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Article

Dissents Against Type

Ward Farnsworth[†]

Legal realists and various others believe that judges in close cases—and thus Supreme Court Justices in *most* cases—vote according to their policy preferences, private empirical views about the world, and other considerations that have little to do with the legal materials bearing on a dispute. For those who think this way, a judge who dissents in an unexpected ideological direction is a surprise and a challenge: the judge is bypassing arguments—arguments favored by at least five colleagues—in favor of his accustomed position. Why? Are these cases where the commitments to legal methodology (say, to an interpretive philosophy) are constraining the judge’s usual inclinations?

This Paper examines such “dissents against type,” distinguishes between real and apparent examples of them, and considers whether and how they can be integrated into a realist view of judging. Part I examines the Justices’ patterns of dissent in criminal cases, a rich area for study of the question because of the large number of cases in that field that involve similar policy stakes. Part II considers the apparent dissents against type made by some particular Justices, asking whether they can be explained on ideological grounds or in some other way. The Article concludes with some general thoughts about when and why apparent dissents against type occur.

I. THE EXTENT OF THE PUZZLE

In prior work I have defended a simple realist view of how judges make decisions.¹ Their policy preferences compete with

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the pressure exerted by the legal materials that bear on the cases in front of them; where they conflict, the stronger of the two prevails.² Legal materials that speak decisively to the point in dispute can override a judge's preferences, which is why judges with different ideologies nevertheless decide so many cases unanimously in the courts of appeals. Legal issues that are more evenly balanced don't have that constraining effect; they allow judges to vote either way and have something legalistic to say for themselves, which is why appellate judges in cases that *aren't* unanimous tend to vote along consistent ideological lines regardless of what sort of legal materials bear on the case.

This also explains why Supreme Court Justices, as distinct from judges on lower courts, regularly vote in predictable blocs: most cases that get to the Supreme Court, and especially cases that produce a split decision there, have solid arguments on both sides, so a Justice can take whatever position seems best on policy grounds and find legal support for it. This is not a claim about how Justices subjectively experience what they are doing; it is a claim about what they end up doing, whatever their thought process may be. An empirical look at how judges vote in criminal cases strongly supports this general model.³ In split decisions that involve similar policy stakes, any given judge or Justice votes for the government at a fairly consistent rate, regardless of whether the underlying legal dispute involves the Constitution or a statute or some other sort of rule.⁴

Possible challenges to this legal realist model arise from cases where judges vote out of character: cases where a judge who typically votes for the government decides to vote for the criminal defendant instead (or vice versa), despite having plausible arguments to support a vote in the usual direction. The most striking of these cases would be *dissents* against type. If a Supreme Court Justice dissents in favor of a defendant, then evidently there were arguments to support the government's view—for at least five of his colleagues found them satisfactory. For a judge to pass by those apparently strong arguments and insist that the defendant is right would seem to suggest, on a realist view, a preference to find for the defen-

1. See Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 88–96, 99–100 (2005).

2. See *id.* at 71.

3. See *id.* at 69–73.

4. See *id.*

dant. So what are we to make of cases where dissents of just that sort are made by Justices who, on the evidence of the rest of their careers, prefer to rule *against* defendants? Such behavior, to the extent it occurs, seems inconsistent with the realist model.

A. THE FREQUENCY OF DISSENTS AGAINST TYPE

So to what extent *do* dissents against type occur? The Supreme Court's criminal docket presents a large and useful set of cases to consider as a basis for investigating this question, and has formed the basis of some of the earlier work described above. This Section revisits that work and considers what it can teach about the incidence and implications of dissents against type.

First some preliminaries. Before one can analyze dissents against type, it is important to define what the "types" are. It's possible to draw conclusions about types from various sources, including "ideal points" and variants devised by political scientists,⁵ various indicia of reputation,⁶ or the data presented in my earlier study of judicial behavior in criminal cases decided non-unanimously.⁷ For present purposes this Paper defines a dissent against type more simply (and in a way that, in any event, produces conclusions about the same as those other methods): it is a dissent that runs contrary to a strongly established tendency found in the rest of the Justice's votes. On a realist or attitudinalist view, any such strong tendencies represent ideological commitments or other sorts of priors the judges bring to the cases, such as being pro-government or pro-defendant in a criminal case. When such tendencies can be identified, the question becomes why they don't hold *all* the time; and the stronger the initial tendency to vote one way or the other, the more a dissent in the other direction invites explanation.

With that framework in mind, consider Figure 1 below. It displays career data for each Justice on the Court from 1975 to the present (through October Term 2007). It reflects their vot-

5. See Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891, 1892–96 (2007).

6. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–61 (1989).

7. See Farnsworth, *supra* note 1, at 68–73.

ing behavior in every case that had a criminal defendant on one side and the government on the other, whether by way of direct appeal from a criminal conviction, on habeas corpus, or in any other posture. It then divides those cases according to the source of law in dispute: constitutional or not, with the latter category covering penal statutes, the habeas corpus statute, and rules of evidence and procedure, and so forth.⁸

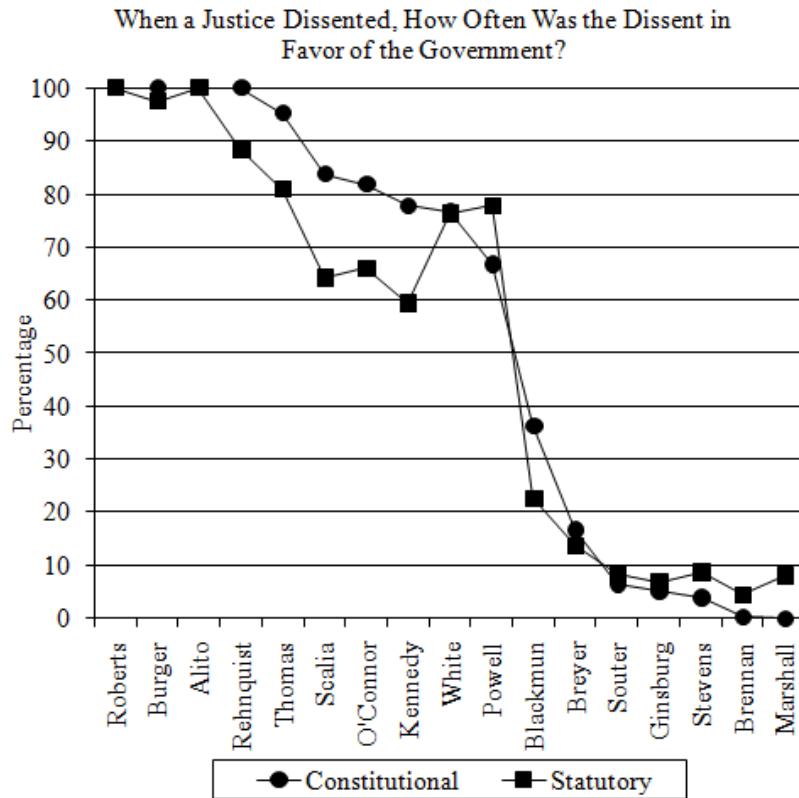


Fig. 1: Dissenting Behavior in Criminal Cases by Selected Supreme Court Justices.

