The Importance of Professional Diversity in the Judiciary

Drew Eyman — May 2015

More than any other time in American history, federal judges today are increasingly diverse in both gender and race.[1] In contrast, the professional backgrounds of those federal judges are strikingly similar. As of February 2014, 85 percent of President Obama's judicial nominees "have been either corporate attorneys or prosecutors (and in some cases both)."[2] Moreover, 71 percent of trial court nominees and 73 percent of court of appeals nominees "practiced with primarily corporate or business clients."[3] Speaking to that current trend in judicial appointments, Justice Ruth Bader Ginsberg stated that "Today, my ACLU connection would probably disqualify me."[4]

This disparity in favor of corporate and prosecution experience in judicial appointments has drawn criticism. In March 2014, more than 30 labor, civil rights, and environmental groups signed a letter urging Senators to present a more professionally diverse group of candidates for appointment to the judiciary.[5] Similarly, in a speech to the

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[1] *See* Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), http://www.newyorker.com/magazine/2014/10/27/obama-brief (reporting that of the 288 judges President Obama has had confirmed, the majority were women and non-white males).

[2] ALLIANCE FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS (Feb. 6, 2014) (rather than only counting a judicial nominee's professional background immediately prior to nomination, this study accounted for the nominee's "entire professional history" and thus some nominees were counted several times—i.e. as a corporate and non-corporate attorney. The study claims that "[t]his methodology gives the fullest, most accurate portrait of the professional experience each nominee brings to the federal judiciary.").

[3] *Id.*

[4] Jamie Stengle, *Ruth Bader Ginsburg speaks at SMU*, ASSOCIATED PRESS (Aug. 29, 2011), http://www.deseretnews.com/article/700174796/Ruth-Bader-Ginsburg-speaks-at-SMU.html (quoting Justice Ginsburg).

[5] Letter from AFSCME et al. to Senators (Mar. 27, 2014), *available at* http://big.assets.huffingtonpost.com/JudicialDiversity.pdf ("[A] truly diverse judiciary . . . includes judges who come from all corners of the legal profession—and particularly those who have worked in the public interest."); *see also* Jennifer Bendery, *Progressive Groups Urge Senators To Stop With All The Corporate*

American Constitution Society, Democratic Senator Elizabeth Warren criticized President Obama's contribution to "a striking lack of professional diversity among the lawyers who currently serve as federal judges."[6] Regarding the judiciary, the Senator said, "I think diversity of experience matters" and called on President Obama to appoint judges "whose life experience extends beyond big firms, federal prosecution, and white-collar defense."[7]

This all begs the question, why do we care about professional diversity in the judiciary? First, to the extent that bias plays a subconscious role in judicial decision making, professional diversity helps to balance out those subconscious biases in the aggregate.[8] Judges, like everyone else, "are the product of their background and experiences, including their professional lives before taking the bench."[9] Former U.S. Supreme Court Justice Benjamin Cardozo believed that "out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."[10]

Second, in addition to balancing biases, a diversity of professional experience aids judicial decision making, helping to ensure that decisions are thoughtfully and fairly

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Judicial Nominees, HUFFINGTON POST (Mar. 27, 2014), http://www.huffingtonpost.com/2014/03/27/judicial-nominees-diversity_n_5041393.html?utm_hp_ref=tw (reporting on the letters advocating for a more professionally diverse judiciary).

[6] Senator Elizabeth Warren, Speech to the American Constitution Society: The Corporate Capture of the Federal Courts (June 13, 2013).

[7] *Id.*

[8] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 176-77 (1921) (arguing that when subconscious biases slip into a judge's decision making process, professional diversity helps to "balance one another.").

[9] Alliance for Justice, *supra* note 2.

[10] Cardozo, *supra* note 8 at 177.

considered. Professionally diverse panels of judges bring a variety of unique legal experiences to the bench. Professionally diverse judges help the court to identify legal nuances and consequences of decisions that only a seasoned practitioner in that field would identify and comprehend, ensuring fair consideration of the full spectrum of legal issues that appear before the court.[11] In other words, judges are better able to recognize the minutia or practicalities that otherwise would have gone unnoticed but for their professional experience, or a colleague's experience, in that particular field of law.

Lastly, professional diversity increases the perceived legitimacy of the judiciary. The federal judiciary does not have the power of the sword or the purse.[12] Courts must rely on the elected branches to enforce their decisions.[13] Therefore, courts must maintain legitimacy as institutions of rationality, logic, and justice, to ensure the proper functionality of the federal courts.[14]

While professional diversity is important for trial and appellate courts alike, it is particularly important for appellate courts, where, unlike trial courts, judges make decisions as a collective body.[15] When decisions are made as a group, professional

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[11] *See* Sanda Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218 (1991-1992) (explaining the vital contribution of Justice Marshall's unique professional background to the court's decision-making, making "clear what legal briefs often obscure: the impact of legal rules on human lives").

