

Florida Law Review

Volume 64 | Issue 5

Article 1

9-12-2012

An Empirical Study of Supreme Court Justice Pre-Appointment Experience

Benjamin H. Barton
bbarton@utk.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/flr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 Fla. L. Rev. 1137 (2012).
Available at: <http://scholarship.law.ufl.edu/flr/vol64/iss5/1>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

ARTICLES

AN EMPIRICAL STUDY OF SUPREME COURT JUSTICE PRE-APPOINTMENT EXPERIENCE

*Benjamin H. Barton**

This Article compares the years of experience that preceded each Justice's appointment to the United States Supreme Court. This Article seeks to demonstrate that the background experiences of the Roberts Court Justices are quite different from those of earlier Supreme Court Justices and to persuade the reader that this is harmful. To determine how the current Justices compare to their historical peers, the study gathered a database that considers the yearly pre-Court experience for every Supreme Court Justice from John Jay to Elena Kagan. The results are 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 Justices. They also spent the most time in elite undergraduate and law school settings. Time spent in these pursuits has naturally meant less time spent elsewhere; the Roberts Court Justices have spent less time in the private practice of law, in trial judging, and as elected politicians than any previous Court. Having demonstrated that the Roberts Justices are outliers across multiple studied experiences, this Article argues that the change is regrettable for multiple normative reasons.

INTRODUCTION	1138
I. STUDY DESIGN AND METHODOLOGY	1141
II. FINDINGS	1148
A. <i>The Private Practice of Law</i>	1148
B. <i>Government Lawyer</i>	1151
C. <i>Total Practice</i>	1154
D. <i>Elected Official</i>	1154
E. <i>Law Teaching</i>	1156
F. <i>Total Judicial Service</i>	1157
G. <i>Trial and Appellate Judging Considered Separately</i> ..	1158
H. <i>State and Federal Judging</i>	1159

* Professor of Law, University of Tennessee College of Law. B.A., 1991, Haverford College; J.D., 1996, University of Michigan. The author gives special thanks to Wendy Bach, Brannon Denning, Lee Epstein, Jennifer Hendricks, Scott A. Hendrickson, Jeff Hirsch, Indya Kincannon, Jack Knight, Andrew D. Martin, Emily Moran, Glenn Reynolds, Jason M. Roberts, Jeffrey A. Segal, Harold J. Spaeth, Nancy Staudt, Thomas G. Walker, the University of Tennessee College of Law for generous research support, and the Honorable Diana Gribbon Motz.

I. *Miscellaneous Employment Categories* 1159

 1. Non-Law Governmental Service..... 1159

 2. Military Service..... 1160

 3. Private Enterprise 1161

J. *Geography*..... 1162

K. *Education*..... 1168

L. *Summary*..... 1170

III. A NORMATIVE ARGUMENT AGAINST THE ELITE
 MAKE-UP OF THE CURRENT COURT 1171

 A. *The New Judicial Elite—Cloistered and Detached*..... 1172

 B. *What the Court Does—The Supreme Court is a Political Court* 1173

 C. *Do These Justices Fit this Court?* 1176

 1. Complexity..... 1177

 2. The Benefits of the Practice of Law, Political Experience, and Trial Judging..... 1179

 3. Regulators 1180

 4. Practical Wisdom and Virtue Ethics 1182

 5. A Last Word on the Nature of Elite Competition..... 1185

CONCLUSION..... 1187

INTRODUCTION

This Article compares the years of experience that preceded each Justice’s appointment to the United States Supreme Court. This Article seeks to demonstrate that the background experiences of the Roberts Court Justices are quite different from those of earlier Supreme Court Justices and to persuade the reader that this is harmful.

The first proposition is an empirical one, and the difference in the Justices’ 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. They also spent the most time in elite undergraduate and law school settings.¹ Time spent in these pursuits has naturally meant less time spent elsewhere;

1. The study treats the Ivy League universities and Stanford University as “elite institutions.”

the Roberts Court Justices have spent less time in the private practice of law, in trial judging, and as elected politicians than any previous Court.

Having demonstrated that the Roberts Justices are outliers across multiple studied experiences, this Article argues that the change is regrettable 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,² more splintered,³ and ever more complex.⁴

Second, the Supreme Court is the leading player in the drafting, amending, and interpretation of the various federal rules,⁵ 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 detached jobs like appellate judging or teaching law and only 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 detached experiences offer limited opportunities for the development of the most critical judicial virtue: practical wisdom.⁶

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,⁷ and excluding Justice

2. See Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634–38 (2008) (demonstrating empirically the growth in opinion length over the history of the Court).

3. See Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, 124 HARV. L. REV. 1305, 1317–26 (2011) (discussing the growth in the dissenting opinion and the word “respectfully”); see also James F. Spriggs II & David R. Stras, *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.”).

4. 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 U.S. Supreme Court federal jurisdiction opinions). Consider Judge Richard Posner's classic critique from *Holmes v. Buss*, 506 F.3d 576, 579 (7th 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.”

5. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1100–04 (2002).

6. See *infra* Subsection III.C.4.

7. See Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices*

Elena Kagan, they are all former judges on federal circuit courts of appeals.⁸ Furthermore, they represent limited geographical diversity.⁹ Others have expressed concern that none of the current Justices have been politicians.¹⁰ Piecing these critiques together, there is a concern that the experiences of the Roberts Court Justices are quite distinct from past Justices and that these differences are deleterious.¹¹

Nevertheless, this study is the first to take a broad view 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 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).¹² Counting years offers a more nuanced and accurate picture of exactly what Justices have done, when, and for how long, and allows for clearer direct comparisons among different Supreme Courts.

From Holmes to Kagan, 58 UCLA L. REV. DISCOURSE 129, 130–31 (2010) (arguing against the dominance of Harvard and Yale on the current Court). *But see* Christopher Edley, Jr., *Why Elites Do Not Belong on the Supreme Court*, WASH. POST, May 16, 2010, at B01 (arguing the opposite).

8. See Lee Epstein et al., *The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 906 (2003); Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1335 (2008).

9. See Tim Padgett, *Is the Supreme Court Too Packed With Ivy Leaguers?*, TIME, May 12, 2010, available at <http://www.time.com/time/nation/article/0,8599,1988877,00.html> (stating that “the [C]ourt today has ‘less geographical diversity than it did even when Thomas Jefferson was President’”).

10. See Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1354–58 (2010).

11. There is a similar concern that the Roberts Court Justices’ life experiences (outside of race and gender) are less diverse than previous Courts. For a pre-Justice Kagan version of this argument, see Timothy P. O’Neill, “*The Stepford Justices*”: *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 702 (2007). In a related study, Benjamin H. Barton & Emily Moran, *Measuring Diversity on the Supreme Court with Biodiversity Statistics*, __ J. EMP. L. STUD. __ (2013) (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.

12. Previous studies have generally relied upon a more binary assessment of experiences, that is, whether a Justice has or has not had a particular experience. See, e.g., Glen, *supra* note 7, at 131–37 (employing binary analysis of law school education); see also Epstein et al., *supra* note 8, at 913–37 & figs.1–10 (employing binary analysis of various factors except for comparisons of positions held by Justices when they were appointed and the mean number of years a Justice worked in private practice before appointment).

The data set 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 institution a Justice attended;¹³ whether a Justice worked in private practice, separating out practice as a solo practitioner, practice as a partner in a small group of lawyers, and practice as part of 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 served 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.

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 suggest that many of the criticisms of the current Justices' backgrounds are well-grounded and that, as a whole, the experiences of the Roberts Court represent a substantial departure from previous Supreme Courts.

This Article proceeds as follows: Part I outlines how the study was designed and implemented; Part II details the findings; and 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 each Justice's appointment to the United States Supreme Court. The study attempts to measure these experiences as broadly and as comprehensively as possible; thus, educational, geographical, and professional experiences are all tracked by years.

There are therefore two assumptions underlying the study—(1) that the experiences of the Justices will have an effect on their decision making and (2) that measuring these experiences in terms of time is more useful 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

13. Because the study includes all U.S. Supreme Court Justices, there are many from the nineteenth and twentieth centuries who "read law" and did not attend law school. There are also a few who were appointed with no formal education whatsoever.

postulated that the backgrounds and experiences of Supreme Court Justices affect their decision making.¹⁴ Although some empirical studies of Justices' backgrounds have failed to find an effect,¹⁵ there are sufficient studies demonstrating an effect to offer empirical support to the intuition that background must affect decision making.¹⁶ In particular, a series of studies have found that certain occupational experiences—like working in academia,¹⁷ as a prosecutor,¹⁸ as a judge,¹⁹ or as a politician²⁰—do have an effect on Supreme Court

14. See, e.g., STUART S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969) (bringing together a group of studies that examined the role that personal background plays in legal decision making); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963* (1965) (applying psychological studies of human behavior to Supreme Court decision making).

15. See, e.g., 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' decisions on the constitutionality of the Federal Sentencing Guidelines); C. Neal Tate, *Personal Attribute Models of the 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).

16. For an outstanding overview of these studies, see George, *supra* note 8, at 1349–55.

17. 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).

18. See, e.g., Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in *CASES IN AMERICAN POLITICS* 84 (Robert L. Peabody ed., 1976) (demonstrating that Justices with prosecutorial experience were more pro-prosecution in civil rights cases); Tate, *supra* note 15, 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 & POLICE SCI. 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).

19. 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 15, at 362 (considering the period 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 Johnston, *supra* note 18, at 87–89 & tbl.3 (showing the opposite correlation, that Justices with prior judicial experience tended to be conservative on civil liberties), and 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, 473–76 (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).

20. See, e.g., James J. Brudney et al., *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 more likely to support labor unions); Sheldon

decision making.

The second assumption is harder to intuit, 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 lifelong and not reducible to a firm set of years.²¹ These diversity elements were studied, however, and will be mentioned, but they cannot be easily compared against the other, annualized factors. Nevertheless, the advantage of using years is that it allows for weighting by time, treating Justice Louis Brandeis's thirty-nine years of private practice differently from Justice Elena Kagan's two years.

The study was built from multiple different source materials, but the basic structure was as follows. The first source considered was *The Biographical Directory of the Federal Judiciary*,²² 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.²³ 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, most notably Leon Friedman and Fred L. Israel's four-volume biography of the Justices, *The Justices of the United States Supreme Court: Their Lives and Major Opinions*.²⁴

Despite (or perhaps because of) these multiple sources, some discrepancies were inevitable, especially when measuring years.

Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 501–02 & tbl.8 (1975) (finding that judges with political experience tended to disfavor the government in fiscal cases); Tate, *supra* note 15, at 363 (showing that politician Justices were more liberal on economic questions).

21. 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 in rural poverty to the twenty-seventh Justice, John Catron. See Frank Otto Gatell, *John Catron*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 372 (Leon Friedman & Fred L. Israel eds., 1997) [hereinafter JUSTICES].

22. BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY: 1789–2000 (Bernan Editorial Staff ed., 2001) [hereinafter BIOGRAPHICAL DIRECTORY].

23. 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].

24. JUSTICES, *supra* note 21.

Justices, especially Justices from the nineteenth century, frequently had two jobs at once, making coding based on time challenging. It was quite common for lawyer–politicians in the nineteenth century 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.²⁵

Likewise, teaching law often overlapped with private practice. Justice Ruth Bader Ginsburg is a recent example, as she worked as counsel for the ACLU’s Women’s Rights Project while she was a law professor at Columbia.²⁶ Surprisingly, two different Supreme Court Justices—Justice Horace Lurton and Chief Justice William Howard Taft—served as deans of a law schools while holding other presumably time-consuming jobs as Circuit Judges on the United States Court of Appeals for the Sixth Circuit.²⁷ Under these circumstances, the study coded both employments for the full number of years, rather than dividing the years or assigning primacy to one of the simultaneous jobs.²⁸

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 subcategories 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.²⁹ 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, Solicitor General, United States Attorney General, United States Attorney for a district, an attorney general of a state, or other miscellaneous government lawyer work. These categories are

25. See COMPENDIUM, *supra* note 23, at 278, 291.

26. See Stephanie B. Goldberg, *The Second Woman Justice: Ruth Bader Ginsburg Talks Candidly About a Changing Society*, 1993 A.B.A. J. 40 (1993); Peter J. Rubin, *Justice Ruth Bader Ginsburg: A Judge’s Perspective*, 70 OHIO ST. L.J. 825, 825 (2009).

