Introduction

All human beings have personalities that influence their behavior. Though it may surprise some to hear, US Supreme Court justices are human beings. What this means, of course, is that justices have personalities that influence their behavior and, in turn, legal development and the US Constitution. If Court watchers want to understand the Court, they must understand how justices’ personalities shape their behavior. The goal of this book is to establish that justices’ personalities – and, more specifically, their conscientiousness – influence judicial decision-making.

A few brief examples should prompt you to believe that personalities matter on the Court. Consider Justice James McReynolds, who served on the Court from 1914 to 1941. He appeared to hate everyone and everything around him (Knox 2002). Once, when Justice Harlan Stone remarked that an attorney’s brief was “the dullest argument” he ever heard, McReynolds responded, “the only thing duller I can think of is to hear you read one of your opinions” (Abraham 1999, 134). An anti-Semite, McReynolds refused to sit for Court pictures with Justice Brandeis, telling his colleagues, “As you know, I am not always to be found when there is a Hebrew around” (Mason 1964, 216–217). One book says he was “the rudest man in Washington, with unspeakable manners – sarcastic, peremptory, and antagonistic” (Knox 2002, xix). Not surprisingly, his colleagues refused to send him “the customary letter of appreciation” when he retired. Not a single justice attended his funeral (Cushman 2003, 749).

Think, next, of Justice Harry Blackmun, who served on the Court from 1970 to 1994. Blackmun notoriously lacked self-confidence. He told prospective clerks “that his was the least desirable clerkship at the Court, in part because his colleagues were more intelligent and better teachers than he” (Lazarus 2005, 23). His own oral argument notes drip with self-deprecating remarks (Johnson 2009). In NLRB v. Food Store Employees Union
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(73–370), he wrote to himself, “What am I doing here on the U.S. Supreme Court!” In Hadley v. U.S. (91–646), he wrote, “What really am I doing here?” Woodward and Armstrong (1979, 143) note that “Blackmun often seemed paralyzed by indecision” and that “[t]he problem was greatest on cases where he was the swing vote.” His indecision was so palpable that Justice Black once remarked, “If he [Blackmun] doesn’t learn to make up his mind, he’s going to jump off a bridge some day” (143–144).

Finally, think of Justice Antonin Scalia, who served from 1986 to 2016. Scalia was perhaps the most aggressive and acerbic opinion writer (and questioner) on the Court. Dissenting in King v. Burwell (2014), he shook a giant admonitory finger at the majority, calling the majority opinion “pure applesauce.” Dissenting in Obergefell v. Hodges, he declared that he would “hide [his] head in a bag” before he signed on to Justice Kennedy’s opinion. And his concurring opinion in Webster v. Reproductive Health Services (1998) ripped Justice O’Connor, saying that her views “cannot be taken seriously.”

His pugnacious personality was not limited to opinion writing. During oral arguments, he regularly interrupted attorneys and his colleagues. Justice Alito (2017, 1605) remarked that Scalia turned oral argument into “a contact sport.” Indeed, in Pennsylvania v. Ritchie (85–1347) – only two months after Scalia took his seat at the Court – Blackmun wrote in his personal papers, “Too much questioning and arguing by Scalia again!” (Johnson 2009).

These are but brief examples, yet they should make the point. Justices have distinct personalities, and it seems eminently reasonable to believe these personalities influence their behavior on the Court. McReynolds’s attitude surely influenced how he interacted with his colleagues when they discussed the content of the opinions they wrote. Blackmun’s hesitancy almost assuredly influenced how he voted to set the Court’s agenda. And it does not require much to believe that Scalia’s aggressiveness affected not only oral argument but also the Court’s treatment of precedent, his relationships with his colleagues, and other actions. Stated simply, justices’ personalities must

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1 Throughout this book, we will refer to the docket number of cases when we discuss them in the agenda-setting or oral-argument context. Doing so makes it easier to search for them at http://epstein.wustl.edu/blackmun.php?p=3 and https://sites.google.com/a/umn.edu/trj/harry-a-blackmun-oral-argument-notes. When we discuss cases the Supreme Court heard and decided, we will refer to the full United States Reports citation or, when necessary, the Supreme Court Reporter.


