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**An Empirical Study of Supreme Court Justice  
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**Benjamin H. Barton**

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## An Empirical Study of Supreme Court Justice Pre-Appointment Experience

Benjamin H. Barton<sup>1</sup>

This study compares the years of experience that preceded appointment to the Supreme Court for each Justice. The study seeks to demonstrate that the background experiences of the Roberts Court Justices are quite different from the Justices of earlier Supreme Courts and to persuade the reader that this is insalubrious.

The first proposition is an empirical one and the difference in Justice backgrounds is demonstrable. To determine how the current Justices compare to their historical peers, the study gathered a massive database that considers the yearly pre-Court experience for every Supreme Court Justice from John Jay to Elena Kagan. The results are startling and telling: the Roberts Court Justices have spent more pre-appointment time in legal academia, appellate judging, and living in Washington, D.C. than any previous Supreme Court.<sup>2</sup> They also spent the most time in elite undergraduate and law school settings.<sup>3</sup> Time spent in these pursuits has naturally meant less time elsewhere: The Roberts Court Justices spent less time in the private practice of law, in trial judging, and as elected politicians than any previous Court.

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<sup>2</sup> This assertion and those that follow in this paragraph are all explained and demonstrated *infra* \_\_\_.

<sup>3</sup> The study treats the ivy league universities and Stanford as elite institutions.

Having demonstrated that the Roberts Justices are outliers across multiple studied experiences, the article argues that the change is regretful for multiple normative reasons. First, the current Justices have been chosen largely on the basis of academic and professional achievements evincing technical excellence in legal reasoning and writing. These strengths are weaknesses in an era where the Court's opinions are growing longer,<sup>4</sup> more splintered<sup>5</sup> and ever more complex.<sup>6</sup>

Second, the Supreme Court is the leading player in the drafting, amending and interpretation of the various federal rules,<sup>7</sup> and these Justices have less courtroom experience (as lawyers or trial judges) than prior Justices.

Lastly, these Justices have a great deal of experience in cloistered and neutral jobs like appellate judging or teaching law and limited experience in jobs that require more interaction with the public and litigants, like trial judging, practicing law, or running for office. These cloistered and neutral experiences offer limited opportunities for the development of the most critical judicial virtue: practical wisdom.<sup>8</sup>

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<sup>4</sup> Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUSTON L. REV. 621, 632-38 (2008) (demonstrating empirically the growth in opinion length over the history of the Court).

<sup>5</sup> James F. Spriggs, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011) ("Historically, plurality decisions by the Supreme Court have been relatively rare . . . the frequency of plurality opinions dramatically increased in the 1940s and 1950s, the occurrence of plurality opinions between 1953 and 2006 has remained fairly steady, with a moderate increase during the 1970s when Warren Burger served as Chief Justice."); Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1306-26 (2011) (discussing the growth in the dissenting opinion and the word "respectfully").

<sup>6</sup> See Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions* 46 UCLA L. REV. 75, 126-27 (1998) (finding increased complexity and obfuscation in Supreme Court federal jurisdiction opinions). Consider Richard Posner's classic critique from *Holmes v. Buss*, 506 F.3d 576, 579 (7<sup>th</sup> Cir. 2007): "The multiplication of rules and standards, carrying in its train as it does endless debate over boundaries, is one of the banes of the American legal system, a source of its appalling complexity."

<sup>7</sup> See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1100-4 (2002).

<sup>8</sup> Discussed *infra* \_\_\_.

There has been a spate of recent commentary on the pre-appointment experiences of the Justices on the Roberts Court. Some have argued that the current Supreme Court Justices are overly similar: they all went to Harvard or Yale Law School,<sup>9</sup> excluding Justice Kagan, they are all former judges on a federal circuit court of appeal,<sup>10</sup> and they represent limited geographical diversity.<sup>11</sup> Others have expressed concern that none of the current Justices have been politicians.<sup>12</sup> Piecing these critiques together, there is a concern that the experiences of the Roberts Justices are quite distinct from past Justices and that these differences are deleterious.<sup>13</sup>

Nevertheless, this study is the first to take a broad overview of *all* of these factors. The question of whether the backgrounds of the current Justices are substantially different from past Justices is an empirical one, and this study attempts to determine the accuracy of these criticisms. The study collects and analyzes the annual pre-appointment experiences of every Justice and every sitting Supreme

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<sup>9</sup> See Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices From Holmes to Kagan*, 58 UCLA L. REV. DISCOURSE 129, 129-31 (2010) (arguing against the dominance of Harvard and Yale on the current Court); Christopher Edley, Jr., *The Elite, No Apology Needed*, WASH. POST, May 16, 2010, at B1 (arguing the opposite).

<sup>10</sup> See Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003); Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333 (2008).

<sup>11</sup> See Tim Padgett, *Is the Supreme Court Too Packed With Ivy Leaguers?*, TIME, May 12, 2010, at 28 (stating that "the Court today has less geographical diversity than it did even when Thomas Jefferson was President").

<sup>12</sup> See Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1354-58 (2010).

<sup>13</sup> There is a related concern that the Roberts Court life experiences (outside of race and gender) are less diverse than previous Courts. In a related study, Benjamin H. Barton & Emily Moran, *Using Biodiversity Statistics to Measure Diversity in Groups of Humans: The Example of Supreme Court Justice Background* (unpublished manuscript) (on file with author), we use biodiversity statistics to prove that the Roberts Court is at least as diverse as prior Supreme Courts in terms of life experiences. Note that this is not inconsistent with a finding that the Roberts Court Justices' experiences are *different* from those of prior Justices. Those experiences can be equally diverse, but still different than prior Courts.

Court from the first to the latest. The study is the first to take a broad and comprehensive look at the annual experiences of the Justices of the Court across multiple criteria (geography, education, and work are all considered).<sup>14</sup> Counting years offers a more nuanced and accurate picture of exactly what Justices have done, when, for how long, and allows for clearer apples to apples comparisons among different Supreme Courts.

The dataset considers a large number of factors, including: the years each Justice spent in which geographic locations; where and if a Justice went to law school; what, if any, undergraduate institutions a Justice attended;<sup>15</sup> whether a Justice worked in private practice, separating out practice as a solo practitioner, as a partner in a small group of lawyers, and work in larger law firms; whether each Justice had ever been elected to office (and how long the Justice served in office), separating out executive from legislative elections, as well as federal from state; how long each Justice worked in a presidential cabinet, taught in a law school, served in the military, ran a non-law business, served as a trial or appellate judge in either the state or federal judiciary, clerked for a judge or Justice, or served as the Solicitor General or Attorney General of the United States. In sum, the study attempts to account for every year of each Justice's pre-appointment life to track the experiences that the Justices brought with them to the Supreme Court over time.

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<sup>14</sup> Previous studies have generally relied upon a more binary assessment of experiences, *i.e.* whether a Justice has, or has not, had a particular experience. *See, e.g.,* Glen, *supra* note \_\_, at 131-37 (binary on education); Epstein, et al., *supra* note \_\_, at 913-41 (binary except for figure 7 on p. 929).

<sup>15</sup> Because the study includes all Supreme Court Justices, there are many from the nineteenth and twentieth centuries who "read the law" and did not attend law school and there are a few who were appointed with no formal educational training whatsoever.

The study reaches some surprising conclusions and offers strong evidence that the latest Roberts Court is a relative outlier in comparison to past Supreme Courts. The data suggests that many of the criticisms of justice background are well grounded and that as a whole the experiences of the Roberts Court represent a substantial departure from previous Supreme Courts.

The Article proceeds as follows. Part I outlines how the study was designed and implemented. Part II details the findings. Part III discusses some of the ramifications of Part II's findings and suggests a return to prior selection criteria.

#### I. STUDY DESIGN AND METHODOLOGY

This study details experiences that preceded appointment to the Supreme Court for each Justice. The study attempts to measure these experiences as broadly and comprehensively as possible, so educational, geographic, and professional experiences are all tracked by years.

There are thus two assumptions underlying the study – that the experiences of the Justices will have an effect on their decision-making and that measuring these experiences in terms of time is useful, rather than counting experiences in a binary fashion by simply noting whether any Justice has or has not had a particular experience.

The first assumption is intuitively obvious and empirically defensible. Since at least the 1960s, political scientists and others have postulated that the backgrounds and experiences of Supreme Court Justices affect their decision-

making.<sup>16</sup> Although some empirical studies of Justice background have failed to find an effect,<sup>17</sup> there are sufficient studies demonstrating an effect to offer empirical support to the intuition that background must affect decision-making.<sup>18</sup> In particular, a series of studies have found that certain occupational experiences – like working in academia,<sup>19</sup> as a prosecutor,<sup>20</sup> as a judge,<sup>21</sup> or as a politician<sup>22</sup> – do have an effect on Supreme Court decision-making.

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<sup>16</sup> See, e.g., GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-63* (1965) (applying psychological studies of human behavior to Supreme Court decision-making); STUART S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969).

<sup>17</sup> See, e.g., C. Neal Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 359-63 (1981) (failing to find a relationship between college prestige and civil rights and liberties liberalism); Gregory C. Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1463-65 (1998) (finding no relationship between elite law school education and district judges federal sentencing guidelines constitutionality decisions).

<sup>18</sup> For an outstanding overview of these studies, see George, *supra* note \_\_, at 1349-55.

<sup>19</sup> See Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 14 (2001) (demonstrating that academic experience was not a proxy for a particular policy preference but that it was associated with greater activism on the bench).

<sup>20</sup> See Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in *CASES IN AMERICAN POLITICS* 108-09 (Robert L. Peabody ed., 1976) (demonstrating that Justices with prosecutorial experience were more pro-prosecution in criminal procedure cases); Tate, *supra* note \_\_, at 359-63 (showing that Justices without prosecutorial experience favored civil liberties claims). For a few non-Supreme Court studies, see Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333, 335-36 (1962) (finding that former prosecutors on state supreme courts were pro-prosecution in criminal cases); Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U. L. REV. 258, 266 (1974) (showing small pro-prosecution effect for former prosecutor judges).

<sup>21</sup> For a recent example of a study showing the effect of prior judicial experience on Justice decision-making, see Lee Epstein, et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009). Other studies considering the effect of prior judicial experience are a bit of a mixed bag. Compare Tate, *supra* note \_\_, at 362 (considering 1946 through 1978 and concluding that Justices with prior judicial experience were more receptive to civil rights and liberties claims regardless of their party identification, other experiences, or personal attributes), with Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in *CASES IN AMERICAN POLITICS* 71 (Robert L. Peabody ed., 1976) (showing the opposite correlation: Justice's with prior judicial experience tended to be conservative on civil liberties), with C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 474-76 (1991) (stating that between 1916 and 1988, prior judicial experience showed no effect on civil rights and liberties decisions and a weak relationship to economic rulings).

<sup>22</sup> See Tate, *supra* note \_\_, at 359-63 (showing that politician Justices were more liberal on economic questions); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1681 (1999) (noting that former politician judges were likelier to support labor unions); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 501-3 (1975) (finding that judges with political experience tended to disfavor the government in fiscal cases).



The second assumption is harder, especially because a purely annual count must ignore other important questions of diversity and experience, like religion, ethnicity and family background, as those experiences tend to be life long and not reducible to a firm set of years.<sup>23</sup> These diversity elements were studied, however, and will be mentioned, but cannot be easily compared against the other, annualized factors. Nevertheless, the advantage of adding in years is that it allows for weighting by time, treating Louis Brandeis' thirty-nine years of private practice differently from Elena Kagan's two years.

The study worked from multiple different source materials, but the basic structure was as follows. The first source considered was *The Biographical Directory of the Federal Judiciary*,<sup>24</sup> which contains brief biographical sketches of every federal judge since 1789, and gives short descriptions of their careers, helpfully listed by years. The study checked this data against an exceptional online database of information about every Supreme Court nominee (including those who were not confirmed) compiled by Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson and Jason Roberts.<sup>25</sup> In cases where there were discrepancies between the two sources, or neither source answered a question (such as which years a Justice spent in which localities as a child) other sources were considered,

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<sup>23</sup> The alternative was to assign a number of years of being a woman before becoming a Supreme Court Justice to Ruth Bader Ginsburg or to assign a number of years to growing up impoverished in a rural setting to the 27<sup>th</sup> Justice, John Catron. See Frank O. Gatell, *John Catron*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 372-73 (Leon Friedman & Fred L. Israel eds., 1997) (hereinafter JUSTICES).

<sup>24</sup> THE FEDERAL JUDICIAL CENTER, THE BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY (2001).

<sup>25</sup> LEE EPSTEIN, THOMAS G. WALKER, NANCY STAUDT, SCOTT HENDRICKSON & JASON ROBERTS, THE U.S. SUPREME COURT JUSTICES DATABASE (2010), available at <http://epstein.law.northwestern.edu/research/justicesdata.html> (hereinafter DATABASE). The study also worked from a less comprehensive print version of similar data, LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS (2d. ed. 1996) (hereinafter COMPENDIUM).

most notably Leon Friedman and Fred Israel's four volume biography of each Justice, *The Justices of the United States Supreme Court: Their Lives and Major Opinions*.<sup>26</sup>

Despite (or perhaps because of) these multiple sources some discrepancies were inevitable, especially when measuring years. Justices, especially Justices from the 19<sup>th</sup> Century, frequently had two jobs at once, making coding for time challenging. It was quite common for lawyer-politicians in the nineteenth to practice law while serving as a government official. For example, the second Justice, John Rutledge, practiced law and served as a member of the South Carolina House of Commons for thirteen years.<sup>27</sup>

Likewise, law teaching often overlapped with private practice. Justice Ginsburg is a recent example, as she worked as the counsel for the ACLU's Women's Rights Project while she was a law professor at Columbia.<sup>28</sup> Humorously, two different Supreme Court Justices – Horace Lurton and William Howard Taft – served as Deans of a Law School while they also held another presumably time consuming job as a Circuit Judge on the United States 6<sup>th</sup> Circuit.<sup>29</sup> Under these circumstances the study coded both employments for the full number of years, rather than try to divide the years or assign one simultaneous job primacy.<sup>30</sup>

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<sup>26</sup> See JUSTICES, *supra* note \_\_\_\_.

<sup>27</sup> See COMPENDIUM, *supra* note \_\_\_\_, at 278, 291.

<sup>28</sup> See Stephanie Goldberg, *The Second Woman Justice*, ABA J., October, 1993, at 40; Peter J. Rubin, *Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 OHIO ST. L.J. 825, 825 (2009).

<sup>29</sup> See James F. Watts, Jr., *Horace H. Lurton*, in 3 JUSTICES, *supra* note \_\_\_\_, at 935; Alpheus T. Mason, *William Howard Taft*, in 3 JUSTICES, *supra* note \_\_\_\_, at 1053.

<sup>30</sup> This option was chosen because it involved the least amount of judgment in terms of coding and thus was least likely to inject any bias. That said, readers should remember that earlier Justices were more likely to do two jobs at once when reading the results of this study.

These sources were boiled down into a short biographical sketch of each Justice divided by years. These years were then divided into studied categories and sub-categories as follows:

1. The Private Practice of Law – Separately lists the years each Justice worked in solo practice, as part of a small partnership, in a larger law firm, or as an in house corporate or organization lawyer.<sup>31</sup> These categories are then combined into a single measure of the length of private practice.
2. Government Lawyer – Separately lists the years each Justice worked as a prosecutor, an assistant solicitor general, the Solicitor General, the United States Attorney General, the United States Attorney for a district, an Attorney General of a state, or other miscellaneous government lawyer work. These categories are combined into a single measure of years spent as a government lawyer.
3. Elected Official – Separately lists the years each Justice spent as the President of the United States, as a United States Senator, a United States Representative, a member of the Continental Congress, a governor, a state legislator, a mayor, or some other local elected position.<sup>32</sup> These categories are combined into a single measure of years spent as an elected official.

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<sup>31</sup> These categories of practice come from DATABASE, *supra* note \_\_\_. There is occasional overlap and confusion between the small partnership and law firm categories and the exact dates of work, especially for the earlier Justices, can be fuzzy. *See id.*

<sup>32</sup> One of my favorite unusual job experiences is Lewis Powell's nine years as the Chairman of the Richmond, Virginia Public School Board. *See* JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 160-66 (2001).

4. Law Teaching – Separately lists the years each Justice spent as a law school instructor, professor or Dean. These categories are combined into a single measure of years spent in law teaching.
5. Prior Judicial Experience – Separately lists the years each Justice spent as a Federal appellate Judge, a Federal trial judge, a state appeals judge, or a state trial judge. These categories are combined into three different aggregate measures: total time spent judging, total appellate judging and total trial judging.
6. Non-law Government Service – Separately lists the years each Justice spent in non-law related government service for local governments, state governments, and the federal government. Time spent as the head of a cabinet level agency other than the Justice Department in the Federal government is separately counted from other federal service. These categories are combined into a single measure of non-law government service.
7. Additional Employment Categories – The study also lists the years each Justice spent in the military, working in a private, non-law capacity, and any years spent as a law clerk to a federal judge, a state supreme court justice or a United States Justice.
8. Geography – Separately lists each geographic location (either a State or foreign country) where a Justice lived from birth until appointment on the Supreme Court. For purposes of adulthood a Justice’s geographic location is

defined by where they worked, rather than where they lived.<sup>33</sup> These locations are then grouped into eight categories:<sup>34</sup> New England,<sup>35</sup> Mid-Atlantic,<sup>36</sup> South,<sup>37</sup> Midwest,<sup>38</sup> Southwest,<sup>39</sup> West,<sup>40</sup> Abroad (foreign countries),<sup>41</sup> and Washington D.C.<sup>42</sup>

9. Education – Separately lists the years each Justice spent in undergraduate or graduate education. There are separate categories for total undergraduate years and years each Justice spent in undergraduate education at Yale, Harvard or Princeton or at another Ivy League institution or Stanford.<sup>43</sup> There are also separate categories for total years in law school, years in law school at Yale or Harvard, years spent in another Ivy League law school or

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<sup>33</sup> The study codes in this manner because the employment data is readily available, whereas the actual domicile data is often unavailable. This adjustment matters most for Justices who worked in Washington, D.C., which is always coded as D.C., rather than attempting to determine if the person actually lived in Maryland or Virginia or both while working in D.C. Insofar as the geographic listing is meant to reflect experiences, it would be strange to code Lewis Powell's years in Richmond, Virginia the same as a Justice who lived in a Virginia suburb while serving as a judge on the D.C. Circuit, so this coding decision is defensible as a matter of both feasibility and accuracy.

