SUPER-DISSENTERS

*Nicholas L. Georgakopoulos**

ABSTRACT

An overview of adjudication by the Supreme Court reveals three phenomena. In the 1976 term, unanimous decisions switch from being decidedly liberal to even, and in 1990, they switch to greater frequency. Also, during the 1970s and 1980s, the Supreme Court displays greater complexity of coalition formation. The departures of Justice Douglas in the first case, and of Justices Brennan and Marshall in the last two, have explanatory power. A look back at pre-WWII data indicates both changes are in the direction of returning to older patterns.

* Harold R. Woodard Professor of Law, Indiana University Robert H. McKinney School of Law, Indianapolis. I wish to thank Josh Fischman for useful comments, Fred Sprunger and Drew Warner for capable research assistance, and Lee Little for librarianship help. The Mathematica notebook to reproduce the analysis and graphics is available at my website, NicholasGeorgakopoulos.org in the scholarship page under the entry corresponding to this Article and by request. I urge you to send your comments to me at ngeorgak@iu.edu.

I. INTRODUCTION

This Article seeks to contribute to the explanation of three changed patterns in Supreme Court adjudication which reveal three super-dissenters. Their influence contributed to a period of a mode of adjudication that may prove exceptional. The Court seems to be returning to its original patterns.

Unanimous decisions change political slant. In the mid-1970s, unanimous decisions became evenly split between being liberal and conservative.[1] From 1946 to that point, they had been decidedly liberal.[2] This Article shows that the departure of Justice Douglas from the Court contributed to that change.[3] Douglas had an unusual willingness to dissent, especially from conservative decisions, even alone.

Unanimous decisions also change frequency.[4] They used to be under 35% of the Court's decisions, but, with the 1990 term, they came to hover around 45%.[5] Justices Brennan and Marshall left the Court in 1990 and 1991, respectively.[6]

Tight splits (5-4 decisions) in the 1970s and 1980s came from, unusually, many different majorities.[7] By contrast, in the 1940s–1950s and in the 2000s–2010s, they came from only three or four primary coalitions.[8] Brennan and Marshall were Justices unique in their ability to produce dissenting groups, including groups of four in the face of majorities of five.[9]

This Article does not claim that the departures of these three Justices from the Court are sufficient to explain the entire magnitude of these phenomena. Rather, against the background of the vast complexity of historical and political change in which the Court as an institution operates, this Article merely offers evidence that the departure of Douglas and the departures of Brennan and Marshall had quantifiable

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1. *See infra* Figure 1.
2. *See infra* Figure 1.
3. *See infra* Part III.A.
4. *See infra* Figure 2; *see also* Lee Epstein et al., *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 701-02 (2012).
5. *See infra* Figure 2; *see also* Epstein et al., *supra* note 4, at 702. In all instances, this Article's analysis focuses on decisions with nine votes. Absences and recusals produce decisions with fewer votes. However, the full dynamics of the interaction between all members of the Court are only expressed in decisions with nine votes, rather than the exceptional instances of decisions with fewer votes.
6. *See Justices 1789 to Present*, SUP. CT. OF THE U.S. (Nov. 11, 2020, 9:59 AM), https://www.supremecourt.gov/about/members_text.aspx.
7. *See* Nicholas L. Georgakopoulos & Frank Sullivan, Jr., *Illustrating Swing Votes II: United States Supreme Court*, 53 IND. L. REV. 135, 143-50, 154-55 (2020).
8. *Id.* at 140-43, 149-55.
9. *Id.* at 145-50.

consequences that plausibly explain a large part of the changes.[10] In the chaos of political winds and institutional complexity surrounding the Supreme Court, no alternative explanation, be it contributing or competing, has been offered or is discernible.

Moreover, when looking further into the past than the 1946 start of the main Supreme Court Database (the "Database"), it appears both changes that unanimous decisions undergo are partial returns to a steady state that existed until about 1932.[11]

One of the phenomena discussed here was also the object of a study by Professor Epstein, Professor Landes, and Judge Posner, who identified the increasing frequency of unanimous decisions.[12] The authors did not offer explanations for it.[13] Epstein and Walker also identified the beginning of the increase in dissenting opinions and pointed out that it comes too late to be attributed to the increased discretion in selecting cases that came in 1925.[14] Professors Corley, Steigerwalt, and Ward study the departure from consensus-driven adjudication with the creation of the New Deal, and this Article complements their findings by identifying elements of a partial return toward consensus.[15]

More generally, decisions interact with the role of grants of review—writs of certiorari in the United States Supreme Court—which by tradition, not rule, turn on the votes of four Justices.[16] If one considers that a Supreme Court will only hear close disputes, then one should expect a relative rarity in unanimous decisions. However, unanimous decisions are quite frequent.[17] To the (limited) extent that the law is a system of descriptive logic, evaluating claims as true and false, unanimous decisions

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10. *See infra* Part IV.

11. *See* Harold J. Spaeth et al., *Supreme Court Database*, WASH. UNIV. L., http://scdb.wustl.edu/analysis.php (last visited Apr. 1, 2021); *infra* Part IV; *see also* PAMELA C. CORLEY ET AL., THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT 16-17 (2013).

12. Epstein et al., *supra* note 4, at 701-02.

13. *Id.* at 702-03.

14. The thinking is that when the Court exercised discretion about which cases to hear, the Court chose to hear the less clear and more ambiguous disputes, with the result of more dissents. Yet, the increase in dissents does not arrive for several years after that point. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 15, 19-20, 35-36 (4th ed. 2001); *see also* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 57-58, 223, 229-30 (4th ed. 2007).

15. CORLEY ET AL., *supra* note 11, at 16-17, 24.

16. *See* Straight v. Wainwright, 476 U.S. 1132, 1134-35 (1986) (Brennan, J., dissenting); *see also* Hamilton v. Texas, 498 U.S. 908, 909 (1990) (Marshall, J., concurring). Justice Brennan explains this "rule of four" as a desirable antimajoritarian feature: "A minority of the Justices has the power to grant a petition for certiorari over the objection of five Justices. The reason for this 'antimajoritarianism' is evident: in the context of a preliminary 5-to-4 vote to deny, 5 give the 4 an opportunity to change at least one mind." *Straight*, 498 U.S. at 1134-35.

17. *See* Epstein et al., *supra* note 4, at 701, 703.

should be the norm, not the exception.[18] Moreover, political science research also identifies the disciplining of lower courts as a role of supreme courts, which also makes unanimous decisions plausible.[19]

II. THE THREE PHENOMENA

Unanimous decisions stopped having a liberal bias in the 1976 term.[20] In the 1990 term, they jumped from a frequency of 33% to 44%.[21] In the 1970s and 1980s, the Court's 5-4 coalitions were unusually complex, whereas at the end of this period, the Court returned to less fluid formation of coalitions and more polarization.[22] The following Subparts document these phenomena.

A. The End of the Liberal Bias

Seen from either the perspective of three-term periods or fifteen-term periods, it is apparent that unanimous decisions leaned strongly liberal until the 1975 term and were about even thereafter.[23]

Figure 1 graphs the conservative ratio of unanimous decisions in fifteen-term periods (the solid line) and in five-term periods (the dashed line).[24] Although the five-term values fluctuate, until the 1975 term, they hover around 28%, where the steadiness of the fifteen-term values stay. From the 1976 term, the values fluctuate around 50%, indicating an even split of conservative and liberal unanimous decisions.

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18. However, Supreme Court Justices may apply normative, not descriptive, logic, in which case, propositions may not be truth-valued, and any hope for certainty disappears. *See* NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 11-16 (2005).

19. Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RSCH. Q. 385, 386-87, 390-91 (2012).

20. *See infra* Figure 1; *supra* note 16 and accompanying text.

