What Makes a Sound Supreme Court Justice?

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When asked, legal scholars, commentators, and avid Court watchers will gleefully name the best Supreme Court justices to have served on the bench. Even justices have their favorite predecessors, and numerous academic lists have set out to rank justices' tenures on the bench. Yet when asked what exactly makes a good justice, there seems to be a pause among academics– individuals can seldom list the qualities that make for a legendary tenure. There is a hole within the literature that identifies which factors made the greatest Supreme Court justices the legal giants they were. This article aims to fill that hole by identifying the qualities that land justices on scholars' "all-time" lists.

Author's Foreword to the Article, May 3, 2022:

I wrote the following article over a three-week period in early January, as the Court resumed its highly contentious 2021-22 term. Against the backdrop of legal issues arising from controversial political responses to the pandemic, and calls from Democratic Congresspeople for the retirement of Justice Stephen Breyer– the Court's activities and rulings were beginning to be presented to citizens through a uniquely *political* lens. I wrote the following article out of a fundamental conviction: that the Court's legitimacy hinges on the justice's fulfillment of their neutral, nonpolitical role in American life, as prescribed by the Constitution. I, and hundreds of thousands of Americans, respect this institution because through much of its contemporary history, it has done its due diligence to remain apolitical, and above all *fair*, in its decision-making.

On May 2nd, millions of Americans were alerted of the Court's likely ruling in *Dobbs v. Jackson Women's Health Organization* (2022). As I read the draft opinion, written by Justice Samuel Alito, one clear thought emerged in my mind, this ruling is *unfair*. Putting aside the subject matter of *Dobbs* (the issue could be interstate commerce, congressional delegation, or any mundane or contentious legal matter), the notion that one branch of government is at liberty to uproot

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longstanding, preexisting legal precedent is simply regarded by most Americans as *unfair*. At a fundamental level –divorced from complex, philosophical theories of ethics– most ordinary citizens believe that justice is fairness. Often, this principle has been reproduced by the Court in the form of granting some legal victories to conservatives, and some to liberals. The public has regarded the Court as a fair institution primarily for this reason. Most Americans believe that the Court has administered justice in its cases by ruling along *fair* grounds. Even if a particular case was decided against an individual's favor, they trust it was decided by the justices along fair, legal grounds.

The likely outcome of *Dobbs* violates this rudimentary principle. Justice Alito grounds his opinion on Justice Brett Kavanaugh's five tests for overruling precedent. The first of these tests concerns whether the precedent case was based on reasoning that was clearly faulty. Justice Alito makes few arguments to support the notion that either *Roe v. Wade* (1973) or *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) was somehow "egregiously wrong." In fact, most Americans will not read Justice Alito's reasoning behind why his opinion fulfills either this or the remaining four tests for overruling precedent. Many will instead focus on the notion that long standing precedent has just been uprooted by a politically unchecked branch of government– and that this action is *unfair*.

I wrote the following article charged with the precious, core belief that the justices of the Supreme Court ought to act judicially, not politically. Yet, regardless of the legal reasoning that Justice Alito provides for his opinion in *Dobbs*, many members of the public will likely –and properly– view the decision as an unfair one. Further, given the political lens through which the Court has been portrayed in the past year, the decision will likely be seen as a *political* one as well. This decision jeopardizes the Court's promise to administer justice *fairly*. Recall that justice is evenhandedness to most Americans; it is consistency– it is the notion that the rule of law at sundown will be the same rule of law at sunrise. Regrettably, the sun may well have gone down on our right to expect the Supreme Court to act in its tradition of fairness.

Introduction

Supreme Court nominations have become some of the most visibly partisan votes on the Senate floor. Justice Samuel Alito's confirmation in 2005 set the precedent that voting along party lines would be the new twenty-first century normal when a nominee testifies before the Senate Judiciary Committee.[74] To illustrate the severity of political polarization in the nomination process, one needs to look no further than the lineage of Justice Neil M. Gorsuch's seat.

In 1986, President Ronald Reagan nominated then-judge for the U.S. District Court for the District of Columbia, Antonin Scalia, to fill the seat of Justice William H. Rehnquist, who was being promoted to Chief Justice. In his own words, Scalia was, "...known at that time to be in my political and social views, fairly conservative. But still, I was known to be a good lawyer, an honest man."[75] Scalia was confirmed by the Senate in a vote of 98-0. Thirty-one years later, Tenth Circuit Judge Gorsuch was confirmed by a vote of 54-45.[76] While some may be inclined to disagree with Gorsuch's personal views, the justice's legal qualifications are not up for debate.[77] Gorsuch's nomination followed the contentious 2016 Republican blockage of the nomination of then-Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, Merrick Garland. This stonewalling effort undoubtedly fanned the flames of partisan division during the Gorsuch hearings. However, Gorsuch's confirmation vote has not been uniquely partisan in comparison to other nominations in this millennium. Justices Alito, Roberts, Sotomayor, Kagan,

