



## SHOULD WE HAVE LAY JUSTICES?

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*"I told you before I'm not a scientist. (Laughter.) That's why I don't want to have to deal with global warming, to tell you the truth."*

—Justice Antonin Scalia<sup>†</sup>

*"Breyer says that if the only thing that matters is historical truths from the time of the Constitution, 'we should have nine historians on the court.' Scalia says . . . that a court of nine historians sounds better than a court of nine ethicists."*

—Dahlia Lithwick<sup>††</sup>

## INTRODUCTION

By "lay Justices" I mean Justices of the Supreme Court of the United States who are not accredited lawyers. Currently the number of lay Justices is zero, although there is no constitutional or statutory rule that requires this. Commentators who urge that the Supreme Court should be diverse on all sorts of margins—methodological diversity, ideological diversity, and racial or ethnic or gender diversity<sup>1</sup>—say little or nothing about *professional* diversity on the Court.

I shall suggest that the optimal number of lay Justices is greater than zero, under specified empirical conditions. I do not know whether those conditions actually hold, but on the other hand no one knows that they do not. It is very plausible that the conditions do hold, in which case the status quo of zero lay Justices is an implausible extreme. In the strong form of the argument, it would be a good idea (whether or not it is a politically feasible one) to appoint a historian, economist, doctor, accountant, soldier, or some other nonlawyer professional to the Court. In a weaker form of the argument, I also suggest that at a minimum, we should appoint more dual-competent Justices—lawyers who also have a degree or some other real expertise in another body of knowledge or skill.

The topic of lay Justices has been examined only briefly in previous work,<sup>2</sup> and only on populist or jurisprudential premises quite different than the ones

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<sup>†</sup> Transcript of Oral Argument at 23, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

<sup>††</sup> Dahlia Lithwick, *Justice Grover Versus Justice Oscar*, SLATE, Dec. 6, 2006, <http://www.slate.com/id/2154993/>.

1. For methodological diversity, see RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 354 (2003); for ideological diversity, see David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *YALE L.J.* 1491 (1992); for racial diversity, see Patrice M. Pitts & Linda Vinson, *Breaking Down Barriers to the Federal Bench: Reshaping the Judicial Selection Process*, 28 *HOW. L.J.* 743 (1985); for gender diversity, see Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 *SOC. SCI. Q.* 315 (1990).

2. See the very brief discussions in Frederick Schauer, *Judging in a Corner of the Law*, 61 *S. CAL. L. REV.* 1717, 1731-33 (1988), and John Denver, *Proudly Political*, 37 *U.S.F. L.*

advanced here. It is no part of my argument that it would be more “democratic” to have courts with some nonlawyers; that some fraction of the cases that reach appellate courts are pervasively indeterminate, so that legal expertise runs out;<sup>3</sup> or that law, or constitutional law, or Supreme Court constitutional law, is “politics” anyway.<sup>4</sup> Rather the argument is based on expertise. Lay Justices have technocratic advantages: a Court with at least some lay Justices will reach more right answers across the total set of cases than will a Court with zero lay Justices.

To bias the inquiry against lay Justices, I assume that law is an objective body of knowledge to which legal training supplies privileged access; that there is a single right legal answer in all cases, even hard cases; and that Justices are sincere and vote their best assessment of the legal merits in each case. Even under these assumptions, I suggest, a multimember Supreme Court with some lay Justices will do better at reaching right legal answers in some class of cases, and will plausibly do better on net across all cases, than a Court composed solely of lawyer Justices. This is because legal training will cause lawyer Justices to do *worse* on average at deciding an important class of cases, even according to legal criteria, than nonlawyer Justices. At a minimum, a Court with some dual-competent Justices will do better in this class of cases than a Court composed solely of pure lawyers.

The relevant class is made up of cases in which law itself requires that judges make decisions based in part on nonlegal knowledge. There are two subclasses of cases within this class: (1) cases in which law draws upon specialized knowledge that is not itself legal, such as economic, medical, or military expertise; and (2) cases in which law draws upon knowledge that is neither specialized nor legal, such as knowledge of “the mystery of human life”<sup>5</sup> or “evolving standards of decency.”<sup>6</sup> In the former subclass, nonlawyers bring to the bench distinctive expertise that can make decisions better. In the latter subclass, lawyers have systematic and correlated biases induced by common professional training, but a bench composed of both nonlawyers and lawyers will have uncorrelated or random biases or at least a lower degree of correlation; the aggregate decisionmaking competence of the group will thus improve if the Court contains at least some lay Justices.

There are tradeoffs to be made because lay Justices will do worse than lawyer Justices in cases where specialized legal knowledge is all that matters. But no sensible guess about the shape of the tradeoffs would suggest that the optimal number of lay Justices is zero. A well-motivated appointer—a kind of

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REV. 27 (2002). There is a broader debate about lay judges at various levels of state judicial systems, especially in local government. See *infra* note 34 and accompanying text.

3. See Schauer, *supra* note 2, at 1731-32.

4. See Denvir, *supra* note 2, at 28-29, 33-34.

5. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

6. Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

benevolent planner for the judiciary—would appoint more than zero lay Justices, in part to diversify and thereby hedge our bets in the face of uncertainty and disagreement about how a well-functioning Court should be composed. The costs and benefits sketched here apply, in diluted form on both the cost and benefit side, to the appointment of dual-competent Justices.

Part I provides factual and legal background and then adopts an array of restrictive assumptions, deliberately biased in favor of a bench exclusively composed of pure lawyer Justices. Part II, the core of the discussion, identifies the major tradeoff: although a bench composed solely of pure lawyers will minimize judicial error in cases in which law draws solely upon specialized legal knowledge, a bench with some lay members will do better at minimizing error when law draws upon knowledge that is not both specialized and legal. So long as the latter class of cases is not trivial, then a multimember court that includes more than zero lay members is likely to minimize errors across a total array of cases that includes both classes. At a minimum, dual-competent Justices would improve on the current Court, which is dominated by pure lawyers.

Part III examines an important objection: the bodies of knowledge that drive the argument in Part II can be incorporated into judicial decisionmaking through deference to administrative agencies, special masters, and juries, and through briefs and arguments by parties and amici curiae. This is a question about whether people with the relevant bodies of knowledge should be brought inside the boundaries of the judicial firm; it is analogous to the make-or-buy decision that private-sector firms face. Under conditions of high transaction costs, I will suggest, it is better to appoint people with the relevant knowledge to the bench than to rely on case-by-case incorporation of knowledge. On this view, expertise in domains outside of law should be institutionalized through a kind of representation, by putting at least some nonlawyer Justices or dual-competent Justices on the Court.

Part IV examines some problems and implications, such as the effect of lay Justices on decision costs; endogeneity issues, such as the effect of lay Justices on the Court's agenda and on the content of the legal rules it creates; whether lay Justices would be excessively deferential to lawyer Justices, or vice-versa; and whether and how the argument extends to lower appellate courts in the federal system or to other types of courts. A conclusion follows.

## I. FACTS, LAW, AND ASSUMPTIONS

### A. *Facts*

Lay judges are hardly novel. Many legal systems today use lay judges at some levels of the judicial hierarchy. I will briefly survey some major liberal democracies and other nations, but we should be aware of subtle institutional factors that make comparison difficult. Chief among these are that in many

legal systems law is not taught in separate professional schools; judging is a separate career from advocacy rather than a later stage in the advocate's career; and judges may—by the terms of their tenure, position, and promotion—be more analogous to Anglo-American administrative officials than to federal Article III judges or Justices. Still, some sense of the comparative landscape helps put matters in perspective.<sup>7</sup>

In the United States, lay judges of various sorts sit in some forty states, although usually on low-stakes matters, and in some cases subject to de novo review by a lawyer-judge.<sup>8</sup> In the United Kingdom, Lords without legal training heard appeals in the House of Lords until 1834;<sup>9</sup> today, lay magistrates or justices of the peace hear certain classes of civil and criminal cases.<sup>10</sup> In Germany, lay judges sit on all courts of first instance that have criminal jurisdiction; in the *Amtsgericht*, which hears civil and less serious criminal cases, one professional judge sits with two lay judges, whereas in the *Landgericht*, which hears all serious criminal cases, three professional judges sit with two lay judges.<sup>11</sup> Japan recently introduced lay judges into its criminal justice system. Criminal cases are heard by a panel composed of three career judges and six lay judges, but the career judges cannot be narrowly outvoted; when the decision is made by a majority vote, the majority must include at least one career judge.<sup>12</sup>

It is sometimes assumed that lay judges are only used on (1) courts of first instance and (2) in low-stakes matters, such as might be handled by a justice of the peace. However, a surprising number of nations use nonlawyer judges on appellate courts or courts that hear serious criminal charges. These include Austria, the Czech Republic, France, Italy, and Sweden, as well as Latvia, Cuba, and Kosovo.<sup>13</sup> The last two nations go farther and put nonlawyer justices

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7. For an overview of lay judges in the European democracies, see John D. Jackson & Nicholay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83 (2007).

8. Lay judges are not present in the United States federal system, but are present in state limited-jurisdiction courts in about forty states. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, JUDGES, MAGISTRATES, AND OTHER JUDICIAL WORKERS (2004), available at <http://www.bls.gov/oco/pdf/ocos272.pdf>.

9. GLENN DYMOND, HOUSE OF LORDS LIBRARY, THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS 6-7 (2006), available at <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>.

10. See Org. for Sec. & Co-operation in Eur. Office for Democratic Insts. & Human Rights, Legislation Online: United Kingdom, <http://www.legislationline.org/?tid=1&jid=54&less=false>.

11. E-mail from Dr. Voelker Roeben, Lecturer in Law, University of Heidelberg to author (Aug. 3, 2006). For an overview of the German system, see Stefan Machura, *Interaction Between Law Assessors and Professional Judges in German Mixed Courts*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 451, 451-56 (2001).

12. See Colin Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 369 (2006).

13. For Austria, see Johannes Oehlboeck & Immanuel Gerstner, *The Austrian Legal*

on the highest appellate court, while in France, nonlawyers serve on the Conseil Constitutionnel, the highest constitutional authority.<sup>14</sup> Most nations, however, have a legal requirement or an implicit practice that allows only trained lawyers to serve on appellate courts of last resort.

In the United States, *no nonlawyer has ever served on the federal Supreme Court in the modern era*. The qualifier “in the modern era” refers to the era of accredited law schools and legal requirements that students attend such a school, requirements that became universal around 1950. Even before the modern rules took hold, however, every person nominated to the Supreme Court had received substantial legal training, perhaps by way of apprenticeship or study towards a bar exam.<sup>15</sup> In that sense, we can drop the qualifier and just say that *no nonlawyer has ever served on the Court*.<sup>16</sup> The Court’s history conspicuously lacks any Justices who were soldiers, engineers, professional politicians, historians, philosophers, economists, accountants, or doctors and who were not *also* lawyers. (Part II will examine the possibility that one can have one’s cake and eat it too, simply by appointing to the Court lawyers who also have expertise or experience in other professions or bodies of knowledge.)

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*System and Laws: a Brief Overview*, GLOBALEX, June 2005, <http://www.nyulawglobal.org/globalex/Austria.htm>; for the Czech Republic, see EUROPEAN COMM’N, JUDICIAL ATLAS, GENERAL COURT STRUCTURE IN THE CZECH REPUBLIC, [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/pdf/org\\_justice\\_cze\\_en.pdf](http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/org_justice_cze_en.pdf); for France, see *Cour d’assises*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/topic-140503/cour-dassises>; for Italy, see Ministero dell Giustizia, Administration of Justice and Judicial Function (June 15, 2006), [http://www.giustizia.it/sito\\_trad\\_inglese/uff\\_giud/en\\_giurisdizione.htm](http://www.giustizia.it/sito_trad_inglese/uff_giud/en_giurisdizione.htm); for Sweden, see Christian Diesen, *Lay Judges in Sweden: A Short Introduction*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 313 (2001), available at [http://www.cairn.info/article.php?ID\\_REVUE=RIDP&ID\\_NUMPUBLIE=RIDP\\_721&ID\\_ARTICLE=RIDP\\_721\\_0313](http://www.cairn.info/article.php?ID_REVUE=RIDP&ID_NUMPUBLIE=RIDP_721&ID_ARTICLE=RIDP_721_0313); for Cuba, see Gerard J. Clark, *The Legal Profession in Cuba*, 23 SUFFOLK TRANSNAT’L L. REV. 413, 424 (2000); for Kosovo, see American Bar Ass’n, Cent. European and Eurasian Law Inst., Legal Information for Kosovo, <http://www.abanet.org/ceeli/countries/kosovo/legalinfo.html>; for Latvia, see Valts Kalnins, *Judiciary and Legal System* (Oct. 2001), [http://www.balticdata.info/latvia/politics/latvia\\_politics\\_administration\\_judiciary\\_and\\_legal\\_system\\_basic\\_information.htm](http://www.balticdata.info/latvia/politics/latvia_politics_administration_judiciary_and_legal_system_basic_information.htm).