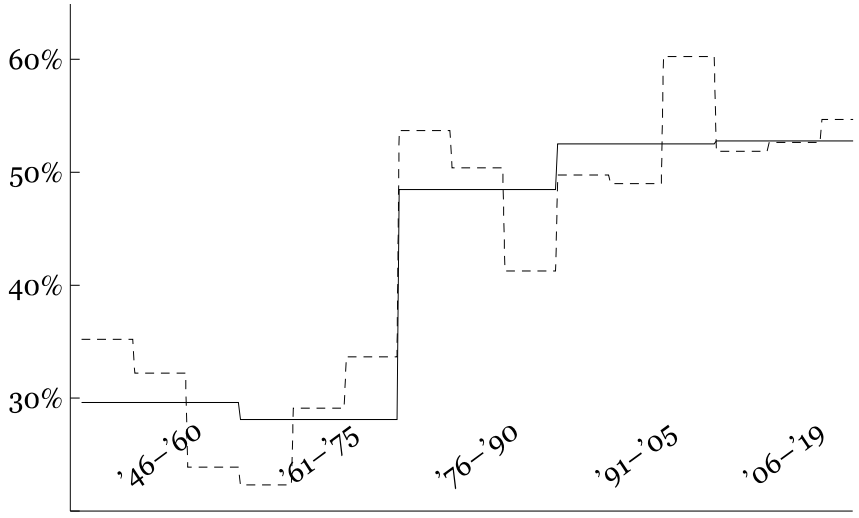
21. *See infra* Figure 2.

22. *See infra* Part II.C.

23. *See infra* Figure 1.

24. *See infra* Figure 1.

Figure 1. Unanimous Conservative Ratio.[25]



A statistical test shows that observing such a change by chance is extraordinarily improbable, much less than one in a trillion.[26] Moreover, it is clear that this is not a gradual change, but a sudden one, and the only other significant change is Justice Douglas's departure in the 1975 term.[27]

B. The Frequency Increase

The other phenomenon that unanimous decisions present is a change in their frequency.

25. *See supra* note *.

26. The chi-square test juxtaposes the 276 conservative and 684 liberal unanimous decisions up to the 1975 term, compared to the 788 conservative and 762 liberal unanimous decisions from the 1976 term, to the null hypothesis of proportionality, respectively, 407, 553, 657 and 892 decisions. *See, e.g.*, GEORGAKOPOULOS, *supra* note 18, at 294-95; T. RAJARETNAM, STATISTICS FOR SOCIAL SCIENCES 142-46 (2015); Adam Hayes, *Chi-Square (X^2) Statistic Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/c/chi-square-statistic.asp (Oct. 7, 2020). The resulting p-value, the probability of observing this change by chance, is a number with twenty-six zeros after the decimal point.

27. Douglas retired on November 12, 1975. *See Justices 1789 to Present*, *supra* note 6. Running two probit regressions on either side of the change, i.e., one with the data from the terms from 1946 to 1975 and one with the data from the terms from 1976 to 2019, does not reveal trends, i.e., the explanatory variable of time does not receive a coefficient that differs from zero with statistical confidence.

Figure 2. The Fraction Unanimous.

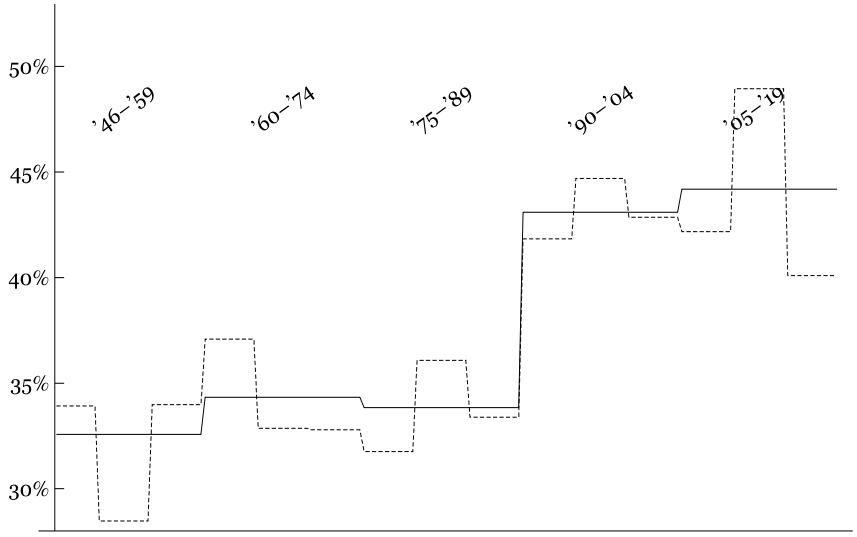


Figure 2 follows the patterns of Figure 1. Figure 2 shows the fraction of decisions with nine votes that are unanimous, aggregating them in the same two durations.[28] The solid line aggregates fifteen terms per period and the dashed line aggregates five terms per period, as did Figure 1. The 1990 term is set to separate fifteen-term periods. Both lines support the conclusion that the change occurred in the 1990 term. Statistical confidence that a change did occur in the 1990 term is again extraordinarily great.[29] Brennan retired from the Court at the end of the 1989 term (on July 20, 1990) and Marshall immediately before the beginning of the 1991 term (on October 1, 1991).[30] Therefore, the 1990 term was the first one without both of them.

C. The Complexity of Coalitions

The difference of the complexity in the formation of coalitions of the 1970s and 1980s from those that came before and after is visible in two approaches: the index of fluidity and the visualizations of coalitions and

28. *See supra* Figure 2.

29. The chi-squared test juxtaposes the 1,568 unanimous to 3,085 split-vote decisions up to the 1989 term, compared to the 964 unanimous and 1,250 split-vote ones from the 1990 term, to the null hypothesis of constant proportional (rounded) numbers of 1,716 to 2,937 and 816 to 1,397, respectively. The probability that the change arose by chance starts with fourteen zeros after the decimal point.

30. *See Justices 1789 to Present*, *supra* note 6.

swing votes. Justice Sullivan and I commandeered a mathematician, my son, Dimitri Georgakopoulos, and produced an index measuring the fluidity of 5-4 coalitions during a period that a Supreme Court's composition does not change.[31]

The index measures where a court's usage of tightly split coalitions lies on a range.[32] One extreme is that all tightly split decisions come from a single coalition—an unchanging group of five Justices against the same four dissenters.[33] The opposite extreme is that every possible coalition forms to issue a proportional number of decisions, i.e., decisions come from all possible coalitions, with each coalition issuing the same number of decisions.[34] The former extreme, which corresponds to an index value of zero, we consider the utter lack of fluidity in the formation of coalitions. The latter extreme, which corresponds to an index value of one, we consider the ultimate display of flexibility and fluidity in the formation of coalitions.

The compositions defined by the appointments of Justices Powell and Rehnquist, of Justice Stevens, and of Justice O'Connor have fluidity index values of 44%, 57%, and 45%, respectively.[35] Those defined by Justices Breyer, Alito, and Kagan have fluidity index values of 34%, 25%, and 29%, respectively.[36] More generally, a reasonable interpretation of the image that the index gives is that it rises after the departure of Justice Douglas and drops as Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, in that sequence, replace Justices Stewart, Burger, Powell, Brennan, and Marshall. The present analysis does not speak on whether some of the new Justices, perhaps O'Connor, Scalia, and Kennedy, brought a different kind of conservatism to the Court, which may have reduced the way in which Justices formed coalitions; that is one of the plausible explanations, but is beside the point here. The point is that the departure of Brennan and Marshall had a quantifiable effect: coalitions, as measured by the fluidity index, were more varied before their departure.

I, with Justice Sullivan, also developed a visual representation of tightly split coalitions and swing votes.[37] A ring of dots indicates all

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31. *See* Frank Sullivan, Jr. et al., *The Fluidity of Judicial Coalitions*, JUDICATURE, Spring 2016, at 34, 36.

32. *Id.* at 37.

33. *Id.*

34. *Id.*

35. *See id.* at 39-41 (describing the fluidity index value of Powell and Rehnquist and displaying other fluidity index values in Table 4).

36. *See id.* at 40 tbl.4.

37. *See* Nicholas L. Georgakopoulos & Frank Sullivan, Jr., *Illustrating Swing Votes I: Indiana Supreme Court*, 53 IND. L. REV. 95, 98-100 (2020); *see also* Georgakopoulos & Sullivan, Jr., *supra* note 7, at 137, 139-40.

possible coalitions and the coalitions that form emit outwardly blue (shown in hexagonal shading) or red (shown in gray) rays for their liberal or conservative decisions. Near-diametrical lines connect coalitions that have a single swing vote.[38] The graphs render visible the difference of having Brennan and Marshall in the minority.

