

The Norm of Prior Judicial Experience (and Its Consequences for the U.S. Supreme Court)

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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, the six 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 now, those charged with nominating and confirming 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 1971 no President (whether a Republican or Democrat) has nominated and no Senate (again whether controlled by the Republicans or Democrats) has confirmed a justice to the Supreme Court who lacked judicial experience;⁴ actually, all appointees to the Court after William H. Rehnquist in 1971 were jurists at the time of their nominations. In contrast, more than fifty years have elapsed since a President has elevated a sitting legislator to the High Court (Harold Burton in 1975), 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, today’s Court—while growing more and more diverse on some dimensions⁶—is becoming less and less so on the dimension of career diversity. All justices serving in 2002 held positions in the public sector immediately prior to their ascension to the Court; only one, the Chief Justice, did not obtain his or her position by way of the nation’s judiciary—with fully seven serving on a U.S.

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We used SPSS and R to analyze the data. <http://www.artsci.wustl.edu/~polisci/epstein/research> houses all data and documentation necessary for replication.

¹ Kenneth L. Manning, Bruce A. Carroll, & Robert A. Carp, *George W. Bush’s Potential Supreme Court Nominees: What Impact Might They Have?*, 85 JUDICATURE 278 (2002), 280-281. 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*, *Lexis-Nexis*.”

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.

³ See, e.g., HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS (1999), MARK SILVERSTEIN, JUDICIOUS CHOICES (1994), DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES (1999). For more on this norm, including its origins, see Part I, *infra* p. 3.

⁴ See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS (1996), Table 4-11.

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 a private practice at the time of appointment.

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 a charismatic Episcopal church but, in 1996, he returned to the Catholic church). Breyer and Ginsburg are Jewish; and the two women are O’Connor and Ginsburg. See *Id.*, at Table 4-3.

Court of Appeals before joining the Court.⁷ Just three of the nine justices came to the bench with any long-term experience in private practice; two *never* practiced in a private law firm.⁸ And while all but two worked, at one time or another, as government attorneys,⁹ only Justice Thomas received an appointment to a position in the executive branch¹⁰ that did not “necessitate” a law degree.¹¹ No previous members of a U.S. 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.

This degree of occupational homogeneity has not been missed by scholars. After conducting an extensive investigation into factors affecting presidential choice of Supreme Court nominees, Yalof claimed that “federal circuit court judges have become the ‘darlings’ of the selection process.”¹² Other commentators agree,¹³ as do jurists. Just this past year, Chief Justice Rehnquist asserted that while at one time his Court housed the likes of Louis Brandeis, John Harlan, and Byron White—in other words, justices “drawn from a wide diversity of professional backgrounds”—those days are long gone.¹⁴

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 come “to resemble the judiciary in civil law countries, [which]

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 First.

⁸ Kennedy was in private practice between 1961-75, Rehnquist from 1953-69, and Stevens from 1948-51 and 1952-70; 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 and was rather short lived. 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 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 26 years between the time he obtained his law degree and his nomination to the Supreme Court, Scalia spent six (less than 25 percent) in private practice. Such is not a typical for this Court. Taken collectively, the nine justices worked in private law firms for sixty-nine years, yielding a median of six. Data available in EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 4-6.

⁹ The two are Justices Kennedy and Ginsburg.

¹⁰ Justice Thomas served as Chairman of the Equal Employment Opportunity Commission between 1982-90.

¹¹ We place the term “necessitate” in quotations since many legal positions in government do not formally require law degrees; it would be possible, for example a president to nominate a non-lawyer to serve as Attorney General or even a U.S. Supreme Court justice. And, in fact, early holders of those positions (*e.g.*, Nathan Clifford, who served as U.S. Attorney General between 1846 and 1848, and became Supreme Court justice in 1858) typically did not have law degrees. Rather it was common for lawyers to be trained by “reading the law,” which they accomplished through self-study or by serving as an apprentice under an experienced lawyer. Only in the more modern period have justices received their education in a formal law school setting. See EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 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 YALOF, *PURSUIT OF JUSTICES*, *supra* note 3, at 170.

¹³ See, *e.g.*, SILVERSTEIN, *JUDICIOUS CHOICES* *supra* note 3; ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS*, *supra* note 3.

¹⁴ William H. Rehnquist, “Year-End Report on the Federal Judiciary, 2001,” released on January 1, 2002 (available at: <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>). The relevant portion of Rehnquist’s report is as follows: “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.”

reasonable people...think...simply do not command the respect and enjoy the independence of ours.”¹⁵ We too are disturbed by the lack of variation seemingly induced by the norm of prior judicial experience but for a different reason: To us, norms that cut against diversity reduce the ability of the affected group to perform its tasks.

This holds for virtually all norms and all groups (the Supreme Court not excepted) but the norm of prior judicial experience is particularly troublesome for two reasons. First, since virtually all analyses show occupational path to be an important factor in explaining judicial choices—from the votes justices cast to their respect for *stare decisis*¹⁶—the homogeneity induced by the norm suggests that the current Court is not making optimal choices. Or, at least not choices as optimal as those made by its more diverse predecessors. 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,¹⁷ the norm is working to limit diversity on dimensions other than occupational path.

Our general claim thus is a simple one: We believe there now exists a norm of prior judicial experience that is working to induce a highly-problematic level of career uniformity on the Court. To make the case for it, we first, in Part I, demonstrate empirically what the (largely anecdotal) extant commentary suggests: that the occupational paths of justices serving on the Supreme 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 diversity: At no other time in American history has the Court been composed of justices so alike in terms of their career experience. Next, in Parts II and III, we turn to the normative components of our claim. Drawing on diverse bodies of literature, we explain why norms that produce homogeneous groups—and the norm of prior judicial experience in particular—are fraught with dangers.

From this discussion we extract a singular but certainly non-trivial policy implication: Because of problems associated with a perpetuation of the norm of prior judicial experience, we believe that the Senate, the President and other key players in the confirmation process, as well as the public writ large, would be well advised to give greater attention to the career experiences of those they would like to see serve on the Nation’s highest Court. But such attention, as we explain in Part IV, 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 over duplication.

I. The Norm of Judicial Experience

Our general claim houses a set of inter-related empirical and normative components. On the normative front, we believe that (1) most any norm that induces homogeneity is troublesome but that (2) the norm of prior judicial experience is particularly so. This position presupposes two empirical claims: that in fact (1) a norm of prior judicial experience exists and (2) it is working to induce unprecedented levels of career homogeneity on the Court.

In what follows, we invoke existing studies, as well as data on the backgrounds of nominees to the Court, to explore these two empirical claims. Since that exploration produces nearly-conclusive evidence of their veracity, we turn, in Part III, to the normative component of our argument.

A. The Existence of the Norm

The first part of our empirical claim—that there now exists a norm of prior judicial experience—is hardly novel. As early as 1959¹⁸ and as recently as 2002,¹⁹ many commentators have acknowledged the grave

¹⁵ 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 Part IC, *infra* p. 20.

¹⁶ For a list of these analyses, see Table 2, *infra* p. 29.

¹⁷ See Table 3, *infra* p. 35.

¹⁸ John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959).

hesitation of Presidents and Senates to appoint anyone other than sitting judges to the Court—and, by and large, U.S. circuit court judges at that.

This is not to say that analysts agree over all features of the norm; they surely do not. For example, while almost all claim that its genesis lies in the 1950s, in the Eisenhower years, some suggest that it originated with certain members of Congress, who, in the wake of Chief Justice Warren's unanimous opinion in *Brown v. Board of Education*,²⁰ "bitterly urge[d]" President Eisenhower to select "men who [would] base decisions... upon 'law,' not 'sociology.'"²¹ Because such "men," at least in their eyes, were more likely to come to the Court from (federal) judgeships, and not from legislatures (as did Hugo Black), academia (as did Felix Frankfurter), or governors' mansions (as did Earl Warren),²² they went so far as to propose legislation requiring that all future appointees have at least five years judicial experience. Others argue that it was the President himself who created the norm.²³ On this account, after nominating Warren as Chief Justice, Eisenhower deliberately "imposed" the criterion of judicial experience to distance himself from the overt "cronism" that characterized the approach to judicial selection taken by his immediate predecessors (Roosevelt and Truman) and, in turn, to increase the likelihood of appointing justices who would "command the respect, confidence, and pride of the population"²⁴

Analysts also disagree over the wisdom of the norm. Some defend it on much the same grounds as did Eisenhower: as a, if not the best, mechanism to ensure the appointment of the most capable, ethical, and qualified individuals.²⁵ Others are quite critical. Rehnquist, for one, as we noted at the onset, claims that a Court replete with former judges will be unable to command respect.²⁶ A more common complaint, however, is that the norm serves merely and simply as a vehicle for Presidents and Senates to assess the political ideology of potential candidates.²⁷ Even Eisenhower, some say, created the 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."²⁸

These debates will inevitably continue;²⁹ what seems foreclosed is discussion over the norm's existence and perpetuation. Nary a contemporary scholar who has written on the subject would dispute Yalof's claim about federal circuit court judges being, at least since the 1950s "the 'darlings' of the selection process."³⁰

And, yet, the evidence in support of such claims tends toward the anecdotal or asystematic. This need not be the case. Though neither we nor any others concerned with the norm of prior judicial experience can directly observe it,³¹ we can identify its possible manifestations and ultimately trace them against data that we

¹⁹ Rehnquist, "Year-End Report," *supra* note 14.

²⁰ 347 U.S. 483 (1954).

²¹ Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 41 *supra* note 18.

²² Black, Frankfurter, and Warren were all members of the Court that produced *Brown*.

²³ E.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES (1997), YALOF, PURSUIT OF JUSTICES, *supra* note 3.

²⁴ GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 3, at 115. Indeed, Eisenhower apparently went so far as to make clear that "he would use an appeal court appointment as a stepping stone to the Supreme Court. In his diary, Eisenhower recounted that he with Attorney General Brownwell about appointing Brownwell to the Supreme Court: 'I told Brownwell 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.'" Quoted in GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 3, at 114. Brownwell turned down Eisenhower's offer.

²⁵ See, e.g., LAWRENCE BAUM, THE SUPREME COURT (2001), 42-43.

²⁶ Rehnquist, "Year-End Report on the Federal Judiciary, 2001," *supra* note 14.

²⁷ See, e.g., Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 41 *supra* note 18 (claiming that "It may be properly suspected that those who urge [the perpetuation of the norm of prior judicial experience] consciously or unconsciously assume that 'good' judges are those who are apt to render decisions in accordance with [their] ideological predilections; DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (2000), 57 (noting that "Judges and scholars perpetuate the myth of merit. The reality, however, is that every appointment is political.)

²⁸ Quoted in ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 3, at 191.

²⁹ We actually hope to contribute to them in Parts II and III of this article.

³⁰ YALOF, PURSUIT OF JUSTICES, *supra* note 3, at 170.

³¹ As Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001) note: "norms 'are not directly observable' and, thus, notoriously difficult to document— so much so that

can observe. In the case of the norm of prior judicial experience, we see three manifestations as particularly compelling: If the norm is now in effect, and has been since the Eisenhower years, we might expect to find (1) a majority of sitting judges among those names on contemporary presidential “short lists” for the Court (2) a statistically significant difference between the proportion of nominees who were sitting judges before 1953 (the year of Eisenhower’s first appointment) and thereafter and (3) a statistically significant increase in the proportion 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, precisely the direction reflected in the extant commentary: they are consistent with the existence of norm of judicial experience

Beginning with the first—the names of persons on presidential short lists—we presented George W. Bush’s in the first sentence of this article; it is replete with sitting judges. The same holds for all other modern-day Presidents. 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. circuit court judges Arlin M. Adams and John Paul Stevens.³² With only scattered exceptions, virtually every name on Reagan’s lists for all four appointments he made to the Court was that of a sitting jurist—with almost all serving on a U.S. Court of Appeals.³³ The final four candidates on Bush Sr.’s short list for a replacement for Justice William Brennan were all federal appellate court judges (Edith Jones, David Souter, Laurence H. Silberman, and Clarence Thomas), as were those for the seat now occupied by Clarence Thomas (in addition to Thomas, Edith Jones, Jose Cabranes, and Emilio Garza).³⁴ Clinton apparently gave consideration to several politicians (including Bruce Babbitt, Mario Cuomo, and George Mitchell) but, in the main and like his predecessors, the vast majority of names he seriously deliberated were all jurists (including Gilbert Merritt, Jon O. Newman, Amalya Kearse, and Richard S. Arnold)—as were his eventual nominees, U.S. circuit court judges Breyer and Ginsburg.³⁵

As a threshold matter, the presence of sitting jurists on presidential short lists is important. But it is not the only possible manifestation of a norm of prior judicial experience, nor is it necessarily the most convincing. After all, even if the norm is in effect it may not necessarily work to constrain Presidents in their private thinking about the Court; rather it would act to constrain their public behavior. So, for example, while Clinton contemplated tapping Babbitt (who was Secretary of the Interior at the time) for a seat on the Court, he dropped that idea when some expressed concern about Babbitt’s “lack of judicial experience.”³⁶

Accordingly, perhaps more telling signs of the norm come in those persons actually nominated to serve—with the two we note above particularly important: (1) a change in the proportion of nominees who were sitting judges before 1953 (Eisenhower’s first nomination) and thereafter and (2) a growth in the proportion 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 (whether successfully or unsuccessfully so) by all Presidents,³⁷ which we now depict in graphic form in Figure 1. As we can observe, whether we consider all nominees or only those who ultimately obtained appointments to the Court we find evidence consistent with the existence of a norm of judicial experience: The anticipated statistically significant difference, in the expected direction, emerges between the judicial backgrounds of

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 (1998), 875.

³² ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 3, at 275.

³³ YALOF, PURSUIT OF JUSTICES, *supra* note 3.

³⁴ ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 3, at 304, 310.

³⁵ *Id.*; SILVERSTEIN, JUDICIOUS CHOICES *supra* note 3.

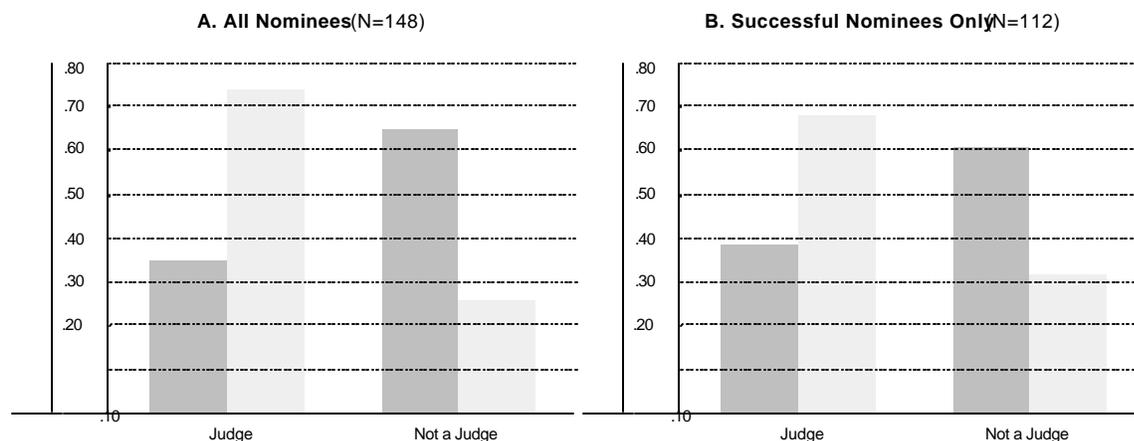
³⁶ SILVERSTEIN, JUDICIOUS CHOICES, *supra* note 3, at 170. But see ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, *supra* note 3, at 317 who claims Clinton offered the job to Babbitt but Babbitt declined. Silverstein writes that Babbitt was “passed over.”

³⁷ All data used here and throughout the article are available on our web site:

<http://www.artsci.wustl.edu/~polisci/epstein/research>. For this analysis and all analyses of “position at the time of appointment,” we double count Associates nominated to serve as Chief Justice (e.g., the post-1953 cohort includes Rehnquist as an Associate and as Chief Justice). We made this decision because a President could have appointed someone other than a sitting Associate to the Chief Justice slot (i.e., a person who was not a judge at the time of nomination).

those appointed before 1953 and thereafter³⁸—such that of the 121 nominations made by Eisenhower’s predecessors, roughly a third 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 jurists. And, for the most part, the seven exceptions to general rule of “prior judicial experience” in the post-Eisenhower years came early on. Eisenhower himself generated one with his 1953 nomination of Earl Warren, who was the Governor of California at the time. But that exception is readily explicable in light of accounts suggesting that it was Warren’s opinion for the Court in *Brown* that led to the creation of the norm in the first place.³⁹

Figure 1 Proportion of Nominees Holding Judgeships at the Time of their Nomination to the U.S. Supreme Court, by Era (Pre- and Post-1953)⁴⁰



Note: Dark bars on the left denote persons nominated between 1789-1952 (up until the nomination of Earl Warren in 1953); the light bars on the right are those appointed thereafter (from Warren on).

Since the remaining six exceptions came about during the Kennedy, Johnson, and Nixon years—with all three Presidents appointing two non-sitting jurists⁴¹—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. That may well characterize the administrations of Kennedy and Johnson, both of which apparently focused more on personal and political patronage than on prior judicial experience.⁴² But it was actually Nixon who revived the norm. Or, at least attempted to do so, explicitly directing his advisors to follow Eisenhower’s model and use as prior judicial experience as a criterion for serious consideration for the Court.⁴³ Nixon’s first two appointments (federal circuit court judges Warren Burger and Harry Blackmun) met this requirement, though not without difficulty: the Senate rejected his first two candidates (G. Harold Carswell and Clement Haynsworth, both also court of appeals judges) for Blackmun’s seat. It was those tangles with the Senate that led Nixon to “forego the requirement of judicial experience, as long as that nominee could still be confirmed.”⁴⁴ Even so, most of names seriously vetted by the Nixon administrator for the next two vacancies were sitting jurists, including Mildred Lillie, a California Court of Appeals judge. When Nixon ran into problems with the American Bar Association (which, to

³⁸ The Pearson Chi square for all nominees is 14.051 ($p < .001$); for successful nominees it is 6.138 ($p = .013$).

³⁹ See *supra* p. 4.

⁴⁰ Data are from EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS, *supra* note 4, at Table 4-9. See also *supra* note 37.

⁴¹ 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).

⁴² See YALOF, PURSUIT OF JUSTICES, *supra* note 3.

⁴³ *Id.*; GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 3.

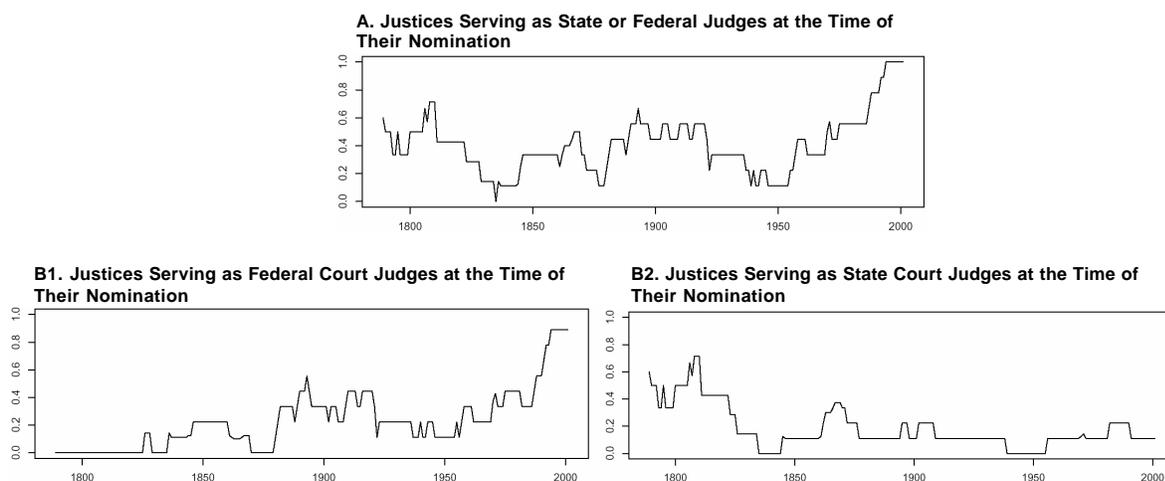
⁴⁴ YALOF, PURSUIT OF JUSTICES, *supra* note 3, 116.

provide one example, deemed Lillie unqualified by a vote of 11-1) he turned to Lewis Powell, an attorney in private practice, and only through near “desperation” did he tap William Rehnquist.

At the end of the day, then, Nixon did not fully succeed in his effort to adhere to the norm of prior judicial experience. But the same cannot be said of his successors. Since 1971, all nominees to the Court, whether successful or not, held judgeships at the time of their appointment—including Ford’s one; Reagan’s five; Bush’s two; and Clinton’s two.

As a result, it should come as little surprise that the other manifestation of the existence of a norm of prior judicial experience emerges from the data. As Figure 2 shows, we observe a steep increase since the 1950s in the proportion of Court members who were sitting judges at the time of their nomination, such that a regression of the proportion of judges (illustrated in the top panel) on time for the years subsequent to 1953 produces a slope coefficient that is positive and significant;⁴⁵ for a regression for the period prior to 1953 the relationship is statistically insignificant.⁴⁶ Note too that, in line with various accounts of the norm of prior judicial experience, the growth has come unevenly: What has increased precipitously and significantly since 1953 is the proportion of nominees coming from federal courts (Panel B1); what has remained relatively flat is the proportion coming from state courts (Panel B2).

Figure 2 Proportion of Justices Serving as Judges at the Time of Their Nomination, by Year (1789-2001)⁴⁷



But should we attribute the observed growth to the existence of a norm of prior judicial experience? We raise this question because another obvious candidate presents itself: the lack of a separate circuit court judiciary until 1869.⁴⁸ Accordingly, if Presidents desired to appoint jurists to the Court before then, their alternatives were limited to federal district court judges or those serving on state courts. Early on they generally opted for the latter, with appointments going to state judges at all levels, from the highest benches⁴⁹ to those at lower rungs.⁵⁰ President John Quincy Adams’s nomination of Robert Trimble—a U.S. District Court judge—in 1826 marked the first departure from this general pattern but it was not until the turn of the century when Presidents made almost a complete break with the past by appointing nearly exclusively federal jurists to the neglect of their state counterparts.

⁴⁵ $P < 0.0001$.

⁴⁶ $P = 0.0872$.

⁴⁷ Data are from EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, Table 4-9. See also *supra* note 37.

⁴⁸ The Judiciary Act of 1869 (16 Stat. 44) provided for a separate circuit judiciary of nine members. The establishment of circuit courts of appeals (renamed courts of appeals in 1948) did not come until the Judiciary Act of 1891 (26 Stat. 826).

⁴⁹ *E.g.*, John Blair, Jr. (Virginia Supreme Court justice); Thomas Todd (Kentucky chief justice).

⁵⁰ *E.g.*, Samuel Chase (Maryland General Court judge), William Johnson (South Carolina Common Pleas judge).

That this break coincides with the creation of separate circuit courts is suggestive: The establishment of these bodies probably plays some role in explaining the trends we observe in Figure 2. But—and this is a big but—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 B1) that began in the 1950s and continues today: Before 1953, the proportion of justices coming directly from the federal courts of appeals was, on average, a mere .16; after that date, it increased to .43.⁵¹

It thus seems that the explanation for this dramatic and significant increase lies not in the 19th century but rather closer to when it occurred—in the mid-20th century, or precisely the period during which scholars say the norm of judicial experience originated. And while we cannot say for sure whether those origins lay with Eisenhower or Congress, what we can say is that, by all indications and in accord with existing commentary, Presidents (with the help of Senates), in following Eisenhower's lead, have now created what appears to be a norm of prior (federal) judicial experience.

B. Homogeneity and the Norm of Judicial Experience

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 occupational homogeneity on the U.S. Supreme Court. Certainly Figure 2 is suggestive: From it we learn that the proportion of justices who came to the Court directly from one of nation's other benches has grown precipitously over time to the point where contemporary justices do not compose a particularly heterogeneous group. But Figure 2 does not help us rule out two possibilities. One is that that “position at time of appointment,” which we have used thus far to gauge the existence of the norm of prior judicial experience, does not capture important features of career diversity. It could be that those serving as judges at the time of their appointment were actually a varied lot, perhaps having been legislators, government attorneys, high-level executive officials, and so on before they joined a state or federal bench. If this were the case, we would be unable to conclude that the norm has produced extraordinary homogeneity; we would rather say that its chief impact was to limit the pool of potential nominees to sitting judges. A second possibility is that other sorts of career experience norms previously have been in effect, leading Presidents and Senates to appoint, say, only attorneys who worked in the private sector at the time of their nomination or only those who served in the executive branch of government. If this were the case—if the Court is and has always been wanting in diversity on the dimension of career experience—then once again we would be unable to say that the norm of prior judicial experience has induced unparalleled homogeneity.

In short, to determine whether the norm has generated a unique lack of heterogeneity on the Court, we cannot stop our analyses with a documentation of a rise in the proportion of sitting judges; we also must look over time at the types of positions held by nominees, as well as at their overall experience. It is to those tasks that we turn below.

1. Position at Time of Appointment

When Presidents present their Supreme Court nominees to the public, they often expend more than a few words on their candidates' current occupation. To take a recent example, 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.

⁵¹ $P < 0.0001$.

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.⁵²

Clinton is not atypical: Virtually every recent President has, at the time of nomination, placed emphasis on his candidate's contemporaneous position and resulting qualifications.

We follow suit, and begin our analysis of career diversity here—with the position held by the nominee when the President taps him or her to serve. Specifically, our task is to explore the possibility that that norm of judicial experience merely supplanted other occupational norms (such as those that would lead Presidents to nominate only attorneys in private practice or sitting legislators), which also led to Courts that were as lacking in career diversity as the present one.

