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Schooling the Supreme Court

Christine Kexel Chabot

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SCHOOLING THE SUPREME COURT

CHRISTINE KEXEL CHABOT[†]

ABSTRACT

Supreme Court Justices' uniform professional backgrounds have drawn increasing criticism. Yet it is unclear how diverse professional training would affect the Court's decisions. This Article offers the first empirical analysis of how Justices with diverse professional training vote: It examines a unique period when Justices with formal legal education sat with Justices who entered the profession by reading the law alone.

The study finds that Justices' levels of agreement and politically independent voting vary significantly according to their professional training. In cases which divided the Court, Justices who shared the benefit of formal legal education (1) voted together more often and (2) voted more independently of their appointing presidents' ideologies than Justices without this background.

These findings substantially qualify earlier views on the desirability of Justices without formal legal education. Diversity in professional training is consistent with calls for a more politically responsive Court. It does not support arguments for an optimally diverse group of decision-makers, however, unless one is also willing to accept diminished political independence that has been shown to accompany diverse professional training.

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INTRODUCTION

Currently, the Supreme Court is comprised of Justices with more homogeneous professional training than ever before.¹ Although the Justices' cookie-cutter backgrounds have drawn increasing criticism,² it is unclear how appointing Justices with diverse professional training would affect the Court's decisions. This Article offers the first empirical analysis of how Justices with diverse professional training vote. It examines a unique period when Justices with formal legal education sat with Justices who entered the profession by reading the law alone.

The study finds that Justices' levels of agreement and politically independent voting vary significantly according to their professional training. In cases which divided the Court, Justices who shared the benefit of formal legal education (1) voted together more often and (2) voted more independently of their appointing presidents' ideologies than Justices without this background. These findings substantially qualify earlier views on the desirability of Justices without formal legal education.

Calls for appointment of Justices without formal legal education reflect different conceptions of the Court.³ The view that the Court's decisions track public opinion,⁴ for example, supports scholars' claims that a Court comprised entirely of formally educated lawyers will stray too far from popular will.⁵ Other scholars find legal training irrelevant to resolving the sliver of exceptionally difficult cases that the Court hears.⁶ These

1. Benjamin H. Barton & Emily Moran, *Measuring Diversity on the Supreme Court with Biodiversity Statistics*, 10 J. EMPIRICAL LEGAL STUD. 1, 19 (2013) (contrasting an extremely low level of educational diversity on the current Court with higher historical levels). Some also note current Justices lack diverse professional experience in positions held before they were appointed to the bench. Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 5 (2012) ("[T]he current Supreme Court is the first in U.S. history to lack even a single member who ever served in elected office."); see also Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1335 (2008) (noting that the initial Roberts Court Justices "were sitting on the U.S. Courts of Appeals at the time of an opening on the Supreme Court").

2. See, e.g., Barton & Moran, *supra* note 1, at 21 (noting that the lack of diversity in educational background prevents the Court from being "optimally diverse"); John Denvir, *Proudly Political*, 37 U.S.F. L. REV. 27, 33 (2002) ("If we admit that the Court plays a political rather than a legal function, then there is no reason to limit its membership . . . [to lawyers]."); Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 960 (2003) (arguing for Justices with diverse career experiences and against a norm of prior judicial experience); Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1570 (2007) ("[I]t would be a good idea . . . to appoint a . . . nonlawyer professional to the Court.")

3. Denvir, *supra* note 2, at 33; Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1720, 1731-32 (1988); Vermeule, *supra* note 2, at 1570-71.

4. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14-15 (2009).

5. Denvir, *supra* note 2, at 33-34.

6. Schauer, *supra* note 3, at 1732 (suggesting that if "most appellate cases" do not involve the "law traditionally taught" in law schools, then perhaps "some appellate judges . . . need not be lawyers"). The view that law plays an insignificant role reflects a widely held perception of the Supreme Court. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 190 (2010) (arguing that "legally uncertain cases" leave Justices free to decide cases in accordance with their "political views"); RICHARD A. POSNER, *HOW JUDGES THINK* 293 (2008) ("[T]he bin containing

scholars suggest appointing Justices with training in fields other than law. Diverse training will help Justices decide cases that implicate knowledge from other fields⁷ and offset bias common to Justices with legal training.⁸

Despite their different outlooks, these scholars all question modern criteria for selecting Justices. From Justice Robert Jackson on, every Justice appointed to the Court has attended law school.⁹ In recent decades, presidents have responded to a highly politicized confirmation process by nominating Justices with increasingly homogeneous educational backgrounds.¹⁰ Critics of this educational and professional homogeneity¹¹ identify another limitation created by the current appointments process. Presidents will no doubt feel pressure to sacrifice professional diversity for traditional credentials, which are beyond senatorial reproach.¹²

cases that are . . . legalistically indeterminate is chronically overflowing in the Supreme Court.”); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 253, 255–59 (1997) (describing views of political scientists, Critical Legal Studies scholars, and legal realists).

7. Schauer, *supra* note 3, at 1732; Vermeule, *supra* note 2, at 1570–71.

8. Barton & Moran, *supra* note 1, at 21 (noting lack of diversity in educational background prevents the Court from being “optimally diverse”); Vermeule, *supra* note 2, at 1570 (“[I]t would be a good idea . . . to appoint a . . . nonlawyer professional to the Court.”); see also Epstein, Knight & Martin, *supra* note 2, at 960 (arguing for Justices with diverse career experiences and against a norm of prior judicial experience).

9. Jackson, appointed in 1941, was the last appointee who attended law school but did not receive a law degree before his admission to the bar. See *Biographical Directory of Federal Judges, 1789–Present*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct. 11, 2014). James Byrnes, also appointed in 1941, was the last Justice who never attended law school. See *id.* Since 1953, all presidents except the second President Bush consulted the American Bar Association’s Standing Committee on the Federal Judiciary regarding prospective federal judicial nominations. AM. BAR ASS’N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2009). The Committee bases its evaluation “solely” on candidates’ “professional qualifications,” and provides that “[a] Supreme Court nominee should possess an especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence.” *Id.* at 9. It seems difficult for a contemporary candidate to obtain these qualifications without a law degree.

10. Barton & Moran, *supra* note 1, at 20–21; Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan*, 58 UCLA L. REV. DISCOURSE 129, 130–31 (2010) (current Justices all attended Harvard, Yale, or Columbia Law School); Timothy P. O’Neill, “*The Stepford Justices*”: *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 702–03 (2007) (after Bork’s failed nomination, presidents turned to Ivy League graduates in response to increased pressure to “sell” nominees to the Senate as “expert legal technician[s]”). For a summary of scholarship addressing politicization of the confirmation process in the late twentieth century, see Christine Kexel Chabot, *A Long View of the Senate’s Influence Over Supreme Court Appointments*, 64 HASTINGS L.J. 1229, 1240–45 (2013).

11. Glen, *supra* note 10, at 146 (presidents’ “mindset[s]” should be open to nominating Justices from a more “diverse” set of law schools); O’Neill, *supra* note 10, at 735 (calling for a return to Justices with “varied backgrounds”). For example, some scholars have argued for appointment of a Justice with experience in politics. Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1356 (2010) (arguing for a Justice with political experience); Epstein, Knight & Martin, *supra* note 2, at 905 (arguing against a norm of prior judicial experience).

12. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 409–10.

Before this study, however, there was little reason to think Justices' voting behavior would vary according to differences in educational background. Past empirical studies have found Justices' political affiliations to predict their votes far more consistently than educational backgrounds.¹³ Neal Tate's leading Supreme Court study, for example, found partisanship significantly predicted Justices' liberal votes in both civil liberties and economics cases.¹⁴ But attending a more prestigious undergraduate institution was only weakly associated with liberal votes in a more limited subset of economics cases.¹⁵ Tate did not identify a relationship between educational background and votes when he extended his study to an earlier period of the Court,¹⁶ and studies of federal courts of appeals reach similarly mixed results.¹⁷

Still, these earlier studies consider relatively small differences in educational backgrounds: whether judges who attended less prestigious institutions vote differently than judges who attended more prestigious institutions.¹⁸ This study considers a much larger difference in professional training. Historically, some Justices who attended law school, in-

13. George, *supra* note 1, at 1350–53 (explaining that while education is not a social background variable “consistently correlated with judicial behavior” it is “well established that political affiliation of . . . [an] appointing President is a strong predictor of how a judge will vote in a case”); see also Cross, *supra* note 6, at 252, 275 (noting that the attitudinal model, which political scientists have used to predict “decisions according to the political ideology” of Supreme Court Justices, does a good job of “accurately” predicting the Court’s decisions) (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993)).

14. 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, 361 tbl.3 (1981).

15. *Id.*

16. C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460, 474 tbl.1 (1991) (not including education as an explanatory factor for liberal decisions); see also Jilda M. Aliotta, *Social Backgrounds, Social Motives and Participation on the U.S. Supreme Court*, 10 POL. BEHAV. 267, 277, 279 (1988) (demonstrating that Justices with less prestigious legal education voted to concur or dissent more frequently than Justices with prestigious legal education).

17. James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715 tbl.II, 1717 (1999) (finding a significant relationship between attendance at a less selective college and pro-union votes by federal court of appeals judges); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 930–31 (1975) (finding judges' school desegregation decisions were significantly correlated with attendance at a Southern college or law school); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–64*, 60 AM. POL. SCI. REV. 374, 382 (1966) (failing to identify significant relationships between prestige of law or undergraduate education and liberal case outcomes in federal court of appeals cases); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1464–66 (1998) (finding that elite law school attendance was not a significant explanatory factor in district court votes on the constitutionality of federal sentencing guidelines); see also Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U. L. REV. 258, 270 (1974) (finding that, at the state level, attending high-tuition law schools was strongly associated only with votes favoring criminal defendants).

18. See Goldman, *supra* note 17, at 382.

cluding Justices Brandeis and Holmes, sat with other Justices who entered the profession by reading the law alone.¹⁹

Formal legal education was introduced to make up for perceived deficiencies in legal education of lawyers who read the law.²⁰ Legal training in the university setting was designed to instruct students in “elements and first principles upon which the rule of practice is founded,”²¹ and supplement the “mere details and procedure” they tended to absorb in a law office.²² Formal legal education took hold and has been common professional training for all Justices since Robert Jackson.²³ More recently, however, some scholars have questioned the utility of legal education for a Court whose decisions may be viewed as political or resolving issues where law does not supply a single correct answer.²⁴ This Article identifies significant differences in how Justices with diverse professional training voted and finds that diversity favors calls for a more political-ly responsive Court.

The Article proceeds as follows: Part I outlines three separate lines of reasoning leading scholars to question the value of formal legal education and uniform professional training in Justices. It also explains how these views align with different conceptions of the Court. Finally, it describes historical differences between reading the law and formal legal education.

Part II sets forth empirical analysis of votes cast by Justices with and without formal legal education. The study combines recently collected historical data²⁵ with more recent data²⁶ to analyze votes for appointees from Justice Noah Swayne (1862) through Justice Robert Jackson (1941), and other Justices with whom they sat. Considering the body of non-unanimous cases that divide the Court, this study reveals two signif-

19. See Lee Epstein et al., THE U.S. SUPREME COURT JUSTICES DATABASE (Jan. 26, 2010), <http://epstein.wustl.edu/research/justicesdata.html> (accessible by clicking on “Legacy Version” link) [hereinafter Epstein et al., JUSTICES DATABASE].

20. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1962–64, 1972 (2012) (“Academic legal instruction . . . was a response to the sentiment reflected by Blackstone that an office apprenticeship by itself was not enough.” (footnote omitted)); see also discussion *infra* Part I.D. To be sure, Justices such as Joseph Story and Stephen J. Field attained greatness notwithstanding their lack of formal legal education. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS app. A, at 374 (5th ed. 2008). This study measures differences in voting rather than merit.

21. 1 WILLIAM BLACKSTONE, COMMENTARIES *32.

22. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 760 (1976).

23. See FEDERAL JUDICIAL CENTER, *supra* note 9.

24. See Denvir, *supra* note 2, at 33; Schauer, *supra* note 3, at 1732; Vermeule, *supra* note 2, at 1570.

25. Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1001–02 (2011) [hereinafter Chabot, *Mavericks*]; Chabot, *supra* note 10, at 1230–31.

26. Harold Spaeth et al., THE SUPREME COURT DATABASE (July 23, 2014), <http://scdb.wustl.edu/data.php> [hereinafter Spaeth et al., SUPREME COURT DATABASE].

icant differences in voting patterns of Justices who shared the benefit of formal legal education.

First, Justices with formal legal education voted together more often than other Justices, even controlling for Justices' political inclinations and other potentially explanatory factors. Second, Justices who shared the benefit of formal legal education voted independently of ideologies of their appointing presidents. Votes of Justices who lacked this educational background, however, were significantly predicted by ideologies of appointing presidents.²⁷ Thus, during a period that was not generally characterized by politically predictable voting, presidents had varied levels of success in appointing like-minded Justices. Presidents lost significant political influence when they appointed Justices who attended law school.

Part III explores the study's implications for proposals to enhance diversity of Justices' professional training. In light of the study's findings, diverse professional training should not be viewed as an unqualified good. Instead, it should be understood as a feature that favors some conceptions of the Court more than others. Appointing Justices without formal legal education is consistent with calls for a more politically responsive Court. In the past, presidents who appointed Justices without formal legal education bolstered their ability to place like-minded Justices on the Court.

To the extent enhanced political responsiveness is desirable,²⁸ the study suggests a further critique of the appointments process. As a practical matter, presidents who wish to win confirmation must nominate candidates with impeccable resumes and degrees from a handful of elite law schools.²⁹ By limiting presidents to a pool of candidates with formal legal education, the appointments process may be understood to impede presidents' ability to update and shape the Court's political views as fully as they might.

Conversely, the study casts doubt on assumptions that legal education is irrelevant or associated with inherently problematic biases in Jus-

27. This study considers Justices politically predictable when their votes are predicted by ideologies of their appointing presidents. See *infra* notes 158–61, Part II.C.1. Justices who vote independently of their appointing presidents' ideologies are considered apolitical.

28. John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 667–68 (1993) (arguing for a strong presidential role and against “compromise” nominees); Stone, *supra* note 12, at 409–10 (“A system in which presidents are relentlessly driven to nominate only the most moderate Justices will not serve the best interests of either the Court or the nation.”); see also Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003) (“[I]t is appropriate, and indeed essential, for the appointing and confirming authorities to consider ideology [in judicial appointments].”); cf. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299, 318, 321 (2004) (arguing Justices should be selected or evaluated using a merit-based tournament, which would make ideological considerations in judicial appointments more transparent).