1.1 Conscientiousness and Supreme Court Justices

Influence their behavior on the Court. To think otherwise would be “a fiction of Jack-and-the-Beanstalk proportions.”

To read empirical legal scholarship over the last fifty years, though, one would hardly see any mention of justices’ personalities. With some important exceptions (Hall 2018; Collins 2011; Klein and Mitchell 2010; Baum 2006; Wrightsman 2006; Baum 1997; Gruenfeld 1995; Aliotta 1988; Tetlock, Bernzweig, and Gallant 1985), scholarship has ignored the role of personality in judicial decision-making. Instead, studies portray justices as either single-minded (Segal and Spaeth 2002) or strategic (Epstein and Knight 1998) seekers of legal policy. Scholars largely treat justices as fungible, with only their ideological differences worth examining. We agree, then, with Schauer (2000, 617), who bemoaned that political scientists do not “even pause to examine the possibility” that things other than ideology determine judicial behavior (see also Epstein and Knight 2013; Posner 2008). There has been almost a singular focus on ideology.

Put simply, empirical legal scholarship has remained in “the clean and well-lit prison of one idea” (Chesterton 1908, 22). That idea has been that justices seek policy goals above all else. It’s time to break out. Empirical legal scholarship must grow beyond its existing boundaries. It must recognize how justices’ personalities influence judicial behavior.

This book seeks to help in that regard. It focuses on how conscientiousness influences justices’ behavior. We set our sights squarely on conscientiousness. We exhaustively examine its effects on justices throughout the decision-making process. And while so doing, we employ the most sound measure of personality to date.

1.1 Conscientiousness and Supreme Court Justices

Personality is a difficult concept to define. Indeed, even psychologists are “unable to arrive at a commonly accepted definition” of it (Greenstein 1969, 2–3). One definition calls personality, “the set of psychological traits and mechanisms within the individual that are organized and relatively enduring and that influence his or her interactions with, and adaptations to, the intrapsychic, physical, and social environments” (Larsen and Buss 2014, 4). Another distinguishes the study of personality into two parts: “the fundamental goal of understanding the structure of personality and also the fundamental

goal of understanding the functions of personality,” where “understanding the functions of personality concerns how personality works to guide and direct human functioning in diverse life domains” (Snyder 1994, 163). These definitions seem, at least to us, full of jargon and not particularly helpful to most readers. Thankfully, we can turn to the concept of traits to help define and understand personality. The scholarship on traits has a more recent scholarly pedigree and tends to be cleaner and clearer. As a consequence, most personality scholars today focus on traits. And so do we.

Most scholars argue that a trait is a fairly stable feature of someone’s behavior. It is a behavior that is “typical of the person in question” (Mondak 2010, 5). One could think of traits as central tendencies. As McCrae and Costa Jr. (2003, 7) note, traits are “dimensions of individuals’ differences in tendencies to show consistent patterns of thoughts, feelings, and actions.” Thus, when we say someone is agreeable, we mean that she usually is agreeable. She could, of course, be uncooperative and disagreeable from time-to-time, but her typical behavior tends to be agreeable (Mondak 2010). In other words, a trait is different than a state of being. Someone who is angry right now is in a state of anger; someone who is prone to anger across many situations would have the trait of disagreeableness.

