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## “I’m Not a Biologist”: A Hayekian Perspective on the Judge’s Implementation of Knowledge and the Umpire Analogy

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## I. INTRODUCTION

While the renowned metaphor of judges as umpires has continued to hold relevancy, it has continued to face scrutiny in recent years.<sup>1</sup> Moreover, the metes and bounds of judges are still arguably ambiguous to this very day. As Justice Kagan put it, “because it wrongly implies that high-court judging ‘is a kind of robotic enterprise . . . that everything is clear cut.’”<sup>2</sup> This legal juxtaposition raises immense concerns about (a) the degree of knowledge necessary to play by the rules in a technologically advancing society, and (b) the roles and expectations of our justice system, especially within the Supreme Court of the United States (SCOTUS), which for years has become labeled as “anti-science.”<sup>3</sup> How can justices improve in applying the rules? How does one effectively interpret the rules and laws of a nation for the good

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<sup>1</sup> See generally Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2008); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007); Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525 (2009); Brett M. Kavanaugh, Cir. J., U.S. Ct. Appeals for D.C. Cir., *Judge as Umpire: Ten Principles*, Speech as part of the Pope John XXIII Lecture Series at the Catholic University of America, Columbus School of Law (Mar. 30, 2015), in 65 CATHOLIC U. L. REV. 683 (2018); Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113 (2010).

<sup>2</sup> Nathan Koppel, *Are Judges Umpires? Eh, Not Exactly, Says Kagan*, WALL ST. J. (June 30, 2010, 11:54 AM), <https://www.wsj.com/articles/BL-LB-30831>.

<sup>3</sup> Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 BOS. U. L. REV. 1049, 1049-50 (2006); see also Daniel Weinberger, *The Supreme Court’s Assault on Science*, SCI. AM. (May 24, 2021), <https://www.scientificamerican.com/article/the-supreme-courts-assault-on-science/>. Compare Jeff Tollefson, *Inside the US Supreme Court’s War On Science*, 609 NATURE 460, 460-61 (Sept. 14, 2022), with Wesley J. Smith, *Nature Attacks SCOTUS as Anti-Science*, NAT’L REV. (Sept. 15, 2022, 2:19 PM), <https://www.nationalreview.com/corner/nature-attacks-scotus-as-anti-science/>.

of the people when society falls into a state of educational regression?<sup>4</sup> Is there a way that SCOTUS can make better informed decisions? Overall, knowledge of the rules alone would not be enough.

In answering these questions, I turn to renowned economist, F. A. Hayek, whose essays and presentations have gained recognition in legal scholarship. In summary, this article aims to address a few things through a Hayekian lens: (1) it will analyze the judge as umpire analogy and the fallacies therein; (2) it will uncover the degrees of knowledge applicable in both law and economics; and (3) provide judicial solutions and suggestions that will facilitate effective and efficient decision-making as society continues making scientific and technological advancements.

## II. JUDGE’S ROLE AS UMPIRE

Firstly, how do judges come to their conclusions? This question for years had perhaps been enigmatic at best. During Chief Justice John Roberts’ Senate confirmation hearing back in 2005, he revisited the “judge as umpire” analogy,<sup>5</sup> which was first coined in the 1886 case of

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<sup>4</sup> See Annie Holmquist, *Why Americans are Getting Dumber and How to Fix It*, FOUND. ECON. EDUC. (Jan. 3, 2017), <https://fee.org/articles/why-americans-are-being-dumbed-down-and-how-to-fix-it/>; see also Lauren Camera, *Pandemic Prompts Historic Decline in Student Achievement on Nation’s Report Card*, U.S. NEWS (Oct. 24, 2022, 12:01 AM), <https://www.usnews.com/news/education-news/articles/2022-10-24/pandemic-prompts-historic-decline-in-student-achievement-on-nations-report-card>; see also Kelsey Nield, *The Largest Decline of Reading Scores In 30 Years Happened During the Pandemic, New Study Finds*, DESERET NEWS (Sept. 12, 2022, 11:00 AM), <https://www.deseret.com/2022/9/12/23334398/the-largest-decline-of-reading-scores-in-30-years-happened-during-the-pandemic-new-study-finds>.

<sup>5</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter Roberts Confirmation Hearing] (statement of Hon. John G. Roberts Jr.).

*State v. Crittenden*.<sup>6</sup> During this hearing, Roberts described that judges and justices were to be servants of the law, not the other way around, and that these individuals are synonymous to umpires.<sup>7</sup> He stated, “Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everyone plays by the rules, but it is a limited role.”<sup>8</sup> While scholars have interpreted the umpire analogy differently through the years, they tend to illustrate that judges are rule interpreters, and nothing more.<sup>9</sup>

#### A. Oversimplified Appreciation of the Role of a Judge

Many scholars have pointed out that the “judge as umpire analogy” is a watered-down depiction of the role of a judge.<sup>10</sup> Judge Theodore A. McKee argues that the umpire analogy fails to consider that there are rule interpretation questions and issues that can come into play, rules that may be considered as obvious, i.e. “you ‘know it when [you] see it.’”<sup>11</sup> He further asserts in his article:

I think it fair to say that the umpire metaphor would be more accurate if, rather than proclaiming that we merely call balls and strikes like an umpire, we recognize that the strike zone is actually defined by the umpire who is calling the balls and strikes. Without that realization the

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<sup>6</sup> *State v. Crittenden*, 38 La. Ann. 448, 451 (1886) (noting that judges have a duty to be an active participant in proceedings, not serve “merely as an umpire”); see Zelinsky, *supra* note 1, at 114.

<sup>7</sup> Roberts Confirmation Hearing, *supra* note 5; Meredith Kirby, *Are Judges Like Umpires?*, MEDIUM (June 10, 2020), <https://medium.com/island-of-misfit-articles/are-judges-like-umpires-bf8ae8d3b82a>.

<sup>8</sup> Roberts Confirmation Hearing, *supra* note 5, at 55; Kirby, *supra* note 7.

<sup>9</sup> McKee, *supra* note 1, at 1723. *But see* Koppel, *supra* note 2 (quoting Justice Kagan does not fully agree with the umpire analogy as judges must exercise their discretion on issues where people can reasonably disagree); Zelinsky, *supra* note 1, at 113-18 (arguing that Justices are “commissioners” not merely interpreters).

<sup>10</sup> McKee, *supra* note 1, at 1723; see Posner, *supra* note 3, at 1051-52; see generally Zelinsky, *supra* note 1 (questioning the analogy in the context of the contemporary role of modern Supreme Court Justices).

