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The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court

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TABLE OF CONTENTS

Introduction 906
I. The Norm of Prior Judicial Experience 909
A. Evidence for the Existence of the Norm 909
B. Career Homogeneity Resulting from the Norm 917
1. Occupation at Time of Appointment 918
2. Homogeneity of Career Paths 927
C. Discussion 937
II. The Importance of Diversity in Institutions 941
A. A General Argument for Diversity 942
1. Diversity in Collective Decision-Making Bodies 944

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We used SPSS and R statistical programs to analyze the data. For all data and documentation necessary for replication of the results, see http://www.artsci.wustl.edu/~polisci/epstein/research/diversity.html.

HeinOnline --- 91 Cal. L. Rev. 903 (2003)

2. The Importance of Diversity in the Argument for Competitive Markets 948
3. Diversity as a Justification for Common Law Courts 950
III. The Importance of Career Diversity on the Supreme Court 953
A. The Positive Effects of Career Diversity on Judicial Decision Making 954
B. Eliminating Career Homogeneity to Diversify the Gender and Racial/Ethnic Composition of the Court 956
IV. Implication of the Study 960

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Lee Epstein, Jack Knight & Andrew D. Martin

For at least three decades now, those charged with nominating and confirming Justices to the U.S. Supreme Court seem to be following a norm of prior judicial experience—one that makes previous service on the (federal) bench a near prerequisite for office. Largely as a result of this norm, today's Court, while growing more and more diverse on some dimensions, is becoming less and less so on the dimension of career diversity.

We argue that all norms that cut against diversity are problematic because they reduce the ability of the decision-making group (the Supreme Court not excepted) to perform its tasks. We further argue that the norm of prior judicial experience is particularly troublesome for two reasons. First, since virtually all analyses show career path to be an important factor in explaining judicial choices—from the votes Justices cast to their respect for stare decisis—the homogeneity induced by the norm suggests that the current Court is not making optimal choices. Second, since women and people of color are less likely than White men to hold positions that are now, under the norm of prior judicial experience, steppingstones to the bench, the norm is also working to limit diversity on dimensions other than career path.

This Article draws on multiple sources, ranging from an original database that houses a wealth of information on the occupational backgrounds of the Court's Justices to the writings of leading contemporary thinkers. From these sources, we extract a clear and significant policy implication: Because of problems associated with a perpetuation of the norm of prior judicial experience, we argue that the Senate, the president, and other key players in the confirmation process should give greater attention to the nominees' career experiences. But such attention ought not come in the form of reserving the next two, three, or four vacancies for nominees hailing directly from private practice, legislatures, the cabinet, and so on. Rather, it should come about by taking into account the career experiences of Justices remaining on the Court and then working to avoid excessive duplication.

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INTRODUCTION

J. Harvie Wilkinson, Frank Easterbrook, Emilio Garza, J. Michael Luttig, Edith Jones, and Janice Rogers Brown. All of these persons have at least two things in common. First, they are the most "frequently named potential George W. Bush U.S. Supreme Court nominees."[1] Second, they are sitting judges—with all but Brown serving on a U.S. court of appeals.[2]

This is no coincidence. For at least three decades, those charged with nominating and confirming Supreme Court justices seem to be following a norm of prior judicial experience—one that makes previous service on the (federal) bench a near prerequisite for office.[3] In fact, since William H. Rehnquist's appointment in 1971, no president has nominated and no Senate has confirmed a justice to the Supreme Court who lacked judicial experience.[4] Furthermore, more than fifty years have elapsed since a president has elevated a sitting legislator to the Court (Harold Burton in 1945), forty since the appointment of a cabinet secretary (Arthur Goldberg in 1962), and thirty since the nomination of an attorney hailing directly from private practice (Lewis F. Powell in 1971).[5]

Largely as a result of this norm of prior judicial experience, today's Court, while growing more diverse in some dimensions,[6] is becoming less so on the dimension of career diversity. All nine justices serving in 2002 held positions in the public sector immediately before their ascension to the Court. With the exception of Chief Justice Rehnquist, who did not obtain his position by way of the nation's judiciary, the other eight justices served on either state or U.S. courts of appeals before joining the Court.[7] Just three

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1. *E.g.*, Kenneth L. Manning et al., *George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?*, 85 JUDICATURE 278, 280-81 (2002). The authors developed their list of potential nominees by consulting "five diverse news, opinion, and legal information sources: *ABC News*, *USA Today*, *The American Prospect*, *National Review*, and *Lexis-Nexis*." *Id.*

2. Brown is an associate justice on the California Supreme Court. Easterbrook serves on the U.S. Court of Appeals for the Seventh Circuit; Garza and Jones are on the Fifth Circuit; and Luttig and Wilkinson are on the Fourth Circuit.

3. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS (1999), MARK SILVERSTEIN, JUDICIOUS CHOICES (1994), DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES (1999). *See also infra* Part I (providing more discussion of the norm of prior judicial experience, including its origins).

4. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 324-31 tbl.4-9 (3d ed. 2003).

5. *Id.* Justices nominated after Powell had experience working in private law firms, *see infra* note 8, but Powell was the last justice who was in private practice at the time of appointment. *Id.*

6. For example, on the current Court there are three Catholics, two Jews, two women, and one Black. Kennedy, Scalia, and Thomas are Catholics. Thomas was born into a Baptist family but was raised as a Catholic by his grandparents; he later attended an Episcopal church, but in 1996, he returned to the Catholic church. Breyer and Ginsburg are Jewish; O'Connor and Ginsburg are women; and Thomas is Black. *Id.* at 267-331 tbl.4-3.

7. Stevens served on the U.S. Court of Appeals for the Seventh Circuit; Scalia, Thomas, and Ginsburg on the District of Columbia Circuit; Kennedy on the Ninth Circuit; Souter and Breyer on the

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of the nine justices came to the bench with any long-term experience in private practice, while two never practiced in a private law firm at all.[8] Moreover, even though all but two worked at some point as government attorneys,[9] only Justice Thomas held an appointed position in the executive branch[10] that did not necessitate a law degree.[11] No previous members of a presidential cabinet can be found among the current justices, nor are there any former Senators or even members of the House of Representatives. In fact, Justice O'Connor is the Court's only member ever elected to a public office that did not call for a legal background.[12]

This degree of career homogeneity has not gone unnoticed by scholars. After conducting an extensive investigation into factors affecting presidential choices of Supreme Court nominees, David Yalof claimed that "federal circuit court judges have become the 'darlings' of the selection process."[13] Other commentators agree,[14] as do jurists. Just this past year, Chief Justice Rehnquist observed that, while at one time his Court housed justices "drawn from a wide diversity of professional backgrounds" such as Louis Brandeis, John Harlan, and Byron White, those days are long gone.[15]

First Circuit; O'Connor on the Arizona court of appeals. Before his appointment, Rehnquist served as U.S. Assistant Attorney General. *Id.* at 324-31 tbl.4-9.

8. Kennedy was in private practice from 1961 to 1976, Rehnquist from 1953 to 1969, and Stevens from 1948 to 1951 and 1952 to 1970; Ginsburg and Breyer never practiced in a private law firm. The remaining four (O'Connor, Scalia, Souter, and Thomas) worked in private law firms, but that experience typically came early in their careers, or was rather short lived, or both. Consider Justice Scalia: After graduating from law school in 1960, he went into private practice in Cleveland, Ohio, where he remained until 1967. For the next fifteen years, he taught at the University of Chicago Law School, with interruptions here and there for various posts within the federal government until his final departure in 1982 for a U.S. judgeship. All told, of the twenty-six years between the time he obtained his law degree and his nomination to the Court, Scalia spent six years (less than 25%) in private practice. This level of experience is not atypical for this Court. Collectively, the nine justices worked in private law firms for sixty-nine years, yielding a median of six years. *See* EPSTEIN ET AL., *supra* note 4, at 272-80 tbl.4-6.

9. The two are Justices Kennedy and Ginsburg. *See id.* at 312-31 tbl.4-8.

10. Justice Thomas served as Chairman of the Equal Employment Opportunity Commission between 1982 and 1990.

11. The term "necessitate" requires explanation since many legal positions in government do not formally require law degrees. It would be possible, for example, for a president to nominate a nonlawyer to serve as Attorney General or even as a Supreme Court justice. In fact, early holders of those positions (e.g., Nathan Clifford, who served as U.S. Attorney General between 1846 and 1848, and became a Supreme Court justice in 1858) typically did not have law degrees. Rather, "it was common for lawyers to be trained by 'reading the law'. . . . This was accomplished through self-study or by serving as an apprentice under an experienced lawyer. Only in the more modern period have justices trained in a formal law school setting." EPSTEIN ET AL., *supra* note 4, at 293 tbl. 4-4. Nonetheless, since it is unlikely that a contemporary president would appoint a non-J.D. to these sorts of positions, we use the term "necessitate" (or "require") here and throughout the Article.

12. Justice O'Connor served in the Arizona Senate from 1969 to 1975. *See id.* at 318 tbl.4-8.

13. YALOF, *supra* note 3, at 170.

14. *See, e.g.*, ABRAHAM, *supra* note 3, at 41-45; SILVERSTEIN, *supra* note 3, at 166-76.

15. William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, *at* http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html (Jan. 1, 2002). The relevant portion of Rehnquist's report is as follows:

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That presidents now look primarily to the U.S. courts of appeals to identify potential nominees disturbs Rehnquist because he fears that the Court will over time "too much resemble the judiciary in civil law countries."[16] As discussed below, these civil law judiciaries consist mainly of judges whose only career experience is service on the court. As a result, Rehnquist notes, these courts "simply do not command the respect and enjoy the independence of ours."[17] We are likewise disturbed by the lack of career diversity apparently resulting from the norm of prior judicial experience, but for a different reason: Norms that cut against diversity reduce the ability of the decision-making group to perform its responsibilities.

Although this issue holds for virtually all norms and all groups, the Supreme Court not excepted, the norm of prior judicial experience is particularly troublesome for two reasons. First, virtually all analyses show career path to be an important factor in explaining judicial decision making—from the votes justices cast to their respect for stare decisis.[18] The current Court's career homogeneity suggests that it is not making optimal choices, or at least choices less optimal than those made by its more diverse predecessors. Second, since women and members of racial/ethnic minorities are less likely than White men to hold the positions that are currently steppingstones to the bench,[19] the norm of prior judicial experience is working to limit not only career diversity but also gender and racial/ethnic diversity.

Our general claim thus is a simple one. We argue that there now exists a norm of prior judicial experience that induces a highly problematic level of career homogeneity on the Court. To support our argument, we demonstrate empirically in Part I what the extant commentary suggests: The career paths of justices serving on the Court are consistent with the existence of a norm of prior judicial experience. We further show that the norm, again in line with speculation on the part of commentators, has led to an extraordinary lack of career diversity. At no other time in American history has the Court been composed of justices so alike in terms of their

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> The federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice. As to the Supreme Court, Justice Louis D. Brandeis, who was known as 'the people's attorney' for his *pro bono* work, spent his entire career in private practice before he was named to the Supreme Court in 1916 by President Wilson. Justice John Harlan served in several government posts early in his career, but the lion's share of his experience prior to his nomination by President Eisenhower in 1954 was in private practice. . . . Retired Justice Byron White, who played professional football for the Detroit Lions on the weekends while attending Yale Law School, was in private practice in Colorado for nearly 14 years before joining the Justice Department as deputy attorney general to Robert Kennedy.

Id.

16. *Id.* Rehnquist is not the only justice to register complaints about the norm of prior judicial experience. For the comments of other Court members, see *infra* Part I.C.

17. Rehnquist, *supra* note 15.

18. For a list of these analyses, see *infra* Appendix.

19. *See infra* pp. 956-60.

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career experience. Next, in Parts II and III, we turn to the normative components of our claim. Drawing on diverse bodies of legal and social science literature, we explain why norms that produce homogeneous groups, in particular the norm of prior judicial experience, are fraught with dangers.

From this analysis we extract a clear and significant policy implication. Because of problems associated with a perpetuation of the norm of prior judicial experience, we urge the president, the Senate, and other key players in the confirmation process, as well as the general public, to pay greater attention to the career experiences of those they would like to serve on the nation's highest Court. But such attention, as we explain in Part IV, ought not result in reserving the next two, three, or four vacancies for nominees hailing directly from private practice, legislatures, the cabinet, and so on. Rather, it should come about by taking into account the career experiences of justices remaining on the Court to avoid excessive duplication.

I
THE NORM OF PRIOR JUDICIAL EXPERIENCE

We base our general claim that the norm of prior judicial experience may adversely affect the Court's ability to perform at optimal levels on interrelated empirical and normative analyses. This Part sets forth the empirical analysis, which shows that data on the career experiences of Supreme Court nominees support two conclusions: (1) that a norm of prior judicial experience exists, and (2) that this norm has induced unprecedented levels of career homogeneity on the Court. In Parts II and III, we turn to the normative analysis of the adverse consequences that this lack of career diversity confers on the Court's decision-making capabilities.

A. Evidence for the Existence of the Norm

The claim that a norm of prior judicial experience currently exists is hardly novel. As early as 1959[20] and as recently as 2002,[21] commentators and jurists have acknowledged the grave reluctance of presidents to nominate and Senates to confirm anyone other than sitting judges (usually U.S. court of appeals judges) to the Court.

It is not that analysts agree on all features of the norm; they surely do not. For example, while almost all claim that its genesis lies in the 1950s during the Eisenhower years, some suggest that the norm originated with certain members of Congress, who, in the wake of Chief Justice

20. *E.g.*, John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959).

21. *E.g.*, Rehnquist, *supra* note 15.

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Warren's unanimous opinion in *Brown v. Board of Education*,[22] "bitterly urge[d]" President Eisenhower to select "men who [would] base decisions . . . upon 'law,' not 'sociology.'"[23] Because these legislators thought that such men, at least in their eyes, were more likely to come to the Court from federal judgeships, and not from legislatures (e.g., Hugo Black), academia (e.g., Felix Frankfurter), or governors' mansions (e.g., Earl Warren),[24] they went so far as to propose legislation requiring that all future appointees have at least five years of judicial experience.[25] Others argue that it was President Eisenhower himself who created the norm.[26] On this account, after nominating Warren as chief justice, Eisenhower deliberately imposed the criterion of judicial experience to distance himself from the overt cronyism that characterized the approach to judicial selection taken by his immediate predecessors, Roosevelt and Truman, and also to increase the likelihood of appointing justices who would "command the respect, confidence, and pride of the population."[27]

In addition to its genesis, analysts disagree over the wisdom of the norm. Some defend it on much the same grounds as did Eisenhower: as possibly the best mechanism to ensure the appointment of the most capable, ethical, and qualified individuals.[28] Others are quite critical. Rehnquist, for one, claims that a Court replete with former judges will be unable to command respect.[29] A more common complaint, however, is that the norm serves as a vehicle for presidents and Senates to assess the political ideology of potential candidates.[30] Even Eisenhower, some say, created the

22. 347 U.S. 483, 494 n.11 (1954) (citing social science studies to support its position that segregation "generates a feeling of inferiority").

23. Schmidhauser, *supra* note 20, at 41.

24. Black, Frankfurter, and Warren were all members of the *Brown* Court. *See Brown*, 347 U.S. at 483.

25. JOHN R. SCHMIDHAUSER, JUDGES AND JUSTICES 17 (1979) (citing 84 CONG. REC. 6521 (1956)).

26. *See, e.g.*, SHELDON GOLDMAN, PICKING FEDERAL JUDGES 115 (1997); YALOF, *supra* note 3, at 43.

27. GOLDMAN, *supra* note 26, at 115. Indeed, Eisenhower apparently went so far as to make clear that "he would use an appeals court appointment as a stepping stone to the Supreme Court." *Id.* In his diary, Eisenhower recounted sharing this philosophy with Attorney General Brownell: "'I told Brownell that if he had any ambitions to go on the Court, that we should appoint him immediately to the vacancy now existing on the Appellate Court in New York and then when and if another vacancy occurred on the Supreme Court, I could appoint him to it.'" *Id.* Brownell turned down Eisenhower's offer. *Id.*

28. *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 42-43 (2001).

29. *See* Rehnquist, *supra* note 15.

30. *See, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 33 (2000) ("Judges and scholars perpetuate the myth of merit. The reality, however, is that every appointment is political."); Schmidhauser, *supra* note 20, at 41 ("It may be properly suspected that those who urge [the perpetuation of the norm of prior judicial experience] consciously or subconsciously assume that 'good' judges are those who are apt to render decisions in accordance with [their] ideological predilections. . . .").

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norm out of the belief that an examination of a nominee's record as a lower court judge would "provide an inkling of his philosophy."[31]

Although these debates about the norm's contours will inevitably continue, what seems beyond debate is the norm's continuing existence. No contemporary scholar who has written on the subject would dispute Yalof's claim that, at least since the 1950s, U.S. court of appeals judges have been "the 'darlings' of the selection process."[32]

Even so, the evidence in support of the norm of prior judicial experience tends toward the anecdotal or asystematic. This need not be the case. Though we cannot directly observe it,[33] we can identify the norm's possible manifestations and ultimately trace them against data that we can observe. If the norm of prior judicial experience has been in effect since the Eisenhower years, we might expect to find three particularly compelling manifestations: (1) a majority of sitting judges among those names on contemporary presidential "short lists" for the Court; (2) a statistically significant difference between the percentage of nominees who were sitting judges before Eisenhower's first appointment in 1953 and thereafter; and (3) a statistically significant increase over time in the percentage of Court members who were sitting judges at the time of their nomination. As it turns out, all three manifestations point in the same direction reflected in the extant commentary: They are consistent with the existence of a norm of judicial experience.

Beginning with the first manifestation—the names of persons on presidential short lists—all modern presidents have given serious consideration almost exclusively to federal judges. Ford, for example, apparently considered well over a dozen persons, most of whom were federal judges, before boiling down his final choices to U.S. court of appeals judges Arlin M. Adams and John Paul Stevens.[34] With only scattered exceptions, the names on Reagan's lists for all four appointments he made to the Court were those of sitting jurists on a U.S. court of appeals.[35] The final four candidates on Bush Sr.'s short list to replace William Brennan were all U.S. court of appeals judges (Edith Jones, David Souter, Laurence H. Silberman, and Clarence Thomas), as were those for Thurgood Marshall's seat (Clarence Thomas, Edith Jones, Jose Cabranes, and Emilio Garza).[36] Clinton apparently gave consideration to several politicians such as Bruce

31. ABRAHAM, *supra* note 3, at 191.

32. *See* YALOF, *supra* note 3, at 170; *see also* text accompanying note 13.

33. *See, e.g.*, Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 365 (2001) ("[N]orms 'are not directly observable' and, thus, notoriously difficult to document—so much so that the best we can typically do is trace their manifestations. . . ."); *see also* Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 875 (1998).

