



11-2020

The Tyranny of Their Mirrors: Social Backgrounds and Variations in Conservative Judicial Philosophies

Andrew Millman
Fordham University

Follow this and additional works at: <https://research.library.fordham.edu/fulr>

 Part of the [Legal History Commons](#), [Legal Profession Commons](#), [Legal Studies Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Andrew Millman, *The Tyranny of Their Mirrors: Social Backgrounds and Variations in Conservative Judicial Philosophies*, 2 Fordham Undergrad. L. Rev. (2020).

Available at: <https://research.library.fordham.edu/fulr/vol2/iss1/1>

This Note is brought to you for free and open access by the Journals at Fordham Research Commons. It has been accepted for inclusion in Fordham Undergraduate Law Review by an authorized editor of Fordham Research Commons. For more information, please contact considine@fordham.edu, bkilee@fordham.edu.

ARTICLE

**“THE TYRANNY OF THEIR MIRRORS”: SOCIAL BACKGROUNDS
AND VARIATIONS IN CONSERVATIVE JUDICIAL PHILOSOPHIES**

*Andrew Millman**

This Article seeks to examine and compare the judicial behaviors of the five conservative justices on the Supreme Court, especially John Roberts and Neil Gorsuch, through the lens of their social backgrounds and opinion-writing and -joining patterns. The research for this Article focused on the frequency with which all nine justices on the high court joined each other’s opinions and were joined by each other justice, as well as a control group of three earlier Supreme Court terms for comparison. This is the best indicator of whether justices are in alignment on a case, not just on the outcome but also the reasoning behind the outcome. I will lay out four hypotheses relating to either Roberts or Gorsuch and how their social backgrounds influence their jurisprudence in ways that deviate from the expected and then use this research to confirm or reject those hypotheses. In doing so, this project seeks to shed light on a set of Supreme Court justices, especially among the conservative bloc, whose votes seem increasingly harder to predict. As seen in recent terms, there is no longer a single usual swing vote, as there might have been in the past, but at least two conservative justices who are liable to side with liberals on certain cases. This Article seeks to determine on what issues and in what circumstances those unexpected votes occur.

I.	INTRODUCTION.....	2
II.	BOSTOCK V. CLAYTON COUNTY AS A FRAME.....	4
	A. Hypotheses.....	9
III.	CLARENCE THOMAS COUNTERARGUMENT.....	10
IV.	PRIOR RESEARCH & CONTRIBUTION TO ACADEMIC LITERATURE.....	12
V.	METHODOLOGY.....	15
VI.	RESEARCH FINDINGS.....	16

¹* B.A. Candidate for Political Science (major), English (minor), and American Studies (minor), Fordham College at Rose Hill, Class of 2021. This Article would not be possible without the support of the Editorial Board of the Fordham Undergraduate Law Review, with special thanks to Reeve Churchill (Executive Articles Editor) and Tyler Raciti (Editor-in-Chief), who gave direction, guidance, and editing assistance for this Article. I would also like to thank Professor Robert Hume for his advice and mentorship throughout this project. In addition, I must thank CNN Supreme Court reporter Joan Biskupic, whose book, *The Chief*, provided the initial inspiration for this project.

2	<i>THE TYRANNY OF THEIR MIRRORS</i>	[Vol. 2
	<i>A. Opinion-Joining Patterns, October Terms (2006-2008)</i>	17
	<i>B. Opinion Joining Patterns, October Terms (2017-2019)</i>	18
VII.	RESEARCH ANALYSIS.....	19
	<i>A. Neil Gorsuch’s Opinions, by Issue Group</i>	21
	<i>B. John Roberts’ Opinions, by Issue Group</i>	22
VIII.	CONCLUSION.....	22

I. INTRODUCTION

With several recent unexpected outcomes, the Supreme Court has become more difficult than ever to decipher. One method, the Social Background Theory (SBT) of Judicial Behavior states that a judge’s social background characteristics can influence their decisions in ways that cannot be inferred through an assessment of ideology alone (the Attitudinal Model). For example, previous research² has shown that Black and women judges are more likely to rule in favor of plaintiffs in race and gender discrimination cases, respectively, which can be explained through each group’s lived experiences related to those issues. The theory works best when it is applied to specific circumstances, not broadly. It would be erroneous, for example, to assume that a judge of color is likely liberal in their judicial outlook simply because most Americans of color vote in favor of Democratic candidates over Republicans.

Today, the SBT can offer unique insights into the judicial behavior of conservative justices on the Supreme Court, who are not often the subjects of this theory’s analysis. While decisions at the Supreme Court are often to the right of American society overall, Republican-appointed justices have not uniformly voted for conservative causes as their nominators may have expected. Justice David Souter, an appointee of Republican George H.W. Bush, is perhaps the clearest example of this.³ The court has also traditionally had a so-called “swing vote.”⁴ For many years, Justice Sandra Day O’Connor, an appointee of Republican Ronald Reagan, occupied this position until her retirement when another Reagan appointee, Anthony Kennedy, took over the “swing vote” position — after Samuel Alito joined the Court — often deciding some of the most contentious, often 5-4 decisions, as he did in

² See Susan B. Haire & Laura P. Moyer, *Diversity Matters: Judicial Policy Making in the U.S. Court of Appeals* (1 ed. 2015).

³ See John Fliter, *The Jurisprudential Evolution Of Justice David Souter*, 26 *Southeastern Political Review*, 725-754 (2008).

⁴ See Peter K. Enns & Patrick C. Wolfarth, *The Swing Justice*, 75 *The Journal of Politics*, (2013).

Planned Parenthood v. Casey (1992)⁵ and *Obergefell v. Hodges* (2015).⁶ Kennedy was not always the deciding vote in 5-4 cases, a notable exception being John Roberts in *NFIB v. Sebelius* (2012),⁷ but he occupied this position most of the time and this perception was near-universal during his tenure.

When Justice Kennedy retired in 2018, Brett Kavanaugh was nominated to replace him on the high court. The confirmation was contentious, not only because Kavanaugh's appointment (like Alito's before him) represented a shift on the court from a swing vote to a perceived reliable conservative,⁸ but because of Dr. Christine Blasey Ford's credible allegations of sexual misconduct against now-Justice Kavanaugh. In the two terms with Kavanaugh on the Court, the fissures in the conservative bloc have been on full display.⁹ There is no longer a single reliable conservative swing vote to potentially side with liberals. Now, it could be John Roberts¹⁰ or Neil Gorsuch¹¹ or maybe even Kavanaugh¹² and the determining factor is which issue area each case falls into, not a simple left-right binary. The Social Background is an ideal lens for this situation and can yield some limited but important insights into the dynamics and inner-workings of the nation's highest court, despite the relative homogeneity of the current bench.

