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Judicial Activism: A Study of the Warren Through Rehnquist Courts

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Judicial Activism: A Study of the Warren Through Rehnquist Courts

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Abstract

Despite the dismissive attitude toward the concept of judicial activism among some members of the academic community, it nevertheless continues to be a relevant theme in politics. Conservatives tend to use this phrase as an attack on "liberal" decisions that sacrifice principles in the name of expediency. This thesis challenges the concept that it is primarily liberal justices who are activist. I examine the activism levels of individual justices to ascertain which ideology, liberal or conservative, is more activist. Using the well-known Spaeth database, I evaluated all of the justices from the Warren through Rehnquist Courts by measuring three types of activism: federal-statute, state-statute, and altering precedent. The results show members of both ideologies engaging in activism.

Many landmark cases that have transformed American society are the result of judicial activism. One example is *Brown v. Board of Education* (1954). *Brown* overturned *Plessy v. Ferguson* (1896), which had maintained that segregation was acceptable so long as the schools for colored children were the same as schools for white children. *Brown* overturned precedent, which is one form of judicial activism. Another example is *Roe v. Wade* (1973). Issues ranging from gambling to murder are traditionally the responsibility of the state. However, the Supreme Court inserted itself into a previously defined state issue, when it legalized abortion and created a policy establishing time frames for abortions and when they may be performed legally (during which trimesters, for example). Legislating from the bench or performing an action that is the responsibility of the state is also an act of judicial activism. Arguably the first instance of judicial activism was in *Marbury v. Madison* (1803), which is also the case that established judicial review. In this case, Chief Justice John Marshall declared the section of the Judiciary Act of 1789 that pertained to the jurisdiction of the Supreme Court unconstitutional because it granted jurisdiction that the Constitution did not. Striking down an act of Congress is also one version of judicial activism. The examples provided give three entirely different definitions of what judicial activism is. It is also important to keep in mind that the Supreme Court has discretionary appellate jurisdiction, which allows justices to pick the cases it would like to hear. Considering the amount of discretion the Court has, this action or inaction is arguably a more subtle form of judicial activism.

Judicial activism is typically invoked in rhetoric that is critical of liberal decisions. However, there is no a priori reason to expect activism to differ by ideology. This is in stark contrast with the logical assumption that conservatives expect no change. Liberals are associated with change, so one could then conclude that they would be activists. Ironically though, conservative justices fostered the first movement of activism. A well-known activist decision led by conservatives is *Lochner v. New York* (1905). The Court struck down a New York statute that limited the hours bakers could work. The Court exhibited symptoms of capitalism. Conservatives claim to adhere to rigorous principles and a strict interpretation of the Constitution, yet here this New York statute was pushed aside with little thought to its constitutionality.

Following the opinion of conservatives, my hypothesis would state that liberal justices of the Supreme Court are more likely to make activist decisions than are conservative justices. However, the null hypothesis, which states that there is no difference in the activist decisions of liberal and conservative justices of the Supreme Court, seems more plausible assuming people act in their own self-interest. I will be using all of the cases decided by each justice on the Warren, Burger, and Rehnquist Courts to create an activist average. I will then be able to analyze quantitatively which justices are the most activist. I will begin by defining judicial activism and summarizing the Courts that will be discussed and then I will explain my methodology and my results. A discussion on the literature provides the history of judicial activism as well as its various definitions. Three definitions recur often and will be used as my measurement for each justice. A discussion on judicial ideology will also be provided.

Literature Review

Most living Americans first encountered both judicial activism and judicial restraint when President Nixon promised in his presidential campaign to only appoint strict constructionists to the Supreme Court. The term judicial activism actually first appeared in a 1947 article in Fortune magazine by Arthur Schlesinger Jr. It focuses on the aftermath of Democratic President Franklin Roosevelt's court packing, and thus largely liberal court, in a Republican era. Schlesinger begins by calling Justices Hugo Black, William Douglas, Frank Murphy and Wiley Rutledge judicial activists. He then states that Justices Felix Frankfurter, Robert Jackson, and Harold Burton pursue methods of self-restraint. Stanley Reed and Chief Justice Fred Vinson were between the two groups (Schlesinger 74-8). Schlesinger then compares the two groups and provides a working definition of judicial activism:

> One group (the Black-Douglas group) is more concerned with the employment of the judicial power for their own conception of the social good; the other (the Frankfurter-Jackson group) with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn. One group regards the Court as an instrument to achieve desired social results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse (Schlesinger, 201).

One reason for this great divide in judicial thought is that the Yale School of Law heavily influenced the views of Justices Black and Douglas. This group recognizes that prior courts had been activist in their approaches toward business and financial interests, so why should this group resist? The main difference being that liberal justices focus not on the business community but on civil liberties. The mentality of a justice from the Yale school of thought is best described by the following: "The resources of legal artifice, the ambiguity of precedents, the range of applicable doctrine, are all so extensive that in most

cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic… A wise judge knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results (Schlesinger, 201)." Schlesinger's provision of the actions of a wise judge suggests that all justices, who are influenced by the Yale school of thought, are activist in some manner. Schlesinger has provided a framework of judicial activism and many scholars have since expanded upon his definition. This little known article has certainly stood the tests of time and is still a relevant modern definition of activism.

Following the historical usage of judicial activism, Judge Joseph C. Hutcheson, Jr. was the first to use it in a judicial opinion. The word was used in a footnote in the *Theriot v. Mercer* (1959) case. The case was an incredibly interesting wrongful death suit that had no legitimate evidence against Theriot (Mrs. Mercer brought suit stating that Mr. Theriot killed her husband with his vehicle). The supporting evidence that the court relied on was that Mr. Theriot, along with other motorists, passed by the body of the deceased on the road. Theiort's request for a directed verdict was twice denied and he was later found guilty by jury (Kmiec 1456). On appeal, Judge Hutcheson wrote for the majority in the footnote of his opinion

> We think, however, we should say that in the controversy thus launched and still continuing, we stand firm against the judicial activism back of the struggle and the results it seeks to achieve, and, regarding as we do the guaranties of the Seventh Amendment, as applicable to plaintiff and defendant alike, we cannot understand how protagonists for the change can look upon the amendment, as apparently they do, as intended for the benefit of plaintiffs alone and, so regarding it, as the dissenters in the *Galloway* case apparently did, advocate doing away with or limiting, beyond the ancient use, the control and guidance of the trial by an informed and experienced judge (Kmiec, 1457).

In order to understand this reference to *Galloway v. United States* (1943) more information is needed. Here, "Justice Black penned a famous dissent, lamenting the declining role of juries and arguing that trial judges should only be able to order new trials (Kmiec, 1456-7)." Galloway was given a directed verdict instead of a trial by jury. The majority decided in a manner sympathetic to Hutcheson's preference; the directed verdict was found to be acceptable.

One can also analyze activism based on stages or specific eras. The following example shows that there have been periods of activism dominated by justices of both parties; the first by conservatives and the second by liberals:

> The first, which continued out of the last decades of the nineteenth century, involved the conservative Court's development of constitutional doctrine to protect business and property. In essence, during this period the Court actively and frequently undertook to frustrate state legislative, and then congressional efforts, to regulate the economy and to ameliorate the economy's harsher effects through social welfare measures…The second great period of activism…is appropriately associated with the chief justiceship of Earl Warren…the Warren Court is in fact a fair shorthand for the peak period of extensive liberal activism that broadened, extended, and nationalized civil liberties and civil rights in America in mid-century (Lewis, 1-2).

As the years progressed, the term judicial activism began to be used mainly as an insult; it has become a pejorative term (Roosevelt 2006). Since Schlesinger's article other definitions of judicial activism have also surfaced. Many scholars create their own definitions, which accounts for the substantial number that are available. Most of the definitions range from declaring acts of other governmental branches unconstitutional to result-oriented judging (Howard and Segal 2004; Brubaker 1984; Wolfe 1997; Kmiec 2004).

The following definitions are a small sample of those that are currently in use. According to Black's Law Dictionary, judicial activism is: "A philosophy of judicial

decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." A common and oft repeated definition is, "The program of judicial activism holds that courts should void the decisions of the other branches of government whenever they offend the judges' own sense of principles required by the Constitution, even though the decisions of the other branches were backed by admittedly reasonable understandings of the Constitution (Brubaker, 504)."

A different approach is provided by Christopher Wolfe, in his book Judicial Activism: Bulwark of Freedom or Precarious Security?, whereby he creates the conventional model. The conventional model can best be summarized with the following,

> Activism and restraint, therefore, cannot be reduced to the simple idea that activist judges 'make law' and restrained judges merely 'interpret the Constitution.' Inevitably, the differences between activism and restraint are more a question of degree than of kind. Most simply put, the basic tenet of judicial activism is that judges ought to decide cases, not avoid them, and thereby use their power broadly to further justice – that is, to protect human dignity – especially by expanding equality and personal liberty. Activist judges are committed to provide judicial remedies for a wide range of social wrongs and to use their power, especially the power to give content to general constitutional guarantees, to do so (Wolfe, 2-4).

Wolfe's model appears to only take liberal activism into account. Liberal activism, occurring during the second period of activism, was described in the section on eras of activism.

Some definitions are all-encompassing, such as the following: "(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial "legislation," (4) departures from accepted interpretive methodology, and (5)

result-oriented judging (Kmiec, 1444)." To avoid confusion, the following terms are associated with judicial activism: judicial rule-making and judicial legislation. Some scholars have taken a different approach by defining activism in relation to a prior court. For example, "…three dimensions of the judicial activism of the Burger Court: its preservation of the activist landmark precedents of the Warren era, its willingness to invalidate acts of Congress, and its willingness to step into the breach of a constitutional crisis (Blasi, 201)."

The term judicial activism has become overused and, more importantly, a slight against the judge in question. To expand on this point,

> We should consider the concept (activism) on its own terms, as ignoring the plain meaning of the Constitution in favor of the judge's personal views. Defined this way, 'activist' is just an insult. In practice, it turns out to mean nothing more or less than that the decision is inconsistent with the speaker's politics. The label 'activist' turns out to possess exactly the same fault it claims to identify in judges: it is entirely result-oriented (Roosevelt, 39).

