

DOES THE HIGH COURT DISAGREE MORE OFTEN IN CONSTITUTIONAL CASES? A STATISTICAL STUDY OF JUDGMENT DELIVERY 1981-2003

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I INTRODUCTION

The central purpose of this article is to test the assumption that constitutional cases generally produce a heightened level of disagreement amongst the members of the High Court. In addition to extra-judicial statements indicating that is so, there are a number of theoretical and pragmatic reasons why we would expect greater individuality in the delivery of constitutional judgments than might be observed in other areas. However, there has not been an empirical study of the Court's behaviour in these cases which is of sufficient longitudinal scope so as to verify this suspicion, no matter how compelling the arguments or anecdotal impressions.

This study attempts to overcome that deficiency. In order to do so, it adopts the following structure. In Part II, the hypothesis under examination will be stated with consideration of the reasons currently given for its acceptance. In Part III, the methodology employed to test the hypothesis will be set out. In Part IV, results of the study will be presented with accompanying analysis. In the concluding Part, the findings of the study will be summed up and possible directions for future research will be suggested.

II HYPOTHESIS

Sir Anthony Mason has stated that the role of the High Court in the interpretation of constitutional provisions is one of two issues (the other being the hardly unrelated matter of judicial law-making) 'that have generated strongly expressed conflicts of opinion' amongst its members.¹ There are several reasons why few should be surprised by that indication that constitutional case law demonstrates higher than

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¹ Sir Anthony Mason, 'Personal Relations: A Personal Reflection' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 531, 532.

normal levels of disagreement. Essentially these all stem from the paramountcy of the *Constitution* itself.

It has been axiomatic for much of the High Court's life that, aside from any general limitations arising in the context of a final court,² the doctrine of *stare decisis* has a particularly weakened operation in the field of constitutional law. In *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia*, Isaacs J insisted that the Justices'

sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation.³

Members of the Court since Chief Justice Isaacs have similarly expressed the opinion that ultimately their interpretation of the *Constitution* is to be conducted free from the restraint of any contrary judicial authority.⁴ While there has certainly been opposition from others on that question,⁵ it is clear that the objection is a matter of degree rather than principle. Rather than simply discarding the values which precedent is designed to serve, these are to be balanced against the desirability of overruling an earlier decision. This has led to the espousal of various standards to indicate that a decision will be vulnerable to overruling if it 'involves a question of "vital constitutional importance" and is "manifestly wrong"'.⁶ But these semantic formulations offer little clarity as to the extent to which Justices are actually constrained by a precedent.⁷

² The High Court has never followed the practice of considering itself bound by its own decisions: *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576, 582; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554.

³ (1913) 17 CLR 261, 278-9.

⁴ *Damjanovic and Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ); *Buck v Bavone* (1976) 135 CLR 110, 137 (Murphy J); *Queensland v Commonwealth (The Second Territory Senators Case)* (1977) 139 CLR 585, 594 (Barwick CJ), 630-31 (Aickin J); *Re Nolan; Ex parte Young* (1990) 172 CLR 460, 492-3 (Deane J); *Stevens v Head* (1992) 176 CLR 433, 461-2 (Deane J), 464-5 (Gaudron J); *Re Tyler; Ex parte Foley* (1993) 181 CLR 18, 35 (Gaudron J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 331 (Callinan J).

⁵ *Queensland v Commonwealth (The Second Territory Senators Case)* (1977) 139 CLR 585, 599 (Gibbs CJ), 603-4 (Stephen J); *Re Tyler; Ex parte Foley* (1993) 181 CLR 18, 39-40 (McHugh J).

⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554.

⁷ Boeddu and Haigh suggest that 'while no exact guidelines can be formulated, it behoves the Court to be direct and avoid reasoning by the use of easy, but unhelpful, terminology': Gian Boeddu and Richard Haigh, 'Terms of Convenience: Explaining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167, 194. For other significant discussions of this issue, see J W Harris, 'Overruling Constitutional Interpretations' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions – Theories, Principles and Institutions* (1996) 231; Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199; Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111; Henry Monaghan, 'Stare Decisis and Constitutional Adjudication' (1988) 88 *Columbia Law Review* 723; and R C Springall, 'Stare Decisis as Applied by the High Court to its Previous Decisions' (1978) 9 *Federal Law Review* 483.

In addition to the status of constitutional law as commanding a special fealty from those charged with its elucidation is the more pragmatic concern that, unlike other areas of the law where the legislature may take steps to reverse the Court's holding, this is not so easily accomplished in response to constitutional decisions.⁸ The requirement of a referendum to alter the *Commonwealth Constitution*⁹ and the consequential practical considerations of such a course mean that change is neither lightly undertaken nor likely to be successful.¹⁰ The effect of this upon the attitude of the High Court has been, perhaps surprisingly, further to promote the diminished role of *stare decisis*. The unanimous judgment in *Lange v Australian Broadcasting Corporation* was succinct:

Errors in constitutional interpretation are not remediable by the legislature, and the Court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes.¹¹

The logic which says that the difficulty of constitutional amendment justifies weaker regard for past judicial interpretations is not entirely satisfactory. It could well be argued that the constraints implicit in the adoption of a rigid constitutional text and the exercise of judicial review by the superior court are actually more obviously complemented by a stringent approach to constitutional precedent.¹² Nevertheless, the High Court has pointedly not taken that stance and sees constitutional questions as ones upon which its members should not be overly deferential to the opinions of their predecessors.

One must realise that this more flexible attitude towards past authority is important not just in the context of those choices, but also as an indication of the way in which members of the Court respond to any other form of pressure towards conformity. Obviously the doctrine of precedent is the law's foremost tool for achieving consensus and certainty but it is definitely not the only means by which we should seek to understand the occurrence of agreement or a failure to secure it. Apart from anything else there are, of course, legal questions upon which no direct precedent provides guidance. On those occasions, one should probably anticipate a splintering of judicial opinion regardless of the area of law. Indeed, to some extent, disagreement is central to the judicial process of any multi-member court of last resort, but I would suggest that, in light of the pervasive rhetoric of individuality referred to above, this must be even more likely in respect of constitutional questions.

⁸ There are, as always, exceptions. The successful insertion of section 51(xxiiiA) into the *Constitution* by the 1946 referendum result was a powerful response to the High Court's finding the *Pharmaceutical Benefits Act 1944* (Cth) invalid in *A-G (Vic) v Ex rel Dale v Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237.

⁹ *Constitution*, s 128.

¹⁰ The cost of conducting constitutional referenda necessarily limits their frequency. This is compounded by the low percentage of successful referendum results, with only 8 in 44 proposals receiving the approval of the electorate.

¹¹ (1997) 189 CLR 520, 554. In its willingness to overrule past decisions, similar significance is attached by the United States Supreme Court to the limited ability to amend the constitutional document: *Burnet v Coronado Oil & Gas Co*, 285 US 393, 407-8 (1932) (Brandeis J); *Thomas v Washington Gas Light Co*, 448 US 261, 272-3 (1980) (Stevens J).

¹² See Larry Alexander, 'Constrained by Precedent' (1989) 63 *Southern California Law Review* 1, 57-8; and Frank Easterbrook, 'Stability and Reliability in Judicial Decisions' (1988) 73 *Cornell Law Review* 422, 430-1.

Further, the specific studies conducted so far on the behaviour of the Gleeson Court offer a measure of empirical support for the view that constitutional cases produce a higher than average level of express disagreement.¹³ The findings in those studies about the rates of unanimous judgment and delivery of concurring opinions are slightly more ambiguous due to the limited length of the period under study, but there are strong indications that these features of the Court's work are also varied in the constitutional context.

Thus, there are many signs that as gatekeeper of the *Constitution* the High Court relaxes the law's normal propensity for conformity — even more so than is inherent just by virtue of its status as a final court of last resort. On repeated occasions, the Court has acknowledged the special nature of constitutional cases and the increased scope for judicial choice which accrues as a result. It has been understandable to assume that, in light also of the limited empirical studies conducted to date, that emphasis produces a corresponding diminution of judicial cohesiveness and increased likelihood of dissent.¹⁴ This assumption is the hypothesis which the following study seeks to prove empirically.

III METHODOLOGY

This paper seeks to determine the correctness of the hypothesis through reporting empirical findings on the prevalence of dissent at both an institutional and individual level over the course of a substantial timeframe in the history of the High Court of Australia. The production of specific figures for each Justice is seen as an essential corollary to understanding any differences in the institutional levels of disagreement between the Court's constitutional decisions when compared with its resolution of cases overall.

Disagreement is found, however, in judgments beside those in which a minority arrives at a different resolution of the case before the court from that of the majority. While the American willingness to equate concurrences and dissents together under the banner of 'separate judgments' for many purposes reflects the traditional practice of the United States Supreme Court of delivering a majority opinion 'for the Court' from which the remaining Justices may distance themselves by varying degrees,¹⁵ the Australian approach is different. We tend to think of concurrences as indicative of

¹³ Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26 *University of New South Wales Law Journal* 32; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Journal* 88; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 *University of New South Wales Law Journal* 14.

¹⁴ Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724, 759–62.

¹⁵ See Justice Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133, 136; Robert 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. Wald's claim that 'most judges dissent more than concur' (Patricia Wald, 'The Rhetoric of Results and the Results of Rhetoric: Judicial Writings' (1995) 62 *University of Chicago Law Review* 1371, 1413) reflects how very different the notion of concurrence is due to the United States Supreme Court's practice of delivering a core majority opinion.

consensus — hardly unreasonable given their name. But it is obviously the case that differences exist between those opinions. A case decided through separate concurring judgments clearly does not demonstrate the same level of agreement of one resolved through a single unanimous opinion. The tables below quantify the delivery of concurrences and are based on the understanding that these are, whilst distinct from dissents, another indicator of disagreement generally amongst the members of the Court.

It should be stated at the outset that the paper aims to test the hypothesis simply through reportage and description of the way in which the Court has decided matters over the differing opinions of its individual members. This piece does not attempt to make other than the most general findings about the factors which give rise to fluctuations in dissent rates over the course of the period under examination. Not only would such an ambition be beyond the scope of this paper — both thematically and for reasons of space — but others have already attempted such an exercise in relation to general findings of the High Court's history of dissent.¹⁶ Instead, the paper focuses upon the distinctive and as yet untouched question of how the levels of disagreement in the subset of constitutional decisions relate to those across the Court's entire case load in the same period.

A Data source

The statistics presented and discussed here span from 1981 to 2003 and commence with the appointment of Sir Harry Gibbs to the position of Chief Justice and conclude with the retirement of Justice Mary Gaudron from the Court. Thus, the eras of four Chief Justices are included — the entirety of the tenures of Chief Justices Gibbs, Mason and Brennan and roughly the first five years of the Gleeson Court.

The statistics were gathered using cases reported in volumes 148 to 216 (Part 2) of the *Commonwealth Law Reports* ('CLR's'). Excluded were any decisions heard before the retirement of Chief Justice Barwick and his replacement by Chief Justice Gibbs¹⁷ and any heard after the departure of Justice Gaudron from the Gleeson Court in February 2003.¹⁸

The use of the High Court's authorised report series is consistent with the conduct of empirical research by others.¹⁹ Despite the fact that the CLR's do not contain each

¹⁶ See Russell Smyth, 'Explaining Historical Dissent Rates in the High Court of Australia' (2003) 41 *Commonwealth & Comparative Politics* 83; Russell Smyth, 'What Explains Variations in Dissent Rates? Time Series Evidence from the High Court' (2004) 26 *Sydney Law Review* 221; Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255.

¹⁷ Three such matters — two being constitutional in character — were included in the reports found in volume 148. Additionally, several cases outside the timeframe of this study were reported in volume 180 which was a special release by the Law Book Company of cases whose subsequent importance had not been predicted by the editors at the time they were first decided.

¹⁸ The last case to be included in the study is *Chief Executive Officer of Customs Pty Ltd v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, heard on 11 December 2002 before Justice Gaudron's departure. Her Honour did not sit on the bench for that decision, in which judgment was handed down on 5 September 2003.