Seven of nine justices are white, six are men, eight were Appeals Court judges, all but one are Catholic or Jewish (and the lone Protestant, Gorsuch, is Catholic educated), all attended Ivy League law schools and seven attended Ivy League schools as undergraduates as well, all are now above the age of fifty (at a time when generational divides are steeper than ever), all but one spent a majority of their pre-SCOTUS lives east of the Mississippi River, and so on.

⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833.

⁶ See *Obergefell v. Hodges*, 576 U.S. 644.

⁷ See *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519.

⁸ See Kevin Cope, *Exactly how conservative are the judges on Trump's short list for the Supreme Court? Take a look at this one chart*, 2018, The Washington Post, <https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/07/exactly-how-conservative-are-the-judges-on-trumps-short-list-for-the-supreme-court-take-a-look-at-this-one-chart/>.

⁹ See Mark Sherman, *Supreme Court Divided in 1st Big Abortion Case of Trump Era*, 2020, AP NEWS, <https://apnews.com/719de432f53c9c9f53fc28b7191103ce>.

¹⁰ See Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, 2020, The New York Times, <https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html>.

¹¹ See Mark Joseph Stern, *How Neil Gorsuch Became the Supreme Court's Most Unpredictable Justice*, 2020, Slate Magazine, <https://slate.com/news-and-politics/2020/07/neil-gorsuch-supreme-court-swing-vote.html>.

¹² See Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, 2019, FiveThirtyEight, <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/>.

Some greater contrasts exist within the ideological blocs. Elena Kagan's Executive Branch experience (as Solicitor General) sets her apart from her fellow liberals on the bench and she has been characterized as being generally more supportive of executive power than her liberal colleagues.¹³ Alito is the lone former prosecutor (a U.S. Attorney in New Jersey), which correlates with him being the justice on the court most in favor of the death penalty¹⁴ and often the toughest on defendants in criminal procedure cases (the latter will be shown later in this paper). Breyer's legislative experience as a Senate staffer, unique among the current justices, has also correlated with his favoring of the legislative branch in many inter-branch disputes; he has the lowest rate of overturning Congressional legislation of any justice between 1994 and 2005.¹⁵ These are just a few of the examples of how a justice's social backgrounds can influence their judicial philosophies.

II. *BOSTOCK V. CLAYTON COUNTY* AS A FRAME

Overall, this paper asserts that social background characteristics have a concentrated but limited effect on judicial behavior, not a wholesale extrapolation of a justice's ideology. This can be seen clearly in the three opinions resulting from the high court's recent *Bostock v. Clayton County* decision. The three opinions were Gorsuch's majority in favor of LGBTQ employment protections, and dissents from Alito and Kavanaugh opposing the expansion of Title VII of the 1965 Civil Rights Act (concerning "sex discrimination") to non-straight and non-cisgender people. The substance of the two dissents was nearly identical, but in tone, Kavanaugh's was much more polite and respectful than Alito's, in regard to the social minority group in question, the LGBTQ community. All three are conservative white cis-hetero men in their fifties or seventies, which public polling shows means that there is about a fifty-fifty shot they tolerate gays and lesbians but a much smaller possibility that they accept trans folks.¹⁶ Alito does not tolerate either group, as evidenced by the language of his dissent (discussed below), while Kavanaugh claims tolerance for the former (while opposing their rights) but not explicitly for the latter. Gorsuch is the anomaly here, because he supports the rights for the entire LGBTQ community, and this, I will argue, can be attributed to his western origins.

¹³ See Elena Kagan—*Executive Power*, 2010, SCOTUSblog, https://www.scotusblog.com/wp-content/uploads/2010/06/Kagan-issues_executive-power-June-27.pdf.

¹⁴ See Brianne J. Gorod, *Sam Alito: The Court's Most Consistent Conservative*, 126 Yale L. J. (2017).

¹⁵ See Paul Gerwitz & Chad Golder, *So Who Are the Activists?*, 2005, The New York Times, <https://www.nytimes.com/2005/07/06/opinion/so-who-are-the-activists.html>.

¹⁶ See polling data cited *infra* note 33.

These three opinions in *Bostock v. Clayton County*¹⁷ perhaps offer the best insights into how SBT can explain some of the surprising outcomes of the most recent term and fissures within the conservative bloc, particularly regarding the two dissents. Unlike Alito (New Jersey) and Kavanaugh (Maryland), Gorsuch hails from a state west of the Mississippi River, Colorado, a state within the Mountain West region. These states, while traditionally bedrocks of conservatism, also have a libertarian streak¹⁸ that runs through them, which is evident in Gorsuch's philosophy, particularly in this case. Where a traditional conservative opposes the creation of another protected class in employment law, Gorsuch believes an individual's right to employment should take precedence over the discriminatory views of their employers.

Perhaps even more fascinating, however, are the differences between Alito and Kavanaugh and how those differences manifest in their tonally-different dissents. Alito was born in the year 1950,¹⁹ while Kavanaugh came into this world in 1965,²⁰ a full fifteen years later. At the time of Stonewall, Alito was already in college and Kavanaugh was a toddler and, during the AIDS crisis, Alito was already a U.S. Attorney (1987),²¹ while Kavanaugh was still in school. These varied life experiences result in two very different perceptions of the LGBTQ community, as borne out by social science research and public opinion polling. According to a 2019 Pew Research Center poll,²² in which 61% of Americans responded that they approve of same-sex marriage,²³ 58% of Gen-Xers,²⁴ such as Kavanaugh and Gorsuch, were supportive, while 51% of Baby Boomers,²⁵ such as Alito, were supportive. Only 37% of all Republicans were supportive.²⁶

Alito's dissent is a fiery invective against "gender identity"²⁷ (his scare quotes), while Kavanaugh's dissent is mostly conciliatory and consensus-seeking, at least tonally, declaring "the court has previously stated and I fully

¹⁷ See *Bostock v. Clayton County*, 590 U.S. ____.

¹⁸ See Randall J. Stephens, *Review: Southern Elites, Western Libertarians and the Conservative Coalition*, 2020, The Washington Post, https://www.washingtonpost.com/outlook/southern-elites-western-libertarians-and-the-conservative-coalition/2020/04/17/f4352c1c-6d4d-11ea-b148-e4ce3fbd85b5_story.html.

¹⁹ See Samuel A. Alito, Jr., Oyez, https://www.oyez.org/justices/samuel_a_alito_jr.

²⁰ See Brett M. Kavanaugh, Oyez, https://www.oyez.org/justices/brett_m_kavanaugh.

²¹ See Samuel A. Alito, *supra* note 18.