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[74] "Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020. A historically savvy reader would note that whilst confirmation votes along party lines have undeniably grown in frequency in the 21st century, throughout the 19th century– when the Senate was a much smaller chamber– votes to confirm nominees to the high bench would also occasionally fall along partisan lines. To name a few, Justice Jeremiah Black received a count of 25-26 in 1861, Justice Mathews Stanley received a count of 24-23 in 1881, and Justice Lucius Lamar received a vote count of 32-28 in 1887. Ibid.
[75] Scalia, *Constitutional Interpretation the Old Fashioned Way*, 2005, 58:57.
[76]"Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020.
[77] "Neil Gorsuch." Oyez. Gorsuch graduated Phi Beta Kappa from Columbia University in 1988, Cum Laude from Harvard Law School in 1991, and went on to become an Oxford Marshall Scholar, studying philosophical natural law in 1992 (completing the two-year program in a year). Gorsuch went on to receive three prestigious clerkships (two for Justices Byron White and Anthony Kennedy) and worked for well-regarded law firms, the Justice Department, and the Colorado School of Law.

Kavanaugh, Barrett, and Jackson have all seen bitter confirmation proceedings.[78]

The Division of the Confirmation Hearings and the Importance of Legal Expertise

The increased division in confirmation hearings can be attributed to a number of factors. Perhaps the most likely explanation is that Americans have come to comprehend the weight the judiciary carries in deciding the trajectory of American culture through its settlement of important legal disputes. However, the age of bitter partisan division distorts how Americans evaluate nominees, creating a nomination process that is deeply inefficient in determining the *legal expertise* of nominees.[79] For the objectives of this article, *legal expertise* can be understood as a synthesization of strong judicial ethics, decisive reasoning, and high *legal fluency*.[80] Scholars have written about the importance of other characteristics aside from *legal expertise* in nominees, however, this article's primary focus is to extrapolate which qualities compose *legal expertise*.

Federalist No. 78, part of a series of influential essays titled *The Federalist Papers* that argued for the ratification of the Constitution, refers to the judiciary as the "least dangerous branch," of government.[81] Notwithstanding that judicial decisions have garnered the capacity to dramatically shrink the power of the Executive, willpower of the Senate, and change the cultural conversation among The People.[82] Given this, it is understandable that Court nominations have become so critically

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[78] "Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020.

[79] A strong argument could certainly be made that elected officials and Americans, alike, have chosen to prioritize the likelihood of a nominee casting judgments that favor their political ideology over a nominee's *legal expertise*. Such an argument could indeed reflect the reality of considerations that nominees are judged against. However, I will be approaching the matter from the assumption that Americans want their elected officials to confirm nominees that possess a high degree of *legal fluency*.

[80] For the purposes of this article I define "legal expertise" as the characteristic of mastering how to read various statutes and comprehending the historical significance of laws at the time of enactment.

[81] Hamilton, *Federalist No. 78*, 378-385.

[82] Amar, *The Words that Made Us: America's Constitutional Conversation, 1760-1840*, 517-518.

important to Americans and their elected representatives. The Judiciary has played a central role in the formation of American society; decisions such as *Brown v. Board of Education* (1954) and *Ledbetter v. Goodyear* (2006) have forced Americans to engage in critical constitutional conversations regarding what America's shared values are and how they ought to be legislated.[83] Thus, the nine unelected jurists who sit on the nation's highest bench should be studied and selected with the utmost care by the American citizenry and their elected representatives. Considerations of nominees should be made free from ideological allegiances, and rather with heightened attention to a nominee's *legal expertise*.

Since their establishment in 1916, the Supreme Court nomination hearings gave elected representatives and Americans the opportunity to gauge a nominee's *legal expertise*. Nominees are selected by the Executive and testify before Congress to determine their legal suitability for the bench. If the nominee's professional experience and testimony before the Senate Judiciary Committee is up to par, they would be confirmed and don a black robe, guaranteed by life tenure. Although there certainly have been contentious historical nominees — our very own Louis D. Brandeis endured bitter opposition from senators due to his association with progressive reform in employment and business practices — most nominees have been confirmed to the bench without much controversy.[84]

The Cruciality of Judicial Independence

Consistent with the *separation of powers* principle enshrined in the Constitution, alternative branches of government influencing the actions of the judiciary has not only been a source of public outrage (i.e., the public outrage following the publicity of the events of President Richard Nixon's *Saturday Night Massacre*). In addition, justices have

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[83]*Brown* forced Americans to reconcile that the separate but equal doctrine would never truly be equal, thus closing the era of Jim Crow laws. While *Ledbetter* forced Americans to converse about how equal pay for equal work should look like on legal paper, eventually opening the door to a greater conversation about how pay discrimination actually affects citizens in workforce.