¹⁹ In addition to those studies cited above n 16, see Mirko Bagaric and James McConville, 'Illusions of Disunity: Dispelling Perceptions of Division in High Court Decision Making'

and every case decided by the Court, they do contain a more than adequate representation of the total and they certainly contain every constitutional law decision. The former consideration means that a perfectly acceptable overall group for comparative purposes is produced and the latter ensures the appropriateness of the report series for this project with its special focus upon constitutional cases.

For tallying purposes, any report where written reasons were recorded in the CLRs – including those involving an application for special leave – contributed to the statistics. Excluded from the study were reports of single or, more rarely, two judge decisions of the High Court. Thus any reported opinion from a bench comprised of three or more members is included in this study.

B What is a 'constitutional case'?

In isolating 'constitutional cases' as a group within the total sample, the essential definition adopted is:

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'.²⁰

Additionally, this study has widened the net so as to include those matters which involved questions of purely State constitutional law of which there were but twelve out of the total of 234.²¹ Of course, many more cases involved consideration of a combination of Commonwealth and State powers and responsibilities, the numerous matters arising with respect to s 109 of the *Constitution* being just the most obvious example.

The classification of a case's topic is made fairly generously using the presence of constitutional descriptors or provisions in the catchwords accompanying the report of the case. However, a few additional cases in which constitutional issues were discussed, even if by only some of the bench, were so classified despite the lack of any indication of those aspects in the accompanying catchwords.²² While this was admittedly a rare occurrence, it ensured that the quirks of particular editorial decisions did not result in exclusion of a relevant case.²³

(2004) 78 *Law Institute Journal* 36; A R Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964–1969' (1972) 3 *Lawasia* 1; A R 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) 133; Paul von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 181.

²⁰ Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25 *University of New South Wales Law Journal* 194, 195.

²¹ Justice Kenny, in assessing the 2002 term of the High Court, made it clear that her use of the phrase 'constitutional cases' included those involving the constitution of an Australian State: Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210.

²² See Appendix B for identification of the few decisions so affected.

²³ For example, the case of *Wong v The Queen* is reported at (2001) 207 CLR 584 as simply a criminal law matter, despite the submission of constitutional arguments which received attention in the opinions of some of the Court's members. By contrast, in the report at

Obviously, the degree to which constitutional questions were central to the resolution of all these cases varied, but wherever constitutional principle arose and, with a few exceptions, was identified by the report editors, then regardless of the dominance of other legal questions, the case was included in the core group under analysis.²⁴ This is to admit some flexibility to the words employed by Gageler in that it recognises that on occasion, only some members of the Court may choose to apply constitutional principles in reaching a result. Such a case may still quite properly be included in a study of constitutional law.²⁵ The employment of this more inclusive 'less stringent criteria...to characterise a case as "constitutional"'²⁶ avoids the drawing of further – and finer – distinctions between constitutional cases of varying weight and importance. As such, it has the advantage of being objective, transparent and replicable by other scholars.

C Period covered – several 'natural courts'

As stated earlier, the study spans from 1981 to early 2003 and thus includes the Gibbs, Mason and Brennan Courts with approximately the first five years of the Gleeson era bringing the timeframe to a close.

Empirical studies tend to look at courts which have remained stable for the period being examined – what is known as a 'natural court'. This is a court 'where the same Justices interact for the whole research period'²⁷ and so the researcher is able to isolate those Justices as a single decision-making unit. This is usually most important in studies attempting to identify regular voting blocs or coalitions amongst those judges. While the closing off of a period in the High Court's life has, to some extent, been a

(2001) 185 ALR 233, the catchwords clearly indicate the constitutional aspects of the case. While those arguments were not decisive of the outcome, that can often be said of cases which are readily described as constitutional in character. The differing levels of importance of constitutional issues in cases and the effect of this upon inclusion in this study are discussed in the following paragraph of the above text.

²⁴ See, for example, *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, which is included because of Callinan J's comments regarding the constitutionally implied freedom of political communication which had been raised by the appellant but which did not form the basis for any Justice's resolution of the case. As explained in Appendix A, even when a majority of the Court chose to avoid a constitutional issue, the case will still be tallied as such if (a) the parties have raised one; and (b) especially when at least one Justice discusses it.

²⁵ A good example is the case of *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 in which a majority of the Court certainly did not decide the matter 'in the application of legal principle identified by the Court as being derived from the *Australian Constitution*': cf Gageler, above n 20, 195.

²⁶ Justice Ronald Sackville, 'The High Court on Constitutional Law: The 2003 Term: The Inaccessible Constitution' (2004) 27 *University of New South Wales Law Journal* 66, 83. The heavy reliance upon the descriptors of each case in the reports is justified by the practice of other empirical studies. See, for example, Lee Epstein, Jeffrey Segal and Timothy Johnson, 'The Claim of Issue Creation on the US Supreme Court' (1996) 90 *American Political Science Review* 845, 848.

²⁷ See Blackshield, 'Quantitative Analysis', above n 19, 11; Youngsik Lim, 'An Empirical Analysis of Supreme Court Justices' Decision Making' (2000) 29 *Journal of Legal Studies* 721, 724; 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, 334.

consideration here, it was decided not to break the empirical study down into strictly identified 'natural courts'. There were several reasons for this.

First, while use of 'natural courts' may add a higher level of precision to understanding judicial interaction, it does not do so in a way which is likely to be of much significance in verifying the hypothesis under examination. Use of that model was not necessary for the purposes of the fairly straightforward information which is being presented and discussed. It was felt that the prevalence of dissent on the Court could be adequately conveyed through the combination of a holistic study with use of definite eras fixed by reference to the incumbent of the office of Chief Justice. In doing so, no special influence is automatically inferred on the part of the respective Chief Justices over their courts. For some time now, Australian scholars have tended to mark off eras in the Court's life by the handover of the Court's centre chair. While this is obviously artificial in some senses, it remains a simple, convenient and widely accepted approach to analysis of the Court.²⁸ Indeed, the Justices themselves talk in terms of eras of the Court identified by Chief Justice.²⁹ So, below are presented statistics not just from the entirety of the timeframe but also from the respective eras of those Chief Justices who fall within it. These eras have been strictly separated by use of the appointment date of each new Chief Justice as the cut-off point. Thus reports of *all* matters heard prior to the new Chief Justice's reign — even when the outgoing incumbent did not sit and judgment was delivered after his departure — are still tallied as belonging to the earlier era.³⁰ This was so even when the successor to the Chief Justiceship was designated as Acting Chief Justice prior to the handover.³¹ This same rule was applied in respect of Justice Gaudron's departure in order to clearly delineate the first era of the Gleeson Court.³²

Secondly, an insistence upon breaking up the statistics according to 'natural courts' risked rendering them, to some extent, unworkable. The dominance of the concept in American literature has been assured by the historically slow turnover in the membership of the United States Supreme Court. Prior to the recent appointment of Chief Justice Roberts, there were no new appointments to that Court for 10 years. The

²⁸ The best evidence of this are the various entries in this vein in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), though note the existence of titles such as Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996). Additionally, it should be noted that equivalent empirical studies in other jurisdictions may adopt incumbency of the office of Chief Justice as the means of isolating a particular court: see Peter McCormick, 'Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada' (2004) 42 *Osgoode Hall Law Journal* 99.

²⁹ For example, see Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court 1989–2004' (Speech delivered at the University of Sydney's Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004); and Justice Kirby quoted in text accompanying n 65.

³⁰ So, for example, *Waterford v Commonwealth* (1987) 163 CLR 54, despite being handed down on 24 June 1987 when Mason's Chief Justiceship had begun, is a Gibbs Court decision. It was heard by a bench comprised of Mason, Wilson, Brennan, Deane and Dawson JJ on 30 October 1986 when Gibbs was still Chief Justice.

³¹ See, for example, *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199.

³² So, for example, *Fox v Percy* (2003) 214 CLR 118, which was heard in September 2002 and handed down in April 2003 and on which Justice Gaudron did not sit, is included as a case heard by the first Gleeson Court for the purposes of this study.

very different conditions prevailing in the High Court of Australia (there have been six new appointments to the Court in the last 10 years) lead to real doubt as to whether the concept of a 'natural court' may usefully be applied here. The introduction of compulsory retirement at 70 years of age means that 'natural courts' are far more short-lived than they once were in Australia.³³ The Brennan era is the best example of this, with the Court characterized by fairly regular departures and arrivals in its personnel. While strictly accurate to consider each change as seeing the birth of a different Court, the very short duration of each natural Court (as comprised by the same seven individuals) which existed between 1995 and 1998 would be far too little a time to be viewed as statistically viable. On the other hand, while it is slightly unwieldy to consider the Brennan era as a whole given the changes in the bench's composition, it remains possible to convey the information of interest here and also a sense of the Court's performance overall – as well as its transitory nature which in many ways was its defining characteristic.³⁴

D Classification

In an earlier paper, I aimed to clarify several core issues which face an empirical researcher seeking to tabulate the levels of disagreement in the judicial decisions of the High Court of Australia.³⁵ Of these, the most significant were surely the difficulties which may arise in seeking to categorise individual judgments as either 'concurring' or 'dissenting'. Through modification of the system employed by the *Harvard Law Review*, this problem was resolved in favour of a strict classification system which sought to limit reliance upon unstable majorities through use of the final orders of the court as a reference point. To repeat, the three rules developed are:

- (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 (therefore, only those cases where all Justices co-authored a single opinion are classified as decided by a unanimous judgment);
- (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. 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;

³³ It is a curious fact that since the introduction of the mandatory retirement age, only Chief Justices Gibbs, Mason and Brennan and Justice McHugh have actually stayed on the Court right up to the point at which they were constitutionally required to vacate it. All other departures, including, obviously, those due to death in office, have pre-empted attainment of that age.

³⁴ See David Jackson, 'The Brennan Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), 68–70.

³⁵ Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470.

- (c) Opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting.³⁶

E Use of discretion to solve problems of multiplicity

Finally, some comment must be made on the challenges which multiple questions and multiple matters in the one case present to those engaged in a simple tally of the Court's work, particularly with respect to rule (b) above. I have earlier suggested that a rigid application of the rules will deal with the former difficulty in most instances, while cases comprised of a number of matters may be tallied singly or severally depending upon the degree to which they were differentiated in the judgments of the Court. The exercise of the researcher's discretion in this regard should be properly noted so as to enable the reader to appreciate where and on what basis subjective choices have been made which affect the figures produced.³⁷

Since highlighting the difficulties which beset any attempt to apply a classification system to phenomena as frequently complicated and untidy as the written opinions of a multi-member judicial decision-making body, others – particularly Russell Smyth – have also acknowledged the problem and the need for the researcher to make choices in order to overcome it.³⁸ However, Smyth has rejected my preferred methodology of simply applying rule (b) above as a means of determining the status of opinions in a case, even where multiple issues are involved which divide the bench differently. Instead, he favours, if anything, greater use of discretion on the part of the researcher:

Where there are multiple issues in the case, one approach would be to record a dissent if Justice X dissented on any issue, but this tends to exaggerate the level of dissent if Justice X agreed in the orders for the other issues in the case. Therefore, in such cases we decided on which was the most important issue or issues before the Court and recorded whether Justice X dissented on this issue or issues.³⁹

Work such as that of McGuire and Palmer, predicated on the view that 'cases simply provide the framework in which issues are addressed... [and] do little more than provide a kind of legal architecture for the principles of law that they represent',⁴⁰

³⁶ These were applied in order to produce the statistics found in the papers cited above n 13.

³⁷ In 1968, the editors of the *Harvard Law Review* provided greater detail as to how the annual Supreme Court statistics which that journal provides were compiled because: '...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': 'The Supreme Court, 1967 Term' (1968) 82 *Harvard Law Review* 63, 301-2. The editors' use of the word 'errors' is inapt for what they are describing is really only those inevitable decisions about which different researchers may have legitimate disagreement. Nevertheless, the aim of greater transparency in respect of those choices is a worthwhile one. To that end, this paper is accompanied by detailed Appendices which explain the more challenging tallying decisions made in respect of the compilation of the following statistics.

³⁸ Smyth, 'What Explains Variations in Dissent Rates?', above n 16, 230. See also, Groves and Smyth, above n 16, 257.

³⁹ Smyth, 'What Explains Variations in Dissent Rates?', above n 16, 232. In the collaborative piece by Groves and Smyth, this passage appears but is varied by use of the phrase 'we made a judgment call' in the final sentence: Groves and Smyth, above n 16, 257.