²² See *Majority of Public Favors Same-Sex Marriage, but Divisions Persist*, 2019, Pew Research Center, <https://www.pewresearch.org/politics/2019/05/14/majority-of-public-favors-same-sex-marriage-but-divisions-persist/>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *Bostock*, *supra* note 17.

agree, that gay and lesbian American ‘cannot be treated social outcasts or as inferior in dignity and worth,’”²⁸ quoting retired Justice Anthony Kennedy’s decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,²⁹ which allowed anti-LGBTQ discrimination based on religious motivations. Kavanaugh’s principal argument that judges would be acting as legislators to expand Title VII protections on the basis of sexual orientation is tantamount to the dissent Alito makes (“there is only one word for what the Court has done today: legislation”).³⁰ The tone is different, but the underlying arguments are the same. Kavanaugh wants to stress that he himself isn’t discriminatory against gays and lesbians, but the law as written still is; Alito just says the same basic point more directly.

The Kavanaugh dissent is also notable for his omission of trans and gender non-conforming people to a footnote, writing “although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion’s legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.”³¹ Kavanaugh refrains from Alito’s over-dramatic punctuation around the term gender identity, but still it is hard not to see Kavanaugh’s relegation of transgender discrimination to a literal footnote in his opinions as anything other than an attempt to evade stating his less-conciliatory attitudes towards trans Americans. As CNN legal analyst and Supreme Court biographer Joan Biskupic noted this year, “Kavanaugh, in his writing, appears keenly aware of tenuous public opinion of him and ready to adopt a posture of conciliation with his colleagues as he tries to influence deliberations on cases”³² and that “his writing has suggested he does not want to appear to be a reflexive conservative vote.”³³ The word *appear* is the operative word here. During *June Medical Services v. Russo* deliberations, Kavanaugh similarly tried to appear conciliatory, according to Biskupic, but in the end “whatever ambivalences he began with, Kavanaugh returned in the end to publicly express his conservative convictions.”³⁴ This has been a consistent theme for Kavanaugh’s nascent tenure. As Biskupic describes Kavanaugh, he desperately wants to give the appearance that he is not a vindictive partisan he came off during his confirmation hearings, but at the same time, consistently reverts to his baseline conservative judicial

²⁸ *Id.*

²⁹ See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __.

³⁰ See *Bostock*, *supra* note 17.

³¹ *Id.*

³² See Joan Biskupic, *EXCLUSIVE: How Brett Kavanaugh tried to sidestep abortion and Trump financial docs cases*, 2020, CNN, <https://www.cnn.com/2020/07/29/politics/brett-kavanaugh-supreme-court-abortion-trump-documents/index.html>.

³³ *Id.*

³⁴ *Id.*

principles. His moderation is on tone, not jurisprudence, the latter of which is consistent with the views of a fifty-something-year-old conservative man.

Public opinion polling has shown a significant difference between how Baby Boomers (such as Alito) and Gen-Xers (such as Kavanaugh) view non-heterosexual people, but they are much more closely aligned in their generally negative attitudes towards people of trans experience. A 2017 public opinion poll from the Pew Research Center found that 55% of Boomers and 57% of Gen-Xers believed that gender was determined by sex assigned at birth,³⁵ while 43% and 41% believed that gender could be different from sex assigned at birth.³⁶ The difference between the two generations is within the margin of error for the poll (2.4%), but it's interesting to note that Boomers are slightly more accepting of trans people than Gen-Xers, which belies the notion that younger generations are always more accepting marginalized peoples. Comparatively, 49% of Millennials say gender is determine by sex assigned at birth,³⁷ slightly less than the 50% of that generation who say gender can be different than sex assigned at birth³⁸ (as Generation Z was not included in this survey, Millennials were the youngest generation polled). Furthermore, according to a 2019 YouGov poll, 32% of Republicans believe employers should be able to fire someone for being transgender,³⁹ while only 18% of them believe that employers should be able to fire someone for being gay,⁴⁰ showing that many Republicans separate their views on the LGBTQ and TGNCNB communities.

Gorsuch belongs to the same generation as Kavanaugh (Gen X), but he wrote the majority opinion in *Bostock* in favor of the expansion of LGBTQ rights, which was especially notable for its inclusion of transgender Americans. The public opinion polling cited above would suggest that someone of Gorsuch's age, especially a registered Republican, would not hold views that are favorable to trans people.

The explanation for this, like in the case of other individual rights cases, is that Gorsuch's Mountain Western origins give him a more libertarian-tinted outlook on such issues than his fellow conservatives, all of whom were born and raised or spent the majority of their lives in the eastern half of the

³⁵ See Anna Brown, *Republicans, Democrats have starkly different views on transgender issues*, 2017, Pew Research Center, <https://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Kathy Frankovic, *American views of transgender people: the impact of politics, personal contact, and religion*, 2019, YouGov, <https://today.yougov.com/topics/politics/articles-reports/2019/10/11/american-views-transgender-people-poll>.

⁴⁰ *Id.*

country. According to a 2006 poll from the Pew Research Center, when identifying Americans by ideological categories, 22% of respondents were from the western region of the country,⁴¹ but 32% of Americans who were identified as having libertarian beliefs were from that region,⁴² the only region to have a higher percentage of libertarians than their share of the overall population. The Northeast, where Justices Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh originated, was 19% of the overall survey, but 15% of the libertarians⁴³ (Breyer was born and educated in the Bay Area, but spent his professional life on the East Coast). The Midwest, where Chief Justice Roberts was born and raised, was 24% of the overall survey, but 22% of the libertarians.⁴⁴ The South, where Justice Thomas was born and raised, was represented as 35% of the survey's respondents, but just 31% of its libertarians.⁴⁵ A Cato Institute report from the same time period declared that "there's little doubt that the libertarian vote is as strong in the Mountain West as anywhere."⁴⁶ In "Man of the West: Goldwater's Reflection in the Oasis of Frontier Conservatism," Sean P. Cunningham traces the political history of the American West's libertarian streak, as identified with longtime Arizona Senator Barry Goldwater.⁴⁷

The justices themselves appear to have taken note of Gorsuch's novelty in this respect on the bench. During an April 2017 oral argument, Justice Gorsuch intervened to correct Chief Justice Roberts on which numerical highways run through Montana and Wyoming, respectively.⁴⁸ Roberts responded, in a joking manner, "There you go. It's that geographical diversity."⁴⁹ This also alludes to the two justices' frequent disagreements with each other. Despite being the two most likely conservatives to side with the liberal justices, they relatively rarely join each other's opinions (as demonstrated by the below research). Roberts and Gorsuch's backgrounds are very similar, it should be noted, except in terms of geographic origin.

A. Hypotheses

⁴¹ See Tom Rosintiel, *In Search of Ideologues in America*, 2006, Pew Research Center, <https://www.pewresearch.org/2006/04/10/in-search-of-ideologues-in-america/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See David Boaz & David Kirby, *The Libertarian Vote*, Policy Analysis, 580 Cato Institute (2006).