14. See John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1763 (1988).

15. The picture is blurred, however, by the practice of nineteenth-century elites to “read law” as part of their general education.” G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 8 n.28 (2005). I do not at all mean to assert that the Justices of the nineteenth and early twentieth centuries were technical lawyers; as Jed Shugerman has helpfully emphasized to me, many were statesmen, or at least politicians, who happened to have some legal training. Recent Supreme Court Justices have been much more specialized in the legal profession. However, what is striking is the absence of Justices who lacked any legal training at all, and who were appointed precisely in order to bring some other form of expertise to the Court.

16. By contrast, “in the early national period nonlawyers served on state supreme courts.” John V. Orth, *Who Judges the Judges?*, 32 FLA. ST. U. L. REV. 1245, 1248 n.16 (2005).

## B. Law

If there were some controlling rule of law requiring all Justices to be lawyers—in either the modern or the older sense—then the argument I offer here could just be cast as an argument for changing that rule. Still, it is worth pointing out that there is no such rule; nothing in the Constitution, statutes, precedents, or legal traditions bars the President from nominating nonlawyers for the Supreme Court.

Articles II and III of the Constitution specify that the President shall nominate and, with the Senate's advice and consent, appoint "Judges of the supreme Court," who serve "during good Behaviour."<sup>17</sup> The United States Code merely says that "[t]he Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate Justices, any six of whom shall constitute a quorum."<sup>18</sup> Any rule barring lay Justices from the Court would have to be read into these texts by forcible implication.

Precedent does not bar lay Justices either. Some have argued for a sweeping rule of due process requiring that all adjudication be performed by lawyers.<sup>19</sup> To date, however, the courts have not accepted these claims. Forty of the fifty states still use nonlawyer adjudicators in some parts of their court systems, and although the state supreme courts that have addressed the question have reached different answers about whether and in what circumstances due process requires the *initial* adjudicator to be a lawyer,<sup>20</sup> apparently no court says that all adjudication without exception must be performed by lawyers.

At the level of the federal Supreme Court, a few cases have addressed due process constraints on the qualifications of initial adjudicators, as opposed to appellate judges. The Court has never said that all judges must be lawyers, or anything close to that; in general, the Court's main concern has been with neutrality and bias, not legal training or expertise. In a 1976 case, *North v. Russell*, the question was whether a person accused of a crime with a possible sentence of imprisonment could be tried by a state police court judge.<sup>21</sup> The Court said yes, in part because the accused had a right to a *de novo* retrial before a law-trained judge, and in part because there was no suggestion of bias.<sup>22</sup>

The import of the *North* decision for the composition of multimember appellate courts of last resort is obscure. Suppose a rule of due process that no

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17. U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 1.

18. 28 U.S.C. § 1 (2007).

19. Frederic S. Le Clercq, *The Constitutional Policy that Judges Be Learned in the Law*, 47 TENN. L. REV. 689 (1980).

20. For an overview, focusing on New York law but with citations to many states, see generally Colin A. Fieman & Carol A. Elewski, *Do Nonlawyer Justices Dispense Justice?*, N.Y. ST. B.J., Jan. 1997, at 20.

21. 427 U.S. 328 (1976).

22. *Id.* at 334-37.

person could be subjected to any legal harm—a fine, prison sentence, or civil judgment—except by a law-trained trial judge. It is hardly obvious that such a rule would require every last judge on the jurisdiction's highest appellate court to be a lawyer; the two questions are only loosely related. If eight out of nine, or even five out of nine, Justices of the high court were lawyers, why would due process require more? Due process does not automatically make unconstitutional any procedure that has never been used before. If the technocratic argument for lay Justices is valid, then having some lay Justices will increase the Court's accuracy overall; the thrust of modern due process law is that procedural innovations with that effect will usually be unobjectionable.<sup>23</sup>

The reason there is little precedent on the question whether due process requires appellate judges to be lawyers is surely that, in the federal system and in the states, all appellate judges are lawyers anyway; the problem has never arisen. This suggests a type of constitutional argument from tradition. Perhaps the global tendency that nonlawyers are generally excluded from the highest appellate courts, and the longstanding American pattern that no nonlawyer has ever sat on the Supreme Court, supply a good normative reason to exclude nonlawyers from the Court in the future. Traditionalists will assume that there is some latent wisdom or epistemically valuable aggregated judgment in the repeated decision of many presidents over time never to appoint a nonlawyer, and in the parallel practice of most other countries to exclude nonlawyers from their high courts.

On the other hand, there are many longstanding behavioral regularities which have no latent wisdom behind them at all and lack any epistemic value whatsoever; this may well be one of them. Perhaps nonlawyers have never been appointed to the Court, in this country, just because most people have thought, stupidly, that what has never been done in the past must be illegal or harmful.<sup>24</sup> Paradoxically, those who rely upon tradition or longstanding practices as the basis for forming their own judgments do not contribute anything to the epistemic value of the practice, because they are not forming their own judgments independently.<sup>25</sup> In a more Benthamite vein, the organized legal profession has attempted to exclude nonlawyers from all courts, although it has been only partly successful. Behavioral regularities may rest on various forms

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23. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 343-47 (1976).

24. The most prominent public discussion of the issue occurred during the 1937 Court-packing fight. Robert Jackson gave a bar-association speech in 1937 warning that a "radical administration" might in the future pack the Court with nonlawyers. While testifying on the Court-packing bill, Jackson was asked by a Senator whether he meant to endorse the prospect of lay Justices. Jackson replied that he had only meant to point out that the Constitution does not require Justices to be lawyers. See Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court*, 5 WM. & MARY BILL RTS. J. 527, 544-48, 574-75 (1997). This episode is ambiguous and hardly illustrates any sort of deliberative tradition against nonlawyer Justices.

25. Cf. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006) (making a similar point in the setting of international and comparative law).

of herding or cascades, informational or reputational, or on the power of interest groups, or on any number of other bases that deprive them of epistemic import.

Moreover, if the longstanding practice of appointing only lawyers to the Supreme Court is to be taken seriously, one must hold the view that of 110 people who have served on the Court, not one should have been a nonlawyer, and that, at present, not one of the nine Justices should be a nonlawyer. This is an extreme solution that might be right, but is usually wrong in complex institutions whose personnel must be chosen under conditions of uncertainty. Indeed, the very unanimity of the practice makes it suspect. Rather than suggesting latent wisdom, it may suggest that the practice rests on a kind of thoughtlessness, such that no one has considered and rejected the arguments for professional diversity on the Court; it may even suggest that the practice arises from interest-group power, just as a plebiscite in favor of the reigning leader is suspect if 100% of the population votes in favor.

### *C. Assumptions*

Discussions of the optimal composition of the Supreme Court tend to bog down in questions about the nature of law, the nature of the appellate caseload, the normative theory of adjudication, and the positive question of what judges maximize. I sidestep these issues by adopting artificial assumptions that are maximally biased in favor of pure lawyer Justices. It is straightforward to argue for lay Justices or dual-competent Justices on the grounds that many appellate cases are legally indeterminate, that the legal profession is just a cartel that lacks any distinctive expertise, that law or constitutional law is all “just politics,” or that the concept of democracy somehow requires representation of nonlawyers on courts, and so on. The argument here does not depend upon these views or their near relations.

Instead I make the following assumptions: that law constitutes an objective body of knowledge; that professional training confers distinctive expertise in that knowledge; that all cases have right answers; and that judges are (1) sincere and (2) vote their view of the legal merits. If the optimal number of lay Justices is greater than zero even under these restrictive assumptions, it will be even larger once some or all of the assumptions are relaxed. I also assume that that all current rules regarding the Court—the tenure of its members, the process by which they are selected, and the voting rules they use—are held constant. A few comments on each assumption follow.

#### *1. The objectivity of law*

I assume that law is objective, in the following sense: law consists of a body of observer-independent knowledge in the same way, or to the same degree, as medicine or military science or accounting. There are many other

conceptions of objectivity; I have chosen a minimalist one that is plausible, mundane, and sufficient to get the issue off the ground. I do not assume that law is a “science.” Science and objective knowledge are not coterminous ideas. Few sensible people doubt, for example, that historical studies supply some objective knowledge whether or not history is a “science” and whatever the importance of the historian’s personal, cultural, and political preconceptions at the outer frontiers of historical inquiry.

### 2. *Professional expertise*

I assume that legal training confers expertise. Lawyers—using “lawyer” in its current sense of “a person who has attended an accredited law school and been admitted to the bar”—know more about the objective body of knowledge called law than do nonlawyers; they are more likely to get the legal answer right. The training that occurs in law schools, and after graduation in law practice, clerkships, and other employment, is not solely a guild apprenticeship or a course of indoctrination in the norms and language of the legal profession, although it may also be those things.

### 3. *Right answers*

I assume that there are right answers in every case, even the hard cases that come before the Supreme Court. Even if different sources of law point in different directions, there is a single internal legal answer to the question what law requires, all things considered.<sup>26</sup> This right-answer assumption is compatible with, but does not require, the further view that the right answer is the one that combines “fit” with “justification” in some suitably weighted function.<sup>27</sup> What it does rule out is the idea that law is indeterminate, because legal sources run out or hopelessly conflict with each other, in some fraction of the cases that reach courts of last resort, especially the Supreme Court.

This assumption biases the inquiry against lay Justices because it blocks an important argument: that, where legal sources run out or conflict, the distinctive legal expertise of lawyer Justices drops out of the picture.<sup>28</sup> I hope to show that the argument from indeterminacy picks an unnecessary fight with the right-answer view. Even from within that view, there is a technocratic argument for lay Justices, because often enough the legally right answer itself incorporates knowledge from other disciplines or from general social life.

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26. See generally Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

27. RONALD DWORKIN, *LAW’S EMPIRE* 255 (1986).

28. Cf. Schauer, *supra* note 2, at 1731-32.

#### 4. *Judicial motivation*

There is a complex of issues surrounding judicial motivation. Economists ask what judges maximize, although this assumes part of the conclusion by assuming that the motivational structure of judges is consequentialist. The most prominent economic description of the judicial utility function is mushy: it is said to include promoting good legal policy, obtaining the regard of professional and social peers, enjoying leisure, and enjoying the intrinsic utility that arises from playing the law game according to its rules—with the relative weights of these utility-components unclear.<sup>29</sup>

In legal theory and political science, there are various explicit and implicit models of the motivation of judges, usually appellate judges. On one view, judges vote their conceptions of what law requires; in another, they vote for the policies they think best;<sup>30</sup> in yet another, their primary motive is to appeal to relevant audiences, of lawyer, law professors, social groups, and elite opinion-makers.<sup>31</sup> Any of these views may further be cast in sincere or strategic terms; the distinction cuts across the different first-order motivations.<sup>32</sup> A judge might, for example, act strategically in order to maximize the chances that his (sincere) view of what the law requires will actually be adopted by the court and will not be overridden by other institutions. More commonly, political scientists model judges as both strategic and interested solely in advancing their views of good policy.

On the level of first-order motivations, I will assume that all Justices are solely motivated by what, in their best judgment, the law requires—although in some cases the law itself requires that Justices defer to the judgments of other decisionmakers or draw upon bodies of nonlegal knowledge, specialized or unspecialized. This assumption biases the inquiry against lay Justices, in the sense that it blocks the easy argument that because Justices are just doing policy anyway (whether or not legal sources are indeterminate), their legal training is irrelevant. I will also assume that all Justices vote sincerely, not strategically. Given the assumption about strictly legal first-order motivations, it is unclear whether a sincere or strategic model is biased against lay Justices; I adopt the assumption of sincerity because it simplifies the discussion, without obvious consequences for the argument.

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29. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

30. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

31. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

32. See generally BAUM, *JUDGES AND THEIR AUDIENCES*, *supra* note 31.

### 5. *Other rules held constant*

Many discussions of the Court's optimal composition slip into confusion because assumptions about other dimensions of institutional design that indirectly affect composition—such as the Justices' tenure, the voting rules they use, or the scope of their jurisdiction—are left unclear, or change implicitly as the discussion unfolds. I will hold constant all other institutional features of the Supreme Court as it currently is; in particular, I assume simple majority voting on all merits questions.<sup>33</sup> Part IV, however, endogenizes the Court's docket by asking whether the introduction of at least one lay Justice would have significant (and perhaps undesirable) effects on the type or amount of cases that the Justices hear.