After recognizing the faults with the term, Roosevelt considers whether or not a case is legitimate instead of activist, "A doctrine is legitimate…if the doctrinal rule it applies is a reasonable way to implement a reasonable understanding of the relevant constitutional meaning. We should be asking…what reasons there are to think that the rule is a good way to achieve compliance with the underlying meaning (Roosevelt, 195)." What this means is that many cases considered to be activist, such as *Brown v. Board of Education* and *Roe v. Wade*, are legitimate.

However, under the definitions previously provided almost any decision and/or judge can be labeled activist. My provision of such a lengthy background on the topic is a testament to the fact that a variety of definitions exist. Robert Howard and Jeffrey Segal closely mirror my own definition with the following,

> The most gripping examples of judicial activism are decisions to declare unconstitutional laws of congress and the state legislatures. The conflict between elected representatives and the appointed judiciary is most pronounced in these situations, and the Court's decision is usually final. Both justices and Courts may be defined as either activist or restraintist. A restraintist justice (or Court) defers to the democratic majority and most often sustains the legislation. An activist judge (or Court) is less deferential, and therefore less reticent about striking down such laws (Howard and Segal, 131).

This leads into the clearly recognized standard, which is that: "…a consensus has emerged that the benchmark measure of judicial activism should be the invalidation of federal legislation (Lindquist and Cross, 48)." Additionally, some scholars find the invalidation of federal laws to be the simplest and most direct way to analyze activism (Caldeira 1215). Three different definitions have become the most prevalent: overturning a federal statute (which is cited most frequently), overturning a state statute, and overturning precedent (Segal and Spaeth 2002; Lindquist and Cross 2009; Howard and Segal 2004; Caldeira 1986).

What is needed is a definition that can be tested empirically. Thus, for the purposes of this paper, an activist decision will be one that overturns a federal statute, a state statute, or alters precedent. The decision to overturn a federal statute is more activist than overturning a state statute because, "Certainly, challenging the lawmaking authority of a coequal branch of government is among the most consequential acts the justices can perform and thus must take pride of place in any study of judicial activism…Less significant, but still important, are the justice's decisions to invalidate the acts of the sovereign state governments (Lindquist and Cross, 34)." I expect state statute activism averages to be much higher than federal statute activism averages because, "Over the course of its history, the states have occupied more of the Court's constitutional attention than has the federal government, and the states have been the primary target of

the power of judicial review (Whittington, 586)." Overturning precedent is included since the, “Failure to follow precedent can disrupt an institutional settlement of disputed questions and leave the law in a state of uncertainty (Lindquist and Cross, 125).”

Having established a clear definition of what activism is, it is now necessary to discuss judicial ideology. The argument could be made that a justice’s use of judicial activism depends strongly on his or her view of the Constitution. If a justice views the Constitution as a living document than he or she is more apt to stray from precedent and thus be considered an activist. Since the Constitution is an evolutionary document, precedent should not become a judicial straightjacket when it becomes clear that a new policy is in order. If a justice views the Constitution along strict constructionist lines he or she should be less willing to break from precedent and should be viewed as an agent of self-restraint. In fact, “…originalists (strict constructionists) tend to be political conservatives and living constitutionalists political liberals (Roosevelt, 49).”

Though liberals are traditionally labeled activists, it is a term that can be applied to justices of both ideologies (Lindquist and Cross 2009; Keck 2004). This is evident by the two separate activist movements, the first taking place beginning at the end of the nineteenth century and the second which occurred during Warren’s tenure (Lewis 1999). In fact, “…there are some very liberal justices who are activists, as well as some liberals who demonstrate restraint. The same can be said of the conservative justices on the Court (Lindquist and Cross, 56).” Although these justices differ in how they engage in activism, traditionally liberals protect civil liberties whereas conservatives protect business interests.

Thomas Keck analyzed each justice by the party of the appointing president and found that, “Supreme Court justices appointed by Republican presidents have been no more restrained than those appointed by Democrats. They exercise judicial review just as frequently, and they are no more reluctant to enter political thickets (Keck, 286).” This statement suggests that the inverse could be true as well; that justices appointed by a Republican president are no more activist than a justice appointed by a Democratic president.

Prior to moving into the historical background, I would like to note that there has been little quantitative research performed on the topic. Through my research, I found many articles on activism that were written between 1960 and 1980. At this point I had not found any work that analyzed activism in a manner similar to how I study it. That is until April of 2009 when Stephanie Lindquist and Frank Cross' book *Measuring Judicial Activism* was published. After reading their work, I based my model on similar grounds; however, I did stray from it slightly. This will be discussed at length in the methodology section. I was able to find three older studies that quantitatively analyze activism. The first I reviewed was by Robert Howard and Jeffrey Segal who researched Supreme Court Justices opportunities to grant review of cases between the 1985 and 1994 terms. The filed briefs requested that the Supreme Court strike down a legislative act, ranging from federal laws to local ordinances. In this case, judicial activism would occur if the court struck down a legislative act without a party requesting it do so. The results show that, "...it is clear that the Court infrequently uses the power of judicial review to overturn legislation enacted by democratic majorities. As our data show, the Court will not, absent a request, strike down legislation passed by states or the federal

government...(Howard and Segal 141)." This suggests that the Court does not engage in activism unless requested to do so. In the analysis I conducted I did not analyze if a party requested the Court to overturn a statute, I only measured whether or not a statute was overturned.

The second study, by Jeffrey Segal and Robert Howard, measured judicial responses between the 1985 and 1994 terms to requests to overturn precedent, and whether or not their responses were determined by the ideological direction of the requestor. Parties to a case rarely asked for precedent to be overturned, in fact, "In only 37 cases (2.9 percent) did the petitioner ask the Court to overturn a precedent, and in only 30 more (2.3 percent) did the respondent ask the same (Segal and Howard, 152)." The results confirm that the decision to overturn precedent is related to the ideological direction of the party requesting stare decisis. This is true especially with the following justices: Marshall, Rehnquist, White, Blackmun, Powell, O'Connor, and Ginsburg. Justices Scalia and Thomas, regardless of the requestor, did not support precedent (Segal and Howard 157). In my research I did not analyze requests to alter precedent, I simply measured whether or not it was altered. This is an interesting study that shows a connection between ideology and the decision to overturn precedent.

In the third study, Stefanie Lindquist and Rorie Solberg measure which influences impact justice's decisions to invalidate federal, state, or local laws for decisions that were considered to contain a constitutional challenge. They analyzed data from the Burger Court, more specifically 1969 to 1985, and from the Rehnquist Court from 1986 to 2000. Lindquist and Solberg perform an extensive analysis on a variety of influences, such as, the position of the solicitor general and pressure from interest groups. I will focus here

on the research they conducted regarding ideology and a justice's decision to declare an act of the federal, state or local government unconstitutional. They find that for the Rehnquist Court, "…liberals (are) more likely to strike state statutes and conservatives (are) more likely to strike federal statutes…and…conservatives and liberals are almost equally likely to vote ideologically in choosing to strike both state and federal legislation (Lindquist and Solberg, 86)." However, the Burger Court does not follow this pattern, restraintist conservatives were less likely than liberals to overturn federal and state legislation even when ideology was factored in (Lindquist and Solberg 86). Their results for the Rehnquist Court, in particular liberals striking state statutes and conservatives striking federal statutes, match mine.

Historical Background

The Warren Court 1953-1969

Chief Justice Earl Warren was appointed by President Eisenhower and was sworn into office on October 5, 1953 and left office on June 23, 1969. Warren joined the following associate justices onto the court: Hugo Black, Stanley Reed, Felix Frankfurter, William Douglas, Robert Jackson, Harold Burton, Tom Clark, and Sherman Minton. Of these eight men already present on the bench, President Franklin Roosevelt appointed five. Several of these men he served a limited amount of time with, such as Robert Jackson who left the court in 1954 and Sherman Minton who left in 1956. He also served with several associate justices who took the oath of office while he was the Chief Justice. They are: John Harlan, William Brennan, Charles Whittaker, Potter Stewart, Byron White, Arthur Goldberg, Abe Fortas, and Thurgood Marshall, though his time with Marshall was brief as he was appointed in 1967. In order to show a more complete timeline of the Warren Court, I have provided table I that shows when a justice was appointed to the court, when he or she left the court (unless he or she served until after Warren left office, which will then be left blank), the appointing President and his party.

Nowhere in Warren's resume was there any judicial position; however, he had an extensive career in politics. In fact, he served as Governor of California for three terms and in 1948 was the vice presidential nominee for the Republican Party (Belknap 1). With this type of background, how was he selected to be the Chief Justice of the United States? It is not entirely without merit to rule out patronage,

> Warren directed the California campaign for the Republican ticket, and after its prospects had been dimmed by September revelations that Ike's running mate,

> Senator Richard Nixon, had been the beneficiary of a secret slush fund, he made a television appearance and numerous speeches on behalf of the GOP nominees…Although the two men (Eisenhower and Warren) had not had much personal contact, Eisenhower greatly respected Warren and was clearly in his debt (Belknap, 5).

This suggests that regardless of whether or not he was qualified for the position, he was selected as repayment for his previous political favor.

Table I:

Justice	Year that Judicial Oath was Taken	Year Justice Left Court	Appointing President	Party of President
Black, Hugo	1937		Roosevelt, F.	Democrat
Reed, Stanley	1938	1957	Roosevelt, F.	Democrat
Frankfurter, Felix	1939	1962	Roosevelt, F.	Democrat
Douglas, William	1939		Roosevelt, F.	Democrat
Jackson, Robert	1941	1954	Roosevelt, F.	Democrat
Burton, Harold	1945	1958	Truman	Democrat
Clark, Tom	1949	1967	Truman	Democrat
Minton, Sherman	1949	1956	Truman	Democrat
Harlan, John	1955		Eisenhower	Republican
Brennan, William	1956		Eisenhower	Republican
Whittaker, Charles	1957	1962	Eisenhower	Republican
Stewart, Potter	1958		Eisenhower	Republican
White, Byron	1962		Kennedy	Democrat
Goldberg, Arthur	1962	1965	Kennedy	Democrat
Fortas, Abe	1965	May, 1969	Johnson, L.	Democrat
Marshall, Thurgood	1967		Johnson, L.	Democrat

Source: http://www.supremecourtus.gov/about/members.pdf.