⁴⁷ See Sean P. Cunningham, *Man of the West: Goldwater's Reflection in the Oasis of Frontier Conservatism*, 61 *Journal of Arizona History* 79-88 (2020).

⁴⁸ See Joan Biskupic, *Gorsuch v. Roberts: The rookie takes on the chief*, 2017, CNN, <https://www.cnn.com/2017/10/08/politics/neil-gorsuch-john-roberts-rivalry/index.html>.

⁴⁹ *Id.*

While *Bostock* provides a framework for this paper, four hypotheses will be tested through empirical research to affirm that social background characteristics have concentrated but limited effects on the judicial behavior of particular justices. These hypotheses will focus on Roberts and Gorsuch, as their behavior has the potential for the biggest impact on the court's overall jurisprudence as the two most likely swing votes.

I argue that Justice Gorsuch's distinctly libertarian outlook, compared to the more conventional conservative jurisprudence of the fellow justices in Gorsuch's ideological block, makes him the Court's likely swing vote on individual rights cases. When studying the justices' opinion-writing and joining patterns, I categorized cases within three groups: individual rights, economic issues, and government powers. For a libertarian, the latter two issue groups align with standard conservative jurisprudence (both a libertarian and a conservative are in favor of minimal government intervention in the economic sphere and limited government in general), but the former issue group, individual rights, libertarians will often align with the liberal orthodoxy, albeit primarily in final decision and not always in the underlying reasoning.

Cunningham also described how the libertarian and westerner Goldwater "nurtured relationships with Indigenous peoples across the region,"⁵⁰ a reflection how many white American westerners have had much more direct and consistent contact with Indigenous peoples than those in the country's other regions and this has led to a sympathy, even among western conservatives and libertarians, that is not as prevalent in those of other regional variations of that same ideology. This tendency can also be found in Neil Gorsuch and it separates him from his conservative colleagues, as demonstrated in the recent *McGirt v. Oklahoma* case.⁵¹ *McGirt* wasn't an anomaly for Gorsuch, but typical of his jurisprudence as it relates to Indigenous rights.

Roberts is not a western-reared libertarian like Gorsuch and the two do not often agree with each other, especially for members of the same ideological blocs. Still, Roberts has cast the deciding vote in several important cases with this composition of justices. I am not the first to proffer that Roberts as Chief Justice has made him more concerned with institutionalism and the high court's reputation than the other justices. This shows itself, during this current administration, in cases that fundamentally come down the government's exercise of its powers. I argue these are the cases where Roberts is the likely swing vote.

⁵⁰ See Cunningham, *supra* note 47, at 80.

⁵¹ See *McGirt v. Oklahoma*, 591 U.S. ___.

An interesting development while researching the opinion patterns of the current Supreme Court justices was just how often John Roberts and Elena Kagan join each other's opinions, at unusually high levels for justices of opposing ideological blocs. One possible explanation for this is the two justices' shared "managerial mindset."⁵² As Chief Justice, Roberts has had to work to manage many opinionated personalities in his tenure. In much the same way, as dean of Harvard Law School, Kagan had to do much of the same work. These experiences, coupled with their centrist leanings and institutional affinities, dispose both to compromise and coalition-building in a way that other justices simply are not.

III. THE CLARENCE THOMAS COUNTERARGUMENT

The obvious counterargument to the SBT, even a limited application, is Associate Justice Clarence Thomas, who frequently votes against expansions of voting and civil rights, but this is in fact the exception that proves the rule. African Americans, like all demographic groups in the U.S. and globally, are not wholly homogenous in their political thinking,⁵³ although they are frequently treated as such in our politics. Because over 90% of African Americans consistently vote for the Democratic candidates according to exit polling,⁵⁴ an ideological uniformity is often assumed by mainstream political thought without much further evidence. The two major political parties are flawed avatars of ideology for the citizenry as a whole, but particularly ill-suited when discussing people of color, especially Black Americans. It's almost silly to think that only ten percent of African Americans hold conservative views. There is a much stronger diversity of thought among people of color than can be inferred through simply looking at their electoral patterns.

Black conservatism is a fully-formed political ideology that has existed in this country for as long as there have been black people on this continent. The clearest historical example of this is the debate between the conservative Booker T. Washington and progressive W.E.B. DuBois.⁵⁵ The key difference

⁵² See Katy Tynan, *Do You Have a Manager's Mindset?*, 2015, Harvard Business Review, <https://hbr.org/2015/10/do-you-have-a-managers-mindset>.

⁵³ See Barnor Hesse & Juliet Hooker, *On Black Political Thought inside Global Black Protest*, 2017, 116 *The South Atlantic Quarterly* 443, https://www.researchgate.net/publication/319131447_Introduction_On_Black_Political_Thought_inside_Global_Black_Protest.

⁵⁴ See Timothy J. Hoffman, *The Civil Rights Realignment: How Race Dominates Presidential Elections*, 2015, 17 *Political Analysis*, <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1006&context=pa>.

⁵⁵ See Ta-Nehisi Coates, *We Were Eight Years in Power*, 20 (2017).

between the conservatism of Washington (and Thomas⁵⁶) and the (white) mainstream conservatism is the acknowledgement of white supremacy. It's not that Washington didn't think white supremacy existed (he very much did), but he believed that black people could not rely on a majority-white government to uplift the black community; Washington believed that black people could only rely on themselves and their communities.⁵⁷ As Ta-Nehisi Coates noted in a profile of Bill Cosby in 2007,⁵⁸ this intellectual lineage can be traced to the contemporary period as well, particularly with Cosby's infamous "Pound Cake" speech (I'm not ignorant of the other glaring similarity between Cosby and Thomas). Coates argued later that Cosby was a proponent of "a race-based black conservatism that had no real home in America's left-right politics, but deep roots in the black community."⁵⁹ Even more recently, on the Pusha T song "What would Meek Do," rapper Kanye West explained this ideology more succinctly, "if you ain't driving while black, do they stop you? Will MAGA hats let me slide like a drive-thru?"⁶⁰ West's embrace of Trumpism follows the intellectual tradition of Thomas and Cosby that Black people are the ones that need to change, not society (in his 2011 song "New Day," West raps "I might even make [my son] be Republican, so everybody know he loves white people"⁶¹). Unlike most white conservatives, each acknowledges the existence of white supremacy, but the difference between them and mainstream black political thought is how they decide to respond to that system. The Black conservative and nationalist tradition, which Thomas follows, "assumes that racism and white supremacy is ineradicable in America"⁶² and this, coupled with a "belief in black self-determination,"⁶³ "pushed Thomas down the road to ultra-conservatism,"⁶⁴ according to political theorist Corey Robin. He is not like his fellow conservative justices who oppose government remedies to racial injustice based on faulty assumptions about race relations but he opposes government intervention because he profoundly believes "that it's impossible to remedy these injustices, he also believes that the acts of paternalism end up

⁵⁶ See Sean Illing, *The Enigma of Supreme Court Justice Clarence Thomas*, 2019, Vox, <https://www.vox.com/policy-and-politics/2019/10/15/20893737/clarence-thomas-supreme-court-corey-robin>.

