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Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan

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**HARVARD AND YALE ASCENDANT:
THE LEGAL EDUCATION OF THE JUSTICES FROM HOLMES TO KAGAN**

PATRICK J. GLEN

INTRODUCTION

The rote and maddening repetition of the phrase “judicial monastery” by Senator Patrick Leahy in his press conference reacting to the nomination of Solicitor General Elena Kagan to the Supreme Court, although focusing on the experiential diversity she would allegedly bring to the high court, obfuscated Kagan’s educational similarity with the sitting Justices. The nomination may not have gone to an alumnus of a federal appellate court, but it has been bestowed on an Ivy League law graduate for the tenth consecutive time, dating back to Justice Antonin Scalia’s 1986 confirmation. Even this phrasing hides more than it clarifies, as out of those ten nominations, nine have been Harvard or Yale law graduates, while Justice Ruth Bader Ginsburg attended Harvard Law School before transferring to, and graduating from, Columbia Law School. If Kagan is confirmed, it would be the first time in the history of the Supreme Court that all nine sitting Justices have been graduates of Ivy League law schools. In fact, seen from this angle it is fitting that Kagan will take the place not only of the last remaining Protestant on the Court, but also of its last non-Ivy League hold-out—the Chicago educated Justice John Paul Stevens (Northwestern Law School).¹

Despite Senator Leahy’s focus on non-educational bases for asserting that Kagan represents “diversity,” other legal commentators have noted the step that Kagan’s confirmation would represent to the Supreme Court.² Yet these observations are not new—similar comments

¹ See Evan Thomas, *Twilight of the WASPs: With the retirement of Justice John Paul Stevens, the white Anglo-Saxon Protestant no longer reigns supreme*, NEWSWEEK, May 31, 2010, at 34.

² See Jonathan Turley, *An incestuous, elitist duopoly*, NEWS & OBSERVER, May 20, 2010, available at 2010 WLNR 10379655; Christopher Edley, Jr., *Supreme Court: The Elite, No Apology Needed*, WASH. POST, May 17, 2010,

were made at the time of the nominations of Chief Justice John Roberts and Associate Justice Samuel Alito, graduates of Harvard and Yale Law Schools, respectively.³ What is new is the predominance of the Ivy League in the nomination of Supreme Court Justices, especially the predominance of Harvard and Yale graduates to the near-exclusion of all others.⁴ In essence, a candidate who received his or her legal education in a locale other than Cambridge or New Haven should lower their aspirations.⁵ They may very well attain a seat on a federal appellate court, or perhaps a state supreme court, but if past is prologue, they will have no hope of setting up an office in the Marble Palace.

The purpose of the instant article is simple—to explore the trends in legal education of the Justices of the Supreme Court from the beginning of the Twentieth Century through the latest nomination. Part I will analyze these trends through a number of different comparisons, including broad trends in the 110 years under observation, the number of Ivy League law graduates as a percentage of total nominees in the relevant time frames, and the increasing predominance of Ivy League law graduates as an absolute function of the composition of the Court. These comparisons will make clear that the Ivy League is not continuing into the Twenty-First Century a history of predominance, but is in fact in the ascendancy. The trend towards Harvard and Yale law graduates is very new in the context of the 110 years surveyed here, commencing only with the 1986 nomination of Antonin Scalia. Part II will attempt to offer explanations for why this is the case, and whether the reality of a duopolistic Supreme Court may have deleterious effects to the development of constitutional law into the future.

available at 2010 WLNR 10193231; *The Harvard-Yalification of the Supreme Court*, NPR WEEKEND EDITION, May 16, 2010, available at 2010 WLNR 10145399.

³ See Richard Cohen, *Ivy League-Dominated Court is New Phenomenon*, PRESS ATLANTIC CITY, Nov. 16, 2005, at A9.

⁴ *Id.*

⁵ See Karen Sloan, *For High Court, Harvard or Yale Degree is a Virtual Prerequisite*, LEGAL INTELLIGENCER, May 12, 2010, at 4.

I. LEGAL EDUCATION OF THE JUSTICES: 1902—2010⁶

A number of preliminary issues must be addressed prior to assessing the trends in the legal education of those Justices confirmed in this and the last century. The first is the relevant time frame. For purposes of this article, the analysis begins with the first confirmation in the Twentieth Century, that of Oliver Wendell Holmes, Jr., in 1902. The reason for setting this as the relevant starting point of the instant investigation is because the law school as an educational entity only began to gain traction in the latter third of the Nineteenth Century.⁷ Prior to that, and even a significant way into the Twentieth Century, “reading law,” *i.e.*, apprenticing with an already-barred attorney, was the far more common way of entering the legal profession.⁸ Beginning the current assessment at the dawn of the Twentieth Century is then the most obvious place to begin an analysis of legal education, as increasingly the Justices confirmed since 1902 were graduates of law schools. A corollary to this must also be noted, as this article will be concerned only with law school *graduates*. As the law school gained traction, some studied for short periods of time, left law school and apprenticed with a lawyer without graduating, and then entered the bar via the apprenticeship. This hybrid education will be disregarded for present purposes, and only those who actually graduated from a law school will be counted towards that law school’s presence as a function of absolute composition on the Court. Additionally, this article will confine itself to the initial legal education, the juris doctorate or LL.B. It is only the school from which a Justice earned his or her basic law degree that will be counted as relevant.

⁶ All information pertaining to the education of the Justices was compiled from the following sources: TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* (Facts on File 2001); THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY (Melvin I. Urofsky, ed. Garland 1994); The Federal Judicial Center, History of the Federal Judiciary, Supreme Court of the United States, <http://www.fjc.gov/servlet/nGetCourt?cid=0&order=c&ctype=sc&inststate=na> (last visited May 25, 2010); Supreme Court of the United States, Members of the Supreme Court of the United States, <http://www.supremecourt.gov/about/members.aspx> (last visited May 25, 2010).

⁷ See Melvin I. Urofsky, *Louis D. Brandeis: His Days at Harvard Law School*, 20 NO. 2 EXPER. 12 (2010).

⁸ See, *e.g.*, John H. Wilkerson, Jr., *Milestones and Memories of Jones School of Law: From Reading Law to Accredited Law School*, 71 ALA. LAW. 138, 138 (2010).

