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Judicial Behavior of the Roberts Court

Introduction

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We've titled this symposium "The Judicial Behavior of the Roberts Court." But perhaps we should have called it "The Judicial Behavior of the Roberts Courts (Plural)"[1] Or simply the "Judicial Behavior of the U.S. Supreme Court." These alternatives are distinctions with differences; they challenge us to consider whether the Roberts Court is uniform, unique, or both.

Taking on this challenge is a talented group of (mostly) social scientists.[2] But please: don't stop reading. Sure, I understand that many (most?) of you tend to think of us social scientists as

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1. As Merrill notes,

> The Supreme Court is implicitly assumed to have a certain unity of character under each Chief Justice. Hence, we refer to the "Marshall Court," the "Warren Court," and the "Rehnquist Court." A closer look at history reveals that this assumption of a natural Court defined by the tenure of each Chief Justice is often misleading. The Marshall Court had a different character late in its life than it did in its early years.

He identifies two different Rehnquist Courts (October 1986 to July 1994; October 1994 forward). Thomas W. Merrill, *The Making of the Second Rehnquist Court*, 47 St. Louis U. L.J. 569, 569-570 (2003).

2. Three of the contributors are J.D./Ph.Ds (Feldman, Hazelton, Owens); and three are J.D.s (Posner, Daneshvar, and Smith).

simpletons who reduce vast swaths of law to little more than dichotomies: the court affirmed or reversed, the judge voted in the liberal or conservative direction, the business party won or lost, and on and on.[3] And even worse: we're obfuscating simpletons what with our tendency to write in code ("measures," "regressions," "*p*-values").

I ask you to give us a chance because the essays in this symposium are neither foolish nor unreadable. Many move beyond simple dichotomies (and those that don't are far more interesting than you might expect); and all accept Earl Warren's "theory" about how to persuade a skeptical audience: keep it "short," "readable," and "non-rhetorical."[4] (In his memoir, Warren added "nontechnical";[5] the essays to follow are that too.)

If you're still not convinced, please keep reading; perchance squibs of our authors' takes on the uniformity and distinctiveness of the Roberts Court era will persuade you. If you're already convinced, head directly to the essays. The synopses below are no substitute for the real things.

I. A ROBERTS COURT?

Is there a Roberts Court? The answer isn't obvious. On the one hand, with the appointment of Neil Gorsuch, the era is starting its sixth chapter (see Figure 1)—with more likely.[6] For this reason

3. I've made this observation in another context. Lee Epstein, "Exemplary Legal Writing 2016: Books," in Green Bag Almanac & Reader (2017, forthcoming), http://epstein.wustl.edu/research/GreenBagBooks2017.pdf

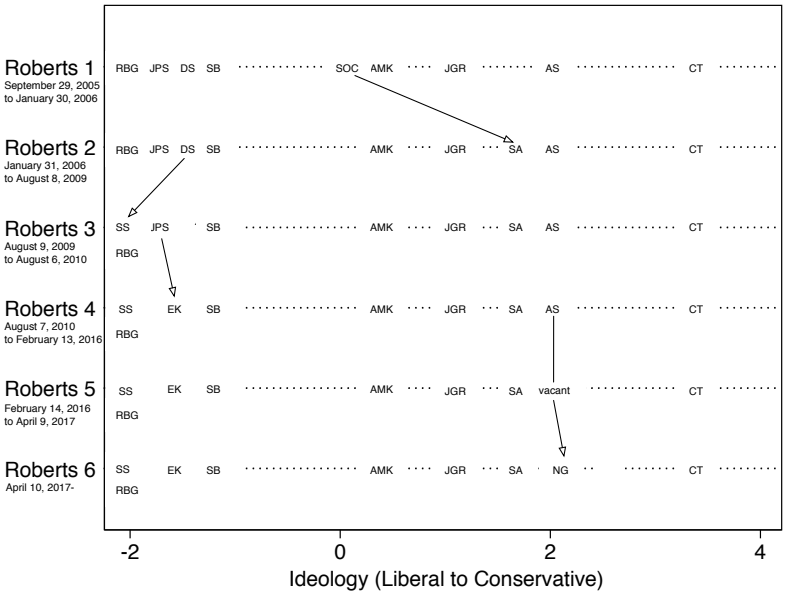
4. Warren was referring to the school segregation cases. See Memo to the Members of the Court, May 7, 1954. *See Brown v. Board at Fifty: "With an Even Hand,"* LIB. OF CONG., https://www.loc.gov/exhibits/brown/brown-brown.html. Warren also wrote that the *Brown* et al. opinions should be "unemotional" and "non-accusatory." The essays follow this rule too.