### 6. *Other courts?*

My focus in Parts II and III will be squarely on the federal Supreme Court. In Part IV.D, I offer some brief comments on whether the considerations relevant to the Court generalize to other courts, and if so in what way. For the most part, however, I do not directly address a longstanding debate in American law over the role of lay judges at lower levels of state judicial systems, especially in local government.<sup>34</sup>

### 7. *Political constraints ignored*

I assume away political constraints. That is, I ask what a well-motivated appointer seeking an optimal composition for the Court would do, regardless of political acceptability. However, I emphatically do not assume away other constraints, such as the cost of information; as discussed below, uncertainty about the Court's optimal composition is one of the main considerations that militate in favor of appointing at least one lay Justice. This combination of assumptions—well-motivated officials, but informational uncertainty—is routine in welfare economics and other disciplines interested in optimal policy and institutional design.

## II. LAY JUSTICES AS ERROR-MINIMIZERS

With these assumptions in place, the main argument for lay Justices focuses on the cost of errors. The cost of reaching decisions, holding constant the cost of error, is discussed in Part IV. Error occurs when the Justices, acting

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33. Thus bracketing the idea that expertise might best be incorporated by adopting a judicial voting rule weighted in favor of administrative agencies. See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 *YALE L.J.* 676 (2007).

34. For the latest skirmish, see William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, *N.Y. TIMES*, Sept. 25, 2006, at A1.

by simple majority voting on the merits of cases, decree a legal answer that is not the right legal answer (which by assumption always exists). The argument does not require that we be able to say what it is that makes the right answer right, or what the right answer actually is in any given case. All we need say is that the right answer, whatever it is, has certain properties such that certain types of decisionmakers—namely nonlawyers—are more likely to reach it, on average, than are other types of decisionmakers—namely lawyers—across some given set of cases.

The argument for lay Justices then takes two basic steps. The first step is that, within the total pool of cases the Supreme Court considers, there is a certain class of cases with the following property: nonlawyers are more competent decisionmakers, with respect to that class of cases, on average, than are lawyers. If this is so, then adding at least one lay Justice would reduce the costs of error in that class of cases, which is a benefit. The second step is that the benefit would be greater than any costs that would occur because the participation of at least one nonlawyer means that the Justices as a group commit more errors in another class of cases—those in which lawyers are, on average, better decisionmakers (more likely to reach the right answer) than nonlawyers. The first of these two steps is addressed in Part II.A; the second is addressed in Part II.B.

In both Part II.A and Part II.B, the mechanisms underlying the argument involve the aggregation of information held by Justices through collective voting. Part II.C extends the discussion by examining some effects of deliberation within the Court. The effects of deliberation on group decisionmaking competence are complex and ambiguous, but in an important range of cases, adding at least one lay Justice can be expected to improve the Court's deliberations (when deliberation occurs at all). Experts in outside bodies of knowledge can make self-confirming contributions, can block a group of lawyer Justices from herding towards the wrong answer, and more generally can dilute the like-mindedness that arises from common professional training and that is a standard cause of deliberative failure.

Finally, Part II.D offers the weaker-form argument that at least some of the advantages of lay Justices can be captured by Justices with dual competence—Justices with knowledge of both law and some other professional discipline. The argument is weaker because it can be accepted even by those who believe that legal training is an indispensable qualification for all Justices. It is still highly consequential, however. At present, legal training is not only necessary for all Justices, but sufficient for all Justices, whereas under a regime of dual competence at least some of the Court's members would be required to possess expertise in other disciplines as well.

A. *The Expertise Argument for Lay Justices*

In the German legal system, lay adjudicators sit in certain types of criminal cases and civil cases. On the criminal side, the common wisdom is that lay adjudicators serve some of the same functions as an American jury; they are said to bring a kind of popular control and democratic legitimacy to the proceedings. On the civil side of things, however, the justifications are more interesting. There the conventional wisdom is that lay adjudicators—who sit in commercial courts, administrative courts, admiralty courts, and elsewhere—bring distinctive expertise to the bench.<sup>35</sup>

This sounds bizarre to American ears. The broader debate over lay judges in this country has, stereotypically at least, pitted the lawyer's claims of expertise against populist claims that lay Justices contribute by enhancing the democratic legitimacy of the court, or by promoting common sense, or in some other non-technocratic fashion. I want to suggest that the German insight generalizes farther than the German legal system itself recognizes. The argument offered here is a technocratic one, based on the superior decisionmaking capacities of a Court that includes at least some lay Justices.

1. *Some taxonomy and terms*

We must begin by defining some useful terms. First, we must roughly distinguish two types of cases—those in which law is *autarkic* and those in which it is not. In autarkic cases, law is self-sufficient and strictly inward-looking. The legal right answer can be found solely through the resources of legal texts, history, precedents and interpretive maxims. The case may be “hard” in either the ordinary-language sense or in the jurisprudential sense—for example, the relevant legal sources may point in different directions, or contain internal conflicts or problems of some other type—but the law does not ask the judge to do anything but to combine these sources into a decision through some decision rule.

In nonautarkic cases, law is outward-looking. The legal right answer itself incorporates by reference nonlegal domains of knowledge, which can be more or less specialized—on a continuum running from professional accounting standards, on the one hand, to “evolving standards of decency”<sup>36</sup> on the other. This incorporation by reference does not make the right answer any less legal, or make the law indeterminate; nor does it mean that law has “run out.” It just means that for various reasons, law decides that law should defer to some other

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35. Email from Dr. Voelker Roeben, *supra* note 11. For institutional and sociological background on the German system, see Machura, *supra* note 11.

36. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

domain of knowledge. Whatever is the right answer in that domain of knowledge is the (fully determinate) right answer in law as well.

This distinction is just a heuristic for ease of exposition. Perhaps many or most cases at the Supreme Court level are mixed, containing some thoroughly inward-looking legal questions or aspects and some outward-looking questions or aspects. Nothing of substance turns on whether we talk about types of cases or aspects of cases, except that the latter is more complicated, so I will adopt the former mode.

Law may incorporate nonlegal knowledge by reference for many reasons. The general idea is just that lawmakers, including judges in a regime that abides by precedent, may believe, according to some higher-order theory, that law will be better if the decisions of present judges are at least partially determined by nonlegal considerations in some domain. That openness to outside knowledge may be justified as making law more efficient, or fair, or publicly acceptable. Whatever the reason, the expertise argument for lay Justices is the same; nothing turns on why, exactly, the legal right answer just is the answer drawn from some nonlegal domain.

Cases in which law is outward-looking can in turn be subdivided into two categories. These two categories are just areas on a continuum, but the distinction will shortly become useful in a rough way. The first category involves cases in which the nonlegal knowledge that law incorporates by reference is specialized, meaning that professionally trained decisionmakers (economists, accountants, historians, military scientists, or doctors) are more likely to reach right answers about questions in that domain. For some recent examples from the Supreme Court, consider the following cases, organized by the type of specialized nonlegal knowledge the Justices attempted to bring to bear:

*Economics and finance.* In *Till v. SCS Credit Corp.*,<sup>37</sup> the Justices had to choose one of four possible interest rates to govern “cramdown” proceedings in bankruptcy. Rejecting the “coerced loan” approach, the “contract rate” approach, and the “cost of funds” approach, the Court opted for the so-called “formula” approach, on economic and institutional grounds.<sup>38</sup>

*Environmental science and ecology.* In *South Florida Water Management District v. Miccosukee Tribe of Indians*,<sup>39</sup> the Court refereed a dispute between a federal water-management project and an Indian tribe. Although remanding for further lower-court findings on some issues, it did not hesitate to offer judgments of fact and policy about some of the disputed waterways:

The District Court correctly characterized the flow through S-9 as nonnatural, and it appears that if S-9 were shut down, the water in the C-11 canal might for a brief time flow east, rather than west. But the record also suggests that if

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37. 541 U.S. 465 (2004).

38. *Id.* at 477-85.

39. 541 U.S. 95 (2004).

S-9 were shut down, the area drained by C-11 would flood, which might mean C-11 would no longer be a distinct body of navigable water, but instead part of a larger water body extending over WCA-3 and the C-11 basin. It also might call into question the Eleventh Circuit's conclusion that S-9 is the cause in fact of phosphorous addition to WCA-3.<sup>40</sup>

*Health and medical science.* In *Merck KGaA v. Integra Lifesciences I, Ltd.*, the Court decided that “the use of patented compounds in preclinical studies is protected under [federal drug statutes] as long as there is a reasonable basis for believing that the experiments will produce ‘the types of information that are relevant to an IND or NDA’ [that is, applications to market new drugs].”<sup>41</sup> Along the way, the Court opined on the nature of “basic scientific research,” its relationship to FDA testing, and the “reality” of the scientific process in the contemporary pharmaceutical industry.<sup>42</sup>

*Military science.* In *United States v. Virginia*,<sup>43</sup> the Court said that the Virginia Military Institute (VMI) could not exclude women from its officer training program. VMI relied, in part, on a claim that its method of “adversative training” would be undermined by admitting women. The Court asserted that “[n]either the goal of producing citizen-soldiers nor VMI’s implementing methodology is inherently unsuitable to women.”<sup>44</sup>

*History.* Any number of cases could supply an example, especially cases in which the Court draws upon the “original understanding” of constitutional texts or upon longstanding traditions. Sometimes, however, the legal analysis becomes even more narrowly focused on the history of particular events. Consider Justice Stevens’ analysis, in *Hamdan v. Rumsfeld*,<sup>45</sup> of the events behind *Ex parte Quirin*,<sup>46</sup> a World War II-era precedent that Stevens attempted to debunk by suggesting that the Roosevelt Administration had pressured the Court into reaching a favorable decision.<sup>47</sup>

In these and many other cases, Supreme Court law is outward-looking and incorporates by reference specialized nonlegal knowledge. In an ultimate sense the legal question is one of statutory or constitutional interpretation. But the correct interpretation—what the constitutional or statutory provision is best taken to say—itself depends on what the body of specialized outside knowledge indicates.

A second and different category involves cases in which the nonlegal knowledge that law incorporates by reference is nonspecialized, in that nonprofessionals are no less likely to get the right answer, as where questions

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40. *Id.* at 97.

41. 545 U.S. 193, 208 (2005) (citation omitted).

42. *Id.* at 205-06.

43. 518 U.S. 515 (1996).

44. *Id.* at 520.

45. 126 S. Ct. 2749 (2006).

46. 317 U.S. 1 (1942).

47. *See Hamdan*, 126 S. Ct. at 2776.

of general social values are concerned. Here too, I assume some form of metaethical realism and cognitivism, such that there can be right answers to questions of general values; what defines the category is that professional legal training confers no special advantage in finding those answers, even though they are, by incorporation into law, the right *legal* answers. Recent examples from the Court include *Roper v. Simmons*, in which the Court held that “evolving standards of decency” prohibit the execution of juveniles;<sup>48</sup> *Atkins v. Virginia*,<sup>49</sup> in which the same evolving standards were held to prohibit the execution of the mentally retarded; and *Lawrence v. Texas*, where the Court invalidated laws against homosexual sodomy on grounds that “involve[d] liberty . . . in its more transcendent dimensions.”<sup>50</sup>

In addition to distinguishing specialized from nonspecialized knowledge, we can classify the relevant questions along another dimension as well, according to the content of the nonlegal information that law incorporates by reference. Consider the following categories:

*Specific facts (or “adjudicative facts”).* Sometimes, law makes the right answer depend, in whole or in part, on specific facts about a particular episode, occurrence or transaction. *Hamdan’s* analysis of the historical background to *Ex parte Quirin* is an example. Conventionally these are known as “adjudicative facts,” although courts do not deal solely in adjudicative facts by any means, and nonjudicial bodies such as administrative agencies often make specific factual determinations of this sort.

*General facts (or “legislative facts”).* Sometimes, law makes the right answer turn on generalized background knowledge of aggregate facts or causation—the sort that is difficult to reduce to well-defined form in litigation. Conventionally these are known as legislative facts, although administrative agencies and other bodies also draw upon them routinely, as do courts for that matter. The claims that adversative training is perfectly suitable for women, or that currently public opinion disfavors the execution of juveniles, are examples.