For instance, Justices Lewis Powell and Sherman Minton earned graduate degrees in law from Harvard and Yale, respectively, but their juris doctorates were from Washington and Lee University and Indiana University. It is those degrees, rather than the Ivy League LL.M.s, that are the focus of the instant article. Finally, the comparisons in Subsections A and B will focus on Harvard and Yale graduates rather than on Ivy League graduates generally. This is so because it is graduates from these two schools that have come to predominate, rather than the Ivy League law schools generally. No Cornell law graduate has been nominated to the Court in the relevant time frame and the only University of Pennsylvania graduate is Justice Owen Roberts, confirmed in 1930. Columbia may seem like an obvious choice for inclusion, as the sole non-Harvard or Yale graduate on the current court is a Columbia alum, yet Justice Ginsburg was the first Columbia law graduate since William Douglas's 1939 confirmation to be appointed. As this article is concerned with recent trends and how they will play out into the future, Columbia graduates do not provide a modern basis for comparison.

With these preliminaries in hand, this section will proceed in the following manner. Subsection A will compare the percentages of Harvard and Yale graduates as a function of the total number of confirmed Justices over the course of the eleven decades spanning 1902 through 2010. Subsection B will compare the percentage of Harvard and Yale Justices as a function of the composition of the sitting court over the same metrics. The results of Subsections A and B will obviously be interrelated, and will make clear that the preference for Harvard and Yale graduates is of recent vintage, while the Court has, over the preceding thirty years, increasingly become a bastion of such graduates to the exclusion of other elite-law school graduates.

A. HARVARD & YALE CONFIRMEES

Although the focus of this article is on Harvard and Yale law graduates confirmed as Justices of the Supreme Court, these two schools have only recently shared a linkage in this category. The fortunes of these two law schools regarding placing graduates on the High Court have not always been as closely linked in the history of the Court as they are at present. Before addressing the distinct fortunes of these two elite institutions, however, it is worth noting that nominations from these schools as a percentage of total nominations have increased dramatically in just the past three decades.

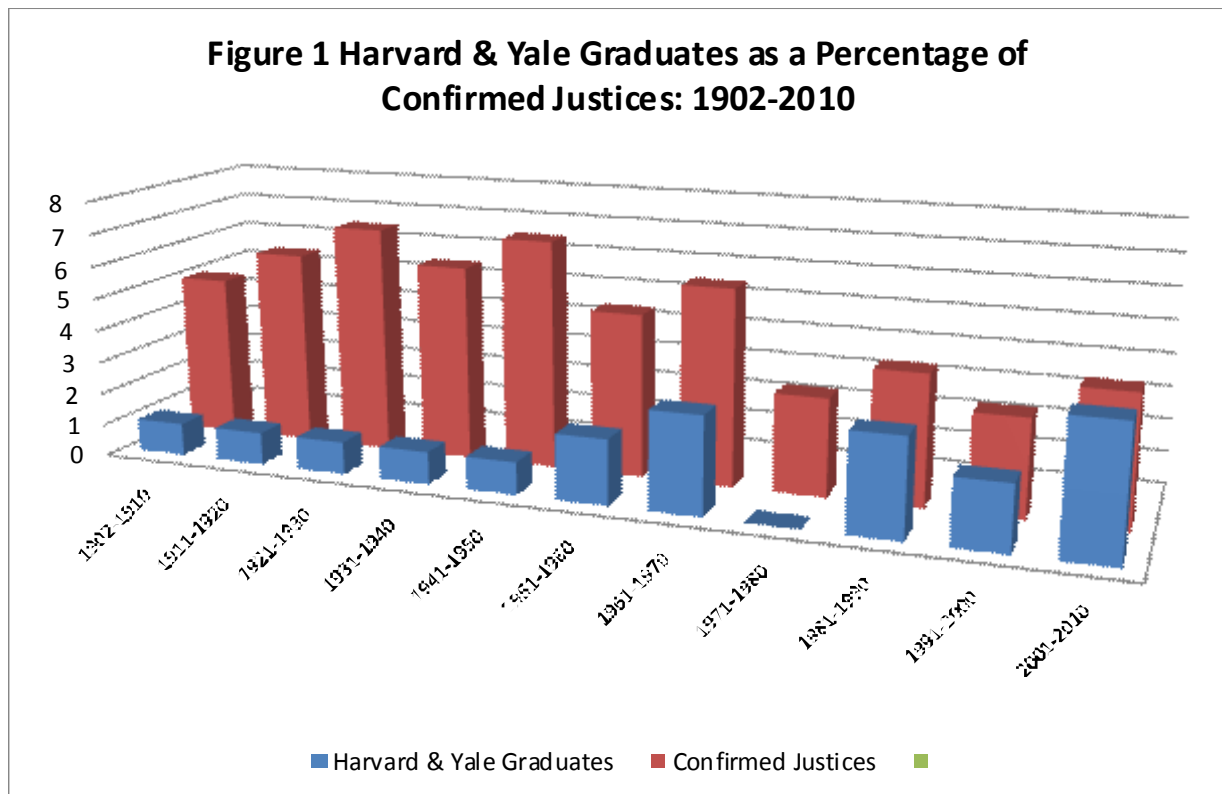


Figure 1 is a decade-by-decade comparison of the total confirmations in that decade and the number of Harvard and Yale graduates confirmed as Justices. In every relevant period except for one, 1971-1980, at least one Harvard or Yale graduate was confirmed as a Justice of the Supreme

Court. Nonetheless, in the five decades beginning with Holmes' confirmation, only one such Justice was confirmed in each relevant time period. Accordingly, between 1902 and 1950, out of 31 confirmed Justices (including Chief Justices), only five Harvard graduates were included. Thus, in the first part of the Twentieth Century, graduates from the schools under review accounted for approximately 16% of the confirmed Justices. Moreover, in no decade did Harvard or Yale graduates account for more than 20% of the confirmed Justices in that decade. In fact, although neither Harvard or Yale dominated the Court in this time frame, Columbia did have the sort of preeminence in placing Justices that the former two schools currently enjoy. Out of the eight confirmed Justices between 1925 and 1939, four were Columbia men, three being graduates and the third, Benjamin Cardozo, finished the traditional two year program of study at Columbia law but left prior to completing the newly instituted third year.⁹ From 1930 through 1945, there were never less than two Columbia graduates on the Court, while there were three such graduates between 1932 and 1941. Alas, after the 1939 confirmation of William Douglas, Columbia would not have another graduate on the Court until Ginsburg's 1993 confirmation, a span of 54 years.