5. Earl Warren, The Memoirs of Chief Justice Earl Warren (1977), at 3.

6. Political scientists refer to each chapter as a "natural court," which is a period of stability in the Court's membership. For an overview, see the U.S. SUPREME COURT DATABASE, http://supremecourtdatabase.org/documentation.php?var=naturalCourt. For approaches to delineating natural courts, see, for example, Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA LAW REVIEW 841, 842–43 (1980) and *Changing Voting Patterns in the Burger Court: The Impact of Personnel Change*, 17 SAN DIEGO L. REV. 1021, 1038 (1980); Harold J. Spaeth & Michael F. Altfeld, *Measuring Power on the Supreme Court: An Alternative to the Power Index*, 26 JURIMETRICS 48, 55

alone, The Six Roberts Courts seems a better descriptor; and on that the justices probably would agree. They are fond of saying that "it's a different" Court with each change in membership.[7]

Figure 1. Justices aligned from left to right, broken down by natural courts, 2005–2015 terms



Notes:

1. A natural court is a period of stability in the Court's membership. See note 6.

2. Ideology is the mean of the Martin & Quinn score for the 2005-2015 terms.[8] Gorsuch's score is an estimate based on Lee Epstein, Andrew D. Martin, and Kevin Quinn, President-Elect Trump and his Possible Justices,

(1985).

7. Byron White, quoted in Linda Greenhouse, *Every Justice Creates a New Seat*, N.Y TIMES (May 26, 2009), http://www.nytimes.com/2009/05/27/opinion/27greenhouse.html; Anthony Kennedy quoted in The *Supreme Court: A C-Span Book Featuring the Justices in their Own Words*, ed. Brian Lamb, et al. 84 (2010) ("When I was trying jury cases . . . if a juror had to be replaced because one was ill or something . . . it was a different dynamic . . . It's the same way here. This will be a very different court [with a new justice].").

8. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 Political Analysis 134 (2002). Scores available at http://mqscores.berkeley.edu/press.php.

at: http://epstein.wustl.edu/research/PossibleTrumpJustices.html.

On the other hand, a casual look at Figure 1 suggests the more things changed, the more they stayed the same. Sotomayor-for-Souter and Kagan-for-Stevens were near even ideological swaps. We predict the same of Gorsuch-Scalia. Only the appointment of Alito to replace O'Connor at the very start of the Roberts Court seems noticeable. Then again, if we believe accounts emphasizing the importance of the Court's center,[9] even that change wasn't so dramatic: the median shifted only slightly—from O'Connor to Kennedy.

And yet our contributors find some truth in the old saw of a "new Court" as justices come and go. Shahrzad Daneshvar and Brooke Smith,[10] for example, identify a similarity between two justices whose names are not naturally linked: Scalia and Sotomayor. Between the 2009 and 2014 terms, both favored criminal defendants at rates higher than their overall voting patterns would let on.

As it relates to Sotomayor, this finding belies pre-appointment speculation that she would be tough on crime because of her prosecutorial experience and judicial decisions.[11] It turns out that Sotomayor votes more often in favor of criminal defendants than any justice since Thurgood Marshall left the Court in 1991.[12] Why the mismatch between Sotomayor's pre-Court record and her votes on the Supreme Court? Research shows that judges with promotion

9. Reviewed in Andrew D. Martin, Kevin Quinn & Lee Epstein, *The Median Justice on the U.S. Supreme Court*, 83 N.C. L. REV. 1275 (2005).

10. Shahrzad Daneshvar & Brook Clason Smith, *Nino & Sonia: The Dark Horse Heroes of Criminal Justice on the Roberts Court*, 54 WASH. U. J. L. POL'Y 18 (2017).

11. *E.g.*, Catherine Rampell, *Sotomayor: Tough on White-Collar Crime*, N.Y. TIMES (July 9, 2009), https://economix.blogs.nytimes.com/2009/07/09/sotomayor-tough-on-white-collar-crime/; Jess Bravin & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J. (June 5, 2009), http://online.wsj.com/news/articles/SB124415867263187033; David Lightman & Michael Doyle, *Sotomayor Hearings Offer Lessons for Future Nominees*, MCCLATCHY (July 17, 2009), http://www.mcclatchydc.com/2009/07/17/72057/sotomayor-hearings-offer-lessons.html.