[12] THE FEDERALIST NO. 78 (Alexander Hamilton).

[13] *See id.* (the judiciary has "neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").

[14] *See* CHIEF JUSTICE JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2007) (regarding congressional funding for the judiciary: "Judges, who have the obligation to make decisions without regard to public favor and who must frequently make unpopular decisions, have no constituency in Congress to voice their concerns. They must rely on fact, equity, and reason to speak on their behalf.").

[15] *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 1-2 (1993) (stating that "One of the most salient features of appellate courts is also one of the most ignored," that appellate judges "have power to adjudicate cases not individually, but only collectively as a court.").

diversity helps to mitigate the subconscious biases of the court by setting different biases against one another to check and compensate for each other in the decisionmaking process. Though, to be sure, trial court judges often seek counsel from one another about troublesome issues and it is in these out-of-court discussions where professional diversity again helps to both mitigate bias and improve decision making.[16]

I. Balancing Professional Bias

As Chief Justice John Roberts explained in his confirmation hearing, "my job is to call balls and strikes and not to pitch and bat."[17] What happens, however, when a judge has to decide the difference between a ball and a strike? Regularly that determination, or at least part of the decisionmaking process, turns on some amount of discretion. For example, "[w]hen a judge decides whether a claim is 'plausible,' or whether a witness is 'credible,' or whether police officers . . . acted 'reasonably,' her determination is necessarily influenced by the nature of her work as a lawyer up to that point."[18]

Ensuring impartial decisions is one of the most sacred obligations of the judiciary.[19] Upon confirmation, all federal judges are required by law to take the following oath:

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[16] *See* Milton J. Valencia, *Dynamics changing on federal bench in Mass.*, BOSTON GLOBE (Feb. 24, 2014), http://www.bostonglobe.com/metro/2014/02/24/court-massachusetts-set-undergo-sweeping-makeover-with-appointment-new-judges/9rNDwsjwIyEHNVUVta5vRP/story.html (former US District Court Judge Nancy Gertner lauded the professional diversity of Massachusetts' newly appointed District Court judges, "'they are professionally diverse, as well as gender diverse,' Gertner said, 'people coming from different parts of the profession and not from the same quarters.'").

[17] John Roberts, Chief Justice of the U.S. Supreme Court, opening statement at the Senate judiciary committee nomination hearings (Sept. 12, 2005), *available at* http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html?_s=PM:POLITICS.

[18] Alliance for Justice, *supra* note 2.

[19] Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U. L. REV. 781, 781 (2008) (quoting ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM

> I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and the laws of the United States. So help me God.[20]

The vast majority of federal judges likely do their sincere utmost to uphold that oath of impartiality. U.S. Supreme Court Justice Clarence Thomas once said that "impartiality is the very essence of judging and of being a judge."[21] A judge, according to Justice Thomas, "must attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being."[22] Accordingly, to the extent that improper bias sneaks into a judge's decisionmaking, it is likely unintentional. These subconscious biases, developed from professional experience, are likely impossible to eliminate entirely, because even "abstract, global self-commands to 'Be fair!' do not much change implicit social cognitions."[23]

It is important to differentiate professional experience from the biases it naturally produces.[24] In the judiciary, and in many industries, the former is almost tangible—storied professional experience is a sought after commodity. The byproduct of past

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14 (1999)) ("[The judge's] obligation of reasoned choice requires of the professional decisionmaker an *impartial* application of principles that are consistent with a community standard.") (emphasis added).

[20] 28 U.S.C. § 453 (2012).

[21] The Honorable Justice Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 4 (1996-1997).

[22] *Id.*

[23] Jerry Kang et al., *Implicit Bias in the Courtroom*, 50 UCLA L. REV. 1124, 1170 (2012).