It is only in the 1950s that the fortunes of Harvard and Yale begin to rise, albeit not dramatically. Between 1951 and 1960, two Harvard and Yale Justices were confirmed out of five total confirmations; in the 1960s, three graduates were confirmed out of a total of six confirmations. The percentage of Harvard and Yale graduates having never previously risen above 20%, these two decades saw the percentage rise first to 40%, then to 50%. The 1970s were a setback of sorts—the three Justices appointed during this period were graduates of Washington & Lee University, Stanford, and Northwestern (Justices Powell, William Rehnquist, and Stevens). Since 1981, however, only one Justice of the eleven confirmed was not educated

⁹ ANDREW L. KAUFMAN, CARDOZO 48-49 (Harvard 1998).

at an Ivy League law school, and only two of the eleven have not graduated from either Harvard or Yale. In the 1980s, Harvard and Yale accounted for 75% of the nominees; in the 1990s, 67%, and in the 20'oughts, 100%.

Between 1902 and 2010, 56 Justices were confirmed to the United States Supreme Court. Included in this number are 19 Harvard and Yale law graduates, accounting for a total of approximately 34%. Since 1980, Harvard and Yale graduates have accounted for approximately 82% of confirmed Justices. The dominance of these institutions is thus clearly a new development in the history of the Supreme Court, not simply a continuation of a dominance that has always existed on the Court. Although the trend in the above graph begins in the 1980s, it is even more recent than that, as there was no Ivy League confirmation in the 1980s until the 1986 confirmation of Scalia. Thus, it is only over the course of the past 24 years that these two institutions have come to dominate the Supreme Court confirmation process. Attempting to explain this result will be the subject of a subsequent section.

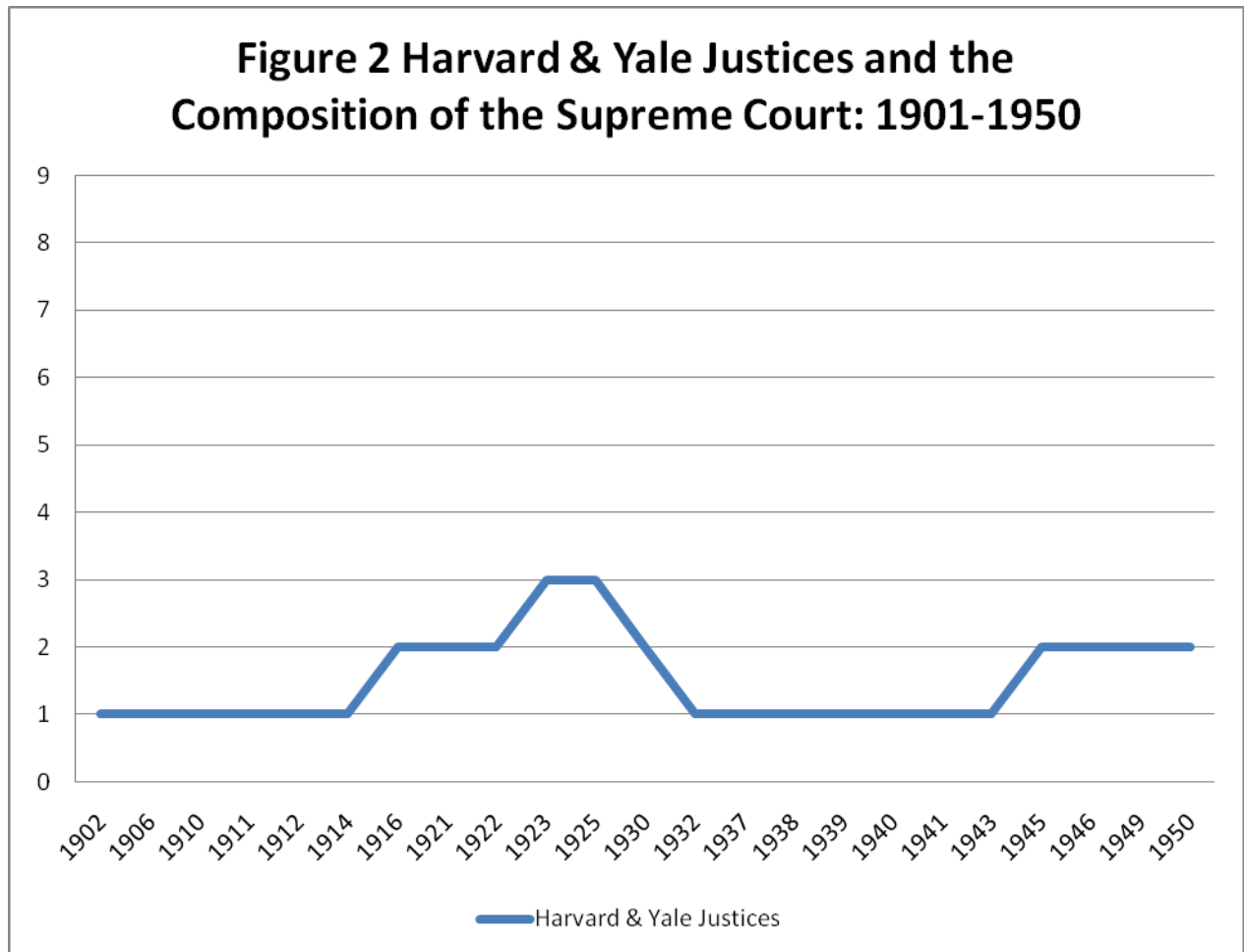
Before proceeding, however, it is also worth noting that the fortunes of Harvard and Yale have not always been so intertwined on the Supreme Court. Since the 1902 confirmation of Holmes, the Supreme Court has never been without at least one Harvard law graduate. Although Holmes was “alone” for fourteen years, he was joined in 1916 by Louis Brandeis and, in 1923, by Edward Terry Sanford. When Holmes left the Court in 1932, Brandeis sat alone as a Harvard graduate until his own retirement in 1939, when he was replaced by Justice Felix Frankfurter, a Harvard law legend. Without charting the entire course of Harvard's fortunes on the Supreme Court, it is simply important to note that in the 108 years since Holmes took his seat, there has never been a moment that the Court was without at least one Harvard graduate, and usually multiple graduates. Yale law school, however, did not place a graduate on the Court until the

1958 confirmation of Potter Stewart. Nonetheless, beginning with Stewart, three of the next four confirmations were Yale law graduates, with the inclusion of Justices Byron White and Abe Fortas. From 1965 through the 1969 retirement of Fortas, the Court could boast three Yale law graduates as opposed to only one Harvard graduate (Justice William Brennan). Yet after Fortas' 1965 confirmation, Yale would have to wait 36 years before another such fortuitous event, in the person of Justice Thomas in 1991. In all, then, 13 Harvard graduates have been confirmed to the Supreme Court, spanning the entire time period between 1902 and the present, whereas 6 Yale graduates have been confirmed, spanning the time period between 1958 and the present. Again, this divergent history only began to converge recently, in the 1990s, when, between the 1991 confirmation of Justice Clarence Thomas and the 2010 nomination of Kagan, Yale matched Harvard nominee for nominee, three to three.

