Death Drop: The Roberts Court, Legitimacy, and the Future of Democracy in the United States

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1. INTRODUCTION

It is no secret that political observers, activists, and actors on the left are highly critical of the Roberts Court. These criticisms have been persistent and consistent since John Roberts ascended to the role of Chief Justice in 2005, but the 2021 term put up a marquee for a new show, garnering pans among critics, who described it as “a blockbuster,” “polarizing,” “divisive,” and “controversial,” among other florid adjectives.[[2]](#footnote-3) The objections target both the substance of the Court’s efforts to remake constitutional law and its approaches to doing so. For left constitutional theorists coming from a purely legal background, the tenor of the objections is shifting from claims that the Roberts Court’s rulings are wrongheaded to claims that they are pushing the boundaries of legitimacy. Political science, on the other hand, has looked at public reactions to the Court and questioned whether it is losing diffuse support to an extent that threatens it. While these concerns are serious, they may not fully capture why or how the Roberts Court is problematic and possibly in trouble.

Analyzing the legitimacy of the Court is thorny. Limiting the question to one of whether the Court is properly applying appropriate interpretive methodologies or accepting the purely political stance that the law is what the Court claims it to be as long as the Court is not checked by the other branches are both unsatisfactory. And while the public’s perception of the Court is important, it cannot independently establish or destroy legitimacy. Rather, legitimacy rests in an analysis of the long project of constitutional development and a normative commitment to democracy. Attending to the past by integrating an analysis of cycles of constitutional development with queer theory may provide a more productive route for critique.

Constitutional interpretation and analysis focus on doctrine, but scholars over the years have recognized that the Court’s work is also performative. As Frederick Mark Gedicks has noted, thinking about the Court and Justices through a framework of performativity can “illustrate the bounded creativity of judicial decision-making.”[[3]](#footnote-4) Gedicks identifies the modern Court’s work as fundamentally performative when they “surreptitiously create constitutional law while denying they do so.” This opens up an alternative framework for evaluating what the Court is doing, asking whether its reasoning from precedent is “faithful *and* creative” in performative terms.[[4]](#footnote-5)

Performance is an iterative process where behavior is repeated to invoke its previous episodes, but the “citation” of this previous behavior can produce a different meaning. Following Judith Butler, Gedicks argues that “citations are performatives that do not simply re-cite prior meanings but produce their own meanings and effects in reciting the original.”[[5]](#footnote-6) While citations invoke the past, they generate new contexts.[[6]](#footnote-7)

Gedicks also observes the need for the generative and transformational nature of performance to remain unacknowledged, even disavowed. If law is to be paramount and the Justices its servant, they “cannot admit their performative role because it cannot be reconciled with still-powerful higher-law and rule-of-law myths.”[[7]](#footnote-8) And so Justice Roberts insists on his role of calling balls and strikes, and Justices speaking off the bench decry attempts to identify the Court as a political institution. But the Supreme Court’s mode of performance goes beyond citation (either as a literary phenomenon or as argumentative strategy).

The Court and its members have long been aware of the performative aspect of their work, and seem to be increasingly conscious of how it plays. While majority opinions have been announced throughout the Court’s history, until “roughly 1940,” the public reading of a dissent from the bench was highly unusual and Chief Justice Burger discouraged it.[[8]](#footnote-9) The practice occurs more frequently now, particularly in salient cases in which the distance between the dissenting Justice and the majority is great, and “Justices who announce dissents use tones that are . . . less pleasant and sadder than Justices who announce majority opinions from the bench.”[[9]](#footnote-10)

But when and how might we think about performance crossing fully into theatricality and high drama, perhaps even camp? The Rehnquist Court moved in this direction. The late Justice Ruth Bader Ginsburg (who declared that her fantasy job would be an opera diva) took performance to another level by wearing gold collars when she announced majority opinions and a black collar with grey beads to announce her dissents.[[10]](#footnote-11) Ginsburg claims that her sartorial choice inspired Chief Justice Rehnquist to attend to his own dress, glamming up his robe with four gold stripes on the sleeves, a style borrowed from a Gilbert & Sullivan operetta.[[11]](#footnote-12) Her close friend and legal adversary Antonin Scalia has been described as “an inveterate performance artist,” and the Justices’ relationship inspired a one-act opera, Scalia/Ginsburg, featuring the two opera buffs.[[12]](#footnote-13) His dissents were sometimes nothing short of flamboyant, describing majority opinions, and at times their authors, in near-histrionic terms.[[13]](#footnote-14) Chief Justice Roberts “has never adorned his robe with any accoutrements” and generally portrays himself as an umpire rather than a player,[[14]](#footnote-15) but on the whole, several Justices in the current era seem quite willing to cast shade in their opinions and spill the tea for admiring Federalist Society audiences.[[15]](#footnote-16)

