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Getting Personal in Supreme Court Opinions

Joseph L. Smith*

“Justice Scalia does not (and cannot) explain why Congress would define ‘air pollutant’ so carefully and so broadly, yet confer on EPA the authority to narrow that definition whenever expedient.”¹

“Justice Breyer’s reliance on the average hourly rate for all of respondents’ attorneys is highly misleading.”²

“Justice Breyer would not only put such extraordinary weight on admitted dicta, but relies on the statement for something it does not remotely say.”³

“Justice Thomas is thus wrong in stating that our approach might suggest ‘a policy-driven preference for government monopoly over privatization.’”⁴

“And Justice Stevens is dead wrong to think that the right to

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¹ Justice John Paul Stevens in *Massachusetts v. Environmental Protection Agency*.

² Justice Samuel Alito in *Perdue v. Kennedy*.

³ Chief Justice John Roberts, *Parents Involved in Community Schools v. Seattle School District No. 1*.

⁴ Chief Justice John Roberts in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*.

petition is ‘primarily collective in nature.’”⁵

These quotes, all taken from recent Supreme Court majority opinions, are quite harsh. To be told by a peer, in official documents certain to be read and publicized broadly, that one’s reasoning is baseless, misleading, or “dead wrong” must be irritating. Beyond the public criticism, targeting the justices by name adds to the insult. These opinion authors could have softened the impact by aiming their criticism at “the dissent” or “the concurrence.” Statements like those above, which name another justice in the process of criticizing his or her work, may be an indicator, a cause, or a consequence of frayed relationships on the Supreme Court.

This Article focuses on these personal references. First, it explains their importance and how they have become much more common in recent terms. Then, it discusses which Justices make personal references most frequently, and who names whom. The Article concludes with thoughts on how these patterns relate to relationships among the Justices and the work of the Court.

THE ROLE OF PERSONAL RELATIONSHIPS ON THE COURT

Scholars have long viewed personal relationships on the Court as potentially important.⁶ The Justices have to work together to choose cases for review, resolve disputes, and produce opinions of the Court. Majority opinions are often refined through multiple rounds of negotiation and compromise. Amicable relationships can smooth these processes.

Beyond the overall functioning of the Court, relationships between individual Justices can influence the formation of coalitions. More than fifty years ago, Walter Murphy noted, “friendship and the

⁵ Justice Antonin Scalia in *District of Columbia v. Heller*.

⁶ See, e.g., WALTER J. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); and Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the ‘Harvard Law Review’ and Other Great Books*, 100 HARV. L. REV. 887, 905-906 (1987).

social amenities . . . help determine with whom a [J]ustice is more apt to interact and with whom he will probably continue to negotiate even after an impasse has seemingly been reached.”⁷

Direct evidence about the level of harmony among justices is hard to come by. When they speak of it at all, Justices tend to describe the Court as harmonious. In an appearance on *The Late Show*, Justice Breyer told Stephen Colbert, “I have never heard a voice raised in anger . . . [W]e are good friends.”⁸ Other Justices have said much the same, insisting that personal relations on the Court are cordial and professional.⁹ However, scholars and insiders have uncovered trends suggesting more acrimony among the Justices than they publicly acknowledge. Yalof, Mello, and Schmidt found that the proportion of non-collegial concurring and dissenting opinions increased during the first four years of the Roberts Court compared to the last four years of the Rehnquist Court, which was itself viewed by scholars as a model of disharmony.¹⁰ Wedeking and Zilis explore the relationship between policy goals and using disagreeable language in Court opinions.¹¹ They suggest that harsh language is a means of getting increased attention for policy goals.¹² Although such language may damage relations among the Justices, it signals the intensity of the

⁷ WALTER J. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 53 (1964).

⁸ Interview by Stephen Colbert with Stephen Breyer, Associate Justice, United States Supreme Court, *The Late Show* (CBS television broadcast Sep. 14, 2015).

⁹ Phillip Allen Lacovara, *Un-Courtly Manners-Quarrelsome Justices Are No Longer a Model of Civility for Lawyers*, 80 A.B.A. J. 50 (1994).

¹⁰ David A. Yalof, Joseph Mello, and Patrick Schmidt, *Collegiality Among US Supreme Court Justices: An Early Assessment of the Roberts Court*, 95 JUDICATURE 12 (2011). On the Rehnquist Court, see MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 63-66, 149-151, 207-208 (2005).

¹¹ Justin Wedeking and Michael Zilis, *The Use of Disagreeable Language in Supreme Court Opinions*, (Oct. 19, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628819.

¹² *Id.* at 8.

author's views and may attract the attention of Congress, lower courts, or other influential actors.