Chief Justice Warren, while addressing an audience at the University of Michigan, claimed that, "conformity is no special virtue. Sometimes nonconformity is exactly the antidote needed to remedy a situation (quoted in Pollack, 181)." These words, spoken in 1955, encompassed his tenure and legacy on the Supreme Court perfectly. He became a hotbed of controversy. The conservatives rued the day that he was appointed to the Court, yet he was a pleasant surprise for liberals who did not expect

this from a Republican presidential appointee. Pollack, in his book *Earl Warren: The Judge Who Changed America*, terms this the Warren paradox, which is:

> Eisenhower had appointed him to the Chief Justiceship largely because the President believed him to be a high-level mediocrity. Everything about Warren seemed to indicate that his role on the Court would be that of an unimaginative moderate-conservative conformist. His loyalty to the President and the Republican Party, together with his politician's instinct for trying to be all things to all men, would surely prevent him from doing anything likely to cause problems for the Administration…Then, with the desegregation decision of May 1954, the astonishing reversal began. Liberals and conservatives alike were stunned; the embarrassed President was enraged. Gentle, soft-spoken Earl Warren was not only beginning to behave like a 'radical-activist liberal,' but was doing so with such apparent disregard for the social and political consequences of his actions that he was throwing the nation into turmoil (Pollack, 12-3).

Chief Justice Warren was a complex person. This quote conveys the message that at some point during his transition from governor to chief justice his ideology changed.

The desegregation decision referred to was *Brown v. Board of Education of Topeka, Kansas* (1954). In order to showcase the Court's activism, I have selected four cases that best encompass the Court's overall reach, this decision of course being one of them. Separate but equal as a concept had been established by the Supreme Court decision *Plessy v. Ferguson* (1896). Since then, the Court had reaffirmed it at least seven times in addition to Congress' reaffirmation of it at least one hundred times. The Court changed course under Warren in the controversial decision *Brown v. Board*, recognizing that separate but equal violated the equal protection clause of the 14th amendment. Colored children were required to attend segregated schools that were further from their homes than the schools attended by white children. So, the parents of the colored students filed a class action suit requesting that racial segregation be reversed. The Court voted unanimously to overturn separate but equal in education broadly and *Plessy v. Ferguson* specifically (Pollack 172-6). This decision was activist in at least two ways: it

overturned precedent and essentially created legislation, since this was not the will of the legislature.

Next, *Miranda v. Arizona* (1966) serves as a great example of Warren Court activism, especially considering the number of cases decided with respect to the rights of criminals. Ernesto Miranda signed a confession statement at the time of his arrest admitting to both the kidnap and rape of a young woman and that he had full knowledge of his legal rights. This was not accurate: his attorney argued that he was never informed of his right to remain silent and had not signed the confession either voluntarily or with knowledge of his rights (Pollack 267). In a 5-4 decision the Court found that, "The correct rule of procedure…is that the police must clearly inform any suspect of his right to remain silent *immediately* upon apprehension, and the suspect must have his lawyer present *before* he can be questioned. If the suspect indicates that he wishes to remain silent, all interrogation must stop. Since these conditions had not been fulfilled in Miranda's case, his conviction was overturned (Pollack, 268)." At the time of the decision there was a great outcry from Congress and from law enforcement officials. Congress went so far as to create the "Crime Control and Safe Streets Act of 1968, which, among other things, specified that confessions are admissible in Federal courts if given voluntarily. In state prosecutions, however, the provisions of *Miranda* necessarily had to remain in full effect (Pollack, 269)." This is another example of judge-made law.

The Court also heavily emphasized religion, with *Engel v. Vitale* (1962) being the most colorful example. In 1962, the Court, in a 6 to 1 decision, struck down compulsory prayer in school as being inconsistent with the establishment clause. The New York Board of Regents drafted the following invocation to be read in public schools,

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country (Urofsky, 142)." The argument of the Court can best be understood by the following, "The nature of prayer itself is religious, and by promoting prayer, the state violated the establishment clause by fostering a religious activity that it determined and sponsored (Urofsky, 143)." It was necessary for the Court to intervene here since government was promoting one religion at the expense of others. The public outcry following the decision was extreme. For example, "This decision aroused a nationwide hurricane of protests from religionists, legislators and parents who wanted their children to secure religious instruction in the schools. Not since the 1954 school desegregation ruling had the Warren Court been condemned so bitterly (Pollack, 210-11)." Even former President Eisenhower, the man who appointed Warren to the bench, lost faith in the institution and called it the Godless Supreme Court. The Court seemed to be the only governmental branch willing to stand by the Free Exercise Clause of the First Amendment to the Constitution. Although this decision is activist for denouncing compulsory student prayer of the New York Board of Regents, it is hard for some to separate the first amendment issue from their own personal religious beliefs.

The Warren Court was faced with a catch 22 in regards to religion. The American people were quickly becoming more religious. However, the various sects of religion created a great divide between the people (Belknap 130-1). In fact,

> The theoretically unrepresentative Supreme Court, however, actually reflected the popular will more accurately than did its critics in the political branches. The Court's decisions outraged those who wanted government to promote religion, but in a nation that was becoming increasingly diverse and divided religiously, there was no consensus concerning what faith government should foster. Ultimately, the only policy that could command the support of a majority of the American

> people was governmental neutrality toward religion, a concept the Warren Court sought, not always successfully, to embody in its decisions interpreting the First Amendment. Although often accused of hostility toward religion, the Supreme Court was merely accommodating constitutional law to religious pluralism (Belknap, 130).

Considering the different religious preferences available, the Court took the path that should have pleased the populace the most. Instead, it helped lead to the New Rights uprising in the following decades, causing the later, and more sympathetic, courts to see an increase in cases involving religion.

The final case that best encapsulates the Court is *Mapp v. Ohio* (1961). Considering the Court's focus on criminal procedure, this is a good example of its interpretation of the fourth amendment. Dollree Mapp was convicted of possessing pornographic material after an unlawful search and seizure. Police were attempting to find a bombing suspect in addition to paraphernalia related to gambling. The police never procured a warrant, although they had ample time to do so. The Ohio Supreme Court did not address the search and seizure aspect of the case; instead it focused on whether or not the state's statute restricting the possession of obscenity violated the First Amendment. The Supreme Court followed suit. The ACLU had provided an amicus curiae brief that addressed seized evidence and how it should be excluded if seized unconstitutionally (Belknap 228-9). Seizing on this, Douglas, Clark, Warren, Brennan, Stewart and Black (though Black, Douglas, and Stewart wrote concurring opinions) were able to create a majority opinion that would, "…apply the Fourth Amendment with full force to the states and make the exclusionary rule part and parcel of the constitutional guarantee (Belknap, 229)." This decision caused dissension in the court for two main

reasons: 1) It overturned *Wolf*, and 2) The dissenters found this to be an unnecessary step to take since many states were moving in this direction already (Belknap 230).

The Burger Court 1969-1986

Chief Justice Warren Burger was appointed to his position by President Nixon on June 23, 1969 and left the Court on September 26, 1986. Burger joined the following associate justices on the court: Hugo Black, William Douglas, John Harlan, William Brennan, Potter Stewart, Byron White, and Thurgood Marshall. Of all the seated justices, he only served two years with both Justice Black and Justice Harlan. He also served with several associate justices who took the oath of office while he was the Chief Justice. They are: Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O'Connor. In order to show a more complete timeline of the Burger Court, I have provided table II for the Burger Court that shows when a justice was appointed to the court, when he or she left the court (unless he or she served until after Burger left office, which will then be left blank), the appointing President, and his party.

Nixon had made the Supreme Court a large issue in his 1968 presidential campaign. He went far on this point and, "…pledged to appoint justices who shared his strict constructionist approach to the Constitution, and Reagan and his legal advisers carried this effort even further, systematically vetting judicial candidates on a series of ideological grounds (Keck, 157)." Reagan only made one appointment, Sandra Day O'Connor, to the Supreme Court during Burger's tenure. Yet he had pledged to appoint a woman to the Supreme Court so this comment really applies more to Scalia and Kennedy, who entered during Rehnquist's chief justiceship. The Burger Court had big

shoes to fill. President Nixon appointed Burger to carry out his agenda, which was a very tall order. In fact, "Burger was a known critic of the Warren jurisprudence, and he was appointed by President Nixon, whose concern about activist judges was a feature of his 1968 campaign. The so-called Burger agenda was projected to be, at least by many Court observers, a counterrevolution against the Warren revolution (O'Hara, 3)." Was Nixon's mission fulfilled? Not according to Alpheus Mason, who claimed that, "During his first term, President Nixon made four appointments, including a chief justice. Yet, even with a nucleus of support carried over from the Warren Court, his pledge remains unfulfilled (Mason, 35)."

Table II:

Justice	Year that Judicial Oath was Taken	Year Justice Left Court	Appointing President	Party of President
Black, Hugo	1937	1971	Roosevelt, F.	Democrat
Douglas, William	1939	1975	Roosevelt, F.	Democrat
Harlan, John	1955	1971	Eisenhower	Republican
Brennan, William	1956		Eisenhower	Republican
Stewart, Potter	1958	1981	Eisenhower	Republican
White, Byron	1962		Kennedy	Democrat
Marshall, Thurgood	1967		Johnson, L.	Democrat
Blackmun, Harry	1970		Nixon	Republican
Powell, Lewis	1972		Nixon	Republican
Rehnquist, William	1972		Nixon	Republican
Stevens, John Paul	1975		Ford	Republican
O'Connor, Sandra Day	1981		Reagan	Republican

Source: http://www.supremecourtus.gov/about/members.pdf.

However, there are times when an associate justice has more sway and swagger than a Chief Justice. Justice Brennan fit this profile. He has been considered one of the most influential justices of all time for many reasons but mainly for his persuasive abilities. Because of this, he was still able to direct the outcome of a decision in the way he saw fit for many important cases, even under the chief justiceship of Warren Burger (Henry 28).

He was so persuasive and important on the Court that he was able to keep afloat many of the issues of the previous Warren Court. To summarize, "Rather than ending with Warren's retirement, the rights revolution continued in full bloom even as conservatives joined the Court. For this reason, some scholars have suggested that the transition from the Warren to the Burger era was relatively inconsequential, and that we might instead think of the whole period from roughly 1962 to 1981 as 'the Brennan Court' (Keck, 133)." This statement seems to claim that Justice Brennan single-handedly kept the rights revolution alive. It would certainly appear that Justice Brennan was more influential than Chief Justice Burger.

