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## “They’ve Got...Personality!” Goals, Traits, and Behavior on the U.S. Supreme Court

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“They’ve Got...Personality!”  
Goals, Traits, and Behavior on the U.S. Supreme Court

Matthew E.K. Hall\*

In June 2015, the *New York Times* summarized the Supreme Court’s most recent term in overtly ideological language: “The Supreme Court under Chief Justice John G. Roberts Jr. has been a conservative court. But even conservative courts have liberal terms—and the term that ended Monday leaned left.”<sup>1</sup> Such ideological descriptions of the justices’ behavior are common and often informative; the justices are almost certainly motivated, at least partially, by their personal policy preferences.<sup>2</sup> However, this emphasis on the justices’ ideological preferences and the ideological content of their rulings may obscure other important motivations behind the justices’ choices. The justices themselves suggest that a variety of personal characteristics are critical for understanding their behavior. For example, Roberts offered this explanation for John Marshall’s success as Chief Justice: “It was the force of his personality. That lack of pretense, that openness and general trustworthiness, were very important personality traits in Marshall’s success.”<sup>3</sup>

Several recent studies emphasize non-ideological motivations that may drive the justices’ behavior; these studies suggest that, in order to understand what justices do, we must understand what they want.<sup>4</sup> I start from the premise that justices are motivated by multiple goals—indeed,

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1. Alicia Parlapiano, Adam Liptak, & Jeremy Bowers, *The Roberts Courts Surprising Move Leftward*, N.Y. TIMES (June 29, 2015), <https://www.nytimes.com/interactive/2015/06/23/upshot/the-roberts-courts-surprising-move-leftward.html>.

2. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

3. Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC (Jan. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559>.

4. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* (2013). See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

by many of the same goals that motivate most people in their daily lives. In fact, like most people justices probably care about so many goals that no one list could possibly be comprehensive. Nonetheless, scholars have identified several goals that are shared by a substantial number of Supreme Court justices and have a significant impact on their professional behavior.<sup>5</sup>

Most prior research assumes that all justices have the same goals—as if every justice cared about the same things and placed the same weight on each of those priorities. A few scholars acknowledge that judges differ in the values they attach to different goals,<sup>6</sup> but these scholars usually ignore varying goal preferences for fear “[t]he enterprise would devolve into ‘what-the-judge-ate-for-breakfast’ accounts, with goals ‘so numerous and relating to outcomes in so complex a manner as to obscure the actual basis for decision.’”<sup>7</sup> “The importance of individual differences,” these scholars argue, “is dampened by . . . group constraints” and superseded by “institutional preferences.”<sup>8</sup> Disregard for varying goal preferences is particularly pernicious in studies of the Supreme Court, which often assume that the justices’ institutional context renders non-policy goals irrelevant. But, of course, the assumption that all Supreme Court justices pursue identical goals is unrealistic. Just as all humans vary in their personal values and motivations,<sup>9</sup> different justices likely prioritize different goals. Any comprehensive model of judicial behavior should account for these individual differences in order to understand the choices judges make.

Accordingly, I adopt a “psychoeconomic” approach, which posits that Supreme Court justices have heterogeneous goal preferences; that is, justices vary in their propensity to seek different goals. Understanding

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5. Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11 (2013).

6. Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS. 157, 188 (1998); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630 (1994).

7. Ronald A. Cass, *Judging Norms and Incentives of Retrospective Decision-Making*, 75 BOSTON U. L. REV. 941, 944 (1994).

8. Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS. 157, 172–73 (1998).

9. Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630 (1994).

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the justices’ behavior requires an examination of the individual characteristics that make them different from one another. I call this approach psychoeconomic because it incorporates the assumptions of both economic and psychological models. Humans are generally rational actors who make strategic choices in pursuit of their goals; however, humans also vary in their individual characteristics, and these varying characteristics prompt some individuals to prefer certain goals over others.<sup>10</sup> Judges are no different—they generally pursue their goals, but they vary in their goal preferences. Therefore, in order to establish *what they want*, we must first determine *who they are*. This means understanding “their enduring emotional, interpersonal, experiential, attitudinal, and motivational styles”; in other words, we must understand their personalities.<sup>11</sup>

#### THE BIG FIVE

The study of personality as it relates to political phenomena has enjoyed a revival in recent years.<sup>12</sup> Most of this research employs the five-factor model, also called the Big Five.<sup>13</sup> The Big Five are based on extensive studies in which subjects rate how well adjectives or phrases describe themselves or others. Researchers then use factor analysis to identify the broad trait domains that underlie these responses.<sup>14</sup> Most analyses identify five predominant traits: conscientiousness, extraversion, agreeableness, neuroticism (or its inverse, emotional stability), and

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10. See, e.g., DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* (1976).

11. Robert R. McCrae & Oliver P. John, *An Introduction to the Five-Factor Model and Its Applications*, 60 J. PERSONALITY 175 (1992).