B. HARVARD & YALE JUSTICES AS A FUNCTION OF COURT COMPOSITION

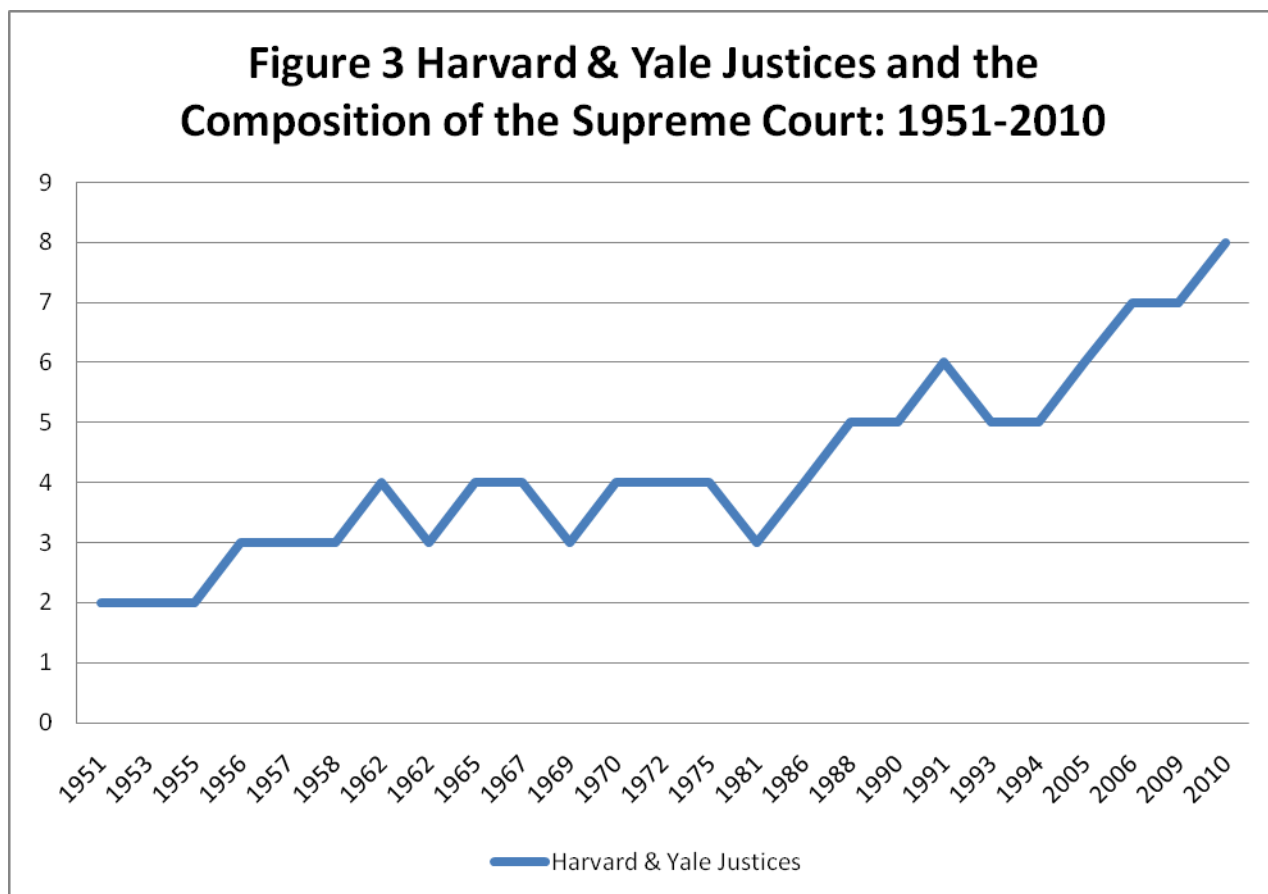
In addition to reviewing how Harvard and Yale graduates have functioned into the confirmation process over the course of the preceding eleven decades, it is also worth charting how this process has altered the composition of the Court over time. The increase in Harvard and Yale Justices obviously has clear effects on the composition of The Nine, but the following two figures are meant to graphically represent how sharp the increase in such graduates has been over the course of the preceding 24 years. Figure 2 plots the number of Harvard and Yale graduates as a function of the total composition of the Court over the period of 1901 through 1950, while Figure 3 plots the same data over the period of 1951 through 2010. The x -axis is plotted by year of a confirmation, *i.e.*, a year in which one or more Justices were confirmed to the Supreme Court. In all cases but one, the confirmation of multiple Justices during a one year period did not affect the plotting of the relevant information. In the one year that it did, 1962, the

year is included twice, first representing the confirmation of Justice Byron White, a Yale law graduate, and secondly representing the confirmation of Justice Arthur Goldberg, a Northwestern graduate.



During the 1901-1950 time frame, in which only Harvard represents the current duopoly on the Court, Harvard graduates as a function of total composition peaks at 33% between the 1923 confirmation of Sanford and his 1930 death. Prior to Sanford's confirmation, seven years were spent with Holmes and Brandeis together on the Court, while the preceding 14 years saw Holmes alone as a Harvard graduate. After Sanford's death, Holmes and Brandeis were again alone on the Court for two years, and then, following Holmes death, Harvard enjoyed only one Justice,

split between Brandeis and his successor, Frankfurter, from 1932 until the 1945 confirmation of Justice Harold Burton. Harvard graduates were undoubtedly a fixture on the Court between 1901 and 1950, but they were not a dominant sect in the composition of the Court.



