the bench, and the degree of such disagreement. Strong evidence of regular voting blocs or alignments may point to the security of any particular view from being overthrown in the foreseeable future. And lastly, statistics on dissent may well attest to a marked difference in methodology or ideology amongst the Justices which is ripe for scrutiny and comment by outsiders.

As we know, it is possible to discuss all of these sorts of matters without any reliance upon statistical research and, on the whole, I would agree that Australian legal scholarship has not suffered unduly for the absence. So keenly is the Court observed that I suspect we appreciate anecdotally much of what is to be confirmed empirically. That is not to say, however, that basic data about the High Court and its judges would not further enhance or support many of the arguments and hypotheses which are regularly aired in academic journals. It many instances, it would. Also, there remains not just simple validation of our opinions and perceptions, but the potential for new avenues of research to be illuminated by statistical information. For these reasons, I would endorse the advice of the *Harvard Law Review* editors when they cautioned the wary that their tables 'are not an end in themselves but are intended to present a foundation for more detailed consideration'.[12]

Lastly, and in some ways conversely to what I have just said, it is appropriate to acknowledge the limitations which inhere in empirical work and the need for it to exist in relation to, and be supported by, more qualitative analysis. Because the compilation of statistics requires the consistent application of a reasonably rigid methodology it is inevitable that the figures produced may, by themselves, present an overly simplistic picture.[13] It certainly will not be the whole picture. There are a number of useful counters to this. One is to design a justifiable methodology which is well suited to the material under examination.[14] Another is then to be explicit about those instances where distorting effects are inevitably produced by application of the methodology to particular sorts of cases. Additionally, accumulating even the very basic statistical information which I am aiming to present here poses occasional problems of complexity requiring the exercise of discretion.[15] The choices made by the researcher should be flagged so that others may be aware of the degree of subjectivity which has been employed in the study's completion. In these ways, the inevitable shortcomings of any one particular approach and the results produced are made apparent. This does not diminish the usefulness of such research – rather, such

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12 Above, n 3.

13 As Blackshield has said, 'like any intellectual method, quantitative analysis involves great simplifications, as one seeks to reduce a disorderly mass of empirical data to conceptual manageability' : AR Blackshield, 'X/Y/Z/N Scales: The High Court of Australia, 1972-1976' in Roman Tomasic (ed), *Understanding Lawyers – Perspectives on the Legal Profession in Australia*, Allen & Unwin, Sydney, 1978 at 134.

14 This is something of a balancing act. Again, Blackshield admitted: 'we need a set of categories simple enough to be usable, but complex enough to illuminate the intricacies and inconsistencies of the human mind' : ibid. Admittedly, this was in the context of his *much more* sophisticated scalogram project but the essential tension which he highlights would seem a universal trade-off in any research aiming to quantify an aspect of human existence.

15 This is the central theme and substance of the paper cited above, n 11.

transparency ensures that reliance upon it is well informed and reinforces that quantitative studies should not stand alone but be used in conjunction with complementary scholarship of a more discursive character.

III Some Statements about Methodology

In preparing statistics on the Gleeson Court's work pertaining to constitutional law over the last five years, essentially one is rarely called upon to do anything more complicated than tally as one goes through the relevant reports.[16] However, the simplicity of much of this activity is underpinned by consistent application of a fixed classificatory system. It is my intention now to briefly highlight the key features of the method I adopted.

Report series

Although recent empirical studies of the High Court have all used the *Commonwealth Law Reports* as the source for their data,[17] two considerations led to my use of the unauthorised *Australian Law Reports* for this research. Firstly, the ALRs commended themselves by virtue of the speed with which they are produced relative to the CLRs. In order to ensure that as much of the entire sample period had been reported and so diminish, as much as possible, reliance upon electronic resources, the series quickest to print was always going to be preferred.[18] Secondly, although certainly every constitutional law case from the period is reported in the CLRs, the authorised series is not as comprehensive as the ALRs with respect to other matters. As shall be seen, this was important because for the purposes of comparison I was keen to prepare the data on constitutional cases as a subset of the totality of the Court's opinions over the period.

Period covered – the 'natural court'

The timeframe for this study commences, appropriately enough, on 22 May 1998 with the appointment of Murray Gleeson as Chief Justice of the High Court. The stability in the Court's composition from that time until Justice Gaudron's departure last week presents us with what is known as a 'natural court' and one which is of a suitably long duration. A 'natural court' is a court 'where the same Justices interact for the whole research period'.[19] With the appointment of Justice Heydon, effectively a new 'natural court' of the Gleeson era comes into being.[20]

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16 It is a similar story in respect of the *Harvard Law Review* which admitted that the construction of similar tables 'is accomplished primarily through tabulations as mechanical and simple as counting': above, n 10 at 302.

17 See any of those cited above, n 4.

18 At the time of writing, the *Australian Law Reports* were so up to date as to be almost complete. The date of the last judgment delivered by the High Court and reported in that series is 5 December 2002 (*R v Carroll* (2002) 194 ALR 1). By comparison, the *Commonwealth Law Reports* had only just reported the judgments in *Yarmirr v Northern Territory* (2001) 208 *Commonwealth Law Reports* 1 which was delivered on 11 October 2001. This case was reported in (2001) 184 ALR 113.

19 Russell Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935-1950' (2001) 47 *Australian Journal of Politics and History* 330

Given that it is the Gleeson Court with which we are concerned, reports of cases heard prior to the Chief Justice's arrival, even if judgment was delivered subsequently were not tallied.[21] This is the only instance where I invest the hearing date of the matter with any significance – and it is for the purpose of exclusion. Otherwise, cases are organised into years on the basis of when judgment was delivered.[22]

Tallying of cases for the entire period involved drawing on the reports found within volumes 156 to 194(1) of the ALRs. The final High Court case found in that series was handed down on 5 December of that year,[23] leaving only five eligible cases of 2002 unreported. These cases have still been included in the study, using the judgments posted on the *AustLII* webpages.[24]

The 'control' sample

All High Court of Australia cases reported in the ALRs across this period were tallied in order to provide some broader context against which to examine the Court's constitutional work. This included any report where written reasons were recorded – including those involving an application for special leave.

Excluded from the study were reports of single judge decisions of the High Court. The only reported decision which requires further comment here is that of *Hancock Family Memorial Foundation Ltd v Porteous*[25] which was a brief two judge decision (McHugh and Gummow JJ) denying special leave. This has not been included either.

What is a 'constitutional case'?

In identifying 'constitutional cases' as a group within the total sample, I have essentially adopted Stephen Gageler's definition from his paper last year as being:

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at 334. For a detailed example of selecting a 'natural court' to study, see AR Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964-1969' (1972) 3 Lawasia 1 at 11.

20 Youngsik Lim, 'An Empirical Analysis of Supreme Court Justices' Decision Making' (2000) 29 *Journal of Legal Studies* 721 at 724; and Blackshield, above n 14 at 139.

21 For example, see *Chappel v Hart* (1998) 156 CLR 517 which was handed down on 2 September 1998. However, as the case was heard in November 1997, it must be seen to predate the formation of the Gleeson Court.

22 In doing so, I am both acting to my own preference and aiming to be consistent with the approach taken by Gageler, above n 1 at 195. But for an example of the reverse approach, see Peter J McCormick, 'The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court 1991-97' (1999) 22 *Dalhousie LJ* 93 at 97.

23 Above n 5.

24 The five cases are *Graham Barclay Oysters Pty Ltd v* Ryan [2002] HCA 54 (5 December 2002); *Dow Jones & Co Inc v Gutnick* [2002] High Court of Australia 56 (10 December 2002); *Roberts v Bass* [2002] High Court of Australia 57 (12 December 2002); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] High Court of Australia 58 (12 December 2002); and *Aktiebolaget Hassle v Alphapharm Pty Ltd* [2002] High Court of Australia 59 (12 December 2002).

25 (2000) 175 ALR 1.

