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The Sistren: Ranking the Top 10 Female Supreme Court Justices

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A TOP TEN RANKING OF THE U.S. SUPREME COURT

THE SISTREN

RANKING THE TOP 10 FEMALE SUPREME COURT JUSTICES

Meg Penrose

OF ALL THE “BEST” AND “WORST” Supreme Court lists published, there has never been a listing of the Top Ten female Justices. The reason for this scholarly void is simple: only four women have served on the Court. Indeed, only five women have been nominated. I am pleased to present the first, though admittedly incomplete, listing of the Top Ten female Justices.

I. BRETHREN AND SISTREN

At the current rate, 4 females in 112 Justices,¹ a complete “Top Ten” list should be available around 2075. This calculation is based on several factors, including the fact modern Justices serve lengthy terms, with most modern Justices’ tenure averaging over 25 years.² Longer terms equate to fewer appointments. Once women began to be included, however, they have experienced an increasingly

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¹ www.supremecourt.gov/about/faq_justices.aspx.

² www.supremecourt.gov/about/members.aspx.

higher percentage of appointments. Of the eleven Justices appointed since 1981, four (36% percent) have been women.³ Assuming the advancing ages of the current Justices portends the appointment of five Justices over the next twelve years, we could see two additional females appointed by 2027.⁴ Of course, this depends on whether a Democrat or Republican occupies the White House, as no Republican since 1981 has successfully nominated a female to the Court.⁵

President Reagan was the first President, and only Republican, to appoint a female Justice.⁶ President Clinton, with one of his two selections, added another female in 1993.⁷ Most recently, President Obama, using both his selections, consecutively appointed women for the first time in history, in 2009 and 2010.⁸

II. PERSPECTIVE

To place the dearth of female Justices in perspective, there are more Supreme Court Justices' *wives* buried in Arlington National Cemetery than women having served on the Court. There have been twice as many Kentuckians (8) to serve on the Court as women.⁹ There have been more Justices born outside the United States (6) than female Justices.¹⁰ Justice William O. Douglas had as many wives as our nation has had female Justices.¹¹

³ *Id.*

⁴ Four current Justices are 77 or older (Ginsburg, Scalia, Kennedy and Breyer). www.supremecourt.gov/about/biographies.aspx. Two current Justices are over 65 (Thomas and Alito), two over 60 (Sotomayor and Roberts).

⁵ www.supremecourt.gov/about/members.aspx. Reagan's two other appointees, Scalia and Kennedy, remain on the Court. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Gardner, *Kentucky Justices on the U.S. Supreme Court*, 70 REGISTER OF KENTUCKY HISTORICAL SOCIETY 121 (1972)(eight natives, two residents).

¹⁰ www.supremecourt.gov/faq_justices.aspx (Justice Wilson, Scotland; Justices Iredell and Sutherland, England; Justice Paterson, Ireland; Justice Brewer, Turkey; and, Justice Frankfurter, Austria).

¹¹ Garrow, *The Tragedy of William O. Douglas*, THE NATION (March 27, 2003).

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More Justices have served the Supreme Court as law clerks (6) than women have sat on the Court.¹² More Solicitor Generals (5) have been appointed than women.¹³ There have been more Jewish Justices than women.¹⁴ And, there are more Catholics *currently* on the Court (6) than women that have served in the Court's history.

Rather than belabor the point, I shall begin ranking those serving, having previously served and two worthy of mentioning as *almost* serving. With only four women to account for, the criteria for inclusion necessarily loosens.

III. THE INCOMPLETE RANKING

While only four women have served on the Court, this essay ranks six women, in descending order, including the only failed female nominee and the only other woman to have been seriously considered, but ultimately passed over, for the Court.

*a. The "Pit Bull in Size 6 Shoes,"*¹⁵

In 2005, President George W. Bush nominated White House counsel, Harriet Miers, to become the 110th Justice.¹⁶ Like the women that have successfully ascended to the Court, Miers accomplished many firsts: "first woman hired by her law firm, in 1972; first woman president of the Dallas Bar Association, in 1985; first woman president of the Texas Bar, in 1992; and first woman president of her law firm, in 1996."¹⁷

¹² *Id.* (White, Rehnquist, Stevens, Breyer, Roberts and Kagan).

¹³ Smelcer, *From Solicitor General to Supreme Court Nominee*, CONGRESSIONAL RESEARCH SERVICE (June 23, 2010).

¹⁴ Five between 1916-1969 and three currently. Keister & Sherkat, eds., *RELIGION AND INEQUALITY IN AMERICA*, at 211.

¹⁵ *Harriet Miers Submits Resignation as White House Counsel*, USA TODAY (Jan. 1, 2007) (Bush's nickname for Miers).

¹⁶ Fletcher & Babington, *Miers, Under Fire From Right, Withdrawn as Court Nominee*, WASH. POST (Oct. 28, 2005).