12. See Lee Epstein & Tonja Jacoby, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L & SOC. SCI. 341 (2010).

13. McCrae & John, *supra* note 11, at 175.

14. John R. Alford et al., *Are Political Orientations Genetically Transmitted?*, 99 AM. POL. SCI. REV. 153 (2005); Alan S. Gerber et al., *Personality and Political Attitudes: Relationships Across Issue Domains and Political Contexts*, 104 AM. POL. SCI. REV. 111 (2010); Alan S. Gerber et al., *The Big Five Personality Traits in the Political Arena*, 14 ANN. REV. POL. SCI. 265 (2011) [hereinafter *Big Five Personality Traits*]; Jeffery J. Mondak et al., *Personality and Civic Engagement: An Integrative Framework for the Study of Trait Effects on Political Behavior*, 104 AM. POL. SCI. REV. 85 (2010); JEFFREY J. MONDAK, *PERSONALITY AND THE FOUNDATIONS OF POLITICAL BEHAVIOR* (2010); Jeffery J. Mondak & Karen D. Halperin, *A Framework for the Study of Personality and Political Behaviour*, 38 BRIT. J. POL. SCI. 335 (2008).

openness or intellect. The five-factor model has been replicated in a variety of languages and contexts,<sup>15</sup> and the literature suggests the Big Five are heritable<sup>16</sup> and stable throughout life, especially after the age of fifty.<sup>17</sup>

Social scientists have employed the Big Five to study the behavior of political elites, including state legislators and members of Congress,<sup>18</sup> and numerous historical and biographical accounts emphasize the importance of judges' personalities.<sup>19</sup> Therefore, the systematic study of judges' personality traits may be particularly useful for explaining their behavior. More specifically, personality traits can help explain judges' behavior by reflecting their goal preferences. The Big Five describe individuals' global personalities; that is, "their enduring emotional, interpersonal, experiential, attitudinal, and motivational styles."<sup>20</sup> These "dispositional traits are believed to be stable aspects of individuals that shape how they respond to the vast array of stimuli they encounter in the world."<sup>21</sup> In other words, personality traits indicate an individual's characteristic style of interacting with their environment—their perceptions, their attitudes, and their preferences with respect to particular goals.<sup>22</sup> By describing the Big Five as goal preferences, I focus on their "motivational properties"—"Talkative people want to talk, sympathetic

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15. *Big Five Personality Traits*, *supra* note 14, at 266.

16. *Big Five Personality Traits*, *supra* note 14, at 266.

17. Avshalom Caspi et al., *Personality Development: Stability and Change*, 56 ANN. REV. PSYCHOLOGY 453, 466–67 (2005).

18. See Bryce J. Dietrich et al., *Personality and Legislative Politics: The Big Five Trait Dimensions Among U.S. State Legislators*, 33 POL. PSYCHOL. 195 (2010); Adam J. Ramey et al., *More than a Feeling: Personality and Congressional Behavior* (Aug. 22, 2014) (unpublished paper) (SSRN No. 2405140).

19. E.g., JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2007); HARRY N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

20. McCrae & John, *supra* note 11, at 175.

21. *Big Five Personality Traits*, *supra* note 14, at 266.

22. Almlund et al. adopt a similar interpretation of personality traits: "Since personality psychologists define traits as 'relatively' stable, person-specific determinants of behavior, preferences are the natural counterpart of these traits in economics." Mathilde Almlund et al., *Personality Psychology and Economics* 65 (Inst. for the Study of Labor (IZA), Working Paper No. 5500, 2011). Consistent with this view, personality traits have been found to moderate how individuals weigh costs and benefits as they make political decisions. Alan S. Gerber et al., *Big Five Personality Traits and Responses to Persuasive Appeals: Results from Voter Turnout Experiments*, 35 POL. BEHAV. 687 (2013).

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people want to help; ergo, at least some traits have motivational properties.”<sup>23</sup> Consequently, the Big Five can serve as valid proxies for an individual’s goal preferences. Personality traits reflect the relative weight that individuals place on different goals.<sup>24</sup> Therefore, we can use a judge’s personality traits to predict their behavior in seeking out various judicial goals. In the following sections, I describe five primary judicial goals: duty, social interaction, social harmony, loss aversion, and intellectual stimulation. I then describe the Big Five factors that reflect the justices’ preferences for each of these goals: conscientiousness, extraversion, agreeableness, neuroticism, and openness, respectively.

#### CONSCIENTIOUSNESS: A PREFERENCE FOR DUTY

First, Supreme Court justices strive to fulfill their professional duties, which encompass two distinct sets of obligations: the duty to follow the law, and the duty to fulfill job-related tasks.

**Duty vs. Policy Preferences.** Upon their confirmation to the bench, Supreme Court justices swear an oath to uphold the Constitution and the laws of the United States. Their professional duty obviously includes an obligation to fulfill that oath. Moreover, though technically not required, the vast majority of Supreme Court justices attended law school, practiced law, and served as a judge in a lower court before their appointment to the High Court. Consequently, most justices have been thoroughly socialized into the legal culture for decades.<sup>25</sup> This culture strongly promotes the rule of law and the understanding that all lawyers and judges have an ethical obligation to follow legal norms.<sup>26</sup> To be sure, lawyers and judges often

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23. McCrae & John, *supra* note 11 at 201. Other approaches to personality (as well as some popular conceptions of personality) depict traits as simple behavioral tendencies; however, the motivational approach is consistent with these alternative views. *See ibid.* It facilitates the incorporation of traits into economic choice models. *See Almlund et al., supra* note 22.

24. The integration of psychological theories into economic choice models is increasingly popular in political science, especially among proponents of behavioral economics. *See, e.g.,* Rick K. Wilson, *The Behavioral Economics to Political Science*, 14 ANN. REV. POL. SCI. 201 (2011); Almlund et al., *supra* note 22, at 14. In contrast, I follow studies of personality psychology, biology, and neuroscience, which establish that stable and heritable personality traits influence individual behavior. *See Almlund et al., supra* note 22, at 14.

25. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 21–25 (1983).

26. BAUM, *supra* note 4.

disagree about what it means to follow legal norms. But few lawyers or judges would deny that they have a professional and ethical obligation to comply with standard legal norms and follow the law, as they best understand it.<sup>27</sup>

However, the justices' desire to fulfill their duty often lies in tension with another goal: their desire to influence policy. Justices generally prefer to support policies that are consistent with their own ideological preferences,<sup>28</sup> but scholars have long recognized that the influence of judges' preferences is "tempered by what they think they ought to do," and judges vary in the extent to which they are willing to comply with legal norms.<sup>29</sup> Thus, the degree to which justices try to align policy with their preferences should be moderated by their normative beliefs about how judges ought to make decisions. In other words, justices must balance their dutifulness against their policy goals.

**Duty vs. Effort Aversion.** A justice's duty also includes assisting in the Court's practical, day-to-day functioning. At the simplest level, an appointment to the Supreme Court is a job, and like any other job, it comes with professional responsibilities. Supreme Court justices undoubtedly feel a sense of duty to fulfill these basic obligations by showing up for work, attending oral arguments and conferences, reading briefs and case materials, and writing their share of opinions; indeed, they were selected, in part, based on their track record of competently performing their judicial duties.<sup>30</sup> Failure to meet these obligations may incur a variety of negative consequences. At the extreme, a justice who seriously neglects his or her responsibilities could theoretically face the threat of impeachment.<sup>31</sup> More minor delinquency could damage a

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27. Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 323 (2007); Barton L. Bartels, *The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court*, 103 AM. POL. SCI. REV. 474, 475 (2009); Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 370 (2008).

28. SEGAL & SPAETH, *supra* note 2; C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890 (2008).

29. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 9 (1983).

30. EPSTEIN, LANDES & POSNER, *supra* note 4, at 35.

31. Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 51 L. & SOC. REV. 83, 97 (1996).

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justice’s reputation or hinder the justice’s ability to pursue other goals. In contrast, reliably performing these tasks in an efficient and effective manner can yield valuable benefits, including influence, prestige, and respect both on and off the Court.<sup>32</sup> Accordingly, justices generally strive to fulfill their basic judicial duties.

However, judges undoubtedly gain satisfaction through nonjudicial activities, such as enjoying leisure, spending time with friends and family, and earning outside income.<sup>33</sup> Judges may also gain satisfaction by engaging in other extra-judicial activities that further enhance their prestige or celebrity, such as writing, teaching, or lecturing.<sup>34</sup> Therefore, judges generally seek to minimize the effort (both time and energy) they devote to judicial work in order to maximize these external satisfactions.<sup>35</sup> But this desire to avoid job-related effort obviously lies in tension with their duty to fulfill their work obligations. Accordingly, justices must also balance their dutifulness against their effort aversion.

**Duty and Conscientiousness.** Different justices balance these goals in different ways. The degree to which individuals prioritize duty is reflected by the Big Five factor of *conscientiousness*, which is defined as “[t]he degree to which a person is willing to comply with conventional rules, norms, and standards.”<sup>36</sup> This broad trait incorporates several interrelated facets, which can be grouped into two “aspects.” The first aspect is called dutifulness or orderliness, and reflects whether an

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32. See Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everyone Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 108–09 (2002); Gulati & McCauliff, *supra* note 6, at 165.

33. Macey, *supra* note 9, at 630; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV., 1, 2 (1993); Epstein & Knight, *supra* note 5, at 19.

34. Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 U. CHI. L. SCH. ROUNDTABLE 205, 213 (2000); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 36 (1994); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000); BAUM, *supra* note 4, at 3.

35. EPSTEIN, LANDES & POSNER, *supra* note 4, at 103. The authors assume that “the large size and quality of staff relative to the number of Justices and the Court’s light caseload in recent years imply that a Justice’s leisure activities and nonjudicial work activities are not significantly constrained by his or her judicial duties.” In contrast, I empirically test whether some justices minimize their job-related effort.

36. ROBERT HOGAN & JOYCE HOGAN, HOGAN PERSONALITY INVENTORY MANUAL 9 (3d ed. 2007).

individual is “governed by conscience.” The second aspect is called industriousness or achievement striving, and reflects whether an individual is diligent and thorough.<sup>37</sup> In other words, highly conscientious individuals tend to be both responsible and hardworking, and these two characteristics are found together so frequently that they constitute aspects of the same broad trait.

Therefore, a justice’s conscientiousness should reflect the degree to which that justice prioritizes duty versus their policy preferences and effort aversion. Highly conscientious justices prioritize duty; therefore, they should tend to follow legal norms (because they are governed by conscience) and expend more effort in their judicial work (because they are industrious and achievement striving). In contrast, less conscientious justices should tend to follow their ideological biases and avoid expending effort. For example, Justice Scalia has been described as a “conscientious” and “hard-working” justice,<sup>38</sup> whose opinions are “carefully wrought” and “highly principled.”<sup>39</sup> And, not surprisingly, Justice Scalia has written a separate opinion in more cases than any other justice on the Roberts Court (24.6% of cases during his career<sup>40</sup>), demonstrating his willingness to expend effort in the course of his judicial duties.

#### EXTRAVERSION: A PREFERENCE FOR SOCIAL INTERACTION

Next, Supreme Court justices value social interaction, either for the sake of social stimulation or as a means to influence others.