> that subset of cases decided by the High Court in the application of legal principle identified by the Court as being derived from the *Australian Constitution*. That definition is framed deliberately to take in a wider category of cases than those simply involving matters within the constitutional description of 'a matter arising under this Constitution or involving its interpretation'.[26]

But additionally, I have widened the net so as to include cases which involved questions of state constitutional law of which there were but three out of the total of sixty.[27]

The catchwords appearing in the headnotes of the ALRs have indicated the involvement of constitutional issues and been relied upon for classification, even when the constitutional point appears relatively minor or incidental.[28] Admittedly, the degree to which constitutional questions were central to the resolution of these cases varied. But wherever constitutional principle arose, regardless of the dominance of other legal questions, the case was included in the core group under analysis.[29]

Basic classificatory terms: unanimity, concurrence and dissent

The central purpose in compiling these statistics has been to quantify the number of unanimous judgments, concurrences and dissents delivered by the Court and its members in the last five years. Although, in company such as this, it may seem superfluous, or indeed even bizarre, to feel the need to explain these terms, some basic definitional clarity is essential if anything is to be gleaned from the figures themselves. This may be briefly done through the statement of three core rules which governed this exercise.

(a) A separate statement of opinion as to how a case should be resolved is recorded as a separate judgment (concurring or dissenting) regardless of whether reasons are given or not.

For the purposes of tallying, unanimity has only been recorded when all sitting Justices deliver the one written opinion. A decision may be unanimous through the conglomeration of separate concurrences, but unless there is a single opinion signed off on by the entire Court, there has been no unanimous judgment recorded here. This is at variance with other empirical studies which tend to regard a separate judgment which does no more than indicate agreement with the opinion of another ('I concur' is the classic example) as *de facto* co-authorship of the judgment which is agreed with. Indeed the *Harvard Law Review* has long adopted this approach.[30] I have indicated a preference elsewhere for resisting this trend where it is not useful for the particular purposes of the research[31] – as it is, for example, in Russell Smyth's recent work on

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26 Gageler, above n 1 at 195.

27 These cases were *Egan v Willis* (1998) 158 ALR 527; *Durham Holdings Pty Ltd v New South Wales* (2001) 177 ALR 436; and *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161 (which did also involve a question of Commonwealth judicial power).

28 See, for example, the catchwords prefacing *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 173 ALR 619.

29 See, for example, *DJL v Central Authority* (2000) 170 ALR 659.

30 Above n 10 at 302.

31 Above n 11.

the identification of coalition voting blocs in the High Court. [32] My position is that unanimous or joint judgments require actual co-authorship and this may be contrasted with the situation where, despite apparently total agreement (though Coper warns against assuming this)[33] a Justice speaks for himself or herself, regardless of the brevity. In this context, it seems best to recognise such concurrences for what they are: matters of substance duly acknowledged, it is clear that what has been delivered is most accurately regarded as a separate, concurring judgment.[34]

(b) A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from the final orders issued by the Court.[35]

Like the preceding rule, this is a slight, albeit important, modification of the *Harvard Law Review* method. Those rules talk not of 'final orders' but 'the majority of the Court'[36] – indicating the relative ease with which majorities have traditionally been identified in the United States Supreme Court.[37] However, identification of a majority can be a less certain exercise in respect of a court which issues opinions in seriatim. Not only does the Court as an institution not have a judgment written for it - there is the increased likelihood that there may not even be a majority of Justices in favour of one particular result. The lack of a clear majority is an accepted incident of our judicial method – the final orders will reflect varying points of consensus amongst the judgments, but not necessarily the orders favoured by any readily discernible majority of the Bench, or even those of any one Justice.

It would be a mistake to use the absence of an identifiable majority as a censure on the finding of a dissent – in such cases, the Court as an institution still states a result, albeit reached by composite. Instead, to enable the noting of dissent without the

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32 See Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting Patterns on the High Court 1935-1950', above n 5 at 333; Smyth, 'Explaining Voting Patterns on the Latham High Court 1935-50', above n 5 at 101; Smyth, 'Acclimation Effects for High Court Justices 1903-1975' (2002) 6 UWSLR 167 at 175.

33 Michael Coper, 'Concurring judgments' in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, Melbourne, 2001 at 129-30.

34 My central concern with allowing a fluidity between these two situations is that it risks obscuring the significance of when the Justices choose to speak together by writing jointly as opposed to the many simply deferring to the solution proposed by one of their number. Even apart from any symbolic importance or enhanced precedential value which may attach to a unanimous opinion, clearly a different process has taken place in the Court's determination of the matter than when an individual author is agreed with. It seems undesirable to lose that nuance unless necessary for a particular purpose. Additionally, the level of agreement between the Justices can be reflected in other ways (such as the tallying of voting alignments in Tables E(I) and (II) of this paper) which do not threaten this distinction.

35 Additionally, this rule will not apply in cases where the final orders are determined by application of a procedural rule (for example, resolution of deadlock between an even number of Justices through use of the Chief Justice's casting vote). The latter type of case should be discounted from any study attempting to quantify dissent. No case of this sort arose in the period under examination here.

36 See, for example, (1988) 102 *Harvard Law Review* 143 at 350.

37 Though there have been complaints in recent times that the Court's 'opinions sometimes exhibit a Byzantine complexity that borders on self-caricature, to such an extent that it becomes a "Herculean task" to try to determine "whether an actual majority exists behind any proposition"': McCormick, above n 22 at 98. It is not a problem of which the Supreme Court Justices are unaware: Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133 at 148-50.

assistance of a majority opinion issued 'for the Court' as a counterpoint, dissension in judicial bodies giving seriatim opinions should be classified as disagreement with the orders issued by the Court. Indeed, this is demanded by the standard definition of dissent which places more emphasis upon the relationship between a dissenting judgment and the orders made by the court as an institution than the differences in reasoning across the presiding judicial officers.[38] It is the former which is determinative of the judgment's status, even though the latter is obviously instrumental in the creation of that institutional position.

The second thing to note here is the insistence that disposition of the case in *any* manner different from the final orders results in a judgment being tallied as dissenting. This is a direct derivation from the rules applied by the *Harvard Law Review* which also sees fit to add that 'opinions concurring in part and dissenting in part are counted as dissents'.[39] I have outlined elsewhere the distorting effect which the strictness of this approach may have in particular cases by magnifying the true extent of disagreement in the Court,[40] but this is the inescapable by-product of the need to insist upon clear and consistent application of these concepts in order to produce a statistical picture. As said earlier, an awareness of that limitation and a willingness to supplement the quantitative results through a more considered analysis of the substance of the opinions are the only ways to offset the traditional deficiency of this sort of work.

(c) Opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting.

This rule really just serves as a corollary to the last one. Having denounced the notion of 'majority' as unhelpful in indicating dissent in courts which deliver judgments in seriatim and replaced in its stead the yardstick of the court's final orders, it seems worth pointing out the surprising results which may accrue. Of the seven Justices in any case, there may be fewer in favour of the final orders than are opposed (either in whole or part) - in which case the number of dissenters exceeds those who concur in the Court's result. The classic example of this is the 3:3:1 split in the decision of *Dennis Hotels Pty Ltd v Victoria*[41] wherein only Justice Menzies concurs completely with the result which the Court reached as an institution. The irony is well appreciated – his Honour's view of the matter as a whole clearly appeals to none of the other Justices yet its reflection in the Court's order leads to a classification of the other six opinions as dissenting. As Kadzielski and Kunda have said of this phenomenon, 'although this may be somewhat unrealistic, the totals [tallied] do reflect the number

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38 See John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221at 240; Coper, above n 31; Ijaz Hussain, *Dissenting and Separate Opinions at the World Court*, Martinus Nijhoff Publishers, Dordrecht, 1984 at 8; Michael Kirby, 'Law at Century's End' (2000) 1 *Macquarie Law Journal* 1 at 13; Donald E Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development*, Praeger, Connecticut, 1992 at xx; Andrew Lynch, 'Dissenting Judgments' in T Blackshield, M Coper & G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 216-8; Lynch, above n 11 at 476-7; McCormick, above n 22 at 102-3.