Judicial professionals from Washington, D.C., who may have access to inside information, have identified Justice Scalia as driving the increased use of harsh language toward other justices. Judge Wald of the D.C. Circuit Court of Appeals was among the first to notice Justice Scalia's tendency to deploy sarcasm and derisive language toward other Justices.¹³ Former U.S. Deputy Solicitor General Philip LaCovara identified Justices Blackmun, Stevens, and Thomas among those likely to aim punitive language at opposing opinions, but singled out Justice Scalia as the harshest attacker.¹⁴ Lacovara goes on to suggest that Scalia's rhetoric had consequences for the Court: "The strained relationship between Justices Scalia and Sandra Day O'Connor, for instance, is now approaching an embarrassing intensity. Once expected to become jurisprudential allies, today they rarely say a civil word about one another in their opinions."¹⁵

A few empirical investigations have explored the relationship between opinion language and the social climate on the Court. Long and Christensen argue that increased use of linguistic "intensifiers" (such as "clearly," "obviously," or "very") in judicial opinions indicates that the author feels threatened in some way.¹⁶ They find that conservative Justices show higher use of intensifiers than liberal Justices, and that all Justices use more intensifiers in dissents

¹³ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

¹⁴ Phillip Allen Lacovara, *Un-Courtly Manners-Quarrelsome Justices Are No Longer a Model of Civility for Lawyers*, 80 A.B.A. J. 50 (1994).

¹⁵ *Id.* at 52. See also Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, Jun. 29, 2009, <http://www.nytimes.com/2007/06/28/washington/28memo.html>

¹⁶ Lance N. Long and William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933 (2012).

compared to majority opinions. Justice Scalia used more intensifiers than other Justices.

Judge Wald has suggested that referring to a fellow judge by name is particularly aggressive and uncivil:

One mark of an old animosity is repeated identification of the “enemy judge” by name; I once counted my own name (or title as Chief Judge) used over two dozen times by a majority in a case in which I was dissenting. Friendly fire, on the other hand, refers instead only to “the dissent” or “our dissenting colleague,” elevating the dispute to a more impersonal plane.¹⁷

The fact that Judge Wald not only noticed, but *counted* personal references to herself suggests she saw them as unusual and potentially divisive. Similarly, Scott and Gobetz argue that the tendency to single out other Justices for criticism indicates an individualistic, rather than communal, feeling among the Justices.¹⁸ They measured this tendency by counting references to particular Justices in 711 Supreme Court opinions issued between 1969 and 1992.¹⁹ Such references to fellow Justices increased dramatically over the time period. Justice Scalia made more such references than any other Justice.

Beyond relationships within the Court, evident disharmony among the Justices may undermine respect for the Court as an institution.²⁰ Strident language aimed at other Justices is likely to pique the interest of journalists and be publicized. It is possible that strong and evident disagreement undermines the Court’s image as an apolitical branch and ultimately the perceived legitimacy of its decisions.²¹ Posner

¹⁷ Wald, *supra* note 6, at 1381.

¹⁸ David K. Scott and Robert H. Gobetz, *The US Supreme Court 1969-1992: A Shift Toward an Individualistic Style of Judging*, 54 COMM’N STUDIES 211 (2003).

¹⁹ *Id.* at 217.

²⁰ Wedeking and Zilis, *supra* note 11.

²¹ See, e.g. Stephen A. Newman, *Political Advocacy on the Supreme Court:*

suggests strong language in opinions “lowers the reputation of the judiciary in the eyes of the public.”²²

PATTERNS IN PERSONAL REFERENCES TO OTHER JUSTICES

To investigate whether personal references are increasing, and how they are deployed, I focus on three questions:

One: Has the practice of naming another in Court opinions increased over time?

Two: Which Justices most frequently name another in their opinions?

Three: Do Justices name their ideological opponents more often than ideological allies?

To answer the first question, the Article presents data on long-term trends in personal references in Supreme Court opinions going back to 1946. It then focuses on the Roberts Court to evaluate the second and third questions. Figure 1 depicts the average number of references (by name) to other Justices during the Vinson (1946–1953), Warren (1953–1969), Burger (1969–1986), Rehnquist (1986–2005), and Roberts (2005–2015) Chief Justice eras. During the Vinson and Warren Courts, personal references were almost unknown. The Burger Court saw a noticeable uptick, but the average was still well under 0.2 references per opinion. Under the Rehnquist and Roberts Courts, the number of such references quintupled to nearly one reference per opinion. There has been a slight downturn in

The Damaging Rhetoric of Antonin Scalia, 51 N.Y.L. SCH. L. REV. 907, 916 (2006).

²² RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 353 (1996).

the frequency of personal references during the Roberts Court compared to the Rehnquist Court, from about 0.95 references per opinion to about 0.88.