**Social Interaction vs. Isolation.** Many scholars have recognized a judge’s “need to turn to others for social interaction.”<sup>41</sup> In fact,

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37. Colin G. DeYoung, Lena C. Quilty & Jordan B. Peterson, *Between Facets and Domains: Ten Aspects of the Big Five*, 93 J. PERSONALITY & SOC. PSYCHOL. 880, 881 (2007); Henry Moon, *The Two Faces of Conscientiousness: Duty and Achievement Striving in Escalation of Commitment Decisions*, 86 J. APPLIED PSYCHOL. 533, 535 (2001); McCrae & John, *supra* note 11, at 197.

38. Jane Morice, *Former Jones Day Colleague Remembers Scalia as Conscientious Lawyer with ‘Twinkle in his Eye,’* CLEVELAND.COM (Feb. 13, 2016), [http://www.cleveland.com/metro/index.ssf/2016/02/former\\_jones\\_day\\_managing\\_part.html](http://www.cleveland.com/metro/index.ssf/2016/02/former_jones_day_managing_part.html).

39. RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION 1 (2006).

40. All data reported in this manuscript were obtained from the Supreme Court Database. Harold J. Spaeth, Lee Epstein, Andrew Martin, Jeffrey Segal, Theodore J. Ruger & Sara C. Benesh, *2016 Supreme Court Database, Version 2016 Release 01*, <http://supremecourtdatabase.org>.

41. Burton Atkins et al., *Personality Theory and Judging: A Proposed Theory of Self Esteem and*

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socialization, including a sense of belonging, affiliation, and regular interaction, is one of the basic human needs.<sup>42</sup> The desire for social interaction is particularly relevant for judges because their career requires an unusual level of isolation and limited interaction with others.<sup>43</sup> Judges are expected to maintain a professional distance from lawyers and the parties in their courts in order to maintain objectivity. Often, the only peers with whom judges can freely and regularly interact are other judges. A job as a Supreme Court justice may be particularly isolating due to its elite status and the small number of justices of equal rank. Accordingly, many justices enjoy interacting with each other as part of their daily jobs.

However, social interactions may also come with costs. Interactions take up time and energy, which means they can distract justices from their judicial work and leisure time. Interactions may also cause stress or conflict. Some justices may actually prefer social isolation—in fact, the isolating nature of a judge’s job may have partially attracted them to a judicial career in the first place. Finally, the longer judges serve on the bench, the more they acclimate to social isolation,<sup>44</sup> and Supreme Court justices have generally had long judicial careers. Accordingly, the justices must balance their desire for social interaction against the possible benefits of isolation.

**Social Interaction vs. Dominance Aversion.** Supreme Court justices also value interaction with other justices because it enhances their own influence. Because the Court operates under majority rule, the justices’ capacity to influence legal and policy outcomes ultimately depends on their ability to build majority coalitions. Consequently, justices often strive to persuade, pressure, or otherwise influence each others’ behavior through questioning at oral argument, the conference discussion, or bargaining memos.<sup>45</sup> Repeated intra-Court interactions can also build

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*Judicial Policy-Making*, 2 L. & POL’Y Q. 181, 196 (1980); JOEL B. GROSSMAN & JOSEPH TANENHAUS, FRONTIERS OF JUDICIAL RESEARCH (1969).

42. A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 381-82 (1943); DAVID C. McCLELLAND, HUMAN MOTIVATION (1987).

43. Lenore Alpert et al., *Becoming a Judge: The Transition from Advocate to Arbiter*, 62 JUDICATURE 325, 331 (1979).

44. *Id.*

45. Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 L. & SOC’Y REV. 349, 350 (2005); James F. Spriggs II et al., *Bargaining on the U.S. Supreme Court:*

mature and balanced relationships, which facilitates consensus and coalition building.<sup>46</sup> Interactions also help justices acquire information about their colleagues' preferences, intentions, and plans,<sup>47</sup> and this information may aid the justices' ability to act strategically in order to advance their legal and policy goals.<sup>48</sup> Therefore, justices may also value social interaction as a means to influence one another. But, of course, influencing other justices through social interactions consumes valuable time and energy, and justices may prefer to conserve that effort for other tasks.<sup>49</sup> Intra-Court bargaining and debate may also hinder collegial relations if other justices feel unduly pressured; for example, when judges pressure each other (especially along ideological lines) it often leads to distrustfulness, stubbornness, and suboptimal outcomes.<sup>50</sup> Finally, striving to influence other justices may cause personal stress and frustration that could otherwise be avoided, and some justices may feel uncomfortable with assertive and dominant behavior. Accordingly, justices must balance the benefits of influencing other justices against the desire for dominance aversion.

**Social Interaction and Extraversion.** The degree to which individuals prioritize social interaction is reflected by the Big Five factor of *extraversion*, which is defined as “[t]he degree to which a person needs attention and social interaction.”<sup>51</sup> This trait also incorporates two “aspects.” The first is called sociability or enthusiasm, which reflects a person’s desire for affiliation and interaction with others; the second is called dominance or assertiveness, which indicates the degree to which an individual strives to influence others.<sup>52</sup> Highly extraverted justices prefer to prioritize social interaction; therefore, they should tend to engage with others (because they are sociable and gregarious) and dominate others (because they are active and assertive). Less extraverted justices should tend to isolate themselves and avoid dominant behavior.

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*Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485, 487 (1999).

46. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639 (2003).

47. Edwards, *supra* note 46, at 1661–62.

48. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 12–13 (1998).