Figure 3 shows the graphical representations of the nine long-lived Supreme Court compositions, i.e., the ones that produce over fifty tightly split decisions.[39] Each graph shows the output in decisions (gray for conservative and hexagonal shading for liberal) of nonminor 5-4 coalitions and the swing votes connecting them. The long-lived compositions, as defined by their junior Justices, are those of Justices Vinson, Stewart, Powell, Rehnquist, Stevens, O'Connor, Kennedy, Breyer, Alito, and Kagan. Nonminor coalitions are those that produce more than two decisions. If coalitions are separated by a single swing vote, a line indicates that.

Notice how few swing votes and nonminor coalitions the earliest and latest compositions have. The compositions of Vinson and Stewart, on the early side, and of Alito and Kagan, on the late side, have three to five coalitions and two to four swing votes. Contrast the central column. Each composition has six to twelve coalitions; except for that of Kennedy, each has eight to twelve swing votes showing a much greater complexity in terms of coalition formation and swing vote relevance.

Although this Article's thesis does not depend necessarily on observing a lack of complexity in Breyer's composition, the appearance of complexity is an artifact of the coalition's unusual duration. Breyer's coalition lasted eleven terms.[40] The coalitions at two, four, five, eight, and eleven o'clock may have remained minor if the Breyer composition only lasted about three years, like the rest.[41] The coalitions, which would have

38. *See* Georgakopoulos & Sullivan, Jr., *supra* note 37, at 98-100 (explaining the method and applying it to a composition of the Indiana Supreme Court); *see also* Georgakopoulos & Sullivan, Jr., *supra* note 7, at 137, 139-40 (extending the method to the United States Supreme Court).

39. *See infra* Figure 3.

40. Georgakopoulos & Sullivan, Jr., *supra* note 7, at 150.

41. *See id.* at app. B7. Indeed, three to five coalitions and three to four swing votes are only due to the duration of this composition. The three decisions of the coalition at one o'clock issued in 1996, 1998, and 2005, meaning that it would not appear if the Breyer composition had lasted three terms. All three decisions of the coalition at four o'clock issued in 1995, and the coalition would only appear, if the three-term window included that year, if the Breyer composition lasted only three terms. The three decisions of the coalition at five o'clock issued in 1997, 2001, and 2005, meaning that the coalition would not appear if the Breyer composition had lasted three terms. The three decisions at eight o'clock issued in 1998, 2002, and 2004, meaning that the coalition would not appear if the Breyer composition had lasted three terms. The five decisions of the coalition at eleven o'clock issued in 1999, 2000, 2003, 2004, and 2005, meaning that the coalition would only appear as nonminor if the Breyer composition had lasted three years if those were 2003 to 2005. Therefore, Breyer's composition, adjusted for its longevity, should be considered analogous to having three to four

remained minor, issue more decisions due to the composition's longevity. Therefore, they appear in the graph. However, they would not appear if the composition had lasted two or three terms, like the other long-lived compositions. The consequence of a coalition's appearance is that its swing votes also appear. If Breyer's composition had the duration of the others, it would only have three nonminor coalitions—those at three, nine, and ten o'clock (and depending on the three-year window considered, perhaps also either the coalition at four o'clock or at eleven o'clock)—and two swing votes (or three, if an additional coalition appears), presenting an image similar to that of the Stewart composition (or the Vinson one).

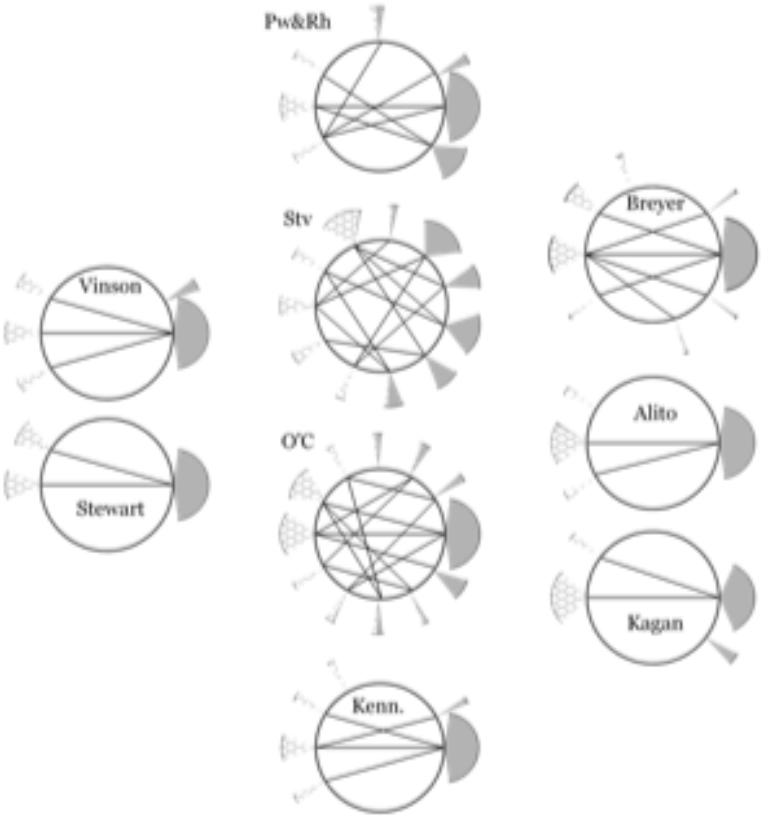
The central column, corresponding to the compositions defined by Powell and Rehnquist, Stevens, O'Connor, and Kennedy, has noticeably more majorities and swing votes.

The point is that some force produced additional complexity in the 1970s and 1980s. A contributing cause to this complexity was the unusual ability of Brennan and Marshall, as a team, to forge minority coalitions, often coalitions of four in the face of a conservative majority of justices.[42]

coalitions and three to four swing votes. The decisions per coalition are listed in the appendix of *Illustrating Swing Votes II: United States Supreme Court*. *Id.*

42. *See* Sullivan, Jr. et al., *supra* note 31, at 39.

Figure 3: The Swing Votes and Outputs of Each Nonminor 5-4 Majority of Long-Lived Compositions, Defined by Their Junior Justices.



III. EXTRAORDINARY DISSENTERS

Three Justices' attitudes about dissenting are related to the above phenomena: those of Douglas, Brennan, and Marshall. All three were emphatically liberal, and nobody would accuse them of having too restrained a view of their role as members of the Supreme Court. Douglas departed the Court in November 1975, during the 1975 term.[43] Brennan departed before the 1990 term, in July 1990.[44] Marshall departed in early

43. *See Justices 1789 to Present*, *supra* note 6.
44. *Id.*

October 1991, before the 1991 term.[45] They became the leftmost justices on the Court, by quite a difference, according to the ideological rankings.[46] Attempts to quantify judicial activism also place them as the most activist.[47]

William O. Douglas came close to being President Franklin D. Roosevelt's vice president, instead of Harry S. Truman, and to running for the Democratic national election two more times.[48] Justice Douglas was the object of three impeachment attempts—he was not seen as a collegial figure on the Supreme Court.[49]

William J. Brennan, Jr. was a Democrat appointed by Republican President Dwight D. Eisenhower as a bipartisan move near the expiration of Eisenhower's first term.[50] After President Nixon's appointments made the Court more conservative, Brennan would be the only strongly liberal member of the Court, along with Marshall.[51] Brennan is seen as an enormously influential justice.[52] To some extent, that influence overlaps with the phenomenon identified here—the unusual ability of Brennan and Marshall to forge coalitions.

Thurgood Marshall was the leader of the legal fight to end racial discrimination and a legendary figure in the integration of American society.[53] His judicial attitude, however, was not one of strict adherence to formalities.[54] His quote, "You do what you think is right and let the law catch up," captures the spirit of all three of these Justices' view of their role.[55] This is the opposite judicial stance to the classic phrase from the confirmation hearings of Chief Justice Roberts that the Justices just "call

45. *Id.*

46. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145-46 (2002); *see* Michael A. Bailey, *Measuring Court Preferences, 1950–2011: Agendas, Polarity and Heterogeneity* (Oct. 2012) (unpublished manuscript), https://blogs.commons.georgetown.edu/american-government-seminar/files/2012/11/CourtPrefOct_ 2012.pdf; *see also* Lee Epstein et al., *Revisiting the Ideology Rankings of Supreme Court Justices*, 44 J. LEGAL STUD. S295, S304-05 (2015).

47. Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1755, 1781 tbl.3 (2007) (creating a metric of judicial activism and placing Douglas, Brennan, and Marshall at the top of the resulting rankings in different order depending on specification).

48. *See generally* James L. Moses, *William O. Douglas's "Political Ambitions" and the 1944 Vice-Presidential Nomination: A Reinterpretation*, 62 HISTORIAN 325 (2000) (exploring Justice Douglas's repeated failed attempts at pursuing a political path).

49. *See* Richard A. Posner, *The Anti-Hero*, NEW REPUBLIC, Feb. 24, 2003, at 27, 27-30.

50. Patricia Brennan, *Seven Justices, on Camera*, WASH. POST, Oct. 6, 1996, at Y06.

51. *Id.*

52. *Id.* ("Scalia . . . concludes: 'He is probably the most influential justice of the century.'").

53. *See* Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1262-64 (1992).

54. *Id.* at 1259.

55. *Id.*

balls and strikes."[56] The rankings of Justices by how frequently they dissent in different groupings are about to reveal different patterns about the dissenting of Justices Douglas, Brennan, and Marshall.

A. Lone Buccaneering: Douglas

The almost disdainful demeanor of Douglas toward the Court is confirmed by his topping the list of solo dissenters by a large margin.[57] Table 1 lists the solo dissents in decisions with nine votes, sorted by the number of dissents per term each Justice produced, with Justices Brennan, Douglas, and Marshall denoted in italics.[58] The first column holds the number of solo dissents by each Justice in the Database in decisions that have nine votes. The next three columns hold the term in which each Justice first appeared in the Database (several Justices, including Douglas but neither Brennan nor Marshall, were on the Court before the 1946 term when the Database begins), the Justice's last term, and the resulting number of terms on the Database. Dividing the number of dissents by the Justice's number of terms gives the final column, the number of dissents per term. The mean value of dissents per term is 0.94 with a standard deviation of 1.22. The median is 0.5. One standard deviation above the mean is 2.15 and two standard deviations above the mean is 3.4. Douglas, Harlan, and Stevens are the Justices whose dissents per term exceed the mean by more than two standard deviations.

Douglas leads the list with over five solo dissents per term. By contrast, Marshall and Brennan do not stand out. Both are within one standard deviation from the mean. Brennan dissents alone with a well below-average frequency. Marshall is fourth on this list, with less than two solo dissents per term. Marshall is indistinguishable from Rehnquist and Black (at this level of precision, to one decimal place). This set of peers can be called forceful, but, unlike Douglas, they are all integral components of their Courts. If one could place the Justices on a range from team players to lone buccaneers, they would be quite different from Douglas, who would be near the lone-buccaneering extreme.

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56. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., U.S. Sup. Ct. C.J. Nominee).

57. *See infra* Table 1; *see also* Posner, *supra* note 49, at 30.

58. *See infra* Table 1.

Table 1. Solo Dissents Per Term.

Justice	*Solo Dissents*	*First Term in DB*	*Last Term*	*N. of Terms*	*Dissents/Term*
Douglas	153	1946	1975	30	5.1
Harlan	83	1954	1970	17	4.9
Stevens	138	1975	2009	35	3.9
Marshall	46	1967	1990	24	1.9
Powell	64	1971	2004	34	1.9
Black	47	1946	1970	25	1.9
Jackson	12	1946	1953	8	1.5
Frankfurter	23	1946	1961	16	1.4
Sotomayor	11	2009	2019	11	1.0
Whittaker	6	1956	1961	6	1.0
Rutledge	3	1946	1948	3	1.0
Thomas	28	1991	2019	29	1.0
Stewart	22	1958	1980	23	1.0
Blackmun	23	1969	1993	25	0.9
White	25	1961	1992	32	0.8
Murphy	2	1946	1948	3	0.7
Alito	9	2005	2019	15	0.6
Reed	6	1946	1956	11	0.5
Gorsuch	2	2016	2019	4	0.5
Fortas	2	1965	1968	4	0.5
Clark	8	1949	1966	18	0.4
Scalia	13	1986	2015	30	0.4
Rehnquist	6	1971	1986	16	0.4
Ginsburg	9	1993	2019	27	0.3
Brennan	11	1956	1989	34	0.3
Breyer	8	1994	2019	26	0.3
Burton	4	1946	1958	13	0.3
Burger	5	1969	1985	17	0.3
Minton	2	1949	1956	8	0.3
Souter	4	1990	2008	19	0.2
O’Connor	4	1981	2005	25	0.2
Kennedy	4	1987	2017	31	0.1
Warren	1	1953	1968	16	0.1

Kavanaugh	0	2018	2019	2	0.0
Kagan	0	2009	2019	11	0.0
Roberts	0	2005	2019	15	0.0
Goldberg	0	1962	1964	3	0.0
Vinson	0	1946	1952	7	0.0

To appreciate how far from the norm Douglas's solo dissenting lies, observe the histogram of solo dissenting, Figure 4.[59] The height of each column reflects the number of Justices producing the number of solo dissents per term in the interval corresponding to the horizontal axis. The vast majority of the Justices, thirty out of the thirty-eight Justices that served from the 1946 term to the 2019 one, produce one or fewer solo dissents per term (this group includes Brennan with 0.3).[60] Note that this includes five Justices who have never dissented alone, a group that includes two Chief Justices, Vinson and Roberts.[61] Never dissenting is a strategy that must not be overlooked. Five Justices produced a number of dissents per term that is between one and two (this group includes Marshall with 1.9). No Justice produces between two and three dissents per term. Only three Justices have produced more than three dissents per term. Stevens occupies the space from three to four, with 3.9 solo dissents per term. Harlan occupies the space from four to five, but is still short of Douglas, who produced over five solo dissents per term.

Despite being such an extraordinary solo dissenter, Douglas's solo dissents cannot quite flip the mix of unanimous decisions and their statistics.[62] With many caveats, let us embark on a counterfactual of what the counts might have been if Douglas behaved like the median Justice. If Douglas dissented with the median frequency over his thirty terms on the Database, then he would have about 15 solo dissents rather than 153. Douglas has about 138 more solo dissents than if he dissented solo with the median frequency. Even if all 138 of the missing unanimous decisions were conservative, they are not quite enough for the 276 conservative unanimous nine-vote decisions to reach the number that would make them proportional. Moreover, despite the fact that it seems they come close, a

59. *See infra* Figure 4.

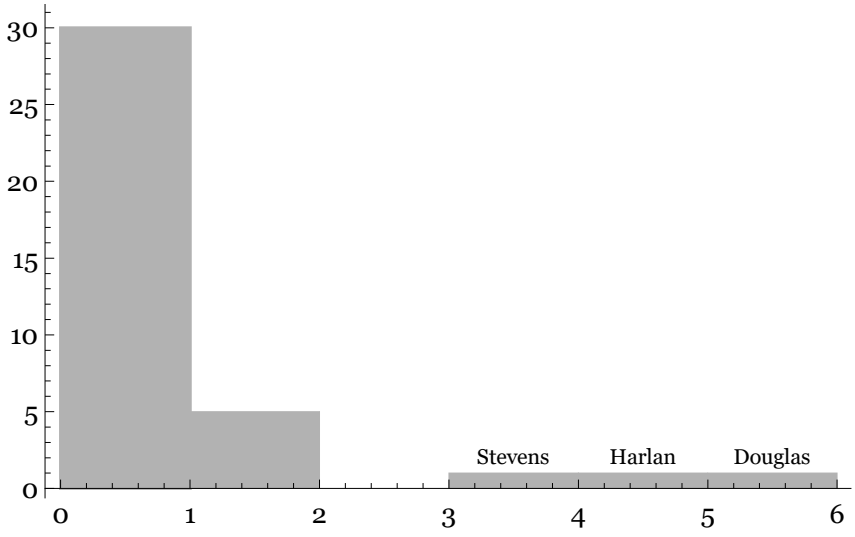
60. *See infra* Figure 4; *supra* Table 1. Convention in the design of histograms places the count of the border value at the grouping above the border. However, in this histogram, the three Justices who produce a value of one dissent per term are included in the count that corresponds to the first column.

61. *See infra* Figure 4; *supra* Table 1; *see also Justices 1789 to Present*, *supra* note 6. While this Article was coming to press, Chief Justice Roberts dissented alone for the first time, but still outside these data, in *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. Mar. 8, 2021).

