



Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010

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Summary

On May 1, 2009, Justice David H. Souter announced his retirement as an Associate Justice when the U.S. Supreme Court recessed for the summer. To fill this vacancy, President Barack Obama selected Sonia Sotomayor, a judge from the U.S. Court of Appeals for the Second Circuit. In announcing the nomination, President Obama noted her Ivy League education and extensive judicial experience. President Obama also emphasized Sotomayor's life story, discussing in particular her upbringing as a child of Puerto Rican-born parents in a Bronx housing project.

The Sotomayor nomination prompted renewed discussion among Senators, media commentators, and scholars regarding racial, ethnic, gender, religious, professional, and educational diversity on the Court. With the upcoming retirement of Justice John Paul Stevens, announced on April 9, 2010, this discussion is likely to be renewed. With his departure, the Court will lose its only protestant Christian member. Justice Stevens is also the only active Justice to have served in the military during wartime. Against the backdrop of recent and pending changes to the Court's composition, this report examines the social, professional, and educational backgrounds of the Justices across the entire history of the Supreme Court.

Over time, the Supreme Court has become more diverse in some ways and more homogeneous in others. When first constituted, and throughout most of its history, no women or minorities served on the Court. This changed with the appointment of the first African-American Justice, Thurgood Marshall, in 1967, and the first female Justice, Sandra Day O'Connor, in 1981. When Justice Marshall retired from the Court in 1991, he was succeeded by another African-American, Justice Clarence Thomas. Although Justice O'Connor, upon her retirement in 2006, was succeeded by a male, Justice Samuel A. Alito Jr., the Court's membership once again, in August 2009, included two female Justices, upon the confirmation of Sonia Sotomayor.

The religious affiliations of the Court's members also has changed over time. For almost the first 50 years of the Court, all Justices were affiliated with protestant Christian churches. The first Jewish Justice, Louis Brandeis, was appointed in 1916. Currently, two Jewish Justices, Ruth Bader Ginsburg and Stephen G. Breyer, serve on the Court. The first Catholic Justice, Chief Justice Roger Brooke Taney, was appointed in 1836. With the confirmation of Justice Sotomayor, six of the nine current Justices identify as Roman Catholic.

The career experiences of the Court's Justices, while quite diverse in the past, have become more homogeneous in recent times. Historically, Justices had served in a variety of professions, such as in the Cabinet, in a federal or state legislative body, or in a private legal practice. In the last 50 years, however, Justices have more and more frequently been elevated from positions on the federal circuit courts of appeals. Of the nine current Justices, all possess federal circuit court experience, and six have served as government attorneys in some capacity. No sitting Justice has served in a federal or state Cabinet position or legislature. Justice Sonia Sotomayor brings both experience as a private practitioner and a government attorney and is the only current Justice on the Court to have experience as a federal trial judge.

Over time, Justices' legal educations have become more homogeneous, as well. In the last 20 years, especially, three Ivy League law schools—Harvard, Yale, and Columbia—have been disproportionately represented on the Court. Of the nine sitting Justices, eight have attended one of these three law schools, including recently confirmed Justice Sotomayor, who is a graduate of Yale Law School.

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Introduction

On May 1, 2009, Justice David H. Souter announced his retirement as an Associate Justice when the U.S. Supreme Court recessed for the summer.¹ To fill the vacancy created by Justice Souter's resignation, President Barack Obama selected Sonia Sotomayor, a judge from the U.S. Court of Appeals for the Second Circuit. In announcing the nomination, the President noted her Ivy League education and extensive judicial experience, first as a federal trial judge and later as a federal appellate judge, as evidence of her qualifications to sit on the Court. President Obama also emphasized Judge Sotomayor's life story, discussing in particular her upbringing as a child of Puerto Rican-born parents in a Bronx housing project.²

On April 9, 2010, after more than 34 years of service, Justice John Paul Stevens announced his intention to retire at the beginning of the Court's summer recess.³ Justice Stevens, who was elevated from the U.S. Court of Appeals for the 7th Circuit in 1975, will retire at the age of 90. With his departure, the Court will lose its only protestant Christian member. Justice Stevens is also the only active Justice to have served in the military during wartime.

The Constitution is silent on the qualifications necessary to be appointed to the Court. The only reference to the appointment of Justices in the U.S. Constitution occurs in Article II, Sec. 2, Cl. 1, which states that the President "shall nominate, and by and with the consent of the Senate, shall appoint ... Judges of the supreme Court." When selecting a Supreme Court nominee, Presidents have often been understood to consider, among other things, the demographic, professional, and educational backgrounds of potential nominees, as well as how their selection might affect the diversity of the Court's membership.⁴ Presidents may choose a nominee with certain characteristics in part to satisfy particular constituencies. They may additionally perceive a nominee's demographic characteristics, professional experience, and legal education as important attributes for the next Supreme Court Justice to have.⁵

A White House news release, issued following President Obama's announcement of the Sotomayor nomination, emphasized the diversity of the nominee's prior professional experience. It noted that "[h]er American story and three decade career in nearly every aspect of the law provide Judge Sotomayor with unique qualifications to be the next Supreme Court Justice.... If confirmed, [she] would bring more federal judicial experience to the Supreme Court than any justice in 100 years, and more overall judicial experience than anyone confirmed for the Court in the past 70 years."⁶

¹ Letter from David H. Souter, Associate Justice of the United States Supreme Court, to Barack Obama, President of the United States, May 1, 2009, http://www.supremecourtus.gov/publicinfo/press/pr_05-01-09.html.

² See U.S. President (Obama), "Remarks on the Nomination of Sonia Sotomayor to be a Supreme Court Associate Justice, May 26, 2009," *Daily Compilation of Presidential Documents*, DCPD-200900402, at <http://www.gpo.gov/fdsys/pkg/DCPD-200900402/html/DCPD-200900402.htm>

³ Charlie Savage, "Justice Stevens to Retire After 34 Years," *The New York Times*, April 9, 2010, <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html?ref=politics>.

⁴ For more information about the criteria used by Presidents in the selection of nominees, please see CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*.

⁵ Some scholars argue, however, that demographic characteristics have little value in explaining judges' decision-making. For an overview of this argument, see Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993), pp. 231-234.

⁶ The White House, Office of the Press Secretary, "Judge Sonia Sotomayor," press release, May 26, 2009, (continued...)

Discussions regarding the importance and proper role of demographic characteristics in the selection of federal judges have occurred since the Carter Administration's concerted effort to appoint minorities and women to the federal bench.⁷ As recently as Justice Sotomayor's confirmation hearings, Senators, the press, and others have debated the importance and appropriateness of achieving ethnic, gender, and other forms of diversity in an institution such as the Supreme Court.⁸

Beyond the effect of demographic characteristics such as race, ethnicity, gender, and religion, some scholars have examined whether a Justice's prior professional or educational experiences influence his or her decision making. Various academics have suggested that prior professional experience, such as prosecutorial experience;⁹ previous service in federal, state, or local legislative, executive, or judicial positions;¹⁰ and military service¹¹ may influence a Justice's

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http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/.

⁷ For a discussion of President Carter's efforts and the opposition he faced, see Sheldon Goldman, "Carter Reforms Judicial Selection," in *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven, CT: Yale University Press, 1997), pp. 236-284. More recently, for a discussion of the perceived pressure on President George W. Bush to appoint a woman to the Court, see, for example, Elizabeth Bumiller, "Pillow-Talk Call for a Woman to fill O'Connor Seat," *The New York Times*, July 18, 2005, p. A13, Late Edition (Final). Additionally, scholars have examined the relationship between race, gender, and judging in the federal courts since the Carter Administration. See, for example, Thomas G. Walker and Deborah J. Barrow, "The Diversification of the Federal Bench: Policy and Process Ramifications," *The Journal of Politics*, vol. 47, no. 2 (June 1985), pp. 596-617; Barbara A. Perry, *A "Representative" Supreme Court? The Impact of Race, Religion, and Gender on Appointments*. (New York: Greenwood Press, 1991); Jennifer A. Segal, "Representative Decision Making on the Federal Bench: Clinton's District Court Appointees," *Political Research Quarterly*, vol. 53, no. 2 (March 2000), pp.138-140. See also Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993), pp. 231-234.

⁸ For a discussion of the role of these issues in the Sotomayor nomination, see, for example, Peter Baker, "Court Choice Brings Issue of 'Identity' Back to the Forefront," *New York Times*, May 30, 2009, p. A20, Late Edition (Final).

⁹ Some scholars suggest that judges with experience as government attorneys may tend to rule in favor of the government more often than their colleagues without such experience. See, for example, C. Neal Tate and Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations," *Journal of Politics*, vol. 51 (Nov. 1989), pp. 911-912; Mark A. Cohen, "Explaining Judicial Behavior, or What's 'Unconstitutional' about the Sentencing Commission?" *Journal of Law, Economics, and Organization*, vol. 7, no. 1 (Spring 1991), pp.183-199, 196; and Theodore Eisenberg and Sherri Lynn Johnson, "The Effects of Intent: Do We Know How Legal Standards Work?" *Cornell Law Review*, vol. 76, no. 6 (Sept. 1991), pp.1151-1197, 1190.

¹⁰ In particular, scholars have examined the influence of prior judicial experience on judges' behavior from a multitude of perspectives. For example, some scholars have studied the relationship between prior judicial experience and the predictability of Justices' decision making on the Court. For a discussion of this, see Edward V. Heck and Melinda Gann Hall, "Bloc Voting and the Freshman Justice Revisited," *Journal of Politics*, vol. 43, no. 3 (Aug. 1981), pp.852-860; David W. Allen, "Voting Blocs and the Freshman Justice on State Supreme Courts," *The Western Political Quarterly*, vol. 44, no. 3 (Sept. 1991), pp. 727-747; Timothy M. Hagle, "'Freshman Effects' for Supreme Court Justices," *American Journal of Political Science*, vol. 37, no. 4 (Nov. 1993), pp.1142-1157; John Szmer and Donald R. Songer, "The Effects of Information on the Accuracy of Presidential Assessments of Supreme Court Nominee Preferences," *Political Research Quarterly*, vol. 58, no. 1 (March 2005), pp.151-160. Others have examined whether Justices with prior judicial experience author higher-quality opinions. See, for example, Felix Frankfurter, "The Supreme Court in the Mirror of Justices," *University of Pennsylvania Law Review*, vol. 105, no. 6 (April 1957), pp. 781-796; William E. Hulbary and Thomas G. Walker, "The Supreme Court Selection Process: Presidential Motivations and Judicial Performance," *The Western Political Quarterly*, vol. 33, no. 2 (June 1980), pp. 185-196; Gregory A. Caldeira, "In the Mirror of the Justices: Sources of Greatness on the Supreme Court," *Political Behavior*, vol. 10, no. 3 (Autumn 1988), pp. 247-266; Montgomery N. Kosma, "Measuring the Influence of Supreme Court Justices," *The Journal of Legal Studies*, vol. 27, no. 2 (June 1998), pp. 333-372. For an examination of United States Courts of Appeals judges, see William M. Landes, Lawrence Lessig, and Michael E. Solimine, "Judicial influence: A Citation Analysis of Federal Courts of Appeals Judges," *The Journal of Legal Studies*, vol. 27, no. 2 (June 1998), pp. 271-332.

perspective and decision-making process. In addition, scholars have hypothesized that a Justice's legal education may affect his or her decision making, as well.¹²

While a Justice's prior professional experience or legal education may influence his or her decision making, it has been suggested that the relative diversity of the Court with respect to demographic characteristics, professional experience, and legal education may also influence collegial, or group, decision making. In particular, it has been argued that the quality of the decisions made by a collective decision-making body, such as the Supreme Court, is dependent in part on the diversity of its membership.¹³ Specifically, these scholars suggest that "the greater the diversity of participation by people of different backgrounds and experiences, the greater the range of ideas and information contributed to the [collective decision-making] process."¹⁴

Supreme Court Appointments in Historical Context

Historically, appointments to the Supreme Court have occurred against the backdrop of a continuing national debate about the role of the Court in our democratic system. In addition to considering a broad range of statutory and constitutional issues, the Court has addressed a wide range of disputes regarding statutory interpretation, policy questions, and the distribution of power in American society, including the balance of power between states and the federal government, the government and businesses, the government and individuals, and the three branches of the federal government.¹⁵

During roughly the first 60 years of the Republic's existence (1789-1850), issues regarding states' rights versus federal supremacy were often highly contentious. Throughout this period, presidential appointments to the Court reflected both the fragile political state of the union and an apparent desire of Presidents, in some cases, to use Supreme Court appointments to shift the balance of power in the direction of either the federal government or the states, depending on the philosophy of the Chief Executive. Presidents often appeared concerned with a nominee's state of

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¹¹ Some scholars suggest that Justices with prior military experience may have a distinct view of the role of the executive. For an example, see Gregory C. Sisk, Michael Heise, and Andrew P. Morris, "Charting the Influence on the Judicial Mind: An Empirical Study of Judicial Reasoning," *New York University Law Review*, vol. 73, no. 5 (November 1998), pp. 1439.

¹² In particular, it has been argued that while law schools generally share the common purpose of "nourish[ing] and transmit[ing] the Anglo-American legal tradition" through a well-documented socialization process, each law school may impart its own institutional perspective. This may be especially true for Ivy League institutions, such as Harvard, Yale, and Columbia, "which ... have changed slowly over time [and] may themselves have fostered a particular culture of legal education." See Daniel J. Meador, "Lawyers and Legal Education in the South: A Proposed Study," *Tennessee Law Review*, vol. 30 (Summer 1963), p. 540; Lani Guiner, Michelle Fine, and Jane Balin, "Becoming Gentlemen: Women's Experiences at One Ivy League Law School," *University of Pennsylvania Law Review*, vol. 143, no. 1 (Nov. 1994), pp. 3.

¹³ Lee Epstein, Jack Knight, and Andrew D. Martin, "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court," *California Law Review*, vol. 91, no. 4 (July 2003), p. 944.

¹⁴ *Ibid.*, p. 944.