29. Stone, *supra* note 12, at 409–10.

tices' decisions. Comparing Justices with and without formal legal education shows Justices with formal legal education have a distinct bias, but this bias favors politically independent decisions. Offsetting this bias would promote a more politically responsive Court. Moving the Court in a more political direction is not a mere matter of error correction. Instead it implicates a normative debate about how politically responsive the Court should be.

This Article concludes that diverse educational background is linked to significant differences in how Justices voted. Calls to eliminate the prerequisite of formal legal education should be understood to promote certain conceptions of the Court better than others. Justices without formal legal education are desirable only if one is also willing to accept a less politically independent Court.

I. WHY ARE LEGAL SCHOLARS QUESTIONING THE NEED FOR JUSTICES WITH FORMAL LEGAL EDUCATION?

Scholars who question the value of Justices with formal legal education have adopted three separate lines of reasoning. First, a Court comprised entirely of Justices with formal legal education may disserve certain conceptions of the Court. Consider the view that the Court's holdings track public opinion and can be updated through elected officials' appointments of new Justices.³⁰ A more politically responsive Court could resolve the "counter-majoritarian difficulty"³¹ posed by judicial review.³² To this end, Christopher Eisgruber and John Denvir contend that the Court's constitutional decisions should be viewed as serving a democratic, representative function.³³ Denvir carries this argument to the conclusion that nonlawyer Justices will further enhance the Court's political responsiveness.³⁴

Second, law and legal education may not impede the Court's representative function so much as they fail to describe grounds upon which the Court's decisions are based. If law and legal education are irrelevant to many judicial decisions, then perhaps the Court should include some

30. FRIEDMAN, *supra* note 4, at 374 ("Undoubtedly, the fact that Presidents select Supreme Court justices and the Senate confirms them plays some role in ensuring that the Court heeds the cry of public opinion.").

31. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

32. The difficulty arises when unelected, life-tenured Justices override decisions made by elected officials. Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 161 (2002). Friedman's 2009 book, *The Will of the People*, suggests that the Court's ability to track current public opinion mitigates this difficulty. FRIEDMAN, *supra* note 4, at 374.

33. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 205 (2001) (the Court's function in interpreting the Constitution "should be regarded as serving a pro-democratic purpose"); Denvir, *supra* note 2, at 31-34.

34. Denvir, *supra* note 2, at 33-34 (suggesting that a Court comprised entirely of lawyers with uniform educational backgrounds cannot claim a broad "democratic pedigree" and speak for the "current political aspirations of the American people.") (reviewing EISGRUBER, *supra* note 33).

Justices with training in other disciplines. Fred Schauer raises this question in his account of appellate judging in “hard cases.”³⁵ He doubts legal education helps judges decide these cases because the underlying disputes are not likely to be informed by “law traditionally taught in most law schools.”³⁶

Finally, a Court comprised only of formally educated lawyers may suffer from lack of diverse professional training.³⁷ Adrian Vermeule contends the Court needs Justices with expertise in another discipline to increase the Court’s technocratic competence.³⁸ The strong form of his argument insists these expert Justices *not* have formal legal training. Complete professional diversity is needed to correct for lawyer Justices’ systematic biases.

Fred Schauer and John Denvir do not set forth elaborate proposals, but question the utility of lawyer Justices based on understandings of the nature of appellate decision-making or normative goals for the Court. Adrian Vermeule offers a more detailed proposal.³⁹ He asserts that Justices with expertise in other disciplines will bolster the Court’s technocratic competence and offset biases systematic to Justices with uniform legal training.⁴⁰ The discussion below elaborates on these scholars’ positions.

A. *It’s All Politics*

Legally trained Justices do not rest easily alongside the goal of a politically responsive Court. The appointments process has long been viewed as an important mechanism for updating the Court’s political views.⁴¹ Presidents have often attempted to place like-minded Justices on the Court, either by packing the Court with additional seats or by carefully considering the ideology of potential Supreme Court nominees.⁴² Presidents have recently enhanced their ability to appoint ideologically compatible Justices, notwithstanding an aggressive Senate.⁴³ But as a practical matter, presidents are still limited to a pool of candidates with formal

35. Schauer, *supra* note 3, at 1718, 1726.

36. *Id.* at 1732. Schauer focuses on appellate judging generally, but the lack of a determinative role for law and legal training in “hard cases” seems especially likely to apply to Supreme Court decisions. *Id.* at 1718, 1726.

37. Vermeule, *supra* note 2, at 1571.

38. *Id.*

39. *Id.* at 1570.

40. *Id.* at 1591–92.

41. FRIEDMAN, *supra* note 4, at 379; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–85 (1957), reprinted in 50 EMORY L.J. 563, 570 (2001) (arguing that frequent appointments can ensure “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States”).

42. FRIEDMAN, *supra* note 4, at 8–11 (describing court-packing plans proposed by FDR and used by Abraham Lincoln’s generation); Chabot, *supra* note 10, at 1245–46 (describing presidents’ consideration of ideology of Supreme Court nominees).

43. Chabot, *supra* note 10, at 1262 fig.2.

legal education.⁴⁴ And lawyer Justices may be predisposed to vote independently of their appointing presidents.

Christopher Eisgruber develops underpinnings of an argument against legally trained Justices in his book, *Constitutional Self Government*.⁴⁵ He asserts Justices who decide constitutional issues should be viewed as serving a representative, democratic function.⁴⁶ Eisgruber contends Justices are qualified to make these representative judgments because they have a democratic pedigree. This pedigree reflects their appointment by elected officials,⁴⁷ through a process that ensures Justices will hold mainstream moral views.⁴⁸

Once in office, Justices' life tenure allows them to uniquely represent people by virtue of "disinterestedness" rather than "legal acumen."⁴⁹ Eisgruber does not expressly advocate Justices without formal legal training. He notes, however, that a Court comprised solely of lawyers may have difficulty claiming a broad democratic pedigree.⁵⁰ He also notes legal training may give Justices a "natural, and destructive, tendency to . . . conceiv[e] of constitutional interpretation as a technical legal exercise."⁵¹

John Denvir carries Eisgruber's theory to the conclusion that the Court should have nonlawyer Justices.⁵² Like Eisgruber, Denvir points out that a Court comprised entirely of lawyers is likely to be politically out of touch.⁵³ Such a Court would send "the wrong signal to the citizenry at large; it tells them that constitutional law involves technical issues

44. Presidents have strong incentives to nominate Justices from elite law schools in order to win confirmation. See Stone, *supra* note 12, at 409-10.

45. EISGRUBER, *supra* note 33.

46. *Id.* at 205 (arguing that the Court's function in interpreting the Constitution "should be regarded as serving a pro-democratic purpose"). Eisgruber thus departs from customary justifications of judicial review as safeguarding "electoral and legislative processes" or "protecting individual rights." *Id.* at 46-47, 221 nn.2-3 (distinguishing theories advanced in works such as JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), and Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998)).

47. U.S. CONST. art. II, § 2, cl. 2; EISGRUBER, *supra* note 33, at 4 (describing judicial selection process as one that is "both political and democratic").

48. EISGRUBER, *supra* note 33, at 66 (explaining that federal judges "are chosen on the basis of (among other things) conformity to mainstream conceptions of political justice").

49. *Id.* at 3 ("What distinguishes the justices from the people's other representatives is their life tenure and their consequent disinterestedness, not their legal acumen."); see also *id.* at 59. According to Eisgruber, Justices should be understood to speak for the views of all people. In this way, judicial review makes up for the fact some people's views are inevitably overlooked by majority rule or legislation passed by elected members of Congress. *Id.* at 18-19 (describing how majority rule does not adequately account for concerns of "the whole people"). This understanding, however, is in tension with democratic responsiveness advanced by elected officials in the appointments process. Nor does Eisgruber clearly identify an under-represented group distinct from minority interests, which might be protected by traditional rights-based review.

50. *Id.* at 66-67.

51. *Id.* at 208.

52. Denvir, *supra* note 2, at 33.

53. *Id.*

on which they should have no view.”⁵⁴ Denvir specifically addresses lawyers, not legal education.⁵⁵ Still, formal legal training is required to become a lawyer, and it is clearly intertwined with problems Denvir identifies. He disfavors limiting Justices to an unrepresentative portion of the population with a unique technical skill set.⁵⁶ These flaws apply to persons who attended law school as much as they apply to lawyers in general.

Denvir instead hopes presidents will start appointing lay Justices in order to create a Court of “high politics.”⁵⁷ This Court could claim “a broader democratic pedigree” and “will possess greater sensitivity to the current political aspirations of the American people.”⁵⁸ Denvir urges presidents to appoint Justices like former President Jimmy Carter⁵⁹ or historian Gerry Wills.⁶⁰ Thus, lay Justices offer one reform that will help the Court “better perform its essential democratic function.”⁶¹

Denvir acknowledges his proposal might lead to different types of political responsiveness. One possibility is that it will create partisan Justices who act “as agents of . . . political parties” or the presidents who appointed them.⁶² Alternatively, it may create a court of “high politics” which speaks for broader democratic interests and accounts for views that are not adequately represented in the electoral process.⁶³ Denvir strongly prefers the latter outcome, a Court of high politics, to a partisan Court.⁶⁴

But he does not support his preference with a clear description of what interests a non-partisan court of high politics is supposed to represent.⁶⁵ Denvir’s concern over interests which are not well-represented in the political process, for example, may overlap with minority interests which are typically protected by “rights-based,” counter-majoritarian judicial review.⁶⁶ Denvir fails to describe a court of high politics with a discernable set of interests that can be identified and measured empirically. In response, this Article incorporates the more discernable representa-

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 33–34.

59. Presumably a younger Jimmy Carter: he is currently 90 years old.

60. Denvir, *supra* note 2, at 34.

61. *Id.* at 33.

62. *Id.* at 35.

63. *Id.* Denvir includes a list of “great” Justices who reflect broader democratic interests rather than partisanship. His list includes Earl Warren, William Brennan, Harry Blackmun, John Paul Stevens, and David Souter. *Id.*

64. *Id.*

65. *Id.* This is also a flaw in Eisgruber’s work. *See supra* note 49.

66. For example, some of the Justices Denvir considers “great,” Justices Warren and Brennan, are generally understood as promoting rights-based, counter-majoritarian review in constitutional areas such as criminal procedure. Denvir, *supra* note 2, at 35.

tive function identified by Denvir: the function served by a partisan court that reflects views of Justices' appointing presidents.

Denvir's reforms also go beyond appointment criteria and call for a separate constitutional court (indeed, his position is inspired by the French Conseil D'Etat).⁶⁷ This would be an even more radical step than adding lay Justices to the current Court, and it would require change beyond the scope of reforming current appointments practice. Thus, this study focuses on the first step in Denvir's proposal: enhancing the Court's political responsiveness by appointing lay Justices to decide the entire mix of cases before the Supreme Court.

To assess this aspect of Denvir's proposal, it would be helpful to know what happened when presidents appointed Justices without formal legal education in the past. Is there any reason to think they might be more politically responsive than other Justices? This study addresses the question by measuring whether Justices who shared the benefit of formal legal education were more or less independent of the ideologies of their appointing presidents than Justices with diverse educational backgrounds. As explained below, the comparison shows educational diversity is related to greater levels of politically responsive voting.

B. Judging Where the Law Has Run Out

Fred Schauer questions the need for appellate judges who are formally educated lawyers.⁶⁸ His question follows logically from the thesis that appellate judging "occupies" a severely under-determined "corner of law."⁶⁹ Appellate cases stand apart from most disputes, which are governed by clear legal rules capable of channeling human behavior "without case-by-case intervention of lawyers and judges."⁷⁰

Schauer's description of appellate cases builds on George Priest's and Benjamin Klein's case-selection hypothesis.⁷¹ Priest and Klein hypothesize that disputes people choose to litigate are unlikely to be a "random" or "representative sample" of all disputes.⁷² People tend to litigate cases where issues are up for grabs, while they settle cases where issues are more clear-cut.⁷³ For appeals, which often focus on legal issues, parties tend to pursue cases where the law is under-determined. As Schauer explains, cases brought to appellate courts are "likely largely to consist

67. *Id.* at 33.

68. Schauer, *supra* note 3, at 1732.

69. *Id.* at 1720.

70. *Id.* For example, vast numbers of people file their tax returns by April 15 of a given year, on average people drive more slowly on roads where the speed limit is lower, and almost all arrests in the United States are accompanied by *Miranda* warnings. *Id.* at 1719.

71. *See id.* at 1723-26.

72. *Id.* at 1723 (quoting George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984)).

73. Priest and Klein's basic model predicts plaintiffs will proceed to trial in cases where they have a 50% chance of winning and settle other cases. *Id.* (citing Priest & Klein, *supra* note 72, at 5).

of cases in which both sides can make more or less equivalent legally plausible arguments from the positive law.”⁷⁴

Viewing appellate decision-making through the lens of the case-selection hypothesis, Schauer identifies “fascinating convergence among quite divergent theories of law.”⁷⁵ All theories grant judges some amount of discretion in resolving cases. When “the positive law runs out,” for example, the “positivist judge” permissibly exercises “discretion” to resolve a case based on “non-legal sources.”⁷⁶ This is not much different than realist claims that “positivist legal sources do not resolve appellate cases.”⁷⁷ Thus, no matter what one’s theory of law, appellate cases call for the exercise of some judicial discretion.

Of course, not all cases that are litigated and appealed fall within this model. People will sometimes bring easy cases. Thus, a multi-member court needs at least some appellate judges with legal training to act as “traffic cops” and issue legally predictable rulings in these cases.⁷⁸ But once judges dispose of easy cases, they are left with hard cases in which the law has run out.

This Article studies non-unanimous Supreme Court decisions. Scholars and judges view most of the cases the Supreme Court hears as hard.⁷⁹ And cases resolved non-unanimously are hard not only because the Supreme Court agreed to hear them, but also because the Justices themselves could not agree on a single outcome.⁸⁰ By definition, at least one Justice invested additional time and political capital in the case by writing a dissent.

In hard cases, Schauer contends law plays a much less important role. Judging these cases is not likely to be a “legal” process that values “skills taught in the first year of conventional . . . law schools.”⁸¹ Thus, there is no need for appellate judges to be formally educated lawyers. Judicial selection might instead focus on “politics, morals, economics,

74. Schauer, *supra* note 3, at 1726–27.

75. *Id.* at 1731.

76. *Id.* at 1729.

77. *Id.* at 1730. And perhaps the case-selection hypothesis would also align with Ronald Dworkin’s views, if appellate cases tend to be those in which “two different results *could* have roughly the same degree of ‘fit’ with the existing sources of decision.” *Id.*

78. *Id.* at 1731.