The Court has been labeled both activist and a counter-revolution that wasn't. Robert Henry claims that, "…the Burger Court was unquestionably an activist Court. Admittedly, that activism was pragmatic, balanced, ad hoc – indeed rootless – or perhaps we might say that the activism was not grounded in any kind of common vision (Henry, 30)." In order to showcase the activism of the Burger Court I selected three decisions: *Roe v. Wade* (1973), *U.S. v. Nixon* (1974), and *Furman v. Georgia* (1972).

Roe v. Wade is arguably one of the most activist decisions made in the history of the Supreme Court. This 7-2 decision provoked a conservative movement whose goal was to overturn *Roe* almost instantly. In the majority opinion, Justice Blackmun relied heavily on "the right to privacy" which has no constitutional basis. This right was established in the decision *Griswold v. Connecticut* (1965), which struck down a Connecticut statute that banned the sale of contraceptives to married couples. *Roe* created a three-stage process for pregnant women that allowed a woman the opportunity

for abortion up until the viability of the fetus, and then allowed state intervention since it has a compelling interest (Garrow 87).

Many observers of the court were outraged by its decision to step into a "state's rights issue." These critics may have a point, especially considering that prior to *Roe*; in July of 1970, a new law, which actually repealed the previous statute regarding abortion, in New York State was passed that allowed any woman who could afford the procedure to have an abortion on request. Later the same year, similar measures were taken in Washington State when a referendum, adopted by popular vote, repealed the previous abortion statute (Garrow 85). As one can see, the nation was beginning a trend to liberalize its abortion laws. In Washington especially, the general populace was the one who initiated the action to legalize abortion. This should serve as an indication of how Americans felt about abortion at the time. Gerald Rosenberg summarizes the stance of the states best, "…in the five or so years prior to the Supreme Court's decisions, reform and repeal bills had been debated in most states, and seventeen plus the District of Columbia acted to liberalize their laws. State action had removed some obstacles to abortion, and safe and legal abortions were thus available in scattered states (Rosenberg, 398)." In a sense, through its intervention, the Supreme Court created a problem that is raging still to this day.

The Court handled an innovative case when it decided *U.S. v. Nixon*, which called into question executive privilege. The President recorded audio taken in the Oval Office and then refused to allow other governmental branches (including the courts) to hear the tapes, claiming immunity. In a unanimous decision (with only 8 justices voting, Rehnquist recused himself) the court declared that even the President of the United States

must obey subpoenas. The case also, "…held for the first time that the president of the United States can be made a party defendant in a federal lawsuit (Blasi, 207)." There is something unique about this case; it is the speed in which it went through the judicial process. The case completely skipped the United States Court of Appeals. It is important to note that Congress was in the impeachment process. Had the case proceeded as usual, instead of on an expedited track, Congress would have impeached the President and have earned back much of its legitimacy from the public (Blasi 200-1). Blasi claims that, "United States v. Nixon represents nothing less than a bold and stunningly successful instance of judicial activism (Blasi, 201)."

The Court declared what punishments it saw fit in *Furman v. Georgia*, which dealt with a state capital punishment law that selected recipients of the death penalty in an arbitrary (and racist) fashion. Here, Furman, a black man accidentally murdered a homeowner during an attempt to rob a home. The case dealt with the eighth amendment right against cruel and unusual punishment. In a 5-4 decision the Court inserted itself in a moral argument regarding the death penalty. Because of the decision, "…the Burger Court held unconstitutional the death penalty as then administered in all the states (Blasi, 213)." The decision was a short per curiam opinion, but the real meat lies within the many concurrences filed. A shining example by Justice Brennan uses the following to claim that the death penalty in all instances is inconsistent with the eighth amendment:

> In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not (*Furman v. Georgia*, 408 U.S. 238 (1972)).

Though there are some truths to this opinion, it is hard to believe that contemporary society almost virtually rejects the death penalty, considering how much debate still lingers on the topic to this day. Considering the fact that, "…the majority of state legislatures responded to the decision by reaffirming their commitment to capital punishment and devising systems for administering the death penalty in a more consistent fashion (Blasi, 213)." This decision, though activist, forced the hand of the state in a positive fashion by making states more predictable and less arbitrary in who was given the death penalty.

The Rehnquist Court 1986-2005

Chief Justice William Rehnquist was first appointed to the court by President Nixon in 1972, and was then elevated to the position of chief justice by President Reagan on September 26, 1986. Rehnquist died in office on September 3, 2005. Rehnquist joined the following associate justices on the court: William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, John Paul Stevens, and Sandra Day O'Connor. Of all the sitting justices, he only served a brief time (while he was chief justice) with Lewis Powell who left the court in 1987. He also served with several associate justices who took the oath of office while he was the chief justice. They are: Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. In order to show a more complete timeline of the Rehnquist Court, I have provided table III that shows when a justice was appointed to the court, when he or she left the court (unless he or she served until after Rehnquist left office, which will then be left blank), the appointing President, and his party.

Table III:

Justice	Year that Judicial Oath was Taken	Year Justice Left Court	Appointing President	Party of President
Brennan, William	1956	1990	Eisenhower	Republican
White, Byron	1962	1993	Kennedy	Democrat
Marshall, Thurgood	1967	1991	Johnson, L.	Democrat
Blackmun, Harry	1970	1994	Nixon	Republican
Powell, Lewis	1972	1987	Nixon	Republican
Stevens, John Paul	1975		Ford	Republican
O'Connor, Sandra Day	1981		Reagan	Republican
Scalia, Antonin	1986		Reagan	Republican
Kennedy, Anthony	1988		Reagan	Republican
Souter, David	1990		Bush, G.H.W.	Republican
Thomas, Clarence	1991		Bush, G.H.W.	Republican
Ginsburg, Ruth Bader	1993		Clinton	Democrat
Breyer, Stephen	1994		Clinton	Democrat

Source: http://www.supremecourtus.gov/about/members.pdf.

Rehnquist was known as a strict constructionist, a legal doctrine that helped him first ascend to the bench and then to elevate to the position of chief justice. According to Thomas Keck, "As soon as he took his seat on the bench in 1972, for example, Rehnquist became the Court's leading advocate of both judicial restraint and a fixed conception of the written constitution (Keck, 115)." Being an advocate of judicial restraint should have meant that he would let the court defer to other branches of government; however, the Rehnquist Court found more federal statutes to be unconstitutional than any other Supreme Court. Figure IV addresses the numbers for the Warren through the Rehnquist Courts.

Figure IV:

Decisions Striking Down Federal Statutes on Constitutional Grounds

Historical Period	Years	Number	Annual Average
Early Warren Court	1954-1962	7	0.78
Late Warren Court	1963-1969	16	2.29
Burger Court	1969-1986	32	1.88
Early Rehnquist Court	1986-1994	7	0.78
Late Rehnquist Court	1995-2003	33	3.67

Source: Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Judicial Conservativism*. Modified table by removing Early Court through Roosevelt Court.

By combining the two Warren Court rows the total becomes 23 overturned federal statutes, while the Rehnquist Court had an astonishing 40 overturned federal statutes. The totals for the two conservative courts shown both outnumber that of the liberal Warren Court. For this, among other reasons, Thomas Keck, in his book *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservativism*, found the Rehnquist Court to be the most activist. The Rehnquist Court, however, fell behind the Burger and Warren Courts, respectively, as figure V shows with the number of state and local statutes overturned.

Figure V:

Decisions Striking Down State and Local Statutes on Constitutional Grounds

Historical Period	Years	Number	Annual Average
Early Warren Court	1954-1962	73	8.11
Late Warren Court	1963-1969	113	16.14
Burger Court	1969-1986	309	18.18
Early Rehnquist Court	1986-1994	85	10.63
Late Rehnquist Court	1995-2003	43	4.78

Source: Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Judicial Conservativism.* Modified table by removing Early Court through Roosevelt Court.

Here, the Rehnquist Court only overturned 128 statutes, while the Warren Court overturned 186. However, the Warren Court falls significantly behind the Burger Court, which overturned a surprising 309 statutes.

The public, as well as many scholars, had assumed that the conservative Rehnquist Court would overturn the liberal activism of the Warren Court; this was not the case. Instead,

> When Reagan elevated Rehnquist to chief justice in 1986, most scholars assumed that the conservative Court would abandon liberal activism and replace it with

> restraint, just as they had expected when Rehnquist first joined the bench in 1972. By the early 1990s, it seemed more likely that the conservative justices would abandon liberal activism not for restraint but instead for their own conservative activism. As it happened, however, neither of these alternatives came to pass. Instead, the justices with the deciding votes endorsed the newer conservative activism, but in a move that produced a sharp conflict with their conservative colleagues, they continued to reaffirm much of the Court's liberal activism as well (Keck, 157).

When looking at the Rehnquist Court, one has to take into account the effect that Justices Sandra Day O'Connor and Anthony Kennedy had on the Court. Keck claims that, "Since their votes are so often decisive, moreover, it is O'Connor's and Kennedy's vision of the judicial role – their particular effort to reconcile the long-standing conservative commitment to restraint and the New Right commitment to limited government – that explains the extraordinary activism of the Rehnquist Court (Keck, 203)." O'Connor's somewhat moderate approaches to cases, such as her undue burden test in *Planned Parenthood v. Casey*, have shown her willingness to limit the reach of her activism in either a liberal or conservative manner. More important however, is the bargaining position that O'Connor and Kennedy are in when it comes to split votes. They would have the ability to have the other justices give concessions for them to join the majority, which normally is not the case.

In order to showcase the Court's activism, I have selected three cases that best encompass the Court's overall reach, they are: *Bush v. Gore* (2000), *Lee v. Weisman* (1992), and *Lawrence v. Texas* (2003). The 2000, 5-4, *Bush v. Gore* decision is well known to Americans as handing the presidency to George W. Bush by halting the recount voting in Florida. The background of the case can be summed up with the following:

> Late at night on December 11, the Court issued its opinion, holding that the application of different standards to determine the intent of the voter violated the Equal Protection Clause. A recount with consistent standards, the opinion

> suggested, would be constitutionally permissible. But Florida law, the Court asserted, required final submission of the results by December 12. Since it was plainly impossible to complete a statewide recount with consistent standards by that date, the Court's opinion also stated that no further recount was permissible (Roosevelt, 191).