49. EPSTEIN, LANDES & POSNER, *supra* note 4, at 31.

50. Edwards, *supra* note 46, at 1648–49.

51. Hogan and Hogan, *supra* note 36, at 95.

52. DeYoung et al., *supra* note 37, at 883; McCrae & John, *supra* note 11.

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For example, Justice Kagan has been called “a classic extrovert”<sup>53</sup> and, consistent with that appraisal, has received a higher percentage of majority opinions assignments from the chief justice during her career than any other justice on the Roberts Court (14.2% of all cases).

#### AGREEABLENESS: A PREFERENCE FOR SOCIAL HARMONY

Supreme Court justices also value social harmony with others. Human beings generally desire affection, warmth, and caring.<sup>54</sup> For justices, this desire manifests itself in two ways.

**Social Harmony vs. Individuality.** First, justices value harmonious relations with their colleagues on the bench. Regardless of how frequently the justices interact with their colleagues, they generally prefer that those interactions are warm and pleasant. Indeed, judges’ job satisfaction depends in large part on their ability to get along with their colleagues.<sup>55</sup> Accordingly, it is no surprise that judges value social harmony among their fellow justices and strive to maintain collegial relations with their peers on the bench.<sup>56</sup>

However, promoting social harmony on the Court often comes at considerable cost. Usually, the best way to get along with other justices is to prioritize the majority’s preferences and forgo one’s own personal goals and strategic opportunities.<sup>57</sup> In many situations, justices may prefer to incur collegiality costs rather than sacrifice their other goals.<sup>58</sup> Moreover, risk-acceptant judges who thrive in competitive environments may actually seek out conflict as a bargaining strategy.<sup>59</sup> Therefore,

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53. Dahlia Lithwick, *Her Honor*, N.Y. MAG. (Nov. 27, 2011), <http://nymag.com/news/politics/elena-kagan-2011-12/>.

54. Maslow, *supra* note 42, at 380–81.

55. EPSTEIN, LANDES & POSNER, *supra* note 4, at 31.

56. Edwards, *supra* note 46; 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, 908 (1987).

57. Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26, 26–27 (1991); Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 32 AM. J. POL. SCI. 362 (2001).

58. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011).

59. Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POLITICS 54, 60 (1990).

justices must weigh the benefits of social harmony against their sense of individuality.

**Social Harmony vs. Objectivity.** Justices may also value social harmony in the broader sense of promoting “norms of Right or Justice.”<sup>60</sup> Some justices may pursue these goals in an attempt to enhance their reputation among “elite reporters and elite law professors”<sup>61</sup> or even secure a place in history.<sup>62</sup> Others may be motivated by more selfless goals, such as promoting moral principles<sup>63</sup> or rights protection.<sup>64</sup> Either way, justices may sometimes make decisions in an effort to help people beyond their immediate social world, particularly disadvantaged members of society.

But even helping the disadvantaged comes at a price. Supreme Court justices are supposed to make decisions based on neutral principles of law, rather than their personal sympathies or their desire for popularity.<sup>65</sup> Actively promoting preferred policy outcomes (for example, those that promote social harmony) may incur reputational costs for judges.<sup>66</sup> Pursuing this goal might also undermine collegiality on the Court if social harmony takes on an ideological meaning (for example, liberal social values).<sup>67</sup> Promoting social welfare could even endanger a justice’s career; for example, years after the *Brown* decision, Southern highways were littered with signs that read “Impeach Earl Warren,” and dozens of congressmen signed the Southern Manifesto, which condemned Warren’s ruling in *Brown*.<sup>68</sup> Accordingly, justices must weigh their desire to promote social welfare against their professional obligation to maintain objectivity.

**Social Harmony and Agreeableness.** The degree to which individuals prioritize social harmony against their desire for individuality

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60. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957).

61. Schauer, *supra* note 34, at 630.

62. EPSTEIN, LANDES & POSNER, *supra* note 4, at 266.

63. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* (1985).

64. Schauer, *supra* note 34, at 627.

65. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–17 (1959).

66. Miceli & Cosgel, *supra* note 34, at 49.

67. Edwards, *supra* note 46, at 1646.

68. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 320 (2004); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 141 (2000).

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and objectivity is reflected by the Big Five factor of *agreeableness*, which is defined as “[t]he degree to which a person needs pleasant and harmonious relations with others.”<sup>69</sup> This trait can also be divided into two general “aspects”: politeness, meaning the degree to which a person is cooperative and tolerant, and compassion, which reflects “the more humane aspects of humanity—characteristics such as altruism, nurturance, caring, and emotional support.”<sup>70</sup> Highly agreeable justices prefer to prioritize social harmony; therefore, they should tend to cooperate with others because they value harmonious relations. They also show compassion toward those in need because they are caring and nurturing. In contrast, less agreeable justices should be less likely to be cooperative or compassionate. Chief Justice Roberts and Justice Kennedy both exemplify agreeableness. Roberts has been described as a “good-natured” justice with a reputation for “good humor” who “managed to excel without making enemies.”<sup>71</sup> Similarly, Kennedy is an “energetic, self-effacing and immensely polite man.”<sup>72</sup> Moreover, both of these agreeable justices have the lowest career dissent rates on the Court (12% and 9%, respectively).

#### NEUROTICISM: A PREFERENCE FOR LOSS AVERSION

Supreme Court justices, like all humans, tend to be loss averse. That is, for most people, “losses and disadvantages have greater impact on preferences than gains and advantages.”<sup>73</sup> Loss aversion causes justices to focus on negativity and avoid risks.