<sup>34</sup> These categories come from U.S. Embassy, *The Regions of the United States*, at <http://usa.usembassy.de/travel-regions.htm> (last visited June 1, 2011).

<sup>35</sup> Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. *See id.*

<sup>36</sup> Delaware, Maryland, New Jersey, New York and Pennsylvania. *See id.*

<sup>37</sup> Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia. *See id.*

<sup>38</sup> Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. *See id.*

<sup>39</sup> Arizona, New Mexico, Oklahoma and Texas. *See id.*

<sup>40</sup> Alaska, Colorado, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming. *See id.*

<sup>41</sup> The foreign countries where Justices spent a year or longer, listed alphabetically, are: Austria, England, France, Germany, Ireland, Italy, Mexico, the Phillipines, Russia, Scotland, Spain and Turkey. The study codes the Philippines as a foreign location, although it was a U.S. Protectorate during the time at issue.

<sup>42</sup> Washington, D.C. is coded separately, rather than grouped with the mid-Atlantic region because the large number of years in D.C. would skew the Mid-Atlantic numbers and because the years spent in D.C. are also of interest as a proxy for time spent in and around the seat of the federal government.

<sup>43</sup> Princeton, Yale and Harvard are listed together as the three most elite American universities historically. *See* Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* (2006). The other Ivy League schools are Brown, Columbia, Cornell, Dartmouth and Penn. *See* FREDERICK RUDOLPH, *THE AMERICAN COLLEGE & UNIVERSITY: A HISTORY* 377 (1991). Stanford is included on this list because in the second half of the 20<sup>th</sup> century it rose to equal prominence to (if not eclipsed) the other Ivy League institutions. *See* JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY* 117-29 (2009).

Stanford, years spent in a masters program, years spent studying in a foreign country, and years spent “reading the law.”<sup>44</sup>

The study assigns a year value (either zero or a whole number) to each of these categories for each Justice. 114 Justices were listed, rather than 112, because Chief Justices Rutledge and Hughes are counted separately from Associate Justices Rutledge and Hughes. Both Rutledge and Hughes left the Court (and gained new experiences before they returned), so they are counted separately both times.<sup>45</sup>

The study then grouped the Justices into “natural Supreme Courts,” each named sequentially for the Chief Justice.<sup>46</sup> Note that these natural Courts do not have the same number of Justices. The first natural court (Jay 1) had only five Supreme Court Justices, all of the Courts from 1790-1807 (Jay 2 to Marshall 4) had six or fewer Justices, and the Courts from 1863-1870 (Taney 15 and Chase 1) had ten Justices.<sup>47</sup> Further, some of these Courts existed for relatively short periods and others for much longer. For example, the period without a chief justice in 1796 following the Senate’s rejection of Justice Rutledge as Chief Justice lasted a little over

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<sup>44</sup> During the 19<sup>th</sup> Century the dominant form of legal education was to “read the law” as an apprentice to a lawyer or on one’s own. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3-10 (1983).

<sup>45</sup> Rutledge left the Court from 1791-1795 to be the Chief Justice of the South Carolina Court of Common Pleas, see MATTHEW P. HARRINGTON, JAY AND ELLSWORTH, THE FIRST COURTS 43-45 (2008). Hughes left the Court to serve as the Republican candidate for President, private practice and service as the Secretary of State, among other activities. See WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES 1930-41 5-12 (2007).

<sup>46</sup> These natural Supreme Courts come from COMPENDIUM, *supra* note \_\_, at 339-48. These natural Courts begin when a new Justice takes the oath of office and continue until the next new Justice takes the oath. When two or more Justices joined the court within a period of fifteen days or fewer it counts as a single natural court. *Id.*

<sup>47</sup> See *id.* at 339-42.

a month,<sup>48</sup> while Rehnquist 6 (Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer) lasted for over eleven years. The study refers to these Supreme Courts by Chief Justice last name and a number (*e.g.*, Roberts 4). The number refers to the particular iteration of a Court within a particular Chief Justice. So the current Court is called Roberts 4, because Chief Justice Roberts has presided over three earlier groups of Justices.<sup>49</sup>

The year values for the individual Justices were then aggregated by natural court to create a publicly available excel spreadsheet to allow comparisons across Supreme Courts. Thus, the study is able to compare experience among individual justices as well as the various natural Supreme Courts. The four main documents underlying the study: the Justices database, the natural Courts database, the key to the databases and the narrative version of the Justices' experiences are all posted online for purposes of transparency.<sup>50</sup>

## II. FINDINGS

The study's findings are divided by category. In each category charts are used to show the prevalence of a particular experience per Justice. "Per Justice" means that the study divides the total years spent in any given activity for all of the Justices on any given natural Supreme Court by the number of Justices on that Court. Because some natural Courts have had as few as five Justices or as many as ten, a

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<sup>48</sup> *See id.* at 339. For more on Justice Rutledge's failed nomination, *see* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 78 (5th ed. 2008).

<sup>49</sup> Roberts 1 lasted from September 29, 2005-January 31, 2006 and consisted of Justices Roberts, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer. Roberts 2 replaced O'Connor with Alito and lasted from January 31, 2006-August 8, 2009. Roberts 3 replaced Souter with Sotomayor and lasted from August 8, 2009-August 7, 2010. Roberts 4 started on August 7, 2010 with Kagan replacing Stevens.

<sup>50</sup> EDS: we can post these documents at the law review website or on my university site.

per Justice measure is generally more accurate than the raw tallies by Court. When relevant the study does discuss the cumulative experience by natural Court. Taken together these findings suggest that the experiences of the Roberts Court Justices are collectively and individually quite distinct from previous Supreme Courts.

A. *The Private Practice of Law*

The private practice of law has been the single most prevalent and lengthy experience of the Supreme Court Justices as a whole. 112 of 114 Supreme Court Justices have at least some private practice experience. Collectively those 112 Justices spent 1,898 years in the practice of law before joining the Court, almost seventeen years per Justice.<sup>51</sup> By comparison, the next most prevalent experience is 671 years as a lower court judge (appellate or district court).

The private practice of law consists of paid work for clients (either as a solo practitioner, a member of a small partnership or a law firm) or work for an institutional client, either a corporation or a non-profit.<sup>52</sup> The only two Justices in the history of the Court with no private practice experience are Justices Breyer and Alito.<sup>53</sup>

Before turning to the trends per Justice over time, the general employment trends are interesting and closely match the overall trend in American legal practice from solo practice to small partnerships to working in larger law firms. The last

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<sup>51</sup> From here forward each of the collective and per Justice figures are derived from the spreadsheets covering the Justices and the natural Supreme Courts. These spreadsheets are available on line at \_\_\_\_\_. The narrative claims, such as Justice Roberts worked as an assistant solicitor general or Justice Thurgood Marshall worked for the NAACP come from the narrative listing of Justice experiences, available on line at \_\_\_\_\_.

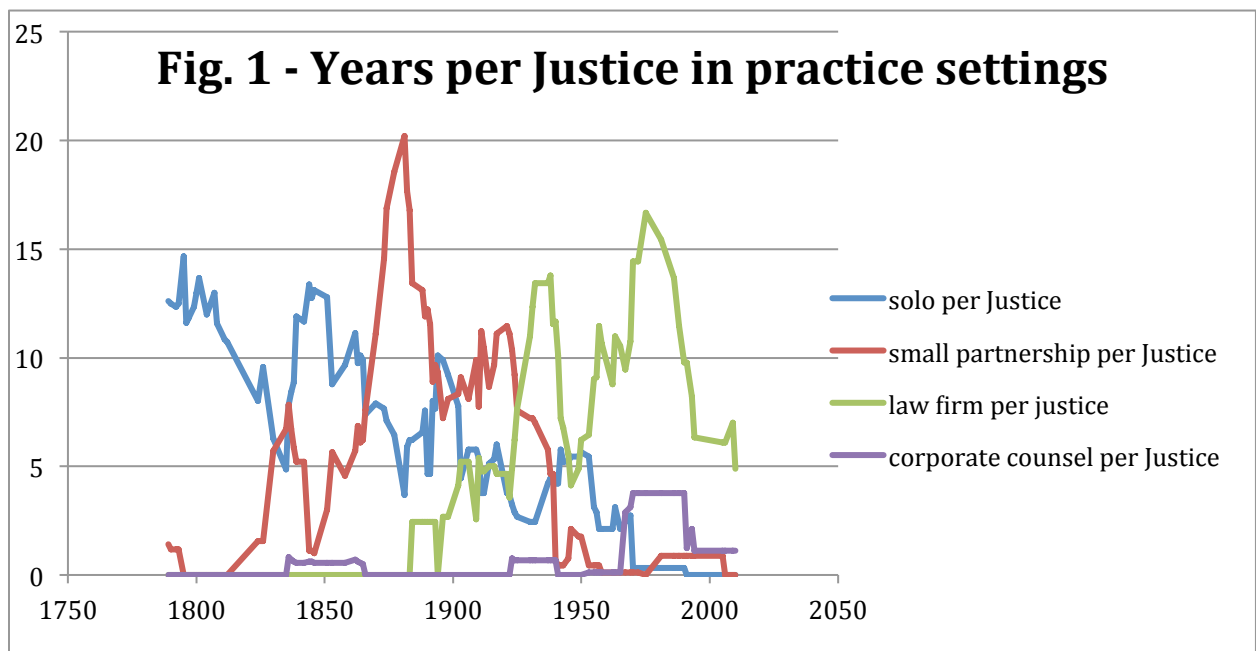
<sup>52</sup> Thus, Justice Ginsburg's work for the ACLU and Justice Marshall's work for the NAACP count as private practice, but Justice Alito's work as a United States Attorney does not.

<sup>53</sup> Note that both Justices Breyer and Alito did practice law as government lawyers.



Supreme Court Justice to have a solo practice was Thurgood Marshall and the last to work in a small partnership was Sandra Day O'Connor.<sup>54</sup> Despite these relatively late examples, the dominance of the law firm after the 1930s is quite striking.

Figure 1 is a chart showing years per Justice in four different practice settings: solo, small partnership, law firm, and corporate/organizational counsel. Note that solo practice is the dominant form at first, followed by small partnership and eventually law firm practice. Note also the shrinkage in private practice experience as a whole since the mid-1970s.

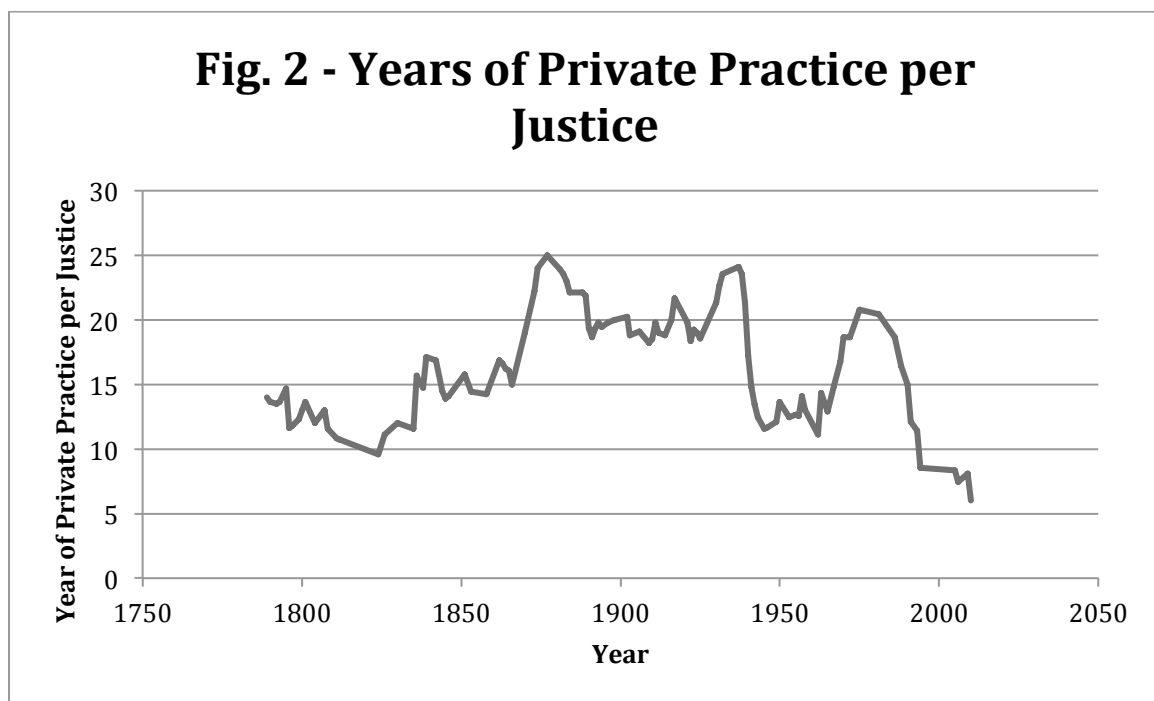


The cumulative total of years in private practice per natural Supreme Court is remarkable. The most recent Roberts Court (Roberts 4) has 54 years total private practice experience, the absolute lowest number of combined private practice

<sup>54</sup> There is, of course, another reason why these Justices practiced in a less popular and remunerative setting at the outset of their careers: most contemporary law firms would not hire African-Americans or women.

experience of any Supreme Court, including the five and six Justice Supreme Courts of the late-eighteenth and early-nineteenth century.<sup>55</sup>

The differences are more marked on a per capita basis. The four Roberts Courts and Rehnquist 6 are the only Supreme Courts with fewer than ten years of private practice per Justice. Charted by time on figure 2, private practice per Justice shows a marked downward trend during the Roberts years, with Roberts 4 the absolute nadir:



In sum, either as a matter of cumulative experience or per capita time in private practice, the Roberts Court is a significant departure from previous Supreme Courts. The average Supreme Court Justice had over sixteen years of private practice experience and the average Roberts 4 Justice has just six years.

<sup>55</sup> The next lowest number is the “no chief Justice 1796,” five person Court of 1796, which has 58 total years. The other 9 person Courts with low private practice experience are Roberts 2 with 67 years, Roberts 3 with 73 years, Roberts 1 with 75 years, and Rehnquist 6 with 77 years. Waite 1, 2, and 3 from 1874-1881 have three of the four highest totals, along with Hughes 4 (1937-38).

In addition, even the time the Roberts 4 Justices spent in private practice is of a different kind than the historical trend. All of the cumulative private practice experience on the current Court came as corporate counsel or in law firm practice. These practice settings are distinct from solo and small firm practice in several ways. First, large law firms tend to represent corporations or businesses rather than individuals.<sup>56</sup> Second, large firm practice is characterized by specialization.<sup>57</sup> Lastly, partially because of the overall trend away from trial work, and partially because of the expense of trial, large firm lawyers spend much less time in court than their solo and small firm predecessors.<sup>58</sup>

Additionally, twenty-one of the collective fifty-four years the study coded as private practice experience for the Roberts 4 Justices was spent in particularly rarified and Supreme Court heavy legal practices. John Roberts' thirteen years at the DC office of Hogan and Hartson focused largely on appellate work in the Supreme Court.<sup>59</sup> Similarly, Justice Ginsburg's eight years founding and running the ACLU's Women's Rights Project involved a constitutional law and Supreme Court heavy docket.<sup>60</sup> Thus, this group of Justices has spent less time in private practice

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<sup>56</sup> See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 961-63 (2000) ("The largest firms serve almost exclusively corporate clients. The most successful, influential, and creative lawyers predominantly (although not exclusively) serve corporate clients. The vast majority of elite law school graduates end up serving corporate clients.").

<sup>57</sup> See JOHN P. HEINZ, ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 37-38 (2005).

<sup>58</sup> See Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 36-37 (2006).

<sup>59</sup> See George W. Bush Whitehouse Archives, *Chief Justice John G. Roberts, Jr.*, at <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html>. Roberts briefed and argued thirty-nine Supreme Court cases before his appointment to the D.C. Circuit. *Id.*

<sup>60</sup> See ACLU, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, at <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> (last visited February 14, 2012).

than any other, and much of the time they have spent tended to be especially focused on constitutional and Supreme Court matters.

B. *Government Lawyer*

The study also considered Justice time spent as a government lawyer. Given the dearth of time spent as a private lawyer, practicing in a government setting is a possible replacement experience. As Part III argues, the private practice of law offers a particularly valuable set of experiences, but practice as a government lawyer may serve some similar purposes. Nevertheless, while the Roberts Courts do run on the high end for experience as government lawyers, these years of experience do not fully counter-balance the relative lack of private practice experience. As demonstrated below, the Roberts Court Justices are on the very low end of the total amount of time spent in practice.

Time spent as a lawyer for the government, either federal or state, has historically been less common than private practice, measured in terms of total years or by individual Justices. While the Roberts Court ranks relatively high on this measure (both Roberts 2 with 52 total years and Roberts 4 with 49 years are in the top 15 Courts for service as a government lawyer, at eighth and thirteenth respectively), the Roberts Courts are not clustered at the very top or bottom of this scale, as they are for private practice, political experience, law teaching or time judging. The 1940s and 1950s were the high water mark for time spent as a government lawyer, with the first Warren Court, serving from 1953-55, topping the list with 78 total years.<sup>61</sup>

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<sup>61</sup> Note that this was still well below the 112 years of total private practice for Warren 1.