To investigate this possibility, we began by sorting the positions nominees held at the time of their appointment into six relatively common categories:⁵³ (1) “professor,” (2) “judge,” (3) “legislator,” (4) “member of the executive branch (in a position that does not require legal training),”⁵⁴ (5) “government attorney,” or (6) “attorney in private practice.”⁵⁵ Then, by calculating the proportions of justices falling into each category on every Court since 1789, we created an indicator of diversity—one that would enable us to assess the level of occupational heterogeneity both in the past and the present.

Figure 3 displays this indicator in gray tones, such that, 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 (government attorneys),⁵⁶ two (.22) were members of executive branch in non-legal capacities,⁵⁷ two (.22) were legislators,⁵⁸ one (.11) was a judge,⁵⁹ and one (.11), a professor.⁶⁰ More generally, the more shades of gray, the more diverse the Court; the fewer shades, the less diverse.

⁵² Quoted in *The Supreme Court: Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15 1993.

⁵³ 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, Theodore Eisenberg, & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcome*, 24 J. LEGAL STUDIES 257 (1995); James J. Brudney, Sara Schiavoni, & Deborah Jones Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L. J. 1675 (1999); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Deborah Jones Merritt, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (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 (1962); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M.L. REV. 325 (2001); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U.L. REV. 1377 (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 (1991); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases*, 17 AM. J. POL. SCI. 622 (1973). Some 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.

⁵⁴ See *supra* note 10. See also *infra* note 55.

⁵⁵ To be specific, “professors” are justices who held positions in universities or colleges at the time of nomination; “Judges” are justices who served as international, federal, or state jurists at the time of nomination; “legislators” are justices who served as federal or state legislators at the time of appointment; “executive branch members” are justices who held elected executive (e.g., governor) or appointed positions that do not call for a legal background (e.g., a seat in the U.S. cabinet, an ambassadorship, or a position on an executive commission or agency) (see also *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 nomination; “attorneys” are justices who were in private practice at the time of nomination.

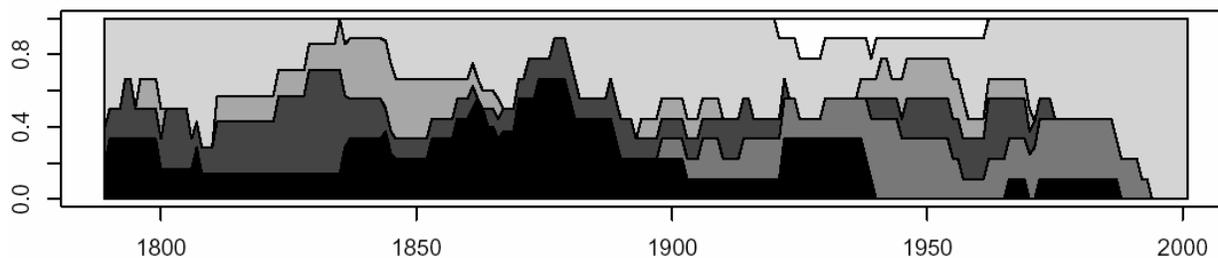
⁵⁶ Justices Reed, Jackson, and Clark.

⁵⁷ Justices Douglas and Vinson.

⁵⁸ Justices Black and Burton.

⁵⁹ Justice Minton.

Figure 3 Proportion of Justices Holding Various Positions at the Time of Their Nomination, by Year (1789-2001)⁶¹



Note: Moving from the lightest (white) region (top) to darkest (black) region (bottom) the categories are: “Professor,” “Judge,” “Legislator,” “Executive Branch,” “Government Attorney,” and “Attorney.” See *supra* note 55 for a description of these categories.

With that in mind, it is easy to see the growing homogeneity of the Court, at least on the basic occupational categories displayed in Figure 3. While a plethora of shades exist for almost all prior periods, after Justice Powell’s retirement in 1987 (through 1993) we see only two: one representing judges, the other, government attorneys. Beginning in 1994, homogeneity reaches new heights, with all members of the Court attaining their current position via a judgeship.⁶²

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 proportion of justices who held political positions—either as legislators (Panel A) or members of the executive branch in capacities that did not require law degrees (Panels B1 and B2)—on each Court each year.⁶³ Beginning with legislators, we see that over the course of the last two centuries or so, justices coming directly from elected positions on the nation’s legislatures have never dominated the Court: At their highest points (in 1844 and 1845), they composed about 38 percent of the Court. Nonetheless, those justices serving in the U.S. Congress, whether as Representatives or Senators, at the time of their appointment, maintained some presence—at least until 1971, when Hugo Black retired.⁶⁴ But, since Black’s departure, no President has nominated a sitting member of Congress or, for that matter, a state legislator to the Court (in fact, the last sitting member of a state legislature appointed to the Court was Benjamin Curtis in 1851). That is why the line flattens out to zero in 1971 after Black’s retirement.

⁶⁰ Justice Frankfurter.

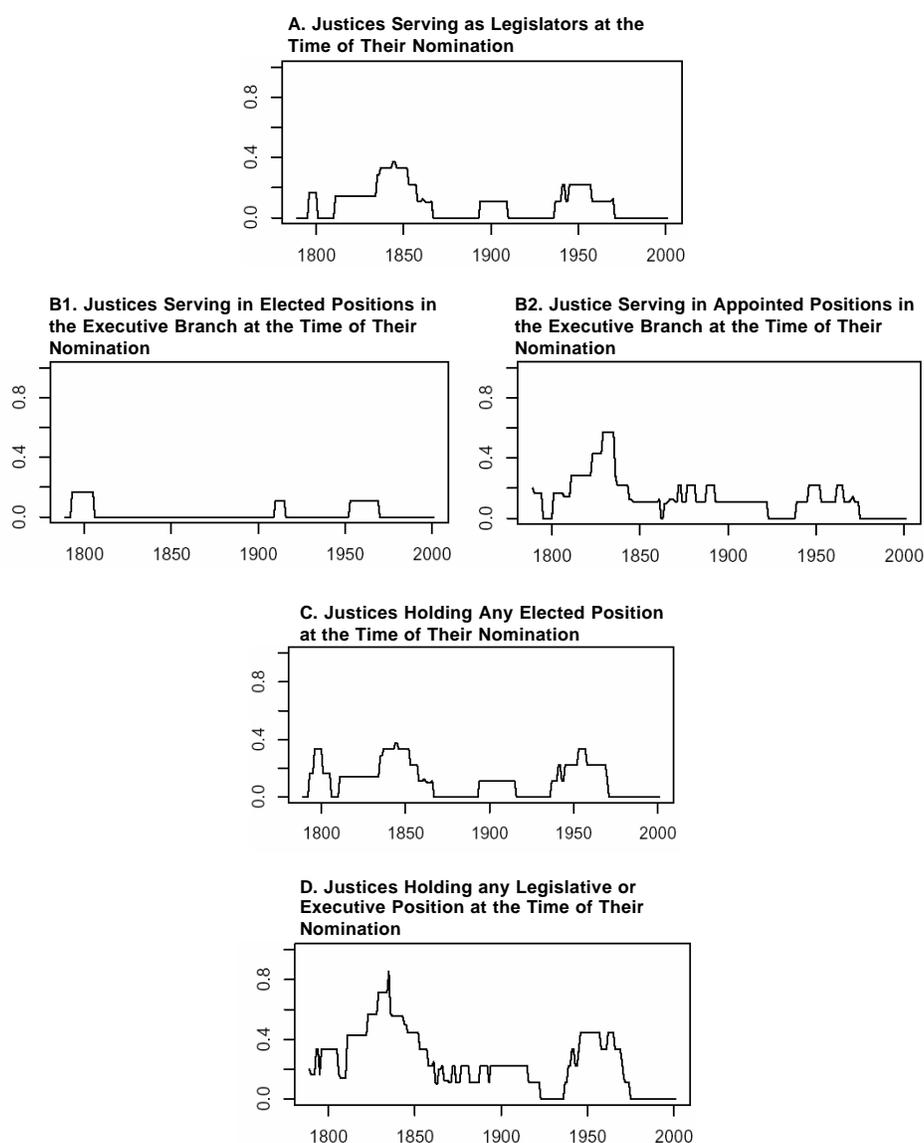
⁶¹ Data derived from EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 4-11. We include only successful nominations. See also *supra* notes 37 and 55.

⁶² Until his nomination as Chief Justice, we code Rehnquist as a “Government Attorney;” after his promotion, we code him as a “Judge.” For our rationale, see *supra* note 37.

⁶³ See *supra* notes 10 and 55.

⁶⁴ 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.

Figure 4 Proportion of Justices Holding Political Positions at the Time of Their Nomination, by Year (1789-2001)⁶⁵



Panels B1 and B2 show a similar decline in the proportion of justices holding positions in the executive branch at the time of appointment, specifically in positions that do not call for training in the law. Of course, it is true that very few came to the bench directly from elected executive positions (Panel B1)—only William Paterson (1793), Charles Evan Hughes (1910), and Earl Warren (1953) fall into this category. But historically Presidents have drawn nominees from their 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). Indeed, there was a point in time (1829-1835) when over 50 percent of the sitting justices had come to the Court from these sorts of positions.⁶⁶ But that era is

⁶⁵ Data derived from EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 4-11. We include only successful nominations. See also *supra* notes 37 and 55.

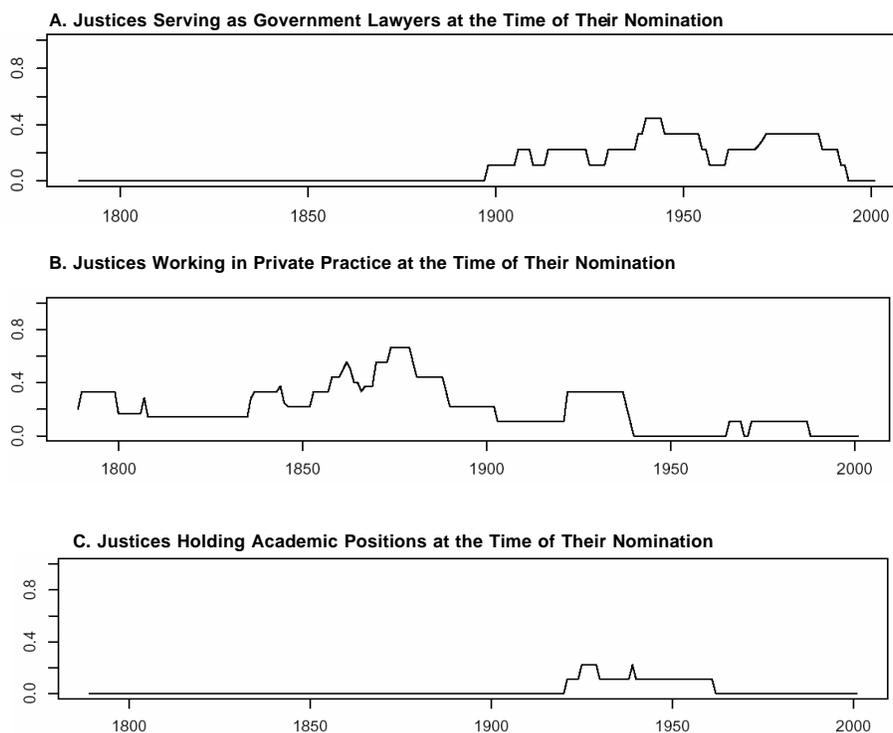
⁶⁶ Specifically, four of the seven justices serving during this period (Marshall, Duvall, Thompson, McLean) fell into this category.

long gone: Over time, as the results of a simple regression of the proportion of justices holding either elected or appointed positions makes clear,⁶⁷ there has been a marked and significant decrease in appointments made directly from the executive branch. Moreover, we observe a complete leveling of the lines in Panels B1 and B2, indicating an (apparent) striking reluctance on the part of Presidents, at least since 1962 when Lyndon Johnson tapped Goldberg, to nominate persons serving in an appointed or elected executive position that did not necessitate a law degree.

The last two panels in Figure 4 summarize the data in slightly different forms. In Panel C, we show the proportion of justices who held elected positions (either in the legislative or executive branch) at the time of their appointment; Panel D illustrates the proportion who served as a legislator or in an executive capacity (either elected or appointed) that did not call for a legal background. In both cases, a downward trend exists⁶⁸ but, again for both, it is the tail of the pictures that tells the most interesting story: Since Douglas's departure in 1975, Presidents have not nominated and Senates have not confirmed any candidate who held a political position at the time of appointment. This stands in marked contrast, as Panel D makes clear, to the previous 186 years.

We even, as Figure 5 shows, see a decline in the appointment of those holding various types of positions in the law community. Whether we consider the proportion of those serving as government lawyers (Panel A), practicing in the private sector (Panel B), or holding academic positions (Panel C) the proportions flatten out. Especially interesting are the data displayed in Panel B. 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 always have had some representation on the Court. During one period (1874-1879), they actually held six of nine seats; but since 1987 (with Powell's departure), the number has been zero.

Figure 5 Proportion of Justices Holding Legal Positions at the Time of Nomination, by Year (1789-2001)⁶⁹



⁶⁷ The slope of a regression of the proportions (taken together) in Panels B1 and B2 on time is statistically significant at $P < 0.0001$.

⁶⁸ The slope of a regression of the measures in Panels C and D on time is statistically significant at $P < 0.0001$.

⁶⁹ Data derived from EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 4-11. We include only successful nominations. See also *supra* notes 37 and 55.