27. See James F. Watts, Jr., *Horace H. Lurton*, in 3 JUSTICES, *supra* note 21, at 934–35; Alpheus Thomas Mason, *William Howard Taft*, in 3 JUSTICES, *supra* note 21, at 1053.

28. 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 when reading the results of this study that earlier Justices were more likely to work two jobs at once.

29. These categories of practice come from LEE EPSTEIN, THOMAS G. WALKER, NANCY STAUDT, SCOTT A. HENDRICKSON & JASON M. ROBERTS, CODEBOOK: U.S. SUPREME COURT JUSTICES DATABASE 45 (2010), available at <http://epstein.usc.edu/research/justicesdata.pdf>. 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.*

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, United States Senator, United States Representative, member of the Continental Congress, governor, state legislator, mayor, or some other locally elected position.³⁰ These categories are combined into a single measure of years spent as an elected official.
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 teaching law.
5. Prior Judicial Experience—Separately lists the years each Justice spent as a federal appellate judge, federal trial judge, state appellate judge, or state trial judge. These categories are combined into three different aggregate measures: total time spent judging, total time spent appellate judging, and total time spent 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 United States Supreme Court Justice.
8. Geography—Separately lists each geographic location (either a state or a foreign country) where a Justice lived from birth until appointment to the Supreme Court. For purposes of adulthood, a Justice's geographic location is defined by where they worked rather than where they lived.³¹ These locations are then grouped

30. One of my favorite unusual job experiences is Justice Lewis Powell's nine years as the Chairman of the Richmond Public School Board in Richmond, Virginia. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 160–66 (1994).

31. The study codes in this manner because the employment data is readily available, whereas the actual domiciliary 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, Virginia, or both while working in D.C. Insofar as the geographic listing is meant to reflect experiences, it would be strange to code Justice 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.

into eight categories:³² New England,³³ Mid-Atlantic,³⁴ South,³⁵ Midwest,³⁶ Southwest,³⁷ West,³⁸ Abroad (foreign countries),³⁹ and Washington, D.C.⁴⁰

9. Education—Separately lists the years each Justice spent in undergraduate or graduate education. There are separate categories for total undergraduate years and the years each Justice spent in undergraduate education at Yale, Harvard, Princeton, another Ivy League institution, or Stanford.⁴¹ There are also separate categories for total years in law school, years in law school at Yale or Harvard, years spent at another Ivy League law school or Stanford, years spent in a masters program, years spent studying in a foreign country, and years spent “reading law.”⁴²

The study assigns a year value (either zero or a whole number) to each of these categories for each Justice. One hundred fourteen Justices were listed, rather than 112, because Chief Justices Rutledge and

32. These categories come from *The Regions of the United States*, U.S. DIPLOMATIC MISSION TO GERMANY, <http://usa.usembassy.de/travel-regions.htm> (last visited June 6, 2012).

33. Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. *See id.*

34. Delaware, Maryland, New Jersey, New York, and Pennsylvania. *See id.* But see *infra* note 40 explaining the coding for Washington, D.C.

35. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. *See id.*

36. Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. *See id.*

37. Arizona, New Mexico, Oklahoma, and Texas. *See id.*

38. Alaska, Colorado, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming. *See id.*

39. The foreign countries where Justices spent one year or longer, listed alphabetically, are: Austria, England, France, Germany, Ireland, Italy, Mexico, the Philippines, 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.

40. Washington, D.C., is coded separately, rather than grouped in 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.

41. 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* 17–23 (2005). The other Ivy League schools are Brown, Columbia, Cornell, Dartmouth, and the University of Pennsylvania. *See generally* DANIEL CAPPELLO, *THE IVY LEAGUE* (2012). Stanford is included in this list because in the second half of the twentieth century it rose to equal prominence. *See* JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY: ITS RISE TO PREMINENCE, ITS INDISPENSIBLE NATIONAL ROLE, WHY IT MUST BE PROTECTED* 117–29 (2009).

42. During the nineteenth century, the dominant form of legal education was to “read 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).

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.⁴³

The study then grouped the Justices into “natural Supreme Courts,” each named sequentially for the Chief Justice.⁴⁴ 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 to 1807 (Jay 2 to Marshall 4) had six or fewer Justices; and the Courts from 1863 to 1870 (Taney 15 and Chase 1) had ten Justices.⁴⁵ 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 a month,⁴⁶ while Rehnquist 6 (Chief Justice Rehnquist and Justices Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer) lasted for over eleven years.⁴⁷ The study refers to these Supreme Courts by Chief Justice last name and a number (for example, Roberts 4). The number refers to the particular iteration of a Court within a particular Chief Justice’s tenure. So, the current Court is called Roberts 4, because Chief Justice Roberts has presided over three earlier groups of Justices.⁴⁸

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 among the various natural Supreme Courts. The four main documents underlying the

43. Justice 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: JUSTICES, RULINGS, AND LEGACY* 43–45 (2008). Justice Hughes left the Court to serve as the Republican candidate for president and then went to work in private practice and to serve as the Secretary of State, among other activities. See WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES: 1930–1941*, 8–12 (2007).

44. These natural Supreme Courts come from COMPENDIUM, *supra* note 23, 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. See *id.*

45. See *id.* at 339–42.

46. 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* 58–59 (5th ed. 2008).

47. See *id.* at 348.

48. Roberts 1 lasted from September 29, 2005, to January 31, 2006, and consisted of Chief Justice Roberts and Justices Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Roberts 2 replaced O’Connor with Alito and lasted from January 31, 2006 to August 8, 2009. Roberts 3 replaced Souter with Sotomayor and lasted from August 8, 2009 to August 7, 2010. Roberts 4 started on August 7, 2010, with Kagan replacing Stevens.

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.⁴⁹

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 per Justice measure is generally more accurate than the raw tallies by Court. When relevant, the study does discuss the cumulative experience of Justices 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 Court Justices'.

A. *The Private Practice of Law*

The private practice of law has been the single most prevalent and lengthy experience of Supreme Court Justices as a whole. One hundred twelve out of 114 Supreme Court Justices have had 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.⁵⁰ 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 or as a member of a small partnership or law firm) or work for an institutional client, either a corporation or a non-profit organization.⁵¹ The only two Justices in the history of the Court with no private practice experience are Justices Stephen Breyer and Samuel Alito.⁵²

Before turning to the trends per Justice over time, the general employment trends are interesting and closely match the overall trend in

49. David Barton, *Data Underlying Barton Supreme Court Justices' Experience Study*, FLORIDALAWREVIEW.COM, <http://www.floridalawreview.com>.

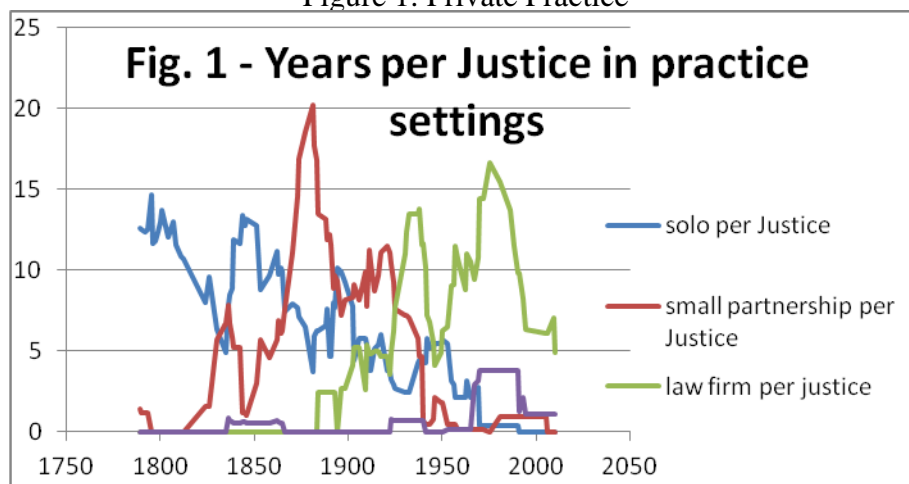
50. From here forward each of the collective and per Justice figures are derived from the spreadsheets covering the Justices and the natural Supreme Courts. These spreadsheets are available online at <http://www.floridalawreview.com>. The narrative claims, such as that Justice Roberts worked as an Assistant Solicitor General or Justice Thurgood Marshall worked for the NAACP, come from the narrative listing of Justice experiences, available online at <http://www.floridalawreview.com>.

51. 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.

52. But both Justices Breyer and Alito did practice law as government lawyers.

American legal practice from solo practice to small partnerships to working in larger law firms. The last 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.⁵³ Despite these relatively late examples, the dominance of the law firm after the 1930s is quite striking. Figure 1 is a chart showing the years per Justice in four different practice settings: solo, small partnership, law firm, and corporate or organizational counsel. One should note that solo practice is the dominant form at first, followed by small partnership and eventually by law firm practice. One should also note the shrinkage in private practice experience as a whole since the mid-1970s.

Figure 1: Private Practice



The cumulative total of years spent in private practice per natural Supreme Court is remarkable. The most recent Roberts Court (Roberts 4) has a total of fifty-four years in private practice experience, the absolute lowest number of combined private practice experience of any Supreme Court, including the five- and six-Justice Supreme Courts of the late-eighteenth and early-nineteenth centuries.⁵⁴

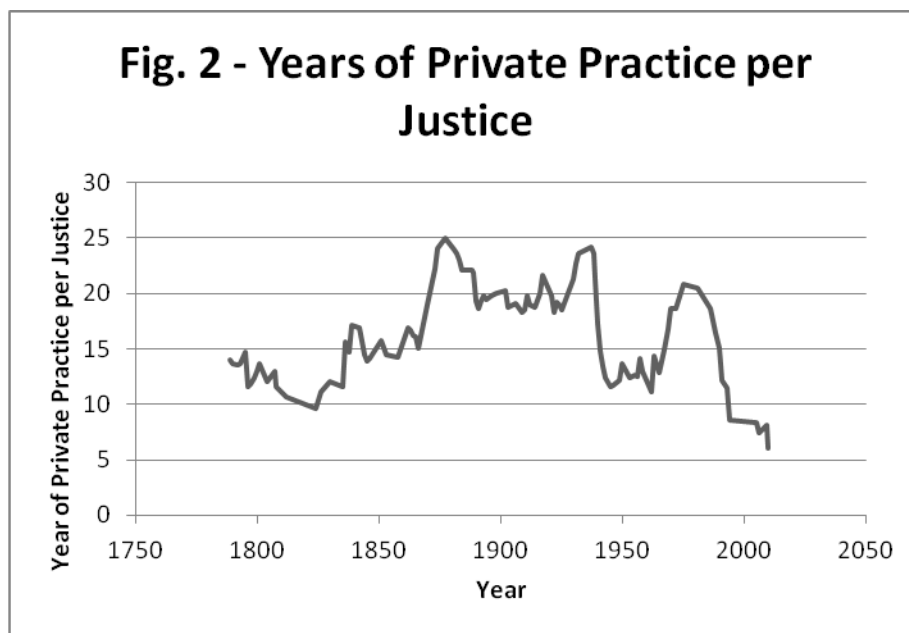
The differences are more marked on a per capita basis. The four Roberts Courts and Rehnquist 6 are the only Supreme Courts with fewer

53. 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.

54. The next lowest number is the five-person Court of 1796, which has fifty-eight total years. The other nine-person Courts with low private practice experience are Roberts 2 with sixty-seven years, Roberts 3 with seventy-three years, Roberts 1 with seventy-five years, and Rehnquist 6 with seventy-seven years. Waite 1, 2, and 3 (1874–1881) have three of the four highest totals, along with Hughes 4 (1937–1938).

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 being the absolute nadir:

Figure 2: Private Practice per Justice



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

In addition, even the time the Roberts 4 Justices spent in private practice is of a different kind than the historical norm. All of the cumulative private practice experience of 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.⁵⁵ Second, large firm practice is characterized by specialization.⁵⁶ Lastly, partially because of the overall trend away from

55. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 961 (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.”).