⁴⁰ Kevin McGuire and Barbara Palmer, 'Issue Fluidity on the US Supreme Court' (1995) 89 *American Political Science Review* 691, 692. See also Kevin McGuire and Barbara Palmer,

might be seen to support Smyth's approach. But the question of whether to categorise judicial decisions by case or issue must ultimately depend upon what the research is seeking to illuminate. McGuire and Palmer, for instance, sought to determine the extent to which the judiciary addressed issues which the parties had not raised or suppressed those which they had. In that light, it is unsurprising that their methodology looked beyond whole cases as a unit of judicial decision-making.

But in the present context of classifying judgments, a strict application of the definitional understanding of 'dissent' to the totality of a judicial opinion is preferable to an approach which is selective amongst the multiple issues addressed by those opinions. While there are often questions of primary and secondary importance in the resolution of a legal problem, to discard the latter and focus solely on the former in order to identify dissent is to do several things. First, it is to ignore the accepted fundamental meaning of that term as it applies to judicial opinions. A dissenting judgment is one where the author proposes resolution of the matter in a manner contrary to the orders issued by the Court *for whatever reason*.⁴¹ Secondly, the discretion which Smyth's approach admits is, to my mind, a step too far. The great benefit of approaching the classification of dissent in accordance with its traditional definition is that the scope for individual choice is kept small so that the methodology is transparent to a degree replicable by others. Admittedly the cost is, as I have readily acknowledged⁴² and Smyth has pointed out,⁴³ that one risks magnifying the true extent of disagreement in the Court. But I would maintain that this is a price worth paying in order to ensure the consistency, objectivity and conceptual accuracy which should underpin any empirical study.⁴⁴ At the same time, one is able to address any limitation of the methodology which flows as a consequence by being explicit about it to the audience and also admitting that the quantitative results cannot alone hope to

'Issues, Agenda, and Decision-Making on the Supreme Court' (1996) 90 *American Political Science Review* 853.

⁴¹ See the authorities cited and discussed in Lynch, 'Towards a Methodology for Measuring Judicial Disagreement', above n 35, 476, 493–8. Although Groves and Smyth have purported to embrace use of the term 'dissenting' so as to be consistent with this classic understanding (Groves and Smyth, above n 16, 256), it is clear that classifying opinions by reference only to an 'important issue or issues' in isolation from the rest of the judgment significantly undermines the purity of the concept of 'dissent' as a label traditionally arrived at through disparity between the orders favoured by the individual judge and those of the Court. It is for this reason that both the methodology employed by the *Harvard Law Review* in presenting statistics on the United States Supreme Court and the modified version of those rules as applied by myself to the High Court of Australia (above n 13) insist that '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'. To focus only on some issues in a case and not all in classifying judgments is inconsistent both with the true concept of dissent and those other empirical studies which have sought accurately to reflect that.

⁴² Lynch, 'Towards a Methodology for Measuring Judicial Disagreement', above n 35, 483; Lynch, 'The Gleeson Court', above n 13, 41.

⁴³ Smyth, 'What Explains Variations in Dissent Rates?', above n 16, 232; Groves and Smyth, above n 16, 257.

⁴⁴ Epstein and King insist that all empirical studies should meet a replication standard — that is, the methodology should be such that other researchers should be able to apply it to obtain the same results: see Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1, 38–45.

reflect the degrees of disagreement which really exist amongst the members of the Court and only a more substantive examination of the judicial opinions will provide the sought after nuance.⁴⁵

Lest it be thought otherwise, in making this criticism of the method employed by Groves and Smyth, I do not mean to suggest that the multitude of statistics they have produced on the High Court and its judges⁴⁶ is not valuable. Obviously, those pertaining to length of judgments and the frequency of joint opinions are derived in such a way that they are immune from this particular problem. So far as those which deal with the percentage of opinions classified as concurring or dissenting are concerned, the figures produced – and, more crucially – their relativity to each other remain a sound indication of trends in High Court decision-making. The authors' observations as to the factors which may have been responsible for producing such variation across the Court are undoubtedly constructive and this paper owes them a particular debt in that regard.

However, methodological differences matter – if only to explain why the figures presented here are not the same as those which Groves and Smyth have produced. This explanation has been rendered particularly necessary in light of Groves and Smyth's assertion that they have adopted and utilised the methodology which I have laid down.⁴⁷ It is apparent that that is not quite the case and so, in addition to differences due to different data sets (and in respect of previous studies,⁴⁸ report series), there is a distinction as to the basic classification of when a judgment is dissenting which inevitably results in these figures being similar, but not the same, as those published by those other authors.

⁴⁵ That seems a preferable approach when compared with a methodology by which the researcher makes a 'judgment call' as to which issues – and thus which disagreements – are to be reflected in the tallying of opinions as dissenting or not. At least with a methodology applying a strict classification of 'dissent' we know that the figures will be slightly inflated in their representation of disagreement. The chief trouble with an approach based upon a selective reading of the cases is that we are unable to say how the distortion occurs since it is not the result of application of a consistent standard but the subjective discretion of the researcher.

⁴⁶ Groves and Smyth, above n 16.

⁴⁷ Ibid 276 n 100.

⁴⁸ Lynch, 'The Gleeson Court', above n 13.

III THE STATISTICS

A The institutional perspective

Table A – Resolution of All Matters Tallied

	Unanimous	By concurrence	Majority over dissent	TOTAL
Gibbs Court	74 (20.05%)	145 (39.30%)	150 (40.65%)	369 (100%)
Mason Court	111 (25.93%)	132 (30.84%)	185 (43.22%)	428 (100%)
Brennan Court	16 (10.88%)	59 (40.14%)	72 (48.98%)	147 (100%)
Gleeson Court	30 (11.76%)	97 (38.04%)	128 (50.20%)	255 (100%)
High Court 1981-2003	231 (19.27%)	433 (36.11%)	535 (44.62%)	1199 (100%)

This table reveals the total number of matters decided by the High Court over the timeframe of this study, organised into four eras separated by reference to the incumbency of the Chief Justiceship. The raw figure and percentage of cases decided unanimously, by a number of concurring opinions or by a majority over dissent are given for each era and as a grand total. Even this most general of all the tables invites some preliminary observations about the ways in which disagreement has been experienced in the High Court of Australia over those years. Adopting the Gibbs Court as the benchmark, we can make interesting comparisons with the later eras.

The statistics provided for the Mason Court indicate more a change in style than anything else. Disagreement in the form of matters decided over a dissenting vote is still significant – in fact it has increased moderately from the rate set by the Gibbs Court. But then so has the percentage of matters decided through unanimous opinion. What the Mason Court figures suggest is not that individualism was diminished on that bench but that it tended to be employed only in the service of very real disagreement. Note the significant drop in cases decided simply through delivery of concurring judgments. Where there was agreement across the court, the Justices of the Mason era were more inclined to write jointly than those who had comprised the bench under Chief Justice Gibbs. This is not at all to say that this group agreed with each other more than its predecessor. The increase in dissent illustrates that was not so. But the efforts of the Chief Justice to avoid unhelpful individualism through largely similar concurrences seemed to meet with some degree of success.⁴⁹

⁴⁹ Sir Anthony Mason has said:

My own view has been that the Court should deliver joint or majority judgments, if they can be achieved. While I was Chief Justice, we made a more concerted effort to achieve that result, particularly by inviting one of our number to write an initial judgment or draft. That practice had some success but the degree of success was less than we had hoped.

Sir Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 *Constitutional Law and Policy Review* 41, 42.

Other dramatic changes occur under the stewardship of Chief Justice Brennan. Dissent continued to climb so as to be present in almost every second case. What is also interesting, but not especially surprising, is that unanimity has dropped right away to a mere 10.88 per cent. Even when all members of the Court agreed as to the outcome of the case, they were much less likely to write jointly than had been so in similar circumstances during the Mason era. While exceptions can obviously be found, these statistics would seem to indicate that the Justices who served in the Brennan era (10 in all) were generally denied by the rapid staff turnovers an opportunity to develop a culture conducive to enhanced co-operation.

While that may be understandable, the results for the succeeding Gleeson Court suggest that explanation alone cannot suffice for a low rate of unanimous judgments. The stability of the first five years of the Gleeson era had little impact in redressing the fall of unanimity witnessed under Chief Justice Brennan. When one holds the Brennan and Gleeson Courts up against the Gibbs Court, we see a comparable percentage of cases decided through separate concurring judgments, with the indications being that unanimity has fallen away into increased explicit disagreement through dissenting opinions. As shall be seen from the figures with respect to individual Justices below, the arrival of Justice Kirby on the bench in 1996 goes a long way to explaining the higher prevalence of dissent from this point forward. But it is too simplistic to see his Honour as the *sole* impediment to total consensus — other Justices of the Gleeson Court can also be determinedly individualistic when the occasion arises.

Table B — Resolution of Constitutional Matters Tallied

	Unanimous	By concurrence	Majority over dissent	TOTAL
Gibbs Court	19 (24.68%)	24 (31.17%)	34 (44.16%)	77 (100%)
Mason Court	18 (23.38%)	17 (22.10%)	42 (54.55%)	77 (100%)
Brennan Court	1 (4.00%)	11 (44.00%)	13 (52.00%)	25 (100%)
Gleeson Court	4 (7.27%)	22 (40.40%)	29 (52.73%)	55 (100%)
High Court 1981-2003	42 (17.95%)	74 (31.62%)	118 (50.43%)	234 (100%)

Table B uses exactly the same categories as Table A but the data source is only those constitutional matters isolated from the remainder of matters which the Court decided in the same periods. So far as evincing the truth of the hypothesis under inquiry, it is clear from a preliminary comparison of the totals lines in each table that dissent in constitutional matters was higher than it was in the High Court's work taken as a whole for the same period. As a percentile, the Court's rate of dissenting opinions was over 5 per cent higher when dealing only with constitutional questions. The percentage of cases decided unanimously was lower, but not by as much as we might have expected — less than 2 per cent difference between the two tables.

While those results support the assumption that the Court disagrees more often in constitutional matters than it does overall, it is necessary, especially given that the margins of difference are not vast, to look beyond simply the bottom line. In respect of each of the four eras making up the total study, except the most recent, it is worth noting that dissent in constitutional matters is clearly more prevalent than it was generally. The increase of 11 per cent in the amount of dissent produced by the Mason

Court when it was engaged solely with constitutional questions is particularly striking. While that result obviously makes a large contribution to the overall totals in Table B, it should be acknowledged that the judgments of the Court in each era bore out the hypothesis — in that regard, the total rate of dissent is not some misleading aggregation, but an accurate reflection of a steady reality.

The situation with respect to the indicators of consensus is more complex. While there is a simple uniformity in the greater incidence of dissent across the board in constitutional cases, the impact relative to rates of unanimity requires closer attention. Reasoning from the hypothesis, one would expect less unanimity than was the case overall. But the Gibbs Court was actually more inclined to issue a single opinion in these matters than it was generally. When its members agreed, they were still more likely to do so through separate concurring judgments, but by a much lesser margin than in Table A. Unanimity was close to 5 per cent higher when the Gibbs Court decided constitutional cases — its rate of dissent did not increase by that much in the shift to the constitutional context. This appears to suggest some qualification of the hypothesis may be called for.

If anything, the decision-making patterns of the Mason Court confirm that need. While, unlike its predecessor, it did issue fewer unanimous constitutional opinions, as a percentage, compared to its own unanimous determination of matters overall, the drop was slight — about 2.5 per cent. What is more, that rate of unanimity in constitutional cases actually managed (just) to exceed the percentage of cases decided through concurrence without dissent. This is the only occasion across the entire study in which the level of cases decided through concurrence alone — the source of so much dissatisfaction and complaint⁵⁰ — was lower than for both cases decided unanimously and those containing dissent. Admittedly, the figures for cases settled by unanimity or by concurrences could not be much closer without being identical, but it is still a remarkable feature of this table.