<sup>11</sup> McKee, *supra* note 1, at 1723-24 (alteration in original).

umpire metaphor resembles Shakespeare's poor player who struts and frets his hour upon the stage telling tales that are full of sound and fury that signify nothing. I hope that this Article will stimulate more thoughtful discussions about the role of judges and judges as individuals, and that they will not be misinterpreted as advocating result-oriented jurisprudence. In sharing these thoughts with you, I wanted to be as candid as possible even though I realize the risk that some may conclude that I am not troubled by the dynamic I have described. I am troubled by the fact that our jurisprudence is shaped by personal beliefs, but I am more troubled by pretending that judges can somehow become perfect objective adjudicators at the flip of a switch, or the wearing of a robe.<sup>12</sup>

### **B. Knowledge, Skills, and Experience**

Furthermore, umpires and referees are expected to develop skills outside of mere knowledge of the rules and understanding of the logic behind them. In contrast, judges are not expected to have any specialized knowledge, beyond what they've picked up in their legal career, before becoming a judge.<sup>13</sup> In a research study from 2019, a list of attributes necessary for sports officiating, which was gathered from past research, was presented to a number of elite Australian football umpires.<sup>14</sup> The study helped establish a framework in identifying the necessary attributes for performance that would provide a greater understanding of the factors that contribute to elite performance.<sup>15</sup> Technological skills can be essential in reviewing plays, game

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<sup>12</sup> *Id.* at 1724.

<sup>13</sup> Compare J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 30-32 (1999), with *infra* Section V.C. and accompanying text.

<sup>14</sup> Aden Kittel et al., *Identification of Key Performance Characteristics of Elite Australian Football Umpires*, 14 INT'L J. SPORTS SCI. & COACHING 490, 492 (2019).

<sup>15</sup> See generally *id.*

management, and communication.<sup>16</sup> Physical fitness is crucial to umpiring and refereeing as well.<sup>17</sup> A basic appreciation of the laws of physics can also help umpires make informed decisions on plays, especially when the public initially casts doubt.<sup>18</sup> Finally, philosophy, like the law, can influence how umpires make decisions.<sup>19</sup>

### III. GENERAL KNOWLEDGE

General knowledge often has nominal value in legal disputes. This includes physical attributes and personal property open to the public.<sup>20</sup> Nor is general knowledge protected by intellectual property

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<sup>16</sup> *Id.* at 4; René Leveaux, *Using Technology in Sport to Support Referee's Decision Making*, in KNOWLEDGE MANAGEMENT AND INNOVATION IN ADVANCING ECONOMIES: ANALYSES & SOLUTIONS 1184, 1184 (2009); Samiran Ghosh, *Can Tech Really Better Human Decisions In Sports?*, FORBES (Nov. 29, 2021, 9:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/11/29/can-tech-really-better-human-decisions-in-sports/?sh=2e7edc47698d>.

<sup>17</sup> See also Nicolas Bloß, et al., *Physical Load and Referees' Decision-Making in Sports Games: A Scoping Review*, 19 J. SPORTS SCI. & MED. 149, 149 (2020).

<sup>18</sup> See Sofie Bates, *Umpires Are Better Than You at Calling Players Safe or Out, and Science Proves It*, ABC (July 28, 2019, 12:23 PM), <https://abcnews.go.com/Technology/umpires-calling-players-safe-science-proves/story?id=64588117>.

Because the speed of sound travels slower than the speed of light, baseball fans up in the stands tend to mistakenly think the player is safe because it takes the sound longer to reach their ears. However, umpires are closer to the action and have a more accurate view of whether a player is safe or out.

*Id.*; see also Kavanaugh, *supra* note 1, at 688 (“[T]o be a good judge, and a good umpire, you have to tune out the crowd noise.”).

<sup>19</sup> J.S. Russell, *Taking Umpiring Seriously: How Philosophy Can Help Umpires Make the Right Calls*, in BASEBALL AND PHILOSOPHY: THINKING OUTSIDE THE BATTER'S BOX 87 (William Irwin & Eric Bronson eds., 2004).

<sup>20</sup> See David A. Zetony, *Understanding the Differences in the State Privacy Laws: What is Publicly Available Information?*, NAT'L L. REV. (July 25, 2022), <https://www.natlawreview.com/article/understanding-differences-state-privacy-laws-what-publicly-available-information>; *Data Privacy Laws*



laws, whether it regards trade secrets,<sup>21</sup> patents,<sup>22</sup> trademarks,<sup>23</sup> or copyrights.<sup>24</sup>

However, the implementation of general knowledge is important for judges, especially when it comes to judicial notice. Judicial notice refers to facts that a judge may receive and act upon from their general knowledge or inquiries made to proper sources.<sup>25</sup> “These facts can thus be ones of which the judge has either actual or acquired knowledge, and they are usually referred to as ‘notorious facts’ on account of their being common knowledge either throughout the country or within the locality of the court.”<sup>26</sup> In other words, these must be facts that are not “subject to reasonable dispute” because they are either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of

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*by State: Comparison Charts*, BLOOMBERG L. (Feb. 2, 2022), <https://pro.bloomberglaw.com/brief/data-privacy-laws-in-the-u-s/>. This can include physical attributes and personal property open to the public. *See generally* *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Dionisio*, 410 U.S. 1 (1973); *California v. Greenwood*, 486 U.S. 35 (1988); *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>21</sup> *See Rohm & Haas Co. v. ADCO Chem. Co.*, 689 F.2d 424, 431-34 (3d Cir. 1982) (holding that trade-secret law does not protect information that is within the general knowledge of the relevant industry).

<sup>22</sup> *See* 35 U.S.C. §§ 101-03.

<sup>23</sup> *See Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 107 (2d Cir. 2010) (holding that a service provider must have more than general knowledge or reason to know that its service is being used to sell counterfeit goods to be found liable for contributory infringement).

<sup>24</sup> *See* 17 U.S.C. § 102.

<sup>25</sup> FED. R. EVID. § 201; *see also* Colin Manchester, *Judicial Notice and Personal Knowledge*, 42 MOD. L. REV. 22, 22 (1979); Cheryl D. Stein, *Judicial Notice: A Useful Tool to Consider*, AM. BAR. ASSOC. (May 20, 2019),

<https://www.americanbar.org/groups/litigation/committees/criminal/articles/2019/spring2019-judicial-notice-a-useful-tool-to-consider/>.

