A Case Study Analyzing How Trial Judge Experience Shapes Intermediate Appellate Review of Discretionary Determinations

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In 2004, Governor James McGreevey appointed then-Judge Fasciale to the New Jersey Superior Court for a seven-year term. In 2011, Governor Chris Christie re-appointed him to the Superior Court, where he then served as a tenured judge. On September 1, 2022, the Chief Justice of the New Jersey Supreme Court temporarily assigned then-Judge Fasciale to that Court. On September 29, 2022, Governor Philip Murphy nominated then-Judge Fasciale to serve on the New Jersey Supreme Court, and he was unanimously confirmed by the New Jersey Senate on October 17, 2022. On October 21, 2022, he took the oath of office as an Associate Justice of the New Jersey Supreme Court, where he now serves as a permanent member.

As a trial judge, he served in the Civil, Criminal, and Family Parts of the New Jersey Superior Court. Before elevation to the intermediate appellate court, the Chief Justice of the New Jersey Supreme Court designated him as Presiding Judge of the Civil and Criminal Parts. He also served as a Drug Court (now known as Recovery Court) trial judge in another diversionary program for individuals with mental health challenges charged with criminal offenses.

As an intermediate appellate judge, the Chief Justice elevated then-Judge Fasciale to the Appellate Division of the New Jersey Superior Court in May 2010. He served as Presiding Judge in the Appellate Division, where he typically wrote approximately 100 judicial opinions annually, adjudicating appeals from final administrative agency decisions, and from judgments and orders of the State Civil, General Equity, Family, Criminal, Tax, and Workers' Compensation courts.

In 2023 Justice Fasciale graduated from Duke University School of Law, where he obtained an LLM in Judicial Studies. The three-year LLM program is the only one in

Anyone interested in appellate review of discretionary trial determinations will want to read this Article. This study contends that prior experience as a trial judge can favorably shape how appellate judges think when analyzing these rulings. For this conclusion, I rely on my own experience as an appellate judge who first sat as a trial judge, and on New Jersey's judicial history. New Jersey's relatively unique appellate court structure is a perfect case study to make that point. By extrapolating lessons learned from that history and relying on empirical data, I maintain that the practical benefits of prior trial judge experience are substantial.

Pre-1947, New Jersey appellate judges had baked-in trial duties, a system which administered justice ineffectively. Change was inevitable. During ratification of the State's third constitution in 1947, there was overwhelming support for separating the trial and appellate roles, and attention shifted to how dedicated appellate judges would be selected. The dual judicial functions stopped in 1947 when New Jersey created an appellate court composed only of former trial judges. This Article tells the fascinating tale of how that happened and why it matters to appellate administration of justice.

I. INTRODUCTION

Imagine that you and your colleague are on an appellate panel assigned to adjudicate two appeals at the next sitting. One is an appeal from an order entered by a Tax Court judge dismissing a complaint.[1] The other is an appeal from a judgment entered after a jury trial in a

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the nation that offers this unique degree for sitting state, federal, and international judges. The master's program offers an intensive and challenging curriculum that addresses an array of issues relating to judicial institutions, judicial behavior, and decision-making.

Justice Fasciale is an elected member of the American Law Institute.

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[1] *See, e.g.*, Gen. Motors Acceptance Corp. v. Dir., Div. of Tax'n, 26 N.J. Tax 93, 95 (N.J. Super. Ct. App. Div. 2011) (affirming the Tax Court's dismissal of the complaint), *cert. denied*, 27 A.3d 950 (N.J. 2011).

car accident case.[2] Each of you has different prior judicial experience at the trial level. Your colleague previously served as a Tax Court judge before her assignment to the appellate court and, pertinent to the tax appeal, is familiar with the doctrine of equitable recoupment and its limited scope in tax litigation. You never sat as a Tax Court judge, but, unlike your colleague, your previous experience as a civil trial judge uniquely prepared you for the car accident appeal. Can you envision, in this hypothetical situation, deferring to your colleague or being particularly solicitous of her views given her prior experience as a Tax Court judge? Wouldn't you want the same consideration in the car accident appeal? This Article argues that prior experience as a trial judge—or lack thereof—importantly shapes intermediate appellate decision-making when the appellate judge and the judge's colleagues review discretionary determinations made at the trial level.[3]

In general, appellate judges, and especially state Supreme Court justices, can serve without prior experience as a trial judge. There are examples of extraordinary judges and justices who have done so without that background.[4] Indeed, several of the Justices who previously served on the United States Supreme Court were appointed without prior judicial experience or only had limited experience on the bench.[5]

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[2] *See, e.g.*, Szczecina v. PV Holding Corp., 997 A.2d 1079, 1087 (N.J. Super. Ct. App. Div. 2010) (vacating a jury verdict due to counsel's repeated inappropriate statements in opening and summation).

[3] In preparing this Article, I relied on my experience of more than thirty-six years: as a law clerk, a Certified Civil Trial Attorney by the New Jersey Supreme Court, a state trial judge, and an intermediate state appellate judge; I consulted with my appellate judge colleagues, all of whom have previous experience as trial judges. As a current Associate Justice of New Jersey's Supreme Court, that experience has provided invaluable context. The research and ideas expressed in this Article should not be misconstrued to reflect any official policies of the New Jersey Judiciary, nor should they be used to forecast how the author, or any other jurist, will rule on legal issues in any case.

[4] At the time of this Article's writing, there are currently seven United States Supreme Court Justices without prior experience as a trial judge. *See Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Jan. 27, 2023); *see also infra* Table 1 (summarizing the prior judicial experience of United States Supreme Court justices).

[5] *See* Jamelle Bouie, Opinion, *Let's Bring the Supreme Court Back Down to Earth*, N.Y. TIMES (Feb. 1, 2022), https://www.nytimes.com/2022/02/01/opinion/biden-breyer-supreme-court.html (citing HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (5th ed. 2007)). Abraham points out that "many of the most illustrious members of the [C]ourt were judicially inexperienced," such as John Marshall, Salmon P. Chase, Morrison R.

Even if a justice has no prior judicial experience, a justice's thinking can be shaped in a multitude of ways. Life and professional experiences obtained before joining the bench influence a justice's outlook in meaningful ways and should not be underappreciated when considering the collaborative work of justices on a state's highest court, or on the United States Supreme Court. The collective non-judicial experience of justices on such courts is important for a balanced consideration of the important issues presented on appeal. For example, Justice Ketanji Brown Jackson, who also has prior federal experience as a trial and appellate judge, brings to the High Court her practical experience as a public defender, which her fellow Justices do not share.[6]

But this Article is not about whether previous trial judge experience shapes decisions by justices of a state's highest court when they review discretionary determinations made at the trial level, although that subject could be analyzed separately. Instead, the Article focuses on intermediate appeals court judges in New Jersey, who generally handle (as intermediate appellate judges do in other states) a markedly different docket than New Jersey's highest Court by annually reviewing thousands of trial court discretionary determinations. This Article will briefly contrast the work of New Jersey's highest Court to further make the point that prior experience as a trial judge is valuable to appellate adjudication of discretionary rulings by trial judges.

This Article reviews and analyzes New Jersey's judicial history to determine whether that history sheds light on the value of prior experience as a trial judge. I believe it does. I contend that New Jersey's history has demonstrated that prior experience as a trial judge can be worthwhile and beneficial to appellate judges.

New Jersey's intermediate appellate court is one of three in the nation whose current members are all former trial judges (New York and Connecticut are the others).[7] I contend that the history of New

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Waite, Melville W. Fuller, Charles Evans Hughes, Harlan F. Stone, Earl Warren and William H. Rehnquist. *Id.*

[6] *See* David Leonhardt, *Why KBJ Is Different*, N.Y. TIMES: THE MORNING (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/briefing/ketanji-brown-jackson-hearings-supreme-court.html (highlighting Justice Jackson's extensive professional background).

[7] *See infra* Table 3 (summarizing the characteristics of intermediate appellate courts in the United States, including judicial qualifications); *see also* Diane M. Johnsen, *Picking Judges: How Judicial-Selection Methods Affect Diversity in State Appellate Courts*, 101 JUDICATURE 29, 31 (2017) (noting as of that time that across the nation, 64

Jersey's intermediate appellate court is a perfect case study to exemplify the benefits of how prior trial judge experience can shape appellate review of discretionary rulings. I maintain, from that history and as an appellate judge who was a trial judge, that prior experience as a trial judge makes a significant difference for appellate review of these determinations. I argue the benefits of that experience manifest in meaningful ways, such as by adding a unique, practical perspective that enhances appellate administration of justice. I conducted this case study because it both validates New Jersey's 1947 fundamental judicial structural change that ensured our appellate court would be entirely composed of former trial judges, and, importantly, because it illuminates the benefits of that commitment and provides additional support beyond empirical data for my conclusion. I also offer preliminary thoughts about maintaining a fresh perspective on prior trial judge experience, although that too could be the subject of another paper.

Part II provides a historical perspective of prior trial judge experience for New Jersey appellate judges pre- and post-1947. Pre-1947, some appellate judges simultaneously sat as trial judges. These baked-in judicial trial/appellate dual roles originated in medieval England, continued through our country's colonial times (1660s to 1776), and persisted with New Jersey's 1776 and 1844 Constitutions. Part II carries the historical discussion forward to the post-1947 period, when intermediate appellate judges stopped serving simultaneously as trial judges, but only after first obtaining prior experience as trial judges. In this Part, I show how pillars of the legal community at the 1947 constitutional convention first identified the benefits of trial judge experience for intermediate appellate judges; I then discuss how the delegates deliberately made structural changes that directly increased those benefits by designing an intermediate appellate court composed of former trial judges.

Part III details typical experience judges obtain while sitting in New Jersey's trial and appellate courts. Not every appellate judge sitting on any given appellate panel has gained the same experience as a trial judge. I maintain that the collective varied, wide-ranging, and

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percent of the 1,285 state appellate judges had prior judicial experience). Judge Johnsen, an Arizona Court of Appeals judge, explained further that "appellate judges in merit-confirmation states are most likely to have prior judicial experience, at nearly 75 percent, and judges in nonpartisan election states are least likely to have prior judicial experience, at 58 percent." *Id.* at 33. Judge Johnsen identified twelve merit-confirmation states where the governor appoints judges subject to the approval of another elected body. *Id.* at 32.

practical trial judge experience on the intermediate appellate court makes a strong panel of appellate jurists. Part III sets the stage for how prior trial judge experience shapes appellate adjudication of trial discretionary determinations.

Part IV exemplifies how prior experience as a trial judge manifests itself in actual appeals. Here, I analyze the advantages and disadvantages of prior trial judge experience. After explaining the standard of appellate review and listing typical discretionary rulings trial judges routinely make, I provide seven concrete examples of how prior experience as a trial judge can shape the appellate judge's thought process. I show how the experience can shape how an appellate judge: (1) evaluates the correctness of the ruling; (2) considers whether the ruling was harmless; (3) perceives what transpired at the trial level; (4) writes more compassionately, sensitively, and with greater patience; (5) demonstrates confidence to write opinions for litigants and counsel; (6) defers generally to credibility findings; and (7) understands the life of the law. Along these lines, I argue that prior experience as a trial judge helps ground the appellate judge and adds a tangible context of what is happening in the trial court. I explore how trial judge experience compares to other kinds of professional experience, such as experience as a trial attorney, and then consider the ideal amount of prior trial judge experience an appellate judge should have. Finally, I address whether there are any downsides to having prior experience as a trial judge.

Part V explores ways for intermediate appellate judges to maintain the benefits of prior experience as trial judges. In this section, I acknowledge that with the passage of time, prior experience as a trial judge becomes stale. In addition to offering preliminary suggestions for how trial judges can prepare to become appellate judges, I suggest how appellate judges can ensure that their prior judicial trial experience remains relevant. Part V could easily lead to additional research and a separate paper analyzing the best methods for ensuring continued effectiveness of prior experience as a trial judge.

Part VI briefly addresses a question that naturally flows from my conclusions. That is, if prior trial judge experience is critical for intermediate appellate judges, does the same hold true for justices on a state's highest court? Looking at New Jersey's judicial structure, I briefly contrast the work done by intermediate appellate judges with that of justices of New Jersey's highest Court, the Supreme Court. Although prior experience as a trial judge or intermediate appellate judge can be valuable to our Supreme Court, Part VI highlights the differences between the two levels of appellate review and points out

the likely reasons—using New Jersey's judiciary as a case study—why the framers of New Jersey's 1947 Constitution elected not to require each justice to have prior experience as a trial judge before joining the Court. Although this Part of the Article can certainly be the subject of another article entirely, I include it solely to support my contention that former trial judges can likely be more beneficial at the intermediate appellate level relative to the court of last resort.

I ultimately conclude that insight gained from prior experience as a trial judge can be helpful, practical, and impactful when intermediate judges review discretionary rulings by trial judges. Learning from the lessons and application of New Jersey's judicial history, I return to the two scenarios at the beginning of this Article—the Tax Court appeal and the car accident appeal—and offer how the judicial backgrounds of the judges on those panels might well have shaped their thinking.

II. HISTORICAL PERSPECTIVE PRE- AND POST-1947

New Jersey's judicial history and current appellate court structure teach us that prior experience as a trial judge can favorably impact the way an appellate judge thinks. Pre-1947, appellate judges had simultaneous trial duties, which ineffectively administered justice. The dual functions stopped when New Jersey created an intermediate appellate court that focused solely on appellate work, composed only of former trial judges who provide an important practical perspective. The following historical analysis details how that happened and why it matters to appellate administration of justice.

New Jersey's Superior Court currently has three divisions: (1) the Law Division, which consists of the State's Civil and Criminal Courts; (2) the Chancery Division, which consists of the State's General Equity and Family Courts; and (3) the Appellate Division, in which litigants can challenge orders or judgments entered in the Law and Chancery Divisions.[8] The Law and Chancery Divisions comprise the State's trial courts; the Appellate Division is considered an Intermediate Court of Appeals. The New Jersey Supreme Court is the State's court of last resort.

Since 1947, one becomes an Appellate Division judge by assignment of the Chief Justice after first serving as a trial judge in

[8] The Appellate Division also hears appeals from the Tax Court and State administrative agencies and disposes of approximately 6,500 appeals and 10,000 motions annually. N.J. CTS., https://www.njcourts.gov/courts/appellate (last visited Feb. 15, 2023).

either the Law or Chancery Divisions, or both.[9] Previously, judges simultaneously fulfilled trial and appellate duties. But New Jersey's 1947 Constitution ("N.J. 1947 Constitution")—and a related 1988 Court Directive—made extensive structural changes ensuring appellate judges serve only in that capacity. Since 1947, the extent of one's trial judge experience has played an important role in becoming a judge in the Appellate Division of the New Jersey Superior Court. New Jersey's constitutional and judicial history teaches us important lessons about the transition from initially expecting that judges simultaneously serve as appellate/trial judges, to appellate judges serving solely in that capacity with prior judicial experience. Analyzing this history underscores the practical and beneficial consequences of appellate review of discretionary trial determinations from the important perspective of former trial judges.

A. *New Jersey's Judicial System*

1. Medieval England

New Jersey's constitutional history begins in medieval England,[10] which I need not detail extensively. Suffice it to say that the system of New Jersey common law courts during colonial times generally mirrored that which existed in England.[11] The Supreme Court and the

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[9] Five judges skipped serving substantial time sitting as a judge in the Law or Chancery Divisions: (1) Governor Robert Meyner appointed Arthur W. Lewis as a Superior Court Judge in January 1961, 84 N.J. L.J. 29 (1961), and Chief Justice Joseph Weintraub assigned Judge Lewis to the Appellate Division in February 1961, 84 N.J. L.J. 93 (1961); (2) Governor Robert Meyner appointed Judge Milton Conford as a judge of the Superior Court in 1954, and Chief Justice Arthur Vanderbilt immediately assigned him to the Appellate Division, Sylvia B. Pressler, Milton B. Conford (1909-1989), 20 SETON HALL L. REV. 1, 1 (1989); (3) William J. Brennan, Jr. was appointed to the Superior Court in 1949, Press Release, N.J. Cts., Bust of Late Justice Brennan of U.S. and N.J. Supreme Courts to be Unveiled in Trenton on January 30 (Jan. 26, 2001), and assigned to the Appellate Division in 1950, 73 N.J. L.J. 273 (1950); (4) Edward Gaulkin was confirmed to the Superior Court in March 1958 and assigned to the Appellate Division in May 1958, Manual of the Legislature of New Jersey, 286 (1959); and (5) Lawrence A. Carton was appointed to the Superior Court in April 1966, 89 N.J. L.J. 257 (1966), and assigned to the Appellate Division in July 1966, 89 N.J. L.J. 433 (1966). Only one of these judges, Milton Conford, entirely skipped serving as a trial judge and went directly to the appellate court.

[10] John Bebout, *Introduction* to PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at xii (New Jersey Writers' Project of the Work Projects Administration ed., 1942).

[11] Edward Q. Keasbey, *Some Account of their Origin and Jurisdiction*, *in* THE COURTS OF NEW JERSEY 75, 76 (1903); *see also* Erwin C. Surrency, *Courts in the American Colonies*,

Court of Common Pleas heard civil actions at common law. The Oyer and Terminer Court and Justices of the Peace heard criminal cases.[12] Further, Courts of Equity disposed of probate matters. John Bebout, writing in 1942, explained that "New Jersey's twentieth[-]century judicial system has been called 'an eighteenth[-]century provincial mill built upon an English model of the [M]iddle [A]ges.'"[13] The system we adopted from England included a practice of appellate judges simultaneously performing duties in the trial courts,[14] which continued during and after the colonial period.[15]

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11 AM. J. LEGAL HIST. 253, 266–69 (1976) (noting that although courts in the colonies were patterned after those in England, they were not identical); *see also* Stephen B. Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 RUTGERS CAMDEN L.J. 262, 286 (1976) (indicating that the establishment of common law courts "was a conscious copying of the English local courts").

[12] Keasbey, *supra* note 11, at 76.

[13] Bebout, *supra* note 10, at xii (quoting CHARLES H. HARTSHORNE, COURTS AND PROCEDURE IN ENGLAND AND NEW JERSEY 5 (1905)). Like in colonial times, judges and justices in England simultaneously served in the trial and appellate levels. It was not until the Judicature Acts of 1873–1875 that England established an appellate court with separate personnel from trial courts for civil cases. There were two reasons for the change in the Judicature Acts of 1873–1875: (1) the speedier administration of justice by eliminating interruptions to appellate court sittings for the judges to preside over trials; and (2) to eliminate doubt as to the efficaciousness of appellate court decisions. Renée Lettow Lerner, *How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury*, 40 J. LEGAL PRO. 215, 235–36 (2016).

