

The Emperors' New "Clothes": Exposing Collar Bias in the Federal Judiciary

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In January, the Supreme Court handed down a unanimous decision that made few waves. In the case, *Sandifer v. U.S. Steel Corp.*,¹ [1. [134 S.Ct. 870](#) (2014).] the Court ruled that time steelworkers spent putting on protective gear was considered “changing clothes” and thus noncompensable under the union’s collective bargaining agreement (CBA).² [2. The CBA stated that “time spent in changing clothes . . . at the beginning or end of each workday” was noncompensable. *Id.* at 874.] The Northern District of Indiana (Miller, J.), Seventh Circuit Court of Appeals (Posner, J.), and Supreme Court (Scalia, J.) all agreed: time spent putting on and taking off such protective gear is noncompensable; it is not time spent making steel, so the steelworkers shouldn’t worry about it.

The merits of the case need not be disputed here. The Court’s ruling is final, and nothing said here will help those steelworkers get paid for that time. But in reading through the opinions and the transcript of the oral argument to the high court, I began to question how these federal judges viewed the work and lives of the steelworkers in question. As a former pipefitter, I empathize with the steelworkers and their daily toil. However, I am not so sure about any such empathy from the federal courts. While judicial empathy is considered heresy by some, I would certainly encourage judges to try to walk a mile in the workers’ steel toe boots.³ [3. Justice Scalia, demonstrating his ignorance of footwear, prefers the term “metatarsal boots—more commonly known as ‘steel-toed’ boots” which are really “just a special kind of shoe.” *Sandifer* at 881. “Justice” Scalia should know that metatarsal boots are “commonly known as” steel toe boots because there is steel or composite material above the toe to keep your toes from getting crushed or sheared off. If you have to wear them day in and day out, a good pair of boots is one of the best investments you can make.] The federal courts—and the Supreme Court in particular—are so far removed those workers’ lives that the courts are incapable of fairly and objectively evaluating the disputes.

The *Sandifer* plaintiffs were 800 former and current steelworkers at the U.S. Steel plant in Gary, Indiana (“Gary Works”). Working with steel, for those who have not had the pleasure, is no simple task. Death and dismemberment are a daily risk. As a welder, cuts, burns, and electric shocks⁴ [4. Colloquially known as “getting juiced” or “getting stuck” (because when your body becomes part of the circuit, your brain has trouble getting your hand to pull away).] are part of the job; catching fire at work is not a metaphor for anything. Hot steel will maim you or kill you if you are not careful and well-protected. It is a far different environment than most federal judges are accustomed to.



A steelworker from U.S. Steel shows off the latest in “hot couture.”