12. Calculated from the Supreme Court Database (at: http://supremecourtdatabase.org) with decisionType=1 or 7 and issue=1 (criminal procedure). Still, there's a substantial and significant gap between Thurgood Marshall (the fourth most favorable toward defendants' rights since 1946) and Sotomayor (the tenth most favorable): 80% in favor of defendants versus 68%. Also, Stevens was not far behind Sotomayor at 68%.

potential—the "auditioners"—may be harsher on defendants out of a belief that the public (and so presidents and senators) disfavors judges who are soft on crime.[13]

More relevant here is Daneshvar and Smith's finding on Scalia. Figure 1 suggests that the switch from Scalia to Gorsuch won't matter much. But Daneshvar and Smith say not so fast. Unless Gorsuch shares Scalia's views on the Fourth Amendment and the Confrontation Clause, he may well push the court to the right in these areas.

Matthew E.K. Hall's essay too gives cause for reconsidering even swaps that appear *de minims* in effect (*e.g.*, Kagan-for-Stevens).[14] Hall's project is to shift focus from ideology to personality—though his is no exercise in hagio- or psychobiography. In effort to explain the justices' choices, he applies a generalized model of personality type. That model, called the "Big Five," emphasizes five traits: openness, conscientiousness, extroversion, agreeableness, neuroticism (the acronym OCEAN might help you remember them).

Hall isn't the first to emphasize the importance of personality. Chief Justice Roberts, for one, attributed John Marshall's success as a judicial leader to "the force of his personality. That lack of pretense, that openness and general trustworthiness, were very important personality traits in Marshall's success."[15] But Hall is among the first to develop these ideas systematically; and assuming he's got it right, then all the comings and goings on the Roberts Court could affect its work.

To illustrate: Hall puts two key players on the current Court—the Chief and the "super median" Kennedy[16]—in the Agreeable category because they value harmony and cooperation over individuality. According to Hall, that explains why neither dissents at very high rates. Their dominant trait of agreeability, along with their dominant positions on the Court, may also explain the recent increase in the

13. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 369–379 (2013).

14. Matthew E.K. Hall, *"They've Got Personality!": Goals, Traits, and Behavior on the U.S. Supreme Court*, 54 WASH. U. J. L. & POL. 98 (2017).

15. *Id.*

16. Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

fraction of unanimous decisions (more on this below). Were a more disagreeable, less cooperative sort to replace Kennedy, we might expect the fraction to drop.

Related is Joseph Smith's article, which contends that personal interactions are relevant to a complete explanation of individual behavior. Anyone who has served on a committee will nod their head in agreement but testing the importance of group relations is another matter. It's hard to identify direct indicators of (dis)harmony in most settings—perhaps especially the Court.[17] The justices have long sang Kumbayaesque refrains of "admiration,"[18] "never . . . a voice raised in anger,"[19] and "bonding."[20]

Smith proves otherwise by focusing not on what the justices say but on what they write—specifically the extent to which they name and blame in opinions, as in "Justice Stevens is dead wrong to think that the right to petition is 'primarily collective in nature'" (Scalia in *Heller*);[21] or "Justice Breyer's reliance on the average hourly rate for all of respondents' attorneys is highly misleading" (Alito in *Perdue*).[22] Smith shows, first, that personal attacks in opinions were uncommon until the Rehnquist years but are now unexceptional; and second, that the offenders are not evenly distributed. Stevens regularly went after Scalia and Thomas; and Scalia returned the favor often calling out Stevens, as well as Breyer and Kennedy.

It's the second finding that relates to membership change. Should

17. Joseph L. Smith, *Getting Personal in Supreme Court Opinions*, 54 WASH. U. J. L. & POL'Y. 187 (2017).

18. *E.g.*, Cristian Farias, *Supreme Court Justices Unanimous in Admiration for Antonin Scalia*, HUFFINGTON POST (Feb. 15, 2016), http://www.huffingtonpost.com/entry/antonin-scalia-supreme-court-colleagues_us_56c0d07de4b0b40245c711da.

19. Stephen Breyer quoted in Samantha Guzman, *Stephen Breyer On How the Supreme Court Justices Get Along*, (Dec. 13, 2016), http://keranews.org/post/stephen-breyer-how-supreme-court-justices-get-along.

20. As Elena Kagan put it "There are nine of us, and we do this thing that only the nine of us do, which you can't really talk to anybody else about . . . . There's a kind of bonding that occurs because of that." Quoted in Pat Vaughan Tremmel, *Kagan Talks About Life on the Supreme Court* (Jan. 5, 2015), https://news.northwestern.edu/stories/2015/02/kagan-talks-about-life-on-the-supreme-court/.