⁵⁷ See Mark Bauerlein, *Booker T. Washington and W.E.B. Du Bois: The Origins of a Bitter Intellectual Battle*, 46 *Journal of Blacks in Higher Education*, 106-114 (Winter 2004/2005).

⁵⁸ See Coates, *supra* note 55, at 13.

⁵⁹ *Id.* at 11.

⁶⁰ See Kanye West, *What Would Meek Do?*, Ye. Def Jam Recordings, 2018.

⁶¹ See Kanye West & Jay-Z., *New Day*, Watch the Throne, Def Jam Recordings, 2011.

⁶² See Illing, *supra* note 56.

⁶³ *Id.*

⁶⁴ *Id.*

perpetuating the injustices,”⁶⁵ according to Robin. As Robin notes, Thomas was “very active as a younger man in leftist black nationalist movements”⁶⁶ during his college years in the late sixties and early seventies, starting student groups and participating in protests. Robin asserts that Thomas’s “black nationalist assumptions remain with him as he’s making that right turn”⁶⁷ during the 1970s and remain with him today. While Black conservatives such as Thomas, Cosby, and West are most certainly in the minority among African Americans, it doesn’t mean they are alone. However, this argument will not be empirically tested through this project because it exists beyond its scope, as no other justice ascribes to Thomas’s thinking on this so it would not show up in opinion-joining patterns.

IV. PRIOR RESEARCH & CONTRIBUTION TO ACADEMIC LITERATURE

This research project originated from a reading of CNN Supreme Court reporter Joan Biskupic’s masterful biography *The Chief: The Life and Turbulent Times of Chief Justice John Roberts*, which drew a connection between many aspects of Roberts’ personal history and his later jurisprudence.⁶⁸ Of particular note, Roberts grew up in a homogenously-white, red-lined neighborhood in Indiana⁶⁹ and Biskupic asserts that this would play a large influence on his later thinking when it came to cases involving race, in which he asserted that the United States had moved beyond the need to address race consciously in public policy.⁷⁰ It was easier for him to believe America is now a post-racial society when for much of his life his interaction with people of color was minimal. In the *Shelby v. Holder* case, Roberts declared “Our country has changed and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”⁷¹ He notably declared “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” in *Parents Involved v. Seattle*.⁷² This causation was central in the chapter “Divided by Race” of Joan Biskupic’s biography of the Chief Justice. As Biskupic noted, Long Beach, Indiana

⁶⁵ See Illing, *supra* note 56.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Joan Biskupic, *The CHIEF: The Life and Turbulent Times of Chief Justice John Roberts* (2019).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *Shelby County v. Holder*, 570 U.S. 529.

⁷² See *Parents Involved in Community Schools v. Seattle School District no. 1*, 551 U.S. 701.

(Roberts's childhood home) once advertised that "all residents are Caucasian Gentiles," albeit this was decades before Roberts' birth.⁷³ At the time of Roberts' childhood, Biskupic noted, "the region was one of the most segregated areas of the nation"⁷⁴ and the schools he attended were also largely homogenous.⁷⁵ While this connection has already been discussed, it provided the template for the formulation of my own hypotheses.

Aside from his homogenous upbringing, Roberts also grew up in a privileged environment not reflective of America as a whole. His father, Jack, was a senior executive at a steel company.⁷⁶ As noted in previous studies, Roberts and the Court he leads have had a "pro-business" orientation, even more than previous courts.⁷⁷ As Biskupic and others have noted, this background could have been instrumental in the later development of Roberts' jurisprudence.⁷⁸ This conservative, business-oriented worldview can be seen in his adult life as well. In remarks at a 2013 commencement ceremony for his high school alma mater, Roberts insisted that "the slogan 'press on' has solved and will always solve the problems of the human race."⁷⁹ As Biskupic notes, it is much easier to believe that to be the case when one is born into the advantages that Roberts was born into and shielded from evidence to the contrary during his formative years. Overlapping both of these experiences, Jack Roberts was an executive at Bethlehem Steel, a company repeatedly embroiled in racial discrimination lawsuits during the future Chief Justice's adolescence, with some suits involving steel plants the elder Roberts had managed.⁸⁰ This was probably the first significant, noticeable impact that the federal judiciary had on the Roberts family, from whose perspective it could have easily been seen as unnecessary government interference in private enterprise. These experiences could have cumulatively shaped Roberts' early opinions during his formative years on the government's role in the market and the value of racial anti-discrimination legislation.

⁷³ See Biskupic, *supra* note 68, at 23.

⁷⁴ See Biskupic, *supra* note 68, at 24.

⁷⁵ *Id.*

⁷⁶ See Todd S. Purdum et. al., *Court Nominee's Life is Rooted in Faith and Respect for Law*, 2005, The New York Times, <https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html>.

⁷⁷ See Cornell W. Clayton & J. Mitchell Pickerill, *The Roberts Court and Economic Issues in an Era of Polarization*, 67 Case Western Reserve L. R. (2017).

⁷⁸ See Biskupic, *supra* note 68.

⁷⁹ See John Roberts, *La Lumiere Commencement 2013—Chief Justice John Roberts*, 2013 YouTube, <https://www.youtube.com/watch?v=KeEofJsH82w>.

⁸⁰ See Biskupic, *supra* note 68, at 30.

As Roberts and Neil Gorsuch have emerged as the two most frequent swing votes in the recent term (2019),⁸¹ these two are focal points for this Note. Previous academic scholarship has focused on a diverse array of social background characteristics to test for any influence these might have on judicial behavior, such as prior career experience as a prosecutor,⁸² circuit court judge,⁸³ as well as race and gender (as mentioned above), region of origin⁸⁴ and birth order have been found to have a concrete effect.⁸⁵ These previous studies helped to guide this project in its early formation.

This Article in many senses attempts to subvert the original meaning of SBT, which was originally and continues to be used to explain the judicial behavior of judges who do not fit the norm of who we as a society think of judges to be — white, male, Christian, cis, straight, privileged, etc. — but, this project attempts to turn this theory onto the judges who completely embody all or most of the characteristics I just listed, the five Republican appointees currently on the Supreme Court.

As James Baldwin wrote in his 1962 essay, “Letter from a Region in My Mind” (italization mine):

A vast amount of the energy that goes into what we call the Negro problem is produced by the white man’s profound desire not to be judged by those who are not white, not to be seen as he is, and at the same time a vast amount of the white anguish is rooted in the white man’s equally profound need to be seen as he is, to be released from *the tyranny of his mirror*.⁸⁶

This Article seeks to take Baldwin’s logic and apply it to those above-mentioned justices, all of whom in some way or another are trapped in the tyranny of their mirrors. Simply because a characteristic is the norm does not mean it has no influence on their judicial behaviors; often, it is in fact the complete opposite case.