The conservative justification for deciding the case in the manner it did was known to few people, "Scalia, Thomas, and Rehnquist's justification for stopping the Florida recounts was rooted in a reading of the original constitutional text - Article II, §1…(Keck, 267)." However, the Supreme Court should not have been the body to decide this case; the legislature should have. The House of Representatives had already decided three elections, 1800, 1824, and 1876, though the 1876 dispute was resolved by a committee of members of both the House of Representatives and the Senate as well as Justices of the Supreme Court (Heumann and Cassak 163-4). Due to the result of the 1876 election, the Electoral Count Act was created. The Act "…does place responsibility for resolving electoral disputes in *Congress*. Congress considered delegating the task to the Supreme Court but decided *against* it (Heumann and Cassak, 165, my emphasis)."

Even defenders of *Bush v. Gore* considered it an activist decision. Richard Posner claimed that, "*Bush v. Gore* is an activist decision...The Court thrust itself boldly into the center of a political struggle…The three most conservative Justices dusted off a forgotten provision of the Constitution…and gave it a meaning very likely unintended by the Constitution's framers, whom conservative lawyers and judges tend to venerate to the point of idolatry (quoted in Keck, 267)." This decision was a special brand of activism considering its notoriety and reach (an eight year presidential term). The Court effectively ignored the congressional remedy, usurping its power, and "…had the effect of overturning the laws of thirty-seven states (which like Florida, used a ballot-counting

standard emphasizing the intent of the voter), laws that had long existed and long been unchallenged, on behalf of a dubious interpretation of the original Constitution (Keck, 252)." With a system that no longer emphasized the intent of the voter, many states had to change their ballot system entirely. I can only assume that this would mean the end for the hanging and dimpled chads as well as other antiquated methods of voting. The decision also wounded the reputation of the Court: "Had the Supreme Court left the election to be settled in Congress, we might have had a more satisfying resolution. We would, at any rate, have had the decision made by officials that voters could hold to account. *Bush v. Gore* was an unfortunate over-reaction to perceived judicial activism, a self-inflicted wound for the Supreme Court (Roosevelt, 198)." The accountability issue cannot be overstated. Citizens are unable to hold justices accountable and because of this decision they had no other option but to wait out the presidential term of George W. Bush.

In *Lee v. Weisman*, a 5-4 split decision, organized prayer at public school graduations was prohibited because the invocation violated the establishment clause. Scalia dissented claiming that this decision was, "…a clear usurpation of popular authority for the Court to invalidate this broad tradition – not to mention the 'more specific traditions of invocations and benedictions at public school graduation exercises' themselves (Keck, 169)." This case is reminiscent of *Engel v. Vitale* in that the Court is again protecting citizens from a message that may be against their religious beliefs. The similarities end when one considers that in *Engel* there was only one vote in opposition and in *Lee* there was only a majority by one vote. However, considering the reach this case has, the decision may not have been the best possible resolution, especially since,

"The government now presides over many significant events, such as public high school graduations, which believers wish to solemnize with religious ceremonies. Prohibiting essentially all official prayer at public school events because of the danger of coercion might be striking the wrong balance (Roosevelt, 148-9)." The religious right was stunned by this decision considering the composition of the Court. However, in instances like this one, where a large body will be receiving the message, it is imperative not to sponsor one particular religion.

Lawrence v. Texas is proof that the Rehnquist Court engages in liberal activism as well as conservative activism. Here, police entered the home of Lawrence due to a weapons disturbance and found him engaging in a sexual act with another man; the two were then arrested. In this case, the Supreme Court struck down the state statute that criminalized same-sex sodomy. As has been previously mentioned, Kennedy and O'Connor are the justices crucial to the outcome of a decision, and this case proved to be no exception. Kennedy wrote the majority opinion in this case, while O'Connor wrote her own concurring opinion. Kennedy wrote that,

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice (*Lawrence v. Texas*, 539 U.S. 558 (2003).

Although this decision, and these comments, surprised many, O'Connor's opinion helped to limit the Court's reach: "… O'Connor supported the Court's liberal activism in the sodomy case…She voted to strike down Texas's sodomy statute, but wrote separately to

limit the reach of the Court's rationale (Keck, 200)." This case was activist in two ways: it overturned a state statute and it overturned the Court's own precedent *Bowers v. Hardwick* when the Court sustained the Georgia statute that criminalized sodomy regardless of the sex of both participants. This historical background provides enough information to allow me to move forward into the methodology section.

Methodology

With respect to the "unit of analysis" issue, it is important to note that activism is a justice-based phenomenon. The attention is normally drawn to courts instead of individual justices who comprise the courts. However, Stefanie Lindquist and Frank Cross in *Measuring Judicial Activism* analyze individual justices. I decided to base my model on similar grounds. Their work does not go far enough nor look at other important factors. They analyze natural courts which I believe eliminates important justices, who although had a brief tenure, made decisions on the bench. By natural court I mean the period of time when a court sees no additions or subtractions. An example of a natural court is the Rehnquist Court after the addition of Stephen Breyer but before the retirement of O'Connor and the death of Rehnquist. They also look at aspects of activism that I would not include, namely overturning regulatory agency actions and executive actions. In their work, they mention on numerous occasions that overturning federal precedent is the most extreme action of all those possible toward statutes (over states or local governments for example). At the end of their research they weigh it equally with all other measured factors, which I believe is an error since they gave it special attention and set it apart from the other forms of activism.

I, along with Lindquist and Cross (2009), used a database provided by Harold Spaeth (2009). I used the Original U.S. Supreme Court Judicial Database (nickname: ALLCOURT). First, I imported the ASCII version of Spaeth's database and then opened it with Excel. This caused a small importation error; every concurrence or dissent with either Justice Harlan, Justice Fortas, Justice Thomas, or a jurisdictional dissent,

caused the numerical value in the column to be read as an increment of time. I maintained a separate base file and made separate sheets for each individual justice. I then removed all cases that did not receive full opinions (such as per curiam opinions, etc.) and I also removed duplicative cases. This filtering left 409 occurrences from the importation error, which I manually checked. First, I used the Lawyer's Edition of the United States Reports (LED) citation, since it was present on every case on Lexis Nexus Law in order to find the case name. Then I used this case name and citation (verifying every case with the decision date and party descriptions) on oyez.org to find how each justice voted in the case. This worked in every instance and the case names and citations are provided in Appendix I. Then after adding back in the correct data in those 409 instances, I used the TERM column, which begins with the 1953 term, to analyze every year the justice was on the bench.

I analyzed the direction of the decision variable for each decision and whether or not a justice was in the majority to decide ideology. For example, if the direction was coded as liberal and the justice was in the majority then he or she decided it as a liberal. For every justice, I calculated the number of times he or she was in the liberal majority and the number of times he or she was in the conservative majority. A justice is coded as liberal if the difference between the number of times he or she voted with the liberal majority versus the conservative majority is greater than 50. A justice is coded as conservative if the difference between the number of times he or she voted with the conservative majority versus the liberal majority is greater than 50. If there are less than 50 decisions separating the two totals, the justice is labeled a moderate. I used 50 so that I could have three distinct groups. Figure VI describes Spaeth's coding scheme in detail.

In Spaeth's database, an alteration of precedent occurs when the majority opinion claims to overrule a former opinion. Simply distinguishing precedent is not considered by Spaeth to be an alteration of precedent.

Figure VI

In order to determine whether an outcome is liberal (=1) or conservative (=0), the following scheme is employed:

In the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys

1=
pro-person accused or convicted of crime, or denied a jury trial
pro-civil liberties or civil rights claimant, especially those exercising less protected civil liberties (e.g., homosexuality)
pro-child or juvenile
pro-indigent
pro-Indian
pro-affirmative action
pro-neutrality in establishment clause cases
pro-female in abortion
pro-underdog

anti-government in the context of due process, except for takings clause cases where a pro-government, anti-owner vote is considered liberal except in criminal forfeiture cases or those where the taking is pro-business
violation of due process by exercising jurisdiction over nonresidents
pro-attorney
pro-accountability and/or anti-corruption in campaign spending
pro-privacy vis-à-vis the 1st Amendment where the privacy invaded is that of mental incompetent
pro-jurisdiction in 506
pro-disclosure in 537 issues except for employment and student records
0=
Reverse of above

In the context of issues pertaining to unions and economic activity

1=
pro-union except in union antitrust where 1 = pro-competition
anti-business
anti-employer
pro-competition
pro-liability
pro-injured person
pro-indigent
pro-small business vis-à-vis large business
pro-state/anti-business in state tax cases
pro-debtor
pro-bankrupt
pro-Indian
pro-environmental protection
pro-economic underdog
pro-consumer
pro-accountability in governmental corruption
anti-union member or employee vis-à-vis union
anti-union in union antitrust
anti-union in union or closed shop
pro-trial in arbitration
0=
Reverse of above

In the context of issues pertaining to judicial power

1=
pro-exercise of judicial power
pro-judicial "activism"
pro-judicial review of administrative action
0=
Reverse of above

In the context of issues pertaining to federalism

1=
pro-federal power
anti-state
0=
Reverse of above

In the context of issues pertaining to federal taxation

1=
pro-United States
0=
pro-taxpayer

Source: The Original United States Supreme Court Judicial Database 1953-2007 Terms by Harold Spaeth (http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf).

From this I was able to provide an average on federal statute activism, state statute activism, and overturning precedent activism. I was then able to look at every justice who served on the Warren, Burger, and Rehnquist Courts and establish an overall activist average by averaging all of his or her annual activism totals. Two different chart types appear below: 1) a bar chart with overall activism averages, and 2) a line chart with the annual averages of the conservative and liberal justices.