21. District of Columbia v. Heller, 554 U.S. 570, 579 (2008).

22. Perdue v. Kenny A., 559 U.S. 542, 557 (2010).

Gorsuch decline to play the naming game in an effort to restore tradition or, more likely, to curry favor with the Court's key player, Kennedy, noticeable effects on the law could follow.

II. A DISTINCTIVE COURT?

Whether there's a Roberts Court or Courts, the question of the era's distinctiveness remains relevant. Scholars emphasizing the importance of ideology, partisanship, or both might conclude that the answer is no. To them, the 2005 to 2016 terms are little more than a continuation of the Republican Court era, ushered in by the Nixon appointees and maintained by the Reagan and the Bush (I & II) justices. Put more starkly, on this account the Burger, Rehnquist, and Roberts Courts are fungible.

Based on Figure 2, which shows the fraction of liberal decisions by chief justice era, this claim isn't so easily dismissed.[23] The Warren Court justices reached liberal decisions in about two out of every three cases (67.1% liberal). Beginning with the Burger Court, when the Court switched from a majority Democratic appointees to a majority Republican, and continuing through today, most decisions are conservative.[24]

Figure 2. Fraction liberal decisions by Chief Justice era, 1953-2015 terms[25]

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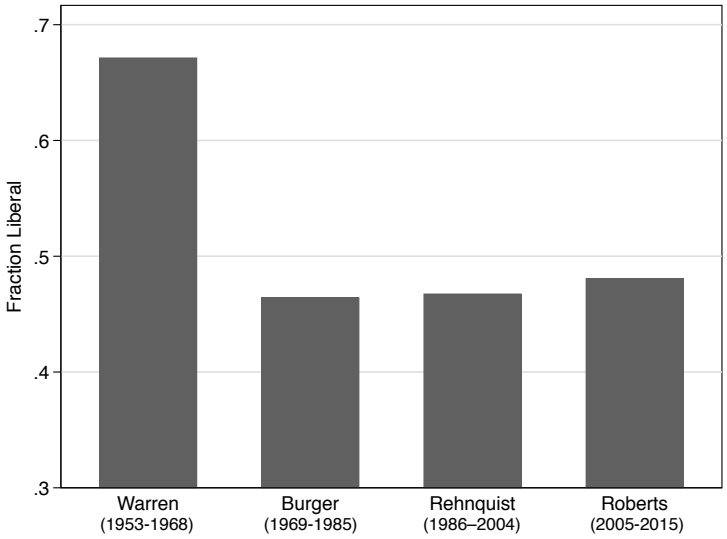
23. For the definition of a liberal decision, see the documentation to the U.S. Supreme Court Database at: http://scdb.wustl.edu/documentation.php?var=decisionDirection

24. 46.4% for the Burger Court, 46.7% for the Rehnquist Court, and 48% during the Roberts Court.

25. Calculated from the Supreme Court Database (at http://supremecourtdatabase.org), Case Centered Data with Cases Organized by Citation, and decision Type=1 or 7. Only decisions coded liberal or conservative are included.



Still Figure 2 hardly supplies a complete answer to the question of the Roberts Court's distinctiveness. For one thing, it ignores ideological trends within Chief Justices eras. For the Roberts Court this is a crucial omission because the Court has been drifting left ever since the 2010 term—so much so that the *New York Times* got it equally right when it reported that the Court's 2009 term was the "Most Conservative in Decades"[26] as when it proclaimed, "The Right-Wing Supreme Court…Wasn't"[27] in 2016.

Second, because Figure 2 aggregates the data, it doesn't tell us much about the effect of ideology at the individual level. Happily, Jeffrey A. Segal's essay does, with his data exposing a stronger link between the Justices' ideology and their voting ever since the Warren Court. (In statistical terms, the correlation increased from about 0.70 range in the 1960s to today's outsized 0.94.) Turncoat justices like Souter and Blackmun are no more—and may never be again as presidents work harder and harder to suss them out through rigorous

26. Adam Liptak, *Court Under Roberts is the Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), http://www.nytimes.com/2010/07/25/us/25roberts.html.

