

# THE NEVADA SUPREME COURT BETWEEN 2010 AND 2014

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For United States Supreme Court junkies, SCOTUSblog's annual stat pack is a cornucopia of information analyzing the Supreme Court Justices and their opinions.<sup>1</sup> SCOTUSblog catalogues everything from the pace of certiorari grants, time between oral argument and decision, each individual Justice's opinion output, the rate of the Justices' agreement, and more.<sup>2</sup> For example, from the most recent term's data, it is known that Justice Thomas authored the most opinions (including concurrences and dissents),<sup>3</sup> while only agreeing with Justice Sotomayor 50 percent of the time.<sup>4</sup> It is also known that Justice Kagan wrote the fewest number of opinions,<sup>5</sup> and Justices Ginsburg and Breyer agreed 94.4 percent of the time.<sup>6</sup> This type of information is an invaluable resource for United States Supreme Court practitioners and others attempting to read the High Court's tealeaves.

Nevada's appellate advocates would benefit from a similar analysis of Nevada Supreme Court opinions.<sup>7</sup> To assist practitioners, this Article aims to provide a snapshot of the Nevada Supreme Court's published en banc opinions from 2010 through 2014. Only published en banc opinions were examined for a number of reasons.

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<sup>1</sup> See generally Kedar Bhatia, *Final Stat Pack for October Term 2014*, SCOTUSBLOG (June 30, 2015, 11:23 AM), <http://www.scotusblog.com/2015/06/final-stat-pack-for-october-term-2014/> [<https://perma.cc/K5A4-YNYP>].

<sup>2</sup> See generally *id.*

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.* at 28; *Statistics*, SCOTUSBLOG, <http://www.scotusblog.com/statistics/> [<https://perma.cc/V4TB-EREU>] (last visited Apr. 18, 2016).

<sup>5</sup> Bhatia, *supra* note 1, at 8.

<sup>6</sup> *Id.* at 28; *Statistics*, *supra* note 4.

<sup>7</sup> The Nevada Supreme Court tracks certain annual statistics, including type of disposition by case category. See *2014 Annual Supreme Court Statistics*, NEV. CTS., [http://nvcourts.gov/Supreme/Reports/Statistics/2014\\_Annual\\_Statistics/](http://nvcourts.gov/Supreme/Reports/Statistics/2014_Annual_Statistics/) (last visited Apr. 18, 2016) (highlighting statistics that demonstrate the overwhelming majority of appeals are affirmed).

First, published en banc decisions are usually limited to those cases raising substantial precedential, constitutional, or public policy issues.<sup>8</sup> The Court's unpublished decisions generally involve straightforward legal issues,<sup>9</sup> are almost universally unanimous,<sup>10</sup> and could not be cited as precedent until January 1, 2016.<sup>11</sup>

Second, unlike the United States Supreme Court, panels of the Nevada Supreme Court have historically decided most of Nevada's appellate matters.<sup>12</sup> As a consequence, it is difficult to identify any meaningful patterns between the Justices in fluctuating groups of three. More substantive information can be ascertained from cases in which all Justices preside.

Third, the five-year timeframe provides a sufficient sample size for the current roster of Justices. By comparison, the newly created Court of Appeals has not yet created a large enough body of published opinions to assess. In time, the Court of Appeals will be equally worth studying.

Finally, published en banc opinions were easier to find and track through traditional research methods.<sup>13</sup>

The most striking Nevada Supreme Court statistic is the overall high level of unanimity amongst the Justices. Most published en banc decisions are unanimous. The following chart illustrates the percentage of agreement between each Justice (i.e., the voting relationships) for all published en banc decisions from 2010 through 2014. The cells represent the percentage of time that each of the

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<sup>8</sup> See NEV. R. APP. P. 36(c) (explaining that a case will be published if (1) it presents an issue of first impression; (2) alters, modifies, or clarifies a rule of law; or (3) involves an issue of public importance); *id.* at 40A(a)(2) (stating the en banc reconsideration of a panel decision is limited to proceedings involving "a substantial precedential, constitutional or public policy issue"); NEV. INTERNAL OPERATING PROCEDURES 2(b)(2)(i) ("Cases tracked for en banc decision are limited to those raising substantial precedential, constitutional or public policy issues, or where en banc consideration is necessary to secure or maintain uniformity of the court's decisions.").