From the 1956 appointment of William Brennan, the Supreme Court has never had less than three Harvard or Yale graduates represented amongst its members. Between 1956 and 1986, the number of Harvard and Yale graduates oscillates between three and four, but not even the fallow decade of the 1970s dents their numbers, as all three non-Ivy League Justices confirmed between 1972 and 1975 replaced non-Harvard and Yale graduates. Not until the 1988 confirmation of Anthony Kennedy do Harvard and Yale graduates represent a majority of the Justices, a first in the history of the Court. This majority grows to six with the confirmation of Justice Thomas in

1991, reverts to five when Ginsburg takes the place of the retiring Yale graduate White in 1993, and remains there the following year when Breyer replaces Blackmun, trading Harvard for Harvard. In 2005 and 2006 the number moves from five to six to seven, as Roberts and Alito replace the departing Stanford graduates, Justices O'Connor and Rehnquist. Kagan would bring the penultimate change to the Court if confirmed, replacing Justice Stevens, leaving Ginsburg the lone non-Harvard or Yale graduate.

The Supreme Court with Kagan as junior Justice would have eight Harvard or Yale law graduates, but as late as 1981 these graduates accounted for only 3 Justices, 33% of the Court, whereas even in 1986 they did not yet hold, and had never before held, a majority of the sitting Justices. Justice Kennedy's 1988 appointment not only breaches the majority, but represents an event horizon of sorts, past which Harvard and Yale graduates have become virtually the sole pool of nominees for Justiceships with the necessary result that the composition of the Court has trended dramatically in the direction of these institutions in the past two-and-a-half decades. Again, dominance is a very recent trend, not a continuation.

II. WHY THE TREND, AND SHOULD ANYONE CARE?

If the confirmation of Harvard and Yale law graduates has exploded over the previous two decades, the question remains why this has occurred? The first potential explanation is that as the importance of a formal law school education increased, the elite law schools themselves took on an increased importance relative to other law schools. When Justice Holmes was confirmed in 1902, he joined a Court that contained only two other law school graduates, Justices John Marshall Harlan and David Brewer, who studied at, respectively, the law faculty of Transylvania and Albany Law School. Not until the 1910 confirmation of Justice Horace Lurton, an alum of Cumberland law school, was another Justice a law school graduate. Between

the 1902 confirmation of Holmes and the 1941 confirmation of Justice Robert Jackson, the last confirmed Justice who did not graduate from law school, ten of the 26 confirmed Justices were not law school graduates. Not until the 1957 confirmation of Charles Whittaker, who replaced the retiring Stanley Reed, was the Court composed *entirely* of law school graduates.

This trend towards law school education as the desired route into the legal profession initially trod local or regional lines. Harvard Law School may have been a preeminent and nationally renowned institution at the time Justice Brandeis was attending, but in that category it stood alone.¹⁰ Columbia and Yale were just beginning to gain national traction in the late Nineteenth and early Twentieth Century, and were still dominated by local, rather than national, students.¹¹ Future Chief Justice Harlan Fiske Stone did much to advance the prospects of Columbia, yet even a virtual contemporary of Stone, Justice Cardozo, was decidedly equivocal regarding the education he received there.¹² Yale Law School itself began gaining in status only in the 1920s as a result of the work of another Columbia graduate, future Justice William Douglas, and this push paid dividends with the confirmations in late 1950 and early 1960 of three Justices.¹³ Into this gap of institutions with national reputations fell regionally elite law schools, which trained the best and brightest of the local students. The Stanford of Rehnquist and O'Connor falls within this category, as does the Colorado of Wiley Rutledge, the Berkeley of Earl Warren, the Indiana of Sherman Minton, the Washington & Lee of Joseph Lamar and Lewis Powell, and the Cincinnati of Willis Van Devanter and William Howard Taft, to name just a few of the schools represented by the confirmed Justices in this time period. Yet as the elite institutions developed elite, nationally recognized law schools, students from across the country

¹⁰ See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 25-26 (Pantheon 2009).

¹¹ See *id.*

¹² See KAUFMAN, *supra* note 9, at 49.

¹³ See, e.g., JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 100-13 (Harper & Row 1980) (discussing Douglas' time at Yale Law School).

then aspired to attend not just Harvard, but Yale and Columbia on the East Coast, as well as Stanford and Berkeley on the West. As the importance of legal education rose, these elite institutions rose in prominence, attracting more of the best and brightest, and placing them in the highest and most prestigious levels of government and private practice, from which judges and Justices are often picked. Seen in this light, then, the increasing dominance is indicative of a more general trend in the development of legal education and the legal profession in the Twentieth Century.

This thesis is sound in theory, false in reality. The Supreme Court is not dominated by the graduates of elite law *schools*, it is dominated by the graduates of two law schools. Since the trend towards Harvard and Yale commenced in the 1951-1960 decade in Figure 3, NYU, Penn, the University of Michigan, the University of Chicago, and the University of Virginia have had no graduates confirmed to positions on the Court, while Berkeley has had only one, Chief Justice Warren, confirmed in 1953. Harvard and Yale have dominated, while Columbia has placed one graduate on the Court, and Stanford two, although none since 1981. Thus, the Supreme Court is not dominated by the top ten law schools, but by two out of that ten.¹⁴ Moving out of the top ten, only Northwestern is represented during this time period, with Justices Stevens and Goldberg, while Duke, Cornell, and Georgetown have not placed a graduate on the Court in the timeframe of 1902 through the present. Thus, the rise of the elite law schools does not itself explain the rise in the fortunes of two of their number to the exclusion of the remainder. Nor can I think of any basis for concluding that Harvard and Yale represent an elite within an elite, from a purely educational perspectives, *i.e.*, that a Harvard and Yale education is so superior to an education at, say, Berkeley, that the former graduates should be always preferred to the latter in

¹⁴ I will not say the top two, as rankings change and are obviously hot-button topics.

the context of appointments.¹⁵ Accordingly, the rise of the law school in the Twentieth Century does not fully or satisfactorily explain the current dominance of Harvard and Yale graduates on the Court.