<sup>26</sup> Manchester, *supra* note 25, at 22.

accurate and ready determination by referring to sources whose accuracy cannot reasonably be questioned.<sup>27</sup>

The use of general knowledge in this context is efficient and resourceful. Consider the following explanation one commentator makes when discussing the novelty of judicial notice:

Judicial Notice is simply a tool used by we legal types to save time and money. Evidence is such a weird concept that if I proposed that it's currently raining outside and opposing counsel objected then I can't make that proposition. So now I have to hire a bevy of legal experts to enter into evidence the fact that it's raining: (1) a scientist to describe and define rain and (2) a weatherman to describe and define today's rain. And then demonstrative evidence of wet clothing and umbrellas. [Next] opposing counsel will put on his own experts to say the exact same thing but with an opposite spin. All very confusing to a jury. So instead we open the window and ask the court to look outside and take [judicial notice] of the fact that it is indeed raining . . . .<sup>28</sup>

#### IV. SCIENTIFIC KNOWLEDGE

For decades, Courts have struggled with separating issues of law with scientific facts.<sup>29</sup> Below is a historical summary of how Courts have attempted to do so.

##### A. Science Court

In 1976, Dr. Arthur Kantrowitz, and with the assistance of the Task Force of the President's Advisory Group on Anticipated Advances in Science and Technology, proposed the formation of the Science Court in determining the state of scientific facts that are key components

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<sup>27</sup> FED. R. EVID. 201; *see also* Manchester, *supra* note 25, at 28; Stein, *supra* note 25.

<sup>28</sup> Gary Charles De Pury, Comment to *What Does a Judicial Notice Mean In My Case?*, AVVO (Jan. 5, 2019), <https://www.avvo.com/legal-answers/what-does-a-judicial-notice-mean-in-my-case--4116887.html>.

<sup>29</sup> *See infra* Section III.A-B.

in controversial public policy decisions.<sup>30</sup> During a time when the discussion of science in public policy was widely politicized, the proposed Science Court had three objectives: (1) “purify scientific debate by teasing out questions of objective scientific fact from those that involve political and cultural value judgments”; (2) allow a panel of scientific experts to evaluate the scientific facts presented to them; and (3) provide transparency to the public by publishing their decisions.<sup>31</sup> However, the project would eventually fall short a couple of years later due to its proposed structural inadequacies and its lack of political support from the newly appointed President James Carter and his administration.<sup>32</sup>

### **B. Scientific Evidence**

In addition to the courts themselves, the use of scientific knowledge has also gained evidentiary prominence, which explains why witness testimony is categorically split up as lay witness and expert witness testimony.<sup>33</sup> Unlike a lay witness, an expert witness must have specific, expert qualifications in order to testify to particular knowledge within a field, whether it be scientific, technical, mathematical, etc.<sup>34</sup> Expert qualifications may consist of knowledge, skill, experience,

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<sup>30</sup> Justin Sevier, *Redesigning the Science Court*, 73 MD. L. REV. 770, 787 (2014); Andrew W. Jurs, *Science Court: Past Proposals, Current Considerations, and a Suggested Structure*, 15 VA. J.L. & TECH. 1, 5-19 (2010); James A. Martin, *The Proposed "Science Court"*, 75 MICH. L. REV. 1058, 1058, 1064-65 (1977); Thomas G. Field, Jr., *The Science Court Is Dead; Long Live the Science Court!*, 4 RISK: HEALTH, SAFETY & ENV'T 95, 95-100 (1993).

<sup>31</sup> Sevier, *supra* note 30, at 787; Jurs, *supra* note 30, at 5-19; Martin, *supra* note 30, at 1058, 1064-65; Field, *supra* note 30; at 95-100.

<sup>32</sup> Sevier, *supra* note 30, at 786-89; Jurs, *supra* note 30, at 16; *see also* Field, *supra* note 30, at 95-100 (implying the project fell short because President Ford did not get reelected).

<sup>33</sup> *See* FED. R. EVID. § 702.

<sup>34</sup> *Id.*

training, or education – no formal qualifications are required, as long as they are relevant to the testimony.<sup>35</sup>

The first established standard regarding the admissibility of scientific evidence stemmed from *Frye v. United States*,<sup>36</sup> which emphasized that the admissibility of such evidence was dependent upon its general acceptance within its relative scientific community.<sup>37</sup> This decision would later be overruled in part in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>38</sup> The demise of the *Frye* standard as the sole consideration for the use of scientific knowledge in evidence was due to a couple of reasons. Firstly, technology had rapidly evolved post-*Frye*.<sup>39</sup> Secondly, the *Frye* standard conflicted with Rule 702 of the Federal Rules of Evidence,<sup>40</sup> which provides that expert testimony is admissible if it will assist the jury in comprehending the evidence and determining issues of fact.<sup>41</sup> In determining whether scientific knowledge is admissible as expert testimony, courts must make a preliminary determination under Rule 104(a) that the reasoning behind the testimony is scientifically valid and can be applied to the facts of the case.<sup>42</sup> Such a determination is based upon a number of factors, including, but not limited to: (a) the testability of the theory or methodology; (b) whether the theory has been published and subject to

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<sup>35</sup> *Id.*

<sup>36</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>37</sup> *Id.* at 1014.

<sup>38</sup> 509 U.S. 579, 587-89 (1993).

<sup>39</sup> See Andrew W. Jurs, *Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions For Reform Of Post-Daubert U.S. Reliability Determinations*, 95 MARQ. L. REV. 1329, 1381 n.340 (2012); Edward J. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 557-59 (1983); Sheila Jasanoff, *Science, Common Sense & Judicial Power in U.S. Courts*, 147 DÆDALUS J. AM. ACAD. ARTS & SCIS. 15, 15-17, 25 (2018).

<sup>40</sup> *Daubert*, 509 U.S. at 587-89, 591.

<sup>41</sup> *Id.*; FED. R. EVID. 702.

<sup>42</sup> *Daubert*, 509 U.S. at 592. See generally FED. R. EVID. 104(a).

peer review; (c) the potential rate of error, if any; and (d) whether the knowledge has reached general acceptance, which is essentially the test laid out in *Frye*.<sup>43</sup>

The *Daubert* standard would eventually be interpreted to apply to all expert testimony provided for in Rule 702 in *Kumho Tire Company, Ltd. v. Carmichael*,<sup>44</sup> since the Rule made “no . . . distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.”<sup>45</sup> The Court in *Kumho* emphasized that it would be almost impossible for courts to distinguish between evidentiary rules for scientific knowledge and technical knowledge, as they often overlap.<sup>46</sup>

The bottom-line here is that ordinary judges are the ultimate gatekeepers with regards to admitting expert testimony based upon some field of scientific or technical knowledge.<sup>47</sup>

## V. HAYEKIAN PERSPECTIVES ON KNOWLEDGE

F.A. Hayek earned doctorates in law and political science from the University of Vienna in 1921 and 1923, where he also studied economics, philosophy, and psychology.<sup>48</sup> He wrote many seminal works in economics, political philosophy, ethics, legal theory, and even psychology that continue to inform the academic conversation within the fields to this day.<sup>49</sup> While many have criticized how Hayek’s philosophy can be ridden with contradictions, the enigma of Hayek’s philosophies and his studies in law and economics, nevertheless, are of

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<sup>43</sup> *Id.* at 593-94.