34. ABRAHAM, *supra* note 3, at 275.

35. YALOF, *supra* note 3, at 133-67.

36. ABRAHAM, *supra* note 3, at 304, 310.

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Babbitt, Mario Cuomo, and George Mitchell. But like his predecessors, most of the candidates he seriously deliberated were jurists (including Gilbert Merritt, Jon O. Newman, Amalya Kearse, and Richard S. Arnold), as were his eventual nominees, U.S. court of appeals judges Stephen Breyer and Ruth Bader Ginsburg.[37] Finally, as previously mentioned, George W. Bush's list is replete with sitting judges.[38]

The presence of sitting jurists on presidential short lists is important. It is not, however, the only possible manifestation of a norm of prior judicial experience, nor is it necessarily the most convincing. After all, even if the norm does not constrain presidents in their private thinking about the Court, it may still constrain their public behavior. So, for example, while Clinton contemplated tapping Babbitt (who was then the Secretary of the Interior) for a seat on the Court, he dropped that idea when some expressed concern about Babbitt's "lack of judicial experience."[39]

Accordingly, perhaps more telling signs of the norm come from the record of those actually nominated. As noted above, two manifestations are particularly important: (1) a change in the percentage of nominees who were sitting judges before Eisenhower's first nomination in 1953 and thereafter; and (2) a growth in the percentage over time of Court members who were sitting judges at the time of their nomination. To assess the first, we amassed data on the backgrounds of all persons nominated to the Court by all presidents.[40] As seen in Figure 1, whether we consider all nominees or only those who were successfully appointed to the Court, we find evidence consistent with the existence of a norm of judicial experience. The anticipated statistically significant difference emerges between the judicial backgrounds of those appointed before 1953 and thereafter[41]—of the 121 nominations made by Eisenhower's predecessors, roughly one-third (42 of the 121) went to persons who were sitting judges at the time of appointment; of the 27 nominations made since 1953, about three-quarters (20 of the 27) were to sitting judges.

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37. *Id.*; SILVERSTEIN, *supra* note 3, at 167-76.

38. *See supra* notes 1-2 and accompanying text.

39. SILVERSTEIN, *supra* note 3, at 170.

40. All data used here and throughout the Article are available on our website: http://www.artsci.wustl.edu/~polisci/epstein/research/diversity.html. For this analysis and all analyses of positions at the time of appointment, we double count associate justices nominated to serve as chief justice (e.g., the post-1953 cohort includes Rehnquist as an associate justice and as chief justice). We made this decision because a president could have appointed someone other than a sitting associate justice to the chief justice slot (that is, a person who was not a judge at the time of nomination).

41. The Pearson Chi Square for all nominees is 14.051 ($p < 0.001$); for successful nominees it is 6.138 ($p = 0.013$). A Pearson Chi Square is a measure of statistical independence; for sufficiently large values, one can reject the null hypothesis of independence. The p-value indicates the exact level of statistical significance. If the p-value is lower than a threshold of Type I tolerable error (typically 5%), then one can conclude that the relationship in the observed data is not due to chance alone and is thus statistically significant. MORRIS H. DEGROOT & MARK J. SCHERVISH, PROBABILITY AND STATISTICS 536-37 (2002).

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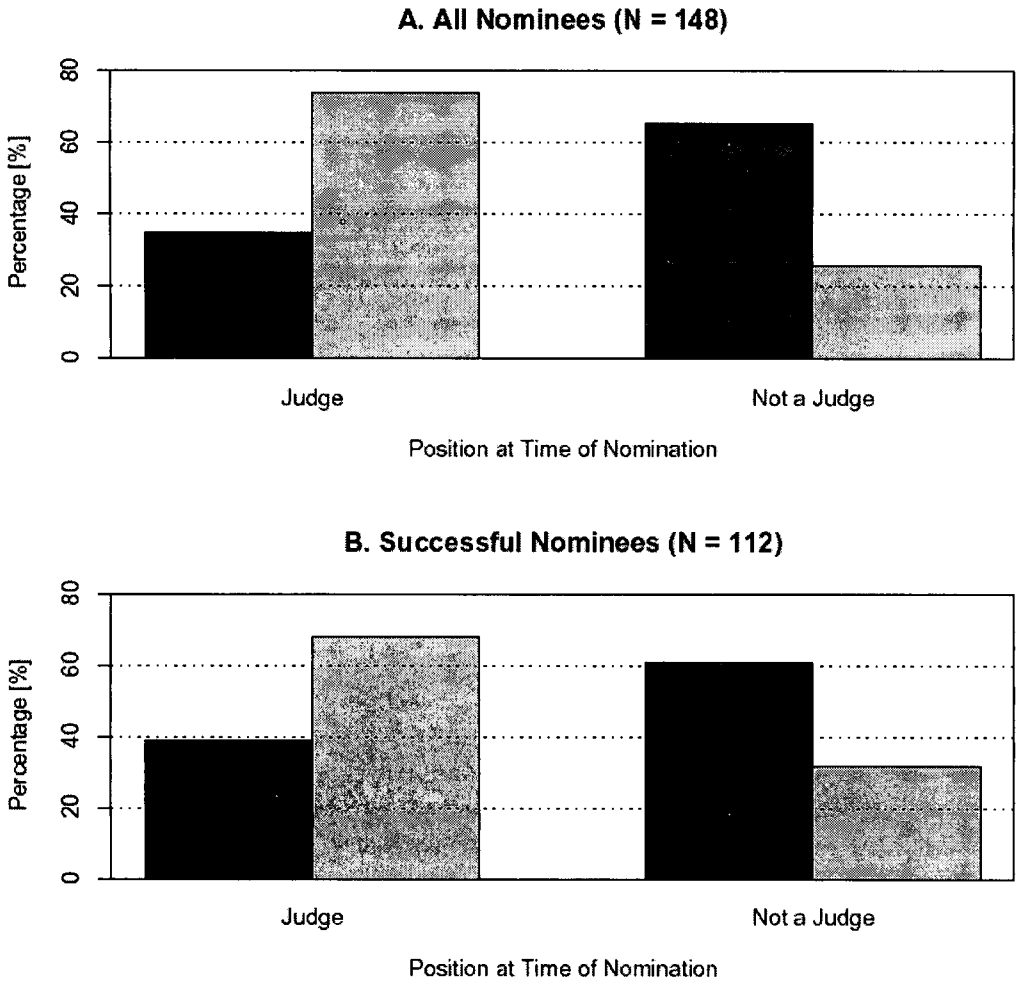
Figure 1 Percentage of Nominees Holding Judgeships When Nominated to the U.S. Supreme Court, by Era (Pre- and Post-1953)[42]



Note: The dark bars represent the time period 1789-1952, ending at the nomination of Earl Warren. The light bars cover those nominated thereafter, from 1953 to the present.

Interestingly, the seven exceptions to the general rule of prior judicial experience in the post-Eisenhower years came early. Eisenhower himself generated one with his 1953 nomination of Earl Warren, who was the governor of California at the time.[43] But that exception is readily explicable in

42. Data are from EPSTEIN ET AL., *supra* note 4, at 324-31 tbl.4-9; *see also supra* note 40.
43. EPSTEIN ET AL., *supra* note 4, at 341 tbl.4-12.

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light of accounts suggesting that it was Warren's opinion in *Brown* that led to the creation of the norm in the first place.[44] Since the remaining six exceptions occurred during the Kennedy, Johnson, and Nixon years,[45] we might be tempted to conclude that the extant literature is insufficiently nuanced—that the norm may have had its origins in the Eisenhower years but failed to take hold until the Ford and Reagan presidencies. This assessment may accurately characterize the Kennedy and Johnson administrations, both of which apparently focused more on personal and political patronage than on prior judicial experience.[46] Nixon, however, seemed to revive the norm, or at least attempted to do so, explicitly directing his advisors to follow Eisenhower's model of using prior judicial experience as a criterion for serious consideration for the Court.[47] Nixon achieved this objective with his first two appointments, U.S. court of appeals judges Warren Burger and Harry Blackmun, though not without difficulty. The Senate rejected his first two nominees (U.S. court of appeals judges G. Harrold Carswell and Clement Haynsworth) for Blackmun's eventual seat. Those tangles with the Senate led Nixon to "forego the requirement of judicial experience, as long as that nominee could still be confirmed."[48] Even so, most of the names seriously vetted by the Nixon administration for the next two vacancies were sitting jurists, including Mildred Lillie, a California court of appeals judge.[49] These jurists, however, faced opposition from the American Bar Association, which, for example, deemed Lillie unqualified by a vote of eleven to one. As a result, Nixon moved away from the judicial experience requirement and turned to Lewis Powell, an attorney in private practice, and only through near "desperation" did he tap U.S. Assistant Attorney General William Rehnquist.[50]

Although Nixon did not fully adhere to the norm of prior judicial experience, the same cannot be said of his successors. Since 1971, all ten nominees to the Court, whether appointed or not, held judgeships at the time of their nomination.[51] As a result, Figure 2 shows a steep increase since the 1950s in the percentage of justices who were sitting judges at the time of their nomination. In fact, a regression of the percentage of judges

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44. *See supra* Part I.A.

45. All three presidents appointed two nonsitting jurists. Kennedy appointed Byron White (U.S. Deputy Attorney General) and Arthur Goldberg (U.S. Secretary of Labor); Johnson named Abe Fortas (a lawyer in private practice) and Thurgood Marshall (U.S. Solicitor General); and Nixon nominated Lewis Powell (a lawyer in private practice) and William Rehnquist (U.S. Assistant Attorney General). EPSTEIN ET AL., *supra* note 4, at 335-42 tbl.4-12.

46. *See* YALOF, *supra* note 3, at 70-96.

47. *Id.* at 97-132.

48. *Id.* at 116.

49. GOLDMAN, *supra* note 26, at 215-16.

50. *Id.*

51. Of the ten nominees, there was one nomination by Ford, five by Reagan, and two each by Bush Sr. and Clinton. EPSTEIN ET AL., *supra* note 4, at 335-42 tbl.4-12.

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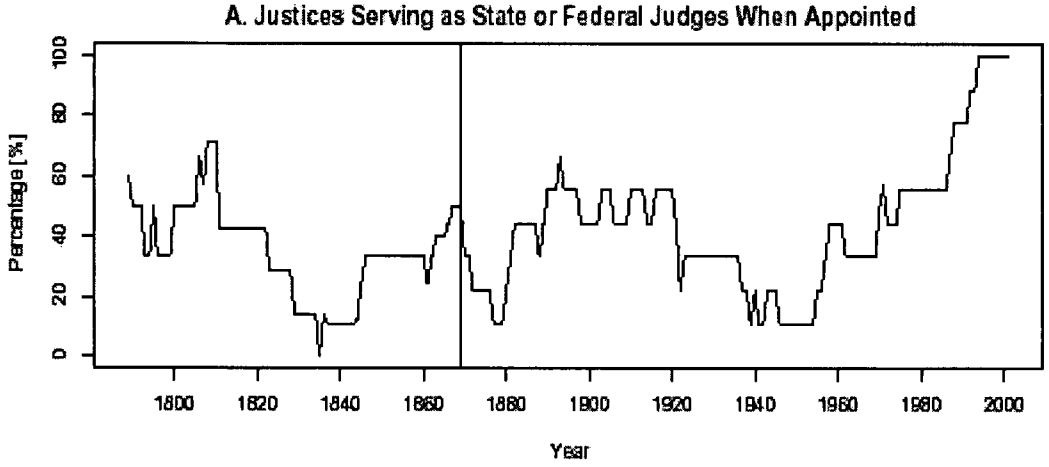
on time for the years subsequent to 1953 (illustrated in Panel A) produces a slope coefficient that is positive and significant;[52] for a regression for the period before 1953 the relationship is statistically insignificant.[53] In accord with various accounts of the norm of prior judicial experience, the growth has been uneven.[54] What has increased precipitously and significantly since 1953 is the percentage of nominees coming from federal courts (Panel B). The percentage coming from state courts (Panel C), on the other hand, has remained relatively flat.

Figure 2 Percentage of Justices with Judgeships When Nominated, by Year (1789-2001)[55]



Note: The vertical line corresponds to the year 1869, when a separate circuit court of appeals was established.

52. A linear regression model quantifies the relationship between two interval-level variables. JOHN FOX, APPLIED REGRESSION ANALYSIS, LINEAR MODELS, AND RELATED METHODS (1997). In this case, the percentage of justices serving as judges is regressed on time. A statistically significant slope coefficient suggests that there is a linear trend in time that differs from zero. Here, the coefficient is significant with $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

53. $p = 0.0872$. *See supra* note 41 (explaining the significance of p-values).

54. *See* GOLDMAN, *supra* note 26; YALOF, *supra* note 3.

55. Data are from EPSTEIN ET AL., *supra* note 4, at 324-31 tbl.4-9. *See also supra* note 40.

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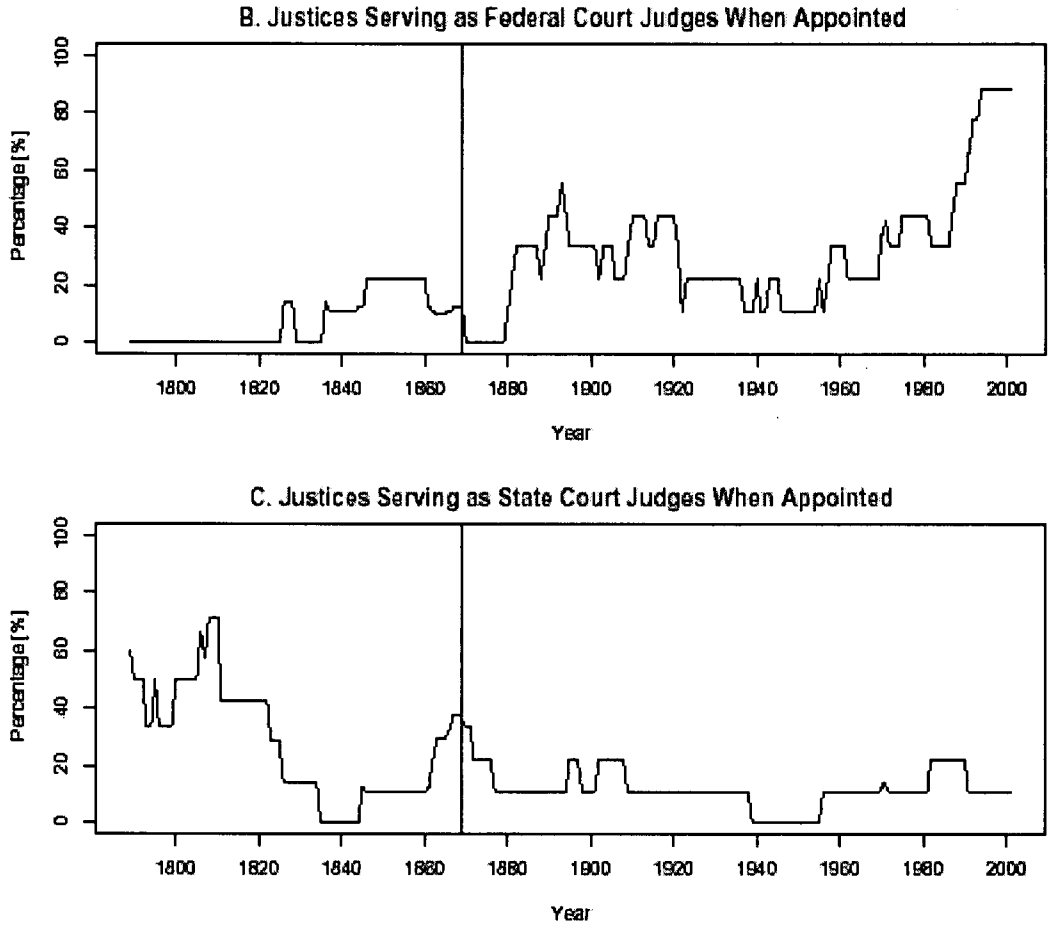
Figure 2 (cont'd) Percentage of Justices with Judgeships When Nominated, by Year (1789-2001)



Note: The vertical line corresponds to the year 1869, when a separate circuit court of appeals was established.

But should we attribute the observed growth in the percentage of nominees from the federal bench to the existence of a norm of prior judicial experience? We raise this question because another obvious explanation presents itself: the lack of a separate circuit court of appeals judiciary until 1869.[56] Accordingly, if presidents desired to appoint jurists to the Court before then, their alternatives were limited to federal district court or

56. The Judiciary Act of 1869 provided for a separate circuit judiciary of nine members. *See* Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44-45 (1869) (repealed 1911). The establishment of circuit courts of appeals (renamed courts of appeals in 1948) did not come until the Judiciary Act of 1891. *See* Evarts Act, ch. 517, § 2, 26 Stat. 826, 826-27 (1891) (codified as amended in scattered sections of 28 U.S.C.).

HeinOnline --- 91 Cal. L. Rev. 916 (2003)

state court judges. Early on, presidents generally opted for the latter, with appointments going to state judges at all levels.[57] President John Quincy Adams's nomination of U.S. district court judge Robert Trimble in 1826 marked the first departure from this general pattern,[58] but it was not until the turn of the last century when presidents made almost a complete break with the past by nearly exclusively appointing federal judges at the expense of their state counterparts.

That this break coincides with the creation of separate circuit courts suggests that the establishment of these bodies probably plays some role in explaining the trends we observe in Figure 2. However, the mere existence of a new pool of jurists cannot explain why presidents stopped looking to the state benches. Nor can it capture the steep upward trend (illustrated in Panels A and B) that began in the 1950s and continues today. Before 1953, only 16% of all justices hailed directly from the U.S. courts of appeals; after that date, 43% came from these positions.[59]

The data, therefore, seem to confirm scholarly works claiming that the norm of judicial experience originated in the mid-twentieth century. And while we cannot positively say whether those origins lay with Eisenhower or Congress, by all indications and in accord with existing commentary, presidents have now created what appears to be a norm of prior federal judicial experience.

B. Career Homogeneity Resulting from the Norm

It is one thing to document behavior consistent with the existence of a norm of prior judicial experience. It is quite another to show, in line with the second part of our argument, that the norm has worked to induce unprecedented career homogeneity on the Court. Certainly Figure 2 suggests that the percentage of justices who came to the Court directly from one of the nation's other benches has grown precipitously over time to the point where contemporary justices are no longer a heterogeneous group. But Figure 2 does not rule out two alternative explanations for these data. First, a justice's occupation at the time of appointment, which we have used thus far to gauge the existence of the norm of prior judicial experience, may not capture important features of career diversity. Those justices serving as judges when appointed could actually be a heterogeneous group, perhaps having served as legislators, government attorneys, high-level executive officials, and other similar positions before joining a state or federal bench. If this were the case, it would be more accurate to say that the norm's

57. Appointees from the highest benches of state courts included John Blair, Jr. (Virginia Supreme Court justice), and Thomas Todd (Kentucky chief justice). Appointees from lower-level judgeships included Samuel Chase (Maryland General Court judge) and William Johnson (South Carolina Common Pleas judge). EPSTEIN ET AL., *supra* note 4, at 335-42, 336 tbl.4-12.

58. *Id.* at 336 tbl.4-12.

59. $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

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primary impact was not to produce homogeneity, but to limit the pool of potential nominees to sitting judges. The second alternative explanation could be that other sorts of career experience norms may have been in effect, leading presidents and Senates to appoint only attorneys who, at the time of their nomination, worked in the private sector or served in the executive branch of the government. Thus, if the Court has traditionally lacked diversity of career experience, we would also be unable to say that the norm has induced unprecedented career homogeneity.

In light of these possible alternative explanations, we cannot end our analysis with a documentation of a rise in the percentage of sitting judges. To determine whether the norm has generated a unique lack of career heterogeneity on the Court, we must also consider trends in the types of positions held by nominees and in their overall career experience. We begin with the occupations of the judges at the time of appointment, and then turn to their career path.