Findings

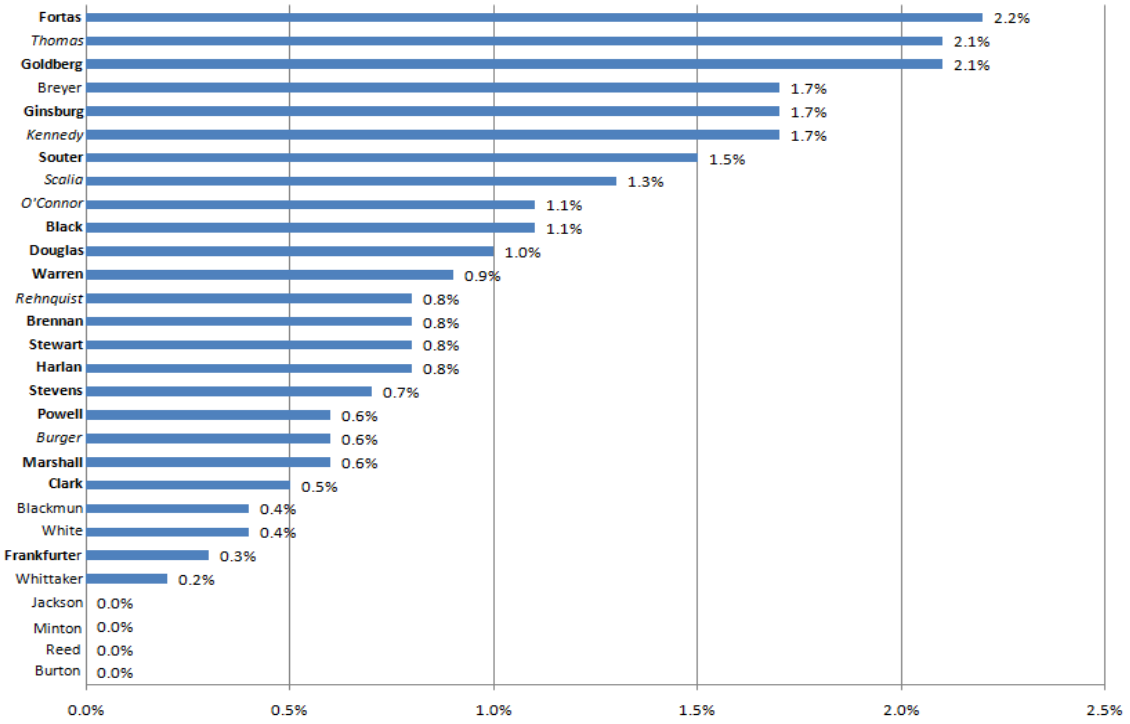
Federal statute activism

The total activism averages are relatively low during the Warren and Burger years, the highest averages belonging to Justice Fortas with an average of 2.2%, Justice Goldberg with a 2.1% average (these inflated percentages are partially due to their brief tenure on the Court), and Justice Black's 1.1% average. I include Justice Black's average because his number is more realistic due to the 18 terms analyzed as opposed to Justice Fortas' four terms and Justice Goldberg's three terms. I consider it a low average when a justice's score is below the average. For this type of activism, the average of all justice's scores is 0.9%. Figure VII shows the overall activism average for all justices of the three courts. The rest of the averages hover between half of a percent and a percent. A surge begins with Justice O'Connor, who barely tops the average with 1.1%, but the numbers reach a high point with Justice Thomas's 2.1% average. As one can see, the majority of the justices who have scores higher than the average served on the Rehnquist Court.

The political party of the appointing president is an insufficient indicator as the sole means of explaining judicial ideology. Consider how often a justice has changed his or her position while serving on the bench. For this reason, I included the number of times each justice was within the liberal majority as well as the conservative one. For example, a Democrat appointed Justice Black, but it is the number of times he voted with the liberal majority (over three times that of the conservative majority) that is important. Therefore, I formatted each justice so that it is apparent with which majority he or she voted. If the justice's name is in bold than he or she voted with the liberal majority most

frequently; the justice's name appears in italics if he or she voted with the conservative majority most frequently. If a justice's name has no special formatting than he or she is moderate. I considered a justice moderate if there were less than 50 votes that separated his or her liberal and conservative majority totals. The justices with an average of over 2.0% all voted strongly with the party of the appointing president (Fortas and Goldberg, appointed by Democrats voted with the liberal majority and Thomas, appointed by a Republican voted with the conservative majority). One member of the Rehnquist Court voted with both parties a comparable amount of the time: Justice Breyer. This is simply an observation but, it appears that those who voted closely with both parties have lower activism averages. The lower the activism average, the closer the voting pattern between the two parties. This figure has a healthy mix of all judicial ideologies, reinforcing my null hypothesis.

Figure VII:

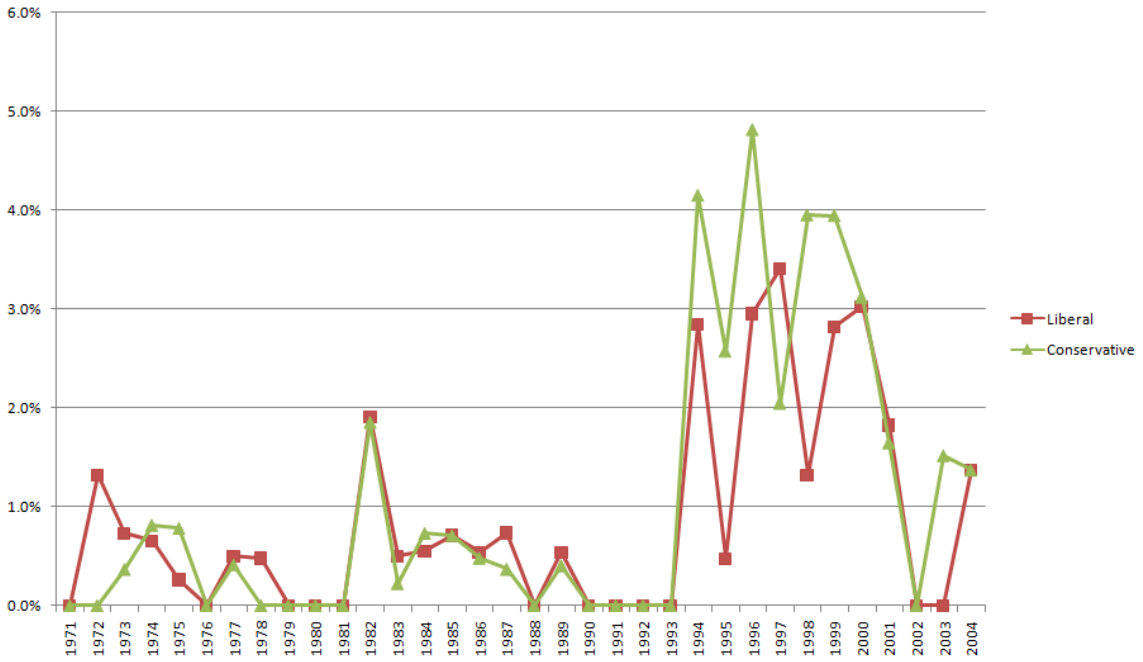


Source: Compiled by author.

To remove any bias that might be associated with only viewing one type of chart, I provided another way to view the material. I provided Figure VIII that showcases the annual activism averages for the liberals and the conservatives. To get these totals, I averaged the annual figures for all of the conservatives and did the same for all of the liberals; the line chart shows the resulting data. This chart spans from 1971 to 2004 because I needed at least two conservatives and two liberals on the court at all times to provide an accurate representation. I did not have two conservatives on the court until 1971.

Looking at this line chart, one can see that the averages are fairly close, until 1994. Then the averages for the conservatives rise substantially, (with the exceptions of 1997, 2001, 2002, and 2004) which lasts throughout the remainder of Rehnquist's tenure as chief justice. This chart exhibits conservative justices engaging in federal statute activism more often than liberal justices.

Figure VIII:



Source: Compiled by author.

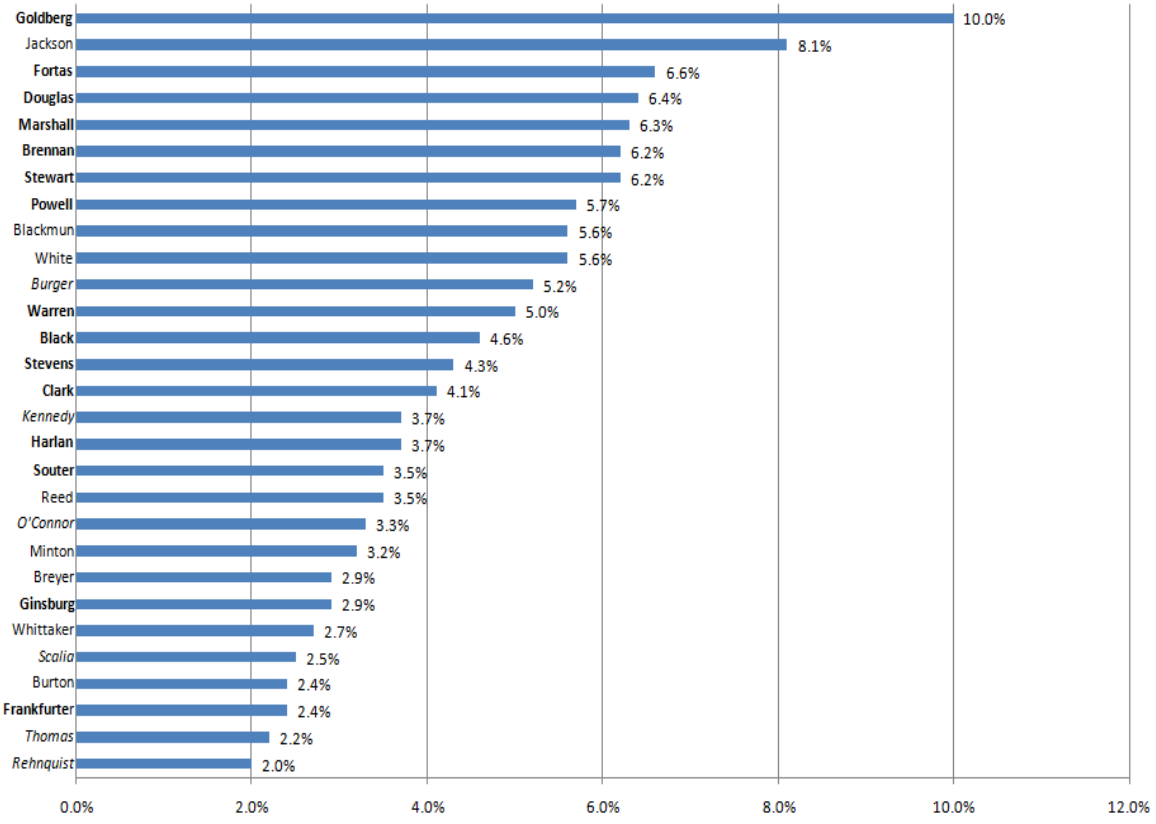
State statute activism

The averages for state statute activism are significantly higher than the corresponding federal averages. Here the overall average is 4.5%, remember that for federal statutes this average was 0.9%. For example, Justice Black's average went from a 1.1% level to a 4.6% level. This means that state statues are overturned more frequently than federal statutes, ensuring the primacy of federal statute activism in any discussion on the extreme forms of judicial activism. The highest average belongs to Justice Goldberg who has a 10% average. Chief Justice Rehnquist and Justice Thomas have the lowest levels, 2.0% and 2.2% respectively. The majority of justice's averages are between 4.0% and 6.5%. Members of the Rehnquist Court have some of the lowest averages, with Stevens having the highest at 4.3%. It is interesting to see that none of the justices on the Rehnquist Court have a score higher than the overall average, especially considering that only Justice Stevens and Chief Justice Rehnquist appeared below the average for federal statute activism. This suggests that liberal justices are more likely to engage in state statute activism than are conservative justices. Figure IX shows the averages for all justices on the three courts.