<sup>44</sup> 526 U.S. 137 (1999).

<sup>45</sup> *Id.* at 147.

<sup>46</sup> *Id.* at 148.

<sup>47</sup> Peter W. Huber & Kenneth R. Foster, *Science in the Courtrooms*, MANHATTAN INST. (Sept. 1, 1997), <https://www.manhattan-institute.org/html/science-courts-5684.html>.

<sup>48</sup> *Friedrich Hayek*, CONTEMP. THINKERS, <https://contemporarythinkers.org/friedrich-hayek/biography/> (last visited Feb. 6, 2023); *Friedrich Hayek*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/friedrich-hayek/> (last updated Apr. 16, 2021).

<sup>49</sup> CONTEMP. THINKERS, *supra* note 48; STAN. ENCYC. PHIL., *supra* note 48.

intrigue by many legal scholars, such as Richard Posner and Richard Epstein.<sup>50</sup> Specifically, the use of data by judges in their decision-making is a crucial aspect for social progression and the preservation of justice.<sup>51</sup>

### A. The Use of Knowledge in Society

The expectation of acquired knowledge for formulating and improving economic policies was predominantly invoked by economist F.A. Hayek's pivotal 1945 essay *The Use of Knowledge in Society*.<sup>52</sup> In "response to the growing analytical nature of economics," Hayek's essay "[C]alls into question one of the key assumptions in his field: the notion of a singular, universal, objective knowledge that, if it existed, could help us achieve perfect economic order."<sup>53</sup> Hayek's goal isn't to

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<sup>50</sup> See generally Richard A. Epstein, *Hayekian Socialism*, 58 MD. L. REV. 271 (1999); Richard A. Posner, *Hayek, Law, and Cognition*, 1 N.Y.U. J.L. & LIBERTY 148, 150 (2005) [hereinafter Posner, *Hayek, Law, and Cognition*]; See, e.g., Samuel Thomas Morison, *A Hayekian Theory of Social Justice*, 1 N.Y.U. J.L. & LIBERTY 225, 246-47 (2005); M. Todd Henderson, *The Influence of F.A. Hayek on Law: An Empirical Analysis*, 1 N.Y.U. J.L. & LIBERTY 249, 284 (2005); William H. Pryor Jr., *Hayek & Textualism*, 11 N.Y.U. J.L. & LIBERTY 893 (2018); Kevin D. Vallier, *Hayekian Social Justice*, 24 INDEP. REV. 63 (2019); Edward Peter Stringham & Todd J. Zywicki, *Hayekian Anarchism*, GEO. MASON L. & ECON. RSCH. PAPER SERIES 11-06 Jan. 2011 at 1, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1744364](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744364); Gautam Bhatia, *The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia's Jurisprudence*, 42 HASTINGS CONST. L. Q. 525 (2015); Mike Rappaport, *Was Hayek an Originalist?*, L. & LIBERTY (Sept. 14, 2018), <https://lawliberty.org/was-hayek-an-originalist/>.

<sup>51</sup> See generally Posner, *supra* note 3, at 1065-68; Morison, *supra* note 50, at 247.

<sup>52</sup> F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

<sup>53</sup> Kyle Becker, *The Use of Knowledge in Society*, KNOWLEDGE IN SOCIETY (Apr. 22, 2016), <https://knowledgeinsociety.com/the-use-of-knowledge-in-society/#:~:text=Hayek%E2%80%99s%20%E2%80%9Calmost%20heretical%E2%80%9D%20assertion%20in%20The%20Use%20of%20the%20particular%20circumstances%20of%20time%20and%20place.%E2%80%9D>.

“dismiss scientific knowledge or the scientific method outright.”<sup>54</sup> While Hayek believed in its usefulness within its scope, he argued that “a different type of knowledge, more distributed, contextual knowledge, needs to be recognized for social science and economic study.”<sup>55</sup> Hayek noted that:

It will at once be evident that on this point the position will be different with respect to different kinds of knowledge; and the answer to our question will therefore largely turn on the relative importance of the different kinds of knowledge; those more likely to be at the disposal of particular individuals and those which we should with greater confidence expect to find in the possession of an authority made up of suitably chosen experts. If it is today so widely assumed that the latter will be in a better position, this is because one kind of knowledge, namely, scientific knowledge, occupies now so prominent a place in public imagination that we tend to forget that it is not the only kind that is relevant. It may be admitted that, as far as scientific knowledge is concerned, a body of suitably chosen experts may be in the best position to command all the best knowledge available—though this is of course merely shifting the difficulty to the problem of selecting the experts. What I wish to point out is that, even assuming that this problem can be readily solved, it is only a small part of the wider problem. Today, it is almost heresy to suggest that scientific knowledge is not the sum of all knowledge. But a little reflection will show that there is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of the particular circumstances of time and place.<sup>56</sup>

## B. The Pretense of Knowledge

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Hayek, *supra* note 52, at 521.

Nearly thirty years later after releasing *The Use of Knowledge in Society*, Hayek would present his lecture called *The Pretence of Knowledge* during a Nobel Prize award ceremony in Stockholm, Sweden.<sup>57</sup> Similarly, Hayek emphasizes how there are different types and kinds of knowledge, and that each person comes to possess knowledge that is uniquely his or her own and which others can never fully know and appreciate in the same exact way.<sup>58</sup> More importantly, Hayek argued that too many in the intellectual world of ideas and in the arenas of government policy decision-making arrogantly believed that they can know enough to centrally plan or heavily regulate the diverse and ever-changing activities of all the people in a developed, complex social system.<sup>59</sup> Hayek further argues that instead of recognizing the “reality of these multiple types of knowledge and their essentially qualitative characteristics that cannot easily or at all be reduced to measurable and quantitative dimensions,” rather, these “social engineers and policy-makers focus on what they can measure and manipulate for their own political gain.”<sup>60</sup>

#### VI. THE USE OF KNOWLEDGE BY COURTS: SCIENTIFIC, GENERAL, AND THE “OPEN AREA”

In both *The Use of Knowledge in Society* and *The Pretence of Knowledge*, Hayek illustrates the existence of a “familiarity gap” between what is considered scientific knowledge and general

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<sup>57</sup> Frederich August von Hayek, *The Pretence of Knowledge*, Lecture before The Nobel Foundation (Dec. 11, 1974), in 79 AM. ECON. REV. 3 (1989) [hereinafter Hayek, *The Pretence of Knowledge*]. Hayek received the 1974 Nobel Prize in Economic Science.