62. *See supra* notes 28-29 and accompanying text.

negative adjustment is necessary. Douglas also took solo dissents from decisions that were liberal. Indeed, in forty-two of Douglas's solo dissents, the Database codes the majority as liberal, and the Database does not give a slant to three more. Thus, Douglas's departure in the 1975 term, taken in isolation, is not enough to flip the conclusion that unanimous decisions up to the 1975 term had a liberal bias. However, Douglas's departure went a long way in that direction, and future research should identify with greater precision additional forces that produced that change.

Figure 4. Histogram of Solo Dissents Per Term.



Whereas the solo dissents of Douglas seem meaningful, the solo dissents of Brennan and Marshall seem unlikely to have had a significant impact. This changes when attention turns to dissents by teams of two or more Justices.

B. Dissent Playmaking: Brennan and Marshall

Brennan and Marshall appear to be a team with unusual capacities, not only acting alone, but mostly in combining with other Justices. Table 2 lists the most frequently forming teams of two dissenters.[63] The number of teams of two dissenters that have actually formed is 154. Given the instances of teams of two Justices whose tenures overlap on the Court, the

63. *See infra* Table 2.

number of possible teams of two that could have issued dissents is 270. In other words, an additional 116 teams of two dissenters could have formed (because those two Justices served concurrently) but did not. Yet, because the listing of solo dissents showed that issuing no dissents is a strategy that should not be ignored, the silent teams must not be ignored here either. The statistics, therefore, take two forms: one on the notional number of dissents, including the teams that did not form as zeros, and the observed statistics, which ignore the teams that did not form. The notional mean number of dissents per term is 0.28 and the median is 0.09, while the observed ones are 0.49 and 0.27. Population notional standard deviation is 0.55 and the observed one is 0.65. One standard deviation above the mean in the notional counting corresponds to 0.83 dissents per term, two to 1.38 (counting the observed, 1.14 and 1.79). The Table holds the twenty-two teams that have dissented with a frequency of more than one standard deviation above the mean, according to the notional statistics. The first twelve are over two standard deviations above the mean. The leading team is Brennan and Marshall, producing 5 dissents per term—114 dissents for the 23 terms during which they served together. The next most active duo is more than two standard deviations behind. No other coalition of Brennan and another Justice appears, but one of Marshall does, with Stevens, producing 1.1 dissents per term (in italics).

Table 2. Top Dissenting Duos.

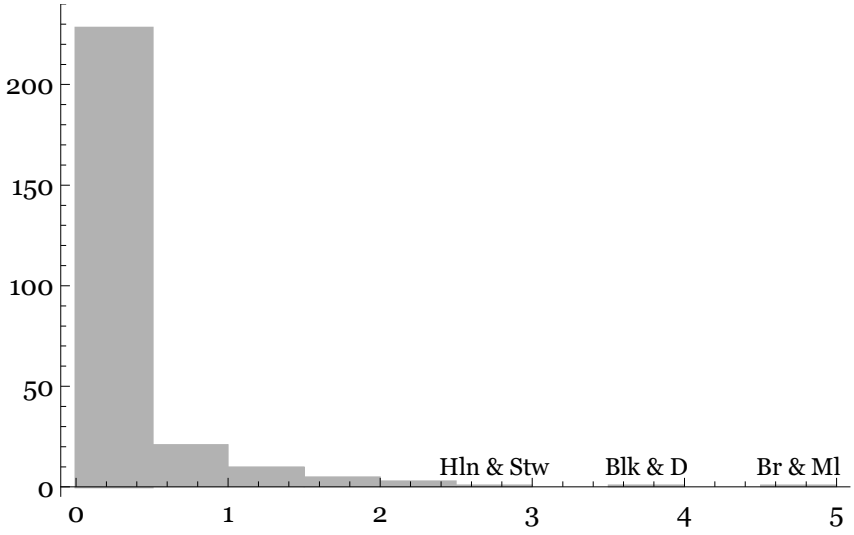
Two-Justice Team	*Dissents*	*First Term*	*Last Term*	*N. of Terms*	*Dissents/ Term*
Brennan & Marshall	114	1967	1989	23	5.0
Black & Douglas	89	1946	1970	25	3.6
Harlan & Stewart	36	1958	1970	13	2.8
Scalia & Thomas	57	1991	2015	25	2.3
Clark & Harlan	28	1954	1966	13	2.2
Stevens & Sotomayor	2	2009	2009	1	2.0
Frankfurter & Jackson	15	1946	1953	8	1.9
Burger & Powell	25	1971	1985	15	1.7
Stevens & Breyer	25	1994	2009	16	1.6
Blackmun & Stevens	29	1975	1993	19	1.5

Harlan & Burger	3	1969	1970	2	1.5
Stevens & Ginsburg	25	1993	2009	17	1.5
Thomas & Alito	21	2005	2019	15	1.4
Douglas & Fortas	5	1965	1968	4	1.3
Thomas & Gorsuch	5	2016	2019	4	1.3
Frankfurter & Harlan	10	1954	1961	8	1.3
Stewart & Powell	12	1971	1980	10	1.2
Marshall & Stevens	17	1975	1990	16	1.1
Murphy & Rutledge	3	1946	1948	3	1.0
Black & Goldberg	3	1962	1964	3	1.0
Blackmun & Souter	4	1990	1993	4	1.0
Ginsburg & Sotomayor	10	2009	2019	11	0.9

Again, the extremity of the lead of Brennan and Marshall as a dissenting duo is visible in a histogram. Figure 5 shows the distribution of notional dissents by teams of two Justices.[64] Two hundred twenty-eight teams of two produced fewer than half a dissent per term (116 of those produce none). Only three teams of two Justices issued more than 2.5 dissents per term. Harlan and Stewart appear alone in the interval corresponding to 2.5 to 3 dissents per term. After a gap, Black and Douglas appear at the 3.5 to 4 interval. One more gap is necessary to reach Brennan and Marshall at the interval just short of five dissents per term.

64. *See infra* Figure 5.

Figure 5. Histogram of Dissents by Two Justices.



The next question is how frequently Brennan and Marshall formed dissents with one or two more Justices. Table 3 lists the most frequently forming teams of three dissenters.[65] The number of teams of three dissenters that have actually formed is 299. Given the instances of teams of three Justices whose tenures overlap on the Court, the possible teams of three that could have issued dissents by three Justices are 913. In other words, an additional 614 teams of three dissenters could have formed (because those three Justices served concurrently) but did not.

The statistics, again, take two forms: one based on the notional number of dissents, including the teams that did not form as zeros, and the observed statistics, which ignore the teams that did not form. The notional mean number of dissents per term is 0.16 and the median is zero. The observed mean is 0.48 and the median is 0.25. The population notional standard deviation is 0.78 (observed 0.50). One standard deviation above the mean corresponds to 1.26 (observed 0.66) dissents per term, and two standard deviations above the mean corresponds to 2.05 (observed 1.16). The Table holds the twenty-nine teams that have dissented with a frequency of more than two standard deviations greater than the mean according to the notional statistics. The top three dissenting teams include Brennan and Marshall. The third members are Douglas, Stevens, and Blackmun, producing 7.6, 7.0, and 3.7 dissents per term. Brennan and Marshall appear again, with Justice White, further down the Table with

65. *See infra* Table 3.

1.3 dissents per term (in italics). This value is still over two standard deviations above the mean but only according to the notional statistics.

Table 3. Top Dissenting Trios.