27. Adam Liptak, *The Right-Wing Supreme Court That Wasn't*, N.Y. TIMES (June 28, 2016), https://www.nytimes.com/2016/06/29/us/politics/supreme-court-term.html.

vetting.[28]

The final and perhaps most obvious reason why Figure 2 and even Segal's interesting study, don't give us a full picture of distinctiveness is that distinctiveness isn't only about ideology or partisanship. Truth be told, commentators have emphasized many other defining traits of the Roberts Court, with our authors weighing in on five: [29] a Court (a) losing public support, (b) reaching consensus, (c) having a hot bench (d) enamored with skilled attorneys, and (e) friendly toward business. It turns out that some are the stuff of legend, while others have some basis in fact.

A. Losing Public Support? Yes and No but Mostly No

Googling "Americans' confidence in the Supreme Court" retrieves scores and scores of relevant and recent pages—many of which emphasize a decline in confidence,[30] approval,[31] and even prestige.[32] It seems as if the Roberts Court is uniquely unpopular.

Alison Higgins Merrill et al.'s article could be read to provide evidence for this claim.[33] The various polls the authors consulted

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28. On Trump's selection of Gorsuch, see Adam Liptak, *How Trump Chose His Supreme Court Nominee*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/us/politics/neil-gorsuch-trump-supreme-court-nominee.html.

29. There are others, notably the "Harvard-Yalification" of the Roberts Court, see, for example, Larry Abrahamson, *The Harvard-Yalification of the Supreme Court*, NPR (May 16, 2010), http://www.npr.org/templates/story/story.php?storyId=126802460; and, the characterization of the Court as the Kennedy, not Roberts, Court. *See, e.g.*, David Cole, *This Isn't the Roberts Court—It's the Kennedy Court*, NATION (Sept. 24, 2015), https://www.thenation.com/article/this-isnt-the-roberts-court-its-the-kennedy-court/.

30. John Daniel Davidson, *Americans Are Losing Confidence in the Supreme Court*, FEDERALIST (June 29, 2016), http://thefederalist.com/2016/06/29/americans-are-losing-confidence-in-the-supreme-court/.

31. Adam Liptak & Allison Kopick, *Approval Rating for Justices Hits Just 44%*, N.Y. TIMES (June 7, 2012), http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html.

32. Eric Posner, *The Supreme Court's Loss of Prestige*, SLATE (Oct. 7, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/10/the_supreme_court_is_losing_public_approval_and_prestige.html.

33. Alison Higgins Merrill et al., *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J. L. & POL'Y 203 (2017).

show that the Court's standing with the public has never been lower; and this decline has affected the Justices' willingness to monitor Congress. There's a big but, though: approval for Congress and the executive branch is even lower. The suggestion here is that Americans' support for all institutions of government, not just the Court, has declined steeply over time.

James L. Gibson's essay presents an even bigger challenge to the unpopular-Court narrative.[34] Using a tried-and-true battery of questions designed to tap Americans' assessment of the Court's legitimacy, he shows that all the speculation about the Roberts Court's loss of support is flat-out wrong: Americans remain loyal to their Supreme Court, despite disapproving some of its decisions. What's more, because the Court continues to draw solid support from Democrats and Republicans alike, it may be the least polarized branch of government.

Why? In an essay adapted from their imaginative book, *U.S. Supreme Court Opinions and Their Audiences*,[35] Ryan C. Black et al. suggest one answer: the justices understand the importance of institutional legitimacy, and work hard to maintain it.[36] That could mean avoiding the avant-garde, with the 2013 same-sex marriage case providing an example.[37] Or it could involve factoring public opinion into case law (as doctrine governing obscenity and cruel and unusual punishment seems to do),[38] or even reaching consensus to

34. James L. Gibson, *Performance Evaluations Are Not Legitimacy Judgments: A Caution About Interpreting Public Opinions Toward the United States Supreme Court*, 54 WASH. U. J. L. & POL'Y 69 (2017).

35. RYAN C. BLACK ET AL., U.S. SUPREME COURT OPINIONS AND THEIR AUDIENCES (2016).

36. Ryan C. Black et al., *Supreme Court Opinions and Audiences*, 54 WASH. U. J. L. & POL'Y 162 (2017).

37. Hollingsworth v. Perry, 133 S.Ct. 2652 (2013). For commentary on the Court's "sidestep" see Eyder Perlata, *Court Overturns DOMA, Sidesteps Broad Gay Marriage Ruling*, NPR (June 26, 2013), http://www.npr.org/sections/thetwo-way/2013/06/26/195857796/supreme-court-strikes-down-defense-of-marriage-act; Joan Biskupic, *Analysis: Supreme Court Seems Poised to Avoid Same-Sex Marriage Tide*, REUTERS (March 26, 2013), http://www.reuters.com/article/us-usa-court-gaymarriage-justices-idUSBRE92P17B20130326.