[24] *Compare bias definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/bias (defining bias as, "an inclination of temperament or outlook; especially: a personal and sometimes unreasoned judgment.") (last visited May 3, 2015), *with experience definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/experience (defining experience as "the fact or state of having been affected by or gained knowledge through direct observation or participation.") (last visited May 3, 2015).

experience, however, is the development of particular biases, whether perceived or unperceived.[25] As the Honorable Justice Rives Kistler of the Oregon Supreme Court remarked:

> A person representing civil plaintiffs will often experience the difficulty in going up against a well-financed opponent who often controls much of the information that the lawyer would really like to get his or her hands on. And those persons will end up being sympathetic with the need to get access to information and perhaps to get cases to the jury.[26]

Justice Kistler's comment evidences the fine line between the influence of experience and the influence of bias in judicial decisionmaking. It benefits the court when a judge's prior professional experience allows him or her to empathize with problems or practicalities of a particular practice area.[27] Such experiential knowledge prevents impractical or unreasonable judicial decisions in light of professional norms. It is beneficial for Judges to understand the unique hurdles of various practice areas and to tailor their decisionmaking accordingly.

In contrast from experience, bias is a subconscious predilection, which is divorced from the unique factual situation at hand. Speaking to the effect of bias on judicial decision making, when Justice Kistler was a judge at the Oregon Court of Appeals, he

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[25] *See* Trang Chu, *How unconscious bias holds us back*, GUARDIAN (May 1, 2014), http://www.theguardian.com/women-in-leadership/2014/may/01/unconscious-bias-women-holding-back-work ("[R]esearch has shown that the beliefs and values gained from family, culture and a lifetime of experiences heavily influence how we view and evaluate both others and ourselves.").

[26] E-Mail from Drew Eyman, Law Student, Boston University School of Law, to the Honorable Rives Kistler, Justice of the Oregon Supreme Court (April 29, 2015, 01:49 ET) (on file with author).

[27] *See* Robert Fishman & Jay Geller, *Interview with the Honorable H. Christopher Mott*, AMERICAN BAR ASSOCIATION (July 14, 2011), http://apps.americanbar.org/litigation/committees/bankruptcy/articles/summer2011-interview-bankruptcy-judge.html (praising the benefit of private practice experience prior to becoming a judge: "I think it would have been much more difficult sitting on the bench without knowing what's going on the other side of the bench, if not specifically, then at least generally.").

used to see bias play a role with stalking cases relatively frequently, stating "for example, I've seen a woman judge who was truly concerned with the stalker's behavior, while a male judge didn't see why the behavior was concerning."[28]

It is these unperceived, subconscious, biases that make professional diversity in the judiciary an important pursuit. A diversity of professional experiences among judges not only provides for more informed and well-rounded legal discourse, but just as important is the balancing effect such diversity has on the judiciary. In his book, "Law and the Limits of Reason," legal scholar Adrian Vermeule argued that, "professionals are inculcated with common skills and hence common prejudices; professional uniformity tends to create harmful groupthink."[29] In contrast, a professionally diverse bench creates a diversity of biases, each helping to keep the other in check and preventing one uniform bias to, perhaps imperceptivity, develop among a group of judges.[30]

Judges must be impartial about the facts of the case and the parties before them. The concern for many, like Senator Warren, is that judges with corporate backgrounds will tend to view corporate/business parties more favorably.[31] Kermit Roosevelt, a law professor at the University of Pennsylvania, acknowledges these improper biases but argues there are times when judges should not be completely impartial.[32] Roosevelt

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[28] E-Mail from Drew Eyman, Law Student, Boston University School of Law, to the Honorable Rives Kistler, Justice of the Oregon Supreme Court (April 29, 2015, 01:49 ET) (on file with author).

[29] ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 85 (2008).

[30] *See id.* (remarking that, in comparison to the judiciary, "the greater professional diversity of legislatures produces greater cognitive diversity, and thus supplies a major epistemic advantage.").

[31] *See* Warren, *supra* note 6 (arguing for a more professionally diverse judiciary to prevent "the corporate capture of the federal courts, with the courts transformed into one more rigged game").

[32] *See* Kermit Roosevelt, *Ways a Judge Should, and Should Not, Be Impartial*, NY TIMES (Nov. 3, 2013), http://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/ways-a-judge-

argues that while judges should take great pains to be impartial with the facts and parties, they should not be impartial about the law surrounding the case.[33] A judge who has no personal opinions about the law, Roosevelt argues, "would not be impartial; she would be incompetent."[34] Quality judging, of course, requires the judge to draw on her past legal experience to examine the merits of a legal argument. It is only when the judge's bias from prior professional experience remains subconscious that justice may be undermined, since the judge would be unaware of its effect.