<sup>58</sup> *Id.* at 4.

<sup>59</sup> Richard Ebeling, Opinion, *Hayek’s Warning: The Social Engineer’s Pretense of Knowledge*, HEARTLAND INST. (Dec. 3, 2014), <https://www.heartland.org/news-opinion/news/hayeks-warning-the-social-engineers-pretense-of-knowledge>; see also Todd Zywicki, *F.A. Hayek and the Pretense of Knowledge*, WASH. POST: THE VOLOKH CONSPIRACY (Oct. 13, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/f-a-hayek-and-the-pretense-of-knowledge/>.

<sup>60</sup> Ebeling, *supra* note 59.



knowledge.<sup>61</sup> In essence, Hayek asserts that one's vantagepoint of time and place allows one to have some advantage of knowledge over others.<sup>62</sup> As one writer stated, "[E]conomically relevant knowledge remains at any given time or sometimes indefinitely as tacit or inarticulate. And even when such tacit knowledge is made partly explicit it will always include a tacit element."<sup>63</sup> As Hayek thoroughly described:

The chief point we must remember is that the great and rapid advance of the physical sciences took place in fields where it proved that explanation and prediction could be based on laws which accounted for the observed phenomena as functions of comparatively few variables — either particular facts or relative frequencies of events. This may even be the ultimate reason why we single out these realms as "physical" in contrast to those more highly organized structures which I have here called essentially complex phenomena. There is no reason why the position must be the same in the latter as in the former fields . . . . The real difficulty, to the solution of which science has little to contribute, and which is sometimes indeed insoluble, consists in the ascertainment of the particular facts . . . . Consider some ball game played by a few people of approximately equal skill. If we knew a few particular facts in addition to our general knowledge of the ability of the individual players, such as their state of attention, their perceptions and the state of their hearts, lungs, muscles, etc. at each moment of the game, we could probably predict the outcome. Indeed, if we were familiar both with the game

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<sup>61</sup> Hayek, *supra* note 52, at 521.

<sup>62</sup> *Id.*; see also Thomas D. Howes, *F.A. Hayek on the Discovery, Use, and Transmission of Knowledge*, 34 AUST. INST. ECON. & SOC. PHIL. 1 (2020); see also Jeffrey A. Tucker, *Hayek: The Knowledge Problem*, FOUND. ECON. EDUC. (Sept. 28, 2014), <https://fee.org/articles/hayek-the-knowledge-problem/>.

<sup>63</sup> Howes, *supra* note 62; see also Posner, *Hayek, Law, and Cognition*, *supra* note 50, at 155, 158-60 (discussing the role of tacit knowledge).

and the teams, we should probably have a fairly shrewd idea on what the outcome will depend. But we shall of course not be able to ascertain those facts and in consequence the result of the game will be outside the range of the scientifically predictable, however well we may know what effects particular events would have on the result of the game. This does not mean that we can make no predictions at all about the course of such a game. If we know the rules of the different games we shall, in watching one, very soon know which game is being played and what kinds of actions we can expect and what kind not. But our capacity to predict will be confined to such general characteristics of the events to be expected and not include the capacity of predicting particular individual events.<sup>64</sup>

Posner similarly describes this familiarity gap between scientific and general knowledge as “the open area,” and emphasizes that in light of technological change, the overflow of federal caseloads, and the alteration and automation of judicial practices by artificial intelligence, judges should think more pragmatically, rather than formalistically.<sup>65</sup>

#### **A. Scientific Knowledge and the Courts Today**

However, Posner is not the only one to acknowledge that the thrust of technical and scientific issues is difficult for judges to muster.<sup>66</sup>

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<sup>64</sup> Hayek, *The Pretence of Knowledge*, *supra* note 57, at 6-7.

<sup>65</sup> See Posner, *supra* note 3, at 1049-50, 1054, 1066-68 (2006); see also Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275-76 (1929); see, e.g., Bernard E. Harcourt, *Judge Richard Posner on Civil Liberties: Pragmatic Authoritarian Libertarian*, 74 U. CHI. L. REV. 1723 (2007) (exemplifying some of Posner’s pragmatic thinking).

<sup>66</sup> Posner, *supra* note 3, at 1049 (“[T]he continued rapid advance in science is going to make life difficult for judges. We live in an age of breakneck technological change that will thrust many difficult technical and scientific issues on judges, for which very few of them (of us, I should say) are prepared, because of the excessively rhetorical emphasis of legal education and the weak scientific background of most law students.” See generally

Justice Breyer once wrote that the search for the right outcome “is not a search for scientific precision. . . . A judge is not a scientist, and a courtroom is not a scientific laboratory.”<sup>67</sup> Nevertheless, Breyer firmly believed that the law must seek decisions that fall within the boundaries of scientifically sound knowledge.<sup>68</sup>

When Justice Breyer stepped down from the Supreme Court, it seemed unclear who the next Justice candidate would be and whether that person would recognize the same concerns as Breyer in deciding cases during a time period with so many advances in science and technology.<sup>69</sup> Ketanji Brown Jackson, who has had several terrific accomplishments in her legal career, was selected to be Breyer’s predecessor.<sup>70</sup> But like many Justices before her, her qualifications and viewpoints did not escape scrutiny.

During Justice Jackson’s interview hearing in 2022, she was asked by Senator Marsha Blackburn what a woman was, something that required neither an industry-specific definition, such as a chicken,<sup>71</sup> or a Merriam-Webster iteration.

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Harcourt, *supra* note 65 (giving examples of technically difficult issues that are difficult for judges to answer).

<sup>67</sup> Stephen Breyer, *Introduction* to NATIONAL RESEARCH COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1, 4 (3d ed. 2011).

<sup>68</sup> *Id.* at 4-5.