38. For an analysis of these areas and the general strategy of building public opinion into case law, see LEE EPSTEIN & JACK KNIGHT, EFFICACIOUS JUDGING ON APEX COURTS *in* COMPARATIVE JUDICIAL REVIEW (Rosalind Dixon & Erin F. Delaney eds.). Edward Elgar, in press (on file with the authors).

induce public support (more on this below). Black et al. set their sights on a different strategy: opinion composition. The central idea is that the justices write more (or less) clear opinions to boost support for the decisions. When they diverge from public opinion, for example, they tend to write with greater clarity so that the public will understand why they reached the decision they did. Earl Warren had it right after all.[39]

B. Reaching Consensus? Yes and No but Mostly No

Black et al. make a convincing argument about how the Court writes opinions to maintain public support and loyalty. But there are other approaches, as I suggest above, and the Roberts Court has supposedly followed one: laboring to produce unanimous decisions.[40]

You've no doubt read about this consensus project, widely believed to be developed by the Chief himself.[41] Maybe Roberts is just an agreeable sort (see Hall's essay). Or perhaps he intuitively (or empirically) understands the punchline of Michael A. Zilis's essay: Consensus leads to more favorable media coverage, which in turn increases popular support for the Court's decisions.[42] This makes sense. Without dissents, journalists writing for the public lack material to punch holes in the majority's arguments. (Of course the same doesn't hold law blogsters; critiquing even unanimous decisions are their raison d'être.)

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39. *See supra* note 4.

40. *See, e.g.*, Daniel Fisher, *So Much for Politics: More than Half of Supreme Court Decisions Unanimous*, FORBES (June 1, 2012), https://www.forbes.com/sites/danielfisher/2012/06/01/so-much-for-politics-more-than-half-of-supreme-court-decisions-unanimous/#31e811e24fff; Neal K. Katyal, *The Supreme Court's Powerful New Consensus*, N.Y. TIMES (June 26, 2014), https://www.nytimes.com/2014/06/27/opinion/the-supreme-courts-powerful-new-consensus.html.

41. If not, see Katyal, *supra* note 41. Roberts said as much at a judicial conference ("I try to achieve as much consensus as I can"), quoted in Adam Liptak, *Rulings and Remarks Tell Divided Story of an 8-Member Supreme Court*, N.Y. TIMES (May 30, 2016), https://www.nytimes.com/2016/05/31/us/politics/rulings-and-remarks-tell-divided-story-of-an-8-member-supreme-court.html.

42. Michael A. Zilis, *The Political Consequences of Supreme Court Consensus: Medica Coverage, Public Opinion, and Unanimity as a Public-Facing* Strategy, 54 WASH. U. J. L. & POL'Y 221 (2017).

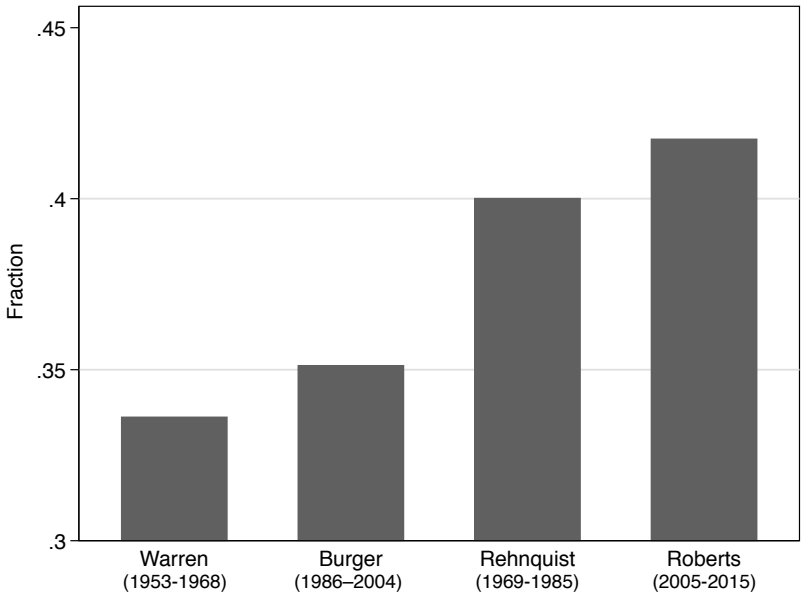
But is it true that the Roberts Court has accomplished the "remarkable" feat of issuing more decisions without dissent than in previous eras, as some commentators maintain?[43] Across the four chief justices periods in Figure 3, the Court was unanimous (no dissents) in 37% of the 6,332 orally argued decisions resulting in a signed majority opinion or judgment. On the one hand, the Roberts Court's rate of 42% is significantly higher than that, lending support to the commentary. On the other hand, statistically speaking the Roberts justices are no more or less likely than the Rehnquist justices to decide cases unanimously. The lack of a significant difference between the two eras is more suggestive a trend toward greater consensus than a signal achievement of the Roberts Court. (And keep in mind that the data in Figure 3 don't account for faux unanimity,[44] which some say *is* a distinctive trait of the current Court).