V. METHODOLOGY

⁸¹ See Thomson-DeVeaux, *supra* note 12.

⁸² See Rob Robinson, *Does Prosecutorial Experience ‘Balance Out’ a Judge’s Liberal Tendencies?*, 32 *The Justice System Journal* (2011).

⁸³ See Lee Epstein et. al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 *University of Penn. L. R.* 833-880 (2009).

⁸⁴ See Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986*, 43 *The Western Political Quarterly* 317 (1990).

⁸⁵ See Kevin T. McGuire, *Birth Order, Preferences, and Norms on the U.S. Supreme Court*, 49, 4 *Law & Society Review* 945-972 (2015).

⁸⁶ See James Baldwin, *Letter from a Region in My Mind*, 95 (1963).

An analysis of the opinions written and joined by each Supreme Court justice was determined to be the best way to understand the personal preferences of each justices, much more so than a standard evaluation of their up-or-down votes. In any given case, a justice has several options, writing or joining the majority opinion, writing or joining a concurring opinion, writing or joining a concurrence/dissent, or writing or joining a dissenting opinion. Typically, this presents justices with a range of options for expressing their personal attitudes in regard to each case, much more so than the binary vote.

For this Article, I gathered data from the three most recent terms (2017-19), which covers Gorsuch's three complete terms and Kavanaugh's two, as well as a control sample of three terms during a stable period earlier in the Roberts Court (2006-08). I collected data on each opinion written by a justice for the period (mentioned above and then looked to see how often each other justice joined them out of available opportunities. I then broke these results down by three issue areas (individual rights, economic issues, and federal powers), based on the previously-existing Supreme Court Database Codebook,⁸⁷ to give a better understanding of correlation between a justice's specific social background characteristics and cases belonging to an issue area. To test other hypotheses, I broke them down into more specific categories. The SCDC has some 260 issue classifications, grouped into twelve issues areas. I further combined these into three issue groups: individual rights (criminal procedure, civil rights, 1st Amendment, due process, and privacy), economic issues (attorneys, unions, and economic activity), and government powers (judicial power, federalism, interstate relations, federal taxation, and miscellaneous). I also disincluded when a justice joined another's opinion, but also wrote their own (for example, writing a concurrence and joining the majority), because the choice to write one's own opinion indicates a difference of opinion beyond the final result with the other justices.

VI. RESEARCH FINDINGS

In Tables 1 and 2, the results of my research are summarized, detailing how often each justice joined and was joined by each other justice, both in terms of raw number of opinions and in percentages out of possible cases (example, in Table 1, Roberts wrote 44 opinions and was joined by John Paul Stevens for 9 of those, or 20.5% of possible cases):

⁸⁷ See Sarah Benesh et. al., *Supreme Court Database Code Book*, 2019, The Supreme Court Database, Washington University Law.

A. Table 1: Opinion-Joining Patterns, October Terms 2006-2008⁸⁸

Justice	Ops	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	RBG	Breyer	Alito
Roberts	44	X	9 20.5%	24 54.5%	22 50%	10 22.7%	24 54.5%	9 20.5%	11 25%	27 61.4%
Stevens	92	9 9.8%	X	6 6.5%	16* 17.6%	35 38%	4 4.3%	43 46.7%	25* 27.5%	8 8.7%
Scalia	75	28 37.3%	9 12%	X	22 29.3%	15 20%	45 60%	13 17.3%	12 16%	28 37.3%
Kennedy	40	16 40%	11 27.5%	10 25%	X	12 30%	9 22.5%	15 37.5%	16 40%	18 45%
Souter	54	20 37%	26 48.1%	20 37%	20 37%	X	13 24.1%	32 59.3%	26 48.1%	20 37%
Thomas	69	26 37.7%	11 15.9%	33 47.8%	21 30.4%	13 18.8%	X	15 21.7%	14 20.3%	26 37.7%
Ginsburg	51	17 33.3%	22 43.1%	16 31.4%	21 41.2%	26 51%	16 31.4%	X	22 43.1%	15 29.4%
Breyer	71	21 29.6%	28 39.4%	11 15.5%	21 29.6%	31 43.7%	12 16.9%	30 42.3%	X	19 26.7%
Alito	56	28* 50.9%	15 26.8%	25 44.6%	27 48.2%	16 28.6%	28 50%	15 26.8%	16* 29.1%	X

⁸⁸ Author's Research.

B. Table 2: Opinion Joining Patterns, October Terms 2017-2019⁸⁹

Justice	Ops	Rob.	Kenn.	Thomas	RBG	Breyer	Alito	Soto.	Kagan	Gors.	Kav.
Rob.	32	X	7* 63.6%	8 25%	13 40.6%	13 40.6%	17 53.1%	14 43.8%	16 50%	14 43.8%	11*** 57.9%
Kenn.	13*	5* 38.5%	X	0* 0.0%	4* 30.8%	4* 30.8%	4* 30.8%	3* 23.1%	4* 30.8%	4* 30.8%	X
Thomas	90	15 16.7%	6* 19.4%	X	10 11.1%	12 13.3%	27 30%	7 7.8%	13 14.4%	33 36.7%	12*** 24.5%
RBG	42	17 40.5%	5* 33.3%	11 26.2%	X	24 57.1%	13 31%	28 66.7%	26 61.9%	12 28.6%	9*** 15.3%
Breyer	52	17 32.7%	5* 26.3%	7 13.5%	38 73.1%	X	8 15.4%	29 55.8%	31 59.6%	13** 26%	6*** 18.8%
Alito	59	27 45.8%	8* 53.3%	17 28.8%	6 10.2%	11 18.6%	X	6 10.2%	13 22%	26 44.1%	17*** 28.8%
Soto.	63	19 30.2%	6* 26.1%	13 20.6%	33 52.4%	27 42.9%	11 17.5%	X	27** 43.5%	19 30.2%	11*** 27.5%
Kagan	31	16 51.6%	4* 44.4%	11 35.5%	23 74.2%	22 71%	13 41.9%	17 54.8%	X	12 38.7%	11*** 27.5%
Gors.	52	20 38.5%	7* 41.2%	23 44.2%	15 28.8%	14 26.9%	20 38.5%	14 26.9%	15 28.8%	X	6*** 18.8%
Kav.	28*	13*** 46.4%	X	9*** 32.1%	7*** 25%	7*** 25%	12*** 42.9%	7*** 25%	7*** 25%	11*** 39.3%	X

The findings from Table 1 confirm the consensus view of Supreme Court observers that Justice Kennedy functioned as the “swing vote” for most cases.⁹⁰ The findings from Table 2 are a bit murkier, but two conservative justices and one liberal justice stand out. Chief Justice Roberts was joined more frequently by each liberal justice than he was by Justice Thomas.