In short, Presidents are no longer searching the corridors of private law firms for nominees. Nor, though, 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 is precisely the sort of behavior we would anticipate if a norm of prior judicial experience was and is now in effect. But that is not all the data tell us: Given the overall patterns of diversity (at least until the contemporary era) we observe in Figures 3, 4, and 5, the data also suggest that the norm of judicial experience did not supplant an akin 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 is unique to the last half of the 20th century. And, as a direct result, contemporary nominees reflect a degree of homogeneity, at least in terms of the positions they held at the time of their appointment, that is entirely unprecedented.

2. Occupational 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, thus, may omit critical career experiences. To see this, we need only consider Sandra Day O'Connor. At the time of her appointment as Associate Justice, she was—as all other appointees since 1971—a judge. But her resume is far longer, with state legislator, assistant attorney general, and private practice lawyer, just three of entries it would contain.

Is 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 occupational experiences? Or are they more likely to have gone on 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)⁷⁰ and then moving directly to the bench, thereby limiting their opportunity to develop varied resumes? If the former holds, we cannot say that the norm of prior judicial experience induces homogeneity; should the latter be the more apt, we would have additional evidence of the impact of the norm.

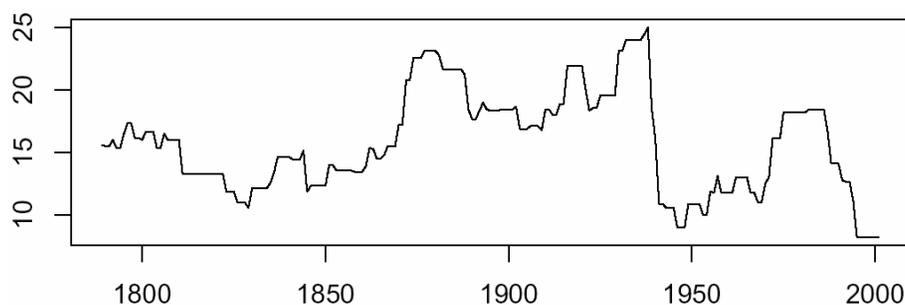
To sort through these alternatives, we gathered a wealth of information on the career experiences of the justices. To the extent that these data focus attention on the complete professional occupational histories of Court members and not simply the position they held at the time of appointment, they differ from those 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 the bench. Our approach to making this determination too follows from previous section: We examine whether justices serving on each court era possessed any experience (1) in private practice, (2) as a legislator, (3) as a member of the executive branch in a capacity that did not require legal training, (4) as a professor, (5) as a government attorney, or (6) as a judge.⁷¹ Figures 6-8 display the results.

⁷⁰ E.g., Data in Sheldon Goldman & Elliot E. Slotnick, *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 227 (2001), 244, 249 show that 41.3 percent 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 percent. Only 28.9 percent of his district court and 29.5 percent of his court of appeals appointees lacked either prosecutorial or judicial experience. See also, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death*, 75 B.U.L. REV. 760 (1995), 781 (claiming that “One of the most frequently traveled routes to the state trial bench is through prosecutors’ offices”); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000), 411 (noting that “President Johnson nominated Marshall as his Solicitor General. 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.”). Louis Fisher, *Public Service as a Calling*, 76 TEX. L. REV. 1185 (1998) concurs with this last point.

⁷¹ See *supra* note 55 for a description of these occupational categories. In the previous analyses, the number of justices was 112 because we double counted Associates who became Chief Justices—a sensible decision since we were interested in “position held at the time of appointment” (see *supra* note 37 for more details on this decision). Here, because our focus is on the totality of professional career experience, we do not double count those Associates.

Beginning with Figure 6, we summarize information pertaining to experience in private practice—specifically the number of years, on average, justices on each Court labored as an attorney in private law firm. We use years rather than proportions (as we did in the previous section) for two reasons. One is simply that over the course of the Court’s entire history all but two justices (Breyer and Ginsburg) worked at one time or another private practice. Accordingly, proportions would not reveal much beyond what we already know. Second, even if the proportions varied from one Court era to the next, using them to summarize law firm experience could produce illusory results. That is because the proportions fail to take into account the number of years of experience; they only consider whether the justices had any at all (and 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,⁷² as a critical difference).

Figure 6 Mean Number of Years Justices Worked in Private Practice Prior to Their Nomination to the Court, by Year (1789-2001)⁷³



This noted, let us turn to Figure 6 and observe the absence of any clear linear trend—the line neither moves, in a monotonic fashion, up or down over time. What we see instead is a non-linear pattern, one resembling an inverted U, such that the mean number of years of experience through the 1850s is about 14; between 1850 and 1940, that figures climbs to 19.5 (the zenith is in 1938, at 25) only to fall rather dramatically in the 1940s and remain comparatively low for the next few decades as the norm of prior judicial experience began to take hold. A short-lived increase in the mean occurs between 1972 and 1986, owing largely to Lewis Powell’s contribution of 38 years in private practice but his departure brings down the figure 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 to us here is the very revealing result that, in terms of the average number of years in private practice, the current Court—perhaps reflecting the culmination of decades-worth of the norm of prior judicial experience—has reached, at 8.2 years, a nadir: at no other point in U.S. history has a group of sitting justices possessed as few years experience practicing in the private sector. Correspondingly and not surprisingly, its 8.2 year figure is well below the one for the period up until 1953 (16.4 years), meaning that, on average, the justices of this Court worked eight fewer years in private practice than their predecessors appointed before the onset of the norm.

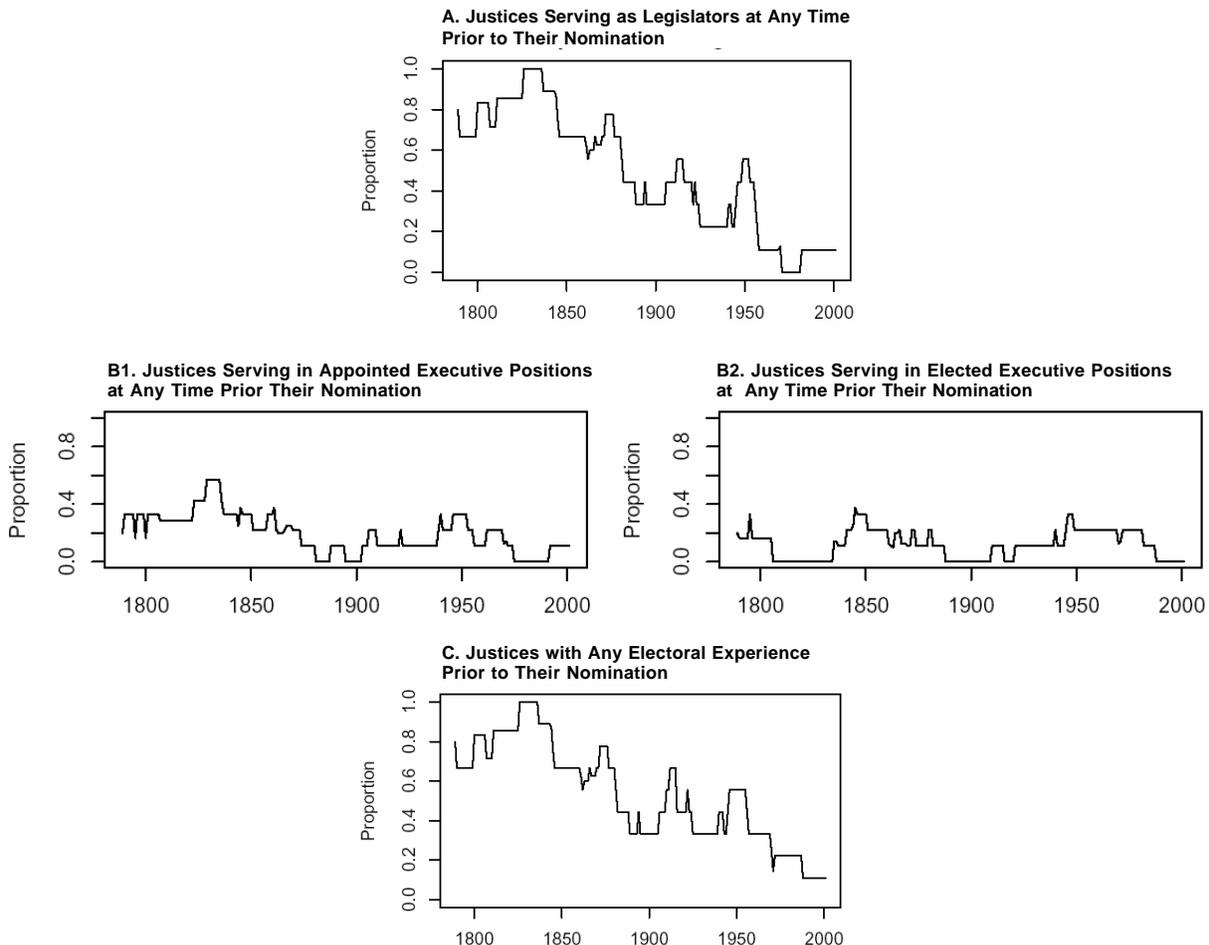
These data convey important information about experience (or the lack thereof) in the private sector; those depicted in Figure 7 turn our attention to the public sector—specifically to political positions held by the justices over time. From Panel A we can observe an overwhelming historical trend: Presidents and Senates have become increasingly and significantly less likely to view elected, representative bodies as potential sources for Supreme Court appointments. To see 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

⁷² See, e.g., Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, *supra* note 53; Rehnquist, *supra* note 14.

⁷³ Data derived from EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 4-6. We include only successful nominations. See also *supra* notes 37 and 55.

Courts had served as state or federal legislators.⁷⁴ For a full decade (1826-1836), every member on the Court had held such a position; and, even as late as 1953, the proportion hovered around .44. By 1958 it dropped to .11; and by 1971, with Hugo Black's retirement, *no* justices were in possession of legislative experience. That changed with O'Connor's appointment but only marginally so, at least relative to all other sitting Courts.

Figure 7 Proportion of Justices with Political Experience Prior to Their Nomination to the Court, by Year (1789-2000)⁷⁵



O'Connor's experience came from service in the Arizona state legislature, which puts her well in line with history: Presidents have been (somewhat) more likely to tap justices with state legislative backgrounds than those who had served in the U.S. Congress. But that distinction is of far less consequence and interest than the overall patterns revealed in the Panel A: The latter part of the 20th century witnessed a marked decline in the willingness of Presidents to nominate former state or federal legislators to the bench.

That same reluctance seems to characterize their approach to potential nominees who held jobs in the executive branch that do not call for training in the law—whether as elected (such as Governor, Mayor) or appointed (such as Cabinet secretary, agency member) officials (see Panels B1 and B2 in Figure 7). Note, first, that the proportion of justices who held an appointed executive position has taken a significant downward

⁷⁴ An exception to this general rule is the fifteen-year period between 1925 and 1940, when two of the nine justices (.22) had been elected to a legislature.

⁷⁵ Data derived from EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, *supra* note 4, at Table 4-8. We include only successful nominations. See also *supra* notes 37 and 55.

turn. From a pinnacle of .57⁷⁶ between 1830 and 1835—during which time 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) served together—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 increase the degree variation in the period between 1946-1952. But once the norm of prior judicial experience set in—that is, for most of the 1970s and 1980s—no sitting justice had previously been appointed to a position in the executive branch (at either the state or local level) that did not necessitate a law degree. Bush's selection of Clarence Thomas, former chair of the Equal Employment Opportunity Commissions, added diversity to the Court on this dimension but the current proportion (.11 or 1 of 9) is still below the overall mean (.23) for the period predating 1953.

Panel B-2 of Figure 7 tells a somewhat different, more meandering, story. For long periods in the 19th century, at least one sitting member on every Court had been elected to an executive office; the proportion reached as high as .38 (three of eight justices) in 1845 owing to the overlapping service of Justices James M. Wayne (former Mayor of Savannah), Peter Daniel (former Lieutenant Governor of Virginia), and Levi Woodbury (former Governor of New Hampshire), 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 slide back up in the mid 1940s. But once again we see the effect of the norm of judicial experience take hold: For the last fifteen years or so, not one sitting justice had ever been 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 last period (1916-1920) enduring for a considerably shorter time than the current one.⁷⁷

Even if we consider executive elected experience in tandem with service as a legislator, contemporary Courts stand out for their lack of diversity. Over the course of the entire Court's history, 60 of the 108 justices (56.6 percent) came to the bench with some elected political experience under their belt—whether that experience came at the federal or state level or via executive or legislative positions.⁷⁸ But, as Panel C of Figure 7 underscores, a healthy portion of those 102 served early in the Court's history, when it was none too rare to find sitting bodies composed of as many as two-thirds of their members who had faced the electorate. Between 1826 and 1836, that proportion was even higher—with all 12 justices who sat during these years coming to the bench with elective experience (seven served in the U.S. Congress; five, in state legislatures).⁷⁹ After that high water mark, a rather steady decline occurred until the proportion (roughly) leveled off to .44, where it remained until 1957, when it dropped to .33. Once Presidents and Senates began adhering to the norm of judicial experience, it started to fall off even further. But never has it been as low as it presently is, what with only one justice—again, O'Connor—in possession of elected political experience.