[84] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 93-157. Brandeis wrote of the opposition to his confirmation "[t]he dominant reasons for the opposition ... are that he is considered a radical and is a Jew."

ordinarily resisted such pressure.[85] Inherent in the responsibilities of the judiciary is that justices are tasked with making decisions based on what laws and prior precedent demands of them, rather than making decisions based on their personal will or to fulfill political favors.

Justice Oliver Wendell Holmes exemplified judicial independence particularly well preceding the earnestly awaited judgment of *United States v. Northern Securities* (1904), in which Holmes joined the minority of justices who voted in favor of Northern Securities. President Theodore Roosevelt said of Holmes "I could carve out of a banana a judge with more backbone than that!"[86] This comment stemmed from Roosevelt's hope that nominating Holmes to the Court would secure votes in favor of his Administration's preferences. Similarly, President George H. W. Bush was remarkably disappointed in Justice David H. Souter's voting record, wishing that his jurisprudence had mirrored that of Scalia's.[87] Justices such as Holmes and Souter reinforce the notion that justices are not merely "junior-varsity politicians,"[88] furthering one political party's interests to both the American public and other governmental branches.

The Unpredictability of Justices and Why it Matters

Justices are simply unpredictable; a judge is subject to change their legal opinion at any given time when a new case is brought before them.[89] The decisions of the Court must be *objectively* sound, not *subjectively* good. In other words, decisions from the judiciary should be grounded in reason derived from the language of law and statutes, rather than rendered from a justice's political preferences. The judicial branch has earned the trust of the American people precisely because of the nature of its decision making.[90] By grounding its decisions in preexisting law and explaining why it decides cases in favor of various parties through opinion writing, the Judiciary is able to retain the trust of the broader public.

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[85] There are, of course, shameful and deeply troubling exemptions to this observation.
[86] Purdum, *Presidents, Picking Justices, Can Have Backfires*, 2005.
[87] Totenberg, *Impact of Souter Retirement Examined*, 2009.
[88] Breyer, *Supreme Court Justice Stephen Breyer and Noah Feldman*, 2015, 1:17:49.
[89] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 144.
[90] Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 1999, 943-955. The nature of how this trust is garnered by the judiciary will be explored further in section two of this paper.

If Americans and their representatives ever wish to separate themselves from the bitter partisanship of Supreme Court confirmation hearings, critical questions regarding what makes a *sound* justice ought to be asked and answered. This article will begin by exploring what makes an effective justice and how they contribute to the legitimacy of the Supreme Court as an institution. Subsequently, it will move to outline the factors that characterize a useful justice, identifying influential theories and engaging with methodologies for classifying the effectiveness of a justice. Following this section, the article will answer what makes a good justice in hindsight. Finally, the article will conclude with how these findings can aid Americans and their senators in understanding what qualities to look for in the future by changing the content of confirmation hearing questions so that the Supreme Court will continue to be graced with justices of exceptional *legal expertise*.

The Effective Judge and their Contribution to the Legitimacy of the Judiciary

Before identifying the qualities that have made historically effective justices, it is helpful to first understand what qualities make a sound judge. Former Baltimore County Circuit Court Judge, Dana M. Levitz, wrote for the University of Baltimore's School of Law Review that a judge should have the capacity to know when they ought to recuse themselves from a case, possess a high degree of legal fluency, and deliver sound and decisive judgments.[91] These qualities build on one another to construct the foundations for sound and impartial reasoning.

Legal Fluency: Content and Consequences

In his 2021 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts voiced significant ethical concerns regarding the 131 federal judges who failed to recuse themselves in 685 matters involving companies in which they or their families owned some share of stock between 2010 and 2018.[92] Recusal from cases in which judges have a personal, political, or financial stake is crucial to safeguard the public trust in the judiciary. Parties that go before a judge should leave the courtroom secure in the knowledge that their case was heard by an

[91] Levitz, *So You Think You Want to Be a Judge*, 2008, 57-72.
[92] Roberts, *2021 Year-End Report on the Federal Judiciary*.

impartial and legally competent expert of the law, regardless of if the case was decided in their favor.[93] The threshold of *legal fluency* that a judge ought to possess is understood as the ethical judgment needed to identify when it is appropriate to recuse oneself from a case where one might have a personal, political, or financial stake in the decision. If a judge fails to have the *legal fluency* to understand when to recuse themselves, the legitimacy of the judiciary is in jeopardy. The legitimacy of an institution is much easier to diminish than to build, thus, it is crucial that all judges realize how their decisions affect the legitimacy of the legal system as a whole.