Scholars have identified five major traits possessed by all humans. These “Big Five” traits are conscientiousness, agreeableness, neuroticism, openness, and extraversion. Conscientiousness bespeaks dependability (Mondak 2010, 53). It captures whether a person is loyal and hardworking. People who score high on the conscientious “dimension” tend to be hard workers, perform well at their jobs, and are academically successful. Perhaps a bit of an overstatement (but not much), one could think of an intelligent Boy Scout as the image of conscientiousness. Agreeableness focuses on interpersonal relations, with an emphasis primarily on the degree to which a person interacts positively with others. Neuroticism touches on emotional instability. Openness to experience touches on a person’s sensitivity toward change and routine. Extraversion is a trait that relates to an individual’s tendency to be outgoing or demure.

While all of these traits combine to create a personality profile, we focus on the trait of conscientiousness throughout this book. We do so for two primary reasons. First, we believe that focusing on one trait is theoretically more precise and informative than examining every trait. Trying to write a careful and coherent theory about how five different traits interact with one another and influence justices in numerous judicial activities would devolve quickly into cherry-picked hypotheses and post hoc rationalizations. Rather than trying to theorize about all traits (probably unconvincingly), we opted to focus on one
1.2 Why Care about Conscientiousness and Supreme Court Justices?

Readers should care about conscientiousness and the Court for at least three reasons. First, knowing how conscientiousness influences justices can answer a number of current mysteries about justices and the Court. We sometimes observe justices behave in ways that existing scholarship cannot explain. For example, why might a conservative justice like Clarence Thomas vote to grant review to a case when other conservative justices do not? Why do some justices vote to overrule precedent when their ideologically similar colleagues do not?

6 https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf.
7 To be sure, “judicial temperament” touches on agreeableness and openness, but those features appear not nearly as important to observers as the analytical features related to conscientiousness.
8 https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.authcheckdam.pdf.
Why are some justices more susceptible to legal persuasion than their ideologically similar colleagues? Existing theories cannot answer these questions. Their predominant focus on ideology leaves them mute. A focus on conscientiousness, however, can answer these questions. And our analyses reveal that conscientiousness plays a strong role in all of these behaviors.

Second, readers should care about conscientiousness and the Court because conscientiousness influences every aspect of judicial behavior. As we show in every empirical chapter throughout this book, Court action and the evolution of law are functions of conscientiousness. Sometimes, conscientiousness plays a stronger role than the factors we currently believe influence justices; sometimes it plays a more subtle, supplemental role. But always, it matters. Conscientiousness influences whether a justice votes to hear cases, receives opinion assignments, upholds precedent, recuses, follows public opinion or the Solicitor General, and many other factors.

Third, the importance of conscientiousness – and how it shapes judicial decision-making – matters to policy makers. Presidents who seek to influence the Court ought to pay attention to the conscientiousness of those whom they select. After all, conscientiousness may make a justice more (or less) effective on the Court. Presidents seeking effective appointees should take the time to understand their nominees’ personalities and how they expect them to interact with the justices with whom they must work (e.g., Rosen 2007). Because conscientiousness influences how justices behave, those who select justices must understand it. In other words, there are both academic and policy-based reasons to understand justices’ conscientiousness.

To be clear, we do not argue that conscientiousness – or personality more broadly – is the sole factor that explains judicial behavior. We simply argue that conscientiousness is another factor – an important one, to be sure – that explains judicial behavior. We agree with Atkins and Ziller (1980, 190), who argue “the issue is not really whether personality, in and of itself, explains the policy outputs of courts… On the contrary, the conceptual utility of personality theory… lies in the extent to which it provides [additional] explanations” to known behavioral patterns. Understanding conscientiousness can provide a fuller understanding of the Court’s behavior.

1.3 A ROADMAP FOR THIS BOOK

This book unfolds as follows: Chapter 2 explicates our theory and provides important background information for readers. We discuss existing theories of judicial behavior, including their strengths and their weaknesses. We then provide an extended discussion about psychology scholarship and the role of
conscientiousness in explaining human behavior. Throughout the book, each hypothesis we proffer draws from this chapter and its theory.