Despite a judge's best efforts, sometimes subconscious bias can still slip into his or her consideration of a case.[35] Judges are humans, and humans have "a well-established tendency" to favor their own particular groups "no matter how strongly they claim to be neutral observers balancing the scales of justice with blindfold firmly in place."[36] That is not to say that judges refuse, or just pretend, to put on the blindfold when sitting on the bench. It is that even blindfolds differ depending on professional background. The color of the blindfold—be it blue, or green, or yellow—casts its hue across the eyes of the wearer as thin rays of light inevitably penetrate the cloth. Accordingly, legal scholar Adrian Vermeule, argues that "adding decisionmakers who are *worse* than random—of lower competence than is a coin toss over two choices—can actually *improve* group

should-and-should-not-be-impartial (arguing that impartiality is desired as to the facts and parties but not for the law applied to those facts and parties).

[33] *Id.*

[34] *Id.*

[35] *See* Cardozo, *supra* note 8 at 175 ("No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.").

[36] S.M., *Playing favourites*, ECONOMIST (May 13, 2014), http://www.economist.com/blogs/democracyinamerica/2014/05/judicial-bias.

performance by reducing the correlation of biases."[37] To be sure, we want judges who have had storied professional careers to sit on the bench, and we want those judges to draw on those past experiences to aid their decisionmaking.[38] What we do not want, however, is for subconscious bias to tag along with that experience to sneak into the courtroom.

Judges can take steps to mitigate that improper subconscious bias by confronting their backgrounds and biases.[39] For example, "thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to bias. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe."[40] That is why orientation programs for newly appointed judges, such as the affably named "Baby Judges School," are so important.[41] These programs can "increase motivation and encourage judges to engage in some behavior modifications," thereby mitigating the effects of subconscious biases."[42]

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[37] Vermeule, *supra* note 29.

[38] *See* E-Mail from Drew Eyman, Law Student, Boston University School of Law, to the Honorable Rives Kistler, Justice of the Oregon Supreme Court (April 29, 2015, 01:49 ET) (on file with author) (stating that a judge's particular "background may allow [him or her] to see issues that go over other people's heads.").

[39] *See* Alissa Skelton, *Omaha police officers get training reminder to confront personal bias*, OMAHA WORLD-HERALD (May 3, 2015) (quoting Officer Austin who teaches a required police officer course on understanding personal biases: "We are not here to train the bias out of you guys—that is impossible. This class is about letting you understand personal bias, recognize that bias and not project that bias on the people that you deal with on a daily basis."); *"Baby Judges School" Jump Starts Learning Process*, THE THIRD BRANCH (Aug. 2005), http://www.uscourts.gov/News/TheThirdBranch/05-08-01/quot_Baby_Judges_School_quot_Jump_Starts_Learning_Process.aspx (discussing the introductory course for new judges, which includes discussion of judicial ethics).

[40] *See* Kang et al., *supra* note 23 at 1173.

[41] The official name of "Baby Judges School" is "Phase I and II Orientation Seminars for Newly Appointed District Judges." Jennifer Nycz-Connor, *Who are you to Judge? Lawyers warm to the bench with "baby judges" training*, WASHINGTON BUSINESS JOURNAL (June 12, 2006), http://www.bizjournals.com/washington/stories/2006/06/12/focus1.html?page=2.

[42] *See* Kang et al., *supra* note 23 at 1176.

Similarly, as Justice Cardozo once said, "The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepositions."[43] However, "[n]ever will these loyalties be utterly extinguished while human nature is what it is."[44] A professionally diverse judiciary, therefore, is essential to balance those subconscious biases that, despite all efforts, cannot be eliminated entirely.

II. Enhanced Decision Making

Professional diversity helps to ensure the existence of a wide-range of knowledge that judges may both draw from and have access to, in the form of their colleagues, when making decisions. Particularly for judges at the appellate level, who typically decide cases as a group, a diversity of experience among the panel of judges helps to ensure the full and unbiased consideration of all issues, as the variety of professional backgrounds of the judges balance and contribute to the legal decision making process.[45] A panel of judges with similar backgrounds may still come to quality, rationale, and well-considered decisions. However, because most judges hear a wide range of legal subject matter, it is easier to ensure that issues are fully explored, and to prevent subconscious bias from

[43] *See* Cardozo, *supra* note 8 at 176.

