24 ROUNDS

JUSTICES SCALIA'S AND STEVENS'S BATTLE FOR AMERICA'S HEARTS AND MINDS

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It is no secret that Justices Antonin Scalia and John Paul Stevens did not see eye to eye on many of the legal issues that came before the United States Supreme Court in the twenty-four terms they served on the bench together.[1] In their final term together, they disagreed how cases should be decided 36 percent of the time, the second highest disagreement rate between any two justices.[2] Indeed, the back and forth between the two justices became caustic on occasion, as some commentators have observed.[3] This rivalry represented more than a battle of wits between two rival intellectuals, however; Justices Scalia and Stevens were considered the leaders of the Court's conservative and liberal wings, respectively, dur-

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[1] As an example, a study covering the 1986-1998 Supreme Court terms found that Justice Scalia joined Justice Stevens's "special" opinions (opinions other than a majority opinion for a court, such as a dissent) in only 1.8% of his opportunities to do so, while Stevens joined only 2% of Scalia's special opinions. JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 400 (2002).

[2] The only two justices who disagreed with each other more often were Justice Stevens and Justice Clarence Thomas, who disagreed in 40% percent of cases decided. SCOTUSBLOG Final Stats OT09 (July 7, 2010), at 8, www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-070710.pdf.

[3] Brooks Holland, *Was Justice Scalia Disrespectful to Justice Stevens on Stevens' Last Day?*, PRAWFSBLAWG (June 28, 2010, 6:09 PM), prawfsblawg.blogs.com.

ing a large portion of their tenures. Now that Justice Stevens has retired, it seems like a fair time to ask the question: can either of them claim victory in their decades-long battle?

In the search for an answer, this Essay begins by briefly examining both the influence each exerted on their peers on the Court, and then surveys their influence on the federal judiciary as a whole. Such a review leads to only one conclusion: neither justice was truly victorious against the other. Both of the justices have very similar opinion authorship statistics, and the citation data suggests that while Stevens has exerted more aggregate influence over the federal judiciary during his time on the bench, Scalia has a higher ratio of citations per opinion written. In fact, not only is there no clear victor now, there may never be a time when the statistics can be tallied up and a winner declared; the opinions of both justices will likely continue to shape the legal discourse in this country for years to come.

I.
THE RULE OF FIVE

As Justice William J. Brennan often observed, the ability to get five votes for a particular opinion, the so-called "Rule of Five," is the most important rule on the Supreme Court.[4] Using objective, nonpartisan statistics, including research done by the editors of the *Supreme Court Sluggers* project,[5] one can evaluate the performance of these two justices by looking at how many times they persuaded four of their colleagues to join their respective opinions.

Scalia joined Stevens on the Court just before the start of the 1986 term,[6] and the two served together until Stevens's retirement

[4] David D. Savage, *Supreme Court Legal Titan Brennan Dies*, L.A. TIMES, July 25, 1997, articles.latimes.com/1997/jul/25/news/mn-16207.

[5] *Supreme Court Sluggers Home*, The Green Bag, www.greenbag.org/sluggers/sluggers_home.html (last visited Dec. 26, 2011). All of the data used in this Essay can be found at the Supreme Court Sluggers website unless otherwise noted. Special thanks to Benjamin A. Gianforti for his assistance in compiling the data for Justice Scalia.

[6] The Supreme Court divides each year into terms, with each term beginning on the first Monday in October and running until the first Monday in the following

after the 2009 term. During those twenty-four terms, Stevens wrote 215 majority opinions,[7] while Scalia wrote 214. This similarity is likely the result of the Court's internal opinion-assigning procedures, which call for the chief justice, if he is in the majority, or the senior associate justice, if he is not, to assign the responsibility for writing the majority opinion to a specific justice.[8] To maintain harmony, the opinion-assigner generally attempts to equally distribute majority opinions among the nine justices.[9] Thus, this similarity does not necessarily tell us much about the justices' respective abilities to persuade. In any event, neither justice distinguished himself from the other during this period based on the number of majority opinions authored.