39 Above n 36.

40 Lynch, above n 11 at 481-3; 487-91; and 498-500.

41 (1960) 104 CLR 259.

of judges who, over the course of the year, deviated from the actual legal decisions which were produced by the courts considered as units'.[42]

However, to put this unusual, though I would stress not illogical, consequence into some kind of perspective, I should add that only one matter from the period under examination displayed this feature.[43]

IV The Statistics

The Gleeson Court's Casework – The Institutional Perspective

Table A (I) – All High Court of Australia Cases Reported for Period

	1998-99	2000	2001	2002	**TOTAL**
Unanimous	19 (20.6%)	1 (2.5%)	11 (16.6%)	6 (10.3%)	**37** **(14.4%)**
By Concurrence	26 (28.2%)	19 (47.5%)	22 (33.3%)	24 (41.3%)	**91** **(35.5%)**
Majority over dissent	47 (51.0%)	20 (50.0%)	33 (50.0%)	28 (48.2%)	**128** **(50.0%)**
TOTAL	**92** **(100%)**	**40** **(100%)**	**66** **(100%)**	**58** **(100%)**	**256** **(100%)**

Table A(I) displays the extent of the High Court's case load over the sample period and indicates how individual matters were resolved by the Bench. As indicated above, the purpose of preparing statistics on all the Court's work is to enable some point of comparison in respect of how it responds to constitutional problems. Of the total 256

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42 Mark A Kadzielski and Robert C Kunda, 'The Unmaking of Judicial Consensus in the 1930's: An Historical Analysis' (1983) 15 *University of West Los Angeles Law Review* 43 at 47.

43 *Lie v Refugee Review Tribunal* (S89 of 1999) reported at *Muin v Refugee Review Tribunal* 190 ALR 601. The two matters contained in this report were each tallied separately (see explanatory notes), though only *Lie v RRT* resulted in a majority of dissenters. The orders in that matter were arrived at by composite of the various diverse opinions (no fewer than five). Only Gaudron J's judgment completely reflects the final orders of the Court in this matter. Consequently, and in accordance with the methodological constraints requiring absolute concurrence in order to avoid dissent, there are six dissenting opinions.

matters tallied for the Court exactly half were split decisions whilst the other half were determined without dissent. A unanimous opinion was written in almost 15% of these cases. It is interesting to observe that the percentage of split decisions remains extremely steady across the yearly breakdown while the ratio between cases decided by unanimous judgment or by concurrence displays a reasonable amount of fluctuation.

I should explain why there are only four individual columns instead of five. Given the Chief Justice's arrival in late May 1998, I forecast that to isolate the figures produced for that year might present problems of too small a selection of cases. Hence, the decision to treat the remainder of 1998 and all of 1999 as one 18 month period. In retrospect, the amount of cases is not so insignificant and that step may have been unnecessary. In any case, it is for this reason that the percentages are a more telling indicator than simply the raw figures.

TABLE A (II) – All Constitutional Cases Reported for Period

	1998-99	**2000**	**2001**	**2002**	**TOTAL**
Unanimous	4 (16.0%)	0 (0.0%)	1 (10.0%)	0 (0.0%)	**5** **(8.3%)**
By Concurrence	5 (20.0%)	7 (50.0%)	4 (40.0%)	6 (54.5%)	**22** **(36.6%)**
Majority over dissent	16 (64.0%)	7 (50.0%)	5 (50.0%)	5 (45.5%)	**33** **(55.0%)**
TOTAL	25 (100%)	14 (100%)	10 (100%)	11 (100%)	**60** **(100%)**

With Table A(II) we turn to the central topic under examination – the Gleeson Court on constitutional law. At a total of 60 cases, the Court's constitutional work over the period represents close to a quarter of its entire load. Even so, in respect of individual years, I suspect the number of cases is just too few to make any particularly firm conclusions. The proportion of decisions resolved over a dissenting minority has increased, but admittedly not by as much as we might have anticipated given the lesser significance of precedent as a constraint in this context. To the extent that dissension is greater in such matters, it appears to impact more potently upon the likelihood of unanimity rather than just agreement *per se*.

Let us consider the resolution of these cases in closer detail:

TABLE B – Constitutional Cases – How Resolved[44]

Size of bench	Number of cases	How Resolved	Frequency
7	42 (70.0%)	Unanimous	1 (1.6%)
		By concurrence	17 (28.3%)
		6:1	10 (16.6%)
		5:2	8 (13.3%)
		4:3	6 (10.0%)
6	13 (21.6%)	Unanimous	1 (1.6%)
		By concurrence	3 (5.0%)
		5:1	7 (11.6%)
		4:2	2 (3.3%)
		3:3	0 (0%)
5	4 (6.6%)	Unanimous	2 (3.3%)
		By concurrence	2 (3.3%)
		4:1	0 (0.0%)
		3:2	0 (0.0%)
3	1 (1.6%)	Unanimous	1 (1.6%)
		By concurrence	0 (0.0%)
		2:1	0 (0.0%)

Unsurprisingly, the bulk of the constitutional cases were heard by a bench comprising all serving Justices, though the number of 6-member benches is not insignificant. Despite the complete absence of dissent in the remaining categories of 5 and 3-member courts, these are so few as to be relatively inconsequential.[45] So far as any

44 All percentages given in this table are of the total of constitutional cases (60).

45 For those intrigued by which constitutional matters were resolved in this way, the bench in *United Mexican States v Cabal* (2001) 183 ALR 645 was comprised of only Gleeson CJ, McHugh and Gummow JJ. The 5-member benches sat for *HA Bachrach Pty Ltd v State of Queensland* (1998) 156 ALR 563; *Rudolphy v Lightfoot* (1999) 167 ALR 105; *Austral Pacific*

clues as to dissent being evidence of the marginalisation of individual Justices, we can see a sizeable percentage of 6:1 and 5:1 decisions in the first two categories. But this is not especially notable in respect of 7-member benches which showed a propensity to split in diverse ways. It is more noticeable for the 6-member benches, over half of which saw a minority of one. It is striking that only one case over the almost 5 year period produced a joint judgment from all seven members of the Court.[46]

Table C is the final one dealing with the Court as an institution before we move to consider the actions of its individual members. The purpose here is simply to indicate the nature of the constitutional matters which have been before the Court over the sample period. The standout group is what I have grouped together as 'Federal Jurisdiction/Judicial Power/ Ch III'. I concede that this is a somewhat clumsy lump but I cannot quite conceive what other moniker could so briefly convey the essential themes of these cases which seem to return again and again to the same concepts and words in Chapter III of the Commonwealth Constitution. It will be noted that I have managed to weed out s.80 cases from the tangle that otherwise appears to sprout from this source – but even those are comparatively frequent. All together, roughly half the High Court's constitutional work since the Gleeson appointment has involved what Leslie Zines memorably described as 'the doctrinal basket weaving that Chapter III has generated'.[47] The presence of inconsistency matters in second place is rather deceptive as four of the seven cases under that topic appear under alternative topic listings – and probably derive their dominant character from elsewhere than s.109. Of the other topics which are not simply one-offs, I do not think there are any surprises. Questions of the place of the Territories, acquisition of property and the implied freedom of speech have all been prominent over the last decade. It would have been more surprising had any of these topics not been represented. But even their relative rarity when contrasted with the domination of questions of judicial power is perhaps somewhat unexpected.

Group Ltd (in liq) v Airservices Australia (2000) 173 ALR 619; and *Pasini v United Mexican States* (2001) 187 ALR 409. All bar *Rudolphy* involved a question of judicial power.

46 *Telstra Corporation Ltd v* Worthing (1999) 161 ALR 489.

47 Leslie Zines, 'The Present State of Constitutional Interpretation' in A Stone & G Williams, *The High Court at the Crossroads – Essays in Constitutional Law*, Federation Press, Sydney, 2000 at 238.