[14] Parliament created the Court of Criminal Appeal in 1907. High Court judges from the King's Bench Division also served on the Court of Criminal Appeal. "In other words, the appellate court was staffed with the very judges who ordinarily heard criminal cases in the first instance." Lerner, *supra* note 13, at 240. Finally, in 1966 the Court of Criminal Appeal in England was made part of the Court of Appeal and staffed with separate appellate judges. *Id.* For a thorough discussion of modern Anglo-American judicial comparisons, see Patrick S. Atiyah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 SW. L.J. 545, 556–62 (1983). Atiyah writes that "[a]lthough appellate judges are not required by statute to have some experience as trial judges, it is today quite exceptional for anyone to be appointed to an appellate court straight from the bar. It would be unusual for a trial judge to be appointed to the House of Lords unless [that person] has served some years in the Court of Appeal," and the "conventional requirement" is for appellate judges to have experience as a trial judge. *Id.* at 557.

[15] The phenomenon of requiring judges to perform simultaneous duties in different courts reached as far as the United States Supreme Court. *See* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1757–1829 (2003) (discussing the duty of Supreme Court Justices commonly referred to as "riding the circuit," which required the Justices to also serve as judges of one of the three intermediate appellate circuit courts until the practice's formal abolishment in 1911).

2. New Jersey's Colonial Constitutions

New Jersey's court structure, as established in the N.J. 1947 Constitution, has "deep roots" in colonial times.[16] Although scholars have written extensively about those roots, none focused solely on whether experience as a trial judge shapes intermediate appellate review of trial discretionary determinations. From colonial times up to the N.J. 1947 Constitution, judges and justices simultaneously performed duties in appellate and trial courts.[17] To understand the benefits of the current court structure in New Jersey, which (but for one exception in seventy-six years) ensures Appellate Division judges first serve as judges in the trial court, I must detail the historical roots of the judiciary. Doing so demonstrates that requiring appellate judges to have prior experience as a trial judge was intentional.

In 1664, New Jersey was granted to the Duke of York,[18] which he almost immediately re-granted to his friends Lord John Berkeley and Sir George Carteret.[19] This led to the first document that might be called a "constitution," dated February 10, 1664, entitled, "The Concessions and Agreement of the Lords Proprietors of the Province of New Cesarea or New Jersey, to and With all and Every the Adventurers, and all Such as Shall Settle or Plant There" ("Concessions").[20] In 1665, Governor Philip Carteret—with consent of his council—officially created courts.[21] The Concessions did not explicitly require appeals to be handled by appellate judges with prior experience as a trial judge.[22]

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[16] *See* Freedom From Religion Found. v. Morris Cnty. Bd. of Chosen Freeholders, 181 A.3d 992, 997 (2018) (tracing New Jersey's constitutional history to colonial times).

[17] *See, e.g.*, Surrency, *supra* note 11, at 254, 261 (explaining generally that "colonial judges would hold sessions of their courts under a different title, such as chancery or exchequer, although the same judge would be presiding" and justices of the supreme courts obtained trial judge experience by going "on circuit to hear appeals and to try a limited number of cases under their general jurisdiction").

[18] Bebout, *supra* note 10, at xii.

[19] *Id.*; *see also* Presser, *supra* note 11, at 268 (indicating that Berkeley and Carteret, and their successors, became known as the "proprietors" of New Jersey).

[20] Bebout, *supra* note 10, at xii (citing SAMUEL SMITH, THE HISTORY OF THE COLONY OF NOVA-CAESARIA, OR NEW JERSEY, 512–21 (1877)).

[21] *Id.*; *see also* THE CONCESSIONS AND AGREEMENTS OF THE PROPRIETORS OF NEW JERSEY, *reprinted in* 1 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW JERSEY, 1631–1687 32–33 (William A. Whitehead, Frederick W. Ricord & William Nelson eds., 1880) [hereinafter CONCESSIONS].

[22] *See generally* CONCESSIONS, *supra* note 21.

In 1676, the province divided into East and West Jersey.[23] Two charters were then enacted to govern these regions: the Charter or Fundamental Laws of West New Jersey (1676), and the Fundamental Constitutions for the Province of East New Jersey in America (1683) (collectively "The Charters").[24] Like the Concessions, The Charters did not specifically address whether appellate judges were required to have trial judge experience.[25] The Charters could be considered the second "constitution."[26] The Concessions arguably retained vitality, at least in East Jersey.[27]

The Charters were superseded by the eventual surrender of both Jerseys to the Crown in 1702,[28] when Edward Hyde—Lord Cornbury—was appointed Governor of New Jersey and New York.[29] The King of England appointed the governor, who enjoyed widespread executive, legislative, and judicial powers.[30] The governor appointed judges and oversaw the courts.[31] The governor and the council—the appointed upper chamber of the legislature—constituted the highest court of appeals.[32] With the consent of the council, the governor established other common law courts, which led to Lord Cornbury's substantial involvement. At that time, the Crown provided Lord Cornbury with

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[23] Bebout, *supra* note 10, at xiii.

[24] Freedom From Religion Found. v. Morris Cnty. Bd. of Chosen Freeholders, 181 A.3d 992, 998 (2018).

[25] *See* THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY, AGREED UPON - 1676, chs. XVII-XIX (1676), http://www.njstatelib.org/wp-content/uploads/slic_files/imported/Research_Guides/Historical_Documents/nj/NJ05A.html; THE FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF EAST NEW JERSEY IN AMERICA, chs. X, XIX, XXIV (1683), https://avalon.law.yale.edu/17th_century/nj10.asp.

[26] The Charters contained an extensive bill of rights including, among other things, the right to a trial by jury. *See* Bebout, *supra* note 10, at xiii.

[27] *Freedom From Religion Found.*, 181 A.3d at 998; *see also* Edward Q. Keasbey, *The Early Constitutions of New Jersey*, 1 N.J. L. REV. 20, 32–33 (1915) [hereinafter *Early Constitutions of New Jersey*].

[28] *Freedom From Religion Found.*, 181 A.3d at 998; *see Early Constitutions of New Jersey*, *supra* note 27, at 33; *see also* Carl H. Esbeck, *Dissent & Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1469 n.283 (2004).

[29] *Freedom From Religion Found.*, 181 A.3d at 998; *Early Constitutions of New Jersey*, *supra* note 27, at 34. Before this point, the people of the two provinces established the provincial courts under the Proprietors either in town meetings or by the legislature. Keasbey, *supra* note 11, at 81.

[30] Bebout, *supra* note 10, at xiv.

[31] *Id.*

[32] Bebout, *supra* note 10, at xiv, xvii.

detailed instructions about governing.[33] In 1702, Lord Cornbury brought with him Commission and Instructions, which could be considered a third "constitution."[34]

The framework of the court system in the royal province of New Jersey demonstrates that judges obtained experience as appellate and trial judges by simultaneously performing duties at each level. In either 1703 or 1704, an "Ordinance for Establishing Courts of Judicature" ("1704 Ordinance") was adopted.[35] The Ordinance laid the foundation for New Jersey's judicial system.[36] The Ordinance established Justices of the Peace, who adjudicated, without a jury, disputes involving forty shillings or less;[37] a Court of Sessions, which heard appeals from judgments entered by the Justices of the Peace involving twenty shillings or more;[38] County Courts, known as Courts of Common Pleas, which had authority to determine most matters at common law;[39] and a Supreme Court of Judicature, which functioned like the Courts of Queen's Bench, Common Pleas, and Exchequer of England.[40]

In a different ordinance enacted in 1705, Lord Cornbury provided for additional appellate review. The 1705 Ordinance declared that the "Governor or Lieutenant-Governor and any three of the Council should constitute a Court of Chancery."[41] Many years later,

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[33] *See* 1 EDWARD Q. KEASBEY, COURTS AND LAWYERS OF NEW JERSEY 1661–1912, at 162–64 (1912) [hereinafter COURTS AND LAWYERS OF NEW JERSEY].

[34] Bebout, *supra* note 10, at xiii.

[35] COURTS AND LAWYERS OF NEW JERSEY, *supra* note 33, at 167. It is unknown exactly who drafted the Ordinance. *Id.* at 168. Judge Richard Stockton Field explains that the drafter was one "familiar with the common law and conversant with the Courts of Westminster Hall . . . and [that] . . . Lord Cornbury had [such a man] in his Council." *Id.* (quoting RICHARD S. FIELD, THE PROVINCIAL COURTS OF NEW JERSEY 50 (1849)). The man to whom Judge Field had been referring is Roger Mompesson, "a member of an ancient family in England" and an eminent lawyer. *Id.* at 168–69.

[36] *Id.* at 171–72.

[37] *Id.* at 172.

[38] *Id.*

[39] The Courts of Common Pleas did not have jurisdiction to hear cases where title to land came in question. *Id.*

[40] *Id.* at 171–72; *see* Erasmus Darwin Parker, *The Origin and History of the King's Bench Division*, 26 LAW MAG. & REV.: Q. REV. JURIS. 297, 304 (1901) (explaining the King's Bench, the Common Pleas, and the Exchequer were the three courts of common law with distinct jurisdiction: (1) Common Pleas heard cases between private persons; (2) Exchequer heard cases "which affected the Revenue"; and (3) King's Bench heard cases "between the Crown and the subject").

[41] COURTS AND LAWYERS OF NEW JERSEY, *supra* note 33, at 173.

the Court of Chancery became much more important, but the 1704 Ordinance focused primarily on the creation of the common law courts.

Judges and justices simultaneously served at more than one level in these common law courts. "It was thus assumed . . . that the judges of the Common Pleas [were] the same as the judges of the sessions . . . ."[42] Justices of the Supreme Court—once a year—would "go the Circuit," which means that they would serve as trial judges with Justices of the Peace in various counties.[43] Judges sitting at the appellate level necessarily obtained trial judge experience in practice. "Notwithstanding the intervening Instructions and charters, [and] the Concessions[, which] remained an influential resource for the drafters of" New Jersey's 1776 Constitution ("N.J. 1776 Constitution"),[44] the practice of appellate judges simultaneously serving in the trial courts continued. The colonial courts established by Lord Cornbury, shortly after reunification of the two provinces, "remained substantially unchanged until the organization of the state government in 1776," even though there were multiple ordinances between 1704 and 1776 as to the organization of the courts.[45]

3. New Jersey's Constitution of 1776

New Jersey adopted the N.J. 1776 Constitution days before the adoption of the Declaration of Independence.[46] On June 21, 1776, a revolutionary Provincial Congress voted fifty-four to three that "a government be formed for regulating the internal policy of this Colony."[47] A ten-person committee convened to produce a draft, and on July 2, 1776, by a vote of twenty-six to nine, the Provincial Congress adopted the N.J. 1776 Constitution.[48] The other members had departed from the meeting and did not vote.[49]

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[42] Keasbey, *supra* note 11, at 85.

[43] COURTS AND LAWYERS OF NEW JERSEY, *supra* note 33, at 173.

[44] *Freedom From Religion Found.*, 181 A.3d at 998.

[45] Keasbey, *supra* note 11, at 91; *see also id.* at 91–98.

[46] *See* ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 1 (G. Alan Tarr ed., 1990). Virginia and Pennsylvania were two other colonies that likewise adopted constitutions at this time. Massachusetts adopted its constitution in 1780. *Id.*

[47] *Id.* (internal quotation omitted).

[48] *Id.*

[49] *Id.* Their failure to vote is perhaps "due partly to the arrival of the British fleet off Sandy Hook." Bebout, *supra* note 10, at xvi. Regardless, "[t]here was no popular ratification of this constitution." WILLIAMS, *supra* note 46, at 1.

The N.J. 1776 Constitution did not name the judiciary as a branch of government.[50] Under article IX, the governor and Legislative Council served as the "Court of Appeals in the Last Resort."[51] Article XII identified other New Jersey courts,[52] which evidences the intention to utilize the judicial system outlined in the 1704 Ordinance.[53] Although the N.J. 1776 Constitution does not explicitly address whether an appellate judge should have prior trial judge experience, in practice, as had been the case before and after 1704, judges continued under that constitution to serve simultaneously in different capacities at multiple levels. For example, "justices of the peace sat as common pleas judges in the civil, criminal and probate courts of the county in those days."[54] Thus, appellate judges necessarily had judicial trial experience.

4. New Jersey's Constitution of 1844

In 1844, New Jersey ratified its second Constitution ("N.J. 1844 Constitution"), which named the judiciary as one of the three "departments" among whom the powers of government were divided.[55] Judges and justices continued performing multiple judicial duties, serving simultaneously in the trial and appellate courts. Under Article VI, Section I, the 1844 Constitution vested judicial power in

> a Court of Errors and Appeals in the last resort in all causes as heretofore; a Court for the trial of impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts, and such inferior Courts as now exist, and as may be hereafter ordained and established by law; which Inferior Courts the Legislature may alter or abolish, as the public good shall require.[56]

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[50] WILLIAMS, *supra* note 46, at 5.

[51] N.J. CONST. of 1776, art. IX; WILLIAMS, *supra* note 46, at 5.

[52] N.J. CONST. of 1776, art. XII (referencing the Supreme Court, "Inferior Courts" of common pleas in the several counties, and the Justices of the Peace).

[53] Legislation declared that existing courts would continue "with the like powers under the present government." Keasbey, *supra* note 11, at 99 (internal quotation omitted).

[54] Bebout, *supra* note 10, at li.

[55] N.J. CONST. of 1844, art. III, para. 1 (expressly referencing the separation of powers doctrine, which divided the powers of government into the Legislative, Executive, and Judicial).

[56] *Id.* art. VI, § I, para. 1. The 1844 Constitution also provides for a court of pardons, *id.* art. V, para. 10, and a court of impeachment, *id.* art. VI, § III, para. 1.

The Legislature established by statute the "Courts of Common Pleas, Courts of Oyer and Terminer, Courts of Quarter Sessions, Courts of Special Sessions, Orphans' Courts, civil district courts, criminal judicial district courts, county traffic courts, and small cause courts."[57] Municipalities were empowered to create "police courts, recorder's courts, magistrate's courts[,] and family courts."[58] The N.J. 1844 Constitution identified specific courts which had overlapping jurisdictions and required judges to simultaneously function in more than one of those courts.[59] Such a system inevitably led to delays and the division of judicial resources.

The Court of Errors and Appeals, the State's highest tribunal under the N.J. 1844 Constitution, consisted of the Chancellor, the justices of the Supreme Court, and six Lay Judges.[60] The Chancellor served as the head of the general equity Chancery Court, and as judge of the Prerogative Court, which heard matters involving Wills, Estates, and Guardianship.[61] The Orphans' Court consisted of a Supreme Court justice and a Common Pleas judge.[62] Judgments entered in this court could be appealed to the Prerogative Court, the Supreme Court, or a Circuit court.[63]

Pertinent to prior experience as a trial judge, one or more justices of the Supreme Court gained that experience by sitting in the Circuit Courts, from which litigants could appeal to the Supreme Court, or directly to the Court of Errors and Appeals.[64] Supreme Court justices heard cases in the trial court while sitting in the Court of Oyer and Terminer and Court of Quarter Sessions, and a Common Pleas judge

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[57] JOSEPH HARRISON, THE COURTS OF NEW JERSEY – PART I: THE PRESENT SYSTEM 1 (1947), https://dspace.njstatelib.org/xmlui/handle/10929/40648 (internal citations omitted).

[58] *Id.*

[59] *See* N.J. CONST. of 1844, art. VI, § I, para. 1; § II, paras. 1, 5–6; § IV, paras. 1–3; § V, paras. 1–3; and § VI, para. 1; *see generally* HARRISON, *supra* note 57 (providing a comprehensive summary of the courts under the N.J. 1844 Constitution, their jurisdictions, the judges' duties, and important commentary); *see also infra* Table 4 (organizational chart of the court system created by the N.J. 1844 Constitution).

[60] *See infra* Table 4.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] N.J. CONST. of 1844, art. VI, § V, paras. 2–3. Justices and judges who heard a matter at the trial level were precluded from participating on appeal. *See id.* art. VI, § II, paras. 5–6.

would also sit in the Court of Special Sessions.[65] The same judge sat in "the county courts of Common Pleas, Oyer and Terminer, Quarter Sessions and Special Sessions, and the Orphans' Court."[66]

The N.J. 1844 Constitution did not explicitly require appellate judges to first obtain experience as trial judges; but again, in practice, appellate judges received that experience by serving simultaneously in a complicated and elaborate system of different trial and appellate courts.[67] The court structure was unworkable, which led to significant structural changes that are contained in the N.J. 1947 Constitution.[68]

There were "numerous critiques" of the pre-1947 court structure.[69] Those criticisms included "overlapping jurisdictions, the multiplicity of duties of the members of the higher courts, inordinate delays in the administration of justice, and a general lack of supervision by any one administrative head of the courts, with the attendant inefficiency in operations."[70] For example, the Chancellor held the position of presiding judge of the Court of Errors and Appeals while also acting as the administrating supervisor of the Court of Chancery and serving as a member of the Court of Pardons.[71] The Chancellor's multiplicity of duties led to cumbersome effects as his overpacked schedule would have likely resulted in less time reviewing cases for the Court of Pardons, unavoidable inefficiency in the administration of the Chancery Court, and an inability to properly oversee the Court of Errors and Appeals.

During the Constitutional Convention of 1947, attendees discussed the trial judge experience of appellate judges,[72] including

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[65] HARRISON, *supra* note 57, at 6; *see also infra* Table 4.

[66] *Id.* at 5.

[67] *See id.* at 4–8 (providing a detailed description of the multiplicity of duties of the judges of the time); COMM'N ON REVISION OF THE N.J. CONST. [HENDRICKSON COMM'N], REPORT OF THE COMMISSION ON REVISION OF THE NEW JERSEY CONSTITUTION 22 (1942) (explaining that New Jersey was the only common law state, except Delaware, that imposed on "the highest judges [the responsibility to] have a multiplicity of duties in different courts"); *infra* Table 4.

[68] In 1941, Governor Charles Edison stressed the need for court reform. G. DIXON SPEAKMAN, THE COURTS OF NEW JERSEY – PART III (C): LAW COURTS IN A UNIFIED JUDICIAL SYSTEM 6 (1947), https://dspace.njstatelib.org/xmlui/handle/10929/40646.

[69] HARRISON, *supra* note 57, at 7.

[70] *Id.* at 7–8.