56. See JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR

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.⁵⁷

Additionally, twenty-one of the collective fifty-four years the study coded as private practice experience for the Roberts 4 Justices were spent in particularly rarified and Supreme Court-oriented legal practices. Chief Justice John Roberts's thirteen years at the Washington, D.C., office of Hogan & Hartson focused largely on appellate work before the Supreme Court.⁵⁸ Similarly, Justice Ginsburg's eight years founding and running the ACLU's Women's Rights Project involved a constitutional law and Supreme Court practice.⁵⁹ Thus, this group of Justices has spent less time in private practice than any other group of Justices, and much of the time they did spend in private practice tended to be especially focused on constitutional and Supreme Court matters.

B. *Government Lawyer*

The study also considered the time each Justice spent as a government lawyer. Given the dearth of time spent in private practice, 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 counterbalance 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 practicing law.

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 fifty-two total years and Roberts 4 with forty-nine total years are in the top fifteen 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 (bottom), political

37–38 & fig.2.4 (2005).

57. See Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RESOL. 35, 36 (2006).

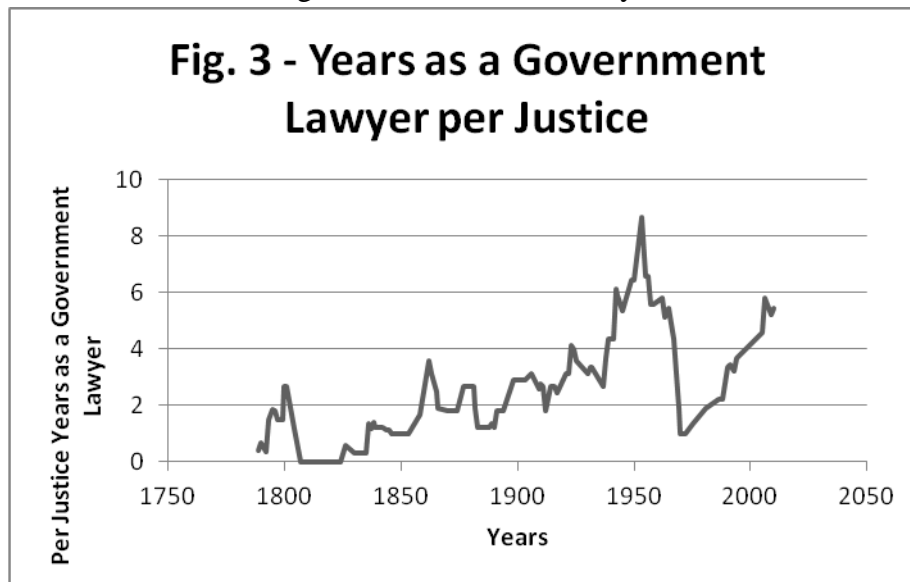
58. See *Judicial Nominations: Chief Justice John G. Roberts, Jr.*, THE WHITE HOUSE: PRESIDENT GEROGE W. BUSH, <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominations/roberts.html> (last visited June 6, 2012). Chief Justice Roberts argued thirty-nine Supreme Court cases before his appointment to the D.C. Circuit. *Id.*

59. See Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff>.

experience (bottom), law teaching (top), or judging (top). The 1940s and 1950s were the high-water mark for time spent as a government lawyer, with the first Warren Court, serving from 1953 to 1955, topping the list with seventy-eight total years of experience.⁶⁰

The trend can be seen in Figure 3's graph of the Justices' per capita years spent as government lawyers⁶¹:

Figure 3: Government Lawyer

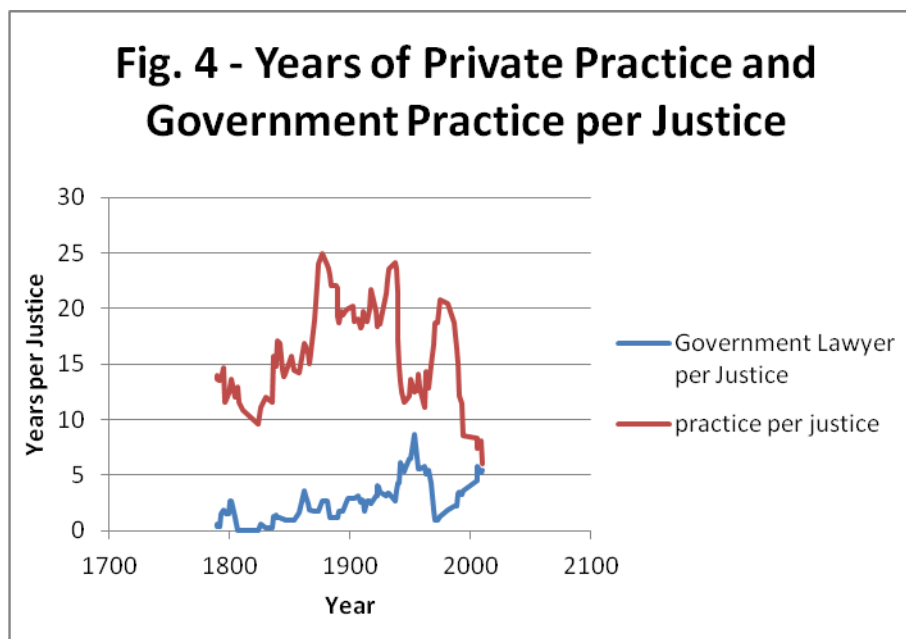


One should note that Roberts Court Justices spent almost the same amount of years as government lawyers as time spent in private practice, a significant departure from previous Courts. Figure 4 shows the two per Justice lines almost converging with Roberts 4.

60. This was still well below the 112 years of total private practice for Warren 1.

61. Note the differences between the scales on the vertical axes of Figure 1 (zero to twenty-five years per Justice), Figure 2 (zero to thirty years per Justice) and Figure 3 (zero to ten years per Justice). The scales are different because private practice has been much more common than service as a government lawyer.

Figure 4: Government Lawyer



The Roberts 4 Court's government lawyering experience, like its private practice experience, is also weighted towards particularly elite and Supreme Court-oriented work. The Roberts 4 Court has a total of forty-nine years spent as a government lawyer. Members of the Court spent nine of those years in the Solicitor General's office, which carries a completely appellate docket,⁶² and spent another twelve years in specialized work for the President or the Senate.⁶³ The balance was

62. Chief Justice Roberts and Justice Alito both worked as Assistant U.S. Solicitors General for four years, and Justice Kagan was the U.S. Solicitor General for one year before joining 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* 1-7 (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: Chief Justice William Howard Taft and Justices Stanley Forman Reed, Robert Jackson, Thurgood Marshall, and Elena Kagan. *See id.* at 181-82 app. A. Only two Justices have ever served as Assistant Solicitors General: Chief Justice Roberts and Justice Alito.

63. 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; Chief Justice Roberts spent four years as an Associate Counsel to the President, White House Counsel's Office; Justice 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.

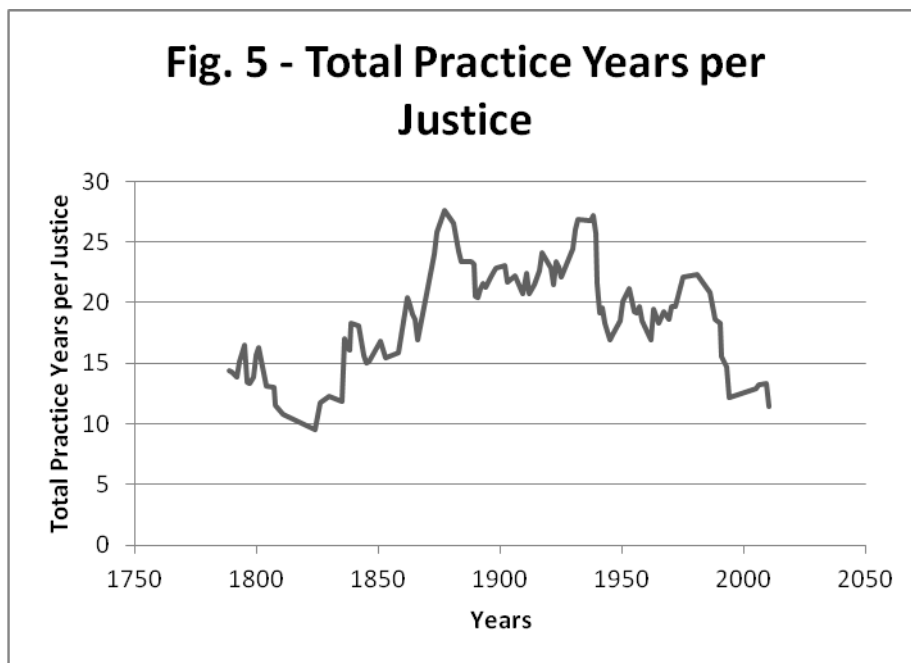
spent in the more typical U.S. Attorney General’s office or as a state prosecutor. Taken with the private practice experience, almost half of the Roberts 4 Court’s lawyering experience focused on the Supreme Court or high-level policy making, not trial practice or traditional lawyering.

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 nineteenth 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 with 11.5 years of total practice experience per Justice.

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

Figure 5: Total Practice



D. Elected Official

One of the great surprises from studying the pre-appointment experiences of Supreme Court Justices is the sheer amount of time prior

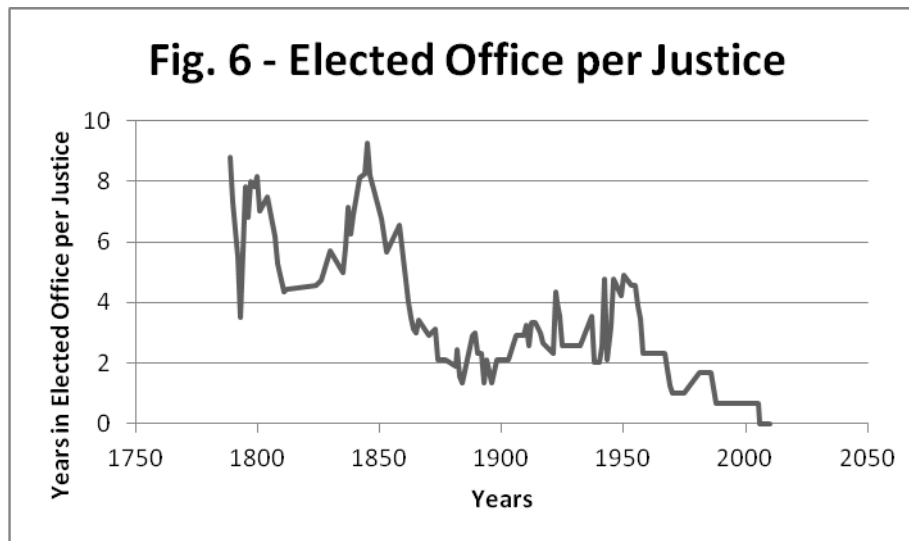
Justices spent as non-lawyer, elected officials.⁶⁴ The only two categories that surpass elected office are private practice and judging, counting trial and appellate experience together. Collectively, Supreme Court Justices have spent 500 total years as elected officials, more than the 429 years as appellate judges. Given the current Court's zero years spent in elected office and seventy-four years spent on an appellate bench, it is clear that the Roberts Courts are quite anomalous.

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

There are only three Supreme Courts on which not a single Justice has served in an elected office: Roberts 2, Roberts 3, and Roberts 4.⁶⁵ 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 was Waite 6, serving from 1882 to 1886 and carrying a total of just twelve years of elected experience.

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

Figure 6: Elected Official



64. This count does not include time spent as an elected judge or elected attorney general. Only stints as an elected state or federal legislator or executive are tallied.

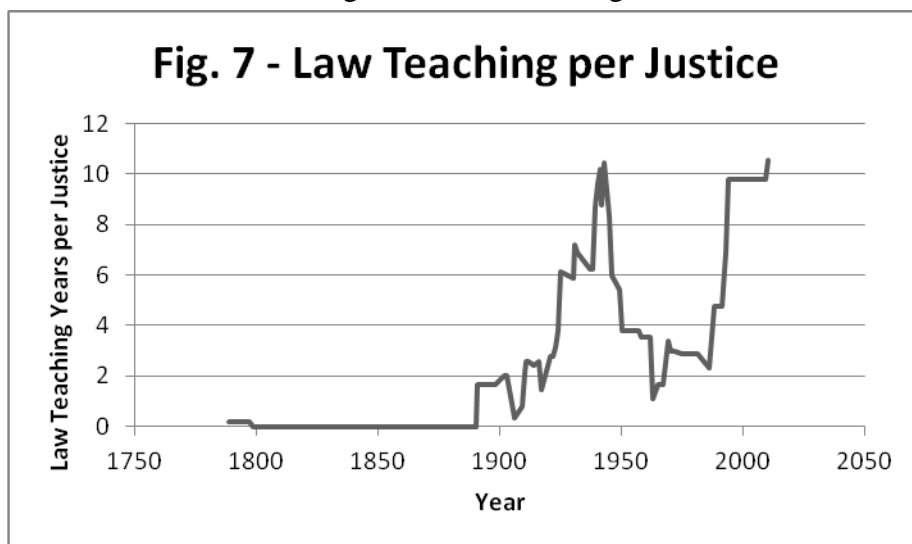
65. The retirement of Justice Sandra Day O'Connor ended a continuous tradition of at least one former politician on every Supreme Court from Jay 1 forward.