TABLE C – Subject Matter of Constitutional Cases[48]

Topic	No. of Cases	References to Cases
Federal Jurisdiction/ Judicial Power/Ch III	21	(156/563); (159/108); (161/318); (162/1); (163/270); (163/576); (163/648); (165/171); (168/616); (172/39); (172/366); (173/619); (176/219); (176/545); (176/644); (177/329); (183/645); (187/409); (188/1); (191/543); (192/217)
Inconsistency of laws – s.109	7	*(161/318)*; (161/489); (163/501); (164/520); (166/258); (169/607); *(176/545)*
Right to Trial by Jury - s.80	6	*(164/520)*; (166/159); (166/545); (175/338); (180/301); (185/111)
Territories	4	*(161/318)*; *(165/171)*; (168/86); (191/1)
s.51(xxxi)	3	(160/638); (167/392); (176/449)
s.51(xix)	2	(182/657); (193/37)
Cross-vesting of power	2	*(163/270)*; (171/155)
Implied Right to Freedom of Expression	2	(185/1); [2002] HCA 57[*]
Sovereignty	2	*(163/648)*; (184/113)
State Parliament (powers of)	2	(158/527); (189/161)
s.51(i)	1	*(167/392)*
s.51(xvii)	1	(170/111)
s.51(xxxv)	1	(172/257)
ss.53 & 55	1	(187/529)
s.64	1	(182/657)
s.92	1	*(163/501)*
s.106	1	(181/371)
s.114	1	(188/241)

[48] The references in Table C are to the *Australian Law Reports* citations by volume and page number. The reader will notice that a few of the cases appear under two topics – one is listed thrice - these are denoted by use of italics in respect of the repetition. This means that if you totalled the figures given in respect of the number of cases for each topic you would exceed the total of 60 given in Table A(II) and reach a total of 64. Whilst this is clearly not a total of 60, in actual fact there are less than 60 references in Table C. There are only 55. The situation is complicated for reasons beyond repeated references. But to deal with that problem first, if one discounts the 9 repeated references, one is left with 55. But what is the significance of this figure and where did the total of 60 in Table A(II) come from? The answer lies in the multiple tallying of three of the cases listed. Although there are only 55 case reports in constitutional law, 60 matters in total have been tallied. This practice is discussed in the explanatory notes and employed in respect of all tables but this one and Table F(III). Table C requires identification with the case report and cannot easily accommodate any finer distinction, thus in this context the multiple matters present in (163/270); (176/644) and (193/37) are suppressed and each report stands as a single unit.

[*] At the time of writing, the case of *Roberts v Bass* [2002] HCA 57 (10 December 2002) is yet to be reported in the *Australian Law Reports*.

s.118	1	(172/625)
Right of citizen to resist expulsion	1	(170/659)
State Acquisition of Property	1	(177/436)
Common Law & the Constitution	1	(168/8)
Appointment of Senator to vacancy	1	(167/105)

The Gleeson Court's Casework – The Individual Perspective

The following tables aim to indicate some of the actions of individual High Court Justices over the period. Tables D(I) and (II) may be seen as further extrapolation on what was examined in Tables A (I), A (II) and B as it notes the number of judgments written by each member of the Gleeson Court either as part of a unanimous effort with his or her colleagues, or in concurrence with or dissent from them. Table D(I) presents this information in respect of all cases, with D(II) dealing only with the constitutional subset.

TABLE D(I) – Actions of Individual Justices: All Cases

	Number of Judgments	**Participation in unanimous judgment**	**Concurrences**	**Dissents**
Gleeson CJ	220	30 (13.6%)	175 (79.5%)	15 (6.8%)
Gaudron J	195	20 (10.2%)	153 (78.4%)	22 (11.2%)
McHugh J	197	25 (12.6%)	138 (70.0%)	34 (17.2%)
Gummow J	216	29 (13.4%)	178 (82.4%)	9 (4.1%)
Kirby J	220	19 (8.6%)	127 (57.7%)	74 (33.6%)
Hayne J	211	27 (12.7%)	171 (81.0%)	13 (6.1%)
Callinan J	217	22 (10.1%)	156 (71.8%)	39 (17.9%)

A number of comments may be made about these results. An obvious one is that the rarity of unanimous judgments is borne out by the figures in respect of all Justices – they represent less than a sixth of the judgments signed off on by any member of the Court. Of course, this is far from surprising given the size of the High Court bench – Table B made it clear that unanimity is unlikely to flourish with the addition of more judges with whom to disagree. But if we move across this table we start to get indications as to the levels of consensus on the court and the impediments to greater unanimity. The rates of concurrence can be seen as existing in three bands. Chief Justice Gleeson, along with Justices Gaudron, Gummow and Hayne are all within 4% of each other in respect of their fairly high propensity to agree with the final result of the Court. Justices McHugh and Callinan are slightly below this with 70% and 71.8% respectively. Lastly, Justice Kirby is a marked outsider with only 57.7% of his judgments sharing in the Court's response – and he was also least likely to participate in a unanimous opinion.

These three bands are borne out by a look at the dissent rate. Instantly we see that Justice Kirby's level of dissent far outstrips – in fact is almost double – that of his nearest brethren, Justices McHugh and Callinan. With a dissent rate slightly in excess of a third of all his opinions, Justice Kirby seems secure in cementing a position as the High Court's Great Dissenter.[49] I am somewhat cautious about using this title, most commonly associated with Justice Oliver Wendell Holmes of the United States Supreme Court. As Shea has said the remarkable thing about Holmes was not so much 'the volume of his dissenting opinions, but the fact that many of them, over the course of time, were adopted as controlling authority by new majorities of Supreme Court Justices'. [50] If it is on this basis that the title is used, then only time will tell if it may fairly be applied to the High Court's Justice Kirby despite his formidable dissent rate. But if the simple delivery of minority opinions suffices, Justice Kirby's nearest rival would be Justice Murphy, previously perceived to be a somewhat exorbitant dissenter but who, with a rate of a mere 21.6%,[51] now seems quite a mild case. Continuing to work backwards, Justices McHugh and Callinan hover around 17% - portraying them as reasonable dissenters in their own right. It is still possible to group the remaining Justices as a third band, but admittedly it is a slacker one than encountered with respect to concurrences due to Justice Gaudron's dissent rate being almost as equidistant to that of Justice McHugh as it is to Chief Justice Gleeson. Justice Gummow's very low dissent score accords perfectly with his having the highest rate of concurrences.

Having looked through the table, the unanimity figures acquire a greater perspective. Despite any cohesiveness of outlook which we may tentatively presume amongst Chief Justice Gleeson, Justices Gaudron, Gummow and Hayne,[52] as a group of four working alongside two judges with robust dissent rates and one whose dissension is quite frankly phenomenal, it is no mystery why the relatively high rates of concurrence do not translate into more unanimity. This is not even to suggest that it is

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49 Justice Kirby has indicated that he is aware of his high rate of dissent: Kirby, above n 38.

50 Thomas F Shea, 'The Great Dissenters: Parallel Currents in Holmes and Scalia' (1997) 67 *Mississipi Law Journal* 397 at 398.

51 AR Blackshield, David Brown, Michael Coper & Richard Krever (eds), *The Judgments of Justice Lionel Murphy*, Primavera Press, Sydney, 1986 at xvii-xix.

52 This will be confirmed more directly by Tables E (I) and (II) and F (I) and (II).

the dissents themselves which are destructive of opportunities for unanimous judgments – though that must undoubtedly be true. Rather, my point is a wider one, and it is that the dissent rates indicate a climate of pronounced individuality which translates to those even more frequent occasions where there is a high degree of concurrence across all sitting judges.[53] Of course, a court which has tended to follow the English tradition of seriatim opinion delivery is a natural environment in which to find this trait. But the relatively low rate of unanimity is especially worth commenting upon when one considers that upon his arrival as Chief Justice, Gleeson implemented conferencing procedures with a view, if not to building consensus, then at least ensuring better communication and exchange of ideas amongst the judges.[54] But this hypothesis can be further, and perhaps better, explored when we move to consider the voting alignments and joint judgment authorship tables shortly.