¹⁵ For a discussion of these themes, see generally Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, Sixth Edition (Washington, DC: CQ Press, 2006); and Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, Sixth Edition (Washington, DC: CQ Press, 2006).

residence, seeking balanced representation from each region of the country, or with a nominee's proven political loyalty or perceived political reliability once on the Court.¹⁶

Starting in the 1850s, as tensions over the appropriate division of power between the federal and state governments increased, Presidents appeared to seek different characteristics in their Supreme Court nominees. According to constitutional scholar and longtime observer of the Supreme Court, Henry J. Abraham, "mounting attacks on the Court because of what abolitionists termed its pro-Southern stance in slavery and fugitive slave issues" prompted Presidents, when making a nomination, to consider a nominee's perceived strength of character, among other attributes, to handle the difficult questions faced by the Court.¹⁷ During and after the Civil War, until about 1880, Presidents sought Justices who could help ease tensions between the North and the South, who were geographically representative of the nation, and, in the case of Abraham Lincoln, who would further the President's interest in the war effort.¹⁸

In the 1880s, the national dialogue shifted to the implementation of laissez-faire economic policy and the ability of the government to regulate business practices; it could be argued that Presidents' criteria for selecting Supreme Court Justices also shifted to match these changing national priorities. This debate over the economic powers of the federal government continued well into the 20th century, culminating in President Franklin Delano Roosevelt's efforts to "pack the Court" with "New Deal" supporters in 1937. From 1881 through 1952, emphasis on a nominee's state of residence and prior judicial experience appeared generally, if not always, to wane. Instead, Presidents appeared to be chiefly influenced by considerations of political loyalty, personal relationships, and perceived reliability in the individuals' social and economic views in their selection of Supreme Court nominees. Arguably, this trend continued through the Truman Administration, where, Professor Abraham contends, all four of Truman's appointees were the result of "crony appointment[s]" and were good friends and political allies of the President.¹⁹

By the early 1950s, however, the Court had begun its involvement in some of the most volatile social issues of the day, including cases involving the separation between church and state and racial discrimination. Upon the death of Chief Justice Frederick M. Vinson in 1953, President Dwight D. Eisenhower, according to Professor Abraham, looked outside of his circle of advisors and colleagues for someone who could command the respect of the nation and create geographic and religious balance on the Court.²⁰ Like Presidents before him, the newly elected President Eisenhower also desired a Chief Justice who would reflect his own "moderate progressivism, common sense, high ideals, and 'absence of extreme views.'"²¹ His selection of Earl Warren as Chief Justice, however, resulted in what scholars describe as some of the Court's most controversial decisions, such as *Brown v. Board of Education* (1954),²² *Abington School District*

¹⁶ For an in-depth discussion of the criteria used by Presidents to select Supreme Court nominees in the first 61 years of the Court's history, see Henry J. Abraham, "Chapter Five: The First Forty Years: From George Washington to John Quincy Adams, 1789-1829" and "Chapter Six: The Next Forty Years: From Andrew Jackson to Andrew Johnson, 1829-1869," *Justices and Presidents: A Political History of Appointments to the Supreme Court*, Third Edition (New York: Oxford University Press, 1992), pp. 71-125.

¹⁷ Abraham, *Justices and Presidents*, p. 110.

¹⁸ *Ibid.*, pp. 110-136.

¹⁹ *Ibid.*, p. 241.

²⁰ *Ibid.*, p. 241.

²¹ *Ibid.*, p. 254.

²² 347 U.S. 483 (1954). This decision effectively overruled the separate-but-equal doctrine, mandating the desegregation of public schools with "all deliberate speed." For a discussion of desegregation cases in a broader (continued...)

v. *Schempp* (1963),²³ and *Reynolds v. Sims* (1964).²⁴ Eisenhower, reportedly disappointed with his appointee's leadership on the Court, required that his next appointee have prior judicial experience so that he would have an "inkling of [the nominee's] philosophy."²⁵

The nomination criteria of Eisenhower's successors, Presidents John F. Kennedy and Lyndon B. Johnson, marked a return, in the words of one scholar, to "the politics of patronage."²⁶ Kennedy and Johnson both purportedly rewarded personal loyalty in their nominations to the Court and encountered very little opposition in the Senate to their selections.²⁷ By the late 1960s, however, the nomination process became highly contentious as a result of the "resentment against the [liberal jurisprudence of the] Supreme Court."²⁸ David Yalof, a scholar of the Supreme Court appointment process, explained the transition into a new era of politics in the following way:

The battle over Abe Fortas's nomination [to the position of Chief Justice] in 1968 had ushered in a new and more contentious era for Supreme Court appointments. Divided government became a reality in the early 1970s, with Senators assuming an increasingly hostile posture against presidential nominees. Enhanced media attention of the process followed. Interest groups, including an increasingly aggressive professional bar [the American Bar Association], jockeyed for position to influence each vacancy.²⁹

During the Nixon Administration, then assistant U.S. Attorney General and future Supreme Court Justice William Rehnquist advised Nixon's Attorney General that, while interest groups may object to a nominee's perceived policy positions, as indicated by prior deeds, past speeches, or judicial record, such objections "cannot successfully defeat a nominee" without some additional objection regarding the nominee's ethics or legal qualifications.³⁰

As a result, it has been suggested, Presidents during this period more frequently sought nominees with impressive judicial qualifications. They purportedly did so not only to insulate a nominee

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context, see Epstein and Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 661-696.

²³ 374 U.S. 203 (1963). This decision found that mandatory religious activities in public schools, such as the recitation of the Lord's Prayer and the reading of Bible verses, is a violation of both the Free Exercise Clause and the Establishment Clause of the First Amendment, even if the school allows a student to be exempted from such activities with parental permission. For a discussion of Supreme Court cases concerning prayer in school, see Epstein and Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 196-213.

²⁴ 77 U.S. 533 (1964). This decision promulgated the "one man, one vote" principle, which required states to apportion state and federal legislative districts based on population. For a discussion of landmark Supreme Court cases concerning voting rights, see Epstein and Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 809-823.

²⁵ Abraham, *Justices and Presidents*, p. 254.

²⁶ David A. Yalof, *The Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: The University of Chicago Press, 1999), p. 70.

²⁷ Both of Kennedy's appointees and Johnson's first nomination of Abe Fortas to Associate Justice encountered very little opposition, with their confirmation hearings before the Senate Judiciary Committee lasting no more than two days. For more information regarding the Supreme Court appointment process generally and the length of nominations specifically, see CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*; and CRS Report RL33225, *Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President*, respectively.

²⁸ Yalof, *The Pursuit of Justices*, p.130.

²⁹ *Ibid.*, p.131.

³⁰ *Ibid.*, p.121.

from criticism, but also (as President Eisenhower had done) to gauge, from a nominee's judicial experience, how he or she might make decisions once on the Court.³¹ Consistent with this hypothesis, the vast majority of Supreme Court Justices appointed in the last 30 years have had prior judicial experience, specifically experience as judges in the U.S. Courts of Appeals.

Over the course of two centuries, the importance of demographic characteristics, professional experience, and legal education in the selection of Justices has varied widely. This report examines these characteristics across the four historical periods described above (1789-1850, 1851-1880, 1881-1952, 1953-2010).³² Specifically, the first section examines, for each of the time periods, the race, ethnicity, gender, and religious affiliation of the Justices. The second section examines the prior professional backgrounds of the Justices, including past experience in private practice or as government attorneys; as judges; as legislators or executives at the local, state, and federal level; and as members of the military. The third and final section examines the professional training and legal education of Supreme Court Justices, focusing on developments in legal education from 1789 to the present and the representation of Ivy League law schools on the Court.

Demographic Characteristics

Race and Ethnicity

Since the creation of the Court in 1789, its membership has largely reflected the class of white, land-owning males. Of the 111 men and women to serve on the Supreme Court, only 2 have self-identified as African-American. The first to join the Court, Justice Thurgood Marshall, was appointed by President Lyndon Johnson in 1967. Prior to his appointment, Marshall had worked as the director and counsel for the NAACP Legal Defense Fund for 21 years, served on the U.S. Court of Appeals for the Second Circuit for four years and, at the time of his appointment, was serving as the solicitor general of the United States. Hearings on Marshall's nomination lasted five days, longer than all but one other Supreme Court nominee to that point in time; Marshall was confirmed by a 69-11 vote.³³

The second African-American to serve on the Court, Justice Clarence Thomas, was nominated by President George H.W. Bush to fill a vacancy created by Justice Marshall in 1991. At the time, Thomas was serving on the U.S. Court of Appeals for the District of Columbia and previously served as the director of the Equal Employment Opportunity Commission from 1982 through 1990. Thomas's confirmation hearings extended across 11 days. In the final 3 days of hearings, 21 public witnesses testified in response to accusations of sexual harassment, including Thomas

³¹ See, for example, Yalof's discussion of Presidents Richard Nixon's and Ronald Reagan's searches in chapters five and six of *The Pursuit of Justice*, pp. 97-167.

³² One important factor, geography, is not discussed in this report. For an account of the importance of geography in the selection process, see generally Abraham, *Justices and Presidents*. For a more focused and systematic study of geographical representation on the Court, see William J. Daniels, "The Geographic Factor in Appointments to the United States Supreme Court: 1789-1976," *The Western Political Quarterly*, vol. 31, no. 2 (June 1978), pp. 226-237.

³³ See CRS Report RL33225, *Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President*, p. 35.

himself. His nomination, reported without recommendation out of the Senate Judiciary Committee, was confirmed by a 52-48 vote.³⁴

Until the confirmation of Justice Sonia Sotomayor, no Justice who identified as Hispanic or Latina had ever served on the Court.³⁵ However, as Sotomayor has explained, her identification as Latina is not reflective of a single idea or definitions of the term. In 2002, she noted,

If I had pursued my career in my undergraduate history major, I would likely provide you with a very academic description of what being a Latino or Latina means. For example, I could define Latinos as those peoples and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. That antiseptic description however... does not explain why individuals like us, many of whom are born in this completely different American culture, still identify so strongly with those communities in which our parents were born and raised.³⁶

Justice Sotomayor, born in New York to Puerto Rican-born parents, views the identification as embracing all of the language, food, and traditions of her family but without monolithically defining the term “Latina” as any one of those things. She recognizes that many people who identify as Latino or Latina may have had completely different cultural experiences.³⁷

Gender

As with racial and ethnic minorities, women have been similarly unrepresented on the Court. In the 220-year history of the Court, only three women have served as Supreme Court Justices. The first, Sandra Day O’Connor, was appointed in 1981 by President Ronald Reagan, following a campaign promise that “[o]ne of the first Supreme Court vacancies in my administration will be filled with the most qualified woman I can find.”³⁸ O’Connor, a former state legislator and state appellate court judge, was confirmed by a 99-0 vote in the Senate.

The second woman appointed to the bench, Ruth Bader Ginsburg, was appointed in 1993 by President William J. Clinton. A widely respected advocate of women’s rights, Ginsburg was the first tenured female law professor at Columbia University, the first director of the American Civil Liberties Union’s Women’s Rights Project, and had successfully argued cases involving gender

³⁴ Of the 106 Supreme Court nominations reported out from the Senate Judiciary Committee to the full Senate, only 4 have been reported without recommendation, one of which was the nomination of Clarence Thomas. *Ibid.*, pp. 9, 38.

³⁵ Scholars debate whether Justice Benjamin Cardozo, whose family roots are believed to trace back to Portugal, was the first Hispanic to serve on the Court. In modern usage, the terms “Hispanic” and “Latino” are terms of self-identification, used inconsistently by individuals who were born or whose ancestors were born in over 20 Spanish-speaking countries. At the time of Cardozo’s appointment in the 1930s, such terms were not used in the census. For example, the only identifier used to count the Hispanic population was that of “Mexican.” When asked how Justice Cardozo would self-identify, a biographer of the Justice answered, “I think he would have identified as a Sephardic Jew whose ancestors came from the Iberian Peninsula.” According to a report by the Pew Hispanic Center, Justice Cardozo would not qualify as Hispanic by current census standards, which do not identify individuals of Portuguese descent as Hispanic. As a result, Justice Sotomayor is the first Hispanic or Latina Justice to serve on the Supreme Court, at least by census standards. For an overview of this issue, see Neil A. Lewis, “Was Hispanic on Court in the ‘30s?” *New York Times*, May 27, 2009, p. A16, Late Edition (Final); Jeffrey Passel and Paul Taylor, *Who’s Hispanic*, Pew Hispanic Center, Washington, DC, May 29, 2009, <http://pewhispanic.org/files/reports/111.pdf>.

³⁶ Sonia Sotomayor, “A Latina Judge’s Voice,” *Berkeley La Raza Law Journal*, vol. 13, no. 1 (Spring 2002), p. 88.

³⁷ *Ibid.*

³⁸ Abraham, *Justices and Presidents*, p. 339.

equality before the Court on five separate occasions. President Clinton purportedly gravitated toward Ginsburg due to former Solicitor General Erwin Griswold's comparison of her contribution to the advancement of women's rights through litigation to that of Justice Thurgood Marshall's contribution in the realm of civil rights.³⁹

From the appointment of Justice Ginsburg in 1993 to the retirement of Justice O'Connor in 2005, two of the nine sitting Justices were women.⁴⁰ O'Connor's retirement reportedly prompted some political pressure on President George W. Bush that her replacement be a woman, including from First Lady Laura Bush.⁴¹ O'Connor herself hoped that President Bush would select a woman. Specifically, she noted, "It is important for the citizens of this country to see that in all areas of our governmental structures that women are also represented there."⁴²

On July 19, 2005, 18 days after O'Connor's announcement, President Bush nominated John G. Roberts, Jr., a judge on the U.S. Court of Appeals for the District of Columbia, to be an Associate Justice. Upon the death of Chief Justice William H. Rehnquist, President Bush withdrew Roberts's nomination and, on the same day, nominated Roberts for the position of Chief Justice. To fill the vacancy created by O'Connor's retirement, President Bush nominated Harriet Miers, who was then serving in the position of White House counsel. Miers's nomination was withdrawn 52 days later, and the name of Samuel A. Alito, Jr., was submitted in her place.⁴³

Another vacancy would not occur again until the retirement of Justice David Souter in June 2009. Confirmed on August 6, 2009, Sonia Sotomayor joined Justice Ginsburg on the bench as the third woman to be appointed to the Court.

³⁹ Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton and Company, 1994), p. 167. Thurgood Marshall served as assistant special counsel for the NAACP and, in that role, was one of the architects of the NAACP's legal strategy that eventually led to the landmark 1954 Supreme Court decision *Brown v. Topeka Board of Education* (347 U.S. 483), in which the Supreme Court found that racial segregation based on the separate-but-equal doctrine was a violation of the Equal Protection Clause of the Fourteenth Amendment. From 1940 through 1961, Marshall argued successfully before the Court in 29 separate cases. Marshall was appointed to the Supreme Court in 1967 by President Lyndon Johnson. Ruth Bader Ginsburg, like Marshall, was the architect of the ACLU's legal strategy with respect to women's rights. Notably, in 1971, Ginsburg successfully argued *Reed v. Reed* (404 U.S. 71) before the Supreme Court, in which the Court found that an Idaho statute that, in determining the executor of an estate of a minor who has died intestate, gave preference to men over women was a violation of the Equal Protection Clause of the Fourteenth Amendment. Ginsburg successfully argued five gender discrimination cases before the Supreme Court.