8. The data for this study—the data used to create the graphs and to make the other numerical findings mentioned later—were derived from the United States Supreme Court Judicial Database at Michigan State University, which was created by Howard Spaeth. The basic method was to seek out all cases in the career of each Justice (through the end of October Term 2007) that involved criminal law in any form. The results from the Spaeth database were then checked against various datasets compiled by hand to help guard against omissions that might otherwise result. For an expanded discussion, see Farnsworth, *supra* note 1, at 68 n.7.

As the graph shows, every Justice has a decided tendency to dissent one way but not the other—for the government and not for defendants, or vice versa. The tendency cuts across cases involving different areas of law without much difference, which strongly suggests that it is the result of priors the Justices bring to the cases from outside the legal materials. These priors can include policy preferences or various empirical views that are relevant to criminal cases of all kinds.⁹ But then why don't those values and views bring about results even more regular than the ones shown here? The question might be presented in more vivid fashion by combining the statutory and constitutional cases and representing them as shown in Figure 2:

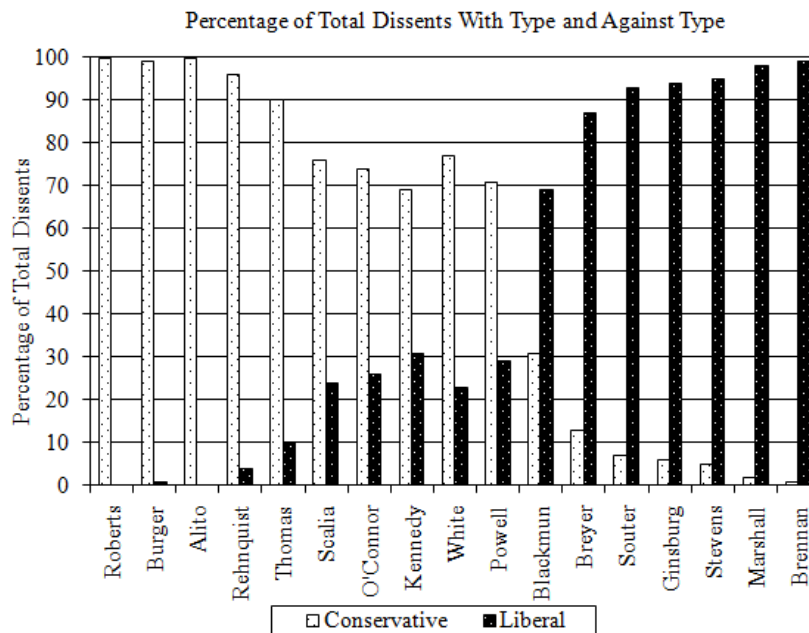


Fig. 2: Proportions of Dissents For and Against Type.

The more the taller line outdistances the shorter one for any given Justice, the clearer the tendency the Justice displays to dissent one way but not the other. The curiosity this provokes involves the short lines. What happens in those cases that *don't* follow form? If a Justice votes for the government 95% of the time, why not 100%? These questions are raised by

9. See Farnsworth, *supra* note 1, at 91–96.

the numbers but can't be resolved by them. Understanding when and why dissents against type occur requires a look at what happened in those cases.

II. REAL AND APPARENT DISSENTS AGAINST TYPE: SOME CASE STUDIES

This Part examines the apparent dissents against type recorded by the more extreme Justices in the charts just shown. The goal is to understand better the various reasons why Justices ever appear to dissent against type, and also to see how the dissents may shed light on their authors and our understanding of what their "types" really are. There are limits to what one can conclude from this data about any particular Justice, because dissents against type are partly a group effort; a Justice cannot dissent against type unless he gets cooperation of a certain kind from his colleagues, five of whom have to vote one way so that he can vote the other. But there nevertheless are interesting observations to make about the cases where such dissents *do* occur, and about Justices in whose careers such dissents almost never occur.

A. WILLIAM REHNQUIST AND OTHER EXTREME CASES

William Rehnquist, who served on the Court from 1971 until his death in 2005,¹⁰ participated in well over a thousand criminal cases and in general was a reliable vote for the government.¹¹ The earlier charts showed how rarely he dissented in favor of a criminal defendant, but there are several more details that deserve mention. The first point to observe is simple: one hesitates to make categorical statements, but in more than thirty years on the Court, Rehnquist appears never to have written or joined a dissent in favor of a defendant on a point of constitutional law. It seems rather astonishing, at least on any but a hard-line realist view, that he never once saw a case where he thought a defendant's claim of constitutional right was incorrectly denied, but no such instance appears in the data.¹²

10. Rehnquist joined the Court as an Associate Justice on January 7, 1972, became Chief Justice on September 26, 1986, and died on September 3, 2005. Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495, 509 n.90 (2007).

11. See Farnsworth, *supra* note 1, at 69.

12. The process of generating and searching data for this purpose leaves room for an individual case to be missed if its coding in the Spaeth database is

The perfect regularity of Rehnquist's constitutional dissents might, in principle, be explained on legalistic grounds in two ways. The first is that he was an originalist surrounded by colleagues who weren't;¹³ so he was less inclined to join expansive readings of the Constitution than anyone else—and if he thought such a reading was appropriate, *a fortiori* there always were at least four colleagues who would agree with him.¹⁴ The other possibility, related but distinct, is that he was applying legal principles in a manner indifferent to policy, but was surrounded mostly by colleagues who would bend a point to find for a defendant whenever they could. The result, again, would be that in any case where Rehnquist was inclined to vote for a defendant, there automatically would be at least four more votes the same way.

Neither of these explanations seems convincing. Rehnquist was a less intense proponent of originalism than Justice Scalia, who, as we shall see, does dissent in favor of defendants from time to time in constitutional cases. And while Rehnquist had a number of colleagues who seemed to vote for the defendant whenever it was plausible to do so, he had many others who weren't like that at all.

The use of originalism to explain Rehnquist's pattern of dissent also does not explain the very similar pattern he displayed in criminal cases that involved statutes or other non-constitutional sources of law to which originalism has no application.¹⁵ It is possible to suggest that a commitment to originalism in constitutional cases will incline a Justice to vote for the

unexpected or idiosyncratic in some way. If any reader knows of a constitutional case in which Justice Rehnquist did dissent for a defendant, kindly forward it to the author's attention.

13. See Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 669 (2006) (describing Chief Justice Rehnquist as among the Court's "most ardent proponents of originalism as a methodology of constitutional interpretation").