At the end of the day, the panels in Figure 7 come together to tell a singular story. During the Court's first 150 years or so, it appears that Presidents and Senates sought to appoint justices with some background in politics—whether as members of Congress (*e.g.*, Harold Burton, Oliver Ellsworth), mayors (*e.g.*, Salmon P. Chase, Peter Daniel, Ward Hunt) or cabinet secretaries (or their functional equivalent) (*e.g.*, John Jay, Fred Vinson). At the very least, the presence of such experience did not kill a nomination. But that has all changed, and markedly and significantly so.⁸⁰ Between 1789 and 1952, the mean proportion of justices with some political background, either in legislative or executive politics, hovered around .65. After 1952, that figure dropped to .34.

Several explanations for the decline may exist mind,⁸¹ 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,

⁷⁶ In words, four of the seven sitting justices served in executive positions that did not call for legal training.

⁷⁷ 1806-1834, 1888-1909, 1916-1920.

⁷⁸ We do not include elected judicial positions here.

⁷⁹ Justices Washington, John Marshall, W. Johnson, Duvall, Story, Thompson, Trimble, McClean, Baldwin, Wayne, Taney, and Barbour.

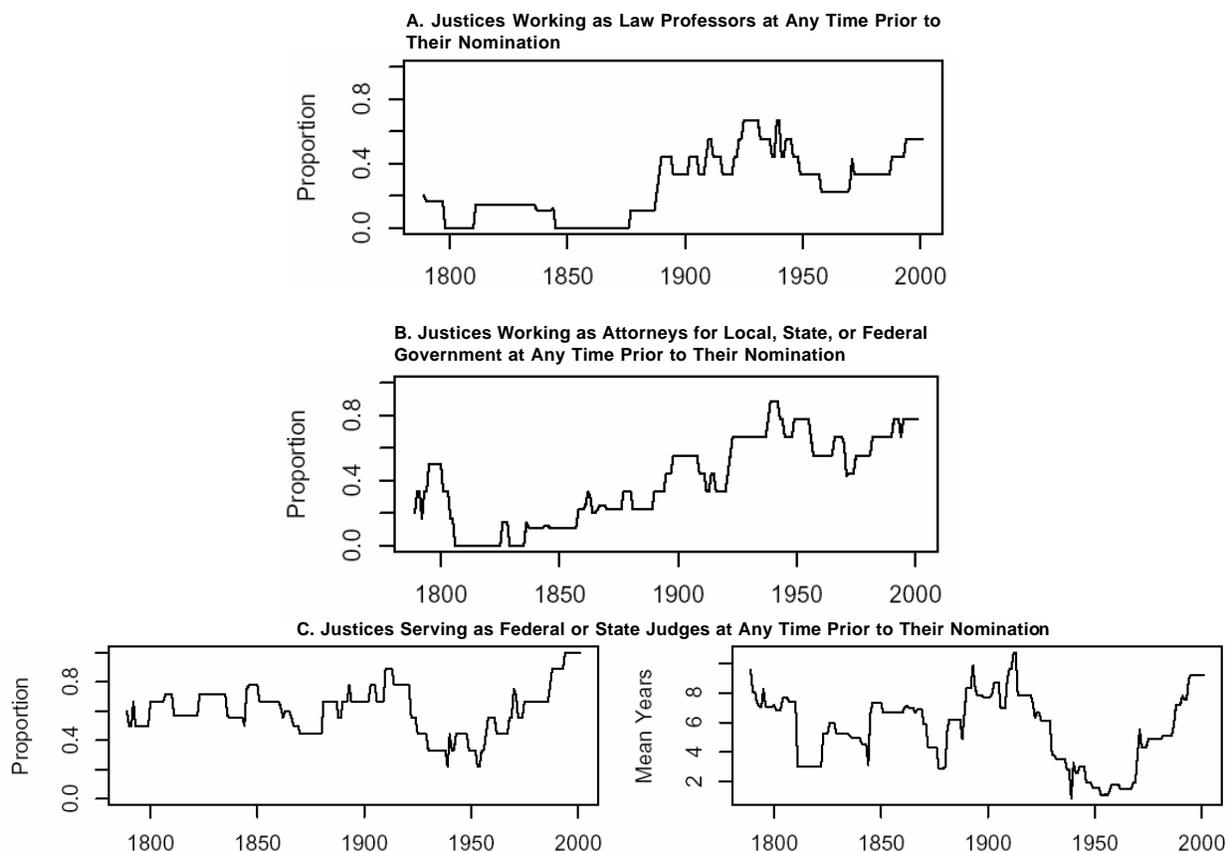
⁸⁰ $P < 0.0001$ on the regression slope coefficient.

⁸¹ For some possibilities, see Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, *supra* note 18; JOHN R. SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES* (1960).

lacked the experience in politics (and, for that matter, in the private practice of law) so characteristic of those appointed before the norm took effect.

What contemporary justices do possess is experience in jobs we now typically associate with steppingstones to state and federal judiciaries:⁸² It is those with backgrounds in government law offices, in (federal) courtrooms, and in the legal academy, and not politicians, who now populate the Court, and have for some years. In all three instances, as Figure 8 highlights, the proportions are on the upswing. Consider, first, Panel A, which shows the proportion of justices with a background in academia: Overall a rather small number of successful nominees possessed such experience—just 26.9 percent (n=29) of the 108. But, if we look only at the 21 justices coming to the bench after 1950, that percentage increases to 43 (n=9). Moreover, while the trend toward appointing justices who worked as law professors seems to predate the establishment of the norm of prior judicial experience, the nature of that experience has intensified since the 1950s. Before 1953, those appointed to the bench with experience in the academy were largely fly-by nights “professors,” those who did a brief stint or two in one of the nation’s law schools.⁸³ But, with the onset of the norm of judicial experience, that has changed. On average, since the 1950s sitting Courts have housed justices with nearly five years of service in U.S. law schools; that figure was only two for the previous 150 years.⁸⁴

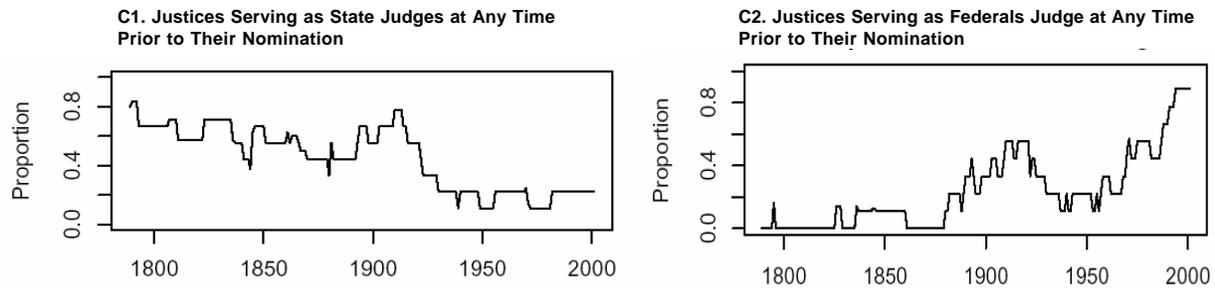
Figure 8 Proportion of Justices with Experience in Positions Necessitating Legal Training



⁸² See *supra* note 70.

⁸³ There are, of course, several notable exceptions. We list them in the text, *infra* p. 18.

⁸⁴ The difference is statistically significant ($P=.008$).



The current Court—again reflecting, in all likelihood, the cumulative effect of the norm of prior judicial experience—is well on its way to pushing those figures 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), Rutgers, and Columbia (Ginsburg). Their presence brings the mean proportion of years in the academy to a near-record level (7.7 years). Only during the period from 1939 and 1945—when the Court was populated by the likes of Harlan Fiske Stone (on the faculty of Columbia Law School, as Professor and Dean, for twenty-four years), Felix Frankfurter (Professor at Harvard Law School from 1914 to 1941), William Douglas (at Yale and Columbia Law Schools between 1928-1936), to name just three—was the figure higher.

The current Court also is well on its way to breaking historical records with regard to the proportion of its members with experience working in public sector jobs that call for training in the law, such as U.S. attorneys, district attorneys, and legal counsel to various government units—in other words, jobs that have long been regarded as steppingstones to the nation’s judiciaries. Many justices have, to be sure, come to the Court with such experience: 42.6 percent (or 46 of the 108 justices) to be specific. What that percentage masks, though, is that the proportion of justices sitting at any particular time who worked in government (legal) jobs has not been evenly distributed over the course of the Court’s history. Rather, as Panel B shows, it has grown significantly and precipitously overtime, such that since 1988 all but two sitting members (Ginsburg and Kennedy) have served, at one point or another, in government positions requiring a background in law. And while the 2002 Court does not represent the height of this trend—the proportion of current justices, who at one time or another, worked as a government attorney (.78) is lower than it was in 1939-42 (.89)—it is quite close to reaching or even surpassing this zenith: Should a President fill a vacancy created by the departure of, say, Ruth Bader Ginsburg with a former member of, say, the Justice Department, the proportion will equal the 1939-42 figure; should the President find himself in a position to replace both Ginsburg and Anthony Kennedy, and does so with government lawyers, he will create a new benchmark.

If these data, along with other pieces we have presented thus far, suggest that the norm of prior judicial experience has induced an unusual degree of homogeneity on contemporary Courts, the last bits of evidence (displayed in the bottom four panels of Figure 8) virtually clinch the case. These pertain to prior judicial experience, and they track precisely the results yielded by our analyses 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 proportion of those sitting concurrently possessed such experience; and only once before has the mean number of years of service exceeded the current average of 9.2, in 1912-1913 (10.7 years).⁸⁵

Moreover, and again paralleling closely the data presented in Figure 2, diversity does not even exist 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 C1), but they are surely turning to those with records of service on a federal court, and have done so with increasing regularity since the 1950s (Panel C2). It should hardly come as a surprise then that at no other point in American history than in 2002 have so many justices sitting together spent at least some part of their career on federal courts—and no small part at that. Not only has the current Court reached record levels on the proportion of sitting members with prior judicial experience, it also has

⁸⁵ But even that is a bit deceptive since it was largely Justices Lurton and Holmes—with their 40+ 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.

surpassed all its predecessors on the mean number of years of service. On average members of this Court served 7.2 years as federal court judges. This is exactly four times the mean across the entire series (1.8 years).

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 federal 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 measure have failed to be enacted.”⁸⁶

While the supporters of these bills lost their battle, they seem to have won the larger war. For, if our data reveal anything, it is that a requirement of prior experience on the bench—and on a federal appellate bench at that—has become a norm. Prior to 1953, the proportion of justices coming directly from the federal courts of appeals was, on average, just 16; since 1953, it has increased significantly, to .43.⁸⁷ Over thirty years have elapsed since anyone lacking such experience ascended to the Court; and it has been over twenty since anyone has reached the high court who has not put in some time as a lower federal appellate court judge. But there is more: Not only does the norm exist, it also has worked to induce unprecedented levels of occupational homogeneity on the Supreme 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, say, former senators and mayors working side-by-side with those who had served in presidential cabinets, worked in private practice, or, yes, 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—former judges, law school professors, and government attorneys—can be found among contemporary Courts.

Why this apparent norm developed is a matter of debate;⁸⁸ and whether it will persist, a matter of speculation. What we do know is the list of names with which we started this article: George W. Bush’s short list—a list full of attorney who hold seats on the nation’s federal courts of appeals. It also seems that America’s current president has made nominations to the U.S. Courts of Appeals (*e.g.*, Michael McConnell) with any eye toward elevating them to the high Court.⁸⁹

Should Bush continue to adhere to this norm, he will inevitably earn the applause of some commentators. As we noted earlier, the practice of appointing only judges to the High Court, whether on ideological or competency grounds, has its share of supporters. But it also has its fair share of detractors. Recall that Chief Justice Rehnquist, for one, argues that further application of the norm will eventually lead to Courts here that too closely resemble tribunals in those civil-law societies that have chosen to set their *ordinary* judiciary apart as a distinct profession—one separate even from the practice of law. Germany provides a case in point. To become a judge there, 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 apprenticeship, and finally sustain another set of rigorous examinations administered by the government. Once in the judicial profession, judges follow careers much like civil servants, moving slowly up the hierarchy from less important to more important courts if they receive good fitness reports from senior jurists.

To Rehnquist, these sorts of systems are troublesome because they do “not command the respect and enjoy the independence of ours.” The Chief Justice cites no data to support this claim, nor are we aware of any directly on point. What we do know, and what Rehnquist might have invoked to bolster his point, is that many civil-law nations in Europe do not always or even often appoint “professional judges” to their *constitutional* tribunals—the only bodies in their societies that have the power to strike down acts of government incompatible with their constitutional documents—precisely because they want these bodies to

⁸⁶ HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* (1998), 62.

⁸⁷ $P < 0.0001$.

⁸⁸ See Part IA, *supra* p. 4.