Thus the figures indicate something about which we are perhaps entitled to be surprised. While constitutional cases certainly produced higher rates of express disagreement through the issuing of dissenting judgments on both the Gibbs and Mason Courts, at the same time, occasions of explicit consensus were relatively greater than decisions reached through individual opinions containing, presumably, points of disparity. Cases decided with dissent as a stand-alone category increased, but the relationship between the two classes of cases decided where agreement was present did not follow that trend in an expected fashion. Taken as a whole these results indicate that, at least on those Courts, constitutional cases had a polarising effect upon the Justices — they were more likely to disagree with each other than the norm, but they were also more likely to write jointly than severally when they shared consensus

⁵⁰ Ginsburg, above n 15, 148; Michael Coper, *Encounters with the Australian Constitution* (1988) 139–40; Martin Davies, 'Common Law Liability of Statutory Authorities: *Crimmins v Stevedoring Industry Finance Committee*' (2000) 8 *Torts Law Journal* 133; Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 50–1; Jason Silverii, 'High Court Chief Encourages Joint Judgments' (2004) 78 *Law Institute Journal* 20. This complaint was raised by the Attorney-General at the swearing in of Chief Justice Gleeson: Bernard Lane, 'Gleeson Calls for Reorder in the Court', *The Weekend Australian* (Sydney), 23–24 May 1998, 4. Cf Mirko Bagaric and James McConvill, 'The High Court and the Utility of Multiple Judgments' (2005) 1 *High Court Quarterly Review* 1.

as to the result. This is particularly true of the Mason Court which seemed to be proficient at achieving the clarity of unanimity when its members shared a core level of agreement, even though they otherwise spent a lot of time disagreeing with each other through formal dissent. That Court's dissent rate in constitutional decisions is the highest tabulated. It would seem fair to conclude that the Court was not one where individualism for individualism's sake drove the judicial process.

The picture follows a more expected pattern when we reach the Brennan and Gleeson courts – though the fewer cases decided by each must not be forgotten. The decline in unanimity which was noted with respect to those courts' handling of matters overall is even more pronounced in the constitutional context. Unlike the story of the preceding eras, this fits with the reasons often given for support of the hypothesis – the limited constraint of precedent in the area, its general difficulty, and the diminished scope for remedial intervention by the legislature. But the features of those particular courts which were earlier discussed as inhibiting unanimity overall would also bear upon the problem. It seems very difficult for production of a single joint judgment from the Court in a constitutional matter to weather all those factors which conspire against it. Though, of course, the Brennan Court's co-operation in respect of *Lange v Australian Broadcasting Corporation*⁵¹ demonstrates that unanimity is still possible even when the matter is not a relatively straightforward one.⁵² Further factors which account for the low unanimity in constitutional cases over these eras will be considered in the next section dealing with individual opinion delivery.

Table C – Constitutional Matters – How Resolved⁵³

Size of bench	Number of cases	How Resolved	Frequency
7	150 (64.10%)	Unanimous	20 (8.55%)
		By concurrence	47 (20.09%)
		6:1	22 (9.40%)
		5:2	23 (9.83%)
		4:3	36 (15.38%)
		1:6 ⁵⁴	1 (0.43%)

⁵¹ (1997) 189 CLR 520.

⁵² The unlikelihood of this case being the Brennan Court's sole unanimous constitutional decision is acknowledged in Nicholas Aroney, 'The Structure of Constitutional Revolutions: Are the *Lange*, *Levy* and *Kruger* Cases a Return to Normal Science?' (1998) 21 *University of New South Wales Law Journal* 645, 653–4; Geoffrey Lindell, 'Expansion or Contraction? Some Reflections about the Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 137; Andrew Lynch, 'Unanimity in a Time of Uncertainty: The High Court Settles Its Differences in *Lange v Australian Broadcasting Corporation*' (1997) 6 *Griffith Law Review* 211.

⁵³ All percentages in this table are given as of the total number of constitutional cases across the study (234).

⁵⁴ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556. As only Mason J concurred precisely in the final orders all other six judges who disagreed by varying degrees – but nonetheless significantly on the central question of substance – are tallied as dissenting. For consideration of the phenomenon of a greater number of minority than majority judgments

Size of bench	Number of cases	How Resolved	Frequency
		3:4 ⁵⁵	1 (0.43%)
6	47 (20.09%)	Unanimous	7 (2.99%)
		By concurrence	16 (6.84%)
		5:1	14 (5.98%)
		4:2	10 (4.27%)
5	34 (14.53%)	Unanimous	14 (5.98%)
		By concurrence	10 (4.27%)
		4:1	2 (0.85%)
		3:2	8 (3.42%)
4	2 (0.85%)	Unanimous	0 (0%)
		By concurrence	1 (0.43%)
		3:1	1 (0.43%)
3	1 (0.43%)	Unanimous	1 (0.43%)
		By concurrence	0 (0%)
		2:1	0 (0%)

The purpose of Table C is simply to present greater detail as to the form which dissent has taken in the 234 constitutional cases decided by a divided Court over the course of the study period. Judicial culture has often tended to the image of a solitary 'Great Dissenter'⁵⁶ — a person isolated on his or her court but whose wisdom may be

see Lynch, 'Towards a Methodology for Measuring Judicial Disagreement', above n 35, 492-3.

⁵⁵ The majority in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 was 6:1 in finding that the Murray Islands are not Crown land, but that majority was then split over the further question of whether extinguishment of native title gives rise to compensation — Mason CJ, Brennan and McHugh JJ denied this, whereas Deane, Toohey and Gaudron JJ made orders for a declaration that such is the case. But as Dawson J (in dissent on the central question) indicated support for no compensation, the final order did not include this restraint upon the Queensland Parliament. While admittedly the question of compensation is somewhat hypothetical on the facts of the case (the native title in question not having been extinguished), Deane, Toohey and Gaudron JJ were at pains to include it in their orders and the brief judgment of Mason CJ and McHugh J is entirely dedicated to clarifying that such was not the finding of the Court as a body. This result is only reflected in the opinions of three judges of the Court — Mason CJ, Brennan and McHugh JJ. The remaining four are tallied as dissenting.

⁵⁶ This title is most commonly associated with Justice Oliver Wendell Holmes of the United States Supreme Court, though there is room for debate. In support of Holmes as America's 'Great Dissenter', see Alan Barth, *Prophets with Honor* (1974) 6 and Percival Jackson, *Dissent in the Supreme Court: A Chronology* (1969) 3, though the irony of this, given Holmes' jurisprudential method, is well observed in Richard Primus, 'Canon, Anti-Canon, and Judicial Dissent' (1998) 48 *Duke Law Journal* 243, 287-8. Even in commentary which seeks to apply the label to other US justices, it is clear that Holmes is the benchmark, if not the solitary wearer of the title. See, for example, Toni Ellington, 'Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero' (1998) 20 *Hawaii Law Review* 797, 818 (involving comparison between Holmes and the second Justice Harlan — and then extending that to Justice Ginsburg at 821-5); Thomas Shea, 'The Great Dissenters: Parallel Currents in

appreciated by the 'intelligence of a future day'.⁵⁷ It is important to our appreciation of the increased likelihood of dissent in constitutional matters, to know whether it takes any particular predominant form — be it through a lone individual or a bench split into two clear camps.

Unsurprisingly, over the timeframe of the study, the bulk of the constitutional cases was heard by a bench comprised of all serving Justices, though the number of six-member and five-member benches is not insignificant. The results provide little support for the anecdotal view that dissent is most often carried out by a single individual. Indeed, 4:3 split decisions were markedly more prevalent than those in the seven-member court which were 6:1. On the ten occasions when a five-member bench split over constitutional questions, only twice was there a lone judge in dissent. The figures for the six-member bench are not so dramatic, but even then the relative frequency between those matters where the majority comprised all but one of the Justices and those where just one vote separated the majority from the minority was not significant.

These findings are important for two reasons. First, and in a general sense, they indicate the myth of dissent as a solitary experience requires some reassessment in light of reality. A similar finding has been made in the context of the United States Supreme Court, where research has shown that unanimous judgments and 5:4 splits are the most common outcomes, while among the least common are cases decided by an 8:1 division.⁵⁸ While the smaller size of the High Court of Australia means that lone dissent is more likely to occur simply due to the fewer possible permutations, the results above accord with that American study.

The second, and specific, value of the results in Table C is in clarifying the nature of the dissenting opinions under discussion in Table B. The increase in constitutional cases decided over minority opinions relative to the pattern of the Court's decision-making overall cannot be simply explained away as due to the idiosyncrasies of a single Justice. We know that the members of the High Court disagree with each other more often than the norm when they interpret the *Constitution* — these figures indicate that disagreement is just as likely to fracture the Court down the middle and thus be central to the Court's resolution of the case than it is to be a side issue involving one member.

B The individual perspective

Showing that the institution of the High Court produces a higher percentage of cases decided over dissenting opinions in the context of constitutional law is one thing. But a more nuanced understanding of this phenomenon may be reached through

Holmes and Scalia' (1997) 67 *Mississippi Law Journal* 397, 398 (involving comparison between Holmes and, obviously, Justice Scalia); Karl ZoBell, 'Division of Opinion in the Supreme Court: A History of Judicial Disintegration' (1959) 44 *Cornell Law Quarterly* 186, 202 (involving comparison between Holmes and the first Justice Harlan). The title has entered Australian parlance, most pointedly in recent times in Haig Patapan, *Judging Democracy — The New Politics of the High Court of Australia* (2000) 192.

⁵⁷ Charles Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* (1928) 68.

⁵⁸ Paul Edelman and Suzanna Sherry, 'All or Nothing: Explaining the Size of Supreme Court Majorities' (2000) 78 *North Carolina Law Review* 1225.

consideration of the extent to which it is observable in the behaviour of individual Justices.

This part of the paper seeks to determine further the divisive effect of constitutional questions on the High Court as a multi-member judicial body by comparing the decision-making patterns of its judges in cases of that ilk against their performance more generally. In doing so, pairs of statistical tables for each of the four distinct eras of the Court from the study period, as well as a pair covering the entirety of the study period, have been generated. The first table in each pair notes the total number of judgments written by each member of the Court at that time and classifies these as either part of a unanimous effort with his or her colleagues, or in concurrence with or dissent from them. The second table of the pair enables comparison by providing the same information in respect of just the constitutional subset.

Two brief points about the presentation of these tables are warranted. The first is that the Justices are organised in order of appointment to the Court, though the results for the Chief Justice occupy the first row (this exception is only relevant in the case of Chief Justice Gleeson as his three predecessors were the longest serving members of the Court at the time of their appointment to that office). The second feature requiring some explanation is the presence of percentile figures for a 'notional member' of each of the Courts, reached through averaging the results of all its Justices. The notional member statistics serve as indicators of the norm of judicial decision-making at that time. It is all too easy to discuss empirical data and lose sight of the relativities and a sense of proportion. The average percentiles aim to anchor scrutiny of the tables for trends and developments. In doing so, they are complemented by referral back to the earlier tables in Part A and the light they shed upon the activities of the Court as a whole in each of the four eras under examination.

1 The Gibbs Court

Table D(I) – Actions of Individual Justices in All Matters Tallied

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gibbs	281	45 (16.01%)	211 (75.09%)	25 (8.90%)
Stephen	42	5 (11.90%)	32 (76.19%)	5 (11.90%)
Mason	285	63 (22.11%)	202 (70.88%)	20 (7.02%)
Murphy	190	29 (15.26%)	120 (63.16%)	41 (21.58%)
Aickin	60	5 (8.33%)	49 (81.67%)	6 (10.00%)
Wilson	312	65 (20.83%)	216 (69.23%)	31 (9.94%)
Brennan	301	60 (19.93%)	192 (63.79%)	49 (16.28%)
Deane	217	51 (23.50%)	125 (57.60%)	41 (18.89%)
Dawson	230	62 (26.96%)	144 (62.61%)	24 (10.43%)
Notional Member's Results		20.07%	67.31%	12.62%

The first thing to be aware of with respect to Table D(I) is that the statistics given for Justices Stephen and Aickin are not really comparable to those of the other members of

the Court. Both Justices served on the Court for less than half of Chief Justice Gibbs' tenure and thus even an analysis based upon the percentage figures is difficult. Nevertheless, as both sat on cases which have contributed to the statistics for the total study, it is appropriate to record their individual actions for the sake of completeness.