⁴⁰ After 24 years of service on the Supreme Court, Justice O'Connor announced her retirement from the Court on July 1, 2005, effective upon the start of the next October term or the appointment of her successor. See Letter from Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States, to George W. Bush, President of the United States, July 1, 2005, <http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf>.

⁴¹ Jan Crawford Greenburg, "Bush advisers alter Court focus; Aides said to push conservative males to replace O'Connor," *Chicago Tribune*, July 19, 2005, p. C8; Steven Thommas and Stephen Henderson, "Bush Picks Roberts for Chief Justice; Speculation on Who Will Fill Other Seat," *Monterey County Herald*, Sept. 6, 2005, Section Z (Nation); Christina L. Boyd and Lee Epstein, "Female Justices vital," *The Virginian-Pilot*, May 5, 2009, p. B7.

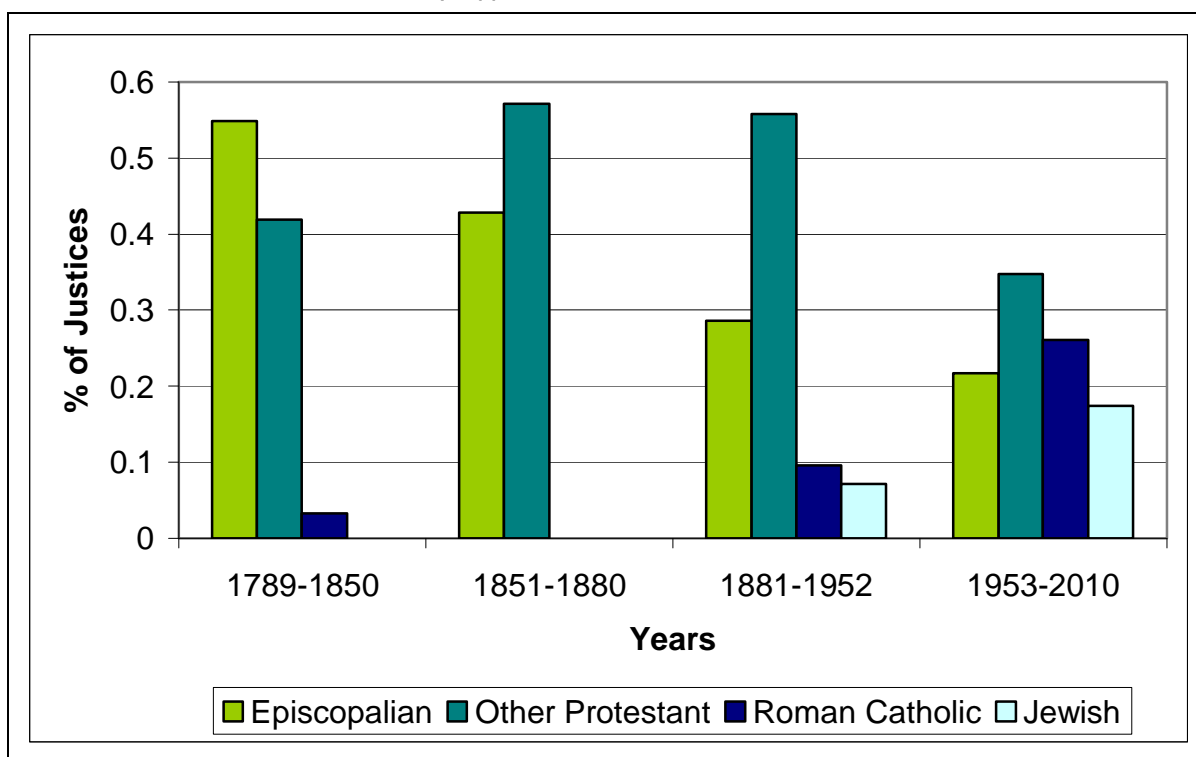
⁴² Laura Mecoy, "O'Connor's advice: Pick a woman," *Sacramento Bee*, Oct. 28, 2005, p. A22, Final Edition.

⁴³ Miers requested that her nomination be withdrawn after Senators requested privileged White House documents from Miers's tenure as White House counsel to evaluate her record. For a more comprehensive account of the nomination of Harriet Miers to the Supreme Court, see Jeffrey Toobin, "Chapter 22: I Know Her Heart," in *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007), pp. 284-297. See also CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2009*.

Religion

Religious diversification on the Court began to occur long before the inclusion of minorities and women on the Court. **Figure 1** displays the distribution of the religious affiliation of Supreme Court Justices appointed during each of the four periods of the Court’s history, as discussed above. As illustrated in **Figure 1**, the first Justices were almost exclusively affiliated with protestant Christian churches. In the first 60 years of the Court, 30 (96.8%) of the 31 Justices appointed were protestant Christians. Seventeen (54.8% of the 31) were Episcopalian,⁴⁴ and 13 (41.9%) were of other Protestant denominations, such as Congregationalism, Methodism, and Presbyterianism.

Figure 1. Religious Affiliation of Supreme Court Justices
By Appointment Date, 1789-2010



Source: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

The lone non-Protestant Christian Justice appointed during this period and the Court’s first Roman Catholic was Chief Justice Roger B. Taney, who was appointed by Andrew Jackson in 1836. The second Roman Catholic Justice, Edward Douglass White, was not appointed until

⁴⁴ The Episcopal Church, a protestant church deriving from the Church of England, was established in the American colonies with the Jamestown colony in 1607. After the Revolutionary War, all English public support for the church ceased. Though relatively impoverished, by this time the church had spread widely through the colonies, especially in the southern and middle colonies. See Theodore Dwight Woolsey et al., *The First Century of the Republic: A View of American Progress* (New York: Harper and Brothers, 1876), p. 480; Episcopal Church of the United States, “Newline: Anglican and Episcopal Church History,” Accessed July 14, 2009, http://www.episcopalchurch.org/newline_22035_ENG_HTM.htm.

1894. Since White's appointment, however, the number of Roman Catholic Justices on the Court has steadily increased. Between 1881 and 1952, 4 (9.5%) of the 42 Justices appointed were Roman Catholic.⁴⁵ Between 1953 and the present, 7 (29.2%) of the 24 Justices appointed have been Roman Catholic. When Samuel Alito, a Roman Catholic, joined the Court in 2006 to replace Justice Sandra Day O'Connor, an Episcopalian, a majority of the Court's membership was Roman Catholic for the first time in the nation's history. This Roman Catholic majority grew from 5 to 6 justices with the confirmation of Justice Sotomayor.

Although the first Roman Catholic Justice was appointed to the Court in 1836, the first Jewish Justice did not join the Court until 1916, with President Woodrow Wilson's appointment of Louis Brandeis. Brandeis was branded as a "radical" due to his socially conscious legal work and was the target of anti-Semitic forces.⁴⁶ Although Brandeis neither appeared at nor commented on the proceedings, the Senate Judiciary devoted 19 days of hearings to the nomination—the longest of any of Supreme Court nominee.⁴⁷

The next Jewish members of the Court were not appointed until the 1930s, with the appointment of Justices Benjamin Cardozo in 1932 to replace Oliver Wendell Holmes, and Felix Frankfurter in 1939 to replace Cardozo upon his untimely death.⁴⁸ Unlike Justice Brandeis, Justices Cardozo and Frankfurter received less contentious and, as a result, much shorter confirmation hearings. Cardozo's 1932 confirmation process lasted only nine days from Senate receipt of the nomination to confirmation by unanimous voice vote.⁴⁹ Only one of those days was dedicated to a hearing before the Senate Judiciary Committee. Like Brandeis, Cardozo chose not to appear before the committee.⁵⁰ The process of appointing Justice Frankfurter took 33% longer (12, as compared with 9, days) and included 3 days of public hearings before his eventual confirmation, also by voice vote on the floor of the Senate. Unlike Brandeis and Cardozo, Frankfurter chose to testify before the Senate Judiciary Committee.⁵¹

Since the 1930s, however, public hearings have become standard practice, and nominees, regardless of the level of controversy surrounding their nomination, routinely appear before the Judiciary Committee.⁵² The nominations of the two Jewish Justices currently serving on the

⁴⁵ These Justices were Joseph McKenna of California and Edward D. White of Louisiana. McKenna was appointed by President William McKinley in 1898; White was appointed by President Grover Cleveland in 1894.

⁴⁶ Abraham, *Justices and Presidents*, pp. 182-185. Additionally, Justice Brandeis encountered some hostility on the Court itself. Justice James McReynolds, appointed by President Wilson in 1914, was reported to be anti-Semitic and "snubbed" Brandeis for that reason. See also David Burner, *The Justices of the Supreme Court, 1789-1969: Their Lives and Major Opinions*, ed. Leon Friedman and Fred L. Israel, vol. 3 (New York: Chelsea House Publishers, 1969), p. 2023.

⁴⁷ Brandeis's confirmation hearings were also the first ever public hearings held by the Judiciary Committee to examine the nomination of an individual to the Supreme Court. Only one other nominee, George Williams, nominated to the position of Chief Justice by President Ulysses S. Grant in 1873, had ever received a hearing. Unlike Brandeis's hearing, Williams's confirmation hearing was closed to the public. See CRS Report RL33225, *Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President*.

⁴⁸ Cardozo was appointed by President Herbert Hoover shortly before the end of his first and final term in 1932. Frankfurter was appointed by President Franklin Roosevelt, a close friend, after Cardozo's death in 1939.

⁴⁹ Abraham, *Justices and Presidents*, p. 206.

⁵⁰ *Ibid.*, p. 222.

⁵¹ *Ibid.* Abraham notes that Frankfurter's appearance before the committee was the first since the nomination of Harlan Fiske Stone to the position of Associate Justice in 1925.

⁵² CRS Report RL33225, *Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President*.

Court, Stephen Breyer and Ruth Bader Ginsburg, were subject to four days of public hearings each.⁵³ Both attended those hearings.

On April 9, 2010, Justice John Paul Stevens, the only protestant Christian Justice, will retire at the end of the Court's current term.⁵⁴ Justice Stevens's pending retirement raises the possibility that, for the first time, no Justice on the Court would identify as a protestant Christian. While Presidents once took religion into account in order to preserve a "Jewish seat," as President Franklin D. Roosevelt did in his 1939 appointment of Felix Frankfurter, or to avoid "religious or sectarian repercussions," a worry of President Herbert Hoover's in his 1932 selection of Benjamin Cardozo,⁵⁵ it is unclear to what extent President Obama would or should take religion into account in choosing Justice Stevens's replacement.

Professional Background

The men and women appointed to the Supreme Court have held a variety of professional backgrounds. While 64% of all Justices appointed to the Court have had some form of judicial experience, Justices have also held positions in federal, state, and local governments, and in the private sector. Those positions have ranged from legislator, to professional athlete,⁵⁶ to President of the United States.⁵⁷

⁵³ The average length of a public hearing, for all public hearings held between 1916 and the present, is 3.97 days. In the last 20 years, the average length of public hearings has increased by almost a full day to 4.91 days.

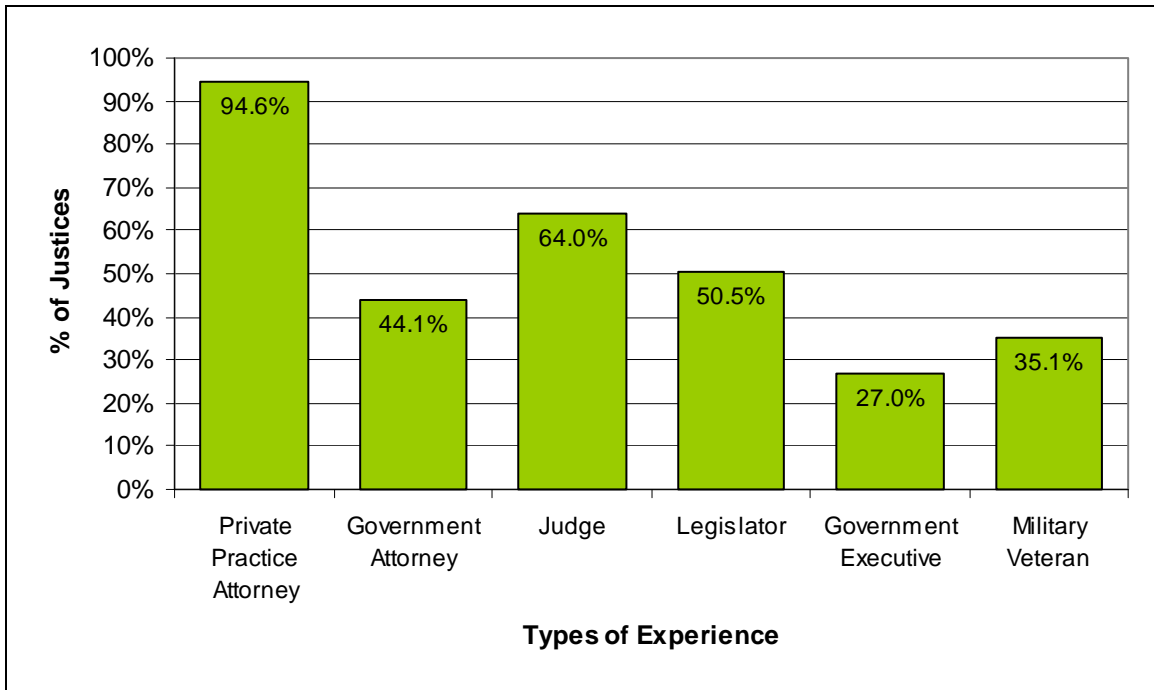
⁵⁴ Letter from John Paul Stevens, Associate Justice of the Supreme Court, to Barack H. Obama, President of the United States, April 9, 2010, <http://www.nytimes.com/aponline/2010/04/09/us/politics/AP-US-Stevens-Letter.html?ref=aponline>. For several months prior to his announcement, observers of the Court remarked that Justice Stevens's decision to hire only one clerk (the total number allowed to retired Justices) as opposed to four (the total number allowed to active Justices) suggested that, at the age of 89, he was seriously considering retirement. When asked about his retirement plans in a March 22, 2010, interview, Justice Stevens remarked, "Well, I still have my options open. When I decided to just hire one clerk, three of my clerks last year said they'd work for me next year if I wanted them to. So I have my options still. And then I'll have to decide soon." Justice Stevens indicated that he would announce his decision by the first or second week in April and guaranteed that he would be retiring "within the next three years." Jeffrey Toobin, "Profiles: After Stevens: What will the Supreme Court be like without its liberal leader?" *The New Yorker*, March 22, 2010, http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin. See also Robert Barnes, "Justice Stevens Hires Just One Clerk for 2010 Term," *The Washington Post*, Sept. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/02/AR2009090203857.htm>; Adam Liptak, "Supreme Court Memo: A Justice Slows His Hiring, and Some Wonder About His Future," *The New York Times*, Sept. 2, 2009, <http://www.nytimes.com/2009/09/03/us/03stevens.html>.