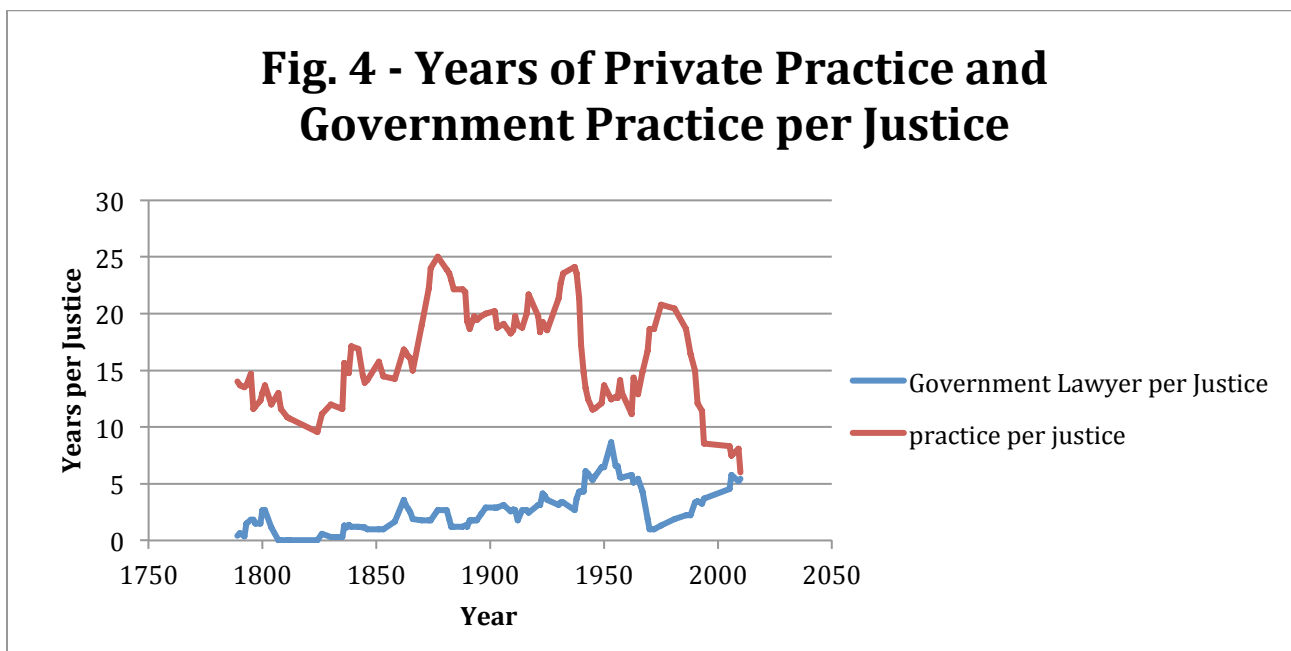
The trend can be seen in figure 3's graph of the Justices' per capita years spent as a government lawyer:<sup>62</sup>



Note that in the Roberts Court the years as a government lawyer are almost equal to the amount of time spent in private practice, a significant departure from previous Courts. Figure 4 shows the two per Justice lines almost converging with Roberts 4.

<sup>62</sup> Note the difference in scale on the vertical access between Figures 1 and 2 (0-30 years per Justice) and Figure 3 (0-10 years per Justice). The scales are different because private practice has been much more common than service as a government lawyer.

**Fig. 4 - Years of Private Practice and Government Practice per Justice**



The Roberts 4 Court's government lawyering experience, like its private practice experience, is also weighted towards particularly elite and Supreme Court heavy work. The Roberts 4 Court has a total of forty-nine years spent as a government lawyer. Nine of those years were spent in the Solicitor General's office, which carries a completely appellate docket,<sup>63</sup> and another twelve was spent in specialized work for the President or the Senate.<sup>64</sup> The balance was spent in the more typical U.S. Attorney General's office or as a state prosecutor. Taken with the

<sup>63</sup> Justices Alito and Roberts each worked as assistant U.S. Solicitor Generals for four years and Justice Kagan was the U.S. Solicitor General for a year before coming on the Court. For a description of the history and role of the Office of the Solicitor General, see REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992). The Solicitor General's Office was not established until 1870, so obviously no Justices worked there before that date. *Id.* at 2-3. Five Justices served as the Solicitor General: William Howard Taft, Stanley Forman Reed, Robert Jackson, Thurgood Marshall and Elena Kagan. Only two Justices have ever served as assistant Solicitor Generals: Justices Alito and Roberts.

<sup>64</sup> The government lawyering that fits this description is as follows. Justice Scalia spent one year as the General counsel, Office of Telecommunications Policy, Executive Office of the President. Justice Breyer spent three years serving as an Assistant Special Prosecutor, Watergate Special Prosecution Force, as a Special Counsel for the Administrative Practices Subcommittee, U.S. Senate Judiciary Committee, and as the Chief Counsel for U.S. Senate Judiciary Committee. Justice Roberts spent four years as an Associate Counsel to the President, White House Counsel's Office. Elena Kagan spent four years as a Special Counsel to the Senate Judiciary Committee, as the Associate Counsel to the President, and as the Deputy Assistant for Domestic Policy and Deputy Director of the Domestic Policy Council.

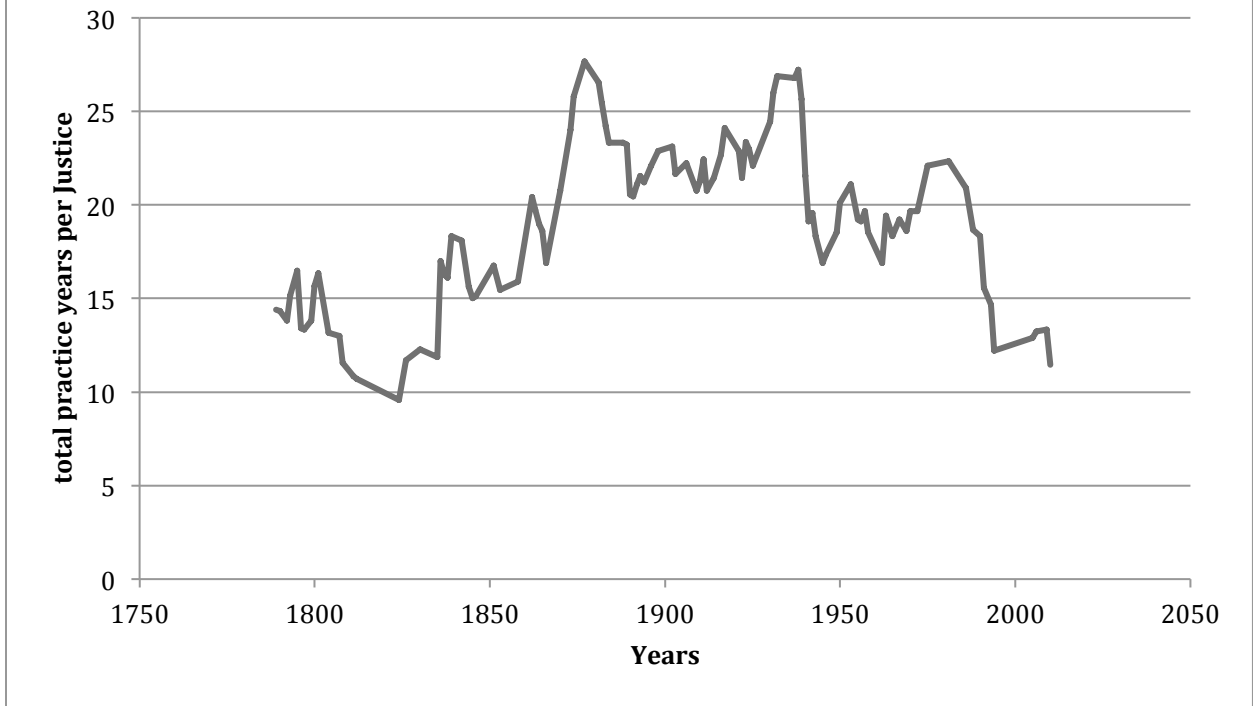
private practice experience, almost half of the Roberts 4 Court's lawyering experience focused on the Supreme Court or high-level policymaking, not trial practice or traditional lawyering.

C. *Total Practice*

Adding the years as a government lawyer with the private practice years to create a total measure of practice experience shows that the Roberts Courts do have a historical precedent in the Marshall Courts of the early 19<sup>th</sup> century. Marshall 7 (1824-1826) is the only Court with under ten years total practice experience per Justice, with the other late Marshall Courts showing similar numbers. The current Roberts Court is the fourth lowest of all time at 11.5 years of total practice per Justice.

A bookended trend towards shorter periods of practicing law in the first Supreme Courts and the most recent Courts can be seen in figure 5:

**Fig. 5 - Total Practice Years per Justice**



D. *Elected Official*

One of the great surprises from studying the pre-appointment experience for Supreme Court Justices is the sheer amount of time prior Justices spent as non-lawyer, elected officials.<sup>65</sup> The only two categories that surpass elected office are time spent in private practice and experience as a judge, counting trial and appellate experience together. Collectively, Supreme Court Justices spent 500 total years as elected officials; more than the 429 years they spent as appellate judges. Given the current Court's zero years spent in elected office and 74 years spent on an appellate bench, the Roberts Courts are quite anomalous.

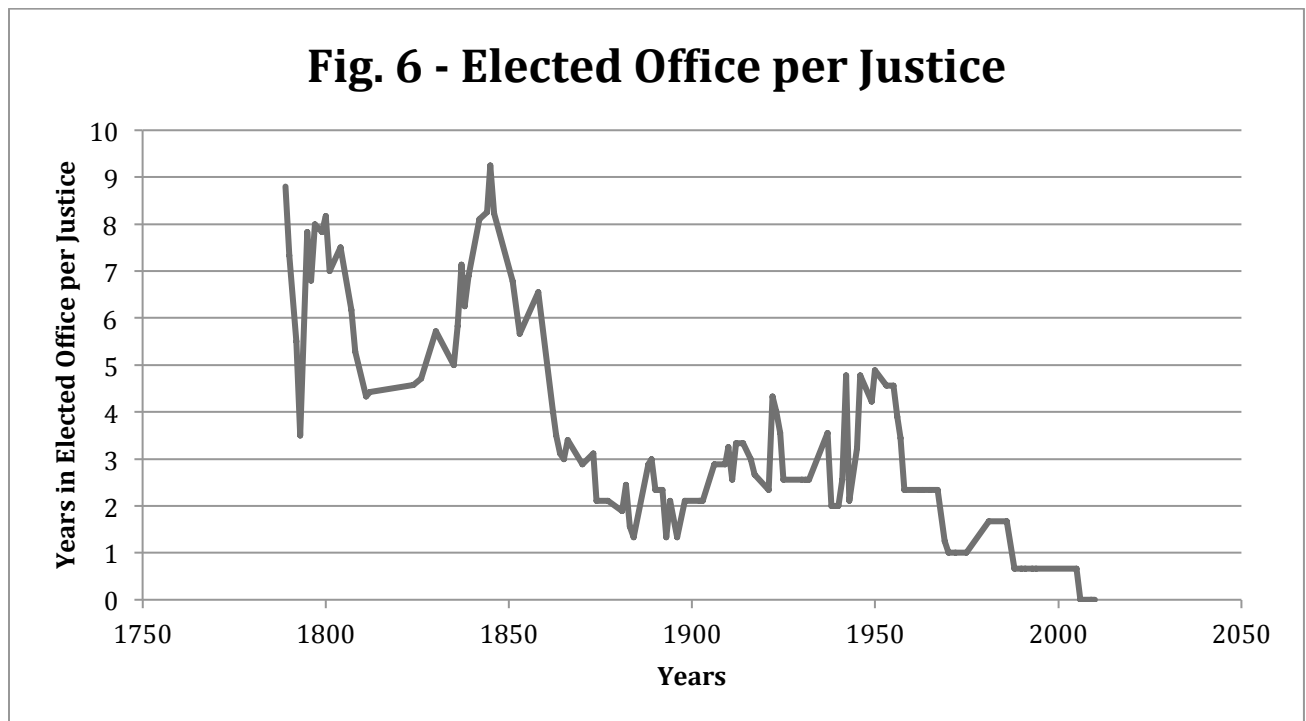
<sup>65</sup> This count does not include time as an elected judge or elected attorney general. Only stints as an elected state or federal legislator or executive are tallied.



This service is impressive for the offices held, the variation, and the sheer amount of time. Supreme Court Justices have served as the President of the United States, governors of multiple states, and mayors. Fourteen different Justices have been Senators and seventeen have been U.S. Representatives.

There are only three Supreme Courts where a not a single Justice has served in an elected office: Roberts 2, Roberts 3, and Roberts 4.<sup>66</sup> The trend away from elected office as an experience for Supreme Court Justices has been marked since the Burger Courts, but has accelerated recently. The first nineteenth century Court with relatively limited elected experience is Waite 6, serving from 1882-1886 and carrying a total of just 12 years of elected experience.

Figure 6 shows how the per Justice years in elected office have fallen precipitously in recent years:



<sup>66</sup> The retirement of Justice Sandra Day O'Connor ended a continuous tradition of at least one former politician on every Supreme Court from Jay 1 forward.

E. *Law Teaching*

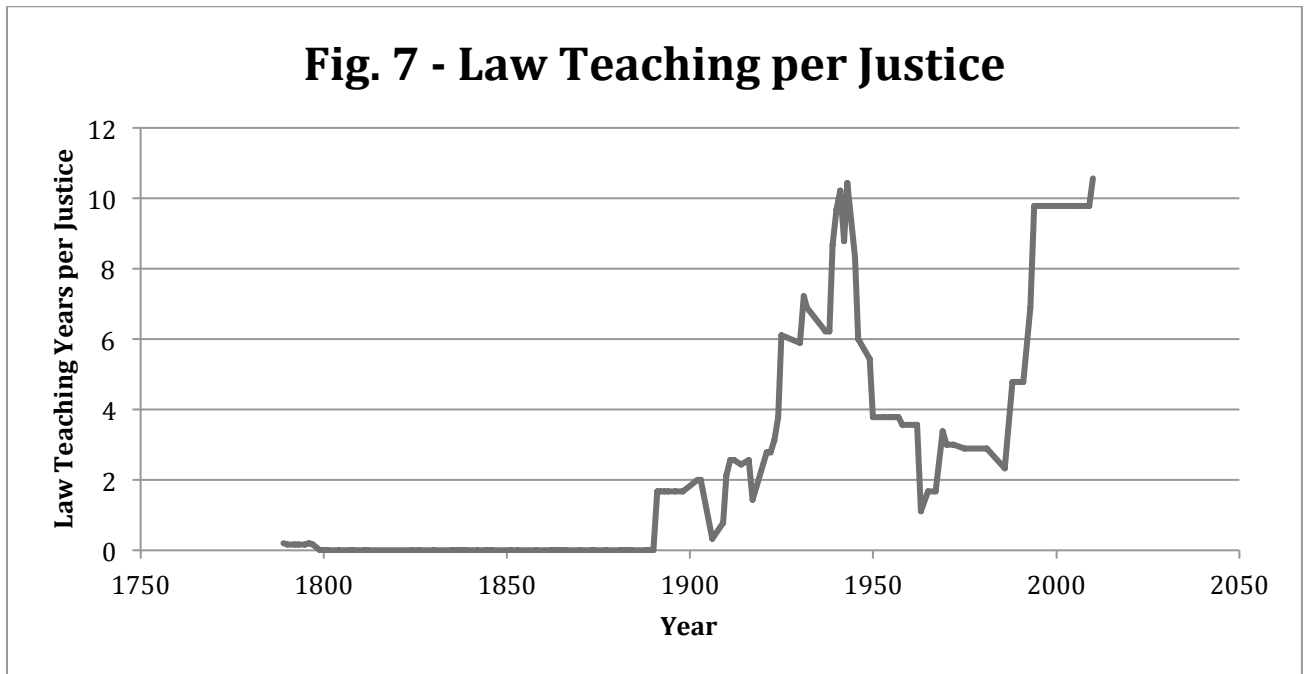
What the Roberts Court lacks in practice experience it makes up in law teaching. With 95 collective years in legal academia, Roberts 4 is again first among all Supreme Courts in years spent in legal academia. Interestingly, the gap is not as large as some other categories; two Courts from the 1940s (Hughes 8 and Stone 2) are just behind with 94 total years.<sup>67</sup> Unsurprisingly, given the rarity of law school training in the 19<sup>th</sup> century, most Supreme Courts during that period have no law teaching experience.<sup>68</sup>

Figure 7 shows a long period where no Justices had any experience teaching, followed by two relative peaks:

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<sup>67</sup> Hughes 8 (Justices Hughes, McReynolds, Stone, Roberts, Black, Reed, Frankfurter, Douglas, and Murphy, February 5, 1940-July 3, 1941) and Stone 2 (Justices Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, R. Jackson, and W. Rutledge, February 15, 1943-October 1, 1945) included several Justices with extensive law teaching experience. Harlan Stone (Professor and Dean at Columbia), Owen Roberts (professor at Penn), Felix Frankfurter (professor at Harvard), William Douglas (professor at Columbia and Yale), and Wiley Rutledge (professor and Dean at Colorado, Washington University, and Iowa) were all long-time academics. In addition, James McReynolds (Vanderbilt), Charles Evan Hughes (Cornell and NYU), and James Murphy (University of Detroit) all taught law for a period of their careers.

<sup>68</sup> This study only measures experience from before joining the Court. As such, Justice Story's long service as an instructor at Harvard while he was a Justice was not counted. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 237-70 (1985).



The experience in law teaching helps explain why the Roberts 4 Court is relatively low in practice or elected experience. Justices Scalia, Kennedy, Ginsburg, Breyer and Kagan spent much of their pre-Court careers in academia.