This striking increase in “naming” Justices fits with other research suggesting the Justices have become ruder and more individualistic—resulting in a less respectful, less collegial atmosphere on the Court.²³ The increase also fits with Wedeking and Zilis’s finding that the recent Court opinions use more disagreeable language compared to previous opinions.²⁴

Noting the dramatic increase of personal references brings us to the question of which Justices are driving this trend. Figure 2 presents relevant data. The height of each bar in Figure 2 indicates the number of times each Justice on the Roberts Court mentioned another Justice in a majority, concurring, or dissenting opinion, respectively. The Justices are arrayed from most liberal to most conservative. Mentions in majority opinions may be particularly important because these opinions articulate authoritative legal rulings and are the most widely read. Justices Stevens, Roberts, and Scalia stand out as naming other Justices particularly frequently in majority opinions, with Stevens and Scalia being the most extreme outliers. Combining majority, concurring, and dissenting opinions, Justices Stevens, Scalia, and Roberts lead the Court in personal references, with averages of 2.5, 1.6 and 1.4 references per opinion, respectively. One takeaway from Figure 2 is that the Justices who name fellow Justices most frequently are not the swing Justices; the most frequent references tend to come from reliable liberals or conservatives.

Table 1 shows individuals the Justices mention by name. The opinion authors are listed on the right, with the Justices listed in liberal to conservative order from top to bottom. Each row shows the relative frequency with which the opinion writer names a Justice. The named Justices are listed left to right in order of increasing conservatism. For example, the top row shows that Justice Stevens

²³ Wald, *supra* note 6, at 1382-1383; Lacovara, *supra* note 9.

²⁴ Wedeking and Zilis, *supra* note 11, at 18-19.

named Justice Ginsburg an average of 0.04 times per opinion, named Justice Scalia 0.82 times per opinion, and named Justice Thomas 0.39 times per opinion.

Shaded boxes in Table 1 indicate higher-than-average rates of naming. The darker gray boxes show cells above the 90th percentile in relative frequency. The lighter gray boxes indicate cells from the 75th to 90th percentile in relative frequency. Notice that there are no shaded boxes in the center part of the table; moderate Justices do not tend to name other moderate Justices in opinions.

In fact, Justices who could provide the swing vote are rarely named at all. Justices O'Connor and Kennedy have occupied the middle ground on the Court in recent years. Getting their vote was often crucial to forming a majority. It is noteworthy that these Justices are seldom named by other Justices, possibly because other Justices fear that alienating them would make it harder for them to garner majority support in future cases.²⁵

Most of the shaded boxes in Table 1 are concentrated in the upper right and lower left corners of the table, indicating that Justices tend to name their ideological opposites more frequently than their ideological allies or moderates.²⁶ The patterns in naming seem to be associated with policy disagreements, because moderates seldom engage in this behavior, and ideological extremists most often name extremists of the opposite ideology (or Justice Scalia). The use of personal names may suggest heated arguments, or that the opinion-writing Justice feels particularly strongly about the implications of the case.

Justice Scalia is an exception to this pattern in two ways: first, Justice Scalia was named relatively frequently by fellow conservatives Justices Roberts and Alito and second, Justice Scalia named Justice Kennedy, a moderate, quite frequently. If Justices are more likely to be named by other Justices in cases with important

²⁵ *Id* at 8.

²⁶ However, the table shows that Justice Breyer is also named relatively frequently by both liberals and conservatives.

policy implications, then Justices who write more of these opinions would be named more often. Lazarus²⁷ has found that Justice Kennedy was assigned to write the majority opinion in a disproportionately large number of highly salient decisions, so this may partially account for him being named frequently by Scalia. However, Scalia is unique among Justices in naming Kennedy so frequently, so the large number of salient decisions written by Kennedy does not completely explain the pattern. The same study finds that Justice Scalia was assigned to write the opinion in an average number of highly salient cases, so this does not seem to account for Justice Scalia being named so frequently.²⁸

CONCLUSION

This Article examines one indicator of fraying personal relationships on the Supreme Court, personal references to other Justices in Court opinions. Scholars and observers of the Court have suggested that relations among the justices are less respectful than in previous times, that this decline in respect may be evident in the language of the Justices' opinions, and that referring to fellow Justices by name may be particularly disrespectful.²⁹ Judge Wald's remarks on her name being used repeatedly in a court opinion indicate that this practice is unconventional and irksome. Personal references have increased dramatically during the Rehnquist and Roberts Courts, from being extremely rare during the 1950s and 1960s, to very common after 2000. The dramatic change suggests that a norm of avoiding personal references may have existed on the Court prior to the 1980s, but has deteriorated. This increase in naming fits with other research suggesting the Court has become a less internally collegial institution.