<sup>9</sup> See NEV. R. APP. P. 36(c) (explaining when decisions will be published).

<sup>10</sup> Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW. 43, 44 (June 2000).

<sup>11</sup> NEV. SUP. CT. R. 123. On November 12, 2015, the Nevada Supreme Court amended Nevada Rule of Appellate Procedure 36 and repealed Supreme Court Rule 123 allowing unpublished dispositions issued after January 1, 2016 to be cited for persuasive value. NEV. R. ADMIN. DOCKET 0504 (Nov. 12, 2015). Justice Saitta dissented from this change. *Id.*

<sup>12</sup> The Nevada Supreme Court has started hearing more cases en banc. For example, in 2012, panels issued 59 percent of the Court's opinions while the en banc court only issued 41 percent. E-mail from Michele M. Shull, Judicial Chambers Administrator to Justice James W. Hardesty, to the Author (Mar. 29, 2016 09:49 AM) (on file with the Nevada Law Journal) (containing Justice Hardesty's PowerPoint presentation describing panel and en banc court opinion trends). The trend flipped in 2013 when the en banc court issued 52 percent of opinions. *Id.* In 2014, the en banc court issued 70 percent of opinions. *Id.* In other words, the later years considered by this study are more statistically significant because there was a larger body of en banc decisions to analyze. The information provided in this Article will become even more useful as the Court continues to hear a greater number of cases en banc.

<sup>13</sup> See *infra* note 14.

Summer 2016]

NEVADA SUPREME COURT

1165

Justices agreed with each other in full, in part, or in judgment in a majority, concurring, or dissenting opinion.<sup>14</sup>

TABLE 1: JUSTICE AGREEMENT – ALL CASES

	Douglas	Gibbons	Hardesty	Parraguirre	Pickering	Saitta
Cherry	93.4%	93.8%	90.3%	92.5%	89.0%	94.3%
Douglas		94.3%	97.4%	95.2%	96.5%	93.8%
Gibbons			94.3%	97.4%	92.5%	93.8%
Hardesty				95.2%	97.4%	93.4%
Parraguirre					92.5%	94.7%
Pickering						91.6%

Unsurprisingly, the data reflects that some Justices agree with each other more than others. For example, Justices Douglas and Hardesty, Justices Gibbons and Parraguirre, and Justices Hardesty and Pickering agreed with each other 97.4 percent of the time during the relevant time period. Every year during the five-year period, there was at least one set of Justices that agreed 100 percent of the time. Over the entire period, Justices Cherry and Pickering agreed the lowest amount at 89 percent—still a very high percentage of general agreement. The lowest annual level of agreement was in 2010 between Justices Cherry and Pickering, where they agreed in only 80 percent of cases.

The voting relationships become more accentuated when evaluating only non-unanimous cases—decisions with at least one concurring or dissenting opinion.