Three other Justices also had less than a full run on the Gibbs Court. Justices Deane and Dawson are, of course, late arrivals who replaced the Justices discussed in the preceding paragraph. Justice Murphy did not take part in many cases between 1984 and 1986 whilst being tried on charges of attempting to pervert the course of justice and a Parliamentary Commission investigated allegations of misbehaviour against him. However, while these Justices are less represented on the table than the remaining four, the disparity is not so great as to deny the possibility of useful comparison being made.

The member of the Court who was least in dissent was Justice Mason with just 7 per cent of his judgments being in the minority. The Chief Justice has a rate of dissent not far off Justice Mason's, though it is worth noting the gap in the rates of unanimity between these two. Justices Wilson and Dawson have a comparable dissent rate hovering around 10 per cent but then the degree to which the remaining members of the Court found themselves outside the majority becomes more marked. It also becomes more staggered – all the way to Justice Murphy's fairly notable figure of 21.58 per cent.⁵⁹

Interestingly, Justice Murphy's participation rate in unanimous judgments is on par with that of his Chief Justice. Of course, the individual rate of unanimity is highly dependant upon those Justices who find themselves sitting with each other when the Court is not at full strength. It is possible that Chief Justice Gibbs' relatively low involvement in unanimous judgments is due to his sitting notably more often with Justice Murphy whose heightened tendency to explicit disagreement was destructive of a single joint opinion. But it is fairly curious that this does not translate to at least some of the other judges who must have sat as often with Justice Murphy. The more likely explanation is that both Chief Justice Gibbs and Justice Murphy were more prone to individual expression – albeit through concurrences and dissents respectively – than the other members of the bench.

Table D(II) – Actions of Individual Justices in Constitutional Matters

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gibbs	70	15 (21.43%)	43 (61.43%)	12 (17.14%)
Stephen	8	0 (0%)	7 (87.50%)	1 (12.50%)
Mason	72	18 (25.00%)	49 (68.06%)	5 (6.94%)
Murphy	44	7 (15.91%)	28 (63.64%)	9 (20.45%)
Aickin	10	0 (0%)	8 (80.00%)	2 (20.00%)

⁵⁹ This figure is almost exactly the same as the one Tony Blackshield produced when calculating the percentage of dissents across Justice Murphy's entire judicial service on the High Court. Blackshield said that his Honour dissented in 137 cases out of 632 (which comes to 21.67 per cent): A R Blackshield, 'Introduction' in A R Blackshield et al (eds), *The Judgments of Justice Lionel Murphy* (1986) xix.

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Wilson	74	17 (22.97%)	46 (62.16%)	11 (14.86%)
Brennan	66	17 (25.76%)	40 (60.61%)	9 (13.64%)
Deane	61	17 (27.87%)	33 (54.10%)	11 (18.03%)
Dawson	58	16 (27.59%)	33 (56.90%)	9 (15.52%)
<i>Notional Member's Results</i>		23.11%	61.99%	14.90%

The most dramatic change between this table and that of Table D(I) presenting statistics for the totality of cases from the same period is just how more often Chief Justice Gibbs found himself in the minority in constitutional cases. Whereas his rate of dissent is not the highest on this table and it is not much greater than the notional figure, this result is still worthy of comment. For while, as seen in Table D(I), the Chief Justice's dissent rate overall was second only to that of Justice Mason and he was one of the few justices to have a score of less than 10 per cent across the entire span of the study, when the matter was constitutional in nature Chief Justice Gibbs was much more regularly in dissent. Whilst one must always be wary about equating a low rate of dissent with a high level of influence on the bench, the reverse conjecture is less risky. Thus it can confidently be said that with a dissent rate in constitutional cases double that of his delivery of minority opinions generally, Chief Justice Gibbs was less frequently in a position to amass support for his views in such cases than he was on average.

This may be contrasted nicely with Justice Mason's level of dissent which has barely wavered in the move to the specific context of constitutional cases. It seems safe to say that Justice Mason was particularly representative of – if not actually marshalling – majority thought across the Court at this time. The Justices in between these two are also interesting as they do not necessarily follow the order which we might have expected. Justice Brennan dissented slightly less often in constitutional cases but the shift across the court was such that in this context he was now the second least likely to be in the minority. Following him are two Justices – Wilson and Dawson – whose fortunes in this respect seem linked to that of the Chief Justice. The federal questions which seemed to predominate in this period – specifically those concerning interpretation of the corporations and external affairs powers – tended to present a fractured court with Chief Justice Gibbs, Justices Aickin (and then his replacement Dawson) and Wilson often in dissent as a less centralist trio.⁶⁰ All these members of the Court had a higher level of involvement in minority opinions when sitting on constitutional matters.

Apart from Justice Mason's significant lead, the figures for all the other Justices tend to work their way up between 13.64 per cent to 20.45 per cent by increments.⁶¹ In considering the ranking of the Justices according to the frequency with which they formally recorded disagreement, one should not lose sight of the *amount* of dissent and

⁶⁰ Sir Anthony Mason has also made this direct link between Chief Justice Gibbs' federalist outlook and his dissent rate: Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 885.

⁶¹ The results for Justices Stephen and Aickin are statistically insignificant.

how that has altered in this specific context. So although Justices Deane and Murphy remain the most regular dissenters with results of roughly one in five opinions in the minority, they have remained steady (dipping a little if anything). It is the Chief Justice and Justices Wilson and Dawson whose levels of dissent have risen significantly, indicating a slip in the extent of their influence over the resolution of constitutional matters. It is in this way that the increase in express disagreement seen in Table B and the rise in the notional percentage of dissenting opinions have occurred.

2 The Mason Court

Table E(I) – Actions of Individual Justices in All Matters Tallied

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Mason	330	84 (25.45%)	226 (68.48%)	20 (6.06%)
Wilson	80	26 (32.50%)	47 (58.75%)	7 (8.75%)
Brennan	342	76 (22.22%)	204 (59.65%)	62 (18.13%)
Deane	352	81 (23.01%)	207 (58.81%)	64 (18.18%)
Dawson	344	82 (23.84%)	217 (63.08%)	45 (13.08%)
Toohey	349	83 (23.78%)	218 (62.46%)	48 (13.75%)
Gaudron	356	90 (25.28%)	209 (58.71%)	57 (16.01%)
McHugh	252	59 (23.41%)	141 (55.95%)	52 (20.63%)
<i>Notional Member's Results</i>		24.16%	61.08%	14.76%

The striking difference between Table E(I) and the equivalent for the Gibbs Court (Table D(I)) is how much higher the individual dissent rate generally is for the members of the Mason Court. The increase in the notional figure does not quite convey this so well as scanning down the columns in each table. Whilst Mason as Chief Justice has an even lower incidence of dissent than he did as a member of the Gibbs Court, the other Justices (barring Justice Wilson whose early departure from the court renders his figures not comparable) all possess rates of dissent well into the teens. The Justice nearest to the Chief Justice is Justice Dawson who dissented over twice as often – on 13 per cent of occasions. Justices Brennan and Deane are significant dissenters and Justice McHugh is almost within 1 per cent of Justice Murphy's figure in Table D(I).

The comments made earlier in respect of Tables A and B about the preparedness of the members of the Mason Court to give voice to legitimate disagreement through dissent whilst at the same time being able effectively to build occasions of consensus into unanimous opinions are echoed by the marriage of these generally high rates of dissent with a similarly uniform incidence of high unanimity across the Court. There is nothing like the range of figures which was observed in respect of unanimity for the Gibbs Court. Admittedly the absence of any specific individual who can be recognised as regularly standing outside opinion on the Court must be of assistance here, but clearly there is also a cohesiveness to judgment writing which discourages repetitive concurrences.

Table E(II) — Actions of Individual Justices in Constitutional Matters

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Mason	75	18 (24.00%)	50 (66.67%)	7 (9.33%)
Wilson	16	5 (31.25%)	8 (50.00%)	3 (18.75%)
Brennan	75	17 (22.67%)	45 (60.00%)	13 (17.33%)
Deane	74	17 (22.97%)	40 (54.05%)	17 (22.97%)
Dawson	76	18 (23.68%)	42 (54.26%)	16 (21.05%)
Toohy	76	18 (23.68%)	48 (63.16%)	10 (13.16%)
Gaudron	74	16 (21.62%)	40 (54.05%)	18 (24.32%)
McHugh	57	11 (19.30%)	33 (57.89%)	13 (22.81%)
<i>Notional Member's Results</i>		22.94%	58.51%	18.55%

The general contours of decision making in the Mason Court which were observed when considering Table E(I) are translated to the constitutional subset without much variation. That Court's distinctive ability to produce a high frequency of unanimous judgments while accommodating robust individual dissent rates is, in fact, even more starkly demonstrated by Table E(II). The percentage of minority opinions issued by each member of the Court, with the exception of Justice Toohey, has increased in constitutional law cases — the notional rate makes this acutely evident. While the rise for the Chief Justice and Justice Brennan has not been great, it has been markedly higher for Justices Deane, Dawson, Gaudron and McHugh, all of whom enjoyed a dissent rate comfortably over 20 per cent. One gains an interesting perspective on the results for these four Justices by comparison with the Gibbs Court on constitutional law where Justice Murphy was the most extreme case with a dissent rate of just over 20 per cent. That figure is unremarkable in light of the levels of formal disagreement in the Mason Court when considering the same kind of matters.

At the same time, the manifestation of consensus through unanimity was achieved with striking regularity. The results of the Mason Court in this regard are uniformly high, (though not, note, as high as the figures for some of the same Justices when members of the Gibbs Court — see Table D(II)). But it must be borne in mind that dissent was generally lower in the institution at that time, which would certainly facilitate the delivery of unanimous opinions. As with the results of the Mason Court for its total decisions, the absence of any specific individual(s) as a more regular outsider than others seems to have been crucial in avoiding the frustration of unanimous expression. Under such circumstances, it is interesting that the existence of regular, but importantly *shifting*, divisions amongst the Justices was not of itself harmful to unanimity.

Lastly, it would be remiss not to note that, unlike his predecessor, Chief Justice Mason retains his central place in the Court's majority when the constitutional cases are isolated. Given the high levels of dissent for most of the other members of the Court at this time, and the fact that these are a notable increase upon the levels generally, Chief Justice Mason's ability to so often be a voice of the Court rather than

against the Court is impressive. Statistically speaking, the only other Justice who appears to have kept his position as one readily identifiable with the majority is Justice Toohey — a result which is perhaps somewhat exaggerated by the extent to which the other Justices were more prone to jump in and out of the majority in constitutional matters.

3 The Brennan Court

Table F(I) — Actions of Individual Justices in All Matters Tallied

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Brennan	104	8 (7.69%)	80 (76.92%)	16 (15.38%)
Deane	8	1 (12.50%)	7 (87.50%)	0 (0%)
Dawson	83	9 (10.84%)	60 (72.29%)	14 (16.87%)
Toohey	94	9 (9.57%)	68 (72.34%)	17 (18.09%)
Gaudron	120	14 (11.67%)	94 (78.33%)	12 (10.00%)
McHugh	127	13 (10.24%)	97 (76.38%)	17 (13.39%)
Gummow	132	12 (9.09%)	111 (84.09%)	9 (6.82%)
Kirby	100	8 (8.00%)	59 (59.00%)	33 (33.00%)
Hayne	29	4 (13.79%)	21 (72.41%)	4 (13.79%)
Callinan	17	3 (17.65%)	12 (70.59%)	2 (11.76%)
<i>Notional Member's Results</i>		9.95%	74.82%	15.23%

The figures in Table F(I) indicate far less consistency in the Brennan Court than the era which preceded it. But for ease of analysis, it is best to put to one side Justice Deane who left very soon after Chief Justice Mason's retirement and also Justices Hayne and Callinan who arrived towards the end of Brennan's tenure. The scores of all three judges are not statistically comparable with the others in this table. While amongst the remaining seven there is still quite a range (with a discrepancy of 49 cases between Justices Dawson and Gummow), the percentages do not defy useful comparison.