²⁷ Richard J. Lazarus, *Back to "Business" at the Supreme Court: The Administrative Side of Chief Justice Roberts*, 129 HARV. L. REV. 33, 58-59.

²⁸ *Id.* at 58.

²⁹ See *supra* discussion on page 201.

Ideology and personality seem to be key factors in the patterns of naming other Justices. More ideologically extreme Justices name other Justices more often than those nearer the center. Justices are more likely to name their ideological opposites than their allies, and swing Justices are almost never named. Personal references take ideological divisions to the personal level. Justices may name other Justices because they feel strongly about a case or outcome, or to draw attention to a legal dispute. Justices seem to refrain from naming, and thereby alienating, Justices whose vote they may need in a future case. Beyond ideology, some personalities may simply have a tendency to ignore norms of restraint. Justices Scalia and Stevens stand out in this regard. Scalia's pattern, in particular, shows less concern for avoiding alienating potential allies.

Pushed by these ideological and personal motivations, some Justices have discarded norms that have contributed to the smooth functioning of the Court. Negotiation and compromise are more difficult when social relations are strained. The processing of the Court's docket could be delayed by Justices who do not interact smoothly with each other.³⁰ Justices who would otherwise be expected to vote together or join one another's opinions might instead write separately or even join conflicting opinions. Most of the patterns shown here reinforce ideological divisions, suggesting that breakdowns in formal courtesies could make it more difficult for conservatives and liberals to work together, and lead to greater polarization on the Court. In this way, personal relationships on the Court could even influence the development of law.

³⁰ On the topic of justices' interactions to produce decisions, see FORREST MALTZMAN, JAMES F. SPRIGGS, AND PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

Table 1: ~~Namers~~ and Named among Roberts Court Justices

Author	Named Justices											
	Stevens	Sotomayor	Ginsburg	Kagan	Souter	Breyer	O'Connor	Kennedy	Roberts	Alito	Scalia	Thomas
Stevens		0.00	0.04		0.07	0.00	0.00	0.09	0.00	0.17	0.82	0.39
Sotomayor	0.00		0.09	0.01		0.11		0.00	0.00	0.12	0.42	0.11
Ginsburg	0.20	0.16		0.06	0.00	0.12	0.00	0.03	0.00	0.14	0.19	0.09
Kagan		0.08	0.00			0.21		0.06	0.00	0.17	0.23	0.29
Souter	0.17		0.00			0.00	0.00	0.08	0.00	0.00	0.04	0.00
Breyer	0.11	0.03	0.03	0.05	0.03		0.00	0.08	0.00	0.05	0.34	0.04
O'Connor	0.00		0.00		0.00	0.09		0.00	0.00		0.00	0.00
Kennedy	0.09	0.02	0.00	0.00	0.04	0.03	0.00		0.00	0.04	0.06	0.06
Roberts	0.25	0.05	0.06	0.00	0.07	0.11	0.00	0.01		0.01	0.25	0.02
Alito	0.18	0.21	0.02	0.05	0.00	0.14		0.03	0.00		0.29	0.11
Scalia	1.49	0.01	0.10	0.00	0.00	0.44	0.00	0.30	0.01	0.18		0.06
Thomas	0.12	0.11	0.00	0.00	0.09	0.05	0.00	0.01	0.00	0.04	0.07	

Figure 1.

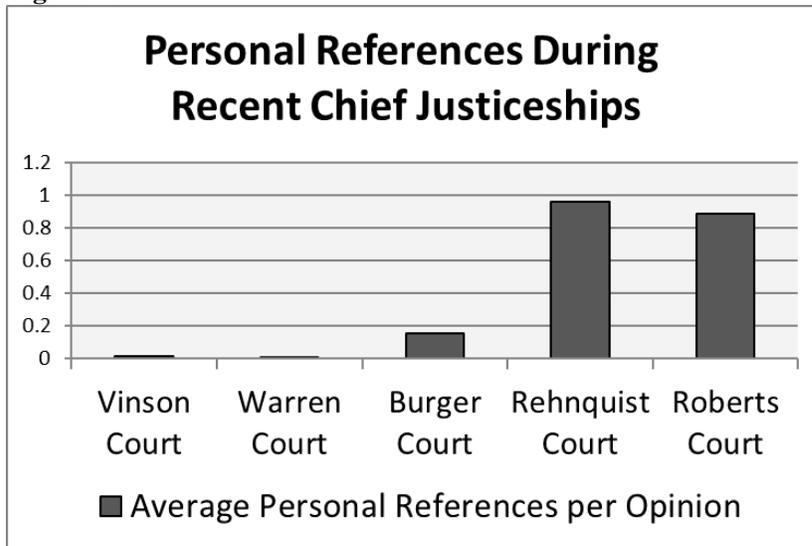


Figure 2.