⁵⁵ Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1992), p. 180.

⁵⁶ Byron "Whizzer" White, appointed by President John F. Kennedy in 1962, was a Heisman Trophy winning football player at the University of Colorado and played professional football for the Pittsburgh Pirates (now Steelers). During his one season in professional football, he was the highest-paid player of his day. See, for more information, Yalof, *The Pursuit of Justices*, pp. 73-76, and Cushman, "Byron R. White" in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, pp. 461-465.

⁵⁷ Appointed by President Warren G. Harding in 1921, William Howard Taft served as the 27th President of the United States (1909-1913) prior to becoming the Chief Justice of the Supreme Court.

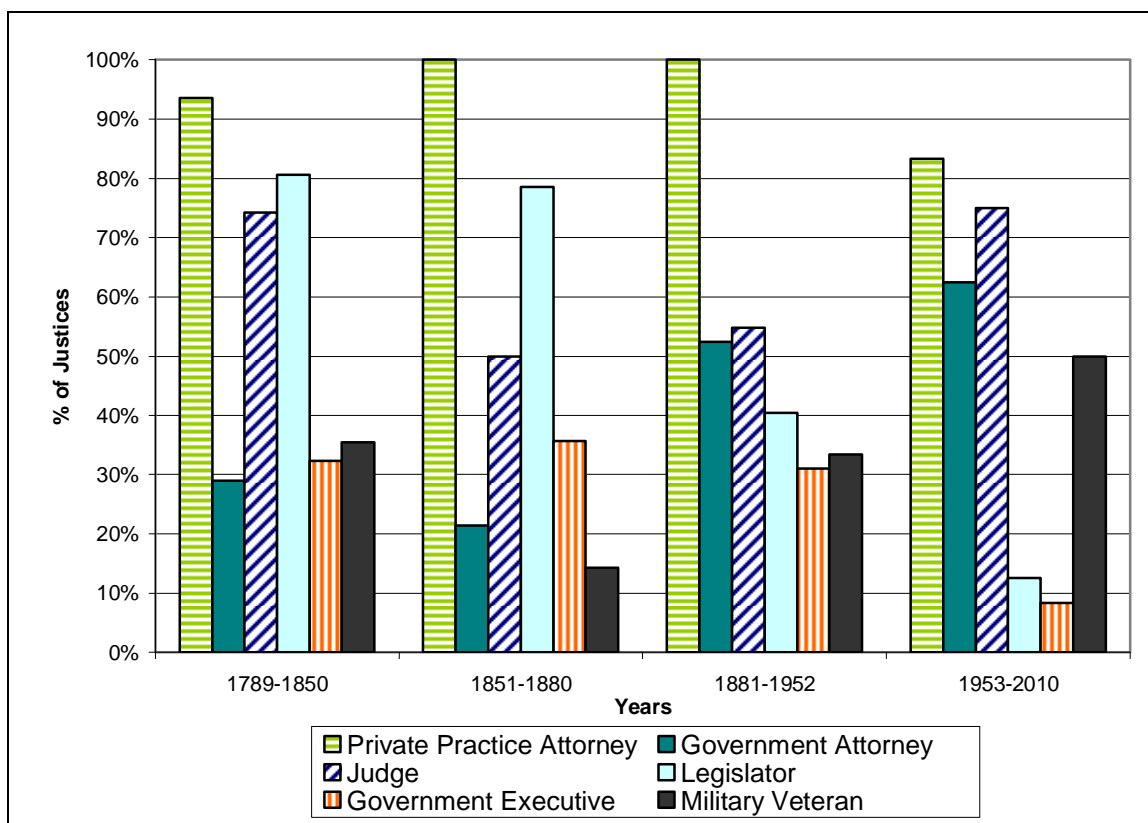
Figure 2. Prior Experience of Supreme Court Justices
Chief Justices and Associate Justices, 1789-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Overwhelmingly, Supreme Court Justices come to the bench with some form of non-judicial legal experience. As illustrated in **Figure 2**, 105 (94.6%) of the 111 Justices appointed to the Supreme Court have engaged in private practice, although only 49 (44.1%) had served as an attorney for a federal, state, or local entity. Across its history, 71 (64.0%) Justices came to the Supreme Court with prior judicial experience in a lower federal or state court. A smaller number of Justices (56 or 50.5%) have come to the bench with prior legislative experience and fewer (30 or 27.0%) have possessed executive experience. While experience in private practice and prior judicial experience have been the most common employment patterns among Supreme Court Justices, 39 (35.1%) have also served in the military.

Figure 3. Prior Occupations of Supreme Court Justices Over Time
By Appointment Date and Type of Experience, 1789-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Experience in Private Practice

As indicated in **Figure 3**, the vast majority of Court appointees have spent some time in private practice. From 1789-1850, all but two Supreme Court Justices had been employed in private practice.⁵⁸ From 1851-1952, all 56 appointees to the Court were engaged in private practice at some point in their careers. In the past 56 years, only four (16.7%) of the 24 Justices had never worked for a private law firm. Justice Clarence Thomas was the first in 180 years to possess no experience in private practice. Notably, like Justice Thomas, three of the next four appointees—Ginsburg, Breyer, and Alito—also lacked experience in private practice. In contrast, the most recent appointee, Sonia Sotomayor, spent eight years in private practice at the firm of Parvia & Harcourt in New York, which places her experience in line with that of the vast majority of Supreme Court Justices.

⁵⁸ The first of these Justices to be appointed was Samuel Chase of Maryland, who was appointed by George Washington in 1796. The second was Chase’s replacement, Gabriel Duvall (also of Maryland), who was appointed by James Madison in 1811.

Experience as a Government Attorney

Of the 111 individuals appointed to the Supreme Court since 1789, 49 (44.1%) have served as government attorneys. This category is a broad one and encompasses any position in which the Justice may have served as a counsel or attorney for a local, state, or federal agency or institution. For example, included in this category are Justice Hugo Black, who worked as a prosecuting attorney in Birmingham, Alabama, from 1914 through 1917; Justice Thurgood Marshall, who served as the solicitor general of the United States from 1965-1967; Chief Justice Oliver Ellsworth, who served as a state attorney in Hartford County, Connecticut, from 1777-1785; and Justice Stephen G. Breyer, who served as an assistant special prosecutor on the Watergate Special Prosecution Force in 1973 and a special counsel for the Administrative Practices Subcommittee of the U.S. Senate Judiciary Committee from 1974-1975.

Justices with experience as United States attorneys are also included in this category.⁵⁹ Of the 49 Justices who worked as government attorneys, only four were U.S. attorneys. The first U.S. attorney to join the Court was Noah Swayne, appointed in 1862; the second and third were Stanley Matthews and William Moody, in 1881 and 1906. The most recently appointed former U.S. attorney, Samuel Alito, was confirmed in 2006.

Of the 31 individuals appointed to the Court between 1789 and 1850, 9 (23.0%) had prior experience as government attorneys. Of these 9, 5 served as the attorney general for their respective states for at least one year,⁶⁰ 3 served as state district attorneys,⁶¹ and 1—Chief Justice Roger B. Taney—served as the Attorney General of the United States. The number of Supreme Court Justices with this type of experience decreased slightly between 1851 and 1880. Of the 14 individuals appointed during this period, 3 (21.4%) had worked as government attorneys. Two of these Justices served as attorney generals of their respective states, one of whom also served as the Attorney General of the United States.⁶² The remaining Justice served as both a county prosecutor and a U.S. attorney prior to joining the Court.⁶³

⁵⁹ U.S. attorneys prosecute criminal offenses against the United States, prosecute or defend for the government all suits or proceedings in which the United States is concerned, and collect debts owed the federal government which are administratively uncollectible. U.S. attorneys are appointed to four-year terms and serve at the pleasure of the President. There are, in total, 93 U.S. attorneys: one for each federal judicial district, with the exception of the District of Guam and the District of the Northern Mariana Islands, which share a U.S. attorney. For more information on the responsibilities of U.S. attorneys, see 28 U.S.C. 547.

⁶⁰ Associate Justices James Iredell and Alfred Moore both served as the attorney general of North Carolina. Iredell served in that position from 1779 through 1781, and Moore served from 1782 through 1791. Associate Justice William Paterson served as the attorney general of New Jersey from 1776 through 1783. Justice John Rutledge, who served as both an Associate Justice and, for a brief period of time, Chief Justice, served as the Attorney General Pro Tem from 1764 through 1765, before the signing of the Declaration of Independence. Chief Justice Roger Brooke Taney served as the attorney general of Maryland from 1827 through 1831.

⁶¹ Justices Henry Baldwin, John Catron, and Robert Trimble served as district attorneys in Pennsylvania, Tennessee, and Kentucky, respectively. Additionally, Chief Justice Oliver Ellsworth served as a state attorney in Hartford County, Connecticut from 1777 through 1785.

⁶² Justice Nathan Clifford served as both the attorney general for the state of Maine (1834-1838) and the U.S. Attorney General (1846-1848); Justice John Marshall Harlan served as the attorney general for the state of Kentucky (1863-1867).

⁶³ Justice Noah Swayne served as both the prosecuting attorney for Coshocton County, Ohio (1826-1829), and U.S. attorney for the district of Ohio (1830-1841).

Since 1851, the percentage of Justices with experience as government attorneys has increased dramatically, rising from 21.4% of the Justices appointed between 1851 and 1880 to 62.5% of the Justices appointed since 1953. Of the 42 Justices appointed from 1881 through 1952, 22 (52.4%) served as government attorneys at some point in their careers. Of these 22, 15 (68.2%) held multiple positions as government attorneys at local, state, and federal levels of government. For example, Justice Stanley Matthews served as both the assistant prosecutor of Hamilton County, Ohio (1845), and U.S. attorney for the Southern District of Ohio (1858-1861). Justice Joseph McKenna was a district attorney in Solano County, California (1866-1870), and the Attorney General of the United States (1897).

Since 1953, 15 of the 24 appointees (62.5%) came to the bench with prior experience as government attorneys. As in the previous period, a majority of these Justices held multiple positions as government attorneys. Of the 15 appointed with such experience, 8 (53.3%) held multiple positions. Chief Justice Earl Warren, for example, held five different prosecutorial positions, including that of city attorney for Oakland, California; district attorney for Alameda County, California; and attorney general for the state of California.

Six of the nine members of the current Court also served as government attorneys. In addition to serving as a U.S. attorney, Justice Samuel Alito worked as an assistant U.S. attorney and in the offices of the Attorney General and solicitor general. Like Justice Alito, Chief Justice John Roberts also served in a variety of government attorney positions, most notably as an associate counsel to President Ronald Reagan in the White House Counsel's Office. Justice Stephen Breyer, in addition to the service described above, was a special assistant to the assistant U.S. attorney general for antitrust and the chief counsel to the U.S. Senate Judiciary Committee. Justice Clarence Thomas spent time as assistant attorney general for the state of Missouri from 1974 through 1977. Justice Antonin Scalia worked as an assistant attorney general in the U.S. Department of Justice Office of Legal Counsel from 1974 through 1977. Recently appointed Justice Sonia Sotomayor was an assistant district attorney in the New York County District Attorney's Office under Robert Morgenthau from 1979 through 1984.

Judicial Experience

While prior judicial experience has been an important factor in the modern confirmation process, presidential emphasis on such experience in the selection of Justices has varied over the history of the Court.⁶⁴ Preference for judicial experience, whether state or federal, can be explained in part by the changing character of the federal judiciary. Congress created the basic organizational structure of the federal judiciary—a structure that still exists to this day—with the Judiciary Act of 1789. The Judiciary Act divided the new nation into 13 districts, for which district court

⁶⁴ This report does not examine whether those appointed to the Chief Justiceship possessed experience as an Associate Justice. Additionally, Chief Justices were occasionally elevated from the ranks of Associate Justices or had prior experience as an Associate Justice, as was the case with Chief Justices John Rutledge, Edward White, Charles Evans Hughes, Harlan Fiske Stone, and William Rehnquist. John Rutledge served as an Associate Justice from 1789 through 1791, resigning to serve as the Chief Justice of the South Carolina Court of Common Pleas. In 1795, George Washington appointed Rutledge to be Chief Justice via a recess appointment after the resignation of John Jay. Rutledge was not confirmed by the Senate and was forced to resign his position that same year. Charles Evans Hughes served as an Associate Justice from 1910 through 1916, when he resigned to run as the Republican candidate for President. After losing to Woodrow Wilson, Hughes went into private practice and later served as U.S. Secretary of State before being appointed to the position of Chief Justice in 1930. Chief Justices White, Stone, and Rehnquist were all elevated directly from the position of Associate Justice.

judgeships were created. District courts held original jurisdiction over admiralty and maritime cases, as well as some minor civil and criminal cases. The appointed district court judge sat with a Supreme Court Justice to constitute the circuit court for the district.⁶⁵ Circuit courts served as trial courts for “most criminal cases, for suits between citizens of different states (diversity cases), and for civil suits initiated by the United States.” Circuit courts also “exercised appellate jurisdiction over all but the smallest admiralty cases and other civil suits that originated in the U.S. district courts.”⁶⁶ In order to exercise this appellate jurisdiction, however, a Supreme Court Justice was required to preside over the proceedings.

In a time of poor roads, slow transportation, and rampant disease, “riding circuit,” or traveling from the nation’s capital to districts to hold circuit court, was an extreme hardship for Supreme Court Justices.⁶⁷ For example, Justice James Wilson died in 1798 after contracting malaria while riding circuit.⁶⁸ These hardships and an increase in the federal caseload led Congress to reform the circuit courts. In 1869, Congress created separate circuit court judgeships for each of the circuits. These new judges, unlike the district court judges operating in the circuit, were authorized to conduct appellate business, with the district court judge, in the absence of a Supreme Court Justice. The circuit courts were stripped of their appellate jurisdiction with the creation of the modern Courts of Appeals in 1891 and eventually abolished in January of 1912.⁶⁹

⁶⁵ The Judiciary Act of 1789 required that two Supreme Court Justices sit with a district court judge to constitute the circuit court. This requirement was changed in 1793 to allow one Justice and a district court judge to constitute a circuit court. Federal Judicial Center, “Courts of the Federal Judiciary: U.S. Circuit Courts and the Federal Judiciary,” <http://www.fjc.gov/public/home.nsf/hisc>.