*Moral facts.* On any version of metaethical realism, there are right answers to questions of morality. In an extreme version, all moral questions have right answers. In a less extreme version, at least some moral questions do. Only if the latter thesis is denied—a form of metaethical antirealism or skepticism—is it awkward to speak of moral facts. The claim that homosexual sodomy involves morally protected autonomy presupposes that there are right answers to at least this moral question.

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48. 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

49. 536 U.S. 304 (2002).

50. 539 U.S. 558, 562 (2003).

## 2. *Lay Justices, expertise, and bias*

With this taxonomy in hand, we can turn to substance. The first step in the expertise argument for lay Justices is that, under very plausible conditions, a Court that contains at least one lay Justice will commit fewer errors in the class of cases in which law is not autarkic. Begin with the easiest case, where the requisite nonlegal knowledge is specialized and the lay Justice is a specialist in the relevant domain. The case is about tax and involves complex accounting, say, and the lay Justice is a professional accountant. Under these conditions, we must compare the performance of a Court composed of eight lawyer Justices and the professional accountant, on the one hand, with the performance of a Court composed of nine lawyers, on the other.

The Condorcet Jury Theorem states that, where right answers exist and where the average competence (likelihood of producing a correct answer) of the decisionmakers exceeds 0.5, then the likelihood that a majority vote of the group will produce the right answer approaches 1 as the group becomes larger or as average competence increases.<sup>51</sup> The Theorem does not apply only to factual or causal questions; it applies whenever there is an exogenously defined right answer, which (we are assuming) is true with respect to all cases, even hard cases. Holding constant the number of the Court's members, adding the accountant-Justice should then improve the Court's performance in the relevant subclass of cases. I assume here that the Justices do not defer to each other; this assumption is relaxed in Part IV.

It is true that there is internal disagreement within other disciplines, just as there is within law. Perhaps the lay Justice will take a position on relevant questions that would be controversial within his or her own professional group. But this is somewhat beside the point because it fails to make the proper comparison. Over a large array of cases, the group is at least as well off with an expert who takes a controversial position in a few cutting-edge cases as it is with no expert at all. On the more common questions, where there is a consensus within the relevant nonlegal profession—questions at the disciplinary core, rather than on the cutting edge where disagreements arise—the expert will help the group to do much better than would a group with no relevant expertise. On average, adding an expert with relevant specialized knowledge raises the average competence of the group and improves its performance.

This case is seemingly easy because we have built in the assumption that there is a match between the requisite nonlegal specialized knowledge—here, accounting—and the special skill of the nonlawyer Justice—here, an accountant. However, this assumption is dispensable. There is no reason to

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51. See generally MARQUIS DE CONDORCET, AN ESSAY ON THE APPLICATION OF PROBABILITY THEORY TO PLURALITY DECISION-MAKING (1785), in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY (Iain McLean & Fiona Hewitt eds., 1994).

think that the accountant-Justice will do worse than the lawyer Justices, on average, in cases that do not involve accounting but that do involve some other domain of nonlegal specialized knowledge. Adding the accountant-Justice is then a pure improvement.

To clarify this point, consider a portfolio of ten cases to reach the Court. In seven of these cases, law is strictly autarkic; in the eighth, ninth, and tenth cases, law incorporates by reference accounting knowledge, medical knowledge, and military science, respectively. The Court with one accountant will, as above, be more likely to get the accounting case right. It will be no more likely than the Court with nine lawyers to get the medical and military cases wrong. (Below, I will go further, suggesting that the former group will in fact be more likely to get all ten cases right; but for now I need not advance that claim.) So the presence of the accountant is a pure improvement, so far as the nonautarkic cases are concerned. Of course, it would also have been a pure improvement to add one doctor or one military scientist instead of one accountant. That point is not inconsistent with the expertise argument. It suggests, if anything, that the Court should contain more than one lay Justice; a diversity of nonlegal expertise would ensure that there is one specialist in every major subclass of case in which law is not autarkic. I return to this point shortly.

What about the subclass of nonautarkic cases in which the requisite knowledge is *not* specialized—where law draws upon community standards, or asks about “evolving standards of decency,”<sup>52</sup> or incorporates some account of “liberty . . . in its more transcendent dimensions”?<sup>53</sup> In such cases, it is tempting to conclude that adding lay Justices cannot make things better. After all, because the relevant issue is not specialized (by hypothesis), all people who participate in the mores or culture of the political community have equal access to the facts or values on which the requisite judgments are based. And lawyers are people too. It is sometimes suggested that if law is “just politics” or “just value judgments” then Justices might as well be elected,<sup>54</sup> or else (not the same thing, of course) should be nonlawyers.<sup>55</sup> I have put aside this class of arguments, but it is worth pointing out that the suggestion falls flat in any event. Because lawyers are people too, there is no obvious advantage, from the standpoint of assessing community values, in replacing lawyers with nonlawyers.

So runs the tempting line of argument. However, I believe this argument fails on two grounds. For one thing, even if it were correct, it would not show that there is no improvement from adding lay Justices. It would show only that

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52. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

53. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

54. See Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators Be Accountable to the Voters?*, 39 CREIGHTON L. REV. 695 (2006).

55. See *Denvir*, *supra* note 2.

the improvement comes only in the set of specialized nonautarkic cases, while judicial performance in the set of nonspecialized nonautarkic cases would be made neither better nor worse. After all, if lawyers are people, then doctors and economists and military officers surely are as well, and will do no worse on average than lawyers in assessing the transcendent dimensions of liberty.

More importantly, however, the argument fails on its own terms. There is a crucial sense in which lawyers are not just like ordinary people. They are part of an elite professional class, and their legal training gives them distinctive professional biases,<sup>56</sup> or is at least correlated with such biases, which arise from

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56. See POSNER, *supra* note 1, at 128 (“Most lawyers, whatever their background, have a narrow, professionally inflected perspective on governance . . .”). This claim is broadly supported by a large literature in psychology, sociology, and legal ethics on the effect of legal training on lawyers’ values and decisionmaking. For overviews, see, for example, SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF (2004); James M. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 4 AM. B. FOUND. RES. J. 791 (1979); John P. Plumlee, *Lawyers as Bureaucrats: The Impact of Legal Training in the Higher Civil Service*, 41 PUB. ADMIN. REV. 220, 221 (1981). It is clear from this literature that lawyers are, compared to people generally, more introverted, more rational as opposed to emotional, more judgmental, and more competitive, aggressive, and materialistic. See DAICOFF, *supra*, at 40-42. It is harder to extract from this literature clear predictions about lawyers’ policy biases. Three relevant claims, in roughly descending order of rigor, are as follows: (1) Legal training gives lawyers a strong status quo orientation and a bias to conventional morality, as compared to similarly educated adults. See Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 L. & PSYCHOL. REV. 39 (1982); June Louin Tapp & Felicie J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974). (2) Legal training reduces law students’ general concern for social justice, see, e.g., Susan Ann Kay, *Socializing the Future Elite: The Nonimpact of Law School*, 59 SOC. SCI. Q. 347 (1978), and reduces their interest in public service or public-interest lawyering, see Robert Granfield & Thomas Koenig, *Learning Collective Eminence: Harvard Law School and the Social Problem of Elite Lawyers*, 33 SOC. Q. 503 (1992). (3) Legal training causes lawyers to favor cumbersome and complicated processes for generating policy. See, e.g., Jerold S. Auerbach, *A Plague of Lawyers*, HARPER’S, Oct. 1976, at 37.

The relevant literatures are not unanimous on these issues. For debate on claim (1) above, see Susan Daicoff, *(Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 FLA. L. REV. 197, 230-48 (1996) (finding that attorneys employ casuistic reasoning to resolve professional ethical dilemmas, rather than relying exclusively on pre-established rules); Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 350 (1981) (finding that law students’ moral views are similar to those of the general population and those of graduate students in other professional schools). For a qualified critique of finding (2) above, see Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC’Y REV. 11 (1978) (finding that law students’ attitudes do change away from “social reform” to a “business orientation,” but that the change is small). I am not aware of any rigorous treatment of claim (3) above, which is intuitively plausible but no more. Despite this residual uncertainty, the weight of the literature supports the general and rather unsurprising claim that lawyers as a group display predictable traits and policy preferences that distinguish them both from society at large and from other professions.

self-selection into the legal career by certain types.<sup>57</sup> The argument for lay Justices is the same in either case; what matters is that lawyers as lawyers have a common outlook distinct from other professionals. If lawyers' values predictably have "the smell of the lamp" about them,<sup>58</sup> there will be a systematic bias in the way that lawyers perceive "evolving standards of decency"<sup>59</sup> and so on. Again the point is emphatically *not* that law is just politics or anything like that. The point is that because of their systematic professional biases, a group of lawyers will be more likely to make a genuine mistake about what the law itself requires, in the subclass of cases in which law draws on nonspecialized and nonlegal knowledge.

In terms of the Condorcet Jury Theorem, the crucial point is that lawyers have *correlated* or systematic biases. Few voters are perfect; what matters is that when voters err, they are as likely to err in one direction as another. In the best case, the uncorrelated biases of different voters will randomly offset each other and wash out at the aggregate level. In general, where voters have correlated biases, the group judgment will be less accurate, holding average competence constant.<sup>60</sup>

The general implication is that the optimal design of a decisionmaking group must consider not only voters' competence, or their chance of making mistakes, but also the nature and direction of their biases where they do make mistakes. Under reasonable assumptions, the chance of a majority selecting the right answer varies inversely with the correlation of bias across the group.<sup>61</sup> This implies, intuitively, that a group of given average competence may do worse than a group with lower average competence but less correlation of biases. Counterintuitively, the effect of correlated biases is so strong that *adding worse-than-random guessers to a group can improve overall performance if their biases are negatively correlated with those of highly competent experts.*<sup>62</sup> Here too, of course, everything depends upon the precise numbers, but the crucial point is that "[t]he uninformed voters drive the average correlation down, thus more than compensating for their relative ignorance."<sup>63</sup>

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57. For a careful attempt to disentangle training effects from the effects of self-selection into the legal career, see generally DAICOFF, *LAWYER, KNOW THYSELF*, *supra* note 56, at 68-77.

58. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 59 (1980).

59. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

60. Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 625-27 (1992).

61. *Id.* at 632.

62. *See id.* at 628-29.

63. *Id.* at 629. In Ladha's example, a group of three decisionmakers, each competent at the 0.8 level, cannot be certain of getting the right answer whatever the voting rule. However, if the group adds two uninformed, worse-than-random guessers, whose competence is a mere 0.3, then the group is certain to choose the right answer so long as the

One implication is this: by reducing the correlation of biases, adding lay Justices into a group of lawyers can improve the decisional accuracy of the group *even as to questions on which none of the group's members has distinctive expertise*. As compared to a Court of nine lawyers, the Court of eight lawyers and one accountant might do better even on questions outside the professional expertise of anyone in the group—questions say, about what “evolving standards of decency” require—because the latter decisionmaking group displays a lower correlation of biases than does the former group.

Indeed, these points hold not only for the cases in which law is nonautarkic and draws upon nonspecialized knowledge of community values; they also hold for cases in which law is nonautarkic and draws upon specialized knowledge *outside* the relevant expertise of the lay Justice. Recall the portfolio of ten cases in which seven are autarkic, one involves accounting, one medicine, and one military science. Suppose there is one lay Justice, an accountant. Because the presence of this lay Justice reduces the correlation of biases relative to a court of nine lawyers, the Court as a whole may guess better even in the medical and military cases—if those cases present issues as to which lawyers have common biases arising from their professional training.

Finally, consider the hypothesis—unlikely but often advanced by lawyers—that lawyers are better at deciding questions outside their expertise than are members of other professions at deciding questions outside their expertise. The counterintuitive finding discussed above shows that this hypothesis misses the point. Reducing the correlation of biases can, at the margin, produce net gains in accuracy even if the group's average competence is reduced. The lawyers' superior competence in domains outside their expertise (again, a hypothesis we are entertaining only for argument's sake) can be overbalanced by the reduction in the correlation of bias across the group.

Of course, other professions have correlated in-group biases as well. But we are not comparing professions in the abstract; rather we are starting with a group of nine lawyers and asking what the effect would be of adding one or more nonlawyers. So long as the biases of the other profession (whatever it may be) are not perfectly correlated with those of lawyers, adding a member of that profession to a group of lawyers will reduce the correlation of bias in the group. The same points would hold, in mirror-image fashion, for any nonlawyer professional group faced with a mixed docket of decisions, some of which required legal determinations; such a group would, on this logic, do well to add a lawyer. So the point is not to criticize lawyers; it is to suggest that professional diversity on the Court promises to maximize overall accuracy.<sup>64</sup>

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guesses of the uninformed are negatively correlated with those of the informed. *See id.*

64. I assume throughout this discussion that the well-motivated appointer of Justices has enough information to understand lawyers' average biases as a class, but not enough to look into the heart of every prospective appointee and simply appoint lawyers who do not share the profession's average biases. Thanks to John Coates for emphasizing this point.