E. Law Teaching

What the Roberts Courts lack in practice experience, they make up in law teaching experience. With ninety-five 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 it is in some other categories; two Courts from the 1940s (Hughes 8 and Stone 2) are just behind with ninety-four total years spent in legal academia.⁶⁶ Unsurprisingly, given the rarity of law school training in the nineteenth century, most Supreme Courts during that period have no experience teaching law.⁶⁷

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

Figure 7: Law Teaching



66. Hughes 8 (Chief Justice Hughes and Justices McReynolds, Stone, Roberts, Black, Reed, Frankfurter, Douglas, and Murphy, February 5, 1940–July 3, 1941) and Stone 2 (Chief Justice Stone and Justices 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 at Colorado and Professor and Dean at Washington University and Iowa) were all longtime academics. *See* BIOGRAPHICAL DIRECTORY, *supra* note 22, at 471, 502, 733, 743, 780. In addition, James McReynolds (Vanderbilt), Charles Evan Hughes (Cornell and N.Y.U.), and Frank Murphy (University of Detroit) all taught law for a period of their careers. *See id.* at 566, 660, 681.

67. This study only measures experience from before joining the Court. As such, the study does not count Justice Joseph Story's long service as an instructor at Harvard while he was a Justice. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 237–70 (1985).

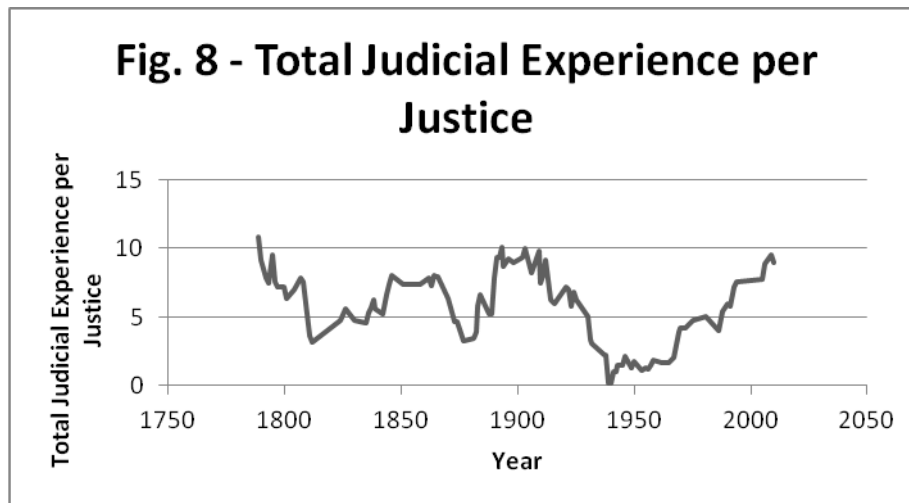
The experience in law teaching helps explain why the Roberts 4 Court is relatively low in practice or elected experience. Justices Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan spent much of their pre-Court careers in academia.

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, as well as trial and appellate. This experience runs from the least—two total years of experience for Hughes 6 and 7 (1939–1940)⁶⁸—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 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 ten, but the bulk of the top ten and the top three are all from the Fuller Courts at the turn of the twentieth century.

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

Figure 8: Total Judicial Service



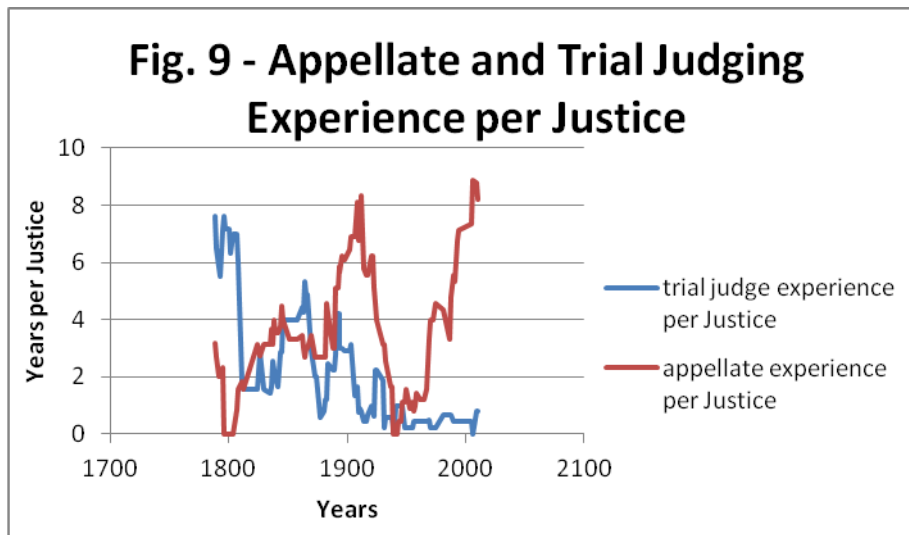
68. Hughes 6 was Chief Justice Hughes and Justices McReynolds, Brandeis, Butler, Stone, Roberts, Black, Reed, and Frankfurter. Hughes 7 subtracted Brandeis and added Douglas. See COMPENDIUM, *supra* note 23, at 345. Of these Justices, only Justice Hugo Black had any judicial experience—two years as a 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 in terms of experience.

The chart shows three different periods where judicial experience dipped on the Supreme Court, with the early 1940s being a clear low point. On a per Justice basis, the Roberts Courts are one of three distinct peaks, yet 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 of appellate judging. Roberts 2 and Roberts 3 are first and second, with Justices spending 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:

Figure 9: Trial and Appellate Judging Considered Separately



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 significantly.⁶⁹ The Roberts Courts have the highest per Justice appellate experience, but the Courts of the early twentieth century are close behind.

69. 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 (1891).

H. State and Federal Judging

If you disaggregate state and federal judging, another unique feature of the Roberts Courts becomes clear—Roberts 3 and Roberts 4 are the only two Supreme Courts on which no Justice has spent any time working as a state court judge. The replacement of Justice David Hackett Souter with Justice Sonia Sotomayor interrupted an unbroken string of Courts featuring at least some state court experience.

Figure 10: State and Federal Judging

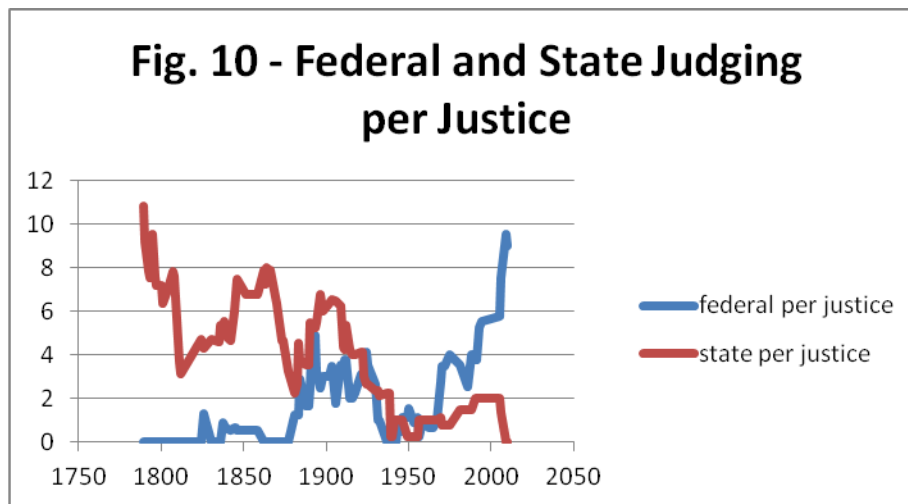


Figure 10 shows that federal judicial experience and state judicial experience have essentially traded places from the first Court to the most recent Court. There was very limited federal court experience before 1881 and state court experience was generally more common until the 1960s, when federal court experience significantly outstripped state court experience for the first time.

I. 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.

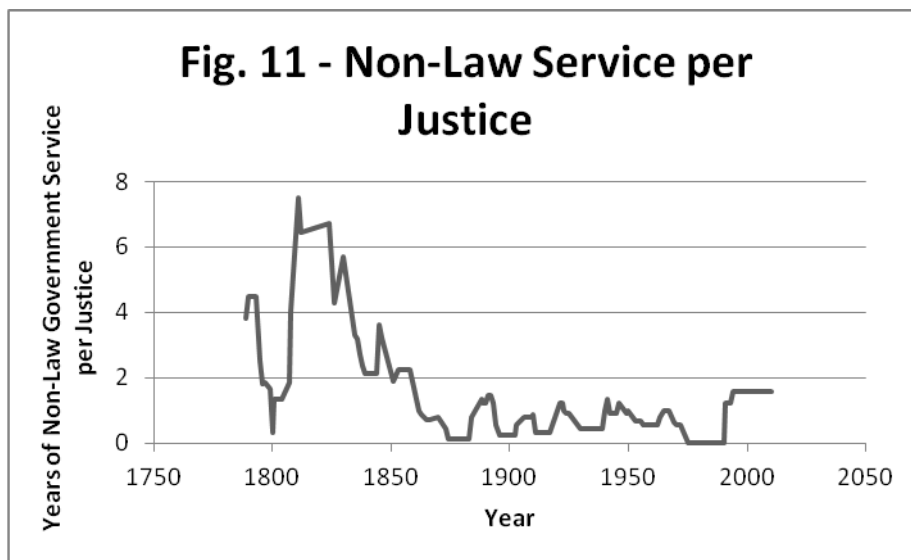
1. Non-Law Government Service

Many Supreme Court Justices have some experience as government employees in jobs that do not involve much, if any, legal practice. This study coded various levels of jobs from undersecretaries to cabinet-level positions as non-law government service. For example, across eleven

years Justice Clarence Thomas worked as a legislative assistant to then U.S. Senator John Danforth, as the assistant secretary for civil rights at the Department of Education, and then as the chairman of the Equal Employment Opportunity Commission.⁷⁰ Each of these experiences counts 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 fourteen cumulative years and approximately one and a half years per Justice. Figure 11 shows that this experience ran high for the first fifty or so years of the Supreme Court⁷¹ and has remained relatively lower ever since:

Figure 11: Non-Law Government Service



2. Military Service

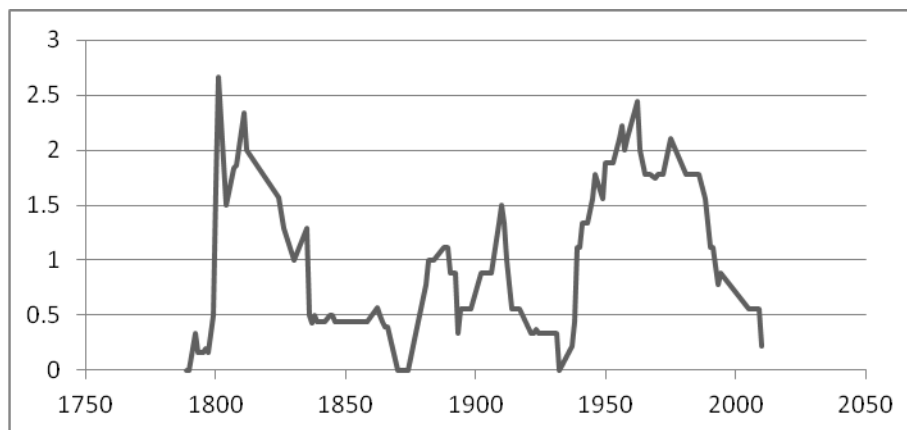
The amount of military service experience of various Supreme Courts tends to rise and fall depending on when wars were fought and the level of participation in those wars. For example, most Justices who were of fighting age during the Revolutionary War and World War II appear to have fought, as shown by the spike in judicial military experience following those wars, while the veterans of other wars were

70. See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 801.

71. The absolute peak of seven and a half years of non-law government service per Justice was Marshall 5 (1811–1812).

less prevalent on the Court.⁷²

Figure 12: 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 to 1874 (Chase 2, Chase 3, and Waite 1), and Hughes 3 from 1932 to 1937.