This article argues that the Court’s performance in 2021 at times took on the character of bad drag. Bad drag is more than a histrionic or problematic performance. It inverts the purpose of drag as a generative and liberating performance, instead using performance to reinstate power structures. When the Court engages in bad drag, it clothes itself in abandoned doctrines with the purpose of performing a new constitutional order, but the order itself is nothing better than a retread, and a terrible one at that.

This article will summarize the Roberts Court’s recent jurisprudential agendas that trouble liberal and left-wing constitutional scholars. It will then explain how different political science approaches raise questions about legitimacy. In discussing historical institutionalist approaches, it will note some significant analogies between the Roberts Curt and its predecessors, particularly the Fuller Court (1888-1910). It will then use queer theory to show that the Court is treating us to a bad drag performance in the garb of the Fuller Court, closing with a brief discussion of where developments might take us in the immediate future.

1. The author thanks the editors of the Maryland Law Review, participants at the Maryland Law Review Symposium, Susan Burgess, and Christine Bird for their helpful comments and insights. [↑](#footnote-ref-2)
2. Robert Barnes, *Chief Justice Ignores Controversial Supreme Court Term in Annual Report*, Washington Post, Dec. 31, 2022, https://www.washingtonpost.com/politics/2022/12/31/supreme-court-roberts-leak-report/; Masood Farivar, *Polarizing US Supreme Court Decisions Headline Blockbuster Term*, VOA, Jul. 2, 2022, https://www.voanews.com/a/polarizing-us-supreme-court-decisions-headline-blockbuster-term/6642017.html; John Fritze & Bart Jansen, *Abortion, Guns, Religion: Breaking Down a Blockbuster Supreme Court Term*, USA Today, Jun. 30, 2022, https://www.usatoday.com/story/news/politics/2022/06/30/breaking-down-supreme-court-on-roe-wade-second-amendment/7757961001/?gnt-cfr=1; Tierney Sneed, *Takeaways from the Blockbuster Victories Conservatives Secured at the Supreme Court*, CNN Politics, Jun. 30, 2022, https://www.cnn.com/2022/06/30/politics/takeaways-supreme-court-term-round-up-conservative-victories/index.html. [↑](#footnote-ref-3)
3. Frederick Mark Gedicks, *Working Without a Net: Supreme Court Decision-Making as Performance*, 2018 Brigham Young Law Review 57, 59–60 (2018). [↑](#footnote-ref-4)
4. *Id.* at 62. [↑](#footnote-ref-5)
5. *Id.* at 67. [↑](#footnote-ref-6)
6. *Id.* [↑](#footnote-ref-7)
7. *Id.* at 57. [↑](#footnote-ref-8)
8. Timothy Johnson, Ryan Black & Eve Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 Minnesota Law Review 1560, 1566 (2009). [↑](#footnote-ref-9)
9. *Id.* at 1580. [↑](#footnote-ref-10)
10. Ruth Bader Ginsburg & Nadine Strossen, *Transcending Ideological Divides to Advance All Rights for All People: A Conversation Between the Honorable Ruth Bader Ginsburg and Professor Nadine Strossen*, 66 New York Law School Law Review 27, 44 (2021). [↑](#footnote-ref-11)
11. *Id.* at 43–44. [↑](#footnote-ref-12)
12. Steve Cohen, *Justice Antonin Scalia as Performance Artist*, Broad Street Review (2015), https://www.broadstreetreview.com/essays/justice-antonin-scalia-as-performance-artist. [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. Richard Wolf, *Chief Justice Roberts’ Fashion Choice: No Stripes*, USA Today, Jan. 21, 2020, https://www.usatoday.com/story/news/politics/2020/01/21/chief-justice-john-roberts-rehnquist-drops-stripes/4532521002/. [↑](#footnote-ref-15)
15. Josh Gerstein, *Gorsuch Takes Victory Lap at Federalist Dinner*, Politico, Nov. 2017, https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538; Scott Lemieux, *Supreme Court Justice Alito’s Federalist Society Speech Shows How Political the Court will Get*, NBC News, Nov. 2020. [↑](#footnote-ref-16)