**Loss Aversion vs. Rationality.** First, loss aversion causes justices to focus on the negative aspects of experiences rather than the positive aspects, even in riskless choices. This focus on negativity causes individuals to fear loss more than an equal gain, prefer the current state

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69. Hogan & Hogan, *supra* note 36, at 9.

70. McCrae & John, *supra* note 11 at 196; DeYoung et al., *supra* note 37, at 885.

71. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 262–63, 335 (2007).

72. Robert Reinhold, *Man in the News; Restrained Pragmatist Anthony M. Kennedy*, N.Y. TIMES (Nov. 12, 1987), <http://www.nytimes.com/1987/11/12/us/man-in-the-news-restrained-pragmatist-anthony-m-kennedy.html?pagewanted=all>.

73. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice*, 106 Q.J. ECON. 1039 (1991).

of affairs to any change (status quo bias), and value objects they currently possess more than identical objects they do not possess (the endowment effect).<sup>74</sup> Of course, federal judges with life tenure and high fixed salaries are well insulated from many common losses, such as losing their job or receiving a pay cut. But they may, nonetheless, face other types of potential loss. As Judge John R. Brown of the Fifth Circuit explains, “[l]ifetime tenure insulates judges from anxiety over worldly cares for body and home and family. But it does not protect them from the unconscious urge for the approbation of their fellow men.”<sup>75</sup> In other words, because judges are insulated from many common forms of loss, they tend to focus on reputational and interpersonal forms of loss, such as the embarrassment, stress, and anxiety associated with criticism from their peers, academics, or the public.<sup>76</sup> Accordingly, justices generally strive to avoid these reputational and interpersonal losses. But loss aversion is an inherently irrational psychological phenomenon. Many decisions involve both gains and losses, and focusing primarily on losses often leads individuals to make irrational choices. Among Supreme Court justices, focusing on reputational losses may lead justices to undervalue the benefits of prominence. For example, authoring the opinion of the Court may involve considerable stress and criticism as other justices employ a “mixture of appeals, threats, and offers to compromise” in an attempt to influence the opinion.<sup>77</sup> Therefore, a loss averse justice may prefer to avoid majority opinion assignments. But these assignments also offer increased policy influence and prestige, and these benefits may outweigh the costs associated with the stress of leadership. Therefore, Supreme Court justices must weigh the costs of reputational and interpersonal losses against the benefits of attention-attracting activities.

**Loss Aversion vs. Risk Taking.** Second, loss aversion leads to a related human tendency called risk aversion.<sup>78</sup> When individuals decide whether to take a risk, they typically do so by weighing the potential

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74. *Id.* at 1042–43. JAMES MONTIER, BEHAVIOURAL INVESTING: A PRACTITIONERS GUIDE TO APPLYING BEHAVIOURAL FINANCE (2007).

75. John R. Brown, *Hail to the Chief: Hutcheson, the Judge*, 38 TEX. L. REV. 140, 145 (1959).

76. Schauer, *supra* note 34, at 630; Miceli & Cosgel, *supra* note 34, at 49

77. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 42 (1964).

78. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

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costs and benefits.<sup>79</sup> However, loss averse individuals tend to place greater weight on potential losses than on potential gains; in fact, one study suggests that loss aversion causes humans to weigh losses roughly twice as heavily as they do gains.<sup>80</sup> Therefore, even if a risk involves a greater potential gain than loss, a loss averse individual might place greater emphasis on the possible loss and, consequently, prefer to avoid the risk. In short, the general tendency toward loss aversion causes a general tendency towards risk aversion. Accordingly, justices generally strive to avoid situations that involve risk, especially risk to their reputations.

But, of course, risk taking is essential for justices to take advantage of potential opportunities, and many justices are happy to accept potential risks. In fact, justices often seek out activities that involve the risk of criticism or embarrassment in order to gain prominence, prestige, and celebrity.<sup>81</sup> For example, some justices seek out opportunities to speak in public, lecture in universities, publish academic articles, and author popular books.<sup>82</sup> Accordingly, justices must balance the potential benefits associated with risky behavior (such as seeking prominence) against the possible costs of these activities (such as negative attention).

**Loss Aversion and Neuroticism.** The degree to which individuals prioritize loss aversion relative to gains and potential gains is reflected by the Big Five factor of *neuroticism*, which is defined as “[t]he degree to which a person experiences the world as threatening and beyond his/her control.”<sup>83</sup> In other words, neuroticism reflects an individual’s “tendency to experience distress . . . [and] chronic negative effects.”<sup>84</sup> This trait can also be divided into two general “aspects.” The first aspect is called volatility, which reflects a person’s tendency to feel emotions that cause them to lose their composure and lash out, such as anger, irritability, and

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79. See Milton Friedman & Leonard J. Savage, *The Utility Analysis of Choices Involving Risks*, 56 J. POL. ECON. 279 (1948).

80. Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297, 310 (1992) (“for even chances to win and lose, a prospect will only be accepted if the gain is at least twice as large as the loss”).