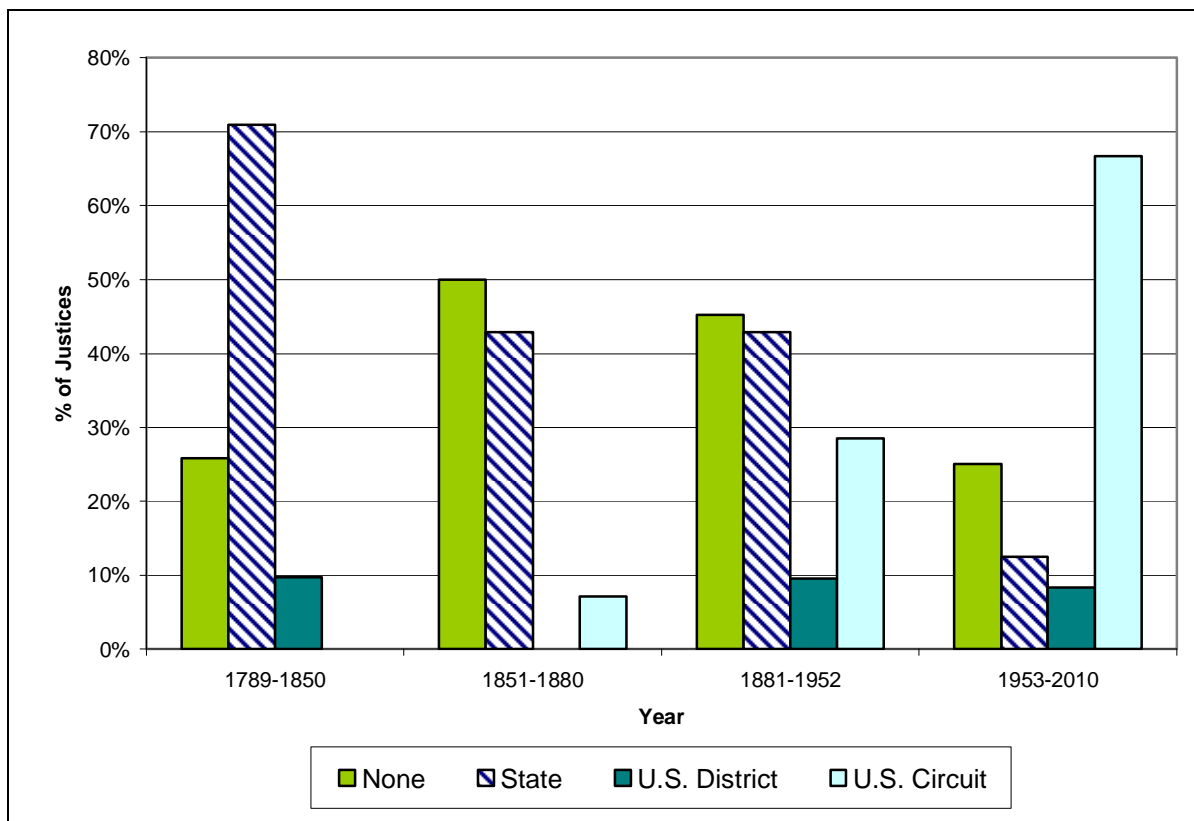
⁶⁶ See Federal Judicial Center, “Courts of the Federal Judiciary: U.S. Circuit Courts and the Federal Judiciary.”

⁶⁷ The location of the nation’s capital has changed several times, and the meeting place of the Supreme Court has changed with it. The first meeting of the Court occurred on February 2, 1790, in the Merchants Exchange Building in New York City. Later that year, the Court moved with the federal government to Philadelphia, where the Court met first in Independence Hall and later in City Hall. In 1800, the Court, along with the executive and legislative branches, moved permanently to the District of Columbia. See U.S. Supreme Court, “The Court Building,” <http://www.supremecourtus.gov/about/courtbuilding.pdf>.

⁶⁸ Wilson was one of the original six justices of the Supreme Court, appointed by George Washington in 1789. See Jeffrey A. Segal, Harold J. Spaeth, and Sara C. Benesh, *The Supreme Court in the American Legal System* (Cambridge: Cambridge University Press, 2005), p. 216.

⁶⁹ From 1891 through 1912, the circuit courts retained their original jurisdiction and served as trial courts for some types of federal cases. See Federal Judicial Center, “Courts of the Federal Judiciary: U.S. Circuit Courts and the Federal Judiciary,” <http://www.fjc.gov/public/home.nsf/hisc>.

Figure 4. Percentage of Total Justices Appointed with Judicial Experience
By Appointment Date and Type of Experience, 1789-2010



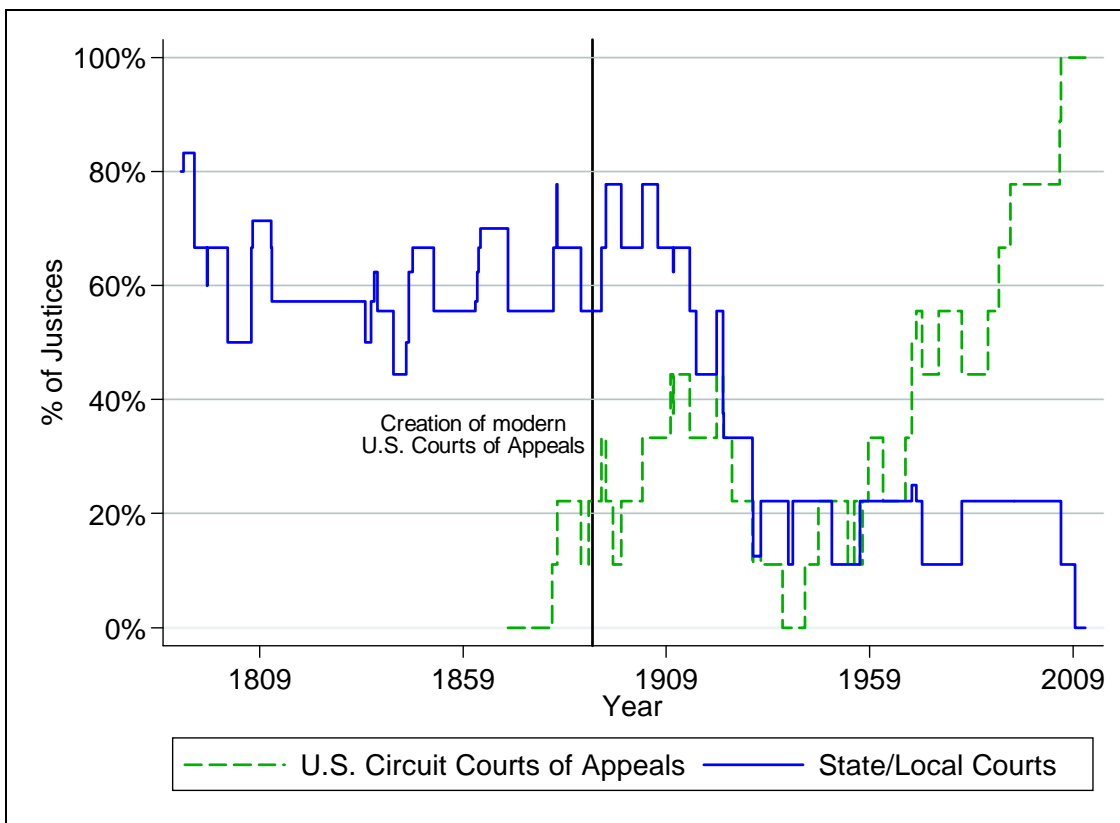
Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Notes: Separate circuit court judgeships were first created by the Judiciary Act of 1801 but abolished 13 months later with the Judiciary Act of 1802. Separate circuit court judgeships were not again created until 1869, when a single circuit court judgeship was created in each of the geographical circuits. As a result, no judge could have been a circuit court judge before 1869, precluding the elevation of a judge with such experience before that time.

It is unsurprising, then, that few Supreme Court Justices appointed between 1789 and 1850 possessed district court experience and none possessed circuit court experience. Justices appointed during this period did, however, possess extensive state judicial experience. Twenty-two (71.0%) of the 31 Justices appointed during this period, as illustrated in **Figure 4**, served on a colonial or state court, whereas only 3 (9.7%) served on a federal district court and 8 (25.8%) lacked judicial experience entirely. Between 1789 and 1850, the percentage of sitting Justices with state judicial experience, for all but three years,⁷⁰ never dropped below 50.0%, as indicated in **Figure 5**. Usually, it was much higher. Justices’ state court experience was, in many cases, quite extensive. The most experienced, William Cushing, served as a judge in one capacity or another in Massachusetts for 29 years, from 1760 to 1789, at which time he was appointed to the Supreme Court. Only 8 (25.8%) of the Justices appointed during this period possessed no judicial experience.

⁷⁰ The percentage of sitting Justices with state court experience dropped to 44.4% between 1842 and 1845.

Figure 5. Percentage of Sitting Justices with Prior Judicial Experience
By Type of Experience, 1789-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Notes: This graph displays the percentage of sitting Justices with either state court or circuit court experience. Unlike **Figure 4**, this graph displays the percentage of Justices serving on the Court at any particular time in history. For example, in 2007, the graph indicates that 11.1% of sitting Justices (one of nine) possessed state court experience, and 100.0% (nine of nine) possessed circuit court experience.

While circuit courts have existed since the Judiciary Act of 1789, separate circuit court judgeships were not created until 1869. The modern courts of appeals were created by the Judiciary Act of 1891, commonly known as the Evarts Act. Thus, the dashed line representing the percentage of sitting Justices with circuit court experience does not begin until 1869. The solid vertical line (placed at 1891) indicates the creation date of modern circuit courts of appeals.

From 1851 through 1880, only one appointee had served on a U.S. circuit court and none on a U.S. district court. As in the previous period, Justices accrued judicial experience at the state, as opposed to the federal, level. Of the 14 Justices appointed during this period, 6 (42.8%) were formerly state court judges, although only one was elevated directly from that position.⁷¹ During this time, no fewer than 50.0%, and as many as 70.0%, of sitting Justices possessed state court experience, as illustrated in **Figure 5**.

⁷¹ Justice Stephen Field was elevated from the California supreme court, on which he had served as Chief Justice, to the U.S. Supreme Court by Abraham Lincoln in 1863.

Despite the continued appointment of Justices with state court experience between 1851 and 1880, Presidents appeared to emphasize characteristics other than judicial experience in choosing nominees. Appointees were selected, in part, because they were perceived as capable of maintaining public respect for the Court in an increasingly hostile political environment and, in many cases, had demonstrated personal loyalty to the President. Most importantly, Presidents sought appointees supportive of the Administration's agenda with respect to the growing sectional tensions prior to the Civil War, during the conflict, and through the traumatic reconstruction process that followed.⁷² Changes such as these in Presidents' selection criteria may explain why only 50.0% of Justices appointed between 1851 and 1880 possessed state or federal judicial experience, as compared with 74.2% in the previous period.

President Millard Fillmore's selection of Benjamin R. Curtis in 1851 illustrates this shift. Curtis, who lacked state and federal judicial experience, possessed characteristics Fillmore perceived to be more important in the difficult political climate of the 1850s, such as "strength of character, and the potential for judicial presence [as well as] an understanding of contemporary history and politics." Fillmore additionally required that his nominee be a "Whig, a comparatively young man, and a New Englander."⁷³ One scholar noted that, for President Abraham Lincoln, "the effect a proposed member might have on the conduct of the [Civil War] was of paramount importance. All other considerations were secondary," including prior judicial experience.⁷⁴

Between 1881 and 1952, appointees with state court experience declined slightly from 42.8% in the previous period to 40.5%. Conversely, appointees with federal court experience increased substantially. Four (9.5%) of the 42 Justices appointed possessed federal district court experience, and 11 (26.2%) possessed federal circuit court experience. One Justice, Samuel Blatchford, appointed by President Chester Arthur in 1882, possessed both district and circuit court experience.

Presidents during this period, however, did not uniformly consider judicial experience as necessary for appointment to the Court, which may explain why 19 (42.5%) of the 42 appointees lacked lower federal or state court experience. While the first President in this period, Chester Arthur, appeared to consider such experience important,⁷⁵ his successor, President Grover Cleveland, the first Democrat elected to the presidency since 1860, did not. Cleveland sought nominees who, like himself, were "Democrat[s] in good standing," were "known to him personally," shared his policy preferences, and hailed from "an appropriate geographic area."⁷⁶ Although Cleveland did not appear to place importance on prior judicial experience, two of his four appointees to the Court did serve as lower court judges. Of the two, only one, Rufus Peckham of New York, was elevated from a state court. The other, Edward Douglass White, was a sitting U.S. Senator at the time of his appointment.

Unlike his predecessor, the selection criteria of President Benjamin Harrison emphasized not only that the appointee should possess similar policy preferences and party affiliation as the President, but also that nominees should be "experienced practicing lawyers and judges."⁷⁷ All but one of

⁷² Abraham, *Justices and Presidents*, pp. 110, 114-115, 117.

⁷³ *Ibid.*, p. 110.

⁷⁴ *Ibid.*, p. 117.

⁷⁵ *Ibid.*, pp. 137-139.

⁷⁶ *Ibid.*, p. 140. In particular, Abraham noted that President Cleveland's criteria were "easy to behold."

⁷⁷ *Ibid.*, p. 148.