1. Occupation at Time of Appointment

When presidents present their Supreme Court nominees to the public, they often discuss their candidates' current occupation at length. Consider President Clinton's statement announcing the nomination of Ruth Bader Ginsburg, and notice that two of the three reasons he offered for his choice center on Ginsburg's service on the U.S. court of appeals:

> After careful reflection, I am proud to nominate for associate Justice of the Supreme Court Judge Ruth Bader Ginsburg of the United States Court of Appeals to the District of Columbia. I will send her name to the Senate to fill the vacancy created by Justice White's retirement. As I told Judge Ginsburg last night when I called to ask her to accept the nomination, I decided on her for three reasons.
>
> First, in her years on the bench, she has genuinely distinguished herself as one of our nation's best judges, progressive in outlook, wise in judgment, balanced and fair in her opinions.
>
> Second, over the course of a lifetime in her pioneering work in behalf of the women of this country, she has compiled a truly historic record of achievement in the finest traditions of American law and citizenship.
>
> And, finally, I believe that in the years ahead, she will be able to be a force for consensus-building on the Supreme Court, just as she has been on the Court of Appeals, so that our judges can become an instrument of our common unity in the expression of their fidelity to the Constitution.[60]

60. Transcript of President's Announcement and Judge Ginsburg's Remarks, N.Y. TIMES, June 15, 1993, at A24.

HeinOnline --- 91 Cal. L. Rev. 918 (2003)

Clinton is not atypical. Virtually every recent president has, at the time of nomination, placed emphasis on his candidate's judicial position and related qualifications.

We therefore begin our analysis of career diversity with an examination of the positions held by nominees when tapped by the president. Specifically, our task is to explore the possibility that the norm of judicial experience merely supplanted other occupational norms (such as norms of only nominating legislators or attorneys in private practice), which also may have led to Courts that lacked career diversity.

To investigate this possibility, we sorted the positions held by all nominees at the time of their appointment into six categories:[61] (1) professors, (2) judges, (3) legislators, (4) nonlegal members of the executive branch (i.e., in a position that does not require legal training),[62] (5) government attorneys, or (6) attorneys in private practice.[63] Then, by calculating the percentage of justices falling into each category on every Court since 1789, we created an indicator of diversity that would enable us to assess the level of career heterogeneity both in the past and the present. Each nominee is classified into one of these six categories at the time of

61. Over the past few decades, scores of scholars and other commentators have developed numerous ways to classify the prior occupations of jurists. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 273-74 (1995); James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1704-05 (1999); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496-501 (1975); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 84-85 (2001); John R. Schmidhauser, *Stare Decisis, Dissent, and the Backgrounds of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 200 (1962); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 334-36 (2001); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1420-21 (1998); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 470-71 (1991); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 623-24 (1973). Some of these scholars' classifications are simple dichotomies, such as whether the justice served as a jurist before coming to the Court or not; others are more detailed. Given the central concerns of our research we opted for a more detailed scheme.

62. *See supra* note 11. *See also infra* note 63.

63. To elaborate, "professors" are justices who held positions in universities or colleges at the time of appointment; "judges" are justices who served as international, federal, or state jurists at the time of appointment; "legislators" are justices who served as federal or state legislators at the time of appointment; "nonlegal members of the executive branch" are justices who held elected executive (e.g., governor) or appointed positions (e.g., a seat in the U.S. cabinet, an ambassadorship, or a position on an executive commission or agency) that do not call for a legal background (e.g., a government attorney would not fall into this category), *see supra* note 11; "government attorneys" are justices who worked as lawyers at the local (e.g., district attorney), state (e.g., state attorney general), or federal (e.g., U.S. attorney, U.S. Solicitor General) level at the time of appointment; "attorneys in private practice" are justices who were in private practice at the time of appointment.

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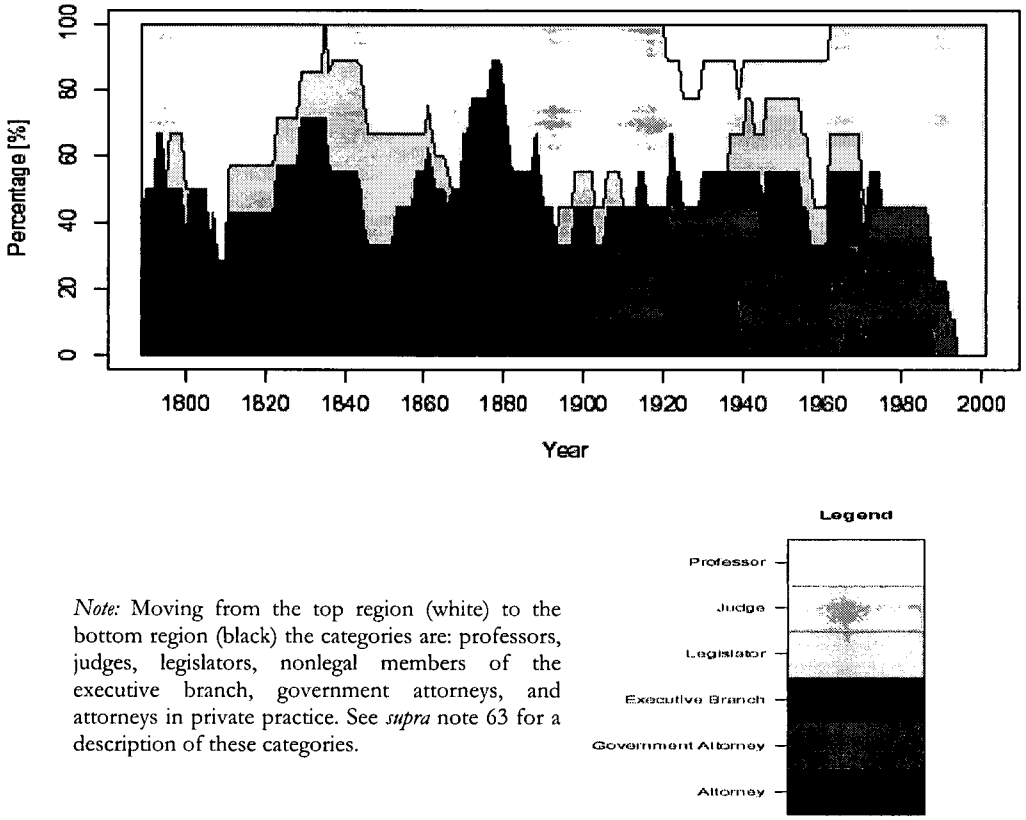
appointment. The information is encoded in a variable that takes one, and only one, of these six categories.

Figure 3 displays this indicator in gray tones. For example, of the nine justices serving in 1950, none were in private practice at the time of appointment, three (33%) worked in the U.S. Justice Department as government attorneys,[64] two (22%) were nonlegal members of the executive branch,[65] two (22%) were legislators,[66] one (11%) was a judge,[67] and one (11%) was a professor.[68] Generally, the more shades of gray, the more diverse the Court; the fewer shades, the less diverse.

Figure 3 Percentage of Justices Holding Various Positions When Appointed, by Year (1789-2001)[69]



Note: Moving from the top region (white) to the bottom region (black) the categories are: professors, judges, legislators, nonlegal members of the executive branch, government attorneys, and attorneys in private practice. See *supra* note 63 for a description of these categories.

64. EPSTEIN ET AL., *supra* note 4, at 335-42 tbl.4-12 (Justices Reed, Jackson, and Clark).
65. *Id.* (Justices Douglas and Vinson).
66. *Id.* (Justices Black and Burton).
67. *Id.* (Justice Minton).
68. *Id.* (Justice Frankfurter).
69. The data here were derived from EPSTEIN ET AL., *supra* note 4, at 335-42 tbl.4-12. *See also supra* note 40.

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Using the variation in gray tones as an indicator, it is easy to see the growing homogeneity of the Court, at least with respect to the basic occupational categories displayed in Figure 3. While multiple shades exist for almost all prior periods, between Justice Powell's retirement in 1987 and 1993 we see only two: the lighter gray representing judges and the darker gray representing government attorneys. Beginning in 1994, homogeneity reaches a new level, with all members of the Court attaining their current position via a judgeship.[70]

Cutting the data into different or even finer slices does nothing to change this basic picture of contemporary homogeneity. Consider, for example, Figure 4, which depicts the percentage of justices who held political positions on each Court by year, either as legislators (Panel A) or as members of the executive branch in capacities that did not require law degrees (Panels B and C).[71] Beginning with legislators in Panel A, we see that over the course of the last two centuries or so, justices coming directly from elected positions in the nation's legislatures have never dominated the Court: They composed about 38% of the Court during their peak from 1844 to 1845. Nonetheless, those justices serving in the U.S. Congress at the time of their appointment maintained some presence until Hugo Black retired in 1971.[72] Since Black's departure, no president has nominated a sitting member of Congress or, for that matter, a state legislator to the Court.[73]

70. Until his nomination as chief justice in 1986, we code Rehnquist as a "Government Attorney;" after his promotion, we code him as a "Judge." For our rationale, see *supra* note 40.

71. *See supra* note 11. *See also supra* note 63.

72. Black was not the last sitting member of Congress selected to serve on the Court. After his appointment in 1937, Roosevelt nominated Byrnes in 1941, and Truman named Burton in 1945. But Black outlasted both. *See* EPSTEIN ET AL., *supra* note 4, at 340-41.

73. The last sitting member of a state legislature appointed to the Court was Benjamin Curtis in 1851. EPSTEIN ET AL., *supra* note 4, at 337 tbl.4-12.

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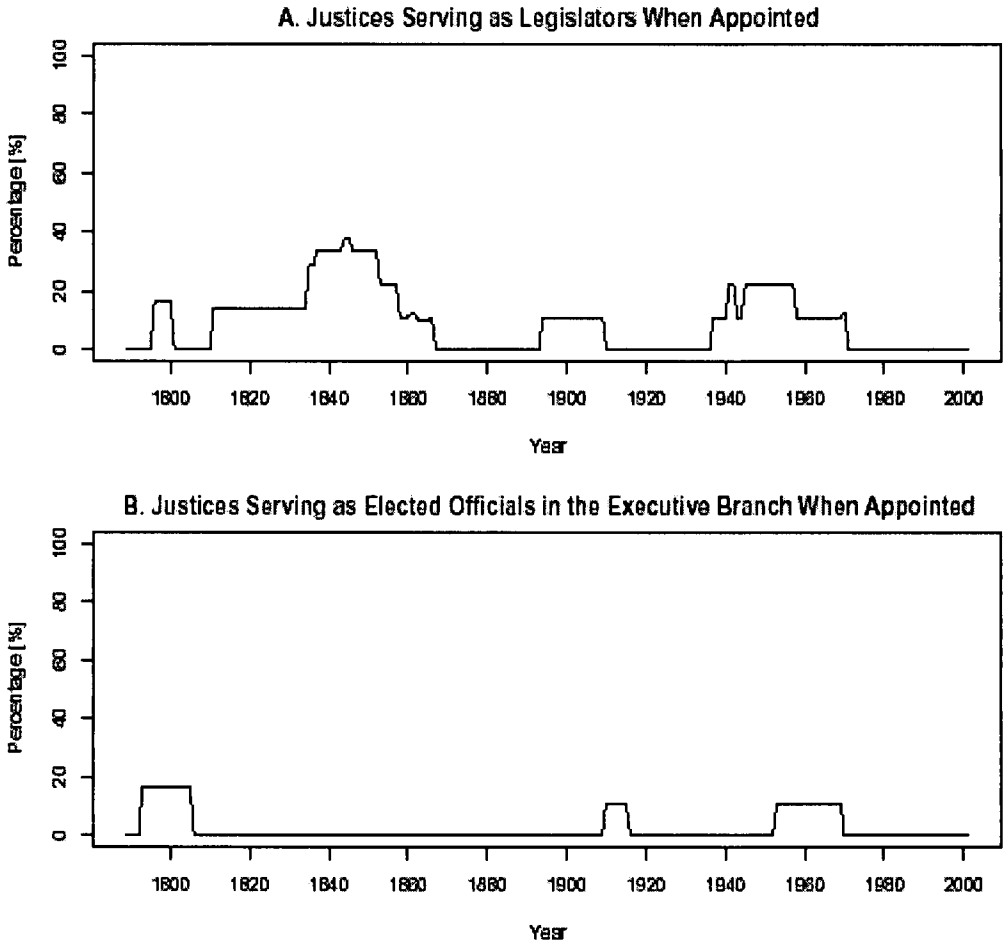
Figure 4 Percentage of Justices Holding Political Positions When Appointed, by Year (1789-2001), Part I[74]



74. The data here were derived from EPSTEIN ET AL., *supra* note 4, at 335-42 tbl.4-12. *See also supra* note 40.

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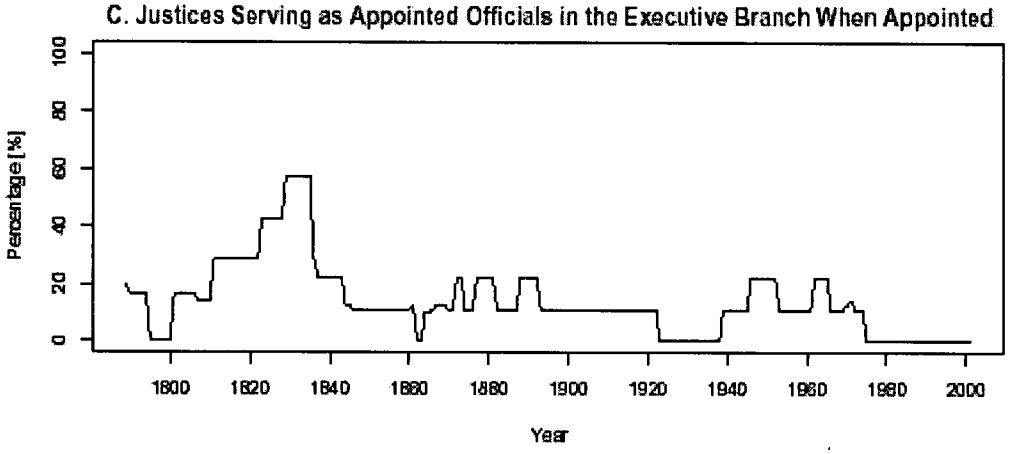
Figure 4 (cont'd) Percentage of Justices Holding Political Positions When Appointed, by Year (1789-2001), Part I



Panels B and C of Figure 4 show a similar decline in the percentage of justices holding nonlegal positions in the executive branch at the time of appointment. Although it is clear from Panel B that very few came to the bench directly from elected executive positions,[75] historically presidents have drawn numerous nominees from their appointed cabinets or commissions, including John Marshall (Secretary of State), Smith Thompson (Secretary of the Navy), Lucius Q.C. Lamar (Secretary of the Interior), and William O. Douglas (Securities and Exchange Commissioner).[76] Indeed, over 50% of the sitting justices came to the Court from these sorts of positions between 1829 and 1835.[77] That era is long past. Panels B and C and a simple regression of the percentage of justices holding either elected or appointed positions demonstrate that there has been a marked and significant decrease in appointments made directly from the executive branch.[78] Moreover, we observe a complete leveling of the lines in Panels B and C, indicating a striking reluctance on the part of presidents, at least since Lyndon Johnson tapped Arthur Goldberg in 1962, to nominate persons serving in an appointed or elected nonlegal executive position.

---

75. The only justices who came directly from elected state office were William Paterson (New Jersey Governor appointed in 1793), Charles Evan Hughes (New York Governor appointed in 1910), and Earl Warren (California Governor appointed in 1953). EPSTEIN ET AL., *supra* note 4, at 335, 339, 341 tbl.4-12.

76. EPSTEIN ET AL., *supra* note 4, at 312-23 tbl.4-8.

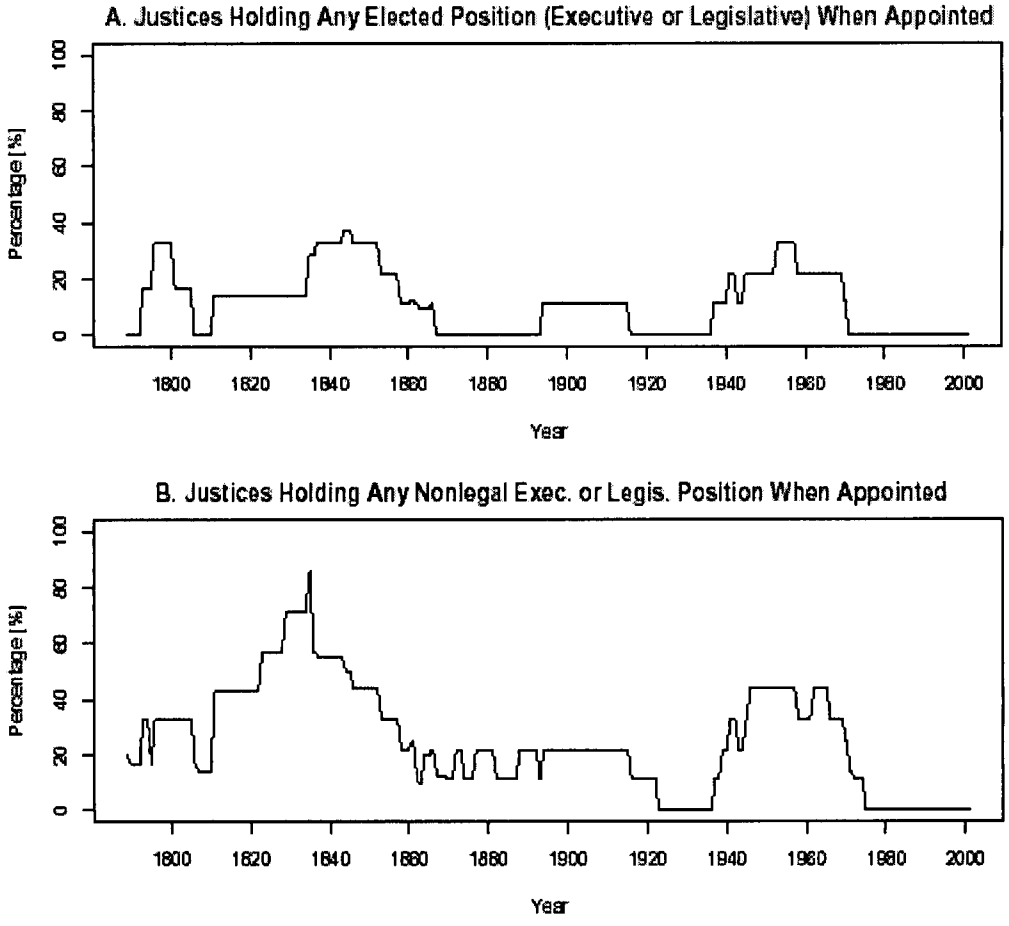
77. *Id.* Specifically, four of the seven justices serving during this period (Marshall, Duvall, Thompson, and McLean) fell into this category.

78. The slope of a regression of the percentages (taken together) in Panels B and C on time is statistically significant at $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

HeinOnline --- 91 Cal. L. Rev. 923 (2003)

Figure 5 summarizes the data in a slightly different form. Panel A shows the percentage of justices who held elected positions (either in the legislative or executive branches) at the time of their appointment; Panel B illustrates the percentage who served in a nonlegal executive position or as a legislator. In both panels, a downward trend exists,[79] but it is the tail of the panels that tells the most interesting story: Since Douglas's departure in 1975, presidents have not nominated any candidate who held a political position at the time of appointment. As Panel B demonstrates, this stands in marked contrast to the practices of the previous 186 years.