As already observed in connection to Table A, unanimity in the Brennan era was rare and this is obviously carried over to these figures for opinions which each individual judge delivered of this character. All unanimity figures are, as a band, much lower than those of the two earlier courts. Nor is there the range which was observable in the comparable statistics for the Gibbs era, despite the presence once more, in Justice Kirby, of a notable dissenter relative to the rest of the Court. In this respect, it is easier to understand these figures as reflecting the degree of unanimity overall than was the case in respect of those given for the Gibbs Court.

Justice Kirby's dissent rate is remarkably high — one in every three cases sees him in the minority at this time. While this seems to clearly outstrip Justice Murphy's level of dissent, one must be wary of direct comparison given the Court's gaining control over its own docket in 1984 and the abolition of appeals from State Supreme Courts to the Privy Council in 1986. Both factors mean that today's High Court is more likely to

receive more 'hard cases' than in Murphy's time.⁶² It is feasible to presume that Justice Murphy would have had a numerically higher rate of dissent if he had served on the Court subsequent to those changes. But such speculation tends to overlook the pivotal factor in determining dissent rates which is not simply the nature of the cases but the makeup of the Court of which the Justice is a member. As discussed elsewhere, how any judge relates to the others on the bench will determine the status of the judgments which he or she issues.⁶³ It is the development and movement of majority and minority voting blocs, intrinsic to collegiate decision-making, which ultimately decides these reputations. In a clear acknowledgement of the relational nature of dissent, Justice Kirby has sought to explain his isolation on the present Court:

it's true, if I had been appointed to the High Court in the time of Chief Justice Mason, and in that period, I would think my dissent rate would be very low because I look back on that time and see the decisions that came through and I don't believe I would have disagreed so much. You get different moods in an institution...⁶⁴

We can only really assess each judge according to the time at which they find themselves on the Court and so while it is probably safe to say that Lionel Murphy's judicial method would have always tended to make him an outsider on any era of the High Court to date,⁶⁵ hypothesising about dissent rates had things been different will generally prove a fruitless task.

While Justice Kirby clearly disagrees with his colleagues a lot of the time, the dissent rates generally remained robust in the Brennan Court. The Chief Justice himself recorded the highest dissent rate by far of any other holding that office in the course of this study, even though it was down slightly on his rate under Mason's leadership and was on par with the notional figure for his Court. The other survivors from that earlier era either increased (Justices Dawson and Toohey) or decreased (Justices Gaudron and McHugh) the percentage of occasions on which they formally disagreed with the outcome of a case. If Justice Kirby appeared to take on the mantle of Justice Murphy and make it his own, then the newly arrived Justice Gummow seemed to step straight into the shoes left by Chief Justice Mason as a central voice in the majority of the Court, with a very low dissent rate indeed.

⁶² Cf Smyth, 'What Explains Variations in Dissent Rates?', above n 16, 238–9. For consideration of the effect of these developments upon the Court's judicial style generally, see Groves and Smyth, above n 16, 259–62.

⁶³ Lynch, 'Towards a Methodology for Measuring Judicial Disagreement', above n 35, 484–7.

⁶⁴ ABC Radio, 'Justice Michael Kirby', *Sunday Profile*, 16 November 2003 at <<http://www.abc.net.au/sundayprofile/stories/s982503.htm>> at 18 October 2005.

⁶⁵ See generally, John Williams, 'Murphy, Lionel Keith' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), 484–6; and Mason, 'Personal Relations', above n 1, 531.

Table F(II) — Actions of Individual Justices in Constitutional Matters

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Brennan	25	1 (4.00%)	22 (88.00%)	2 (8.00%)
Deane	2	0 (0%)	2 (100%)	0 (0%)
Dawson	22	1 (4.54%)	16 (72.73%)	5 (22.73%)
Toohey	24	1 (4.17%)	18 (75.00%)	5 (20.83%)
Gaudron	23	1 (4.35%)	19 (82.61%)	3 (13.04%)
McHugh	25	1 (4.00%)	21 (84.00%)	3 (12.00%)
Gummow	25	1 (4.00%)	24 (96.00%)	0 (0%)
Kirby	15	1 (6.67%)	9 (60.00%)	5 (33.33%)
Hayne	2	0 (0%)	2 (100%)	0 (0%)
Callinan	0	0 (0%)	0 (0%)	0 (0%)
Notional Member's Results		4.29%	81.60%	14.11%

The beautiful thing about empirical research is the way in which its presentation can make a point so simply and yet to such dramatic effect. Given the contents of the equivalent table for the Mason Court (Table E(II)), one is immediately struck by the sharp distinctions between it and the era of Chief Justice Brennan which followed. The production of just one unanimous judgment in a constitutional law case over this time — *Lange v Australian Broadcasting Corporation*,⁶⁶ of all unlikely prospects⁶⁷ — is a drop from the situation under Chief Justice Mason that cannot be simply accounted for by the lesser number of such cases heard in a mere three years. Comment has already been made about the short duration of this era and the significant changes to the Court's composition which occurred within it. While the transitional nature of the Court at that time must be a substantial reason for such an altered performance, the nature of the Court's work may also sustain an explanation.

It might be fair to say that the Court faced questions prompted by the innovative spirit of the preceding era, but, for the answers to which, it inherited little guidance as to how best to proceed. The departure of a figure as central to the Court's majority view as Chief Justice Mason (as we have seen) must necessarily create something of a vacuum. In a different sense, the departure of Justice Deane removed a strong alternative voice from the bench. Although the Mason Court had settled some matters with the seal of solidarity, it might be said that it more troublingly left behind a wake of issues upon which real division was highly likely. The implied freedom of political communication is, of course, the obvious example and while that was the one topic upon which consensus was clearly secured (or at least appeared to be so secured),⁶⁸

⁶⁶ (1997) 189 CLR 520.

⁶⁷ See above n 52.

⁶⁸ For discussions of just some of the major questions which still hang over the implied freedom see Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of

even that was not accomplished without a significant realignment of thought – and division – on the issue in *McGinty v Western Australia*.⁶⁹ Cases which demonstrate the open-ended nature of the questions facing the Court and hence the perhaps understandable sparseness of unanimous opinions include *Kruger v Commonwealth*,⁷⁰ *Kartinyeri v Commonwealth*,⁷¹ *Ha v New South Wales*,⁷² and *Kable v Director of Public Prosecutions (NSW)*.⁷³ These were matters in respect of which guidance from past authority could hardly be said to be decisive.

While all those cases produced memorable dissents, it is important to note that although unanimity dropped almost as far as it could go, the incidence of formal disagreement fell for many of the Court's members. The new Chief Justice more than halved his dissent rate from the preceding era and became the member of the bench least likely to be in the minority on constitutional issues. Significantly, Chief Justice Brennan's dissent rate in these cases is also much lower than his level of disagreement generally (Table F(I)). Justices Gaudron and McHugh dropped their dissent rate in constitutional matters dramatically from their Mason era highs. Justice Dawson lowered his also to a degree, but Justice Toohey now found himself much more often in minority.

Of the two new arrivals who are statistically significant for analysis in this table, Justice Kirby's early forays with the *Constitution* more than match his level of dissonance generally. His rate of dissent of one in three opinions augured poorly for his chances of finding regular consensus with his colleagues on the Court in the future. The reverse was true of Justice Gummow who did not lodge a single minority judgment in a constitutional case in the Brennan era.

The final comment on Table F(II) is simply to note that behind the simple tally for Justice Callinan of zero constitutional decisions made whilst a member of the Brennan Court, lies his aborted participation in one such case – *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)*.⁷⁴ His Honour's absence from these results was not entirely due to his appointment just before Chief Justice Brennan's retirement but also his unilateral decision to disqualify himself from involvement in that particular case.⁷⁵

Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; and Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374.

⁶⁹ (1996) 186 CLR 140.

⁷⁰ (1997) 190 CLR 1.

⁷¹ (1998) 195 CLR 337.

⁷² (1997) 189 CLR 465.

⁷³ (1996) 189 CLR 51.

⁷⁴ (1998) 195 CLR 337.

⁷⁵ For a discussion of this decision, see Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of Its Own' (1999) 73 *Australian Law Journal* 72.

4 The Gleeson Court

Table G(I) – Actions of Individual Justices in All Matters Tallied

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson	221	28 (12.67%)	181 (81.90%)	12 (5.43%)
Gaudron	181	15 (8.29%)	148 (81.77%)	18 (9.94%)
McHugh	204	24 (11.76%)	143 (70.10%)	37 (18.14%)
Gummow	222	27 (12.16%)	188 (84.68%)	7 (3.15%)
Kirby	223	18 (8.07%)	133 (59.64%)	72 (32.29%)
Hayne	216	26 (12.04%)	176 (81.48%)	14 (6.48%)
Callinan	215	19 (8.84%)	152 (70.70%)	44 (20.47%)
<i>Notional Member's Results</i>		10.59%	75.64%	13.77%

Interestingly, many of the trends from the Brennan era are observable in the entirely stable period which followed – the first five years of the Gleeson Court. In particular, the defining statistical feature of the institution at this time must be the extreme distance between the positions occupied by Justices Gummow and Kirby. Justice Gummow has the highest rate of concurring opinions (though he is closely followed by the Chief Justice and Justices Gaudron and Hayne) and a startlingly low level of dissent – the lowest of any Justice considered within this 22 year study. But one should not fail to notice that the Chief Justice and Justice Hayne also record fewer disagreements with the outcome of a case, as a percentage, than any other judge in any of the earlier eras – including Chief Justice Mason whose rate of dissent was easily the lowest among any of his contemporaries. While significant, it is important to bear in mind the lower number of cases on which the current members of the Court have sat when making fine comparisons such as that. But undoubtedly, one cannot fail to be impressed by the rarity with which formal disagreement is expressed by these members of the Gleeson Court.

Correspondingly, the proportion of majority opinions is generally high – certainly the fact that four Justices have a concurrence rate over 80 per cent whilst also maintaining a respectable rate of unanimity is noteworthy. It is less than fair to compare the figures in Table G(I) with those of the Brennan Court in Table F(I) due to the latter's transient membership, but it is interesting that when we do so, the notional figures are generally similar. A very different impression is gained by comparison with the Mason Court (Table E(I)) where, as we earlier saw, unanimity was impressively both high and uniform, with fewer individual concurrences as a consequence. It is fair to say that these two Courts both have generally high levels of consensus but stylistically there is a clear difference in approach with agreement being expressed much more often through use of unanimous judgment in the Mason Court. However, one should not jump to the conclusion that the members of the Gleeson Court are simply determined individualists. In explaining the recent rise of dissent rates for the Court as a whole, Smyth has attributed this to Justice Kirby – calling it the 'Kirby

effect'.⁷⁶ To borrow that pithy expression, the 'Kirby effect' also makes itself felt in denying the opportunity for the other six members of the Gleeson Court to increase the delivery of unanimous judgments. A not insignificant number of the concurring judgments tallied may, one suspects, be authored by all members of the bench but Justice Kirby.⁷⁷ The presence of one committed dissenter on the Gleeson Court is a factor which the Mason Court did not have as an impediment to unanimous expression of its consensus.⁷⁸

While the 'Kirby effect' is a very real consideration, one does not wish to overemphasise it at the expense of other factors. In discussing elsewhere the Gleeson Court's apparent difficulty in converting consensus to unanimity, I remarked:

Despite any cohesiveness in outlook which we may tentatively presume amongst Gleeson CJ, Gaudron, Gummow and Hayne JJ, 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 simply to suggest that it is the dissents themselves which are destructive of opportunities for unanimous judgments — that much is obvious. Rather, my point is a wider one — the dissent rates indicate a general climate of pronounced individuality which may be observed in those even more frequent occasions where there is a high degree of concurrence across all sitting judges.⁷⁹

The other two members of the Court whose dissent rate cannot be ignored are, of course, Justices McHugh and Callinan. The former, after having lowered his proportion of dissenting opinions from being the highest amongst members of the Mason Court so as to be amongst the lowest during the Brennan era, has climbed back to a rate of 18.14 per cent — not only the third highest on the Gleeson bench, but well away from the low levels of the other Justices discussed above. Justice Callinan clocks in with a proportion of dissents just one percent below that of Justice Murphy in Table D(I).