14. See, e.g., *Deck v. Missouri*, 544 U.S. 622, 633–35 (2005) (joining a majority opinion holding that the use of visible restraints before a jury violates due process); *Smith v. Texas*, 543 U.S. 37, 48 (2004) (per curiam) (agreeing with the majority opinion that a nullification instruction failed to allow the jury to fully consider mitigating evidence); *Wiggins v. Smith*, 539 U.S. 510, 534–38 (2003) (agreeing that counsel's failure to investigate mitigating evidence beyond a presentence report violated the Sixth Amendment right to effective assistance of counsel).

15. See Earl M. Maltz, *Introduction* to REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 1, 5 (Earl M. Maltz ed., 2003) (defining "originalism" as a theory of constitutional interpretation whereby the Constitution's meaning is fixed by the "original understanding" of its language).

government a lot, because originalism will systematically disfavor arguments by defendants that protections in the Bill of Rights should be expanded for their benefit. But there is no theory of *statutory* interpretation that can be expected to produce such a systematic preference for the government's positions.

As strong an exhibit as Rehnquist makes in the realist description of the Court's work, he did make very occasional dissents against type in criminal matters not involving the Constitution—ten of them, to be precise; what can we learn from those cases? First, in eight of those cases,¹⁶ Rehnquist's dissent was based on the rule of lenity—the doctrine that if the scope of a criminal statute's coverage is unclear, the ambiguities should be resolved in favor of the defendant.¹⁷ And with one exception, all of Rehnquist's dissents for defendants, whether or not they involved the rule of lenity, involved disputes about substantive criminal law, not procedure. This helps clarify the pattern that Rehnquist presents, because cases about substantive criminal law and cases about criminal procedure involve fundamentally different policy considerations and ideological stakes. Substantive disputes, from a policy standpoint, require judgments about *who* deserves punishment and deterrence and who does not. Procedural disputes assume those questions are resolved and ask how many resources ought to be spent making sure the government has caught the right person; they call for tradeoffs between accuracy on the one hand and finality or cost on the other, and depend significantly on how much one trusts the government or is concerned about abuses.¹⁸

Justice Rehnquist was a little (but only a little) solicitous of defendants with respect to the first sort of question—the subs-

16. See *Lopez v. Davis*, 531 U.S. 230, 245–49 (2001) (Stevens, J., dissenting); *Bryan v. United States*, 524 U.S. 184, 200–05 (1998) (Scalia, J., dissenting); *Muscarello v. United States*, 524 U.S. 125, 139–50 (1998) (Ginsburg, J., dissenting); *Rogers v. United States*, 522 U.S. 252, 260–61 (1998) (Kennedy, J., dissenting); *United States v. O'Hagan*, 521 U.S. 642, 680–701 (1997) (Thomas, J., concurring in part, dissenting in part); *Evans v. United States*, 504 U.S. 255, 278–97 (1992) (Thomas, J., dissenting); *United States v. Yermian*, 468 U.S. 63, 75–84 (1984) (Rehnquist, J., dissenting); *Dixson v. United States*, 465 U.S. 482, 501–12 (1984) (O'Connor, J., dissenting). Justice Rehnquist's "dissents" are not always his own dissenting opinions, but include those authored by other Justices. I use this terminology throughout the Article.

17. See Farnsworth, *supra* note 1, at 72–73, 97–99.

18. *Cf. id.* at 97 ("The best explanation probably is that substantive cases, unlike almost all the others, don't involve an underlying trade-off between accuracy and its costs.").

tantive kind. That is the question to which the rule of lenity is relevant, and he relied on it from time to time. With respect to the second set of issues—procedural matters of all sorts—the numbers suggest that Rehnquist was as committed to the government’s side of the battle as consistently as any Justice ever was. So far as the record reveals, he believed that during his thirty-three years on the Court only one decision there gave criminal defendants any less procedure than they were due: the rather obscure *United States v. Gillock*, which held that state politicians prosecuted for bribery can have their legislative acts used as evidence against them.¹⁹ Rehnquist’s opinion in that zenith of his procedural solicitude for defendants reads in its entirety as follows: “For the reasons stated by Chief Judge Edwards in his opinion in this case for the Court of Appeals for the Sixth Circuit, I would affirm the judgment of that court.”²⁰

We find some other striking patterns when we turn to the *facts* of Rehnquist’s dissents for defendants. Half of the ten cases involve white-collar criminal defendants: three prosecutions of politicians for bribery or extortion;²¹ one of a defendant charged with violations of the securities laws;²² and one of a defendant for making false statements to the Department of Defense.²³ Cases of this general kind make up a substantial but not proportionate share of the Court’s criminal docket—less than ten percent—so their prominence among Rehnquist’s dissents is notable. The other half of Rehnquist’s dissents for defendants involves firearms. In one of them the defendant had a gun and the question was whether the law criminalized this even though the defendant never left the state to obtain it,²⁴ or—in another case—even though the gun was in his glove compartment (and thus perhaps wasn’t being “carried” by him),²⁵ or—in still another case—even if he didn’t know that

19. See 445 U.S. 360, 371, 374 (1980).

20. *Id.* at 374.

21. *Evans*, 504 U.S. at 278–97 (Thomas, J., dissenting); *Dixson*, 465 U.S. at 501–12 (O’Connor, J., dissenting); *Gillock*, 445 U.S. at 374 (Rehnquist, J., dissenting).

22. *United States v. O’Hagan*, 521 U.S. 642, 680–701 (1997) (Thomas, J., concurring in part, dissenting in part).

23. *United States v. Yermian*, 468 U.S. 63, 75–84 (1984) (Rehnquist, J., dissenting).

24. *Barrett v. United States*, 423 U.S. 212, 228–32 (1976) (Stewart, J., dissenting).

25. *Muscarello v. United States*, 524 U.S. 125, 139–50 (1998) (Ginsburg, J., dissenting).

his silencer counted as a “firearm” for legal purposes.²⁶ In another, a criminal defendant was selling guns without a license, but didn’t know of the licensing requirement.²⁷ In yet another, the defendant was in prison and was denied early release because his offense included possession of a gun, and the Bureau of Prisons therefore held him to be automatically guilty of a crime of violence.²⁸ Majorities of the Court found for the government in all these cases, and Rehnquist dissented in favor of the defendant in all of them. Firearms cases of these kinds make up roughly ten percent of the Court’s statutory caseload on the criminal side, so their large share of Rehnquist’s dissents seems noteworthy. Perhaps owners of guns, along with white-collar criminal defendants, are segments of the criminal defendant population most likely to seem familiar or otherwise sympathetic to a conservative in our times.

In the end it seems questionable whether William Rehnquist ever really did dissent against ideological type in the criminal area. His dissents may merely clarify what his ideological type *was*: a Justice committed not precisely to the government but to certain values usually associated with the government’s position: law and order, yes, but especially finality, trust of the police and prosecutors, and administrative savings.