A second potential explanation fits within a more general examination of the confirmed Justices over the preceding two decades offered by Professor Timothy O'Neill. O'Neill posits that the remarkable similarity of the Justices education and professional backgrounds, including the unifying characteristic that all were sitting, and relatively uncontroversial judges on a federal appellate court, can be traced to the debacle of the Bork confirmation hearings in 1987.¹⁶ This is a seductive thesis which fits the relevant timeline perfectly—it was the 1988 confirmation of Kennedy, the third choice to replace the retiring Lewis Powell, that proved the event horizon in the subsequent dominance of the Court by Harvard and Yale graduates. The more general thrust of O'Neill's argument is also seductive, *i.e.*, that Presidents wanted to nominate candidates above reproach, which meant, among other things, educational backgrounds that were as impressive as possible. Yet as convincing as O'Neill is, this explanation seems to fall afoul of the same problem as the preceding explanation. To say Presidents need a nominee beyond reproach from an educational perspective is one thing, to say this means only Harvard and Yale graduates is quite another. Other top ten graduates would seemingly be as much beyond reproach as the Harvard and Yale nominees actually offered, as would graduates from elite law schools outside the top ten, including the Dukes and Georgetown and Cornells. O'Neill's thesis makes intuitive sense, but again falls upon the rough shoals of reality—it is not only elite

¹⁵ See Turley, *supra* note 2 (“there is no objective basis for favoring these two schools. Annual rankings from law schools on publication or reputation or student scores show relatively small differences in the top 20 law schools. The actual scores of the small pool of students in the top tier vary by only a few points. While Harvard and Yale are routinely ranked in the top spots, the faculties and student bodies are not viewed as manifestly superior to such competitors as Stanford, Chicago, Michigan or other top schools.”).

¹⁶ See Timothy P. O'Neill, “*The Stepford Justices*”: *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701 (2007).

education that Presidents are seemingly looking for, but education at an elite-of-two within that broader elite.

The dominance of Harvard and Yale graduates on the Supreme Court may also be seen as simply a result of the preeminence of both institutions in the zones feeding into that class of candidates who may be considered for future nomination.¹⁷ These two schools dominate in sending clerks to the federal courts of appeals and the Supreme Court, and have increasingly come to dominate legal academia as well.¹⁸ These positions then lead to a greater likelihood of political appointments, whether they be Executive or Judicial, which then may place the candidate squarely in the eyes of a President seeking a Supreme Court nomination. The question then becomes less why these graduates have come to form a supermajority on the Supreme Court, but why other law schools have not been as successful in placing their graduates within the range of such an appointment through clerkships, government work, or academia. In this light, it is something of self-perpetuating dominance. Justice Scalia has often remarked that he will chose his clerks only from the very top of the top tier, half-joking that he would not have hired Jeffrey Sutton as a law clerk had he not inherited him from the retiring Lewis Powell.¹⁹ Sutton was a “lowly” Ohio State law graduate, although he has since been confirmed as a judge on the Sixth Circuit Court of Appeals.²⁰ This seems the most likely explanation, but if so, it points to a cyclical nature in the confirmation process and the clear possibility that the current dominance is accidental. As Jeffrey Fisher, a Stanford Law professor, has noted, “Stanford has

¹⁷ See, e.g., Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 JURIMETRICS 413 (2005).

¹⁸ See Sloan, *supra* note 5.

¹⁹ See Turley, *supra* note 2; NPR, *supra* note 2 (“Well, I wouldn’t have hired Jeff Sutton, for God’s sake, he went to Ohio State.”).

²⁰ See NPR, *supra* note 2.

had justices in the past, and I assume we will again in the future. The people who went to top law schools will get the top jobs.”²¹

This point aside, and regardless of the *why*, should anybody care that only Harvard and Yale nominees have been confirmed in recent memory if these justices are eminently qualified individuals? To begin, if Professor Fisher is correct that the current dominance is simply a self-correcting aberration, there is nothing to be worried about as the Harvard-Yale duopoly will subside with the subsequent appointment of graduates of other elite law schools. It’s not clear that this will be the case, however, as the trend has been dominant now for 24 years and has shown little signs of subsiding if the “short-lists” of candidates the Obama Administration has compiled in the last two years are a realistic indication of what future nominees may look like. This is not to say that the administration *would* go with another Harvard or Yale graduate, only that the most likely candidates have these credentials. And for the second time, with the nomination of Kagan, Obama has cast aside the eminently qualified, Texas Law graduate, Diane Wood, a current judge on the Seventh Circuit whose legal experience and education would bring at least as much diversity to the Court as the nomination of Kagan. So to say simply that the trend may not continue into the future is no reason not to question the current prominence of Harvard and Yale graduates on the Court.

It is also clear that the rise of the Harvard and Yale Justices has not lead to a period of confluence in adjudication. Justices Alito and Sotomayor share the exact same educational background, yet view constitutional adjudication in remarkably different lights. If Justice Thomas is added, he presents a third view point, not entirely consistent with Alito’s. Across the Harvard Justices, you have Scalia the originalist and Brennan of the “living Constitution,” two antithetical visions of how the constitution should be interpreted. Quite simply, a legal education

²¹ Sloan, *supra* note 5.

at Harvard or Yale does not lead inexorably to one view point, meaning that diversity of opinion is not necessarily compromised by the prominence of only two law schools on the Supreme Court. Experience in life and career inform these decisions, and provide a far greater point of departure for judging than where an education was obtained. Of course, three years in New Haven or Cambridge would be remarkably different from three years in Austin, or San Francisco, or Durham, so the question is not simply whether the concentration leads only to singular viewpoints, but whether the Court would not benefit from the introduction of Justices whose life and educational experiences have taken them outside the purview of the Ivies.

On this point, opinion seems remarkably consistent that candidates outside the Ivy League, especially Harvard and Yale, should be examined as vacancies occur in the coming years. This opinion is shared by many graduates of Harvard and Yale in the academy, including Giovanna Shay and Mark Tushnet,²² as well as prominent commentator and Northwestern graduate Jonathan Turley.²³ Turley went so far as to declare that “[t]he favoritism shown Harvard and Yale should be viewed not just as incestuous but as scandalous. It undermines educational institutions across the country by maintaining a clearly arbitrary and capricious basis for selection. It also runs against the grain of a nation based on meritocracy and opportunity.”²⁴ The underlying point is that there are few, if any, objective metrics on which to favor two law schools to the exclusion of other unquestionably elite institutions.

CONCLUSION

When Michelle and Robert King were creating the CBS drama *The Good Wife* they decided to make the two main characters, lawyers Alicia Florrick and Will Gardner, Georgetown Law alums. Michelle King explained the rationale behind their choice of law school: “We

²² Sloan, *supra* note 5.