Figure 5 Percentage of Justices Holding Political Positions When Appointed, by Year (1789-2001), Part II[80]



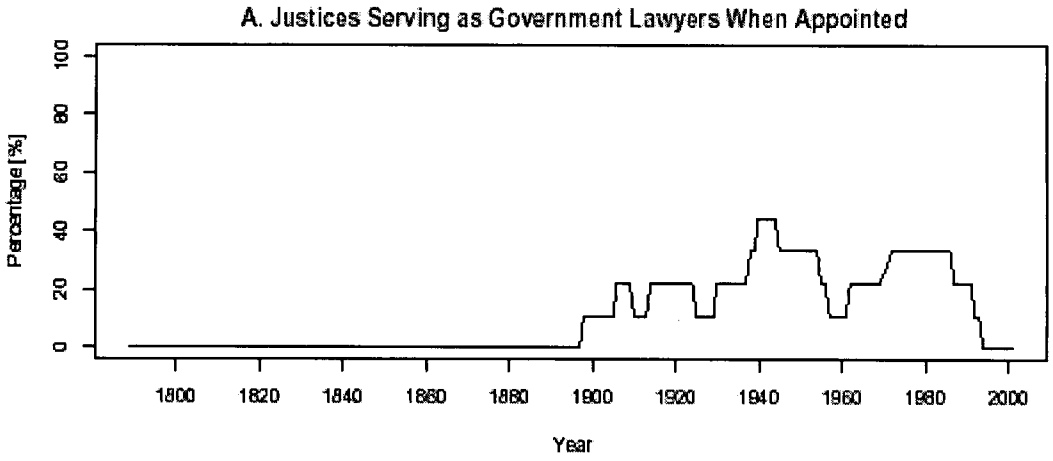
79. The slope of a regression of the measures in Figure 5, Panels A and B on time is statistically significant at $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

80. The data here were derived from EPSTEIN ET AL., *supra* note 4, at 312-23 tbl.4-8. *See also supra* note 40.

HeinOnline --- 91 Cal. L. Rev. 924 (2003)

Figure 6 further shows a decline in nominees holding various types of positions in the legal community immediately before their appointment. Whether we consider the percentage of those serving as government lawyers (Panel A), practicing in the private sector (Panel B), or holding academic positions (Panel C), the percentages flatten out. Panel B is of special interest. With the exception of the current justices and those sitting for the twenty-five year period between 1940 and 1965 (until Fortas's appointment), private practitioners have always had some representation on the Court. During one short period (1874-79), they actually held six of nine seats; but since Powell's departure in 1987, the number has been zero.

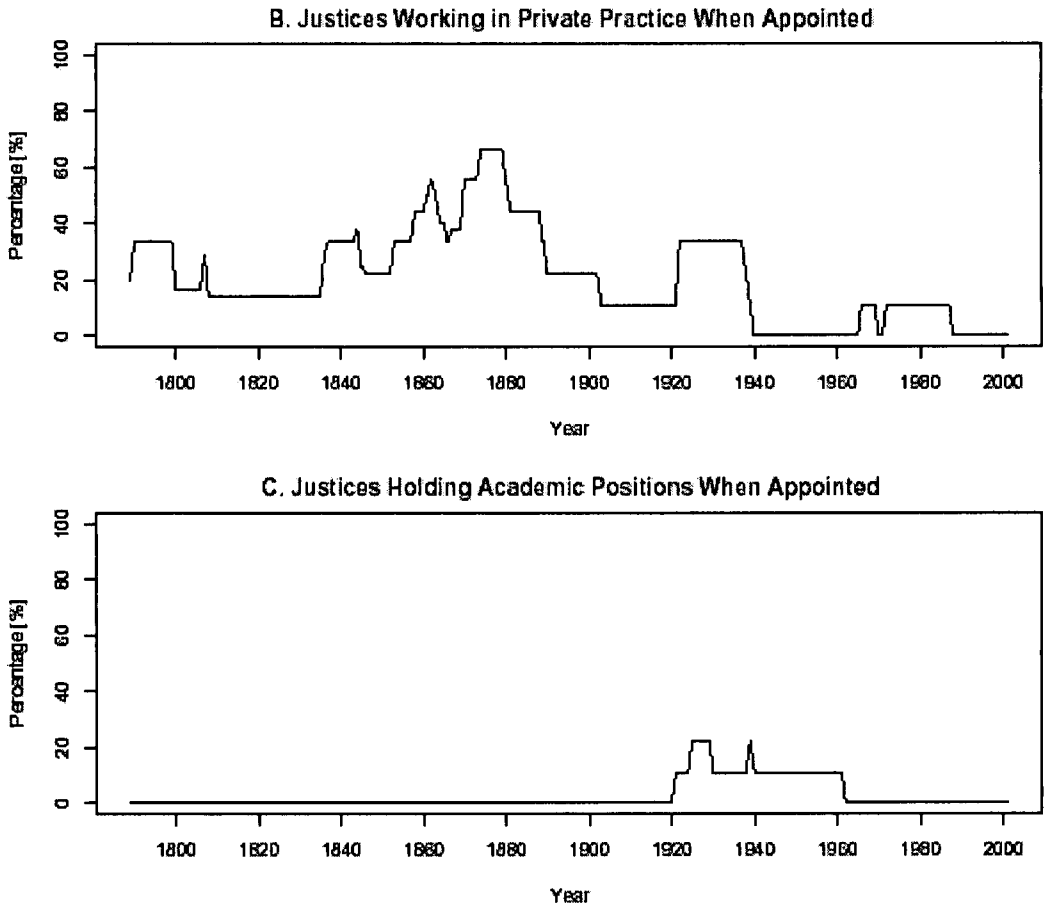
Figure 6 Percentage of Justices Holding Legal Positions When Appointed, by Year (1789-2001)[81]



81. The data here were derived from EPSTEIN ET AL., *supra* note 4, at 335-42 tbl.4-12. *See also supra* note 40.

HeinOnline --- 91 Cal. L. Rev. 925 (2003)

Figure 6 (cont'd) Percentage of Justices Holding Legal Positions When Appointed, by Year (1789-2001)



In short, presidents are no longer searching the corridors of private law firms for nominees. Nor are they looking in the halls of academia, the offices of prosecutors, or the floors of legislatures. These days, as Figure 2 makes clear, the only site they seem to visit is the courthouse—and only the federal courthouse at that.

This behavior is precisely what we would anticipate if a norm of prior judicial experience were in effect. But that is not all the data tell us. Given the overall patterns of diversity we observe in Figures 3 through 6 (at least until the contemporary era), the data also suggest that the norm of prior judicial experience did not supplant an equivalent norm, such as one that would lead presidents to nominate only attorneys in private practice or legislators. Rather, the sort of occupational norm in effect today, with

HeinOnline --- 91 Cal. L. Rev. 926 (2003)

occasional exceptions, is rather unique to the last half of the twentieth century. Thus, contemporary nominees reflect a degree of career homogeneity that is entirely unprecedented.

2. Homogeneity of Career Paths

Though instructive, the data we have presented thus far are limited. They deal only with the position held at the time of ascension to the Court and may thus overlook other critical career experiences. To see this, we need only consider Sandra Day O'Connor. At the time of her appointment as an associate justice, she was—like all other appointees since 1971—a judge. But her resume also includes service as a state legislator, a state assistant attorney, and a private practice attorney.

Is Justice O'Connor representative? That is, is it typical for justices who come directly to the Court from other judgeships to possess a wide range of career experiences? Or are they more likely to have followed a "judicial track" early in their careers, perhaps initially serving in positions we now associate as steppingstones to the nation's judiciary (e.g., working as a state prosecutor or as an attorney in the U.S. Department of Justice)[82] and then moving directly to the bench, thereby developing less varied resumes? If the former holds, we cannot say that the norm of prior judicial experience induces career homogeneity; if it is the latter, we would have additional evidence of the impact of the norm.

To sort through these alternatives, we gathered a wealth of information on the career experiences of the justices. To the extent that these data focus attention on the complete professional occupational histories of Court members and not simply the position they held at the time of appointment, they differ from the data we presented above. But our reason for examining them is identical: to determine whether the norm of prior judicial experience has induced an unusual degree of homogeneity on the Court. Our approach to making this determination also follows from the previous section. We examine whether justices serving in each Court era possessed any experience in the following categories: (1) attorneys in

82. Data in Sheldon Goldman & Elliot E. Slotnick, *Introduction: Clinton's Judicial Legacy*, 84 JUDICATURE 227, 244, 249 (2001), show that 41.3% of Clinton's 305 appointees to the U.S. district courts had prosecutorial experience; the figure for Clinton's 61 appointees to the U.S. courts of appeals is 37.7%. Only 28.9% of his district court and 29.5% of his court of appeals appointees lacked either prosecutorial or judicial experience. *Id. See also* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 781 (1995) ("One of the most frequently traveled routes to the state trial bench is through prosecutors' offices."); Louis Fisher, *Public Service as a Calling*, 76 TEX. L. REV. 1185, 1202 (1998) ("The solicitor generalship has often been a steppingstone to the Supreme Court."); Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 411 (2000) ("In order to become the government's advocate before the Supreme Court, Marshall gave up his life tenure as a Second Circuit judge, took a $4,500 pay cut, and moved to Washington, D.C. for a job that was generally considered a stepping stone to the Supreme Court. . . .").

HeinOnline --- 91 Cal. L. Rev. 927 (2003)

private practice, (2) legislators, (3) nonlegal members of the executive branch, (4) professors, (5) government attorneys, or (6) judges.[83] Figures 7 through 9 display the results.

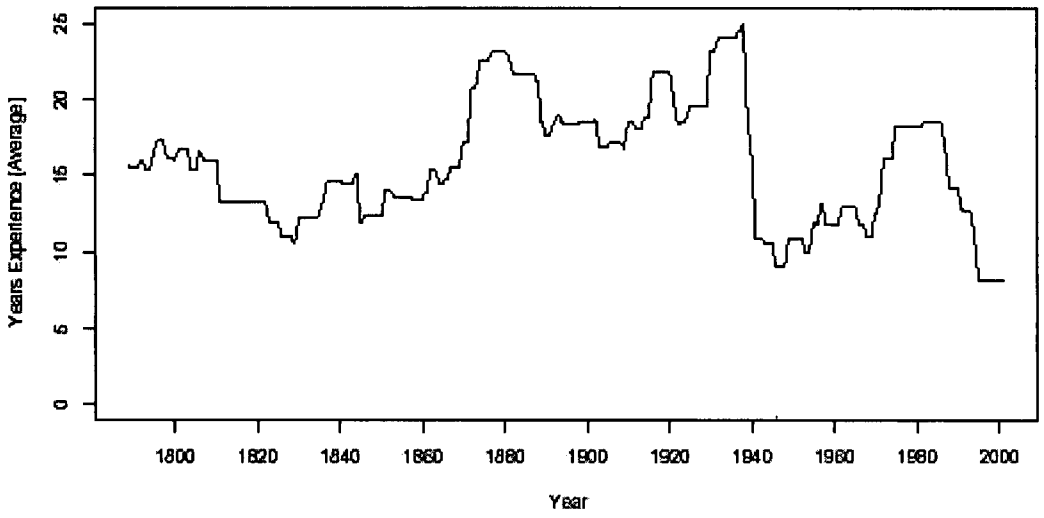
Figure 7 summarizes the justices' experience in private practice, specifically the average number of years they worked as an attorney in a private law firm. We use years rather than percentages as in the previous Section for two reasons. First, over the entire course of the Court's history all but two justices, Breyer and Ginsburg, worked at one time or another in private practice. Accordingly, percentages would not reveal much beyond what we already know. Second, even if the percentages varied from one Court era to the next, using them to summarize law firm experience could produce illusory results. Because the percentages fail to take into account the number of years of experience, they only consider whether the justices had any exposure to private practice. Whether a justice spent six years in the private sector, as did Antonin Scalia, or nearly forty, as did Louis Brandeis, strikes us and other observers[84] as a critical difference.

83. *See supra* note 63 (providing a description of these occupational categories). In the previous analyses, the number of justices was 112 because we double counted associate justices who became chief justices—a sensible decision since we were interested in "position held at the time of appointment." *See supra* note 40 (providing more details on this decision). Here, because our focus is on the totality of professional career experience, we do not double count those associate justices.

84. *See, e.g.*, Schneider, *supra* note 61, at 335; Rehnquist, *supra* note 15.

HeinOnline --- 91 Cal. L. Rev. 928 (2003)

Figure 7 Mean Number of Years Justices Worked in Private Practice Before Their Appointment to the Court, by Year (1789-2001)[85]



In looking at Figure 7, we observe the absence of any clear linear trend—the line does not move in a monotonic (linear) fashion over time. Instead, we see a nonlinear pattern resembling an inverted U, such that the mean number of years of private-practice experience through the 1850s is about 14; between 1850 and 1940, that figure climbs to 19.5 (the zenith in 1938 is 25 years) only to fall rather dramatically to 10.7 in the 1940s and remain comparatively low for the ensuing decades as the norm of prior judicial experience began to take hold. A short-lived increase in the mean occurs between 1972 and 1986. However, because this increase was largely due to Lewis Powell's contribution of thirty-eight years in private practice, his departure lowered the mean once again.

How might we explain this pattern? To what extent does it reflect particular historical events (such as the Industrial Revolution or the growth of the economy in the 1920s), presidential preferences, or other factors? These are interesting questions deserving of serious consideration. But far more relevant and revealing is that, at a mean of 8.2 years of private practice, the current Court has reached a nadir—at no other point in U.S. history has a group of sitting justices possessed so few years of experience practicing in the private sector. Compared to the mean for the period up until 1953 (16.4 years), this 8.2-year figure indicates that the justices of

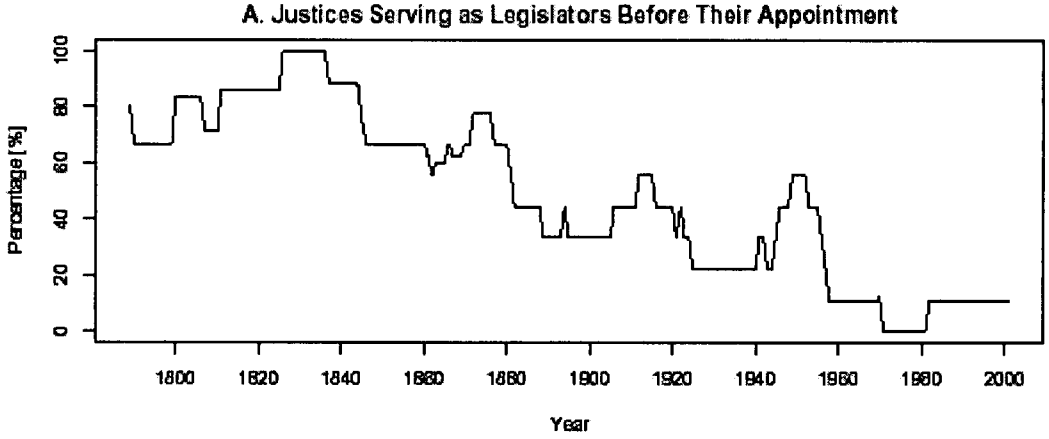
85. Data derived from EPSTEIN ET AL., *supra* note 4, at 272-80 tbl.4-6. *See also supra* note 40.

HeinOnline --- 91 Cal. L. Rev. 929 (2003)

this Court worked an average of half the number of years in private practice than their predecessors appointed before the onset of the norm.

Not only do recent Courts lack private-sector experience, justices lack public-sector experience as well. As Figure 8 indicates, this lack of experience is particularly true with regard to political positions. Panel A presents an overwhelming historical trend: presidents and Senates have become increasingly less likely to view elected, representative bodies as potential sources for Supreme Court appointments. To illustrate this, we need only consider that up until 1953, the year of Eisenhower's nomination of Earl Warren, at least one-third of the justices sitting on virtually all Courts had served as a state or federal legislator.[86] For a full decade between 1826 and 1836, every member on the Court had held such a position; and, even as late as 1953, the percentage hovered around 44%. By 1958 it dropped to 11%, and by 1971, upon Hugo Black's retirement, none had legislative experience. That changed with Justice O'Connor's appointment in 1981, but only marginally so relative to all other Courts.[87] Thus, the latter part of the twentieth century witnessed a marked decline in the willingness of presidents to nominate former state or federal legislators to the bench.

Figure 8 Percentage of Justices with Political Experience Before Their Appointment to the Court, by Year (1789-2001)[88]



86. An exception to this general rule is the fifteen-year period between 1925 and 1940, when two of the nine justices (22%) had previously been elected to a legislature.

87. O'Connor's experience in the Arizona state legislature puts her well in line with history. Presidents have been more likely to tap justices with state legislative backgrounds than those who had served in Congress. But that distinction is of far less interest than the overall pattern revealed in Figure 8, Panel A.

88. Data derived from EPSTEIN ET AL., *supra* note 4, at 312-23 tbl.4-8. *See also supra* note 40.

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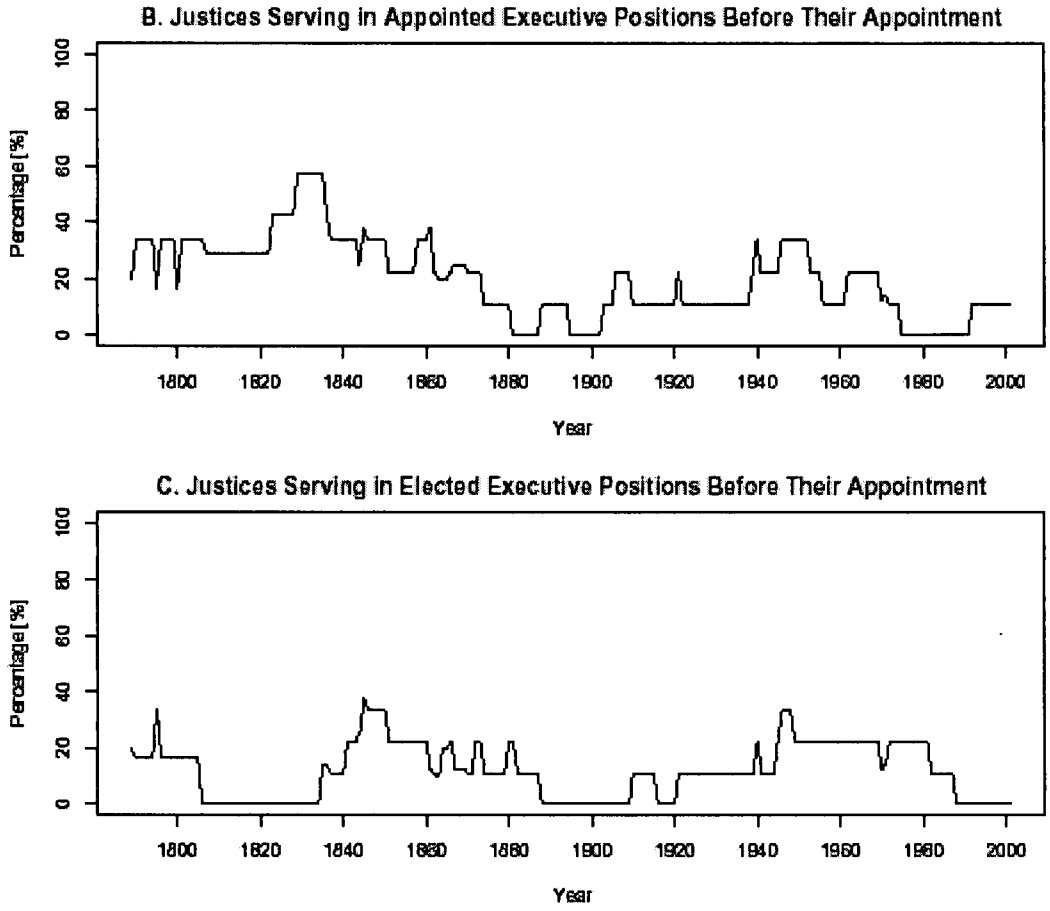
Figure 8 (cont'd) Percentage of Justices with Political Experience Before Their Appointment to the Court, by Year (1789-2001)



That same reluctance seems to characterize presidents' approach to potential nominees who previously held jobs in the executive branch that did not require formal legal training—whether as elected (e.g., governor, mayor) or appointed (e.g., cabinet secretary, agency member) officials. First, as presented in Figure 8, Panel B, the percentage of justices who held an appointed executive position took a downward turn after reaching a high point of 57% between 1830 and 1835.[89] Although it fell to 0% in 1881 (with the departure of Nathan Clifford), Roosevelt and Truman appointees (including William O. Douglas, a member of the Securities and Exchange Commission, and Fred Vinson, a U.S. Secretary of the Treasury) helped to

89. Between 1830 and 1835, four of the seven sitting justices previously served as nonlegal members of the executive branch: Justices Gabriel Duvall (former U.S. Comptroller of the Treasury), John Marshall (former U.S. Secretary of State), John McClean (former U.S. Postmaster General), and Smith Thompson (former U.S. Secretary of the Navy).