[44] *Id.*

[45] Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 49 (2009), *available at* http://www.greenbag.org/v13n1/v13n1_ifill.pdf ("[T]he interplay of perspectives of judges from diverse backgrounds and experiences makes for better judicial decisionmaking, especially on our appellate courts.").

playing a role, with a professionally diverse bench than with a mostly professionally uniform bench.[46]

Regarding the effect of professional backgrounds on judicial decision-making, Justice Kistler said, "You don't decide cases to conform to the answers you argued for, but your background may allow you to see issues that go over other people's heads."[47] Elaborating on that point, Justice Kistler stated, "Essentially, I think that your background makes you aware of the issues that your clients faced."[48] For instance, "a person representing business is aware of the problems businesses sued for no good reason face, or the difficulties of negotiating contracts, or what the practice in the industry is."[49]

When making judgments regarding the reasonableness of particular actions, intimate familiarity with those professional norms is invaluable to a judge and to the bench as a whole. The value of a diverse bench is that where one judge does not have knowledge of particular professional norms or practicalities, a fellow judge likely will. Supreme Court Justice Sandra Day O'Connor once remarked that Justice Thurgood Marshall's professional background in civil rights work allowed him to communicate to his fellow justices "what legal briefs often obscure: the impact of legal rules on human lives."[50]

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[46] *See* Vermeule, *supra* note 29 at 154 (in contrast to the judiciary, "the cognitive diversity that accompanies professional diversity across the decisionmaking group is a decisive advantage of legislatures.").

[47] E-Mail from Drew Eyman, Law Student, Boston University School of Law, to the Honorable Rives Kistler, Justice of the Oregon Supreme Court (April 29, 2015, 01:49 ET) (on file with author).

[48] *Id.*

[49] *Id.*

[50] O'Connor, *supra* note 11 ("Although I disagreed with Justice Marshall about the constitutional validity of the death penalty, his story made clear what legal briefs often obscure: the impact of legal rules on human lives."); *see also* Ifill, *supra* note 45 ("Although there's been very little interest in exploring the

Justice O'Connor's comment exemplifies a critical, often overlooked, element required for courts to fully realize the benefits of a professionally diverse bench—collegiality.[51] Judges, as their professional relationship with one another uniquely allows for, can confer on difficult issues and educate one another.[52] When discussing the benefits of a professionally diverse judiciary, Justice Kistler seemed to imply that collegiality is a necessary condition to achieve the maximum benefits of professional diversity, stating that "The value of diversity on a collegial bench is that it allows people from different backgrounds to enrich each other with their perception of the issues."[53] That enrichment most directly applies to courts of appeals where judges must work closely with one another to come to a decision that is agreeable to the group as a whole.[54] Harry Edwards, former Chief Judge of the U.S. Court of Appeals for the District of Columbia, said that "appellate judging is an inherently *interdependent* enterprise," requiring "strong collegial relationships" to allow judges "to use their disagreements to improve and refine the opinions of the court."[55]

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importance of professional-background diversity, the value of bringing [Justice Marshall's] kind of experience to the bench is fairly non-controversial.").

[51] *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1640-41 (May 2003) (arguing that "scholars invariably ignore the many ways in which collegiality mitigates judge's ideological preferences and enables us to find common ground and reach better decisions.").

[52] *See id.* at 1646 ("Through the experience of working as a group, one becomes familiar with colleagues' ways of thinking and reasoning, temperaments, and personalities. All of this makes a difference in how smoothly and comfortably group members can share, understand, and assimilate each other's ideas and perspectives.").

[53] E-Mail from Drew Eyman, Law Student, Boston University School of Law, to the Honorable Rives Kistler, Justice of the Oregon Supreme Court (April 29, 2015, 01:49 ET) (on file with author).

[54] *See* Ifill, *surpa* note 45 ("[T]he interplay of perspectives of judges from diverse backgrounds and experiences makes for better judicial decisionmaking, especially on our appellate courts.").

[55] Edwards, *surpa* note 51 at 1646.

Trial court judges, however, also benefit from such collegiality, since they too share a unique professional relationship that allows them to confide in and seek counsel from one another.[56] All judges must strive to be comfortable and self-aware enough to approach one another about their vulnerabilities and to seek counsel when necessary. Moreover, that counseling is particularly helpful for solving unique and varied legal issues when the judge seeking counsel has a professionally diverse set of colleagues to consult.[57]

In a tribute to Supreme Court Justice Thurgood Marshall, Justice Byron White echoed Justice Kistler and Judge Edward's comments, lauding the value of Justice Marshall's unique civil-rights background as a major contributor to the court's decisionmaking.[58] Specifically, Justice White said that "Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match."[59] It also appears Justice White considered collegiality to be a critical factor in realizing the benefits of professional diversity, saying that Justice Marshall, drawing from his civil-rights background, "could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past."[60]

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[56] *See* Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1235 (2006) ("[I]ndividual judges may be predisposed to certain viewpoints, they also seem to be affected by interacting with colleagues of differing viewpoints.").

[57] *See id.* at 1237 (arguing that professional uniformity in the judiciary decreases the likelihood of openness to "alternative ways of thinking").