The same trend holds for lower levels of activism and close vote numbers between liberal and conservative majorities, though this pattern is not as accurate as it was for federal statute activism. For example, Justice Whittaker voted with the liberal majority 185 times, the conservative majority 165 times, and had an activism average of 2.7%. Chief Justice Rehnquist who has the lowest activism average at 2.0% voted with the liberal majority 1,039 times but with the conservative majority 1,871 times. This

simply shows that a low activism average is not necessarily a reliable indicator of whether or not a justice is moderate.

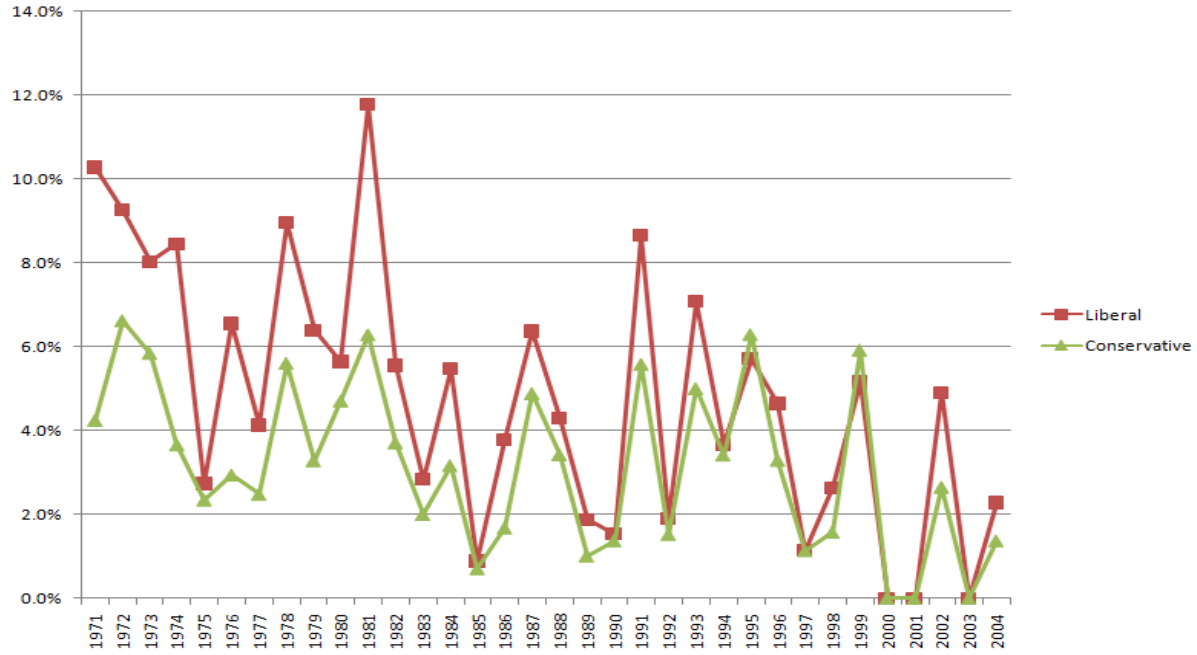
Figure IX:



Source: Compiled by author.

Figure X displays annual activism averages. As one can see, some years have incredibly high activism levels, such as 1981. The liberals have higher annual activism averages for the most part; however, they are surpassed at a couple of data points, namely 1995 and 1999. This figure strengthens my previous statement regarding liberal justices being more likely to engage in state statute activism than conservative justices.

Figure X:



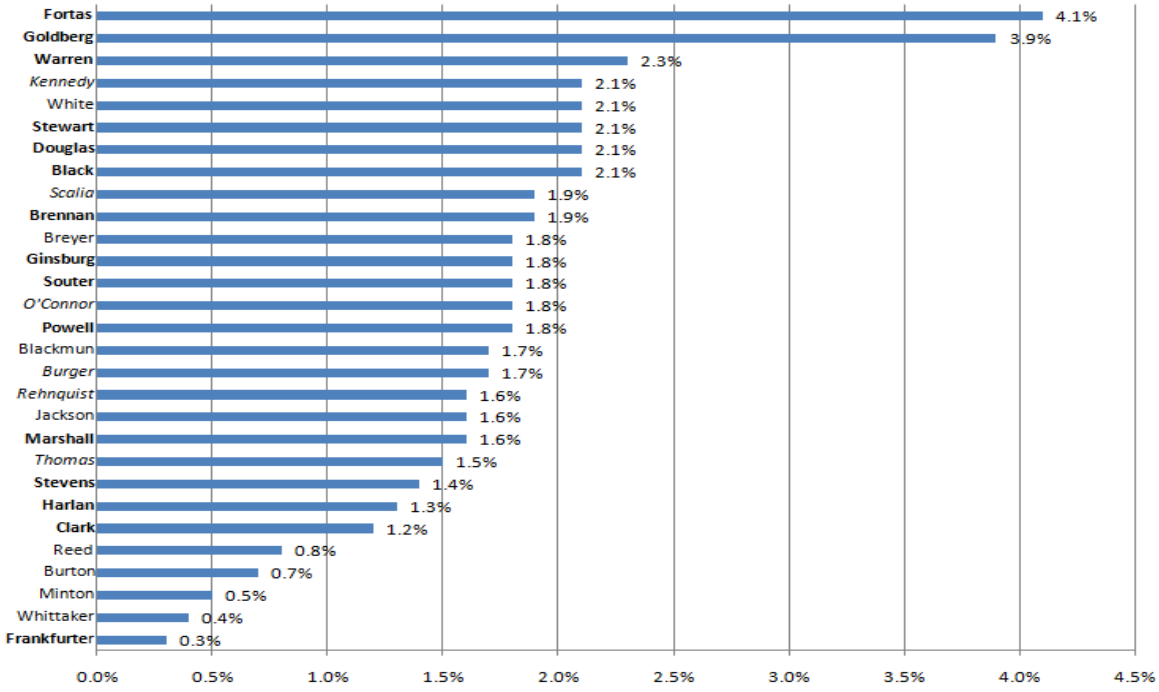
Source: Compiled by author.

Altering precedent activism

The averages for precedent activism more closely mirror federal statute activism than state statute activism. Although the numbers are closer, the pattern means little as to which ideology is more activist since this does not show a clear domination by one ideology as did federal statute activism. Here, the overall average is 1.7%, which is almost double that of federal statute activism. Justices Fortas and Goldberg have the highest levels reaching 4.1% and 3.9% respectively. Due to their short tenure, their numbers seem artificially inflated. Therefore, I cannot stress enough their limited and brief time on the bench being the reason for such high figures. The only justice on the Rehnquist Court who passes 2.0% is Justice Kennedy with 2.1%. Again, members of the Rehnquist Court hover near the average with the exception of Kennedy. 2.1% is a pretty common figure being shared by Justices Black, Douglas, Stewart, White and Warren with a slightly higher average at 2.3%. The figures dip slightly during the Burger Court, with

averages between 1.6% and 1.8%. Figure XI shows the overall activism averages for the justices of the three courts. There does not seem to be much connection between ideology and altering precedent; there are judicial ideologies scattered throughout the chart. This furthers the credibility of my claim that activism exists within both ideologies, no one ideology is in complete control of activism.

Figure XI:

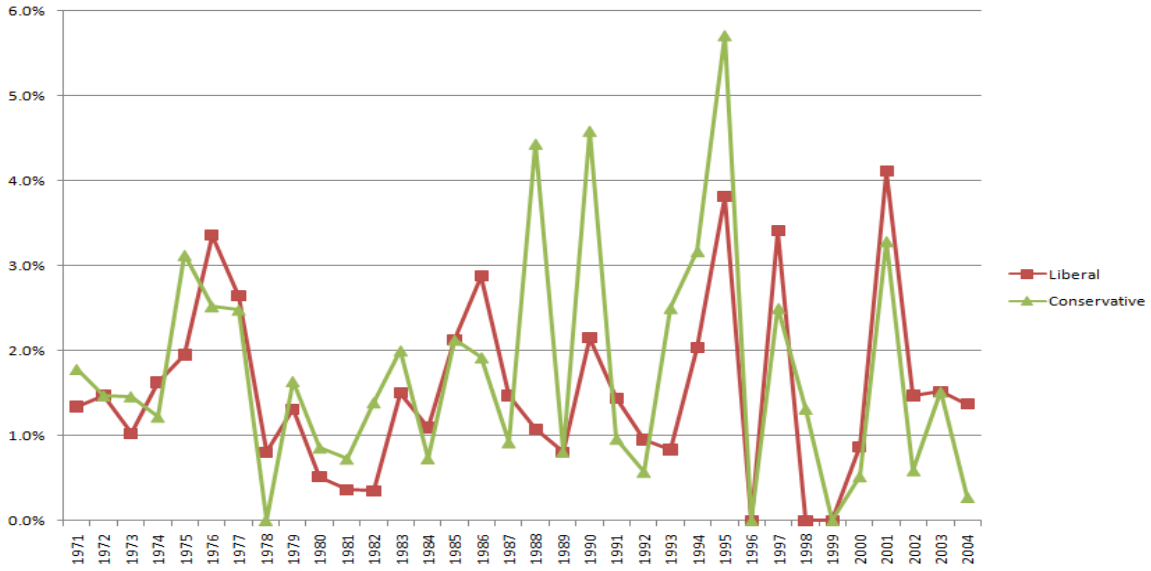


Source: Compiled by author.