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increase the percentage to 33.3% between 1946 and 1952. But once the norm of prior judicial experience attached during most of the 1970s and 1980s, it again declined to 0%. Bush Sr.'s selection of Clarence Thomas, former chair of the Equal Employment Opportunity Commission, added diversity to the Court on this dimension, but the current percentage (11%, or one of nine justices) is still below the overall mean (23%) for the period before 1953.

Figure 8, Panel C, tells a different, more meandering story. For long periods in the nineteenth century, at least one sitting member on every Court had previously been elected to a nonlegal executive office; the percentage reached as high as 38% (three of eight justices) in 1845,[90] and hovered at 33% (three of nine justices) for the period between 1846 and 1850. It fell to 0% between 1888 and 1909, only to rise to 22% in the mid-1940s. But once again the norm of judicial experience took hold. For the last fifteen years, not one sitting justice has been previously elected to an executive office that did not require legal training. During only three other times in the Court's history has this been the case, with the most recent period, 1916-1920, lasting for a considerably shorter time than the current one.[91]

Even if we consider elected executive experience in tandem with service as a legislator, contemporary Courts stand out for their lack of career diversity. Over the course of the entire Court's history, 60 of the 108 justices (56.6%) came to the bench with some elected political experience, either at the federal or state level, or via executive or legislative positions.[92] But a healthy portion of those served early in the Court's history, when it was not rare for as many as two-thirds of the Court to have previously faced the electorate. Between 1826 and 1836, the proportion was even higher, with all twelve justices who served during this time having experience as elected officials.[93] After that high-water mark, a rather steady decline occurred until the percentage (roughly) leveled off at 44% until 1957, when it dropped again to 33%. Once presidents and Senates began adhering to the norm of judicial experience, the percentage fell even further. But never has it been as low as presently, with only Justice O'Connor having prior elected political experience.

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90. This high percentage was occasioned by the overlapping services of Justices James M. Wayne (former Mayor of Savannah), Peter Daniel (former Lieutenant Governor of Virginia), and Levi Woodbury (former Governor of New Hampshire). EPSTEIN ET AL., *supra* note 4, at 312-23 tbl.4-8.

91. The three periods where the Court lacked this type of career diversity were 1806-1834, 1888-1909, and 1916-1920.

92. We do not include elected judicial positions here.

93. Seven justices served in the U.S. Congress, five served in state legislatures, and five of the twelve served in both. Justices John Marshall, Duvall, Story, McClean, Baldwin, Wayne, and Barbour were in the U.S. Congress. Justices Washington, John Marshall, W. Johnson, Duvall, Story, Thompson, Trimble, Wayne, Taney, and Barbour were in state legislatures. EPSTEIN ET AL., *supra* note 4, at 312-23 tbl.4-8.

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Overall, the panels in Figure 8 tell an interesting story. During the Court's first 150 years, it appears that presidents and Senates sought to appoint justices with some background in politics—whether as members of Congress (e.g., Harold Burton and Oliver Ellsworth), mayors (e.g., Salmon Chase, Peter Daniel, and Ward Hunt), or cabinet secretaries or their functional equivalent (e.g., John Jay and Fred Vinson).[94] At the very least, the presence of such experience did not sink a nomination.

However, the career profile of justices has markedly and significantly changed since 1952.[95] Between 1789 and 1952, the mean percentage of justices with some political background, either in legislative or executive politics, hovered around 65%. Since 1952, that figure has dropped to 34%. Several explanations for this decline may exist,[96] but surely the norm of judicial experience is chief among them. Simply put, those tapped to serve directly from one of the nation's benches have, in general, lacked the experience in politics and in the private practice of law that was so characteristic of those appointed before the norm took effect.

What contemporary justices do possess is experience in jobs we now typically consider steppingstones to state and federal judiciaries.[97] Those with backgrounds in legal academia, government legal offices, and federal or state courtrooms now populate the Court. As Figure 9 highlights, the percentages of justices with these types of career experiences are increasing. Consider Panel A, which shows the percentage of justices with a background in academia. Overall a relatively small number of justices have possessed such experience: 29 of the 108 justices (26.9%). But, if we consider only those justices coming to the bench after 1950, that percentage increases to 43%, or 9 of the 21 justices. Moreover, while the trend toward appointing justices who worked as law professors seems to predate the establishment of the norm of prior judicial experience, this trend has intensified since the 1950s. Before 1953, those appointed to the bench with experience in academia were largely fly-by-night "professors"—those who did one or two brief stints in one of the nation's law schools.[98] But, with the onset of the norm of judicial experience in the 1950s, sitting Courts have housed justices with an average of nearly five years of service in U.S. law schools, as compared to only two years of experience during the previous 150 years.[99]

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94. *Id.*

95. $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

96. *See* Schmidhauser, *supra* note 20 (offering some possibilities); *see also* JOHN R. SCHMIDHAUSER, THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES 44-47 (1960).

97. *See supra* note 82.

98. There are, of course, several notable exceptions. *See infra* note 101 and accompanying text.

99. The difference between the two periods is statistically significant ($p = 0.008$). *See supra* note 41 (explaining the significance of p-values).

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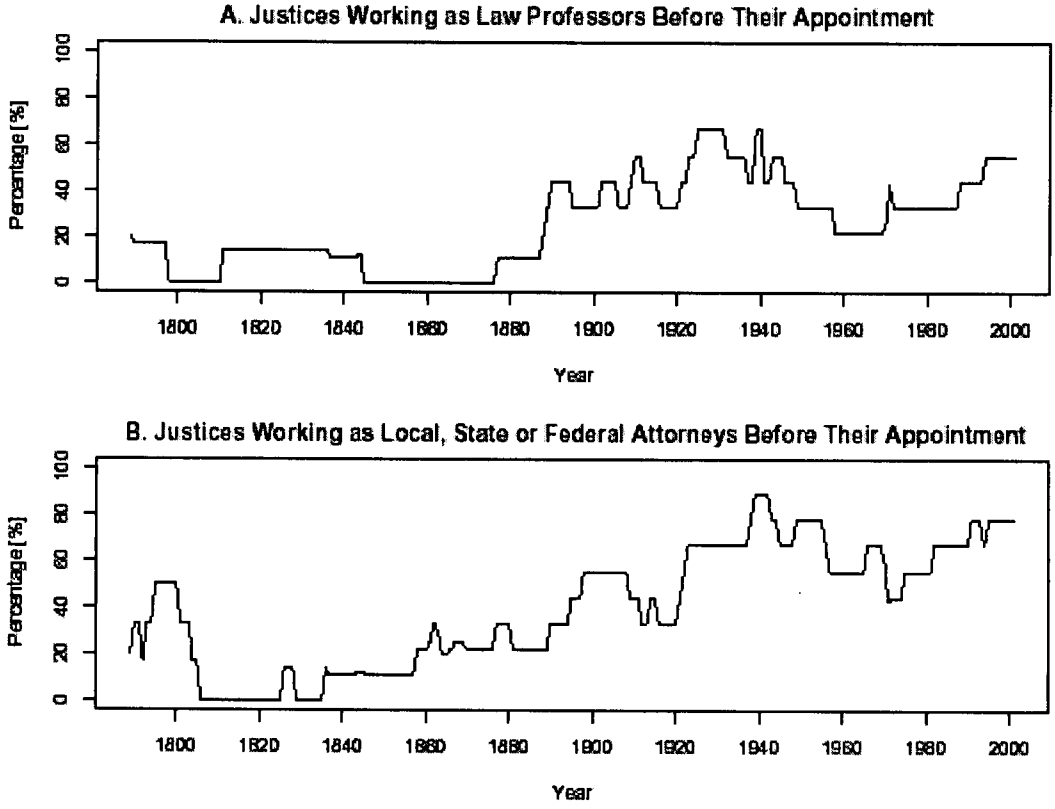
Figure 9 Percentage of Justices with Experience in Positions Necessitating Legal Training Before Their Appointment to the Court, by Year (1789-2001)[100]



100. Data derived from EPSTEIN ET AL., *supra* note 4, at 300-09 tbl.4-6, 312-23 tbl.4-8. *See also supra* note 40.

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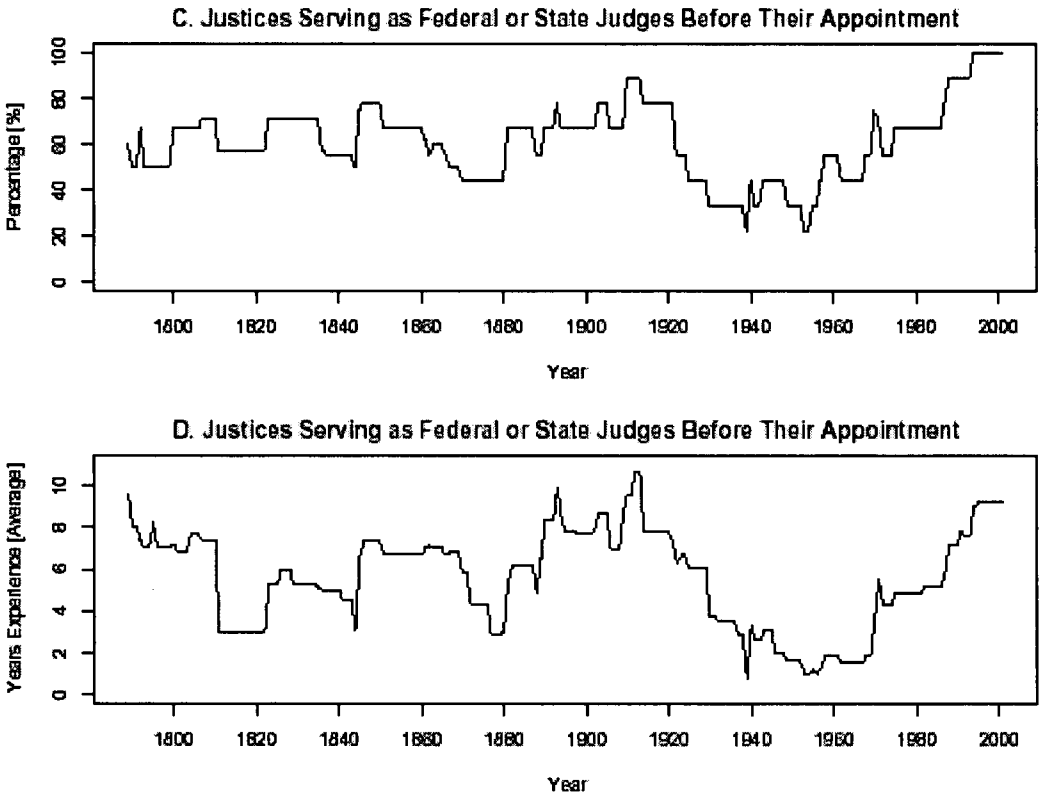
Figure 9 (cont'd) Percentage of Justices with Experience in Positions Necessitating Legal Training Before Their Appointment to the Court, by Year (1789-2001)



The current Court, reflecting the cumulative effect of the norm of prior judicial experience, is pushing the percentages in Figure 9 to new highs. It contains three former law professors—Justices Breyer, Scalia, and Ginsburg—who toiled for a total of forty-two years at Harvard (Breyer), Chicago (Scalia), and Rutgers and Columbia (Ginsburg). Their presence brings the mean percentage of years in academia to a near record level at 7.7 years. Only during the period between 1939 and 1945, when the Court was populated by the likes of Harlan Fiske Stone (twenty-four years at Columbia as Professor and Dean), Felix Frankfurter (twenty-seven years at Harvard), and William Douglas (eight years at Yale and Columbia), was the mean higher (10 years in 1943 and 1944).[101]

The current Court is likewise on its way to breaking historical records for the percentage of its members with experience working in public sector jobs that require specific legal training. These jobs, such as U.S. attorneys, district attorneys, and legal counsel to various government agencies, have

101. EPSTEIN ET AL., *supra* note 4, at 300-09 tbl.4-6.

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long been regarded as steppingstones to the nation's judiciary. Over the years, 46 of the 108 justices have come to the Court with such experience. What that percentage masks, however, is the uneven distribution over time of the percentage of sitting justices who have worked in law-related government jobs. Rather, as Figure 9, Panel B, shows, the percentage overall has grown significantly and precipitously over time.[102] Since 1988, all but two sitting members (Ginsburg and Kennedy) have served in government positions requiring a background in law. And while the 2002 Court does not represent the height of this trend—the percentage of current justices who once worked as government attorneys (78%) is lower than it was from 1939 to 1942 (89%)—it is quite close to this zenith. If a president filled a vacancy created by the departure of, for example, Ruth Bader Ginsburg with a former member of, for example, the Department of Justice, the percentage will equal the 1939-42 figure.

If the data we have presented thus far suggest that the norm of prior judicial experience has induced an unusual degree of homogeneity on contemporary Courts, the evidence displayed in Figure 9, Panels C and D, virtually clinches the case. These Panels directly examine prior judicial experience, and they lead to precisely the same results as our previous analyses in Figure 2 of the positions held by justices at the time of their nomination. While a majority of the 108 justices came to the bench with service on other courts, never in our history has such a large percentage of sitting justices concurrently possessed such experience; and only once before, from 1912 to 1913, has the mean number of years of prior judicial service exceeded the current average of 9.2 years.[103]

Moreover, as Figure 10 shows, diversity is minimal even within the narrow category of prior judicial experience. No longer are presidents, by and large, drawing on nominees with experience on a state bench (Panel A). Instead, they are turning, with increasing regularity since the 1950s, to those who have served on a federal court (Panel B). It should hardly come as a surprise that at no other point in U.S. history have so many justices sitting together spent at least part of their career on a federal court. Not only has the current Court reached record levels on the percentage of sitting members with prior federal judicial experience, but it has also surpassed all its predecessors for the mean number of years of service. On average, members of this Court have served 7.2 years as federal court judges, which is exactly four times the mean across the entire series (1.8 years).

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102. $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

103. From 1912 to 1913, the mean number of years of prior judicial service was 10.7 years. But even that figure is a bit deceptive since it was largely Justices Lurton and Holmes, with their forty-plus years of experience on judicial tribunals, who drove up the mean. For the current Court, "years of experience" is far more evenly distributed, as indicated by the relatively low standard deviation of 4.9 years (compared to the standard deviation of 8.7 years for 1912-1913).

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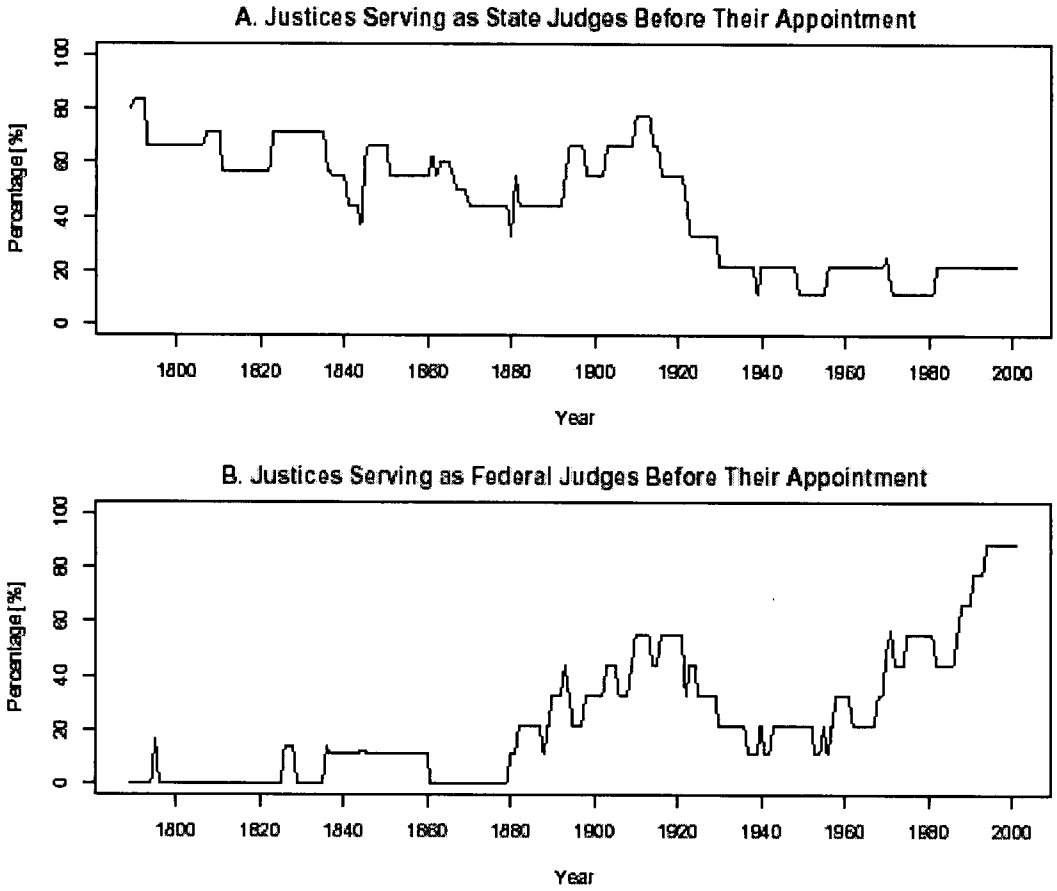
Figure 10 Percentage of Justices with Judicial Experience Before Their Appointment to the Court, by Year (1789-2001)[104]



C. Discussion

According to political scientist Henry J. Abraham,

> Bills are continually introduced that would require future nominees to the Supreme Court to have upward of five years of experience on lower court benches. In the 89th Congress, and again in the 91st, for example, thirteen bills of this type were sponsored by members on both sides of the aisle in both houses of Congress. But all of these measures have failed to be enacted.[105]

While the supporters of these bills have lost their battles, they seem to have won the war. Based on our data, it seems that a requirement of prior

104. Data derived from EPSTEIN ET AL., *supra* note 4, at 324-31 tbl.4-9. *See also supra* note 40.

105. HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 62 (1998).

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judicial experience has become a norm. Before 1953, the percentage of justices coming directly from the U.S. courts of appeals was, on average, just 16%; since 1953, it has increased significantly to 43%.[106] Over thirty years have elapsed since anyone lacking judicial experience has ascended to the Court, and it has been over twenty since anyone has reached the Court who has not previously served as a federal appellate judge.[107] Moreover, not only does the norm of prior judicial experience exist, it has also worked to induce unprecedented levels of career homogeneity on the Court. At one time, justices with a wide range of experiences, whether in the private or public sector, populated the nation's highest bench. Before the 1950s, it was not unusual to find, for example, former senators and mayors working side-by-side with those who served in presidential cabinets, worked in private practice, sat on one of the nation's courts, lectured in a law school, or prosecuted cases for the government. But no longer. Owing at least in part to the establishment and maintenance of the norm of prior judicial experience, only the latter three categories of justices—former judges, law school professors, and government attorneys—can be found on contemporary Courts.