3. Private Enterprise

While it is 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 Justice James Wilson's ten years as a businessman and land speculator in Philadelphia to Justice Byron White's years as a professional football player for the Pittsburgh Steelers and the Detroit Lions.⁷³ Five Justices ran nineteenth and early twentieth century newspapers.⁷⁴ Justice Lucius

72. In reading Figure 12, please note the difference in scale on the vertical axis. The bulk of the previous charts have run from zero to ten years per Justice, and this Figure spans zero to three years per Justice.

73. See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 841, 848.

74. Justice John McLean was the founder and editor of *The Western Star*, a Lebanon, Ohio newspaper from 1807 to 1812. *John McLean and The Western Star*, HISTORICLEBANONOHIO (May 17, 2009, 6:52PM), <http://www.historiclebanonohio.com/?q=mclean>. *The Western Star* is still in publication. See THE WESTERN STAR, <http://www.westernstar.com> (last visited June 6, 2012). 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 based on the video game *Grand Theft Auto* entitled "Liberty Tree" was created in 2001. See LIBERTY TREE, <http://www.rockstargames.com/libertytree> (last visited June 6, 2012). Justice Stanley Matthews was the editor of the *Tennessee*

Q.C. Lamar was the President of the University of Mississippi and Justice 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 had at least one Justice with some such experience. No Justice has had any private, non-law experience since Justice Byron White's retirement in 1993.

J. Geography

The study measures the years each Supreme Court Justice spent in any state or foreign country.⁷⁵ For ease of use, the study aggregates the states into different geographic areas of the country and a category for foreign countries.⁷⁶ 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,⁷⁷ 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 114 Justices considered, sixteen listed New York as their home state. Massachusetts is second with ten Justices—a substantial gap that reflects New York's dominance as the historic legal and commercial center of the United States.⁷⁸

Democrat in Maury County, Tennessee. See D. GRIER STEPHENSON, JR., *THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY* 123 (2003). Chief Justice Melville Fuller was the editor of the *Augusta Age* in Augusta, Maine. See JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER: 1888–1910* 5 (1995). Justice James Byrnes edited the *Aiken Journal and Review* in Aiken, South Carolina. See ROBERT SOBEL, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989* 54 (1990).

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

76. The categories are New England, Mid-Atlantic, South, Midwest, Southwest, West, foreign countries, and Washington, D.C. See *supra* notes 32–40 and accompanying text.

77. See DATABASE, *supra* note 23, at 93.

78. 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 and 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* 17 (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.”).

The rest of the top ten includes some surprises. Ohio has nine Justices; Virginia has eight. Pennsylvania and Tennessee have six each, and Kentucky, Maryland, and New Jersey have five each. Virginia's standing as the fourth state for producing Supreme Court Justices, behind Ohio, is rather surprising,⁷⁹ given Virginia's relative political and economic dominance post-Revolution and into the early nineteenth century and Ohio's comparative stature as a frontier during that time period.⁸⁰ Tennessee and Kentucky were also relative frontier states in the first half of the nineteenth century,⁸¹ so their representation on the Court seems improbable, especially in comparison to the relative paucity of Justices from the non-Virginia original southern states—North Carolina (two), South Carolina (three), and Georgia (four). Two other original states, Delaware and Rhode Island, have never produced a Justice. Other surprisingly underrepresented states include Texas with one Justice, and Florida, Oregon, Vermont, Washington, and Wisconsin with none.⁸²

Tallied by years, these geographic trends are more pronounced because many Justices who have not claimed New York or Massachusetts as their home state for nomination purposes have spent a chunk of time in those states for work or education.⁸³ The Justices have spent a total of 793 years in the State of New York and 522 years in Massachusetts, the two highest numbers.⁸⁴ The next longest stay in any single jurisdiction is Washington, D.C., with 468 collective years. No Justice was born or raised in Washington, D.C., so that collective time all results from time spent working in the federal government, generally

79. 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.?*, FACTCHECK.ORG (Feb. 29, 2008), <http://www.factcheck.org/2008/02/home-to-more-presidents-ohio-or-virginia>. So maybe Ohio has punched above its weight in two of the three branches.

80. Compare KEVIN R.C. GUTZMAN, *VIRGINIA'S AMERICAN REVOLUTION: FROM DOMINION TO REPUBLIC, 1776–1840* 163–97 (2007) (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).

81. For a history of Tennessee's frontier period, see generally JOHN R. FINGER, *TENNESSEE FRONTIERS: THREE REGIONS IN TRANSITION* (2001). For Kentucky, see generally OTIS K. RICE, *FRONTIER KENTUCKY* (1993).

82. 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.

83. Harvard, Yale, and Princeton are a relative boon to Massachusetts, Connecticut, and New Jersey.

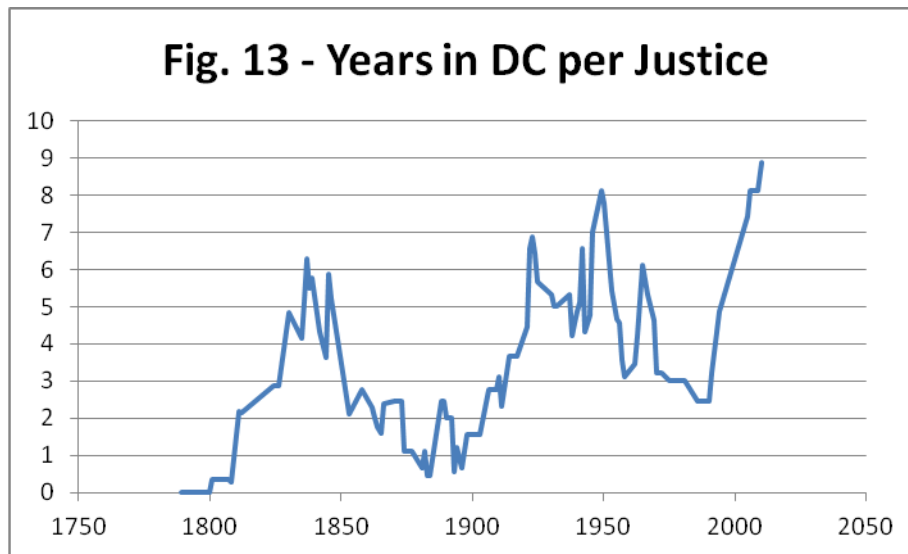
84. From 1789 to the present, every Court but six (the six Courts from 1795 to 1807) has had at least one Justice who has spent a year or more in New York. Likewise, only Marshall 5 (November 23, 1811 to February 3, 1812) and five of the later Taney Courts from 1845 to 1862 did not include any Justices who had lived in Massachusetts.

as a politician, a lawyer, or a judge.

The Justices have spent the most time in the Mid-Atlantic,⁸⁵ with the South a close second.⁸⁶ 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 have spent almost half of their collective lives in that region. If we aggregate the East Coast states (states bordering on the Atlantic Ocean), the Justices have spent over half of their collective pre-Court lives in those states.⁸⁷ The Justices have spent a relatively short amount of time west of the Mississippi and almost no time in the Southwest.⁸⁸

The following charts show the geographic tendencies. First, Figure 13 shows the recent uptick of time spent in Washington, D.C.,⁸⁹ with Roberts 4 as a high point:

Figure 13: Geographic Tendencies



85. One thousand six hundred twenty-five collective years without Washington, D.C., and 2093 with D.C. included.

86. One thousand five hundred one collective years spent in the South.

87. The non-East Coast states that have the longest stays are Ohio, Kentucky, and Tennessee.

88. Collectively, the Justices have spent more time living in foreign countries than in the Southwest.

89. Note that the early "0" years per Justice on the graph is a little deceiving since Washington, D.C., did not become the capital until 1800.

Figure 14 shows the time spent in New England and the Mid-Atlantic (not including D.C.) on one chart.⁹⁰ Although the D.C. chart shows some volatility, the remaining geographic charts fluctuate significantly 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 retirement of Justice 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 the Mid-Atlantic:

Figure 14: Years per Justice in New England and the Mid-Atlantic

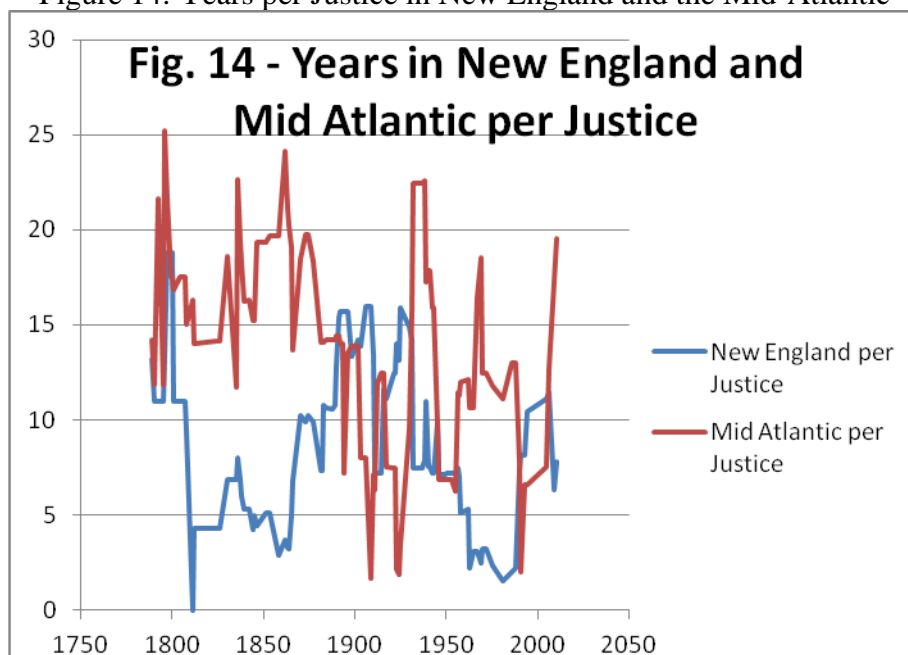


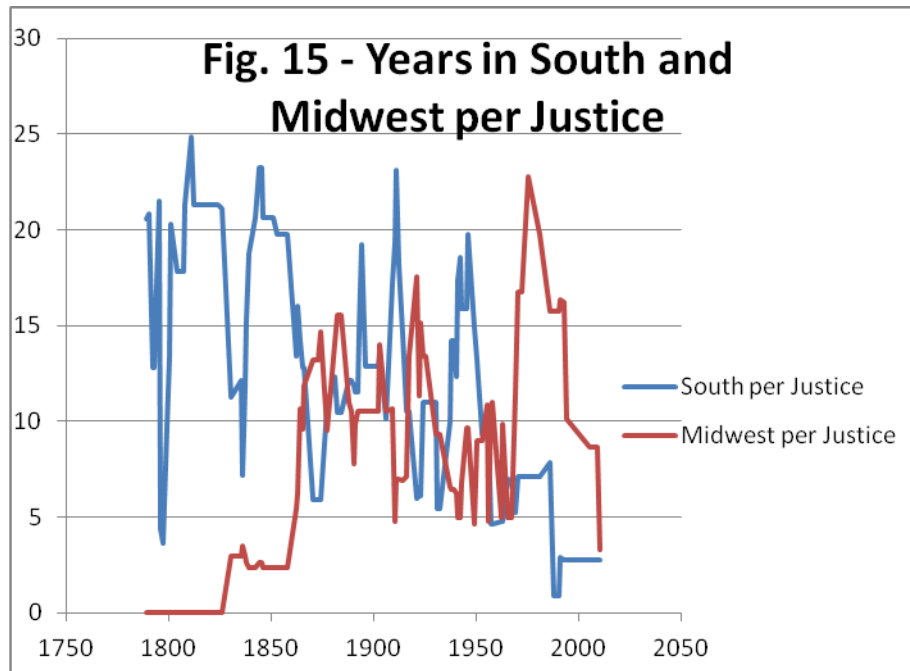
Figure 15 shows the years each Justice spent in the South and the Midwest. First, and unsurprisingly, there are no Midwest years until the appointment of Ohioan Justice John McLean in 1830. Second, one should note the relative prevalence of southern Justices from 1789 until 1949.⁹¹ From 1949 to 1955, the Southerners Rutledge, Vinson, and

90. Because of the variability in the per Justice numbers, only two data sets are combined on the next two charts. A chart with more than two data sets is very hard to read.