[58] Byron White, *A Tribute to Justice Thurgood Marshall*, STAN. L. REV. 1215, 1215-16 (1992).

[59] *Id.*

[60] *Id.* at 1216.

This call for professional diversity in the judiciary is in stark contrast to the legal systems of Europe, which employ career judges.[61] In the civil-code legal systems of Europe, "lawyers move into lower levels of the judiciary early in their careers, and (to the extent they are successful) they move upward to higher courts over time."[62] While judges in such systems are intimately familiar with the process of hearing and deciding cases, that familiarity is also a drawback. A system of career judges runs the risk of politicizing legal decisions, since "judges who are interested in promotion may have incentives to rule in ways that presidents and senators favor."[63] Moreover, unlike U.S. judges, the career judges of Europe are entrenched in the legal system from the time they graduate from law school, and thus are likely to be "less cognizant of the practical consequences of [their] decisions" than they would be if they, or their colleagues, had a more diverse professional background from which to draw upon in their decision-making.[64]

The role of a judge in a European civil-code legal system is far more limited than the role of a judge in the common law legal system in the United States.[65] Therefore, while a career judiciary may serve the needs of European legal systems, the lack of

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[61] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM xiii (1996) ("A European legal system, being inquisitorial rather than adversarial, places more responsibility on judges relative to lawyers than our system does.").

[62] Monique Renee Fournet et al., *Evolution of judicial careers in the federal courts, 1789-2008*, 93 JUDICATURE 63, 63 (No. 2, Sept.-Oct. 2009).

[63] *Id.*

[64] *Id.*

[65] "Although common-law systems make extensive use of statutes, judicial cases are regarded as the most important source of law, which gives judges an active role in developing rules." S.B., *What is the difference between common and civil law?*, ECONOMIST (Jul. 16, 2013), http://www.economist.com/blogs/economist-explains/2013/07/economist-explains-10. In contrast, in civil-code systems, "codes and statutes are designed to cover all eventualities and judges have a more limited role of applying the law to the case in hand." *Id.*

professional diversity is a critical flaw when applied to America's adversarial system. Prior judicial experience should be a factor in favor of one's nomination to a higher judgeship, but, unlike European systems, it should not be the only factor. Indeed, a 2010 Washington Post-CBS News poll showed that 70 percent of those polled viewed prior judicial experience as "the most valued quality among a list of professional and personal characteristics" for nomination to the U.S. Supreme Court.[66] A judge's prior judicial experience is certainly beneficial to a court's decisionmaking, but likely provides diminishing returns as the professional backgrounds of those on the court trend towards uniformity.[67]

Courts derive significant benefits from a collegial and professionally diverse group of judges, whose diversity of experiences combine to create better judicial decisionmaking.[68] Accordingly, due to the unique benefits of professional diversity, a judicial nominee's professional background should be a significant consideration in the judicial appointment process.

III. Increased Legitimacy

Regardless of whether professional diversity balances subconscious biases and/or increases the quality of judicial decisionmaking, professional diversity enhances the

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[66] Robert Barnes & Jennifer Agiesta, *Poll affirms a vote for judicial know-how*, WASHINGTON POST (Apr. 30, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042904893.html (70 percent of those polled viewed prior judicial service as a positive quality for nomination, while only "35 percent view[ed] experience outside the legal world as a positive.").

[67] *See* Milligan, *supra* note 56 (arguing that professional uniformity in the judiciary decreases openness to "alternative ways of thinking"); Vermeule, *supra* note 29 at 154 (in contrast to the judiciary, "the cognitive diversity that accompanies professional diversity across the decisionmaking group is a decisive advantage of legislatures.").

[68] *See* Ifill, *supra* note 45 ("[D]iversity on the courts enriches judicial decisionmaking . . . the interplay of perspectives of judges from diverse backgrounds and experiences makes for better judicial decisionmaking, especially on our appellate courts.").

perceived legitimacy of the judiciary.[69] As Washington D.C. Superior Court Chief Judge Lee Satterfield argues, "a judge's past work experience does matter in terms of the court's overall knowledge base and how the public *perceives* the balance of the bench."[70] That perception is important because "Without public confidence, the judicial branch could not function."[71] President Obama also recognized the importance of the public's perception of the judiciary, as White House Spokesman Eric Schultz stated, "The President has been explicit that the court should be reflective of the community it serves and that includes professional backgrounds."[72]