The upshot is this: Let us suppose that there are always right legal answers, but that sometimes the right legal answer is just the answer that obtains in some other domain of knowledge, specialized or unspecialized. We can say something general, even without knowing what the right answers are, about how a group of nine Justices should be constituted if the social goal is to maximize accuracy, or to minimize the likelihood and gravity of mistakes. Under plausible conditions, I have argued, a Court with more than zero lay Justices will make fewer mistakes in the subset of cases in which law looks outside texts and precedents—“legal” sources in conventional terms.

This claim is clear enough where law looks outside itself to specialized domains of knowledge, because lay Justices with relevant expertise can bring their expertise to bear, and because lay Justices will do no worse than lawyer Justices in cases where the relevant nonlegal specialized knowledge is not the type that the lay Justices possess. Even where law looks outside itself to nonspecialized knowledge shared by all members of the political community, the presence of lay Justices can produce greater accuracy, because lay Justices lack the systematic biases of lawyers that arise from lawyers’ common professional training. More technically, the presence of lay Justices reduces the correlation of biases across the group, increasing the effective number of independent votes and thus the group’s overall accuracy; indeed, this effect can obtain both in cases where law incorporates unspecialized knowledge about community values, and in cases where law incorporates specialized knowledge that does not lie in the lay Justice’s area of expertise. Overall, lay Justices should increase the Court’s accuracy in cases where law is not autarkic, and this is a benefit, all else equal.

### *B. Tradeoffs and Uncertainty*

So far I have suggested only that, under plausible conditions, there is a benefit to including lay Justices on the Court. The magnitude of this benefit is uncertain, and I have not yet suggested that the benefit exceeds the cost. In this section, I will define the relevant cost and suggest that given the severe uncertainty about the magnitudes of the benefit and the cost, opting for zero lay Justices is a poor decision.

The principal cost of including lay Justices is that lay Justices will, plausibly, increase the number of mistakes in what I have called autarkic cases—cases in which law only looks to “legal” sources conventionally so-called. Nonlawyers will bungle the intricacies of doctrine, especially at the Supreme Court level, where many cases are hard (even if there are right answers) and strictly legal competence is at a premium. This argument from the technocratic expertise of lawyers has always been the main objection to lay Justices.

This tradeoff is a real one. Because it is real, we face an optimization problem. The problem is to find the number of lay Justices, and the types of

professional expertise those lay Justices should have, that minimizes errors overall, netting out the reduced expected errors in cases in which law is not autarkic and the increased expected errors in cases in which law is autarkic. I have no direct information about the values on either side of the ledger; nor does anyone else, because we have never had even a single lay Justice on the Court (in the sense described above). *The current regime—zero lay Justices—*itself represents an uninformed guess about the best solution to the optimization problem across the total array of cases. And when a new seat comes open on the Court, there is no status quo set of qualifications for possible appointees; neither the appointment of a lawyer nor the appointment of a nonlawyer has any default priority or pretheoretical superiority.

Despite the uncertainty, the optimal number of lay Justices is quite likely greater than zero; conversely, the guess that the optimal number of lay Justices is zero is among the least plausible guesses that could be made. This follows from the principle of marginalism: because there are diminishing marginal returns to expertise in group decisionmaking, the last increment of legal expertise is worth much less than the first increment, and the first increment of nonlegal expertise is worth much more than later increments. Suppose a Court of nine Justices, with one vacancy, and a docket comprised of both autarkic cases and nonautarkic cases. The ninth lawyer Justice will add a tiny extra increment of legal expertise, but the first nonlawyer Justice will add much greater value to the Court in the domain of nonautarkic cases.

Again, this argument need not assume that the lay Justice has relevant expertise. If he does, so much the better; it is easy to think that the benefits exceed the costs if the lay Justice is a doctor and a nontrivial set of cases require medical knowledge, or the lay Justice is an accountant and a nontrivial set of cases require understanding of complex financial or tax transactions. Suppose the lay Justice does not have relevant expertise, however. There is a technocratic cost to having the lay Justice vote in autarkic cases, but there is nonetheless a benefit from the lay Justice even in nonautarkic cases requiring specialized knowledge outside his area of expertise. As we have seen, the presence of the lay Justice can reduce the correlation of biases and thus improve group performance; so even lay Justices without relevant expertise still confer some benefit.

This underscores an important practical point: the greatest marginal net benefit would be produced by appointing a first lay Justice whose expertise is relevant to whatever is the most common subcategory of nonautarkic cases requiring specialized expertise. If, as some have suggested, the Court tends to do poorly in business cases and tax cases, then perhaps the first lay Justice should be an eminent partner from an accounting or securities firm. Or, if it is a sensible prediction that biotechnology and medical ethics cases will take on an important share of the docket in the next generation, a doctor might be appointed. A very small number of lay Justices—say, three—could diversify the Court's knowledge and thereby cover a good portion of the professional

landscape. A Court composed of six lawyers, one historian, one economist, and one soldier would rarely find itself deciding a case requiring expertise possessed by no one in the group. On the current Court, having no justice with expertise in the relevant area situation is routine.

Nothing in these points is unique to lawyers, as opposed to other professions. Exactly the same argument from marginalism would support adding a single lawyer to a panel of nine doctors charged with a portfolio of medical decisions, in some of which medical standards themselves incorporate legal issues. In general, under circumstances of grave uncertainty, it is a good rule of thumb for the institutional designer of a decisionmaking committee to diversify the committee along margins relevant to the decision, ensuring against the correlated biases and “groupthink”<sup>65</sup> that can afflict a group of the likeminded;<sup>66</sup> I return to this point shortly. One of the major sources of correlated bias is common professional training or background.<sup>67</sup> The many recent arguments for diversity along ideological and other dimensions make it all the more surprising that our highest court is so conspicuously undiversified, so monolithic, along the dimension of professional training.

An important further question, at least in principle, is the number of cases in the autarkic and nonautarkic categories. If many cases are autarkic, the costs of lay Justices are high; if there are many cases in which Supreme Court law is open to outside knowledge, then the benefits of lay Justices are high. (Here we are holding constant the composition of the docket and the content of the legal rules the Court announces. If lay Justices affect the Court’s case selection and rulemaking, then more nonautarkic cases would be added, in turn increasing the benefits of having lay Justices among the Court’s members. I return to these questions in Part IV.)

Casual scrutiny suggests that surprisingly many cases do incorporate outside knowledge, but there are no systematic studies. To believe that the optimal number of lay Justices is zero, however, requires an implausible prior belief that almost all cases are autarkic.<sup>68</sup> On marginalist grounds, the most sensible assumption is that adding the first increment of nonlegal expertise, and thereby the first increment of negative correlation with lawyers’ professional biases, will bring net benefits, so long as some nontrivial fraction of cases run beyond autarkic law.

Uncertainty, then, is not a problem for the argument; it is the cornerstone of the argument. We lack essential knowledge about the key variables: the

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65. See generally IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982).

66. See generally CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

67. Again, it is not material to any of the points made here whether lawyers’ correlated biases arise directly from professional training or from self-selection into the legal profession by certain types.

68. This point assumes that the cost of errors that do occur is symmetric—that a mistake in a nonautarkic case is, on average, as harmful as a mistake in an autarkic case.

competence of lawyer Justices and lay Justices across various classes of cases, the degree to which lawyers' biases are correlated, and the nature of the Court's docket. It is impossible to prove, empirically, that the optimal number of lay Justices is  $X$  rather than  $Y$ . But this means it is especially wrong to be complacent that the optimal number of lay Justices is zero. Precisely because we are not sure what conditions obtain, it would be best to mix things up a bit, hedging our bets with at least a minimum of professional diversity. The solution we have adopted by default—zero lay Justices—is too extreme.

To be sure, even if we suspect that a prudent institutional designer concerned with minimizing error would not choose the extreme solution, we do not know how many lay Justices the Court should have: Two? Five? However, starting from zero, we might be able to move towards the optimum, and know that we are moving towards the optimum, even if we do not know exactly where the optimum lies. Why not experiment a bit, appointing one lay Justice and watching how things go?<sup>69</sup> I examine some of the costs and benefits of this sort of experimentation shortly.

### *C. Deliberation and Expertise*

So far, in Parts II.A and II.B, we have discussed mechanisms that aggregate the information held individually by members of the voting group.<sup>70</sup> These mechanisms need not involve any sort of deliberation; the logic of the Jury Theorem operates whether or not the voters talk to one another before voting. Voting without deliberation is not a misleading picture of the Court if, as many accounts suggest, the Justices do little in the way of group deliberation, even in conference before voting on cases.<sup>71</sup> However, suppose that there is real deliberation within the Court prior to voting. How is the argument for lay Justices affected, if at all? What are the relationships among information, deliberation and voting, within the Court and in general?

In general, the relationships are complex, and the effects of deliberation on group performance are ambiguous, depending a great deal on the specifics of the case. It has often been suggested that deliberation is inconsistent with the

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69. Where error is a multi-peaked function of the number of lay Justices, further complications might arise. Adding one lay Justice might reduce overall error, adding a second increase it again, and adding a third reduce it to an even lower level than after the first addition. However, I cannot think of any plausible account that would predict this. The most sensible presumption is that overall error, as a function of the number of lay Justices, has a single internal minimum—a U-shape, such that adding the  $n$ th lay Justice minimizes overall error but that with every new lay Justice beyond  $n$  overall error would start to increase again. If so, the problem described here does not occur.

70. I thus put aside other possible interpretations of the Jury Theorem, such as the polling model—the idea that a given group might be a valid sample from which to gauge the views of a larger population. See Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 332-33 (2002).

71. See LAWRENCE BAUM, *THE SUPREME COURT* 159-61 (7th ed. 2001).

condition of the Jury Theorem that requires the aggregated votes to be independent of each other.<sup>72</sup> However, this view is false. The Theorem requires that independent votes cannot be predicted just by knowing how some other vote was cast, but voters can deliberate together and influence each others' views without undermining the Theorem's logic.<sup>73</sup> Even if there is a great deal of deliberation among the Justices, the Jury Theorem continues to operate as indicated in Parts II.A and II.B.

In some cases, however, it is clear that deliberating groups can suffer pathologies that hamper group performance, including various forms of herding, informational or reputational cascades, and group polarization.<sup>74</sup> In a range of settings, deliberation among the likeminded can make decisions worse, not better, than voting without deliberation. In other cases, however, decisionmaking groups do better by deliberating before voting, especially where a modicum of diversity—of information, judgments, and outlook—is present among the group's membership.<sup>75</sup>

These ideas suggest that adding at least some lay Justices might improve the Court's decisionmaking. Two mechanisms are especially important here. Lay Justices with relevant expertise can improve deliberation by making self-confirming contributions. And lay Justices, with or without relevant expertise, can block a group of lawyer Justices from herding towards the wrong answer. In general, professional diversity dilutes groupthink and can thus improve both group deliberation and group decisionmaking.

First, where one member of a group has genuine expertise in a relevant area, the expert may have outsized influence in steering the group towards correct answers. Experts will sometimes offer so-called "eureka" contributions—arguments or information that are not obvious to the uninformed before the expert speaks, but that are self-confirming and patently true or sensible once uttered.<sup>76</sup>

72. See David M. Estlund et al., *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1333-34 (1989) (Bernard Grofman & Scott L. Feld excerpt).

73. See ROBERT E. GOODIN, REFLECTIVE DEMOCRACY 125-27 (2003); Estlund et al., *supra* note 72, at 1328 (Jeremy Waldron excerpt); David M. Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem*, 36 THEORY & DECISION 131 (1994).

74. On herding and informational cascades, see Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992). On reputational cascades, see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999). On group polarization, see Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71 (2001). For an overview of these problems, see CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006) [hereinafter SUNSTEIN, INFOTOPIA].

75. See generally SUNSTEIN, *supra* note 66.

76. See Garold Stasser & Beth Deitz-Uhler, *Collective Choice, Judgment, and Problem Solving*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 31-55 (Michael A. Hogg & Scott Tindale eds., 2002); see also SUNSTEIN, INFOTOPIA, *supra* note 74, at 60-64.

More generally, in deliberating groups, sometimes experts will prevail simply because all concerned will recognize the force of the better argument. Where a lay Justice has professional expertise relevant to the case at hand, even a dollop of that expertise can provide large benefits to the Court's deliberation.