The number of unanimous majority opinions written by each is also similar over this twenty-four year period. "Unanimous opinions," as used here, are defined as those which provoked no dissenting or concurring opinions by other members of the Court, and thus, may provide a better indicator of persuasiveness than simple majority opinions written. After all, the opinion-assigner, much to his or her frustration, cannot force all the members of the Court to agree to join a single opinion. Stevens thus deserves a point for his relative ability to build consensus as he holds something of an edge here, with sixty-one unanimous opinions, to only fifty-one for Justice Scalia. But this edge, of course, disappears in the hard cases – cases in which the nation's top jurists disagree.

Of course, typically the cases decided 9-0 do not make headlines. It is the hard, or polarizing, cases where the justices' persuasive skills are truly put to the test. The particularly hard cases sometimes result in what one might call a "majority decision in part," in

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October. *See* A Brief Overview of the Supreme Court, www.supremecourt.gov/about/briefoverview.aspx (last visited Dec. 26, 2011).

[7] Majority opinions here are defined as opinions which received a total of five or more votes, as distinguished from plurality opinions receiving less than five votes but still representing the opinion of the Court in a given case.

[8] Paul J. Walbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1735 (2006).

[9] *Id.*

which a justice received five votes for part of the opinion, but less than five votes for others. In these cases, unlike classic pluralities, a justice may still write an opinion representing the Court's opinion and judgment on one issue, but not all the issues. An example of this is the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), in which Justice Stevens wrote for a majority of the justices in striking down the mandatory federal Sentencing Guidelines in the first part of the Court's opinion, but was reduced to writing a dissent regarding the appropriate remedy for the constitutional violation when he lost the critical vote of Justice Ruth Bader Ginsburg.[10] During the 1986-2009 period, Stevens authored twelve majority decisions in part. Scalia authored fourteen.

Distinct from the majority decision in part opinion is the plurality opinion, in which five or more justices agree as to the appropriate judgment or outcome of the case, yet those five or more justices do not agree to join even a single part of one majority opinion. During the 1986-2009 period, Stevens wrote eleven plurality decisions, while Scalia authored ten. In terms of measuring the influence of a justice, majority in part opinions and plurality opinions represent something of a mixed bag. On one hand, these opinions may be no less important or historic than pure majority opinions, as evidenced by Justice Stevens's landmark *Booker* opinion. On the other hand, they represent an inability of the opinion-authoring justice to persuade a majority of the Court to join the full extent of his or her views on the subject. When the justices disagree in this manner, lower court judges are forced to fill in the gaps in the reasoning of these opinions in the absence of clear guidance from the nation's highest court.

"Special opinions," such as concurrences or dissents, also represent a failure to persuade, despite the fact that these opinions some-

[10] One could certainly consider the majority and dissenting portions of Stevens's opinion in this case to be two different opinions altogether; however, since together they represent his singular view on how the case should have been decided, it (and others like it) was treated as one opinion in compiling the statistics upon which this Essay relies.

times forecast important future shifts in the Court's jurisprudence.[11] By definition, a justice writing one of these types of opinions could not garner more than three other votes. This is not to suggest that simply comparing the sheer volume of special opinions written by any two given justices is necessarily always indicative of their persuasive ability, or lack thereof; sometimes otherwise highly persuasive judges are simply more willing to publicly take unpopular positions, for a variety of reasons, that they know have no chance of gaining traction with most of the Court.[12] That being said, few would make the claim that either Justice Stevens or Justice Scalia are meek in that respect. And certainly not all special opinions are created equal; for example, it is hard to fault a justice for writing a dissent receiving four votes in a case that splits the courts along clear ideological lines, as it is unrealistic to expect any jurist to convince his or her peers to abandon long and passionately held positions on these types of issues. Having clearly set forth these large and important caveats, not *every* case represents a life and death struggle between conservative and liberal justices. Over the course of twenty-four terms, the aggregate total of these special opinions may suggest something about the justice's persuasive abilities, as presumably that justice generally would not have felt the need to write separately if he or she agreed with the majority's view. While Justices Stevens and Scalia both were on the Court together, Stevens wrote 224 concurring opinions and 440 dissents, a total of 664 separate opinions. Scalia wrote 274 concurring opinions, and 225 dissents, a total of 499 separate opinions.