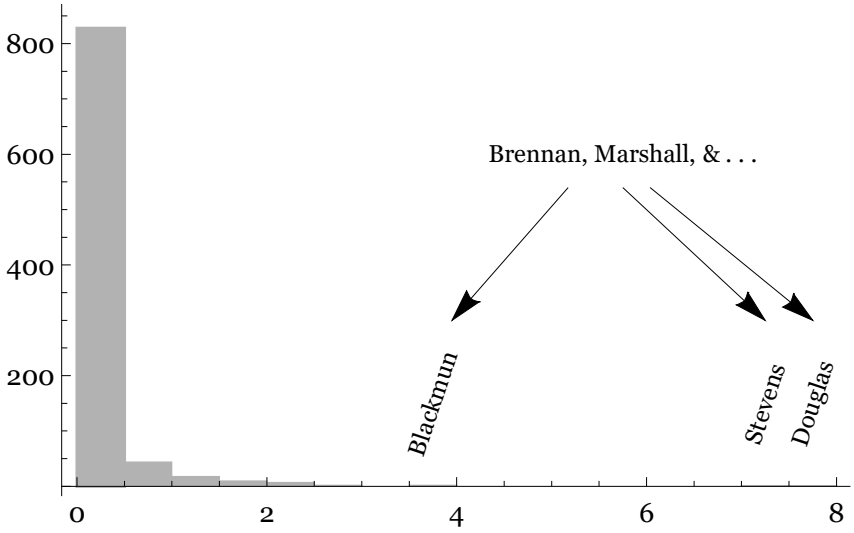
Three-Justice Team	*Dissents*	*First Term*	*Last Term*	*N. of Terms*	*Dissents/ Term*
Douglas, Brennan, & Marshall	68	1967	1975	9	7.6
Brennan, Marshall, & Stevens	105	1975	1989	15	7.0
Brennan, Marshall, & Blackmun	78	1969	1989	21	3.7
Frankfurter, Harlan, & Whittaker	21	1956	1961	6	3.5
Harlan, Stewart, & Goldberg	8	1962	1964	3	2.7
Powell, Scalia, & Thomas	34	1991	2004	14	2.4
Thomas, Alito, & Gorsuch	7	2016	2018	3	2.3
Black, Douglas, & Warren	36	1953	1968	16	2.3
Blackmun, Stevens, & Ginsburg	2	1993	1993	1	2.0
Black, Murphy, & Rutledge	6	1946	1948	3	2.0
Black, Douglas, & Fortas	8	1965	1968	4	2.0
Frankfurter, Burton, & Harlan	10	1954	1958	5	2.0
Clark, Harlan, & Stewart	18	1958	1966	9	2.0
Black, Harlan, & White	18	1961	1970	10	1.8
Frankfurter, Harlan, & Stewart	7	1958	1961	4	1.8
Stevens, Souter, & Ginsburg	27	1993	2008	16	1.7
Black, Douglas, & Murphy	5	1946	1948	3	1.7

Douglas, Murphy, & Rutledge	5	1946	1948	3	1.7
Burton, Clark, & Whittaker	5	1956	1958	3	1.7
Black, Douglas, & Goldberg	5	1962	1964	3	1.7
Rehnquist, Powell, & O'Connor	10	1981	1986	6	1.7
Burger, Powell, & O'Connor	8	1981	1985	5	1.6
Black, Burger, & Blackmun	3	1969	1970	2	1.5
Brennan, White, & Marshall	30	1967	1989	23	1.3
Harlan, Stewart, & White	13	1961	1970	10	1.3
Blackmun, Stevens, & Souter	5	1990	1993	4	1.3
Burger, Blackmun, & Powell	18	1971	1985	15	1.2
White, Burger, & Powell	18	1971	1985	15	1.2
Stewart, Powell, & Stevens	7	1975	1980	6	1.2

Again, the unusual frequency of the dissenting trios that include Brennan and Marshall is visible in a histogram, Figure 6.[66] Most trios produce fewer than half a dissent per term. All other frequencies are a very small fraction of that. The most frequently dissenting trios that include Brennan and Marshall are distant outliers.

66. *See infra* Figure 6.

Figure 6. Histogram of Dissents by Three Justices.



Turning the attention to teams of four brings an additional consideration. Teams of four are much more closely associated with the Court's composition than smaller groups. If Justices truly aligned from political left to political right, then dissenting teams of four would depend on the Court's composition. They would only change upon the appointment of a new Justice. The extraordinary ability of Brennan and Marshall to form coalitions should be considered most pronounced here, where political inflexibility would imply a single coalition. Instead, Brennan and Marshall demonstrate the ability to make numerous minorities of four.

Brennan and Marshall would tend to be members of the liberal sides of tight splits—in majorities of five when they would garner a fifth vote, elsewise in minorities of four dissenters. Moreover, a dissent of four has a less discretionary nature because the mere addition of a fifth Justice would make it a majority. The notion that a dissent of four is one vote away from being a majority opinion gives it significant additional weight and importance. By comparison, a solo dissent can be seen as having the somewhat frivolous nature that it is an opinion very far from becoming a majority opinion. A solo dissenter can stay silent with little loss, usually. It is no accident that the list of Justices with zero solo dissents includes two Chief Justices, Vinson and Roberts.[67]

67. *See supra* Table 1.

Table 4. Top Dissenting Teams of Four Lasting over Three Terms.

Four-Justice Team	*Dissents*	*First Term*	*Last Term*	*N. of Terms*	*Dissents / Term*
Stevens, Souter, Ginsburg, & Breyer	124	1994	2008	15	8.3
Brennan, Marshall, Blackmun, & Stevens	118	1975	1989	15	7.9
Ginsburg, Breyer, Sotomayor, & Kagan	54	2009	2018	10	5.4
Black, Douglas, Warren, & Brennan	58	1956	1968	13	4.5
Douglas, Brennan, Stewart, & Marshall	39	1967	1975	9	4.3
Clark, Harlan, Stewart, & White	25	1961	1966	6	4.2
Burger, Rehnquist, Powell, & O'Connor	20	1981	1985	5	4.0
Scalia, Thomas, Roberts, & Alito	43	2005	2015	11	3.9
Brennan, Stewart, Marshall, & Stevens	20	1975	1980	6	3.3
White, Burger, Powell, & O'Connor	16	1981	1985	5	3.2
Frankfurter, Harlan, Whittaker, & Stewart	12	1958	1961	4	3.0
Douglas, Warren, Brennan, & Fortas	11	1965	1968	4	2.8
Powell, Scalia, Kennedy, & Thomas	33	1991	2004	14	2.4
Douglas, Brennan, White, & Marshall	19	1967	1975	9	2.1
Frankfurter, Clark, Harlan, & Whittaker	11	1956	1961	6	1.8
Stewart, Burger, Rehnquist, & Powell	18	1971	1980	10	1.8
Black, Douglas, Brennan, & Marshall	7	1967	1970	4	1.8
White, Powell, O'Connor, & Scalia	11	1986	1992	7	1.6

Powell, O'Connor, Scalia, & Thomas	22	1991	2004	14	1.6
Brennan, White, Marshall, & Stevens	21	1975	1989	15	1.4

However, if a team of four stays silent, it jeopardizes the possibility that its position will become a majority, either by persuading a fifth Justice or upon a subsequent appointment of a Justice who may join them. Subject to such caveats that 5-4 splits likely involve different dynamics than other splits, Brennan and Marshall, again, are members of some of the most frequently dissenting coalitions of four Justices.[68]

Table 4 lists the most frequently forming teams of four dissenters.[69] The number of teams of four dissenters that actually form is 329. Given the instances of teams of four Justices whose services overlap on the Court, the possible teams of four that could have issued dissents are 1,813. In other words, an additional 1,484 teams of four dissenters could have been formed (because those four Justices served concurrently) but did not. The statistics, again, take two forms: one on the notional number of dissents, including the teams that did not form as producing zero dissents, and the observed statistics, which ignore the teams that did not form. The notional mean number of dissents per term is 0.11 (observed is 0.62) and the median, zero (observed is 0.25). Its population standard deviation is 0.58 (observed is 1.23). One standard deviation above the mean corresponds to 0.69 (observed is 1.85) dissents per term, and two to 1.27 (observed is 3.08). The Table holds the teams that have dissented with a frequency of more than two standard deviations greater than the mean according to the notional statistics and have lasted more than three terms. Brennan and Marshall appear in six (in italics) of the twenty teams. Their teams produce from 1.4 to 7.9 dissents per term. Brennan also appears without Marshall in two teams of four that formed before Marshall's appointment. If the Table were to be extended to include teams dissenting more than one standard deviation above the mean, Brennan and Marshall would appear in four more teams together.

C. Dissent-Aversion or Policy Overlap?

Interpreting the frequencies of dissents of more than one Justice has the uncertainty of not knowing how the other dissenters would have behaved without the one being studied. For example, from the pattern of

68. *See also* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 450-51, 454, 460-61 (2008) (identifying Justices Brennan and Marshall as perpetual dissenters).

69. *See supra* Table 4.