[71] *Id.* at 8.

[72] These discussions included proposals for Supreme Court justices to first serve as judges in the trial court, which became known as the New Jersey Superior Court, for one year. *E.g.*, 4 NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947: COMMITTEE ON THE

remarks that appellate judges should not simultaneously perform duties as trial court judges.[73] Performing multiple judicial roles made for an inefficient court system. For instance, any appellate judge who participated in the case at the trial level had to be recused from the appeal, meaning that appellate judge would stand by until argument concluded before resuming appellate work with the other members of the highest court. By removing dual judicial roles, I contend that the attendees also strove to maintain the practical benefits that appellate judges can have from experience as trial judges.

As former Dean of Harvard Law School Roscoe Pound recognized in 1947, "[i]t takes a strong and experienced and learned judge to deal properly with cases involving wide discretion."[74] This was especially so considering that appellate work had "increased enormously" and that judges needed different judicial experience depending on their assignments.[75] Reviewing discretionary decisions, in my view, involves a certain feel for a case. As I later explain in greater detail, I contend prior trial judge experience better equips appellate judges when analyzing routine trial discretionary determinations.

Delegates at the 1947 convention therefore advocated for selecting appellate judges from the trial court.[76] The Committee on the Judiciary reported that assignment of judges according to ability and experience is important to litigation being decided promptly.[77] Likewise, the Committee indicated that the Chief Justice should assign judges to the appellate court "according to qualifications and experience . . . [and] Judges who perform meritorious service in a particular branch of judicial work will be continued in their respective

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JUDICIARY 11 (Sidney Goldmann & Herman Crystal eds., 1951) (Robert C. Hendrickson's remarks as first speaker in the morning session of the second meeting of the Committee on the Judiciary, in support of the Revision Commission's proposal) [hereinafter CONSTITUTIONAL CONVENTION VOL. IV].

[73] *See, e.g.*, *id.* at 43 (documenting the afternoon session of the second meeting, where George W.C. McCarter, Chairman of the Committee on Law Reform of the New Jersey State Bar Association, delivered a revised draft of judicial articles of the new constitution and discussed the reason for the changes).

[74] ROSCOE POUND, ORGANIZATION OF COURTS 17 (1947).

[75] *Id.* at 1–2, 8.

[76] CONSTITUTIONAL CONVENTION VOL. IV, *supra* note 72, at 559 (recognizing that the "requirement of previous judicial experience for appointment to the [appellate court] will [e]nsure not only great care in the selection of trial judges . . . but will also guarantee the recognition of meritorious service on the bench"); *id.* at 178, 458–59.

[77] 2 NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947: COMMITTEE ON THE JUDICIARY 1180 (Sidney Goldmann & Herman Crystal eds., 1949) [hereinafter CONSTITUTIONAL CONVENTION VOL. II].

assignments."[78] The time for simultaneous trial and appellate duties was ending, and more attention was devoted to selecting appellate judges only from the trial court.

Comments from prominent individuals at the convention led to a disaggregation of judicial roles. New Jersey's then-Chief Justice Clarence E. Case explained that removing multiple duties would avoid wasting valuable time by requiring appellate judges to recuse themselves while the appellate court heard a matter in which they were previously involved as the trial judge.[79] Other leaders addressed eliminating the problem of dual judicial roles. Governor Alfred E. Driscoll explained that appellate judges were overburdened by sitting at the trial and appellate levels simultaneously.[80] These remarks gained general acceptance that trial and appellate roles should be separated. The delegates did not ignore the practical benefits that appellate judges receive from having sat as trial judges. Instead, more time was spent on how appellate judges would be selected, specifically that they be drawn from the trial court.

Underscoring the benefits of first serving as a trial judge, then-Attorney General Walter D. Van Riper reiterated the need for experience as a trial judge before assignment to the Appellate Division. On this subject, he remarked that "the constitution[] . . . ought to be broad enough to permit . . . the Chief Justice . . . to set up the Appellate Division, and to designate these judges *from* the trial courts who would comprise the Appellate Division."[81] In various drafts of the Judicial Article to the 1947 Constitution, the Committee on the Judiciary documented the need for judges of the Appellate Division to have experience as a trial judge.[82]

Reform was clearly needed due to the precipitating factor of burdening judges with a multiplicity of judicial duties. The delegates therefore eliminated dual judicial roles of appellate judges and importantly acknowledged the need for appellate judges to have prior experience sitting as a trial judge. Indeed, as to the overwhelming

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[78] *Id.* at 1194.

[79] CONSTITUTIONAL CONVENTION VOL. IV, *supra* note 72, at 131, 133. Some pointed out that members of the Supreme Court should be selected from the Chancery, Law, and Appellate Divisions of the New Jersey Superior Court. *Id.* at 264.

[80] *Id.* at 427, 432.

[81] *Id.* at 281, 284 (emphasis added).

[82] *See, e.g.*, *id.* at 592 (noting "[t]he purpose of this is to ensure that the Court of Appeals be not filled up with men without court experience as counsellors or judges. Of course, the Chancellor and Chief Justice can be appointed from the bar.").

support for change, the Committee on the Judiciary concluded that defects in the judiciary fell into three categories.[83] Relevant to this Article, the Committee characterized the combined trial and appellate duties of judges as a "disturbing defect."[84] It reported a "defect in our existing organization of courts [resulting from the] multiple functions of appellate court judges . . . [t]he aggregate of each judge's assignments mak[ing] it impossible [for that judge] to concentrate judicial energies upon a single important task and den[ying] adequate opportunity for thoughtful consideration of appeals."[85] Changes were made because of these problems.[86] The Committee determined:

> Numerous appeals to the same judges, sitting in different courts, endlessly protract justice, multiply expense and present the undesirable example of judges taking turns from day to day in reviewing [one another's] decisions. There was absolute agreement that both conditions should be eradicated by limiting the number of appeals and by assigning judges to membership in only one appellate court at a time.[87]

The ratification of the New Jersey Constitution in 1947 did not eliminate opportunities for appellate judges to gain experience as a trial judge. Instead, learning from our past, the changes enhanced judicial efficiency and ensured the creation of an intermediate appellate court which would be composed of former trial judges.

5. New Jersey's Constitution of 1947

The N.J. 1947 Constitution strengthened the opportunity for appellate judges to receive trial judge experience by changing the way appellate judges obtained that experience. The new court structure ensured that one must obtain experience as a trial judge before serving solely as an appellate judge. As I later explain, although the N.J. 1947 Constitution did not explicitly require prior trial judge experience before becoming an appellate judge,[88] the structural change created

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[83] CONSTITUTIONAL CONVENTION VOL. II, *supra* note 77, at 1182–83.

[84] *Id.* at 1183.

[85] *Id.*

[86] *See id.* at 1181 (stating that the seven justices on the Supreme Court "serve on that [C]ourt exclusively").

[87] *Id.* at 1183.

[88] *See, e.g.*, CONSTITUTIONAL CONVENTION VOL. IV, *supra* note 72, at 18–19 (documenting a participant who declined to suggest that certain proposals made at the 1947 constutional convention need be expressly enumerated in the text of the Constitution).

an appellate court that would only (with the exception of one individual since 1947) be composed of former trial judges.

The N.J. 1947 Constitution vested judicial power in "a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction."[89] As the court of last resort, the Supreme Court has appellate jurisdiction.[90] The Law and Chancery Divisions of the Superior Court have original jurisdiction.[91] Appeals may be taken from the Law and Chancery Divisions to the Appellate Division of the Superior Court.[92] Appeals are taken from the Appellate Division to the Supreme Court.[93]

Since 1947, the Governor nominates and appoints, with the advice and consent of the Senate, the Chief Justice and six Associate Justices of the Supreme Court, and judges of the trial divisions of the Superior Court. After the seventh year, the justice or judge wishing to continue to serve must be renominated and appointed, again with the advice and consent of the Senate. If reappointed, that jurist obtains tenure and can serve until the age of seventy. Once a judge is appointed or re-appointed, the Chief Justice makes the judicial assignments to the Law, Chancery, and Appellate Divisions of the Superior Court.[94] Since 1947, the path to becoming an intermediate appellate judge is to first sit as a judge in the Law or Chancery Divisions, or both, of the Superior Court.[95] The Governor does not make the assignment to the Appellate Division; the Chief Justice does so. But the Chief Justice only considers candidates from the trial court. Thus, the bottom line is that the Appellate Division is composed entirely of former trial judges, some with extensive experience as a trial judge, others with less. As a guide to New Jersey appellate practice aptly explains:

> As a matter of practice, a judge will ordinarily sit in one of the trial divisions for some time before being considered for

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[89] N.J. CONST. art. VI, § I, para. 1. For this Article, there is no need to address the reference to the inferior courts of limited jurisdiction.

[90] *Id.* art. VI, § II, para. 2.

[91] *Id.* art. VI, § III, paras. 2–3.

[92] *Id.* art. VI, § V, para. 2.

[93] *Id.* art. VI, § V, para. 1(a).

[94] "[A]s part of New Jersey's longstanding tradition of legal excellence and political neutrality, appointments to the Appellate Division historically are . . . based on judicial merit alone." JEFFREY S. MANDEL, NEW JERSEY APPELLATE PRACTICE 138 (2022 ed. 2022).

[95] CONSTITUTIONAL CONVENTION VOL. II, *supra* note 77, at 1187 (providing that the Chief Justice assigns judges "according to experience and qualifications").

> elevation to the Appellate Division. The judge's scholarship, judicial temperament and leadership skills as demonstrated by trial court performance are all considered. Recommendations may be made by a trial court presiding judge, by the Presiding Judge for Administration of the Appellate Division, or by the Appellate Division's Management Committee, comprised of all of the presiding judges of the Parts. The final choice rests with the Chief Justice, whose decision is nonreviewable.[96]

Creating a well-rounded experience within trial court divisions is important. In 1988, New Jersey's Chief Justice, Robert Wilentz, addressed trial judge experience in the Law and Chancery Divisions of the Superior Court.[97] Chief Justice Wilentz determined it was "important for newly appointed judges to have the opportunity to gain experience in all areas of judicial service."[98] Rotation in the Law and Chancery divisions ensured that each trial judge became a "more well-rounded judge" who would be "available for any assignment."[99] The rotation policy extended to experienced trial judges. Although the time spent in each trial assignment varies, the aspirational goal was to "achieve service in all three [trial] Divisions."[100] In my view, an appellate judge who gains widespread experience as a trial judge by rotating in the trial divisions may be better prepared and more likely to conduct appellate review of discretionary determinations from an invaluable practical perspective.

B. *Historical Conclusion and Transition to the Present Day*

Pre-1947, judges simultaneously performed duties as trial judges while performing appellate functions. This led to judicial inefficiency and the need for changes that recognized the benefits of prior trial judge experience before becoming an appellate judge.

Post-1947, the drafters of the N.J. 1947 Constitution knew that experience as a trial judge benefited appellate decision making.[101] But

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[96] MANDEL, *supra* note 94, at 138.

[97] Sup. Ct. of N.J., *Rotation of Judicial Assignments*, Administrative Directive #6-88 (Apr. 15, 1988), https://www.njcourts.gov/sites/default/files/administrative-directives/1988/04/dir_6_88.pdf.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] For instance, the Governor's Committee on Preparatory Research explained that one of the "best" features for the selection of judges would be for "appointments to vacancies in the courts above the trial court [to be] restricted to those judges who

they also understood that appellate judges could not efficiently perform simultaneous duties as appellate and trial judges.[102] They therefore removed the dual judicial roles and structured a new system that ensured that appellate courts would be composed only of former trial judges. The Governor appoints individuals to the Superior Court but does not make judicial assignments within the Superior Court. Only the Chief Justice makes those assignments. The Chief Justice assigns judges to the Appellate Division only from the State's trial courts. Except for only one individual sixty-eight years ago, all New Jersey Appellate Division judges since 1947 have been former trial judges.[103]

Part II has illuminated the evolution of the Appellate Division of New Jersey's Superior Court over hundreds of years. I detailed this background not to just document dates and events, which are of course independently important. Rather, I researched this history to extrapolate an important lesson learned about the value of prior trial judge experience. An intermediate appellate court composed entirely of former trial judges prepares that court—practically and substantially—to review trial discretionary determinations in meaningful ways, which brings us to the heart of this Article.

III. THE NEW JERSEY APPELLATE DIVISION: AS IT STANDS NOW

Since the implementation of judicial structural changes in 1947, the Chief Justice of the New Jersey Supreme Court has continued assigning judges to the Appellate Division of the New Jersey Superior Court pursuant to the constitutional mandate.[104]

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have had a certain minimum of experience in the trial courts." CONSTITUTIONAL CONVENTION VOL. II, *supra* note 77, at 1638; *see also* CONSTITUTIONAL CONVENTION VOL. IV, *supra* note 72, at 430 (Governor Alfred E. Driscoll proposing that "members of [the] intermediate court of appeal [be] drawn from the [trial courts]").

[102] At the 1947 constitutional convention, the New Jersey Committee for Constitutional Revision urged, for example, that "judges composing the Court of Appeals must owe no allegiance except to their own court." CONSTITUTIONAL CONVENTION VOL. IV, *supra* note 72, at 18. The Chairman of the Committee on Law Reform of the New Jersey State Bar Association similarly stressed the need to "get away from . . . the situation that the Justices of the Supreme Court have found themselves in the past—they have duties in the Court of Errors and Appeals, they have duties in the Supreme Court, and they have duties in the Circuit Courts." *See id.* at 43.

[103] *See* sources cited *supra* note 9.

[104] Chief Justice Arthur T. Vanderbilt initially assigned twenty-six judges to the Superior Court in 1948. Chief Justice Vanderbilt named two three-member parts of the Appellate Division, with Judges Nathan L. Jacobs, Howard Eastwood, and John O. Bigelow in Part A, and Judges John B. McGeehan, Ralph W.E. Donges, and Frederic R. Colie in Part B. Apart from Judges McGeehan and Bigelow, this new Appellate

> The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears.[105] Assignments to the Appellate Division shall be for terms fixed by rules of the Supreme Court.[106]

Consequently, but for one individual in 1954, all appellate judges necessarily have had prior experience as trial judges in the Superior Court because the Chief has selected from among our trial court judges to sit in the Appellate Division.

Before addressing how prior experience as a trial judge has generally shaped the decision-making of our appellate judges when reviewing trial discretionary determinations, I will discuss two distinct but related points: (A) the typical experience gained while sitting as a trial judge; and (B) the collective composition of the Appellate Division and the broad range of prior trial judicial experience of the appellate judge. Doing so informs my contention that prior

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Division was composed of members of the pre-1947 Supreme Court. Although the Superior Court assignments were subject to change at any time, Chief Justice Vanderbilt initially set one-year terms for Appellate Division judges. *Judges Named to New Posts by Vanderbilt*, ASBURY PARK EVENING PRESS, Sept. 15, 1948, at 1, 4.

[105] *See* Hon. Edwin H. Stern, *Frustrations of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey)*, 60 RUTGERS L. REV. 971, 975–76 (2008) (recognizing the importance of the Chief Justice's constitutional power of appellate assignment). Judge Stern, the former Presiding Judge for Administration of the Appellate Division, comments that "the most important aspect to a good appellate court in New Jersey is the [C]hief [J]ustice's unique assignment authority." *Id.* at 975. Remarking on such authority, Judge Stern states insightfully "[a] byproduct of the [C]hief [J]ustice's assignment powers, and rotation of panels on a yearly basis, is collegiality—an essential component to quality appellate justice. Mutual respect and a good working relationship are essential to achieving good and expeditious appellate justice[]." *Id.* I wholeheartedly agree with Judge Stern's observations.

[106] N.J. CONST. art. VI, § 7, para. 2. Each year, the Chief Justice issues a General Assignment Order (GAO) assigning judges in the Appellate Division to different parts (usually four judges to each of the eight parts). The one-year GAO affords yearly rotation among the judges on each part of the Appellate Division, which is consistent with court rules. For example, in 1948, N.J. CT. R. 4:1-4 stated, "[a]ssignments to the [parts of the] Appellate Division shall be for a term of one year." In 1968, that rule was superseded by N.J. CT. R. 2:1-6(a), which also stated, "[r]egular assignments to the [parts of the] Appellate Division shall be for a term of one year." In 1969, N.J. CT. R. 2:1-6 was revised. N.J. CT. R. 2:13-2(b) ("The Appellate Division shall consist of such parts with such number of judges as the Chief Justice shall from time to time designate."). N.J. CT. R. 1:33-4 and 2:13-1(b) make clear that the assignment power is exercised exclusively by the Chief Justice. Yearly rotation among the judges on the parts of the Appellate Division enables the appellate judges constantly to gain unique insights from the collective prior experience of their colleagues as trial judges.

experience as a trial judge enhances appellate administration of justice, both as to each appellate judge and collectively for that court.

A. *Typical Experience as a Trial Judge*

Judges appointed by the Governor to serve in the New Jersey Superior Court typically receive one of these trial assignments: a judge of the Civil Part of the Law Division (including first being a judge of the Special Civil Part of the Law Division); a judge of the Criminal Part of the Law Division (maybe including serving as a Recovery Court[107] judge); a judge of the Family Part of the Chancery Division; or a judge of the General Equity Part of the Chancery Division. The trial judge, especially if interested in sitting in the Appellate Division, is expected to rotate among multiple trial assignments to gain varied trial judge experience.

A judge assigned to the Special Civil Part of the Law Division of the Superior Court is responsible for managing a high-volume docket. The Special Civil Part judge might have more than 100 cases to resolve on a typical day. The judge generally hears, without a jury, small claims cases, where the amount in dispute cannot exceed $5,000;[108] Special Civil Part cases, where the amount in controversy does not exceed $20,000;[109] and landlord tenancy cases, where the landlord seeks possession of the premises.[110] In addition, the Special Civil Part Law Division judge adjudicates wage executions, motions to enforce litigants' rights, default motions, applications for default judgment, motions to vacate defaults or judgments, and applications initiated by orders to show cause on illegal lockouts and hardship stays.

A judge might be assigned to the Civil Part of the Law Division, where there is no monetary limit on the amount in controversy. This judge conducts bench trials and presides over civil jury trials. The judge hears a variety of matters, such as statutory discrimination and retaliation employment claims; intentional torts; false imprisonment or false arrest; a multitude of contract disputes; negligence cases; products liability disputes; malpractice cases; condemnation disputes; defamation cases; and property damage claims. In addition to trying these cases to conclusion, this judge typically hears hundreds of dispositive and discovery motions every other week. The judge also

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[107] Formerly known as the Drug Court.