79. POSNER, *supra* note 6, at 293 (“[T]he bin containing . . . legalistically indeterminate [cases] is chronically overflowing in the Supreme Court.”); Cross, *supra* note 6, at 285 (“Virtually none of the disputes that reach the Supreme Court are easy cases” (quoting Vincent Blasi, *Praise for the Court’s Unpredictability*, N.Y. TIMES, July 16, 1986, at 23) (internal quotation mark omitted)); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 851 (“[T]he Court considers . . . many ‘very hard’ cases . . .”); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 409 (1985) (“[T]here are no easy cases in the Supreme Court.”).

80. This is not to say all unanimous cases are easy. Sometimes the Court resolves hard cases, such as *Brown v. Board of Education*, unanimously. Schauer, *supra* note 79, at 408.

81. Schauer, *supra* note 3, at 1732. Schauer also notes that judging is not likely to value the “technical skills of most practicing lawyers.” *Id.*

and a wide range of other factors that might now be relevant under one theory or another of non-legal decisionmaking."⁸²

Schauer's analysis provides an intriguing starting point for thinking about qualifications of appellate judges. He does not subscribe to a particular theory of non-legal decision making. His proposal does not require judges to be "electorally responsible,"⁸³ and it does not address other mechanisms to enhance judicial accountability, such as the appointments process or limited terms of office.

Still, given the questions Schauer raises, it would be interesting to know whether Justices with formal legal education decide cases differently than Justices without formal legal education. And it would also be interesting to know whether legal education is associated with lower rates of political voting. It may be necessary to make more of a choice than Schauer himself makes about the desirability of politically responsive judges.

C. *Optimal Diversity*

Adrian Vermeule offers the most thoroughly developed proposal for lay Justices.⁸⁴ While his primary concern is enhanced technical competence in a field other than law,⁸⁵ the extreme version of Vermeule's argument calls for "nonlawyer professional[s]" who do not have a degree in law.⁸⁶ He argues completely diverse professional training is needed to offset common biases held by Justices with formal legal training.⁸⁷

As a starting point, Vermeule opts out of realist models of decision making, in which cases are "legally indeterminate" or unavoidably political.⁸⁸ He bypasses these models on the assumption they present an easy case for lay Justices.⁸⁹ Persons with legal training have no special expertise in deciding political or indeterminate issues. Thus, Vermeule understands lawyer Justices to have no advantage over lay Justices in deciding legally indeterminate issues.

Instead of a realistic model Vermeule adopts "artificial assumptions," which he claims "are maximally biased in favor of pure lawyer

82. *Id.*

83. *Id.*

84. Vermeule, *supra* note 2.

85. Vermeule makes a convincing case for having a Justice with expertise in another field. This Article takes issue only with his call to eliminate legal expertise. It does not question the benefits Vermeule associates with Justices who have a degree in both law and another field.

86. *Id.* at 1570 (also noting fallback position of Justices with a degree in both law and another field).

87. Vermeule focuses on the difference between lawyer and lay Justices, but his definition of lawyer hinges on formal legal education: a "lawyer" is a "person who has attended an accredited law school and been admitted to the bar." *Id.* at 1578 (internal quotation marks omitted).

88. *Id.* at 1577 (noting his argument "does not depend upon these views" that "many appellate cases are legally indeterminate" or that law is "just politics" (internal quotation marks omitted)).

89. *Id.*

Justices.”⁹⁰ The assumptions are: “[T]hat law constitutes an objective body of knowledge; that professional training confers distinctive expertise in that knowledge; that all cases have right answers; and that judges are (1) sincere and (2) vote their view of the legal merits.”⁹¹ According to Vermeule, relaxing any of these assumptions will merely bolster the case for lay Justices.⁹²

Vermeule’s right answer model allows him to estimate relative error rates for lay and lawyer Justices.⁹³ His argument against Justices with legal education depends on lay Justices’ ability to offset error-producing bias common to lawyer Justices. After outlining Vermeule’s general argument, this Article elaborates on problems raised by his failure to quantify the desirable bias he believes lay Justices will introduce.

Fundamentally, Vermeule’s decision to sidestep a realistic model of decision-making hinges on assumptions about relative expertise and fails to adequately account for the role of bias. Vermeule does not directly address the possibility that lay Justices will follow personal political preferences more closely than lawyer Justices in cases where law is indeterminate. Checking this type of political independence should not be viewed as mere error correction, but as a feature that favors advocates of a more politically responsive Court.

1. Likely Error Rates for Lay Versus Lawyer Justices

Under Vermeule’s model, all Supreme Court cases have a single right answer. This assumption allows him to estimate costs and benefits based on likelihoods lay or lawyer Justices will err in different types of cases.⁹⁴ Vermeule estimates relative error rates for three different types of cases. First, there are cases where the right answer depends on conventional legal arguments and sources.⁹⁵ Second, there are cases where the right answer turns on specialized, non-legal knowledge.⁹⁶ An example might be a tax case involving complex accounting issues. Third, there are cases where the right answer turns on knowledge that is both non-legal and non-specialized.⁹⁷ An example is a case turning on “evolving standards of decency.”⁹⁸

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1581.

94. He does not include other possible costs or benefits, such as the effect on the Court’s reputation with the general public.

95. He calls these “autarkic” cases. *Id.* at 1582.

96. *Id.* at 1582–83.

97. *Id.* at 1582.

98. *Id.* at 1582 (quoting *Roper v. Simmons*, 543 U.S. 551, 561 (2005)). Vermeule calls the second and third categories of cases “nonautarkic” because their outcomes depend on non-legal knowledge. *Id.*

Employing the Condorcet Jury Theorem,⁹⁹ Vermeule asserts a more diverse body of decision-makers is more likely to reach a correct answer in a greater number of cases.¹⁰⁰ Vermeule's basic model assumes independent voting and focuses on the marginal benefit of adding a single, more competent voter.¹⁰¹ Some benefits are easy to predict: lawyers are more likely to reach the correct answer in legalistic cases, while accountants are more likely to reach the correct answer in tax cases involving difficult accounting issues.¹⁰²

It is harder to predict error rates for cases in which the right answer does not turn on specialized expertise held by any member of the Court. Is an accountant Justice likely to improve the Court's odds of reaching the correct decision in a case turning on specialized knowledge in another field, such as history? Would the same be true for a decision turning on non-specialized knowledge, such as "evolving standards of decency"?¹⁰³ For Vermeule, the answer to both of these questions is yes.¹⁰⁴

He answers yes because he expects lay Justices to offset lawyer Justices' "correlated or systematic" biases in these cases.¹⁰⁵ Vermeule assumes lay Justices will improve decision making simply because they hold different and countervailing biases than lawyers. Thus, Vermeule contends lay Justices' ability to offset lawyers' common biases will reduce mistakes in cases that do not involve subjects in which either lawyer or lay Justices have expertise.¹⁰⁶

Vermeule's concern over lawyers' correlated biases also leads him to disfavor dual-competent Justices with a degree in law and another field.¹⁰⁷ A dual-competent Justice would share the same systematic biases held by other Justices with formal legal education. Vermeule argues the Court would be better off with a Ph.D. economist or some other professional who has no legal training.¹⁰⁸

99. *Id.* at 1586 (citing MARQUIS DE CONDORCET, AN ESSAY ON THE APPLICATION OF PROBABILITY THEORY TO PLURALITY DECISION-MAKING (1785), reprinted in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY (Iain McLean & Fiona Hewitt eds. & trans., 1994)). The Theorem is essentially a law of large numbers. Vermeule emphasizes certain diversity benefits that may flow from larger groups of voters—increases in average competence and correction for systematic biases held by smaller groups. *Id.* He does not argue, however, that the Court should have more than nine Justices.

100. *Id.*

101. *Id.* at 1589.

102. Vermeule also notes lay Justices may have broader beneficial effects on the Court: they may enlighten their colleagues, receive deference from their colleagues, or help the Court write more carefully-reasoned opinions within their particular area of expertise. *See id.* at 1594–97.

103. *Id.* at 1587, 1589–90 (quoting *Roper*, 543 U.S. at 561).

104. *Id.* at 1591.

105. *Id.* at 1589–90.

106. *Id.* at 1588–89.

107. *Id.* at 1598.

108. *Id.* at 1611. He lists Harvard economics professor Andrei Schleifer as potential nominee. *Id.*

2. Bias and Voting According to One's Political Inclinations

Correction of error-producing bias, then, is central to Vermeule's argument: "[O]ptimal design of a decisionmaking group must consider not only voters' competence . . . but also the nature and direction of their biases where they do make mistakes."¹⁰⁹ Vermeule argues that Justices without legal training are needed to offset biases held by lawyers.¹¹⁰

Vermeule notes, for example, that as a group people who choose to attend law school and become lawyers may favor "conventional morality," lack concern for "social justice," and prefer "cumbersome . . . processes for generating policy."¹¹¹ While in theory these biases may be worrisome, Vermeule ultimately professes "uncertainty" about the systematic nature of these biases for lawyers.¹¹² He nevertheless advocates diversity on the assumption that lay Justices will provide different and countervailing biases.¹¹³

But Vermeule's assumptions about benefits flowing from biases held by lay Justices are untested and uncertain. He does not quantify or elaborate on the direction of helpful, offsetting bias that he expects lay Justices to introduce. He assumes any difference in professional training will do, so that in terms of bias correction alone, the Court could benefit just as much from appointment of an "astrologer" as it could from appointment of a PhD economist.¹¹⁴

Without specifics, however, it is difficult to accept that the bias introduced by a nonlawyer professional—whom Vermeule prefers to the astrologer because of her enhanced technological competence—will have a desirable effect. It may be that Justices with training in another profession *share* many of the biases held by legal professionals. The critical "in-group," in other words, may be white-collar professionals who hold advanced degrees from elite institutions.¹¹⁵

More fundamentally, Vermeule's failure to identify desirable biases introduced by lay Justices raises questions about his decision to skirt realistic models of decision making. Recall that Vermeule's right answer

109. *Id.* at 1589.

110. *Id.* at 1591 ("[L]ay Justices lack the systematic biases . . . that arise from lawyers' common professional training.")

111. *Id.* at 1588 n. 56 (citing studies).

112. *Id.* at 1593–94 ("We lack essential knowledge about . . . the degree to which lawyers' biases are correlated . . .").

113. *Id.* at 1605–06.

114. *Id.* at 1611 ("[A]ppointing an astrologer to the Court might dilute lawyerly biases . . .").

115. Consider *Riley v. California*, in which a unanimous Court held that police may not search a person's cellphone without a warrant. 134 S.Ct. 2473, 2495 (2014). The Justices' ability to relate to privacy concerns arising from cellphone searches has led to the case being described as a "yuppie" spin on search and seizure law. Nina Totenberg, *Rare Unanimity in Supreme Court Term, With Plenty of Fireworks*, NATIONAL PUBLIC RADIO (July 6, 2014, 3:12 PM), <http://www.npr.org/2014/07/06/329235293/rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks> (internal quotation marks omitted).

framework sidestepped realistic models of decision-making based solely on considerations of relative expertise. He assumes that legal training confers no superior expertise where law is indeterminate.¹¹⁶ But these assumptions obscure important considerations of bias. Although legal expertise may not play much role in a realistic model, bias still seems relevant, and is perhaps even more relevant to how Justices resolve indeterminate or inherently political issues.

In the real world—where many cases do not have a single right answer—it may be that legal training is nevertheless associated with distinct biases omitted by Vermeule. That is, legally trained judges may be more inclined to decide cases independently of their personal political inclinations. This potential bias implicates a normative debate over how political or independent judges should be.¹¹⁷ A proposal that offsets or mitigates politically independent voting should not be viewed as mere error correction. Instead, attempting to offset or mitigate independent decision-making favors one side of a normative debate about the nature of the Court.

To assess Vermeule's call for Justices without formal legal education, then, it would be helpful to know whether Justices who attended law school are more or less politically independent than other Justices. At least some scholars would find proposals to enhance political voting problematic, and likely more worrisome than in-group biases held by lawyers. In this case, perhaps dual-competent Justices, who have expertise in both law and another field, might offer a better tradeoff than Vermeule originally assumes.

D. Historical Differences in Legal Education

The proposals above all question the need for Justices with formal legal education. This study considers empirical evidence from a unique historical period when the Court had a mix of Justices with and without formal legal education. These Justices' varied educational backgrounds reflect a transition in legal education in the United States. Before admission to the bar required a law degree, it required aspiring lawyers to spend a fixed period of time reading the law.¹¹⁸ Many lawyers satisfied

116. Vermeule, *supra* note 2, at 1577. This is similar to Schauer's position that legal training does not matter in indeterminate cases. See Schauer, *supra* note 3, at 1732.

117. Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV 2464, 2492 (2014) (reviewing LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)) (noting "normative" debate in which "[f]ormalists argue that law should play a greater role in judging" whereas "realists" contend "policy preferences should trump formal considerations").

118. ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 82-84 (1921).

this requirement by apprenticing under the supervision of a practicing lawyer, without attending law school.¹¹⁹

The apprenticeship system “left much to be desired.”¹²⁰ While apprentices gained valuable exposure to “professional tradition[s]” as well as relationships with established attorneys,¹²¹ it was difficult to find time for the systematic study of law in a busy office. Law clerks tended to spend a great deal of time “copying writs” with “little opportunity for constructive reading.”¹²² They were often “left alone” to wade through opaque law books while their “teacher[s] tended to business.”¹²³ Although some aspiring lawyers had better experiences, “[a]s a rule” practicing lawyers did not have time to “pay much attention” to their students.¹²⁴

Sir William Blackstone¹²⁵ spearheaded reform by arguing that “the study of law should be undertaken at the university.”¹²⁶ According to Blackstone, apprenticeship would leave a lawyer “uninstructed in the elements and first principles upon which the rule of practice is founded,” such that “the least variation from established precedents will totally distract and bewilder him.”¹²⁷ Legal education in the university setting would permit students to focus on “principles and first questions rather than mere details and procedure.”¹²⁸

Thomas Jefferson led early attempts to offer professional legal training in a university setting in the United States. He “initiat[ed] university instruction in professional law” at William and Mary College.¹²⁹ In addition to courses in moral philosophy, the college included a school of “Law and Polic[y],” which was chaired by Chancellor George

119. *Id.* Of the Justices who did not attend law school, only Samuel Freeman Miller and James Byrnes were self-taught. Other Justices who did not attend law school read the law by apprenticing with a practicing attorney. See Epstein et al., JUSTICES DATABASE, *supra* note 19.

120. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1962 (2012).