⁸⁹ Eisenhower apparently followed the same practice. See *supra* note 24.

be distinct from and command more respect than the ordinary courts.⁹⁰ This is reflected in the formal rules they maintain for selecting their justices, which often differ markedly from the procedures used to seat or qualifications necessary to become an ordinary court judge. So, for example, while in many civil-law societies students must go through a separate training program to become regular judges and then work their way up the ordinary court hierarchy, aspirants to constitutional courts need not necessarily possess any special professional qualifications (as in France) or 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).⁹¹ It also is reflected in the persons who attain seats on these constitutional tribunals. As Table 1 shows, the French Constitutional Council, is, unlike its American analog, quite a diverse body—composed of former politicians, academics, private practitioners, and, yes, judges. As we might expect in light of the qualifications for office, the Italian Court contains a high proportion 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.

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

	German Constitutional Court⁹²	French Constitutional Council⁹³	Italian Constitutional Court⁹⁴
Government Attorney	0	1	0
Government Position that Does Not Require Legal Training	1	4	1
Attorney	1	1	1
Professor	7	2	9
Judge	6	1	4

The irony here is obvious: While decision makers in Europe (who have actually developed structures to instantiate a professional “ordinary” judiciary) *pointedly* do not adhere to the norm of prior judicial experience when it comes to appointments to their highest tribunals, those in America seem bent on following the norm when it comes to appointments to their highest Court. As a consequence, it is probably the case that many U.S. Supreme Court justices would be unable to ascend to positions on European *constitutional* courts; their occupational experience is simply too limited. But it is equally true that most of the current nine members would have little difficulty meeting at least some of the criteria necessary to sit on *ordinary* European courts: On average, they served 8.9 years on federal or state benches before attaining their current position on the Supreme Court.⁹⁵ Their predecessors, on the other hand, would have found it easier, due to their more varied occupational experiences, to attain positions on constitutional courts but more difficult to gain appointment to the ordinary courts: For those justices appointed between 1900 and 1971, the mean number of years of prior judicial service is only 4.3.

It is just these kinds of data that might disappoint commentators who do not desire to see the American bench resemble its “ordinary” European counterparts. But they are not the only one who is or would have been discouraged by the norm of prior judicial experience. “One is entitled to say without qualification,” Justice Felix Frankfurter wrote in 1957, “that the correlation between prior judicial experience and fitness for the Supreme Court is zero. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from the judicial experience but from the fact that they were Holmes and

⁹⁰ Many nations that come out of a civil-law tradition have ordinary courts, as well constitutional tribunals. Typically only the latter can exercise the power of judicial review; the “ordinary” courts are typically barred from so doing, though they may refer constitutional questions to the constitutional court.

⁹¹ Information available at: <http://www.giurcost.org/traduzioni/inglese.html>.

⁹² Data available at: <http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?aktuell>.

⁹³ Data available at: <http://www.conseil-constitutionnel.fr/anglais/ang3.htm>.

⁹⁴ Data available at: http://www.cortecostituzionale.it/cc/comp/comp_m.htm.

⁹⁵ This counts Rehnquist’s time as Associate.

Cardozo.”⁹⁶ His former colleague, Sherman Minton, who had served as federal judge prior to his ascension to the Supreme 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.”⁹⁷

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,”⁹⁸ it seems clear that it will and, in fact, has led to judicial homogeneity. Which, as we detail in Parts II and III below, is fraught with dangers. For one, and 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 sub-optimal decision making. This argument, as we explain in Part II, finds support in analyses of various types of 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 people of color and women hold a trivial number of positions on the federal courts, limiting the pool of potential nominees to lower (federal) appellate court judges may work to restrict diversity on other dimensions, such as race and gender.

II. The Importance of Diversity as a General Principle

Most contemporary support for diversity comes from advocates of groups who claim past exclusion from America’s legal, political and economic affairs. Typically, they ground their claims in arguments about unfair treatment and previous injustices, and focus attention on the need to expand participation in political and economic life. While cast in the language of diversity, advocates usually do, in fact, place their primary emphasis on inclusion; and they center their justifications not so much on the benefits of diversity but rather on the rights of those previously denied participation and influence.

We find considerable merit in many of these claims but, since they do not form the basis of our support of diversity, we set them aside for the moment.⁹⁹ We turn instead to the development of our own justification, which rests on the effects of diversity on the effective performance of social, economic and political institutions. Specifically and succinctly, we argue that diversity makes these institutions perform in more effective and socially beneficial ways. In what follows, we first sketch the basic logic of our argument and, then, draw support for it from the writings of advocates of various types of institutions.

A. A Basic Argument for Diversity

We begin our argument by adopting a common conception of social institutions: “Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (for example, rules, laws, constitutions), informal constraints (for example, norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics.”¹⁰⁰ Put simply, institutions are the rules of the game that structure social life—the rules that establish 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

⁹⁶ Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).

⁹⁷ Quoted in ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE*, *supra* note 86, at 61. 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 dated March 2, 1957 on file with the authors.)

⁹⁸ For more on this point, see *infra* note 143.

⁹⁹ We do, however, return to these claims in Part II, where we discuss the implications of career diversity for the U.S. Supreme Court.

¹⁰⁰ Douglass North, *Economic Performance over Time*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* (Mary C. Brinton & Victor Nee ed. 1998).

particular needs of the various aspects of social life. So, for example, we observe different types of institutional frameworks for economic interactions than we do for political interactions, and different ones still for legal activity.

Analysts justify these differences by making claims about the “best” way to satisfy the particular functions of a given social interaction,¹⁰¹ with the claims themselves often associated with each of our basic institutional forms: “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.” “Trial by jury is the best means of assessing the guilt or innocence of criminal defendants.” This list goes on but, in each instance (while disagreement always will exist about many of the institutional particulars), the basic point remains: institutions are justified in terms of their capacity to outperform other types of institutions 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 are weighed towards competition, while democratic bodies are weighed towards 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 which rests on the belief that groups can, *under the appropriate conditions*, make better decisions than individuals. The phrase “under the appropriate conditions” does a great deal of work here, because the arguments over the appropriateness of particular institutions are usually about 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.

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 of testing produces a collective understanding that is superior to that previously held by any individual member of the group. With this superior knowledge base, better solutions to collective problems emerge.

On these various accounts, 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 initial ideas broadens and enhances the base on which experimentation and testing occurs. Here the diversity-of-inputs requirement recommends 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. Successful experimentation and testing requires variation, and this variation is a product of diversity of participation. On the other hand, the test involves a process in which the ideas and information are assessed in terms of their quality, and not in terms of some arbitrary factor or some condition exogenous to the aggregation process. The condition of effective experimentation and testing thus entails procedural constraints on extraneous factors that would distort the test of information and ideas. For example, any characteristics of an individual unrelated to the quality of his or her ideas and beliefs should be constrained from consideration in the testing process. Therefore, the overall effectiveness of these institutional mechanisms is a function of our ability to satisfy these conditions, that is, to satisfy the requirements of diversity and effective experimentation and testing.

To put it simply, then, our argument for the value for diversity follows from the justification of our basic social institutions: Given the appropriate procedural conditions, our institutions are most effective when participation is most diverse.

¹⁰¹ This section draws on Jack Knight, *A Pragmatist Approach to the Proper Scope of Government*, 157 J. INSTITUTIONAL & THEORETICAL POL. 28 (2001).

B. Support for the Basic Argument

Having now sketched out the central argument, we support it with reference to the justifications for a number of basic institutional forms. We start with a centralized institution—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 for their particular forms of social interaction (*e.g.*, decentralized market for economic exchange, centralized deliberation and voting for democratic decision making), they share the basic logic of diversity and effective testing in their underlying institutional processes.

1. Collective Decision-Making Bodies

The idea that groups make better decisions than individuals is a standard feature of many justifications of democracy, as well as of other collective decision-making procedures. One of the primary sources of this justification has been the Condorcet Jury Theorem,¹⁰² which seeks to establish the conditions under which a group of individuals using a majority rule voting procedure would produce a collective decision that was more *accurate* than the decision of any individual member of the group—with the criterion of “accuracy” emphasizing the task facing the group as one of resolving a question of the truth of a statement of fact. The main conditions assumed by Condorcet are: (1) the question is a binary decision problem, (2) the participants each have a probability $> .5$ that they know the correct answer to the question and (3) the individual participants’ votes are statistically independent. 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 1.

The 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. Grofman and Feld¹⁰³ and Waldron¹⁰⁴ among others ground their support of majority rule mechanisms on the epistemic advantages of aggregating individually held ideas and information. Bohman¹⁰⁵ and Knight and Johnson¹⁰⁶ are examples of similar arguments about the superiority of shared knowledge as a justification of deliberative mechanisms; and Kornhauser and Sager¹⁰⁷ offer an akin claim in their analysis of collegial courts. Finally, N. Miller¹⁰⁸ and Ladha and G. Miller¹⁰⁹ have explicitly employed the epistemic argument to emphasize the importance of diversity for democratic political institutions. All these 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.

¹⁰² Marquis de Condorcet, *Essay on the Application of Mathematics to the Theory of Decision-making*, in CONDORCET: SELECTED WRITINGS (Keith Michael Baker ed. 1976).

¹⁰³ Bernard Grofman & Scott Feld, *Rousseau’s General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567 (1988).

¹⁰⁴ Jeremy Waldron, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, AM. POL. SCI. REV. 1322 (1989).

¹⁰⁵ James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASONS AND POLITICS (James Bohman & William Rehg ed. 1997).

¹⁰⁶ Jack Knight & James Johnson, *What Sort of Equality Does Deliberative Democracy Require?*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASONS AND POLITICS (James Bohman & William Rehg ed. 1997).

¹⁰⁷ Lewis Kornhauser & Lawrence Sager, *Unpacking the Court*, 96 YALE L. J. (1986).

¹⁰⁸ N.R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, in INFORMATION POOLING AND GROUP DECISION MAKING (Bernard Grofman & Guillermo Owen ed. 1986), N.R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983).

¹⁰⁹ 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 (Norman Schofield ed. 1996).

Much of the recent work on this issue, however, has focused on the constraining nature of the Condorcet theorem's assumptions, specifically on the implications of altering them for the robustness of the primary conclusions. But this research has itself reached mixed conclusions. Some analysts find that they can loosen the assumptions and still maintain the basic claim about the epistemic superiority of majority rule. So, for example, Grofman, Owen and Feld¹¹⁰ 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, Ladha¹¹¹ 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. On the other hand, recent analyses that focus on the crucial assumption that the 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, Austin-Smith and Banks¹¹² and Feddersen and Pesendorfer¹¹³ 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 case 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 are issues of preference aggregation; they are not about what people think is correct, but rather about what people prefer. The relevance of the Condorcet theorem for a more general justification of collective decision-making mechanisms would seem to rest on the importance of information and knowledge aggregation for these processes.

Advocates of the continued relevance of the theorem for such justifications have, we think, two arguments in support of their position. First, the challenge of sophisticated voting to the epistemic conclusions of the theorem is only relevant if we think that individuals have reason to act in a sophisticated way about questions of fact. To think that they have such a reason we need to believe that individuals have a stronger preference for causally affecting the outcome than they do for the group arriving at the correct answer. Margolis¹¹⁴ offers a set of compelling arguments to the effect that this is not a well founded belief in most normal social situations. Second, 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 theorem may have little relevance. However, if we allow for a substantial role for information sharing and knowledge acquisition in democratic processes, this supports the continued relevance of 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.¹¹⁵

¹¹⁰ Bernard Grofman, Guillermo Owen, & Scott Feld, *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISION 261 (1983).

¹¹¹ Krishna K Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617 (1992); Krishna K Ladha, *Information Pooling through Majority-rule Voting: Condorcet's Jury Theorem*, 26 J. ECON. BEH. & ORG. 353 (1995).

¹¹² David Austin-Smith & Jeffrey Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POL. SCI. REV. 34 (1996).

¹¹³ Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts under Strategic Voting*, 92 AM. POL. SCI. REV. 23 (1998).

¹¹⁴ Howard Margolis, *Game Theory and Juries: A Mathematical Miracle*, J. THEORETICAL POL. (2001); Howard Margolis, *Pivotal Voting*, J. THEORETICAL POL. (2001); Howard Margolis, *Swing Voters and Real Elections*, SOC. CHOICE & WELFARE (2002).

¹¹⁵ 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 other arguments which we could have

2. Markets

The underlying logic of testing among diverse alternatives forms the basis of claims about the superiority of markets for economic activity. Consider, for example, Friedrich Hayek's justification of the market. Hayek notes that original support for the market is based on the idea that it is composed 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 determine 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."¹¹⁶ On this account, the market produces these benefits through the salutary effects of competition—the most important of which involves the ways in which competition solves problems of information acquisition and the effective use of knowledge: "competition 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."¹¹⁷

Hayek argues that the most significant problem for society related to economic activity is "one of rapid adaptation to changes in the particular circumstances of time and place."¹¹⁸ In order to adequately solve this problem, "it would seem to follow that the ultimate decisions must be left to the people who are familiar with the 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."¹¹⁹ The argument here is that decentralized decision making offers the best way of aggregating all of the local knowledge necessary to achieve an effective societal response to the problem.