81. Miceli & Cosgel, *supra* note 34, at 36; Schauer, *supra* note 34, at 630; BAUM, *supra* note 4, at 39–40.

82. EPSTEIN, LANDES & POSNER, *supra* note 4, at 37–38.

83. Hogan & Hogan, *supra* note 36 at 9.

84. McCrae & John, *supra* note 11, at 195.

mood instability. The second aspect is called withdrawal. Withdrawal reflects an individual's tendency to feel emotions that cause them to withdraw from activities, interactions, and risks, such as sadness, fear, doubt, and embarrassment.<sup>85</sup> Highly neurotic justices tend to prioritize loss aversion; therefore, they should tend to focus on costs and losses (because they are irritable and easily upset) and withdraw from interactions and risks (because they are anxious, fearful, and easily embarrassed). In contrast, less neurotic justices should focus on gains and seek out risky, but potentially beneficial, situations. For instance, Justice Sotomayor has been described as “withdrawn,” “listless,” and “plagued by her own self doubts” during her early life.<sup>86</sup> And, as one might expect, she has received a lower percentage of majority opinions assignments from the chief justice during her career when there is a minimum winning coalition than any other justice on the Roberts Court (10% of cases with a minimum majority coalition).

#### OPENNESS: A PREFERENCE FOR INTELLECTUAL STIMULATION

Finally, judges value intellectual stimulation from their jobs. By definition, most people prefer more interesting work over mundane tasks. Moreover, some judges enjoy the intrinsic pleasures associated with resolving legal disputes, such as writing opinions.<sup>87</sup> Therefore, Supreme Court justices may gain job satisfaction from intellectual variety and intellectual challenges in their jobs.

**Intellectual Stimulation vs. Consistency.** First, many judges value variety in their judicial work. Lower court judges are often required to hear numerous disputes on similar issues, which creates monotony and

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85. DeYoung et al., *supra* note 37, at 887, 894, and 896.

86. MEG GREENE, SONIA SOTOMAYOR: A BIOGRAPHY 21–37 (2012).

87. See Posner, *supra* note 33. Judge Posner acknowledges “the intrinsic pleasure of writing, for those who like to write, and of exercising and displaying analytical prowess or other intellectual gifts, for those who have them and want to use them” *Id.* at 14. Nonetheless, he “ignore[s] these and other additional sources of satisfaction in the work of a judge” under the premise that “they are not important to most judges, who are happy to cede opinion-writing to eager law clerks, believing . . . that the core judicial function is deciding, that is, voting, rather than articulating the grounds of decision.” *Id.* at 19. However, he offers no evidence or citation to support that claim. In contrast, I argue that many judges may appreciate intellectual stimulation.

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boredom.<sup>88</sup> In contrast, because the Supreme Court controls its own docket, the justices can strongly influence the variety of legal issues they hear, and they generally avoid mundane and routine disputes.<sup>89</sup> Those who generally value change and new experiences also tend to hold unconventional ideas and oppose conservative values.<sup>90</sup> Consequently, highly open individuals tend to promote liberal values.<sup>91</sup>

But pursuing variety and change also incurs significant costs. Hearing a wide variety of cases requires the justices to invest more time and energy into researching different statutes, precedents, and legal rules.<sup>92</sup> Therefore, judges may craft procedural rules in order to help avoid hearing cases about which they have little interest or expertise.<sup>93</sup> Additionally, trying to use the law as a tool to promote liberal values may conflict with a judge’s professional obligations.<sup>94</sup> Accordingly, justices must weigh their interest in variety and change against regularity and consistency.

**Intellectual Stimulation vs. Simplicity.** Second, judges undoubtedly find some cases more interesting than others and prefer to think, talk, and write about the cases they find especially intriguing.<sup>95</sup> Cases that reach the Supreme Court often involve interesting and controversial legal issues; in fact, the Court’s rules specifically state that the justices should consider whether a case poses an “important question of federal law.”<sup>96</sup> Thus, after gaining control over their own docket, the justices tended to hear more important and contentious legal controversies.<sup>97</sup>

Yet, even among those cases that reach the High Court, some cases are more interesting than others. Some Supreme Court cases attract numerous *amicus curie* briefs, inspire frequent questioning by the justices during

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88. John T. Wold, *Going Through the Motions: The Monotony of Appellate Court Decisionmaking*, 62 JUDICATURE 58, 64–65 (1978).

89. Epstein, Segal & Spaeth, *supra* note 57, at 364.

90. McCrae & John, *supra* note 11, at 198; Almlund et al., *supra* note 22, at 72.

91. *Big Five Personality Traits*, *supra* note 14, at 269.

92. Bainbridge & Gulati, *supra* note 32, at 113–14.

93. Macey, *supra* note 9, at 632; Gulati & McCauliff, *supra* note 8, at 158.

94. Wechsler, *supra* note 65, at 15–16.

95. *See, e.g.*, Gulati & McCauliff, *supra* note 8, at 189.

96. Rule 10 of the Rules of the Supreme Court of the United States.

97. Epstein, Segal & Spaeth, *supra* note 57, at 364.

oral argument, and are covered on the front page of major newspapers.<sup>98</sup> In contrast, other cases are of considerably less concern to interest groups, the justices, and the media. In fact, a small portion of the Court's docket consists of mandatory cases that the justices hear only because they are required to do so. Moreover, justices often develop particular interest and expertise in certain areas of law.<sup>99</sup> For example, "[s]ome [judges] enjoy complex tax and bankruptcy cases, while others abhor them."<sup>100</sup> Accordingly, cases that are interesting to one justice may not be interesting other justices. Supreme Court justices are especially likely to gain intellectual satisfaction from hearing cases related to those legal issues that interest them most.