Although I accept the findings that there are certainly no more separate judgments than there have been in earlier times of the High Court, and that there are in fact rather less,⁸⁰ I would maintain that the Gleeson Court curiously manages to combine strong levels of agreement with the presence of significant individualism from several of its members — but in a way not seen in any of the earlier tables, particularly that of the Mason Court about which the same general comment could nevertheless be made. That comment, however, may require revision in light of the statistical analysis of the

⁷⁶ Smyth, 'What Explains Variations in Dissent Rates?', above n 16, 239; Groves and Smyth, above n 16, 275.

⁷⁷ Separate inquiry into verifying this is beyond the scope of the present paper and awaits future attention.

⁷⁸ This would seem to be supported by Groves and Smyth's findings that joint judgments per 100 judgments (by which they mean any authored by two or more Justices) remained high (and climbed) in the first three years of the Gleeson Court, while the number of single-author concurring opinions, although not as low as under Chief Justice Mason, was still at much lower levels than in the Court's past: Groves and Smyth, above n 16, 267–8 (Figures 2 and 3). Additionally, Bagaric and McConvill have performed their own, much more limited study, in order to expose as false the perception that the High Court is presently beset by multiple concurring opinions: Bagaric and McConvill, 'Illusions of Disunity', above n 19. Cf Davies, above n 50, 145–51.

⁷⁹ Lynch, 'The Gleeson Court', above n 13, 49.

⁸⁰ See above n 77.

Court's 2004 cases where close to 25 per cent were decided unanimously — just as many as were resolved through concurring opinions.⁸¹

Table G(II) — Actions of Individual Justices in Constitutional Matters

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson	52	4 (7.69%)	46 (88.46%)	2 (3.85%)
Gaudron	53	3 (5.66%)	44 (83.02%)	6 (11.32%)
McHugh	50	3 (6.00%)	38 (76.00%)	9 (18.00%)
Gummow	54	4 (7.41%)	49 (90.74%)	1 (1.85%)
Kirby	54	3 (5.56%)	38 (70.37%)	13 (24.07%)
Hayne	51	3 (5.88%)	44 (86.27%)	4 (7.84%)
Callinan	50	1 (2.00%)	33 (66.00%)	16 (32.00%)
<i>Notional Member's Results</i>		5.77%	80.22%	14.01%

The actions of individual members of the Gleeson Court when deciding constitutional law matters are, to some extent, consistent with the results presented for resolution of all matters by that Court. The similarity is strongest when one looks at the very low rates of dissent of some of the justices. The figures for the Chief Justice and Justice Gummow are unparalleled by any other Justice across the entire study. With the exception of his Honour's opinion in *Abebe v Commonwealth*,⁸² Justice Gummow spoke with a majority of the Court in all other cases. The Chief Justice recorded two dissents in constitutional matters, though even that low figure is somewhat inflated as in neither was his resolution of the case determined by constitutional factors.⁸³ Justice Hayne's result is not to be overlooked either, being as it is also lower than that of any other Justice in constitutional cases. Of course, the percentages are derived from raw figures which vary from era to era but the number of judgments upon which Table G(II) is based should not be thought to be too few to take as reliable indicators. There are approximately twice as many matters as the Brennan Court decided, and about two-thirds of the number considered by the Mason Court.

As with the Brennan Court, the modest rate of unanimous judgments overall (Table G(I)) drops further in the constitutional context. Again, this all goes towards supporting the central hypothesis of this paper that such cases cause greater disagreement. That appears to be exacerbated — not surprisingly — when there is a frequent obstacle to unanimity in the form of a Justice who is a stand-out dissenter. This problem was multiplied during the first era of the Gleeson Court by the presence of two particularly strong dissenters in constitutional law. The 'Kirby effect' was observed in relation to Table G(I), but that Justice has a substantially lesser proportion of constitutional opinions which are in the minority here. Admittedly, it is still a large

⁸¹ It is worth noting though that none of those decisions was constitutional in character: see Lynch and Williams, 'The 2004 Statistics', above n 13.

⁸² (1999) 197 CLR 510.

⁸³ His Honour's dissents are found in *Wong v The Queen* (2001) 207 CLR 584 (see comments above n 23) and a partial dissent in *Roberts v Bass* (2002) 212 CLR 1.

number — roughly a quarter of his Honour's judgments in this context. But, while Justice Kirby was easily the most frequent dissenter in both the total caseload of the Gleeson Court and the constitutional cases of the Brennan Court, his Honour has been dislodged from that position in respect of the constitutional matters here by Justice Callinan. Indeed, as a percentage, Justice Callinan's is the highest rate of dissent of any justice in the constitutional cases across the 22 years of this study. He also has the lowest incidence of joining a unanimous opinion. Although he has heard slightly fewer cases than Justice Kirby, the comparison does not necessarily suffer on that account. The evidence very clearly supports the view that Justice Callinan was the justice least representative of mainstream thought in constitutional matters overall for the first era of the Gleeson Court.

When one considers also that Justice McHugh has, in comparison with his figure for the Brennan Court, returned to a position of having a higher level of dissent with 18 per cent of his judgments being in the minority, it is something of a wonder that consensus has been achieved as often as it has.

While the Gleeson Court is perhaps more of an enigma than any of its predecessors, two things are certainly apparent. Three members of the court — the Chief Justice and Justices Gummow and Hayne — have the lowest rates of dissent on constitutional matters of all the judges considered in this study. It follows that those members of the Court have been consistently involved in shaping the Court's institutional position in these cases. This has occurred in a context which, on the other hand, displays a high level of individual disagreement from the Court's other members — hence the still quite high notional dissent rate. Table B showed that the percentage of constitutional matters decided with a split court was actually lower in the Gleeson era than it had been under either Mason or Brennan as Chief Justice. Yet the amount of disagreement emanating, in descending order, from Justices Callinan, Kirby and McHugh makes that rather surprising. The only logical explanation is, of course, that those Justices must have often dissented in the same cases rather than across the whole range of constitutional matters. That can not always have been so, but it must have occurred often enough for the Court's overall incidence of dissent to have fallen while the levels for some of its individual members were the highest seen in this study.

5 High Court 1981–2003

Table H(I) – Actions of Individual Justices in All Matters Tallied

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gibbs	281	45 (16.01%)	211 (75.09%)	25 (8.90%)
Stephen	42	5 (11.90%)	33 (78.57%)	4 (9.52%)
Mason	615	147 (23.90%)	428 (69.59%)	40 (6.50%)
Murphy	190	29 (15.26%)	120 (63.16%)	41 (21.58%)
Aickin	60	5 (8.33%)	49 (81.67%)	6 (10.00%)
Wilson	392	91 (23.21%)	263 (67.09%)	38 (9.69%)
Brennan	747	144 (19.28%)	476 (63.72%)	127 (17.00%)
Deane*	577	133 (23.05%)	339 (58.75%)	105 (18.20%)
Dawson*	657	153 (23.29%)	421 (64.08%)	83 (12.63%)
Toohy*	443	92 (20.77%)	286 (64.56%)	65 (14.67%)
Gaudron*	657	119 (18.11%)	451 (68.65%)	87 (13.24%)
McHugh	583	96 (16.47%)	381 (65.35%)	106 (18.18%)
Gummow	354	39 (11.02%)	299 (84.46%)	16 (4.52%)
Kirby	323	26 (8.05%)	192 (59.44%)	105 (32.51%)
Hayne	245	30 (12.24%)	197 (80.41%)	18 (7.35%)
Callinan	232	22 (9.48%)	164 (70.69%)	46 (19.83%)
Gleeson	221	28 (12.67%)	181 (81.90%)	12 (5.43%)
<i>Notional Member's Results</i>		18.19%	67.85%	13.96%

Table H(I) simply presents the raw number and percentage of opinions issued by each Justice which were unanimous, concurring or dissenting over the entire period under study. For most judges these results do not, of course, span their total career – but an asterisk denotes those for whom they do.⁸⁴

⁸⁴ The results produced for these four Justices are those which we might have expected to bear the closest similarity with the figures produced by Groves and Smyth in tabulating the method of judgment delivery for every member of the High Court since its inception: above n 16, 279–80. However, the figures here do not simply repeat those provided by those authors for Justices Deane, Dawson, Toohey and Gaudron. There are a number of reasons for this. First, in respect of the last named Justice, Groves and Smyth's study concludes in 2001 whereas this one takes her Honour's departure from the High Court as its finishing point. Secondly, of the remaining three Justices whose careers on the High Court are covered by both studies, the different results can be explained by different methodologies. The number of judgments provided in Table H(I) above is slightly more for all three than that given by Groves and Smyth – reflecting this author's greater willingness to multiple tally those reports which can be sensibly be seen as containing more than one matter. As for the breakdown of the opinions themselves, it should be clear that the two studies have a very different approach. Groves and Smyth do not separately identify unanimous judgments, but rather include them in the category of joint judgments which

Given that the levels of unanimity, concurrence and dissent are crucially affected by the opinions of the Court's members at any one time relative to those of each other, 'it is difficult to compare judgment writing of individual Justices across time'.⁸⁵ These figures are not as illuminating as those for the Justices operating within the reasonably stable four eras of the Court. But even so, some greater longitudinal perspective is worth examining if only because it indicates in general those Justices who managed to find a place in the centre of the Court and those whose position tended to be more to one side of it and thus more frequently in the minority.

The generation of the average rates for a notional member of the Court is of assistance here. These enable some reference point from which to examine the individual totals. Justice Gaudron is the member of the Court whose individual performance most closely correlates with the rates of unanimity, concurrences and dissenting opinions of our artificial average Justice. Everyone else delivered judgments which, in varying degrees, were distanced from that norm.

Table H(II) — Actions of Individual Justices in Constitutional Matters

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gibbs	70	15 (21.43%)	43 (61.43%)	12 (17.14%)
Stephen	8	0 (0%)	7 (87.50%)	1 (12.50%)
Mason	147	36 (24.49%)	99 (67.35%)	12 (8.16%)
Murphy	44	7 (15.91%)	28 (63.64%)	9 (20.45%)
Aickin	10	0 (0%)	8 (80.00%)	2 (20.00%)
Wilson	90	22 (24.44%)	54 (60.00%)	14 (15.56%)
Brennan	166	35 (21.08%)	107 (64.46%)	24 (14.46%)
Deane*	138	34 (24.64%)	76 (55.07%)	28 (20.29%)
Dawson*	156	35 (22.44%)	91 (58.34%)	30 (19.23%)
Toohy*	100	19 (19.00%)	66 (66.00%)	15 (15.00%)
Gaudron*	150	20 (13.34%)	103 (68.67%)	27 (18.00%)
McHugh	132	15 (11.36%)	92 (69.70%)	25 (18.94%)

may have two or more authors so long as they concur in the orders given. This, plus the isolation of 'short concurring judgments' means that the figures provided by those authors for 'concurring judgments' (by which they mean only those single author opinions which agree with the final orders) must necessarily be at variance with what is provided here. In saying this, I am certainly not saying that the results produced by Groves and Smyth in the categories as they have defined them are in any way in error. They are simply a different way of looking at the same raw material and in so doing cast their own particular illumination on the opinion delivery practices of the High Court. One might expect more commonality in the number of dissenting opinions since this is a stand-alone category in both studies, but for the reasons already detailed in Part III of this paper there is a crucial difference in the way in which the two studies have classified dissent. This is reflected in the varied results between the two studies. In this respect, I do think there are competing strengths in the two approaches but maintain that consistency and accuracy is best served by a strict application of the concept of dissent as it is formally understood.

⁸⁵ Groves and Smyth, above n 16, 277.

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gummow	79	5 (6.33%)	73 (92.41%)	1 (1.27%)
Kirby	69	4 (5.80%)	47 (68.12%)	18 (26.09%)
Hayne	53	3 (5.66%)	46 (86.79%)	4 (7.55%)
Callinan	50	1 (2.00%)	33 (66.00%)	16 (32.00%)
Gleeson	52	4 (7.69%)	46 (88.46%)	2 (3.85%)
<i>Notional Member's Results</i>		16.84%	67.31%	15.85%

Like the table before it, Table H(II) reveals the occurrence of individual consensus and disagreement across the length of this entire 22 year study – though this time in the specific context of constitutional law matters. These results complement the support given by the other statistics throughout this paper to the central hypothesis. Significantly, most of the Justices wrote a higher percentage of dissenting opinions in constitutional cases than they did generally. For a few – Justices Toohey, McHugh and Hayne – the increase was, admittedly, only marginal, but otherwise the increases were clear.⁸⁶ Only five Justices – a fairly surprising assortment consisting of Chief Justices Brennan and Gleeson, and Justices Murphy, Gummow and Kirby – had a lower dissent rate in respect of just their constitutional law opinions.