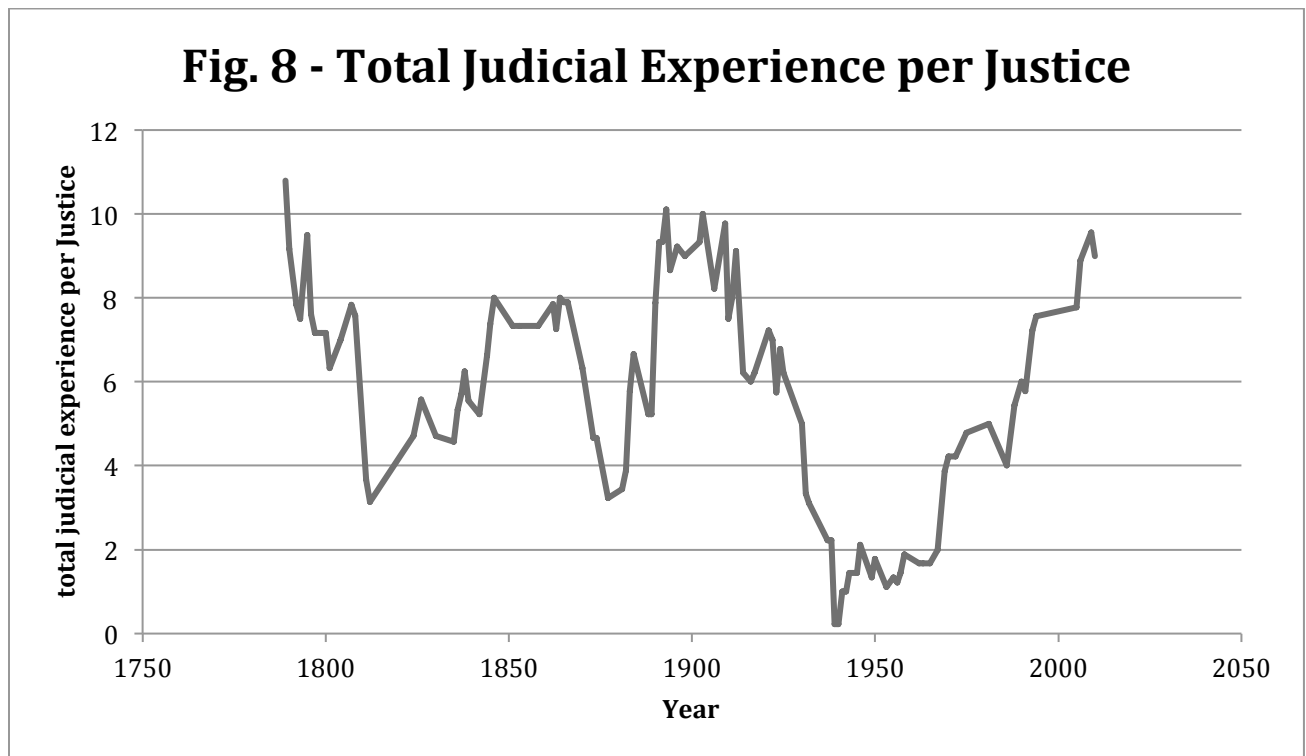
F. *Total Judicial Service*

Like elected service before the retirement of Justice O'Connor, every Supreme Court has had at least one Justice with some prior judicial experience. This first measure of judicial service combines any and all judicial service, including state and federal, trial and appellate. This experience runs from the least – two total years experience for Hughes 6 and 7, 1939-40<sup>69</sup> – to the most – Fuller 5 (1893-1894), with ninety-one total years. Surprisingly, given the criticism of the current practice of appointing former U.S. Circuit Court Judges to the Court, the Roberts

<sup>69</sup> Hughes 6 was Justices Hughes, McReynolds, Brandeis, Butler, Stone, Roberts, Black, Reed, Frankfurter and Hughes 7 subtracted Brandeis and added Douglass. Of these Justices only Justice Black had any judicial experience, two years as a police court judge in Birmingham, Alabama. See HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 5, 13 (1996). The Hughes 6 and 7 Courts, like the Roberts Courts, were relative outliers experience-wise.

Court is not at the highest end of prior judicial service. On this measure Roberts 3 (eighty-six years total judicial experience) and Roberts 4 (eighty-one years) are in the top 10, but the bulk of the top 10 and the top 3 are all from the Fuller Courts at the turn of the 20<sup>th</sup> Century.

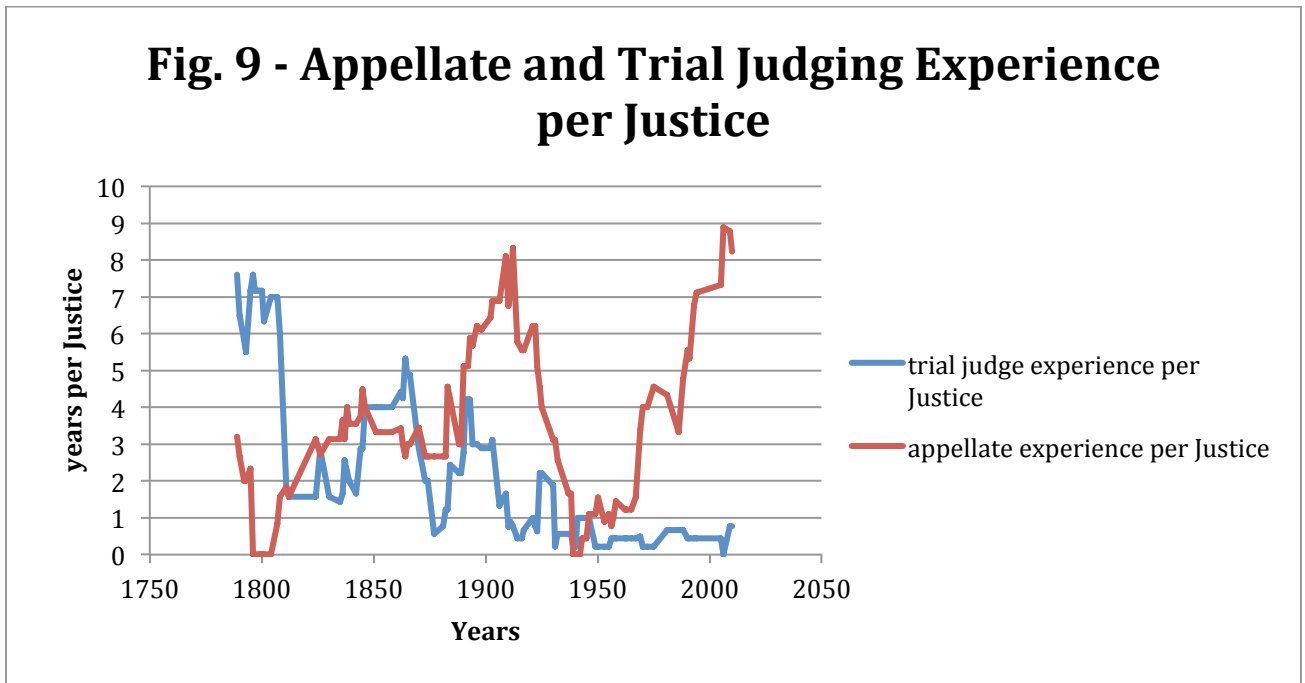
Figure 8 – total judicial experience per Justice – shows that the first Supreme Court actually had the most prior judicial experience per Justice:



The chart shows three distinct periods where judicial experience dipped on the Supreme Court, with the early 1940s a clear low point. On a per Justice basis the Roberts Courts are one of three distinct peaks, and lower than the highs of Jay 1 and the Fuller Courts.

G. *Trial and Appellate Judging Considered Separately*

If you disaggregate trial and appellate judicial experience, however, the Roberts Courts' lengthy experience as appellate judges stands out more clearly. The Roberts Courts are four of the top six in cumulative total years in appellate judging. Roberts 2 and Roberts 3 are first and second, with eighty and seventy-nine total years as appellate judges respectively. In fact, while commentators have noted the rise of the federal appellate judgeship in the last fifty years, the trend lines also show the move away from trial court experience. Figure 9 shows both trial and appellate experience.



Trial Judge experience has shown a relatively steady decline since the heights of the early Supreme Courts, while appellate experience has waxed and waned more

extremely.<sup>70</sup> The Roberts Court has the highest per Justice appellate experience, but the Courts of the early 20<sup>th</sup> century are close behind.

#### H. *Miscellaneous Employment Categories*

The five categories considered above are the five biggest sources of pre-Court professional experience, but there are three additional, less prevalent categories worth mentioning: non-law government service, military service, and non-law private employment.

##### 1. Non-Law Government Service

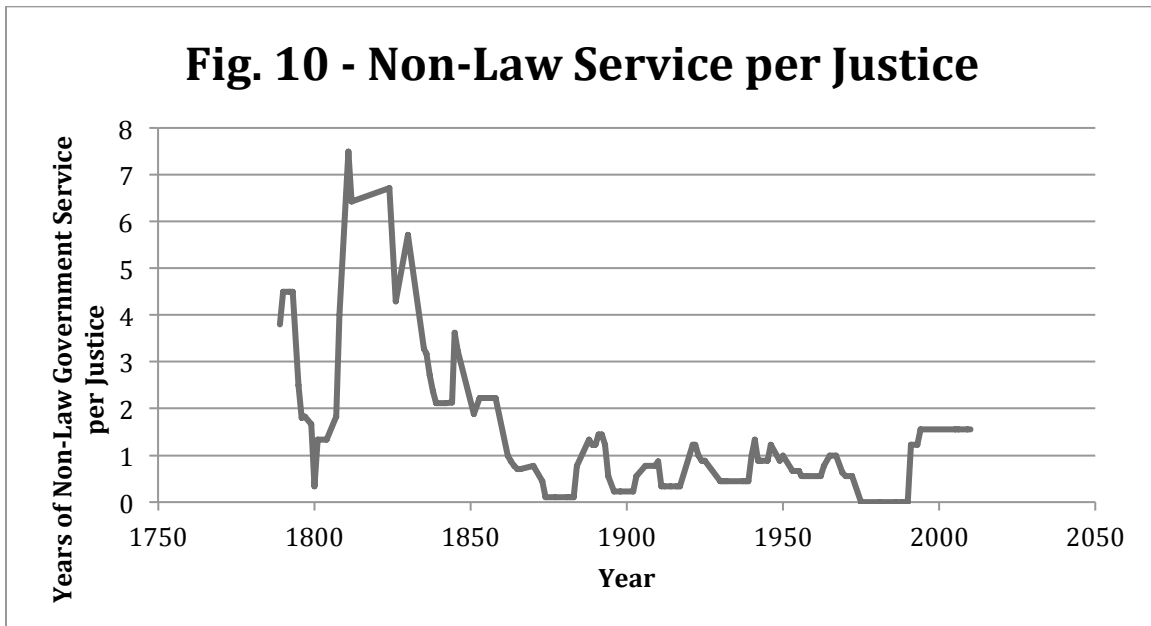
Many Supreme Court Justices have some experience as government employees in jobs that do not involve much, if any legal practice. Various levels of jobs from under-secretaries to cabinet level positions were coded as non-law government service. For example, Justice Thomas worked as a legislative assistant to then U.S. Senator John Danforth, the assistant secretary for civil rights at the Department of Education, and then the chairman of the EEOC across eleven years. Each of these experiences is counted as non-law government service, because these jobs (unlike working as an assistant U.S. Attorney or in the white house counsel's office) do not require a law degree.

Non-law government service was less common historically. The Roberts 4 Court is above the median, but still in the middle with 14 cumulative years and approximately 1.5 years per Justice. Figure 10 shows that this experience ran high

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<sup>70</sup> Congress did not create the federal courts of appeals until 1891, so all of the pre-1891 appellate experience came from state appellate courts. See Circuit Court of Appeals Act of 1891, ch. 517, § 6, 26 Stat. 826.

for the first fifty or so years of the Supreme Court<sup>71</sup> and has remained relatively lower since:



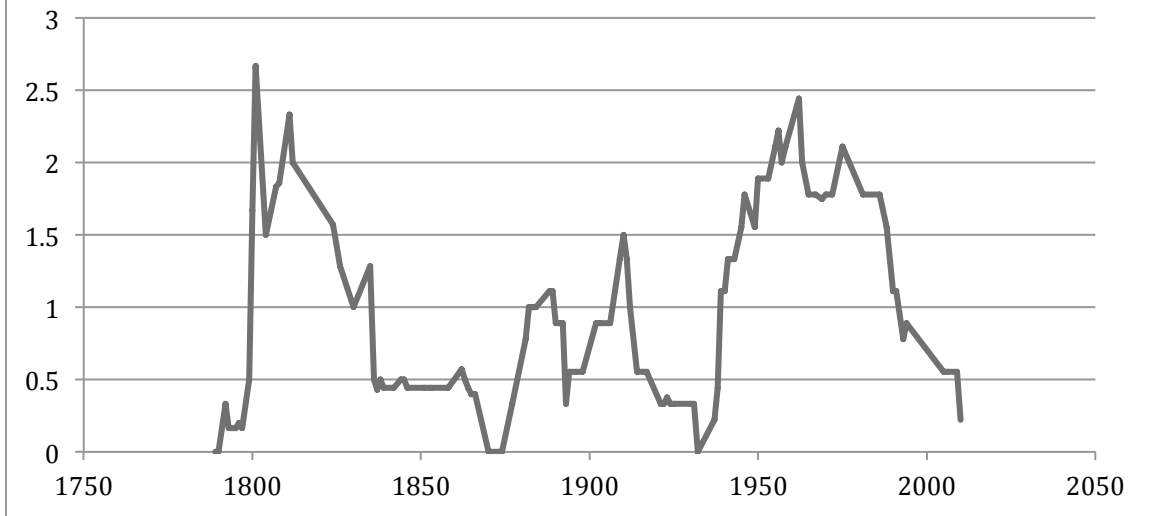
## 2. Military Service

The amount of military service on various Supreme Courts tends to rise and fall depending on the wars America fought over the years, as well as the depth of population-wide participation. For example, most Justices who were of fighting age during the Revolutionary War and World War II appear to have fought, as shown by the spike in judicial military experience following those wars, while the veterans of other wars were less prevalent on the Court.<sup>72</sup>

<sup>71</sup> The absolute peak of 7.5 years of non-law government service per Justice was from Marshall 5 (which sat from 1811-12).

<sup>72</sup> In reading Figure 11 please note the difference in scale on the vertical access. The bulk of the previous charts have run from 0-10 years per Justice and this Figure spans 0-3 years per Justice.

**Fig. 11 - Military Service per Justice**



Roberts 4 has relatively little military experience (Justices Breyer and Kennedy each have one year of experience), but there are several Courts with no military experience, including Jay 1 from 1789, the three Courts from 1870-1874 (Chase 2, 3 and Waite 1) and Hughes 3 from 1932-37.

### 3. Private Enterprise

While a relatively rare category of experience, there are twelve Justices who worked in a private, non-law enterprise for some period of time before joining the Court. This experience varies quite widely, from James Wilson's ten years as a businessman and land speculator in Philadelphia to Byron White's years as a professional football player for the Pittsburgh Steelers and the Detroit Lions. Five Justices ran nineteenth and early twentieth century newspapers.<sup>73</sup> Justice Lucius

<sup>73</sup> Justice John McLean was the founder and editor of *The Western Star*, Lebanon, Ohio from 1807-1812. *John McLean and the Western Star*, at <http://www.historiclebanonohio.com/?q=mclean> (last visited June 1, 2011). The *Western Star* is still in publication. See THE WESTERN STAR, at <http://www.western-star.com/> (last visited June 1, 2011). Justice Henry Baldwin was the publisher of *The Tree of Liberty* a Republican newspaper in Pittsburgh. See TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 83 (2001). The *Tree of Liberty* is no longer in publication, although a spurious newspaper



Q.C. Lamar was the President of the University of Mississippi and Joseph Lamar was a professor of Latin at Bethany College. The twelve Justices with non-law experience were spread out over time, so that more than half of all the historical Supreme Courts have at least one Justice with some such experience. No Justice has had any private, non-law experience since Byron White's retirement in 1993.

#### J. *Geography*

The study measures the years each Supreme Court Justice spent in any state or foreign country.<sup>74</sup> For ease of use the study aggregates the states into different geographic areas of the country and a category for foreign countries.<sup>75</sup> Without aggregating the data there are some interesting trends.

Each nomination by the President to the Senate has included an official home state for the nominee,<sup>76</sup> and these alone show some noteworthy results. Unsurprisingly given the historical context, the two most prevalent official home states are New York and Massachusetts. New York's overall lead is somewhat surprising, however. Out of one hundred and fourteen Justices considered, sixteen listed New York as their home state. Massachusetts is second with ten Justices, a

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based upon Grand Theft Auto entitled "The Liberty Tree" was created in 2001. See *Liberty Tree*, at <http://www.rockstargames.com/libertytree/> (last visited June 1, 2011).

Justice Stanley Matthews was the editor of the *Tennessee Democrat* in Maury County, Tennessee. See D. GRIER STEPHENSON, *THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY* 123 (2003). Melville Fuller was the editor of the *Augusta Age*, in Augusta Maine. See JAMES W. ELY, *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER* 5 (1995). James Byrnes edited the *Aiken Journal and Review*, in Aiken, South Carolina. ROBERT SOBEL, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH* 54 (1990).

<sup>74</sup> Only full years of experience are counted and for some of the Justices the years of their childhood are somewhat fuzzy. For example, John McLean's years of childhood were split between New Jersey, Virginia, Kentucky and Ohio without any clear record of when he lived in which state. See TIMOTHY S. HUEBNER, *THE TANEY COURT: JUSTICES, RULINGS, AND LEGACY* 51 (2003).

<sup>75</sup> The categories are New England, Mid-Atlantic, South, Midwest, Southwest, West, foreign countries, and Washington D.C. These categories are described further *supra* notes \_\_ and accompanying text.