Why the norm of judicial experience has developed is a matter of debate,[108] and whether it will persist is a matter of speculation. What we do know is that George W. Bush's short list for potential Supreme Court nominees comprising U.S. court of appeals judges will perpetuate the norm. It also seems that Bush has already made nominations to the U.S. courts of appeals (e.g., Michael McConnell to the Tenth Circuit) with an eye toward elevating them to the high Court.[109]

Such perpetuation of the norm of judicial experience will inevitably earn applause from some commentators and condemnation from others. Recall Chief Justice Rehnquist's argument that further application of the norm will lead to Courts that closely resemble tribunals in civil law societies that have chosen to set their ordinary judiciary apart as a distinct profession—one separate even from the practice of law.[110] Germany provides a case in point. In order to become a judge in that country, one must be a university graduate with the equivalent of an undergraduate major in law, pass with exceptionally high marks a set of professional examinations, undergo several years of training that combine further study with

106. $p < 0.0001$. *See supra* note 41 (explaining the significance of p-values).

107. Rehnquist, appointed in 1971, was the last justice who lacked state or federal judicial experience upon ascension to the Court. O'Connor, appointed in 1981, was the last justice who did not serve as a U.S. court of appeals judge before joining the Court. *See* EPSTEIN ET AL., *supra* note 4, at 324-31 tbl.4-9.

108. *See supra* Part I.A.

109. Eisenhower apparently followed the same practice. *See supra* note 27.

110. *See* WALTER F. MURPHY ET AL., COURTS, JUDGES, AND POLITICS 137 (2002). *See also supra* note 16 and accompanying text.

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apprenticeship, and finally sustain another set of rigorous examinations administered by the government.[111] Once in the judicial profession, judges follow career paths similar to civil servants, moving slowly up the hierarchy from less important to more important courts if they receive good fitness reports from senior jurists.[112]

To Rehnquist, these systems are troublesome because they do "not command the respect and enjoy the independence of ours."[113] Although Rehnquist cites no data to support this claim, he might have bolstered his point by examining the practices of European civil law countries that often appoint "professional judges" to their constitutional courts precisely because they want these bodies to be distinct from and command more respect than the ordinary courts.[114] These priorities are reflected in the formal rules they maintain for selecting their justices, which differ markedly from the procedures and qualifications required to seat an ordinary court judge.[115] For example, while in many civil law societies students must first go through a separate training program to become regular judges before working their way up through the ordinary court hierarchy, aspirants to constitutional courts need not possess any special professional qualifications (as in France).[116] Alternatively, they may be chosen from a large pool that often includes ordinary court judges, as well as "full university professors of law and lawyers with at least twenty years practice" (as in Italy).[117]

That prior judicial experience is not required is reflected in the persons who attain seats on these constitutional courts. As Table 1 shows, the French Constitutional Council, unlike the U.S. Supreme Court, is quite a diverse body composed of former politicians, academics, private practitioners, and, of course, judges. Likewise, the Italian Constitutional Court contains a high percentage of professors, but also includes a former member of the government. Even the German Constitutional Court, whose members "must have all the qualifications necessary to become a judge," is more diverse than the data reveal. Several of the law professors, for example, came to the bench with extensive political experience as ministers, parliamentarians, or both.

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111. *See* MURPHY, *supra* note 110, at 137.

112. *Id.*

113. *See* Rehnquist, *supra* note 15.

114. Many civil law nations have ordinary courts as well as constitutional courts. Typically, the latter are the only bodies that have the power to strike down acts of government incompatible with their constitutional documents; the "ordinary" courts may only refer constitutional questions to the constitutional court. Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 13 (2001).

115. *Id.* at 12-15 (2001).

116. *Id.* at 17.

117. *See* Consulta Online, *The Constitutional Court (English)*, *at* http://www.giurcost.org/traduzioni/inglese.html (last visited Mar. 17, 2003).

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Table 1 Position at Time of Appointment of Justices Serving on Three European Constitutional Courts

Position When Appointed	Constitutional Court		
	Germany[118]	France[119]	Italy[120]
Government Attorney	0	1	0
Government Position that Does Not Require Legal Training	1	4	1
Attorney in Private Practice	1	1	1
Professor	7	2	9
Judge	6	1	4
Total	**15**	**9**	**15**

Currently, certain decision makers in Europe who have developed explicit structures to instantiate a professional lower judiciary do not seem to adhere to the norm of prior judicial experience when it comes to appointments to their highest tribunals. Those in the U.S., on the other hand, seem determined to follow the norm when it comes to appointments to their highest Court. Ironically, it is perhaps the case that many U.S. Supreme Court justices would have been unable to attain appointment to European constitutional courts because their career experience is simply too limited. But it does appear that most of the current nine justices would have little difficulty meeting some of the criteria necessary to sit on lower European courts, as they have on average served 8.9 years on federal or state benches before attaining their current positions on the Supreme Court.[121] Due to their more varied career experiences, however, the current Court's predecessors would have found it easier to attain positions on civil law constitutional courts, but more difficult to gain appointment to the ordinary courts. For those justices appointed between 1900 and 1971, the mean number of prior judicial service is only 4.3 years.[122]

In addition to Rehnquist and his concern of resembling civil law courts, other former justices have been discouraged by the norm of prior judicial experience. Justice Felix Frankfurter wrote in 1957:

> One is entitled to say without qualification, that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero. The significance of the greatest among

118. *See* Das Bundesverfassungsgericht, *at* http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?aktuell (last visited Mar. 17, 2003) (providing data as of 2000).

119. *See* Conseil Constitutionnel, *Constitutional Council: Members (English)*, *at* http://www.conseil-constitutionnel.fr/langues/anglais/ang3.htm (last visited Mar. 17, 2003) (providing data as of 2000 via judges' biographies).

120. *See* http://www.cortecostituzionale.it/eng/lacortecostituzionale/composizione/composizione.asp (last visited Apr. 14, 2003) (providing data as of 2000 via judges' biographies).

121. This counts Rehnquist's time as an associate justice.

122. *See* EPSTEIN ET AL., *supra* note 4, at 324-29 tbl.4-9.

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> the Justices who had had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo.[123]

Frankfurter's former colleague, Sherman Minton, who had served as a federal judge prior to his ascension to the Court, apparently agreed. In response to Frankfurter's comments, Minton wrote: "'A copy of your lecture . . . should be sent to each member of Congress. . . . I am a living example that judicial experience . . . doesn't make one prescient.'"[124]

We agree with these general sentiments but for a different reason. While it may be that a norm of judicial experience will not lead to respect for the federal bench or to judicial "greatness,"[125] it seems clear that it will and, in fact, has led to judicial homogeneity. As we detail in Parts II and III below, this concept is fraught with dangers. In general terms, because diversity is an important condition for the effective performance of our basic social institutions, a lack of diversity can lead to suboptimal decision making. This argument, as we explain in Part II, finds support in numerous analyses of various institutions, from the most decentralized frameworks (such as markets) to the most centralized (such as democratic decision-making bodies). Another danger, which we document in Part III, pertains specifically to the Supreme Court. Because few women and people of color hold positions on the federal courts, the limited pool of potential nominees from federal appellate courts may work to restrict diversity on other dimensions, such as gender and race/ethnicity.

II
THE IMPORTANCE OF DIVERSITY IN INSTITUTIONS

Most contemporary support for diversity comes from those who claim past exclusion from America's legal, political, and economic affairs.[126] Typically, they ground their claims in arguments about unfair treatment and previous injustices, and they focus attention on the need to expand participation in political and economic life. Although these claims are cast in the language of diversity, advocates usually place their primary emphasis on inclusion, and they center their justifications not so much on the

123. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1957).

124. ABRAHAM, *supra* note 105, at 61 n.98 (quoting letter from then-retired Justice Sherman Minton, U.S. Supreme Court, to Justice Felix Frankfurter, U.S. Supreme Court (Apr. 18, 1957) (on file with Library of Congress, Frankfurter Papers)). In the same year, Justice William O. Douglas wrote that "the requirement of prior judicial service is an unwise one and over the years would have too narrowing an effect." Letter from Justice William O. Douglas, U.S. Supreme Court, to Fred Rodell, Professor of Law, Yale Law School (Mar. 2, 1957), *available at* http://www.haverford.edu/library/special/aids/rodell/rodellbx10.jpg (last visited Mar. 17, 2003).

125. For more on this point, see *infra* note 213.

126. *See, e.g.*, ADOLPH L. REED, JR., WITHOUT JUSTICE FOR ALL (1999); CORNEL WEST, RACE MATTERS (1993); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

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benefits of diversity, but rather on the rights of groups previously denied participation and influence.[127]

Though we find considerable merit in many of these claims, they do not form the basis of our support of diversity.[128] Instead, we develop our own justification and argue that diversity is distinctly related to the effective performance of social, economic, and political institutions. The Court is one such institution. In this Part we argue that diversity, on dimensions such as career experience, can enhance the Court's performance. For our purposes here, it is helpful to think of the Court as a nine-member decision-making body whose primary task is to resolve problems arising out of conflicts over constitutional and other legal questions. There are a number of ways these nine individuals might go about resolving these conflicts. The different conceptions would be grounded in different assumptions we might make about what motivates the justices in their decision making.[129] On one end of the motivational dimension, the justices may be motivated by a principled pursuit of the law and thus search for the correct answer to legal questions. On the other end, the justices may be motivated by personal political goals and preferences and thus strive to achieve a collective decision that approximates the preferences of as many of the American people as possible. And, of course, there are a number of other conceptions somewhere in between these two that would reflect a mixture of assumptions about the legal and political motivations affecting the judicial decision-making process.

Regardless of the particular conception one might endorse, each of these conceptions shares a similar structure: A group of individuals work together in pursuit of a collective judgment by sharing their individual knowledge and abilities and aggregating them as they see best. This basic structure is also reflected, in varying degrees, by many other social, economic, and political institutions. This structure forms the basis of our argument about the value of diversity in general and about the value of career diversity on the Court. We proceed as follows: first, we sketch out the basic argument for why diversity enhances institutional performance; then, we draw support for the argument by illustrating the role that diversity plays in the justification of other types of institutions.

A. A General Argument for Diversity

We define social institutions as follows: "Institutions are the humanly devised constraints that structure human interaction. They are made up of

127. *See supra* note 126.

128. We do, however, return to these claims in Part III, where we discuss the implications of career diversity for the Court.

129. There is extensive literature on the various motivations of judges, which we have discussed in detail elsewhere. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

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formal constraints (e.g., rules, laws, and constitutions), informal constraints (e.g., norms of behavior, conventions, and self-imposed codes of conduct), and their enforcement characteristics."[130] Put simply, institutions structure social life by establishing the incentives and sanctions, the principles and standards, and the modes of appropriate behavior that define the nature of social cooperation. But social cooperation takes many forms, and different institutional arrangements have been developed to satisfy the particular needs of the various aspects of social life. For example, we observe different types of institutional frameworks for economic, political, and legal interactions.

Analysts justify these differences by making claims about the "best" way to satisfy the particular functions of a given social interaction,[131] with the claims themselves often associated with basic institutional arrangements. The literature on institutions is full of claims akin to the following: "Markets are the most efficient means of allocating economic resources and distributing economic benefits"; "Democratic decision-making procedures are the fairest and most equitable means of making collective decisions and satisfying political interests"; "Common law adjudication is the best means of arriving at a just and socially beneficial body of law"; or "Trial by jury is the best means of assessing the guilt or innocence of criminal defendants." The list continues, but in each instance, the basic point remains: Institutions are justified by their capacity to outperform other types of structures in meeting our basic social needs.

Each institutional form is characterized by some combination of a basic array of social mechanisms: competition, coordination, deliberation, bargaining, voting, and so on. In various ways, these mechanisms aggregate individual actions into social outcomes. The combinations vary across institutional forms. For example, markets encourage competition, while democratic bodies encourage deliberation and voting. But what is striking about the justifications of the different combinations is that they share a basic logic about the effective performance of social institutions—a logic that rests on the belief that groups can, under the appropriate conditions, make better decisions than individuals. The phrase "under the appropriate conditions" is important here because arguments regarding the appropriateness of particular institutions usually relate to the appropriate institutional conditions for certain types of social interactions. For example, claims about market superiority are grounded in claims about the appropriateness of decentralized exchange for effective economic activity.

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130. Douglass North, *Economic Performance over Time*, *in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 248 (Mary C. Brinton & Victor Nee eds., 1998).

131. *See* Jack Knight, *A Pragmatist Approach to the Proper Scope of Government*, 157 J. INSTITUTIONAL & THEORETICAL ECON. 28 (2001).

HeinOnline --- 91 Cal. L. Rev. 943 (2003)

Regardless of the particulars, however, the standard justifications of our basic legal, political, and economic institutions are based on the idea that better decisions follow from a process by which individuals contribute their individual knowledge to the collective activity. By so doing, individuals test the merits of their own ideas and beliefs, as well as the ideas and beliefs of others. This process produces a collective understanding that is superior to one held by an individual. With this superior knowledge base, better solutions to collective problems emerge.

Accordingly, the effectiveness of institutional performance depends fundamentally on two features: (1) the diversity of inputs, and (2) an effective process of experimentation, inquiry, and testing. On the one hand, the diversity of inputs broadens and enhances the base upon which experimentation, inquiry, and testing occurs. Here the diversity-of-inputs requirement favors diversity of participation; the greater the diversity of participation by people of different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process. On the other hand, this institutional process tests ideas and information in terms of their quality alone. The condition of effective experimentation, inquiry, and testing thus entails procedural constraints on extraneous factors that would distort the testing of information and ideas. For example, any characteristics of an individual unrelated to the quality of his or her ideas and beliefs would be constrained from consideration in the testing process. Therefore, the overall effectiveness of these institutional mechanisms is a function of our ability to satisfy the requirements of diversity and effective experimentation, inquiry, and testing.

Thus, our argument for the value of diversity on the Court follows from the justification of our basic social institutions: Given the appropriate procedural conditions, our institutions are most effective when participation is most diverse.

Having presented the central argument, we now support it with reference to basic institutional theories. We start with centralized institutions—collective decision-making bodies—and then move to more decentralized institutions—the market and the common law. As we show, although these different institutional forms vary markedly in terms of the appropriate conditions of organization (e.g., decentralized market for economic exchange, but centralized deliberation and voting for democratic decision making), they share the same basic logic of diversity in their underlying institutional processes.

1. Diversity in Collective Decision-Making Bodies

The idea that groups make better decisions than individuals is a standard feature of many justifications of democracy and other collective

HeinOnline --- 91 Cal. L. Rev. 944 (2003)

decision-making procedures.[132] One of the primary sources of this justification has been the Condorcet Jury Theorem,[133] which asserts that a group of individuals, using a majority-rule voting procedure, will produce a collective decision that is more accurate than the decision of any individual member of the group.[134] The main theorem assumes: (1) the question is a binary decision problem, (2) the participants each have greater than a 50% likelihood that they know the correct answer to the question, and (3) the individual participants' votes are statistically independent.[135] From these conditions Condorcet deduced two main conclusions that have important consequences for the use of majority-rule voting. First, a majority of the group of voters will more often produce the correct decision than will any of the individual members of the group. Second, as the size of the group increases, the probability that the group will be correct approaches 100%.[136]

The Condorcet Jury Theorem and its underlying intuition about the epistemological value of group decision making has formed the basis for many defenses of the value of collective decision-making mechanisms. Bernard Grofman and Scott Feld[137] and David Estlund,[138] among others, ground their support of majority-rule mechanisms on the epistemic advantages of aggregating individually held ideas and information. James Bohman[139] and Jack Knight and James Johnson[140] offer similar arguments about the superiority of shared knowledge as justification for deliberative

132. *See* David M. Estlund et al., *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, AM. POL. SCI. REV. 1317, 1322 (1989); Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567, 572 (1988).

133. *See* Marquis de Condorcet, *Essay on the Application of Mathematics to the Theory of Decision-Making*, *in* CONDORCET: SELECTED WRITINGS 33 (Keith Michael Baker ed., 1976). Note that we focus here exclusively on the Condorcet Jury Theorem as the source of the claim that collective decision-making procedures benefit from diversity. We do so because the epistemic argument supported by the theory mirrors the justifications for other institutional forms discussed below. There are, however, other arguments that we could have offered to support the benefits of diversity for democratic institutions. Consider, for example, Madison's argument in Federalist No. 10, that diversity was necessary for the stability of the American state and for the preservation of liberty. THE FEDERALIST NO. 10 (James Madison).

134. An "accurate" decision entails one that resolves whether a statement of fact is true or false. *Id.*

135. Condorcet, *supra* note 133, at 33-45.

136. *Id.* at 50-70.

137. *See generally* Grofman & Feld, *supra* note 132.

138. *See* Estlund et al., *supra* note 132.

139. James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 321 (James Bohman & William Rehg eds., 1997) [hereinafter DELIBERATIVE DEMOCRACY].

140. Jack Knight & James Johnson, *What Sort of Equality Does Deliberative Democracy Require?*, *in* DELIBERATIVE DEMOCRACY, *supra* note 139, at 279.

HeinOnline --- 91 Cal. L. Rev. 945 (2003)

mechanisms; Lewis Kornhauser and Lawrence Sager[141] offer an equivalent claim in their analysis of collegial courts. Finally, Nicholas Miller[142] and Krishna Ladha and Gary Miller[143] explicitly employ the epistemic argument to emphasize the importance of diversity for democratic political institutions. All of these analyses rest on the idea that centralized collective decision-making procedures are substantially enhanced by the diversity of ideas guaranteed by the free and equal participation of all members of the relevant group.

Much of the recent work on the Condorcet Jury Theorem has focused on Condorcet's assumptions, arguing that the narrowness of his assumptions undermines the importance of his conclusions. Recent research has modified these assumptions and assessed whether the claims about the value of diversity for collective decision making can be sustained. The results have been mixed. Some analysts find that they can loosen the assumptions and still maintain the basic claim about the epistemic superiority of majority rule. For example, Grofman, Guillermo Owen, and Feld[144] demonstrate that we can relax the assumption about the homogeneity of the individual probabilities of correctness, allowing for the possibility that the individual members of the group differ in these probabilities, and maintain the basic conclusions of the theorem. Similarly, Ladha shows that relaxing the assumption about the statistical independence of the individual votes does not impinge on the claim about the benefits of majority rule.[145] On the other hand, recent analyses that focus on the crucial assumption that individuals vote sincerely—that they base their individual votes on what they think is the correct answer without reference to the final decisions of others—have reached a different conclusion. When they analyzed the Condorcet decision-making problem under the assumption that the participants vote in a sophisticated manner, David Austen-Smith and Jeffrey Banks[146]

141. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986) (basing their arguments around a "collegial court," which they use to refer to any multimember judicial body).

142. Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, *in* INFORMATION POOLING AND GROUP DECISION MAKING 173 (Bernard Grofman & Guillermo Owen eds., 1986); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983).

143. Krishna K. Ladha & Gary Miller, *Political Discourse, Factions, and the General Will: Correlated Voting and Condorcet's Jury Theorem*, *in* COLLECTIVE DECISION-MAKING: SOCIAL CHOICE AND POLITICAL ECONOMY 393 (Norman Schofield ed., 1996).

144. Bernard Grofman et al., *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISION 261 (1983).

145. Krishna K. Ladha, *Information Pooling Through Majority-Rule Voting: Condorcet's Jury Theorem with Correlated Votes*, 26 J. ECON. BEHAV. & ORG. 353 (1995); Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617 (1992).