Rehnquist is useful to discuss because he epitomizes the type of Justice that legal realists and political scientists have in mind when they put forward ideological models of judging. But I do not mean to suggest that Rehnquist is by himself in this. In seventeen years on the Court, Warren Burger dissented in favor of a defendant only once—in a statutory case, in favor of a corporate defendant charged with criminal acts of pollution.²⁹ Nor are these patterns confined to the right. Thurgood Marshall never dissented in favor of the government in a constitutional case involving a criminal defendant; of the six statutory cases where he did dissent for the government, half involved white collar crimes,³⁰ two involved the jurisdiction of Indian

26. *Rogers v. United States*, 522 U.S. 252, 260–61 (1998) (Kennedy, J., dissenting).

27. *Bryan v. United States*, 524 U.S. 184, 200–05 (1998) (Scalia, J., dissenting).

28. *Lopez v. Davis*, 531 U.S. 230, 245–49 (2001) (Stevens, J., dissenting).

29. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 675 (1973) (Burger, C.J., dissenting).

30. *Cheek v. United States*, 498 U.S. 192, 209–10 (1991) (Blackmun, J., dissenting) (tax evasion); *Williams v. United States*, 458 U.S. 279, 292–306 (1982) (Marshall, J., dissenting) (check kiting scheme); *Chiarella v. United*

courts,³¹ and one involved the power of Guam to create a Supreme Court.³² William Brennan was similar. He dissented for the government in a criminal constitutional matter just once, in *Estes v. Texas*,³³ where the question was whether the defendant's rights had been violated by broadcasting his trial on television. Brennan joined a dissent saying that televised trials were a bad idea but not a constitutional violation. The case might be understood as having more to do with freedom of the press than with criminal law; the dissent said that there were "intimations" in the majority opinion that were "disturbingly alien" to the First Amendment.³⁴ As for Brennan's statutory dissents for the government, there were four, most of them the now-familiar white-collar variety.³⁵

B. JOHN PAUL STEVENS AND THE PROBLEM OF FAUX DISSENTS AGAINST TYPE

As Figures 1 and 2 show, Justice Stevens is the member of the current Court least likely to dissent in favor of the government.³⁶ His apparent dissents against type, in which a majority voted for a criminal defendant but he did not, fall into three basic categories. First, sometimes a criminal case isn't really a criminal case: it does involve a criminal defendant, but raises issues of law not necessarily—and perhaps not normally—associated with crime and punishment. In those situations it is no surprise to see the Justices vote according to their policy preferences on the true issue in the forefront of the case, which incidentally may produce an unexpected outcome for the crimi-

States, 445 U.S. 222, 245–52 (1980) (Blackmun, J., dissenting) (securities fraud).

31. *Duro v. Reina*, 495 U.S. 676, 698–710 (1990) (Brennan, J., dissenting); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (Marshall, J., dissenting).

32. *Guam v. Olsen*, 431 U.S. 195, 204–08 (1977) (Marshall, J., dissenting).

33. 381 U.S. 532, 601–16 (1965) (Stewart, J., dissenting).

34. *Id.* at 614.

35. *Williams v. United States*, 458 U.S. 279, 292–306 (1982) (Marshall, J., dissenting); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 291–93 (1978) (Stewart, J., dissenting) (prosecution under Clean Air Act); *United States v. Maze*, 414 U.S. 395, 408–17 (1974) (White, J., dissenting) (credit card fraud scheme); *United States v. Johnson*, 383 U.S. 169, 186–89 (1966) (Warren, C.J., concurring in part, dissenting in part) (prosecution of politician for conspiracy).

36. For discussion of Stevens's ideology and its development over time, see Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC, *supra* note 15, at 157.

nal defendant. A vivid example from Justice Stevens is *United States v. Lopez*,³⁷ in which the Court struck down the Gun-Free School Zones Act of 1990.³⁸ The five more conservative members of the Court formed the majority; the four more liberal members, including Stevens, dissented. From one point of view these votes might all seem to be “against type,” because in effect the conservatives were all voting in favor of the criminal defendant who had been prosecuted under the law, while the liberals were all voting in support of the federal government. But the explanation is obvious: *Lopez* really wasn’t a criminal case. It was a case about congressional authority; by far the most important stakes of the case involved the extent of congressional power under the Commerce Clause. So *Lopez*, properly understood, produced no actual dissents against type, and situations of this kind account for an important portion of that small set of cases where such dissents seem to occur. Stevens has other dissents like this, too, including flag-burning cases where he rejected the defendant’s First Amendment arguments and dissented for the government.³⁹ In a sense those are criminal cases, but nobody thinks of them that way.

Second, Stevens, like most Justices, has cast a fair number of votes that look like dissents against type until one examines the facts and notices that they tend to involve the scope of laws meant to catch white-collar criminals, which he reads broadly.⁴⁰ There is enough behavior against type in those white-collar cases that they may require refinement of our understanding of the type rather than our understandings of the Justices involved. Perhaps the “liberal” type is harder on white-collar criminals, while the “conservative” type is more lenient. This conjecture fits the facts, for cases involving white-collar criminals provoke dissents against type considerably more often than one would expect from the share of the Court’s criminal docket they constitute.

37. 514 U.S. 549, 615–44 (1995) (Breyer, J., dissenting).

38. 18 U.S.C. § 922(q) (2006).

39. See *United States v. Eichman*, 496 U.S. 310, 319–24 (1990) (Stevens, J., dissenting); *Texas v. Johnson*, 491 U.S. 397, 436–37 (1989) (Stevens, J., dissenting).

40. See, e.g., *McCormick v. United States*, 500 U.S. 257, 280–90 (1991) (Stevens, J., dissenting) (prosecution of a state politician under the Hobbs Act); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 474–77 (1978) (Stevens, J., concurring in part, dissenting in part) (antitrust prosecution); *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 319–21 (1978) (Stewart, J., dissenting) (prosecution of a bank for tax offenses).