Additionally, but hardly unexpectedly given discussion of the earlier tables, the average dissent rate derived from the table was higher than that generated for the entire group of cases in Table H(I). With the average percentage of opinions which Justices delivered as concurrences virtually identical at 67 per cent in both tables, the reduction in the average percentage of unanimous opinions issued when the Court considered constitutional questions explains the growth in express disagreement. That said, the figures for unanimity cannot simply be understood through the device of averaging. As discussed earlier, the propensity of the Gibbs and Mason Courts to deliver such opinions in constitutional cases was strong whilst the latter eras saw unanimity much more rarely. Thus, the notional figure here is far from indicative of any steady pattern of unanimous judgments across the study.

The risk of averaging in flattening out some of the distinctive features of the statistics is also true simply in presenting the results for each judge in a total. For example, Justice Gaudron's results in Table H(II) for all three categories are fairly unremarkable, but it is important to appreciate that they do not convey her performance on the Court at any one time. Her Honour's percentage of unanimous opinions is derived in part from the high frequency with which such judgments were issued during the Mason era but also reflects the much lower incidence of unanimity in the Brennan and Gleeson courts. Similarly, her Honour's lower dissent rates towards the end of her membership of the Court is not simply translated to this total figure, but is bolstered by her earlier, much higher, level of disagreement. For many Justices, their total levels of consensus and dissent may not be especially striking, having been flattened out over time and by fluctuations in the Court's internal dynamic.

⁸⁶ Admittedly, the entries for Justices Stephen and Aickin do not lend support of any great significance.

Conversely, those Justices for whom the results in total retain a markedly extreme quality, have clearly occupied a consistent position relative to their colleagues despite changes to the Court's composition. While for many the particularities may be dimmed and require scrutiny of more limited periods of the Court's recent history, the overall figures here still reliably suggest certain things about certain Justices. For example, it is clear that over a high number of cases and through several changes in the Court's personnel, Chief Justice Mason maintained a position within the majority with great steadiness. Similarly, Justice Deane's much greater tendency to deliver dissenting opinions — admittedly to varying degrees over the different eras in which he took part — is readily observable by the high figure given in this respect here as a total.

V CONCLUSION

This paper has presented the empirical evidence of 22 years of institutional and individual behaviour on the High Court. It has done so in order to confirm or disprove the assumption that the Court experiences higher levels of disagreement in deciding constitutional matters. Through a comparison of the Court's resolution of matters generally with the way in which it addressed constitutional cases, there was a clear increase in the percentage of dissenting judgments in the latter. This was a constant throughout the study — almost all Justices in all four of the particular eras of the Court delivered a higher proportion of minority opinions in constitutional cases. This was reflected in the notional averages generated from each table.

Certainly then, it can be said that this study supports the hypothesis that constitutional law cases produce greater explicit dissension amongst the Justices of the High Court. But, as acknowledged at the outset, disagreement is also evidenced by the delivery of concurrences which, to varying degrees may diverge from the reasoning of each other despite sharing a common view as to the result in a case. The disagreement in question is often, though not always, more subtle and of less importance than that of a judge who is in dissent, but it is nevertheless still real — and measurable. It would have accorded with the hypothesis had the percentage of constitutional cases decided by concurring opinions either increased or stayed level while the prevalence of dissent simultaneously rose.

Although that pattern was observable in the Brennan and Gleeson courts, where opportunities for unanimity were overwhelmed by a strong combination of constitutional cases decided through individual concurrences or over outright dissents, the Gibbs and Mason Courts did not conform to that expectation. Instead, the two earlier eras featured a surprising drop in the share of constitutional cases decided through separate concurrences. While, in that context, the rate of dissent increased, those two Courts were also able to achieve a high percentage of cases decided unanimously. In the Gibbs Court, the rate of unanimity in constitutional decisions was such an improvement on its general performance, that statistically the Court experienced an almost 5 per cent *decrease* in disagreement overall (ie. cases reached through separate concurrences and over minority judgments).

Faced with this, and in light of the limited scope of the present study, I think significant reservations exist in making any claim about the effect of constitutional issues upon levels of disagreement more generally. So, we need to apply a caveat to our finding: although the High Court decides a higher percentage of constitutional cases over dissenting opinions than it does overall, there is not enough evidence to

confirm that the Justices of the Court simply disagree *per se* – both explicitly and through the delivery of separate concurrences – more often in that specific legal context. On the contrary, there is evidence that sometimes the Court is better able to secure real consensus on those matters. Future work could further examine this issue either by engaging in a longer study to see if the results in respect of the Gibbs and Mason Courts are aberrant in this regard or by construction of a methodology which enables some further breakdown and classification of the category of concurring opinions.

The second qualification which it is possible to add to the finding that the Court issues a greater number of dissenting opinions in constitutional cases, is to acknowledge that in those cases the minority is not statistically more likely to consist of a single Justice. As Table C illustrated, the higher rate of dissension in constitutional matters is regularly reached through the contrary opinions of several of the Court's members. Dissent is, by definition, a minority exercise – but it is not especially a lone one.

To answer one question – is there more dissent when the Court decides constitutional cases – is, though, to launch many more. Even with the fairly basic breakdown of the High Court under different Chief Justices here, quite notable distinctions arose in the manner with which the institution dealt with cases at those various times. This prompts reflection on judicial processes and deliberative decision-making, the role of leadership on the Court, the diversity or unity of particular benches and the procedures for judicial appointment. A particular line of inquiry arising from this paper must be to assess the *value* of this body of minority opinions to the development of Australian constitutional law. One of the dominant functions of dissent is to pave the way for future change.⁸⁷

That the Justices' individual rates of participation in unanimous, concurring and dissenting judgments can so clearly alter over time is indicative of movement and transformation. Patapan vividly captured this when he described the Court's decisions as 'protean and slippery, each in a sense consuming and rewriting all that went before'.⁸⁸ The extent to which, in the area of constitutional law, such change is driven by the reversal of majority opinion in favour of earlier dissents remains for future investigation.

⁸⁷ Lynch, 'The Rewards and Risks of Judicial Disagreement', above n 14.

⁸⁸ Patapan, above n 56, 139.

APPENDIX A: CASE REPORTS INVOLVING A NUMBER OF MATTERS – HOW TALLIED

Reports tallied singly due to a common substratum of facts or legal question which leads to little or no distinction being drawn between the matters in the judgments	149/431; 150/402; 150/510; 151/302; 151/342; 151/566; 152/25; 152/211; 152/254; 152/329; 152/477; 153/168; 153/402; 154/261; 154/311; 155/21; 156/397; 156/532; 157/149; 158/622; 159/1; 159/323; 160/55; ⁸⁹ 160/315; 160/423; 160/475; 161/119; 161/315; 162/549; 163/329; 163/558; 165/71; 166/351; 167/348; 168/461; 169/379; 169/482; 170/249; 170/649; 171/432; 173/95; 173/194; 176/277; 177/378; 178/44; 178/249; 178/379; 181/41; 181/338; 183/501; 184/188; ⁹⁰ 184/265; 184/399; 185/149; 185/410; 187/416; 191/471; 191/559; 192/1; 192/285; 197/61; 198/334; 199/1; 199/160; 199/321; 199/462; 200/485; 201/443; 203/346; 204/559; 207/235; 207/562; 207/584; 208/1; ⁹¹ 209/165; 209/372; 211/317; 211/540
Reports tallied multiple times due to distinctions being drawn between the matters in the judgments and orders made: ⁹² (<i>italics denote constitutional cases</i>)	
Tallied as two	151/117; 153/1; ⁹³ 154/404; ⁹⁴ 158/395; 163/378; 167/259; 174/268; ⁹⁵ 192/159; 192/330; 197/510; ⁹⁶ 205/50; 205/337; 205/507; ⁹⁷ 206/323; ⁹⁸ 206/401

⁸⁹ The three tax matters here are differentiated in the judgments delivered but they are all contingent upon interpretation of one statutory provision which dictates the result in each.

⁹⁰ The case of *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 contains fifteen separate matters. I have previously discussed (see Lynch, 'Towards a Methodology for Measuring Judicial Disagreement', above n 35, 500–2) the dilemma regarding tallying of this decision (in which Dawson J dissents in fourteen of the matters and concurs in one). While in the abstract, I was prepared to follow the precedent of the *Harvard Law Review* (see above n 41) and recognise the fifteen individual matters, the practical result of such a course is to distort so grossly the figures in respect of all members of the Mason Court (not just Dawson J) that the matter has eventually been tallied just once, with Dawson J in dissent. Although there is a degree of distinction made between matters in the judgments, the driving factor in tallying singly (aside from practicality) has been to recognise the central constitutional questions which determine those related actions on their facts.

⁹¹ See 'Clarification of particular tallying decisions' below regarding individual judgments in this case.

⁹² The purpose behind multiple tallying in such circumstances – and the competing arguments – are considered at length in Lynch, 'Towards a Methodology for Measuring Judicial Disagreement', above n 35, 500–2. By tallying some case reports on the number of separate matters they contain, the risk of distortion is alleviated. The researcher is able to isolate the disagreement and convey its true extent and by so doing avoid the possibly inflationary effects of a strict application of the tallying rule (b). Of course, in the interests of a transparent methodology, it is vital that the choice to multiple tally be noted – hence the inclusion of this table here.

⁹³ The timing of Justice Aickin's death means that this report effectively comprises two hearings of differently composed courts.

⁹⁴ There are two individual matters – staggered over a 3:2 decision on leave, appeal pending filing of affidavit from ASIO; and then 4:1 on dismissal.

Tallied as three	167/94 ⁹⁹
Tallied as four	198/511 ¹⁰⁰

⁹⁵ There are three matters in this report and although there is a common factual substratum, one matter (*R v Nowytarget*) is kept significantly distinct from the other two. Thus the report is tallied twice. This results in the recording of two concurring judgments from Mason CJ, Brennan and Toohey JJ; two dissents from Deane J who refused special leave in all three matters; and a concurrence and dissent from McHugh J.

⁹⁶ *Abebe v Commonwealth* (1999) 197 CLR 510 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.

⁹⁷ There are actually four matters in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 – 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. 205/507 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 197/510 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 205/507, their respective litigation cannot simply be lumped together as a whole and is best treated as two separate matters – neither of which is constitutional.

⁹⁸ Exactly the same situation as in respect of 205/507.

⁹⁹ There is a common factual substratum but sufficient difference remains to be reflected in the orders of the three matters. Brennan and Dawson concur in the orders of 167/94(ii) and (iii) but dissent in 167/94(i).

¹⁰⁰ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 is tallied as four cases – both for the statistics on the constitutional subset and in general. The only table in which this is not reflected is Table C(II). 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 and Callinan JJ) arrived 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, particularly so in respect of the raw figure of joint judgments between Justices Gummow and Hayne.

APPENDIX B: CLASSIFICATION OF CASES

In almost all instances, the catchwords have appropriately indicated the involvement of constitutional issues. However, there are cases not so identified but which have been tallied as constitutional due to their substantive features. The list below identifies these cases and indicates the reason for inclusion:

154/1	—	An industrial law case but interpretation of s 51(xxxv) occurs.
154/207	—	An industrial law case but passing interpretation of s 75(v) occurs.
171/232	—	An industrial law case but a question as to whether a privative clause may be protected on constitutional grounds is considered.
176/154	—	An industrial law case but interpretation of s 51(xxxv) occurs.
176/433	—	A private international law case but Deane and Gaudron JJ apply s 118 of the <i>Commonwealth Constitution</i> — hence tallied as a constitutional matter.
192/1	—	An industrial law case but interpretation of s 51(xxxv) occurs.

Cases not tallied as constitutional in nature are 203/194, 203/645, 205/507, 206/57, 206/128 which, while involving constitutional writs in s 75(v), do not feature any substantive interpretation of that provision.