[108] N.J. CT. R. 6:1-2(a)(2).

[109] N.J. CT. R. 6:1-1(c).

[110] N.J. CT. R. 6:10.

summarily adjudicates orders to show cause and presides over case management and settlement conferences.

Alternatively, a judge might be assigned to the Criminal Part of the Law Division. This judge presides over arraignments, for some vicinages while sitting in courtrooms located in county jails; handles pre-trial detention hearings; conducts pre-indictment conferences, which might result in a guilty plea to accusations or violations of probation; sentences defendants in accordance with plea agreements; manages post-indictment calendars, including presiding over testimonial motions, jury trials, and post-conviction relief hearings; and sentences defendants found guilty by petit juries. This judge might also be responsible for running the Recovery Court program, which is a diversionary program that emphasizes rehabilitation rather than punishment. Probationers in the program must obtain drug and alcohol treatment during an intensive period of probation, with the goal of breaking the chain linking addiction and the criminal justice system.

Experience at the trial level might include sitting as a judge in the Family Part of the Chancery Division. Sitting without a jury, a Family Part judge gains wide-ranging experience. The judge might hear child abuse and neglect cases or adjudicate guardianship complaints filed by the Division of Child Protection and Permanency seeking to terminate parental rights. Or the judge might hear juvenile cases; domestic violence cases; matrimonial disputes, including post-judgment divorce applications; non-dissolution cases; and adoptions. The Family Part judge routinely multitasks by handling more than one case type simultaneously.

Another possibility is that a judge might be assigned to the General Equity Part of the Chancery Division. Here, the Chancery judge adjudicates cases in which a "plaintiff's primary right or the principal relief sought is equitable in nature."[111] If permitted by rule or statute, the judge hears summary actions and, for example, may issue injunctive relief as an initial temporary restraint and then permanent restraint.[112] The judge generally conducts bench trials; hears orders to show cause; conducts case management conferences; performs settlement conferences; and disposes of numerous motions, dispositive or otherwise.

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[111] N.J. CT. R. 4:3-1(a)(1).

[112] N.J. CT. R. 4:67-1(a) (summary actions); *see also* N.J. CT. R. 4:52-1(a); N.J. CT. R. 4:42-2 (injunctions).

Thus, although judges in the Appellate Division each have prior experience as a trial judge, the breadth and depth of the appellate judge's experience depends on the assignments the judge had in the trial court before the Chief Justice assigned that judge to the appellate court. The one judge who was assigned directly to the Appellate Division in 1954 is an anomaly; it never happened earlier and has never happened since, even though the N.J. 1947 Constitution does not expressly forbid it.[113]

B. *Typical Experience as an Appellate Judge*

The Appellate Division is generally composed of thirty-two judges who sit in two- and three-judge panels chosen from "parts" of four judges. The appellate court adjudicates appeals from final judgments of the Law and Chancery Divisions of the Superior Court, final judgments of the Tax Court, and final decisions of state administrative agencies. Litigants may seek review of interlocutory or interim orders of a trial court or agency, but only with leave of court. The appellate court disposes of approximately 6,500 appeals and 10,000 motions each year.[114]

To some degree, therefore, an Appellate Division judge necessarily has prior experience as a trial judge in the Civil, Criminal, and Chancery Divisions. But as we can see, that experience varies. Chief Justice Wilentz directed that trial judges rotate among the trial divisions, but the degree of rotation is not identical. Thus, the collective prior trial judge experience of our appellate judges—due to the 1947 structural changes—is varied and wide-ranging, yet practical.

IV. ANALYSIS: PRIOR EXPERIENCE AS A TRIAL JUDGE SHAPES APPELLATE DECISION-MAKING WHEN REVIEWING DISCRETIONARY TRIAL RULINGS

I begin by briefly describing typical civil discretionary rulings and explaining the appellate standard of review when considering those rulings. In this context, I describe how prior experience as a trial judge can shape appellate review of discretionary rulings; the advantages and potential disadvantages of that prior judicial experience; and whether prior experience as a trial judge or litigator/trial attorney is more helpful to the decision-making of an appellate judge. I end by suggesting how much trial judge experience an appellate judge ideally

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[113] *See* Hon. Sylvia B. Pressler, *In Memoriam Milton B. Conford (1909–1989)*, 20 SETON HALL L. REV. 1, 1 (1989).

[114] *Appellate Division Overview*, *supra* note 8.

should have, which I contend will depend on the quality, not the duration, of that experience.

A. *Standard of Review and Discretionary Rulings*

1. Discretionary Trial Rulings

A trial judge has broad discretion. Typical discretionary determinations include rulings on adjournments; change of venue; control of courtroom; discovery issues; admissibility or exclusion of testimonial or documentary evidence; and joinder and severance.[115] A trial judge exercises discretion on issues concerning juries, which could include voir dire, qualifications, illness, inability to continue; influence or misconduct; read-backs; polling; sequestration; and continued deliberations.[116] Other discretionary rulings include mistrials; opening and closing arguments; order of trial proofs; reconsideration; relief to litigants; recusal; sanctions; stays and injunctive relief; evidentiary rulings as to lay witnesses and expert witnesses; and reliability of scientific expert testimony.[117]

2. Standard of Appellate Review

In New Jersey, appellate judges do not reverse discretionary rulings unless the trial judge committed an abuse of discretion,[118] which occurs when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."[119] Trial judges are afforded wide latitude when making discretionary determinations.[120] "When examining a trial court's exercise of discretionary authority," the appellate court "w[ill] reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances."[121] In this Article, my focus is only on the

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[115] *See generally* Ellen T. Wry & Christina Oldenburg Hall, *New Jersey Standards for Appellate Review*, CENT. APP. RES.: N.J. SUPER. CT. APP. DIV. 28–43 (Aug. 2022), https://www.njcourts.gov/sites/default/files/courts/appellatestandards.pdf (explanation of each type of discretionary ruling that a trial judge may make).

[116] *See id.* at 32–35.

[117] *See id.* at 35–43.

[118] *See* Flagg v. Essex Cnty. Prosecutor, 796 A.2d 182, 187–88 (N.J. 2002).

[119] *Id.* at 187 (quoting Achacoso-Sanchez v. I.N.S., 779 F.2d 1260, 1265 (7th Cir. 1985)).

[120] *See id.* at 187–88.

[121] Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 31 A.3d 623, 644 (N.J. Super. Ct. App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 920 A.2d 125, 130 (N.J. Super. Ct. App. Div. 2007)).

impact of judicial experience when reviewing discretionary trial rulings, rather than legal conclusions by the trial judge.[122]

B. *Five Questions Illuminating the Benefits of Prior Trial Judge Experience*[123]

1. Does Prior Experience as a Trial Judge Shape Appellate Decision-Making When Reviewing Discretionary Rulings? In My Opinion, Yes.

As to review of trial discretionary determinations, I argue previous trial judge experience can indeed shape how an appellate judge analyzes the arguments on appeal. I spoke to many of my colleagues, all former trial judges, and extrapolated seven examples of how the experience can manifest itself. Prior trial judge experience can shape how the judge: (1) evaluates the correctness of the ruling; (2) considers whether the ruling was harmless; (3) perceives what was happening at the trial level; (4) writes more compassionately, sensitively, and with greater patience; (5) demonstrates confidence to write shorter unpublished opinions for litigants and counsel; (6) defers generally to credibility findings; and (7) enlightens an appellate judge's understanding of the life of the law. This is not an exhaustive list; rather, it represents my best approximation of how the experience can add a tangible practical perspective. And as someone who has seen firsthand how each appellate judge contributes to pre- and post-argument discussions, I argue that the institutional collective of prior judicial trial experience on the court strengthens the intermediate appellate administration of justice.

First, although prior experience as a trial judge influences an appellate judge's evaluation of the correctness of a discretionary ruling by a trial judge, more importantly, it shapes consideration of whether the ruling was harmless. Not every abuse of discretion is reversible.

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[122] Experience as a trial judge shapes appellate decision-making when reviewing discretionary rulings. Important to that decision is the abuse of discretion standard of review, where deference is applied. This Article is not about whether appellate review of legal interpretations is shaped by trial judge experience, although it might be contended that appellate judges gain useful experience with specific areas of law during their previous trial court assignments. Appellate judges review de novo legal questions. A "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 218 A.3d 784, 796 (N.J. 2019) (quoting Manalapan Realty, L.P. v. Twp. Comm., 658 A.2d 1230, 1237 (N.J. 1995)).

[123] These answers are based on my experience and after consultation with my colleagues, all of whom are former trial judges.

Determining whether an abuse of discretion is reversible or harmless error involves an appreciation for trial nuances from the perspective of a trial judge.

For example, imagine that during voir dire in a controversial employment discrimination case, a defendant remarks directly to the trial judge about his own counsel's exercise of a peremptory challenge, causing plaintiff's counsel to request a mistrial because a juror may have overheard the remark. Assume that the judge denies the motion after questioning the juror at side bar. Any appellate judge who sat with juries knows the proximity of the jury box to the counsel table, the subsequent questioning of the juror, and the atmosphere in the courtroom are relevant in determining whether the denial amounted to an abuse of discretion.[124] There is a certain feel of the case that a trial judge develops which cannot be discerned by the written appellate record. Having "been there, done that" gives the appellate judge an ability not to unreasonably second guess what is happening in the real world of trial advocacy.

Another example is when the trial judge overrules a hearsay objection and allows into evidence testimony from a witness. Having previously made evidentiary rulings in trials, the appellate judge who applies an abuse of discretion standard understands that there might be nuances involving testimony, witnesses, or counsel that impact the ruling that cannot be discerned from the cold record. Previous trial judging gives the appellate judge a unique perspective and context about whether an abuse of discretion warrants reversal or was harmless. And prior experience as a trial judge helps the appellate judge more confidently make those evaluations. For example, the testimony admitted into evidence over an assistant prosecutor's hearsay objection might address a subject matter fairly presented on rebuttal that might very well militate against any potential prejudicial effect that would make the argued error harmless, especially if there is overwhelming evidence of guilt in a criminal case.

Second, prior experience as a trial judge gives the appellate judge a practical perspective of what happened at the trial level. This is critical. In applying the abuse of discretion standard of review, it is important to understand the pressures that trial judges face.

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[124] *See* STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 185–96 (2019); *see also* Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting) (acknowledging his own experience as a trial judge and stating "[a]ny judge who has sat with juries knows that in spite of forms, they are extremely likely to be impregnated by the environing atmosphere").

Appreciating the challenges of serving as a trial judge in the trenches provides an intangible context for reviewing the trial judge's discretionary ruling, which is not readily revealed from the appellate record. Trial judges are under fire and must make decisions on the spot. One appellate colleague of mine, who I deeply respect and have served with on the same panel, explained that trial judges play ping pong; appellate judges shoot pool. My colleague made the compelling point that in certain dockets, trial judges must make decisions one after the next, like ping pong players hitting the ball rapidly back and forth,[125] but appellate judges have the luxury of slowing down the pace, like one does playing pool, without the same pressures. Practical perspective matters.

Take for example, a typical day in the Special Civil Part of the Law Division. A judge might have seventy-five small claims trials listed at 9:00 a.m. that must be resolved before 12:30 p.m., since the judge likely has 100 landlord tenancy trials listed for 1:30 p.m. Consider too that in addition to the hectic morning trial calendar, the judge might have hardship applications by tenants requesting stays of evictions, and several orders to show cause addressing multiple claims that tenants have been illegally locked out of their homes. In the middle of a complicated Uniform Commercial Code bench trial, assume the judge was interrupted to rule on an adjournment request in a different case and summarily denies that request because the case had been previously listed four times. A party might appeal from the order denying the adjournment. Having sat as a Special Civil Part judge, an appellate judge understands those pressures: there were probably 200 self-represented litigants waiting for their cases to be called, the court clerk may have been off to the side quietly communicating with counsel seeking permission to step out of the courtroom to answer other obligations, a court interpreter's equipment may have been malfunctioning, and the judge was thinking about the clock and the afternoon calendar. Prior experience as a trial judge facing those challenges provides an invaluable practical perspective when deciding whether the judge abused his or her discretion by denying the adjournment. I do not mean to suggest that having an appreciation for the real-life situation confronted by the judge gives that trial judge a pass if a mistake was made. A mistake is a mistake. But

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[125] I am entirely aware that trial judges routinely make well-reasoned decisions after careful deliberation, and therefore play pool, too. Indeed, the Appellate Division readily affirms the order or judgment under review in certain cases "o.b." for the thorough reasons expressed by the trial judge.

understanding how it works in the trial court is likely relevant to determining whether the judge committed an abuse of discretion, and if in no other way, it impacts how that appellate judge addresses the mistake, which brings me to the next point.

Third, and along those lines, prior experience as a judge in the trial trenches shapes the decision-making of the appellate judge, fostering more compassionate, sensitive, and patient writing. I cannot overemphasize this point. Why should we care about compassion and sensitivity and things like that? Because, in my humble view, we are dealing with people: judges, trial lawyers, and litigants. Trial judges, and trial attorneys, are under considerable stress. Everyone is usually trying to do the best they can do. The last thing anyone wants is an appellate judge who has forgotten this reality. Tone of an appellate opinion matters, and prior trial judge experience reminds the appellate judge of the enormous pressures of being on the front lines and being the face of the judiciary for the public.[126] Having "been there, done that" reminds the appellate judge of the practical difficulties facing a trial judge. Reversal of discretionary determinations (not errors of law) requires appellate judges to conclude the trial judge exercised an abuse of discretion, which is harsh in-and-of-itself. I have been reversed. I know the impact that that has, especially when I am told I abused my discretion. There are ways to reach that conclusion respectfully by recognizing the enormous pressure trial judges face daily: sitting in the shoes of those whose work is under review goes a long way without personal rebukes of the trial judges when mistakes are made. Again, having been in the trenches as a trial judge, with few exceptions, chastising trial judges is treacherous, bad for good will, and does—in my view—a disservice to appellate administration of justice. We are professionals whose obligation is to the rule of law, and we can meet that obligation respectfully.

Fourth, prior experience as a trial judge can often influence the review of discretionary determinations by giving the appellate judge confidence to write shorter opinions for litigants and counsel. By shorter, I do not mean to imply incomplete. Of course, we are tasked with considering all the arguments on appeal. And we do. But someone who has done this knows what is relevant to the contentions on appeal. For example, let us say the trial judge denied a defendant's

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[126] *See* Judgment Calls, *Judge Jon O. Newman*, DUKE L. SCH.: BOLCH JUD. INST., at 2:11–2:51 (Nov. 20, 2019), https://judicialstudies.duke.edu/2019/11/s1-ep2-judge-jon-o-newman (discussing the importance of the trial judge as the "face of justice").

motion to extend the discovery end date[127] in a medical malpractice case because a trial date had been set, and the defendant was unable to demonstrate exceptional circumstances for the extension. On appeal, the defendant doctor argues that the COVID-19 pandemic prevented him from completing discovery. The appellate judge who has ruled on discovery motions as a trial judge can confidently write a succinct yet thorough unpublished opinion highlighting the unique facts of the case, affirming the order denying the defendant's motion, and pointing out that the defendant spent the entire pre-trial time without any COVID-19 difficulties and attempted to settle the case rather than propound discovery. Trial judge experience boosts the appellate judge's self-assurance to write succinct but comprehensive opinions for the approval of the judge's co-panelists, which I am sure is appreciated by the attorneys.[128] I say prior experience is a confidence booster because the appellate judge with prior trial judge experience will not unduly fret over what happened in the trial court. Would a

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[127] A discovery end date sets the time before which a trial date is fixed. *See* N.J. CT. R. 4:24-1.

[128] Writing short yet comprehensive opinions is difficult and should not be underestimated:

In his essay on human understanding, John Locke said about the length that "it might be reduced . . . [b]ut to confess the [t]ruth, I am now too lazy, or too busy to make it shorter." 1 JOHN LOCKE, *An Essay Concerning Human Understanding*, *in* THE WORKS OF JOHN LOCKE IN NINE VOLUMES vii (C. & J. Rivington et al. eds., 12th ed. 1824).

In his letter describing his experiments, Benjamin Franklin said "I have already made this paper too long, for which I must crave pardon, not having now time to make it shorter." BENJAMIN FRANKLIN, EXPERIMENTS AND OBSERVATIONS ON ELECTRICITY, MADE AT PHILADELPHIA IN AMERICA 85 (1751).

In his letter to a friend, Henry David Thoreau said about the length "[n]ot that the story need be long, but it will take a long while to make it short." LITERARY CRITICISM, BLOOM'S CLASSIC CRITICAL VIEWS: HENRY DAVID THOREAU 41 (Harold Bloom ed., 2008).

In a letter to his friend, Mark Twain remarked about the length, "[y]ou'll have to excuse my lengthiness—the reason I dread writing letters is because I am so apt to get to slinging wisdom & forget to let up. Thus[,] much precious time is lost." Letter from Mark Twain to William Bowen (June 12, 1871), *in* 4 MARK TWAIN'S LETTERS, 1870–1871, 409 (Victor Fischer & Michael B. Frank eds., 1995).

When asked about the time it takes him to prepare his speeches, Woodrow Wilson said it depends on the length of the speech and added "[if] it is a ten-minute speech it takes me all of two weeks to prepare it; if it is a half-hour speech it takes me a week; if I can talk as long as I want to it requires no preparation at all. I am ready now." The Operative Miller, *Association Matters*, 23 OPERATIVE MILLER 130 (1918).

competitive weightlifter second guess how much to bench press? Of course not. Would an appellate judge with trial judge experience worry about elaborating on a ruling that that appellate judge made many times before? No. Lawyers and judges do not want to read unnecessarily long opinions anyway.

Fifth, prior experience as a trial judge very well might shape decision-making as to credibility findings. Appellate judges who served as trial judges know how credibility findings are made because they have made them. A trial judge should not simply find that the witness is or is not credible in a conclusory fashion. The trial judge should provide reasons for that finding.[129] For example, the trial judge might say something like, "I find the witness credible because I have had the chance to watch the witness testify, hear the way the witness answered the questions on cross-examination, and see how the witness made eye contact with the court and counsel during her testimony." Deference to that detailed trial finding is likely. This is preferable because there are so many moving parts during a trial that credibility deference is expected, unless the findings are wide of the mark.