Before turning to those, let us consider the actions of Justices in the constitutional cases:

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53 Chief Justice Gleeson has acknowledged the 'individualistic spirit of [the Court's] members': M Gleeson, *The Boyer Lectures – The Rule of Law and the Constitution*, Sydney, 2000 at 89.

54 See High Court of Australia, *Annual Report 1998-99* at 5-6. The Report states:

> In the past, there has always been informal discussion on such matters. The new series of meetings has formalized the arrangements to a greater extent and provide the occasion for the review of current thinking of the Justices concerning the cases reserved for decision. …The discussions will not always secure agreement between the Justices and this is not their purpose. Even where important differences exist, discussion can help to clarify and refine opinions and reasoning.

TABLE D(II) – Actions of Individual Justices: Constitutional Cases

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	57	5 (8.7%)	50 (87.7%)	2 (3.5%)
Gaudron J	57	4 (7.0%)	47 (82.4%)	6 (10.5%)
McHugh J	54	4 (7.4%)	39 (72.2%)	11 (20.3%)
Gummow J	59	5 (8.4%)	53 (89.8%)	1 (1.6%)
Kirby J	57	3 (5.2%)	38 (66.6%)	16 (28.0%)
Hayne J	55	4 (7.2%)	47 (85.4%)	4 (7.4%)
Callinan J	55	1 (1.8%)	39 (70.9%)	15 (27.2%)

There are several interesting features of this table, especially when compared with the behaviour of the Justices generally as evinced by Table D(I). The likelihood of participation in a unanimous opinion is reduced for all but the concurrence and dissent rates take some fairly unpredictable turns. All Justices with the exception of Justice Callinan display an increased propensity to concur in the result of constitutional cases compared to their normal response. Admittedly the increase is incredibly slight with respect to Justice McHugh and Justice Kirby is still least likely of all other members of the Court to concur. Justice Callinan's decrease in concurrence is so insubstantial as to remain steady for all intents and purposes.

What adds a dimension here is the change to the dissent rates. For one, Justice Kirby has not only reduced his rate of dissent to 28%, but he now finds himself in very close company with Justice Callinan on 27.2% - seemingly these two judges are just as likely to be in the minority in a constitutional case as each other, though of course, not necessarily in the *same* cases. Justice McHugh's rate of dissent is also up but nowhere near as dramatically as that of Justice Callinan. The remaining four judges have not remained perfectly steady either – nor have they fared similarly in a breakdown of these cases. Justice Hayne's dissent rate has increased mildly, whilst Justice Gaudron's has dipped by even less. Chief Justice Gleeson and Justice Gummow have

taken their already low dissent rates in general and effectively halved them in respect of constitutional cases.

The purpose of Tables E (I) and (II) and F (I) and (II) is to indicate the levels of agreement existing between the individual Justices. This is done in two distinct ways. Table E (I) and (II) notes the number of times each Justice voted with others to dispose of a case in the same way. As alluded to in Part III, I have not adopted the stricture employed by the *Harvard Law Review* and those investigating voting blocs of only seeing agreement where there is total concurrence in the reasons for the vote – be it through co-authorship of the judgment or a simple concurrence without more.[55] Instead, in addition to these blatant forms of agreement, I have included separate opinions which contain an individual statement of reasons but which still arrive at the same result as the court. This is not to say that I reject entirely the 'reasons are more important than the outcome' approach,[56] but upon reflection I think it has greater relevance in the context of the United States Supreme Court where concurring judgments represent a breaking away from – and thus something of a direct challenge to – the reasons contained in the 'opinion of the Court'. In courts used to seriatim judgments, it seems uncomfortably rigid to deny the existence of consensus simply because it lurks behind individual expression. Certainly, the numerous voices with which a majority may speak seem to cause little precedential angst for subsequent courts – in fact, it probably provides a welcome flexibility. Where this strict approach has been applied in respect of non-American decisions, it has been to detect voting coalitions[57] – a term I have consciously avoided using here. I appreciate that 'coalition' emphasises a higher degree of cohesion than arises when two judges independently reach the same outcome for very different reasons. Those studies seeking to identify steady alliances of justices who dominate the court's jurisprudence are perfectly right to discount individual concurrences which bear an uncertain relationship to, and share only an indeterminate commonality with, the approach of the rest of the majority. But this only further illustrates the limitations of research into coalitions – given its reliance upon such a strict premise, it will not recognise agreement in a situation where *all* judges write separately, even when they may all reach the same result.[58]

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55 'Two Justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a Justice in the body of his or her own opinion. The table does not treat two Justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement': (1996) 110 *Harvard Law Review* 135 at 369.

56 Smyth, ' "Some are More Equal than Others" – An Empirical Investigation Into the Voting Behaviour of the Mason Court', above n 4 at 197; Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935-1950', above n 4 at 333; and Smyth, 'Explaining Voting Patterns on the Latham High Court 1935-50' above n 4 at 99. Smyth expands upon this:

> If a Justice dissents from the outcome of the case it is clear that he or she is not part of the successful coalition that decided the case. However, it might be less obvious that a Justice who writes a separate judgment agreeing with the outcome, but not the reasons, of the other Justices should be treated the same. But this follows once it is accepted that the reasons are more important than the outcome.

57 Ibid. For a Canadian example, see McCormick, above n 22 at 108-9; and Peter McCormick, 'Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997' (1998) 36 *Osgoode Hall Law Journal* 339.

58 Smyth himself acknowledges this point in the context of his most recent study when he says, 'in the majority of cases during the period in which Latham was Chief Justice, all of the Justices

Tables E (I) and (II) embrace all instances of agreement between Justices as to the resolution of a matter – without requiring the individuality of the judge to be suppressed behind the single approach of a coalition. These tables sets their sights somewhat lower and record simply voting *alignments* not blocs, though of course, their inclusion is implicit as one form of agreement. The presence of a like approach to resolution of the dispute is used as an indicator of substantive agreement between the particular Justices, though obviously, the very real limitation upon Tables E (I) and (II) is that there may indeed be significant disagreement in the reasoning amongst the concurring judges. Whilst this deficiency may be avoided by the identification of clear coalitions only, that occurs, as I have just indicated, at the corresponding cost of ignoring the true width of consensus behind a collection of individual opinions. The precise extent of consensus lies somewhere between the results reached by the two methods – it is certainly more than will be revealed through a coalition study yet highly unlikely to be as much as indicated by simple concurrence in the result of the Court. The final thing to note about Tables E (I) and (II) is that all clear voting alignments are tallied regardless of success. So the agreement between a minority of judges as to the outcome of a case is tallied alongside that of the majority.

Tables F (I) and (II) redress the breadth of Tables E (I) and (II) by only recording participation in joint judgments – and, in accordance with the comments in Part III above, this does *not* include mere statements of concurrence by other judges. The purpose of these tables, therefore, is to point to the most explicit form of agreement there is – where two or more Justices share the one opinion so completely that it belongs to them in partnership.

In all four tables, the raw figures are the number of times a Justice voted or co-authored with each of his or her colleagues. This is then followed by an indication of the frequency of each particular alignment or joint-judgment as a percentage out of all the cases which that individual Justice determined. For this reason these tables should be read across rather than vertically in order that the percentages are consistent.

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delivered separate judgments; therefore this study focuses on a by-product of High Court practice': 'Explaining Voting Patterns on the Latham High Court 1935-50' above n 4 at 108.