Legal Fluency and Judicial Institutional Legitimacy

The judiciary builds its institutional legitimacy like any other institution. Sociologist Max Weber's three points of institutional legitimacy are identified through tradition, (legal) rationality, and affective ties.[94] Dean Erwin Chemerinsky of the UC Berkeley School of Law argues that the Supreme Court has gained its institutional legitimacy by maintaining traditions such as oral arguments, conferences, and opinion circulation.[95] The public has grown accustomed to these traditions which install a sense of thoroughness and sensibility to the Court's decision-making process. Chemerinsky goes on to explain that because the Court bases its decision making in laws, precedent, and other forms of legal scholarship, the public can conclude that their decisions are reached from a position of rational reasoning even if a particular decision on a matter is unpopular.[96] Finally, the Court's affective ties are projected through the rest of society via governmental regulation, lawmaking, and other bureaucratic operations.[97] These institutional customs are what have bestowed the judiciary with the highest amount of trust among Americans out of the three branches of government.[98]

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[93] Levitz, *So You Think You Want to Be a Judge*, 12.
[94] Weber, *The Three Types of Legitimate Rule*, 1958, 1-11.
[95] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 4.
[96] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 5.
[97] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 4.
[98] The University of Texas at Austin, *Most Trusted Branch of Government*, 2020.

The judiciary must work to uphold this level of trust if it wishes to safeguard its institutional legitimacy. Thus, as hallmark figures of the judiciary, judges carry the responsibility of reaching their decisions in line with judicial customs. Without a reservoir of public trust in the judiciary, the rule of law no longer carries significant weight in settling disputes among parties which could land the country in a politically contentious or violent place.[99] The Chief Justice's 2021 End-Year Report suggests that he too has concerns regarding the judiciary's capacity to maintain its institutional legitimacy.[100] An effective judge must realize that they are part of a greater institutional body whose legitimacy is directly contingent on the decisions that members of the judiciary make.[101]

It is now appropriate to stress that this conclusion does not mean that judges must alter the means of reaching their decisions. Judges and their jurisprudence do not have to be tailored to what the public would *favor* it to be.[102] Judges are not tasked with pleasing the public, rather they are tasked with resolving legal conflicts by means of honest and fair reasoning. Honest and fair reasoning implies that judges recuse themselves from a case when their personal, financial or political interests are furthered by the outcome of a case. Furthermore, possessing a high degree of *legal fluency* ensures that parties' grievances are analyzed by an expert of law who can dictate exactly how the established law applies to a case before them. Finally, the capacity to deliver sound and decisive judgments ensures that decisions made by judges are consistent with law and precedent, even in difficult circumstances where cases are deeply complex. These qualities are absolutely essential for any nominee being considered for a seat on the Supreme Court as justices are faced with intricate cases which demand that these qualities are already mastered by the nominee. This article will now shift from what makes an effective judge to identifying what makes a useful justice by recognizing two aims of a justice's tenure and two methodologies tasked with measuring how these aims make a justice useful to the greater legal community.

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[99] Levitsky & Ziblatt, *How Democracies Die*, 2018.
[100] Roberts, *2021 Year-End Report on the Federal Judiciary*, 3.
[101] Levitz, *So You Think You Want to Be a Judge* 13.
[102] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 5.

What Makes a Useful Justice? Theories and Methodologies

Justices notably differ from lower court judges in that their opinions traditionally carry more weight than those of lower court judges, leading them to be more well known by the public and members of the legal community.[103] Legal commentators suggest that Justices who (1) act as the intellectual epicenter of their respective court or (2) influence the trajectory of American law past their tenure fulfill the central aims of a justice's tenure.[104] Undoubtedly, significant overlap exists between these two aims, and Justices, like all individuals within the workforce, have multiple professional desires they wish to accomplish simultaneously. Yet, most justice's tenures are remembered by legal academics or the greater public because one of these aims was emphasized by the justice's tenure more so than the other— this is accomplished through the justice's writing on the Court.

Motivation I: The Epicenter of a Legal Movement and the Subsequent Role of the Law Review

Beginning with the first motivation, justices land themselves in the intellectual epicenter of academic legal writing by developing robust and unique legal theories which garner the respect of academics and legal commentators.[105] Justices develop robust legal theories because they are deeply invested in the trajectory of the law as figures who determine it. Justices spend their professional lives either employing the law to further their understanding of how lawyers should interact with it in private and public practice, or sketching out how they believe the law ought to be interpreted in professorial tenures - among other legal occupations.[106]

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[103] Cross & Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 2010, 409-474.
[104] Baum & Devins, *Why The Supreme Court Cares About Elites, Not the American People*, 2010, 1516-1555.
[105] Baum & Devins, *Why The Supreme Court Cares About Elites, Not the American People*, 19.
[106] "Tom Johnson Lectureship: Justice Neil Gorsuch." The LBJ Foundation, 2019. Such professional experience is often preceded by a judicial clerkship. Whilst speaking at the LBJ Foundation, Justice Gorsuch remarked that law graduates ought to be attentive when applying and choosing between clerkships because the first few mentors of a law graduate have an enormous influence on how a lawyer will argue cases and how they believe judges should interpret laws; Gorsuch, Neil.