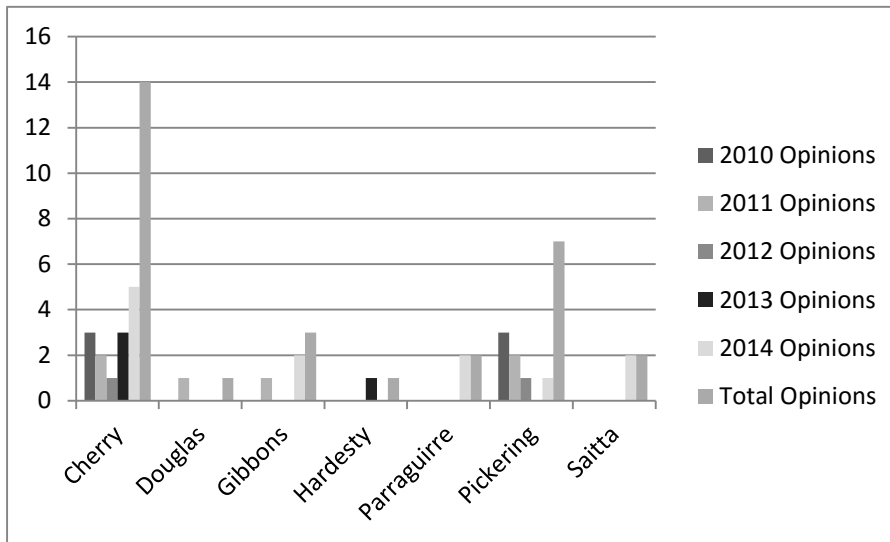
<sup>14</sup> A note on methodology: the data was compiled through an exhaustive manual review of all published en banc decisions from 2010 to 2014. Recent decisions were analyzed from the Nevada Supreme Court webpage that releases advanced opinions every Thursday. *See Supreme Court of Nevada: Advanced Opinions*, NEV. CTS., [http://nvcourts.gov/Supreme/Decisions/Advance\\_Opinions/](http://nvcourts.gov/Supreme/Decisions/Advance_Opinions/) (last visited Apr. 18, 2016). Older opinions were located on Westlaw. Opinion authorship, agreement, and participation information was coded into an Excel spreadsheet for each opinion and cumulative statistics were compiled based upon the recorded data. There may be a slight numerical margin of error due to unavailability of certain decisions, use of the calendar year rather than the fiscal year, and other case-specific nuances that are too cumbersome to detail. Admittedly, some judgment is involved when ascertaining whether the Justices actually agreed despite the labels attached to their opinions. *See generally* Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1995*, 65 LAW WEEK 3029 (1996), <http://www.scotusblog.com/wp-content/uploads/2007/OT95.pdf> [<https://perma.cc/S8SK-TFMX>] (last visited Apr. 18, 2016). And, after all, the Author is a litigator, not a statistician.

TABLE 2: JUSTICE AGREEMENT–NON-UNANIMOUS CASES

	Douglas	Gibbons	Hardesty	Parraguirre	Pickering	Saitta
Cherry	67.3%	73.1%	57.7%	67.3%	51.9%	75.0%
Douglas		75.0%	88.5%	78.8%	84.6%	73.1%
Gibbons			75.0%	88.5%	67.3%	73.1%
Hardesty				78.8%	88.5%	71.2%
Parraguirre					67.3%	76.9%
Pickering						63.5%

If there was a fractured opinion, the data further confirms that Justices Cherry and Pickering agreed the lowest percentage of the time (51.9 percent) and the same three sets of Justices agreed most often (88.5 percent). Additionally, if the Court split, Justice Cherry was most likely to author the dissenting opinion, as he authored 45.2 percent of dissenting opinions from 2010 to 2014.<sup>15</sup>

FIGURE 1: DISSENTING OPINIONS BY AUTHOR



It is noteworthy that over 40 percent of the dissenting opinions written throughout the relevant time period were issued during the 2014 calendar year. The sharp increase in dissenting opinions in 2014 is one indication that the Justices may have faced more difficult issues or areas of the law that are particularly unsettled. Moreover, in 2014, there was an increase of dissents that were joined by multiple Justices. In other words, more cases were decided by a five to two or

<sup>15</sup> For an interesting discussion of how the Court's composition affects dissenting opinions and the "dissent aversion" phenomenon, see RICHARD A. POSNER, *HOW JUDGES THINK* 32–34 (Harvard Univ. Press paperback ed. 2008).