⁸⁹ Author’s Research.

⁹⁰ See Colin Dwyer, *A Brief History Of Anthony Kennedy’s Swing Vote - And The Landmark Cases It Swayed*, 2018, NPR, <https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed>.

Roberts also joined Kagan more than any other justice, including all the conservatives on the bench. He also joined Justice Ginsburg, Breyer, and Sotomayor more frequently than Thomas and Ginsburg more frequently than Gorsuch. It should also be noted that Roberts and Gorsuch are not frequent joiners of each other's opinions, relative to the rest of the conservative ideological bloc.

Justice Gorsuch was joined by all four liberals more frequently than he was joined by Justice Kavanaugh, by margins between 8 to 9 cases (8.1% to 10%), although this is a smaller sample size than the rest of the justices, owing to Kavanaugh having only been on the bench for the two most recent terms. However, Gorsuch also joined three of the four liberal justices more frequently than Kavanaugh (Kagan being the exception).

The average percentages for each conservative justice joining a liberal justice are 38.75% for Roberts, 30.86% for Gorsuch, 28.50% for Kavanaugh, 26.45% for Alito, 23.95% for Thomas. For context, these conservatives join a fellow conservative justice by averages of 41.13% for Alito, 40.98% for Gorsuch, 36.85% for Roberts, 32.53% for Thomas, and 32.50% for Kavanaugh. The differentials between how much a conservative justice joined other conservatives on average and liberals on average -1.90% for Roberts, 4.00% for Kavanaugh, 8.58% for Thomas, 10.12% for Gorsuch, 14.68% for Alito. In this analysis, Roberts stands out as an anomaly among conservatives, as he on average joins liberal justices more than conservatives.

As mentioned previously, Justice Elena Kagan and Chief Justice John Roberts join each other's opinions with an unusual frequency. Kagan joins Roberts for 50% of his opinions, while the other three liberals on average join Roberts for 41.67% of his opinions. Roberts joins Kagan for 51.6% of her opinions, while the other four conservatives join 42.13% of her opinions. It should be noted that Kavanaugh joined Kagan 52.4% of the time, slightly more than Roberts, but this was only over two terms, not three as was the case with Roberts, and Kagan only joined 25% of Kavanaugh's opinions, which is in line with the other liberals. Also, Kavanaugh joins Roberts more than any other justice (57.9% of cases), which is more than Alito (53.1%), who was the most-frequent joiner of Roberts during the Early Roberts Court (61.4%). During 2006-2009, Roberts joined Alito 50.9% of the time and was his most-frequent joiner, but in 2017-2020, Roberts' joining percentage for Alito declined to 45.8%, although this was still the highest of any justice.

Aside from their overall frequencies in joining each other's opinions, a greater understanding of where justices deviate from their expected behavior can be gleaned from a dissection of their joining frequencies by the issue group. A breakdown of joining frequencies by issue group are discussed below for Chief Justice Roberts and Justice Gorsuch.

VII. RESEARCH ANALYSIS

This research shows that *McGirt* wasn't an anomaly. Gorsuch has a consistent record of rulings in favor of Indigenous rights, dating back to his days in the lower rungs of the federal judiciary.⁹¹ Once on the high court, Gorsuch continued his support for Indigenous rights. In *Washington State Department of Licensing v. Cougar Den* (2018), Gorsuch declared that “it is the least we [the U.S. Government] can do”⁹² to uphold the “modest promises”⁹³ of the government’s historic treaties with Indigenous tribes. Both the tone of Gorsuch’s decision and the judgement itself are remarkably different from the standard conservative views towards Indigenous rights, both in tone and effect. There have been five major indigenous rights cases during Gorsuch’s tenure. He has written the majority in two (*Upper Skagit Tribe v. Lundgren* and *McGirt v. Oklahoma*), joined a liberal justice for another two (*WA Department of Licensing v. Cougar Den* and *Herrera v. Wyoming*) and joined a *per curiam* opinion for a fifth (*Washington v. U.S.*). All five times he voted for the expansion of indigenous rights and in three cases his was the pivotal vote in a 5-4 decision. Justice Gorsuch’s affinity for Indigenous rights, unusual among the conservative bloc, is a clear and hyper-specific example of the broader dissimilarities between Gorsuch and the rest of the conservative bloc. When Supreme Court cases are divided into three issue groups (individual rights, economic, and government powers), a libertarian would side mostly with a stereotypical conservative judge, especially on the latter two, but would be more likely to side with the average liberal on individual rights cases. As demonstrated in Tables 4 and 5, Gorsuch is much more likely to defect from the conservative orthodoxy and side with the liberal bloc on cases categorized in Issue Group 1 (individual rights), while much more likely to tow the conservative line on cases categorized as Issue Groups 2 (economic) and 3 (government powers). Of the twenty individual rights cases that Gorsuch penned over the last three terms, the liberal justices joined those opinions on average 30.0% of the time, while the conservatives averaged joining those opinions a mere 25.5% of the time. For the thirty-two Gorsuch opinions not related to individual rights, the liberals joined those opinions 27.35% on average, while the conservatives on average joined 40.3% of those opinions. The liberal justices joined Gorsuch’s opinions relating to economics and government powers slightly less

⁹¹ See Rob Capriccioso, *Tribes Support Neil Gorsuch Supreme Court Nod as Democrats Plan Filibuster*, 2017, National Congress of American Indians, https://indiancountrytoday.com/archive/tribes-support-neil-gorsuch-supreme-court-nod-as-democrats-plan-filibuster-x1kmrvBna0SgPN_hd_OGWQ.

⁹² See *Washington State Department of Licensing v. Cougar Den, Inc.*, 586 U.S. __.

⁹³ *Id.*

frequently than they did for his opinions relating to individual rights, while conservatives were much less likely (by a factor of 14.8%) to join Gorsuch in individual rights cases than in other cases. This is consistent with a libertarian outlook, which objects to government intervention in the economic sphere and advocates for government powers to be as limited as possible, but also holds individual rights to be paramount. Issue groups 2 and 3 converge with conventional conservative jurisprudence, but with Issue Group 1, Gorsuch has a distinct overlap with the jurisprudence of his liberal colleagues.