Harrison's four appointees possessed judicial experience. The next two Presidents, William McKinley and Theodore Roosevelt, deemphasized judicial experience in their selection criteria, although Roosevelt delineated "competence" an important criterion. Roosevelt was the first President to "go on public record with a policy of downgrading geography" as an important consideration in the selection of Supreme Court Justices.⁷⁸

President William H. Taft, who would later serve as the Court's Chief Justice, explicitly emphasized judicial experience,⁷⁹ with five of six appointees possessing either state or federal experience or both. President Woodrow Wilson, Taft's successor, deemphasized judicial experience as a selection criterion and selected Supreme Court Justices who were personal or professional acquaintances and who possessed similar political opinions.⁸⁰

Presidents who followed Wilson continued this trend. Only half of Warren G. Harding's appointees possessed any form of judicial experience, and Calvin Coolidge's lone appointee, Harlan Fiske Stone, had no judicial experience. Of Franklin D. Roosevelt's eight Associate Justice appointees, only three had any form of judicial experience and, of these, just one served on the federal bench.⁸¹ Only one of President Harry Truman's three Associate Justice appointees possessed judicial experience.⁸²

Both Roosevelt and Truman, however, chose Chief Justices with federal judicial experience, although such considerations, reportedly, were not important in their selections of Associate Justices. Roosevelt chose to elevate Harlan Fiske Stone, who, while not having any lower court experience, had served on the Supreme Court for over 16 years before his elevation. Truman appointed Frederick M. Vinson, who had served for almost six years on the U.S. Court of Appeals for the District of Columbia, to the position after Chief Justice Stone's death in 1946.⁸³

Although Presidents increasingly selected appointees with federal judicial experience during this period, the Justices' length of tenure on lower federal courts varied widely. Most Justices possessed less than 10 years of federal judicial service, with 10 of the 14 Justices having served between 2.0 to 8.4 years in the federal district or circuit courts. A smaller number possessed well above 10 years of service, with four Justices having served between 14.7 and 16.7 years before their elevation to the Court. Of these four, one served entirely on a circuit court, two on district courts, and one on both district and circuit courts.

⁷⁸ Abraham, *Justices and Presidents*, p. 157.

⁷⁹ *Ibid.*, p. 167.

⁸⁰ *Ibid.*, pp. 176-177.

⁸¹ Franklin D. Roosevelt's one appointee with federal judicial experience was Wiley B. Rutledge, who had served on the D.C. Circuit Court of Appeals.

⁸² Truman's sole Associate Justice appointee with judicial experience was Sherman Minton, who had served on the Seventh Circuit Court of Appeals.

⁸³ During this period, President Herbert Hoover's appointees were the exception to this trend. Hoover reportedly sought candidates with prior judicial experience, and two of his three appointees had served as judges at the state or federal level. Charles Evans Hughes, Hoover's choice for Chief Justice, had previously served as an Associate Justice, and Benjamin Cardozo, one of Hoover's selections for Associate Justice, was a widely regarded jurist on the supreme court of New York. Hoover's only selection without judicial experience, Justice Owen Roberts, was selected after John J. Parker, a sitting judge on the U.S. Court of Appeals for the Fourth Circuit, was rejected by the Senate. See Abraham, *Justices and Presidents*, pp. 198-207.

Since 1953, most Presidents have tended to emphasize the importance of judicial experience, especially in the federal circuit courts. Immediately prior to President Dwight D. Eisenhower's appointment of Chief Justice Earl Warren in 1953, only one of nine sitting Justices possessed state court experience and two possessed circuit court experience; none had served on a federal district court (see **Figure 5**). Following Warren's appointment, however, the Court began to consider more cases that were widely publicized and had widespread, controversial social consequences, contrary to Eisenhower's reported desire that the Chief Justice reflect his own "moderate progressivism, common sense, high ideals, and 'absence of extreme views.'" Due to his disappointment with Warren's leadership, however, Eisenhower required that his next appointee have prior judicial experience so that he would have an "inkling of [the nominee's] philosophy."⁸⁴

Presidents John F. Kennedy and Lyndon B. Johnson, unlike Eisenhower, purportedly rewarded personal loyalty in their nominations to the Court; judicial experience was not required.⁸⁵ Such "patronage" appointment encountered very little opposition in the Senate in the early and mid-1960s.⁸⁶ By the late 1960s, however, the confirmation process had become very contentious due to "resentment against the [liberal jurisprudence of the] Supreme Court,"⁸⁷ and patronage appointments, such as Johnson's nomination of his close friend and sitting Associate Justice Abe Fortas to Chief Justice, began to encounter heavy opposition in the Senate.⁸⁸

Presidents following Johnson, as a result, began to consistently favor nominees with prior judicial experience, especially those with service in the federal circuit courts, in order to both better predict nominees' behavior once confirmed⁸⁹ and avoid criticism in the press and opposition in the Senate.⁹⁰ Such experience has increasingly become an almost standard background feature of every Supreme Court nominee. As one scholar noted, "[F]ederal circuit court judges have become the 'darlings' of the selection process."⁹¹ Of the 24 Justices appointed since 1953, 16 (66.7%) of the 24 Justices served on a federal circuit court, 2 of whom also served on federal district courts⁹² and 1 on a state court.⁹³ Only 3 (8.3%) of the 24 appointed during this period possessed state

⁸⁴ Abraham, *Justices and Presidents*, p. 254.

⁸⁵ For a discussion of the use of patronage politics in Kennedy's and Johnson's selections of Supreme Court nominees, see Yalof, "Chapter Four: Kennedy and Johnson Restore the Politics of Patronage," *The Pursuit of Justices*, pp. 70-96.

⁸⁶ Both of Kennedy's appointees and Johnson's first nomination of Abe Fortas to Associate Justice encountered very little opposition, with their confirmation hearings before the Senate Judiciary Committee lasting no more than two days. For more information regarding the Supreme Court appointment process generally and the length of nominations specifically, see CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*; and CRS Report RL33225, *Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President*, respectively.

⁸⁷ Yalof, *The Pursuit of Justices*, p.130.

⁸⁸ Other problems, such as Justice Fortas's alleged financial improprieties and President Johnson's "lame duck" status complicated an already hostile Senate reception to the nomination. See Yalof, "Chapter Four: Kennedy and Johnson Restore the Politics of Patronage," *The Pursuit of Justices*, pp. 70-96.

⁸⁹ Yalof, *Pursuit of Justices*, p. 70.

⁹⁰ *Ibid.*, p. 121.

⁹¹ *Ibid.*, p. 170.

⁹² The two Justices with both federal district and circuit court experience are Justice Charles Whittaker, appointed in 1957 by President Dwight D. Eisenhower, and Sonia Sotomayor, appointed in 2009 by President Barack Obama.

⁹³ Justice David H. Souter, appointed by President George H.W. Bush in 1990, served on both the New Hampshire Supreme Court and the U.S. Court of Appeals for the First Circuit.

court experience. Whereas in 1953 only one sitting Justice possessed federal circuit court experience, all nine current Justices have such experience (see **Figure 5**).⁹⁴

Most Justices appointed since 1953 possessed less than 10 years of federal judicial experience, although the range and minimum length of tenure is shorter than in the previous period. Nine of the 16 Justices appointed since 1953 served between 0.5 and 5.2 years on lower federal courts before their elevation, as compared with 2.0 to 8.4 years in the previous period. Seven of the 16 Justices served for more than 10 years on the lower federal court, with tenures ranging between 10.7 and 17.0 years. Four of the last five appointees each served as federal judges for more than 13 years before their elevation to the Court.

The most recent appointee, Sonia Sotomayor, possesses more federal lower court experience than any Justice in American history.⁹⁵ In announcing her nomination, President Obama emphasized Sonia Sotomayor's qualifications as a former U.S. district court judge and current U.S. circuit court judge. The President explained, "Over a distinguished career that spans three decades, Judge Sotomayor has worked at almost every level of our judicial system, providing her with a depth of experience and a breadth of perspective that will be invaluable as a Supreme Court justice." The President continued by stressing that "[w]alking in the door, she would bring more experience on the bench and more varied experience on the bench than anyone currently serving on the United States Supreme Court had when they were appointed."⁹⁶

Prior Political Experience

Legislative Experience

Legislative experience among Supreme Court Justices has exhibited a consistent decline since the middle of the 19th century. Prior to 1850, the appointment of Justices with legislative experience at the federal, state, or local level was not uncommon. From 1789-1850, 25 (80.6%) of the 31 Justices appointed had some form of legislative experience. Twenty-four Justices (77.4%) had served in a state or colonial legislative body, 6 (19.4%) in the Continental Congress, 3 (25.8%) were previously U.S. Senators, and 8 (6.3%) were previously Members of the U.S. House of Representatives.

When choosing nominees for the Supreme Court, President George Washington desired, among other things, that his nominees be politically involved in their local communities and home states and sought nominees with both judicial and legislative experience.⁹⁷ Of the 10 appointments made by Washington, 9 had prior legislative experience. Like Washington, his successor,

⁹⁴ Justices Ruth Bader Ginsburg, Antonin Scalia, Clarence Thomas, and Chief Justice John Roberts served on the U.S. Court of Appeals for the D.C. Circuit; Justice Stephen Breyer on the First Circuit; Justice Sonia Sotomayor on the Second Circuit; Justice Samuel Alito on the Third Circuit; Justice John Paul Stevens on the Seventh Circuit; and Justice Anthony Kennedy on the Ninth Circuit.

⁹⁵ Sonia Sotomayor served on two federal courts before her appointment to the Supreme Court: (1) the District Court for the Southern District of New York for 6.2 years and (2) the U.S. Court of Appeals for the Second Circuit for 10.8 years. On the day of her confirmation, her combined federal service totaled 17.0 years.

⁹⁶ See U.S. President (Obama), "Remarks on the Nomination of Sonia Sotomayor to be a Supreme Court Associate Justice, May 26, 2009," *Daily Compilation of Presidential Documents*, DCPD-200900402, at <http://www.gpo.gov/fdsys/pkg/DCPD-200900402/html/DCPD-200900402.htm>

⁹⁷ Abraham, *Justices and Presidents*, pp. 72, 77-78.

President John Adams, reportedly viewed public service as an important qualification for a Justice. Two of his three appointees, including Chief Justice John Marshall, possessed either state or federal legislative experience.⁹⁸

However, while President Washington was purported to have valued both state political service and prior judicial experience as distinct qualifications, some later Presidents appeared not to distinguish between the two when considering potential nominees for the Court. For example, James Monroe was reported to have viewed judicial experience as interchangeable with “other high public-service experience,” such as executive or legislative experience, when determining the qualifications of nominees.⁹⁹ Similarly, President Andrew Jackson was reported to have valued public service, but he did not emphasize judicial experience as a separate qualification from legislative experience.¹⁰⁰

After 1850, however, the percentage of Supreme Court Justices with legislative experience began to decline. Between 1851 and 1880, 11 (78.6%) of the 14 Justices appointed had some form of prior legislative experience. In particular, nine (64.3%) had served in their state’s legislature or another local legislative body, two (14.3%) in the U.S. House of Representatives, and two (14.3%) as U.S. Senators.

Whereas 71.4% of Justices appointed between 1850 and 1881 held some form of legislative position, only 40.5% (17 of 42) Justices appointed between 1881 and 1952 had similar legislative experience. Six (14.3%) had served as Members of the U.S. House of Representatives, 7 (16.7%) as U.S. Senators, and 12 (28.6%) as legislators in state or local legislative bodies.

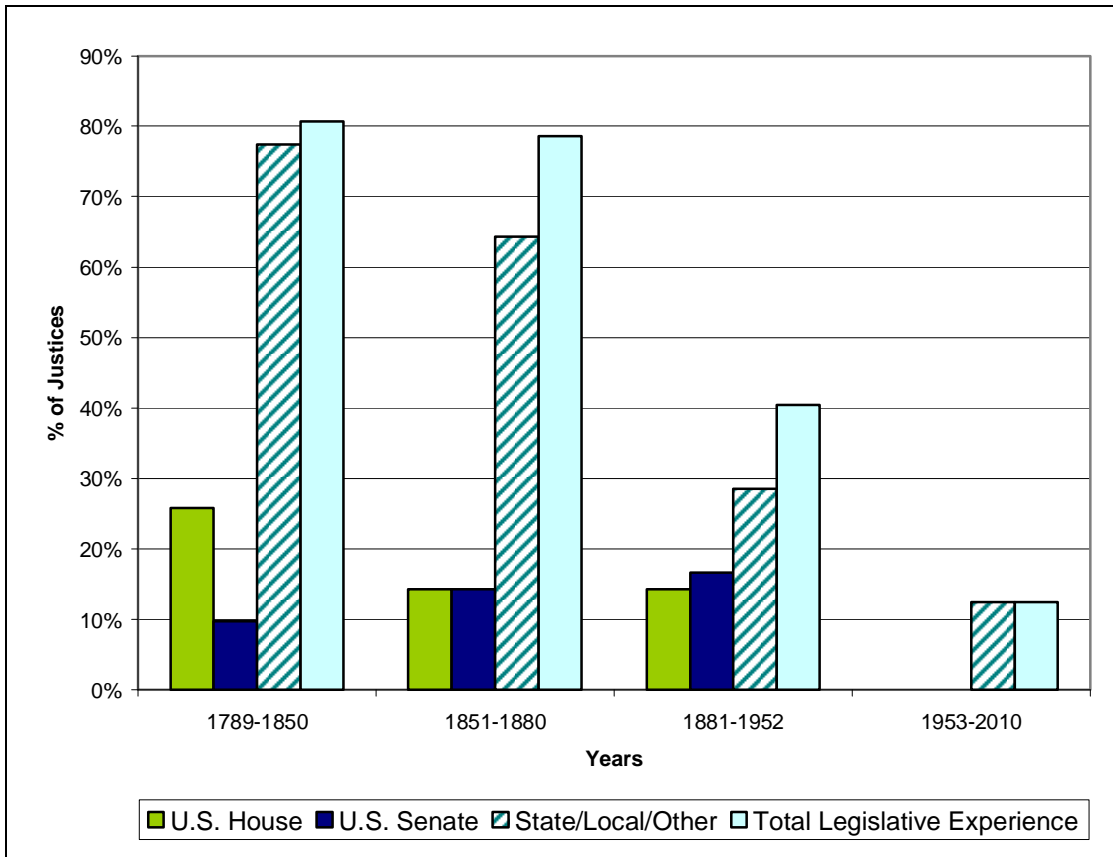
Since 1953, only 3 (12.5%) of the 24 Justices appointed possessed any form of legislative experience, and none served as Members of the U.S. House of Representatives or U.S. Senate. One of these two Justices, Lewis Powell, served as chairman of the Richmond Public School Board from 1952 through 1961. Another, Potter Stewart, served on the Cincinnati, Ohio, city council from 1950 through 1953. The third, Sandra Day O’Connor, served in the Arizona Senate from 1969 through 1975. Following this trend, President Obama’s appointee to the Court, Justice Sonia Sotomayor, has no prior legislative experience.

⁹⁸ Abraham, *Justices and Presidents*, p. 80.

⁹⁹ *Ibid.*, p. 91.

¹⁰⁰ *Ibid.*, p. 96.

Figure 6. Legislative Experience Over Time
By Appointment Date and Type of Experience, 1789-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov).

Notes: The category “State/Local/Other” also includes service in the Continental Congress. In most cases, if a Justice has served as a delegate to the Continental Congress, he has also served as a member of a colonial or state legislature. Justice James Wilson, the fourth Justice appointed by Washington, served in the Continental Congress but no other state legislative body.