<sup>69</sup> *See id.*

<sup>70</sup> Melissa Macaya et al., *Biden Nominates Ketanji Brown Jackson to Supreme Court*, CNN (Mar. 1, 2022, 4:50 PM)

[https://www.cnn.com/politics/live-news/biden-supreme-court-nominee-ketanji-brown-jackson/h\\_8f7b13a53a47683f208aa61dcd11520](https://www.cnn.com/politics/live-news/biden-supreme-court-nominee-ketanji-brown-jackson/h_8f7b13a53a47683f208aa61dcd11520); John Fritze, *Who Is Judge Ketanji Brown Jackson? For Starters, She Clerked For Justice Breyer*, USA TODAY (Feb. 27, 2022, 4:29 PM)

<https://www.usatoday.com/story/news/politics/2022/01/27/ketanji-brown-jackson-possible-supreme-court-nominee/7806941002/?gnt-cfr=1>.

<sup>71</sup> *Cf.* *Frigalment Imp. Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (holding that plaintiff did not sustain its burden of persuasion that the contract with the defendant used the word “chicken” in the narrower rather than broad sense).

BLACKBURN: “Do you agree with Justice Ginsburg that there are physical differences between men and women that are enduring?”

JACKSON: “Senator, respectfully, I am not familiar with that particular quote or case, so it’s hard for me to comment as to whether or not—”

BLACKBURN: I’d love to get your opinion on that, and you can submit that. Do you interpret Justice Ginsburg’s meaning of men and women as male and female?

JACKSON: Again, because I don’t know the case, I do not know how I’d interpret it. I’d need to read the whole thing.

BLACKBURN: Ok. And can you provide a definition for the word “woman”?

JACKSON: Can I provide a definition?

BLACKBURN: Mmhm.

JACKSON: No. I can’t.

BLACKBURN: You can’t?

JACKSON: Not in this context. *I’m not a biologist.*

BLACKBURN: So, you believe the meaning of the word “woman” is so unclear and controversial that you can’t give me a definition?

JACKSON: Senator, in my work as a judge, what I do is I address disputes. If there’s a dispute about a definition, people make arguments, and I look at the law and I decide.

BLACKBURN: The fact that you can’t give me a straight answer about something as fundamental as what a woman is underscores the dangers of the kind of progressive education that we are hearing about.<sup>72</sup>

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<sup>72</sup> PBS NewsHour, *WATCH LIVE: Judge Ketanji Brown Jackson Supreme Court confirmation hearings - Day 2*, YOUTUBE (Mar. 22, 2022), <https://www.youtube.com/watch?v=euFaRaVi4Js>.

While Justice Jackson was eventually appointed as both Breyer's replacement and ironically the first African-American woman to serve as a SCOTUS Justice, her response nevertheless would raise both tremendous concerns and ridicule.<sup>73</sup> While Justice Jackson has undoubtedly made some tremendous accomplishments in her career, her response to Blackburn's questioning raises concerns as to whether she was the best choice of candidate to fill Breyer's seat. Many commentators have highlighted her pragmatism as being synonymous to that of Breyer's.<sup>74</sup> From a Hayekian perspective, this does not appear

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<sup>73</sup> See, e.g., David Harsanyi, *It's Okay, I'm Not a Biologist Either*, NAT'L REV. (Mar. 23, 2022, 11:53 AM), <https://www.nationalreview.com/corner/its-ok-im-not-a-biologist-either/>; Ernst Speaks in Opposition to Judge Jackson's Nomination to Serve on Supreme Court, JONI ERNST (Apr. 5, 2022), <https://www.ernst.senate.gov/news/press-releases/ernst-speaks-in-opposition-to-judge-jacksons-nomination-to-serve-on-supreme-court>; Compare Alia E. Dastagir, *Marsha Blackburn Asked Ketanji Brown Jackson to Define 'Woman.' Science Says There's No Simple Answer.*, USA TODAY, <https://www.usatoday.com/story/life/health-wellness/2022/03/24/marsha-blackburn-asked-ketanji-jackson-define-woman-science/7152439001/> (last updated Mar. 27, 2022, 9:13 PM ET) with Alex Schemmel, *USA Today Slammed For Saying 'There's No Simple Answer' When Defining the Word 'Woman'*, NBC 15 NEWS (Mar. 25, 2022), <https://mynbc15.com/news/nation-world/usa-today-slammed-for-saying-theres-no-simple-answer-when-defining-the-word-woman-scotus-supreme-court-kentanji-brown-jackson-biologist>.

<sup>74</sup> Noah Feldman, *Jackson Is the Perfect Choice for Today's Supreme Court*, BLOOMBERG, <https://www.bloomberg.com/opinion/articles/2022-02-25/ketanji-brown-jackson-is-the-supreme-court-justice-we-need-now> (last updated Feb. 28, 2022, 11:10 AM EST); Amy Davidson Sorkin, *Judge Ketanji Brown Jackson's Historic Nomination to the Supreme Court*, NEW YORKER (Feb. 25, 2022), <https://www.newyorker.com/news/daily-comment/judge-ketanji-brown-jacksons-historic-nomination-to-the-supreme-court>; Colleen Long, Michael Balsamo & Zeke Miller, *Biden Nominates Jackson, First Black Woman, to Supreme Court*, AP NEWS (Feb. 25, 2022),

to be the case. This is not to diminish her credibility as a potentially viable candidate for SCOTUS entirely. At the same time, however, characterizing her as the ideal replacement for Breyer is arguably far-fetched.<sup>75</sup>

Justice Jackson does not ponder into the open area between scientific and general knowledge, as described by both Hayek and Posner.<sup>76</sup> Rather, Jackson seems to hold staunchly onto the umpire role, when dealing with scientific and technical concerns.<sup>77</sup> While Jackson is correct to point out that her role, as a judge, is to address the law and uphold those laws in a way that is based upon the scientific testimony of the experts called forth, her failure to provide a generalized characterization is alarming.<sup>78</sup>

In all fairness though, Justice Jackson is not the only recent appointee that demonstrates this similar issue. Justice Amy Coney Barrett, too, was reserved in making any commentary on public policy when asked about climate change.<sup>79</sup> Of all the SCOTUS Justices

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<https://apnews.com/article/Ketanji-Brown-Jackson-biden-supreme-court-nominee-32f77fe08d7cf64af95591668a0aaa41>.

<sup>75</sup> Feldman, *supra* note 74.

<sup>76</sup> See Section IV & V and accompanying text.

<sup>77</sup> See Section I and accompanying text.

<sup>78</sup> See Section II and accompanying text. See also Jasanoff, *Science, Common Sense & Judicial Power in U.S. Courts*, in *DÆDALUS*, *supra* note 39, at 15-17, 25.