Brennan's dissents, one may infer an aversion for dissenting alone that was amply overcome when dissenting with others, which very often included Marshall. Marshall, however, may have had less of an aversion for solo dissents. Therefore, one might conclude that the departure of Brennan would have less of an effect for unanimous decisions than the departure of Marshall. Brennan without Marshall would not break unanimity as much as Marshall would without Brennan. Vice versa, if the two Justices share values on several aspects of legal analysis, then they would rarely dissent separately regardless of their attitudes about dissenting alone. Expand this analysis to include additional Justices and the reasoning becomes exponentially more complex. Restricting this inquiry only to the context of Brennan and Marshall allows some further investigating, which unfortunately proves fruitless due to the small number of corresponding decisions.

First, from the frequency of Marshall's solo dissents, one might infer that Marshall did not have a strong aversion to dissenting alone. Moreover, Marshall's aversion appears less intense than Brennan's, since Brennan did not dissent alone nearly as frequently.[70] To test this hypothesis, search for opportunities for the two to dissent alone without the other. One arises from recusals and the other arises from Marshall's remaining on the Court for one more term after Brennan's departure.[71]

The Database allows the comparison of solo dissents while Marshall was recused but Brennan participated, and those while Brennan was recused but Marshall participated.[72] However, the number of decisions is too small to draw conclusions, let alone with any confidence. Of the thirty-one solo dissents that arise while Marshall was recused and Brennan participated (twenty-two are 7-1 and nine are 6-1),[73] four have Brennan as the solo dissenter.[74] Four solo dissents arise while Brennan is recused and Marshall participates, but none have Marshall as a solo dissenter (curiously, all have Rehnquist as the solo dissenter, all in 7-1 votes).[75] This might suggest that an overlap of the policy preferences of Brennan and Marshall may have some additional weight compared to Brennan's

70. *See supra* Table 1.

71. *See Justices 1789 to Present*, *supra* note 6.

72. *See* Spaeth et al., *supra* note 11 (collecting data by narrowing the Database to show solo dissents, recusals, and individual Justices' participation).

73. *Id.*

74. California v. Green, 399 U.S. 149, 170, 189 (1970) (Brennan, J., dissenting); Francis v. Henderson, 425 U.S. 536, 542 (1976) (Brennan, J., dissenting); O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 805 (1980) (Brennan, J., dissenting); United States v. Frady, 456 U.S. 152, 175, 178 (1982) (Brennan, J., dissenting).

75. *See* Spaeth et al., *supra* note 11.

particular aversion to solo dissents (as explanations for the frequency of their joint dissents, accompanied by Brennan's rare solo dissents).

After Brennan departed the Court in the summer of 1990, if Marshall truly did not have much of an aversion to solo dissents, then one may have expected to see Marshall dissent alone more than previously. Yet only one decision with a solo dissent by Marshall arises that term, and that with only eight votes, 7-1.[76] Compare Marshall's rate of 1.9 solo dissents per term for cases with nine votes. Thus, rather than a particular disregard of lone dissents, the scant evidence of these two queries lends some credence to the notion that the joint dissenting of Brennan and Marshall was more a result of policy overlap, rather than either's aversion to solo dissenting.

IV. CONCLUSION

In sum, the two changes in the unanimous decisions—the elimination of their liberal bias and the increase of their frequency, but more generally, a reduced complexity of coalitions—seem plausibly related to two changes in the Court's composition: the first to the departure of Douglas and the second to the departures of Marshall and Brennan. Douglas was a prodigious lone dissenter.[77] Marshall and Brennan were a prodigious team of two.[78]

This is especially visible in relation to the two phenomena at the foundation of this research: the conservative ratio and the frequency of unanimous decisions. The expansion of the Database with a "legacy dataset" covering the terms before 1946 allows the calculation of those values from further back. Figures 7 and 8 expand the looks at these two phenomena to begin when the Court's membership was fixed at nine in 1869.[79]

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76. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 50 (1990) (per curiam) (Marshall, J., dissenting) (indicating that Justice Souter did not participate in the decision).

77. *See supra* Part III.A. An additional avenue for further research opens from a curiosity related to Douglas's frequent solo dissenting until the 1975 term. One would expect that the missing unanimous conservative decisions would appear as unusually many 8-1 conservative decisions, but that is not the case. The presence of Douglas is associated with a paucity of unanimous conservative decisions, but the natural expectation of finding more 8-1 decisions does not materialize. This suggests that other paths to conservative 8-1 decisions produce unusually few such decisions. Perhaps part of the explanation of this paradox is likely that if the lone dissenter would have been Brennan or Marshall, then the Court's decision would not end up as an 8-1 decision, in part due to their capacity to form coalitions.

78. *The Private Thurgood Marshall*, THURGOOD MARSHALL, http://thurgoodmarshall.com/the-private-thurgood-marshall (last visited Apr.1, 2021).

79. Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44 (codified currently at 28 U.S.C. § 1 (2020)). The next appointments, which brought the number of Justices to nine after the intervening departure of Justice Grier in January 1870, were Justices Strong and Bradley in the spring of 1870. Therefore, the graphs begin with the 1870 term.

Both of the changes discussed here appear to be reversions toward pre-New Deal equilibria. The historically predominant attitude is the even conservative ratio, and the fraction of decisions that are unanimous, are now much greater than it has ever reached since the 1992 increase.[80]

The longer look reveals that both these phenomena were greatly influenced by the New Deal, although in slightly different ways. The fraction of decisions that are unanimous underwent sudden, step-like changes.[81] The conservative ratio of unanimous decisions dropped more gradually.[82] Understanding how the New Deal changed judging, and how and to what extent judging is returning to pre-New-Deal norms, are fundamental questions that research must address. The former has been valiantly engaged by Professors Corley, Steigerwalt, and Ward, who attribute the transition away from consensus to the personalities of the new Justices and several changes in the institutional details of the way the Court operated.[83]

Figure 7. Fraction of Unanimous Decisions from the 1870 Term.

The Court that was dominated by appointees of President Franklin D. Roosevelt, after the New Deal, produced different outcomes on these metrics.[84] Corley, Steigerwalt, and Ward show that New Deal judges

80. *See supra* Figure 2.
81. *See infra* Figure 7.
82. *See infra* Figure 8.
83. *See* CORLEY ET AL., *supra* note 11, at 15-18, 22-32, 38-45, 47.
84. *Id.* at 23-24.

brought a subjectivity to legal interpretation that turned out to be new, and produced more divisions than more traditional legal analysis had.[85] The apparently increasingly different appointments after 1970 may be restoring a less subjective approach to Supreme Court adjudication.

An alternative, but not necessarily contrary, interpretation of these findings relates the liberal attitudes of Douglas, Brennan, and Marshall to the conservative movement of the Court, pursuant to successive conservative appointments. As the conservative appointees of Presidents Eisenhower and Nixon moved the Court in a direction contrary to Douglas's preferences, Douglas reacted in a solitary way.[86] As the Nixon and Reagan appointees took the Court in a similarly conservative direction, contrary to Brennan and Marshall's preferences, Brennan and Marshall reacted in a more collective way.[87] The underlying social optimal is unknown and likely depends on the path of subsequent popular majorities and appointments. If more liberal appointees had followed, would bringing their desired interpretations to majority status have been easier if preceded by the path laid by Douglas or that by Brennan and Marshall? The answer may well depend on how many liberal appointments followed—if few, the more collective approach of Brennan and Marshall would offer more paths to five votes in more issues, but if many, the presumably less centrist views of Douglas might have garnered a majority and allowed the new majority to cover more policy space by using the existing interpretations of Douglas rather than by creating novel ones that may have needed to be more incremental. Furthermore, does either strategy produce different speeds of convergence of the Court's interpretive choices to the preferences of the electorate? A likely answer is that the more paths to new majorities that the Brennan and Marshall strategy opens, the more facilitated, and thus faster, the formation of subsequent majorities with fewer appointments would be. Yet, one can counter that speedy change of interpretation may not be the ideal that a Supreme Court should offer society.

85. *Id.* at 24.
86. *See supra* Part III.A.
87. *See supra* Part III.B.

Figure 8. Unanimous Conservative Ratio from the 1870 Term.