<sup>76</sup> See DATABASE, *supra* note \_\_, at 93.

substantial gap that reflects New York's dominance as the historic legal and commercial center of the United States.<sup>77</sup>

The rest of the top ten includes some surprises. Ohio has nine Justices, Virginia eight, Pennsylvania and Tennessee six each, and Kentucky, Maryland and New Jersey five each. Virginia's standing as the fourth state for placing Supreme Court Justices behind Ohio is rather surprising,<sup>78</sup> given Virginia's relative dominance politically and economically post-revolution and into the early nineteenth century and Ohio's comparative stature as a frontier during that time period.<sup>79</sup> Tennessee and Kentucky were also relative frontier states in the first half of the nineteenth century,<sup>80</sup> so their representation on the Court seems unlikely, especially in comparison to the relative paucity of Justices from the non-Virginia original southern states – North Carolina (2), South Carolina (3), and Georgia (4). Two other original states, Delaware and Rhode Island, have never had a Justice. Other

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<sup>77</sup> See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 80 (1994) (stating that following the opening of the Erie Canal in 1825 into the late-nineteenth century New York City was “the dominant force in American economic life” and “a center for legal work”); MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988) (“Though New York was not the only city in which large law firms emerged around the turn of the [twentieth] century, it did have the greatest concentration of them, reflecting its position as the nation’s financial and commercial center.”).

<sup>78</sup> Of course students of presidential history will note that Ohio and Virginia have a spirited debate over which state has been the “home” state to more U.S. Presidents as well, see *Home to More Presidents: Ohio or Va.?*, available at <http://www.factcheck.org/2008/02/home-to-more-presidents-ohio-or-virginia/> (last visited January 2, 2012), so maybe Ohio has punched above its weight in two of the three branches.

<sup>79</sup> Compare KEVIN R. GUTZMAN, *VIRGINIA’S AMERICAN REVOLUTION: FROM DOMINION TO REPUBLIC, 1776-1840* (2009) 163-97 (describing Virginia’s fall from political and economic dominance in the early-nineteenth century), with R. DOUGLAS HURT, *THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720-1830* (1998) (discussing the frontier period of Ohio history).

<sup>80</sup> For a history of Tennessee’s frontier period, see JOHN R. FINGER, *TENNESSEE’S FRONTIERS: THREE REGIONS IN TRANSITION* (2001). For Kentucky, see OTIS K. RICE, *FRONTIER KENTUCKY* (1993).

surprisingly underrepresented states include Texas with one Justice, and Florida, Oregon, Vermont, Washington and Wisconsin with none.<sup>81</sup>

Tallied by years these geographic trends are more pronounced, because many Justices who do not claim New York or Massachusetts as their home state for nomination purposes have spent a chunk of time in those states, for work or education.<sup>82</sup> The Justices have spent a total of 793 years in New York State and 522 in Massachusetts, the two highest numbers.<sup>83</sup> The next longest stay in any single jurisdiction is Washington, D.C. with 468 collective years. No Justice was born or grew up in Washington D.C., so that collective time all results from time spent working in the federal government, generally as a politician, a lawyer, or a judge.

The Justices have spent the most time in the mid-Atlantic,<sup>84</sup> with the South a close second.<sup>85</sup> Adding regions together suggests the dominance of the Northeast and the east coast in the lives of the Justices. If we aggregate to create a Northeast measure (a combination of New England, the Mid-Atlantic and Washington D.C.) the Justices spent almost half of their lives in that region. If we aggregate the east coast states (states bordering on the Atlantic Ocean) the Justices spent over half of their

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<sup>81</sup> The other states with no Justices are less surprising: Alaska, Arkansas, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, West Virginia and the District of Columbia.

<sup>82</sup> Harvard, Yale and Princeton are a relative boon to Massachusetts, Connecticut, and New Jersey.

<sup>83</sup> From 1789 to the present every Court but six (the six Courts of 1795-1807) has had at least one Justice who has spent a year or more in New York. Likewise, only Marshall 5 (November 23, 1811-February 3, 1812) and five of the late-Taney Courts from 1845-62 did not include any Justices who had lived in Massachusetts.

<sup>84</sup> 1625 collective years without Washington D.C., and 2093 with D.C. included.

<sup>85</sup> 1501 collective years spent in the South.

pre-Court lives in those states.<sup>86</sup> The Justices have spent a relatively short amount of time west of the Mississippi and almost no time in the Southwest.<sup>87</sup>

The following charts show the geographic tendencies. First, Figure 12 shows the recent uptick of time spent in DC,<sup>88</sup> with Roberts 4 a high point:

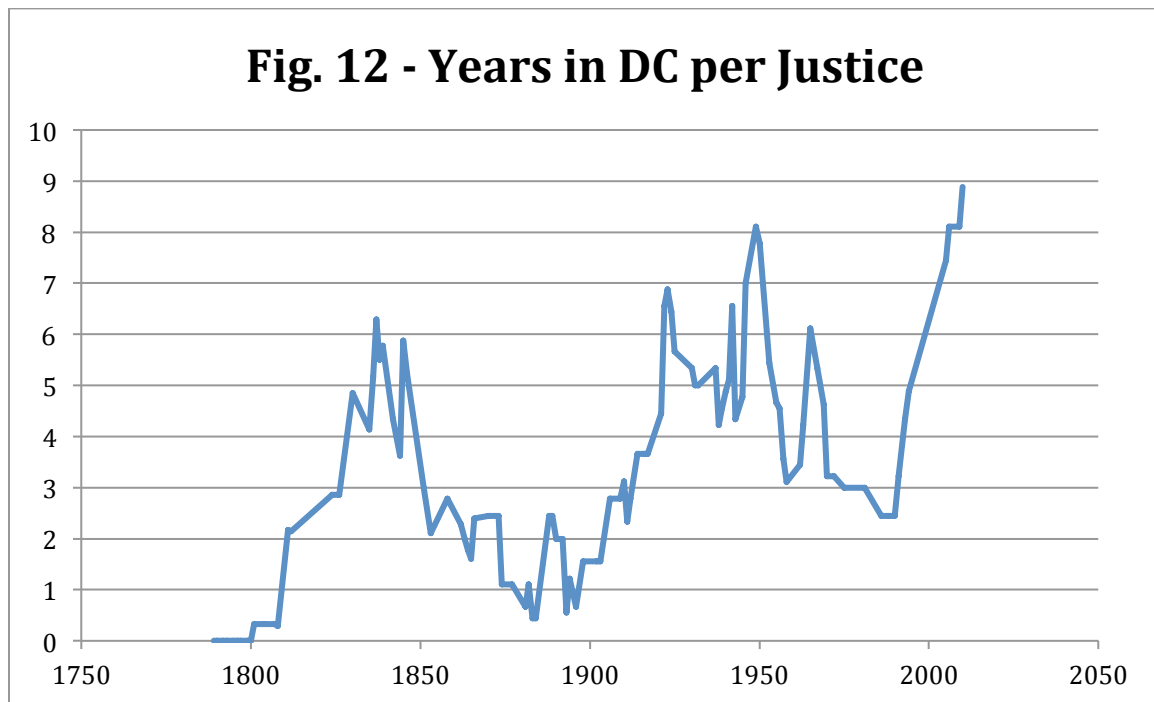


Figure 13 shows the time spent in New England and the Mid Atlantic (not including DC) on one chart.<sup>89</sup> Although the DC chart shows some volatility, the remaining geographic charts really fluctuate a lot depending on the addition or subtraction of individual Justices from the Court. For instance, the last three Justices appointed (Alito, Sotomayor, and Kagan) had all spent significant time in either New York or New Jersey, so the Mid-Atlantic count spikes since 2006. Likewise, the

<sup>86</sup> The non east coast states that have the longest stays are Ohio, Kentucky and Tennessee.

<sup>87</sup> Collectively the Justices have spent more time living in foreign countries than in the Southwest.

<sup>88</sup> Note that the early “0” years per Justice on the graph is a little deceiving, since Washington, DC did not become the capital until 1800.

<sup>89</sup> Because of the variability in the per Justice numbers only two datasets are combined on the next two charts. More than two datasets are very hard to read.

retirement of Souter dented the New England count, although the collective time spent at Yale and Harvard, plus Justice Breyer and Justice Kagan’s long New England experience, has kept New England afloat. Here is New England and Mid Atlantic:

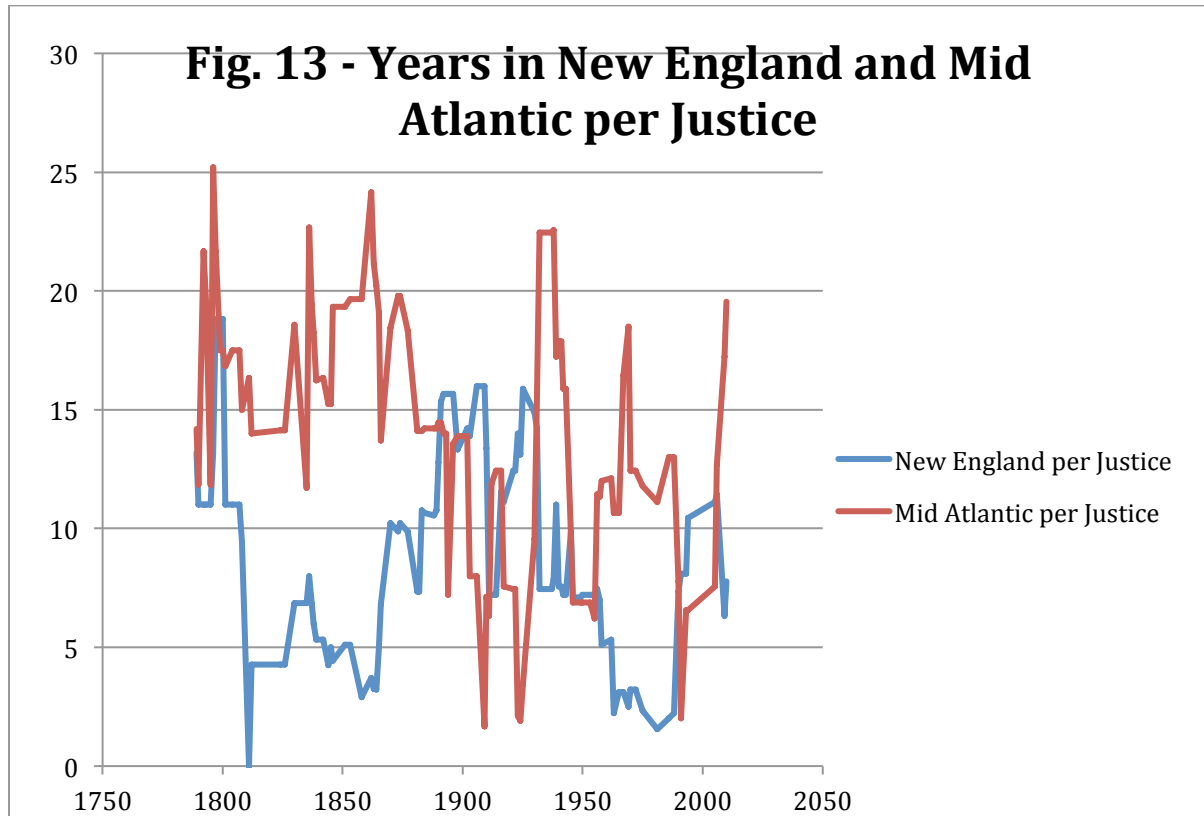


Figure 14 shows the South and Midwest. First and unsurprisingly, there are no Midwest years until the appointment of Ohioan John McLean in 1830. Second, note the relative prevalence of southern Justices from 1789 until 1949.<sup>90</sup> From 1949-55 the Southerners Rutledge, Vinson, and Jackson died in office and were

<sup>90</sup> 1946-49 marked a modern highpoint for Southern geographic experience with the replacement of Harlan Stone (who was primarily a New Yorker and New Englander) with the Kentucky native Frederick Vinson. The other Justices with Southern experience on the Vinson 1 and Vinson 2 Courts were Alabama native Hugo Black, Kentucky native Stanley Reed, and Wiley Rutledge, who grew up in the South. 1949 saw Tom Clark replace the Midwesterner Frank Murphy. Clark is not coded as a southerner, but as the only Texan to serve on the Supreme Court his years, plus the other Vinson 1 Justices created a relatively strong southern flavor to the Court.

replaced by non-southerners Minton, Warren, and the second Justice Harlan and the South has been less prevalent since.<sup>91</sup>

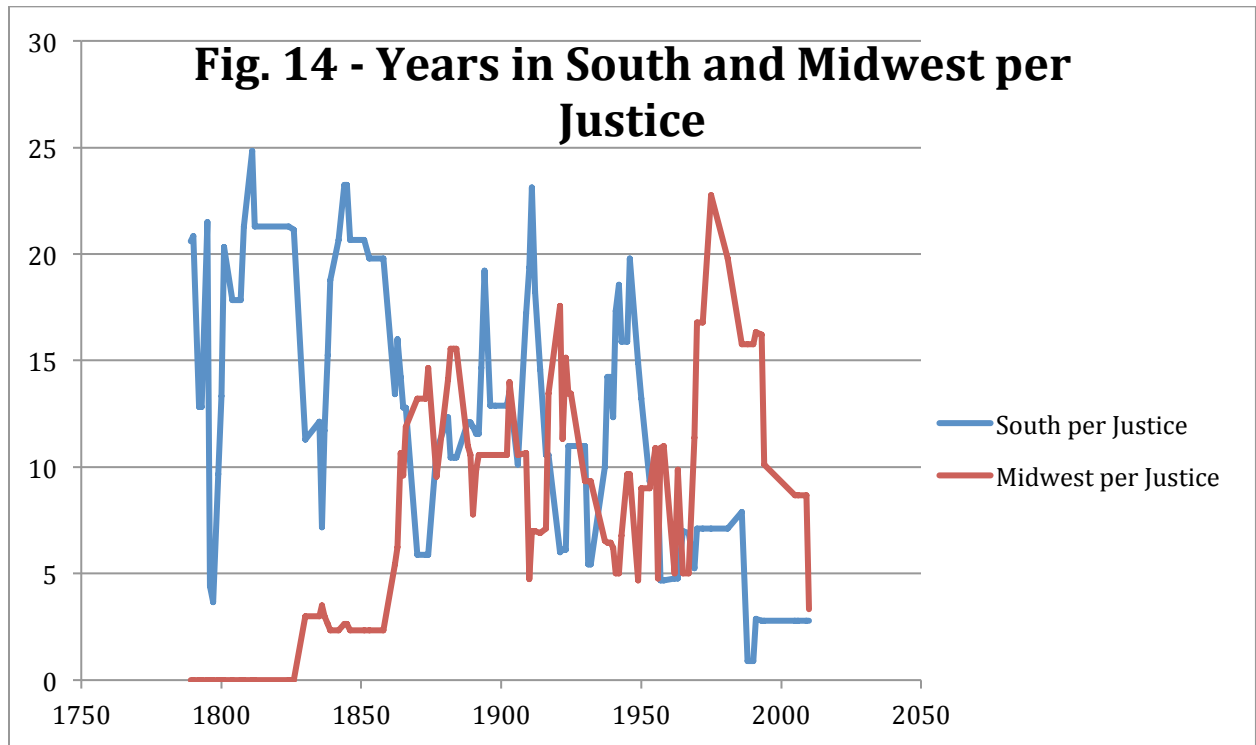
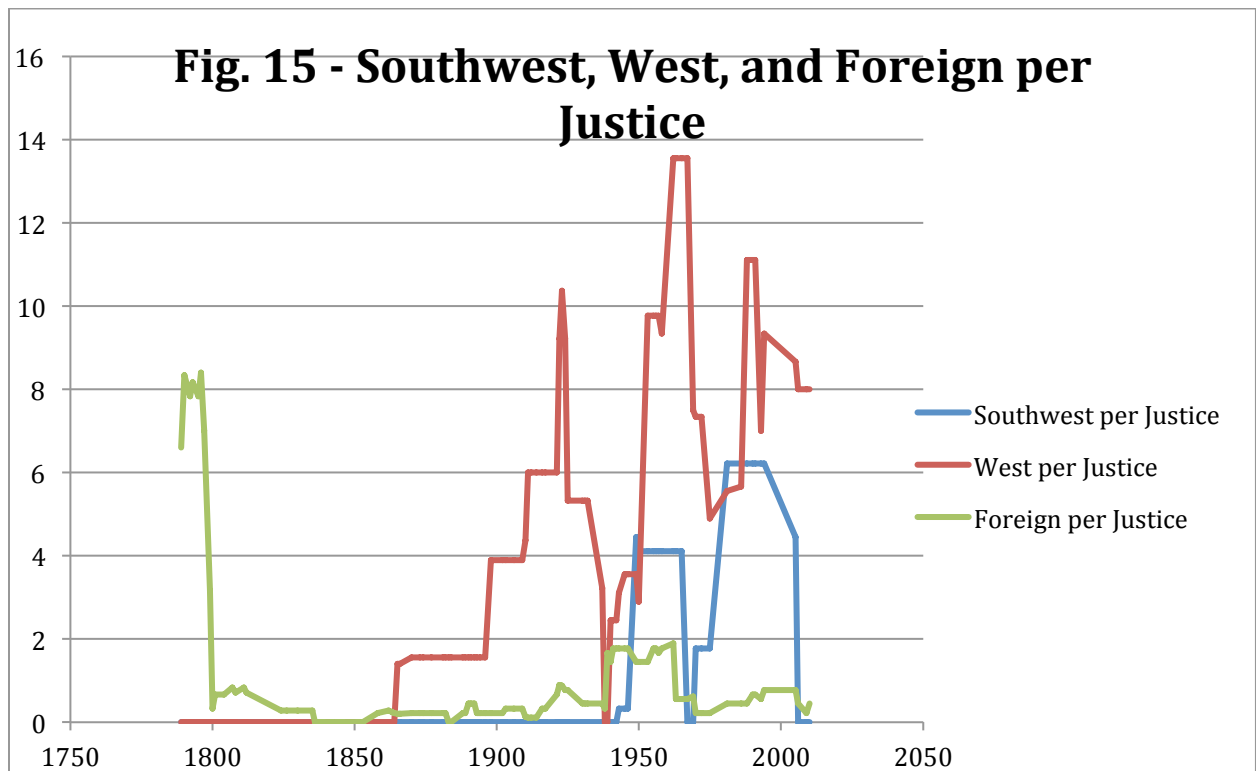


Figure 15 displays the remaining categories: years per Justice in the Southwest, West, and foreign countries. The foreign line is highest during the periods where Justices had grown up in a foreign country. The five Justice, no Chief Justice group from 1796, and the six Justice Jay 2 Court of 1790-92, are the two Courts with the most foreign experience. Justices Wilson, Paterson and Iredell were

<sup>91</sup> Justice Minton had spent 3 years practicing in Miami from 1925-28, but spent the great bulk of his life in Indiana. Neither Warren nor Harlan had any Southern experience.