Last, there are a handful of cases—one every half-dozen years or so—where Justice Stevens unexpectedly dissents in favor of the government on a question under the Fourth, Fifth, or Sixth Amendments—such as *Pennsylvania v. Muniz*,⁴¹ where he dissented in favor of the government in a prosecution of a drunk driver who complained about the use of statements he made during a sobriety test before being read his *Miranda* rights; and *Kyllo v. United States*,⁴² where Stevens would have allowed the use of thermal imaging technology without a warrant to detect marijuana cultivation inside a house.⁴³

Are these dissents against type? They are if Stevens's "type" is one who always votes for the defendant. But in fact that has never quite been his approach. Stevens has long been an unpredictable vote—whether in the majority or in dissent—in cases arising under certain branches of these constitutional provisions. He has written or joined majority opinions—opinions which provoked dissent—that upheld dog sniffs conducted during routine traffic stops,⁴⁴ detention of the occupants of a house while it is searched,⁴⁵ and searches of a suspect's garbage without a warrant.⁴⁶ Then again, Stevens has written dissents for defendants in which he argued for broad readings of the exclusionary rule,⁴⁷ and against allowing police to order drivers out of their cars without a showing of good ground for suspicion.⁴⁸

It is difficult to explain this patchwork of results. It may be that Justice Stevens has weak policy preferences in these areas, so that the outcomes he favors wander back and forth for lack of a rudder. It may also be that he does have preferences but that they are disciplined by his commitment to legal me-

41. 496 U.S. 582, 606–08 (1990) (Rehnquist, C.J., concurring in part, dissenting in part).

42. 533 U.S. 27, 41–51 (2001) (Stevens, J., dissenting).

43. For other, earlier examples, see *Robbins v. California*, 453 U.S. 420, 444–53 (1981) (Stevens, J., dissenting) (advocating for a broader "automobile exception" to the Fourth Amendment than the one adopted by the majority) and *Doyle v. Ohio*, 426 U.S. 610, 620–36 (1976) (Stevens, J., dissenting) (arguing that using silence after *Miranda* warnings against defendants should be allowed).

44. *Illinois v. Caballes*, 543 U.S. 405, 405–10 (2005).

45. *Michigan v. Summers*, 452 U.S. 692, 692–706 (1981).

46. *California v. Greenwood*, 486 U.S. 35, 35–45 (1988).

47. *Segura v. United States*, 468 U.S. 796, 817–40 (1984) (Stevens, J., dissenting).

48. *Pennsylvania v. Mimms*, 434 U.S. 106, 115–24 (1977) (Stevens, J., dissenting).

thod, but this hypothesis is hard to support with any evidence because his decisions do not follow from any particular method; he is an “all-things-considered” sort of judge who avoids large statements.⁴⁹

What is true, however, is that Stevens is a much more reliable vote for criminal defendants in a different procedural context: petitions for habeas corpus. The irregularity of his votes in some areas (e.g., search and seizure) and the regularity of them in the other (habeas corpus) tends to suggest that consistent legal method is not likely at the root of these patterns. The better explanation is probably that Justice Stevens does care very much about a certain *aspect* of criminal procedure: he believes strongly in laying out resources for the sake of accuracy and opportunities to protest an unfair trial. He just is not nearly as concerned about restraining the government at the front end of the process, when it is gathering evidence—for the costs of invaded rights then are to *liberty* rather than to *accuracy*. On this view of the cases, it becomes less clear whether Stevens’s dissents in cases like *Kyllo* are against type. Such votes are not what one might expect of a “liberal” Justice, but they aren’t really surprising once one more precisely considers the evidence of what Stevens values and what he doesn’t. If Stevens dissented in favor of the government in a case about the scope of habeas corpus, that truly would seem to be behavior against type so far as his type now appears. But it never has happened.

C. ANTONIN SCALIA AND HOW LEGAL METHOD MAY CONSTRAIN

Antonin Scalia has served on the Supreme Court for twenty-two years, and like Rehnquist he is conservative by reputation and tends to vote for the government in criminal cases;⁵⁰ the two therefore produce instructive comparisons. While some of the same trends seen in Rehnquist’s career are evident in Figure 2 as well, Justice Scalia has dissented in favor of defendants more often: thirty-two times in total, nineteen of them statutory and thirteen constitutional. Most of the statutory dissents involve substantive criminal law rather than procedure, with about two-thirds of them relying on the rule of lenity, to which he is a more consistent adherent than Rehnquist. Scalia also has dissented for defendants in a somewhat wider range of factual situations.⁵¹ Most interestingly by way of contrast, Sca-

49. See Farnsworth, *supra* note 36, at 167.

50. See Farnsworth, *supra* note 1, at 69.

51. This is true even in his dissents on substantive matters. In *Holloway*

lia has sometimes dissented in favor of defendants on *procedural* grounds. A couple of these dissents have come in statutory cases,⁵² but the more notable departure comes on the constitutional side. Scalia has dissented in favor of defendants in cases involving the interpretation of the Fourth,⁵³ Fifth,⁵⁴ Sixth,⁵⁵ and Fourteenth⁵⁶ Amendments, including a couple of dissents apiece in favor of defendants making claims of double jeopardy⁵⁷ or arguing that some feature of the proof against them must be established beyond reasonable doubt—an issue on which, after dissenting twice in related cases,⁵⁸ Scalia provided the fifth vote to secure victory for the defendant in the highly consequential decision of *Apprendi v. New Jersey*.⁵⁹

I see nothing in the facts of these constitutional cases to suggest that they are faux dissents against type that express conservative policy preferences. In all the cases just cited, Scalia's position put him in company with the more liberal members of the Court and at odds with the usual conservatives, al-

v. United States, 526 U.S. 1, 12–22 (1999), for example, the defendant had put a gun in the face of a driver and told him to get out of the car so he could steal it. Holloway hadn't wanted to shoot the driver (and didn't), but would have done so if the driver had given him a "hard time." The question was whether, on these facts, Holloway had an "intent to cause death or great bodily harm." The majority said that he did; Scalia dissented, saying the statute was ambiguous and that the ambiguity should be resolved in Holloway's favor. Holloway was far from being a white-collar defendant.

52. See *Day v. McDonough*, 547 U.S. 198, 212–19 (2006) (Scalia, J., dissenting) (arguing that a complaint about the untimeliness of a habeas corpus petition should be considered waived if not pressed by the state); *Johnson v. United States*, 544 U.S. 295, 312–19 (2005) (Kennedy, J., dissenting) (arguing that the Antiterrorism and Effective Death Penalty Act does not require due diligence in seeking vacatur of a state conviction); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 282–85 (1999) (Scalia, J., dissenting); *Peretz v. United States*, 501 U.S. 923, 952–56 (1991) (Scalia, J., dissenting).

53. *County of Riverside v. McLaughlin*, 500 U.S. 44, 59–71 (1991) (Scalia, J., dissenting).

54. *Braswell v. United States*, 487 U.S. 99, 119–30 (1988) (Kennedy, J., dissenting).

55. *Indiana v. Edwards*, 128 S. Ct. 2379, 2389–94 (2008) (Scalia, J., dissenting); *Maryland v. Craig*, 497 U.S. 836, 860–70 (1990) (Scalia, J., dissenting).

56. *Rogers v. Tennessee*, 532 U.S. 451, 467–81 (2001) (Scalia, J., dissenting).

57. *United States v. Lara*, 541 U.S. 193, 226–31 (2004) (Souter, J., dissenting); *Jones v. Thomas*, 491 U.S. 376, 388–96 (1989) (Scalia, J., dissenting).