91. The years from 1946 to 1949 marked a modern highpoint for Southern geographic experience with the replacement of Chief Justice Harlan Stone (who was primarily a New Yorker and New Englander) with the Kentucky native Chief Justice Frederick Vinson. The other Justices with Southern experience on the Vinson 1 and Vinson 2 Courts were Alabama native

Jackson died in office and were replaced by non-southerners Minton, Warren, and the second Justice Harlan; the South has been less prevalent since.⁹²

Figure 15: Years per Justice in the South and the Midwest

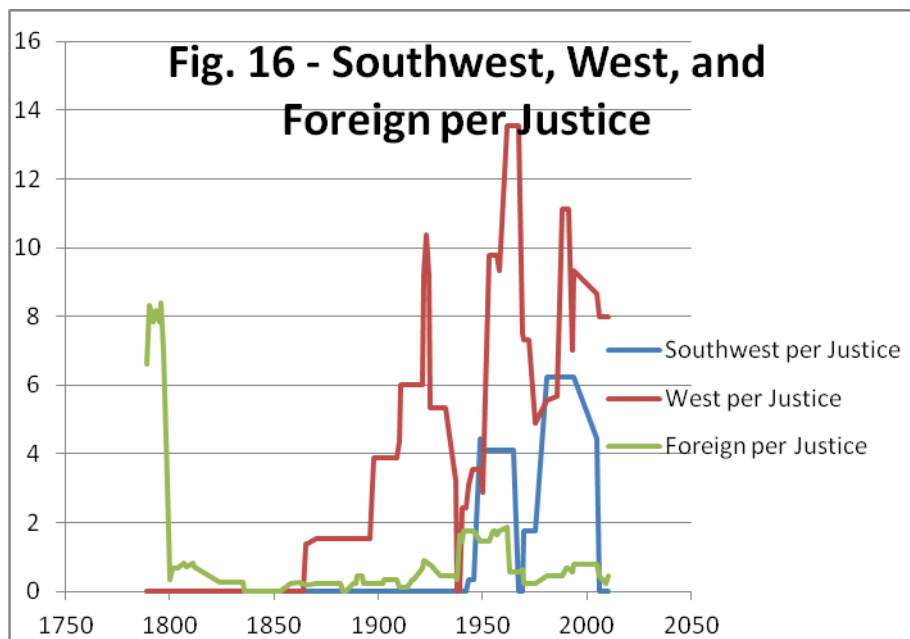


Hugo Black, Kentucky native Stanley Reed, and Wiley Rutledge, who grew up in the South. Year 1949 saw Tom Clark replace the Midwesterner Frank Murphy. Justice Clark is not coded as a southerner, but as the only Texan to serve on the Supreme Court, his years plus the years of other Vinson 1 Justices created a relatively strong southern flavor to the Court. See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 379, 435, 681, 725, 743, 780, 820; COMPENDIUM, *supra* note 23, at 346.

92. Justice Sherman Minton had spent three years practicing in Miami from 1925 to 1928, but spent the great bulk of his life in Indiana. See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 670. Neither Chief Justice Warren nor Justice 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” laws. It is worth noting, however, that the first, tentative steps in dismantling segregation were taken under the late Stone and early Vinson Courts, which were relatively southern. See, e.g., Robert A. Burt, *Brown’s Reflection*, 103 YALE L.J. 1483, 1486 (1994) (arguing that “in a series of cases involving such matters as voting rights, interstate transportation, and graduate school education,” from 1944 to 1954 “the Court gave clear indications that it disapproved of Southern segregation practices”).

Figure 16 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 to 1792 are the two Courts with the most foreign experience. Justices James Wilson, William Paterson, and James Iredell were born overseas, and Justices John Jay, John Blair, and John Rutledge each spent a short period overseas working or studying law.⁹³ While the time spent abroad by the Justices has lessened over time, it is noteworthy that at least one Justice has had 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 1863,⁹⁴ and the Southwest does not appear until Justice Wiley Rutledge's appointment in 1943.⁹⁵

Figure 16: Years per Justice in the Southwest, the West, and Foreign Countries



93. See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 382, 576, 580, 702, 743, 848.

94. Justice Field was born in Connecticut and raised mostly in Massachusetts, but spent the bulk of his adult life and career in California. See *id.* at 494. California had only been a state for thirteen years when President Abraham Lincoln appointed Field.

95. Justice Rutledge spent three years of young adulthood in New Mexico, see JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 35-39 (2004), and six years in Colorado attending law school, practicing law, and beginning his career as a legal academic. See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 743.

The three most prevalent geographic areas on the Roberts 4 Court are the Mid-Atlantic, Washington, D.C., and the 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 shows increases in Washington, D.C., and Mid-Atlantic and a decline in the other areas. The most notable feature of the Roberts 4 Court is the time the Justices spent working in Washington, D.C., where the current Court represents a high-water mark.

K. Education

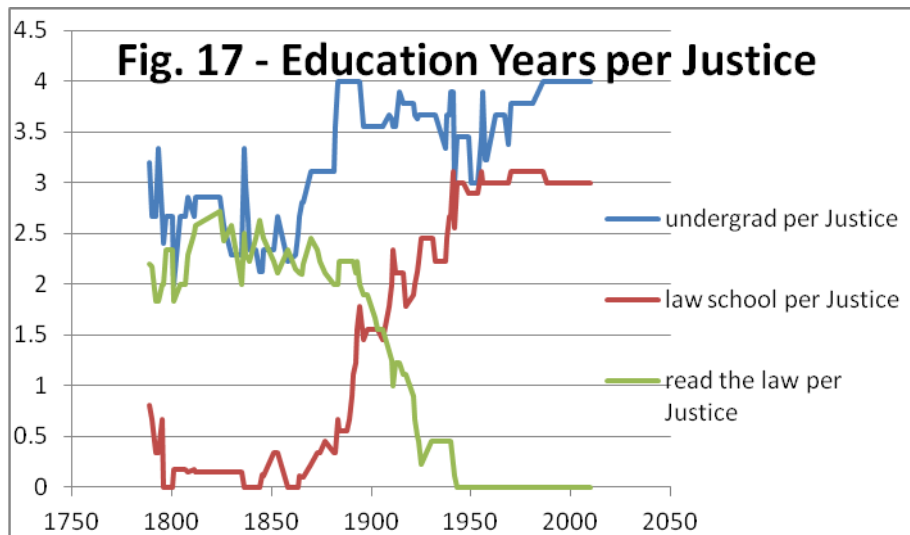
The Justices' educational experiences mirror larger changes in the educational paths of lawyers in America. For instance, every Justice appointed from 1789 to 1899, except two, spent some period of years "reading the law."⁹⁶ From the twentieth century forward, this became much less common. Likewise, eleven different nineteenth-century Justices (and one twentieth century Justice) had no formal undergraduate or graduate education whatsoever, just a period reading law.⁹⁷ Three twentieth-century Justices have only a law school education and no undergraduate studies.⁹⁸ Figure 17 illustrates the relative years spent in undergraduate education, law school, and reading the law per Justice:

96. There were fifty-eight Justices during this period (counting Justice Rutledge twice). See DATABASE, *supra* note 23. The only two Justices who did not read the law were Justice 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 Justice Benjamin Curtis (1851–1857), who attended Harvard Law School. See *id.*; BIOGRAPHICAL DIRECTORY, *supra* note 22, at 382, 453. The first Justice of the twentieth century, Justice Oliver Wendell Holmes, did not read the law and attended Harvard Law School. See DATABASE, *supra* note 23; BIOGRAPHICAL DIRECTORY, *supra* note 22, at 559. In this and other ways, Justice Holmes was a sign of things to come in the twentieth century.

97. The eleven from the nineteenth century are John Catron, Samuel Chase, Nathan Clifford, Gabriel Duvall, James Iredell, John Marshall, John McKinley, John McLean, Alfred Moore, Rufus Peckham, and Noah Swayne. See DATABASE, *supra* note 23; BIOGRAPHICAL DIRECTORY, *supra* note 22, at 425, 430, 439, 479, 576, 637, 655, 656, 674, 705, 786. Justice 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 U.S. Senator, the Governor of South Carolina, a Supreme Court Justice, Chairman of the U.S. War Mobilization Board during World War II, and Secretary of State immediately following World War II. See DATABASE, *supra* note 23; BIOGRAPHICAL DIRECTORY, *supra* note 22, at 412.

98. These are Justices Robert Jackson, Sherman Minton, and Charles Whittaker. See DATABASE, *supra* note 23; BIOGRAPHICAL DIRECTORY, *supra* note 22, at 579, 670, 842.

Figure 17: Years Spent in Undergraduate Education, Law School, and Reading the Law per Justice



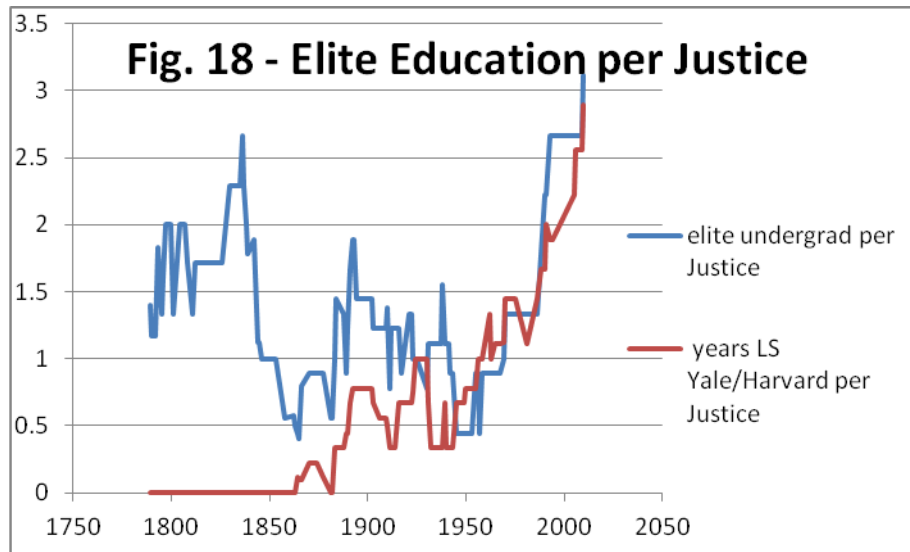
The current educational program of four years of undergraduate education and three years of law school education per Justice is actually of relatively recent vintage, as demonstrated by the Justices' various educational routes to the Supreme Court over the years. The first year when every Justice had four years of undergraduate work and three years of law school was 1986, when Justice Scalia replaced Chief Justice Burger.⁹⁹

Nevertheless, recent Supreme Courts have not only completed more formal legal 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 in this measure 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 in this ranking of elite education is the Hughes 5 Court (1938 to 1939) with twenty-eight years of combined elite education.

Figure 18 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.

99. Chief Justice Warren Burger spent three years getting a law degree at St. Paul College of Law and two years as an undergraduate (without earning a degree). See BIOGRAPHICAL DIRECTORY, *supra* note 22, at 407.

Figure 18: Years Spent in Elite Undergraduate and Law School Institutions



Although there is one other high point in the early nineteenth century for elite undergraduate education,¹⁰⁰ the Roberts 4 Court is far and away the first in time spent at the most elite American undergraduate institutions and law schools.

L. 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 geographic location leads to a rather startling picture of the current Supreme Court. The Roberts 4 Court has spent less time in private practice than any previous Supreme Court. The Justices of the Roberts 4 Court have spent almost as much time as government lawyers as they have in the private practice of law, another first for any Court.¹⁰¹ The Justices of Roberts 2, 3, and 4 have the least collective experience in elected office and are the first Courts to lack any Justice with experience as an elected official. The Roberts Courts are also on the low end of trial judging experience.