The prevalence of southern Justices in the post-Civil War period is surprising. As noted in Part I, tying case results to non-ideological experiential factors has been challenging, but the prevalence of southerners on the Court before the 1950s may help explain *Plessy v. Ferguson* and the many other Court cases upholding Jim Crow and separate but equal. It is worth noting, however, that the first, tentative steps in dismantling segregation were taken under the late Stone and early Vinson Courts that were relatively southerner heavy. See, e.g., Robert A. Burt, *Brown's Reflection*, 103 YALE L.J. 1483, 1486-87 (1994) (arguing that “in a series of cases involving such matters as voting rights, interstate transportation, and graduate school education,” from 1944-54 the Court “gave clear indications that it disapproved of Southern segregation practices”).

born overseas and Justices Jay, Blair and John Rutledge each spent a short period overseas working or studying law. While the foreign years have lessened it is noteworthy that at least one Justice has at least one year overseas for the great majority of the Court's existence. In contrast, Western Justices were unknown until the appointment of the Californian Stephen Field in 1863<sup>92</sup> and the Southwest does not appear until the appointment of Wiley Rutledge in 1943.<sup>93</sup>



The two most prevalent geographic areas on the Roberts 4 Court are mid-Atlantic, Washington, DC and West, although all of the Justices have spent at least a few years in New England, the only such region on the current Court. Roberts 4

<sup>92</sup> Field was born in Connecticut and raised mostly in Massachusetts, but spent the bulk of his adult life and career in California. California had only been a state for 13 years when President Lincoln appointed Field.

<sup>93</sup> Rutledge spent three years of young adulthood in New Mexico and six years in Colorado attending law school, practicing, and beginning his career as a legal academic.

shows increases in Washington, DC and mid-Atlantic and a decline in the other areas. The most notable feature of the Roberts 4, is the time spent working in Washington D.C., where the current Court is at a high water mark.

#### J. *Education*

Educational experience mirrors the changes in the educational paths of lawyers in America. For instance, every Justice appointed from 1789-1899 except two spent some period of years “reading the law.”<sup>94</sup> From the twentieth century forward this became much less common. Likewise, eleven different nineteenth century Justices (and one twentieth century Justice) had no formal undergraduate or graduate education whatsoever, just a period reading law.<sup>95</sup> Three twentieth century Justices have only a law school education and no undergraduate studies.<sup>96</sup> Figure 16 illustrates the relative years in undergraduate education, law school, and reading the law per Justice:

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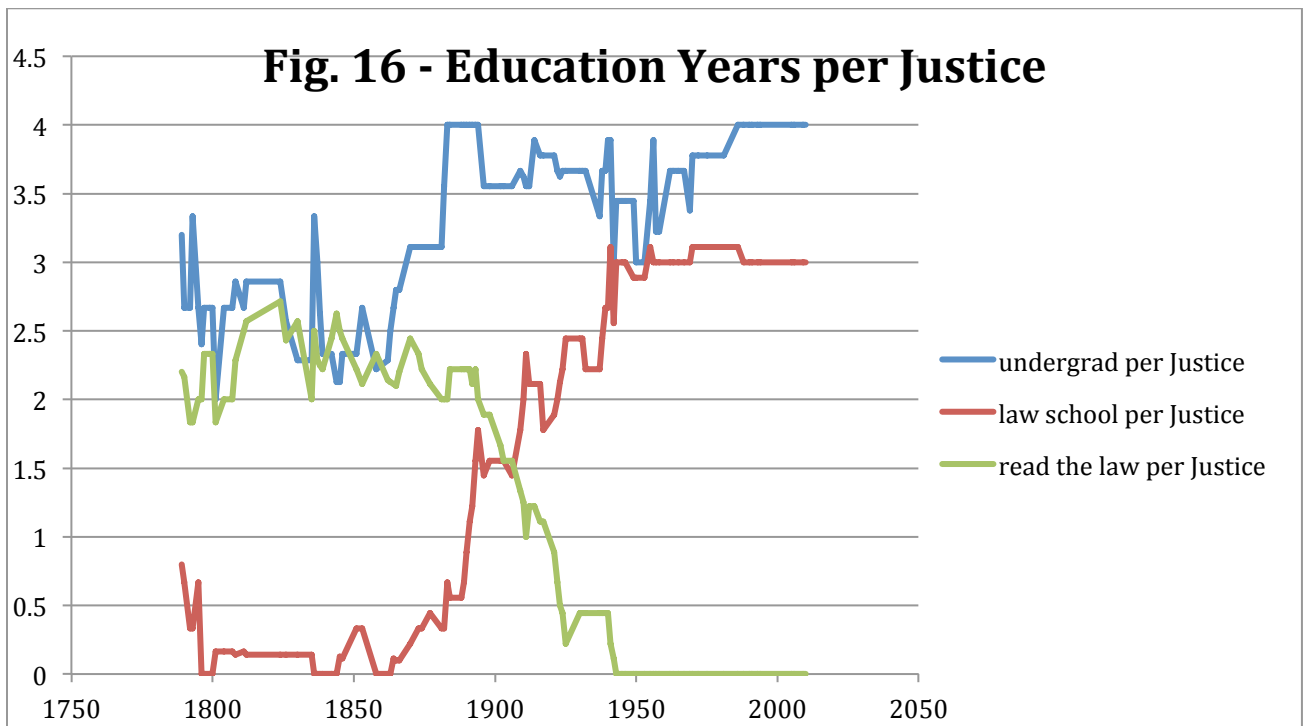
<sup>94</sup> There were 58 Justices during this period (counting Rutledge twice). The only two Justices who did not read the law were John Blair (1790-1796), who studied law at the Middle Temple in London (which could be coded as reading the law, but was coded as law school) and Benjamin Curtis (1851-1857), who was educated at Harvard Law School. The first Justice of the twentieth century, Oliver Wendell Holmes, did not read the law and was educated at Harvard Law School. In this, and other ways, Holmes was a sign of things to come in the twentieth century.

<sup>95</sup> The eleven from the nineteenth century are: James Iredell, Samuel Chase, Alfred Moore, John Marshall, Gabriel Duvall, John McLean, John Catron, John McKinley, Nathan Clifford, Noah Swayne, and Rufus Peckham.

James F. Byrnes is the lone twentieth century example. Byrnes was, of course, a remarkable man in most every respect. In the course of his career he served as a U.S. Representative, a Senator, the Governor of South Carolina, a Supreme Court Justice, Chairman of the U.S. War Mobilization Board during World War II and the Secretary of State immediately following World War II.

<sup>96</sup> These are Robert Jackson, Sherman Minton, and Charles Whittaker.





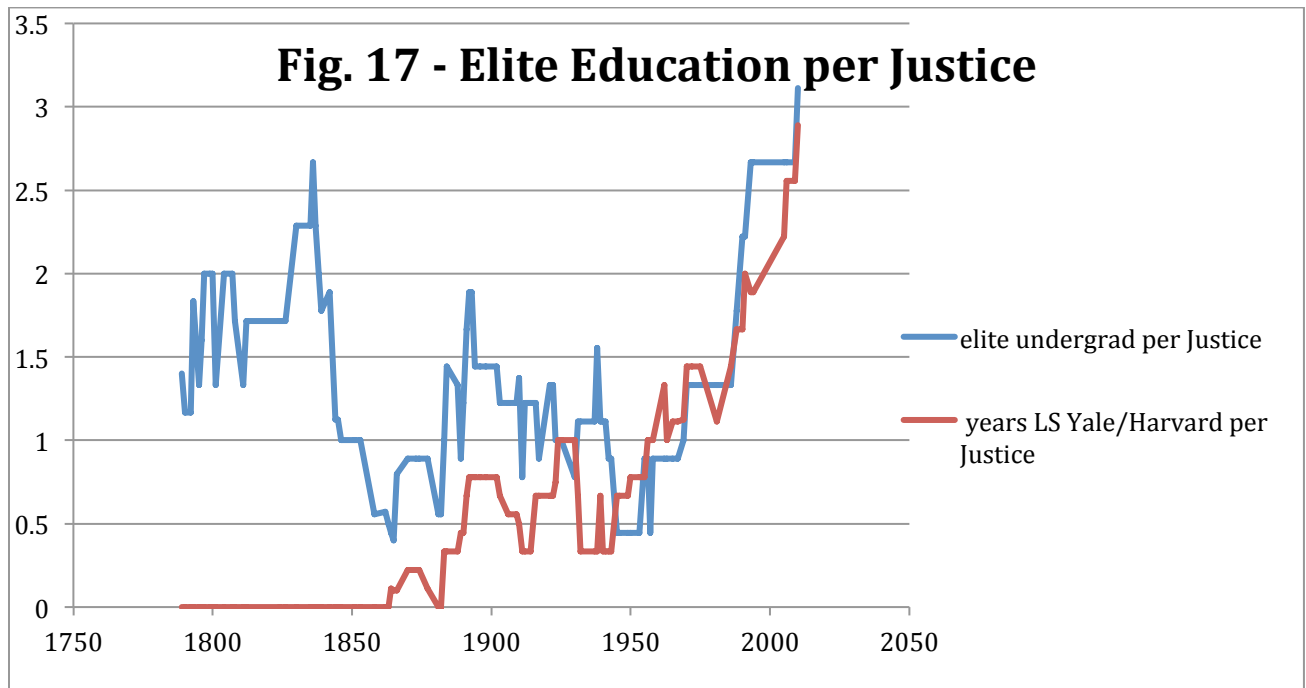
The current educational formula of four years of undergraduate and three years of law school education per Justice is actually of relatively recent vintage, as demonstrated by the various educational routes to the Supreme Court over the years. The first year when every Justice had four years of undergraduate work and three years of law school was 1986, when Justice Scalia replaced Chief Justice Burger.<sup>97</sup>

Nevertheless, recent Supreme Courts have not only completed the maximum amount of possible education, their education has grown increasingly elite. For example, a count of total years spent in undergraduate or law school education at either Stanford or an Ivy League institution shows that the Roberts 4 Court is first by a substantial margin with fifty-five total years. Notably, this trend started in the Burger and Rehnquist Courts. The first non-Roberts, Rehnquist or Burger Court on

<sup>97</sup> Chief Justice Burger spent three years getting a law degree at St. Paul College of Law and two in undergraduate (without earning a degree).

this ranking of elite education is the Hughes 5 Court (1938-39) with twenty-eight years of combined elite education.

Figure 17 separates out elite undergraduate and law school educations. It demonstrates graphically the rise of elite undergraduate education (counting ivy league institutions and Stanford) and the Yale and Harvard Law Schools.



Although there is one other high point in the early nineteenth century for elite undergraduate education,<sup>98</sup> the Roberts 4 Court is far and away first in time spent at the most elite American undergraduate institutions and law schools.

#### K. *Summary*

The Roberts 4 Court is the apogee of a number of Supreme Court selection trends. Counting Justice backgrounds by the number of years each Justice spent on an activity or in a location leads to a rather startling picture of the current Supreme

<sup>98</sup> The Taney 1 Court (1836) featured Harvard educated Joseph Story, Princeton (then called the College of New Jersey) educated Smith Thompson and James Wayne, and Yale educated Henry Baldwin. The other two Justices, Roger Taney and John McLean, read law and did not attend any undergraduate institution.

Court. The Roberts 4 Court spent less time in private practice than any previous Supreme Court. The Justices of the Roberts 4 Court spent almost as much time as government lawyers as they have in the private practice of law, another first for any Court.<sup>99</sup> The Justices of Roberts 2, 3 and 4 have the least collective experience in elected office and are the first Court to lack any Justice with experience as an elected official. The Roberts Courts are also on the low end of trial judging experience.

Much of this lost experiential time can be found in legal academia. The Justices of the Roberts 4 have spent more time in legal academia than any other Supreme Court, although two Courts of the 1940s are close.

Much of the rest of the time has been spent in appellate judging. Roberts 2 and 3 are the two Supreme Courts with the most time spent in appellate judging. Roberts 2 and 3 are not first in total years judging, however, the combination of trial and appellate judging on some previous Courts has been higher.

Partially because of all of the combined years on the DC Circuit and in government lawyering the Roberts 4 Court has spent more years in Washington D.C. than any other Supreme Court. Lastly, the Roberts 4 Court has spent more time in elite undergraduate institutions and law schools than any other Court.

Thus, the trend towards law teaching and appellate judging, and away from the private practice of law, elected office and serving as a trial judge have all reached peaks or valleys in the Roberts Courts. These trends are empirically demonstrable and irrefutable. The harder question is whether they are salutary or insalubrious, a question we turn to next.

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<sup>99</sup> This additional government experience means that the Roberts Court does not have the least time practicing law of any Court. See Figure \_\_, *supra*.

### III. A BRIEF, NORMATIVE ARGUMENT AGAINST THE ELITE MAKE-UP OF THE CURRENT COURT

This Part builds off of the empirical analysis to make a normative case that that the collective past experiences of the current Court is not optimal given what the Court actually does. This section is not empirical and many can and will disagree with its conclusions. At heart, the question of whether the changes in Justice background have been good or bad likely depends on one's view of the quality of the work of the current Court and one's impression of the current Court's brand of elitism/meritocracy, and those questions do not lend themselves to empirical answers.

Nevertheless, it is demonstrable that the Justices themselves come from different backgrounds and that the current Court is operating differently than previous Courts have. The final conclusion – that these two phenomena are related and regretful – requires some additional persuasion. Part I.A discusses the collective backgrounds of the current Justices and argues that they are a uniquely elite and cloistered group of Justices. Part I.B describes the role of the current Court and argues that it is now largely a policy making body, not a court of appeals correcting errors and applying narrow legal principles. Part I.C argues that the role of the Court and the nature of the Justices are heading in opposite directions: a policy-making Court needs Justices with real life experience, individuals who have faced the hurly burly of legal practice or politics or trial court judging to understand the ramifications of broad social policy. Individuals with more multivariate life experience may also be less likely to default to complex legalism in deciding cases and writing opinions, a serious problem with the current Court.

A. *The New Judicial Elite – Cloistered and Neutral*

It is empirically demonstrable that the background experiences of Supreme Court Justices have changed over time and that the current group of Supreme Court Justices is relatively unique. This part argues that the current Court exemplifies a certain way of thinking about judicial meritocracy and elitism.

First consider the more prevalent experiences on the Roberts 4 Court – these Justices have spent more time in cloistered and neutral work settings than any previous group of Justices. Cloistered and neutral means settings where a lawyer is kept out of the fray and encouraged to think about legal problems (and life) in the abstract.

These Justices have spent more time in appellate judging and legal academia than prior Justices. These jobs share much in common. Both jobs are notoriously and proudly independent.<sup>100</sup> Both jobs deal with law in an abstract manner.<sup>101</sup> Neither job involves much contact with the public at large. Both law professors and appellate judges tend to encounter litigants on the written page – judges in the fact sections of briefs and professors in the fact sections of the cases they teach. Both jobs are closely associated with law students or recent law school graduates (in their role as judicial law clerks).

Both jobs are very hard to get and require a high level of technical excellence in legal reasoning. I have written elsewhere about how judges and Justices are often

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<sup>100</sup> Compare the various mechanics of judicial independence, *see, e.g.*, Symposium, *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 311 (1999) (discussing judicial independence), with the legal academic's distaste for "advocacy scholarship." MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 208 (1996).

<sup>101</sup> Consider Judge John Noonan's excellent comparison between the professions on this point. *See* John T. Noonan, Jr., *Hercules and the Snail Darter*, N.Y. TIMES, May 25, 1986, § 7, at 13.

selected based upon their mastery of legal analysis and complexity,<sup>102</sup> and the import placed upon analytical legal reasoning is even higher in the law professoriate.<sup>103</sup>

Perhaps unsurprisingly given their work post-law school, the Roberts 4 Justices are particularly elite educationally. No Supreme Court has spent more time studying at the very best of the best of American educational institutions (ivy league or Stanford for undergrad and Harvard or Yale for law school). These experiences reflect a particular type of achievement and another heavy dose of the ivory tower.

The Roberts 4 Court has spent more time living in Washington D.C. than any previous Court. This shows a deep involvement with both the federal government and the Supreme Court before becoming Justices. Insofar as there is truth to an “inside the beltway” mentality,<sup>104</sup> the Roberts 4 Court would likely reflect it.

The Roberts 4 Justices also probably know more about the workings, output, and nature of the Supreme Court than any other group of Justices. Many of the Justices have spent a lifetime studying the Court as law professors or working at the Court as clerks or practicing before it as lawyers.<sup>105</sup>

Consider what experiences are missing. This Court is historically short in three previously well-represented categories of experience – the private practice of

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<sup>102</sup> BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 259-83 (2011).

<sup>103</sup> See, e.g., Leland Ware, *People of Color in the Academy: Patterns of Discrimination in Faculty Hiring and Retention*, 20 B.C. THIRD WORLD L.J. 55, 61-62 (2000) (describing the traditional hiring criteria for law professors); Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 432-33 (1986) (same).

<sup>104</sup> See, e.g., Sanford Levinson, et al., *Should We Dispense With the Electoral College?*, 156 U. PA. L. REV. PENNUMBRA 10, 22 (2007), available at [http://www.pennumbra.com/debates/pdfs/electoral\\_college.pdf](http://www.pennumbra.com/debates/pdfs/electoral_college.pdf) (describing and decrying the inside-the-beltway mentality).  
University of Pennsylvania Law Review PENNumbra 2007

<sup>105</sup> See *infra* notes \_\_\_ and accompanying text.

law, serving as an elected politician, and trial judging. The time these Justices have spent in the practice of law, moreover, is clustered in appellate-heavy work or highly-politicized work in the White House Counsel's Office or for Congress, with little time spent in the more traditional litigation or transactional practices of law.<sup>106</sup>

Thus, the experiences of the Roberts Court Justices evince a focus upon high-level legal reasoning, experience in appellate judging, experience in jobs that are especially independent and "neutral," and a special kind of meritocracy/elitism at play. These Justices have less experience with the operation of the legal system below the theoretical/appellate level and less "real life" experiences of the give and take of conflict, advocacy, and compromise.