58. *Neder v. United States*, 527 U.S. 1, 30–40 (1999) (Scalia, J., concurring in part, dissenting in part); *Almendarez-Torres v. United States*, 523 U.S. 224, 248–71 (1998) (Scalia, J., dissenting).

59. 530 U.S. 466, 468 (2000).

ways including Rehnquist. In *County of Riverside v. McLaughlin*, for example, the plaintiff brought a class action suit challenging the length of time the county allowed between the point when defendants were arrested without a warrant and the later moment when a showing of probable cause had to be made before a judge.⁶⁰ The majority found for the county; Scalia dissented, along with Brennan, Marshall, and Stevens, arguing that the county violated the Fourth Amendment by depriving defendants of protections afforded them by the common law.⁶¹ In *Maryland v. Craig*, the defendant was convicted of child abuse based on testimony provided by the child through a closed-circuit television broadcast to the courtroom.⁶² While the majority upheld the conviction, Scalia dissented—again with Brennan, Marshall, and Stevens—saying the state violated the plain language of the Sixth Amendment by not permitting the defendant to confront her accuser.⁶³ He again dissented with Brennan, Marshall, and Stevens in *Jones v. Thomas*,⁶⁴ a double-jeopardy case involving a defendant convicted of theft and felony murder; and in *Rogers v. Tennessee*⁶⁵ he dissented in favor of a convicted murderer on the ground that his crime was only manslaughter at the time it was committed, saying among other things that the majority's decision violated the original understanding of the Ex Post Facto Clause.⁶⁶

In short, Justice Scalia appears to have methodological commitments that sometimes cause him to dissent (and otherwise vote) against type. The significance of the finding should not be exaggerated. Lots of Justices will look legalistic by comparison when set next to William Rehnquist; and as I have shown elsewhere, Justice Scalia usually does vote for the government in constitutional as well as statutory cases involving crime and punishment.⁶⁷ Most cases do not present clear occasions for use of those methodological commitments he has, so then he evidently votes according to his policy preferences, usually clothing them—as all Justices do—in the language of whatever constitutional tests or precedents the Court has in

60. 500 U.S. 44, 47 (1991).

61. *Id.* at 59–71 (Scalia, J., dissenting).

62. 497 U.S. 836, 843 (1990).

63. *Id.* at 860–70 (Scalia, J., dissenting).

64. 491 U.S. 376, 388–96 (1989) (Scalia, J., dissenting).

65. 532 U.S. 451, 467–81 (2001) (Scalia, J., dissenting).

66. *Id.*

67. See Farnsworth, *supra* note 1, at 69.

place for decision of the issue. And of course one can ponder larger questions about whether a commitment to those methods is attractive to Scalia precisely because they usually produce results he likes, yet frustrate him just often enough to give the look of law to his conduct. But those sorts of speculations really are beyond the scope of this inquiry. For now let us be content to note that once in a while a criminal case does squarely lend itself to decision for the defendant on textual or originalist grounds, and Justice Scalia votes accordingly, at least sometimes, even if the arguments for the government are good enough for five of his colleagues.

D. DAVID SOUTER AND THE HAZARDS OF DRAWING
CONCLUSIONS FROM A JUSTICE'S EARLY YEARS ON THE COURT

Justice Souter's patterns of apparent dissents against type look something like those of Justice Stevens, starting with a couple that really aren't against type after all. One of them is *Lopez*, the Commerce Clause case.⁶⁸ Another is an excellent example of a dissent that appears to be against type only until its facts are fully appreciated: *Koon v. United States*, where the defendants were police officers convicted of various crimes arising from their well-publicized beating of Rodney King.⁶⁹ The Court took the case to consider whether the sentences the officers received were too harsh. The most divisive issue was whether the officers should have received reduced sentences because they were likely to be beaten in prison by other inmates who had heard about the case.⁷⁰ On this point Justices Souter, Ginsburg, and Breyer dissented in favor of the government. Their argument had as much to do with the dissenters' notions of morality and good sense as with any source of law from the federal sentencing guidelines:

To allow a departure on this basis is to reason, in effect, that the more serious the crime, and the more widespread its consequent publicity and condemnation, the less one should be punished; the more egregious the act, the less culpable the offender. In the terminology of the Guidelines, such reasoning would take the heartland to be the domain of the less, not the more, deplorable of the acts that might come within the statute. This moral irrationality cannot be attributed to the heartland scheme, however, and rewarding the relatively severe of-

68. *United States v. Lopez*, 514 U.S. 549, 603–14 (1995) (Souter, J., dissenting).

69. 518 U.S. 81, 114–18 (1996) (Souter, J., concurring in part, dissenting in part).

70. *Id.* at 112 (majority opinion).

fender could hardly have been in the contemplation of a Commission that discouraged downward departures for susceptibility to prison abuse even when the nonculpable reason is an unusual “[p]hysical . . . appearance, including physique.”⁷¹

So it might seem that we have dissents against type, and indeed votes against type by most of the Justices—but only on a superficial view of the case. On closer inspection the results seem easily understood as consistent with how Souter and his dissenting colleagues vote in other criminal cases. These weren’t typical criminal defendants; they were police officers, and indeed they were officers charged with overzealous conduct in subduing a criminal defendant who *was* more typical. In this case voting for the government thus was not a clear-cut vote for law and order at the expense of defendants’ rights; it might better be understood as the opposite. Probably the best view is that it was a mixed case, where the usual policies at stake in criminal disputes ran in both directions. That is why the case produced not only some dissents and other votes against type, but also the odd alignment of Justice Stevens with the conservative faction of the Court. When the same general policy interests are at stake on both sides of a case, it’s hard to predict how any particular Justice will balance them. *Koon* thus is an unusually vivid example of a case where some feature of the facts causes the usual proxies for policy preferences to be misleading or at least incomplete. Most apparent dissents against type don’t involve quite such an obvious reversal, but many of them do involve defendants who, while not police officers, nevertheless seem to be of recurring interest to some of the Justices for one reason or another—such as the prosecuted politician or other white collar defendant.

Justice Souter joined two other dissents for the government that seem idiosyncratic because they are neither the product of any particular legal method nor of anything obvious in the facts. But both involve substantive criminal law, and one involves a white-collar defendant, so neither is very surprising by this point in our inquiry; those are the sorts of issues that often provoke votes which seem uncharacteristic.⁷²

71. *Id.* at 116 (Souter, J., dissenting) (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (1995)).

72. *Begay v. United States*, 128 S. Ct. 1581, 1592–97 (2008) (Alito, J., dissenting) (arguing that driving under the influence of alcohol counts as a “serious” crime); *Hubbard v. United States*, 514 U.S. 695, 718–24 (1995) (Rehnquist, C.J., dissenting) (arguing that the petitioner’s conviction under the Federal False Claims Act should have been upheld).