TABLE E(I) –Voting Alignments: All Cases

	Gleeson CJ	**Gaudron J**	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**
Gleeson CJ	____	131 (59.5%)	138 (62.7%)	172 (78.1%)	116 (52.7%)	170 (77.2%)	148 (67.2%)
Gaudron J	131 (67.1%)	____	109 (55.8%)	145 (74.3%)	110 (56.4%)	139 (71.2%)	121 (62.0%)
McHugh J	138 (70.0%)	109 (55.3%)	____	129 (65.4%)	115 (58.3%)	127 (64.4%)	123 (62.4%)
Gummow J	172 (79.6%)	145 (67.1%)	129 (59.7%)	____	116 (53.7%)	167 (77.3%)	144 (66.6%)
Kirby J	116 (52.7%)	110 (50.0%)	115 (52.2%)	116 (52.7%)	____	113 (51.3%)	105 (47.7%)
Hayne J	170 (80.5%)	139 (65.8%)	127 (60.1%)	167 (79.1%)	113 (53.5%)	____	137 (64.9%)
Callinan J	148 (68.2%)	121 (55.7%)	123 (56.6%)	144 (66.3%)	105 (49.7%)	137 (63.1%)	____

TABLE E(II) –Voting Alignments: Constitutional Cases

	Gleeson CJ	**Gaudron J**	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**
Gleeson CJ	____	46 (80.7%)	40 (70.1%)	53 (92.9%)	36 (63.1%)	49 (85.9%)	38 (66.6%)
Gaudron J	46 (80.7%)	____	37 (64.9%)	51 (89.4%)	38 (66.6%)	47 (82.4%)	36 (63.1%)
McHugh J	40 (74.0%)	37 (68.5%)	____	41 (75.9%)	33 (61.1%)	38 (70.3%)	36 (66.6%)
Gummow J	53 (89.8%)	51 (86.4%)	41 (69.4%)	____	39 (66.1%)	51 (86.4%)	38 (64.4%)
Kirby J	36 (63.1%)	38 (66.6%)	33 (57.8%)	39 (68.4%)	____	34 (59.6%)	27 (47.3%)
Hayne J	49 (89.0%)	47 (85.4%)	38 (69.0%)	51 (92.7)	34 (61.8%)	____	36 (65.4%)
Callinan J	38 (69.0%)	36 (65.4%)	36 (65.4%)	38 (69.0%)	27 (49.0%)	36 (65.4%)	____

The figures presented in Tables E(I) and (II) go some way to indicating the varying levels of influence of members of the Court. For example, in Table E(I) we see that all Justices with the exception of Justice McHugh, voted least with Justice Kirby than any of their other colleagues. A glance along Justice Kirby's row shows that he only sided with any of his fellow judges on approximately half of the possible occasions he had to do so. At the other end of the spectrum, all members of the Court, barring Justice Gaudron, voted in accord with Chief Justice Gleeson more often than anyone else. However, it is worth noting that Justice Gummow is not far behind with Chief Justice Gleeson and Justice Gaudron voting most similarly to him, and Justice Kirby being just as prepared to favour a resolution in conjunction with Justice Gummow as he is with the Chief Justice (as well as Justice McHugh). Justice Hayne is also noticeably dominant so far as attracting support from across the Court for his resolution of matters. Of course, these results are not so surprising when one recalls the high level of concurrence and very low rates of dissent of Chief Justice Gleeson and Justices Gummow and Hayne demonstrated by Table D(I).

Turning to Table E(II), the picture in respect of constitutional cases is interestingly altered. Instantly, we can see that proportionally the frequency of alignment has increased across the board indicating perhaps less creativity by the Justices in fashioning individual solutions to constitutional problems. Some of the shifts as against what has just been observed in respect of the total caseload are striking. The most obvious is the clear centrality of Justice Gummow as a barometer to the entire court in constitutional cases. All six of his colleagues voted with him more often than any other Justice (though Justice Callinan was just as likely to agree with Chief Justice Gleeson). Both the Chief Justice and Justice Hayne voted with Justice Gummow in close to 93% of the constitutional cases on which they sat. The ascendancy of Justice Gummow in constitutional matters may convey the appearance that the Chief Justice has less influence in this area than he does overall, but he has not been dramatically usurped. He remained a very likely voting partner for all Justices. The same is true of Justice Hayne – and additionally in this context, Justice Gaudron also. With the exception of Justice Hayne, all members of the Court were noticeably more likely to find themselves aligned with Justice Gaudron over other Justices in constitutional cases than they were generally. The remaining three Justices still have the lowest alignment scores. But while, in this subset of cases, Justice Kirby at least had marginally more instances of agreement with Justices Gaudron and Gummow compared to the other alignments of those judges, Justice Callinan's position as a preferred voting partner relative to his other colleagues appeared to slip with respect to all members.

Turning now to Tables F (I) and (II), we can place these early perceptions about agreement amongst the Justices to a more rigorous test based upon the frequency with which they join in authorship of an opinion. Does that particularly explicit indicia of consensus bear out the level of agreement indicated by the patterns of similar voting we have just encountered?

TABLE F(I) –Joint Judgment Authorship: All Cases

	Gleeson CJ	**Gaudron J**	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**
Gleeson CJ	____	68 (30.9%)	70 (31.8%)	102 (46.30%)	33 (15.0%)	99 (45.0%)	53 (24.0%)
Gaudron J	68 (34.8%)	____	53 (27.1%)	80 (41.0%)	26 (13.3%)	90 (46.1%)	46 (23.5%)
McHugh J	70 (35.5%)	53 (26.9%)	____	72 (36.5%)	20 (10.1%)	67 (34.0%)	38 (19.2%)
Gummow J	102 (47.2%)	80 (37.0%)	72 (33.3%)	____	32 (14.8%)	121 (56.0%)	60 (27.7%)
Kirby J	33 (15.0%)	26 (11.8%)	20 (9.0%)	32 (14.5%)	____	32 (14.5%)	20 (9.0%)
Hayne J	99 (46.9%)	90 (42.6%)	67 (31.7%)	121 (57.3%)	32 (15.1%)	____	42 (19.9%)
Callinan J	53 (24.4%)	46 (21.1%)	38 (17.5%)	60 (27.6%)	20 (9.2%)	42 (19.3%)	____

TABLE F(II) –Joint Judgment Authorship: Constitutional Cases

	Gleeson CJ	**Gaudron J**	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**
Gleeson CJ	____	22 (38.5%)	23 (40.3%)	29 (50.8%)	5 (8.7%)	24 (42.1%)	12 (21.0%)
Gaudron J	22 (38.5%)	____	16 (28.0%)	31 (54.3%)	4 (7.0%)	25 (43.8%)	12 (21.0%)
McHugh J	23 (42.5%)	16 (29.6%)	____	21 (38.8%)	2 (3.7%)	17 (31.4%)	12 (22.2%)
Gummow J	29 (49.1%)	31 (52.5%)	21 (35.5%)	____	3 (5.0%)	37 (62.7%)	13 (22.0%)
Kirby J	5 (8.7%)	4 (7.0%)	2 (3.5%)	3 (5.2%)	____	4 (7.0%)	1 (1.7%)
Hayne J	24 (43.6%)	25 (45.4%)	17 (30.9%)	37 (67.2%)	4 (7.2%)	____	11 (20.0%)
Callinan J	12 (21.8%)	12 (21.8%)	12 (21.8%)	13 (23.6%)	1 (1.8%)	11 (20.0%)	____

If anything, these tables present a clearer picture of the position which the Justices often find themselves in vis-à-vis each other. In respect of the entirety of cases across the period as recorded in Table F(I), Chief Justice Gleeson and Justices Gummow and Hayne have a marked tendency towards co-authorship with each other. In particular, the two Justices were parties to joint-judgments with each other in over half the cases in which they presided. Additionally, all three were the favoured writing partners of the other members of the court. Barring Justice Gaudron being Justice Callinan's third most frequent co-author over Justice Hayne, his Honour and Justices Gaudron, McHugh and Kirby all joined the Chief Justice and Justices Gummow and Hayne in writing more often than they teamed with each other. Aside from this trio, the most collaborative Justice tended to be Justice Gaudron, followed by Justice McHugh. And in a table with quite clearly discernible trends, none was more apparent than that Justices Kirby and Callinan are the determined individualists of the Court. The former teamed the least often with any of his colleagues – and by a sizeable margin. Justice Kirby joined with the Chief Justice in only 15% of the cases on which he sat and even less with everyone else. Justice Callinan had a higher rate of co-authorship but was a definite runner-up to Justice Kirby – his Honour was the next least likely partner in a judgment for all those on the bench.