Sixth, prior experience as a trial judge enlightens an appellate judge's understanding of the life of the law. At the appellate level—not necessarily the Supreme Court where other backgrounds likely matter[130]—the experience as a former trial judge increases broad knowledge of the law, having applied it firsthand to real-world problems that unfold in courtrooms every day. Of course, other experiences, especially for a state's highest court, are relevant to the administration of justice. But as a former trial judge, I have seen the life of the law play out. I know what it is like to look into the eyes of a parent and terminate parental rights, despite knowing that the parent made efforts to reconcile with the child. And I know what it is like to revoke probation and impose a prison term after a probationer fails to meet the conditions of a Recovery Court sentence. We are not talking about academic issues; the balance of real lives rests in the hands of trial judges, and appellate review of these rulings can reflect this reality. Appellate records are no substitute. Trial judge experience provides an appellate judge with a practical frame of reference to understand ordinary life problems of litigants and trial judges more

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[129] *See* State v. Locurto, 724 A.2d 234, 240–41 (N.J. 1999).

[130] Take, for example, the practical manifestations of Justice Ketanji Brown Jackson's beneficial experience as a public defender.

sensibly.[131] Justice Holmes—who simultaneously tried hundreds of cases during his service as a Massachusetts Supreme Court justice—remarked that "[t]he life of the law has not been logic: it has been experience."[132] I argue, like Justice Holmes, that trial judge experience is invaluable to appellate work.

Seventh, there are institutional benefits for a court of appeals to be composed of former trial judges. Of course, collective experience as trial judges does not undervalue non-judicial experience, such as in academia, or as a trial attorney, public defender, prosecutor, or public servant. Life's experiences impact appellate thinking. But the appeals court inherently administers justice embodying the six benefits mentioned above, which enables a robust adjudication of issues on appeal, particularly as it relates to reviewing discretionary determinations. And as my esteemed colleague Judge Stern pointed out, a byproduct of that background is a more collegial body. Should parties seek further review of the appellate judgment by the Supreme Court, the Court's consideration of the contentions on appeal will be more fully informed by opinions of an intermediary court of appeals reflecting experience in the trial trenches.

2. Are There Advantages to Having Prior Experience as a Trial Judge Upon Review of a Trial Discretionary Ruling? Yes.

As we have seen, experience provides a helpful perspective that grounds the appellate judge by understanding what is happening in the real world of trial courts. It provides a tangible context, which enables an appellate judge to properly frame issues and apply the correct standard of review. This practical background informs the judge's decision to affirm, reverse, or remand a matter, and if remanding, how to give the trial judge and parties concrete guidance.[133]

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[131] *See generally* Hiller B. Zobel, *Oliver Wendell Holmes, Jr., Trial Judge*, 36 BOS. BAR J. 25 (1992) (commenting on how the range and variety of matters that came before the justice shaped his view of the life of the law). *See also* BUDIANSKY, *supra* note 124, at 184–86 (explaining Holmes's experience as a trial judge was an "enormously important influence in shaping his understanding of human nature and the way the law actually bears upon life").

[132] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Boston: Little, Brown and Co. 1881).

[133] One commentator aptly explained the benefits of trial judge experience manifesting itself in appellate judges' clear guidance to trial courts:

A prominent example of the advantages of prior experience is the judicial career of Oliver Wendell Holmes. Justice Holmes famously obtained extensive experience as a trial—and state—judge, which he believed was substantially different from the experience one obtains practicing law. Before becoming a United States Supreme Court Associate Justice in 1902, Oliver Wendell Holmes served as an Associate Justice and as Chief Justice of the Massachusetts Supreme Judicial Court. While serving on the high court of Massachusetts from 1882 to 1902, he presided over several hundred jury trials. As to his widespread and divergent experience as a trial judge in all areas of law, he remarked it was "most varied—very different from that one gets at the bar—and I am satisfied most valuable from an all[-]round view of the law."[134]

And especially pertinent here, when Justice Holmes sat as a justice on the Supreme Judicial Court of Massachusetts, he (and his colleagues) adjudicated appeals and simultaneously tried hundreds of cases as a trial judge in that dual assignment. His trial record spanning twenty years proved to be "an enormously important influence" in shaping his thinking as an appellate judge.[135] The benefits are evidenced by Justice Holmes's record on appeal, as nearly four-fifths of his trial rulings were upheld.[136] Suffice it to say, as further amplification of my comments in the preceding section, I contend prior trial judge experience benefits appellate review of discretionary trial-level rulings.

> [L]ong experience as a trial judge, however, gave him at least two particular strengths during his tenure as an appellate judge. The first of these was his ever-present sensitivity to the trial judge's frustrating, everyday task of translating the lofty and abstract pronouncements of appellate court decisions into concrete form for trial court application. One hallmark of [his] appellate opinions was their constant recognition of the desirability of giving specific guidance to the trial courts.
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> . . . .
>
> [The] second outstanding quality was his ability to deal effectively with diverse legal subject matters[.]

John W. Strong, *Richard Unis: A Judge's Judge*, 76 OR. L. REV. 35, 35–36 (1997).

[134] *See* Mark Tushnet, *Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 983 (1977).

[135] *See* BUDIANSKY, *supra* note 124, at 184–96.

[136] *Id.* at 196.

3. Are There Disadvantages to Having Substantial Experience as a Trial Judge? No, but . . .

Substantial experience is relative. Some appellate judges with substantial experience as a trial judge (e.g., more than ten years) might be tempted to ignore the standard of review. Such an appellate judge might look at the discretionary ruling by the trial judge and say, "I would not have done it that way," rather than applying the abuse of discretion standard. Obviously, the question on appeal is not whether the appellate judge personally would have ruled that way if sitting as the trial judge, but rather whether there was an abuse of discretion by the trial judge. And an appellate judge with substantial trial judge experience may have more sympathy for a trial judge's mistaken ruling and might shy away from finding an abuse of discretion when appropriate. In my view, these potential disadvantages of experience as a trial judge, however, are outweighed by the significant benefits of prior trial judge experience and can be overcome by the appellate judge resisting the temptation to ignore the standard of review.

But substantial experience as a trial judge cannot be viewed in a vacuum. I do not mean to undervalue the contribution one makes as an appellate judge who is without prior experience as a trial judge. There is added value to a "fresh set of eyes." Take our hypothetical appellate judge with ten years of experience as a trial judge. Ten years on the trial court means the judge has ten fewer years' experience on the other side of the bench, for example as a public defender, prosecutor, and so on. Non-judicial prior experience is important too.

There are many states whose intermediate appellate courts are composed of judges with no prior experience as a trial judge.[137] As members of those other intermediate appellate courts, the judges possess unique individual professional experience and commonly write thoughtful opinions adjudicating discretionary trial court determinations. But from my prior experience as a trial judge, and looking at the historical progression in New Jersey, the benefits realized from prior experience as a trial judge manifest in meaningfully different ways in appellate decision-making when

[137] *See infra* Table 3.

reviewing trial discretionary rulings. One obvious way is in the tangible and practical feel for the case as a trial judge.

4. Which Shapes Appellate Decision-Making More: Prior Experience as a Trial Lawyer/Litigator, or Prior Experience as a Trial Judge? Both Are Important, but Prior Experience as a Trial Judge Is More Important When Reviewing Trial Discretionary Rulings.

As someone with experience as a trial attorney and trial judge, I can say with great confidence that those backgrounds manifest in different ways. Lawyers advocate for clients and master a different set of legal skills than a trial judge. The trial judge fulfills an entirely different role than the lawyer. Experience as a trial attorney prepares the lawyer for becoming a trial judge. I provide two illustrative examples.

First, after becoming a trial judge I had to immediately resist the temptation to participate in the witnesses' questioning while presiding over jury trials. Instinctively, I found myself wanting to take over during an attorney's opening or closing statement. I had to suppress the urge to object to a question during a witness examination. I stopped myself from performing the direct or cross-examination. And I pondered why certain in limine motions and objections were never made, and why the lawyers employed various trial strategies. I saw firsthand that the work of a trial lawyer and judge is different. I had to let the lawyers try their own cases.

Second, along those lines, I quickly learned trial judges are not advocates. For example, a trial judge might have to intervene during an opening or closing statement when counsel's remarks overstep the bounds of appropriate trial advocacy, even in the absence of an objection. That was the case in *Szczecina* when, without objection, plaintiff's counsel made derisive comments and invectives in his opening and closing statements about the defendant, defendant's counsel, and defendant's expert.[138] Although it is important for lawyers to try their own cases,[139] the trial judge—fulfilling a different role than a trial attorney—has an obligation to act sua sponte before an unjust result becomes likely.

Thus, because a trial judge performs a different role than a lawyer, trial judge experience more directly prepares for appellate review of

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[138] Szczecina v. PV Holding Corp., 997 A.2d 1079, 1087 (N.J. Super. Ct. App. Div. 2010).

[139] *Id.* at 1087 n.5.

whether the trial judge's discretionary trial ruling constituted an abuse of discretion. After all, when conducting that analysis, the appellate judge focuses primarily on what the trial judge did or did not do in response to the circumstances presented. Of course, what the lawyers do creates context for the appeal, but trial judges live in the world of litigation and having that background is important for the appellate judge—that does not mean that experience as a trial lawyer or litigator is irrelevant.

Experience as a trial attorney still adds value when an appellate judge reviews a trial judge's discretionary rulings.[140] We cannot forget that. Previous experience as a litigator or trial attorney importantly also shapes decision-making of the appellate judge in substantial and meaningful ways when reviewing discretionary rulings. It enhances appreciation for the practical costs and benefits trial judges and litigants face when allocating resources in the trial court, and it gives the appellate judge a real-world grasp of important challenges that trial judges encounter. For the appellate judge, this does not replace serving as a trial judge, but prior experience as a trial or litigation lawyer makes for a well-rounded jurist. Professor Suzanna Sherry posits that the legal community should "promote increased appellate exposure to [trial] court perspectives."[141] In her opinion, this could avoid some doctrinal inconsistencies arising from inexperience in the trial court.[142] But my experience generally shows that prior trial judge experience often is more beneficial than advocacy for appellate review of discretionary rulings. Remember, we are talking about an

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[140] Judge Willie J. Epps, Jr., an outstanding federal jurist with substantial experience in the trenches, interviewed Chief Judge Roger L. Gregory, United States Court of Appeals for the Fourth Circuit, and uncovered the enormous benefits of first having a litigation background before becoming an appellate judge.

> [D]o you think experience as a trial judge can be beneficial for an appellate judge? . . . .
>
> I think being a trial judge gives you a rich perspective and foundation for being an appellate judge. I was never a trial judge, but I was a litigator with a lot of experience in court. It enhances your insights when you have experienced first-hand the dynamics of a law practice and presented evidence and examined witnesses in court.

Judge Willie J. Epps Jr., *An Interview with Judge Roger L. Gregory*, ABA: JUDICIAL DIV. (Nov. 1, 2018), https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/fall/an-interview-judge-roger-l-gregory.

[141] Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 98 (2006).

[142] *See id.* at 146–49.

intermediate court of appeals where the appeals are routinely from discretionary rulings, not a state's highest court.

5. How Much Experience as a Trial Judge Should an Appellate Judge Ideally Have Before Reviewing Trial-Judge Discretionary Determinations? It Depends.

It is the quality of the experience as a trial judge that matters, not the length of time sitting as a trial judge. Ideally, before becoming an appellate judge, the trial judge should sit in each trial division. Implementing a rotation policy, like in New Jersey, is excellent preparation for serving as an appellate judge. A trial judge assigned to the Special Civil Part of the Law Division can obtain substantial experience in less than six months because that judge will see thousands of cases during that period. A judge assigned to the Civil Part of the Law Division in one vicinage might obtain more hands-on experience, while a similar assignment in a different vicinage might provide less experience due to a lower volume of cases.

Thus, one should not mechanically answer the question about the requisite length of prior time in the trial court an appellate judge should ideally have. There is no magic formula. That said, depending on the appellate judge's professional experience before joining the bench and the nature of the experience the appellate judge obtains while sitting as a trial judge, a reasonable estimate of a minimum of two-to-five years of trial judge experience is ideal before becoming an appellate judge.[143] Of course, there are other relevant considerations such as the age of the judge; but in general, two-to-five years is reasonable.

V. REALIZING BENEFITS OF PRIOR EXPERIENCE AS A TRIAL JUDGE

The judicial system as envisioned by the framers of the N.J. 1947 Constitution works well and has served the administration of justice in our State admirably since 1947. The nearly absolute practice that an intermediate appellate judge first sit as a trial judge has been beneficial overall. But the farther away an appellate judge gets from prior experience as a trial judge, the less impact prior experience has when reviewing discretionary rulings. Experience becomes stale. Things can be done, first to prepare trial judges for appellate judging, and then to keep an appellate judge's memory of experience as a trial judge current and useful. Although the subject of what can be done should

[143] A recommendation regarding the ideal length of experience as a trial judge may impact other characteristics of an appellate judge.

be the topic of a separate paper, I offer these recommendations understanding that my impressions are by no means exhaustive.

First, trial judges interested in serving as an appellate judge should make the most of their time as judges in the trial court and intentionally seek rotation in the different trial divisions. The amount of time in each division might depend on that individual's legal practice before appointment to the Superior Court. Each trial judge is unique, and the ideal time in any division should be tailored to that person's background. The more diverse the trial judge's experience, the more impactful it will be on that individual's appellate decision-making on trial discretionary rulings.

Second, and along those lines, the Appellate Division should invite trial judges to experience, in confidence, an appeal from the perspective of the panel of appellate judges. Appellate judges read merits briefs, digest appendices, prepare for argument by exchanging preliminary written views with other judges on the panel, and attend pre- and post-argument conferences. A trial judge interested in appellate judging will benefit from observing this process. Doing so will provide a stronger foundation before joining the appellate court.

Third, and similarly, the judiciary should continue offering courses on writing opinions to trial judges at the annual New Jersey judicial educational college. Once a year, all the New Jersey justices and judges attend this event and satisfy our continuing legal education requirements in a variety of subjects. The courses are taught mainly by judges, but lawyers, visiting speakers, and professors also teach. Opinion writing is covered. For the judge interested in serving as an appellate judge, assigning a retired appellate judge to help the trial judge write more like an appellate judge would be beneficial. Appellate opinions are somewhat different from opinions written by trial judges because trial judges do not typically analyze whether there exists an abuse of discretion at the trial level. This would give the trial judge preliminary practical, hands-on experience with the Appellate Division manual on style, the manual on captions, the Bluebook, and application of other standards of review.

Fourth, encourage annual Appellate Division retreats for appellate judges to share perspectives as former trial judges. A newly assigned appellate judge with experience as a trial judge will likely contribute differently than an appellate judge who has been on the court for fifteen years and whose trial judge experience is remote. Constant communication among appellate judges is imperative and builds collegiality. Importantly, it forces the experienced appellate

judge to appreciate the job of trial judging, which goes a long way when reviewing trial discretionary rulings.

Fifth, provide opportunities for appellate judges to return to the trial court to reacquaint themselves with the trenches by at least observing the work of trial judges. This could be tricky since the appellate workload is relentless and continues even though an appellate judge may be temporarily unavailable while observing at the trial level. If possible, permit the appellate judge to try a criminal, family, or civil case; handle a high-volume docket, such as the Special Civil Part, or Family Court non-dissolution calendar; or conduct plea hearings at a pre-indictment calendar. Appellate judges will benefit enormously by returning to the trial court periodically and reacquainting themselves with that work.[144] Such opportunities ensure enormous benefits, including educational rewards.[145] This is not rocket science; the same thing happens in the federal courts.

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[144] While serving as an Associate Justice of the United States Supreme Court, Justice William H. Rehnquist either expressed an interest in trying a civil case or he was invited to do so by Judge D. Dortch Warriner, U.S.D.J. *See* Charles Fishman, *U.S. Supreme Court Justice Rehnquist to Sit as Judge in a Civil Rights Trial*, WASH. POST (May 12, 1984), https://www.washingtonpost.com/archive/local/1984/05/12/us-supreme-court-justice-rehnquist-to-sit-as-judge-in-a-civil-rights-trial/d8ab359a-7d7d-44d6-bf5d-b0acfc198d50/#:~:text=The%20Washington%20Post-,U.S.%20Supreme%20Court%20Justice%20Rehnquist%20To%20Sit,in%20A%20Civil%20Rights%20Trial&text=Supreme%20Court%20Justice%20William%20H,and%20praised%20by%20court%20observers. Justice Rehnquist had no prior judicial experience before joining the United States Supreme Court. He therefore designated himself as a United States District Judge and tried a Section 1983 consolidated case in Richmond, Virginia. The main issue in the case required application of the test, as annunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), under which a public employee's speech may qualify for constitutional protection. At the conclusion of the evidence, he denied the defendants' motions for a directed verdict. They appealed after the jury returned a verdict in the plaintiffs' favor, and the United States Court of Appeals for the Fourth Circuit reversed the judgment concluding there was "no violation of any constitutionally protected right of the plaintiffs as a matter of law." Heislup v. Town of Colonial Beach, Nos. 84-2143, 85-1128, 1986 U.S. App. LEXIS 37723, at *1 (4th Cir. Nov. 6, 1986) (not reaching the defendants' remaining contentions on appeal, including, "particularly[,] their right to a new trial for improper jury argument of counsel and for error in admission of evidence").

[145] *See generally* Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67 (2019) (providing an outstanding, thorough, and enlightening analysis of the phenomenon of "sitting by designation" in the federal courts). Professor Levy traced the origins of judges sitting by designation and riding the circuit, and through her insightful qualitative interviews of federal judges and others, uncovered the practical teaching implications that exist when appeals judges "visit" the trial court, and the same implications for district court judges "visiting" circuit courts.

VI. SUPREME OR STATE'S HIGHEST COURT

Although adoption of the N.J. 1947 Constitution resulted in the long-standing practice that intermediate appellate judges first receive experience as a trial judge, the same cannot be said for justices of the New Jersey Supreme Court.[146] The Appellate Division and the Supreme Court, which have been effectively operating for roughly seventy-five years, are entirely different. And for good reason.