Executive Experience

Table 1 lists four types of executive experience Supreme Court Justices have possessed when appointed to the Supreme Court: experience as a mayor, governor or lieutenant governor, presidential appointee, and U.S. President. Some Justices have served in more than one of these positions. For example, Chief Justice William Howard Taft served as the civil governor of the Philippine Islands, Secretary of War, and President of the United States before being appointed Chief Justice by President Warren G. Harding in 1921.

Between 1789 and 1952, more than 40% of the Justices appointed to the Court possessed some form of executive experience. Across this 163-year period, 11 governors or lieutenant governors and 29 former presidential appointees were appointed to the Court.¹⁰¹ As with legislative

¹⁰¹ Justices who formerly served as presidential appointees have served as Cabinet members, ambassadors, solicitors (continued...)

experience, however, a smaller number of nominees with executive experience were appointed to the Court in the last 56 years. One Justice, Earl Warren, served as governor of California prior to his 1953 appointment as Chief Justice by Dwight D. Eisenhower in 1953. Another, Arthur Goldberg, served as Secretary of Labor when appointed to the Court by John F. Kennedy in 1962. The other six Justices held positions such as United States attorney, chairman of the Administrative Office of United States, and chairman of the Equal Employment Opportunity Commission.

Table I. Executive Experience of Supreme Court Justices
By Appointment Date and Type of Experience from 1789-2010

	Mayors	Governors/ Lt Governors	Presidential Appointees	U.S. Presidents	Total Executive
1789-1850 (N=31)	1 (3.2%)	5 (16.1%)	8 (25.0%)	—	12 (38.7%)
1851-1880 (N=14)	2 (14.3%)	2 (14.3%)	5 (35.7%)	—	8 (57.1%)
1881-1952 (N=42)	—	4 (9.5%)	16 (38.1%)	1 (2.3%) ^a	16 (38.1%)
1953-2010 (N=24)	—	1 (4.2%)	7 (29.2%)	—	8 (33.3%)
Total (N=111)	3 (2.7%)	12 (10.8%)	36 (32.4%)	1 (0.9%)	44 (39.6%)

Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Notes: The percentages listed in each row indicate the percentage of Justices appointed in that period who possessed the characteristic of interest. “N” indicates the number of Justices appointed during each time period.

a. William Howard Taft, the 27th President of the United States, is the only former President to be appointed to the Court.

Prior Military Experience

The number of Supreme Court Justices with military experience has fluctuated over time, and military service patterns of Justices reflect the history of American military engagement at home and abroad. Since 1789, the United States has engaged in five declared wars with foreign nations, the Civil War, and prior to this time period, the Revolutionary War.¹⁰² Of the 111 Justices

(...continued)

general, and department heads within agencies, to name a few. For example, Justice William O. Douglas, appointed by President Franklin D. Roosevelt in 1939, had previously served as both a member and chairman of the Securities and Exchange Commission.

¹⁰² “From the Washington Administration to the present, there have been eleven separate formal declarations of war against foreign nations enacted by Congress and the President, encompassing five declared wars” These wars are the War of 1812 (declared in 1812), the Mexican-American War (1846), the Spanish-American War (1898), World War I (1917), and World War II (1941, 1942). The United States participated in several “extended military engagements that might be considered undeclared wars,” including the Korean War, the Vietnam War, the Persian Gulf War of 1991. “In addition, Congress has adopted a number of authorizations for the use of military force, the most recent being the joint resolution enacted on October 16, 2002, authorizing the use of military force against Iraq.” See CRS Report RL31133, (continued...)

appointed to the Supreme Court, 39 (35.1%) have served in various branches of the military during times of both war and peace, serving in the Revolutionary War, the War of 1812, the Civil War (in both the Confederate and Union Armies), the First World War, and the Second World War.

Prior to 1851, more than 35% of the Supreme Court appointees possessed military experience, including the first Chief Justice of the Supreme Court, John Jay, and the longest serving Chief Justice, John Marshall. The military experience of the Justices appointed during this time was derived almost exclusively from service in the Continental Army or local or state militias during the Revolutionary War.¹⁰³ The two Justices appointed during this period who did not serve in the Revolutionary War fought in the War of 1812.¹⁰⁴

Only 2 of the 18 Justices (14.3%) appointed between 1851 and 1880 possessed military experience, as opposed to 9 of the 31 Justices (35.5%) appointed prior to 1851. Both of these Justices, John Marshall Harlan I and William B. Woods, served in the Union Army during the Civil War and were appointed by President Rutherford B. Hayes.¹⁰⁵

Presidents continued to appoint Justices to the Court who had fought in the Civil War between 1881 and 1952. Between 1881 and 1900, Presidents appointed five Justices who fought in the Civil War, with two having served in the Confederate Army.¹⁰⁶ Later in this period, Presidents appointed nine World War I veterans.¹⁰⁷ In total, 14 (33.3%) of the 42 Justices appointed possessed military experience.

Since 1953, the percentage of Justices with military experience increased to 50.0%, with 12 of 24 Justices having some form of military experience. Unlike Justices in previous periods, however, more recently appointed Justices have served during periods of both war and peace. Eight of the 12 Justices with military experience fought in World War II (two in the Army, four in the Army Air Force,¹⁰⁸ and three in the Navy). John Paul Stevens, who served as a lieutenant commander in the U.S. Navy from 1942 through 1945, is the only current Justice to have served during wartime.

(...continued)

Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, p.1; CRS Report RL32170, *Instances of Use of United States Armed Forces Abroad, 1798-2008*, Summary.

¹⁰³ Additionally, one Justice, William Paterson (appointed by George Washington in 1793), served as a minuteman.

¹⁰⁴ Justices James M. Wayne and John Catron, both appointed by Justice Andrew Jackson, were the only Justices in this period with military experience to have served in a war other than the Revolutionary War.

¹⁰⁵ John Marshall Harlan I and William B. Woods were appointed by Rutherford B. Hayes in 1877 and 1880, respectively.

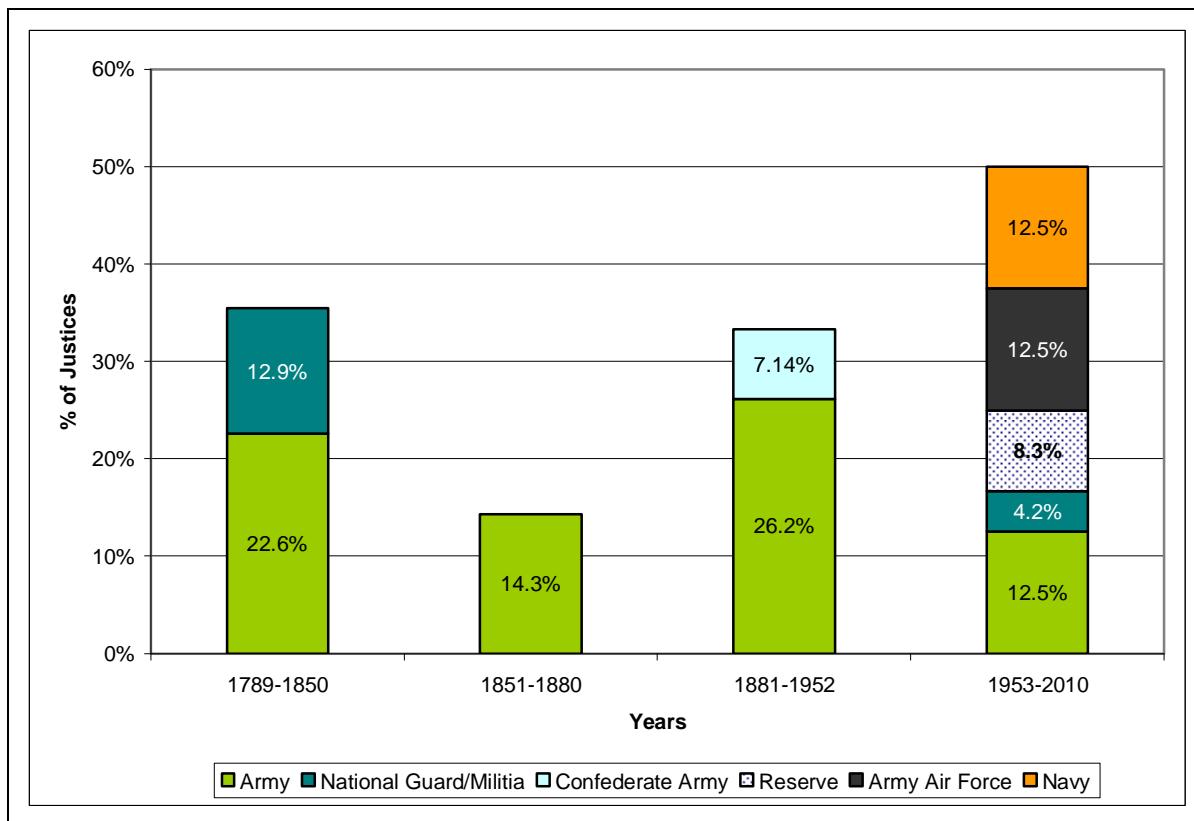
¹⁰⁶ The first, Lucius C.Q. Lamar, had served as a colonel in the Confederate Army and was appointed to the Court by President Grover Cleveland in 1888. The second, Edward Douglass White, who served as a lieutenant, was appointed by Cleveland in 1894. White was later elevated to the position of Chief Justice in 1910 by President William Howard Taft.

¹⁰⁷ One of these veterans, Frank Murphy, appointed by Franklin Delano Roosevelt in 1940, also participated in army training as a lieutenant during a Court recess in 1942 during the Second World War. For more information, see Sidney Fine, "Frank Murphy," in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman (Washington, DC: Congressional Quarterly, 1993), pp. 396-400.

¹⁰⁸ The Army Air Force was the immediate precursor to the modern Air Force. The Army Air Force came into being in 1941, assuming control over the Army Air Corps, which had been in existence since 1926, and the Air Force Combat Command. At this time, the Army Air Force was still a combatant arm of the U.S. Army. See Air Force Historical Research Agency, "Fact Sheet: The Birth of the United States Air Force," <http://www.afhra.af.mil/factsheets/factsheet.asp?id=10944/>.

Current Justices Stephen Breyer, Samuel Alito, and Anthony Kennedy are the only Justices to have had peacetime military experience.¹⁰⁹ Justices Breyer and Alito have both served in the Army Reserve: Alito as a captain, and Breyer as a corporal. Justice Kennedy served in the National Guard as a private first class.

Figure 7. Military Service of Supreme Court Justices
By Appointment Date and Type of Experience, 1789-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Notes: Categories of service have been simplified for the purposes of display. For example, the category “Army” includes service in the Continental Army (which is a distinct body of the Army that formed after the Revolutionary War) and the Union Army. In particular, between 1881 and 1952, three of the nine Justices who are categorized as serving in the Army had served in the Union Army during the Civil War.

¹⁰⁹ Justice Alito joined the Army Reserve Officer’s Training Corps (ROTC) while a student at Princeton University in the late 1960s. While commissioned as a Second Lieutenant after graduation in 1972, Alito deferred until his graduation from law school in 1975. While Alito’s military service technically overlapped with the Vietnam War for several months, he did not begin military service until two years after the termination of the conflict. For an account of Alito’s decision to join the military, see “Alito Joined ROTC While at Princeton,” *The Washington Post*, November 3, 2005, Final Edition, p. A4.

Educational Background

To date, every Supreme Court Justice has been a lawyer. There is, however, no constitutional requirement regarding the educational background of a Justice or the necessity of a law degree. The legal education of many, though not all, Supreme Court Justices reflects the best training available at the time, whether that meant “reading the law” with a prominent attorney or attending an elite law school.

Type of Legal Training

For the first 75 years of the nation, modern legal education as conducted by standard programs administered by law schools did not exist.¹¹⁰ Some of the most privileged Justices traveled to England for their legal education to study at one of the four Inns of Court, which, from the 14th century to the middle of the 19th century, provided legal training to laypersons and admitted them to the bar.¹¹¹ Two of the first five Justices, John Blair and John Rutledge, chose this path and received the bulk of their legal education at the Inn of the Middle Temple in London.

Most Justices, however, trained through an apprenticeship, during which they “read the law.” In this apprenticeship, an aspiring attorney would be trained by a practicing attorney. Some lawyers were self-taught. With no standards regarding the qualifications required of a mentor/practicing attorney to take an apprentice and the absence of a common curriculum among mentors, this era has been “dismissively [portrayed] as consisting of shoddy and unscientific training performed haphazardly, either in the law offices of failed attorneys needing to pay the bills or of their successful but overworked counterparts eager to turn their prestige into quick cash.”¹¹²

Of the 111 Justices, 62 (55.9%) were educated in whole or in part through reading law. As **Figure 8** indicates, the vast majority of Justices appointed between 1789 and 1850 “read the law.” During this period, some Justices, such as Chief Justices John Rutledge and John Marshall, both read the law and attended law school.¹¹³ Of the 31 Justices appointed during this time, 27 (87.1%) read the law as their sole means of legal education, 3 (9.7%) attended some law school and read the law, and 1 (3.2%) attended law school.