100. The Taney 1 Court (1836) featured Harvard alumnus Justice Joseph Story, Princeton (then called the College of New Jersey) alumni Justices Smith Thompson and James Wayne, and Yale alumnus Justice Henry Baldwin. *See id.* at 362, 782, 804, 834. Of the other two justices, Chief Justice Roger Taney attended Dickinson University and Justice John McLean did not attend an undergraduate institution but read law. *See id.* at 656, 795; DATABASE, *supra* note 23.

101. This additional government experience means that the Roberts Court does not have the least time practicing law of any Court. *See supra* Figure 5.

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

Much of the rest of their 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 of 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 D.C. 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 trends toward 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 undeniable. The harder question is whether they are healthy or harmful, a question to which we next turn.

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

This Part builds on the empirical analysis to make a normative case that the collective past experiences of the current Court are not optimal given what the Court actually does. The arguments in this Part are not empirical and many can, and will, disagree with my conclusions. At heart, the question of whether the changes in Justices' backgrounds have been good or bad likely depends on one's view of the quality of the work of the current Court as well as one's impression of the current Court's brand of elitism and meritocracy. 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. The final conclusion—that these two phenomena are related and regrettable—requires some additional persuasion. Section III.A. discusses the collective backgrounds of the current Justices and argues that they are a uniquely elite and cloistered group of Justices. Section III.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. Section III.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, politics, or trial court judging to understand the ramifications of broad social policy. Individuals with more varied life experience may also be less likely to revert to complex legalism in deciding cases and writing opinions, which is a serious problem with the current Court.

A. *The New Judicial Elite—Cloistered and Detached*

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 Section 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 detached work settings than any previous group of Justices. Cloistered and detached means settings where a lawyer is kept above 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.¹⁰² Both jobs deal with law in an abstract manner.¹⁰³ 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 facts of the cases they teach. Both jobs are closely associated with law students or recent law school graduates (in their roles 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 selected based upon their mastery of legal analysis and complexity,¹⁰⁴ and the emphasis placed upon analytical legal reasoning is even higher in the law professoriate.¹⁰⁵

102. Compare, Scott H. Bice, Foreword, *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 311 (1999) (discussing judicial independence), with MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 208 (1996) (discussing the legal academic's distaste for "advocacy scholarship").

103. 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 12.

104. See BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 259–83 (2011).

105. See, e.g., Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 432–37 (1986) (examining how the traditional hiring criteria for law professors impact minorities); Leland Ware, *People of Color in the Academy: Patterns of Discrimination in Faculty Hiring and Retention*, 20 B.C. THIRD WORLD

Perhaps, unsurprisingly, given their work post-law school, the Roberts 4 Justices are particularly academically well-credentialed. No Supreme Court has spent more time studying at the top 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.

Furthermore, 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 an “inside-the-Beltway” mentality,¹⁰⁶ the Roberts 4 Court would be likely reflect to 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, working at the Court as clerks, or practicing before the Court as lawyers.¹⁰⁷

Consider what experiences are missing. This Court is historically short in three previously well-represented categories of experience: the private practice of law, service as an elected politician, and trial judging. The time these Justices have spent in the practice of law, moreover, is clustered in appellate 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.¹⁰⁸

Thus, the experiences of the Roberts Court Justices evince a focus on high-level legal reasoning, experience in appellate judging, experience in jobs that are especially independent and “neutral,” and a special hybrid of meritocracy and elitism. These Justices have less experience with the operation of the legal system below the theoretical and appellate levels 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 transformed from its inception to the present, but recent years have marked a particularly substantial change. Over time, the Court’s caseload has fallen¹⁰⁹ while the size of its

L.J. 55, 61–62 (2000) (describing the traditional hiring criteria for law professors).

106. See Daniel H. Lowenstein, *Five Inconceivable Reasons to Support the Electoral College*, 156 U. PA. L. REV. PENNUMBRA 20, 22 (2007), available at <http://www.pennumbra.com>

/debates/pdfs/electoral_college.pdf (decrying the “inside-the-Beltway” mentality).

107. See *supra* notes 62–69 and accompanying text.

108. See *supra* notes 62–63 and accompanying text.

109. During the 1970s and 1980s, the Court’s caseload hovered around 170 cases per term. Since the 1990s, that number has settled to around ninety cases per term. See Margaret

potential certiorari pool has grown.¹¹⁰ This means that the Court is deciding fewer cases both as an absolute number and as a percentage of petitions. As a consequence, the Court limits itself to cases of national impact—cases where it can announce broad rules or decide critical constitutional issues.¹¹¹ While the overall percentage of constitutional cases in the Court’s docket has not risen,¹¹² the salience of those decisions (and the public backlash) certainly has grown since the 1950s.¹¹³

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 behind this, ranging from a desire “to reduce the role of the judiciary in the nation’s political life,”¹¹⁴ changes in the Court’s mandatory jurisdiction,¹¹⁵ the power of the Court’s clerks in the process,¹¹⁶ advanced age,¹¹⁷ to sloth.¹¹⁸ Professor Arthur Hellman has

Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1339 (2010). For one explanation why, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 750–93 (2001).

110. See RICHARD A. POSNER, HOW JUDGES THINK 269–70 (2008). 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, 1368–69 (2006), and Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 729 & n.9 (2001).

111. 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. SUP. CT. R. 10.

112. See Richard A. Posner, Foreword, *A Political Court*, 119 HARV. L. REV. 31, 37–39 & fig.1 (2005).

113. See 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).

114. David O. Stewart, *Quiet Times: The Supreme Court is Reducing its Workload—But Why?*, 80 A.B.A. J. 40, 43 (1994).

115. 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, 781–82 (1997).

116. See, e.g., Stephanie Francis Ward, *Clerks Avoid Getting Their DIGs In: They Just Say No to Cert Petitions, as the Court’s Docket Shrinks*, 93 A.B.A. J. 12 (2007).

117. See, e.g., 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, 166–68 (2006).

118. See, e.g., Kevin Fayle, *Supreme Slackers?*, FINDLAW BLOG (Sept. 28, 2009, 1:24 PM), <http://blogs.findlaw.com/courtside/2009/09/supreme-slackers.html>.

concluded that the Court's shrunken docket reflects an "Olympian" Court that issues fewer, but more monumental, decisions.¹¹⁹

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 the Court's selections.¹²⁰ The actual process of writing and disseminating the opinions also depends on the salience of the issue at hand, with higher profile cases drawing longer, more complex opinions and more dissents and concurrences.¹²¹

The last sixty years have also seen a change in the public perception of the Court's nature and role¹²² and increased attention to issues of Justice selection and confirmation.¹²³ Controversy and interest in the selection of Justices are also at all-time highs.¹²⁴

The combination of these factors means that if the Supreme Court has not always been a political, policy-making body, it is now. Judge 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 errors.¹²⁵ Political scientists have likewise argued that the current

119. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 433 (1996).

120. The empirical evidence has frequently come from political scientists under the rubric of the "attitudinal model." See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (using the attitudinal model to explain and predict Supreme Court decision making). 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 Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 2, 13–16 (2011) (discussing the reaction to *Roe*); see also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1409 (2001) (suggesting that *Bush v. Gore* appeared to be motivated by the "'low' politics of partisan political advantage").

121. See Posner, *A Political Court*, *supra* note 112, 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.").

122. See 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).

123. See RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 4–5 (2005).

124. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 449–54 & fig.40 (2010).

125. POSNER, *HOW JUDGES THINK*, *supra* note 110, at 323; Posner, *A Political Court*, *supra* note 112, at 34; 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> (recognizing the Court as a "cert court"). For an outstanding description of previous thinking about how judges are naturally political in deciding unclear

Supreme Court has “virtually untrammelled policymaking authority.”¹²⁶

C. *Do These Justices Fit this Court?*

The remaining question is whether these Justices are a good fit for this Court. Supporters of this Court can argue that it 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 of Justices. Moreover, one person’s elitism is another person’s highly functioning meritocracy—the current Court arguably evinces a healthy 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.¹²⁷ 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 a group of Justices that have spent significant chunks of their pre-Supreme Court lives working in comparatively elite, detached, cloistered, and independent settings are a bad fit for a policy making Court. Perhaps Justices who have had 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.¹²⁸

Nevertheless, this Section argues that this trend is exactly backwards: As the Court begins to more closely resemble a policy making, “Olympian” body, it is especially important to appoint individuals with real-life experiences. This is because the current Supreme Court makes many decisions that are not strictly “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

cases, see Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 713–23 (2009).

126. SEGAL & SPAETH, *supra* note 120, at 12 (2002); see also *id.* at 26 (characterizing the perception of judges as “objective, dispassionate, and impartial” as the “mythology of judging”).

127. A particularly famous version of this argument considers the Supreme Court’s “countermajoritarian difficulty.” See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

128. See *supra* note 8 and accompanying text.

and unfortunately to increased legal complexity. The Section then turns to the Justices' missing experiences and argues that complicated, diverse work with real people (through politics, lawyering, and trial judging) has advantages in deciding 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 a Justice's 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 clarification. Evidence abounds that the Court's output has grown less accessible and more complex from the Court's beginning to the present.¹²⁹ Consider the opinions themselves. Majority opinions have grown substantially longer.¹³⁰ The prevalence of dissenting and concurring opinions has grown drastically as well.¹³¹ The most confusing and complex type of decision—those decided by a plurality rather than a majority—has also become more common.¹³²

Empirical and doctrinal legal scholarship further suggests increased complexity in the Court's output.¹³³ Professor Laura Little's empirical study of the Supreme Court's obfuscating use of linguistic devices found "increased splintering" within the decisions and "increased opinion length and complexity."¹³⁴ Describing the opinions of the 1980s and 1990s, Professor 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

129. Of course, correlation does not prove causation. This Subsection is not arguing that the current selection criteria have necessarily increased complexity. Instead, this Subsection argues that Justices predisposed to complexity are less likely to reverse the recent trend towards complexity.

130. See Black & Spriggs, *supra* note 2, at 632–38.

131. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 221–27 (7th ed. 1998) (noting the trend away from unanimous opinions and towards increased use of dissents and concurrences).

132. See Spriggs & Stras, *supra* note 3, at 519 ("Historically, plurality decisions by the Supreme Court have been relatively rare . . . [T]he 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."); see also Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, *supra* note 3, at 1306–26 (discussing the growth in the dissenting opinion and the word "respectfully").

133. 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).

134. Little, *Hiding with Words*, *supra* note 4, at 126–27.

opinions.”¹³⁵ 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 amidst a welter of separate opinions and contentious footnotes.”¹³⁶ Commentators have criticized the Court’s treatment of conflict of laws and federal jurisdiction as complex and incoherent.¹³⁷ Complexity and nuance have also led to “stealth overruling”—situations where the Court discards a disfavored precedent piece by piece, rather than by clearly overruling it.¹³⁸

An easy proxy for the growth in legal 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.¹³⁹ Legal complexity is quite costly. The most obvious harm is increased transaction and compliance costs,¹⁴⁰ but it also can contribute to crises like the recent financial meltdown¹⁴¹ and the BP *Deepwater Horizon* oil spill.¹⁴²

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

135. JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 17 (1992).

136. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985); see also Morton J. Horwitz, 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”).

137. 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); see also Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925 (2004); Little, *Hiding with Words*, *supra* note 4.

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

139. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 3–7 (1995).

140. See BARTON, *supra* note 104, at 261–62; Jonathan Barry Forman, *Simplification for Low-Income Taxpayers: Some Options*, 57 OHIO ST. L.J. 145, 172 (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.”).

141. See Jeffrey M. Lipshaw, *The Epistemology of the Financial Crisis: Complexity, Causation, Law, and Judgment*, 19 S. CAL. INTERDISC. L.J. 299, 300–05, 343–50 (2010) (analyzing how complexity played a role in the financial crisis); Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211 (2009) (citing complexity as the primary cause of the financial crisis and the greatest challenge financial markets face in the future).

142. Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1099–1115 (2011) (identifying four major challenges complexity produced in the BP *Deepwater Horizon* oil spill).

group of Justices can take their jurisprudence of standing¹⁴³ or the Establishment Clause¹⁴⁴ seriously (to use two particularly egregious 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 overthinking, overwriting, and more complexity. This trend is especially discouraging in the cases of highest salience; the Court decides cases that have a massive effect 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 one is directly answerable to third parties—either clients or voters. One serves in a clear master–servant relationship as the servant. This relationship has powerful psychological effects.¹⁴⁵ Successful politicians and lawyers 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 and sometimes must work outside of their own preferences. These acts of self-control and self-denial can prove helpful for a Justice when his preferences clash with what he sees as 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 detached or

143. Standing is notoriously indeterminate and results-oriented. Standing cases have been called “notoriously inconsistent,” *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 619 (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 C. 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 104, at 278–83. There may be Court doctrines that are clear and law-based, but standing is not one of them.