Hayek emphasizes that the effectiveness of the competitive process is contingent on the equal participation of all 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."¹²⁰ And the participation must be free and voluntary: "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 strict limitation of all coercive or exclusive power."¹²¹

From this, Hayek concludes that a precondition for achieving the positive value of diversity of participation is the establishment and maintenance of an institutional framework for experimentation and testing. 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."¹²² Hayek associates the distortions of market competition to misuses of power, either by government or by economic actors: "All we need to consider is how difficult it is in a competitive system to

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. JACK RAKOVE, JAMES MADISON: WRITINGS (1999).

¹¹⁶ F.A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (1948), at 12-13.

¹¹⁷ F.A. Hayek, *Competition as Discovery Procedure*, in *THE ESSENCE OF HAYEK* (Chiaki Nishiyama & Kurt R. Leube ed. 1984), at 255.

¹¹⁸ F.A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER*, *supra* note 116, at 83.

¹¹⁹ *Id.*, at 83-84.

¹²⁰ HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER*, *supra* note 116 at 15.

¹²¹ *Id.*, at 16.

¹²² *Id.*, at 13.

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 underdeveloped 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.”¹²³ For Hayek this places government in the rather paradoxical position of using coercive power as a way of limiting coercive power in the market: “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.”¹²⁴

Here the importance of diversity of participation and effective experimentation and testing are clearly articulated as necessary conditions 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 in such a way as to garner the benefits from the diversity of economic ideas and experiences.

3. Common Law

There is a similar, but somewhat more complex, logic to the justification 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 the course of their decision making, evolve over time.

To see this, consider Richard Posner’s pragmatic justification for the value of the common law.¹²⁵ Posner begins by acknowledging that, because judges will more likely confront legal questions that lack a clear and straightforward answer in the field of common law (which he defines “any body of law created primarily by judges through their decisions rather than by the framers of statutes or constitutions”¹²⁶) than in the areas of statutory and even constitutional law, common law decision making introduces important questions of determinacy and legitimacy.

These concern Posner, as he is troubled by what he calls the “inherently precarious” position of judges in a democratic polity.¹²⁷ Fairness, insofar as it is attainable, requires that jurists insulate themselves from powerful outside influences of various sorts, but such independence has a price: it distances 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.”¹²⁸ This is why basic issues about the objectivity and legitimacy of the common law emerge.

Posner recommends legal pragmatism as a way of resolving these issues for many reasons—two of which are especially relevant to this discussion. First, he claims that pragmatism will generate much-needed knowledge about the relationship between law and its consequences, knowledge that can reduce the indeterminacy in the law and enhance, in an admittedly weak sense, its objectivity.¹²⁹ Second, he argues that because pragmatism is oriented to the pursuit of “socially desirable” consequences, if attained, those consequences will enhance the legitimacy of judicial decisions. 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 the legitimacy of judicial decisions.

To see the details of Posner’s argument, consider the question, “What should a pragmatist judge do in cases which lack a clear and straightforward answer?” On Posner’s account, a pragmatist judge should treat

¹²³ Hayek, *Competition as Discovery Procedure*, ed. , *supra* note 117 at 260.

¹²⁴ HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* , *supra* note 116, at 16-17.

¹²⁵ This argument is further elaborated in Knight and Johnson, *supra* note 106.

¹²⁶ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990), 247.

¹²⁷ *Id.* , at 6-7, 454.

¹²⁸ *Id.* , at 454.

¹²⁹ *Id.* , at 110, 298, 468, repeatedly laments how little is known about the consequences of judicial decision making.

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. He answers both the question of what consequences such a judge should seek to effectuate and the question of what means such a judge should employ in so doing by referring to those consequences and those reasons which have survived in an open and unforced competition of ideas. He defends both the objectivity and the legitimacy of pragmatist judicial decisions by making certain claims about the nature of that competition, about the conditions under which certain ideas come to achieve a consensus. On his account, pragmatist judges will be constrained by (or, at the very least, show special deference to) those principles and rules that reflect social consensus or have survived the test of time.

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 they limit their decisions to those grounded in good reasons. Here there are two primary categories of reasons: judicial precedent and principles on which there is a social consensus. And the claims about the socially-beneficial quality of the reasons rests on claims about the processes by which such reasons are produced. For judicial precedent, it is the formal institutional structure instantiated in the decentralized network of courts in the common law system. For consensus principles, it is the unstructured process of informal social interactions from which social norms and other socially-shared ideas emerge.

On this account, both of these processes are characterized by the existence of what Posner calls "free" or "unforced" inquiry¹³⁰ that can generate rules and knowledge which people accept and continue to reaffirm in uncoerced ways. This process is analogous to the idea of the "marketplace of ideas," which Posner borrows from Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*.¹³¹ There 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 the free trade in idea— that the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹³² For the pragmatist, consensus or convergence on a particular principle is evidence that it has demonstrated its value by virtue of having withstood the "test of time."¹³³ On Posner's account, principles which demonstrate their utility over time in the face of competing principles enjoy some presumption as to their socially-desirable character.

The important feature of this argument is the role that evidence of 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 rests not so much on the fact that judges decided previous cases in a particular way, but rather that the consequences of those decisions were deemed sufficiently desirable that they were replicated and expanded over time. Posner argues that some precedents meet this standard and 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.*¹³⁴

¹³⁰ *Id.*, at 114, 461.

¹³¹ 250 U.S. 616 (1919).

¹³² RICHARD A. POSNER, *THE ESSENTIAL HOLMES* (1992), 320.

¹³³ POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 126, at 112-122.

¹³⁴ *Id.*, at 117-118 (emphasis added).

Thus, the source of legal soundness in this case rests on the survival of certain precedents in the competition of judicial decisions.

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 it important for the generation of inputs, but it also enhances the subsequent testing of these ideas. As he emphasizes in the italicized sentence of the above quote, the greater the diversity of participation in the process of experimentation, the more rigorous the test of the value of any particular idea. As in the case of the market, the justification rests in the end on claims about the conditions under which common law adjudication takes place, effective testing of a diverse set of ideas by a diverse judiciary.

III. The Importance of Career Diversity

Thus far we have emphasized the importance of diversity as a general principle. On our account, diversity and the related conditions of effective experimentation and testing are fundamental to arguments about the beneficial role of institutional mechanisms 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. To the extent to which these conditions are not satisfied, claims in support of the superiority of a particular institutional mechanism are undermined. Our argument for the value for 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. Nothing but the most trivial purposes, if any at all, would be served by attempting to induce a bench evenly divided among brunettes, red heads, and blondes.

In this section we argue that career diversity does not fall into the trivial category. Quite the opposite: Because individuals with distinct career experiences vary in the choices they, as justices, make and because the U.S. courts of appeals contain few people of color and women, diversifying the Court in terms of the occupational path of its members would serve two distinct 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 (but especially race and gender) 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 (federal) judicial experience.

A. Career Diversity and Judicial Decision Making

Over the past five decades or so social scientists and legal academics have produced a nearly uncountable number of papers examining the personal attributes and backgrounds of the nation's jurists.¹³⁵ Some are largely descriptive efforts, providing quantitative and qualitative profiles of the judges;¹³⁶ but others are more analytical, seeking to determine the extent to which various attributes and background factors affect the choices jurists make.¹³⁷ So, for example, in his classic 1981 study of the personal attributes of Supreme Court justices, Tate investigated the effect of various background characteristics (including prosecutorial experience,

¹³⁵ See Table 2, *infra* p. 29 for some of the more influential and recent studies.

¹³⁶ See, e.g., Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, *supra* note 18; SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES*, *supra* note 81.

¹³⁷ See Table 2, *infra* p. 29 for examples.

age, and party affiliation) on judicial votes;¹³⁸ writing twenty years later, Merritt and her colleagues 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 cases.¹³⁹

To be sure, many of the studies in the Tate and Merritt modes have their share of conceptual and analytical problems. Nonetheless, we should not ignore a finding common to many of these efforts: the link between career diversity and judicial decisions. Specifically, and as we depict in Table 2, of the 22 studies we were able to locate that investigated this linkage, nearly 70 percent found a relationship between career experiences 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 et al. study, in which the researchers considered numerous background characteristics of the judges, including the party of the appointing president, gender, the quality of the law school attended, experience representing management, experience in a union, government, or academic.¹⁴⁰ Only a few turned out to be significant explanations of whether judges decided to publish their opinions or not—including one designed to tap occupational experiences. As the authors report, appellate court panels containing more judges with experience representing management clients in union cases “were significantly less likely to publish their opinions than were other panels.”¹⁴¹ Experience and expertise, Merritt et al. say, account for this rather counter-intuitive 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.”¹⁴²

Table 2 Summary of Literature Exploring Links between the Prior Occupations of Judges and Judicial Decision Making¹⁴³

Study	Prior Occupation(s) Under Investigation	Feature(s) of Judicial Decision Making Under Investigation	Did Study Generally Find a Relationship between Occupation and Judicial Decision Making?
Ashenfelter et al. (1995) ¹⁴⁴	Whether judges have: <ul style="list-style-type: none"> •prior judicial experience •prosecutorial experience •experience as elected office holders 	Examples include whether judges: <ul style="list-style-type: none"> •rule for or against the plaintiff •refer cases to a magistrate 	No
Brudney et al. (1999) ¹⁴⁵	Whether judges have: <ul style="list-style-type: none"> •experience as elected office holders 	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

¹³⁸ C. Neal Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices*, 75 AM. POL. SCI. REV. 355 (1981) *supra* note 53.

¹³⁹ Merritt, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, *supra* note 53.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, at 96.

¹⁴² *Id.*, at 103.

¹⁴³ 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 (Albert P. Blaustein & Roy M. Mersky ed. 1978). This work does not explore linkages between occupation and judicial decisions but rather between occupation and how a group of scholars rated the careers of Supreme Court justices (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.

¹⁴⁴ Ashenfelter, Eisenberg, & Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcome*, *supra* note 53.

Study	Prior Occupation(s) Under Investigation	Feature(s) of Judicial Decision Making Under Investigation	Did Study Generally Find a Relationship between Occupation and Judicial Decision Making?
	<ul style="list-style-type: none"> •experience in high-level non-elected offices •prior judicial experience •academic experience (as law professors) •private practice experience (of various types) 		judges without such experience)
Dolbeare (1969) ¹⁴⁶	Whether judges have prior judicial experience	Whether judges vote for or against the government	Yes (judges with prior judicial experience are more likely rule in favor of the government than judges without such experience)
Eisenberg and Johnson (1991) ¹⁴⁷	Whether judges have: <ul style="list-style-type: none"> •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) ¹⁴⁸	Whether judges have political experience	Degree to which judges support school desegregation	No
Goldman (1966) ¹⁴⁹	Whether judges have: <ul style="list-style-type: none"> •political experience •prior judicial experience 	Whether judges: <ul style="list-style-type: none"> •vote in the “liberal” or “conservative” direction in several areas of the law •are prone to dissent 	Mixed but generally no
Goldman (1975) ¹⁵⁰	Whether judges have: <ul style="list-style-type: none"> •prior judicial experience •experience as candidates for office •prosecutorial experience 	Whether judges: <ul style="list-style-type: none"> •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 ¹⁵¹	Whether justices have experience as elected office holders	Whether justices vote for or against claims of sex discrimination	No

¹⁴⁵ Brudney, Schiavoni, & Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, *supra* note 53.

¹⁴⁶ Kenneth M. Dolbeare, *The Federal District Courts and Urban Public Policy*, in *THE FRONTIERS OF JUDICIAL RESEARCH* (Joel B. Grossman & Joseph Tanenhaus ed. 1969).

¹⁴⁷ Theodore Eisenberg & Sherri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, *CORNELL L. REV.* 1151 (1991).

¹⁴⁸ Micheal W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Desegregation*, 37 *J. POLITICS* 917 (1975).

¹⁴⁹ Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 *AM. POL. SCI. REV.* 378 (1966) *supra* note 53.

¹⁵⁰ Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, *supra* note 53.

¹⁵¹ Gerard S. Gryski, Eleanor C. Main, & William J. Dixon, *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 *J. POLITICS* 143 (1986).

Study	Prior Occupation(s) Under Investigation	Feature(s) of Judicial Decision Making Under Investigation	Did Study Generally Find a Relationship between Occupation and Judicial Decision Making?
Howard (1981) ¹⁵²	Whether judges have prior judicial experience	Whether judges vote in the “liberal” or “conservative” direction in several areas of the law	Generally no
Johnson (1976) ¹⁵³	Whether justices have prosecutorial experience	Whether judges vote in the “liberal” or “conservative” direction in several areas of the law	Yes (<i>e.g.</i> , justices with prosecutorial experience tend to be more “conservative” than justices without such experience)
Merritt (2001) ¹⁵⁴	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 (<i>e.g.</i> , judges with experience representing management are less likely to publish opinions than judges without such experience)
Nagel (1962) ¹⁵⁵	Whether justices have prosecutorial experience	Whether justices vote for or against criminal defendants	Yes (<i>e.g.</i> , justices with prosecutorial experience are less favorable toward criminal defendants than justices without such experience)
Schmidhauser (1962) ¹⁵⁶	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) ¹⁵⁷	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 (<i>e.g.</i> , judges without private practice work experience rely less on regulations or pronouncements as their primary interpretive approach than judges with such experience)
Sisk (1998) ¹⁵⁸	Whether judges have: •criminal defense experience •prior judicial experience •prosecutorial experience •military service experience •academic experience (law professors)	•Whether judges vote to uphold or strike down federal sentencing guidelines •What reasoning judges use in federal sentencing guideline cases	Yes (<i>e.g.</i> , judges with criminal defense experience are more likely to invalidate guidelines than those without such experience)

¹⁵² J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM (1981)

¹⁵³ 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).