The sheer difference in the quantity of special opinions is striking. Stevens authored a staggering 165 more special opinions than Scalia, nearly seven per term. However, it is difficult to draw definitive conclusions from this disparity. Intuitively, it seems unlikely

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[11] *See, e.g.*, Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) (featuring a famous dissent by Justice Oliver Wendell Holmes, Jr. advocating a position that was later adopted by the court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

[12] Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

that all of Stevens's additional separate writing engendered a great deal of goodwill with his colleagues; studies have shown that Stevens received the least number of votes for his dissents and concurrences than any other justice during the 1986-1998 period.[13] However, it does not appear as though these dissents and concurrences measurably affected the rate at which Stevens was able to compose majority decisions over time.[14] Further, neither concurrences nor dissents require the support of any of the justice's colleagues, and thus, these statistics are a poor measure of the justice's ability to positively persuade his fellow justices, though it may, in the aggregate, suggest the absence of such persuasive ability. The disparity between the number of dissents and concurrences written by each judge might also be explained by the fact that they were both inclined to explain their reasoning and thought processes, regardless of who agreed with them in any given case, and that the Court's arguably more conservative lineup in these years simply turned potential Scalia special opinions from dissents into concurrences through no particular fault (or credit) of his own.[15]

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[13] *See* SEGAL & SPAETH, *supra* note 1, at 396-97; *see also* Ginsburg, *supra* note 12, at 7 (stressing that frequent and "random" dissents weaken the institutional impact of the Supreme Court).

[14] *See* Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 2 J.L. (1 J. LEGAL METRICS) 135 (2012) (originally published by the ELON J. OF LEADERSHIP AND THE LAW, *available at* www.elon.edu/e-web/law/leadership_journal/studiesinleadership.xhtml (last visited Dec. 26, 2011) (noting that Stevens's majority opinion authorship rate hovered around 8% throughout his tenure on the Court). This is not to suggest that Stevens's dissent rates had no impact on his ability to forge consensus, only to note that the rate at which Stevens wrote majority opinions did not appreciably change over time. Though outside the scope of this Essay, it is worth wondering if Stevens would have had a greater impact in terms of writing majority opinions had he curbed his practice of writing separately. However, because Stevens dissented frequently during his entire judicial career, we have no way to isolate how this particular variable affected his judicial performance.

[15] However, this explanation is not entirely persuasive either, if one looks at each justice's opinion writing trends before and after major changes in the composition of the Court. For example, in the years preceding the retirement of the liberal Justice Brennan from 1986-1990, Scalia averaged nineteen concurrences and roughly eleven dissents per term. From 1991-2009, while the Court ostensibly turned more conservative, Scalia's concurrences dropped sharply as he only aver-

In sum, very little in their opinion authorship rates distinguishes Scalia from Stevens. Both persuaded a majority of the Court to join their opinions in roughly the same number of cases, although Stevens was able to achieve unanimity at a slightly higher rate. Scalia wrote separately in dissent far less than Stevens did, though the practical impact of this on Scalia's ability to persuade his colleagues is unclear. Regardless, neither justice can point to their opinion authorship statistics and claim victory in their intellectual bout at One First Street. However, this was – and continues to be – a fight waged on multiple fronts.

II.
AMERICAN IDOL,
FEDERAL JUDICIARY EDITION

Although national media coverage of judicial opinions tends to focus on Supreme Court decisions, the bulk of the federal judiciary's work is handled in, as the Framers put it, "such inferior Courts as the Congress may from time to time ordain and establish."[16] Congress has "ordained and established," by conservative counting, well over eight hundred federal district court and appellate court judgeships.[17] That figure excludes federal magistrate judges, bankruptcy judges, and judges that have taken senior status, but who nonetheless keep the gears of the nation's courts from grinding to a halt.[18] While occasionally directly bound by a Supreme Court decision on point, these judges often have substantial discretion in applying general principles to the specific circumstances of the cases before them. When exercising their discretion, federal judges often

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aged about nine concurrences and nine dissents per term. Stevens averaged thirteen concurrences and twenty-four dissents between 1986-1990, and about eight concurrences and just shy of seventeen dissents between 1991-2009. Thus, while the overall opinion authorship rates of both dropped substantially, proportionally, the only change seen as the court tilted to the right was that Scalia concurred *less*.

[16] U.S. CONST. art. III, § 1.

[17] 28 U.S.C. §§ 44, 133 (2000).

[18] *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2010 YEAR END REPORT ON THE FEDERAL JUDICIARY 8.

look to different justice's individual opinions to guide them, both because they agree with the justice's ideology and because the lower court judges may believe that the justice's views indicate how the Court would rule if the specific issue being decided was brought before the Court. Thus, Supreme Court justices may have a great deal of influence even in these "open spaces" of the law.