121. Roscoe Pound, *The Law School and the Professional Tradition*, 24 MICH. L. REV. 156, 158 (1925); see also A. Christopher Bryant, *Reading the Law in the Office of Calvin Fletcher: The Apprenticeship System and the Practice of Law in Frontier Indiana*, 1 NEV. L.J. 19, 22 (2001).

122. Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 128 (1976).

123. *Id.* at 133.

124. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 166 (1911).

125. Blackstone authored *Commentaries on the Laws of England*, which also became a highly influential treatise in the United States. Nolan, *supra* note 22, at 735–37.

126. Nolan, *supra* note 22, at 760. Although apprentices may have had opportunities to take undergraduate courses in “moral philosophy,” they seem ill-suited to Blackstone’s desire for enhanced professional training. Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. LEGAL EDUC. 311, 318 (1998). The moral philosophy courses “lacked the specifics necessary to prepare lawyers for [law] practice.” *Id.*

127. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *32.

128. Nolan, *supra* note 22, at 760. Although Blackstone’s hope for separate schools of law “never came to fruition in England . . . it did obtain acceptance many years later in the United States.” *Id.*

129. REED, *supra* note 118, at 116.

Wythe.¹³⁰ Wythe's course covered professional law, required students to read Blackstone, and also offered opportunities to participate in moot courts and legislatures.¹³¹

By 1784, the first American school of law, "organized strictly to prepare students to be lawyers, and distinct from a general bachelor's degree course," was established in Litchfield, Connecticut.¹³² Judge Tapping Reeve organized the Litchfield Law School to accommodate an overflow of students in his law office. Judge Reeve's fourteen-month course used Blackstone's *Commentaries* and covered topics running the gamut of private law.¹³³ His program's distinctive feature was systematic, daily lectures.¹³⁴ The school closed shortly after Reeve's death, when it began to struggle "to compete with the newly opened law programs at Harvard, Columbia, Yale," and other universities.¹³⁵

University law schools originally "offered one- to two-year courses of study consisting of lectures and readings of treatises in . . . areas of law considered important at the time."¹³⁶ Decades later, Christopher Columbus Langdell "became the Dane Professor and Dean at the Harvard Law School" and "ushered in several innovations that characterize the modern American law school."¹³⁷ Although shifts to the case and Socratic methods promoted inductive reasoning and changed students' educational experiences, the program continued to emphasize formal study of law in an academic setting.¹³⁸

As this history makes clear, formal legal education evolved over time and was not as standardized as it is today. Formal legal education of Justices in this study ranged from Litchfield's treatise-style lectures to Harvard's case method.¹³⁹ Notwithstanding the variety of educational offerings, however, formal legal education offered students regular and systematic instruction in general principles of law.¹⁴⁰ Law schools were

130. *Id.*

131. *Id.* at 116–17. John Marshall, who sat on the Court before the period covered by this study, participated in this program. *Id.* at 116–17 n.2.

132. Steve Sheppard, *An Introductory History of Law in the Lecture Hall*, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 13 (Steve Sheppard ed., 1999); see also REED, *supra* note 118, at 129 n.3.

133. *Id.*

134. REED, *supra* note 118, at 131.

135. Sheppard, *supra* note 132, at 13.

136. Spencer, *supra* note 120, at 1969 (describing how topics included "constitutional law, American jurisprudence, English common law, equity, pleading, evidence, bailments, insurance, bills and notes, partnerships, domestic relations, conflict of laws, sales, and real property").

137. *Id.* at 1973.

138. *Id.* at 1974. Historically, law schools did not focus on practice skills because they were taught in law office apprenticeships that often followed law school. *Id.* at 1972.

139. For example, Ward Hunt attended Litchfield Law School, while Louis Brandeis attended Harvard Law School in the 1870s, as it was transitioning to the Socratic method under Dean Langdell. See FEDERAL JUDICIAL CENTER, *supra* note 9; Spencer, *supra* note 120, at 1973 (noting transition occurring after Langdell became Dean in 1870).

140. Sheppard, *supra* note 132, at 13.

designed to make up for perceived deficiencies in legal education of lawyers who read the law alone. It follows that people who chose to attend law school may better understand or appreciate some aspects of law than people who entered the profession by reading the law alone.¹⁴¹

The study does not attempt to disentangle alternative reasons why Justices who attended law school may vote differently than others. It could be law school attendees gained more knowledge of the law, or it could be that they simply value law taught in school more than others. Either reason would provide a basis to reconsider the wisdom of eliminating formal legal education as a prerequisite for the Supreme Court.

II. EMPIRICAL ANALYSIS

This section examines how Justices with and without formal legal education voted. It reports empirical analysis of voting data from a unique period when Justices who attended law school sat with Justices who entered the profession by reading the law alone. Specifically, the analysis measures whether common background in formal legal education explains why some Justices agreed more than others, even controlling for political inclinations and other alternative explanations for their agreements. It also identifies whether Justices who shared the benefit of formal legal education voted more or less politically than others.

The results are striking. First, Justices with formal legal education agreed with one another significantly more than they agreed with other Justices.¹⁴² When considered alongside Justices' political inclinations and several other potentially explanatory variables, common background in formal legal education is the *only* significant predictor of Justices' votes.¹⁴³

Second, political voting patterns differ significantly for Justices with different educational backgrounds. Justices who attended law school were less politically predictable than other Justices.¹⁴⁴ Ideologies of appointing presidents predict agreements with Justices who did not attend law school, but they lack significant predictive power over votes cast by Justices who share the benefit of formal legal education.¹⁴⁵

The sections immediately below provide an overview of data and methodology supporting these findings. Readers who wish to skip this

141. This study focuses on attendance at law school rather than earning a law degree. During the historical period covered here, many more Justices attended law school than earned law degrees. Attending law school for a shorter period could still establish important differences: Justices may still gain more information about general principles of law during their initial period of study, and enrollment might indicate greater concern for law taught in law school.

142. See *infra* note 185 and Figure 1.

143. See *infra* note 185 and Figure 1.

144. See *infra* note 186 and Figure 2.

145. See *infra* note 186 and Figure 2.

background and proceed directly to results should consult the Results section beginning in Part II.G.

A. Data

This study draws on a unique historical data set that records every time two Justices who sat together agreed or disagreed in a vote on the judgment of non-unanimous cases decided from 1862 to 1949.¹⁴⁶ When combined with more recent voting records reported in the Spaeth United States Supreme Court Database,¹⁴⁷ the data record voting alignments in 4,444 non-unanimous cases.¹⁴⁸ The study focuses on non-unanimous cases because they best illuminate differences between Justices' voting patterns.¹⁴⁹

B. Dependent Variable

The dependent variable is Justices' pairwise rates of agreement in non-unanimous cases.¹⁵⁰ Agreement rates are a time-honored metric that reflects the same information contained in a leading measure of ideology, Martin-Quinn scores.¹⁵¹

This study calculates agreement rates in two steps. First, for each non-unanimous case, it records whether two Justices agreed in a majority or minority vote on the judgment.¹⁵² Second, the study adds each case in which the pair agreed and divides this number by the total number of

146. See generally Chabot, *Mavericks*, *supra* note 25, at 1001–02. The data exclude a small percentage of individual Justices' votes for opinions the Supreme Court Historical Society coded as separate opinions or statements rather than majority, concurrence, or dissent. *Id.* at 1042 n.142.

147. Spaeth et al., SUPREME COURT DATABASE, *supra* note 26. Agreement rates in this paper were calculated using the release including votes from 1953–2009. The historical data set has 1,924 non-unanimous cases and Spaeth's has 2,520. Historically there were a smaller number of non-unanimous cases because Justices wrote far fewer dissents before the 1920s. See Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 363 fig.1 (2001); Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471, 476 fig.1, 478 fig.2, 479 fig.3, 480 fig.4 (1977).

148. This study begins with cases in 1862 and ends with cases in 1975, which is the last year William Douglas was on the bench. Douglas was the last Justice on the Court who sat with both Justices with and without formal legal education during his tenure on the Court. (Jackson was the last appointee to sit with Justices with mixed educational backgrounds, but Douglas remained on the Court for a longer period of time.) Thus the data cover cases decided over a decided over a 103-year period.

149. See Chabot, *supra* note 10, at 1248.

150. It is not helpful to include unanimous cases, because they offer no additional information about Justices' relative positions. *Id.*

151. This metric follows "some of the earliest empirical studies of the Supreme Court," in which "political scientist Herman Pritchett constructed tables showing how often each pair of Justices was in agreement, or how often each pair dissented together." Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 163 (2009) (citing C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890 (1941)). For an illustration of how it reflects the same information contained in Martin-Quinn scores, see Chabot, *Mavericks*, *supra* note 25, at 1011 fig.2 (discussing similarities between percentages of agreement and Martin-Quinn Scores for 2009).

152. It counts votes for a majority, plurality, or concurrence as part of the majority coalition and votes for a dissent as part of a minority coalition.

cases in which the pair sat together. This calculation provides a rate of agreement for each pair of Justices who sat together.

Paired agreement rates capture differences and similarities in voting behavior without noise that may be introduced by directional coding of case outcomes.¹⁵³ In non-unanimous cases, for example, Justice Brandeis agreed with Justice Stone 85% and Justice Holmes 81% of the time. Brandeis agreed with Justice Butler in only 45% of non-unanimous cases. Note that unanimous cases do not add to the analysis because Brandeis will agree with other Justices at the same rate in unanimous cases.

Paired agreement rates also yield a large number of observations for regression analysis. The voting records reflect agreement rates for forty-one Justices, from Swayne¹⁵⁴ through Jackson, and all other Justices with whom they sit, for a total of 551 paired agreement rates. The study excludes a handful of Justices for whom no political inclination scores are available.¹⁵⁵ It ends with paired records for Justice Jackson, because he was the final appointee to sit with Justice James Byrnes. Byrnes was the last Justice on the Court who never attended law school.¹⁵⁶ All Justices since Jackson sat only with other Justices who attended law school, so their voting records provide no insight into how variation in educational background might influence voting patterns.

C. Explanatory Variables

This Article focuses on whether Justices' agreement rates can be explained by two variables: proximity of Justices' political inclinations and education. These explanatory variables are described below.

153. Directional coding would identify whether a Justice voted in favor of a liberal or conservative outcome for each case. While in theory directional coding could capture the same differences or similarities in Justices' votes, it is extremely difficult (perhaps impossible) to objectively identify a single conservative or liberal outcome across all areas of the Court's docket. See Fischman & Law, *supra* note 151, at 161–62; Anna Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG. 414, 415 (2013); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 778–79 (2009); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 480, 493 (2009). This study avoids judgments involved in directional coding by looking to Justices' agreement rates alone.

154. Although Justices before Swayne also had mixed educational backgrounds, Justices sitting before Swayne had decided significantly fewer non-unanimous cases upon which to calculate percentages of agreement. Paired voting records for Swayne begin with all Justices appointed after Swayne, and so on.

155. As explained *infra* Part II.C.1, my measure of Justices' political inclinations is a leading political science metric known as presidential DW-NOMINATE scores. I exclude Justices for whom no presidential scores are available: Cardozo, Roberts, L.Q. Lamar, Fuller, Matthews, Woods, and Harlan I.

156. As noted earlier, although Jackson was the last *appointee* whose paired voting records I consider, my voting records go beyond Jackson's tenure to William Douglas. Though Douglas was appointed before Jackson, Douglas had a longer tenure on the Court, and was the last sitting Justice who had opportunities to vote with Justices who lacked formal legal education.

1. Proximity of Justices' Political Inclinations (POL_DIST)

The proxy for a Justice's political inclinations is the ideology of the appointing president, which has been one of the most popular predictors of judicial ideology.¹⁵⁷ Though ideology of appointing presidents has typically been measured according to the president's political party,¹⁵⁸ partisan affiliation offers only a rough metric of ideology.¹⁵⁹ This study improves on partisan measures by using leading political science metrics, known as DW-NOMINATE Scores, which were developed by Keith Poole, et al.¹⁶⁰

Poole et al.'s DW-NOMINATE scores, or an earlier variant of these scores, have helped explain judicial behavior or identify judicial ideology in several prominent studies.¹⁶¹ As explained by Lee Epstein, Andrew Martin, Jeffrey Segal, and Chad Westerland, Poole's work in this area makes a "profound contribution . . . to the study of American political institutions."¹⁶² Poole et. al.'s scores account for "var[ie]d . . . ideological intensity" among presidents of the same party¹⁶³ and have been found to "outperform[]" parties of appointing president as a predictor of judicial behavior.¹⁶⁴

157. Fischman & Law, *supra* note 151, at 167 ("The most popular proxy for a judge's ideology . . . has been the party of the official who appointed the judge."); George, *supra* note 1, at 1352 ("It is well established that political affiliation of . . . [an] appointing President is a strong predictor of how a judge will vote in a case.").

158. Fischman & Law, *supra* note 151, at 167.

159. *Id.* at 170.

160. See Keith Poole et al., "Common-Space" DW-NOMINATE Scores with Bootstrapped Standard Errors (*Joint House and Senate Scaling*), VOTEVIEW.COM, <http://www.voteview.com/dwnomjoint.asp> (last updated Feb. 6, 2013).

161. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 165 n.6 (2005) (identifying Poole's measure of appointing president's ideology as a predictor of Justices' votes in recent time periods); CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH* 117, 119–21 (2007) (using DW-NOMINATE score as measure of nominating president's ideology and finding that unconstrained presidents select ideologically proximate Justices); Chabot, *supra* note 10, at 1260 fig.1 (presidential DW-NOMINATE scores generally have significant predictive power over Justices votes, even controlling for variation in senatorial DW-NOMINATE scores); Michael W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001) (using Poole and Rosenthal's "first dimension common space scores to measure the ideological preferences of the appointing President and relevant senators" and finding that both presidential ideology and ideology of home state senator helped predict court of appeals judges' votes); see also FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 166, 172–75 (2007) (using common space scores to identify median judges on panel of court of appeals judges).

162. Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 n.4 (2007).

163. Fischman & Law, *supra* note 151, at 174.

164. Epstein et al., *supra* note 162, at 306–07 (describing Giles' study). Studies of district and court of appeals judges have found it helpful to consider not only ideologies of appointing presidents, but also ideologies of opposing-party home-state senators, to predict judges' voting behavior. See, e.g., Giles, Hettinger & Peppers, *supra* note 161 at 632; see generally Fischman & Law, *supra* note 151, at 173–74 (discussing studies). This senatorial role reflects the practice of senatorial courtesy, which is not understood to play as significant a role across all Supreme Court appointments. See EPSTEIN & SEGAL, *supra* note 161, at 22–23 (unlike Senators from states where there is a district

This study focuses on how proximate a pair of Justices' political inclinations—or ideologies of appointing presidents—are. To measure proximity, the study calculates absolute distance between DW-NOMINATE scores for a particular pair of Justices' presidents.¹⁶⁵ The distance between scores of appointing presidents provides a metric of how close or distant a pair of Justices' political inclinations are.