Professional experience is consequential because it dictates how a justice is likely to use the law to further their understanding of its role— such professional experiences mold a justice's legal philosophy.

Legal philosophy provides justices with a foundation upon which they can further existing or carve out new, intricate legal theories. Legal theories allow justices the opportunity to not only lead an intellectual movement concerning how lawyers and judges utilize the law to further various objectives but also to provoke intellectual discourse around these legal theories. The principal audience of justices' writing is professors and law students. Hence, the yearning for academic dialogue about a justice's legal theory cannot be understated because justices write for this community. Further, justices craft opinions with this audience in mind because they *care* about how academic communities perceive *them*. A justice's tenure is more often remembered by the professors, commentators, and other influential elites who publish legal writing -often in the form of law review articles- or biographies about a justice's tenure on the Court. Thus, it is of little surprise that a justice's authoring style, which extrapolates their legal theory in various cases, would be designed to garner the literary attention of such influential figures.

A contemporary example of this phenomenon is illustrated by Justice Gorsuch's tenure. Professor Noah Feldman of Harvard Law School hypothesized that Gorsuch's primary professional aim is to be regarded as the new conservative intellectual of the Court, carrying the torch of his direct predecessor, Scalia.[107] Feldman wrote, "Gorsuch decides cases a little differently from his colleagues… In every case…he takes pains to shape a consistent judicial philosophy that defines the conservative position."[108] Feldman further divulges that due to the strict jurisprudence that Gorsuch is actively carving out, some of his decisions have led to deeply conservative rulings, while others have led to surprisingly liberal outcomes.[109] This jurisprudence was displayed in Gorsuch's majority opinion in, *Bostock vs. Clayton County*, which extended the Civil Rights Act's ban on employment discrimination on the basis of sex, protecting LGBTQ+ workers.[110] Upon publication, this opinion shocked both liberal and conservative legal writers; yet, when

[107] Feldman, *Neil Gorsuch Is Channeling the Ghost of Scalia*, 2021.
[108] Ibid.
[109] Feldman, *Neil Gorsuch Is Channeling the Ghost of Scalia*, 2021.
[110] *Bostock v. Clayton County*, 590 U.S. 17-1618, 2020.

reading the opinion, it becomes clear that Gorsuch's conclusions are perfectly consistent with the legal theory he has spent his entire judicial career carving out.

Gorsuch's judgement in *Bostock*, which entirely depended on the reading of the word "sex," in Title VII protections which ban the termination of employment on the basis of sex. Gorsuch wrote that "...an employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."[111] His reading of the word, lodged in a textualist interpretation of statutes, was entirely consistent with his long standing legal philosophy that one ought to read legal words in their original meaning. The decision garnered much attention from both liberal and conservative legal writers, undoubtedly fulfilling Gorsuch's desire to provoke academic discourse regarding textualism and its outcomes. Indeed, such discussion did come about as legal writers and commentators published articles in blogs, journals, and eventually law reviews citing the case and debating textualism and its use in judicial decisions. The role of the law review ought to be highlighted as these journals are not only prestigious publications that have influenced judges historically, but they also provide an avenue that justices can use to reflect on the influence of their legal theories.[112]

Law review articles provide justices with the opportunity to consider how their legal theories are being received in the legal community by reading what various law professors in influential legal academies believe their legal theories can accomplish. Appearing in law review papers and other legal publications suggests that a justice's jurisprudence is particularly influential in the trajectory of contemporary law. Though it should be noted that attempting to quantify a justice's influence by merely counting how many times they appear in Law Reviews may over-inflate their influence, particularly as time moves forward.

Law Review-Inflation: a Caveat

[111] *Bostock v. Clayton County*, 590 U.S. 17-1618, 2020, 6.
[112] Once again, our very own then-lawyer, Louis Brandeis' collaborative article in the 1890 Harvard Law Review titled "The Right to Privacy," essentially created the judicial recognition of a right to privacy. The article altered the trajectory of the Fourth Amendment cases from then on, as courts began recognizing the right in proceedings.