B. *What the Court Does - The Supreme Court is a Political Court*

The Court has naturally morphed from its inception to today, but recent years have marked a particularly substantial change. Over time the Court's caseload has shrunk,<sup>107</sup> while the size of its potential certiorari pool has grown.<sup>108</sup> This means the Court is deciding fewer cases as an absolute number and as a percentage of petitions.

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<sup>106</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>107</sup> During the 1970s and 1980s the Court's caseload hovered around 170 cases per term. Since the 1990s that number has settled around ninety cases per term. See Margaret Meriwether Cordray, *The Solicitor General's Changing Role In Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1339-40 (2010). For one explanation of why, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 737-94 (2001).

<sup>108</sup> POSNER, *supra* note \_\_\_, at 269-70. For a description of the collapse in the number of certiorari petitions granted as an absolute and relative number, see Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006); Kevin H. Smith, *Certiorari and The Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 729 & n. 9 (2001).

As a consequence, the Court limits itself to cases of national impact: cases where it can announce broad rules or decide critical constitutional issues.<sup>109</sup> While the overall percentage of constitutional cases in the Court's docket has not risen,<sup>110</sup> the salience of those decisions (and the public backlash) certainly has grown since the 1950s.<sup>111</sup>

The Supreme Court makes politically freighted decisions at every level of case review. The decision to rarely grant review itself is politically loaded. The Court has essentially limited its own power by choosing to address fewer cases. Commentators have speculated about the reasons, ranging from a desire "to reduce the role of the judiciary in the nation's political life,"<sup>112</sup> changes in the Court's mandatory jurisdiction,<sup>113</sup> the power of the court clerks in the process,<sup>114</sup> advanced age,<sup>115</sup> or sloth.<sup>116</sup> Arthur Hellman has concluded that the Court's shrunken docket reflects an "Olympian" Court that issues fewer, but more monumental decisions.<sup>117</sup>

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<sup>109</sup> The Court's own Rule 10 suggests that *certiorari* will be granted only for "compelling reasons," based upon an "important federal question" or "important matter" that has divided federal courts of appeals, divided federal and state courts; and has not been decided by the Supreme Court. See SUPREME COURT RULE 10.

<sup>110</sup> See Posner, *supra* note \_\_\_, at 37-39.

<sup>111</sup> See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 589-91 (2009) (examining the Court's increasingly controversial Constitutional decisions).

<sup>112</sup> David O. Stewart, *Quiet Times: The Supreme Court Is Reducing Its Workload - But Why?*, A.B.A. J., Oct. 1994, at 40, 43.

<sup>113</sup> In 1988, Congress eliminated mandatory appeals from state supreme courts, as well as appeals from any courts that invalidate state statutes. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662, (codified as amended at 28 U.S.C. §§ 1252, 1254, 1257, 1258 (2012)). See also David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997).

<sup>114</sup> Stephanie Ward, *Clerks Avoid Getting Their DIGs In: They Just Say No to Cert Petitions, as the Court's Docket Shrinks*, ABA J., Mar. 18, 2007.

<sup>115</sup> Joshua C. Teitelbaum, *Age and Tenure of the Justices and Productivity of the U.S. Supreme Court: Are Term Limits Necessary?*, 34 FLA. ST. U. L. REV. 161, 164-68 (2006).

<sup>116</sup> Kevin Fayle, *Supreme Slackers?*, at <http://blogs.findlaw.com/courtside/2009/09/supreme-slackers.html>.

<sup>117</sup> Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 409-29 (1996).



Once the Court chooses its cases, the decisions themselves will have political consequences and there is ample empirical and scholarly evidence that politics plays a role in these decisions.<sup>118</sup> The actual process of writing and disseminating the opinions also reacts to the salience of the issue at hand, with higher profile cases drawing longer, more complex opinions and more dissents and concurrences.<sup>119</sup>

The last sixty years have also seen a change in the public perception of the Court's nature and role<sup>120</sup> and increased attention to issues of justice selection and confirmation.<sup>121</sup> Controversy and interest in the selection of Justices selection is also at an all-time high.<sup>122</sup>

The combination of these factors means that if the Supreme Court has not always been a political, policy-making body, it is now. Richard Posner has led a chorus of current scholarship proclaiming the current Court a superlegislature that sits chiefly to proclaim broad new law governing categories of new cases, rather than a more traditional appellate court, that aims to create uniformity and correct

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<sup>118</sup> The empirical evidence has frequently come from political scientists under the rubric "The Attitudinal Theory." See SEGAL & SPAETH, *supra* note \_\_. Scholarly evidence has come from all directions. Consider for example the negative reaction to two very different cases: *Roe v. Wade* and *Bush v. Gore*. See, e.g., Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 13-16 (2011) (discussing the reaction to *Roe*); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408-9 (2001) (suggesting that *Bush v. Gore* appeared to be motivated by the "low" politics of partisan political advantage").

<sup>119</sup> See Posner, *supra* note \_\_, at 38-39 ("Last Term [2004], 80% of the Court's primarily constitutional decisions were by split vote, compared to 63% of its other decisions, and a split decision is more likely to attract attention than a unanimous one, in part by generating more – and more contentious – opinions in the case. Although only 38% of all the Court's cases were primarily constitutional, 44% of all opinions (including concurrences and dissents) were issued in such cases.").

<sup>120</sup> See, e.g., Carolyn Dineen King, *Challenges To Judicial Independence And The Rule Of Law: A Perspective From The Circuit Courts*, 90 MARQ. L. REV. 765, 773-74 (2007).

<sup>121</sup> See, e.g., RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 4 (2005).

<sup>122</sup> Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 442-54 (2010).

errors.<sup>123</sup> Political scientists have likewise argued that the current Supreme Court has “virtually untrammelled policymaking authority.”<sup>124</sup>

C. *Do These Justices Fit this Court?*

The remaining question is whether these Justices are a good fit for this Court. Supporters can argue that this Court is the most qualified of any Court in history – they have spent more time considering and studying constitutional theory and the Court itself than any other group. Moreover, one person’s elitism is another person’s highly functioning meritocracy: the current Court arguably evinces a salutary desire to have the best of the very best serve in government and to have the finest legal minds work on the Court.

Lastly, supporters might argue that the Court itself naturally tends to be an elitist and anti-democratic body.<sup>125</sup> It is thus self-defeating to argue that “ordinary people,” who have “real life experience” should staff the Court. Given the institutional design, the best practice is to find the very best and most able Justices possible to serve critically important life tenures.

It is somewhat counterintuitive to suggest that group of Justices that have spent significant chunks of their pre-Supreme Court lives working in comparatively elite, neutral, and cloistered/independent settings are a bad fit for a policy-making

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<sup>123</sup> RICHARD A. POSNER, HOW JUDGES THINK 323 (2008); Richard A. Posner, *The Supreme Court, 2004 Term--Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); see also Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 99-101 (2010), available at, <http://yalelawjournal.org/images/pdfs/842.pdf>. For an outstanding description of previous thinking about how judges are naturally political in deciding unclear cases, see Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 713-23 (2009).

<sup>124</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 12, 26 (2002) (characterizing the perception of judges as “objective, dispassionate, and impartial” as “The Mythology of Judging”).

<sup>125</sup> A particularly famous version of this argument considers the Court’s “countermajoritarian difficulty.” See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

Court. Perhaps Justices who have extensive experience as appellate judges and law professors and who are well versed in abstract thinking on constitutional issues are especially well suited to a life on the Court. Further, given the long-term changes in the nature, approach and salience of the Court, it makes sense that Presidential appointments would drift towards candidates with unimpeachable backgrounds and a history as a judge as a proxy for future performance.<sup>126</sup>

Nevertheless, this Part argues that this trend is exactly backwards: as the Court begins to more closely resemble a policymaking Olympian body it is especially important to appoint individuals with real life experience. This is because the current Supreme Court makes many decisions that are not expressly “legal” at all, so technical legal expertise and excellence is not particularly useful. In some cases it is actually harmful. This Section first considers the experiences these Justices do have, and argues that they lead inevitably and unfortunately to increased legal complexity. The Section then turns to the missing experiences and argues that complicated, multivariate work with real people (politics, lawyering and trial judging) has advantages in deciding the cases and regulating the federal courts. Lastly, “real life” experience is a key ingredient in the development of practical wisdom, perhaps the most necessary of Justice traits.

### 1. Complexity

Although long experience in writing judicial decisions or law review articles may sharpen analytical reasoning, immersion and excellence in that style of writing and reasoning in constitutional cases frequently leads to obfuscation, rather than

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<sup>126</sup> See *supra* note \_\_ and accompanying text.

clarification. Evidence abounds the Court's output has grown less accessible and more complex from the Court's beginning to the present.<sup>127</sup> Consider the opinions themselves. Majority opinions have grown substantially longer.<sup>128</sup> The prevalence of dissenting and concurring opinions has grown drastically.<sup>129</sup> The most confusing and complex type of decision – those decided by a plurality rather than a majority – has also become more common.<sup>130</sup>

Empirical and doctrinal legal scholarship further suggests increased complexity in the Court's output.<sup>131</sup> Laura Little's empirical study of the Supreme Court's use of linguistic devices for obfuscatory purposes found "increased splintering" within the decisions and "increased opinion length and complexity."<sup>132</sup> Describing the opinions of the 1980s and 1990s Joseph Goldstein argued that even "professional interpreters" would struggle "to unravel what the Court has to say, often at great length in heavily footnoted multiple opinions."<sup>133</sup> Robert Nagel described the writing as "formalized" and characterized by "elaborately layered sets of 'tests' or 'prongs' or 'requirements' or 'standards' or 'hurdles' [and] standing

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<sup>127</sup> Note that correlation does not prove causation. This section is not arguing that the current selection criteria have necessarily increased complexity. Instead, this section argues that Justices pre-disposed to complexity are less likely to reverse the recent trend towards complexity.

<sup>128</sup> Black & Spriggs, *supra*, note \_\_ at 632-38.

<sup>129</sup> See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 221-27 (1997) (noting the trend away from unanimous opinions and towards increased use of dissents and concurrences).

<sup>130</sup> See Spriggs, *supra* note \_\_, at 519 ("Historically, plurality decisions by the Supreme Court have been relatively rare . . . the frequency of plurality opinions dramatically increased in the 1940s and 1950s, the occurrence of plurality opinions between 1953 and 2006 has remained fairly steady, with a moderate increase during the 1970s when Warren Burger served as Chief Justice."); Note, *supra* note \_\_, at 1306-26 (discussing the growth in the dissenting opinion and the word "respectfully").

<sup>131</sup> The best empirical study of Supreme Court complexity is Ryan J. Owens & Justin Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC'Y REV. 1027 (2011).

<sup>132</sup> Laura Little, *supra* note \_\_, at 126-27.

<sup>133</sup> JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 17 (1992).

amidst a welter of separate opinions and contentious footnotes.”<sup>134</sup> Commentators have criticized the Court’s treatment of conflict of laws and federal jurisdiction as complex and incoherent.<sup>135</sup> Complexity and nuance have also led to “stealth overruling,” situations where the Court discards a disfavored precedent piece by piece, rather than by clearly over-ruling.<sup>136</sup>

An easy proxy for the growth in complexity is lawyers and case law. Over the past forty years the number of lawyers per capita, the amount spent on lawyers and the numbers and pages of reported judicial decisions have all spiked.<sup>137</sup> Legal complexity is quite costly. The most obvious harm is increased transaction and compliance costs,<sup>138</sup> but it also can lead to crises like the recent financial meltdown<sup>139</sup> and the BP deepwater spill.<sup>140</sup>

If this concern about legal complexity is valid, this group of Justices seems particularly ill situated to reverse the trend. Insofar as the current group of Justices

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<sup>134</sup> Robert Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985); see also Morton J. Horowitz, *The Supreme Court, 1992 Term--Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 98 (1993) (decrying the Court’s creation of a “thick undergrowth of technicality” and its development of multipronged tests “everywhere and for everything”).

<sup>135</sup> See, e.g., Louise Ellen Teitz, *Complexity and Aggregation in Choice of Law: An Introduction to the Landscape*, 14 ROGER WILLIAMS U. L. REV. 1 (2009); Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925 (2004); Little, *supra* note \_\_.

<sup>136</sup> See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

<sup>137</sup> RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 3-12 (1995).

<sup>138</sup> See BARTON, *supra* note \_\_, at 261-62; Jonathan Barry Forman, *Simplification for Low-Income Taxpayers: Some Options*, 57 OHIO ST. L.J. 145, 173 (1996) (“Complexity is a major problem for the federal tax system. Complexity erodes voluntary compliance with the tax laws, creates a perception of unfairness for the system, impedes the effective administration of the tax laws, results in high compliance costs, and interferes with economic transactions.”).

<sup>139</sup> Jeffrey M. Lipshaw, *The Epistemology of the Financial Crisis: Complexity, Causation, Law, and Judgment*, 19 S. CAL. INTERDISC. L.J. 299, 299-305, 343-51 (2010) (analyzing the way in which complexity played a role in the financial crisis); Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211 (2009) (same).

<sup>140</sup> Hari M. Osofsky, *Multidimensional Governance and the Bp Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1100-1101 (2011).

can take their jurisprudence of standing<sup>141</sup> or the establishment clause<sup>142</sup> seriously (just to use two particularly galling examples), it is a sign that we are placing too much stock in technical excellence and too little in common sense. Finding the smartest people to try to untangle the thorniest problems does not necessarily result in elegant solutions. To the contrary, it may result in over-thinking, over-writing, and more complexity. This trend is especially discouraging in the highest salience cases: the Court decides cases that have a massive affect on the country as a whole in opinions that few can read and understand.

## 2. The Benefits of the Practice of Law, Political Experience and Trial Judging

Experiences practicing law and serving as a politician have three notable common benefits. First, in each profession you are directly answerable to third parties – either clients or voters. You serve in a clear master-servant relationship as the servant. This relationship has powerful psychological effects.<sup>143</sup> Successful lawyers and politicians frequently have to suppress their own natural preferences to follow the will of the public or their clients. Politicians and lawyers are certainly both likely to be advocates, but they must temper their advocacy to their audiences

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<sup>141</sup> Standing is notoriously indeterminate and results oriented. Standing cases have been called “notoriously inconsistent,” *Hein v. Freedom From Religion Foundation, Inc.*, 127 S.Ct. 2553, 2574 (2007) (Scalia, J., concurring), a “jumbled mess,” John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1010 (2002), “a quagmire,” Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 389 (2006) and a “chaotic collection of rules and standards,” Nancy Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 671 (2004). I have called standing an example of indeterminate complexity, cumbersome and hard to predict. BARTON, *supra* note \_\_\_, at 278-83. There may be Court doctrines that are clear and law-based; but standing is not one of them.

<sup>142</sup> See, e.g., Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) (“It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess – both hopelessly confused and deeply contradictory.”).

<sup>143</sup> William O. Fisher, *Lawyers Keep Out: Why Attorneys Should Not Participate In Negotiating Critical Financial Numbers Reported By Public Company Clients*, 2010 B.Y.U. L. REV. 1501, 1545-46 (discussing the “ethos of legal practice” and the “psychological effects of the lawyer/client relationship”).

and sometimes must work outside of their own preferences. These acts of self-control and self-denial can prove helpful for a Justice when her preferences clash with her perception of the correct legal decision. Appellate judges and law professors, in contrast, are instructed to be neutral and ignore the preferences of outsiders.

Second, politicians and practicing lawyers operate in busy and complicated real life situations. They cannot operate in a neutral or cloistered fashion, they must get elected, find clients, make legal or political arguments. Trial lawyers and politicians must also make their arguments in a manner ordinary people (jurors or voters) can understand. Both jobs encourage the translation of the complicated into the explicable, a key (and frequently missing) talent on the Court.

Lastly, politicians and lawyers frequently must compromise or settle. There is a reason why politics is compared to sausage making – it is a messy business that requires give and take from all parties involved.<sup>144</sup> Likewise, much of lawyering involves negotiation, settling and deal making.<sup>145</sup>

The lack of trial judging in addition to the loss of trial lawyering is also notable. Trial judges are required to make actual decisions about the people who appear before them, so though they are neutral, they are not cloistered. The mere act of sentencing defendants or witnessing jury verdicts means that trial judges see

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<sup>144</sup> Among the recent examples of former politician Justices known for their ability to compromise and generate consensus are Chief Justice Warren, RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 716 (1975) (discussing Warren's dexterous use of power and compromise in *Brown*) and Justice O'Connor. See Keith J. Bybee, *The Jurisprudence of Uncertainty*, 35 *Law & Soc'y Rev.* 943, 943-44 (2001) (describing O'Connor as the "swing" vote on the Court, who follows "a path of compromise and accommodation").

<sup>145</sup> See, e.g., JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008).

the effects of their work daily. Moreover, trial judges have a particularly critical experience of the American justice system: they work with juries. In a time of expanded judicial power, the Court has been notably suspicious of juries.<sup>146</sup>

### 3. Regulators

The Supreme Court is at the head of the process for drafting the Federal Rules of Procedure, Evidence, Criminal Procedure, Bankruptcy, Appellate Procedure, and Admiralty.<sup>147</sup> The Supreme Court has been at the head of the process of drafting and amending the Federal Rules of Civil Procedure from the passage of The Rules Enabling Act of 1934.<sup>148</sup> The Supreme Court leads the drafting and amending of the rules, although Congress retained the power to revise or reject. Unless proposed rules are rejected, modified, or deferred, they automatically become law, provided that Congress has had at least seven months to consider them.<sup>149</sup> While the Court has ceded some of the rulemaking responsibility to the Judicial Conference,<sup>150</sup> the Justices are still key players in the process.<sup>151</sup>

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<sup>146</sup> Consider the Court's refusal to require a jury in trials for petty crimes, *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968) (refusing to grant a jury for crimes punishable by less than six months in jail and questioning "the wisdom of allowing untrained laymen to determine the facts in civil and criminal proceedings"). The Court's cases on preemption of state tort actions likewise evince hostility toward juries. *See Riegel v. Medtronic*, 552 U.S. 312, 325 (2008) ("Indeed, one would think that tort law, applied by juries . . . is less deserving of preservation" because a jury "sees only the cost of a more dangerous design, and is not concerned with its benefits").