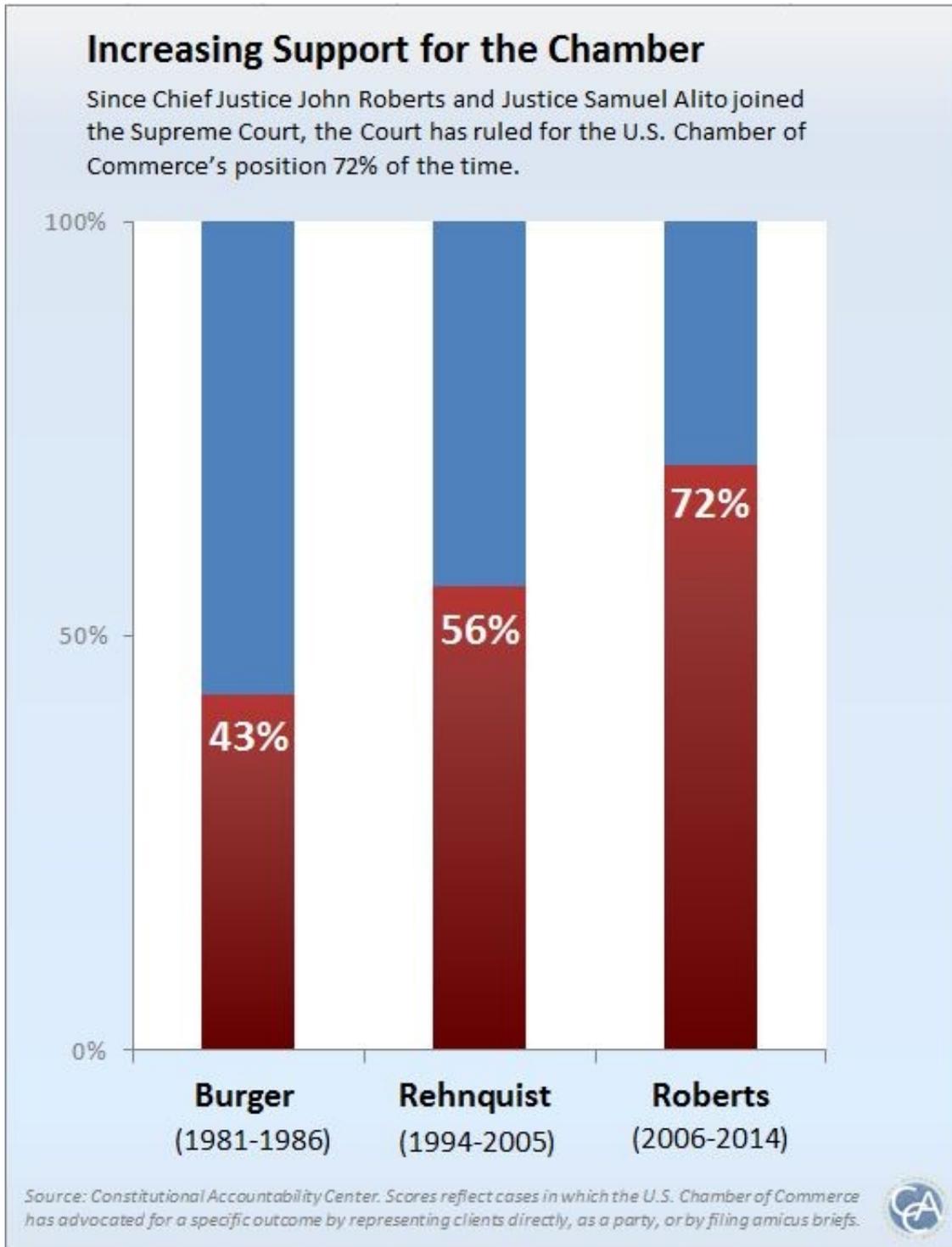


The Supreme Court Conference Room where the justices work.

For the judges who work in the comfortable confines of the nation’s federal courthouses, it may be difficult to truly understand how dangerous steel work is and why putting on the protective equipment involved is not only mandatory, but an integral part of the work. But the myopic view of the working class is not only a factor of environment, but rather a function of how judges make their way to the federal bench. For the judges who have never worked with their hands (or even worked around people who work with their hands), the working class exists only in hypotheticals, in anecdotes, or in passing.

This inability to adequately relate to blue collar workers is what I refer to as “collar bias.” In disputes between white collar parties and blue collar parties, the cards are always stacked against the laborers. The “pro-business, anti-regulatory, and ideologically conservative” Chamber of Commerce gets [more Supreme Court cert petitions granted each year than any other group](#) and has a [continually growing success rate](#) in the high court.⁵ [5. The Constitutional Accountability Center has been tracking the Chamber of Commerce’s litigation record before the Supreme Court since 2010. See *also* Jeffrey Rosen, [Supreme Court Inc.](#), N.Y. TIMES (Mar.

16, 2008).] The working class is routinely and consistently outclassed in court by corporations and business interests. The fact that the Supreme Court justices have little to no experience in any blue collar occupation should certainly be considered a factor in this trend.



Of the current Justices, only Justice Sotomayor stems from a working class background and aside from her teenage years, Sotomayor worked exclusively in white collar positions. Sotomayor, of all the Justices, might be able to bring some perspective to the blue-white collar

divide. Whereas none of the Justices felt that steelworkers should be paid for putting on protective equipment necessary for their safety and to perform their duties, Sotomayor once noted that her “first glimpse inside corporate America” was disappointing due to “how much time presumably productive people were capable of wasting.”⁶ [6. SONIA SOTOMAYOR, MY BELOVED WORLD 164–5 (2013).] In my own experience, white collar workers who find ways to get paid for doing nothing are considered savvy, while blue collar workers who try to get compensated for work-related activities are considered greedy.