So-called law review-inflation has three leading causes, the first being that preceding the 1870's the publication of law reviews hadn't been established in American law schools.[113] Law review features tend to focus on contemporary issues, thus, some influential justices, like Justice James Wilson, are frequently underwritten about. Secondly, some justices may have lived distinguishable lives, however, their tenure on the bench may not be nearly as memorable. Chief Justice John Jay was one of America's founding fathers, a member of the commission initiating the Treaty of Paris, and a co-author of the Federalist Papers— just to name a few of his many notable achievements.[114] Yet, Jay's six year-tenure serving as the nation's first Chief Justice was remarkably dull.[115]

Finally, some justices exert their influence on American law when they are serving as judges on a lower court, rather than as a justice on the U.S. Supreme Court. Justice Benjamin N. Cardozo is perhaps the most conventional example of this phenomenon. Like Jay, Cardozo only served on the U.S. Supreme Court for six years.[116] Consequently, Cardozo couldn't deliver nearly as many landmark opinions as his longer-serving colleagues. Yet, Cardozo's fifteen-year tenure serving as an Associate and as the Chief Judge of the New York Court of Appeals was where his landmark opinions were delivered.[117] Therefore, whilst law review features can be a sound indicator for measuring the influence of a justice's tenure, one should refrain from solely relying on features after considering the caveats mentioned above.

Motivation II: Determining the Trajectory of American Law

Moving to the second primary aim of a justice's tenure, the desire to shape the trajectory of American law, D.C. Circuit Judge Montgomery N. Kosma developed a method derived from economic theory to measure the influence of a Supreme Court justice by counting the number of citations to a justice's opinion found in lower court opinions.[118] Kosma

[113] Closen & Dzielak, *The History and Influence of the Law Review Institution*, 2015, 1-45.
[114] Amar, *The Words that Made Us: America's Constitutional Conversation, 1760-1840*, 2021.
[115] Ibid.
[116] "Benjamin N. Cardozo." Oyez.
[117] Ibid.
[118] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 333-372.

reasons that if a justice provides an opinion that is frequently cited in lower court opinions, their jurisprudence was sound enough to be utilized in future cases.[119] Kosma addresses the issue of citation inflation by considering that older opinions are less often cited than contemporary ones.[120] Early in the republic's history, the Court released fewer opinions than it does today, however, many of those early opinions, such as *Marbury v. Madison* (1803) or *McColloch v. Maryland* (1819), set what is now acknowledged as *super precedent*.[121] Although judges no longer utilize *super precedent,* such cases are undoubtedly some of the most influential opinions authored in American history.[122] Kosma compensates for infrequent citation of older cases by reasoning that an opinion from 1900 which has been cited ten times is equivalent in terms of influence to an opinion from 1960 that has been cited 18 times in lower court opinions.[123]

Aside from citation inflation and the underrepresentation of *super precedent*, Kosma does address the possibility of the overrepresentation of a Chief Justice's significance in his citation-count method. Kosma underscores that because Chiefs assign the opinions of cases whenever they are in the majority or minority of a case, the Chief has the opportunity to assign themselves a landmark case to author, thereby over inflating their own significance on the Court.[124] As a result, Kosma cleverly remarks, "...influence may not be perfectly correlated with talent."[125] On this point, it should also be noted that citation-count excludes dissents. Therefore, a truly great and wise dissenter's influence, such as that of Justice Ginsburg, may be understated in a study that centralizes solely on citation count.[126] As was the case with law review

[119] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 6.
[120] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 7.
[121] For the purposes of this article, I define "super precedent," as decisions that have gone unchallenged for such a great amount of time that contemporary opinions are written by judges excluding a citation to the case because judges assume that all individuals reading the case regard the citation as a precondition for the judgment rendered (precedent laid down by cases such as *Marbury v. Madison* would fall under such an understanding of *super precedent*).
[122] Ibid.
[123] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 15.
[124] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 8.
[125] Ibid.
[126] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 6.

features, a more holistic method is required than purely citation count to capture the accurate influence of a justice.

In addition, Kosma points to a justice's jurisprudence as an indicator of influence. As mentioned earlier, a justice's capacity to develop or utilize a judicial philosophy can earn them high respect among influential legal writers, but it can also cement their influence on the trajectory of American law over time.[127] Judicial philosophies such as textualism, pragmatism, and originalism are theories that have been adopted and modified to such a degree by hundreds of judges across the country that attorneys often arrange their arguments in a way that caters to these schools of thought[128] Kosma asserts the longevity of jurisprudence which justices expand over time will often determine that justice's influence on the direction American law proceeds in.[129]

In understanding what makes a useful justice it is favorable to take a measured approach. Firstly, when evaluating justices it is crucial to understand which of the two motivations: either to act as the intellectual epicenter of their respective court or to influence the trajectory of American law past their tenure a justice prioritizes during their tenure. If a justice wishes to be regarded as the epicenter of a legal movement, a count of written features in law reviews may reflect how their opinions are being perceived by influential legal elites. On the other hand, if a justice is primarily concerned with determining the trajectory of American law in the coming generations, perhaps calculating the number of lower court citations of their writing can reveal their influence. Secondly, it is important to note that there are caveats to both methods, as they can inflate the significance of some justices or their opinions whilst neglecting the influence of others. Hence, taking a measured approach that combines these measures or simply taking into account other factors such as Court culture, legal biographies, and other historical writings can