Much of this is simply translated to the specific setting of constitutional law cases found in Table F(II) but there are a few observations worth making. While the trio of Chief Justice Gleeson and Justices Gummow and Hayne certainly retains its centrality, Justice Gaudron appears to acquire a greater share of this. Admittedly, this is not to the extent of her Honour having co-authored opinions the most often with any other Justice, but she is the next most collaborative for Justices Gummow, Kirby, Hayne and Callinan (in respect of joining with the latter, she is tied with the Chief Justice and Justice McHugh). Between this table and the last, there is almost no change to the tail end at all – a very clear growth in individual expression as one moves from Justice McHugh, to Justice Callinan and ultimately to Justice Kirby. The results in respect of Justice Kirby are strikingly low and might be seen to reflect his Honour's methodological isolation from the rest of the Court in constitutional cases. Statements of constitutional principle such as that offered by Justice Kirby in *Newcrest Mining (WA) Ltd v Commonwealth*[59] and his marked intolerance for originalist approaches,[60] has set his Honour on a course where the opportunity for joint-judgment must be severely constrained while his brethren remain unpersuaded by his approach. The same might be expected to a lesser extent in respect of Justice McHugh who has also been fairly explicit about adhering to a particular methodology,[61] though the results in respect of his Honour are not so very pronounced that we can readily make such an inference. This is probably also largely due to the greater acceptance which Justice McHugh's approach would appear to have found amongst his colleagues.

Table F(III) aims to give some dimension to the figures just provided in F(II) by listing the joint-judgment authors and indicating by case reference the occasions on

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59 (1997) 190 CLR 513 at 657-61. See also Kirby J's dissent in *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

60 See particularly, Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1.

61 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 1 at 549-553; and *Eastman v The Queen* (2000) 203 CLR 1 at 44-51.

which they partnered. This is not, as I have already made clear, a study into voting blocs which successfully determine the outcome of a case. Table F(III) is intended merely as a record of the various occurrences of co-authorship:

TABLE F(III) – Joint Judgment Authorship: Constitutional Cases[62]

No. of Js	Justices	Case Reference
7	Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan JJ	(161/489)
6	Gleeson CJ, Gaudron, McHugh, Gummow, Kirby & Hayne JJ	(169/607);
	Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ	(159/109); (163/576); (170/111); (171/155); (172/366); (181/371); (191/543)
5	Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ	(167/105); (170/659); (172/625)
	Gleeson CJ, Gaudron, Gummow, Kirby & Hayne JJ	(156/563)
	Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ	(192/217)
4	Gleeson CJ, Gaudron, McHugh, & Gummow JJ	(187/409)
	Gleeson CJ, Gaudron, McHugh, & Hayne JJ	(188/241)
	Gleeson CJ, Gaudron, Gummow & Hayne JJ	(184/113); (191/1)
	Gleeson CJ, Gaudron, Gummow & Callinan JJ	(168/86)
	Gleeson CJ, Gaudron, Kirby & Hayne JJ	(166/259)
	Gleeson CJ, McHugh, Gummow & Hayne JJ	(176/644)
	Gaudron, McHugh, Gummow & Hayne JJ	(177/436)
	Gaudron, McHugh, Gummow & Callinan JJ	(164/520)
3	Gleeson CJ, Gaudron & Gummow JJ	(177/329)
	Gleeson CJ, McHugh, & Gummow JJ	(163/501); (183/645)
	Gleeson CJ, McHugh, & Callinan JJ	(165/171)
	Gleeson CJ, Gummow & Hayne JJ	(163/648); (173/619); (175/339); (185/111)
	Gaudron, McHugh & Gummow JJ	(2002) HCA 57*

62 Because all joint writing, whether for the majority or minority, has been recorded in the foregoing tables, two of the case references do appear twice. These have been italicised. Additionally, for the same reasons present in respect of Table C, a simple tallying of the cases here is not going to produce parity with the raw figures used in other tables in this paper: see n 48.

	Gaudron, Gummow & Callinan JJ	(166/159)
	Gaudron, Gummow & Hayne JJ	(158/527); (168/8); (180/301); (185/233); (189/161)
2	Gleeson CJ & Gaudron J	(160/638)
	Gleeson CJ & Gummow J	(161/318); (166/545); (188/1)
	Gleeson CJ & Kirby J	(167/392)
	Gaudron & Gummow JJ	(176/219); (176/449)
	Gaudron & Hayne JJ	(187/529)
	McHugh & Callinan JJ	(161/318)
	Gummow & Hayne JJ	(162/1); (163/270); *(165/171)*; (172/257); (182/657); (185/1)
	Hayne & Callinan JJ	*(177/329)*

V Conclusion

With the recent change in the composition of the Gleeson Court occurring close to the culmination of its first five years, the time was ripe for some basic empirical approach to be taken to its work in order to try to discern patterns of behaviour – both institutionally and from the Justices as individuals. Of course, political scientists and those legal academics taken with the jurimetrics movement would be in a position to subject this material to a range of sophisticated empirical techniques with a view to teasing out conclusions of a more specific nature. The methods adopted here have been comparatively straightforward and devised simply to capture a sense of the Court through examining not, as is more commonly the case, how it explains itself, but rather how it *acts*.

We may consider the statistics compiled and find our existing impressions confirmed. Additionally, we may be mildly surprised by the frequency of various happenings where we had not previously perceived any trend. Doubtless, different observers amongst you may be able to draw different things from the material I have presented today. As such, I desist from the temptation to read too much into the figures. However, two things evidently stand out in respect of what statistics can tell us about the Gleeson Court on constitutional law. The first is that the Court seems to have had a solid core led by Justice Gummow and comprising, in rough order of influence, Chief Justice Gleeson, Justices Hayne and Gaudron. The replacement of the latter with Justice Heydon would not seem likely to result in a dramatic weakening of the hold which that portion of the Court has in constitutional matters. Whilst one should always be wary of making predictions, it seems fair to suggest that Justice Heydon has given indications that he is likely to find more common ground with the approach of the dominant trio than he is with those less obviously in the centre of the court – Justices McHugh, Kirby and Callinan.

The second observation is that although Justice Callinan appears almost as likely to dissent in constitutional matters, the indication from the tables of voting alignments and joint judgment authorship is that Justice Kirby is really running his own race. This

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* At the time of writing, the case of *Roberts v Bass* [2002] HCA 57 (10 December 2002) is yet to be reported in the *Australian Law Reports*.

tends to obscure the position of Justices Callinan and McHugh both of whom are removed from the centre of the court to an not insignificant degree in their own right. It also invites speculation about the competing fealties of individualism and institutionalism. Justice Kirby's position on the Court is one which clearly displays an overriding commitment to the former over the latter. There is a wide body of literature which attempts to weigh the benefits and harm which pronounced disagreement may have upon an institution.[63] It is obviously outside of the scope of this paper to explore those arguments now, but clearly the prevalence of dissent in the present Court ensures that is a debate to which me must stay attuned.

[63] For a recent sample, see John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221; Bader Ginsburg, above n 37; Robert G Flanders Jr, 'The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable' (1999) 4 *Roger Williams University Law Review* 401; Claire L'Heureux-Dubé, 'The Dissenting Opinion: Voices of the Future?' (2000) 38 *Osgoode Hall Law Journal* 495; and Robert K Little, 'Reading Justice Brennan: Is There a "Right" to Dissent?' (1999) 50 *Hastings Law Journal* 683; Kevin M Stack, 'The Practice of Dissent in the Supreme Court' (1996) 105 *Yale Law Journal* 2235. Additionally, Justice Brennan's highly influential 1986 contribution, (William J Brennan, 'In Defense of Dissents' (1986) 37 *Hastings Law Journal* 427), was reprinted in (1999) 50 *Hastings Law Journal* 671.