Summer 2016]

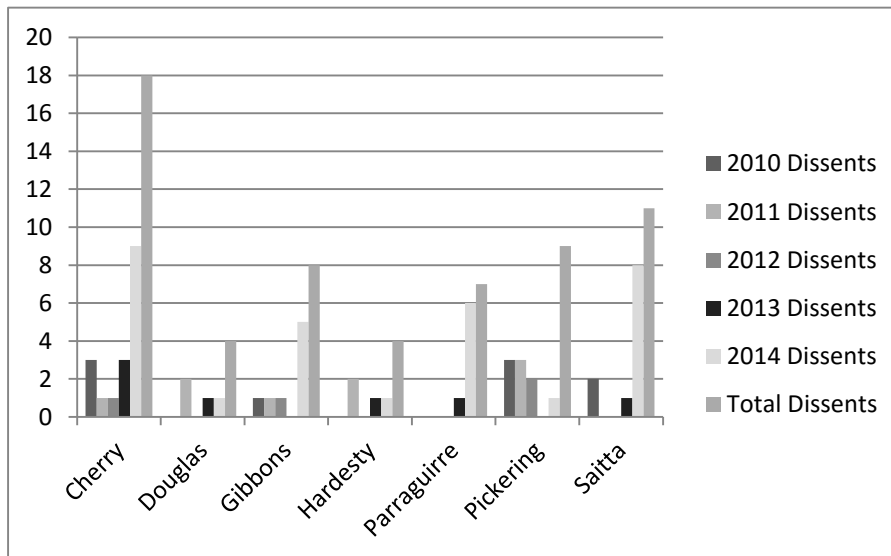
NEVADA SUPREME COURT

1167

four to three vote than usual. This is another indicator that there may have been stronger division within the Court during 2014.

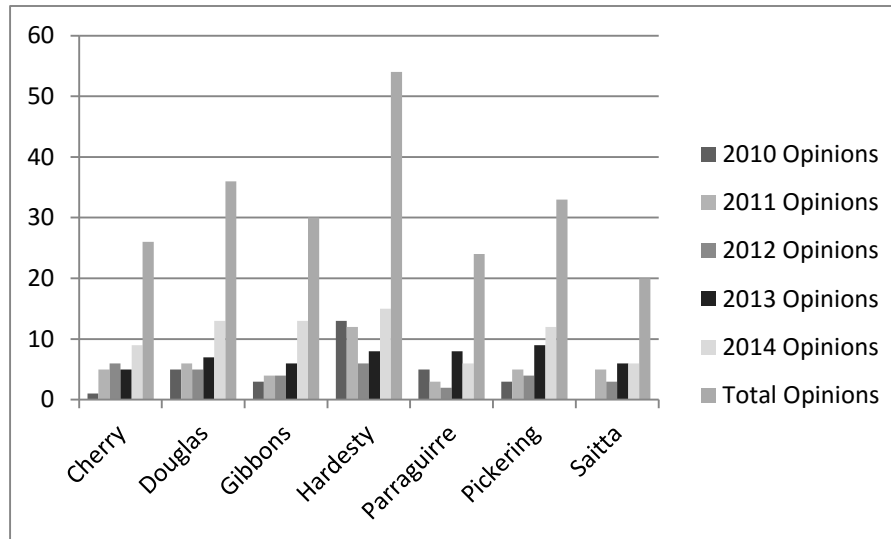
Aside from authoring dissents, Justice Cherry was also most likely to participate in dissenting opinions, followed by Justice Saitta.