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[127] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 3.
[128] Kagan, *The 2015 Scalia Lecture| A Dialogue with Justice Elena Kagan on the Reading of Statutes*, 2015, 1:01:12.When Justice Scalia was serving on the Bench and an attorney was citing legislative history in their brief or in a footnote, they would often begin the sentence with a string of words to the tune of "for those who care for such matters." Due to Scalia's famous distaste for legislative history, he would know to skip over that section of the brief.
[129] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 5.

aid in understanding what has made a justice particularly useful during or after their tenure.

The *Sound* Justice: Maximalists, Minimalists, and Other Qualities

Thus far, this article has identified what makes a sound judge and has explored various theories utilized by legal scholars whom justices often hope will commemorate their influence on American law. Now, this article will engage in identifying which qualities have made America's greatest jurists the legal giants they were. Writing for the Tulsa Law Review, distinguished law professor Bernard Schwartz asserts that there is no mathematical formula that can select infallible variables which determine what makes a fine justice. There will always be some degree of subjectivity in determining which justices were truly remarkable jurists. Yet certain factors such as those discussed above– *legal fluency*, judicial independence, and influential writing– stipulate a basic criteria that will be expanded upon in the following section to determine what makes a sound justice.

Maximalists and Minimalists

In understanding what makes justices truly outstanding, one must distinguish between the two kinds of jurists. Writing for the Emory Law Review, professors Frank B. Cross and James F. Spriggs II identified judges as either maximalists or minimalists. Judicial maximalists customarily follow a strong jurisprudence that favors ruling what the law is in one sweeping gesture.[130] An example of a judicial maximalist on the contemporary Court is Justice Clarence Thomas, a staunch originalist, who favors declaring the law emphatically rather than incrementally.[131] On the other hand, judicial minimalists, akin to Justice Stephen Breyer, favor making small, incremental changes to the law that eventually pave the way for larger changes over time.[132] A considerable number of academic lists have ranked the best Supreme Court justices of all time; three justices consistently appear: Chief Justice John Marshall, and

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[130] Cross & Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 86.
[131] Cross & Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 86.
[132] Ibid.

Justices Joseph Story and Oliver Wendell Holmes.[133] Marshall and his protégé, Story, were judicial maximalists, favoring broader decisions that laid down a solid foundation for the law of the land.[134] Yet, Holmes was a judicial minimalist, preferring to further the law in small, gradual increments.[135] Hence, a justice can be classified as a judicial minimalist or maximalist, and still be a sound and influential jurist.

The Value of Judicial Instrumentalism

In reading the various explanations for why law professors select certain justices to appear on their lists of greatest Supreme Court jurists, one clear theme comes up time and again: the common thread linking justices who were minimalists and maximalists is the capacity to understand that the law declared by the Court today will serve a future society, whose culture and values will be different from the justices' contemporary culture.[136] Six out of the ten Justices that appeared in Schwartz's, "Supreme Court Superstars: The Ten Greatest Justices," were described as "result-oriented".[137] The value of *judicial instrumentalism* cannot be understated in examining the greatness of the justices who truly altered the trajectory of American law.[138] Consequently, the greatest justices understood the law as a governing tool used each and every day across American society, and American society characteristically strives to progress forward with the benefit of shared experience across diverse groups.[139] The law has to survive and evolve alongside society, and an instrumentalist perspective of how the law interacts with its society has

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[133] Hambleton, *The All-Time All-Star All-Era Supreme Court*, 1983, 462-465.
[134] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*. There is a strong argument to be made that Marshall and Story *had* to be judicial maximalists to settle what the law of the early republic ought to have been. Afterall, it is rather difficult to govern a constitutional republic when clear legal boundaries aren't set. Thus, hindsight offers a unique perspective, in that it almost seems obvious that the two most influential early figures on the Court were judicial maximalists.
[135] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 25.
[136] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 6.
[137] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 2.
[138] For the purposes of this article, *judicial instrumentalism* can be understood as a jurisprudence that places a heavier emphasis on the consequences a law will serve in society, rather than simply consulting the legislative language used in the statute when deciding the outcome of cases.
[139] Lynd, *Knowledge for What? The Place of Social Science in American Culture*, 1939.

undoubtedly contributed to landing the most celebrated justices on academic lists.