Second, the presence of lay Justices can block herding towards wrong answers by a group of lawyer Justices. Herding can arise even in groups all of whose members are fully rational; it arises because each individual rationally assumes that the views of others rest on information that together swamps the value of the individual's own information.<sup>77</sup> However, the presence of better-informed individuals, who tend to resist the group judgment when it contradicts their own, can shatter information cascades.<sup>78</sup> This mechanism can work even where, indeed because, the nonconformist is excessively confident in her own judgment. Under plausible conditions, groups with some mix of overconfident members—members who put too much weight on their own information—actually do better than groups where all members form fully rational beliefs, because the overconfident members disclose more private information to be aggregated in the group decision.<sup>79</sup> Where the lay Justice has relevant information not held by lawyers, and even if the lay Justice is unreasonably confident in her own information or judgment, cascades in bad directions can be broken. In such cases, the lay Justice contributes just by taking a different perspective than the group of lawyer Justices.

To be sure, herding can occur in good directions as well as bad, and the presence of dissenters in a decisionmaking group creates costs as well as benefits. In some cases the lay Justice will resist lawyerly cascades in desirable directions—perhaps towards the right legal answer in cases where law is autarkic. Here too, however, the question is whether the marginal benefit of including at least one lay Justice in a group of lawyers outweighs the marginal harm. The addition of the first lay Justice produces the largest benefits in terms of outside expertise and dilution of like-mindedness, while the marginal move from nine to eight lawyer Justices produces only a small reduction of the group's overall legal expertise.

The point unifying these mechanisms is that many deliberative pathologies arise from groupthink,<sup>80</sup> in one sense or another, and professional diversity dilutes groupthink. A group of likeminded Justices may err in similar directions because of common professional training.<sup>81</sup> In Part II.B, we interpreted the

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77. Bikhchandani et al., *supra* note 74.

78. SUNSTEIN, *supra* note 66, at 66-67.

79. See Antonio E. Bernardo & Ivo Welch, *On the Evolution of Overconfidence and Entrepreneurs*, 10 J. ECON. & MGMT. STRATEGY 301, 303 (2001) (“[O]verconfidence . . . can be useful if groups are large enough to benefit from the positive information externality [supplied by the irrationally overconfident members], if individuals have low-precision information, and if overconfidence is moderate rather than extreme.”).

80. See generally JANIS, *supra* note 65.

81. *Id.* (identifying common professional training as one cause of groupthink).

effects of common training strictly in terms of correlated biases in a voting group; that interpretation does not assume any exchange of information or views within the group before voting occurs. Here, we interpret the same point in deliberative terms. Where views are exchanged, a group containing professional diversity will do better, under plausible conditions, than a professionally homogenous group.

Crucially, we need only consider these costs and benefits at the margin, not in the abstract. To hold the view that the optimal number of lay Justices is zero, one must believe that the deliberative costs of subtracting the ninth and last lawyer Justice in cases where the law is autarkic outweigh the deliberative benefits of introducing the first lay Justice in cases where the law incorporates outside knowledge. While this is possible, it is unlikely so long as there are diminishing marginal benefits to legal expertise.

#### *D. Dual Competence?*

Even if the foregoing argument fails, there is a weaker version that may succeed: the Court should have more Justices of dual competence than at present. There are now programs at major law schools that provide joint degrees in law and medicine, or law and business. Nor are formal degrees necessary; a well-motivated President might appoint Richard Posner, a lawyer with no economics degree who is nonetheless a leading scholar of law and economics. In the same vein, commenting on the idea that lay Justices with political experience might be beneficial, Christopher Eisgruber writes: "I am inclined to believe that we might get equal benefits from less radical changes to the composition of the Court, such as by selecting lawyers with political experience to fill vacancies. A president inclined to nominate Bill Bradley could instead call upon Bruce Babbitt or George Mitchell."<sup>82</sup> I believe that Eisgruber's point generalizes well beyond politics, even if politics is conceived as a professional career that requires objective expertise. The status quo composition of the Court is extreme along more than one dimension: not only does it contain all lawyers, it is also the case that all the Court's lawyers are lawyers alone. We could have not only more politician-cum-lawyer Justices, but also more economist-cum-lawyer Justices, historian-cum-lawyer Justices, and so on.

I offer the dual-competence argument as a fallback claim, but we should underscore how large a change it would effect, compared to the current baseline. On the current Court, none of the Justices is dual competent in any strong way (at least if one puts aside Justice Breyer). In the public sphere,

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82. Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 157 (2002); see also Akiba Covitz & Mark Tushnet, *Political Appointee*, NEW REPUBLIC ONLINE, Sept. 29, 2005, <https://ssl.tnr.com/p/docsub.mhtml?i=w050926&s=covitztushnet092905>.

debates over judicial appointments would look far different if genuine expertise in some other body of knowledge or skill, along with sterling legal credentials, were seen as a necessary qualification. If the dual-competence argument is correct, we would not have a full argument for lay Justices, but we would have the better half of the loaf—an argument against the current domination of the Court by pure lawyer Justices.

That said, however, the dual competence argument poses, without answering, a crucial conceptual question: even if it is desirable to have dual competence, should dual competence be built in at the level of individuals or at the aggregate level of the group? The group of Justices that contains both pure lawyers and pure nonlawyers is dual competent *as a group* even if none of its members is dual competent, taken one by one. Groups may have emergent group-level properties by virtue of aggregation; it is not clear why dual competence at the level of the group is inadequate.

It is tempting but wrong to think that dual competence offers a free lunch—that we can have accountants for the nonautarkic accounting cases who are also lawyers for the autarkic cases, and so on, without costs on other margins. But there are such costs, precisely because the dual-competent Justice also has legal training. In the categories developed in Parts II.A and II.B, the Court's docket consists of (1) autarkic cases and (2) nonautarkic cases, with the latter set divided into two subsets: (2a) cases that draw upon specialized nonlegal knowledge and (2b) cases that draw upon nonspecialized knowledge of social values. (2a) further divides into (2aa) cases in which the nonlegal expertise at issue is relevant (economics in a financial case) and (2ab) cases in which it is not relevant (medicine in a financial case).

We must then compare the performance of two groups: a Court composed of eight pure lawyers and one economist (for example) with a Court composed of eight pure lawyers and one dual-competent lawyer-economist. (2aa) is a wash; either the pure lay Justice or the dual-competent Justice will improve the group's performance where relevant nonlegal expertise is needed. As compared to appointing a purely lay Justice, dual competence improves the average competence of the group in (1). But because the dual-competent Justice is a lawyer with the common training and professional blind spots of the lawyer, the presence of the dual-competent Justice increases the correlation of biases across the group, and thus reduces the group's performance at least in (2b) and perhaps also in (2ab).

We need to consider possible cross-cutting effects of training, but these are ambiguous. The dual-competent Justice's training in the other field may dilute his lawyerly biases, ameliorating the costs in (2b) and (2ab). But it is not clear that lawyerly skill is unaffected when lawyerly biases are diluted, so the benefits of the dual-competent Justice may be lower in (1); moreover, the dual-competent Justice's training as a lawyer may just as well dilute his expertise in the other field, in which case the purely lay Justice may do better than the dual-competent Justice in (2aa).

It is unclear how these costs and benefits net out. But three conclusions are possible. First, even those who are convinced that legal training is an indispensable prerequisite for all nine of the Court's seats might still agree that we should have more dual-competent Justices than at present, perhaps many more. Second, it is an unsupported prejudice to assume that a dual-competent Justice must necessarily bring greater net benefits to the group's overall performance than would a pure lay Justice; everything depends on factors such as the strength of the common biases induced by lawyerly training and the risks and harms of errors in (various subsets of) autarkic or nonautarkic cases. Third, lay Justices and dual-competent Justices are not mutually exclusive ideas. Even if as many as seven of the Court's nine slots are permanently reserved for pure lawyers, we might appoint an eighth dual-competent Justice and a ninth lay Justice, and see how things work out.

### III. THE REPRESENTATION OF EXPERTISE

Part II provided a technocratic or expertise-based argument for nonlawyer Justices, or at a minimum for dual competence. However, even when law looks outside itself to other domains of knowledge (specialized or unspecialized), and even if having more than zero lay Justices or dual-competent Justices would improve the group's decisional accuracy on net, the argument is not complete. There might be other means by which a group exclusively composed of pure lawyer Justices could improve their decisionmaking in cases in which law is not autarkic—means that might produce greater overall benefits than putting lay Justices on the Court. These include litigants' arguments, amicus briefs, deference to administrative agencies or court-appointed experts, and so forth.

The problem is roughly analogous to a firm's problem of "make-or-buy," a standard issue in economic theory.<sup>83</sup> Should the judicial firm (the Court) employ its own experts to manufacture expertise from within, or should it buy expertise case-by-case? I suggest that the crucial advantage of having at least some lay Justices on the Court is *the representation of expertise*. Having experts (in nonlegal domains) participating in the selection of cases for full hearing, and in deliberation, provides an institutional foundation for expertise that cannot be replicated through case-by-case mechanisms for incorporating expert views.

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83. See generally OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 117-31 (1975). The analogy is slightly inexact because law clerks and other judicial staff, unlike agencies and special masters, are employed inside the judicial firm rather than consulted ad hoc, so are on the "make" side rather than the "buy" side. I offer the analogy to provoke ideas, but it is not essential to the argument, and should be ignored by anyone who finds it distracting.

*A. Make or Buy?*

A bench solely composed of pure lawyer Justices might use many techniques to incorporate extrinsic expertise into its decisions. Among these are the following, although no doubt others might be added:

*Deference to administrative agencies and other bodies.* Under the *Chevron* rule,<sup>84</sup> lawyer Justices defer to the reasonable views of administrative agencies. *Chevron* grants agencies a “policy space” in which to make technocratic and democratic judgments, rather than having to provide a “point estimate” of the legal answer that they think will find approval with reviewing judges.<sup>85</sup> Lawyer Justices themselves benefit from providing agencies with this policy space, insofar as doing so encourages agencies to base decisions on their expertise, because lawyer Justices can incorporate the resulting expertise into their own decisions.<sup>86</sup> Beyond agencies properly so-called, judges draw upon the views and decisions of a bewildering variety of more or less specialized nonjudicial bodies and tribunals, such as Article I courts and advisory commissions, with the level and nature of judicial deference varying according to the case.

*Litigants, expert witnesses, and amicus briefs.* Litigants will attempt to import expertise when it benefits them to do so, through expert witnesses (at trial) and selective citation of authorities (on appeal). Looking beyond the litigants themselves, courts routinely permit the Department of Justice and the Solicitor General, other federal agencies, interest groups, advocacy groups, coalitions of academics, and other nonparties to file amicus briefs with the court. These briefs are sometimes tendentious, but can provide valuable factual information or serve as informative signals of the views and judgments of outsiders. With regard to the central holding of *United States v. Virginia*, that the Virginia Military Institute’s adversative training method would not be undermined if women were admitted,<sup>87</sup> it is sensible to ask “[h]ow does the Court know?”<sup>88</sup> Part of the answer, if there is one, must involve the wide range of amicus briefs presented to the Court in that case.<sup>89</sup>

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84. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that the courts should defer to agency expertise when Congress has not clearly expressed an intent on a matter of interpretation).

85. E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005).

86. Whether they in fact do so is a different question. Recent research suggests that (1) it is unclear whether *Chevron* makes a difference by increasing judicial deference to agencies, but that (2) the political or ideological views of the Justices do clearly influence the decision whether to defer to agencies. See Thomas J. Miles & Cass R. Sunstein, *Do Federal Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

87. *United States v. Virginia*, 518 U.S. 515, 520 (1996).

88. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 13 (1998).

89. Seventeen briefs amici curiae were filed: Brief for Women’s Schools Together, Inc. et al. as Amici Curiae Supporting Respondents, *United States v. Virginia*, 518 U.S. 515

*Special masters and law clerks.* Between soliciting the views of outside experts, on the one hand, and appointing experts to the Court, on the other, there is a middle ground: experts might be employed as judicial adjuncts, either for particular cases (as are special masters) or as more permanent personnel. One might imagine a Justice having a preference for hiring law clerks with joint degrees or other nonlegal expertise; it is unclear whether any current Justice has such a preference, but as joint degrees become more common it would not be shocking to see it develop.