146. David Austen-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POL. SCI. REV. 34 (1996).

HeinOnline --- 91 Cal. L. Rev. 946 (2003)

and Timothy Feddersen and Wolfgang Pesendorfer[147] discovered that there are conditions under which Condorcet's conclusion about the epistemic superiority of majority rule do not hold.

Thus, it is unclear how far one would want to extend the Condorcet Jury Theorem as the basis for a broad epistemic claim about majority rule. The challenge to the sincere voting assumption highlights a more general issue about the relevance of the Condorcet result for a justification of collective decision-making procedures. As we stated, the theorem analyzes the resolution of questions of fact. This is clearly relevant to the deliberations of juries and to some of the issues on the agenda of collegial courts. But many, if not most, of the decisions faced by collective decision-making bodies are not questions of fact but, rather, issues of preference aggregation. In other words, these decisions are not about what people think is correct but, rather, about what people prefer. The relevance of the Condorcet Jury Theorem for a more general justification of collective decision-making mechanisms would seem to rest on the importance of information and knowledge aggregation toward these latter processes.

Advocates for the continued relevance of the theorem offer two primary arguments in support of their position. First, they assert that the recent criticisms of the theorem are only relevant if we actually believe that individuals act in a sophisticated way about questions of fact. Hence, we need to believe that individuals have a stronger preference for causally affecting the outcome than they do for helping the group arrive at the correct answer. Margolis offers a set of compelling arguments suggesting that this is not a well-founded belief in most normal social situations.[148] Second, advocates argue that the broader relevance of the theorem is contingent on the relative importance of deliberation for democratic decision-making bodies. If we limit democratic decision making merely to preference aggregation, then the Condorcet Jury Theorem may have little relevance. However, if we allow a substantial role for information sharing and knowledge acquisition in democratic processes, the idea that collective decision-making bodies are substantially enhanced by the diversity of ideas guaranteed by the free and equal participation of all members of the relevant group continues to be relevant.

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147. Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts Under Strategic Voting*, 92 AM. POL. SCI. REV. 23 (1998).

148. Howard Margolis, *Pivotal Voting and the Emperor's New Clothes*, 19 SOC. CHOICE & WELFARE 95 (2002) (noting that the argument that pivotal voting is a necessary feature of any system of jury decision making is not well supported); Howard Margolis, *Game Theory and Juries: A Miraculous Result*, 13 J. THEORETICAL POL. 425 (2001) (noting that the recent theoretic criticisms of the Condorcet Jury Theorem make assumptions about the motivations of individual jurors that cannot be reasonably justified); Howard Margolis, *Pivotal Voting*, 13 J. THEORETICAL POL. 111 (2001) (noting that the assumption that individual jurors care more about being decisive than being correct is necessary for the argument that the theory of pivotal voting is relevant to the Condorcet Jury Theorem).

HeinOnline --- 91 Cal. L. Rev. 947 (2003)

2. The Importance of Diversity in the Argument for Competitive Markets

Diversity has also played an important, somewhat implicit, role in the justification of economic institutions. Although competitive markets share few, if any, institutional features with centralized collective decision-making bodies, they do share the underlying logic that effective institutional performance depends on finding a way to institutionalize the benefits of diversity. As with collective decision making, claims of the superiority of competitive markets for economic activity rest on the ways in which decentralized mechanisms effectively test the relative value of diverse alternatives. Consider, for example, Friedrich Hayek's description of the value of free market. He notes that the original justification for the market was based on the idea that it is composed of a set of institutions designed to produce collectively beneficial outcomes through the contributions of self-interested individuals:

> The chief concern of the great individualist writers was indeed to find a set of institutions by which man could be induced, by his own choice and from the motives which determined his ordinary conduct, to contribute as much as possible to the need of all others; and their discovery was that the system of private property did provide such inducements to a much greater extent than had yet been understood.[149]

Through the salutary effects of competition, the market produces benefits, the most important involving the ways in which competition solves problems of information acquisition and the effective use of knowledge.[150]

Hayek argues that for society, the most significant problem related to economic activity is "one of rapid adaptation to changes in the particular circumstances of time and place. . . ."[151] To adequately solve this problem, Hayek states:

> [T]he ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them. . . . We need decentralization because only thus can we insure that the knowledge of the particular circumstances of time and place will be promptly used.[152]

Hayek's argument here rests on the ways in which decentralized decision making aggregates information. On his account, the market allows each

149. FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 12-13 (1948).

150. Friedrich A. Hayek, *Competition as a Discovery Procedure*, *in* THE ESSENCE OF HAYEK 254, 255 (Chiaki Nishiyama & Kurt R. Leube eds., 1984) ("[C]ompetition as a procedure for the discovery of such facts as, without resort to it, would not be known to anyone, or at least would not be utilised. . . . competition is valuable *only* because, and so far as, its results are unpredictable and on the whole different from those which anyone has, or could have, deliberately aimed at.").

151. HAYEK, *supra* note 149, at 83.

152. *Id.* at 83-84.

HeinOnline --- 91 Cal. L. Rev. 948 (2003)

individual to contribute his or her own local knowledge to a social process that effectively aggregates the knowledge in the pursuit of collectively beneficial outcomes.[153]

Hayek emphasizes that the effectiveness of competition is contingent on the equal participation by diverse members of the society. The importance of the diversity of participation follows directly from the uncertainty produced by the complexity of economic activity. The basic problem "is that nobody can know *who* knows best and that the only way by which we can find out is through a social process in which everybody is allowed to try and see what he can do."[154] Moreover, the participation must be free and voluntary.[155]

From these principles, Hayek concludes that the establishment of an institutional framework for experimentation and testing are preconditions for achieving the positive value of diversity of participation. He attributes this view to the earliest advocates of the market:

> They were more than merely aware of the conflicts of individual interests and stressed the necessity of 'well-constructed institutions' where the 'rules and principles of contending interests and compromised advantages' would reconcile conflicting interests without giving any one group power to make their views and interests always prevail over those of all others.[156]

Hayek associates the distortions of market competition with misuses of power, either by government or economic actors:

> All we need to consider is how difficult it is in a competitive system to discover ways of supplying to consumers better or cheaper goods than they already get. Where such unused opportunities seem to exist we usually find that they remain undeveloped because their use is either prevented by the power of authority (including the enforcement of patent privileges), or by some private misuse of power which the law ought to prohibit.[157]

For Hayek, this places government in the rather paradoxical position of using coercive power as a way of limiting coercive power in the market.[158]

Here the importance of diversity of participation, achieved through effective experimentation, inquiry, and testing, is clearly articulated as a

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153. *Id.*

154. *Id.* at 15.

155. *Id.* at 16 ("From the awareness of the limitations of individual knowledge and from the fact that no person or small group of persons can know all that is known to somebody, individualism also derives its main practical conclusion: its demand for a strict limitation of all coercive or exclusive power.").

156. *Id.* at 13 (citation omitted).

157. Hayek, *supra* note 150, at 260.

158. HAYEK, *supra* note 149, at 16-17 ("True individualism . . . does not deny the necessity of coercive power but wishes to limit it—to limit it to those fields where it is indispensable to prevent coercion by others and in order to reduce the total of coercion to a minimum.").

HeinOnline --- 91 Cal. L. Rev. 949 (2003)

necessary condition for the effective performance of markets. On Hayek's account, individual decision makers lack the knowledge and capacity to make broad economic decisions affecting the society as a whole. Societies need institutional mechanisms to aggregate, through a process of experimentation and testing, individual contributions of knowledge and resources. Since each of us lacks the knowledge to know who knows best in a particular situation, we have to organize ourselves to effectively garner the benefits from the diversity of economic ideas and experiences.

3. Diversity as a Justification for Common Law Courts

The relevance of diversity for the effective competition of ideas also can be found in justifications of common law adjudication. Common law adjudication involves two related competitive processes: the structured competition that takes place within formal judicial institutions, and the unstructured competition through which social norms and principles, employed by judges in their decision making, evolve over time.

Consider Richard Posner's pragmatic justification for the value of the common law.[159] Posner begins by acknowledging that because judges will more likely confront legal questions that lack a clear and straightforward answer in the common law,[160] as opposed to statutory and even constitutional law, common law decision making introduces important questions of objectivity and legitimacy. Posner is troubled by the "inherently precarious" position of judges in a democratic polity.[161] Fairness, insofar as it is attainable, requires that jurists insulate themselves from powerful outside influences. Such independence, however, comes at the price of distancing the judiciary from sources of moral and political legitimacy. In other words, while an independent judiciary makes decisions with far-reaching social and political consequences, it lacks "the intrinsic authority of the more 'organic' (popular, authentically sovereign) branches of government. . . ."[162] This is why concerns about the objectivity and legitimacy of the common law emerge.

For two reasons especially relevant to this discussion of judicial decision making, Posner recommends legal pragmatism for resolving these issues. First, he asserts that pragmatism will generate much-needed knowledge about the relationship between law and its consequences. This knowledge can reduce the indeterminacy in the law and enhance, in an

159. For further elaboration of this argument, see Jack Knight & James Johnson, *The Political Consequences of Pragmatism*, 24 POL. THEORY 68 (1996).

160. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 247 (1990) (defining the common law as "any body of law created primarily by judges through their decisions rather than by the framers of statutes or constitutions").

161. *Id.* at 6-7.

162. *Id.* at 454.

HeinOnline --- 91 Cal. L. Rev. 950 (2003)

admittedly weak sense, its objectivity.[163] Second, Posner argues that because pragmatism is oriented to the pursuit of socially desirable consequences, those consequences, if attained, will enhance the legitimacy of judicial decisions.[164] According to Posner, pragmatism has two central features that produce these benefits: It is committed to methods of scientific inquiry, and it relies on social consensus both as a way of deciding cases and as a source of legitimacy for judicial decisions.

To see the force of Posner's argument, consider what a pragmatist judge should do in cases that lack a clear and straightforward answer. On Posner's account, a pragmatist judge should treat the law instrumentally. She should be forward looking, and her decisions should be based on what she considers to be the best consequences that a ruling can produce. A pragmatist judge thus needs to determine: (1) the consequences she should seek to fulfill in a given case, and (2) the best means of achieving those consequences. The objectivity and legitimacy of judicial decision making rest on the way she answers these practical questions.

Posner argues that a pragmatist judge can decide difficult common law cases without resorting to merely subjective and illegitimate solutions.[165] He answers both the question of what consequences the judge should seek to effectuate and the question of what means the judge should employ in so doing by referring to those consequences and reasons that have survived in an open and unforced competition of ideas.[166] He defends both the objectivity and the legitimacy of pragmatist judicial decisions by making claims about the nature of that competition, and the conditions under which certain ideas reach a consensus. On his account, pragmatist judges will be constrained by (or at least show special deference to) principles and rules that reflect social consensus.[167]

Posner's justification of common law adjudication is based on the quality of the reasons on which judges base their decisions. The argument is that common law judges will produce socially beneficial decisions when their decisions are grounded in good reasons. For Posner, there are two primary categories of good reasons: judicial precedent and principles on which there is a social consensus. The claims about the socially beneficial quality of the reasons rest on claims about the processes by which such reasons are produced. For judicial precedent, the process is the formal institutional structure instantiated in the decentralized network of courts in the common law system. For consensus principles, the process is an

163. *Id.* at 110, 298, 468 (lamenting repeatedly how little is known about the consequences of judicial decision making).

164. *Id.* at 112-26.

165. *Id.* at 255.

166. *Id.* at 112-22.

167. *Id.* at 126.

HeinOnline --- 91 Cal. L. Rev. 951 (2003)

unstructured one of informal social interactions from which social norms and other socially shared ideas emerge.

On this account, Posner characterizes both of these processes by the existence of "free" or "unforced" inquiry that can generate rules and knowledge that people accept and continue to reaffirm in uncoerced ways.[168] This process is analogous to the concept of the marketplace of ideas, which Posner borrows from Oliver Wendell Holmes' dissenting opinion in *Abrams v. United States*.[169] Holmes wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[170]

For the pragmatist, consensus or convergence on a particular principle is evidence that the principle has demonstrated its value by virtue of having withstood the "test of time."[171] On Posner's account, principles that demonstrate their utility over time in the face of competing principles enjoy some presumption as to their socially desirable character.[172]

The important feature of this argument is the role that evidence of consensus and convergence in the evolution of the common law might play in a pragmatist justification of societal principles and judicial precedent. The key to this kind of justification is not so much that judges decided previous cases in a particular way, but rather that the judges deemed the consequences of those decisions sufficiently desirable to replicate and expand them over time. Posner argues that precedents that meet this standard acquire a more authoritative status over time:

> One thing that can solidify a precedent—that can make it authoritative (or more authoritative) rather than just a source of information—is its endorsement by many judges over a substantial period of time. Other things being equal, a conclusion to which a number of different individuals have come—a conclusion (better, a hypothesis) that has survived continual retesting—is entitled to more deference than the conclusion of a single individual. So time can help stabilize legal doctrine. Notice that, from this perspective, the more diverse the judiciary, the more its rulings invite unforced agreement, ungrudging deference.[173]

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168. *Id.* at 114.
169. 250 U.S. 616 (1919) (Holmes, J., dissenting).
170. *Id.* at 630.
171. POSNER, *supra* note 160, at 112-22.
172. *Id.* at 126.
173. *Id.* at 117-18.

HeinOnline --- 91 Cal. L. Rev. 952 (2003)

Thus, the source of legal soundness, according to Posner, rests on the survival of certain precedents in the competition of the judicial decision-making process. On Posner's account, the underlying justification of common law adjudication is that it establishes a competition of ideas that tests the merits of judicial decisions over time. Through the testing process legal problems are resolved in a socially beneficial way. And here, by framing his justification in these terms, Posner highlights another significant effect of diversity: Not only is diversity important for the generation of inputs, but it also enhances the subsequent testing of these ideas. As he emphasizes, the greater the diversity of participation in the process of experimentation, the more rigorous the test of the value of any particular idea. As with the market, the justification of the common law system rests in the end on claims about the conditions under which common law adjudication takes place and about the effective testing of a diverse set of ideas by a diverse judiciary.

III

THE IMPORTANCE OF CAREER DIVERSITY ON THE SUPREME COURT

Thus far we have emphasized the importance of diversity in a range of institutions. On our account, diversity and the related conditions of effective experimentation, inquiry, and testing are fundamental to arguments about the beneficial role institutional mechanisms play in satisfying the basic needs of society. Establishing the circumstances under which the conditions are satisfied is a necessary precondition for the effective operation of the relevant institution. If these conditions are not satisfied, claims of the superiority of a particular institutional mechanism are undermined. Our argument for the value of diversity, then, follows from the justification for the most basic of social institutions: Given the appropriate procedural conditions, our institutions are most effective when participation is most diverse.

At the same time, though, we recognize that not all dimensions of diversity are of equal importance, at least not when it comes to the selection of U.S. Supreme Court justices. For obvious reasons, we would not, for example, advocate the appointment of justices who differ on the dimension of, say, hair color.

In this Part we argue that career diversity does not fall into the category of trivial attributes. Instead, we find quite the opposite. Diversifying the Court in terms of the career paths taken by its justices would serve two distinct and important functions. First, operating under the assumption that diverse groups perform their tasks more ably than homogeneous ones, a Court composed of justices with different career backgrounds will make better choices than one replete with, say, U.S. court of appeals judges. Second, believing that diversity on other dimensions, especially gender and

HeinOnline --- 91 Cal. L. Rev. 953 (2003)

race/ethnicity, is valuable in any number of ways, presidents will have deeper pools from which to draw potential nominees if they move away from the norm of prior judicial experience.

A. The Positive Effects of Career Diversity on Judicial Decision Making

Over the past five decades or so, social scientists and legal academics have produced countless papers examining the personal attributes and backgrounds of the nation's jurists.[174] Some are largely descriptive efforts, providing quantitative and qualitative profiles of the judges;[175] but others are more analytical, seeking to determine the extent to which various attributes and background factors affect the choices jurists make.[176] For example, in his classic 1981 study of the personal attributes of U.S. Supreme Court justices, C. Neal Tate investigated the effect of various background characteristics (including prosecutorial experience, age, and party affiliation) on judicial votes.[177] Writing twenty years later, Deborah Merritt and James Brudney designed a study to assess whether U.S. court of appeals judges with experience representing management are more (or less) likely than colleagues without such experience to publish their opinions in National Labor Relations Act ("NLRA") cases.[178]

To be sure, many studies like those of Tate and Merritt and Brudney have their share of conceptual and analytical problems. Nonetheless, we should not ignore the common finding that a link exists between career diversity and judicial decisions. Specifically, as we depict in the Appendix, of the twenty-two studies located that investigate this linkage, nearly 70% found some sort of a relationship between career experience and judicial choices.

In some instances, career experience turned out to be one of only a handful of factors that explained the phenomenon under investigation. Such was the case in the Merritt and Brudney study, in which the researchers considered numerous background characteristics of the judges, including the party of the appointing president, gender, the law school attended, experience representing management, and experience in a union, government, or academia.[179] Only a few of these variables, including the variable designed to measure career experiences, were significant predictors of whether judges published their opinions. The authors reported that appellate court panels composed of more judges with experience representing

174. *See infra* Appendix (providing summaries of several recent, influential studies).

175. *See supra* note 96; Goldman & Slotnick, *supra* note 82.

176. *See infra* Appendix (providing examples).

177. *See generally* C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981).

178. *See generally* Merritt & Brudney, *supra* note 61.

179. *Id.*

HeinOnline --- 91 Cal. L. Rev. 954 (2003)

management clients in union cases "were significantly less likely to publish their opinions than were other panels."[180] Experience and expertise, Merritt and Brudney argued, accounted for this rather counterintuitive result: Judges who formerly represented management

> have more experience implementing the NLRA than judges lacking a management background. Applying the same circuit rules and guidelines as colleagues who are less versed in labor law, they may genuinely view a higher percentage of cases as routine and unworthy of publication. The negative association between publication and number of panel members with NLRA management experience, in sum, most likely stems from [differences in] expertise rather than strategic conduct.[181]

Given the goal of the Merritt and Brudney study to explain the publication choices of judges in labor cases, their concern with legal experience is sensible. But as the Appendix shows, their approach is only one of many possible approaches to capturing the effect of career experience. For example, in his analysis of the methods used by judges to interpret the tax code, Daniel Schneider was interested in the primary work experience of the jurists under investigation—whether that experience came in private practice, in government, as a judge, or as a professor.[182] Tate took into account whether a justice with prosecutorial experience also had judicial experience,[183] finding that while prosecutors are less favorable to rights and liberties claims, those with some judicial experience are more favorable than those without it, "reflecting the moderating influence of sitting on the other side of the bench."[184] Gregory Sisk and his colleagues, in their quest to explain decisions involving the federal sentencing guidelines, even considered whether jurists had any military experience.[185]

As the Appendix shows, the type of judicial decision making under investigation also varied. In many instances, the researcher was concerned solely with explaining the votes of judges. Brudney and his colleagues' exploration of labor cases serves as an example. The authors used several background variables, such as experience as a law professor and as an elected office holder, to predict whether judges would vote for or against the outcome desired by a labor union.[186] In other studies, the concern was less with the vote and more with other types of judicial choices, such as adherence to precedent or the tendency to dissent.[187] Some even sought to

180. *Id.* at 95-96.
181. *Id.* at 102-03 (citation omitted).
182. Schneider, *supra* note 61, at 335.
183. Tate, *supra* note 177, at 362.
184. *Id.*
185. Sisk et al., *supra* note 61, at 1478-79.
186. Brudney et al., *supra* note 61, at 1699-1704.
187. Schmidhauser, *supra* note 61; Goldman, *supra* note 61.