144. 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.”).

145. William O. Fisher, *Lawyers Keep Out: Why Attorneys Should Not Participate in Negotiating Critical Financial Numbers Reported by Public Company Clients*, 2010 BYU L. REV. 1501, 1545–46 (discussing the “ethos of legal practice” and the “psychological effects of the lawyer-client relationship”).

cloistered fashion; they must get elected, find clients, and make legal or political arguments. Politicians and trial lawyers must also make their arguments in a manner that ordinary people (voters or jurors) can understand. Both jobs encourage the translation of the complicated into the plain, 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 making sausage—it is a messy business that requires give and take from all parties involved.¹⁴⁶ Likewise, much of lawyering involves negotiation, settling, and deal making.¹⁴⁷

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 although they are neutral, they are not cloistered. The mere act of sentencing defendants or witnessing jury verdicts means that trial judges see the effects of their work daily. Moreover, trial judges have a particularly crucial experience with the American justice system: They work with juries. In a time of expanded judicial power, the Court has been notably suspicious of juries.¹⁴⁸

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.¹⁴⁹ The Supreme Court has been at the head of the process of drafting and amending the Federal Rules of

146. Among the recent examples of former politician Justices known for their ability to compromise and generate consensus are Chief Justice Warren, *see* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 695–99 (1976) (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”).

147. *See generally* JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008).

148. Consider the Court's refusal to require a jury in trials for petty crimes. *Duncan v. Louisiana*, 391 U.S. 145, 156–58 (1968) (refusing to require a jury trial for crimes punishable by less than six months in jail and acknowledging the argument of critics who question “the wisdom of permitting 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, Inc.*, 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 . . .”).

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

Civil Procedure since the passage of the Rules Enabling Act of 1934.¹⁵⁰ The Supreme Court leads the drafting and amending of the rules, although Congress retained the power to revise or reject their proposals. Unless proposed rules are rejected, modified, or deferred, they automatically become law provided that Congress has had at least seven months to consider them.¹⁵¹ While the Court has ceded some of its rulemaking responsibility to the Judicial Conference,¹⁵² the Justices are still key players in the process.¹⁵³

Similarly, the Court is also the last word in the interpretation of those Rules. A pair of recent decisions—*Bell Atlantic Corp. v. Twombly*¹⁵⁴ and *Ashcroft v. Iqbal*¹⁵⁵—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,¹⁵⁶ a significant tightening in pleading standards.¹⁵⁷ The text of Rule 8 requires only a “short and plain”

150. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072) (2012); see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (examining the Act’s history and how the Supreme Court has interpreted the Act); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 673 (1975).

151. See, e.g., 28 U.S.C. §§ 2071, 2074, 2075 (2012); see also Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 300 (1994).

152. 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 Federal Rules of Practice and Procedure: Administrative Office of the U.S. Courts*, U.S. COURTS (Oct. 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

153. “The Chief Justice of the United States is the presiding officer of the Judicial Conference.” U.S. COURTS, JUDICIAL CONFERENCE OF THE UNITED STATES, MEMBERSHIP, available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx> (last visited June 15, 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, 1619–20 (2006). The Court has the last vote on any rule changes before submission to Congress. See Hogan, *supra* note 152. Because Congress regularly chooses not to act on the rules, the Court is frequently the last step in the rulemaking 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.”).

154. 550 U.S. 544 (2007).

155. 556 U.S. 662 (2009).

156. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

157. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823–32 (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, 3–53 (2010).

statement of facts and claims and has done so since its inception.¹⁵⁸

Given the Court's central 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, the Roberts Court Justices have less perspective than ever.

Commentators have pilloried *Iqbal* and *Twombly*, noting that these cases evince hostility to, and ignorance of, litigation practice.¹⁵⁹ 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 almost contemporaneously.¹⁶⁰

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 manner¹⁶¹ and less formally as a synonym for common sense.¹⁶² Under its formal or informal descriptions, however,

158. Elizabeth Chamblee Burch, *There's a Pennoyer in My Foyer: Civil Procedure According to Dr. Seuss*, 13 GREEN BAG 2D 105, 115 (2009) (noting that "the old [Rule 8] hasn't been amended in the least" but the Court's interpretation changed nonetheless).

159. 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*, 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, 867–78 (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) (decrying 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).

160. Compare *supra* Figure 2 (showing a decline in practice experience beginning in the 1980s), with Michael Orey, *The Vanishing Trial*, BLOOMBERG BUSINESSWEEK (Apr. 30, 2007), 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.")

161. Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 228–31 (2007).

162. Justice O'Connor has been praised for exactly this virtue. See Jane E. Stromseth, *The*

experience creates, shapes, and guides practical wisdom.

Virtue ethics places practical wisdom at the very heart of proper decision making. In short, 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.¹⁶³ Consequentialism judges a moral act by its consequences. Utilitarianism is thus a form of consequentialism.¹⁶⁴ 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.¹⁶⁵

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.¹⁶⁶ Virtue ethics are seen as a "third way" around the eternal battle between the consequentialists and the deontologists.¹⁶⁷ 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 by measuring the act against a rigid, external set of rules.¹⁶⁸

Professor Lawrence Solum has been in the forefront of applying virtue ethics to the law as "virtue jurisprudence."¹⁶⁹ He has argued for an "aretaic turn" in the selection of Justices, away from their perceived politics and towards a broad examination of their virtues, especially Aristotle's conception of practical wisdom or *phronesis*.¹⁷⁰ He likewise

International Criminal Court and Justice on the Ground, 43 ARIZ. ST. L.J. 427, 427 (2011); see also Scott Bales, *Justice Sandra Day O'Connor: No Insurmountable Hurdles*, 58 STAN. L. REV. 1705, 1711 (2006). Also, consider 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). For a most interesting series of biographical notes on Justice Jackson, see John Q. Barrett, *The Jackson List*, available at <http://www.stjohns.edu/academics/graduate/law/faculty/profiles/Barrett/JacksonList.sju>.

163. See, e.g., Marcia Baron, *Virtue Ethics in Relation to Kantian Ethics: An Opinionated Overview and Commentary*, in PERFECTING VIRTUE: NEW ESSAYS ON KANTIAN ETHICS AND VIRTUE ETHICS 18–21 (Lawrence Jost & Julian Wuerth eds., 2011).

164. See, e.g., John L. Watts, *Fairness and Utility in Products Liability: Balancing Individual Rights and Social Welfare*, 38 FLA. ST. U. L. REV. 596, 597–98 (2011).

165. See Peter A. Alces, *Contract is Context*, 45 WAKE FOREST L. REV. 903, 907–08 (2010).

166. One of the first modern statements of virtue ethics was G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. I (1958).

167. See Christopher Miles Coope, *Modern Virtue Ethics*, in VALUE AND VIRTUES: ARISTOTELIANISM IN CONTEMPORARY ETHICS 37–38 (Timothy Chappell ed., 2006).

168. For a prominent recent version of this argument, see ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999).

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

170. See Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L.

has criticized empirical efforts to “rank” Justices because of their failure to consider the importance of the essentially immeasurable virtue of practical wisdom.¹⁷¹

Professor Solum’s work is of a piece with other explanations of the act of judging. Professor Anthony Kronman spends a large chunk of *The Lost Lawyer* on practical wisdom¹⁷² and its role in good judging¹⁷³ and lawyering.¹⁷⁴ The idea that the act of judging is best described as a craft fits this model as well.¹⁷⁵ 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).¹⁷⁶

Practical wisdom is at the heart of the virtue jurisprudence project.¹⁷⁷ 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.¹⁷⁸ Practical wisdom, or *phronesis*, is

REV. 475, 510–12 (2004–2005). 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).

171. Lawrence B. Solum, *A Tournament Of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1387 (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.”).

172. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 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).

173. See KRONMAN, *supra* note 172, at 315–52.

174. See *id.* at 109–62.

175. 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. 2245, 2274–2322 (2001).

176. In recent American jurisprudence, law and economics is the most popular consequentialist theory and John Rawls’s concept of “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 (6th ed. 2003). Of course, not everyone agrees that these categories are useful. See 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.”).

177. See Solum, *Virtue Jurisprudence*, *supra* note 169, 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*, in VIRTUE JURISPRUDENCE 142–62 (Colin Farrelly & Lawrence Solum eds., 2008).

178. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI (W.D. Ross trans., 1908), available at

primarily “concerned with things human and things about which it is possible to deliberate;” deliberation about particulars is the heart of *phronesis*.¹⁷⁹ Practical wisdom is distinct from the other virtues because it is not “concerned with universals only—it must also recognize the particulars.”¹⁸⁰ Animals can have practical wisdom, “those [animals] which are found to have a power of foresight with regard to their own life.”¹⁸¹

Professor 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.”¹⁸²

Practical wisdom is not gained by cloistered study and contemplation of the neutral principles of law; it is gained by living a varied and challenging life.¹⁸³ 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.”¹⁸⁴

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.¹⁸⁵ 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 long and hard roads to get where they are. To the contrary, Justices with these résumés have worked relentlessly and tirelessly from their earliest ages

http://www.ilt.columbia.edu/publications/Projects/digitexts/aristotle/nicomachean_ethics/book06.html.

179. *Id.* bk. VI, ch. 7.

180. *Id.*

181. *Id.*

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

183. 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.”). Professor 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).

184. ARISTOTLE, *supra* note 178, bk. VI, ch. 7.

185. See KRONMAN, *supra* note 172, at 109–62 (outlining several crucial problems that arise when lawyers and judges lack practical wisdom).

to be the very best of the best. They competed for admission to the best universities and law schools. Three Justices received fellowships to study in Europe.¹⁸⁶ Three Justices served as clerks to Supreme Court Justices.¹⁸⁷ Five of the Justices taught at law schools, four of them at top ten schools.¹⁸⁸ Five of them held a high level law and policy job with either the executive branch or the U.S. Senate. Three worked in the Solicitor General's Office and four had argued cases before the Supreme Court before becoming Justices.¹⁸⁹ Eight of the Justices were able to secure jobs as federal appellate judges.¹⁹⁰ 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 on 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 is 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 comparison, success in the private practice of law or as a politician rewards 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 Douglas Adams, "it is a well-known fact that those people who must

186. Justices Kagan and Breyer also competed for, and received, scholarships to study at Oxford University (Breyer a Marshall Scholarship and Kagan a Daniel M. Sachs Scholarship). Justice Scalia received a Sheldon fellowship from Harvard for European travel and study.

187. Justice Breyer clerked for Justice Arthur Goldberg; Justice Roberts clerked for Justice Rehnquist; and Justice Kagan clerked for Justice Thurgood Marshall. Justice Alito clerked for Judge Leonard Garth on the Third Circuit Court of Appeals, but not for a Justice on the Supreme Court.

188. 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.

189. 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.

190. Justice Kagan is the only non-appellate judge now on the Court. In 1999, President Bill Clinton nominated Elena Kagan for a seat on the D.C. Circuit, but the Senate took no action on her nomination. Instead, she spent the years before her nomination to the Supreme Court as the Dean of Harvard Law School and as the Solicitor General of the United States.

want to rule people are, *ipso facto*, those least suited to do it.”¹⁹¹ By comparison, it is quite unlikely that the politicians or lifelong 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.¹⁹²

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 or policy jobs for the government, time spent in academia, time living in Washington, D.C., and time serving as federal appellate judges. The Justices’ lost experiences include the private practice of law, elective office, and trial judging.

After establishing these trends, this Article has made 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 Justices who have displayed a particular kind of technical legal excellence and a single-minded focus upon achievement, then 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 the Court with some needed practical wisdom.

191. See DOUGLAS ADAMS, *THE RESTAURANT AT THE END OF THE UNIVERSE* 197 (1995).

192. For example, Justice Charles Evan Hughes left the Court to become the Republican candidate for President, engage in private practice, and serve as the Secretary of State (among other activities), before returning to the Court as Chief Justice. See ROSS, *supra* note 43, at 8–12. Chief Justice John Jay retired from the Court to serve two terms as the Governor of New York. See *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800* 7 (Maeva Marcus & James R. Perry eds., 1985).