Chapter 3 discusses how we measure conscientiousness. We measure conscientiousness by examining justices’ pre-nomination speeches and writings. We employ IBM’s Watson Personality Insights program to derive empirical estimates of their traits. We follow the path set out by Winter, who broke ground in measuring the personality components of political actors by using their written (and recorded) words (Winter 2003). Winter used this method to determine the personalities of presidents, other world leaders, and even individuals in the business world. Others have verified the use of language to assess leaders’ traits (see, e.g., Keller and Foster 2012). After an extensive discussion of our measurement methodology, we provide an exhaustive series of analyses to establish the criterion validity of our measures. We then compare our measures of justices’ personalities to a similar, recently published study (Hall 2018). The comparison reveals our measurement approach to be substantively and empirically stronger. We urge scholars to employ our estimates of justices’ personality traits.

Chapter 4 examines how justices’ conscientiousness influences their behavior at the Court’s agenda-setting stage. Justices enjoy the legal authority to select which cases the Court will hear and decide each year. And while scholars know quite a bit about the conditions under which justices set their agenda (see, e.g., Black and Owens 2009a), they know next to nothing about how personality influences those decisions. Using the private archival data of Justice Harry Blackmun, we scrutinize how conscientiousness influences justices’ agenda setting votes. The data uncover three important results. First, highly conscientious justices are more likely to seek to resolve legal conflict than justices who are less conscientious. Second, highly conscientious justices are less likely to cast tentative “Join-3” votes. Third, highly conscientious justices are less likely to pursue forward-looking policy goals than less conscientious justices.

Chapter 5 focuses on whether conscientious justices are more likely to be persuaded by strong and credible legal arguments than less conscientious justices. After the Court grants review to a case, it receives written briefs from the attorneys and then holds oral argument. The attorneys provide justices with information about the case and try to persuade them to vote for their position. Existing scholarship suggests that justices respond to strong legal arguments (Black, Hall, Owens, and Ringsmuth 2016; Johnson, Wahlbeck, and Spriggs 2013).
They are less likely to vote for the party that employs emotional language in its briefs (i.e., the less credible attorney), and they are more likely to side with the attorney who makes a stronger oral argument. We seek to understand why. More specifically, we analyze whether those findings apply to all justices similarly, or whether, as we expect, those results obtain primarily among the most conscientious justices. Our analyses reveal that conscientious justices are most amenable to strong legal arguments.

Chapter 6 analyzes whether conscientious justices are more or less likely to support the US Solicitor General. The SG’s office is highly successful before the Supreme Court. Recent scholarship ties that success to the SG’s practice of making professional and objective arguments to the Court (Black and Owens 2012b; Wohlfarth 2009). We go beyond these findings, however, and argue that particular justices – the highly conscientious ones – are more likely to put a premium on that high quality information. Our results concur. Conscientious justices are more likely to support the SG’s position than less conscientious justices. And these results hold whether the SG is a party to the case or participates as a “friend of the Court.” The conscientious justice appears to value the SG’s high quality information more than less conscientious justices.

Chapter 7 investigates the conditions under which Chief Justices assign majority opinions to some justices but not others. When the Chief is in the majority coalition in a case, Court norms empower him to assign the opinion, either to himself or to another justice in the majority coalition. The question we seek to answer is whether the Chief is more likely to assign opinions to increasingly conscientious justices. The results show that Chiefs are, in fact, significantly more likely to assign opinions to conscientious justices. Because of the strong norm of equitable opinion assignment – everyone receives about the same number of opinions these days – the Chief’s powers are somewhat constrained. But some cases are more important than others, and in those cases, Chiefs favor conscientious justices.