Despite President Obama's official stance in favor of appointing professionally diverse judges, most of his nominees have come from "the ranks of prosecutors and corporate lawyers," which "deprives the courts of crucial perspectives and reduces public trust in the justice system."[73] That disconnect between the administration's goal and its actual results highlights a significant barrier to increasing the perceived legitimacy of the judiciary—Senate confirmation of the President's judicial nominees.[74] Times of great

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[69] *See* Zoe Tillman, *In D.C., judges' backgrounds are changing*, NATIONAL LAW JOURNAL (Oct. 31, 2011), http://c.ymcdn.com/sites/www.law.udc.edu/resource/resmgr/media/national.law.journal.oct.30.pdf (quoting dean of the University of the District of Columbia David A. Clarke School of Law, Katherine "Shelly" Broderick, "There are some terrific prosecutors on the bench, but I think a much broader set of backgrounds is critical . . . it changes the conversation.").

[70] *Id.* (emphasis added).

[71] In re Raab, 100 N.Y.2d 305, 316 (2003).

[72] Tillman, *supra* note 69 (quoting Eric Shultz).

[73] Editorial Board, *The Homogenous Federal Bench*, NY TIMES (Feb. 6, 2014), http://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html?_r=1; *see* Alliance for Justice, *supra* note 2 (reporting that 85 percent of President Obama's judicial nominees have been either corporate attorney's prosecutors, or both).

[74] U.S. CONST. art. II, § 2 (stating that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States . . . .").

partisanship, such as when the opposite party from the President controls the Senate, can turn what is almost a procedural barrier into a roadblock.[75] During such times, Republican Senators typically seek to only confirm ideologically like-minded judges, and vice versa for Democratic Senators.[76]

That ideological divide may explain why President Obama nominated so many prosecutors and corporate attorneys to the bench, so that Republican senators, who like to appear hard on crime and friendly to business, would quickly confirm them.[77] For instance, it took three separate nominations, from 2009 to 2011, before Edward Chen, an attorney for the American Civil Liberties Union, was finally confirmed to the U.S. District Court for the Northern District of California.[78] Before the elimination of the Senate filibuster, "the Senate was only confirming 71 percent of Obama's appeals court nominees and 77 percent of his district court nominees."[79] After the filibuster was

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[75] Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS (Dec. 30, 2013), http://www.brookings.edu/blogs/fixgov/posts/2013/12/30-staffing-federal-judiciary-2013-no-breakthrough-year (stating that, in the past, "other-party senators rarely objected to administration judicial nominees").

[76] *See* Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619,620 (2003) ("[T]he entire confirmation process centers around the Senate using ideology to reject nominees; during the Clinton presidency, to deny seats on the bench to those whom Republicans perceived as too liberal; now, to block those whom Democrats view as too conservative.").

[77] *See* ELIZABETH RYBICKI, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE, CONGRESSIONAL RESEARCH SERVICE (Mar. 9, 2015) (stating that there is typically a high confirmation-rate of presidential nominations because "[t]he President would prefer a smooth and fast confirmation process, so he may decide to consult with Senators prior to choosing a nominee.").

[78] Press Release, Senator Barbara Boxer, Senate Confirms Judge Edward Chen for U.S. District Court in San Francisco (May 10, 2011), https://www.boxer.senate.gov/press/release/senate-confirms-judge-edward-chen-for-us-district-court-in-san-francisco/.

[79] Al Kamen & Paul Kane, *Did 'nuclear option' boost Obama's judicial appointments?*, WASHINGTON POST, (Dec. 17, 2014), http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/12/17/did-nuclear-option-boost-obamas-judicial-appointments/.

eliminated, however, that confirmation rate rose to over 90 percent.[80] For example, after the elimination of the Senate filibuster, President Obama nominated and had confirmed, Cornelia Pillard, a striking minority among federal judges—a law professor and former N.A.A.C.P. lawyer—to the federal appeals court in Washington.[81] The shift in the success-rate of judicial confirmations pre-Senate filibuster elimination as compared to post-Senate filibuster elimination, evidences the ideological nature of the confirmation process and highlights the need for both President and Senate to work together to create a professionally diverse judiciary, which gives the perception of legitimacy.

Once appointed, Judges have a fair amount of discretion as to how to conduct their business, but, at a minimum, the perception of legitimacy requires judges to convey competence, independence, and impartiality.[82] In comparison to the other branches of government, impartiality has a uniquely important role for judges, who must be trusted to merely "call balls and strikes and not to pitch and bat."[83] When a court has a professionally uniform group of judges, "it will appear as though the deck is stacked in advance, and public confidence in the courts—the belief that all litigants truly can have their day in court—will erode."[84] Senator Warren's comments regarding the perceived

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[80] *See id.* (reporting that Obama's post-filibuster confirmation rate of 90 percent is "slightly higher than Clinton's or Bush's").