In an attempt to measure the importance of opinions other than just majority opinions, the editors of the *Supreme Court Sluggers* project count references to individual Supreme Court justices by name in federal court opinions.[19] As the generally accepted citations rules do not require judges to refer to a particular justice by name when they cite majority opinions issued by the Court,[20] this method ensures that the our statistic reflects only instances where judges refer to the views of an individual justice by choice, and not out of obligation. Thus, the citation statistic attempts to capture when Supreme Court justices are influencing the legal discourse through the issuance of non-majority opinions, law review articles, and other citable, published comments when lower court judges delve into these gray areas.

Scalia and Stevens are undoubtedly among the most often cited justices of their era. Through the 2009 term, Stevens had been cited individually by name in 10,858 federal court opinions during his career, counting his time on the Seventh Circuit. Through 2009, Scalia had been cited in a similar manner "only" 8,657 times, including his D.C. Circuit tenure. However, this is not exactly an apples-to-apples comparison, as Stevens took a seat on the court of appeals in 1970, while Scalia did not join the judiciary until 1982. If we return to the 1986-2009 time frame used throughout this Essay, Scalia jumps ahead. During those twenty-four years, Stevens was cited in 8,437 federal court opinions, about 352 times per term, whereas Scalia was cited in 8,615 opinions, or an average of 359 times per term.

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[19] Ross E. Davies, Craig D. Rust, & Adam Aft, *Supreme Court Sluggers: Justice John Paul Stevens is No Stephen J. Field*, 13 Green Bag 2d 465 (2011).

[20] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6.1, at 100 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

If anything, this understates Scalia's influence, as it takes time for Supreme Court justices to build up a critical mass of citable opinions and accumulated thoughts on the law. For example, while both justices have averaged hundreds of citations per term over their careers, both had fewer than a hundred in their first term on the Court (seventy-six for Stevens in 1975 and eighty-seven for Scalia in 1986). If we remove Scalia's "rookie" year from the sample size and look at the 1987-2009 terms, Scalia's lead grows – up to 8,528 citations (371 per term) to 8,131 (354 per term).

Even this may not be an apples-to-apples comparison, however. Stevens, of course, was a more prolific author than Scalia in their twenty-four terms together. And Stevens's penchant for writing so frequently impacts his statistics. During the 1986-2009 period, Stevens was cited 8.08 times in federal judicial opinions per opinion that he had written. Scalia was cited 11.61 times per opinion during that same period.

In sum, although Stevens has generated substantially more citations by name than Scalia, Scalia has generated them at a higher rate per opinion and per term on the Supreme Court. Of course, citations can be accumulated long after a justice retires from the Court. Landmark opinions, like *Booker* and *Crawford v. Washington*, 541 U.S. 36 (2004) (Scalia, J.), will continue to be cited repeatedly. Thus, it remains unclear if Scalia will ever equal Stevens's impressive totals, even though at age seventy-five, Scalia likely has a number of years left on the Court.

CONCLUSION

Statistically, Justices Scalia and Stevens are far more alike than they are different. They are both extremely prolific writers, perhaps amongst the most prolific in the Supreme Court's history.[21] While they both served on the Court, they were able to build consensus about the same number of times through their majority opinions. Stevens dissented (significantly) more, while Scalia seemed to prefer concurring opinions. In terms of stretching their influence

[21] See Davies, Rust & Aft, *supra* note 19, at 480.

beyond the Supreme Court's steps and into federal courthouses around the country, Stevens has clearly had a greater aggregate impact, while Scalia has had a greater impact per term on the Court and per opinion written. This suggests that while Scalia has written less over fewer years, his opinions tend to pack a stronger statistical punch than Stevens's did.

Ultimately, even though Stevens has now retired from the bench, it is still too early to call a winner in this bout of intellectual heavyweights. Both are leading figures in modern American jurisprudence. While Stevens holds the edge in a number of career totals, Scalia still appears to have several years left to catch him. And, of course, it is possible either justice has, in some little-regarded dissent or concurrence, sown the seeds of a particularly powerful idea or philosophy that will come to dominate legal thinking in the future. Either way, those who have observed the Supreme Court over the last three decades have certainly witnessed an entertaining bout between two legal heavyweights.

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