<sup>147</sup> For an overview of these powers and their historical development, *see* PAUL M. BATOR, ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 749-65 (3d. ed. 1988).

<sup>148</sup> *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §2072 (2012)). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STANFORD L. REV. 673, 673 (1975).

<sup>149</sup> Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 297 (1994); *see also* 28 U.S.C. §§ 2074, 2075 (2012).

<sup>150</sup> The current process begins with five advisory committees dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. Any proposed changes to these rules is hashed out by an advisory committee, published for public comment, then reconsidered by the advisory committee before approval by the Standing Committee of the Judicial Conference, the Judicial Conference itself, the Supreme Court, and lastly Congress. For a full overview of the process, *see* Thomas F. Hogan, *The*



Similarly, the Court is also the last word in the interpretation of those Rules. A pair of recent decisions – *Bell Atlantic Corp. v. Twombly*<sup>152</sup> and *Ashcroft v. Iqbal*<sup>153</sup> – displays the broad contours of this power. The Court held that Rule 8 of the Federal Rules of Civil Procedure (FRCP) requires plaintiffs to present a “plausible” claim for relief in the complaint,<sup>154</sup> a significant tightening in pleading standards.<sup>155</sup> The text of Rule 8 requires only a “short and plain” statement of facts and claims and has done so since that Rule’s inception.<sup>156</sup>

Given the Court’s linchpin role in these critical functions, a clear understanding of how these Rules play out in practice would be helpful. Nevertheless, between the loss of time as trial judges and in the private practice of law, these Justices have less perspective than ever.

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*Federal Rules of Practice and Procedure*, available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx> (last visited February 16, 2012).

<sup>151</sup> The Chief Justice of the United States is the presiding officer of the Judicial Conference. See Judicial Conference of the United States, *Membership*, available at, <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx> (last visited February 16, 2012). The Chief Justice also appoints the members of the pertinent committees. See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States* 154 U. PA. L. REV. 1575, 1618-19 (2006). The Court has the last vote on any rule changes before submission to Congress. See Hogan, *supra* note \_\_. Because Congress regularly chooses not to act on the Rules, the Court is frequently the last step in the rule-making process. See Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 78 (2010) (“As a practical matter, Congress involves itself in the [rulemaking] process only infrequently.”).

<sup>152</sup> 550 U.S. 544 (2007).

<sup>153</sup> 129 S. Ct. 1937 (2009).

<sup>154</sup> *Twombly*, 550 U.S. at 570; *Iqbal*, 129 S.Ct. at 1949.

<sup>155</sup> See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823-31 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3-17 (2010).

<sup>156</sup> Elizabeth C. Burch, *There’s a Pennoyer in My Foyer*, 13 GREEN BAG 105, 115 (noting that “the old [Rule 8] has not been amended at all” but the Court’s interpretation changed nonetheless).

Commentators have pilloried *Iqbal* and *Twombly*, noting that these cases evince hostility to, and ignorance of, litigation practice.<sup>157</sup> Correlation does not equal causation, but the Supreme Court's recent trend away from Justices with lawyering experience greatly accelerated in the 1980s, and the recent collapse in the number of federal court trials began roughly contemporaneously.<sup>158</sup>

#### 4. Practical Wisdom and Virtue Ethics

Consider the connection between life experience and "practical wisdom." Practical wisdom has been praised as a judicial characteristic in both the Aristotelian manner<sup>159</sup> and less formally as a synonym for common sense.<sup>160</sup> Under its formal or informal descriptions, however, experience creates, shapes and guides practical wisdom.

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<sup>157</sup> See Lisa Eichhorn, *A Sense Of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 967 (2010); A. Benjamin Spencer, *Iqbal and The Slide Toward Restrictive Procedure Plausibility Pleading*, 14 LEWIS & CLARK L. REV. 185, 200 (2010). For other notable critiques, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) (arguing that *Iqbal* extended *Twombly* in a dangerous direction); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1932-34 (2009) (noting the Court's empirical weakness in *Twombly*, acting "with no empirical support that a problem existed, and with no exploration of the dimensions of that problem or the efficacy of the Court's newfangled cure"); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (decriing the burden that the new pleading standard imposes on civil rights and employment discrimination plaintiffs); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460-86 (2008) (asserting that new standard will weed out otherwise meritorious claims); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (stating that the Court has moved the summary judgment inquiry to the pleading stage).

<sup>158</sup> Compare *supra* Figure 2 (showing decline in practice experience beginning in the 1980s) with Michael Orey, *The Vanishing Trial*, BLOOMBERG BUSINESSWEEK, April 30, 2007, available at, [http://www.businessweek.com/magazine/content/07\\_18/b4032047.htm](http://www.businessweek.com/magazine/content/07_18/b4032047.htm) ("After peaking at 12,018 in 1984, the number of civil trials in all federal district courts has dropped precipitously, reaching a new low of 3,555 last year. That's almost half the number of federal trials that took place 40 years ago, even though the number of suits filed during the same period soared from 66,144 to 259,541.").

<sup>159</sup> Edward C. Lyons, *Reason's Freedom And The Dialectic Of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 228-31 (2007).

<sup>160</sup> Consider, for example, Justice Jackson's famous take on practical wisdom and the Constitution: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Justice O'Connor has been praised for exactly this virtue. See Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 427 (2011); Scott Bales, *Justice Sandra Day O'Connor: No Insurmountable Hurdles*, 58 STAN. L. REV. 1705, 1711 (2006).

Virtue ethics places practical wisdom at the very heart of proper decision-making. To simplify in the pursuit of brevity, moral philosophy can be roughly separated into three categories: consequentialism, deontology, and virtue ethics. These categories overlap and there is not always agreement that they are separate at all.<sup>161</sup> Consequentialism judges a moral act by its consequences. Utilitarianism is thus a form of consequentialism.<sup>162</sup> Deontology judges a moral act according to an external set of rules, regardless of its consequences. Kant's moral imperative is an example of a deontological alternative to utilitarianism.<sup>163</sup>

Virtue ethics, in comparison, focuses on the character of the actor. Modern virtue ethicists work from Aristotle's vision of virtue as the key to moral decision-making.<sup>164</sup> Virtue ethics are seen as a "third way" around the eternal battle between the consequentialists and the deontologists.<sup>165</sup> This is because virtue ethics allows one to judge an act based on the character of the actor, rather than on the act's results or measuring the act against a rigid, external set of rules.<sup>166</sup>

Lawrence Solum has been in the forefront of applying virtue ethics to the law as "virtue jurisprudence."<sup>167</sup> He has argued for an "aretic turn" in the selection of Justices, away from their perceived politics and towards a broad examination of

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<sup>161</sup> See, e.g., Marcia Baron, *Virtue Ethics in Relation to Kantian Ethics*, in PERFECTING VIRTUE 18-21 (Lawrence Jost & Julian Wuerth, eds., 2011).

<sup>162</sup> See, e.g., John L. Watts, *Fairness and Utility In Products Liability: Balancing Individual Rights and Social Welfare*, 38 FLA. ST. U. L. REV. 597, 597-98 (2011).

<sup>163</sup> Peter A. Alces, *Contract is Context*, 45 WAKE FOREST L. REV. 903, 907-8 (2010).

<sup>164</sup> One of the first modern statements of virtue ethics was G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 1-19 (1958).

<sup>165</sup> See Christopher Miles Coope, *Modern Virtue Ethics*, in VALUE AND VIRTUES: ARISTOTELIANISM IN CONTEMPORARY ETHICS 37-38 (2006).

<sup>166</sup> For a prominent recent version of this argument, see ROSALIND HURSTHOUSE, ON VALUE ETHICS (1999).

<sup>167</sup> Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 69-76 (2006); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) [hereinafter Solum, *Virtue Jurisprudence*].

their virtues, especially Aristotle's conception of practical wisdom or phronesis.<sup>168</sup> He likewise has criticized empirical efforts to "rank" Justices because of their failure to consider the importance of the essentially immeasurable virtue of practical wisdom.<sup>169</sup>

Solum's work is of a piece with other explanations of the act of judging. Anthony Kronman spends a large chunk of *The Lost Lawyer* on practical wisdom,<sup>170</sup> and its role in good judging<sup>171</sup> and lawyering.<sup>172</sup> The idea that the act of judging is best described as a craft fits this model as well.<sup>173</sup> In sum, virtue jurisprudence argues that the interaction between the character of the judge and the act of judging is the key question, not the outcomes of the decision (consequentialism) or the decision's compliance with any strict conception of justice (deontology).<sup>174</sup>

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<sup>168</sup> See Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 510-12 (2005). For an early version of his thinking, see Lawrence B. Solum, *Comment, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

<sup>169</sup> Lawrence B. Solum, *A Tournament Of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1386-87 (2005) ("Supreme Court Justices should be selected from among those who have demonstrated their possession of practical wisdom, both from the bench and in wider public life.").

<sup>170</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER* 53-108 (1993); see also Anthony Kronman, *Practical Wisdom and Professional Character*, in PHILOSOPHY AND LAW 203, 208 (Jules Coleman & Ellen Frankel Paul eds., 1987).

<sup>171</sup> KRONMAN, *supra* note \_\_, at 315-52.

<sup>172</sup> *Id.* at 109-62.

<sup>173</sup> For a classic version of law as craft, see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 213-35 (1960). For a more modern overview, see Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2243, 2274-322 (2001).

<sup>174</sup> In recent American jurisprudence, law and economics is the most popular consequentialist theory and John Rawls' *Justice as Fairness* is among the leading deontological approaches. Compare JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999) with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2 (6<sup>th</sup> ed. 2003). Of course, not everyone agrees that these categories are useful. Richard A. Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163, 166 (1990) ("I do not derive my economic libertarian views from a foundational moral philosophy such as the philosophy of Kant, or Locke's philosophy of natural rights, or utilitarianism, or anything of that sort. I regard moral philosophy as a weak field, a field in disarray, a field in which consensus is impossible to achieve in our society. I do not think it provides a promising foundation for a philosophy of government.").

Practical wisdom is at the heart of the virtue jurisprudence project.<sup>175</sup> It is thus important to consider what practical wisdom looks like, how to recognize it, and how one fosters it. Book VI of Aristotle's *Nicomachean Ethics* discusses four intellectual virtues: science, theory, philosophy and practical wisdom.<sup>176</sup> Practical wisdom, or "phronesis," is primarily "concerned with things human and things about which it is possible to deliberate;" deliberation about particulars is the heart of phronesis.<sup>177</sup> Practical wisdom is distinct from the other virtues because it is not "concerned with universals only – it must also recognize the particulars."<sup>178</sup> Animals can have practical wisdom, those animals "which are found to have a power of foresight with regard to their own life."<sup>179</sup>

Jeffrey Lipshaw has put it succinctly. Phronesis is "the ability to deliberate well, to deal with universal principles as well as particular actions, to assess which actions are conducive to ends, to employ sympathetic understanding in the effort to determine what is fair, and to distinguish and abjure mere cleverness in the pursuit of a bad end."<sup>180</sup>

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<sup>175</sup> See Solum, *Virtue Jurisprudence*, *supra* note \_\_, at 202 ("[T]he notion of a just decision cannot be untangled from the notion of a virtuous judge grasping the salient features of the case. Virtue, in particular the virtue of phronesis, or judicial wisdom, is a central and ineliminable part of the story."); Lawrence B. Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, 142-62, in VIRTUE JURISPRUDENCE, *supra* note \_\_, at 142-62.

<sup>176</sup> ARISTOTLE, NICOMACHEAN ETHICS, Book VI (W.D. Ross trans., 1908), available at

[http://www.ilt.columbia.edu/publications/Projects/digitexts/aristotle/nicomachean\\_ethics/book06.html](http://www.ilt.columbia.edu/publications/Projects/digitexts/aristotle/nicomachean_ethics/book06.html).

<sup>177</sup> *Id.* at Book VI, Chapter 7.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Jeffrey Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1, 3 (2011).

Practical wisdom is not gained by cloistered study and contemplation of the neutral principles of law; it is gained in living a varied and challenging life.<sup>181</sup>

Aristotle argued that phronesis is “practical, and practice is concerned with particulars. This is why some who do not know, and especially those who have experience are more practical than others who know.”<sup>182</sup>

The trend in Justice selection criteria seems designed to emphasize “those who know” over those with practical wisdom. Anthony Kronman has noted that technical expertise in law without practical wisdom is at the root of the American legal profession’s existential crisis.<sup>183</sup> Selecting Justices based upon their “merit” rather than a fuller look at their character or experiences will likewise prove self-defeating.

##### 5. A Last Word on the Nature of Elite Competition

This is not to say that these Justices have not ploughed a long and hard road to get where they are. To the contrary, Justices with these resumes have worked relentlessly and tirelessly from their earliest ages to be the very best of the best. They competed for admission to the very best universities and law schools. Three Justices received fellowships to study in Europe.<sup>184</sup> Three Justices served as clerks

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<sup>181</sup> See Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623, 678-79 (2003) (“Notions of practical wisdom and creative problem solving by their very nature depend upon life experience.”). Mark Tushnet has similarly argued that the best sign of a Justice’s character is his or her experience. Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 756-63 (1992).

<sup>182</sup> ARISTOTLE, *supra* note \_\_, Book VI, Chapter 7.

<sup>183</sup> KRONMAN, *supra* note \_\_, at 109-62.

<sup>184</sup> Justices Kagan and Breyer also competed for and received scholarships to study at Oxford University (Breyer a Rhodes and Kagan a Daniel M. Sachs Scholarship). Justice Scalia received a Sheldon fellowship from Harvard for European travel and study.

to Supreme Court Justices.<sup>185</sup> Five of the Justices taught at law schools, four of them at top ten schools.<sup>186</sup> Five of them held a high level law and policy job with either the executive branch or the Senate. Three worked in the Solicitor General's Office and four had previously argued cases before the Supreme Court before becoming Justices.<sup>187</sup> Eight of the Justices were able to secure jobs as federal appellate judges.<sup>188</sup> In sum, at each level of their professional careers these Justices have competed against their peers for accolades and jobs that were very, very difficult to obtain, and won.

All the same, success in these competitions is a mixed bag. These competitions encourage a particular kind of "head down" focus upon achievement above all else. These career achievements certainly predict an ability to work hard and push through difficult and complicated tasks. They do not, however, tend to correlate very strongly with a sense of perspective.

Each of these various achievements are quite academic. As argued above, these achievements favor technical legal excellence and a particular type of intelligence. It should not be surprising that *these* Justices produce the types of opinions now common on the Court: divided, over-written and complex. In

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<sup>185</sup> Justice Breyer clerked for Justice Goldberg, Justice Roberts clerked for Justice Rehnquist, and Justice Kagan clerked for Justice Thurgood Marshall. Justice Alito clerked for Judge Garth on the U.S. Court of Appeals, Third Circuit, but not the Supreme Court.

<sup>186</sup> Justice Scalia taught at the University of Virginia, the University of Chicago and Stanford. Justice Ginsburg taught at Rutgers and Columbia. Justice Breyer taught at Harvard. Justice Kagan taught at the University of Chicago and Harvard. Justice Kennedy taught at the University of the Pacific, McGeorge School of Law.

<sup>187</sup> Justices Kagan, Alito and Roberts worked in the Solicitor General's Office. Justice Ginsburg argued several cases before the Supreme Court while working for the ACLU Women's Rights Project.

<sup>188</sup> Justice Kagan is the only non-appellate judge now on the Court. She spent the years before her nomination as the Dean of Harvard Law School and as the Solicitor General of the United States.

comparison, success in the private practice of law or as a politician reward a broader and different set of skills.

Lastly, many of these achievements show a potentially overweening desire to be on the Supreme Court. To paraphrase Plato and quote Douglass Adams, “it is a well-known fact that those people who must want to rule people are, *ipso facto*, those least suited to do it.”<sup>189</sup> By comparison, it is quite unlikely that the politicians or life long lawyers who became Justices were angling for Court appointment from the start of their careers. Multiple prior Supreme Court Justices left the Court to pursue other ambitions, it is hard to think of any of these Justices doing the same.<sup>190</sup>

## CONCLUSION

It is empirically demonstrable that the current Supreme Court Justices have had different collective experiences than past Supreme Court Justices. These experiences have clustered around particularly elite experiences: time spent at ivy league institutions and Stanford, time spent working in high end law/policy jobs for the government, time spent in academia, time living in Washington, D.C., and time serving as federal appellate judges. The lost experiences include the private practice of law, elective office, and trial judging.

After establishing these trends, this Article makes a normative case against them. The success of this argument likely rests upon one’s reaction to elitist meritocracy. If one thinks that lifetime Supreme Court appointments should go to

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<sup>189</sup> See DOUGLAS ADAMS, *THE RESTAURANT AT THE END OF THE UNIVERSE* 38 (1980).

<sup>190</sup> For example, Justice Charles Evan Hughes left the Court to serve as the Republican candidate for President, private practice and service as the Secretary of State, among other activities, before returning as Chief Justice. See WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES 1930-41* 5-12 (2007). John Jay retired from the Court to two terms as the Governor of New York. See MAEVA MARCUS & JAMES R. PERRY, *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800* 7 (1985).



Justices who have displayed a particular kind of technical legal excellence and a single-minded focus upon achievement, the current system is perfect.

If, on the other hand, we would prefer Justices with more “real life” experiences, a return to prior emphasis on the practice of law, trial judging and political experience would be welcome. This might also ameliorate overly complex Supreme Court case law and provide some needed practical wisdom to the Court.