[81] *See* Jeremy W. Peters, *Tempers Flare as New Rules Strain Senate*, NY TIMES (Dec. 12, 2013), http://www.nytimes.com/2013/12/13/us/politics/senate-confirms-georgetown-law-professor-to-powerful-appeals-court.html?_r=1 (reporting on Pillard's confirmation).

[82] *See* Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 FORDHAM INT'L L.J. 136, 137 (2013) (discussing the judicial role of competence, independence and impartiality and, in particular, the importance "that judges are *perceived* as being impartial.").

[83] Roberts, *supra* note 17.

[84] Alliance for Justice, *supra* note 2 (speaking to a lack of judges with civil rights experience).

danger of a "corporate capture" of the judiciary reflect that concern.[85] The Senator claims that the high percentage of former corporate attorneys now serving as federal judges compromises the court's impartiality due to judges' biases in favor of businesses.[86]

Professional diversity enhances the public's perception of the judiciary as an impartial and legitimate institution in the same way that racial and gender diversity increases trust in any governmental institution.[87] Diversity avoids the underrepresentation of a particular group on the bench, thus decreasing perceived gaps between the "*judges* and the *judged*."[88] In this way, a professionally diverse bench furthers the public's perception of the court as a legitimate institution of justice, one that does not tend to favor one industry/cause over another, which enhances the efficacy of judicial decisions.[89]

Perception of the judiciary as a trustworthy and impartial institution is important because "Court decisions, requiring people to act, are not self-executing."[90] Public

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[85] *See* Warren, *supra* note 6. (discussing her concern for a "corporate capture" of the judiciary through the appointment of judges with primarily corporate law backgrounds).

[86] *See Id.* (arguing for a more professionally diverse judiciary to counteract the general tendency of former corporate attorneys-turned judges to favor businesses).

[87] Andrew Lynch, *Diversity among judges is matter of legitimacy and equality, but also a help in decisionmaking*, AUSTRALIAN (Dec. 19, 2014), http://www.theaustralian.com.au/business/legal-affairs/diversity-among-judges-is-matter-of-legitimacy-and-equality-but-also-a-help-in-decision-making/story-e6frg97x-1227161101823 (arguing that diversity in the judiciary matters partly because "public confidence in the courts is stronger when the judiciary bears some broad resemblance to the community it serves, rather than an exclusive segment of it.").

[88] *See* LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY: A REVIEW OF STATE JUDICIAL SELECTION MODELS AND THEIR IMPACT ON CREATING A MORE DIVERSE JUDICIARY, 7 (June 21, 2005) (discussing the "palpable friction" between parties and judges when those parties feel that they are underrepresented in the judiciary).

[89] *See id.* at 5 (June 21, 2005) ("The effectiveness of our nation's judicial branch of government relies heavily upon the public's respect and deference to the opinions and rulings of the courts.").

[90] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 15 (2008).

confidence in the judiciary is essential to ensuring the ability of courts to do justice, for "Where people do not trust the courts, they will resort to other means to resolve those matters that are properly in the judiciary's realm."[91] In other words, as Justice Stevens stated in Bush v. Gore, "It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[92] Therefore, even if professional diversity only has a minimal impact on balancing biases and enhancing judicial decisionmaking, it is still an important pursuit for maintaining the perception of legitimacy. Ultimately, "deference to the 'wisdom of the court' is sustained by the public's confidence in the credibility and legitimacy of the judges making the decisions."[93]

IV. Conclusion

Professional diversity is essential for ensuring both the actual and perceived functionality of the judiciary. First, to the extent that subconscious biases affect a judge's decisionmaking, professional diversity helps to balance out these biases in the aggregate. Second, professional diversity plays an invaluable role in the court's decisionmaking process, allowing for the consideration of multiple unique judicial perspectives. Third, regardless of how much of a substantive effect that professional diversity has on mitigating subconscious biases and/or contributing to judicial decisionmaking, professional diversity enhances the perceived legitimacy of the courts as institutions. The

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[91] NY COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, JUDICIAL ELECTIONS REPORT (2004), *available at* https://www.nycourts.gov/reports/JudicialElectionsReport.pdf.

[92] Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

[93] *See* Lawyer's Committee for Civil Rights Under Law, *supra* note 88 at 5.

public should make a habit of demanding professionally diverse judicial appointments from the President and the Senate. Future presidents and senators would do well to overcome ideological ties to appoint professionally diverse judges in order to ensure the proper functionality of the courts of the United States.