Figure 3. Fraction decisions without dissent by Chief Justice era, 1953-2015 terms[45]

43. Katyal, *supra* note 41; Zilis, *supra* note 42.

44. Usually meaning 9-0 decisions with one or more concurring opinions (some of which read closer to dissents than concurrences. *See* Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 18, 2010), http://www.nytimes.com/2010/11/18/us/18rulings.html; Robert Barnes, *For These Supreme Court Justices, Unanimous Doesn't Mean Unity*, WASH. POST (July 1, 2014), https://www.washingtonpost.com/politics/courts_law/for-these-supreme-court-justices-unanimous-doesnt-mean-unity/2014/07/01/94003590-0132-11e4-b8ff-89afd3fad6bd_story.html?utm_term=.23ca6ffe2817.

45. Calculated from the Supreme Court Database (at: http://supremecourtdatabase.org) with decisionType=1 or 7 and minVotes=0.



The Roberts Court doesn't do all that much better on other measures of unity.[46] Recall Smith's finding of a breakdown in the long-standing norm against naming and blaming in opinions—perhaps a cause (or consequence) of fraying relations on the current Court.[47] Then there's Timothy R. Johnson and Ryan C. Black's essay on oral arguments, unmasking several "serial interrupters"[48] on the Roberts Court. The generally agreeable Justice Kennedy is one (though his colleagues rarely interrupt him. Surprise surprise.). But Sotomayor is not; she is the least likely to interrupt another justice. Now that is a surprise considering commentary on her less-than-deferential demeanor on the bench. When she served as an appellate judge, lawyers described her as a "bully," a "terror," and just plain

46. Including other approaches to measuring consensus. *See supra* note 45.
47. Smith, *supra* note 17.
48. Timothy R. Johnson & Ryan C. Black, *The Roberts Court and Oral Arguments: A First Decade Retrospective*, 54 WASH. U. J. L. & POL'Y 131 (2017).

"nasty."[49] Either she's changed or she's just more courteous to her colleagues than to lawyers.

C. A Hot Bench? Mostly Yes

Speaking of oral arguments, it's way too late in the day to take issue with the conventional depiction of the Roberts Court as having a hot bench;[50] mounds of data support it.[51]

Nonetheless, Johnson & Black's essay adds quite a bit of nuance.[52] For example, the authors demonstrate that even though (most of) today's justices aren't wallflowers, they still give attorneys considerable leeway. Of the total words spoken at oral arguments the share is 39% for the justices and 61% for the attorneys. This is even more remarkable because each new Roberts Justice has tended to be chattier than his or her predecessor.[53] Sotomayor is an exception (on average she speaks fewer words than did Souter); and Gorsuch may prove to be one as well as Justice Scalia long vied with Breyer for the #1 ranking on most indexes of talkativeness.[54]

D. Enamored with Expert Attorneys? Mostly Yes

Perhaps even the very active questioners on the Roberts Court give attorneys their due because the attorneys are very good. As Lazarus[55] and Biskupic et al.[56] revealed several years back, advocates

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49. Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES (May 26, 2009), http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html.

50. *E.g.*, Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES (Oct. 7, 2013), http://www.nytimes.com/2013/10/08/us/inquisitive-justices-no-argument-there.html.

51. *See, e.g.*, Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. UNIV. J.L. & POL'Y 241 (2009); Epstein, Landes & Posner, *supra* note 13, at 311–15.

52. Johnson & Black, *supra* note 48.

53. Johnson & Black, *supra* note 48, Figure 1.

54. Epstein, Landes & Posner, *supra* note 13, at 330; Robert Barnes, *Supreme Court Justices are Talking More*, WASH. POST (March 2, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030104697.html.

55. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court*, 96 GEO. L.J. 1487 (2008) (table 3).

56. Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014),

appearing for the first time in the Supreme Court are now in the minority; a small of group of experts dominates. At the same time, "friend-of-the-court" participation can't go much higher; almost every case during the Roberts years attracted at least one amicus curiae brief.[57]

Our contributors do not bother to rehearse these facts; they rather analyze their importance. Take Adam Feldman's essay on the success of these expert attorneys.[58] Among other findings, Feldman shows that former Roberts Court clerks—a healthy fraction of today's (and tomorrow's) "elite" litigators[59]—can leverage knowledge of their former bosses' preferences into success for their clients. Along similar lines, Morgan L. W. Hazelton and her colleagues demonstrate that the effect of amicus curiae briefs depends less on lopsided filings for one side or other (as some studies suggest[60]) than on the quality of the information they provide the justices.[61]

Shane A. Gleason et al.'s[62] and Christine Nemacheck's[63] articles also explore advocacy but their focus is on less traditional forms. The Gleason team tests a novel hypothesis about female attorneys: Because they represent only 12% of all litigators before the Court, they should be *more* successful when they conform their advocacy to gender expectations (emotional and warm) rather than professional norms (unemotional and assertive). The data support the hypothesis—for now. Stay tuned as more and more women appear

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http://www.reuters.com/investigates/special-report/scotus/.

57. Lazarus, *supra* note 56, at 1514 (tbl. 1).

58. Adam Feldman, *Former Roberts Court Clerks' Success Litigating Before the Supreme Court*, 54 WASH. U. J. L. & POL'Y 55 (2017).

59. John Shiffman, *Former Clerks: Today's Prospects, Tomorrow's Elite*, REUTERS, http://www.reuters.com/investigates/special-report/scotus/#sidebar-clerks.

60. *E.g.*, Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC. REV. 807 (2004); Paul M. Collins, *Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RESEARCH Q. 55 (2007).

61. Morgan L. W. Hazelton, *The Long and Short of It: The Influence of Briefs on Outcomes in the Roberts Court*, 54 WASH. U. J. L. & POL'Y 119 (2017).

62. Shane A. Gleason et al., *Gender Performance in Party Brief Success*, 54 WASH. U. J. L. & POL'Y 89 (2017).

63. Christine L. Nemacheck, *The Path to* Obergefell: *Saying "I do" to New Judicial Federalism?*, 54 WASH. U. J. L. & POL'Y 143 (2017).

before the Court.

Nemacheck too takes a different cut at advocacy, focusing less on attorneys than on the groups and movements behind the Roberts Court's decision in *Obergefell v. Hodges*[64] to invalidate same-sex marriage bans. As she explains, years before anyone had ever imagined a "Roberts Court," Justice William Brennan laid the groundwork for the expansion of rights with his "new judicial federalism."[65] By adapting Brennan's approach to their cause, gay rights advocates achieved the state victories that served as the "stepping-stones" to *Obergefell*, demonstrating, yet again, that Justice Scalia was right to call Brennan "probably the most influential justice" of the 20th century.[66] Maybe the 21st too.

E. A Business-Friendly Court? Yes but with Some Surprises

But even Brennan's influence has its limits, and business cases are one. Five years ago, William M. Landes. and Richard A. Posner and I found that the Roberts Court was the most pro-business of the five Chief Justice eras in our dataset (from Vinson through Roberts).[67] Updating our study through the 2015 term does no damage to that conclusion[68] but our new findings are nonetheless surprising: Although the conservatives (all Republican appointees) on the Roberts Court are more favorable to business than the four liberals (all Democratic appointees), the liberals are hardly anti-business. We show that the four are far more business-friendly than Democratic appointees of *any* other Court era. Even more unexpected, the Roberts Democrats vote in favor of business at significantly

64. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

65. William J. Brennan, Jr., *State Constitutionalism and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (2007).

66. Quoted in *Justice Brennan Remembered*, PBS NEWS HOUR (July 24, 1997), http://www.pbs.org/newshour/bb/law-july-dec97-brennan_7-24a/ (transcript).

67. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

68. Lee Epstein et al., *When It Comes to Business, the Right and the Left Sides of the Court Agree*, 54 WASH. U. J. L. & POL'Y 32 (2017).

higher rates than Republican appointees in all the other chief justice periods since 1946.

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And there you have it: a symposium that tries to capture the moving target that is the Roberts Court. Perhaps we authors will return in a few years to assess the accuracy of our characterizations and predictions. In the meantime, please let us know how you think we've done. I know I speak for all the authors when I say that we'd love our work products to stimulate debate and conversations about the Court—today and as it continues to evolve.