²³ Turley, *supra* note 2.

²⁴ *Id.*

wanted to highlight that they were smart, highly successful people without falling into the every-bright-fictional-character-went-to-Harvard-or-Yale trap.”²⁵ Harvard and Yale law graduates undoubtedly represent some of the best and brightest entrants to the legal profession every year, and it has not been the purpose of this article to in any way question that. The concluding point is, however, that an applicant pool composed entirely of Harvard and Yale law graduates for the Supreme Court, or any other legal position, does not exhaust the range of highly intelligent, competent, and driven candidates who may be able to bring significant life, educational, or professional experience to bear on issues of grave and pressing importance. When the next vacancy does occur on the Court, President Obama, or his successor, would be wise to look outside Cambridge and New Haven for a qualified candidate. There is no shortage of these in the legal profession, although this point seems to have been obscured in the past two and half decades. Such diversity would bring a boon to schools currently unrepresented on the Court, and it would bring diversity to that very Court which has so often trumpeted how important diverse views and experiences can be. Although it is impossible to quantify what would be lost if Harvard and Yale perpetuate their current hold on the Court, it is easy to see what could have been lost had such dominance pervaded the mindset of Presidents in the last century. The Court may never have had a Hugo Black, Thurgood Marshall, John Marshall Harlan II, Wiley Rutledge, or John Paul Stevens. The Court and the country benefited from the service of these men as Justices, and both can benefit again by casting a wider net in the next nomination cycle.

²⁵ Ann W. Parks, *It's That Georgetown Thing: CBS TV Series Features Fictional Law "Alums,"* available at <http://www.law.georgetown.edu/news/webstory/11.19.09.html> (last visited May 26, 2010).

Appendix

Education of the Justices: Appointments since 1900

2010 Kagan (Harvard)	Roberts (Harvard)	Scalia (Harvard)	Kennedy (Harvard)	Thomas (Yale)	Ginsburg (Columbia)	Breyer (Harvard)	Alito (Yale)	Sotomayor (Yale)
2009 Sotomayor (Yale)	Roberts (Harvard)	Stevens (Northwestern)	Scalia (Harvard)	Kennedy (Harvard)	Thomas (Yale)	Ginsburg (Columbia)	Breyer (Harvard)	Alito (Yale)
2006 Alito (Yale)	Roberts (Harvard)	Stevens (Northwestern)	Scalia (Harvard)	Kennedy (Harvard)	Souter (Harvard)	Thomas (Yale)	Ginsburg (Columbia)	Breyer (Harvard)
2005 Roberts (Harvard)	Stevens (Northwestern)	O'Connor (Stanford)	Scalia (Harvard)	Kennedy (Harvard)	Souter (Harvard)	Thomas (Yale)	Ginsburg (Columbia)	Breyer (Harvard)
1994 Breyer (Harvard)	Rehnquist (Stanford)	Stevens (Northwestern)	O'Connor (Stanford)	Scalia (Harvard)	Kennedy (Harvard)	Souter (Harvard)	Thomas (Yale)	Ginsburg (Columbia)
1993 Ginsburg (Columbia)	Rehnquist (Stanford)	Blackmun (Harvard)	Stevens (Northwestern)	O'Connor (Stanford)	Scalia (Harvard)	Kennedy (Harvard)	Souter (Harvard)	Thomas (Yale)
1991 Thomas (Yale)	Rehnquist (Stanford)	White (Yale)	Blackmun (Harvard)	Stevens (Northwestern)	O'Connor (Stanford)	Scalia (Harvard)	Kennedy (Harvard)	Souter (Harvard)
1990 Souter (Harvard)	Rehnquist (Stanford)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Stevens (Northwestern)	O'Connor (Stanford)	Scalia (Harvard)	Kennedy (Harvard)
1988 Kennedy (Harvard)	Rehnquist (Stanford)	Brennan (Harvard)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Stevens (Northwestern)	O'Connor (Stanford)	Scalia (Harvard)
1986 Scalia (Harvard)	Rehnquist (Stanford)	Brennan (Harvard)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Powell (W&L)	Stevens (Northwestern)	O'Connor (Stanford)
1981 O'Connor (Stanford)	Burger (St. Paul)	Brennan (Harvard)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Powell (W&L)	Rehnquist (Stanford)	Stevens (Northwestern)
1975 Stevens (Northwestern)	Burger (St. Paul)	Brennan (Harvard)	Stewart (Yale)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Powell (W&L)	Rehnquist (Stanford)
1972 Rehnquist (Stanford)	Burger (St. Paul)	Douglas (Columbia)	Brennan (Harvard)	Stewart (Yale)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Powell (W&L)
1972 Powell (W&L)	Burger (St. Paul)	Douglas (Columbia)	Brennan (Harvard)	Stewart (Yale)	White (Yale)	Marshall (Howard)	Blackmun (Harvard)	Rehnquist (Stanford)
1970 Blackmun (Harvard)	Burger (St. Paul)	Black (Alabama)	Douglas (Columbia)	Harlan (NYLS)	Brennan (Harvard)	Stewart (Yale)	White (Yale)	Marshall (Howard)
1969 Burger (St. Paul)	Black (Alabama)	Douglas (Columbia)	Harlan (NYLS)	Brennan (Harvard)	Stewart (Yale)	White (Yale)	Marshall (Howard)	---
1967 Marshall (Howard)	Warren (Berkeley)	Black (Alabama)	Douglas (Columbia)	Harlan (NYLS)	Brennan (Harvard)	Stewart (Yale)	White (Yale)	Fortas (Yale)
1965 Fortas (Yale)	Warren (Berkeley)	Black (Alabama)	Douglas (Columbia)	Clark (Texas)	Harlan (NYLS)	Brennan (Harvard)	Stewart (Yale)	White (Yale)
1962 Goldberg (Northwestern)	Warren (Berkeley)	Black (Alabama)	Douglas (Columbia)	Clark (Texas)	Harlan (NYLS)	Brennan (Harvard)	Stewart (Yale)	White (Yale)
1962 White (Yale)	Warren (Berkeley)	Black (Alabama)	Frankfurter (Harvard)	Douglas (Columbia)	Clark (Texas)	Harlan (NYLS)	Brennan (Harvard)	Stewart (Yale)
1958 Stewart (Yale)	Warren (Berkeley)	Black (Alabama)	Frankfurter (Harvard)	Douglas (Columbia)	Clark (Texas)	Harlan (NYLS)	Brennan (Harvard)	Whittaker (Kansas City)
1957 Whittaker (Kansas City)	Warren (Berkeley)	Black (Alabama)	Frankfurter (Harvard)	Douglas (Columbia)	Burton (Harvard)	Clark (Texas)	Harlan (NYLS)	Brennan (Harvard)
1956 Brennan (Harvard)	Warren (Berkeley)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Burton (Harvard)	Clark (Texas)	Harlan (NYLS)
1955 Harlan (NYLS)	Warren (Berkeley)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Burton (Harvard)	Clark (Texas)	Minton (Indiana)