Secondly, it is worth mentioning that most justices who have landed on "all-time" roundups have not had a strong jurisprudence. Rather, these justices had strong legal opinions (or, one might say, *judicial principles*) that were universal among their decision-making.[140] The distinction between the two aforementioned aims of a justice's tenure is particularly noticeable among this group of justices. During their tenures on the bench, these justices placed greater emphasis on the trajectory of American law than on the probability of being at the intellectual center of legal writing. Some of the greatest justices of the twentieth century, such as Chief Justices Charles Evans Hughes and Earl Warren, as well as Justices Hugo Black and William J. Brennan, are often commemorated as justices who ruled on the grounds of *judicial principles*, rather than from a robust legal theory that they carved out.[141]

The Merits of Moderatism

Trends in the last century suggest that the negotiation abilities of a justice have become an indicator of judicial excellence.[142] Particularly in times of deep ideological disagreement between members of the Court, the ability to garner a majority of votes on a case has landed some justices in particularly high respects with academics and the greater public, alike. For example, Justice Sandra Day O'Connor's ability to pull one of her more conservative colleagues to form a majority in cases landed her in such a prominent position on the Rehnquist Court that it was colloquially rebranded the O'Connor Court.[143] Although some scholars have questioned the importance of *swing justices*, most have conceded that the ability to negotiate with other ideologically minded

[140] Hambleton, *The All-Time All-Star All-Era Supreme Court*, 3.
[141] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 51. it will certainly be interesting to see how Scalia will be remembered by future academics because he, unlike the four previously-mentioned justices, did have a strong jurisprudence. However, he undeniably transformed how law (specifically statues) ought to be interpreted by judges and lawyers, alike.
[142] Hambleton, *The All-Time All-Star All-Era Supreme Court*, 4.
[143] Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most influential Justice,* 2005.

justices has historically been a central factor in many of the so-called *greatest justices*.[144, 145]

How to Select Sound Justices

This article has highlighted the importance of strong judicial ethics, decisive reasoning, and high legal fluency in judges; and *judicial instrumentalism*, strong principles, and effective negotiating skills as qualities which make for legendary justices. However, what has yet to be answered is how exactly Americans and their senators can evaluate nominees during the confirmation hearings so that they can make an informed decision regarding which nominees have earned the honor of serving on the highest bench.

The factors that former Judge Levitz listed which make an effective judge, such as possessing a high degree of legal fluency, having the capability to make decisive judgments, and understanding when to recuse oneself from a case, are relatively easy to identify in a nominee.[146] However, qualities such as *judicial instrumentalism* are less identifiable, especially if a nominee has no prior judicial background. Furthermore, as was highlighted throughout this paper, nominees are often subject to change their legal opinions over time. Thus, changing the *content* of the questions senators ask is the key to unlocking the legal suitability of a nominee to the bench.

In a lecture given at Rice University, Chief Justice Roberts was asked how he believed the nomination hearings should be altered. Roberts suggested that senators ask nominees about their judicial philosophy and what they hope to accomplish on the bench during their tenure.[147] Although legal opinions are inclined to change, it is rather rare for a justice's jurisprudence to change on its head. By questioning a nominee's judicial philosophy, Americans can gain an accurate sense of

[144] A justice who traditionally provides the tie-breaking vote in decisions, but whose ideologically-inconsistent record makes predicting their vote on a given case tricky. Justice Sandra Day O'Connor was regarded as the swing vote in the Rehnquist Court, and was succeeded by Justice Anthony Kennedy in the Roberts Court.
[145] Enns & Wohlfarth, *The Swing Justice*, 2013, 1089-1107.
[146] Levitz, *So You Think You Want to Be a Judge*, 15.
[147] Roberts, *Centennial Lecture Series: Chief Justice John Roberts Speaks at Rice University*, 2012, 1:02:07.

the nominee's *judicial principles* which tend to remain steady over a justice's tenure.

How a nominee answers a question regarding what they wish to accomplish on the Court can actually reveal what the nominee's long-term goals are for their tenure. In answering a question that instructs a nominee to answer how they believe the law should be interpreted by judges, a nominee may reveal their desire to shape the trajectory of law in a new direction. This kind of an answer may reveal a nominee's wish to instate the use of a legal theory in the coming legal generations. This kind of answer suggests a desire to be at the center of academic legal scholarship, as it clearly shows a nominee has an existing legal theory they wish to spread in legal circles. Alternatively, a question probing a nominee to state which justices they admire most can reveal a nominee's possible inclination for instrumentalist thinking if they list justices who ruled along strong judicial principles, such as Story or Warren. In contrast, if they list examples of justices who are largely remembered for furthering strong judicial theories such as Holmes or Scalia, senators and citizens can infer that such a nominee is likely to be concerned with developing or furthering a legal theory.

Regardless of how the nominee answers these new questions that senators ask, Americans can gain a more reliable sense of what kind of justice a nominee will make if they are indeed confirmed to the Bench. In summation, the nomination process will regain a more accurate and useful metric for determining the legal suitability of nominees intending to be confirmed for a seat on the United States Supreme Court.

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