However, resolving important and interesting cases also comes at considerable cost. Difficult intellectual challenges may take more time and energy to resolve, and the challenge may cause stress and anxiety.<sup>101</sup> Highly salient cases might also attract more attention from peers, academics, and the public and, therefore, pose the threat of negative attention.<sup>102</sup> Finally, the old legal adage, "hard cases make bad law,"<sup>103</sup> suggests that tackling the most difficult intellectual challenges may create undesirable precedents. Accordingly, simpler cases may offer better opportunities to develop clear and well-reasoned legal rules. Therefore, justices must weigh the desirability of tackling interesting intellectual challenges against the benefits of hearing simple and straightforward cases.

**Intellectual Stimulation and Openness.** The degree to which individuals prioritize intellectual stimulation is reflected by the Big Five factor of *openness/intellect*, which defined as is "[t]he degree to

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98. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 74 (2000); Paul J. Wahlbeck et al., *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 *American Politics Research* 488, 500 (1999); Ryan C. Black et al., *Toward an Actor-Based Measure of Supreme Court Case Salience: Information Seeking and Engagement During Oral Arguments*, 66 POL. RES. Q. 804, 805 (2013).

99. Black et al., *supra* note 98, at 804.

100. Gulati & McCauliff, *supra* note 8, at 188. See Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007).

101. Gulati & McCauliff, *supra* note 8, at 177.

102. Bainbridge & Gulati, *supra* note 32.

103. *Northern Securities Co. v. United States*, 193 U.S. 197, 364 (1904).

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which a person needs intellectual stimulation, change, and variety.”<sup>104</sup> As its name implies, this trait can also be divided into two general “aspects.” The openness aspect reflects the degree to which a person enjoys variety, change, and new experiences, while the intellect aspect reflects an individual’s interest in philosophical discussions, abstract ideas, and complex problems.<sup>105</sup> Highly open justices prefer to prioritize intellectual stimulation; therefore, they should tend to seek out new experiences and promote progressive ideas (because they value variety and change) and seek out intellectual challenges (because they enjoy abstract, philosophical discussions). In contrast, less open justices should be less likely to seek out variety, change, or intellectual complexity. For example, one of the most important changes Supreme Court justices can make is to formally alter one of the Court’s precedents. Justice Kagan, an “open-minded” and “progressive” academic who loves literature and the opera,<sup>106</sup> is the only justice who has never dissented from a majority opinion that formally altered a precedent.

#### A PSYCHOECONOMIC MODEL OF SUPREME COURT BEHAVIOR

In sum, Supreme Court justices maximize their job satisfaction by pursuing multiple goals, including duty, social interaction, social harmony, loss aversion, and intellectual stimulation. However, the value of these goals varies depending on the justices’ personality traits. Each of the Big Five factors reflects the justices’ preferences with respect to a specific judicial goal. Table 1 presents the Big Five factors, their definitions, and associated characteristics. The last column lists the specific preferences that are reflected by each factor.

Combining these theoretical expectations, a justice’s utility function with respect to job satisfaction ( $S$ ) can be formalized as follows:

$$S=f(DUT(c),SOC(e),HAR(a),LOS(n),INT(o)) \quad (1)$$

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104. Hogan & Hogan, *supra* note 36, at 9.

105. DeYoung et al., *supra* note 37, at 888; McCrae & John, *supra* note 11, at 197.

106. Sherl Gay Stolberg, Katharine Q. Seelye & Lisa W. Foderaromay, *A Climb Marked by Confidence and Canniness*, N.Y. TIMES (May 10, 2010), <http://www.nytimes.com/2010/05/10/us/politics/10kagan.html>.

*DUT* denotes the satisfaction a justice receives from dutifulness, which is a function of conscientiousness (*c*). *SOC* denotes satisfaction from social interactions, which depends on extraversion (*e*).

Table 1: The Big Five

Trait	Definition	Associated Characteristics	Goal Preference
Extraversion	The degree to which a person needs attention and social interaction.	Talkative, assertive, active, sociable, gregarious vs. quiet, reserved, shy	Social interaction
Agreeableness	The degree to which a person needs pleasant and harmonious relations with others.	Sympathetic, kind, friendly, cooperative, tolerant vs. fault-finding, cold, unfriendly	Social harmony
Conscientiousness	The degree to which a person is willing to comply with conventional rules, norms, and standards.	Organized, hardworking, achievement-striving, responsible vs. careless, disorderly, frivolous	Duty
Neuroticism	The degree to which a person experiences the world as threatening and beyond control.	Tense, anxious, emotional, nervous, embarrassed vs. stable, calm, contented	Loss aversion
Openness/intellect	The degree to which a person needs intellectual stimulation, change, and variety.	Imaginative, widely-interested, intelligent vs. commonplace simple, narrowly-interested	Intellectual stimulation

*Note.* Table reports definitions and associated characteristics for the Big Five factors. The last column reports the goal preference reflected by each factor.

*HAR* indicates satisfaction from social harmony, which is a function of agreeableness (*a*). *LOS* indicates satisfaction from loss aversion, which depends on neuroticism (*n*). Finally, *INT* denotes satisfaction from

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intellectual stimulation, which depends on openness (*o*).

Because Supreme Court justices make decisions in pursuit of multiple goals and their individual personality traits determine the relative importance of those goals, a comprehensive analysis of Supreme Court behavior must account for the judges’ personality traits. Future research on judicial behavior should develop valid and reliable measures of the justices’ personality traits and specific expectations regarding how those traits may influence specific behaviors on the Court. Only by considering the full range of individual differences across individual justices will we start to understand the complex nature of Supreme Court decisionmaking.