HeinOnline --- 91 Cal. L. Rev. 955 (2003)

explore the reasoning jurists used in their opinions. Schneider's essay serves as an example, as does the Sisk study, which invoked occupational variables not only to explain whether judges upheld or struck down the sentencing guidelines but also to examine the reasoning jurists employed in their decisions.[188]

Despite these variations, the near uniformity of the results is overwhelming. Whether the authors approached career path in specific ways (e.g., legal experience representing management) or more general ones (e.g., any experience in private practice) or whether they sought to account for the vote, legal reasoning, or some other feature of judicial decision making, they generally found that career experience influenced judicial decision making. In several instances, the results took even the authors by surprise. Consider the conclusion reached by Sisk and his colleagues:

> Our findings provide greater support to the behavioral model of judicial decision making than we anticipated. While most of the social background variables we explored proved insignificant, some striking findings emerged that were consistent with a sociological or social construction model of decision making, particularly with respect to the prior employment variable. For example, prior experience as a criminal defense lawyer was significant under several formulations of our dependent variables as an explanatory variable for opposition to the Sentencing Guidelines. On the other hand, prior experience as a state or local judge was related to upholding the Guidelines as constitutionally valid.[189]

We believe that such results, along with the many others depicted in the Appendix, underscore the importance of career diversity on collegial courts. Because judges with varied career experiences bring distinct perspectives to the bench—perspectives that ultimately lead them to make distinct judicial choices—merging jurists with diverse career paths on a particular Court ought (in accord with our analysis in Part II) lead to more effective decision making.

B. Eliminating Career Homogeneity to Diversify the Gender and Racial/Ethnic Composition of the Court

As the quote above from the Sisk study suggests, not all background characteristics are as helpful in explaining variation in judicial choices as career experiences. Many characteristics, in fact, generate far more ambiguous results. Gender is a good example. For virtually every study that

188. Schneider, *supra* note 61; Sisk et al., *supra* note 61.
189. Sisk et al., *supra* note 61, at 1383 (citations omitted).

HeinOnline --- 91 Cal. L. Rev. 956 (2003)

has found that female judges behave differently than their male counterparts, there is a study that has found no differences between the two.[190]

Simply because relationships between judicial choice and gender are more ambiguous than relationships between judicial choice and career path does not reduce the importance of gender diversity. We need not recount here why variation in gender and race/ethnicity is desirable; scores of scholars, commentators, and policymakers have already done so.[191] What is worthy of emphasis is that decision makers ought be attentive to career path when making nominations to the Court because increasing diversity on this dimension may lead to increases in diversity on other critical dimensions, but particularly gender and race/ethnicity.

To see why, consider Table 2, which shows the numbers of women, Blacks, Latinas/os, and Asian Americans holding positions that, at least before the onset of the norm of prior federal judicial experience, presidents and Senates regarded as appropriate springboards to the Court. Note first that if decision makers continue to follow the norm and appoint only current U.S. court of appeals judges, the numbers of women and people of color available for appointment are quite limited. Of those jurists in active service, only thirty-five are women and just twenty-three are racial/ethnic minorities. Those numbers begin to border on the trivial if we consider that presidents typically nominate members of their own political party to the Court (and to the lower federal courts).[192] Since only eleven of the women and two of the minorities on the U.S. courts of appeals are Republicans, if George W. Bush followed both the norms of experience and of partisanship, he would be forced to draw from a very small pool of candidates comprising mostly Whites and males.

190. There are many relatively recent reviews of this literature. *See* Schneider, *supra* note 61, at 350 ("Studies about the impact of gender on judges' decisions are divided in their conclusions, some perceiving a difference and others, not."); *see also* Lee Epstein & Lynn Mather, *Beverly Blair Cook: The Value of Eclecticism*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2002); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995).

191. *See generally* DEREK BOK & WILLIAM G. BOWEN, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

192. Of Clinton's sixty-one appointees to the U.S. courts of appeals, 85.2% were Democrats. The percentages of Republicans appointed by Reagan and Bush Sr. were higher (96.2% and 89.2%, respectively). *See* Goldman & Slotnick, *supra* note 82, at 249.

HeinOnline --- 91 Cal. L. Rev. 957 (2003)

Table 2 Potential Pools of Candidates for U.S. Supreme Court Seats, by Gender and Race/Ethnicity

	U.S. Courts of Appeals Judges[193]	State Supreme Court Justices[194]	Tenured Law School Professors (Including Deans)[195]	Members of the U.S. Congress[196]	Members of State Legislatures	Governors	Partners in Law Firms[197]
Women	35	66	999	73[198]	1,668[199]	5[200]	7,669[201]
Blacks	12	25	230	37[202]	583[203]	0[204]	Not available
Latinas/os	10	4	114	22[205]	198[206]	0[207]	Not available
Asian Americans	1	6	62	6	72[208]	2[209]	Not available
Total Minority	23	35	406	61	853	2	1,723[210]

As the table shows, altering the norm of prior federal judicial experience just slightly to include service on a state supreme court would work to increase the available pool of female candidates and those of color. Only Latinas/os have less representation on the nation's highest state courts than they do on the federal courts of appeals; women, in contrast, hold nearly double the number of seats on the state courts than on the U.S. courts of appeals. Even so, the numbers remain relatively small in comparison to

193. *Id.* at 250 (including data only of judges in active service).

194. John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 47, 52 (1997) (data are for 1996).

195. Ass'n of Am. Law Schools, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions 2000-2001*, *at* http://www.aals.org/statistics/index.html#women (last visited Mar. 17, 2003) (data are for 1999-2000).

196. Data are for the 108th Congress. *See infra* notes 198, 202.

197. Nat'l Ass'n for Law Placement Found., *Women and Attorneys of Color at Law Firms - 1999*, *at* http://www.nalp.org/nalpresearch/mw99sum.htm (last visited Mar. 17, 2003) (data are for 1999).

198. Ctr. for Am. Women & Politics, *Women Who Will Serve in the 108th Congress 2003-05*, at http://www.cawp.rutgers.edu/facts/cong-03.html (last visited Mar. 17, 2003).

199. Ctr. for Am. Women & Politics, *Women in Elected Office 2003: Fact Sheet Summaries*, *at* http://www.rci.rutgers.edu/~cawp/facts/cawpfs.html (last visited Mar. 17, 2003) (data are for 2002) (on file with authors).

200. *Id.*

201. *See* Nat'l Ass'n for Law Placement Found., *supra* note 197.

202. CBSNews.com, *Meet the New Congress*, *at* http://www.cbsnews.com/stories/2003/01/06/politics/main535476.shtml (Jan. 6, 2003).

203. Ctr. for Voting & Democracy, *Racial Representation in State Legislatures 2000*, *at* http://www.fairvote.org/vra/legrace.htm (last modified Feb. 26, 2003) (data are for 2000).

204. Ctr. for Voting & Democracy, *Party Affiliation and Race of Governors by State 2001*, *at* http://www.fairvote.org/vra/govrace.htm (last modified Feb. 26, 2003) (data are for 2001).

205. *See supra* note 202.

206. *See* Ctr. for Voting & Democracy, *supra* note 203 (data are for 2000).

207. *See* Ctr. for Voting & Democracy, *supra* note 204 (data are for 2001).

208. *See* Ctr. for Voting & Democracy, *supra* note 203 (data are for 2000).

209. *See* Ctr. for Voting & Democracy, *supra* note 204 (data are for 2001).

210. *See* Nat'l Ass'n for Law Placement Found., *supra* note 197 (including African Americans, Asian/Pacific Islanders, American Indians, and Latinas/os).

HeinOnline --- 91 Cal. L. Rev. 958 (2003)

those that would be obtained if the president looked toward the nation's law schools—either to deans or other tenured professors.

Over the past decade or so the number of female professors has increased dramatically, such that there are now nearly a thousand in the senior ranks of legal academia. The figures for minorities are not as large, but they are certainly greater than those for state and federal judges. Of course, we are not suggesting that every female law professor or state supreme court justice is qualified to serve on the Court, just as not every member of the lower federal appellate bench would pass scrutiny either. But surely lurking in the nation's law schools are many Felix Frankfurters and Harlan Fiske Stones—distinguished justices who came to the Court directly from academia, or spent large portions of their career there.

Additionally, the nation's legislatures must house promising candidates as well. Though complaints about the underrepresentation of women, Blacks, Latinas/os, and Asian Americans in the U.S. Congress remain valid, the numbers of women and minorities are larger there than in the U.S. courts of appeals. Women now hold fourteen seats in the U.S. Senate and fifty-nine in the House,[211] with 35.6%, or twenty-six seats, filled by female Republicans. Again, the figures are smaller for Blacks, Latinas/os, and Asian Americans, but in all three cases they are greater than they are for positions on the U.S. courts of appeals.

Searching at the state level for potential candidates would have an even greater impact. For years social scientists have observed that state legislatures provide large openings for minorities and, especially, women to make their way into politics. Sandra Day O'Connor provides an example, and the data show that she is not alone. In 2002, 1,668 women served in the nation's state legislatures—a figure larger than their presence on U.S. courts of appeals, on state supreme courts, in law schools, and in Congress combined. They also serve as the governors in five states, as well as lieutenant governors in seventeen others. Blacks, Latinas/os, and Asian Americans do not yet have as strong a presence as state governors, but they are becoming increasingly represented in state legislatures.

Of course, not all legislators and executives, just as not all law professors or U.S. court of appeals judges, are qualified to serve on the nation's highest court. At least some nontrivial percentage do not even hold law degrees, a seemingly ironclad (though not constitutionally mandated) requirement for nomination.[212] But this criterion is certainly not a problem for partners in private practice law firms. As indicated by Table 2, large numbers of women and minorities hold these positions. While the percentages of women and minorities serving as partners remain relatively low, the absolute numbers are large compared to the other categories we have

211. *See* Ctr. for Am. Women & Politics, *supra* note 198.

212. ABRAHAM, *supra* note 3, at 35.

HeinOnline --- 91 Cal. L. Rev. 959 (2003)

examined. Thus, private firms may be presidents' greatest untapped source (at least in contemporary times) for potential nominees.

IV
IMPLICATION OF THE STUDY

As is true for many academics, we sometimes struggle to develop the policy implications of our research. But that is not the case here. In fact, we believe our work leads to a conclusion as stark as the data we have presented throughout—namely, that both the president and Senate ought strive to create a more diverse Court by taking into account the career experiences of potential nominees, just as they are now attentive to other dimensions of diversity (such as race and gender) when they make appointments to the bench.

How might they accomplish this? Their first task is to eradicate the norm of prior federal judicial experience—a norm that apparently began in the 1950s and continues to structure presidential and senatorial choices today. It is this norm, we believe, that has induced the homogeneity so apparent on the current Court; and it is this homogeneity, as we have argued throughout, that limits the ability of the Court to operate optimally.

Eradicating the norm should present no major difficulties. It only requires the president to look beyond the U.S. courts of appeals towards other potential sources of nominees, notably the state and federal legislatures, private law firms, law schools, and executive branches, where presumably, if history is any indication, there are hundreds, if not thousands, of qualified lawyers. In so doing, we hasten to note that the president should not feel bound to fill the next three or four vacancies with, for example, all federal legislators, former cabinet members, or legal academics. This would only have the effect of perpetuating homogeneity on the Court and, perhaps, create a new, equally troublesome norm (e.g., a norm of elected political experience). Rather, the president must be attentive, as we have been in this Article, to the career experiences of the justices remaining on the Court and work in direct contrast to his recent predecessors to avoid overrepresentation of those drawn from particular segments of the legal community. Given the large pool that exists from which to draw potential nominees, we cannot imagine that our current president and his successors will find this a particularly onerous task. More to the point, it is a task they ought desire to undertake in light of the serious consequences of perpetuating the norm of prior judicial experience and the enormous benefits of eradicating it.

HeinOnline --- 91 Cal. L. Rev. 960 (2003)

APPENDIX

Summary of Studies Exploring Links Between the Prior Occupations of Judges and Judicial Decision Making[213]

Study	Prior Occupation(s) Investigated	Feature(s) of Judicial Decision Making Investigated	Found a Relationship between Occupation and Judicial Decision Making?
Ashenfelter et al. (1995)[214]	Whether judges have: • prior judicial experience • prosecutorial experience • experience as elected office holders	Examples include whether judges: • rule for or against the plaintiff • refer cases to a magistrate	No
Brudney et al. (1999)[215]	Whether judges have: • experience as elected office holders • experience in high-level non-elected offices • prior judicial experience • academic experience (as law professors) • private practice experience (of various types)	Whether judges vote for or against unions	Yes (e.g., judges with experience in private practice representing management are more likely to support union claims than judges without such experience)
Dolbeare (1969)[216]	Whether judges have prior judicial experience	Whether judges vote for or against the government	Yes (judges with prior judicial experience are more likely to rule in favor of the government than judges without such experience)

213. In addition to the studies listed here, we should note Thomas G. Walker & William E. Hulbary, *Selection of Capable Justices*, *in* THE FIRST ONE HUNDRED JUSTICES 52 (Albert P. Blaustein & Roy M. Mersky eds., 1978). This work does not explore the link between occupation and judicial decisions. Rather, it explores the link between Supreme Court justices' occupations and whether a group of scholars rated the justices' careers as "great," "near great," "average," or "failure." Among the many interesting findings is that scholars tended to give lower ratings to justices with prior judicial experience.

214. Ashenfelter et al., *supra* note 61.

215. Brudney et al., *supra* note 61.

216. Kenneth M. Dolbeare, *The Federal District Courts and Urban Public Policy*, *in* THE FRONTIERS OF JUDICIAL RESEARCH 388 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

HeinOnline --- 91 Cal. L. Rev. 961 (2003)

Study	Prior Occupation(s) Investigated	Feature(s) of Judicial Decision Making Investigated	Found a Relationship between Occupation and Judicial Decision Making?
Eisenberg and Johnson (1991)[217]	Whether judges have: • prosecutorial experience • prior judicial experience	Whether judges vote for or against constitutional claim of race discrimination	Yes (e.g., judges with prior judicial experience are more likely to support claims of race discrimination than judges without such experience).
Giles and Walker (1975)[218]	Whether judges have political experience	Degree to which judges support school desegregation	No
Goldman (1966)[219]	Whether judges have: • political experience • prior judicial experience	Whether judges: • vote in the "liberal" or "conservative" direction in several areas of the law • are prone to dissent	Mixed but generally no
Goldman (1975)[220]	Whether judges have: • prior judicial experience • experience as candidates for office • prosecutorial experience	Whether judges: • vote in the "liberal" or "conservative" direction in several areas of the law • are prone to dissent	Mixed but generally no
Gryski et al. (1986)[221]	Whether justices have experience as elected office holders	Whether justices vote for or against claims of sex discrimination	No
Howard (1981)[222]	Whether judges have prior judicial experience	Whether judges vote in the "liberal" or "conservative" direction in several areas of the law	Generally no

217. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991).

218. Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917 (1975).

219. Goldman, *supra* note 61.

220. *Id.*

221. Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986).

HeinOnline --- 91 Cal. L. Rev. 962 (2003)

Study	Prior Occupation(s) Investigated	Feature(s) of Judicial Decision Making Investigated	Found a Relationship between Occupation and Judicial Decision Making?
Johnson (1976)[223]	Whether justices have prosecutorial experience	Whether justices vote in the "liberal" or "conservative" direction in several areas of the law	Yes (e.g., justices with prosecutorial experience tend to be more "conservative" than justices without such experience)
Merritt & Brudney (2001)[224]	Whether judges have: • experience representing management in labor cases • union, government or academic (non-management) experience in labor cases	Whether judges publish opinions or not	Yes (e.g., judges with experience representing management are less likely to publish opinions than judges without such experience)
Nagel (1962)[225]	Whether justices have prosecutorial experience	Whether justices vote for or against criminal defendants	Yes (e.g., justices with prosecutorial experience are less favorable toward criminal defendants than justices without such experience)
Schmidhauser (1962)[226]	Whether justices have prior judicial experience	Whether justices adhere to stare decisis or not	Yes (justices with prior judicial experience are more willing to abandon stare decisis than justices without such experience).
Schneider (2001)[227]	Whether judges' primary professional experience is: • in private practice • in government • as a judge • as a teacher	What method judges use to interpret tax code	Yes (e.g., judges without private practice work experience rely less on regulations or pronouncements as their primary interpretive approach than judges with such experience)

222. J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 170 (1981).

223. Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, *in* CASES IN AMERICAN POLITICS (Robert L. Peabody ed., 1976).

224. Merritt & Brudney, *supra* note 61, at 95-96.

225. Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333 (1962).

226. Schmidhauser, *supra* note 61, at 200.

HeinOnline --- 91 Cal. L. Rev. 963 (2003)

Study	Prior Occupation(s) Investigated	Feature(s) of Judicial Decision Making Investigated	Found a Relationship between Occupation and Judicial Decision Making?
Sisk (1998)[228]	Whether judges have: • criminal defense experience • prior judicial experience • prosecutorial experience • military service experience • academic experience (law professors) • political experience	• Whether judges vote to uphold or strike down federal sentencing guidelines • What reasoning judges use in federal sentencing guideline cases	Yes (e.g., judges with criminal defense experience are more likely to invalidate guidelines than those without such experience)
Sprague (1968)[229]	Whether justices have prior judicial experience	Whether justices joined particular voting blocs	Mixed
Tate and Sittiwong (1989)[230]	Whether justices have: • prior judicial experience • political experience	Whether justices vote in the "liberal" or "conservative" direction in several areas of the law	Yes (e.g., justices with prosecutorial experience are more "conservative" than justices without such experience)
Tate and Handberg (1991)[231]	Whether justices have: • prior judicial experience • prosecutorial experience	Whether justices vote in the "liberal" or "conservative" direction in several areas of the law	Yes (e.g., justices with prosecutorial experience are more "conservative" than justices without such experience)

227. Schneider, *supra* note 61, at 349.

228. Sisk et al., *supra* note 61, at 1382.

229. JOHN D. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM 1889-1959 109-11 (1968).

230. C. NEAL TATE & PANU SITTIWONG, DECISION MAKING IN THE CANADIAN SUPREME COURT: EXTENDING THE PERSONAL ATTRIBUTES MODEL ACROSS NATIONS, 51 J. POL. 900, 911-12 (1989).

231. Tate & Handberg, *supra* note 61, at 474-76.

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Study	Prior Occupation(s) Investigated	Feature(s) of Judicial Decision Making Investigated	Found a Relationship between Occupation and Judicial Decision Making?
Tate (1981)[232]	Whether justices have: • prior judicial experience • prosecutorial experience • experience as elected office holders • federal administrative experience	Whether justices vote in the "liberal" or "conservative" direction in several areas of the law	Yes (e.g., justices with prior judicial experience are more "liberal" than justices without such experience)
Ulmer (1970)[233]	Whether justices have political experience	Whether justices are prone to dissent	Yes (justices with political experience are more likely to dissent than justices without such experience)
Ulmer (1973)[234]	Whether justices have federal administrative experience	Whether justices vote in the "liberal" or "conservative" direction in several areas of the law	Yes (e.g., justices with federal administrative experience are more "conservative" than justices without such experience)
Vines (1964)[235]	Whether judges have: • political experience • judicial experience	Whether judges have a positive or negative general disposition toward race relations cases	Generally yes (e.g., judges who held state political office are more negatively disposed toward race cases than judges who did not hold such positions)

232. Tate, *supra* note 177, at 361-63.

233. S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580 (1970).

234. Ulmer, *supra* note 61, at 624-25.

235. Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 338 (1964).

HeinOnline --- 91 Cal. L. Rev. 965 (2003)

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