For example, Justice Brandeis was appointed by a liberal president, Woodrow Wilson, while Justices Butler and Stone were appointed by conservative Presidents, Harding and Calvin Coolidge.¹⁶⁶ Wilson has a DW-NOMINATE score of -0.612581,¹⁶⁷ while Harding and Coolidge have scores of 0.144168 and 0.533545, respectively. Thus the absolute distance between Wilson and Harding is 0.756749, and between Wilson and Coolidge is 1.146126. These distances provide a proximity of political inclinations, or "POL_DIST," variable that can be compared to paired voting records for all Justices.

Recall that for the Justices above, proximity of political inclinations has only limited ability to explain agreement rates. Justice Brandeis votes with Justice Butler at a politically predictable low rate (45%). This is what one would expect from Justices whose political inclinations (and ideologies of appointing presidents) are not proximate. But the explanation does not hold for Justices Brandeis and Stone. Their political inclinations are even less proximate, but they voted together 85% of the time. Perhaps these voting patterns make more sense in light of the fact that Justices Brandeis and Stone both attended law school, but Justice Butler did not.

2. Educational Background (FORMAL_ED)

"FORMAL_ED" is a dummy variable identifying similarities or differences in Justices' formal educational backgrounds. Pairs of Justices who both attended law school received a 1, all other pairs received a 0.¹⁶⁸ This coding identifies whether pairs of Justices who share the benefit of formal legal education find more or less to agree about than other Justices. The coding compares them to other pairs where one or more Justice did not attend law school.¹⁶⁹ This study draws information on Justices' educational backgrounds from U.S. Supreme Court Justices Database.¹⁷⁰

court or court of appeals vacancy, "senators do not expect to have much of a say in . . . the nomination" of Supreme Court Justices); Giles, Hettinger & Peppers, *supra* note 161, at 628.

165. Appendix A *infra* provides a detailed description of this calculation.

166. This study uses scores for Stone's initial appointment as Associate Justice.

167. As explained in Appendix A *infra*, this is a weighted score combining the first and second dimensions of DW-NOMINATE scores.

168. One might argue paired voting records for Justices who did not attend law school should be excluded, as they show no variation (all zeros) for this variable. I included them because they are still important in considering whether Justices who did not attend law school vote politically.

169. While it is also possible to compare pairs of Justices who both read the law to pairs of Justices where one or more attended law school, this study focuses on agreements reached by Justice-

D. Control and Interaction Variables

Simply considering the explanatory power of political inclinations and educational background could be misleading. It may be that factors other than education and political inclinations explain varied levels of agreement between different groups of Justices. To account for this possibility, the study includes control and interaction variables reflecting other likely predictors of Justices' agreement. This section provides an overview of control and interaction variables, and Appendix A provides a more detailed description of each control and interaction variable.

The first control variables are Justice-level fixed effects variables. These variables control for Justices who may have had generally inflated agreement rates and suppressed political voting due to historical norms of consensus.¹⁷¹ The fixed effects allow the regression to measure variation in each Justice's rates of agreement by calculating a unique starting point (or intercept) for each Justice. The unique starting point ensures Justices who have generally inflated agreement rates do not skew the analysis and cause the regression to unduly downplay politically predictable voting by other Justices. Fixed effects properly focus analysis on whether *intra*-Justice variation in agreement rates is significantly explained by differences in proximity of political inclinations, educational backgrounds, or other control variables.¹⁷²

A second group of control variables looks to two types of professional experience: experience as a prosecutor or as a judge. Both of these experiences have been found to help predict Justices' votes in historical cases.¹⁷³ The third group considers three of the Justices' personal attributes: familial economic status, non-urban origins, and regional origins.¹⁷⁴ The latter two have been found to explain historical voting patterns in earlier studies.¹⁷⁵ This study also considers whether familial economic

es with common background in formal legal education. Thus, the study captures whether Justices who have common formal professional training have more to agree about than other Justices. This scenario also reflects the most likely change in the Court's composition following the appointment of a Justice without formal legal education. It is highly unlikely a lay Justice would initially sit with even one other Justice who also lacked formal legal education.

170. Epstein et al., JUSTICES DATABASE, *supra* note 19 (variable 37: name of nominee's law school; variable 38: law school status).

171. The norms controlled for here are ones that would generally inflate rates of agreement with all other Justices. Thus they would operate independently of differences in educational background and provide an alternative explanation for apolitical voting by certain Justices. For discussion of historical norms of consensus on the Court, see generally Epstein, Segal & Spaeth, *supra* note 147; Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1335 & fig.8 (2001); *infra* Appendix A.

172. As noted in Appendix A, *infra*, results for fixed effects controls are not included in graph results because they calculate a unique starting point for each Justice in the study.

173. Tate & Handberg, *supra* note 16, at 473-74 & tbl.1.

174. Religion was not included because Tate and Handberg's historical study did not find a significant difference between liberalism in voting patterns based on religion (Protestant versus non-Protestant). *See id.*

175. *Id.*

status explains agreement rates.¹⁷⁶ The study draws information for all control variables in the second and third group from the U.S. Supreme Court Justices Database.¹⁷⁷

Last, the study uses interaction variables to identify differences in predictive power of political inclinations for distinct groups of Justices. These variables control for the possibility that politics has predictive power, but only over certain subsets of Justices. The regressions accomplish this by interacting political inclinations with two sets of dummy variables.

The first regression uses dummy interaction variables to compare political voting of Justices appointed before and after 1925. This interaction variable accounts for the possibility that politics does help explain votes, but only for Justices who were appointed after 1925. These later-appointed Justices might have had more opportunities to vote politically because the Judiciary Act of 1925 gave later appointees greater discretion to hear politically divisive cases.¹⁷⁸

The second regression adds different dummy interaction variables. It compares political voting for pairs of Justices who both attended law school to political voting for pairs where one or more Justice did not attend law school.¹⁷⁹ It may be that Justices who share the benefit of formal legal education are more likely to agree on grounds independent of politics than Justices who do not share the same professional training. A detailed description of these interaction variables is reported in Appendix A.

E. Hypotheses

Regression analysis identifies whether changes in Justices' agreement rates can be explained by differences in educational backgrounds,

176. The opportunity to apprentice with a practicing lawyer was often facilitated by social connections available to persons from well-to-do families. Bryant, *supra* note 121, at 26. Thus, Justices who read the law were not necessarily from families with more limited financial resources than those who attended law school.

177. See Epstein et al., JUSTICES DATABASE, *supra* note 19.

178. See Judiciary Act of 1925, ch. 229, § 237(a), 43 Stat. 936, 937.

179. This study also includes a test in which the interaction between legal education and political inclinations was added to the first regression. The combined regression failed to identify a significant individual coefficient for either the FORMAL_ED dummy or FORMAL_ED dummy interacted with political inclinations. Still, this result does not necessarily mean the FORMAL_ED variables lack significant explanatory power: the variables may be correlated, and thus have significant joint explanatory power that is not identified by either individual measure.

This study included an F-test to determine whether both legal education variables (the FORMAL_ED dummy and FORMAL_ED dummy interacted with political inclinations) jointly have significant explanatory power when considered in the same regression. It compares the difference in explanatory power of regressions with and without the two educational variables. The F-test measures whether the regression including the educational variables has significantly more explanatory power than one would expect from adding random variables without explanatory power. This test yielded an f-statistic of 5.5663, which establishes the joint effect of these educational variables is significant at the 1% level.

proximity of political inclinations, or control variables. The analysis tests two hypotheses about the relationship between formal legal education and Justices' voting patterns:

1. *Common background in formal legal education significantly explains Justices' agreements, even after one controls for alternative explanations of political inclinations and other background variables.*
2. *Political inclinations significantly predict agreement with Justices who never attended law school, but they do not predict agreement between Justices who share the benefit of formal legal education.*

F. Analysis

This study tests these hypotheses using two OLS regressions.¹⁸⁰ The first regression considers the general explanatory power of a common background in formal legal education, controlling for political inclinations and other background variables.¹⁸¹ The second regression includes the same control variables but focuses on whether Justices who share the benefit of formal legal education vote more or less politically than other Justices.¹⁸²

If proximate political inclinations predict rates of agreement, the regressions will yield a significant negative coefficient for the POL_DIST variable. The expected coefficient is negative for the following reason: Justices whose votes can be explained politically will agree *less* with Justices whose expected political inclinations (ideology of appointing president) are *more* distant from their own. Justice Brandeis, for example, agrees with Justice Butler far less than he agrees with his fellow Wilson appointee, Justice John H. Clarke. Justice Butler was appointed

180. This study uses OLS regressions because the dependent variable reflects rates of agreement rather than binary (0 or 1) outcomes. It also reports Justice-level clustered standard errors, to help adjust for heteroskedasticity, or variance in unobservable factors, which may be uneven from Justice to Justice. For a detailed explanation of this methodology, see Chabot, *supra* note 10, at 1254–55.

181. $(\text{Agree_Rate})_{i,j} = \alpha_i + \beta_1*(\text{POL_DIST}_{i,j}) + \beta_2*(\text{POL_DIST}_{i,j})*(\text{POST_1925}) + \beta_3*(\text{FORMAL_ED}) + \beta_4*(\text{JU_EX}) + \beta_5*(\text{PRO_EX}) + \beta_6*(\text{ECON}) + \beta_7*(\text{NON_URBAN}) + \beta_8*(\text{REG}) + \epsilon$.

Where $(\text{Agree_Rate})_{i,j}$ is the percentage of cases in which Justice *i* and Justice *j* joined the same majority or minority coalition on the judgment, POL_DIST is the absolute distance between Justices' political inclinations as reflected by their appointing president, FORMAL_ED = 1 if both Justices attended law school, 0 otherwise, and other variables are coded as described above and in Appendix A. The intercept (α_i) is allowed to vary across Justices.

182. $(\text{Agree_Rate})_{i,j} = \alpha_i + \beta_1*(\text{POL_DIST}_{i,j}) + \beta_2*(\text{POL_DIST}_{i,j})*(\text{FORMAL_ED}) + \beta_4*(\text{JU_EX}) + \beta_5*(\text{PRO_EX}) + \beta_6*(\text{ECON}) + \beta_7*(\text{NON_URBAN}) + \beta_8*(\text{REG}) + \epsilon$.

Where $(\text{Agree_Rate})_{i,j}$ is the percentage of cases in which Justice *i* and Justice *j* joined the same majority or minority coalition on the judgment, POL_DIST is the absolute distance between Justices' political inclinations as reflected by their appointing president, FORMAL_ED = 1 if both Justices attended law school, 0 otherwise, and other variables are coded as described above and in Appendix A. The fixed effects variables allow the intercept (α_i) to vary across Justices.

by a more conservative president than Justices Brandeis and Clarke, and thus Brandeis' differing levels of agreement are politically predictable.¹⁸³

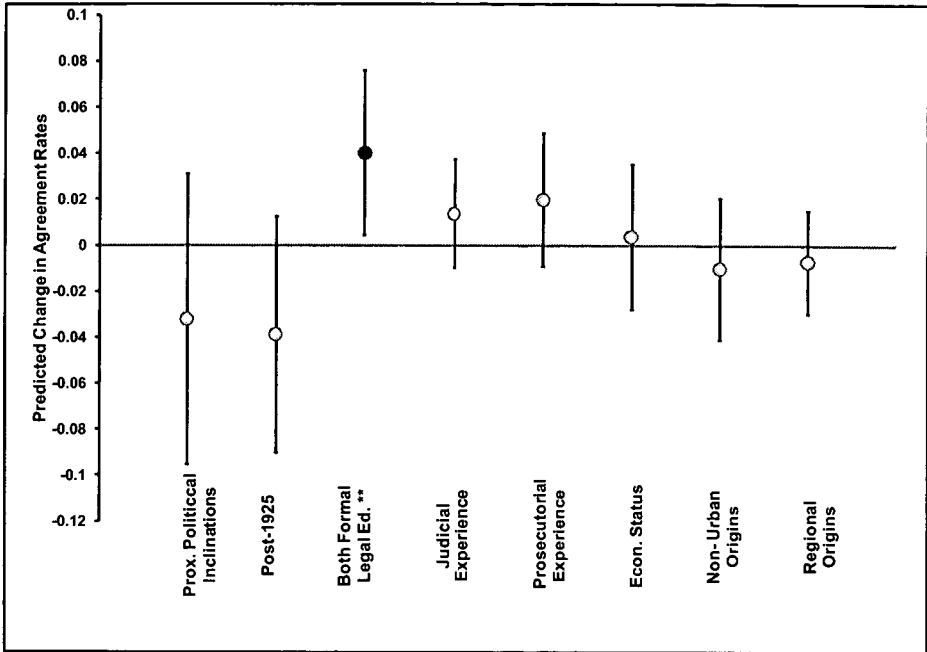
Of course, it may be that other background variables have predictive power that political inclinations lack. FORMAL_ED and other background control variables are coded as dummy variables, with a 1 for Justices who share background traits associated with particular voting patterns and 0 for Justices who do not. Thus, if a background variable has predictive power, one would expect that Justices who share that background experience or trait will agree with one another at a higher rate. This should yield a significant positive coefficient for the dummy background variable.

G. Results

Both regressions identify significant differences in Justices who share the benefit of formal legal education. As illustrated by Figure 1, Justices who share the benefit of formal legal education agree with one another significantly more than other Justices.