Chapter 8 analyzes whether conscientiousness influences how justices bargain and negotiate with each other over the content of opinions. After the majority opinion author circulates his or her draft opinion, other justices in the majority coalition can (among other things) join the opinion, ask for changes, make threats, or refuse to join. We analyze whether a justice’s conscientiousness influences the duration of time it takes her to write a majority opinion. We also examine whether an increasingly conscientious justice is more likely to bargain with opinion writers, and whether conscientiousness influences the types of bargaining tactics justices employ. Our results suggest that conscientious justices take longer to draft opinions than...
less conscientious justices. They take their time in an effort to write more thorough opinions. Contrary to our expectations, increasingly conscientious justices are, on average, less likely to bargain with opinion writers. Nevertheless, they are more likely to bargain in salient cases. And when they do bargain, they are more likely to make suggestions than less conscientious justices.

Chapter 9 examines whether justices’ conscientiousness influences the content of the opinions they write. The chapter investigates how justices’ conscientiousness influences the legal breadth, cognitive complexity, length, and rhetorical clarity of the opinions they write. Rooted in the theory that conscientious justices will be more likely to seek out as much information as possible to resolve a legal dispute, the results suggest that conscientious justices write opinions with greater breadth, opinions that are more cognitively complex, longer opinions, and (contrary to our expectations) slightly less readable opinions.

Chapter 10 examines whether increasingly conscientious justices are more likely to overrule precedent. Our theory is simple. Conscientious people believe they must fulfill their roles and obligations. The role of a justice, at least according to most people in the public and in the legal community, is to follow rather than circumvent precedent. Therefore, conscientious justices should be more supportive of precedent. Our analyses concur. Conscientious justices are more likely to treat precedent positively than their less conscientious colleagues. Further, to the extent that conscientious justices must circumvent precedent, they do so in a limited manner, and appropriately within the realm of legal treatment. They are less likely to overrule or criticize a precedent than their less conscientious colleagues. Instead, they distinguish those precedents.

Chapter 11 investigates whether conscientious justices are more likely to follow public opinion than less conscientious justices. We believe conscientious justices seek out information about the Court’s external environment. Why? Conscientious people tend to value their professions and protect existing norms. The Court needs public support in order to survive. As such, we suspect that conscientious justices will pay attention to public opinion when reaching decisions. The results agree. The most conscientious justices in the modern era exhibited considerable concern for public opinion when making decisions. By contrast, the least conscientious justices exhibited no responsiveness to public opinion at all.

Chapter 12 probes judicial recusal, a normative topic that has become newsworthy in recent years. We analyze whether conscientious justices are more likely to recuse themselves from cases than less conscientious justices.
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Because conscientious individuals tend to be more dutiful than less conscientious people, we believe conscientious justices will be more likely to recuse. They are. Whereas less conscientious justices stay involved with cases to accomplish their policy goals, conscientious justices remove themselves to avoid the appearance of impropriety.

Chapter 13 offers our concluding thoughts. We lay out the implications of our findings and discuss the future study of judicial behavior. We theorize what a Court full of conscientious justices might look like and discuss what our examination of conscientiousness can tell us more broadly. It is our hope that other scholars begin to examine personality more carefully and how it interacts with existing theories about the Court and justices, all in an effort to gather a more realistic understanding of judging on the High Court.

We should note one thing for the reader. In most of the empirical chapters, we replicate existing studies (either our own or those of others) while adding conscientiousness and the other four personality traits. Because those models contain different variables, some chapters include some covariates not found in other chapters. While this approach allows us to examine numerous empirical questions across a multitude of judicial actions, it does come at the (very slight) cost of employing different covariates in different chapters.

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When Chief Justice Fred Vinson passed away, Justice Frankfurter stated, “This is the first indication that I ever had that there is a God” (Cooper 1995, 31). Writing to Frankfurter, then-Solicitor General Philip Elman remarked:

What a mean little despot he [Vinson] is. Has there ever been a member of the Court who was deficient in so many respects as a man and as a judge[?] Even that s.o.b. McReynolds, despite his defects of character, stands by comparison as a towering figure and powerful intellect...This man is a pygmy, morally and mentally. And so uncouth. (Cooper 1995, 31)

Does personality influence judicial behavior? It sure seems as though it must. And our goal is to find the answer.