Are these and other mechanisms for incorporating expertise superior to putting nonlawyers, experts in other fields, on the Court? What we are interested in, of course, is really the optimal mix of mechanisms. A Court with more than zero nonlawyers or dual-competent lawyers would surely continue to use amicus briefs, and would be right to do so. The question then becomes whether mechanisms for incorporating external expertise into the decisions of a Court of nine pure lawyers can provide a full substitute for actually appointing a nonlawyer or a dual-competent lawyer to the Court—whether the external mechanisms should be the *exclusive* means for generating expertise. This is akin to the make-or-buy decision that faces firms in ordinary markets. Were transaction costs zero, all productive resources could be assembled on spot markets for particular transactions, and no firms would exist.<sup>90</sup> Likewise, were there zero transaction costs to incorporating expertise through extrinsic mechanisms, no internal judicial expertise would be necessary.

For two reasons, however, these considerations do not require rejecting the argument for lay Justices or dual-competent Justices. First, the argument from incorporation of external expertise is double-edged because nonlawyer Justices could also incorporate legal expertise from outside sources; indeed, in a world

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(1996) (No. 94-1941), 1995 WL 761812; Brief for Mary Baldwin College as Amicus Curiae Supporting Respondents, 1995 WL 744994; Brief for Dr. Kenneth E. Clark et al. as Amici Curiae Supporting Respondents, 1995 WL 744995; Brief for Center for Military Readiness et al. as Amici Curiae Supporting Respondents, 1995 WL 744997; Brief for States as Amici Curiae Supporting Respondents, 1995 WL 744999; Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Supporting Petitioner, 1995 WL 745002; Brief for Independent Women's Forum et al. as Amici Curiae Supporting Respondents, 1995 WL 745003; Brief for South Carolina Institute of Leadership for Women as Amicus Curiae Supporting Respondents, 1995 WL 807057; Brief for the State of South Carolina and the Citadel et al. as Amici Curiae Supporting the Commonwealth of Virginia et al., 1995 WL 747463; Brief for American Association of University Professors et al. as Amici Curiae Supporting Petitioner, 1995 WL 702833; Brief for the Employment Law Center, a Project of the Legal Aid Society of San Francisco et al. as Amici Curiae Supporting Petitioner, 1995 WL 702836; Brief for Twenty-Six Private Women's Colleges as Amici Curiae Supporting Petitioner, 1995 WL 702837; Brief for Nancy Mellette as Amicus Supporting Petitioner, 1995 WL 703385; Brief for Wells College et al. as Amici Curiae Supporting Respondent, 1995 WL 703388; Brief for the States of Maryland et al. as Amici Curiae Supporting Petitioner, 1995 WL 703389; Brief for National Women's Law Center et al. as Amici Curiae Supporting Petitioner, 1995 WL 703392; Brief for Lieutenant Colonel Rhonda Cornum et al. as Amicus Curiae Supporting Petitioner, 1995 WL 703393.

90. R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

of zero or very low transaction costs a Court could be composed *solely* of pure nonlawyers and could then incorporate legal expertise as needed. Second, in our world of positive transaction costs, there are benefits from having nonlawyers or dual-competent lawyers on the Court that cannot be replicated through case-by-case mechanisms. I will treat these two points in turn.

### *B. Incorporating Legal Expertise*

Expertise can be incorporated through mechanisms of the sort we have canvassed. But nothing about that point necessarily favors having a Court composed of pure lawyers. The point applies to all expertise, including legal expertise, which could also be incorporated as needed. A lay Justice or Justices, for example, might rely on law clerks, on amicus briefs, or on law review articles to help clarify the legal issues in particular cases. At the extreme—in a world of zero transaction costs—we could have a Court composed solely of pure nonlawyers, who incorporate legal advice from lawyers on a case-by-case basis. It would not be helpful to claim that, where legal expertise is incorporated, the lawyers who do the advising would be acting as the “real” Justices, or that nonlawyer Justices will misunderstand the external legal sources. Symmetrically, one might equally say that, in cases where the Justices take the advice of nonlawyers on subjects that the law makes decisive, the “real” decisionmakers are the nonlawyers, or that lawyer Justices will misunderstand the nonlegal sources.

Of course transaction costs are not zero; across the array of cases the Court actually hears, the most efficient course is surely to have some lawyers as permanent members of the Court. But this emphasizes that the presence of transaction costs cuts in both directions. If there are advantages to incorporating lawyers directly into the Court’s composition, there are symmetrical advantages to incorporating nonlawyers as well. Suppose that some members of the Court should be lawyers because nonlawyers cannot fully evaluate the arguments of lawyers, or because legal considerations will be slighted unless a trained lawyer is present to argue for them, or simply because it is cheaper to have a legal expert permanently on staff than to seek out an expert anew in every case. The same might just as well be said about other types of expertise. In a world of positive transaction costs, there are institutional benefits to bringing desired forms of expertise within the institution’s walls. And this is true of both legal and nonlegal expertise.

### *C. The Benefits of Representation*

What, concretely, are the costs of incorporating expertise from external sources? What, concretely, are the benefits of “producing” expertise internally rather than “buying” it case-by-case? Here I want to suggest that there are important benefits to building desired forms of nonlegal expertise into the very

personnel and composition of the Court. We may call these “the benefits of representation”—where what is being represented are various bodies of professional knowledge and skill, rather than geographic districts of voters or any of the other represented entities familiar from democratic politics.

The leading argument for intellectual or ideological diversity on the Court gives two reasons for building diversity—on these margins—into the Court’s composition. The first involves agenda-setting: the Court’s docket is essentially discretionary, and “[j]udges with distinctive views notice legal problems that other judges do not see—not through ignorance or malice, but because of differing priorities.”<sup>91</sup> The second involves deliberation: “If they are willing to listen, judges of one general outlook will learn a great deal from those with other basic orientations. . . . [D]ifferences in perspective often improve both the collective reasoning process and the outcomes.”<sup>92</sup> By contrast with these two advantages, the alternative—to incorporate intellectual diversity through the arguments of litigants—is “inevitably inadequate,” because “even the best advocate usually plays only a limited role in comparison with a member of the Court. Divergent views should be presented, and pressed, during internal deliberations, when the Court is formulating results and reasons.”<sup>93</sup>

This line of argument says, in essence, that differing views must be incorporated into the Court’s decisionmaking process through structural representation—that there is no close substitute for having people of different views actually in the room where decisions are made. The same is true for differing bodies of expertise. At the agenda-setting stage, prominent voices have complained that the Court does not take enough cases involving tax, accounting, and business, in part because as lawyers the Justices’ interests mostly do not run in that direction.<sup>94</sup> The same complaint might be made about other areas, such as complex environmental or antitrust or energy cases. At the stage of argument, deliberation, and voting on the merits, it is plausible that the mechanisms we have surveyed—*Chevron* deference, briefs by litigants and *amici*, joint-degree law clerks, and so on—do not provide adequate substitutes for having lay Justices on the Court. Those sources of external expertise—which will often conflict, or be tendentious or misleading, or just confusing—must ultimately be evaluated by the members of the Court, whose ultimate deliberations occur (to the extent they occur at all) in a secret conclave that excludes all outside staff and outside sources of expertise. There is good reason to worry that, if only lawyers are doing the evaluating, important information or

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91. Strauss & Sunstein, *supra* note 1, at 1510-11.

92. *Id.* at 1511.

93. *Id.*

94. Cf. Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366, 1384-85 (2006) (arguing that the Court should decide more cases of a “less headline-grabbing nature,” as by bringing greater uniformity to federal securities law).

ideas will never be heard or will be mishandled, where an expert evaluator would not have made those mistakes.

In general, structural representation is indispensable where there is a gulf between having *A* attempt to take account of *B*'s views, on the one hand, and having *B* herself present those views and participate in the decision, on the other—even if *A* acts in the best of faith. Why might such a gulf arise? Again, the arguments for ideological, racial, and gender diversity implicitly suggest several plausible mechanisms. One is that information costs and cognitive limitations will prevent *A* from even conceiving of the arguments or ideas *B* would offer, whereas *B* might present those arguments quite easily if sitting in the room. Another is that disparities in background or training or experience will prevent *A* from appreciating the force of *B*'s arguments; even if they occur to *A* in a pallid form, they will not pack sufficient emotional punch to influence *A*'s deliberation or voting, whereas face-to-face exchange with *B*, and the need to accommodate *B* as an equal member of the voting group, will bring home the force of *B*'s arguments.

The argument from representation is not, of course, the sort of argument from “democracy” that I disavowed at the outset. Representation has no intrinsic connection to democracy. Aristocratic orders have often had elaborate rules to ensure representation of different clans or regions in a national council, and several nations today require some sort of representation of professional groups or economic sectors in political fora. The argument here is just that a kind of representation—having experts from other domains of knowledge present among the very membership of the Court itself, not merely providing supporting advice to the in-group of lawyers—is a necessary adjunct or complement to other means of incorporating expertise into the Court's decisionmaking. External sources of expertise cannot be the whole story.

#### IV. PROBLEMS AND IMPLICATIONS

Part II presented the main line of the argument, while Part III examined a major institutional alternative. Here I will touch upon a cluster of remaining issues and tie up some loose ends. I assume, in each case, that the relevant considerations pro and con apply to dual-competent Justices, but in a weakened or diluted form on both sides of the ledger, so I will not explicitly discuss them as a separate category.

##### A. *Decision Costs*

The argument of Part II focused strictly on accuracy, or minimizing error costs, while bracketing process, or decision costs. A standard assumption in consequentialist theories of adjudication is that the sum of error costs and decision costs should be minimized. This is hardly the only possible decision rule even for consequentialists—one might hold, for example, that error costs

should be minimized subject to some ceiling of decision costs incurred—but under any of these rules it is clear that decision costs matter too. Holding the rate of error constant, lower decision costs are better than higher.

However, it is difficult to see any general reason to think that adding at least one lay Justice to the Court will raise the costs of reaching decisions, on net. Two effects are likely, but the two effects cut in opposite directions. On the one hand, communication within a common professional culture is easier than communication across professional cultures. Professions develop their own vocabulary and shorthand references; these are easily mocked as jargon, but also reduce the costs of communication, because common knowledge can be assumed rather than explained from the ground up. Introducing a member of a different profession into the deliberations means that tedious explanations will be necessary and confusion or mutual misunderstandings can occur. When lay Justices deliberate with lawyers on cases in which law is autarkic, the costs of deliberation will rise at least marginally.

On the other hand, a major cost to having no lay Justices—again, bracketing the accuracy costs examined in Part II—is that decision costs are higher than need be in cases where law is *not* autarkic. Consider a case in which the legal answer itself turns on specialized medical knowledge, or financial knowledge, or military knowledge. Briefs and oral argument have left confusion in the minds of the deliberating lawyer Justices about a problem in the incorporated domain of knowledge. A short explanation—a “eureka” contribution—from a lay Justice might clear up the matter on the spot;<sup>95</sup> with only lawyers present, however, laborious extra process might have to be incurred, such as rebriefing or reargument. (We are assuming that the lawyer Justices understand what it is that they do not understand. Where that condition fails to hold, the risk is not extra decision cost, but inadvertent error.)

The net result of these countervailing effects is unclear. Suppose we believe, after considering accuracy alone, that there is a firm case for having at least one lay Justice on the Court and that overall decision costs might rise or might fall under such a regime. The sensible course, I believe, is to declare the issue of decision costs a wash—to decide on the basis of accuracy alone. The point is not that decision costs are not important. Rather it is a point about how to design institutions under uncertainty. By a version of the principle of insufficient reason,<sup>96</sup> the institutional designer—here a hypothetical designer of the Court’s composition—would do best to assume that having more than zero lay Justices will increase accuracy, for the reasons discussed in Part II, and will have no predictable effect either way on decision costs.<sup>97</sup>

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95. See Stasser & Dietz-Uhler, *supra* note 76.

96. Roughly, the principle of insufficient reason instructs decisionmakers to assume that unknown probabilities are equal. For an account defending the principle as an indispensable adjunct to reasoning under uncertainty, see Elinor Mason, *Consequentialism and the Principle of Indifference*, 6 UTILITAS 316 (2004).

97. For a more extended explanation of this approach, see ADRIAN VERMEULE,

To be sure, this is, in effect, to run an experiment that might create interim losses and that would be costly to reverse. Were we to find that adding a lay Justice dramatically increased decision costs overall, the lay Justice would be on the Court for the remainder of her term. On the other hand, adding no lay Justices is also an irreversible experiment that might be creating losses right now. Were we to discover, at some future time  $T$ , that adding at least one lay Justice did not increase or even reduced decision costs overall (while, we are assuming, increasing accuracy) then we would have cause to regret that lay Justices were not present on the Court at times  $T-1$ ,  $T-2$ , and so on. Right now we are laying our bets on the proposition that having zero professional diversity on the Court is the optimal solution to the composition problem, under conditions of uncertainty. Perhaps that is so, but there are no obvious grounds for being confident that it is so.