183. See Chabot, *Mavericks*, *supra* note 25, at 1023–24 & tbl.3.

Figure 1: *Predictive Power of Common Background in Formal Legal Education Over Justices' Agreement Rates*



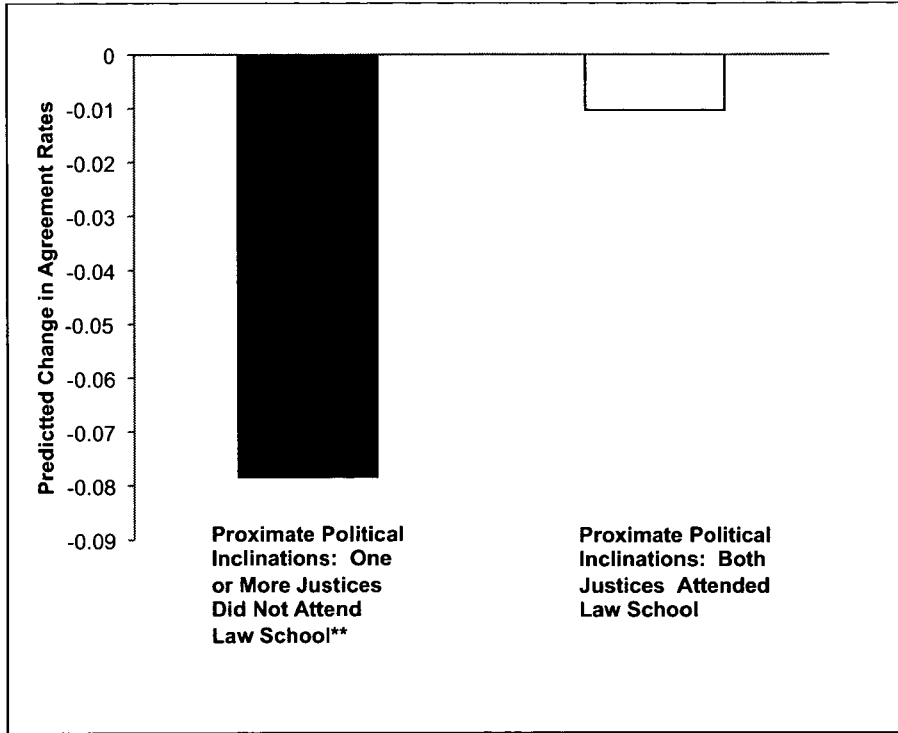
*Estimated for Justices appointed from Swayne through Jackson and all other Justices with whom they sit, excluding Justices for whom appointing presidents have no DW-NOMINATE scores.¹⁸⁴ ** denotes $p < 0.05$; p -values are estimated with clustered standard errors, and error bars denote 95% confidence intervals. $N = 551$. $Adj. R^2 = 0.1939$. See Appendix B for a detailed table of regression results.*

Indeed, common background in formal legal education is the *only* significant predictor of Justices' agreements. One can be highly confident, at the 5% level, that the true relationship is not zero. This educational background is significant even controlling for likely alternative explanations, such as Justices' political inclinations pre- and post- 1925. The findings support the first hypothesis: common background in formal legal education significantly explains Justices' agreements.

Beyond overall predictive power, it is helpful to consider how political voting patterns might differ for Justices with diverse educational backgrounds. Figure 2, below, summarizes the difference between Justices with and without formal legal education.

184. See regression equation *supra* note 181. For a list of excluded Justices see *supra* note 155.

Figure 2: *Predictive Power of Proximate Political Inclinations Over Justices' Agreement Rates, Comparing Justices with Common Background in Formal Legal Education to Others*



*Estimated for Justices appointed from Swayne through Jackson and all other Justices with whom they sit, excluding Justices for whom appointing presidents have no DW-NOMINATE scores.¹⁸⁵ ** denotes $p < 0.05$, and p -values are estimated with clustered standard errors. The regression also fails to identify significant explanatory power for control variables. $N=551$. $Adj. R^2=0.2016$. See Appendix B for a detailed table of regression results.*

Here, the difference between the two groups is significant and striking. Proximity of Justices' political inclinations has significant explanatory power over votes cast with Justices who lack formal legal education. (Recall that the expected result for political inclinations is negative because one expects politically close appointees to agree at *higher* rates and politically distant appointees to agree at *lower* rates.)¹⁸⁶ Justices who share the benefit of formal legal education are significantly less politically predictable than others. Indeed, for Justices with common background in formal legal education, politics' explanatory power loses significance and shrinks to almost zero. These results support the second hypothesis.

185. See regression equation *supra* note 182. For a list of excluded Justices see *supra* note 155.

186. See *supra* note 183 and accompanying text.

Justices who share the benefit of formal legal education vote less politically than others.

III. IMPLICATIONS

Empirical analysis identifies a significant relationship between formal legal education and Justices' agreements in non-unanimous cases. In addition, Justices who share the benefit of formal legal education vote apolitically while other Justices do not. These findings should give pause to advocates of Justices without formal legal education. They cast doubt on assumptions that legal training is irrelevant to Supreme Court decision-making.

This section describes how the findings relate to specific arguments advanced by Denvir, Schauer, and Vermeule. It then explains how evidence from historical voting records bears on current conceptions of the Supreme Court.

A. Independence, Diversity, and a More Politically Responsive Court

John Denvir calls for Justices without formal legal education.¹⁸⁷ He hopes this reform will help the Court serve an enhanced representative function.¹⁸⁸ This study provides further reason to think diverse educational background will bolster the Court's representative function.

Recall that variables measuring Justices' political inclinations reflect ideologies of Justices' appointing presidents.¹⁸⁹ Justices who share the benefit of formal legal education voted independently of their appointing presidents' ideologies. Votes cast with Justices who never went to law school, however, were significantly predicted by ideologies of their appointing presidents.¹⁹⁰

Of course, Denvir himself would find these results consistent with a less desirable form of representation: Justices who mirror views of their appointing presidents.¹⁹¹ This enhanced representation may be imperfect because appointing presidents may select Justices preferred by "extremists in their own party" rather than Justices "who capture the mainstream of popular thought."¹⁹²

187. Denvir, *supra* note 2, at 33.

188. *Id.*

189. *See supra* Part II.C.1.

190. *See supra* fig.2.

191. Denvir, *supra* note 2, at 34–35. Denvir focuses on constitutional cases, while the non-unanimous cases in this study were not limited to constitutional cases. There is no reason to think legal issues in constitutional cases will be more determinate or that voting in constitutional cases will be less political than in other cases. *See* Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819, 830–31 (2008). Thus, results from the general sample of non-unanimous cases still raise questions about political voting in constitutional cases.

192. FRIEDMAN, *supra* note 4, at 374.

Still, responsiveness to views of an appointing president may offer an attractive outcome,¹⁹³ even if it is second best in terms of responsiveness to current public opinion. Justices who reflect their appointing presidents' views would have enhanced representative qualities. Their votes may be understood to reflect dominant political forces at the time of their appointments.¹⁹⁴ And these views may be updated by every subsequent appointment.¹⁹⁵ Barry Friedman describes this facet of the appointments process as playing "some role in ensuring that the Court heeds the cry of public opinion."¹⁹⁶ Given that Justices without formal legal education more closely reflected ideologies of their appointing presidents in the past, this option may also be desirable to current presidents.

Nevertheless, a nominee who never went to law school seems an unlikely choice for presidents who desire like-minded Justices. Since the 1970s, presidents have redoubled their efforts to appoint politically compatible Justices and achieved unprecedented success in doing so.¹⁹⁷ At the same time, however, the Senate has resumed an aggressive role in opposing nominees to the Court.¹⁹⁸ Geoffrey Stone points out that the Senate is less likely to put up a fight over nominees with impeccable professional qualifications.¹⁹⁹

Thus, the Senate gives presidents strong incentives to choose candidates whose professional qualifications are beyond reproach.²⁰⁰ Indeed, recent appointments reflect a narrower than ever range of educational backgrounds—currently all Justices attended Harvard, Yale, or Columbia Law School.²⁰¹ Harriet Miers's nomination drew criticism because

193. Some scholars call for broad presidential discretion to appoint Justices with more extreme views. See McGinnis, *supra* note 28, at 667–68 (arguing for a strong presidential role and against "compromise" nominees); Stone, *supra* note 12, at 460 ("A system in which presidents are relentlessly driven to nominate only the most moderate Justices will not serve the best interests of either the Court or the nation.").

194. "When a party wins the White House, it can stock the federal judiciary with members of its own party," and these judges will provide extended "partisan representation" during their time on the bench. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001); see also Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 147 (2009) (describing this theory of partisan entrenchment).

195. In his seminal 1957 article, majoritarian Robert Dahl asserted that frequent appointments ensure "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Dahl, *supra* note 41, at 570.

196. FRIEDMAN, *supra* note 4, at 374. Friedman also points out that the appointments process is imperfect due to lower frequency of vacancies on the Court and ideological drift. *Id.* This does not mean appointments themselves have no effect, but that their influence on the Court could be enhanced if presidents had the ability to make appointments more frequently.

197. Chabot, *supra* note 10, at 1262 fig.2.

198. Stone, *supra* note 12, at 383–84.

199. *Id.* at 410 ("[T]here is a substantial correlation between perceived [inferior] qualifications and hotly-contested nominees.").

200. See Glen, *supra* note 10, at 141; O'Neill, *supra* note 10, at 703.

201. Glen, *supra* note 10, at 148.

she attended a non-elite law school.²⁰² Presumably, a nominee who never went to law school would be even more objectionable to the Senate.

As a result, presidents who want to win confirmation of ideologically compatible Justices are unlikely to choose nominees who never attended law school. This limitation adds to complaints raised by critics of an overly aggressive senatorial role in the confirmation process.²⁰³ Even if presidents have generally succeeded in appointing Justices who reflect their views,²⁰⁴ they cannot further enhance their political influence by appointing Justices without formal legal education.²⁰⁵ Thus, the confirmation process prevents presidents from creating a more politically responsive Court by enhancing its educational diversity.

B. Does the Law Run Out More Quickly for Justices Who Never Attended Law School Than for Other Justices?

Schauer questions the need for formal legal education because he assumes it is unrelated to the work appellate judges do in deciding hard cases.²⁰⁶ The cases in this study are hard not only because they were heard by the Supreme Court, but because the Justices themselves could not agree on a unanimous outcome. In these hard cases, the study identifies significant relationships between Justices' educational backgrounds and their votes. Justices who share the benefit of formal legal education found more to agree about than other Justices, and they also voted significantly less politically than other Justices.

These findings call Schauer's assumption into question. It may be that Schauer is generally correct, the law does run out in hard cases. But his understanding fails to account for the possibility that the law may run out more quickly for some people than others. Perhaps people who never went to law school are less well equipped or predisposed to abide by potentially governing legal principles than people who attended law school. For example, would a person without formal legal training be as likely to concede that a contested policy issue is governed by the doctrine of stare decisis?²⁰⁷

Given these possibilities, and evidence that Justices who attended law school vote differently than others, the value of formal legal education should not be assumed away. One should hesitate before dismissing

202. *Id.* at 144 (noting that Miers's "legal education at Southern Methodist University served as a lightning rod for criticism over her nomination to the Court").

203. Some scholars object to an aggressive Senate, which drives presidents to nominate only middle-of-the road Justices. See McGinnis, *supra* note 28, at 667; Stone, *supra* note 12, at 459.

204. Chabot, *supra* note 10, at 1262 fig.2.

205. Presidents' appointments power is also limited by their lack of control over when a vacancy on the Court occurs. FRIEDMAN, *supra* note 4, at 374 (noting that presidents' influence is diminished as Justices' "period of service is going up").

206. Schauer, *supra* note 3, at 1731-32.

207. See Schauer, *supra* note 79, at 434 ("Law seems almost unique in its use of authoritative interpretations.").

it as useless training that bears no relationship to judicial decision-making. Instead, eliminating this prerequisite should be viewed as a choice about the direction in which the Court should move. Is it desirable to call for Justices with qualifications that have been associated with enhanced political voting? Future dialogue on this issue should directly confront possible changes brought about by eliminating Justices who are formally educated lawyers.

C. Is Eliminating Legal Education in Technocratic Justices a Good Tradeoff?

As noted above, this study focuses on the strong version of Vermeule's proposal, in which he argues that optimal diversity requires appointment of a professional *who does not also have a degree in law*.²⁰⁸ Vermeule argues completely diverse professional training is necessary to correct for lawyers' systematic biases.²⁰⁹ This study identifies politically independent voting as a distinct bias held by lawyer Justices. It therefore calls into question Vermeule's assumption that checking lawyer Justices' bias would serve only a neutral, error-correcting function.

Vermeule, of course, calls for Justices whose lack of legal training is offset by professional training in another field.²¹⁰ But it is unclear this expertise would check a Justice's tendency to vote in favor of her political inclinations.²¹¹ Without training in law, moreover, a lay Justice may be less inclined to grasp or value legal frameworks that *could* shape the outcome of a particular case. Again, legal doctrines such as *stare decisis* may be less appealing to lay Justices than they are to Justices with formal legal education.²¹² As a result, they may be prone to view a greater number of decisions as discretionary. And, based on what happened in the past, the proposal must account for the possibility that lay Justices' exercise of discretion will be biased in favor of their own political inclinations.

Not everyone considers political bias undesirable. Vermeule does not address its desirability, beyond his assumption that diverse views—here more versus less political bias—have the benefit of offsetting one another. This may have some value under Vermeule's artificial model, which focuses on enhanced competence in reaching *the* "right answer[.]"²¹³ But it is not clear why bias would necessarily have a favora-

208. Vermeule, *supra* note 2, at 1570.

209. *Id.* at 1598–99.

210. *Id.* at 1598.

211. In administrative law, for example, the New Deal vision of the agency as an expert and a political decision maker has been heavily criticized. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1683–87 (1975). Technocratic decisions made by judges may be political as well.

212. *See supra* Part III.B.

213. Vermeule, *supra* note 2, at 1577–78.

ble offsetting effect under more realistic assumptions where the right answer is up for grabs.

Introducing *more* political bias or checking a Justice's tendency to vote independently should not be viewed as mere error correction. Instead, it is a side effect that is desirable only for persons willing to accept a more politically responsive court. In light of this study, one should not discount the possibility that formally educated lawyers are better able to set aside personal political views.

These findings qualify Vermeule's assumption that lay Justices will serve a desirable, bias-checking function. For those who object to a more political Court, the weak version of Vermeule's proposal—appointing a dual-competent Justice who has formal legal training in addition to expertise in another discipline²¹⁴—represents a more compelling option. The compromise also presents a more realistic option for future appointments. A nominee with a law degree as well as a Ph.D. in economics may be more palatable to the Senate than a nominee with a Ph.D. in economics alone.²¹⁵ Thus, presidents who wish to add a Justice with diverse professional training and experience may consider dual-competent Justices a more attractive option.

D. Enhanced Political Voting and the Current Court

The proposals above are all influenced by the possibility Justices without formal legal education will enhance political voting on the Court. The study establishes this possibility using historical evidence—the only available evidence on voting patterns of Justices without formal legal education. One should not expect historical evidence to map perfectly into the present or perfectly predict votes cast by a hypothetical future Court including lay Justices. There are no doubt important differences between the historical period studied and today.

Nevertheless, it would also be unwise to ignore the only available evidence of what happened during the time when the Court included Justices without formal legal education. The study identifies enhanced political voting by Justices without formal legal education. And this occurred in a period not generally characterized by politically predictable voting on the Court. Further, Justices who voted politically in the past were at least lawyers with informal legal training. A lay Justice appointed today might have no training in law whatsoever.²¹⁶ Such a Justice may be even less likely to reach agreement on legal and apolitical grounds than Justices who read the law.