The New Jersey Supreme Court performs a role unlike that of the Appellate Division. The Appellate Division is primarily a court of corrections in which litigants have an absolute right to appeal from final judgments or orders. The Supreme Court's docket is not consumed, like that of the Appellate Division, with thousands of nuts-and-bolts appeals requiring adjudication of discretionary rulings made at the trial level. The State's judiciary website puts it this way:

> The New Jersey Supreme Court is the state's highest appellate court . . . . The chief justice and six associate justices compose the Supreme Court. They are responsible for reviewing cases from the lower courts . . . . Most litigants must request that the Court hear their appeal. They need to file a petition for certification with the Court. *The Supreme Court mostly reviews cases with significant importance to [the] public*, the interpretation of a law, and when there are conflicting Appellate Division decisions. In very limited circumstances, such as where a judge in the Appellate Division files a dissenting opinion, a party may appeal as of right to the Supreme Court. In deciding the cases that come before it, the Court interprets: the New Jersey and the United States Constitution[,] New Jersey statutes[,] [a]dministrative regulations of the state's governmental agencies[,] [as well as] [t]he body of common law.[147]

The business of the justices of the Supreme Court is not the same as the judges of the Appellate Division. And the Supreme Court, more frequently than the Appellate Division, invites various stakeholders and organizations to participate as amici. Because of these differences, the benefits of trial judge experience for a justice can be contrasted

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[146] During the 1947 convention, some proposed a requirement that justices first serve one year as trial judges before becoming eligible for the Supreme Court. *See* CONSTITUTIONAL CONVENTION VOL. IV, *supra* note 72, at 11. This proposal was not implemented.

[147] *Supreme Court of New Jersey*, N.J. CTS., https://www.njcourts.gov/courts/supreme (last visited Jan. 17, 2023) (emphasis added).

with the prior trial judge experience of judges in the Appellate Division.[148]

Like the New Jersey Supreme Court, the experience of the judges of the Appellate Division is unique. But unlike the Supreme Court, which has seven justices, each Appellate Division panel is composed of only two or three judges. The collective experience of the panel changes from term to term because Appellate Division judges rotate panels each year, unlike Supreme Court justices. Regardless of the differences between the experience of the justices and judges, prior trial judicial experience shapes decision-making in different ways because the work and adjudication of appeals at both levels are not the same.[149]

In many ways, similar structural differences exist between the United States Supreme Court and the United States Court of Appeals. Their dockets are different. "[M]ost [federal] appeals courts decisions involve routine examinations of lower court outcomes, primarily using highly deferential standards of review, such as abuse of discretion or plain error."[150] That is also true for New Jersey's Appellate Division, which adjudicates not only many complex cases but also thousands of routine appellate issues, and pertinent here, hundreds of appeals

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[148] Some of the most highly regarded Justices had no prior experience as trial judges, such as Justices: John Marshall; William Rehnquist (except for one trial); Lewis Powell, Jr.; Earl Warren; William Douglas; Felix Frankfurter; Louis Brandeis; and Elena Kagan. *See infra* Table 1.

[149] One prominent Editorial Board, however, has opined—noting the pending vacancies at the time—that at least one justice on the New Jersey Supreme Court should have prior judicial experience. *See* Law Journal Editorial Board, *At Least One Justice Should Have Prior Judicial Experience*, N.J. L.J., Jan. 16, 2022, at 22 (acknowledging that although "[m]ost of our recent Supreme Court justices had no prior judicial experience, and throughout history some of the very best justices of our federal and state Supreme Courts were among them," the board explained that "[i]t would be beneficial to the Court and to the legal system if at least one of the new justices has had practical [judicial] experience," and that a sitting judge be appointed to the Court, "preferably one with appellate experience"). Of course, in New Jersey (as we have seen), an intermediate appellate judge automatically possesses prior experience as a trial judge. The New Jersey Law Journal Young Lawyers Advisory Board rendered a thoughtful response emphasizing, pertinent to this Article, the practical beneficial implications of trial judge experience on appellate review of trial discretionary determinations. *See* Young Lawyers Advisory Board, *Response to Editorial Board: Diversity Is Crucial When Selecting Supreme Court Nominees*, N.J. L.J. (Jan. 31, 2022, 10:00 AM), https://www.law.com/njlawjournal/2022/01/31/response-to-editorial-board-diversity-is-crucial-when-selecting-supreme-court-nominees.

[150] Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1360 (2008).

involving review of typical trial court discretionary determinations. Justices of the United States Supreme Court, like New Jersey's Supreme Court, hear only "hard"[151] cases involving legal issues of great public importance.

My focus in this Article, however, has not been on whether prior trial judge experience is required for eligibility for service on the Supreme Court. Nevertheless, I think it was important for me to briefly address that question. Clearly, I have concentrated on whether prior experience as a trial judge shapes how intermediate state appellate judges adjudicate discretionary trial court determinations. And in that regard, my prior experience as a trial judge indeed shaped my appellate decision-making. But I want to make the point that the Supreme Court, or a state's highest court, is fundamentally different.[152]

VII. CONCLUSION

Prior experience as a trial judge can beneficially influence how a New Jersey Appellate Division judge decides appeals from orders memorializing discretionary rulings. And, as indicated above, Justice Holmes observed that "[t]he life of the law has not been logic: it has been experience."[153] In my view, in the context of reviewing discretionary determinations by trial judges, previous trial judge experience can shape how an appellate judge: (1) evaluates the correctness of the ruling; (2) considers whether the ruling was harmless; (3) perceives what is happening at the trial level; (4) writes more compassionately, sensitively, and with greater patience; (5) demonstrates confidence to write succinct yet comprehensive, shorter unpublished opinions for litigants and counsel; (6) defers to credibility findings; and (7) enlightens an appellate judge's understanding of the life of the law. The insight gained from the experience is helpful,

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[151] *See id.* at 1360–61 (utilizing the adjective "hard" to differentiate the challenge Justices on the United States Supreme Court face as compared to the circuit courts).

[152] I acknowledge the ongoing national debate as to judicial experience. *See* Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, N.Y. TIMES (Feb. 16, 2009), https://www.nytimes.com/2009/02/17/us/17bar.html; *see also* Tom Curry, *For Court Clout, No Judicial Experience Needed*, NBC NEWS (May 12, 2010, 10:20 AM) https://www.nbcnews.com/id/wbna37072697 (discussing criticism of Justice Elena Kagan's lack of prior judicial experience upon her appointment to the Supreme Court); *see generally* Elisha Carol Savchak, *From Bench to Bench: Is Prior Judicial Experience Favored by Certain Judicial Selection Methods?*, 36 JUST. SYS. J. 378 (2015) (examining the prior judicial experience of state supreme court justices from 1959 to 2010). That debate exceeds the narrow focus of this Article.

[153] HOLMES, *supra* note 132, at 5.

practical, and impactful when reviewing discretionary rulings by trial judges. Institutional prior judicial experience of each intermediate appellate judge diversifies and strengthens the appellate court and its administration of justice.

Experiences generally form us. My experience as a Certified Civil Trial Attorney by the New Jersey Supreme Court prepared me to become a trial judge in the New Jersey Superior Court. I understood from my experience as a practicing attorney the challenges that attorneys face, such as representing clients, juggling calendars, engaging in pre-trial discovery, filing motions, trying cases, and everything else they do. Consequently, some counsel kindly referred to me as a "lawyer's judge" because I knew firsthand what it meant to be in the trial trenches as a lawyer. As a New Jersey appellate judge, my trial judge experience impacted my decision-making when reviewing discretionary trial court determinations in ways that were consistent with this Article. It further instilled a deep sense of humility for what I do, and, significantly, previously serving as a trial judge underscored my enormous respect for the difficult challenges trial judges face administering justice every day (the administrative pressures to move the calendar, respectfully addressing the meaningful needs of litigants and lawyers, etc.). In many ways they are the backbone of our courts.

Returning to the two appellate scenarios at the beginning of this Article (the Tax Court appeal and the car accident appeal), the prior judicial experience of the two appellate judges likely shaped how they reviewed and adjudicated the issues on appeal, and, as I contend, benefited their adjudication of the issues and the interests of justice. That contention is not just based on my empirical data or conversations with colleagues for whom I have enormous respect, but also the lessons learned from our New Jersey judiciary case study.

In the first appeal, a corporation appealed from an order dismissing its complaint after the Division of Taxation disallowed an offset related to its tax return. The Tax Court dismissed the complaint because the corporation filed an untimely claim for a refund of its corporate business return. In rejecting the corporation's contention that the doctrine of equitable recoupment entitled it to a refund, the Tax Court judge concluded that the Internal Revenue Service audited the corporation's subsidiary, which meant that the claim for recoupment did not arise out of a single transaction, and the Tax

Court judge confidently determined that the equities weighed against the corporation.[154]

Your colleague's previous experience as a Tax Court judge influenced her decision-making in ways that do not apply to you. You likely deferred to your colleague, whose experience as a Tax Court judge made her more comfortable applying the doctrine of equitable recoupment in tax litigation. She has done that before, understands its nuances, and can easily determine the correctness of the order under review. And because your colleague has previously weighed the equities against the interests of corporations under similar factual scenarios, she will write more compassionately, sensitively, and with greater patience, perhaps even writing a more concise opinion.

In the second appeal, a defendant appealed from a judgment entered after a jury returned a substantial verdict for the plaintiff in a car accident case. For the first time on appeal, the defendant contended that the plaintiff's counsel overstepped the bounds of appropriate comments during his opening and summation. The defendant argued that the panel should reverse the judgment and remand for a new trial because the trial judge failed to take steps during the comments to avoid an unjust result.[155]

Your previous experience as a civil trial judge shapes your decision-making in ways that do not apply to your colleague. You intuitively understand the boundaries of permissible comments in an opening and closing statement in cases like this. "Been there, done that." Even in the absence of a defense objection, you know from your previous experience as a trial judge when you must act before the situation reaches a point where an unjust result is possible, thereby ensuring the parties receive a fair trial. An appellate judge who previously served as a trial court judge in the Civil Part instinctively knows what must be done. As an appellate judge, you can evaluate the correctness of the judge's determination to remain silent, you can more easily determine whether counsel's statements were harmless, and you have a real-world feel for the case. And like your colleague in the tax case, you may write a short but comprehensive opinion, which sensitively deals with the plain error standard. I believe there is no reasonable substitute for this prior experience. That is, as to discretionary trial rulings, an appellate judge cannot realistically or

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[154] *See* Gen. Motors Acceptance Corp. v. Dir., Div. of Tax'n, 26 N.J. Tax 93, 95 (N.J. Super. Ct. App. Div. 2011).

[155] Szczecina v. PV Holding Corp., 997 A.2d 1079, 1087 (N.J. Super. Ct. App. Div. 2010).

practically get a feel for the case by only resolving the contentions raised on appeal solely through legal research or a cold record. Of course, research is critical and must be conducted to fully adjudicate the dispute, but as far as the feel of the case goes, there is no appellate feel without the prior experience.

I have tremendous respect for all judges and justices. Judging is a tough job. Having served as a trial judge, an intermediate appellate judge, and as an Associate Justice of the New Jersey Supreme Court, I hope this Article has illuminated the ways previous experience as a trial judge can enhance intermediate appellate decision-making when an appellate judge reviews discretionary determinations made at the trial level. And to whatever extent I may have contributed to the conversation on appellate administration of justice nationally, doing so has been a satisfying endeavor.

Appendix

TABLE 1 - PRIOR JUDICIAL EXPERIENCE OF SUPREME COURT JUSTICES[1]

Bold indicates that the Justice is currently serving on the Supreme Court.

CJ indicates the role of Chief Justice.

	Appointed by President	Year Judicial Oath Taken	Year Service Terminated or Senior Status Attained	Prior Judicial Experience	If Yes, What Court	Prior Experience as A Trial Judge
Jay, John (CJ)	Washington	1789	1795	Yes	Chief Justice, Supreme Court of Judicature of New York	Yes
Rutledge, John (CJ)	Washington	1789	1795	No		
Ellsworth, Oliver (CJ)	Washington	1796	1800	Yes	Judge, Connecticut Superior Court	Yes
Marshall, John (CJ)	Adams, John	1801	1835	No		
Taney, Roger Brooke (CJ)	Jackson	1836	1864	No		
Chase, Salmon Portland (CJ)	Lincoln	1864	1873	No		
Waite, Morrison Remick (CJ)	Grant	1874	1888	No		
Fuller, Melville Weston (CJ)	Cleveland	1888	1910	No		
White, Edward Douglass (CJ)	Cleveland (Associate Justice);Taft (CJ)	1894 as Associate Justice; 1910 as CJ	1921	Yes	Associate Justice, Louisiana Supreme Court	

[1] I include this table to make the historical point that at the highest level of judicial review, we have amazing jurists who have served with impactful results.

Taft, William Howard (CJ)	Harding	1921	1930	Yes	Judge, Ohio Superior Court; Judge, U.S. Court of Appeals for the Sixth Circuit	Yes
Hughes, Charles Evans (CJ)	Taft (Associate Justice) Hoover (CJ)	1910 as Associate Justice; 1930 as CJ	1916 resigned as Associate Justice; CJ service terminated 1941	No		
Stone, Harlan Fiske (CJ)	Coolidge (Associate Justice) Roosevelt, F. (CJ)	1925	1946	No		
Vinson, Fred Moore (CJ)	Truman	1946	1953	Yes	Judge, U.S. Court of Appeals for District of Columbia Circuit; Judge, Emergency Court of Appeals; Chief Judge, Emergency Court of Appeals	
Warren, Earl (CJ)	Eisenhower	1954	1969	No		
Burger, Warren Earl (CJ)	Nixon	1969	1986	Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Rehnquist, William H. (CJ)	Nixon (Associate Justice); Reagan (CJ)	1972	2005	No		
Roberts, John G., Jr. (CJ)	Bush, G. W.	2005		Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Cushing, William	Washington	1790	1810	Yes	Judge, Superior Court of Massachusetts; Chief Justice, Supreme Judicial Court of Massachusetts; Justice of the Peace and Probate Judge, Lincoln County, Maine	Yes
Wilson, James	Washington	1789	1798	No		

Blair, John, Jr.	Washington	1790	1795	Yes	Judge, General Court of Virginia; Chief Justice, General Court of Virginia; Chancellor, Virginia High Court of Chancery; Judge, Supreme Court of Appeals of Virginia	Yes
Iredell, James	Washington	1790	1799	Yes	Judge, North Carolina Superior Court	
Johnson, Thomas	Washington	1791	1793	Yes	Chief Judge, Maryland General Court	Yes
Paterson, William	Washington	1793	1806	No		
Chase, Samuel	Washington	1796	1811	Yes	Judge, Baltimore County, Maryland Criminal Court; Chief Judge, Maryland General Court	Yes
Washington, Bushrod	Adams, John	1798	1829	No		
Moore, Alfred	Adams, John	1800	1804	Yes	Judge, North Carolina Superior Court	Yes
Johnson, William, Jr.	Jefferson	1804	1834	Yes	Judge, South Carolina Court of Common Pleas	Yes
Livingston, Henry Brockholst	Jefferson	1807	1823	Yes	Associate Justice, Supreme Court of Judicature of New York	Yes
Todd, Thomas	Jefferson	1807	1826	Yes	Judge, Kentucky Court of Appeals; Chief Justice, Supreme Court of Kentucky	
Duvall, Gabriel	Madison	1811	1835	Yes	Chief Justice, Maryland General Court	Yes
Story, Joseph	Madison	1812	1845	No		

Thompson, Smith	Monroe	1823	1843	Yes	Associate Justice, Supreme Court of Judicature of New York; Chief Justice, Supreme Court of Judicature of New York	Yes
Trimble, Robert	Adams, J. Q.	1826	1828	Yes	Second Judge, Kentucky Court of Appeals; Chief Justice, Kentucky Court of Appeals	
McLean, John	Jackson	1829	1861	Yes	Justice, Supreme Court of Ohio	
Baldwin, Henry	Jackson	1830	1844	No		
Wayne, James Moore	Jackson	1835	1867	Yes	Judge, Court of Common Pleas and Oyer and Terminer of Savannah, Georgia; Judge, Superior Court of Georgia	Yes
Barbour, Philip Pendleton	Jackson	1836	1841	Yes	Judge, General Court of Virginia; Judge, U.S. District Court for Eastern District of Virginia	Yes
Catron, John	Jackson	1837	1865	Yes	Judge, Tennessee Supreme Court of Errors and Appeals; Chief Justice, Tennessee Supreme Court of Errors and Appeals	
McKinley, John	Van Buren	1838	1852	No		
Daniel, Peter Vivian	Van Buren	1842	1860	Yes	Judge, U.S. District Court for Eastern District of Virginia	Yes
Nelson, Samuel	Tyler	1845	1872	Yes	Associate Justice, Supreme Court of Judicature of New York; Chief Justice, Supreme Court of Judicature of New York	Yes
Woodbury, Levi	Polk	1845	1851	Yes	Associate Justice, New Hampshire Superior Court of Judicature	

Grier, Robert Cooper	Polk	1846	1870	Yes	President Judge, District Court of Allegheny County, Pennsylvania	Yes
Curtis, Benjamin Robbins	Fillmore	1851	1857	No		
Campbell, John Archibald	Pierce	1853	1861	No		
Clifford, Nathan	Buchanan	1858	1881	No		
Swayne, Noah Haynes	Lincoln	1862	1881	No		
Miller, Samuel Freeman	Lincoln	1862	1890	Yes	Justice of the Peace, County Court, Barbourville, Kentucky	Yes
Davis, David	Lincoln	1862	1877	Yes	Judge, Illinois Circuit Court	Yes
Field, Stephen Johnson	Lincoln	1863	1897	Yes	Justice, Supreme Court of California; Chief Justice, Supreme Court of California	
Strong, William	Grant	1870	1880	Yes	Justice, Supreme Court of Pennsylvania	
Bradley, Joseph P.	Grant	1870	1892	No		
Hunt, Ward	Grant	1872	1882	Yes	Judge, New York Court of Appeals; Chief Judge, New York Court of Appeals	
Harlan, John Marshall	Hayes	1877	1911	Yes	Judge, Franklin County Court, Kentucky	Yes
Woods, William Burnham	Hayes	1881	1887	Yes	Judge, U.S. Court of Appeals for the Fifth Circuit	
Matthews, Stanley	Garfield	1881	1889	Yes	Judge, Hamilton County Court of Common Pleas, Ohio; Judge, Superior Court of Cincinnati, Ohio	Yes
Gray, Horace	Arthur	1882	1902	Yes	Justice, Supreme Judicial Court of Massachusetts; Chief Justice, Supreme Judicial of Massachusetts	