*B. Endogenous Agendas, Endogenous Rules?*

Another simplifying assumption of Part II was that the Court's agenda and the legal doctrines it declares are exogenous to the Court's professional composition. Of course this is false; the assumption is useful to clarify the argument for lay Justices. But does the possible endogeneity of the Court's agenda and doctrines undermine the argument? Perhaps a Court that appointed a lay Justice expert in profession  $P$  would find itself hearing many more cases implicating the concerns of  $P$  in one way or another—perhaps because the  $P$ -competent Justice would contribute the decisive fourth vote to take those cases. Perhaps the legal rules the Court would declare on the merits would change their character as well, more often incorporating (as the right legal answer) knowledge from the relevant domain. It is even possible that a self-reinforcing process would result: the Court might hear many more cases in which law is not autarkic and develop many more nonautarkic rules, which would increase the demand for lay Justices, who would vote to hear more such cases, and so on, to what limits no one can say.

In the shadow of this scenario, two considerations seem appropriate:

*So what?* If something makes this scenario intuitively terrible, it is a set of embedded assumptions about the optimal mix of autarkic and nonautarkic cases on the Court's docket and the optimal mix of autarkic and nonautarkic rules in Supreme Court law. The embedded assumptions are vague, but they seemingly hold at a minimum that autarkic law should dominate nonautarkic law by a wide margin. If Court-declared constitutional and statutory law became too

dependent upon knowledge from other domains, too wide open to breezes from other disciplines and other professions, its distinctive character would be lost.

It is hard to evaluate this view, because it is not at all clear what is at stake in the composition of the Court's docket or the mix of its legal rules; it is not clear what theory or theories could help us decide what the docket should look like, or what subset of Court-declared rules should incorporate outside knowledge by reference. Law is a partially autonomous discipline,<sup>98</sup> influenced and penetrated by other domains of knowledge but not wholly reducible to them, and that remains so whether many cases in the Supreme Court are autarkic or not. Even if the proportion of nonautarkic cases rose dramatically at the Supreme Court level, this might reflect nothing more than an optimal division of labor between the Court on the one hand and lower courts on the other. Perhaps the Court spends far too much of its time, now, on cases in which law is autarkic—on fiddling with the impenetrably self-centered details of law. Perhaps the scenario described here would be good, for reasons other than the increase in accuracy.

Indeed, if the Court's agenda and rulemaking are endogenous, one worry about lay Justices that might otherwise seem plausible becomes less so. The main costs of lay Justices are incurred in cases where Supreme Court law is autarkic, while the main benefits arise in nonautarkic cases. If adding lay Justices to the Court reduces the proportion of autarkic cases or rules, then the costs of lay Justices go down and the benefits of lay Justices go up. In this scenario, appointing lay Justices would be a kind of self-fulfilling or self-confirming good.

*It won't happen.* But suppose someone offered a persuasive theory explaining why the runaway scenario would be bad, not good. Still, it seems unlikely to be worth worrying about. The Court's agenda and its scope for choosing legal rules are not as elastic as all that. On the assumptions of the runaway scenario, it is hard to explain why the Court takes a substantial proportion of cases and announces a substantial proportion of legal rules that are *not* autarkic, despite the current and historic total dominance of lawyers on the Court. On the very assumptions that generate a self-reinforcing spiral once a lay Justice is introduced, it should be the case that the bench of lawyers is interested in cases in which law is autarkic, which generates more appeals by litigants with such cases, which reinforces the demand for lawyer Justices, and so on—ending up with a corner solution in which not only are all Justices lawyers, but all cases are “lawyer's cases.”

But that has not occurred. The demands of operating a legal system that regulates many nonlegal domains constrains the bench of lawyers to take a substantial fraction of cases in which law is open to outside knowledge. A symmetrical constraint operates in the other direction. Even a Court composed

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98. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1265 (1987).

*solely* of nonlawyers would surely be constrained to hear many cases, perhaps a majority of the docket, in which law is utterly autarkic. Such cases are the meat-and-potatoes of any legal system, and, on simple statistical grounds, make up the bulk of occasions on which circuit courts disagree, or issues of unusual public importance are raised, or in some other way the Court's criteria for hearing cases are implicated. Overall, the runaway scenario is unlikely to occur; nor is it clear that a (more modest and therefore more plausible) increase in the number of nonautarkic cases on the court's docket would be bad.

### C. *Intracourt Deference*

The argument in Part II assumed that each Justice votes independently on all cases, in the sense that no Justice defers to the views of any other. (This assumption is not inconsistent with the point that, because of common professional training, lawyer Justices will display a higher correlation of biases as a group.) If that assumption is relaxed, perhaps there is a problem for the argument. Within a voting group, deference by some to others reduces the number of effectively independent votes, and can thus reduce the group's aggregate accuracy. Perhaps the problem is that lawyer Justices will excessively defer to lay Justices where law incorporates specialized nonlegal knowledge, making the lay Justice(s) in effect the sole decisionmaker(s).

However, this argument goes much too quickly. It is wrong to compare (1) a Court composed of nine lawyer Justices in which all vote independently, so that no intragroup deference occurs with (2) a Court with more than zero lay Justices in which intragroup deference does occur. This is a kind of nirvana fallacy, because intragroup deference occurs and historically has occurred among the lawyer Justices as well. Justice Blackmun was widely reputed to be "the tax Justice," to whom colleagues deferred on the complex questions of accounting, finance, and statutory interpretation presented by tax cases. If other Justices are going to defer to someone on tax questions in any event, it might well be an improvement to have them deferring to a professional tax accountant, rather than a lawyer Justice who—however successful or unsuccessful his tax opinions—was basically moonlighting.<sup>99</sup> Deference occurs under either regime, so raising the competence of the Justice who is afforded deference improves matters.

It is even unclear, in the first place, that intragroup deference reduces group accuracy; it might or might not do so, depending upon the facts. Under the Jury Theorem, group accuracy is a function of (1) the number of independent voters and (2) the average competence of voters. Where low-competence voters defer to high-competence voters, the number of independent votes is effectively reduced, but the average competence of the voting group goes up; whether the

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99. See Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109 (1998).

gain is greater than the loss depends entirely on the precise values of these variables.<sup>100</sup> A small number of (effectively independent) voters of very high average competence can do better than a large number of voters of lower average competence. So it is hard to know, even in principle, whether deference by lawyer Justices to lay Justices on matters within the lay Justice's specialty would increase or decrease the Court's overall accuracy.

The converse concern is that lay Justices will excessively defer to their lawyer-Justice colleagues. In the broader debates I adverted to above, opponents of lay judges hope for deference by lay judges to their legally-trained colleagues, so it is unclear that anyone will actually see this as a concern. Still, several brief points are useful. As above, under some conditions intragroup deference can actually increase the group's overall accuracy, and in any event harmful deference can occur even within a group of nine lawyer Justices. Moreover, one mechanism that is often said to produce deference by lay adjudicators to legally-trained adjudicators is that the lay adjudicators are at best part-timers, and are sometimes even single-shot participants in the system, as are Anglo-American jurors. Players of that sort will often be dominated by professional repeat players, who know the institution's rules and norms. This sort of mechanism does not apply to nonlawyer Justices, who will be repeat players in the work of the Court as much as their legally-trained colleagues.

#### D. Extensions and Scope

As mentioned in Part I, there are broader debates of law and policy about whether all judges, or at least all judges who are authorized to impose civil or criminal sanctions, should be lawyers, either as a matter of fairness or optimal judicial design; and about whether legislation or due process law should so require. I have not tried to contribute to those debates, at least directly. Some of the considerations offered here generalize to, say, the lower federal appellate courts, but some do not. Differences in the size and composition of dockets (especially the proportion of autarkic and nonautarkic cases) in the legal "hardness" of cases, and in the quality and quantity of external and internal sources of legal and nonlegal expertise, would make a difference.

An important question is what proportion of the relevant court's docket is composed of what types of cases. There is no relevant rigorous empirical work. Perhaps nonautarkic cases are disproportionately represented at the Supreme Court level; they are certainly a larger fraction of the docket than at the level of district courts and courts of appeal. A plausible explanation for this involves the differential rate of settlement of autarkic and nonautarkic cases. All else equal, the greater the uncertainty of litigants about what judges will say, the

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100. See Estlund et al., *supra* note 72, at 1320-21 (David Estlund excerpt); Estlund, *supra* note 73.

less likely is settlement to occur;<sup>101</sup> and cases in which law draws upon outside knowledge are likely to generate more uncertainty, at least among the lawyers who must make settlement decisions and who must make the prediction about what other lawyers, namely the judges, will do with these cases.

We can make progress by indicating the conditions under which it would make sense, or not make sense, to appoint lay judges to the generalist federal appellate courts.<sup>102</sup> Suppose that there are many fewer nonautarkic cases on those courts; that cases are legally very technical and in that sense hard; and that the average quality of legal advocacy is lower than in Supreme Court litigation. Under conditions like these, having lay judges on the federal appellate courts might produce more costs than benefits, as lay judges often make technical legal mistakes (not dispelled by lawyers' arguments) but rarely contribute through their distinctive expertise. On the other hand, perhaps federal appellate courts hear more cases in which nonlegal specialized knowledge matters; perhaps the D.C. Circuit would do well to have an expert in environmental policy on the bench. All depends on circumstances.

With all these uncertainties, however, it seems unlikely that out of the many hundred federal appellate judges on the generalist courts, every last one should be a lawyer. If the argument here contributes anything to the broader question, it is to emphasize that we have adopted, by unthinking default, a radical or extremist view about the optimal composition of the federal courts of appeal, and of many other courts as well.

#### CONCLUSION: PHILOSOPHER-KINGS AND ACCOUNTANT-JUSTICES

A stock complaint about the Supreme Court, especially where constitutional judicial review is concerned, is that the Justices are like "philosopher-kings." An implication of the argument here is that we might take this point more literally, and more seriously, than those who make it intend. If law generally, or constitutional law in particular, incorporates specialized knowledge to which philosophers have privileged access, perhaps we should have a professional philosopher on the bench. Whether that is so depends on whether philosophy generates usable objective knowledge relevant to law—a much-debated question.<sup>103</sup>

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101. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

102. This formulation excludes the partly specialized federal courts and tribunals such as the Federal Circuit and the Tax Court, which already contain many dual-competent judges.

103. On the question whether moral philosophy is objective knowledge, see Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFFAIRS 87 (1996); on the question whether it is usable objective knowledge, given intractable disagreement, see Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158 (Robert P. George ed., 1992); and on the question whether it is relevant to law, compare Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997),

Whatever the case with philosophy, there are undoubtedly disciplines that do generate specialized bodies of objective and usable knowledge relevant to law. I have mentioned several such disciplines, but only by way of example. If the examples are bad ones, no matter; whatever disciplines turn out to make the cutoff, the important thing is to ensure that at least some of the disciplines that do make the cutoff have representation on the Court. A corollary is that pseudo-disciplines that do not meet these conditions do not fall within the proposal. Although appointing an astrologer to the Court might dilute lawyerly biases, the astrologer would have nothing else to offer and would thus be strictly inferior to a professional with genuine expertise in any class of cases that reach the Court.

Suppose that economics is one of the disciplines that make the grade. We might appoint a professional economist to the Court; perhaps Andrei Shleifer, an economist with a strong interest in law, would add a great deal of economic sense to the Court's decisions while detracting only a little, if at all, from its aggregate doctrinal skills. If philosophy and economics are too rarefied, more mundane suggestions may seem more appealing. We might do well to appoint a trained accountant, historian, doctor, environmental scientist, or military officer to the Court. At a minimum, dual-competent figures come to mind as potential Justices.

I do not know how many lay Justices or dual-competent Justices there should be, or what the priority of appointment should be across nonlegal disciplines. Much would depend on facts about which types of nonlegal specialized knowledge are most often incorporated into law and which types of professional would add the most value to the Court's decisionmaking. On the present state of empirical knowledge we can do little better than guess at these things. What I have emphasized, however, is that our current practices already and inevitably embody a guess about the same questions—the content of that guess being that zero lay Justices is the best solution. There is no reason to think that is so, and there is no natural or default priority to the practice of putting only pure lawyers on the Court. Even if we do not know what the right number of lay Justices is, we can be as confident as the deep uncertainty will permit that by appointing at least one, we will at least be moving towards the optimum.