APPENDIX - EXPLANATORY NOTES

(Throughout these notes italics indicate constitutional cases)

The purpose of the notes contained in this appendix is to identify when and how discretion has been exercised by the researcher in compiling the statistical tables discussed throughout this paper. As the *Harvard Law Review* editors stated, when explaining their own methodology, 'the nature of the errors likely to be committed in constructing the tables should be indicated so that the reader might assess for himself the accuracy and value of the information conveyed'.[64]

Case reports involving a number of matters – how tallied

Reports containing a number of matters but tallied singly due to a common substratum of facts which leads to little or no distinction being drawn between the matters in the judgments:[65]
(161/399); *(161/489)*; (162/577); *(163/501)*; *(164/520)*; *(167/392)*; (167/575); *(168/8)*; (169/385); (169/677); (171/613); *(172/257)*; (173/665); *(175/338)*; *(176/545)*; *(177/329)*;[66] (179/416); (179/625); (183/404); *(184/113)*; *(191/1)*; (192/129); (193/1)

64 Above, n 8.

65 I have argued elsewhere that multiple tallying of case reports containing more than one matter may well be justified where the matters are distinct and this is recapped below, n 67. But conversely, multiple tallying should be dispensed with where it is not absolutely necessary to convey the true extent of consensus and disagreement amongst the bench. Such cases are those where there is so little difference between the two or more separate matters in the report that the Court draws little distinction on the basis of their separate facts, and even parties. In short, the one answer will 'do' for all matters. The obvious example of such a case is where a number of States challenge the same Commonwealth law, but private law cases can be similarly treated where the Court makes little or no distinction between the matters within its written opinions.

66 There are six matters in *(177/329)* (*ASIC v Edensor Nominees Pty Ltd* (2001)) which are essentially the fallout from *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 (see below, n 70). M20 is the central matter and the common fact substratum was used to justify single tallying.

Reports tallied multiple times due to distinctions being drawn between the matters in the judgments and orders made:[67]	
Tallied as two	*Tallied as four*
(162/1)[68]; *(176/644)*; (178/421);[69] (179/349); (180/1);[70] (180/145); (180/402); (190/601); (191/449); *(193/37)*	*(163/270)*[71]

67 The purpose behind multiple tallying in such circumstances – and the competing arguments – are considered at length in Lynch, above n 11at 500-2. By tallying some case reports on the number of separate matters they contain, the risk of inconsistency across subsequent statistics is alleviated. For an example of the kind of thing I am trying to avoid, see (1961) 75 *Harvard Law Review* 40 at 92: 'Some distortion is introduced into the Table [showing voting alignments between Justices] by the fact that when the same Justices join in more than one opinion applying to a single decision, the *Review* notes two agreements but only one decision; thus it is theoretically possible for two Justices to agree more times than the number of cases in which they participate together'. Separate tallying also allows disagreement amongst the bench to be isolated to one specific matter, rather than having it magnified in instances where there is actually a great deal of consensus. An example of this is the report found at (190/601) which if tallied singly would have required all seven members of the Court to be noted as dissenting despite the presence of a clear majority in respect of one of the two matters contained in that report (the peculiarities of (190/601) and how it was treated in compiling these statistics are noted below under 'Decisions to tally dissents warranting explanation').
Of course, there are drawbacks to such an approach as well. This arises through distortion of the true number of opinions written – with particular effects upon the statistics for joint judgment authorship (as an example, see n 70 below with respect to tallying of the judgments in *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 - the case in this sample with the most expansive effect in this regard). But while this inflates raw data, the distorting effect is minimised through greater reliance upon the percentage figures. And once again, identifying which cases have involved discretion on the part of the researcher is vital in the interests of a transparent methodology. The choice to multiple tally should be noted and justified – hence the inclusion of this table here. The sentiment from the *Harvard Law Review* accompanying n 64 is the guiding principle here.

68 *Abebe v Commonwealth* (1999) 162 ALR 1 is tallied twice for the purposes of compiling statistics on the total number of cases, but only once with respect to constitutional cases. This is because of the two matters dealt with by the judgments, (a) the jurisdiction of the Federal Court and the meaning of 'matter'; and (b) Abebe's application for prerogative relief under s.75(v), only the former involves a constitutional question.

69 There are actually four matters in (178/421) – two appeals by the Minister for Immigration and Multicultural Affairs and two applications for prerogative relief under s.75(v) of the Constitution by different visa applicants. (178/421) is tallied twice. The appeal and application concerning each individual visa applicant have enough common ground to be treated together (It should be noted that, despite immediate appearances, this is *not* equivalent to what is occurring in (162/1) which, although only involving one visa applicant was nevertheless tallied twice due to the considerations raised by the Minister's appeal being quite distinct from those arising through the applicant's case for prerogative relief under s.75(v)). However, as distinctions are drawn between the different facts applying to each applicant in (178/421), their respective litigation cannot simply be lumped together as a whole and is best treated as two separate matters.

70 Exactly the same situation as in (178/421).

71 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 is tallied as four cases – both for the statistics on the constitutional subset and in general. Although the four matters dealt with in the report have significant features of commonality, there are enough distinctions to lead to members of the court dealing with them separately in their judgments. Additionally, three judges (McHugh, Kirby & Callinan JJ) arrive at different conclusions in respect of some of the matters and not others. Whilst it was judged that multiple tallying was preferable in this case, it must also be noted that this has a potentially distorting effect. This is particularly so in two respects: first, on the statistics for constitutional cases specifically where the sample size is smaller; and second, on the incidents of authorship of joint judgments between Gummow and Hayne JJ.

Decisions to tally dissents warranting explanation

(175/338) - Gaudron J would grant special leave but dismiss the appeal. The majority order is to dismiss the application for leave. Her Honour's reason for the different order (which, admittedly, gives the applicant the same practical result) is based on her opinion on the operation of provisions of the *Customs Act* rather than the central constitutional point. However, this point of difference from the majority leads to her variation of the resolution of the matter and tallying as a total dissent.

(176/219) - Callinan J dissents as well as McHugh J despite the headnote accompanying the report. His Honour does not completely agree with the final orders as he would not grant certiorari. As only a partial concurrence in the final orders, this is tallied as a dissent.

(185/335) - Callinan J differs from the Court's orders by requiring interest to be paid. The majority leaves that to the Federal Court to determine. As only a partial concurrence in the final orders, this is tallied as a dissent.

(189/161) - Callinan J only allows the demurrers in part and is therefore tallied as dissenting.

(190/313) - McHugh and Callinan JJ are tallied as concurring rather than dissenting. The form in which they answer the questions asked of the Court is slightly different from the majority (it is expressed with less caution) – but essentially the same responses are given.

(190/601) - The two matters contained in this report require the Justices to answer a number of discrete questions in respect of each. For Matter S36 there is a clear 4:3 majority in favour of one set of answers. This is not the case in Matter S89, the result of which is arrived at by composite of the various diverse opinions (no fewer than five). Only Gaudron J's judgment completely reflects the final orders of the Court in this matter. Consequently, and in accordance with the methodological constraints requiring absolute concurrence in order to avoid dissent, there are six dissenting opinions in respect of Matter S89.[72] It should be noted that, as recorded above, these matters were tallied separately.

(192/181) - Kirby J agrees with the majority that the conviction should be quashed but he does not order a new trial. As only a partial concurrence in the final orders, this is tallied as a dissent.

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[72] The apparent illogicality, yet necessity of arriving at, this result is considered in discussing rule (c) in Part III of this paper. See also Lynch, above n 11at 492-8 which discusses the problems of many dissenters and institutional coherence across multiple issues.

(192/217) - Kirby J agrees with the majority that the appeal should be dismissed but he does not concur on the matter of costs. As only a partial concurrence in the final orders, this is tallied as a dissent.