Blatchford, Samuel	Arthur	1882	1893	Yes	Judge, U.S. District Court for the Southern District of New York; Judge, U.S. Court of Appeals for the Second Circuit	Yes
Lamar, Lucius Quintus C.	Cleveland	1888	1893	No		
Brewer, David Josiah	Harrison	1890	1910	Yes	Judge, Leavenworth County Probate and Criminal Courts, Kansas; Judge, Kansas District Court; Justice, Kansas Supreme Court; Judge, U.S. Court of Appeals for the Eight Circuit	Yes
Brown, Henry Billings	Harrison	1891	1906	Yes	Judge, Wayne County Circuit Court, Michigan; Judge, U.S. District Court for the Eastern District of Michigan	Yes
Shiras, George, Jr.	Harrison	1892	1903	No		
Jackson, Howell Edmunds	Harrison	1893	1895	Yes	Special Judge, Court of Arbitration for Western Tennessee; Judge, U.S. Court of Appeals for the Sixth Circuit	Yes
Peckham, Rufus W.	Cleveland	1896	1909	Yes	Justice, Supreme Court of New York; Judge, New York Court of Appeals	Yes
McKenna, Joseph	McKinley	1898	1925	Yes	Judge, U.S. Court of Appeals for the Ninth Circuit	
Holmes, Oliver Wendell	Roosevelt, T.	1902	1932	Yes	Justice, Supreme Judicial Court of Massachusetts; Chief Justice, Supreme Judicial Court of Massachusetts	Yes
Day, William Rufus	Roosevelt, T.	1903	1922	Yes	Judge, Ohio Court of Common Pleas; Judge, U.S. Court of Appeals for the Sixth Circuit	Yes
Moody, William Henry	Roosevelt, T.	1906	1910	No		

Lurton, Horace Harmon	Taft	1910	1914	Yes	Chancellor, Tennessee Chancery Court; Justice, Tennessee Supreme Court; Judge, U.S. Court of Appeals for the Sixth Circuit	Yes
Van Devanter, Willis	Taft	1911	1937	Yes	Chief Justice, Wyoming Supreme Court; Judge, U.S. Court of Appeals for the Eighth Circuit	
Lamar, Joseph Rucker	Taft	1911	1916	Yes	Justice, Supreme Court of Georgia	
Pitney, Mahlon	Taft	1912	1922	Yes	Justice, Supreme Court of New Jersey	
McReynolds, James Clark	Wilson	1914	1941	No		
Brandeis, Louis Dembitz	Wilson	1916	1939	No		
Clarke, John Hessin	Wilson	1916	1922	Yes	Judge, U.S. District Court for the Northern District of Ohio	Yes
Sutherland, George	Harding	1922	1938	No		
Butler, Pierce	Harding	1923	1939	No		
Sanford, Edward Terry	Harding	1923	1930	Yes	Judge, U.S. District Court for the Middle District of Tennessee; Judge, U.S. District Court for the Eastern District of Tennessee	Yes
Roberts, Owen Josephus	Hoover	1930	1945	No		
Cardozo, Benjamin Nathan	Hoover	1932	1938	Yes	Justice, Supreme Court of the State of New York; Judge, New York Court of Appeals; Chief Judge, New York Court of Appeals	Yes
Black, Hugo Lafayette	Roosevelt, F.	1937	1971	Yes	Judge, Birmingham Police Court, Alabama	Yes
Reed, Stanley Forman	Roosevelt, F.	1938	1957	No		
Frankfurter, Felix	Roosevelt, F.	1939	1962	No		
Douglas, William Orville	Roosevelt, F.	1939	1980	No		
Murphy, Frank	Roosevelt, F.	1940	1949	Yes	Judge, Detroit Recorder's Court, Michigan	Yes
Byrnes, James Francis	Roosevelt, F.	1941	1942	No		

Jackson, Robert Houghwout	Roosevelt, F.	1941	1954	No		
Rutledge, Wiley Blount	Roosevelt, F.	1943	1949	Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Burton, Harold Hitz	Truman	1945	1958	No		
Clark, Thomas Campbell	Truman	1949	1967	No		
Minton, Sherman	Truman	1949	1956	Yes	Judge, U.S. Court of Appeals for the Seventh Circuit	
Harlan, John Marshall, II	Eisenhower	1955	1971	Yes	Judge, U.S. Court of Appeals for the Second Circuit	
Brennan, William J., Jr.	Eisenhower	1956	1990	Yes	Judge, Superior Court of New Jersey, Law Division; Judge, Superior Court of New Jersey, Appellate Division; Justice, Supreme Court of New Jersey	Yes
Whittaker, Charles Evans	Eisenhower	1957	1962	Yes	Judge, U.S. District Court for the Western District of Missouri; Judge, U.S. Court of Appeals for the Eighth Circuit	Yes
Stewart, Potter	Eisenhower	1958	1981	Yes	Judge, U.S. Court of Appeals for the Sixth Circuit	
White, Byron Raymond	Kennedy	1962	1993	No		
Goldberg, Arthur Joseph	Kennedy	1962	1965	No		
Fortas, Abe	Johnson, L.	1965	1969	No		
Marshall, Thurgood	Johnson, L.	1967	1991	Yes	Judge, U.S. Court of Appeals for the Second Circuit	
Blackmun, Harry A.	Nixon	1970	1994	Yes	Judge, U.S. Court of Appeals for the Eighth Circuit	
Powell, Lewis F., Jr.	Nixon	1972	1987	No		
Stevens, John Paul	Ford	1975	2010	Yes	Judge, U.S. Court of Appeals for the Seventh Circuit	

O'Connor, Sandra Day	Reagan	1981	2006	Yes	Judge, Superior Court of Arizona; Judge, Arizona Court of Appeals	Yes
Scalia, Antonin	Reagan	1986	2016	Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Kennedy, Anthony M.	Reagan	1988	2018	Yes	Judge, U.S. Court of Appeals for the Ninth Circuit	
Souter, David H.	Bush, G. H. W.	1990	2009	Yes	Justice, Superior Court of New Hampshire; Associate Justice, Supreme Court of New Hampshire; Judge, U.S. Court of Appeals for the First Circuit	Yes
Thomas, Clarence	Bush, G. H. W.	1991		Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Bader Ginsburg, Ruth	Clinton	1993	2020	Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Breyer, Stephen G.	Clinton	1994	2022	Yes	Judge, U.S. Court of Appeals for the First Circuit	
Alito, Samuel A., Jr.	Bush, G. W.	2006		Yes	Judge, U.S. Court of Appeals for the Third Circuit	
Sotomayor, Sonia	Obama	2009		Yes	Judge, U.S. District Court for the Southern District of New York; Judge, U.S. Court of Appeals for the Second Circuit	Yes
Kagan, Elena	Obama	2010		No		
Gorsuch, Neil M.	Trump	2017		Yes	Judge, U.S. Court of Appeals for the Tenth Circuit	
Kavanaugh, Brett M.	Trump	2018		Yes	Judge, U.S. Court of Appeals for the District of Columbia Circuit	
Coney Barrett, Amy	Trump	2020		Yes	Judge, U.S. Court of Appeals for the Seventh Circuit	

Brown Jackson, Ketanji	Biden	2022		Yes	Judge, U.S. District Court for the District of Columbia; Judge, U.S. Court of Appeals for D.C. Circuit	Yes

Source: *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges (last visited Mar. 2, 2023).

TABLE 2 - COLLECTIVE TRIAL EXPERIENCE UNDER EACH CHIEF JUSTICE

Chief Justice (CJ)	**Years as CJ**	**Judges with Prior Trial Experience on the Bench during CJ's Tenure**	**Number of Justices with Prior Trial Experience during CJ's Tenure**	**Justices**
John Jay	1789 - 1795	Yes	4	Jay, Blair, Cushing, and T. Johnson
John Rutledge	1795 (recess appointment, nomination not confirmed)	Yes	2	Blair, Cushing
Oliver Ellsworth	1796 - 1800	Yes	4	Ellsworth, Chase, Cushing, Moore
John Marshall	1801 - 1835	Yes	8	Cushing, Chase, Moore, W. Johnson, Livingston, Duvall, Thompson, Wayne
Roger Taney	1836 - 1864	Yes	7	Thompson, Wayne, Barbour, Nelson, Grier, Miller, Davis
Salmon Chase	1864 - 1873	Yes	5	Wayne, Nelson, Grier, Miller, Davis
Morrison Waite	1874 - 1888	Yes	5	Miller, Davis, Harlan, Matthews, Blatchford
Meville Fuller	1888 - 1910	Yes	10	Miller, Harlan, Matthews, Blatchford, Brewer, Brown, Jackson, Peckham, Day, Lurton
Edward White	1910 - 1921	Yes	5	Harlan, Brewer, Day, Lurton, Clarke
William Taft	1921 - 1930	Yes	4	Taft, Day, Clarke, Sanford
Charles Hughes	1930 - 1941	Yes	4	Sanford, Cardozo, Black, Murphy
Harlan Stone	1941 - 1946	Yes	2	Black, Murphy
Fred Vinson	1946 - 1953	Yes	2	Black, Murphy
Earl Warren	1954 - 1969	Yes	3	Black, Brennan, Whittaker
Warren Burger	1969 - 1986	Yes	3	Black, Brennan, O'Connor
William Rehnquist	1986 -2005	Yes	3	Brennan, O'Connor, Souter
John Roberts	2005 - Present	Yes	3	O'Connor, Souter, Sotomayor, Brown Jackson

Source: *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges (last visited Mar. 2, 2023).

TABLE 3 - INTERMEDIATE APPELLATE COURTS IN THE UNITED STATES

State	Year Appeals Court Created	Number of Judges on the Court	Filling an Interim Vacancy	Filling a Vacancy at the End of a Judge's Term	Judicial Qualifications	Former Judicial Experience* for Current Appellate Judges
Alabama (*Has an appellate court for civil matters and another for criminal.)*	**1969**	**10**	**Gub. Appointment** until Alabama's next general election more than one year after appointment, unless the remainder of the seat's term runs out before then.	**Partisan Election** where multiple candidates may vie for the seat. The elected judge serves a six-year term.	Licensed to practice law for at least 10 years, state resident for at least one year, and under the age of 70 at the time of election.	**6 No, 4 Yes**
Alaska	**1980**	**4**	**Assisted Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Assisted Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	Citizen of the U.S., state resident for 5 or more years, licensed to practice law in Alaska, 8 years of active legal practice.	**3 No, 1 Yes**
Arizona (2 Divisions)	**1965**	**27**	**Assisted Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Assisted Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	At least 30 years old, of good moral character, a resident of Arizona who has been licensed to practice law in the state for the five years immediately prior to taking office.	**17 No, 10 Yes**
Arkansas	**1978**	**12**	**Gub. Appointment** The governor appoints a judicial candidate. The appointed judge holds office until Arkansas' next general election more than four months after she was appointed, unless the remainder of the seat's term runs out before then, and then participates in a nonpartisan election.	**Nonpartisan election** Multiple candidates may vie for the seat.	At least 30 years old, of good moral character, learned in the law, a citizen of the U.S., a resident of Arkansas for more than two years, and practiced law for at least 8 years.	**5 No, 7 Yes**

California (6 Districts)	**1905**	**106**	**Gub. Appointment & Commission on Judicial Appointments**The governor appoints a judicial candidate, who must be confirmed by a majority vote of the Commission on Judicial Appointments.	**Gub. Appointment & Commission on Judicial Appointments** The governor appoints a judicial candidate, who must be confirmed by a majority vote of the Commission on Judicial Appointments.	An attorney admitted to practice in California or have served as a judge of a court of record in the state for 10 years immediately preceding appointment.	**16 No, 84 Yes, 6 Vacant**
Colorado	**1891, 1970**The Colorado Court of Appeals was first established in 1891, but was abolished and re-established in 1970, when it was established in its current form.	**21**	**Gub. Appointment & Binding Nominating Comm.**The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	Qualifed elector, licensed to practice law in Colorado for 5 years, and under the age of 72.	**16 No, 5 Yes**
Connecticut	**1982**	**10**	**Gub. Appointment & Binding Nominating Comm. & House & Senate Confirmation**The governor nominates a judicial candidate from a list provided by a judicial nominating commission who must be confirmed by a majority vote of the state House and Senate. An appointed judge serves an eight-year term.	**Gub. Appointment & Binding Nominating Comm. & House & Senate Confirmation** The governor appoints a judicial candidate from a list provided by a judicial nominating commission who must be confirmed by a majority vote of the state House and Senate. An appointed judge serves an eight-year term.	State resident, licensed to practice law in the state for at least 10 years, and under the age of 70.	**10 Yes**
Florida - (Six Courts of Appeal)	**1957**	**64**	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a	Qualified elector, Florida resident, admitted to practice law in Florida for at least 10 years, and no more than 70 years old.	**27 No, 44 Yes**

			nominating commission.	list provided by a judicial nominating commission.		
Georgia	**1906**	**15**	**Gub. Appointment, Nonbinding Commission** The governor appoints a judicial candidate to the empty seat on the bench. The governor receives a list of candidates vetted and recommended by the judicial nominating commission but is not required to select a candidate from the list. The appointed judge holds office until Georgia's next general election more than six months after she was appointed, unless the remainder of the seat's term runs out before then. During the election, multiple candidates may vie for the seat in a nonpartisan election. The elected judge serves the remainder of the unexpired term.	**Nonpartisan Election** Multiple candidates may vie for the seat.	Resident of Georgia and admitted to practice law for at least 7 years.	**7 No, 7 Yes, 1 Vacant**
Hawaii	**1959**	**7**	**Gub. Appointment & Binding Nominating Comm. & Senate Confirmation** The governor nominates a judicial candidate from a list provided by a judicial selection commission, who must be confirmed by a majority vote of the state Senate. The appointed judge serves a 10-year term.	**Gub. Appointment & Binding Nominating Comm. & Senate Confirmation** The governor appoints a judicial candidate from a list provided by a judicial selection commission, who must be confirmed by a majority vote of the state Senate. The appointed judge serves a 10-year term.	U.S. resident and citizen, resident and citizen of the state, practicing attorney in the state for at least 10 years, and under the age of 70.	**5 No, 2 Yes**
Idaho	**1980**	**4**	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate to the empty seat	**Nonpartisan election** When a seat becomes open at the end of a judge's term	At least age 30 at the time of appointment or election, citizen of the U.S., registered to vote in	**3 No, 1 Yes**

			on the bench, who holds office for the remainder of the seat's term.	(for example, due to retirement), the vacancy is filled through a nonpartisan election, where multiple candidates may vie for the seat. The elected judge serves a six-year term.	Idaho, admitted to practice law for at least 10 years, and admitted to the practice of law in Idaho for at least 2 years.	
Illinois (Five Districts)	**1877**	**54**	**Supreme Court Appointment** The justices of the state supreme court appoint a judicial candidate to the empty seat on the bench. The appointed judge holds office until the next general election more than 60 months after she was appointed, unless the remainder of the seat's term runs out before then. Multiple candidates may vie for the 10-year term.	**Partisan Elections** Multiple candidates may vie for the seat. The elected judge serves a 10-year term.	U.S. Citizen, district resident, and licensed to practice law in Illinois.	**8 No, 44 Yes, 2 Vacant**
Indiana	**1891**	**15**	**Gub. Appointment & Binding Nominating Comm**.The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	Commission selects three finalists, who must have been admitted to the practice of law in Indiana for at least 10 years or served as a trial court judge for at least five years.	**3 No, 12 Yes**
Iowa	**1976**	**9**	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	Licensed to practice law in Iowa, resident of the state of Iowa, member of the Iowa State Bar, and under the age of 72	**4 No, 5 Yes**
Kansas	**1977** ***(Re-established permanently after the original 1895 Court of Appeals provision***	**14**	**Gub. Appointment & Senate Confirmation** The governor nominates a judicial candidate for the empty seat on the bench, who must be	**Gub. Appointment & Senate Confirmation** The governor nominates a judicial candidate for the empty seat on	At least 30 years old and have been a Kansas lawyer, judge, or full-time teacher at an accredited law school for	**8 No, 5 Yes, 1 Vacant**

	expired in 1901.)		confirmed by a majority vote of the state Senate.	the bench, who must be confirmed by a majority vote of the state Senate.	at least 10 years.	
Kentucky	**1975** ***(Prior to 1975, the Court of Appeals was the only appellate court in KY. Since 1975, it has been the intermediate appellate court.)***	**14**	**Gub. Appointment & Binding Nominating Comm.**The governor appoints a judicial candidate from a list provided by a judicial nominating commission. The appointed judge holds office until Kentucky's next general election more than three months after she was appointed, unless the remainder of the seat's term runs out before then. Multiple candidates may vie for the seat in a nonpartisan election. The elected judge serves the remainder of the unexpired term.	**Nonpartisan Elections** The vacancy is filled through a nonpartisan election, where multiple candidates may vie for the seat.	Citizen of the U.S., resident of both the Commonwealth and of the district from which he is elected for two years preceding his taking office, licensed to practice law in the courts of the Commonwealth, and a licensed attorney for at least 8 years.	**5 No, 9 Yes**
Louisiana (Five Courts of Appeal)	**1879**	**53**	**Supreme Ct. Appointment & Partisan Elections** The justices of the state supreme court appoint a judicial candidate to the empty seat on the bench. Within a year, the governor calls a special election to fill the seat. The judge appointed in the interim by the supreme court may not run in the special election. During the special election, multiple candidates may vie for the seat in a partisan election.	**Partisan Elections**The vacancy is filled through a partisan election, where multiple candidates may vie for the seat.	Practiced law for at least 10 years in Louisiana, resident of the district and/or circuit for at least one year, and no more than 70 years old.	**19 No, 34 Yes**
Maryland	**1966**	**15**	**Gub. Appointment, Nonbinding Nominating Comm. & Senate Confirmation** The governor nominates a judicial candidate for the empty seat on the bench. The governor receives a list of candidates vetted and recommended by the	**Gub. Appointment, Nonbinding Nominating Comm. & Senate Confirmation** The governor appoints a judicial candidate to the empty seat on the bench. The governor	Membership in the Maryland Bar. The State Constitution also speaks generally of the second category of qualifications, by providing that those selected for judgeships shall be lawyers "most	**8 No, 7 Yes**

			judicial nominating commission but is not required to select a candidate from the list. The governor's nominee must be confirmed by a majority vote of the state Senate.	receives a list of candidates vetted and recommended by the judicial nominating commission but is not required to select a candidate from the list. The governor's nominee must be confirmed by a majority vote of the state Senate.	distinguished for integrity, wisdom and sound legal knowledge."	
Massachusetts	**1972**	**25**	**Gub. Appointment, Nonbinding Nominating Comm. & Governor's Council Confirmation**The governor appoints a judicial candidate to the empty seat on the bench. The governor receives a list of candidates vetted and recommended by a judicial nominating commission but is not required to select a candidate from the list. The governor's nominee must be confirmed by a majority vote of the Governor's Council, consisting of elected district representatives and the lieutenant governor. An appointed judge serves a single term until mandatory retirement at age 70.	**Gub. Appointment, Nonbinding Nominating Comm. & Governor's Council Confirmation** The governor appoints a judicial candidate to the empty seat on the bench. The governor receives a list of candidates vetted and recommended by a judicial nominating commission but is not required to select a candidate from the list. The governor's nominee must be confirmed by a majority vote of the Governor's Council, consisting of elected district representatives and the lieutenant governor. An appointed judge serves a single term until mandatory retirement at age 70.	At least 13 years of legal experience and training, state bar member in good standing, U.S. citizen, resident of Massachusetts, and no more than 70 years old.	**16 No, 9 Yes**
Michigan	**1963**	**25**	**Gub. Appointment** The governor appoints a	**Nonpartisan Elections**The vacancy is	A qualified elector of his or her district,	**12 No, 13 Yes**