The path to the Supreme Court does not run through factories and construction sites. Rather, without at least one Ivy League degree (preferably two or more), one is highly unlikely to ever get appointed. The majority of federal judges “tend to be from either the netherworld of political clubs or the top-of-the-world country club community.”⁷ [7. MARTIN MAYER, THE JUDGES 62 (2006).] This is not a modern phenomenon. In the 1840’s, Alexis de Tocqueville stated:

If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.⁸ [8. *Id.* at 53 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 288–89 (Vintage Books 1954)).]



Charles Evan Hughes demonstrates how a proper Supreme Court justice should dress.

Indeed, federal judges live far removed from the daily struggle of blue collar life. The work of a federal judge, while difficult, is not physically demanding or dangerous. The only protective clothing necessary is a robe, which clothes the wearer with great power. There is no hourly wage, no penalty for tardiness. There is no struggle to live paycheck to paycheck. [Most of the Supreme Court justices are millionaires](#); none ever have to worry about getting fired or laid off.

The oral argument in Sandifer demonstrates just how oblivious the justices are to the reality of blue collar labor. The case hinged on whether the protective gear the steelworkers had to don each day should be considered “clothing,” as time spent “changing clothes” had been bargained away by the union. The “clothing” in question consisted of twelve particular items, as demonstrated in an attachment to the 7th Circuit opinion (likely one of Judge Posner’s [otherwise illustrious clerks](#)).⁹ [9. The items: a flame-retardant jacket, flame-retardant pants, hood, hardhat, snood, wristlets, work gloves, leggings, steel toe boots, safety glasses, earplugs, and a respirator.]



@Real_JPosner: Hey @Frank_Estrbrk: Check out my law clerk! Gonna put this in an opinion!
#posnering

The justices, all obviously lacking in familiarity with the process of putting on and taking off protective equipment for work, had difficulty relating to the process. Justice Ginsburg likened the protective gear to the uniform “a doorman in an apartment house” might wear.¹⁰ [10. [Transcript of Oral Argument](#), *Sandifer*, 134 S.Ct. at 18–19.] Justice Sotomayor compared a task thousands of Americans engage in daily to jousts “putting on a suit of armor” or astronauts putting on space suits.¹¹ [11. *Id.* at 37. The latter Sotomayor referred to as “the space people who put on that complicated white suit that has all the connections to equipment.”] Justice Alito thought it would be helpful to examine why the human species ever began wearing clothing in the first place.¹² [12. *Id.* at 6. For protection against cold and thorns, Justice Alito concludes.] Justice Scalia, to no one’s surprise, looked to the dictionary to find the textualist meaning of what “clothes” are.¹³ [13. *Sandifer*, 134 S.Ct. at 876–77.]

In the decision below, written by famed economist Richard Posner, Posner actually does show some judicial empathy—for U.S. Steel, of course. Posner repeatedly argues that paying steelworkers for time spent not making steel is adverse to their long-term interests. Shame on the steelworkers for believing that time spent at the workplace engaging in activities necessary for the work is time spent at work! Don’t they know that if companies have to pay them for anything other than making steel, the companies will have to cut their pay or ship their jobs overseas?!¹⁴ [14. [Sandifer v. U.S. Steel Corp.](#), 678 F.3d 590, 594, 597 (7th Cir. 2012).] Somehow, Judge Posner fails to realize that because that time is not being compensated, the costs are already borne by the workers. Of course, it is difficult to see the workers’ perspective when looking down through the scope of corporate interests.

The primary path to a career at the nation’s highest court only goes through the nation’s elite schools. From there, pre-justices typically go to work in lucrative private practice, high profile political positions, or academia. The occasional justice will have a military or working class background, but the majority were born into privilege, live in luxury, and have little exposure to the daily grind. As federal judges become further and further removed from the working class, it is highly likely that more and more decisions will come out on the side of corporate America and the upper class; those are the kinds of people the judges can relate to.