More interesting, though, are the three more-or-less constitutional dissents for the government that Souter wrote or joined in 1991 and 1992 during his first two terms.⁷³ In *Stringer v. Black*, the defendant had been sentenced to death and was seeking habeas corpus.⁷⁴ The question was whether he could rely on a decision that had been issued after his conviction which suggested the jury in his case had received an unconstitutional instruction. The majority said that he could rely on the later decision; Justice Souter wrote a dissent, joined by Scalia and Thomas, to argue that such reliance was forbidden because the intervening decision of the Court had announced a “new rule” under the doctrine of *Teague v. Lane*.⁷⁵ Similarly, in *Arizona v. Fulminante*, Souter joined Rehnquist, Kennedy, and O’Connor in dissent from the majority’s view that the defendant in the case had made an involuntary confession.⁷⁶ Souter also joined Rehnquist, Scalia, and White in another capital case, *Lankford v. Ohio*,⁷⁷ dissenting from the majority’s view that the defendant did not receive enough notice that he might be sentenced to death.

These dissents—just the direction of them, without reference to the reasoning—are a bit startling to anyone who follows Souter’s work because it is hard to imagine him taking such positions now; and indeed he has not written or joined a dissent in favor of the government in a constitutional case in the sixteen years since *Stringer*. It seems clear enough what happened: it took Souter a couple of years to figure out what sort of Justice he was going to be. He arrived more conservative than he became only a few years later, and by the mid-1990s he had arrived at a more liberal ideological identity that seems to have been stable since then.⁷⁸

The phenomenon is noted here because it is of general interest; it is not limited to Souter. A similar pattern can be

73. *Stringer v. Black*, 503 U.S. 222, 238–48 (1992) (Souter, J., dissenting); *Lankford v. Ohio*, 500 U.S. 110, 128–35 (1991) (Scalia, J., dissenting); *Arizona v. Fulminante*, 499 U.S. 279, 302–06 (1991) (Rehnquist, C.J., dissenting). I say “more or less” because *Stringer* could possibly be characterized as a nonconstitutional decision, depending on how one interprets *Teague v. Lane*, 489 U.S. 288 (1989).

74. *Stringer*, 503 U.S. at 224–25 (majority opinion).

75. *Teague*, 489 U.S. at 288.

76. *Fulminante*, 499 U.S. at 302–06 (Rehnquist, C.J., dissenting).

77. *Lankford*, 500 U.S. at 128–35 (Scalia, J., dissenting).

78. See Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important*, 101 NW. U. L. REV. 1483, 1504–10 (2007).

found, for example, in the career of Harry Blackmun: during his first two terms on the court (1970 and 1971) all of his dissents in criminal cases were in favor of the government, and roughly eighty-four percent of his total votes were in the government's favor. Later in his career (from 1972 to 1994), Blackmun's voting pattern changed dramatically: only fifty-eight percent of his total votes were in the government's favor, and 157 out of 217 of his dissents in criminal cases favored the defendant. These examples support the general point that perhaps one should not be too quick to draw conclusions about Justices based on their first year or two on the Court.⁷⁹ These results also illustrate how dissents against type generally can be used to track ideological movement. Souter went from sometimes dissenting for the government and never for defendants to never dissenting for the government and often dissenting for defendants.

E. STEPHEN BREYER AND THE OCCASIONAL DIFFICULTY OF
DEFINING LIBERAL AND CONSERVATIVE POSITIONS

Most of Justice Breyer's dissents against type—that is, against defendants—can be sorted into two categories. He has dissented in a long series of cases about whether facts that increase a defendant's prison sentence have to be proved beyond a reasonable doubt.⁸⁰ He also has dissented for defendants in a few statutory cases that likewise involved sentencing.⁸¹ Sentencing cases, like disputes about substantive criminal law (of which they might be considered a branch), do not involve the trade-offs that predictably divide liberals and conservatives. There is no question of finality, or of accuracy; instead the defendant is assumed to have committed the crime charged, and it only remains to say how long he should go to prison. On that question Breyer has no particularly "liberal" inclinations (as Justice Scalia, for example, does); but perhaps it is best here

79. See Lee Epstein et al., *On the Perils of Drawing Inferences About Supreme Court Justices from Their First Few Years of Service*, 91 JUDICATURE 168, 168–79 (2008).

80. *Cunningham v. California*, 549 U.S. 270, 295–311 (2007) (Kennedy, J., dissenting); *Blakely v. Washington*, 542 U.S. 296, 328–47 (2004) (Breyer, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 555–66 (2000) (Breyer, J., dissenting); *Jones v. United States*, 526 U.S. 227, 254–74 (1999) (Kennedy, J., dissenting).

81. *Shepard v. United States*, 544 U.S. 13, 28–39 (2005) (O'Connor, J., dissenting); *Koon v. United States*, 518 U.S. 81, 118–19 (1996) (Breyer, J., concurring in part, dissenting in part).

just to conclude that in this time and place, it's not very clear what, if anything, the liberal and conservative positions *are* on the subject of sentencing. The same might be said about disputes over double jeopardy, where the question is whether conviction or acquittal of crime X should prevent prosecution for X₁. Justice Breyer has dissented for the government once in a case of that kind, too.⁸² Double jeopardy disputes, like disputes over sentencing, do not involve the trade-offs that we have seen are most likely to split the Justices predictably along ideological lines.

Justice Breyer's few other dissents for the government are somewhat idiosyncratic and miscellaneous in character, but most of them can be explained without much trouble. One of them—*United States v. Santos*—is the sort of substantive dispute that produces strange bedfellows once in a while: the question was simply whether the defendant's conduct fell within the statute.⁸³ There is also *United States v. Lopez*, of course, which is not really a dissent against type, as already discussed. Justice Breyer also dissented in a case concerning the validity of a conviction entered by a judicial panel in Guam, which has less to do with crime and punishment than with the power of a territorial government.⁸⁴ There is the case where a father was accused of sexually abusing his child and the government wanted to bring in evidence that the child's testimony against him was corroborated by other statements the child had made outside of court;⁸⁵ here again the majority found for the defendant, while Justice Breyer dissented for the government—but perhaps this can be understood as a case like *Koon* where the parties involved provoke unusual sympathies. A vote for the government in this case would not have come at the expense of a vulnerable defendant, but in favor of the interests of his daughter, who might be viewed as even more vulnerable.⁸⁶ Explicable on similar grounds is Breyer's recent dissent for the government in *Giles v. California*, which involved a claim under the Confrontation Clause.⁸⁷ The defendant was a man con-

82. *Smith v. Massachusetts*, 543 U.S. 462, 475–80 (2005) (Ginsburg, J., dissenting).

83. 128 S. Ct. 2020, 2035–45 (2008) (Alito, J., dissenting).