<sup>79</sup> While Barrett was able to affirm that Covid-19 can be infectious and that cigarettes may cause cancer, as a matter of judicial review, she declined to express a view on what she called a "very contentious matter of public debate." See BBC News, *Kamala Harris asks Amy Coney Barrett: 'Do you believe climate change is happening?'* - BBC News, YOUTUBE (Oct. 15, 2020), <https://www.youtube.com/watch?v=TTNKg1jygpQ>; see also Jeff Barardelli, *"I'm Certainly Not a Scientist": Amy Coney Barrett's Views On Climate Change – And Why It Matters*, CBS (Oct. 16, 2020, 1:12 PM), <https://www.cbsnews.com/news/amy-coney-barrett-climate-change-views/>; Justin Nobel & Antonia Juhasz, *More Than 70 Science and Climate Journalists Challenge Supreme Court Nomination of Amy Coney Barrett*, ROLLING STONE (Oct. 25, 2020),

appointed in the last decade still presiding, the most pragmatic ones appear to be Justice Kagan<sup>80</sup> and Justice Kavanaugh.<sup>81</sup>

While judges should not be expected to become expert biologists, they should be able to understand general and fundamental science, in the same way that an umpire or referee should have a basic appreciation of physics in order to make correct judgment calls in a game.<sup>82</sup> After all, the law imposes on trial judges the duty, with respect

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<https://www.rollingstone.com/politics/political-commentary/amy-coney-barrett-climate-journalists-challenge-supreme-court-nomination-1080453/>; Mark Hertsgaard, *The Supreme Court Battle and the Climate Crisis*, COL. JOURNALISM REV. (Oct. 25, 2020), [https://www.cjr.org/covering\\_climate\\_now/supreme-court-amy-coney-barrett-climate.php](https://www.cjr.org/covering_climate_now/supreme-court-amy-coney-barrett-climate.php); Abby Smith, *Barrett's Views Pose Challenge to Climate Regulations*, WASH. EXAMINER (Sept. 26, 2020, 06:23 PM), <https://www.washingtonexaminer.com/policy/energy/barretts-views-pose-challenge-to-climate-regulations>.

<sup>80</sup> Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635, 636 (2012); *see also* Daniel A. Farber, *Legal Pragmatism and Presidential Power: A Case Study*, 69 DRAKE L. REV. 749 (2021) (comparing Justice Kagan to Chief Justice Roberts); Laura K. Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 IND. L.J. 1 (2014); Lauren DiMartino, *Democracy and the Fourth Seat: Kagan's Jurisprudence, Stevens's Legacy*, U. COL. L. REV. (Oct. 25, 2020).

<sup>81</sup> Daniel Harris, *Supreme Court Justices Neil Gorsuch and Brett Kavanaugh Clash Over Federal Regulation and Criminal Justice*, 24 CHAP. L. REV. 339, 341 (2021); *see also* Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018, 5:48 PM), <https://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/>; ANDREW NOLAN & CAITLAIN DEVEREAUX LEWIS, CONG. RSCH. SERV., R45293, *JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT* 19-31 (2018).

<sup>82</sup> *See supra* Section I and accompanying text; *see also* Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 DÆDALUS, J. AM. ACAD. ARTS & SCIS. 164, 164 (2018); *see* Shari Seidman Diamond & Richard O. Lempert, *When Law Calls, Does Science*

to scientific evidence, to become evidentiary gatekeepers.<sup>83</sup> The judge, without interfering with the jury's role as trier of fact, must determine whether purported scientific evidence is "reliable" and will "assist the trier of fact," thereby keeping testimony from juries that is not respected by other scientists.<sup>84</sup>

### **B. The Conflict Between Rule Making and Ideological Convictions**

As society progresses or regresses, it begs the question of what is considered general knowledge. Many centuries ago, knowledge that the Earth was round was not widely accepted as fact.<sup>85</sup> Today, a vast majority of people can agree that the Earth is not flat. On the other hand, what defines a woman is allegedly now more complex than it was decades, if not centuries ago.<sup>86</sup> One problem that presents is the leveragability that the conflict between what should be scientific versus what should be general can have. No doubt, this can occur as a means of inserting a political bias.<sup>87</sup> Such leverage can hinder the efficiency of litigation as well, thus delaying the judicial process.<sup>88</sup>

### **C. Career Backgrounds of Judicial Appointees**

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*Answer? A Survey of Distinguished Scientists & Engineers*, 147 DÆDALUS, J. AM. ACAD. ARTS & SCIS. 41, 42 (2018).

<sup>83</sup> See *supra* Section III.B and accompanying text.

<sup>84</sup> See *supra* Section III.B and accompanying text.

<sup>85</sup> See *Flat Earth*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Flat\\_Earth](https://en.wikipedia.org/wiki/Flat_Earth) (last visited Feb. 5, 2023).

<sup>86</sup> *Compare What Is a Woman?*, THE DAILY WIRE (2022), <https://www.dailywire.com/collections/what-is-a-woman>, with Susan Stryker, *What Does It Mean to Be a Woman? It's Complicated*, TIME (Mar. 5, 2020, 7:11 AM EST), <https://time.com/5795626/what-womanhood-means/>.

<sup>87</sup> McKee, *supra* note 1, at 1715-16, 1719-22; Kavanaugh, *supra* note 1, at 686; Posner, *supra* note 3, at 1058-63; see generally Michael J. Cedrone, *Supreme Silence and Precedential Pragmatism: King v. Burwell and Statutory Interpretation in the Federal Courts of Appeals*, 103 MARQ. L. REV. 43 (2019).

<sup>88</sup> See *What Does a Judicial Notice Mean in my Case*, *supra* note 27, and accompanying text.



Not only does the President appoint Supreme Court Justices based on factors including merit, record, experience and political affiliations, but Justices can be chosen from a large pool and their backgrounds can be varied.<sup>89</sup> While the recently appointed Justice Jackson became the first Justice to have served as a public defender,<sup>90</sup> she nevertheless is another Ivy law graduate to serve on the Supreme Court.<sup>91</sup> The most diversity SCOTUS has currently, aside from race and gender, is the sector of legal practice,<sup>92</sup> and what prior judicial experience they had, if any.<sup>93</sup> Although the appointment of a former public defender is a step in the right direction, there is plenty of

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<sup>89</sup> *How Judges and Justices Are Chosen*, AM. GOV'T, <https://www.ushistory.org/gov/9d.asp> (last visited Mar. 15, 2023).

