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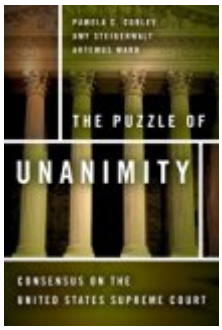

Pamela C. Corley, Amy Steigerwalt, Artemus Ward. *The Puzzle of Unanimity: Consensus on the United States Supreme Court.* Stanford: Stanford Law Books, 2013. x + 201 pp. $45.00, cloth, ISBN 978-0-8047-8472-6.

Reviewed by Christopher Schmidt

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Commissioned by Christopher R. Waldrep (San Francisco State University)

Many of the most notable recent Supreme Court decisions have been sharply divided affairs, usually involving predictable configurations of conservative and liberal justices glaring across a vast chasm of ideological differences. The majority and dissenting opinions in cases such as last term's decisions on the Voting Rights Act and the Defense of Marriage Act reflect such fundamentally opposing judicial worldviews that it can be hard to imagine their authors agreeing on much of anything of importance. Yet these 5-4 decisions, which capture the attention of the public and scholars alike, reflect only a fraction of the docket of the nation's highest court. As the justices often remind audiences when writing or speaking about their work, they actually agree with each other quite often. Approximately one-third of all decided cases in recent terms have been unanimous. If we add those decisions in which only a single justice dissented, we find a majority of cases in recent terms have been either unanimous or nearly unanimous. Why does this happen? How can a court that is so polarized on many of the most foundational legal and constitutional questions come together with such regularity? This is the question explored by political scientists Pamela C. Corley, Amy Steigerwalt, and Artemus Ward in *The Puzzle of Unanimity*: *Consensus on the United States Supreme Court*.

The answer they provide to this motivating question is intuitively persuasive, if perhaps rather anticlimactic. Their answer, in a nutshell: it is complicated. Explaining the prevalence of unanimous and near-unanimous decisions requires attention to numerous factors--the ideology of the justices, strategic considerations, and constraints of law and legal norms, among them--with certain factors playing more or less of a role in different circumstances. "Rather than single out a specific group of factors as the primary explanation for consensus, we argue that various potential influences all operate in each case and many times, in complex interactive fashion" (p. 6).

The heart of *The Puzzle of Unanimity* is an empirical study of all the unanimous and near-

unanimous decisions the Supreme Court issued between 1953 and 2004. Before getting to their empirical study, however, the authors offer a chapter of legal history in which they examine the factors that led to the court's abandonment of the norm of consensus that had defined the institution for most of its history. Until the middle decades of the twentieth century, dissenting and concurring opinions were unusual; between 1801 and 1940, the court ruled unanimously in approximately 90 percent of its cases. Under Chief Justice Harlan Fiske Stone (1941-46), dissent rates shot up to 45 percent. They have remained above 50 percent ever since. Only in the wake of the "dissensus revolution" (p. 47) of the 1940s does the persistence of unanimity become a "puzzle" to be identified and solved. Relying primarily on the papers of Chief Justice Stone, the authors argue that the increase of dissenting opinions was the product of historical developments outside the court coupled with institutional changes within the court in the late 1930s and 1940s. The external developments the authors identify include the increased discretion the justices had over their docket as a result of the Judges Bill of 1925, the rising importance of civil liberty cases, and the influence of legal realism. The internal developments the authors identify include the increasingly discursive nature of the justices' conferences following oral argument, additional time between oral argument and opinion hand-downs, and a more academic mind-set on the part of certain justices.

Having set up the historical background to their puzzle, the authors then turn to their empirical analysis of the factors that have brought the court to consensus, even in an era characterized by chronic divisions among the justices. They consider consensual rulings measured in two ways: by votes on the merits; and by opinion consensus (the justices in these cases agree not only on the outcome of the legal dispute, but also on the legal reasoning of the majority opinion author). The authors divide their list of potential factors that might explain consensus into five categories: legal considerations (i.e., the clarity of the controlling law); attitudinal factors (e.g., the ideological polarization of a particular court); strategic considerations (e.g., whether a decision abandons precedent or strikes down a statute and whether the solicitor general is a party to the case); institutional context (e.g., docket size and number of law clerks); and case-specific factors (e.g., issue area and level of political salience). Among these factors, legal clarity has been notoriously difficult to operationalize into empirical analysis. The authors confront this challenge with a five-variable index that accounts for the legal complexity of a case, whether amicus curiae briefs were filed in the case, whether there was a circuit court split, whether the judges in the court below were divided, and whether the case turns on statutory or constitutional interpretation.

From all this, the authors find confirmation for what they call their "comprehensive model of consensus." Its premise is that "Consensus on the Supreme Court can only be understood by recognizing the multitude of factors that influence the justices in every single case, many times in complex interactive fashion. Law, attitudes, strategy, institutional imperatives, and case-specific factors all play an important role" (p. 62).

Whether one finds this thesis particularly surprising likely reflects the reader's disciplinary grounding. The authors frame their argument against what they characterize as a prevailing assumption among political scientists. After providing an overview of the three dominant models of judicial decision making--attitudinalism (judges vote based on personal ideological preferences or attitudes); strategic voting (judges assess institutional and collegial constraints and vote with an eye toward advancing their agendas over time); and legalism (judges vote based on legal texts and doctrine)--the authors write that "most studies of the U.S. Supreme Court focus on determining which of these models best captures judicial decision making." To this assumption of explanatory

singularity, they insist on variety--"consensus on the Court is a reflection of multiple, concurrently operating influences" (p. 6).

To those who view with skepticism efforts to reduce something as complex and variable as judicial decision making into some golden bullet of explanation--and I assume most legal historians fall in this category--the central argument of ***The Puzzle of Unanimity***, while surely right, feels something less than revelatory. For the historian, the complexity of judicial decision making and the necessity of context-specific analysis is typically the starting point of inquiry, not its conclusion. The historian's challenge is to show how that complexity played out over time, and to discern connections, patterns, or trends that were not initially evident. A historian thus typically starts with an assumption of complexity and searches for order. By contrast, the political scientist authors of this book begin by assuming that scholars believe there to be a single factor that predominates and then go about showing this is not the case. They start with the assumption of singularity and demonstrate the reality of multiplicity.

Empirical scholarship on the courts tends to fall into one of two categories. There are studies that bring to light factors or trends that are not readily apparent to the general observer (or the historian) whose attention is drawn to high profile events that might not be representative. And there are studies in which quantitative analysis ends up confirming what the attentive observer already suspects or believes. For most historians, I assume this book, with its central conclusion that consensus on the Supreme Court cannot be reduced to a single dominant causal factor, falls into the second category. There is value in confirmation, of course. And for those readers who come to this book believing that the justices arrive at consensus primarily because of determinate law or ideological convergence or strategic considerations or some other overriding causal factor, this book offers a powerful challenge to these kinds of reductionist assumptions.

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