Figure XII shows the annual averages that pertain to the alteration of precedent. Looking at this chart, it is easy to see that both ideologies at one point or another have higher averages. The conservatives surpass the liberals from 1979 to 1983 and then from 1988 to 1995, with the exceptions of 1989, 1991, and 1992. The liberals do not surpass the conservatives in substantial blocks, but do have higher averages during select years. However, it is interesting to note that during the years in which the liberals do have higher averages they do not outnumber the conservatives by much. Examples include the

years of 1974, 1976, 1986, 1997, 2001, 2002, and 2004. With the exception of 1986, all of these averages are separated by less than 1 point. In 1995, the conservatives and liberals are separated by almost two full points (5.7% and 3.8% respectively). Seeing that no one party is dominating this field suggests that once again justices from both ideologies engage in activism.

Figure XII:

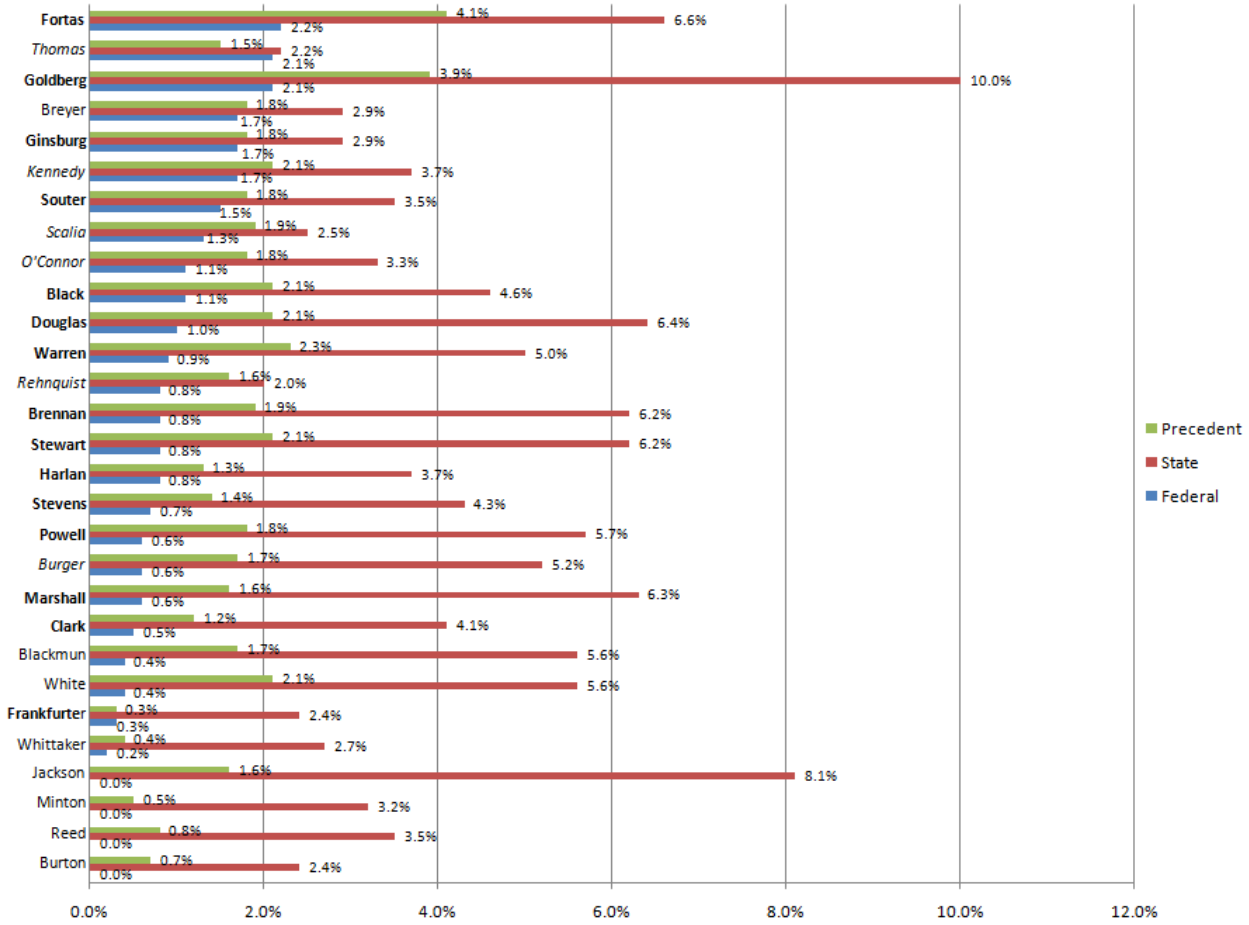


Source: Compiled by author.

Figure XIII has been provided to show each justice's activist average in all three criteria. This bar chart has been sorted by federal statute activism. This bar chart is an excellent display of state statute activism. By combining all three types of activism, the reader really gets a good idea of just how high the state averages really are. This combination of all three types of activism puts the data into perspective. The main reason for the inclusion of this chart is to simplify the material previously shown and to provide the reader with a resource that allows them to compare all justices against one another in one place. It is interesting to see how close some justice's totals are grouped, an example being Justice Thomas. It is also interesting to see how spread they can be, an example

being Justice Stewart. As one can see, the justices are mixed throughout. Though a justice may have a higher state activism average than another justice, he or she usually has a lower federal activism average or altering precedent activism average. For example, Justice Ginsburg has a higher state activism average than Justice Thomas, but he has a higher federal activism average than she does. This suggests that justices from both ideologies engage in activism, though they may pursue it in different avenues.

Figure XIII:



Source: Compiled by author.

Up to this point I have only measured activism based on each justice's conservative or liberal votes. It is necessary to include another measurement that can be declared free of contaminants; thus, I have performed a T-Test that is based upon the

party of the appointing president. Verifying the party of the appointing president is an easily proven fact that lends no bias.

The first important thing to note is that none of the differences are statistically significant. This further confirms the validity of my null hypothesis. Looking at this figure, notice the column marked difference; if a number is positive it means that justices appointed by Republicans have a higher activism average than those justices appointed by a Democratic president. If the difference is a negative figure, then justices appointed by Democrats have a higher activism average than those appointed by Republican presidents.

Figure XIV: Mean Activist Score by Party of Appointing President

Activism	Democrat (N = 14)	Republican (N=15)	Difference	P-Value
Federal-Statute	0.77	0.94	0.17	0.47
State-Statute	4.92	4.13	-0.79	0.29
Altering Precedent	1.76	1.69	-0.07	0.84

Note: All differences are not statistically significant.

Drawing attention to federal-statute activism, it is easy to see that justices appointed by Republicans have a larger activism average. However, as I have already mentioned, the difference is not significant. Justices appointed by Democratic presidents have higher averages in both state-statute and altering precedent activism, although the -.07 difference for altering precedent is very slight. This table shows the same results that the others previously listed show: that conservatives have higher activism averages in regard to federal statutes, whereas liberals have higher activism averages in regard to state-statutes and altering precedent.

One important thing to keep in mind is the fact that once on the bench a justice can abandon his or her ideology. This is one reason why it is difficult to assess the ideology of the justice simply by looking at the party of the appointing president. Examples of justices whose ideologies changed on the bench include: Chief Justice Earl Warren, William Brennan, David Souter, and John Paul Stevens. President Eisenhower is famously noted with stating that his appointment of Warren was "the biggest damn-fooled mistake (quoted in O'Brien, 70)" he had made as president. More proof that Brennan and Warren were not what President Eisenhower had in mind, is given with the following, "(Justice) Clark also recalled how Eisenhower was 'very much disturbed over Chief Justice Warren and Justice Brennan (quoted in O'Brien, 88)." Souter turned out to be more liberal than conservatives thought, "…Souter disappointed supporters of Presidents Reagan and George H.W. Bush… (O'Brien, 88)." John Paul Stevens, during his tenure on the court, has become the most liberal justice currently serving, even though a Republican appointed him.

Conclusion

This thesis sought to answer whether or not a liberal justice was more likely to engage in activism than a conservative justice. The goal was to see whether or not the rhetoric spouted by the media was a true assessment of reality. Chief Justice Warren was persecuted for his supposed activism. The public blamed his Court for, "...all manner of social maladies - permissiveness, communism, pornography, venereal disease, and the breakdown of the family (Caldeira, 1216)." Billboards were erected calling for his impeachment. He lost the respect of President Eisenhower, the man who appointed him to office. Since his time in office, the mainstream media is claiming only liberals as judicial activists. The results from the T-test and from the charts show that justices from both parties are equally likely to engage in activism, though they may approach it in a different manner.

After following the history of the term judicial activism and reviewing the various definitions available, I established three that would be measured. The three I chose, due to the frequency that they appeared within the literature, were federal statute activism, state statute activism and altering precedent activism. Following this, I provided a brief summary on each of the three courts (Warren, Burger and Rehnquist) analyzed.

I have failed to reject my null hypothesis; there is no difference in activism levels between liberal or conservative justices on the Supreme Court. Averages from the justices from all judicial ideologies are scattered throughout the charts, suggesting that justices from all ideological backgrounds engage in activism (one ideology is not dominating a certain spectrum of each chart). I established the ideology by looking at the

number of cases that they decided with the liberal majority and with the conservative majority. I found that the party of the appointing president was not sufficient in itself, considering that several justices switched positions while on the bench. To curtail possible criticism, I ran a t-test that measured a justice's activism level against the party of the appointing president. Justices appointed by a Republican President did have a higher federal statute activism average. Justices appointed by a Democratic President had higher state statute activism and altering precedent averages. However, none of the measurements were statistically significant, meaning that no one party is more activist than the other. I mentioned in the literature review that the justices who view the Constitution as a living document are more prone to alter precedent than justices who are strict constructionists. Liberal justices typically view the Constitution as a living document and the results have suggested the validity of this statement.

On a side note, Justices Fortas and Goldberg appear high on every level of activism; however, I am not putting much attention into these averages because the justices on the bench during the same years also had high annual averages. Although it is impossible to say for sure, I do not think their voting shows a significant pattern. I believe their averages were artificially inflated due to their short tenures as well as the years they served. They have been included in all of the charts because I do not want to appear biased; however, removing them in later research may verify my thesis further. This may have been a chief reason why Lindquist and Cross looked only at natural courts.

The intent of my thesis is to clear the air regarding which justices are activist. Members from both political parties spout accusations that justices representing opposite

ideologies are activist. This thesis clarifies that members representing both ideologies are activist.

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