<sup>90</sup> Christina Pazzanese, *Supreme Court Nominee's Pioneering Background*, HARV. GAZETTE (Mar. 8, 2022), <https://news.harvard.edu/gazette/story/2022/03/scotus-picks-pioneering-background-as-public-defender/>; Alicia Bannon, *A Public Defender on the High Court*, BRENNAN CTR. JUST. (Mar. 1, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/public-defender-high-court>; Kenichi Serino, *How Having a Former Public Defender on the Supreme Court Could Be 'Revolutionary'*, PBS (Mar. 21, 2022, 10:22 AM), <https://www.pbs.org/newshour/politics/few-public-defenders-become-federal-judges-ketanji-brown-jackson-would-be-the-supreme-courts-first>.

<sup>91</sup> Jessica Gresko, *Supreme Court Shouldn't Be Covered in Ivy, 2 Lawmakers Say*, AP (Feb. 1, 2022), <https://apnews.com/article/stephen-breyer-joe-biden-us-supreme-court-law-schools-lindsey-graham-f7c3968b6a956ab36b8523d490fe9f4e>; Ed Kilgore, *Supreme Court Ivy League Snobbery Is a Recent Development*, INTELLIGENCER (Feb. 2, 2022), <https://nymag.com/intelligencer/2022/02/supreme-court-ivy-league-snobbery-is-a-recent-development.html>; Ilana Kowarski, *Where Supreme Court Justices Earned Law Degrees*, U.S. NEWS (Apr. 7, 2022, 4:00 PM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/where-supreme-court-justices-earned-law-degrees>.

<sup>92</sup> Kristen Bialik, *What Backgrounds Do U.S. Supreme Court Justices Have?*, PEW RES. CTR. (Mar. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have/>.

<sup>93</sup> *Id.*; See also Kavanaugh, *supra* note 1, at 685-86.

improvement to be made in implementing a diverse array of talent and backgrounds that face the least politicization.

#### **D. Specializations and Specialized Courts**

Why is it that the highest court in the United States – the arbiter of truth when it comes to the supreme law of the land – has a lower bar in requiring a science background than either the United States Patent and Trademark Office (USPTO) or the Patent Trial and Appeal Board?<sup>94</sup> It is a question that even Live Science fails to consider when listing what traits every Supreme Court Justice should have.<sup>95</sup> Breyer emphasizes that judges typically are generalists, in that they deal with cases that can vary widely in subject matter.<sup>96</sup> Thus, while the dispute at hand is more specific and individualized, the objective for judges is usually process related.<sup>97</sup>

Much of the criticism around a specialized “science court” existed before the 1982 establishment of the United States Court of Appeals for the Federal Circuit, which has exclusive appellate jurisdiction over all U.S. federal cases involving patents, trademarks, government contracts, veterans' benefits, public safety officers' benefits,

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<sup>94</sup> Compare *supra* Section V.C. with U.S. PAT. & TRADEMARK OFF., GENERAL REQUIREMENTS BULLETIN FOR ADMISSION TO THE EXAMINATION FOR REGISTRATION TO PRACTICE IN PATENT CASES BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE (2023) and Michael Wagner, *An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board*, 62 FED. LAW. 36, 36-37 (2015).

<sup>95</sup> Laura Geggel, *What Traits Should Every Supreme Court Justice Have?*, LIVE SCI. (Feb. 17, 2017), <https://www.livescience.com/57917-supreme-court-justice-qualities.html>. But see Jennifer Hijazi, *Supreme Court Nominee Barrett Resisted Climate Science, but Other Judges Have Embraced It*, SCI. AM. (Oct. 16, 2020), <https://www.scientificamerican.com/article/supreme-court-nominee-barrett-resisted-climate-science-but-other-judges-have-embraced-it/>.

<sup>96</sup> Breyer, *supra* note 67, at 4.

<sup>97</sup> *Id.*

federal employees' benefits, and various other categories.<sup>98</sup> There are currently more than five U.S. Courts of Special Jurisdiction, each adopting their own practices and procedures.<sup>99</sup> And in 2020, the Case Act established the Copyright Claims Board, a small claims court-type system that exclusively handles copyright infringement claims where damages are less than \$30,000.<sup>100</sup>

## VII. CONCLUSION

President Joe Biden had this to say about Justice Jackson's nomination, "For too long, our government, our courts haven't looked like America. I believe it's time that we have a court that reflects the full talents and greatness of our [N]ation with a nominee of extraordinary qualifications."<sup>101</sup> While it is unclear as to what Biden meant by this statement, such exemplification of our courts is essential. The unfortunate reality is that for the past several years, courts have

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<sup>98</sup> *United States Court of Appeals for the Federal Circuit*, WIKIPEDIA, [https://en.wikipedia.org/wiki/United\\_States\\_Court\\_of\\_Appeals\\_for\\_the\\_Federal\\_Circuit](https://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Federal_Circuit) (last visited Feb. 5, 2023).

<sup>99</sup> *Court Rules Research Guide: U.S. Courts of Special Jurisdiction*, MARQ. UNIV. L. SCH., <https://libraryguides.law.marquette.edu/c.php?g=318621&p=2127210> (last updated Dec. 16, 2022, 3:29 PM); *Specialized Federal Courts*, U.S. LEGAL, <https://courts.uslegal.com/federal-courts-and-jurisdictions/structure-and-power-of-the-federal-courts/specialized-federal-courts/> (last visited Feb. 5, 2023).

<sup>100</sup> *Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/small-claims/> (last visited Feb. 5, 2023); Steve Brachmann, *Copyright Office Issues Final Rules for CASE Act Copyright Claims Board Proceedings*, IP WATCHDOG (Mar. 14, 2022, 12:15 PM), <https://ipwatchdog.com/2022/03/14/copyright-office-issues-final-rules-case-act-copyright-claims-board-proceedings/id=147480/>.

<sup>101</sup> Jeff Mason et al., *Biden Picks Ketanji Brown Jackson as Historic U.S. Supreme Court Nominee*, REUTERS (Feb. 26, 2022, 4:04 AM), <https://www.reuters.com/world/us/biden-announce-us-supreme-court-pick-friday-white-house-sources-2022-02-25/?fbclid=IwAR3hYXcwuvtvvLpiOxSnMrm1Fu0XxODLJuhrmBwd6Vck500c3AtzklNjEoE>.

seemed to place less emphasis on reflecting the full talents and greatness of our Nation, to the extent that they do not interfere with any political agendas being pushed forth. But a diversity of talents and backgrounds in the courts alone is not enough for improvement in our judicial system. The use of knowledge by our courts is just as crucial, whether that entails more decentralization in our judicial system through the implementation of more specialized courts, a more pragmatic approach to judicial decision-making, or both. This will undoubtedly question the legitimacy of the umpire analogy over time.