214. *Id.* at 1581.

215. See generally Stone, *supra* note 12, at 409–10.

216. Vermeule, *supra* note 2, at 1585.

Moreover, the study controls for alternative explanations as to why the Court voted less politically in the historical time period.²¹⁷ Politically independent voting cannot simply be attributed to generally inflated rates of agreement due to norms of consensus or fewer opportunities to hear politically salient cases before 1925.²¹⁸ Current proposals to eliminate Justices with formal legal education should acknowledge that this background has been significantly associated with enhanced political voting in the past.

If anything, changes in appointments criteria seem more likely to enhance political voting now than in the past. Since 1925, the Court has enjoyed virtually unfettered discretion²¹⁹ to fill its docket with cases involving politically salient issues.²²⁰ Further, politically salient issues themselves have become more divisive in an era of enhanced political polarization.²²¹ And since the 1970s presidents have enjoyed unprecedented success in selecting Justices whose votes reflect ideologies of appointing presidents.²²² In a Court that is already well-situated to grow increasingly political, there is more reason than ever to think Justices without formal legal education could enhance this tendency.

Still, one might wonder whether the modern Court has become such a “political court”²²³ that it cannot be pushed in an even more political direction. This query fails, however, to account for evidence of the political independence the Court has retained. As a matter of constitutional structure, Justices are not elected and hold life tenure once in office.²²⁴ Nor do Justices hold themselves out as political actors. In confirmation hearings, for example, Supreme Court nominees “have long insisted that their ‘personal predilections’ have no place in the judicial enterprise.”²²⁵ And once in office, Justices maintain the appearance of neutrality by publicly justifying their decisions with opinions incorporating “prece-

217. See *supra* Part II.D (describing variables and interactions that account for norms of consensus and different levels of political voting by Justices appointed before and after 1925).

218. See *supra* note 171 and accompanying text.

219. The Court gained discretion over its docket under the Judiciary Act of 1925, ch. 229, § 237(a), 43 Stat. 936, 937. For a more detailed discussion of this change, see *infra* Appendix A, Part C.2.

220. Justices today also have more clerks than in the past. It is not clear this would alter the way Justices without formal legal education decide cases. First, a Justice would need to decide she wants to hire a clerk with a degree in law rather than another field. Second, adding clerks would only matter if lay Justices vote differently based on diminished understanding of the law. If these Justices grasp competing legal arguments but simply value the law less, it is unclear law clerks would make a difference.

221. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 278–79 (2011).

222. Ideology of appointing presidents has predicted Justices’ agreements better than ever since the 1970s. See Chabot, *supra* note 10, at 1262 & fig.2.

223. POSNER, *supra* note 6, at 269 (dubbing the Supreme Court a “political court”).

224. See U.S. CONST. art. II, § 2, cl. 2; see also U.S. CONST. art. III, § 1.

225. Carolyn Shapiro, *Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings*, 88 CHI.-KENT L. REV. 455, 465 (2013).

dent-based” arguments.²²⁶ Justices have also been known to “expressly disclaim . . . personal policy preferences” in their opinions.²²⁷

Beyond appearances, many Supreme Court decisions defy political explanation.²²⁸ Since the 1940s the Court has decided “[a]bout 29 percent” of “orally argued decisions” unanimously.²²⁹ Just last term the percentage of unanimous decisions spiked to 66%.²³⁰ In unanimous cases, Justices appointed by Republicans and Democrats, and who have staked out as ideologically distant positions as Justice Sonia Sotomayor and Justice Clarence Thomas, nevertheless agree on the same case outcome. Thus, it is not surprising that “ideology” has been found to play “only a small role in unanimous decisions.”²³¹

Even non-unanimous decisions, which no doubt reflect a “substantial ideology effect,”²³² still leave room for explanatory factors other than Justices’ expected political preferences.²³³ In recent decades, for example, ideology of appointing presidents has gained statistically significant predictive power over Justices’ agreements in non-unanimous cases.²³⁴ But variation in ideology of appointing presidents (along with variation in ideology of Senates to whom Justices were nominated) explains only 17% of the variation in Justices’ rates of agreement.²³⁵

Beyond predictors of Justices’ votes, Justices’ actual voting alignments also provide evidence of ideologically independent voting. For example, Justice John Paul Stevens’s general voting record places him at the far left of the Court’s ideological spectrum, whereas Justice Antonin Scalia has a conservative voting record that places him at the opposite end of the spectrum.²³⁶ Justices Stevens and Scalia nevertheless voted

226. Cross, *supra* note 6, at 260, 325.

227. *Id.* at 261 (quoting Justice Stevens’ disclaimer of ideological reasons for the decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)) (internal quotation mark omitted).

228. See generally Solum, *supra* note 117, at 2487–88 (“[R]esults reported in *Behavior of Federal Judges* make it clear that a purely ideological model does not fare well at any level, even the United States Supreme Court. The data strongly suggest that law and legal preferences play an important role in explaining judicial behavior.”).

229. EPSTEIN, LANDES, & POSNER, *supra* note 117, at 124.

230. Kedar S. Bhatia, *Stat Pack for the October Term 2013*, SCOTUSBLOG 5 (July 3, 2014) http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_Stat_Pack_for_OT13.pdf; Kedar Bhatia, *A Few Notes on Unanimity*, SCOTUSBLOG (July 10, 2014, 10:40 AM), <http://www.scotusblog.com/2014/07/a-few-notes-on-unanimity> (noting that the Court’s resolution of 38% of cases in 9-0 opinions without any concurrence was also higher than in previous years).

231. EPSTEIN, LANDES & POSNER, *supra* note 117, at 136; Solum, *supra* note 117, at 2477.

232. EPSTEIN, LANDES & POSNER, *supra* note 117, at 149.

233. Chabot, *Mavericks*, *supra* note 25, at 1013–14.

234. Chabot, *supra* note 10, at 1261–62 & fig.2.

235. *Id.* at 1261 fig.2, 1272 App. B (reporting Adj. R2d = .1724 in column 2).

236. See Randy Schutt, *Graph of Martin-Quinn Scores of Supreme Court Justices 1937–Now*, WIKIMEDIA COMMONS (Sept. 17, 2014), http://commons.wikimedia.org/wiki/File:Graph_of_Martin-Quinn_Scores_of_Supreme_Court_Justices_1937-Now.png. For more information about Martin-Quinn scores, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

together in a non-trivial 43% of non-unanimous cases.²³⁷ Indeed, ideologically “disordered” voting coalitions, with extremes such as a Stevens-Thomas or Scalia-Souter-Ginsburg dissent,²³⁸ are not uncommon: Edelman, Klein, and Lindquist identify significant numbers of ideologically disordered votes in non-unanimous cases.²³⁹ They conclude “unexpected voting patterns are frequently caused by other considerations outweighing ideology in the thinking of at least some Justices.”²⁴⁰

Justices have cast surprisingly independent votes even in high profile cases. Take Justice Roberts’s decision to vote with the liberal bloc of the Court and uphold the Affordable Care Act’s individual mandate in *National Federation of Independent Business v. Sebelius*.²⁴¹ Roberts’s decision was surprising because he parted company with Justices Thomas, Scalia, Alito, and Kennedy and was the only Republican appointee to find the Act’s mandate constitutional.²⁴² Roberts’s decision has been explained in legal and institutional terms that transcend basic political inclinations.²⁴³

No matter what the theoretical explanation for judicial independence, it is a trait that has been significantly associated with going to law school.²⁴⁴ Thus, one should pause before assuming a Justice who lacks formal legal education will maintain current levels of judicial independence. It is difficult to imagine a candidate who has not formally studied the role of precedent, for example, explaining to the Senate how she will follow it, much less skillfully incorporating precedent into an opinion. And, based on what happened in the past, one should not expect Justices without formal legal education to do as well seeking or reaching politically independent grounds for agreement with their colleagues. Proposals to enhance the Court’s professional diversity should account for this study’s significant link between diverse professional training and enhanced political voting.

237. Chabot, *supra* note 10, at 1248 (discussing voting records through 2009).

238. Edelman, Klein & Lindquist, *supra* note 191, 834–35 tbl.3.

239. *Id.* at 830 tbl.1 (noting ideologically ordered voting, by select natural court, in only 36–57% of all non-unanimous cases).

240. *Id.* at 843.

241. 132 S. Ct. 2566, 2577 (2012).

242. *Id.*

243. Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 86 (2012) (accepting accounts of Roberts’s opinion as “institutionalist and as resisting government compulsion”); Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 118 (2012) (arguing that Roberts “transcended . . . polarized political debates” through “analytical convergence” and the “law”); Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 55 (2013) (noting that Roberts’s opinion reflects his ability to see both dominant and alternative constitutional gestalts).

244. See *supra* note 185 and Figure 2.

CONCLUSION

This study links diverse educational backgrounds to two significant differences in how Justices voted. Justices who shared the benefit of formal legal education (1) voted together more often and (2) were less politically predictable than other Justices without this background. Proponents of Justices without formal legal education should recognize that educational diversity has been associated with greater levels of politically predictable voting in the past.²⁴⁵ This enhanced political voting may occur even if a Justice without formal legal education sits with other Justices who attended law school.²⁴⁶

Advocates of a more politically responsive Court should generally find Justices without formal legal education desirable. In the past they reflected views of their appointing presidents more closely than other Justices. These findings suggest another critique of the appointments process for advocates of a strong executive role.²⁴⁷ By limiting presidents to a pool of candidates with formal legal education, the appointments process impedes presidents' ability to update and shape the Court's political views.

On the other hand, appointing a Justice without formal legal training should not be understood to promote optimal diversity in a purely neutral manner. It should also be understood to have an important potential side effect: enhanced political voting. Complete professional diversity should be expected to improve decision making only if one considers enhanced political voting an improvement.

This study considers one type of diversity in professional training that is no longer present on the Court. Future studies might expand the inquiry to consider how educational and professional diversity relate to a wider array of judicial behavior. Are judges with certain backgrounds more likely to apply particular legal doctrines or favor formalism or pragmatism in judging?

These future inquiries can help identify differences associated with enhanced professional and educational diversity on the bench, as well as the normative goals diversity is likely to serve. For now, however, formal legal education is associated with significant differences in how Supreme Court Justices voted. Justices who attended law school voted together more often and less politically than Justices without the same educational background. A Court including Justices without formal legal education should not be expected to maintain the same level of political independence as a Court comprised entirely of Justices who attended law school.

245. See *supra* note 185 and Figure 2.

246. See *supra* note 185 and Figure 2.

247. See McGinnis, *supra* note 28, at 667; Stone, *supra* note 12, at 460.

APPENDIX A:

A. Explanatory Variables: Calculation of Absolute Distance Between Appointing Presidents' DW-NOMINATE Scores (POL_DIST)

As noted in Part II, above, proximity of two Justices' political inclinations was calculated using the absolute distance between their appointing presidents' DW-NOMINATE scores. This section provides a detailed description of DW-NOMINATE scores used in the study.

The DW-NOMINATE scores rank presidents from liberal to conservative on a scale of -1 to +1. They are derived from roll call votes cast by each member of Congress and are comparable across different Congresses. The scores rank presidents in equivalent terms based on the positions presidents take on particular congressional roll call votes.

For the historical time period covered here, it is important to consider both dimensions of liberal and conservative ideology represented by DW-NOMINATE scores.²⁴⁸ The first dimension addresses the "basic issue of the role of government in the economy."²⁴⁹ The second dimension picks "up regional differences within the United States,"²⁵⁰ often accounting for issues of race or other dimensions, which may divide members of the same party.²⁵¹

To account for both dimensions, the study incorporates a combined DW-NOMINATE score. It assigns each dimension the weight recommended by their authors. First dimension scores receive a weight of 1 and second dimension scores receive a weight of 0.4638.²⁵² For Justices who were elevated to Chief Justice while serving as Associate Justices, such as Chief Justice Edward White, the study uses DW-NOMINATE scores for the initial nomination to the Court.²⁵³

248. See, e.g., KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 129 (1997). Historical DW-NOMINATE scores for presidents are based on limited numbers of observations. See generally VOTEVIEW.COM, <http://www.voteview.com/> (last visited Oct. 11, 2014). They nevertheless remain the best available metrics of presidential ideology beyond party.

249. Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Party Polarization: 1879–2010*, VOTEVIEW.COM (Jan. 11, 2011), http://voteview.com/polarized_america.htm.

250. *Id.*

251. POOLE & ROSENTHAL, *supra* note 248, at 232.

252. Keith Poole et al., "Common-Space" DW-NOMINATE Scores with Bootstrapped Standard Errors (Joint House and Senate Scaling), VOTEVIEW.COM (Jan. 22, 2011), <http://www.voteview.com/dwnomjoint.asp>.

253. The study makes a further adjustment for Charles Evans Hughes. Hughes originally served as an Associate Justice but then left the Court to run for president in 1916. See 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 448–49 (1924). He was later appointed Chief Justice in 1930. *Id.* Because there are DW-NOMINATE scores for only Hughes's initial appointment, the study uses these scores for both of Hughes's terms on the bench.

B. Control Variables

As noted in Part II, the study includes several control variables. These variables reflect alternative explanations for variation in Justices' agreements. The sections below describe control variables used in the study.

1. Fixed Effects Variables Control for Varied Norms of Consensus

The study uses fixed effects dummy variables to control for generally inflated rates of agreement due to norms of consensus. Justices are thought to have publicly suppressed private disagreements, and joined unanimous opinions with which they did not personally agree, more frequently in part of the period covered by this study.²⁵⁴

Although Justices originally issued their opinions *seriatim*, Chief Justice John Marshall used his leadership skills to convince Justices to abandon this practice and join a single opinion of the Court.²⁵⁵ This pattern of unanimity held during the remainder of the nineteenth century and into the twentieth century.²⁵⁶ High levels of unanimity continued through the 1920s, eroded somewhat after the Judiciary Act of 1925, and gave way to sharply increased rates of dissent by the 1940s.²⁵⁷

Thus, it is possible that high rates of agreement between some Justices in the study relate to historical norms of consensus, which operate independently of Justices' educational backgrounds.²⁵⁸ This study sidesteps much of the concern by excluding unanimous decisions. The non-unanimous cases studied here are those in which at least one Justice violated consensual norms by dissenting.

254. See Epstein, Segal & Spaeth, *supra* note 147, at 362–63; Post, *supra* note 171, at 1335 fig.18; see generally Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781 (2011) (developing “a consensus voting model for estimating preferences of federal circuit court judges”).

255. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 166 (1999); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent* 21 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory, Working Paper No. 186, 2008) (citing 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 16 (1919) and William H. Rehnquist, *The Supreme Court “The First Hundred Years Were the Hardest,”* 42 U. MIAMI L. REV. 475, 480–81 (1988)), available at http://ssrn.com/abstract_id=1019074.

256. Epstein, Segal & Spaeth, *supra* note 147, at 362.

257. *Id.* at 365; Post, *supra* note 171, at 1310 & fig.10. The Court's ability to hear a greater percentage of politically salient cases under the 1925 Judiciary Act may have also contributed to increased rates of dissent. Halpern & Vines, *supra* note 147, at 480 (discussing how, in addition to wider discretionary jurisdiction, the Act eliminated appeals as of right in many “uncontroversial cases” and “freed the [C]ourt to concentrate in obligatory appeals on only those cases raising salient national issues”). See generally Judiciary Act of 1925, ch. 229, 43 Stat. 936, 936–42. To the extent this change in jurisdiction was followed by stronger patterns of politically predictable voting, it is accounted for in the interaction variable comparing changes in political voting before and after 1925. See *infra* Appendix A at Part C.

258. Alternatively, it may be that Justices who share the same background in formal legal education adhere to norms of consensus more strongly.

Still, pressure to agree with one's colleagues could influence voting patterns in non-unanimous cases. Even when one Justice dissented, other Justices may have still felt pressure to join a majority decision. A 5–4 decision sends a different message than an 8–1 decision, and may have been perceived as less legitimate in at least part of the period studied here.²⁵⁹ Thus, it is possible that some Justices in the study had generally inflated agreement rates and suppressed political voting due to historical norms of consensus.

This study controls for inflated agreement rates by including Justice-level fixed effects dummy variables.²⁶⁰ The fixed effects measure variation in each Justice's rates of agreement by calculating a unique starting point (or intercept) for each Justice. The unique starting point adjusts for generally inflated agreement rates. It allows analysis to focus on whether *intra*-Justice variation in agreement rates is significantly explained by differences in proximity of political inclinations, educational backgrounds, or other control variables. Because these variables calculate a unique starting point for each Justice in the study, they are not reported in graphical depictions of results above.

2. Professional Experience

a. Same Judicial Experience (JU_EX)

Scholars have frequently hypothesized “how [prior] judicial experience may influence attitudes about case outcomes.”²⁶¹ Although prior judicial experience has not been consistently associated with judges' voting patterns, Tate and Handberg's historical study finds that it has some explanatory power over Supreme Court decisions in economics cases.²⁶² Thus this study will also account for its possible explanatory power.

This study uses “JU_EX” as a dummy variable identifying differences or similarities in Justices' prior experience as judges. Pairs of Justices who both had prior experience as judges at the federal or state level received a 1, all other pairs received a 0.²⁶³

259. See Post, *supra* note 171, at 1315–17 (discussing Brandeis' concern with dissent in light of legislation proposed by Senator Borah, which would have required at least 7 members of the Court to agree to “any decision invalidating an Act of Congress”).

260. The study included the fixed effects specification by hand coding binary fixed effects dummy variables for each Justice and adding them to data used in the regression.

261. See George, *supra* note 1, at 1354–55, 1362–63 (describing past studies and hypothesizing how prior experience may influence decision making on the Roberts's Court).

262. Tate & Handberg, *supra* note 16, 474 tbl.1.

263. See Epstein et al., JUSTICES DATABASE, *supra* note 19. Variables 81–96 describe place and dates a Justice served on a state trial or appellate court, or federal district court or court of appeals.

b. Same Prosecutorial Experience (PRO_EX)

Many studies hypothesize that prosecutorial experience “will influence the ideological direction of judges’ decisions.”²⁶⁴ These judges may tend to favor government interests in cases against criminal defendants, as well as other types of cases.²⁶⁵ Or their experience prosecuting underdogs or have-nots may make them generally more conservative than judges without prosecutorial experience.²⁶⁶ Prosecutorial experience has been found to predict Justices’ rulings in historical civil rights and liberties and economics cases,²⁶⁷ so it is important to consider its explanatory power here.

This study uses “PRO_EX” as a dummy variable identifying differences or similarities in Justices’ experience as prosecutors or government attorneys. Pairs of Justices who both had this experience received a 1, all other pairs received a 0.²⁶⁸ Although some studies measuring outcomes in criminal cases have focused narrowly on judges with experience as a criminal prosecutor,²⁶⁹ this study looks to all types of cases. Thus it considers experience in both criminal and civil cases where a Justice has past experience representing the government.²⁷⁰

3. Personal Attributes

a. Same High Economic Status (ECON)

Familial economic status has not been generally thought or found to explain Justices’ voting patterns in historical or other cases.²⁷¹ Still, it seems a possible alternative explanation for higher rates of agreement. Perhaps Justices who grew up in a more affluent environment, with greater amounts of property to protect, valued property rights more than Justices from less wealthy backgrounds.

This study uses “ECON” as a dummy variable identifying differences or similarities in Justices’ family economic status. Pairs of Justices

264. George, *supra* note 1, at 1353.

265. *Id.* at 1354; Nagel, *supra* note 17, at 266 tbl.1.

266. George, *supra* note 1, at 1354; Tate & Handberg, *supra* note 16, at 474 tbl.1 (prosecutorial service was negatively correlated with liberal votes in civil rights and economics cases, but the effect was mitigated for prosecutors who also had judicial experience).

267. Tate & Handberg, *supra* note 16, at 474 tbl.1, 474–76.

268. Epstein et al., JUSTICES DATABASE, *supra* note 19. Variables 145–159 record place and dates of experience representing local or state government interests: deputy or city attorney, assistant district or county attorney, district or county attorney, state assistant attorney general or state attorney general. Variables 97–110 record place and dates of experience representing federal government interests: Assistant U.S. Attorney or U.S. Attorney, work in the office of or as Solicitor General, and work in the office of or as Attorney General.

269. Sisk, Heise & Morriss, *supra* note 17, at 1473.

270. See Epstein et al., JUSTICES DATABASE, *supra* note 19.

271. Tate & Handberg, *supra* note 16, at 476; Tate, *supra* note 14, at 358.

whose families were both upper to upper-middle class received a 1, all other pairs received a 0.²⁷²

b. Same Non-Urban Origins (NON_URBAN)

Justices from rural and urban origins may also vote differently. Tate and Handberg's historical study measured whether Justices from non-urban, agricultural backgrounds voted more conservatively in both civil rights and economics cases.²⁷³ They identified a significant negative relationship between this background variable and liberal votes in both civil rights and liberties and economics cases.²⁷⁴

This study uses "NON_URBAN" as a dummy variable identifying differences or similarities in Justices' childhood surroundings. Pairs of Justices whose childhood surroundings were non-urban received a 1, all other pairs received a 0.²⁷⁵

c. Originated From Same Geographic Region (REG)

A final factor that may explain Justices' agreements is common regional origin. Tate and Handberg found Justices from the South voted considerably more conservatively in civil rights and liberties cases but not in economics cases.²⁷⁶

This study incorporates "REG" as a dummy variable identifying differences or similarities in Justices' regional origins. Pairs of Justices who were both from Northern states or both from Southern states received a 1, all other pairs received a 0.²⁷⁷

C. Interaction Variables

As noted in Part II, *supra*, the study interacts political inclinations with the FORMAL_ED dummy and with a dummy identifying Justices appointed after 1925. This interaction identifies whether Justices who both went to law school or Justices appointed after 1925 vote more or less politically than other Justices. The sections below provide more detail on these interactions.

272. Epstein et al., JUSTICES DATABASE, *supra* note 19. Variable 18, Family economic status. For this variable, scores 5 and 4 represent upper to upper-middle class family status. Justices who both had scores of 4 or 5 received a 1. Any pair with a Justice from a middle to lower class family status (scores 3-1) received a zero.

273. Tate & Handberg, *supra* note 16, at 468. Their study identifies agricultural background according to whether the Justice had a father who was a farmer. *Id.*

274. *Id.* at 474 tbl.1.

275. Epstein et al., JUSTICES DATABASE, *supra* note 19. Variable 17. For this variable Justices with urban childhood surroundings were coded as 5s. Justices in more rural childhood surroundings were coded as 1s through 4s. Thus, both Justices had to have a score of 4 or less to receive a "1" dummy for this variable.

276. Tate & Handberg, *supra* note 16, at 474 tbl.1.

277. Epstein et al., JUSTICES DATABASE, *supra* note 19 (variable 16, nominee's childhood location). The study uses a strict definition of Southern states and did not count border states, such as Maryland, as the South.

1. Political Inclinations and Justices Who Both Attended Law School

The second regression interacts proximity of political inclinations and educational backgrounds. The regression multiplies the FORMAL_ED dummy by the variable for proximity of Justices' political inclinations, POL_DIST.²⁷⁸ The interaction between these variables measures whether there is a significant difference between predictive power of political inclinations for two groups of Justices:

- (1) pairs of Justices with one or more Justice who did not attend law school; and
- (2) pairs of Justices who both attended law school.²⁷⁹

The interaction coefficient reported by the regression allows calculation of the total predictive power of political inclinations for Justices who both attended law school.²⁸⁰

2. Political Inclinations for Justices Appointed Before and After 1925

The first regression uses an interaction to account for the fact that later appointed Justices may have had greater opportunities to hear politically salient cases than earlier appointed Justices. The Judiciary Act of 1925 gave the Court greater discretion to decide politically salient cases than before.²⁸¹ Discretionary review by writ of certiorari replaced much of the Court's mandatory appellate jurisdiction and "essentially recognized the Court as the supervisor of the system of federal law."²⁸²

278. See *supra* text accompanying note 179.

279. If the effect of distance between political inclinations changes for Justices who both attended law school, it will show up in the data as a significant coefficient on the interaction variable. To see this, note the expected change in agreement rate for a change in political distance is the general POL_DIST coefficient for pairs where the dummy variable is equal to zero and the POL_DIST coefficient plus the POL_DIST*FORMAL_ED interaction coefficient during the time periods the dummy variable is equal to one. A formal test of the null hypothesis that the predictive power of political inclinations did not change is therefore equivalent to a test of the null hypothesis that the POL_DIST coefficient = POL_DIST coefficient + POL_DIST*FORMAL_ED interaction coefficient, or that the POL_DIST interaction coefficient = 0.

280. To accomplish this I add the coefficient for group (1) to the interaction coefficient for group (2). Thus, total predictive power of political inclinations for Justices who both attended law school equals the sum of group 1 plus group 2. I also needed to calculate new confidence intervals for sum of two coefficients. This involved a multi-step process. First, $\text{Variance}(\beta_a + \beta_b) = \text{Variance}(\beta_a) + \text{Variance}(\beta_b) + 2 * \text{Co-variance}(\beta_a + \beta_b)$. See generally JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 140-41 (5th ed. 2008). The standard error is the square root of this estimated variance, and the t-stat is $(\beta_a + \beta_b) - 0 / \text{standard error}$. The t-stat can then be converted into a p-value, which reflects confidence intervals reported in this study.

281. See Judiciary Act of 1925, ch. 229, 43 Stat. 936, 936-42.

282. Post, *supra* note 171, at 1273; see also Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POLS. 361, 385 (1988) (concluding that multiple factors including Chief Justice Stone's ineffectual leadership and change to discretionary jurisdiction contributed to decline of consensual norms on the Court).

Changes in mandatory appellate jurisdiction are also thought to have freed the Court from “uncontroversial” appeals and allowed it to focus on appeals “raising salient national issues.”²⁸³ Thus, different opportunities to resolve politically divisive cases before and after 1925, rather than common educational background, may explain voting by some Justices in the study. To account for this possibility, the study adds a time dummy variable to identify the distinct explanatory power attributable to political inclinations in the post-1925 time period.

The post-1925 time dummy accounts for voting records of Justices appointed after 1925. The time dummy allows consideration of two different groups of Justices: Justices appointed through 1925 (Justice Swayne through Justice Stone) and Justices appointed after 1925 (Justice Black through Justice Jackson). This dummy controls for politically predictable voting limited to a set of later-appointed Justices.

It codes each dummy variable according to a single Justice’s paired agreements with all other Justices with whom he sits. For example, the data includes agreement rates for Justice Sutherland and all other Justices with whom he sits, then agreement rates for Justice Reed and all other Justices with whom he sits, etc. I assign a 1 or 0 according to the first Justice in the pair, so that the pairs for Justice Reed, who was appointed after 1925, receive a 1, and the pairs for Justice Sutherland, who was appointed before 1925, receive a 0.

The regression multiplies the POST_1925 time dummy by the variable representing proximity of Justices’ political inclinations (POL_DIST).²⁸⁴ Again, the interaction between these variables measures whether there is a significant difference between predictive power of political inclinations over agreement rates for Justices appointed in distinct time periods. The interaction coefficient reported by the regression is used to calculate the total predictive power of political inclinations for Justices appointed in the post-1925 time period.

283. Halpern & Vines, *supra* note 147, at 480.

284. See *supra* note 181 and accompanying text.

APPENDIX B: SUMMARY OF REGRESSION RESULTS

Explanatory Variable	1		2	
Proximate Political Inclinations (All Justices)	-0.0322	[0.0322]	n/a	
Proximate Political Inclinations, one or more Justices Did Not Attend Law School	n/a		0.0784**	[0.0356]
Difference in Prox. Pol. Inclinations for Justices Appointed Post-1925	-0.0066	[.0406]	n/a	
Total Level Prox. Pol. Inclinations for Justices Appointed Post-1925	-0.0388	[0.0262]	n/a	
Both Justices=Formal Legal Ed	0.0401**	[0.0182]	n/a	
Difference in Proximate Political Inclinations For Justices Who Both Attended Law School	n/a		0.0681**	[0.023]
Total Level Proximate Political Inclinations For Justices Who Both Attended Law School	n/a		-0.0103	[0.0247]
Judicial Experience	0.0137	[0.012]	0.019	[0.0122]
Prosecutorial Experience	0.0197	[0.0148]	0.0203	[0.0146]
Economic Status	0.0036	[0.0161]	0.0036	[0.0162]
Non-Urban Origins	-0.0103	[0.0157]	-0.009	[0.016]
Regional Origins	-0.0073	[0.0115]	-0.0039	[0.0123]
Adj. R2d	.1939		.2016	
N	551		551	

Column I reports results depicted in Figure 1,²⁸⁵ Column II reports results depicted in Figure 2.²⁸⁶ ** denotes $p < 0.05$; p-values are estimated with clustered standard errors, which are reported in brackets.

285. See *supra* note 184.

286. See *supra* note 185.