84. *Nguyen v. United States*, 539 U.S. 69, 83–89 (2003) (Rehnquist, C.J., dissenting).

85. *Tome v. United States*, 513 U.S. 150, 169–76 (1995) (Breyer, J., dissenting).

86. *Id.*

87. 128 S. Ct. 2678, 2695–709 (2008) (Breyer, J., dissenting).

victed of killing his ex-girlfriend, and he had a history of domestic violence against her in the past. Breyer, along with Justice Stevens, wrote that the defendant forfeited his right to confront the witness by his acts.⁸⁸ *Giles* is another case where a vote seemingly for the government and against a vulnerable defendant can better be viewed as a vote in favor of a more vulnerable victim; it isn't really a surprise when domestic violence against women causes a normally "liberal" Justice to prefer the prosecution's view of the case.

This leaves just one stray dissent for the government from Justice Breyer: *Bond v. United States*, where he thought no search occurred when police felt the contents of a bus passenger's carry-on bag.⁸⁹ That vote is hard to explain. It has neither a clear political explanation nor an evident explanation rooted in judicial method or interpretative philosophy. So here, as we saw in discussing Justice Stevens, we find that not every dissent against type can be accounted for neatly; no doubt some allowance must be made for a Justice to cast a genuinely mysterious dissenting vote every once in a while.

F. JOHN G. ROBERTS AND SAMUEL ALITO AND THE POSSIBILITY THAT A SHORTAGE OF DISSENTS AGAINST TYPE IS EVERYONE ELSE'S FAULT

As noted a moment ago, it's risky to draw quick conclusions about Justices based on their first years at the Court. With that said, Chief Justice John Roberts and Justice Samuel Alito have each completed two years there, and the results for purposes of this study can be stated briefly enough: neither of them has yet dissented in favor of a criminal defendant. They appear to be well on their way to ideologically predictable careers.

Against this, one can imagine their reply—and it is a reply that could be made as well by any other Justice examined in this study: it is not entirely up to them whether to dissent. There is some validity to this point. It takes six to dissent: five to vote one way and one to vote the other. If five *other* members of the current Court vote for the government in a criminal case, then that voting bloc has to include one of the more "liberal" members of the Court. From this it follows that the arguments for the government must be strong, since the Court's liberals don't like to vote that way. But if the arguments are as strong

88. *Id.*

89. 529 U.S. 334, 339–43 (2000) (Breyer, J., dissenting).

as all that, what is there for Roberts to do but support them? To put the point differently: Roberts might say that whenever he votes for defendants, lots of his colleagues do, too: *a fortiori*, he doesn't end up dissenting—but this has nothing to do with *his* tendencies, only with *theirs*.

A good example of this phenomenon may be found in the career of Byron White. During his first decade on the Court (from 1962 to 1972) he did not once dissent in favor of a criminal defendant, although thirty-four percent of his total votes in criminal cases were in the defendant's favor. From 1972 to 1993, however, roughly forty percent of White's dissents in criminal cases were in favor of defendants, while his total votes for the defendant *dropped* to twenty-six percent. The probable explanation is fairly straightforward: White's ideological preferences were secure by the time Rehnquist joined the Court in 1972; as the Court became more conservative, White was forced to dissent in some sorts of cases where he formerly had joined majorities (and he also joined the new, more conservative majorities in voting for the government in some cases where he formerly would have had to dissent). This observation does no damage to the model presented in this paper; Justice White was a relatively moderate Justice, and consistently split 70/30 between voting for the government and the defendant. When looking at dissents, one must remember that the same ideological preference can produce different footprints depending on a Justice's colleagues.

III. CONCLUSION

What, then, causes Supreme Court Justices to dissent against type? The conclusions of this inquiry may be summarized as follows.

1. Dissents against type—in other words, dissents for the government by a Justice who usually dissents just for defendants, or vice versa—are rare, and the rate at which they are made in favor of the government or in favor of defendants is not usually affected much by the source of law involved.

2. Dissents against type usually do not seem to reflect consistent differences in legal methodology; for example, they do not tend to reflect disagreements about whether to use one interpretive approach rather than another. Often an apparent dissent against type can be explained as expressing a policy preference that isn't made evident by just looking at the case as

a typical conflict between government and a criminal defendant.

3. Dissents that initially appear to be against type sometimes aren't; sometimes a case happens to involve a criminal defendant but raises larger legal issues that really have little to do with crime and punishment, as when an apparently criminal case actually has more to do with the Commerce Clause or the First Amendment.

4. Dissents might seem to be against type, but in fact be quite characteristic, for a subtler reason: some feature of the facts may provoke different reactions than the legal subject matter of the case would ordinarily suggest. In the broad field of criminal law we find several examples. Disputes over the substance of criminal law—over what is legal and what is illegal, and over the sentence for a given crime—are much more likely to cause conservatives to vote for defendants, and liberals to vote for the government, than disputes about procedural protections a defendant or convict is due. Dissents against type in habeas corpus cases, by contrast, are nearly unheard of. Prosecutions of white-collar criminals also are more likely than cases of violent crime to cause reversals of those kinds.

5. Occasionally, a Justice really does dissent against type: he usually votes for the government but this time votes for the defendant (or vice versa), the legal issue is straightforward, and there is no factual feature of the case that explains the result. In the rare cases of this sort the explanation must be either that the case provoked an idiosyncratic preference or belief on the part of the Justice or that the Justice was propelled to the result by methodological preferences. Convincing examples of the latter aren't common for any Justice but can be found from time to time, particularly in Justice Scalia's opinions. His adherence to the rule of lenity causes him to dissent in favor of criminal defendants more often than other conservatives who otherwise tend to share his positions.

6. Some prominent trends in the apparent dissents against type might reasonably call for more careful consideration of how those types are defined. Being conservative does not necessarily mean preferring the government's position across the board in criminal cases; being liberal does not necessarily mean preferring the defendant's position across the board. For some varieties of "conservative" and "liberal," the terms really do mean those extreme things; but for others, it means a commitment to more particular values that often, but not always, are

associated with the government or the defendant's position. Conservatism does consistently seem to mean a preference for finality over accuracy when those values are in close conflict, and liberalism does consistently seem to mean the opposite. But there are some varieties of conservative and liberal that switch places, or at least come unmoored from their usual positions once in a while, as when the question in a criminal case is substantive—in other words, when it involves questions about *who* should go to prison and for how long.

7. Dissents against type are no real threat to a realist view of the Supreme Court, though they might cause some trouble for clumsier claims that the Justices vote their monolithic policy preferences always and everywhere. What seems to be true, rather, is that Supreme Court Justices *usually* vote their preferences and empirical beliefs—and that cases where they appear not to do so can give interesting clues to the details of those preferences and the extent to which they occasionally feel constrained by the law.