FIGURE 2: DISSENTING OPINION PARTICIPATION



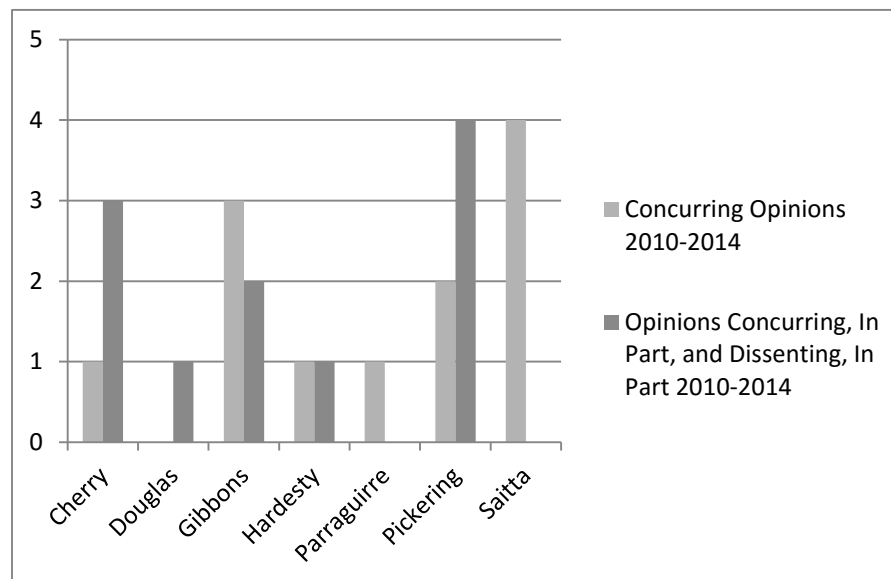
In contrast to dissents, Justice Hardesty wrote the highest number of majority opinions between 2010 and 2014. He and Justice Douglas were most often in the majority, authoring or joining the decision of the Court in approximately 97.4 percent of cases.

FIGURE 3: MAJORITY OPINIONS BY AUTHOR



Although separate concurring opinions were relatively infrequent, Justice Saitta wrote the most concurring opinions. Similarly, Justice Pickering wrote the most opinions concurring, in part, and dissenting, in part.

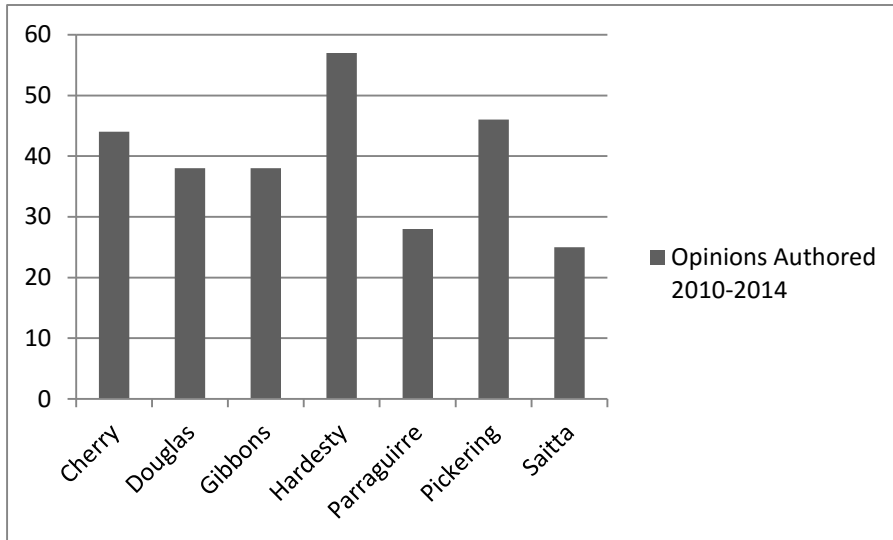
FIGURE 4: CONCURRING OPINIONS BY AUTHOR



It is notable that Justice Hardesty wrote the greatest number of published en banc opinions (majority, concurring, and dissenting) during the relevant time pe-

riod, while Justice Saitta wrote the fewest. It should be emphasized that this information does not include published panel authorship and that the total number of authored opinions does not necessarily correlate to work load.

FIGURE 5: TOTAL OPINIONS AUTHORED



Analyzing the last five years of the Nevada Supreme Court’s published en banc opinions provides useful insight into how the Justices decide cases. By examining these statistical voting relationships, advocates can identify Justices with similar judicial philosophies and interpretative methods. This type of appellate “moneyball” research<sup>16</sup> will help Nevada’s appellate litigators assess their prospects on appeal, tailor their arguments, and advise their clients. Over time, the data will also allow practitioners to objectively measure the evolution of the Court, particularly with changes in the Court’s composition.

<sup>16</sup> See generally MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003) (discussing a statistical sabermetric approach to baseball).

1170

*NEVADA LAW JOURNAL*

[Vol. 16:1163