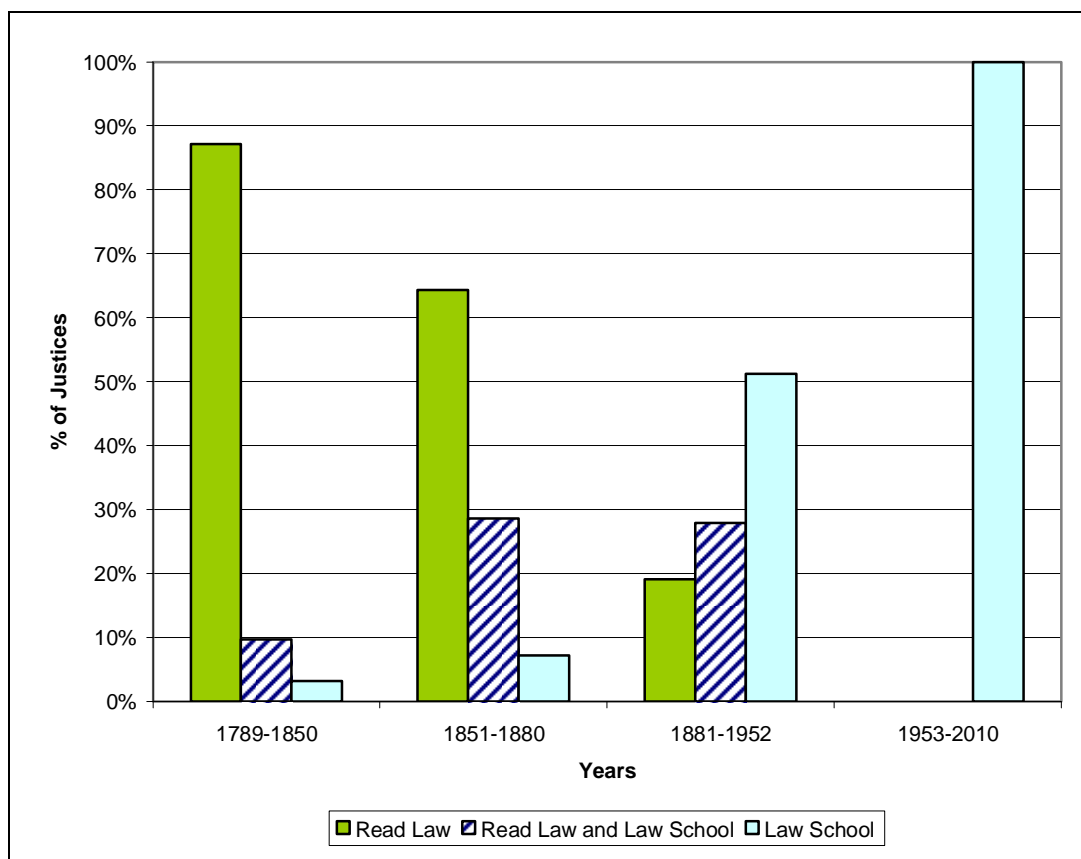
¹¹⁰ William D. Bader and Roy M. Mersky, *The First One Hundred and Eight Justices* (Buffalo, NY: William S. Hein & Co., 2004), p. 10.

¹¹¹ During the 17th and 18th century, many colonists came to study at the inns, and this practice continued until the War of 1812. Today, these four Inns of Court have “the exclusive right to Call men and women to the Bar, i.e. to admit those who have fulfilled the necessary qualifications to the degree of Barrister-at-Law, which entitles them, after a period of pupillage (vocational training) either to practice as independent advocates in the Courts of England and Wales or to take employment in government or local government service, industry, commerce or finance.” See The Honourable Society of the Middle Temple, *Middle Temple*, “The Inn,” <http://www.middletemple.org.uk/>.

¹¹² Andrew M. Siegel, “‘To Learn and Make Respectable Hereafter:’ The Litchfield Law School in Cultural Context,” *New York University Law Review*, vol. 73, no. 6 (Dec. 1998), p. 1979.

¹¹³ Justice John Rutledge attended the Inns of Middle Temple; Justice John Marshall attended William and Mary.

Figure 8. Legal Education of Supreme Court Justices Over Time
By Appointment Date and Type of Education, 1789-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

While not the first law school in the United States, the reopening of Harvard Law School in 1829 is generally viewed as the beginning of the modern era in legal education.¹¹⁴ The movement toward standardized legal education is reflected in the education of Justices appointed between 1851 and 1880. Of the 14 Justices appointed in this period, 64.3% (nine Justices) read the law as their sole method of legal education, as compared with 87.1% (27 of 31 appointed) prior to 1851. Between 1851 and 1880, 28.6% (four Justices) of those appointed both attended law school and read the law, and 7.1% (one Justice) attended law school as their sole means of legal education.

As indicated in **Figure 8**, between 1881 and 1952, many more Justices attended law school than in the previous two periods. Importantly, the number of Justices who read law as their sole means of legal education or read law in addition to attending law school dropped precipitously. Of the 42

¹¹⁴ Siegel, “To Learn and Make Respectable Hereafter,” p. 1978. While first founded in 1817, Harvard failed to allocate sufficient resources to its law school and struggled with declining enrollment and the long absences of the school’s one professor. By 1827, the struggling law school had just one teacher and one student. Legal education at Harvard was reinvigorated by alumnus Nathan Dane, who recruited Supreme Court Justice Joseph Story to serve as the first Dane Professor at Harvard. See also Harvard Law School, “About HLS: Our History,” *Harvard Law School Website*, <http://www.law.harvard.edu/about/history.html>.

Justices appointed during this period, 22 (51.1%) attended law school and did not read law, 8 (19.0%) read law but did not attend law school, and 12 (27.9%) received both types of training. The last Justice to be appointed without having attended law school was Justice James Byrnes, appointed in 1941 by President Franklin D. Roosevelt. Byrnes, who was a U.S. Senator at the time of appointment, had read law between 1896 and 1903; he was self-taught.¹¹⁵

All 24 Justices appointed since 1953 were trained at law schools and, unlike many Justices in previous periods, obtained a formal law degree. By this time, the structure of modern legal education was firmly in place and members of the bar, including Supreme Court Justices, were no longer trained through apprenticeship.

Law School Education

Justices since 1909, as **Figure 9** shows, have increasingly received their legal training at Harvard, Yale, or Columbia. Of the 50 Justices appointed in the past 100 years, 46 (92.0%) received part, if not all, of their legal education at a law school. Of these 46 Justices, 22 (47.8%) were trained at Harvard, Columbia, or Yale.

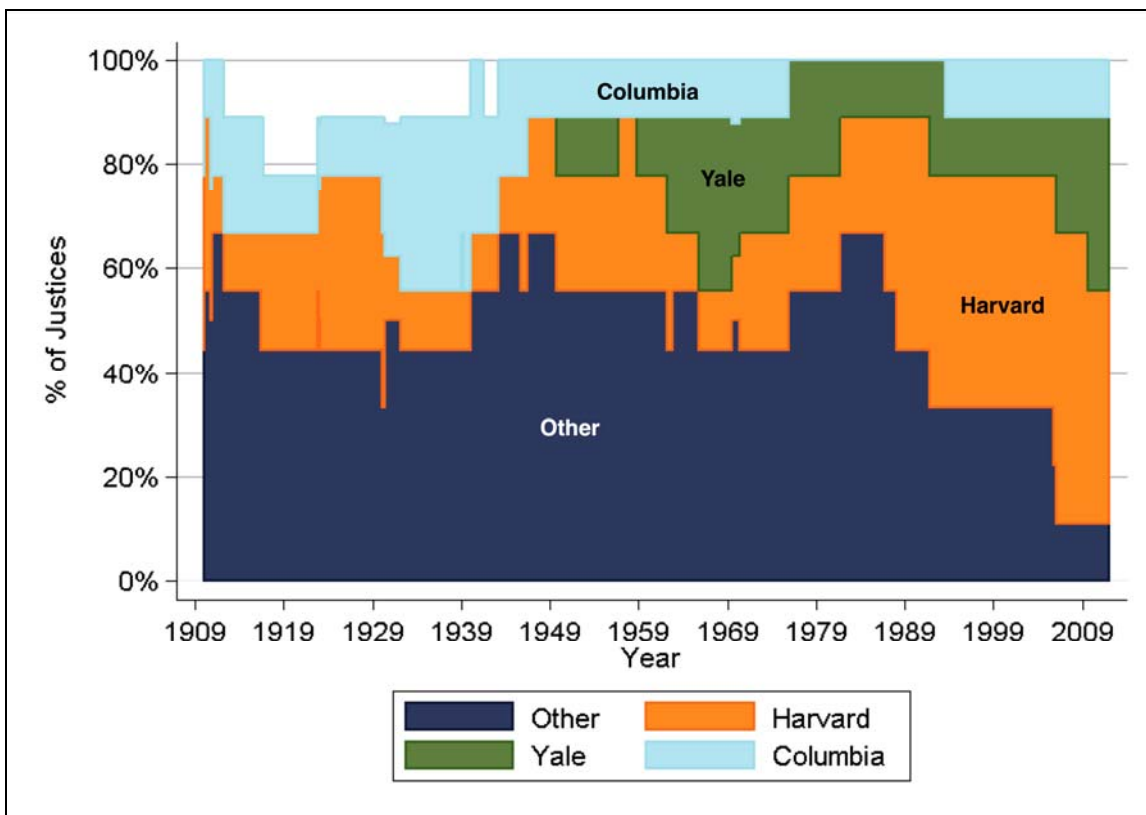
Since 1988, Justices from these three schools have consistently composed over 50% of the Court's membership. Each of the nine Justices appointed since the elevation of William Rehnquist to Chief Justice in 1986 has received his or her legal training at Harvard, Yale, or Columbia.¹¹⁶ The only sitting Justice who did not graduate from Harvard, Yale, or Columbia is John Paul Stevens, who received his law degree from Northwestern University in 1947.

The appointment of Justice Sonia Sotomayor has produced little change in the composition of the Court with respect to legal education. Like Justices Clarence Thomas and Samuel Alito, Judge Sotomayor attended Yale University and replaced David H. Souter, a Harvard alumnus. As a result, the number of Harvard-educated Justices on the Court has been reduced from five to four in the current Court, and the number of Yale-educated Justices has increased from two to three.

¹¹⁵ Notably, Justice Robert H. Jackson, appointed seven days after Justice Byrnes, attended Albany Law School from 1911 through 1912, but he left law school and passed the bar before receiving a degree. Justice Jackson, unlike Justice Byrnes, both "read law" and attended law school before passing the bar exam.

¹¹⁶ Though Justice Ruth Bader Ginsburg (appointed by President Clinton in 1993) received the bulk of her legal education at Harvard, she graduated from Columbia.

Figure 9. Law Schools Attended by Supreme Court Justices
 Percentage of Sitting Justices Who Attended Law School, 1909-2010



Source: CRS analysis of data from the Federal Judicial Center’s *Federal Judicial Biographical Database* (www.fjc.gov) and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *Supreme Court Compendium: Data, Decisions, and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

Notes: The figure displays the percentage of sitting Justices attending Harvard, Yale, or Columbia. All other law schools are represented in the “Other” category. For example, during the third natural court of the Chief Justiceship of Charles Evans Hughes in 1935, Justice Pierce Butler was the only Justice to have not attended a law school. Of the eight Justices who attended law school, three attended Columbia and one each attended Harvard, Virginia, Michigan, Cincinnati, and the University of Pennsylvania. The three attending Columbia (33.3% of sitting Justices) are represented by band at the top of the graph, labeled “Columbia.” The one Justice who attended Harvard (11.1% of sitting Justices) is represented by the narrower band, labeled “Harvard.” The law school affiliations of the remaining four Justices (44.4% of sitting Justices) is represented by the large band at the bottom of the graph, labeled “Other.”

Conclusion

Since President Obama announced the nomination of Sonia Sotomayor in May 2009, Senators, media commentators, and scholars have engaged in renewed discussion regarding the social, professional, and educational diversity of the Court’s membership. Discussion about the importance and appropriate role of a nominee’s background is not new. It has been debated widely since the Carter Administration’s efforts to diversify the federal judiciary in the late 1970s. Such discussions will likely continue with each future Supreme Court nomination.

Over time, the membership of the Supreme Court has become more diverse in some ways and more homogeneous in others. When the Court was first constituted and throughout most of its

history, neither women nor minorities served on the Court. This changed with the appointment of the first African-American Justice, Thurgood Marshall, in 1967, and continued with the appointment of Justice Marshall's replacement, Clarence Thomas, in 1991. The historical makeup of the Court changed yet again with the selection of Justice Sandra Day O'Connor in 1981. She was subsequently joined by Ruth Bader Ginsburg in 1993. The appointment of Sonia Sotomayor has added additional diversity to the Court's membership. Confirmed on August 6, 2009, Sotomayor is the third woman and the first Latina to be appointed to the Court.

The religious affiliations of the Justices have changed over time, as well. For the first 50 years of the Court, all Justices were affiliated with protestant Christian churches. The first Catholic Justice, Chief Justice Roger Brooke Taney, was appointed in 1836. After his appointment, increasing numbers of Roman Catholic Justices have been appointed. Six (66.7%) of the eight Justices on the current Court identify as Roman Catholic, including recently appointed Justice Sonia Sotomayor. The first Jewish Justice, Louis Brandeis, was appointed in 1916. For the next 50 years, at least one Jewish Justice served on the Court until the resignation of Abe Fortas in 1969. Currently, two Jewish Justices, Ruth Bader Ginsburg and Stephen G. Breyer, serve on the Court.

While the Court has become more diverse with respect to race and gender, the career experiences of Justices have become more homogeneous over time. Historically, Justices served in a variety of professions in the public and private sector prior to their elevation. Some have been members of presidential Cabinets, others were governors, members of federal or state legislative bodies, or engaged in private legal practice. During the last 50 years, however, Justices have more and more frequently been elevated from positions on the federal circuit courts of appeals. Of the currently serving Justices, all possess federal circuit court experience. Only one served on a trial court at the state or federal level. Six of the nine current Justices were government attorneys in some capacity. No sitting Justice has served as a federal or state executive or legislator. Notably, only five have prior experience in private practice, as compared with 98.0% (100) of the other 102 Justices elevated to the bench throughout the history of the Court.

The legal educations of the Justices have become more homogeneous, as well. Before the standardization of modern legal education, many Justices pursued their legal education through "reading the law" as an apprentice to a mentoring attorney and supplemented their education through formal legal training at the nation's burgeoning law schools. As legal education became increasingly standardized, an ever-growing number of Justices earned law degrees. Throughout the history of the Court, and especially in the last 20 years, three Ivy League law schools—Harvard, Yale, and Columbia—have been disproportionately represented on the Court. Of the nine sitting Justices, eight attended one of these three schools.

Movement toward greater racial, ethnic, and gender diversity on the Court, as well as patterns of career and education homogenization, reflect both changes in American society and changes in the Senate confirmation process over time. The participation of women and minorities in civic life has led, since the late 1960s, to greater representation of these groups in the federal judiciary, generally, and the Supreme Court, specifically. For example, Jimmy Carter sought to increase the numbers of women and minorities in the federal courts throughout his presidency, and Ronald Reagan explicitly sought a woman to fill the first Supreme Court vacancy of his Presidency.

Importantly, since the 1950s, the Court has increasingly considered cases with widespread, highly publicized, and controversial social consequences. The Court's often contentious decisions involving issues such as racial segregation, defendants' rights, and personal privacy led to greater

scrutiny of Supreme Court nominees by interest groups, media commentators, and the U.S. Senate. Whereas earlier nominees were often confirmed with little Senate scrutiny, extended Senate confirmation hearings have become a routine component of the modern Supreme Court appointment process. Presidents, as a result, have reportedly selected nominees with federal appellate court experience and sterling educational credentials to better predict the nominee's judicial philosophy and insulate the nominee from questions of competency in an increasingly rigorous Senate confirmation process.

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