			judicial candidate to the empty seat on the bench. The appointed judge holds office until Michigan's next general election where multiple candidates may vie for the seat in a nonpartisan election. The elected judge serves the remainder of the unexpired term.	filled through a nonpartisan election, where multiple candidates may vie for the seat. The elected judge serves a six-year term.	be licensed to practice law in the state, have at least five years of law practice experience, be under the age of 70. Sitting judges who reach age 70 are allowed to serve the remainder of their term.	
Minnesota	**1983**	**19**	**Gub. Appointment** The governor appoints a judicial candidate to the empty seat on the bench. The appointed judge holds office until Minnesota's next general election more than one year after she was appointed, unless the remainder of the seat's term runs out before then. During the election, multiple candidates may vie for the seat in a nonpartisan election.	**Nonpartisan Elections** The vacancy is filled through a nonpartisan election, where multiple candidates may vie for the seat. The elected judge serves a six-year term.	"Learned in the law," a phrase courts have interpreted to mean a licensed attorney-at-law, and no more than 70 years old.	**7 No, 12 Yes**
Mississippi	**1995**	**10**	**Gub. Appointment & Nonbinding Nominating Comm.** The governor appoints a judicial candidate to the empty seat on the bench. The governor receives a list of candidates vetted and recommended by the judicial nominating commission but is not required to select a candidate from the list. If less than half of the vacated term remains, the appointed judge serves the remainder of the unexpired term. If more than half of the term remains, the appointed judge holds office until Mississippi's next general election more than nine months after she was appointed, where	**Nonpartisan Elections** The vacancy is filled through a nonpartisan election, where multiple candidates may vie for the seat. The elected judge serves an eight-year term.	Practicing attorney for at least five years, a minimum of 30 years old, and a state citizen for at least five years.	**7 No, 3 Yes**

			multiple candidates may vie for the seat in a nonpartisan election. The elected judge serves the remainder of the unexpired term.			
Missouri (Divided into 3 Districts)	**1875**	**32**	**Gub. Appointment & Binding Nominating Comm.**The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	U.S. citizen for at least 15 years, a district resident, a qualified state voter for at least nine years, licensed to practice law in the state, over the age of 30 and under the age of 70.	**14 No, 18 Yes**
Nebraska	**1991**	**6**	**Gub. Appointment & Binding Nominating Comm.**The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	A resident of the state, at least 30 years old, a U.S. citizen, have practiced law in Nebraska for at least five years, and a member of the state bar.	**4 No, 2 Yes**
Nevada	**2014**	**3**	Gub. Appointment. The Governor appoints a judicial candidate to the empty seat on the bench by granting a commission, which expires at the next general election by the people and upon the qualification of her successor. The winner of the general election shall be appointed for the remainder of the unexpired term.	Gen. Election The vacancy is filled through a general election.	Qualified elector, a state resident for at least two years, minimum age of 25 years, licensed and admitted to practice law in Nevada, licensed attorney for at least 15 years, with at least two of those years in Nevada.	2 No, 1 Yes
New Jersey	**1947**	**32**	**Gub. Appointment, Supreme Court Appointment & Senate Confirmation** The chief justice of the state supreme court appoints a replacement judge from the trial division of the superior court to the empty seat on the bench. An appointed judge	**Gub. Appointment, Supreme Court Appointment & Senate Confirmation** The chief justice of the state supreme court appoints a judge from the trial division of the	Admitted to practice law in New Jersey for at least 10 years and no more than 70 years old.	**32 Yes**

			serves a seven-year term.	superior court to the empty seat on the bench. An appointed judge serves a seven-year term.		
New Mexico	**1965**	**10**	**Gub. Appointment & Binding Nominating Comm.**The governor appoints a judicial candidate from a list provided by a judicial nominating commission, who serves until the next general election. where multiple candidates may vie for the seat in a partisan election. The elected judge serves the remainder of the unexpired term.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	At least 35 years old, practiced law for 10 years or more, and a state resident for at least three years.	**9 No, 1 Yes**
New York Supreme Court, Appellate Division	**1894**	**60**	**Gub. Appointment & Binding Nominating Comm.**The governor appoints a replacement justice from a list of sitting trial court justices provided by the judicial nominating commission. An appointed justice serves a 5-year term or the remainder of their supreme court term, whichever is shorter.	**Gub. Appointment & Binding Nominating Comm.** The governor appoints a replacement justice from a list of sitting trial court justices provided by the judicial nominating commission. An appointed justice serves a 5-year term or the remainder of their supreme court term, whichever is shorter.	A resident of New York, have been admitted to practice law in New York for at least 10 years, and at least 18 years old. Nominees only from current sitting trial court justices.	**60 Yes**
North Carolina	**1967**	**15**	**Gub. Appointment** The governor appoints a judicial candidate to the empty seat on the bench. The appointed judge holds office until North Carolina's next general election more than 60 days after the vacancy occurred. Multiple candidates may vie for the seat in a	**Partisan Elections** The vacancy is filled through a partisan election, where multiple candidates may vie for the seat.	At least 21 years old, licensed attorney, registered to vote, resident of the state, and under the age of 72.	**8 No, 7 Yes**

			partisan election. The elected judge serves the remainder of the unexpired term.			
North Dakota	**1987**	No permanent Judges. The supreme court selects judges for the court of appeals from a pool of active and retired district court judges, retired supreme court justices and lawyers. Judges serve a maximum of one year.	**Supreme Court Appt.** Judges of the North Dakota Court of Appeals are chosen by the state's supreme court justices to hear cases specifically assigned to them. The court sits in three-member panels, and its judges are chosen from among retired district judges, retired supreme court justices, and attorneys.	**Supreme Court Appt.** Judges of the North Dakota Court of Appeals are chosen by the state's supreme court justices to hear cases specifically assigned to them. The court sits in three-member panels, and its judges are chosen from among retired district judges, retired supreme court justices, and attorneys.	U.S. and State citizen, and licensed attorney.	**Varies**
Ohio (12 Districts)	**1851**	**69**	**Gub. Appointment** The governor appoints a judicial candidate to the empty seat on the bench. The appointed judge holds office until Ohio's next general election more than 40 days after the vacancy occurred, unless the remainder of the term concludes within a year of said election, in which case the appointed judge serves the remainder of the unexpired term. Multiple candidates may vie for the seat in a nonpartisan election (preceded by a partisan primary). The elected judge serves the remainder of the unexpired term.	**Nonpartisan Elections** The vacancy is filled through a nonpartisan election (preceded by a partisan primary), where multiple candidates may vie for the seat. The elected judge serves a six-year term.	Resident of his or her district, attorney with at least 6 years of experience in the practice of law, and under the age of 70.	**34 No, 35 Yes**
Oklahoma	**1968**	**12**	**Gub. Appointment & Binding Nominating**	**Gub. Appointment & Binding**	Qualified elector for at least one year,	**6 No, 5 Yes, 1 Vacant**

			Comm. The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	**Nominating Comm.** The governor appoints a judicial candidate from a list provided by a judicial nominating commission.	licensed to practice or a judge of a court of record for at least 4 years.	
Oregon	**1969**	**13**	**Gub. Appointment**The governor appoints a judicial candidate to the empty seat on the bench. The appointed judge holds office until Oregon's next general election. During the election, multiple candidates may vie for the seat in a nonpartisan election. The elected judge serves a six-year term.	**Nonpartisan Elections**The vacancy is filled through a nonpartisan election.The elected judge serves a six-year term.	U.S. citizen, qualified elector of county of residence, member of the Oregon State Bar, and under the age of 75.	**9 No, 4 Yes**
Pennsylvania Superior Court	**1895**	**15**	**Gub. Appointment & Senate Confirmation** The governor appoints a judicial candidate to the empty seat on the bench. The governor's selection must be confirmed by a two-thirds vote of the state Senate. The appointed judge holds office until the next municipal election more than 10 months after the vacancy opened, unless the remainder of the seat's term runs out before then. During the election, multiple candidates may vie for the seat in a partisan election.	**Partisan Elections** The vacancy is filled through a partisan election, where multiple candidates may vie for the seat. The elected judge serves a 10-year term.	Resident of the state for at least one year, member of the state bar, and under the age of 75.	**3 No, 11 Yes, 1 Vacant**
Pennsylvania Commonwealth Court	**1968**	**9**	**Gub. Appointment & Senate Confirmation** The governor appoints a judicial candidate to the empty seat on the bench. The governor's selection must be confirmed by a two-thirds vote of the state Senate. The appointed judge holds office until the next	**Partisan Election** The vacancy is filled through a partisan election. The elected judge serves a 10-year term.	Resident of the state for at least one year, member of the state bar, and under the age of 75.	**4 No, 4 Yes, 1 vacant**

			municipal election more than 10 months after the vacancy opened, unless the remainder of the seat's term runs out before then. During the election, multiple candidates may vie for the seat in a partisan election.			
South Carolina	**1983**	**8**	**Gub. Appointment, Legislative Appointment & Binding Nominating Comm.**The Legislature votes to appoint a judicial candidate from a list provided by a judicial nominating commission. If less than one year remains of the unexpired term the governor may appoint a judicial candidate instead. The appointed judge serves the remainder of the unexpired term.	**Legislative Appointment & Binding Nominating Comm.**The Legislature votes to appoint a judicial candidate, selected from a list provided by a judicial nominating commission, to a six-year term.	A U.S. citizen, a resident of South Carolina for at least 5 years, a licensed attorney for 8 years, and between 32 and 72 years old.	**2 No, 6 Yes**
Tennessee Court of Criminal Appeals	**1967**	**12**	**Gub. Appointment, Binding Nominating Comm. & House & Senate Confirmation** The governor nominates a judicial candidate from a list provided by a judicial nominating commission. The governor's nominee must be confirmed by a majority vote of the state House and Senate.	**Gub. Appointment, Binding Nominating Comm. & House & Senate Confirmation**The governor nominates a judicial candidate from a list provided by a judicial nominating commission. The governor's nominee must be confirmed by a majority vote of the state House and Senate.	Authorized to practice law in the state, state resident for five years, and at least 30 years old.	**2 No, 9 Yes, 1 Vacant**
Tennessee Court of Appeals	**1925**	**12**	**Gub. Appointment, Binding Nominating Comm. & House & Senate Confirmation** The governor nominates a judicial candidate from a list provided by a judicial nominating commission. The	**Gub. Appointment, Binding Nominating Comm. & House & Senate Confirmation**The governor nominates a judicial candidate from a	Authorized to practice law in the state, district resident for at least one year, state resident for five years, and at least 30 years old.	**4 No, 8 Yes**

			nominee must be confirmed by a majority vote of the state House and Senate.	list provided by a judicial nominating commission. The nominee must be confirmed by a majority vote of the state House and Senate.		
Texas Court of Appeals (14 Districts)	**1891**	**80**	**Gub. Appointment & Senate Confirmation** The governor appoints a judicial candidate to the empty seat on the bench. The governor's selection must be confirmed by a majority vote of the state Senate. The appointed judge holds office until Texas' next general election, where multiple candidates may vie for the seat in a partisan election. The elected judge serves a six-year term.	**Partisan Elections** The vacancy is filled through a partisan election. The elected judge serves a six-year term.	Citizen of the U.S. and Texas, between the ages of 35 and 74, a practicing lawyer, or lawyer and judge of court of record together, for at least 10 years.	**51 No, 29 Yes**
Texas Court of Criminal Appeals	**1876**	**9**	**Gub. Appointment & Senate Confirmation-** The governor appoints a replacement who must be confirmed by the state Senate. The appointee serves until the next general election, where he or she may compete to serve for the remainder of the unexpired term	**Partisan Elections** The vacancy is filled through a partisan election. The elected judge serves a six-year term.	U.S. citizen, resident of Texas, licensed to practice law in the state, between 35-75 years old, and a practicing lawyer and/or judge for at least 10 years.	**5 No, 4 Yes**
Utah	**1987**	**7**	**Gub. Appointment, Binding Nominating Comm. & Senate Confirmation** The governor nominates a judicial candidate from a list provided by a judicial nominating commission, who must be confirmed by a majority vote of the state Senate.	**Gub. Appointment, Binding Nominating Comm. & Senate Confirmation** The governor nominates a judicial candidate from a list provided by a judicial nominating commission, who must be confirmed by a majority vote of the state Senate.	U.S. citizen, resident of Utah for at least 3 years, between 25-75 years old, and admitted to practice law in Utah.	**3 No, 3 Yes, 1 Vacant**

Virginia	**1985**	**17**	**Gub. Appointment & Legislative Appt.** The Legislature votes to appoint a judicial candidate to fill the empty seat. The appointed judge serves an eight-year term. If the Legislature is not in session, the governor may appoint a judicial candidate to serve until the next legislative session.	**Legislative Appointment** The Legislature votes to appoint a judicial candidate to an eight-year term.	Resident of Virginia, no more than 73 years old and a member of the Virginia State Bar for at least 5 years.	**10 No, 7 Yes**
Washington (3 Divisions)	**1969**	**22**	**Gub. Appointment** The governor appoints a judicial candidate to the empty seat on the bench. The appointed judge holds office until Washington's next general election, where multiple candidates may vie for the seat in a nonpartisan election. The elected judge serves the remainder of the unexpired term.	**Nonpartisan Election**The vacancy is filled through a nonpartisan election. The elected judge serves a six-year term.	Must have practiced law in the state of Washington for at least five years and a resident of the district they represent for at least one year.	**10 No, 12 Yes**
West Virginia	**2021**	**3**	**Gub. Appointment, Binding Nominating Comm. & Nonpartisan Elections** The governor appoints a replacement from a list of two to five qualified applicants submitted by a nominating commission. The appointee serves until the next general election, at which point he or she may compete to fill the remainder of the unexpired term.	**Gub. Appointment & Nonpartisan Elections**The three judges of the West Virginia Intermediate Court of Appeals are initially appointed by the governor to serve 10-year terms and run for re-election in nonpartisan elections.	Member in good standing of the State Bar, admitted to practice law in the state for at least 10 years prior to appointment, and a state resident for at least 5 years.	**2 No, 1 Yes**
Wisconsin (Four Appeals courts)	**1978**	**16**	**Gub. Appointment & Nonbinding Nominating Comm.** The governor appoints a judicial candidate to the empty seat on the bench. The governor receives a list of candidates vetted and recommended by the judicial nominating commission but is	**Nonpartisan Elections**The vacancy is filled through a nonpartisan election, where multiple candidates may vie for the seat. The elected judge serves a six-year term.	Qualified elector of Wisconsin, licensed to practice law in WI for at least 5 years.	**5 No, 11 Yes**

			not required to select a candidate from the list. The appointed judge holds office until Wisconsin's next spring election when no other judge is to be elected. If the vacancy occurs between December 1 and the date of the spring election, the appointed judge stands for election in the second succeeding spring election (or later, if another judge is to be elected) instead. During the election, multiple candidates may vie for the seat in a nonpartisan election.			

* Indicates experience may include that of an Administrative Law Judge, Juvenile Court Judge, or Municipal Judge

Notes:

The following states do not have intermediate courts of appeals: Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming.

This information is current as of March 3, 2023.

South Carolina is one of two states, along with Virginia, that uses a system of legislative election of judges. Judges are elected by public vote of the South Carolina State Legislature. Both chambers come together for a joint vote. Before the assembly votes on a particular judicial candidate, he or she must be approved by the South Carolina Judicial Merit Selection Commission, making the system somewhat reminiscent of the assisted appointment method. Judges are also re-elected by the legislature. If there is an unexpired term with less than a year left before expiration, the governor may fill the vacancy. Terms for justices on the Court of Appeals last six years, including the term of the chief justice. The chief justice is also chosen by legislative election.

The justices of the New York Supreme Court, Appellate Division, are appointed by the governor from a list of nominees submitted by a nominating commission. The nominees are selected from the elected justices of the supreme court. The length of a justice's term with the appellate division is either five years or until the end of the justice's

term on the supreme court, whichever is shorter. Justices are retained using the same appointment process, and subsequent terms are also five years.

In Alabama, the requirement that a potential judge practice law for 10 years before becoming eligible to serve on the court is fairly new; it was established in 2009.

The Nevada intermediate appellate court was created by state constitutional amendment in 2014, and began hearing cases in January 2015. The court's three initial judges were selected by gubernatorial appointment from among nine total nominees (three for each seat) selected by the Commission on Judicial Selection. The Nevada intermediate appellate court hears appeals deflected from that state's supreme court.

The West Virginia intermediate appellate court was created by Senate Bill 275, which was signed by Gov. Jim Justice (D) on April 9, 2021. The court began hearing cases on July 1, 2022.

In Washington, the Court of Appeals is the intermediate appellate court for the state. The court is a non-discretionary appellate court. This means that it must accept, review and issue a written decision for all appeals filed with it, unlike the Washington State Supreme Court, which can reject an appeal.

Sources:

Judicial Selection: An Interactive Map, BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF L. http://judicialselectionmap.brennancenter.org.

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Nevada Court of Appeals, BALLOTPEDIA, https://ballotpedia.org/Nevada_Court_of_Appeals.

Qualifications to Serve As An Appellate Court Judge, NAT'L CTR. FOR STATE CTS. (NCSC), https://cdm16501.contentdm.oclc.org/digital/collection/appellate/id/159.

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Directory of Judges of State Courts of Appeal, THE COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL (2021).

State Court Websites, NAT'L CTR. FOR STATE CTS. (NCSC), https://www.ncsc.org/information-and-resources/state-court-websites.

TABLE 4 – NEW JERSEY COURTS SYSTEM UNDER 1844 CONSTITUTION

Source: Joseph Harrison, The Courts of New Jersey—Part I: The Present System, The Governor's Committee on Preparatory Research for the New Jersey 1947 Constitutional Convention, at 13 (1947).