¹⁷ *Id.*

Miers' nomination was bungled by opposition from the political right, left and split public opinion.¹⁸ Facing a likely negative vote, Miers voluntarily withdrew her nomination.¹⁹

b. Truman's Missed Opportunity

For a brief moment, it appeared the first woman to serve as an Article III judge, Florence Allen, would become the first female Justice.²⁰ Allen remains the ultimate pioneer for female lawyers: "first female assistant prosecutor in the country; first woman elected to sit on a court of general jurisdiction; and the nation's first female state supreme court justice."²¹ She also served as the Sixth Circuit's first female Chief Judge.²² Concerns about how a woman would blend in with the Brethren doomed Allen's seat.²³

c. The Woman Who "Saved Baseball"

Justice Sotomayor helped saved both professional baseball and football as a judge.²⁴ Still, some remember her more for her "wise Latina" musing that nearly thwarted her appointment. As a former prosecutor, it is unsurprising she is one of the most vigorous questioners during oral argument. She also has written passionate dissents from denials of certiorari, with a particular focus on criminal procedure and prisoner cases.

At this stage it is too early to know where Sotomayor will ultimately rank among the female Justices. She has penned 44 majority opinions, 31 concurring opinions and 32 dissenting opinions. For now, however, Sotomayor comes up just short of her Sistren.

¹⁸ *Miers Withdraws Nomination*, FOXNEWS.COM (Oct. 27, 2005).

¹⁹ *Id.*

²⁰ RBG, *Remarks on Women's Progress at the Bar and on the Bench*, 89 CORNELL L. REV. 801 (2004).

²¹ *Id.* at 805.

²² *Id.*

²³ *Id.*

²⁴ Gregory, *How Sotomayor 'Saved' Baseball*, TIME (May 26, 2009).

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d. "Shorty"

Despite her brief tenure, Justice Kagan distinguishes herself as an exceptional writer.²⁵ She has written 36 majority opinions, 7 concurring opinions and 12 dissenting opinions. Like all on this list, Kagan has achieved notable firsts: first female Dean of Harvard Law School and first female Solicitor General.²⁶ Her wittiness, as demonstrated by her recent Marvel Entertainment opinion, propels her to number three on this list.

Kagan is the only female Justice to have served as a judicial law clerk for another Justice.²⁷ In fact, it was her boss, Justice Thurgood Marshall, who dubbed her "Shorty."²⁸ She was the first Solicitor General, since Marshall, to be elevated to the Court.²⁹ Known for bringing frozen-yogurt to the Supreme Court dining room, Kagan has quickly made her indelible mark.³⁰

e. "The Original"

Justice O'Connor was the original. Being first does not always make one great. But, O'Connor is. She remains a heralded trailblazer, with a legacy of legislative and judicial achievements. O'Connor was the first female Majority Leader of any state senate.³¹ For nearly 25 years, she served the Court with grace and distinction. She authored 286 majority opinions, 183 concurring opinions and 161 dissenting opinions. The quintessential "swing vote," Justice O'Connor's opinions often carried greater weight than her single vote suggested.

She refers to herself as FWOTSC.³² All Americans should remain grateful to O'Connor for merging femininity with intellect and forging a path for all to follow.

²⁵ Rosen, *Strong Opinions*, NEW REPUBLIC (July 28, 2011).

²⁶ Smelcer, *supra* note 13.

²⁷ www.supremecourt.gov/faq_justices.aspx.

²⁸ Savage, *Kagan's Link to Marshall Cuts 2 Ways*, NY TIMES (May 12, 2010).

²⁹ Smelcer, *supra* note 13.

³⁰ Lithwick, *Her Honor*, NEW YORK MAGAZINE (NOV. 27, 2011).

³¹ *Sandra Day O'Connor Fast Facts*, CNN (March 23, 2015).

³² Michiko Kakutani, N.Y. TIMES BOOKS (March 4, 2013).

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f. "Notorious RBG"

At age 82, Justice Ginsburg (a/k/a "Notorious RBG") has achieved cult status.³³ She has both an opera and movie written about her life. She is listed by Time Magazine as a Top 100 icon.³⁴ Having served over 20 years, RBG asserts there will be enough women on the Court when "there are nine."³⁵ She has authored 167 majority opinions, 98 concurring opinions and 120 dissenting opinions. While the ranking between O'Connor and RBG is close, admittedly all but interchangeable, I rank RBG as the foremost female Justice due to the continuation of her gender equity dedication once on the Court. Many see RBG as the Thurgood Marshall of the women's movement.³⁶ The cases she argued before the Court in the 1970s helped open the door for women in the law and, ultimately, judiciary.

For now, I toast Notorious RBG as number 1.³⁷



³³ NYU law student, Shana Knizhnik, originated the term. Lithwick, *Justice LOLZ Grumpycat Notorious R.B.G.*, SLATE.com (March 16, 2015).

³⁴ Alter, *RBG Upends the Notion of the Silent Justice*, TIME (Feb. 18, 2015).

³⁵ Fuller, *RBG owns a surprisingly large number of 'Notorious RBG' t-shirts*, WASH. POST (Oct. 20, 2014).

³⁶ Lithwick, *supra* note 33 (RBG won five of six cases she argued before the Court).

³⁷ With a closing nod to her infamous "not 100 percent sober" comment. Alter, *supra* note 34.