¹⁵⁴ Merritt, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, *supra* note 53.

¹⁵⁵ Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333 (1962).

¹⁵⁶ Schmidhauser, *Stare Decisis, Dissent, and the Backgrounds of the Justices of the Supreme Court of the United States*, *supra* note 53.

¹⁵⁷ Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, *supra* note 53.

Study	Prior Occupation(s) Under Investigation	Feature(s) of Judicial Decision Making Under Investigation	Did Study Generally Find a Relationship between Occupation and Judicial Decision Making?
Sprague (1968) ¹⁵⁹	<ul style="list-style-type: none"> •political experience Whether justices have prior judicial experience	Whether justices joined particular voting blocs	Mixed
Tate and Sittiwong (1989) ¹⁶⁰	Whether justices have: <ul style="list-style-type: none"> •prior judicial experience •political experience 	Whether judges vote in the “liberal” or “conservative” direction in several areas of the law	Yes (<i>e.g.</i> , justices with prosecutorial experience are more “conservative” than justices without such experience)
Tate and Handberg (1991) ¹⁶¹	Whether justices have: <ul style="list-style-type: none"> •prior judicial experience •prosecutorial experience 	Whether judges vote in the “liberal” or “conservative” direction in several areas of the law	Yes (<i>e.g.</i> , justices with prosecutorial experience are more “conservative” than justices without such experience)
Tate (1981) ¹⁶²	Whether justices have: <ul style="list-style-type: none"> •prior judicial experience •prosecutorial experience •experience as elected office holders •federal administrative experience 	Whether judges vote in the “liberal” or “conservative” direction in several areas of the law	Yes (<i>e.g.</i> , justices with prior judicial experience are more “liberal” than justices without such experience)
Ulmer (1970) ¹⁶³	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) ¹⁶⁴	Whether justices have federal administrative experience	Whether judges vote in the “liberal” or “conservative” direction in several areas of the law	Yes (<i>e.g.</i> , justices with federal administrative experience are more “conservative” than justices without such experience).
Vines (1964) ¹⁶⁵	Whether judges have: <ul style="list-style-type: none"> •political experience •judicial experience 	Whether judges have a positive or negative general disposition toward race relations cases	Generally yes (<i>e.g.</i> , judges who held state political office are more negatively disposed toward race cases than judges who did not hold such positions).

¹⁵⁸ Sisk, Heise, & Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, *supra* note 53.

¹⁵⁹ JOHN D. SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM 1889-1959* (1968).

¹⁶⁰ C. Neal Tate & Panu Sittiwong, *Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations*, 51 J. POLITICS 900 (1989).

¹⁶¹ Tate & Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, *supra* note 53.

¹⁶² Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices*, *supra* note 53.

¹⁶³ S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POLITICS 580 (1970).

¹⁶⁴ Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases*, *supra* note 53.

Given the goal of their study—to explain the publication choices of judges in labor cases—Merritt et al.’s concern with legal experience is sensible. But, as we can see from the table, this is only one of many possible approaches to capturing career experience. In his analysis of the methods used by judges to interpret the tax code, for example, 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 a professor.¹⁶⁶ Tate took into account whether a justice with prosecutorial experience also had judicial experience.¹⁶⁷ This turned out to be a wise choice on the researcher’s part, in light of his 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.”¹⁶⁸ Sisk and his colleagues, in their quest to explain decisions involving the federal sentencing guidelines, even considered whether jurists had any military experience.

The type of judicial decision making under investigation, as the table shows, also varied. In many instances, the researcher was concerned solely with explaining the votes of judges. Brudney and his colleagues’ exploration of labor cases is exemplary: 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.¹⁶⁹ In other essays, 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. Some even sought to explore the reasoning jurists used in their opinions. Schneider’s essay is exemplary, as is the Sisk et al. study, which invoked occupational variables not only to explain whether judges upheld or struck down the sentencing guidelines but also to examine what reasoning jurists employed in their decisions.

Despite these variations, we remain struck by the near-uniformity of the results. Whether the authors approached occupational path in specific ways (such as legal experience representing management) or more general ones (such as 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 some influence of career experience. In several instances, the results were so crisp that they 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 decisionmaking 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 decisionmaking, *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.¹⁷⁰

Such results, along with the many others depicted in Table 2, we believe, underscore the importance of career diversity on collegial courts: Because judges with varied occupational 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.

¹⁶⁵ Kenneth N. Vines, *Federal District Court Judges and Race Relations Cases in the South*, 26 J. POLITICS 338 (1964).

¹⁶⁶ Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, *supra* note 53.

¹⁶⁷ Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices*, *supra* note 53.

¹⁶⁸ *Id.*

¹⁶⁹ Brudney, Schiavoni, & Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, *supra* note 53.

¹⁷⁰ Sisk, Heise, & Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, *supra* note 53.

B. Career Diversity and the Pool of Candidates

Not all background characteristics, as the quote above from the Sisk et al. study suggests, are as helpful in explaining variation in judicial choices as career experiences; many characteristics, in fact, generate far more ambiguous results—with gender providing an example. For virtually every study finding that female judges behave differently than their male counterparts, there is one that finds no differences between the two.¹⁷¹ Or, as Schneider succinctly and recently puts it, “Studies about the impact of gender on judges' decisions are divided in their conclusions, some perceiving a difference and others, not.”¹⁷²

Simply because relationships between judicial choice and gender are more ambiguous than they are for occupational path, though, does not reduce the importance of gender diversity. We need not recount here why variation on this dimension, not to mention on race and ethnicity, is desirable; scores of scholars, commentators, and policy makers have already done so.¹⁷³ What is worthy of emphasis leads us to a second reason why decision makers ought be attentive to occupational path when making nominations to the Court: Increasing diversity on this dimension may lead to increases in diversity on other critical dimensions but especially race and gender.

To see why, consider Table 3, which shows the numbers of women, blacks, Hispanics, and Asians 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 Supreme Court. Note, first, that if decision makers continue to follow the norm and appoint only former U.S. circuit court 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; just twenty-three, minorities. And those numbers begin to border on the trivial if we consider that Presidents typically nominate members of their own political party to the Supreme Court (and to the lower federal courts).¹⁷⁴ Since only eleven of the women and two of the minorities are Republicans, if the current U.S. President followed both the norms of experience and of partisanship, he would be forced to draw from a very small pool of candidates—assuming racial and gender diversity concern him and he was in a position to fill a vacancy on the Supreme Court before any of his appointees to the U.S. Courts of Appeals could gain the requisite experience.

¹⁷¹ For relatively recent reviews of this literature, see Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, *supra* note 53; Lee Epstein & Lynn Mather, *Beverly Blair Cook*, 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).

¹⁷² Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, *supra* note 53.

¹⁷³ See, e.g., DEREK BOK & WILLIAM G. BOWEN, *THE SHAPE OF THE RIVER: LONG TERM-CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) and cites contained therein.

¹⁷⁴ 85.2% of Clinton's 61 appointees to the U.S. Courts of Appeals were Democrats. The percentages of Republicans appointed by Reagan and Bush were higher (96.2 percent and 89.2 percent, respectively). Data are from Goldman & Slotnick, *Clinton's Judges: Summing Up the Legacy*, *supra* note 70, at 249.

Table 3 Potential Pools of Candidates for Seats on the U.S. Supreme Court, by Gender and Race

	U.S. Courts of Appeals Judges ¹⁷⁵	State Supreme Court Justices ¹⁷⁶	Tenured Law School Professors (Including) Deans ¹⁷⁷	Members of the U.S. Congress ¹⁷⁸	Members of State Legislatures	Governors	Partners in Law Firms ¹⁷⁹
Women	35	66	999	74 ¹⁸⁰	1,668 ¹⁸¹	5 ¹⁸²	7,669 ¹⁸³
Blacks	12	25	230	36	583 ¹⁸⁴	0 ¹⁸⁵	Not available
Hispanics	10	4	114	19	198 ¹⁸⁶	0 ¹⁸⁷	Not available
Asian	1	6	62	6	72 ¹⁸⁸	2 ¹⁸⁹	Not available
Total Blacks, Hispanics, and Asians	23	35	406	61	853	2	1,723 ¹⁹⁰

Altering the norm of federal appellate experience just slightly—to include service on a state supreme court—would work, as the table shows, to increase the available pool of female candidates and those of color. Note only Hispanics have less representation on the nation’s highest state courts than they do in the courts of appeals; women, in contrast, hold nearly double the number of seats in the states than on the circuits. Even so the numbers remain relatively small in comparison to 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 women have increased their numbers dramatically, such that there are now nearly a thousand in the senior ranks of the legal academy. 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, say, female law professor is “qualified” to serve on the Supreme Court, just as not every member of the lower federal appellate bench would make the cut. 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 the academy (or spent large portions of their career there).

And just as surely the nation’s legislatures house promising candidates. Though complaints about the underrepresentation of women, blacks, Hispanics, and Asians in the U.S. Congress remain valid, the numbers of women and minorities are larger there than in the nation’s circuit courts. Women now hold 13 seats in the

¹⁷⁵ Data Source: Id. , at 250. The data include only judges in active service.

¹⁷⁶ Data Source: John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 New Eng. L. Rev. 47 (1997), at 52. Data are for 1996.

¹⁷⁷ Data Source: <http://www.aals.org/statistics/index.html#women>. Data are for 1999-2000.

¹⁷⁸ Data source: *Congressional Quarterly*, Jan. 20, 2001. Data are for the 107th Congress.

¹⁷⁹ Data are for 2001.

¹⁸⁰ This figure includes one non-voting delegate from Washington, D.C.

¹⁸¹ Data source: <http://www.rci.rutgers.edu/~cawp/facts/cawpfs.html>. Data are for 2002.

¹⁸² Data source: <http://www.rci.rutgers.edu/~cawp/facts/cawpfs.html>.

¹⁸³ Data source: <http://www.nalp.org/nalpresearch/mw99sum.htm>.

¹⁸⁴ Data source: <http://www.fairvote.org/vra/legrace.htm>. Data are for 2000.

¹⁸⁵ Data source <http://www.fairvote.org/vra/govrace.htm>. Data are for 2001.

¹⁸⁶ Data source: <http://www.fairvote.org/vra/legrace.htm>. Data are for 2000.

¹⁸⁷ Data source: <http://www.fairvote.org/vra/govrace.htm>. Data are for 2001.

¹⁸⁸ Data source: <http://www.fairvote.org/vra/legrace.htm>. Data are for 2000.

¹⁸⁹ Data source: <http://www.fairvote.org/vra/govrace.htm>. Data are for 2001.

¹⁹⁰ Data source: <http://www.nalp.org/nalpresearch/mw99sum.htm>. The figure includes African-Americans, Asian/Pacific Islanders, American Indians, and Hispanics of any race.

U.S. Senate and 61 in the House,¹⁹¹ with 28 percent (n=21) filled by Republicans. Again, the figures are less for blacks, Hispanics, and Asians 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 bear out 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 and state supreme courts and in the law schools and halls of Congress combined. They also serve as the chief executives in five states, as well as lieutenant governors in seventeen others. Blacks, Hispanics, and Asians do not yet have as strong a presence at top levels of state executive branches but they are becoming an increasing one in the nation's statehouses.

Certainly, not all legislators and executives—just as not all law professors or circuit court judges—are qualified to serve on the Nation's highest court. At least some non-trivial proportion do not even hold law degrees, a seemingly ironclad (though not constitutionally-mandated) requirement for nomination. But this criterion is certainly not a problem for partners in private practice law firms; even more to the point, in light of the large numbers of women and minorities holding these positions, private firms may be where Presidents find the greatest untapped (at least in contemporary times) source for potential nominees. While the percentages of women and minorities serving as partners remain relatively low, such figures are far less important to our analysis than the absolute numbers. Which are, in fact, very large in comparison to the other categories we have examined.

IV. Implications of the Study

As is true for many academics, we have sometimes struggled 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 and singular as the data we have presented throughout; namely, that both Presidents and Senates ought strive to create a more occupationally diverse U.S. Supreme Court, that they take 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 primary task at this moment must focus on eradicating the norm of prior (federal) judicial experience—a norm that seems to have come about 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 Supreme Court; and it is this homogeneity, as we have argued throughout, that limits the ability of the Court to operate at the highest levels.

Eradicating the norm should present no major difficulties. It only requires the President to look beyond the circuit courts for potential nominees—and towards the Nation's legislatures, private law firms, law schools, and executive branches, where, presumably (if history is any indication), hundreds, if not thousands, of qualified lawyers labor. In so doing, we hasten to note, the President should not feel bound to fill the next three or four vacancies with, say, all U.S. Senators, all former cabinet members, or all 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). The President must rather 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 predecessors, at least from Eisenhower on—to avoid over representation of those drawn from particular sectors of the legal community. Again, given the large pool from which to draw potential nominees, we cannot imagine that our current President and his successors will find this a particularly onerous task. Even 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.

¹⁹¹ See *supra* note 180.

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