*A. Tables 3 & 4: Neil Gorsuch's Opinions, by Issue Group*⁹⁴

Issue Group	Gorsuch	Roberts	Thomas	RBG	Breyer	Alito	Soto.	Kagan	Kav.
1	20	6 30.0%	6 30.0%	6 30.0%	6 30.0%	7 35.0%	6 30.0%	6 30.0%	1* 7.1%
2+3	32	14 43.8%	17 53.1%	9 28.1%	8 25.0%	13 40.6%	8 25.0%	10 31.3%	5* 23.8%

Issue Group	Gorsuch	Average Liberal	Average Conservative
1	20	30.0%	25.5%
2+3	32	27.35%	40.3%

With Chief Justice Roberts, a similar pattern emerges as it relates to cases relating to government powers, the third issue group. There have been several important cases relating to the powers of the government, especially concerning the federal executive branch, during the era of the Trump presidency, from *Commerce v. New York* (2018) to *Trump v. Vance* (2020) to *DHS v. Regents of U-C* (2020). In the cases just mentioned, as well several other notable and landmark cases, the Chief Justice had sided with the liberal bloc against all or most of his conservative colleagues. In Table 6, a liberal justice is more likely to join Roberts on a government powers case than an individual rights or economic case by at least 16%. Half of the conservatives (Alito and Kavanaugh) saw significant decreases in their joining frequencies from issue groups 1 and 2 to issue group 3, while the other two conservatives (Thomas and Gorsuch) recorded only marginal increases of 3.5% and 2.5%, respectively, between the two clusters. When averaged out, as shown in Table

⁹⁴ Author's Research.

7, Roberts is joined by a conservative justice 47.6% of the time for individual rights and economic cases, while joined only 40.3% of the time by the conservative bloc for government powers cases.

*B. Tables 5 & 6: John Roberts' Opinions, by Issue Group*⁹⁵

Area	Roberts	Thomas	RBG	Breyer	Alito	Soto.	Kagan	Gorsuch	Kavan.
1+2	21	5 23.8%	7 33.3%	7 33.3%	12 57.1%	8 38.1%	10 47.6%	9 42.9%	8* 66.7%
3	11	3 27.3%	6 54.5%	6 54.5%	5 45.4%	7 63.6%	7 63.6%	5 45.4%	3* 42.9%

Issue Area	Roberts	Average Liberal	Average Conservative
1+2	21	38.1%	47.6%
3	11	59.1%	40.3%

This pattern can be seen clearly in *June Medical Services v. Russo*. As Biskupic noted, “four years earlier, Roberts had voted to uphold a nearly identical physician regulation from Texas. In fact, in his 15 years on the high court, Roberts had never cast a vote to invalidate an abortion regulation.”⁹⁶ The obvious difference between *June Medical* and *Whole Women's Health v. Hellerstedt* (2016) is that Justice Kennedy, a moderate on abortion rights, was no longer on the court and Roberts' vote was now consequential. While *June Medical* would be classified by the code I used as an individual rights case, the three category framework serves as a good stand-in for similar cases more broadly relating to laws or decisions enacted by conservative federal or state officials that are deeply unpopular with the general public, as is the case in the DACA and Trump tax returns cases. There is little evidence in the rest of Roberts' social background or his judicial record that his sincere policy preferences match his votes in these cases. However, in both his record and public comments, Roberts identifies the institution of the Supreme Court as of paramount importance to him and central to his role as chief justice. With this in mind, it would be unlikely that Roberts would have voted the same way in many of these cases had he been an Associate Justice instead of the Chief Justice. This experience and position gives Roberts an extra consideration in his judicial behavior that has a clear effect on his votes.

⁹⁵ Author's Research.

⁹⁶ See Biskupic, *supra* note 30.

VIII. CONCLUSION

At the beginning of this paper, I laid out four principal hypotheses. First, Justice Neil Gorsuch's western origins make his jurisprudence more libertarian in nature than his conservative colleagues. Secondly, I argue that Justice Gorsuch's libertarian streak would be especially evident as it relates to LGBTQ issues and Indigenous rights. Third, I asserted that Chief Justice John Roberts and Associate Justice Elena Kagan, through their similar "managerial mindsets," find in each other partners in compromise. Fourth, Roberts' institutional concerns, as Chief Justice, outweigh his personal policy preferences for certain contentious cases, especially as it relates to government powers. An analysis of the opinion-writing and -joining patterns of Supreme Court justices from the 2017 to 2019 terms, as well as using the 2005-2008 Court as a control group, shows that these hypotheses were largely correct in their assessment of the court as this current juncture.

As demonstrated by the joining frequencies of other justices to Justice Gorsuch's opinions, Gorsuch is more likely to gain liberal support for his opinions concerning individual rights, while conservatives are more likely to support his opinions relating to economic activity and government powers. This is consistent with a libertarian, rather than a traditional conservative, jurisprudence. He is especially sympathetic to the plight of indigenous peoples as well. Both of these tendencies in Gorsuch's jurisprudence have their origin, based on the available evidence, in the justice's Mountain Western origins.

Roberts, on the other hand, is more conservative on individual rights cases, as well as economic issues, but in recent terms, has often sided with the liberals on government powers cases. There is nothing in Roberts' pre-SCOTUS social background or jurisprudence during previous administrations that would indicate he would hold these positions, but his role as a Chief Justice, and that position's necessary concern with the institution as well as the rulings, makes him more disposed to compromise on these types of cases than the other conservatives. This can be seen clearly in Roberts' relationship with Justice Elena Kagan. As shown in Table 2, Roberts is joined by Kagan for 50.0% of his opinions, while Kagan is joined by Roberts for 51.6% of her opinions. By significant margins, each is the other justice's most frequent joiner from the opposing ideological bloc. Kagan even joins Roberts more frequently than two of his fellow conservatives (Thomas and Gorsuch). While Chief Justice Roberts is considered to be on the center-right and Justice Kagan is considered to be on the center-left of the court, such higher joining frequencies must mean that something else is at play. I would posit that that variable is their experiences as managers; their common life experiences have molded each to be more consensus-seeking and

compromising than their colleagues, from both ideological blocs, who do not share similar managerial experiences.

As shown with the case studies of Neil Gorsuch and John Roberts, the Social Background Theory can show the significant impact on judicial behavior that certain social background characteristics can yield. However, these effects are limited and specific. Gorsuch's western origins moderate his judicial behavior specifically on individual rights cases, but not even on all individual rights cases (he still sides with the conservatives with high frequency on cases involving religious liberty and abortion). Roberts' institutional and managerial disposition leads him to moderate on contentious cases, especially those involving government power. Therefore, Roberts and Gorsuch are not uniform swing votes, but each will be likely swing votes in specific circumstances relating to certain issues. Notably, neither can be observed to be a possible swing vote on economic cases (and, according to this research, no other conservative has emerged as a moderate on economic issues), which may take on added importance if the Supreme Court's current composition, especially its conservative bloc, remains intact during the next Democratic administration as they will likely pursue a progressive economic agenda that would include government intervention in private enterprise that both Gorsuch and Roberts would find objectionable.

* * *