1953 Warren (Berkeley)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Jackson (N/A)	Burton (Harvard)	Clark (Texas)	Minton (Indiana)
1949 Minton (Indiana)	Vinson (Centre)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Jackson (N/A)	Burton (Harvard)	Clark (Texas)
1949 Clark (Texas)	Vinson (Centre)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Jackson (N/A)	Rutledge (Colorado)	Burton (Harvard)
1946 Vinson (Centre)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Murphy (Michigan)	Jackson (N/A)	Rutledge (Colorado)	Burton (Harvard)
1945 Burton (Harvard)	Stone (Columbia)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Murphy (Michigan)	Jackson (N/A)	Rutledge (Colorado)
1943 Rutledge (Colorado)	Stone (Columbia)	O. Roberts (Penn)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Murphy (Michigan)	Jackson (N/A)
1941 Jackson (N/A)	Stone (Columbia)	O. Roberts (Penn)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Murphy (Michigan)	Byrnes (N/A)
1941 Byrnes (N/A)	Hughes (Columbia)	Stone (Columbia)	O. Roberts (Penn)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)	Murphy (Michigan)
1940 Murphy (Michigan)	Hughes (Columbia)	McReynolds (UVa)	Stone (Columbia)	O. Roberts (Penn)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)	Douglas (Columbia)
1939 Douglas (Columbia)	Hughes (Columbia)	McReynolds (UVa)	Butler (N/A)	Stone (Columbia)	O. Roberts (Penn)	Black (Alabama)	Reed (N/A)	Frankfurter (Harvard)
1939 Frankfurter (Harvard)	Hughes (Columbia)	McReynolds (UVa)	Butler (N/A)	Stone (Columbia)	O. Roberts (Penn)	Black (Alabama)	Reed (N/A)	---
1938 Reed (N/A)	Hughes (Columbia)	McReynolds (UVa)	Brandeis (Harvard)	Butler (N/A)	Stone (Columbia)	O. Roberts (Penn)	Cardozo (N/A)	Black (Alabama)
1937 Black (Alabama)	Hughes (Columbia)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	Butler (N/A)	Stone (Columbia)	O. Roberts (Penn)	Cardozo (N/A)
1932 Cardozo (N/A)	Hughes (Columbia)	Van Devanter (Cincy)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	Butler (N/A)	Stone (Columbia)	O. Roberts (Penn)
1930 O. Roberts (Penn)	Hughes (Columbia)	Holmes (Harvard)	Van Devanter (Cincy)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	Butler (N/A)	Stone (Columbia)
1930 Hughes (Columbia)	Holmes (Harvard)	Van Devanter (Cincy)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	Butler (N/A)	Sanford (Harvard)	Stone (Columbia)
1925 Stone (Columbia)	Taft (Cincy)	Holmes (Harvard)	Van Devanter (Cincy)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	Butler (N/A)	Sanford (Harvard)
1923 Sanford (Harvard)	Taft (Cincy)	McKenna (N/A)	Holmes (Harvard)	Van Devanter (Cincy)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	Butler (N/A)
1923 Butler (N/A)	Taft (Cincy)	McKenna (N/A)	Holmes (Harvard)	Van Devanter (Cincy)	McReynolds (UVa)	Brandeis (Harvard)	Sutherland (N/A)	---
1922 Sutherland (N/A)	Taft (Cincy)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Van Devanter (Cincy)	Pitney (N/A)	McReynolds (UVa)	Brandeis (Harvard)
1921 Taft (Cincy)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Van Devanter (Cincy)	Pitney (N/A)	McReynolds (UVa)	Brandeis (Harvard)	Clarke (N/A)
1916 Clarke (N/A)	White (N/A)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Van Devanter (Cincy)	Pitney (N/A)	McReynolds (UVa)	Brandeis (Harvard)
1916 Brandeis (Harvard)	White (N/A)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Van Devanter (Cincy)	Pitney (N/A)	McReynolds (UVa)	---
1914 McReynolds (UVa)	White (N/A)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Hughes (Columbia)	Van Devanter (Cincy)	Lamar (W&L)	Pitney (N/A)
1912 Pitney (N/A)	White (N/A)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Lurton (Cumberland)	Hughes (Columbia)	Van Devanter (Cincy)	Lamar (W&L)
1911 Lamar (W&L)	White (N/A)	Harlan I (Transylvania)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Lurton (Cumberland)	Hughes (Columbia)	Van Devanter (Cincy)

1911 Van Devanter (Cincy)	White (N/A)	Harlan I (Transylvania)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Lurton (Cumberland)	Hughes (Columbia)	Lamar (W&L)
1910 Hughes (Columbia)	White (N/A)	Harlan I (Transylvania)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Moody (N/A)	Lurton (Cumberland)	---
1910 Lurton (Cumberland)	Fuller (N/A)	Harlan I (Transylvania)	Brewer (Albany)	White (N/A)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)	Moody (N/A)
1906 Moody (N/A)	Fuller (N/A)	Harlan I (Transylvania)	Brewer (Albany)	White (N/A)	Peckham (N/A)	McKenna (N/A)	Holmes (Harvard)	Day (N/A)
1903 Day (N/A)	Fuller (N/A)	Harlan I (Transylvania)	Brewer (Albany)	Brown (N/A)	White (N/A)	Peckham (N/A)	McKenna (N/A)	Holmes (Harvard)
1902 Holmes (Harvard)	Fuller (N/A)	Harlan I (Transylvania)	Brewer (Albany)	Brown (N/A)	Shiras (N/A)	White (N/A)	Peckham (N/A)	McKenna (N/A)