Another side of counterfactuals exploring what might have happened if more liberals had been appointed to the Court appears by looking at the most conservative Justices of the Eisenhower or Nixon periods. How would Justices like Harlan or Rehnquist have evolved in a hypothetical future where they remained on a Court that had turned liberal? Would the Brennan and Marshall strategy of forming multitudes of coalitions have been available to them? Harlan's appearance immediately behind Douglas at the top of solo dissenters may suggest a role analogous to that of Douglas. Yet Harlan's dissenting duos with Justice Stewart and with Justice Clark, and his trio with Justices Frankfurter and Whittaker, take third, fifth, and fourth places, respectively, unlike Douglas, who only appears once at the top of the non-solo lists.[88] This suggests that for Harlan, the formation of broader coalitions was more feasible than it was for Douglas.

88. *See supra* Table 2; Table 3; Table 4.

Figure 9. Percentage of Decisions Having Dissents.

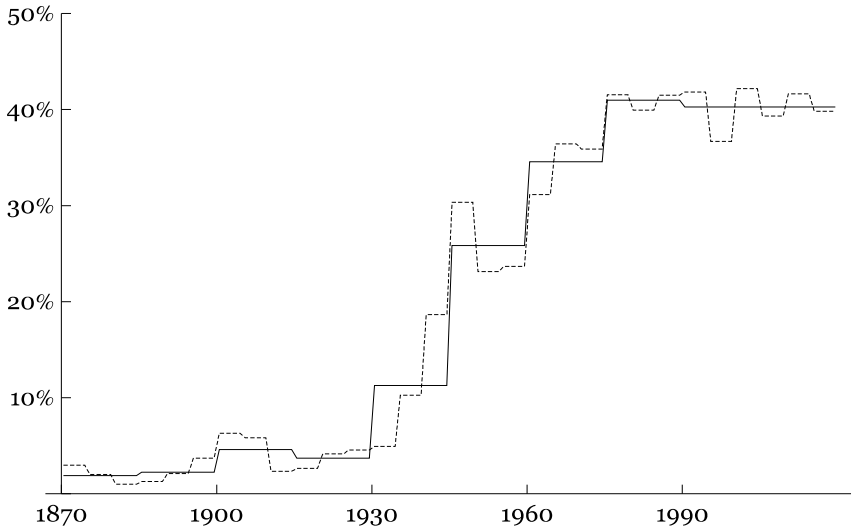
A further question is the degree to which these metrics map onto the political discourse about judicial activism. Conservative politicians promise appointees who will not engage in judicial activism.[89] Conservative judicial appointees vow to not take liberties with the law.[90] To some extent, the advent of variation with the New Deal and its

89. *See, e.g.*, *Remarks at a White House Briefing on Proposed Criminal Justice Reform Legislation*, RONALD REAGAN LIB. & MUSEUM (Oct. 16, 1987), https://www.reaganlibrary.gov/archives/speech/remarks-white-house-briefing-proposed-criminal-justice-reform-legislation (statement of Republican President Ronald Reagan) ("[T]his leniency in the courtroom itself was the result of another liberal phenomenon: judicial activism; judges who thought it was their right to make the law, not just interpret it . . . ."); 140 CONG. REC. 27,486 (1994) (statement of Sen. Orrin Hatch) ("Judge Sarokin has earned a nationwide reputation as a stridently liberal judicial activist. On a broad range of telltale issues—such as crime, quotas, reverse discrimination, pornography, and minimal community standards of decency and behavior—Judge Sarokin has pursued his own political agenda instead of following the law."); *Dole Campaign Speech*, C-SPAN (Apr. 19, 1996), https://www.c-span.org/video/?71331-1/dole-campaign-speech (statement of Republican Presidential Candidate and Sen. Majority Leader Bob Dole) (stating a reelection of President Bill Clinton would "lock in liberal judicial activism"); *Presidential Candidates Debate*, C-SPAN (Oct. 3, 2000), https://www.c-span.org/video/?159295-1/2000-presidential-candidates-debate (statement of then Presidential Candidate George W. Bush) ("[Judges] shouldn't misuse their bench. I don't believe in liberal activist judges. I believe in strict constructionists. Those are the kind of judges I will appoint.").

90. In addition to the classic quote by Chief Justice Roberts on "balls and strikes," see *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr., U.S. Sup. Ct. C.J. Nominee). All recent Supreme Court appointees have stressed the objectivity of judging. *See, e.g.*, Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585, 633-34 (2018).

dissipation upon the increasing conservative appointments to the Court supports the idea that activism and liberal judges may be correlated. Some have countered that judicial activism is symmetrical, equally potent from conservative judges as from liberal ones.[91]

Figure 10. Percentage of Decisions Having Concurrences.



Yet, the two metrics discussed in this Article do not support symmetry in uncertainty. Rather, conservative judging seems correlated with less variation and more unanimity. This appearance, however, has to be taken with the caveat that the Court's direction has stayed conservative.[92] Conservative Justices who might have dissented from liberal majorities may not have tended to do so because the Court moved in a conservative direction. Conceivably, if a liberal majority had appeared, then the Court's conservatives might have revealed variation.

A fuller attempt at testing for symmetry in activism looks at three more metrics of consensus (those that Corley, Steigerwalt, and Ward examine to document the end of consensus upon the New Deal's arrival) and tracks them through the 2019 term.[93] Figures 9, 10, and 11 use the

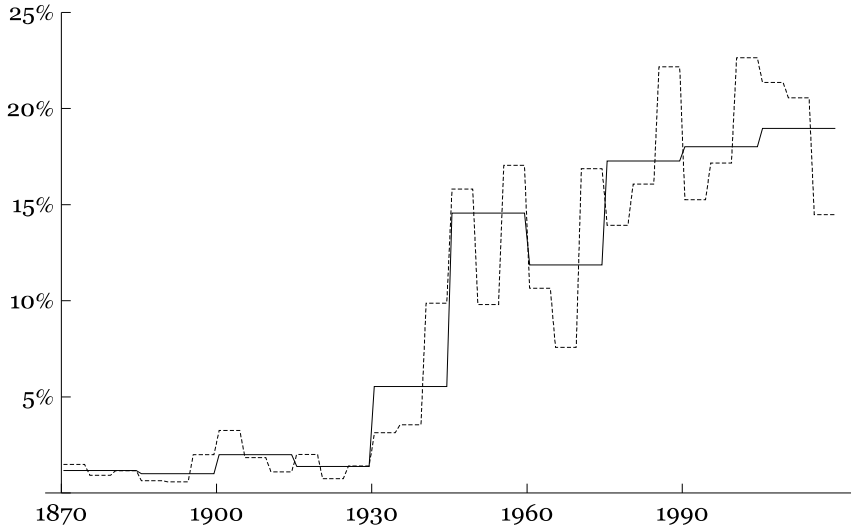
91. The point that, in its increasing conservatism, the Supreme Court remains activist is made from both the left and the right. *See, e.g.*, Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863 *passim* (2011); The Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401-02, 1409-10 (2002).

92. Chemerinsky, *supra* note 91, at 864-66.

93. *See* CORLEY ET AL., *supra* note 11, at 17-21.

same five-term and fifteen-term periods as the prior figures to show the evolution of, respectively, the percentage of decisions that have dissents, the percentage of decisions that have concurrences, and the percentage of decisions that are made on a one-vote margin. In all of the figures, the 1992 term begins a new period. Of the three, only the first shows a slight and partial tendency of a return toward the pre-New Deal level of consensus-based adjudication, and it, too, happens in the 1992 term, when Brennan and Marshall had left the Court.[94] One more caveat is necessary. The percentage of decisions that have dissents is almost the inverse of the percentage of unanimous decisions with nine votes. The only difference is that the latter only looks at decisions with nine votes. Thus, these two metrics are fundamentally related and should not be seen as two different metrics.

Figure 11. Percentage of Decisions Made on a One-Vote Margin.



Stepping back to look at all five metrics, the picture is mixed. One shows a complete return to pre-New Deal levels: the conservative ratio of unanimous decisions. The two related ones show a partial return to pre-New Deal levels: the percentage of decisions with nine votes that are unanimous and that of decisions having dissents (and in both, the partial return coincides with the departure of Brennan and Marshall). Two show no change from the post-New Deal levels: the percentage of decisions that have concurrences and that of decisions made on a one-vote margin. One

94. *See supra* Figure 9; *see also Justices 1789 to Present*, *supra* note 6.

can even argue that the one-vote margin image shows a continuing movement away from the pre-New Deal unanimity. In sum, they do not support the proposition that the more conservative Court is trending toward pre-New Deal levels in every metric of unanimity.